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2018 Global Review of Constitutional Law

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Editors

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Table of Contents

4 INTRODUCTION

5 A Renewed Partnership in Support of Constitutional Democracy

6 The Global Review Turns Three

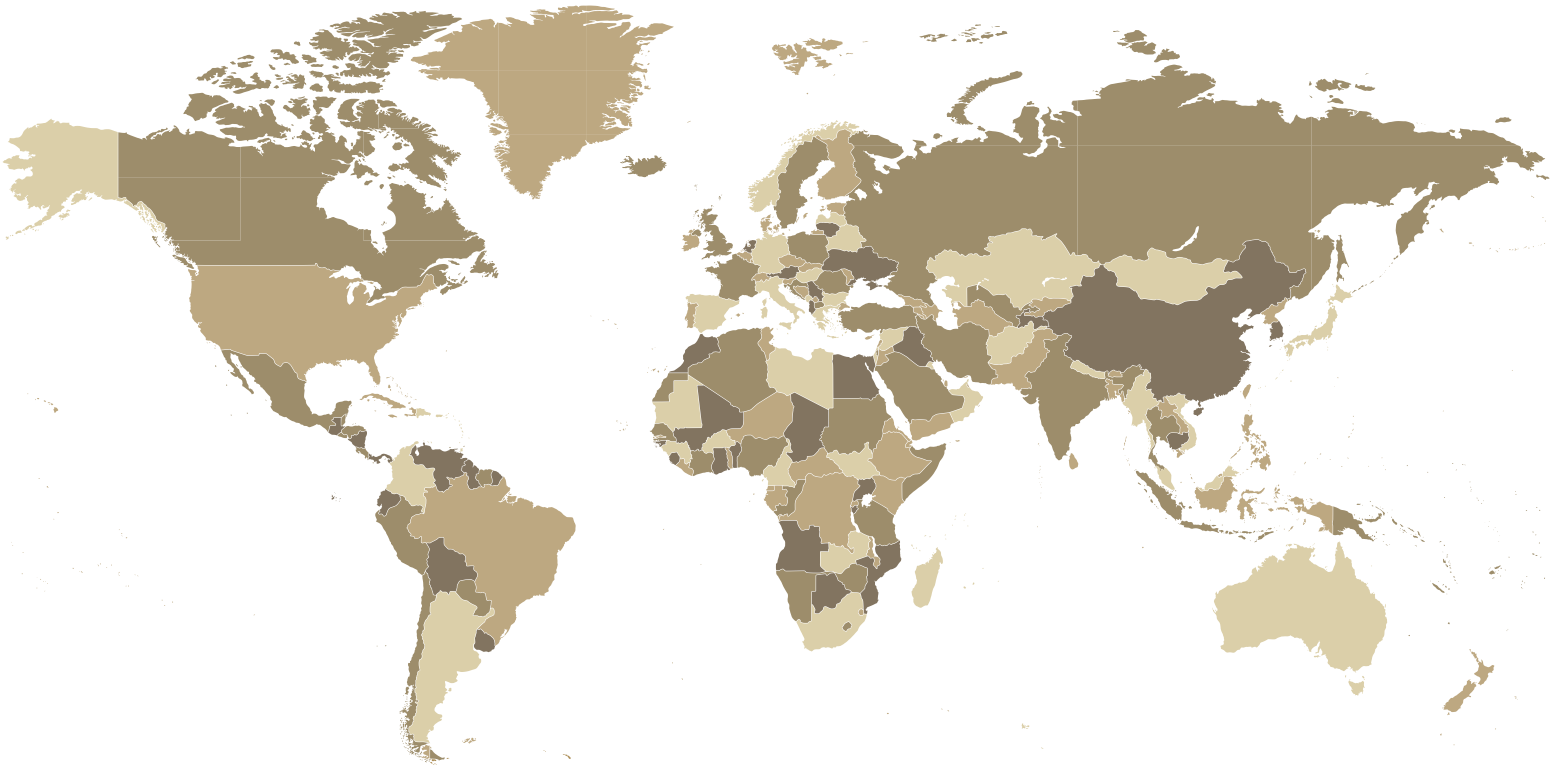
7 COUNTRY REPORTS

9 Argentina
13 Austria
18 Bangladesh
23 Belgium
28 Boznia and Herzegovnia
33 Brazil
37 Bulgaria
42 Cameroon
47 Cape Verde
52 Chile
58 Colombia
63 Commonwealth Caribbean
68 Croatia
74 Cyprus
79 Czech Republic
84 Denmark
87 Ecuador
92 Egypt
97 Finland
102 France
107 Gambia
112 Georgia
117 Ghana
120 Greece
125 Guatemala
131 Hong Kong
138 Hungary
143 India
149 Indonesia
154 Iran
158 Ireland
163 Israel
167 Italy
172 Japan
177 Kenya
182 Latvia
188 Liechtenstein
193 Malaysia
199 Mexico
204 Moldova
209 New Zealand
214 Nigeria
219 Norway
224 Palestine
229 Peru
234 Philippines

238 Poland
243 Portugal
248 Romania
253 Russia
258 Serbia
263 Singapore
269 Slovakia
274 South Africa
279 South Korea
285 Spain
289 Sri Lanka
294 Sweden
298 Switzerland
303 Taiwan
309 Thailand
314 Turkey
319 Ukraine
325 United Kingdom
331 Vietnam

336 SUMMARY

INTRODUCTION



A RENEWED PARTNERSHIP IN SUPPORT OF CONSTITUTIONAL DEMOCRACY

Vlad Perju
Director, Clough Center for the Study of Constitutional Democracy
Professor, Boston College Law School

The Clough Center for the Study of Constitutional Democracy at Boston College is delighted to join, for the second year, I-CONnect in making this unique resource available to scholars and practitioners of constitutional law and policy around the world. The first - 2016 - edition of the Global Review of Constitutional Law, to which the Clough Center was a proud partner, received the outstanding reception it deserved as it quickly established itself as an indispensable resource for the world community. The 2017 edition, with its expanded number of jurisdictions, will undoubtedly solidify the reputation of the Global Review.

The Clough Center for the Study of Constitutional Democracy aims to offer a platform that meets, in depth and scope, the urgency of the ongoing challenges to constitutional democracy. Each year, we welcome to Boston College some of the world's leading jurists, historians, political scientists, philosophers and social theorists to participate in our programs and initiatives. The Center also welcomes visiting scholars from around the world, and I use this opportunity to encourage interested scholars to contact us. More information about the Center's activities, including free access to the Clough Archive, is available at http://www.bc.edu/centers/cloughcenter.html.

The Clough Center is deeply grateful to all the contributors to this year's Global Review, and to its editors. Particular thanks go to Professor Richard Albert, a trusted friend and partner of the Clough Center, for his vision and initiative in turning the Global Review into reality.

THE GLOBAL REVIEW TURNS THREE

Richard Albert and David Landau
Founding Co-Editors of I·CONnect and Co-Editors of the Global Review

Pietro Faraguna and Simon Drugda
Co-Editors of the Global Review

This year marks the third edition of the *I·CONnect-Clough Center Global Review of Constitutional Law*. First published in 2017 to review the constitutional law developments in the world in the year 2016, this edition reviews the constitutional law developments in the world in the year 2018.

From 44 jurisdictions in our first year and 61 last year, this year we are pleased to feature 65 jurisdictions. We continue to grow, slowly but steadily. With the help of our current roster of contributors and with new interest from our readers and others, we hope to continue expanding our coverage of the world.

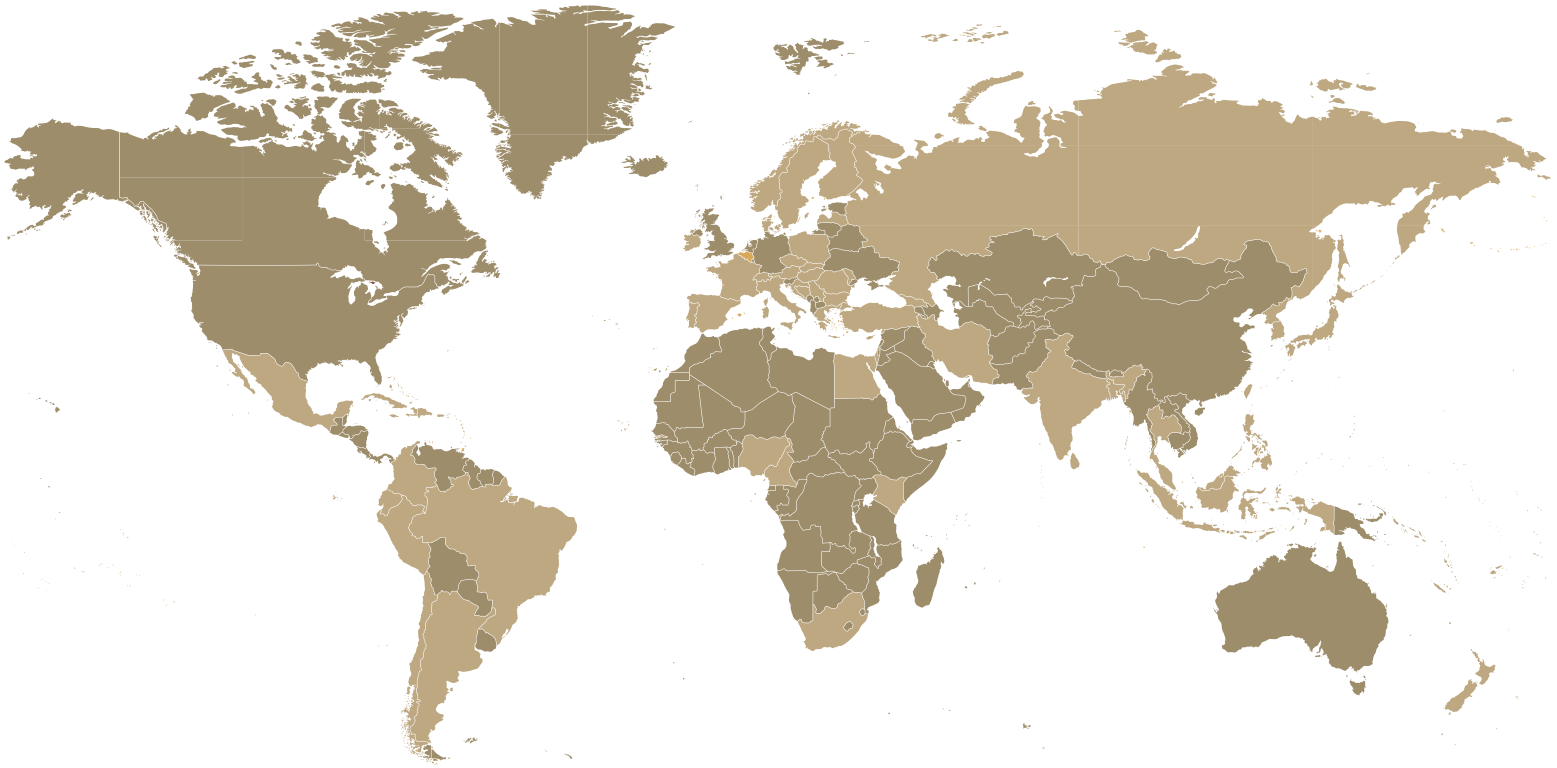
The purpose of the Global Review has remained unchanged since its founding. It is to offer readers systemic knowledge that has previously been limited mainly to local networks rather than a broader readership. By making this information available to the larger field of public law in an easily digestible format, we aim to increase the base of knowledge upon which scholars and judges can draw. Our ambition is to make our vast world smaller, more familiar, and more accessible.

We are grateful to our authors for preparing their rich, insightful, and informative jurisdiction reports. We also thank the leadership team at the *International Journal of Constitutional Law*—Gráinne de Búrca and Joseph Weiler, Co-Editors-in-Chief, as well as Sergio Verdugo, Associate Editor, for publishing a few contributions from this year's Global Review focused on Latin America to coincide with the 2019 Annual Conference of the International Society of Public, held on July 1-3 in Santiago, Chile. We also wish to recognize the leaders of the Central and Eastern European Chapter of the International Society of Public Law for hosting a regional workshop this past year for Global Review contributors. We hope their initiative inspires others to host similar programs in their own part of the world. We give thanks as well to Gaurie Pandey at the Center for Centers at Boston College for her help once again in designing this beautiful volume.

We reserve our biggest thanks for Professor Vlad Perju, Professor of Law and Director of the Clough Center for the Study of Constitutional Democracy at Boston College. Professor Perju continues to inspire us with his vision for the Center, which he has transformed into a leading site in the world for discussion and debate on constitutionalism. A learned scholar of the field, a respected teacher, and a passionate defender of democracy, he has our deepest gratitude.

We invite interested authors from new jurisdictions to contact us via email at contact.iconnect@gmail.com to express their interest in producing a report for next year's Global Review. And, as always, we welcome feedback, recommendations, and questions from our readers.

COUNTRY REPORTS





Argentina

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I. INTRODUCTION

In our 2017 report, we described a Supreme Court in flux. Early in 2016, two new justices joined a five-member Court against the background of broader political change.[1] We therein hinted at possible jurisprudential shifts, involving a redefinition of both the Court's role in general and its standards on human rights law in particular. In 2017, an ostensibly minor decision but with heavy implications regarding the policies of memory, truth, and justice concerning human rights violations during the last dictatorship had invited strong popular backlash. In 2018, and after a legislative intervention, the Supreme Court revisited its decision, this time amidst turmoil within the Court itself. After an eleven-year tenure, Justice Lorenzetti was replaced in September as Court President by Justice Rosenkrantz, the member perceived to be most closely aligned with the national Executive.[2] The move seems to have left strangled relationships within the Court and was followed by another power reconfiguration, what may partly account for the relative paucity of significant cases decided during the year. The most important development in constitutional politics, concerning the legalization of abortion, took place outside the courts.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

We start by analyzing what probably was the most important constitutional issue in Argentina during 2018: the legislative debate around the legalization of abortion. The debate strongly engaged the public and channeled constitutional discourse for the better part of the year. Next, we will turn to the Supreme Court.

Abortion

Abortion is criminalized by the 1921 Criminal Code in force except for two cases: (a) if the pregnancy puts at risk the woman's life or health, or (b) if the pregnancy is the outcome of rape (Section 86). The original wording of this second exception was infelicitous, creating the impression for some observers—including religiously motivated people—that only pregnancies resulting from rape against mentally deficient women could legally be terminated. Both out of uncertainty about the law and ideological pushback, many doctors refused to perform legally permitted procedures. In 2012, in *FAL*, the Supreme Court said the provision applied to rape committed against *any* woman, and that this stemmed from both statutory interpretation and the country's human rights law commitments. The Court thus attempted to minimize the judicialization of such procedures, ordering all provinces to pass clear guidelines to guarantee access to legal abortions, a process still facing obstacles.

[1] J. F. González-Bertomeu; R. Álvarez-Ugarte, 'Argentina' (2018), The I·CONnect-Clough Center 2017 Global Review of Constitutional Law, pp. 13-14, https://papers.ssrn.com/abstract=3215613.

[2] Disclaimer: During Justice Rosenkrantz's confirmation process, Juan F. González-Bertomeu submitted a letter of support.

In 2018, after months of engaged public demonstrations by women to protest gender violence, President M Macri invited the (often-described as "reactive") Congress to debate for the first time whether abortion should be legalized, a point that had long been at the forefront of an ever-growing local feminist movement and that a majority of the population seems to support.[3] For weeks, the lower house listened to hundreds of experts and public figures who shared their views. The discussions were widely addressed by the media, and citizens mobilized for and against the measure (green and blue scarves became symbols for the former and the latter, respectively). In June, the lower house narrowly passed a bill legalizing the termination of pregnancies during the first trimester and mandating health care providers to guarantee access to medications and procedures. After this result in a country where the Catholic Church and, lately, Protestant denominations opposing abortion exert social influence, the bill moved to the less democratically apportioned Senate, where, after another round of debate, it was narrowly rejected.

The debate invigorated a stale political system, with many women (and men) forcefully reclaiming a voice in public discussions. In the lower house, it was moved by a women's caucus organized across party lines and that promises to continue pushing for women's rights. Also, either because of the virtues of deliberation or to save face by catering to an aware constituency, several legislators claimed to have changed their position during the debate, mostly for legalization. While opposing legalization, others accepted that aborting women do not belong in jail. Finally, though with differences (Macri's party leaned toward the status quo), all parties fractured around the matter, an unusual development for a legislature characterized by party cohesion.

During the Senate debate, a senator in favor of legalization, suspecting that rejection would carry the day, called for the Court to intervene. He claimed that "[the Court] may surprise us with a comprehensive definitive decision … [that] Congress would have to follow … [T]he Court might settle what Congress did not dare to settle".[4] The Court, however, is likely to remain silent in the near future—even assuming that justices are willing to intervene in this debate, there does not appear to be a relevant case in its docket or approaching it.

The Court Changes

The Supreme Court went through a process of renewal with the turn of the century, after a Court-packing move in the early 1990s left it in disrepute.[5] This allowed the Court to regain prestige and to be gradually perceived as impartial. Apart from the profile of the new justices, what contributed to this was the Court's human rights agenda, expressing a relatively strong commitment to international human rights law (since 1994 on par with the Constitution) and the interpretations made by relevant international bodies. The Court also expressed some willingness to get involved in cases of social significance, including structural litigation and social and economic rights litigation concerning the rights to health, housing, and an adequate standard of living.

In December 2015, right after taking office as President, the right-leaning Macri selected two candidates to fill vacant seats at the Court. A 2006 statute had ordered the gradual reduction of the Court's membership from nine members to five, a number reached in 2014. In such a small body, two nominations potentially would be close to entailing a significant accommodation at the Court. As we hinted last year, some indications suggested that the new members, Justices H Rosatti and C Rosenkrantz, might be willing to embrace a form of judicial minimalism and to weaken the previously expressed deference toward international human rights law and its adjudicatory bodies. Some cases from 2018 provide a degree of support to that view.

Now, a series of developments at the Court has reached beyond its case law, though it will likely have an impact on the latter. In September, Justice Rosenkrantz was joined by two others to end Justice Lorenzetti's eleven-year tenure as Court President, a renewable three-year position selected by the justices themselves that carries considerable power, including acting as the representative of the federal judiciary, supervising the administrative workings of the Court, and making such relevant determinations as the order and timing of decisions. Allegedly, this change exacerbated an acrimonious confrontation between at least two of the justices, which made the general news for days. In December, a new coalition of justices (including Rosatti, who days before had supported Rosenkrantz) decided to strip the Court President of some relevant capacities. This perceived instability, which resulted in a slowdown in the pace of the Court, may not help cement its legitimacy.

III. CONSTITUTIONAL CASES

During 2018, the Court's internal turmoil led it to push important decisions to the last part of the year. The Court seemed to be undergoing a period of ad-hoc coalitions, although a handful of sensitive cases show Justice Rosenkrantz as a lone dissenter. Some of the Court's decisions were marked by a dispute over interpretative doctrines and its restrained versus expansive role. Curiously, a few of its justices seemed to change their positions regarding this matter from one case to the next, and it will be their task to show that these changes were not politically motivated. We believe that, while representing only a snapshot of the Court's docket, the four decisions we cover offer a decent view of this period of transition. A case nearly making the cut is *Peralta Valiente,*[6] a summarily dismissed appeal of a foreigner expelled from the country, in which two dissenting justices (Rosenkrantz and Highton) claimed the per-

[3] Eduardo Paladini, 'Dos nuevas encuestas sobre el aborto', Clarín, 8 August 2018, https://www.clarin.com/politica/nuevas-encuestas-aborto-horas-arranque-debate_0_rkAj4JusG.html

[4] Senado de la Nación, MA Pichetto (debate of 8 August 2018), available https://www.youtube.com/watch?v=OvWDyFoNj6c.

[5] González-Bertomeu and Álvarez-Ugarte, *supra* note 2.

[6] *Peralta Valiente, Mario* CAF 38158/2013/2/RH1 [2018].

son's rights had been violated for lack of notification of his right to receive free legal aid.

1. Batalla: The Constitution inside and outside the courts

The single most significant cases from 2017 and 2018 concerned the same topic. In 2017, the case had involved the fate of one Mr Muiña, convicted in 2011 of kidnapping and torturing five people (one still disappeared) in the context of massive human rights violations committed during the last dictatorship (1976-1983).

In that case (*Bignone*), what was at stake was whether Muiña could claim a benefit regarding how his prison term was to be calculated, or whether international human rights law concerning the fight against impunity prevented that result. Muiña had invoked the so-called "Two for one" rule establishing that, after two years in detention, each extra day would count as two served if convicted. The rule had been repealed in 2001, before his arrest, but Muiña argued it still applied to him as a result of the Criminal Code's "Most favorable to the defendant" rule, mandating that "[i]f the law in force at the time of the offense is different from that which exists at the time of the judgment *or in the intermediate time,* the more favorable law will *always* be of application" (emphasis added).

When, in *Bignone*, a 3-2 majority granted Muiña the benefit he demanded, hundreds of thousands took to the streets to protest what they considered an affront to the social and legal consensus on memory and justice regarding past human rights violations. Days after the decision, and to prevent it from applying to similar cases, a unanimous Congress passed a so-called "interpretative" statute, saying that the "Two for one" rule had never been meant to apply to cases involving human rights abuses.

We remarked last year that the Court would have to analyze the validity of this statute, which it did in 2018 in a case known as *Batalla* due to the appellant's name.[7] The question the Court addressed was whether its previously announced criterion should change as a result of the enactment. The Court's 4-1 plurality decision suggested an affirmative answer, but only two of the four justices voting to move away from *Bignone* took the new statute into consideration. Justices Maqueda and Lorenzetti insisted on their previous position—mostly based on the state's international obligations—and claimed that the statute did not add anything. In contrast, the remaining justices forming the decisional majority considered that the statute had changed the legal landscape.

In *Bignone*—the previous case—Justices Rosatti and Highton each expressed the view that Congress had not legislated a difference between common crimes and human rights abuses, and that it was not for judges to alter the statute. A straightforward interpretation of their stance is that it referred to *judges* because that is what was at stake, but that Congress itself would be banned from differentiating ex post as well. In *Batalla*, however, they jointly said that Congress had legitimately established such a difference through the new statute. The statute was a reasonable legislative exercise that did not violate fundamental rights but only clarified the way to interpret the law, without creating a new crime or worsening punishment. In a showing of restraint, the justices declared that judges were not the mouth of the law, but neither were they "freethinkers" who could alter a statute as they saw fit. When the problem lies 'in a statute,' the solution must come 'by way of a statute', what had happened in the case. Each institution—the Court and Congress—had said its piece when it was its turn to speak, as is appropriate in a republic, and the Court therefore had to uphold Congress's view.

Justice Rosenkrantz stuck to his position in *Bignone*, becoming the only dissenter. He considered the new statute unconstitutional, since its aim was not to clarify an obscure clause in the clear-enough "Two for one" statute. The new statute established that the latter did not apply to human rights violations, so the presupposition was that it *did* apply originally to those cases. He added that the new statute was invalid even if seen as an interpretative rule because it entailed the retroactive application of the law to worsen a defendant's standing.

There are two ways to understand these opinions. One is as a genuine discrepancy regarding the nature of the "interpretative" statute. Justice Rosenkrantz concluded that the statute could not be regarded as such because, among other reasons, it violated constitutional protections, while Justices Rosatti and Highton concluded otherwise. If this was the issue at stake, Justice Rosenkrantz's stance was a sensible one only if understood within the confines of his previous (and most probably wrong) criterion in *Bignone* concerning the state's human rights law obligations. If Congress did not distinguish between common crimes and human rights violations *when enacting that statute,* a new Congress could not do it now without violating non-retroactivity. (We do not believe in a metaphysically ever-present Congress whose decisions across time cannot ever be retroactive.) Since Justices Rosatti and Highton had shared that view in *Bignone,* a superior option for them would have been to acknowledge that human rights law did soften the ban on retroactivity, and that they had been wrong to say otherwise.

Perhaps there is another way to conceive of the discrepancy. The position of Justices Rosatti and Highton *might* be construed as one indicating that the current Congress had offered its view—on par with that of the Court's—on whether the "Two for one" statute must apply taking human rights law and constitutional law into consideration, and that the Court should accept that view. This would be compatible with a type of "departmentalist" perspective of constitutional interpretation, under which this is an activity that all three branches share equally. If this were these justices' position, it would mark a change in the way justices conceive of constitutional adjudication. But this would be reading too much into both Justices Rosatti and Highton's vote and Congress's own perception as a constitutional interpreter.

[7] *Hidalgo Garzón, Carlos del Señor y otros* FLP 91003389/2012/TO1/93/1/RH11 [2018].

2. Asociación Francesa: minimalism and strict-construction

A case from 2018 further illustrates the interpretative battles at the Court. A medical doctor and a hospital were found responsible for malpractice that occurred in 1994, as a result of which a baby girl had been born with spastic cerebral palsy. The hospital filed for bankruptcy, and, given her condition, the child's parents asked the bankruptcy judge that they be paid with priority over any other credit, even if this meant altering the ranking established by statute. They said that several conventions on par with the Constitution—including the Convention on the Rights of the Child, mandating to privilege the "best interest" of the child—demanded that reclassification.

In a 3-2 decision, the Court upheld a lower court's denial of the request. Justices Rosenkrantz, Highton, and Lorenzetti said that only legislators could alter the bankruptcy statute's ranking. Though several obligations concerning special treatment of children flowed from human rights conventions, it was not possible to derive from them a specific recognition of a special privilege when a credit was involved. Justices Maqueda and Rosatti each filed a dissent, rejecting such strict constructionism. Maqueda emphasized the absolute vulnerability of the child and said that the claim was meant to protect her essential rights to life and the enjoyment of a level of existence adequate for her development. Together with the obligations stemming from the Constitution and human rights law, this meant that the statute establishing a ranking had to be struck down for not allowing an exception that placed the credit in question on top of others. In a departure from his stance of restraint announced in *Batalla,* Justice Rosatti largely agreed.

3. Blanco: Pensions under ever-recurring crises

So far, under its current configuration, the Court has seemed unwilling to develop a social and economic rights agenda, something that would be authorized or mandated by a thick rights enumeration. However, it has decided a few consequential cases. The *Blanco* decision,[8] announced in December, was the most significant: it involved the Executive's authority to establish an adjusting formula to update pensions. This arithmetic operation defines how much money retirees will receive and how costly the state-run pension system will be, a sensitive question for any government.[9]

The decision in *Blanco* must be read against the backdrop of an economy almost perpetually in crisis, with inflation levels eating up much of the income of retirees, hundreds of thousands of whom initiate legal actions to dispute the way their pensions are calculated. *Blanco* should also be read within the context of an over a decade-long case law in which the Court underscored the constitutional principle of "mobility" in social security (section 14 *bis*), according to which pensions are to be adjusted to keep a "reasonable proportion between worker's incomes and those of retirees."[10]

In 2016, Congress acknowledged that the state owed a proverbial debt to retirees and offered a voluntary adjustment program. What was at stake in *Blanco* was the authority to establish an adjustment formula of the now-devalued salaries to be used as the basis to calculate the pension of plaintiffs who had *not* signed into that program. The Social Security Administration (SSA, part of the Executive) vindicated its authority to choose the formula via an administrative decision. The SSA's chosen index coincided with that of the voluntary program, but this entailed a lower pension for Mr. Blanco than the pension he would get under the index devised by a lower court.

After analyzing a complex web of regulations, the majority (all justices but Rosenkrantz) considered that it was up to Congress, and not the Executive, to decide on the formula.[11] The SSA had based its authority on a statutory provision from 1993 granting it the power to "apply, monitor and oversee" the pension system. For the Court, however, this could not be interpreted as a delegation to the SSA of the formula-setting authority, since, in 2008, Congress had eliminated from the statute an explicit delegation to create an index, establishing itself a new one to be applied for future adjustments. Now, since Congress was silent regarding the formula to update salaries *before* 2008, the Court fell back on a previous decision in which a Court-mandated index was used to calculate a plaintiff's pension.[12]

Justice Rosenkrantz dissented. He argued that the Court had traditionally recognized in Congress a broad authority to decide how to organize the social security system, an authority Congress chose to exert on some occasions and delegated on others.[13] A partial delegation to the SSA still existed because Congress had remained silent regarding the question of how to update pensions *before* 2008.[14] He rejected the index chosen by the majority, and opted to defer to the Executive since the SSA's formula fell within the constitutional power vested in the Executive to issue instructions and rules "necessary for the enforcement of the laws of the nation [….]"[15] Blanco's claim could only succeed if the formula was shown to be substantially flawed, something he had not proven.[16]

Rosenkrantz's dissent appears as an exercise of self-restraint in a matter with huge financial implications for the government. He said that "the most delicate mission for the judiciary [was] to keep itself within the boundaries of its jurisdiction…." [17] On the other hand, by insisting it was for Congress and not the Executive to settle the matter, the majority was willing to limit the government. The majority said that "legislators [were] better suited to make real the goals of our constitutional text." In mandating

[8] *Blanco, Lucio Orlando* CSS 42272/2012/CS1-CA1 [2018].

[9] The state-run pension system coexisted with a private system from 1993 to 2008, when the entire system was renationalized.

[10] *Blanco,* ibid., par 12, *Badaro, Adolfo 329 Fallos* 3089 [2006], *Badaro, Adolfo 330 Fallos* 4866 [2007], *Elliff, Alberto José 332 Fallos* 1914 [2009].

[11, 12] *Blanco,* ibid

[13,14 ,15,16] *Blanco,* ibid (Rosenkrantz's dissent).

that pensions were to be adjusted by statute, the Constitution "combine[d] the ideal of representation with the fulfillment of social rights."[18] Unless Congress chooses another formula, the Court's criterion will apply to tens of thousands of similar cases.

4. UCR: elections and federalism

A traditional political party—and a member of the national ruling coalition—sued the southern Santa Cruz province to challenge the double simultaneous voting system (DSV) (*Lemas*) used for electing the governor.[19] The system allows political parties to bring their primaries to the general election and to benefit from the parties' fragmentation. A candidate carries the election if she is the most-voted politician of the most-voted party. Since all the party's candidates' votes are aggregated to determine the latter, this means a politician may win even if a candidate from a different party received more votes. This undemocratic result had taken place in the province in 2015.

In a unanimous decision composed of four opinions, the Court dismissed the claim. The local constitution establishes that the "governor and vice-governor shall be elected directly by the people of the Province by simple plurality of votes...."[20] According to the provincial high court, the clause mandated plurality voting instead of absolute majority and referred to both candidates and political parties. A DSV system was compatible with both issues or conditions.[21] For the Supreme Court, this was a plausible reading of the local constitution, given the deference with which federal bodies must treat provincial authorities when they reasonably exercise the autonomy accorded by the national Constitution.[22] (A case from 2003 also had concluded that the DSV system did not violate the *national* Constitution.[23]) The Court still considered it appropriate to question the system: it confused voters; fractured political parties; and took internal disagreement to the general election.[24] However, the fact that "an electoral system [was] inconvenient [did] not make it by itself unconstitutional."[25]

IV. LOOKING AHEAD TO 2019

This Court likely is in the process of developing new jurisprudential trends, partly pushed by the personae the new justices are adopting and the evolving coalitions with the remaining justices. In such a small body, much can change as a result of even a little accommodation. The new members of the Court seem to vote differently on important matters. Although it is too soon to tell, Justice Rosatti seems closer to summon or become part of a relatively stable majority around certain issues than is Court President Rosenkrantz.

Apart from a few significant cases, what immediately lies ahead is a presidential election in October 2019, which may indirectly affect the future of the Court and test the justices' consistency. Also, the women's rights advocates who strongly pushed for the legalization of abortion will likely attempt to fight another legislative battle. Perhaps courts will also be called to intervene.

V. FURTHER READING

Arballo G, 'La Corte actual: participación, solistas, mayorías frecuentes' (Saber Leyes no es Saber Derecho, February 5, 2019) <http://www.saberderecho.com/2019/02/la-corte-actual-participacion-solistas.html> accessed 15 February 2019

Bergallo P, 'Cosmovisiones Constitucionales e Interrupción Del Embarazo' (2018) 5 Revista Pensar en Derecho <http://revista-anfibia.com/ensayo/la-corte-suprema-dividida-tres/> accessed 13 February 2019

Cánaves V, 'Constitucionalidad del proyecto de ley de interrupción voluntaria del embarazo' (ELE, CEDES y REDAAS 2018)

Farrell M, 'La otra Batalla' (En Disidencia, 15 December 2018) <http://endisidencia.com/2018/12/la-otra-batalla/> accessed 14 February 2019

Saba R, 'La Corte Suprema Dividida En Tres' [2018] Revista Anfibia <http://revista-anfibia.com/ensayo/la-corte-suprema-dividida-tres/> accessed 13 February 2019

[17, 18] *Ibid*

[19] *Unión Cívica Radical de la Provincia de Santa Cruz* CSJ 004851/2015/RH001 [2018].

[20] Constitution of the Province of Santa Cruz, Section 114.

[21] *Unión Cívica Radical, ibid.*

[22] *Ibid.*

[23] *Partido Demócrata Progresista 326 Fallos* 2004 [2003].

[24, 25] *Ibid.*



Austria

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I. INTRODUCTION

2018 was a busy year in terms of Austrian constitutional law. First and foremost, the year marked the centenary of the Republic of Austria, founded in 1918 (formerly as "German-Austria") after the end of the First World War. Even though the Federal Constitutional Act (Bundes-Verfassungsgesetz; hence: B-VG) was only enacted in 1920, the enactment of the laws pertaining to the "provisional constitution" as well as the triggering of the federal system, which both fell into the transitory period of 1918/19, were given due regard during the jubilee year. As to more recent developments, the new Conservative coalition government, which had been appointed at the end of 2017, launched several reforms of constitutional impact that will be discussed in this report. While some of these reforms have not come into force (or even passed the legislative procedure) yet, others already have or will do so in early 2019. However, since the coalition government only holds a simple majority in the National Council (the lower chamber of the Federal Parliament), the consent of one or more of the opposition parties is necessary in order to pass constitutional legislation. Moreover, the Austrian Constitutional Court delivered a number of important judgments that dealt with issues such as minimum social aid, asylum seekers, citizenship, parliamentary investigation committees and intersex people, as will be reported below. These cases demonstrate the varieties of "dialogue" between the lawmaker and the Constitutional Court, ranging from the repeal of laws to constituent interpretation to deference by the lawmaker in order to find out what the Court, among different options, considers constitutional. Finally, Austria took over the Presidency of the Council of the European Union for the second half of 2018 (for the third time, after 1998 and 2006)—a difficult task in times of crisis, in particular with regard to Brexit, migration and fiscal issues.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Austrian Federal Constitution is not a codified constitution incorporated in a single document, but consists of approximately 500 fragments (laws, single provisions, several state treaties, certain laws enacted prior to 1920), all of which are endowed with the formal rank of federal constitutional law. Accordingly, constitutional reforms often do not just refer to the main constitutional document, i.e., the B-VG, but also other pieces of federal constitutional law. Thus, the most important constitutional reform project launched by the new Federal Government in 2018 did not just amend the B-VG but also other parts of federal constitutional law. The respective constitutional bill[1] was passed at the end of 2018 and its entry into force is partly set in 2019, partly at a later date. Its main concern is a reform of the highly complicated allocation of powers between the federation and the nine constituent Länder (states). Art 12 B-VG, which enlists several subject matters for which the federation is responsible to enact framework laws, while the Länder are entitled to pass implementing laws and to execute them, will in the future apply only to a few politically controversial subject matters, such as social aid.[2] In turn, most of the enlisted matters were either transformed into exclusive federal subject

[1] BGBl I 2019/14.
[2] See below III.1.

matters under Art 10 B-VG or into powers under the residuary competence of the Länder (Art 15 para 1 B-VG). Even though the shared type of competence, which Art 12 B-VG enshrines, was not totally abolished, the amendment sought to make the allocation of powers clearer and more coherent. Inasmuch as the transformed subject matters became either part of the exclusive federal or Länder competence, the reform was neither over-centralistic nor just Länder-friendly, which enabled the political compromise required for constitutional approval. The same amendment, moreover, eliminated the mutual approval rights of the federation and the Länder, respectively, regarding the boundaries of district administrative authorities, which are now exclusively regulated by the governments of the Länder and those of the district courts, which are regulated by the Federal Government. Likewise, the amendment includes some other minor issues of a deregulatory and clarifying nature.

A deregulatory effect was also intended by the Second Federal Law Clarification Act, [3] which was, however, passed as an ordinary law. According to this Act, all federal laws and regulations entered out of force by 31 December 2018 unless they fell under exceptions mentioned in the Act itself (e.g., federal constitutional laws or provisions) or were mentioned in the schedule to this Act. Even though the aim to decrease the number of federal laws and regulations—the law of the Länder was not concerned—was generally welcomed, the Act was severely criticized for its technical design: the main concern was that important laws or regulations might be overlooked and accordingly not mentioned in the schedule, and would thus automatically enter out of force. For reasons of legal clarity and certainty, it was suggested to, vice versa, enlist those laws and regulations that should enter out of force instead of enlisting those that should. Still, the schedule enlists on 240 pages just those laws and regulations that should not enter out of force.

Other constitutional amendments referred, among minor legal issues, to adaptations required by the General Data Protection Regulation,[4] which provides legal protection by the administrative courts of the federation and the Länder, the Administrative (Appeal) Court and the Constitutional Court. The proposal to pass a headwear ban for elementary schools (apart from a similar ban for nursery schools that fell into the competence of the Länder that, in a formal agreement with the federation,[5] obliged themselves to enact such bans) was politically much more contested. The coalition parties in the National Council initiated the respective amendment to the School Teaching Act at the end of 2018, i.e., a constitutional provision that would require a qualified quorum and majority in the National Council.[6] An Anti-Face-Veiling Act[7] had already been enacted as an ordinary law under the previous Federal Government. While the purpose of this Act had been to generally ban the veiling of faces in public places, which, inter alia, applies to the burqa or niqab, the new amendment is concerned with a more specific ban: under ten-year-old pupils in elementary schools would be prohibited to wear head-covering garments based on ideology or religion, which goes beyond the prohibition of face veils and, inter alia, refers to ordinary headscarves as well. At the same time, the draft provision emphasizes that the ban seeks to implement certain constitutional and educational values such as the equality of men and women or the social integration of children in accordance with Austrian traditions. In case of a violation of the ban, the parents would be asked to attend a briefing by the responsible authority in order to be informed about the reasons of the violation and their respective responsibility. Only if the violation was continued or the parents ignored the invitation more than once would they be fined. It is currently unclear whether the qualified quorum and majority required for this constitutional provision will be met. The question also is whether a constitutional amendment would at all be required for the enactment of this provision. The provision would likely interfere with the freedoms of religion and opinion—if children at that age can be presumed to be able to exercise those rights—as well as the right to private life or the right of parents to ensure school education and teaching in conformity with their own religious and philosophical convictions. All these rights are entrenched in the ECHR and its Protocol No 1, which in Austria form part of federal constitutional law. At the same time, however, the ban might exactly protect the freedoms of religion, opinion and private life, inasmuch as children must not be forced by others to cover their heads, as well as further the equality between men and women and other important public interests, such as social integration. Also, the ECtHR's cases *Köse and Others v. Turkey* and *Leyla Şahin v. Turkey* [GC] show that a headwear ban may be legitimate under certain conditions.

III. CONSTITUTIONAL CASES

In recent years, the Austrian Constitutional Court has had to deal with a couple of thousand cases per year, most of which are rejected for formal or substantive reasons.[8] In 2018, many cases dealt with violations of rights of asylum seekers or persons entitled to the right of asylum, while the Constitutional Court also held that persons with subsidiary protection status were not entitled to the same rights (more concretely, the right of family reunification) as persons belonging to the latter group. The Constitutional Court also dealt with numerous other issues, ranging from the review of elections to the constitutionality of cash machine fees. In this section, a selection of decisions will be examined more closely since they raised particular attention.

[3] BGBl I 2018/61.

[4] BGBl I 2018/22.

[5] Art 3 para 1 Vereinbarung gemäß Art. 15a B-VG zwischen dem Bund und den Ländern über die Elementarpädagogik für die Kindergartenjahre 2018/19 bis 2021/22, BGBl I 2018/103.

[6] 495/A XXVI. GP.

[7] Anti-Gesichtsverhüllungsgesetz, BGBl I 2017/68.

[8] See, most lately, the Constitutional Court's annual report 2017, https://www.vfgh.gv.at/downloads/taetigkeitsberichte/VfGH_Taetigkeitsbericht_2017.pdf.

1. VfGH 7 March 2018, G 136/2017-19 (Lower Austria); 27 June 2018, G 415/2017 (Vienna); 1 December 2018, G 308/2018-8 (Burgenland); 11 December 2018, G 156/2018-28 (Upper Austria): Minimum Social Aid

Social aid is a shared competence under Art 12 B-VG, entitling the federation to enact framework laws and the Länder to enact implementing laws as well as to execute them. As long as the federation does not pass a framework law, however, the Länder will have full legislative competence. So far, the federation has not passed a framework law under this competence—which will, however, change soon—so that all Länder enacted their own laws on minimum social aid. Since applications for minimum social aid have strongly increased with the large number of persons entitled to asylum, the Länder reacted in different ways in order to reduce costs. In 2018, the Constitutional Court examined the relevant legislation of four Länder. The compatibility of these models with the Constitution attracted vast attention, since the Federal Government simultaneously prepared a draft bill for a new federal framework law (which, to some extent, resembles the Upper Austrian model).[9] In this dialogue between different legislatures and the Constitutional Court, the latter's decisions prove a particularly important yardstick for the constitutional design of this new law, with the examined Länder laws serving as its "laboratories".

In the *Lower Austrian case,* the Constitutional Court struck down provisions that, with regard to the amount of social aid, discriminated against those beneficiaries who, within the last six years, had stayed in Austria less than five years. The Constitutional Court held that this provision, which also referred to Austrian citizens among others, discriminated between Austrian citizens living in Austria and those living elsewhere and that this different treatment could not be reasonably justified, since it was not understandable why a stronger motivation to work (instead of receiving social aid) should be needed for Austrian citizens living outside Austria. Likewise, it was held unconstitutional that the law discriminated between other persons with regard to their stay in Austria, e.g., between persons entitled to asylum that could not return to their own country and other migrants that could. Moreover, the Constitutional Court struck down as unconstitutional the provision according to which social aid for persons living in the same household should, as a total, not exceed 1,500 euros. While the Constitutional Court admitted that the lawmaker could, in principle, reduce social aid in the case of more persons living in the same household because of decreasing "synergetic" costs, this ought to be done reasonably and in accordance with the concrete and individual need of the respective number of persons. The fact that families additionally receive "family aid" and that the provision made some exceptions was not considered a sufficient justification.

In the *Burgenland case,* the Constitutional Court decided in a very similar manner. Additionally, the Court held that Art 1 of the Federal Constitutional Act on the Rights of Children[10] had been violated because the limit of 1,500 euros per household particularly affected large families with more children. In both cases, it is interesting to find how the Constitutional Court applies the equality principle, namely (just) with regard to the relation between Austrian citizens among each other and between other persons among each other.

In the *Vienna case,* the Constitutional Court repealed a provision that denied minimum social aid to underage Austrian citizens who can neither themselves receive such aid nor receive it from parents if they are not entitled to it.

In the *Upper Austrian case,* the basic model of minimum social aid was found to be constitutional because it does not absolutely limit the minimum social aid per household but allows additional aid for additional persons living in that household, even though the additional aid is significantly lower than the basic aid due to "synergetic" costs of persons living in the same household. While the Constitutional Court held that the lawmaker had a wide margin of appreciation to decide on social aid systems and its limits, it also emphasized that the lawmaker, when providing for social aid, had to consider the minimum requirements of a life led in human dignity. The Constitutional Court, however, repealed a provision of the Upper Austrian law which, when limiting minimum social aid per household, did not distinguish between persons living in the same household who receive minimum social aid from those that do not.

2. VfGH 15 June 2018, G 77/2018-9: Entry of Intersex Persons into Civil Register

In this case, an intersex person sought to have their gender entry in the Austrian Civil Register changed to a term other than "male" or "female". The request was refused by the administrative authority and the refusal confirmed by the Upper Austrian administrative court against which a complaint was lodged at the Constitutional Court. Sec 2 para 2 no 3 Civil Register Act[11] mentions just "gender" among the general Civil Register data, but does not specify between different genders. The Constitutional Court found it possible to interpret this provision consistently with the Federal Constitution inasmuch as the Civil Register authorities should register the individual gender requested by a person and not just "male" or "female". The authorities might, however, verify whether the requested entry term was adequate—terms such as "inter", "open" or "diverse" were suggested—since persons were not entitled to choose any kind of term for their gender. The Constitutional Court based its decision on Art 8 ECHR, which forms part of Austrian federal constitutional law, arguing that a restriction to have one's gender entry limited to just "male" or "female" would not be proportional and thus violate the right to one's own gender identity. The Constitutional Court did not, however, deal with the numerous provisions in the B-VG that just mention males and females—e.g., with regard to voters or the obligation of male citizens to military or civilian service. Neither did the Constitutional Court point out that it had been the same Court that, in VfSlg

[9] 104/ME XXVI. GP.

[10] Bundesverfassungsgesetz über die Rechte von Kindern, BGBl I 2011/4.

[11] Personenstandsgesetz, BGBl I 2013/16 as amended by BGBl I 2018/104.

18.929/2009, had acknowledged that the Austrian legal system recognized just male or female gender. Moreover, consistent interpretation should only be applied in the case of doubt left by other interpretive methods. Sec 77 Civil Register Act, however, provides that all male denominations in this Act apply to females as well. The Court considered this provision to have been made just for reasons of linguistic equality, eclipsing its meaning with regard to the interpretation of "gender" in Sec 2 para 2 no 3 of the same Act. Still, it would be paradoxical to assume that a law recognizes more than two genders and at the same time requires that all terms relating to persons for which the male term is used applies to females as well, but not to a third gender. The same problem will arise in numerous laws that expressly apply to two genders only, e.g., in the context of gender equality and non-discrimination. It is not at all clear how such provisions should be dealt with just by consistent interpretation, which shows that this is in truth an issue for the lawmaker.

3. VfGH 3 October 2018, G 69/2018-9: Adoption of Children by Homosexual Couples

Already in 2017, the Constitutional Court had repealed a provision of the Austrian Civil Code which prohibited homosexual couples to marry, even though the same Court had, in previous cases, upheld the difference between marriage (for heterosexual couples) and registered partnership (for homosexual couples).[12] Substantively, however, the decision is also a consequence of previous judgments in which the Constitutional Court allowed homosexual couples to receive sperm donation[13] and to adopt children[14]. The decision made in 2018 follows in the same strain: § 197 para 3 Austrian Civil Code[15] provides that if a child is only adopted by an adoptive father (or an adoptive mother), all legal family relations to the biological father (or mother) will cease to exist. This provision was held to be unconstitutional by a lesbian complainant who had ended her relationship with the biological mother of the child, but nevertheless wanted to adopt the child afterwards, without, however, replacing the biological mother. According to the Constitutional Court, a literal interpretation of the provision (allowing the replacement of a biological parent only by an adoptive parent of the same gender) would indeed violate the right to equality and Art 8 ECHR. But the Constitutional Court also held that it was possible—and even required—to construe the provision consistently with these constitutional rights inasmuch as an adoptive father could also replace a biological mother and an adoptive mother a biological father. Even though neither the wording nor the explanatory materials suggested this result, the Constitutional Court applied consistent interpretation instead of striking down the provision. This is one example where the Constitutional Court applies consistent interpretation as a "primary" instead of—as in some other cases—subsidiary interpretive method that seems to express deference towards the lawmaker whose provision thus is not struck down, while the reasons and motives intended by the lawmaker are nevertheless totally reversed.

4. VfGH 11 December 2018, E 3717/2018-42: Deprivation of Citizenship

In 2017, the right wing Freedom Party submitted a list to the Federal Ministry of the Interior that contained the names and other data of more than 66000 persons of allegedly Turkish citizenship who were also supposed to be Austrian citizens. According to the Austrian Citizenship Act,[16] a person generally—unless certain exceptions apply—loses Austrian citizenship when obtaining the citizenship of another state. The Freedom Party claimed that it had received the list anonymously and that the list, showing the current status of allegedly Turkish voters in Austria, could demonstrate the illegal status of (allegedly) Turkish citizens who thus would have to lose their Austrian citizenship. As a consequence, the Länder authorities responsible for carrying out the federal Citizenship Act began to individually examine the nationality status of persons mentioned in the list, which, in some cases, entailed a deprivation of Austrian citizenship. In a case where the Viennese administrative court had rejected the complaint of a person who had been deprived of his Austrian citizenship because of an alleged reacquisition of his former Turkish citizenship, a complaint against that decision was lodged before the Constitutional Court. The Constitutional Court held that the complainant had been violated in his right to equality because the administrative court had used the list as a token of evidence, even though it could not be proven that the list was real and correct. Ex officio investigations, which would have to be led by the authorities, could not be supplanted by such a list. It was the obligation of the authorities to prove that the person was a Turkish citizen, whereas it was not the obligation of that person to prove that he was not a Turkish citizen. Even though many enquiries had been made, neither the origin and truth of the list could be clarified nor could the complainant obtain relevant evidence from the Turkish authorities that he was not a Turkish citizen. The Constitutional Court, repealing the administrative court's decision, concluded that as long as the authorities could not prove the Turkish citizenship of the complainant, one had to assume that he was not a Turkish citizen and should therefore not have lost his Austrian citizenship. The Constitutional Court also mentioned that a concerned party was obliged to a "certain participation" in the procedure if "justified by ex officio investigation results and not exceeding tolerable limits for the concerned party", but did not spell out what this meant in detail. However, since many cases will be similar and since, as long as the Turkish authorities do not cooperate, it will not be clear whether the respective persons are in truth Turkish

[12] VfGH 4 December 2017, G 258/2017 ua (G 258-259/2017-9).
[13] VfSlg 19.824/2013.
[14] VfSlg 19.942/2014.
[15] Allgemeines bürgerliches Gesetzbuch, JGS 1811/946 as amended by BGBl I 2018/100.
[16] Staatsbürgerschaftsgesetz, BGBl 1985/311 as amended by BGBl I 2018/56.

citizens, the Austrian authorities will not be allowed to deprive such persons of their Austrian citizenship.

5. VfGH 14 September 2018, UA 1/2018-15 (first BVT case); 11 December 2018, UA 2/2018-17 (second BVT case); 11 December 2018, UA 3/2018-30 (Eurofighter case): Parliamentary Investigation Committees

In accordance with its new competence under Art 138b B-VG, the Constitutional Court had to decide on appeals raised in the context of two parliamentary investigation committees. In 2018, the National Council established these committees with regard to the examination of two separate issues, namely the non-transparent purchase of military aircraft ("Eurofighter case") and the controversial police raid on the Federal Constitution-Protection and Antiterrorism Agency ("BVT case"). In the Eurofighter case, the respective investigation committee itself appealed to the Constitutional Court in order to require the Finanzprokuratur (the legal advisory body of the Republic) to submit all documents on the "Task Force Eurofighter". The Court held that the Finanzprokuratur had to oblige this request. In the first BVT case, the Constitutional Court was appealed to by the other investigation committee and accordingly required the Federal Minister for the Interior to submit at least certain documents to the committee. In the second BVT case, the Constitutional Court rejected the appeal made by complainants who asserted the violation of their personality rights because certain documents that concerned them had been forwarded to the investigation committee. According to the Court, the complaints had been delayed and, moreover, incorrectly addressed to the Constitutional Court that was not competent to decide on such an appeal since their personality rights had not been violated.

IV. LOOKING AHEAD

The Federal Government has already laid down an ambitious program for 2019, which will, among other issues, focus on tax reform, digitalization and health matters. At the same time, it may be expected that the Constitutional Court will decide on a number of laws passed under the new government either on the appeal of the parliamentary opposition or on individual appeal. Among these, the social insurance reform, the planned prohibition of headwear in elementary schools and the minimum social aid federal law are likely to be dealt with by the Court. After the intense election years 2016-2018, no regular elections at federal or Länder level will take place in 2019 except the election of the parliament of the Land Vorarlberg. In May 2019, however, Austrian citizens will vote in the EU parliamentary elections. Last but not least, 2019 will be the centenary of the first constitutions of the Austrian Länder under the new Republic.

V. FURTHER READING

Gerhard Baumgartner (ed), *Öffentliches Recht.* Jahrbuch 2018 (NWV 2018)

Hans Georg Ruppe, 'Ehe für alle - Grundrechtejudikatur auf neuen Wegen?' (2018) JBl 428

Karl Korinek and others (eds), *Österreichisches Bundesverfassungsrecht* (R 14, August 2018)

Benjamin Kneihs/Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (R 21, August 2018)

Walter Berka, *Verfassungsrecht* (7th edn, Österreich 2018)



Bangladesh

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I. INTRODUCTION

Bangladesh witnessed heaps of constitutional law developments in 2018, with the much-talked-about general elections that were held on 30 December. In recent years, especially since 2014, fair, participatory, and peaceful elections appeared to be a daunting challenge for Bangladesh's democracy. With the 11th parliamentary elections on the calendar, therefore, the whole year of 2018 remained occupied with tensions, debates and controversies in every sphere of public and private life. The Supreme Court, too, was extraordinarily busy with bail petitions of detained politicians and ordinary people as well as electoral petitions. On the other hand, two major social movements, by university and school students, for reform of reservation in government jobs and road safety, received enormous mass support as they aimed at mending some long-standing good-governance ills, but were mishandled by the government.

At the legislative front, the Parliament, overwhelmingly dominated by the ruling party, enacted a controversial digital security law, whittling down all critiques and protests from the rights activists and social actors who claimed it was anti-rule of law and would stifle online freedom. The Supreme Court continued with its previous year's activism in the area of compensatory justice but played a largely passive role in protecting civil and political rights. Promisingly, however, it handed down two leading decisions concerning sexual violence prosecution and the protection of rape survivors.

We start with major constitutional developments of 2018 in part II, which addresses important decisions, enactments, controversies in politics and civic good-governance movements. The third part of this report analyzes some select constitutional cases, followed by conclusions in part IV.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

11th General Election

Bangladesh is a parliamentary democracy with general elections every five years. Major opposition boycotted the 10th general election of 5 January 2014 as their demand for the re-installation of the election-time caretaker government system was not met. The 15th Constitutional Amendment abolished the caretaker system in 2011 after the Supreme Court declared it unconstitutional for being undemocratic. The 2014 elections led to a practically one-party government, which made the year 2018 an extremely significant year for participatory democracy. During 2018, the major opposition Bangladesh Nationalist Party (BNP) led by Begum Zia remained busy battling legally and politically for her release at least on bail. Many other senior leaders of BNP also remained busy attending courts. Until the last moment, the party remained undecided as to whether to take part in the election at all or without the party leader participating.

Keeping suspense alive for the whole year, all political parties finally participated in the election after 10 years, the democratic credibility of which was widely questioned. BNP joined the election with an electoral alliance with major opposition parties except one that joined the ruling party block. This strategic alliance, called Oikya Front (United Front),

was helmed by Dr. Kamal Hossain, the renowned international law scholar and former chair of the country's constitution drafting committee. They consistently accused the government and the law enforcers of carrying out unlawful detentions, arrests and lawsuits against their leaders and supporters. They also blamed the Election Commission for not ensuring a level playing field for all. The opposition alliance won only eight seats out of 300, while the ruling party secured 259 seats on their own and a total of 288 seats with allies.

National and international media reported vote rigging and deadly violence, which cost at least 20 lives, including a security force member.[1] Moreover, despite the opposition's defiance, a controversial ordinance authorized the use of electronic voting machines (EVMs). EVMs were used for the first time in the country for six electoral seats, but they proved faulty.

Overlooking the opposition's demand for fresh elections, the new Parliament, excluding those eight opposition members-elect, commenced its journey. The government gives opposition party status to a party that ran in the elections as an ally of the ruling party. This echoes the same democratic decay that was seen in the 10th Parliament except that the appointed opposition party has not taken any membership in the current Cabinet.

Student Movements

In April and August, two major student protests took place. The first one demanded reformation of the quota system in public employment and the second was the road safety movement by the high school kids.

The Constitution permits positive discrimination to benefit women or children, or any 'backward section' of the people (Art 28) to ensure constitutional equality (Art 27) as well as equal participation for all citizens in public service (Arts 28-29). However, 56% of government jobs were reserved for various categories of citizens, of which 30% alone were for children and grandchildren of liberation war fighters and just 1% for physically challenged people. The reform had been demanded for years, but this year's movement was refuelled by a clash between the reformists and the ruling party's student wing, also lately invaded by the police. The students blocked major streets in Dhaka as a protest against police attacks on them. Soon, the movement spread nationwide and received civil society support.

Leaders and participants of the movement were arrested, attacked and prosecuted. One reportedly disappeared and was killed. Dialogue with the reformists and administrative committee recommendations all went in vain when the Prime Minister declared abolition of the quota system altogether a few months before the election. This made both the reformists and the beneficiaries unhappy. Finally, however, a notification in October abolished the quota system in the upper two tiers of government jobs.

The second student protest for safe roads began in the background of a horrific road accident on a busy Dhaka street on 29 July, when two schoolchildren, awaiting their bus, were killed by a speeding bus. It was racing with another to pick up more passengers from the stop. The average daily death count on Bangladesh roads is 20, which makes them among the deadliest. This time, however, fellow students immediately occupied the streets, vandalized transports and commenced a movement demanding justice and traffic law reform. The movement spread throughout the capital the very next day. The teens realized that the flouting of traffic rules and the widespread and open-secret corruption in the licensing system were the main reason for such clandestine accidents. For days, they kept the entire capital city seized and continued to regulate the traffic system, sometimes assisting the traffic police. They defied several calls for a recess, leaving the government worried. After over a week, this protest was also brutally suppressed, as private individuals, with state agencies as onlookers, attacked the protesting students indiscriminately. Panicked and traumatized, the students went home, but left a big question mark on their constitutional rights to organize and freedom of expression.

This was the movement where a renowned photojournalist, Dr. Shahidul Alam, was picked up from his residence by undercover policemen on the charge of instigating the student movement. Dr. Alam's 'fault' was that he took photos of the protests and commented that the attackers were from the ruling party. Charged under the infamous section 57 of the ICT Act 2006, Dr. Alam was denied justice for over 100 days, after which he was released on bail.

The two movements pointed a finger at the ailing condition of freedom of expression in Bangladesh. The quota reform movement could have given rise to a healthy constitutional dialogue on affirmative action, which, unlike in India, has never been a prominent issue in the country. It has never made any participatory and deliberative legislation to carry out constitutionally authorized affirmative measures for weaker or underdeveloped sections of its citizens. The government clearly missed out on an opportunity to enact such laws to realize one of its constitutional goals: social justice and inclusive development. The road safety movement, however, can be said to have had some impact, albeit minimal, as a new transport law was hurried-up. It remains faulty, however, and its making was devoid of public participation. On a positive note, the police now enforce traffic rules on a more regular basis and more strictly than before.

Digital Security Act of 2018

Amid huge criticism at home and abroad, the Parliament enacted the Digital Security Act 2018 in October, many provisions of which contradict constitutional freedom of expression. The news editors' forum has been protesting since the drafting of the law, and they now demand that at least nine sections of it be amended. These provisions, they argue,

[1] From among many media reports, see a report in *Foreign Policy:* https://foreignpolicy.com/2019/01/07/the-world-should-be-watching-bangladeshs-election-debacle-sheikh-hasina/ (last accessed 14 Feb 2019).

allow the authorities to shut down any online portal any time and prosecute any person on the vague allegation of publishing or spreading rumor or 'controversial' information. This draconian law sanctions higher fines and prison terms, extending to life imprisonment. The 2018 Act has in fact ingeniously reenacted the infamous section 57 of the ICT Act 2006 that was widely used to silence online activists and the media mostly in the name of regulating 'defamatory' comments against political higher-ups and anti-religious writing.

New Judicial Appointments

Prior to the general elections, three High Court Division (HCD) judges, including a female judge, were elevated to the Appellate Division of the Supreme Court (SCAD) after almost three years since the last appointment. This raised the strength of SCAD to seven against the approved number of 11. As we predicted in our 2017 report regarding controversiality, the most senior judges were superseded too, and one appointee is a brother of a sitting SCAD judge. The appointments also had political undercurrents, and the government seemingly foresaw politically sensitive issues to come before the SCAD, including the issue of bail and the participation in elections of the now interned opposition leader. Earlier in May, the HCD got 18 new additional judges, and the credentials of many of them were controversial.

III. CONSTITUTIONAL CASES

As we noted in the 2017 report, the Supreme Court has in recent years developed a practice of awarding compensation for what are in fact ordinary torts, such as medical negligence and road accidents. We are critical of this trend because it does not meet the test of 'gross' violation of constitutional rights that the SCAD laid down for such a remedy (*Bangladesh v. Nurul Amin* (2015) 3 CLR (AD) 410). The new constitutional tort jurisprudence, however, has become quite popular amongst legal practitioners and academics. In 2018, there were several constitutional compensation decisions, both interim and final. In the case of the traffic accident that led to the student movement for road safety, for example, the HCD in October hurriedly ordered the bus owners involved to pay huge compensation to the victims' families. In another case, in which 17 patients lost eyesight following their negligent eye surgery at a private clinic, the SCAD affirmed the HCD decision holding the clinic and a pharmaceutical company liable to pay 1 million BDT to each victim.

In 2018, a judicial decision sought to forge certain reforms in the functioning of lower criminal courts. In *Md Aynul Haque v. The State,*[2] the HCD issued a set of guidelines for Sessions Courts, asking them, inter alia, to hold a monthly 'judicial conference' to identify and overcome the problems that they confront when dispensing justice. Questions have always remained about the impact of such pedagogic rulings short of any systematic and viable judicial reform, which is long overdue. In retrospect, we recall that earlier, in December 2017, the apex court approved the disciplinary rules for the junior court judges, which were later officially notified after yearlong tension with the Executive.

At the constitutional rights level there were multiple decisions, but those on gender-based violence and women's rights received wider attention. Regarding the most precious question of the protection of people's liberty, life and freedom of expression, however, the year witnessed judicial avoidance and abdication. One sees almost no proactive civil rights decision in 2018, which was marred by mass arrests, false prosecutions and suppression of freedom of expression. Interestingly, the year 2018 saw a few cases in the field of social rights that are judicially non-enforceable in Bangladesh (Art 8(2)).

Below, we first set out the leading cases concerning structural issues and then analyze civil rights cases, followed by social/collective rights decisions.

1. Eunus Ali Akond vs. State: Legality of an original constitutional provision

In this case, Art 70 of the Constitution, which provides for the anti-defection law, was challenged. Unlike in India where the 52nd Constitutional Amendment introduced the anti-defection law, Article 70 was enacted into Bangladesh's founding Constitution of 1972. That provision, after a couple of amendments, was restored to its original form via the 15th Amendment in 2011.

On the question of admissibility of this challenge, the HCD handed down a split judgment (15 January 2018). Chowdhury J ruled for its admissibility, relying on his own observation, made in an earlier decision,[3] that Art 70 was undemocratic. The other judge on the bench, Justice Kamal, summarily rejected the petition and reasoned that an original provision of the Constitution was unassailable. Drawing on the Constituent Assembly debates, he further argued that the anti-defection law was a guarantor of democracy. Kamal J was also on the bench that invalidated the 16th Amendment, but there he refrained from raising a constitutional objection to Art 70. In the present case, the two judges have reiterated their respective ideology about the legality of Art 70, which thus raises a serious question of their impartiality to hear the challenge.

The matter went to a third judge, Justice Taher, who agreed that Article 70 is a 'safeguard' for the Bangladeshi democracy, reasoning that an original provision of the Constitution is not subject to judicial review. The judge cited the SCAD's old observation (reported in 19 BLD (AD) 276) that Art 70 in the original Constitution was a pragmatic solution for democratic durability.

2. Disqualifications for election to Parliament

At the end of 2018, the Supreme Court faced a surge of cases concerning electoral disputes, including the much-talked-about petition of Khaleda Zia, the opposition chief

[2] Criminal Miscellaneous Case No. 20550 of 2014.

[3] *Advocate Asaduzzaman Siddiqui v. Bangladesh,* HCD, May 5, 2016, invalidating the 16th Amendment. This was endorsed by the Appellate Division, in which a petition for review of the decision has been currently pending. For details, see our 2016 and 2017 reports.

and a former prime minister, who sought to run in the general election. In early 2018, a criminal court convicted Khaleda Zia with five years in prison on several corruption charges. On appeal, this punishment was raised to 10 years by the HCD, which reasoned that there was no scope for it to take a lenient approach to corruption. A further appeal has now been pending in the SCAD, the final court of the country. Because of this conviction, Zia could not compete in the election. Interestingly, however, a politician who defected from her party and whose conviction for corruption was affirmed by the HCD in November 2017 (and, like Zia's case, was on further appeal in the SCAD) could run in the general election.

The Constitution prohibits any convict from participating in the election until after five years of his release (Art 66(2)(d)). However, the question of whether a person whose conviction has not yet become 'final' with the last court's affirmation can run for election has yet to be authoritatively decided, unlike the case in India.

On the question of the impact of Art 66(2)(d), another significant verdict was handed down on 1 March 2018. A 2014 writ petition, lodged after the 10th general election, challenged the legality of the office of a ruling party MP who was released from jail allegedly before serving the full length of his conviction, thus invoking disqualification under Art 66(2)(d). On 6 December 2016, a division bench of the HCD handed down a split decision. Over another year later, a one-judge court decided that the challenge was inadmissible under Art 102 as it involved the resolution of disputed facts (*Shakwat Hossain Bhuiyan v Bangladesh,* WP No. 5556 of 2014). The Court questionably reasoned that its judicial review authority does not permit adjudication of factual issues. Even a plain reading of Art 102(2) does not suggest the lack of such authority when it comes to the question of constitutional legality of any public office.

3. BLAST v Bangladesh: Human dignity of rape victims

In this PIL (WP No. 10663 of 2013) by six human rights organisations, a colonial and reprehensible system of medical examination of rape victims, called the 'two-finger-test' (TFT), was challenged on constitutional grounds including the ground of violation of human dignity. The petitioners argued that the impugned TFT was incompatible with Bangladesh's international obligations to protect the victims of sexual offences and prevent their retraumatization. TFT permits doctors to inspect the hymen of any rape survivor as well as to test her vaginal laxity to determine her previous virginity.

In April 2018, the HCD banned the inhumane TFT and held that the test does not have any evidential value or scientific merit. Five years after lodging the litigation, the HCD declared the inhumane test to be arbitrary, discriminatory and violative of fundamental constitutional rights of rape survivors. The decision was arrived at after relying on an expert committee report. Notably, the Court framed a guideline with eight directives for criminal justice actors to follow, at the core of which lies the protection of victims' privacy and dignity.

4. Naripokkho v Bangladesh: Effective prosecution of rape cases

In this PIL (WP No. 5541 of 2015), the HCD issued directives in the form of an 18-point guideline with a view to ensuring the effective prosecution of sexual violence offenders as well as the protection of rape survivors. This has been a structural reform litigation as well as an abstract judicial review inasmuch as the petitioners sought judicial intervention to close the gap in the existing practice of investigation and prosecution of rape cases generally, and not any specific remedy for the concerned victim. The case indeed built on an earlier decision in which the Court issued guidelines on how to deal with sexual harassment at work. The background that led to the PIL was the rape of an indigenous girl on 21 May 2015, who was picked up from a bus stop and gang-raped in a running microbus by five men. The victim's family members went to three different police stations to lodge a complaint, but the police turned them away. Following media reports, the family finally succeeded in registering a case, and the victim was medically examined after three days of rape. Such a delay often results in the loss of substantive evidence of rape.

In the guidelines published on 22 April 2018, the Court recommended that an online reporting system for complaints of rape should be introduced, DNA samples must be sent for test within 48 hours of the incident and the dignity and privacy of the victim must be maintained at all stages. The Court ordered that the guidelines were to be complied with until legislation is enacted. In short, the Court in effect enforced the rape victims' constitutional rights to equality and life and liberty.

5. M/S Liberty Fashion Wears v Bangladesh Accord Foundation (2018) 6 CLR (HCD) 107: Work place safety in the ready-made garments industry

In this case, the Court in fact enforced the workers' collective right to work in a safe environment. The decision is an extraordinary instance of judicial intervention in a bid to improve the standard of life at work of millions of garment-industry workers. After the deadly 'Rana Plaza Disaster' in 2013 that killed some 1200 workers when an industrial building collapsed, the government established a body with private partners, including foreign buyers of ready-made Bangladeshi garments, to overhaul the safety system in the industry. The Bangladesh Accord Foundation, a private body, was responsible for implementing a national plan of action on fire and building safety. When

[4] This decision is in line with *Moulana Md. Abdul Hakim v Bangladesh* (2014) 34 BLD (HCD) 129, which was described as the 'Datafin turn' in Bangladesh in Ridwanul Hoque (2017). 'The "Datafin" Turn in Bangladesh: Opening Up Judicial Review of Private Bodies', 25 October 2017: https://adminlawblog.org/2017/10/25/ridwanul-hoque-the-datafin-turn-in-bangladesh-opening-up-judicial-review-of-private-bodies/.

Liberty Fashion Wears, a private company, was excluded from the scope of this plan of action, they sought constitutional remedies under Art 102. The whole issue was, therefore, whether the inactions of a private body could be remedied under judicial review jurisdiction. Article 102(1) allows the enforcement of fundamental rights against private bodies, while under Art 102(2), judicial review on the ground of breach of legality can only be sought against public agencies. A judge on the division bench quite unconvincingly argued that the private litigant had constitutional rights to enforce (Chowdhury, J), which the other judge refuted (Kamal, J). However, both judges ruled that since the respondent, although a private entity, was under the supervision of government authorities and discharging a public-law function, a judicial review would bind them under Art 102(2).[4]

6. Syed Kamal & BLAST v Bangladesh (WP No. 1509 of 2016): Enforcement of socioeconomic rights

PIL's focus on the realisation of socioeconomic rights has remained at an extremely low level in recent years. In a landmark PIL decision on 8 August 2018, however, the HCD enforced the right to 'medical care', which is a non-justiciable state policy principle in Bangladesh. The Court held that traffic accident victims have a right to receive emergency medical treatment from all hospitals and clinics—private and public (per Ahmed, J). This decision thus marks a notable exception to the long-standing absence of legal and judicial activism on social and collective rights of the disadvantaged sections of the people. The decision arguably represents the Constitutional Court's institutional voice for poor or disadvantaged people. Private hospitals in Bangladesh generally refuse to admit road-accident victims, most of whom are poor. The real but hidden reason for such refusals had always been a fear of losing earnings. One unique aspect of the judgment is the enclosure of private entities within the remedial framework, who will now have to share some of the burden of the State vis-à-vis an increasing number of traffic accident victims. Much social and legal activism will, however, be needed to translate the verdict into a reality.

IV. LOOKING AHEAD

Given that the main opposition party is once again left out of the Parliament formed after the 2018 general elections, the year 2019 will be of great importance for constitutional law, politics and democracy. Ensuring democratic practice would likely be a serious challenge for the government. In the 2017 report, we anticipated that the fate of the 16th Amendment of the Constitution would probably hold the heat up in the Court. This analytical prophecy went in vain. We remain skeptical this year as to the reemergence of the issue of the 16th Amendment's legality in 2019. This year the higher judiciary will have to put significant effort to overcome both internal weaknesses and external pressures, which had been evident in the past few years. Like the past year, cases of abuses of the newly enacted digital security law will likely increase, pulling the Court into a testground to show its ability and willingness to protect freedom of speech and information.

V. FURTHER READING

Ridwanul Hoque, 'Eternal provisions in the Constitution of Bangladesh: A Constitution once and for all?' in Richard Albert and Bertil E. Oder (eds.), *An Unconstitutional Constitution?: Unamendability in Constitutional Democracies* (Springer, 2018) 195-229

Ridwanul Hoque, 'Rule of Law in Bangladesh: The Good, the Bad and the Ugly?' in Chowdhury Ishrak A. Siddiky (ed.), *The Rule of Law in Developing Countries: The Case of Bangladesh* (London: Routledge, 2018) 18-59

Ridwanul Hoque, 'Implicit Unamendability in South Asia: The Core of the Case for the Basic-structure Doctrine', in 3 *Indian J. of Con. & Admin. Law* (symposium on the doctrine of unconstitutional amendments) (2018) 23-34: <http://ijcal.in/wp-content/uploads/2018/12/Ridwan_Symposium.pdf>



Belgium

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I. INTRODUCTION

During the last two months of 2018, Belgian politics were dominated by controversy on whether the Prime Minister could approve the so-called UN Migration Compact. The disagreement resulted first in a minority government and finally led to the resignation of the federal government. These events are elaborated below, since they constitute the most important constitutional developments in Belgium over the course of 2018. Next, the article gives an overview of the main cases of the Belgian Constitutional Court of the past year that may be of interest to an international audience. Finally, the overview looks ahead to the upcoming vacancy in the Constitutional Court, a number of interesting pending cases and the upcoming electoral period.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

During the last two months of 2018, Belgian politics were dominated by controversy. The main question at issue was whether Prime Minister Charles Michel could approve the Global Compact for Safe, Orderly and Regular Migration (hereafter: UN Migration Compact),[1] an intergovernmental agreement promoting a common global approach to migrant flows, at the UN intergovernmental conference in Marrakesh on 10 December 2018, and formally endorse it at the UN General Assembly on 19 December 2018. In spite of it being non-binding, it is generally accepted that the Compact can be used as guidelines for legal developments. In the end, the Prime Minister both approved and endorsed it, which first resulted in a minority government and finally led to the resignation of the government.

After the federal elections of 25 May 2014, Flemish parties N-VA, Open VLD and CD&V, together with Walloon party MR, established government Michel I. All four government parties initially agreed on the Compact and PM Michel pledged Belgium's support at the UN General Assembly. Following Austria's opposition to the Compact and the local elections of 14 October 2018, which led to an increase of votes for the extreme right party Vlaams Belang, N-VA (i.e., New Flemish Alliance, a Flemish nationalist, right-wing political party), and more importantly its Secretary of State for Migration Theo Francken, suddenly started to oppose the Compact, while the three other government parties continued to defend it. This created a situation of deadlock. N-VA also refused the proposal to write a supplementary declaration on how the text is interpreted by Belgium. Since the decisions of the gov-

[1] See <https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf> accessed 13 February 2019.

ernment are made on the basis of consensus, N-VA could no longer be part of a government that would endorse the Compact.

Consequently, as of 9 December, the other three parties continued as a minority government— which is quite exceptional in Belgian politics—without N-VA and with the support of only 52 of 150 seats in the House of Representatives. It is controversial whether this rearrangement established a new government, as the Prime Minister did not offer the resignation of his government to the King, but only entailed the dismissal of three ministers and two Secretaries of State and a redistribution of the powers among the remaining members of the government. However, it became common to refer to (the new) "Government Michel II" in the press. The opposition claimed that the government required a vote of confidence, a position which was supported by a considerable number of scholars, but not by all.

Nonetheless, after ten days, on 18 December, the Belgian government eventually fell. PM Michel tried to find support from left-wing opposition parties in order to stay in power until the parliamentary elections in May 2019. However, the socialists and greens announced that they would table a motion of no confidence in Parliament,[2] which triggered the Prime Minister to offer his resignation to the King. The day after, on 19 December, PM Michel endorsed the Migration Compact. After consultations with the presidents of the political parties, King Filip accepted the resignation of the government on 21 December, which turned it into a caretaker government with limited powers.

N-VA has proposed a turn to confederalism after the federal, state and European elections in May 2019. However, it is now uncertain whether a list with constitutional provisions susceptible to amendment will be approved before the elections. According to the constitutional amendment procedure of Article 195 of the Constitution, that is necessary in order to be able to amend the Constitution (with a two-thirds majority) after the election. Undeniably, 2019 will again be an interesting time for consociational democracy in Belgium.

III. CONSTITUTIONAL CASES

In 2018, the Belgian Constitutional Court delivered 183 judgments and handled 226 cases in total. Regarding the nature of the complaints, conflicts of competencies between the federated entities and the federal state only represent 4% of the judgments in 2018. The majority of cases concern infringements of fundamental rights. In 2018, the principle of equality and non-discrimination is still the most invoked principle before the Court (51%), followed by review of compliance with the jurisdictional warranties of Article 13 (6%), the property rights of Article 16 (6%), the right to private and family life of Article 22 (6%), the socioeconomic rights of Article 23 of the Constitution (6%), the guarantees in taxation matters of Articles 170 and 172 (4%), the personal freedom and legality of criminal charges of Article 12 of the Constitution (4%) and the freedom and equality in education of Article 24 (3%). References were made to the jurisprudence of the European Court of Human Rights (ECtHR) in 49 cases. Moreover, the jurisprudence of the Court of Justice of the European Union (CJEU) is also regularly reflected in the judgments of the Constitutional Court, with references to this case law in 17 cases. References to other sources of international law can be found in 29 cases.

1. Measures of Integration and Exclusion

At the end of 2016, the Belgian legislator inserted two new conditions in the Immigration Act of 15 December 1980: the so-called "integration efforts" and "newcomers declaration." As to the first condition, a person has to provide evidence, in the first term of his temporary residence permit, of his willingness to integrate into society. If he is unable to prove his "reasonable effort" to integrate, the Immigration Office can put an end to its permit. The second condition implies that a person applying for a residence permit needs to sign a declaration indicating that he or she "understands the fundamental values and norms of society and will act accordingly." Signing this "newcomers declaration" will be a condition of admissibility for the residence permit. In case no. 126/2018, the Constitutional Court rejected almost all arguments invoked against both conditions. However, it ruled out that the criminal past of a person can be taken into account when measuring his integration efforts because of the disproportionately wide scope of that criterion. It is also interesting to note that the freedom of expression and religion, according to the Court, includes the right of a person not to reveal his convictions. It observes, however, that the newcomers declaration does not compel a person to accept the fundamental values and norms of society, but only to understand them and act accordingly.

Under Article 23 of the Citizenship Code, citizens may have their citizenship withdrawn if they seriously breach their duties as Belgian citizens, provided that the withdrawal does not result in the person concerned being made stateless. This provision makes it possible to exclude certain citizens from the national community when their conduct demonstrates that they do not accept the basic rules of community life and seriously infringe on the rights and freedom of their fellow citizens. The Antwerp Court of Appeal submitted preliminary questions to the Constitutional Court concerning the application by the state prosecutor to have FB's Belgian citizenship withdrawn. FB had been convicted of criminal offences of acts of violence and leadership of a terrorist group. In case no. 16/2018, the Constitutional Court considered the provision not discriminatory. As a matter of fact, citizenship can only be withdrawn in cases where citizenship is not obtained as a result of birth but on the ground of a declaration, before the age of 18 years. According to the Court, this difference of treatment is based on an objective and relevant distinguishing criterion, which

[2] In case of an ordinary vote of no confidence, Parliament indicates that it no longer supports the government, but government is not obliged to resign. In case of a constructive vote of no confidence (introduced in 1993) supported by a parliamentary majority, however, Parliament itself proposes an alternative Prime Minister and forces the government to resign (Article 96 of the Constitution).

is linked to the way Belgian citizenship was acquired and the ties maintained with the national community. Further, the Court held that the impugned provision did not infringe on the general legal principle of *non bis in idem* enshrined in Article 14.7 ICCPR and Article 4 Protocol 7 ECHR. The withdrawal of citizenship at issue is not a penalty but a civil measure. Finally, it is interesting to note that the Court, for the first time in its history, ruled that the hearing, for security reasons, would be televised (interlocutory Judgment no. 1/2018).

2. Fight against Terrorism

In 2018, the Court addressed two cases that dealt with regulations regarding counter-terrorism. In case no. 8/2018, the Court rejected an appeal for annulment of Article 140sexies of the Criminal Code that penalized those who leave or enter the national territory with the intent to commit terrorist acts or criminal offences of incitement to commit terrorist acts. According to the Court, the fact that it can be difficult for the prosecuting authorities to prove double "intention" (the intention to adopt a specific behavior which itself is motivated by a more precise intention) was insufficient to conclude that this provision is inconceivable with the principle of legality in criminal matters. Moreover, it did not affect the free movement of persons. The Court concluded that the text of this Article, despite its general scope containing cross-references, is sufficiently foreseeable and a more precise definition of the term "intention" is not necessary. It is for the judge to assess this intention objectively on a case-by-case basis.

Case no. 31/2018 concerned an action for annulment of two Articles of the act containing a number of provisions to combat terrorism (here: Terro III). The first item was Article 2 Terro III, which amended Article 140bis of the Criminal Code in three different ways, of which two were challenged before the Constitutional Court. Article 140bis, final sentence, of the Criminal Code contained a so-called "risk requirement," which means that only serious indications of a possible terrorist crime may be punished. Article 2, 3° Terro III deleted that risk requirement aimed at simplifying the assessment of evidence. However, this deletion was annulled by the Constitutional Court because it violated the freedom of expression. The Court considered that the intended aim does not justify that a person is likely to be sentenced to five to ten years' imprisonment and be fined, even if the risk requirement would not be fulfilled. The Court stipulated that the effects of this provision remained in force until 1 September 2018. The second item was Article 6 Terro III, which facilitates the conditions for issuing an arrest warrant in cases of terrorist crimes that exceed the maximum penalty of five years. The Court rejected this action as unfounded because the rights of the accused are not disproportionately affected. The procedural safeguards were still guaranteed, including the fact that the investigating judge remains competent.

3. Access to Justice (pro bono legal advice)

In 2018, the Constitutional Court ruled in two remarkable cases relating to access to justice, specifically with regard to *pro bono* legal advice. In one of them, a rare argument concerning forced labor was raised. *Pro bono* legal advice is a service to which citizens are entitled if certain conditions are met. This advice is offered by attorneys who are later paid by the government on the basis of a performance-related code. Attorneys usually offer their services voluntarily. In an act in 2016 however, the legislator decided that the bar association can force attorneys to perform pro bono whenever this is necessary for the effectiveness of the service. Qualifying this measure as forced labor, a number of attorneys and a bar association applied to the Constitutional Court. In its decision no. 41/2018, the Court disagreed. It observed that attorneys have a significant role to play in the administration of justice. They also enjoy certain privileges. Given that, they can be expected to contribute to the performance of the justice system, which is a pillar of the rule of law. Moreover, *pro bono* services are an essential element of the right to legal aid as provided in Article 23 of the Constitution. Qualifying lawyers are free to exercise the profession of attorney as they please, so whoever chooses this profession accepts the burdens that come with it, including providing *pro bono* services. As such, the Court concluded, the measure does not violate the right to free choice of a profession, nor does it constitute forced labor.

The Court's judgment in case no. 77/2018 potentially has more far-reaching consequences. During the last years, access to justice has increasingly been analyzed through the prism of *financial* access. Obviously, access to pro bono services is an essential component of that. Through the act of 2016 already mentioned above, the legislator had restricted the access to those services by imposing a broader definition of the means taken into account to determine an individual's need for assistance and by tightening presumptions of need and control mechanisms. In addition, the legislator introduced a limited, flat rate contribution required from anyone relying on *pro bono* services. Although the law provided for general and individual exceptions, the Constitutional Court struck this new financial burden in view of the standstill obligation in Article 23 of the Constitution. The Court was puzzled by the idea that a contribution was imposed on litigants who were, by definition, incapable of paying for their legal advice. By lack of numbers demonstrating a real problem of overconsumption, the argument that the measure was intended to promote a responsible litigation attitude was equally rejected. As a result, for the first time, the Court found a violation of the standstill obligation as it is applicable to the right to legal aid.

4. Curtailing the Vulture Funds

The Federal Act of 12 July 2015 curtails the activities of so-called "Vulture Funds"; it was adopted unanimously by the Belgian Parliament and found its origin in a bill drafted in consultation with the Committee for the Abolition of Illegitimate Debt, an umbrella of a bunch of NGOs. The Court rejected an appeal for annulment of that act introduced by NML Capital Ltd., a subsidiary of Paul Singer's hedge fund Elliott Management Corp., registered in the Cayman Islands (case no. 61/2018). The act provides that when creditors pursue an illegitimate advantage by the purchase of a State's loan or debt obligation, their rights towards the debtor State

will be limited to the price they paid for the purchase. The challenged act also prohibits the issuance of an enforcement order in Belgium, or the adoption of measures aimed at ensuring the payment of the debt, where this gives the creditor an illegitimate advantage. The pursuit of an illegitimate advantage is deduced from the existence of a manifest disproportion between the purchase value of the loan or debt obligation by the creditor and the face value of the loan or debt obligation, or else between the purchase value of the loan or debt obligation by the debtor and the amount they demand in payment. The Court held that this limitation is not infringing property rights, nor primary or secondary EU Law, nor the right to a fair trial. The criterion of "manifest disproportion" between the said values is deemed to be sufficiently precise to be applied by the courts and the curtailing to the purchase value is not infringing on the undisturbed enjoyment of the property of the creditor.

5. Data Protection

In 2018, the Court addressed four cases that dealt with the protection, management and exchange of personal data. Case no. 29/2018 concerned an action for annulment of federal legislation that provided for automatic exchange of data between utility companies and the providers of social housing in order to combat domicile fraud. Although the Court acknowledged that the measure interfered with the right of social tenants to retain respect for their private lives *ex* Article 22 of the Constitution and Article 8 ECHR, it held that it was pertinent and proportionate in light of the aim to effectively and efficiently combat social fraud. According to the Court, the legislator had foreseen sufficient guarantees to contain the pushing, mining and storing of data.

The Flemish Parliament had adopted similar legislation in October 2016. Indeed, it had also provided for an additional exchange of personal data between government departments and agencies in order to combat domicile fraud in social housing. The new measure essentially required all agencies involved in social housing to share information with the supervisory authorities if they suspected fraud. The Flemish Tenants Association challenged the legislation before the Constitutional Court (case no. 104/2018). The Court considered the measure to be an interference with the right to respect for private life ex Article 22 of the Constitution and Article 8 ECHR, which was nevertheless justified in light of the fight against social fraud. According to the Court, the legislator implemented strict boundaries for the exchange of data. Not only does the information provider have to check whether the data are relevant and useful for the receiver's statutory duties but the receiver also has to effectively limit the use of the information to its statutory duties. Moreover, according to the Court, the exchange of data only leads to higher levels of government efficiency, since the information exchange is limited to relevant data that other government agencies involved in social housing already obtained.

In case no. 174/2018, the Constitutional Court annulled Articles 39*bis,* §3 of the Code of Criminal Investigation and Article 13 of the Act on Special Investigation Methods. On the basis of these provisions, the Public Prosecutor had become competent to order a non-confidential network search, instead of the previously competent investigating judge. The Court held that an investigation method that enables access to all personal communication data presents an interference with the right to respect for private life comparable to a house search or wiretapping. Considering the severity of the investigation method and the lack of procedural safeguards similar to the guarantees complementing a house search, the Court held that a network search can only be ordered by an investigating judge.

Last year, the Court referred four cases for preliminary ruling to the CJEU. One of these cases, concerning the new Belgian *Data Retention Act,* deserves particular attention (case no. 96/2018). This act replaced the previous one annulled by the Court in a judgment (case no. 84/2015)[3] narrowly tailored to the judgment of the CJEU that declared invalid the EU Directive 2006/24/EC on data retention.[4] The annulled Belgian Act transposed that directive. Meanwhile, the CJEU has confirmed and has even strengthened its views in a more recent judgment.[5] The CJEU held indeed that Directive 2002/58/EC must be interpreted as precluding national legislation, which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. Furthermore, those provisions preclude national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access (in the context of fighting crime) is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union. However, the ECtHR adopted a different view on data retention when it found that Swedish legislation on the subject did not infringe on Article 8 ECHR.[6] Although the new Belgian Act is stricter than the previous one, it nevertheless still provides for massive data retention, but more limited in time and subject to more safeguards to avoid misuse of those data. The Constitutional Court found it necessary to continue its dialogue with the CJEU, offering it the opportunity to nuance, detail or alter its jurisprudence[7] given the fact that the Belgian legislator is of the opinion that it is simply impossible to practice more

[3] See Developments in Belgian Constitutional Law: The Year 2015 in Review: <http://www.iconnectblog.com/2016/10/developments-in-belgian-constitutional-law-the-year-2015-in-review/> accessed 28 January 2019.

[4] Cases C -293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] CJEU.

[5] Cases C-203/15 and C-698/15 *Tele2 Sverige and Watson and Others* [2016] CJEU.

[6] *Centrum för Rättvisa v Sweden* App no 35252/08 (ECHR, 19 June 2018). In February 2019, the case was referred to the ECtHR's Grand Chamber.

[7] See <http://europeanlawblog.eu/2018/10/01/reconsidering-the-blanket-data-retention-taboo-for-human-rights-sake/> accessed 28 January 2019.

differentiated data retention as advocated by the CJEU (an opinion that is shared by other EU Member States).[8] Furthermore the Court noted that more than one reference for a preliminary ruling was pending before the CJEU,[9] that an advocate general has delivered opinions which are critical for the case law and that data retention is not only practiced in view of combating serious crime but also, e.g., to protect the physical and moral integrity of minors in the fight against sexual abuse by electronic communication means.[10] The Court therefore submitted several preliminary questions to the CJEU concerning the interpretation of Directive 2002/58/EC read in conjunction with the EU Charter of Fundamental Rights.

IV. LOOKING AHEAD

On January 1, 2019, 337 cases were pending before the Constitutional Court. Some of these cases are of interest to an international audience. The Court must, for example, decide whether the *Unstunned Slaughter Ban* introduced in the Flemish and Walloon Region is compatible with the freedom of religion, the separation of church and state and the freedom of labour and enterprise, and whether the *Federal Transgender Act* respects the non-discrimination principle. Various cases concern the right to privacy, in particular with regard to the obligation to communicate personal data (e.g., client data by Airbnb hosts and Air companies) to the authorities. Furthermore, we have cases on the *Act to Combat Squatting,* the act providing that there should be a minimum service of the railways in case of an industrial action and the act prohibiting some persons to be blood donors. In October 2019, a Dutch-speaking[11] Justice from the group of former MPs,[12] Erik Derycke, is retiring, which means a new judge from that group has to be appointed. Lastly, new elections for the European Parliament, the Federal Parliament and the parliaments of the federated entities will be held on 26 May 2019.

[8] <http://statewatch.org/news/2017/nov/eu-eurojust-data-retention-MS-report-10098-17.pdf> accessed 28 January 2019.

[9] Referrals of the Investigatory Powers Tribunal London, 31 October 2017, Case C 623/17 *Privacy International / Secretary of State for Foreign and Commonwealth Affairs e.a.* and of the Audiencia provincial de Tarragona, Sección cuarta, 14 April 2016, Case C 207/16, Ministerio Fiscal. The Grand Chamber has already delivered judgment in the latter case: Case C 307/16 *Ministerio Fiscal* [2018] CJEU.

[10] See *K.U. v Finland* App no 2872/02 (ECHR, 2 December 2008).

[11] The Court is composed of six Dutch-speaking and six French-speaking Justices, each linguistic group electing their own president.

[12] The Court is composed of six former Members of Parliament and six Justices with a background in the legal or academic profession.



Bosnia and Herzegovina

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I. INTRODUCTION

Compared to 2017, the events in 2018 witnessed several quite diverse constitutional matters in Bosnia and Herzegovina. After the elections in October 2018, the political life in Bosnia and Herzegovina was (and still is) revolving around the distribution of mandates in legislative bodies in the country. In particular, the contentious question was which census to apply when distributing mandates, the 1991 one or the 2013 one. This continues to emphasize the importance of the participation of all citizens of Bosnia and Herzegovina in its system of government under non-discriminatory conditions, yet doesn't support the status of the constituent peoples that remain an integral element of the heterogeneous legal and political order of Bosnia and Herzegovina.

With some exceptions, and for a change, the focus of the Constitutional Court of Bosnia and Herzegovina was shifted to the excises, criminal procedure, and land registries. One possible explanation for this might be that after it became clear that several decisions of the European Court for Human Rights, namely *Sejdić and Finci v. Bosnia and Herzegovina, Zornić v. Bosnia and Herzegovina,* and *Pilav v. Bosnia and Herzegovina*, would not be implemented again, attention was shifted to another direction. During 2017, the Parliamentary Assembly of the Council of Europe, the Head of the Delegation of the European Union to Bosnia and Herzegovina, and the European Union Special Representative in Bosnia and Herzegovina urged representatives in the Parliamentary Assembly to amend the country's Constitution and Election Law. Since 2018 was an election year, it was expected that the representatives would adopt modifications to the Constitution and Election Law in order to harmonize them with the aforementioned decisions of the European Court for Human Rights. But in the end, the representatives put pressure on the Constitutional Court to decide in several cases involving the amendments to the Election Law and did not comply with its decisions. As the elections approached, it became obvious that there was not enough time to amend the Constitution and Election Law. The subject was set aside, and so too the pressure from the Constitutional Court, although not entirely. As a result of that, unlike in the previous year, the Constitutional Court of Bosnia and Herzegovina heard quite diverse cases.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The political representatives still show no progress in introducing constitutional amendments that would make the constitutional system of Bosnia and Herzegovina responsive. At the same time, internal intermediaries, such as the Office of the High Representative in Bosnia and Herzegovina, still remain mere bystanders. During 2018, ethnicity continued to play an important role in constitutional reality since there is still a lot of support for ethnic strongholds, which became and have remained a fundamental factor in the system of government.

In terms of the above-mentioned decisions of the European Court for Human Rights, the Parliamentary Assembly of Bosnia and Herzegovina remains inert in taking steps to harmonize constitutional and legal norms with the decisions. In 2009, the European Court, deciding in the case of *Sejdić and*

Finci v. BaH,[1] established that the constitutional provisions that rendered the applicants ineligible for election to the Presidency of BaH were discriminatory. (In this case, the persons who did not identify themselves as one of the constituent peoples.) Later on, in 2014, in the case of *Zornić v. BaH*,[2] the European Court reinforced the previous decision. Finally, in 2016, in the case of *Pilav v. BaH,*[3] the European Court again looked into the provisions of the Constitution, this time from a different angle. In particular, the Presidency of BaH consists of one Bosniac and one Croat, each directly elected from the Federation of BaH, and one Serb directly elected from the Republic of Srpska. The European Court held that the applicant (in this case a Bosniac living in the Republic of Srpska) were prevented from being entitled to stand for the election to the Presidency and therefore the Court found it to be a discriminatory feature of the constitutional system. All of this means that the persons who do not identify themselves as one of the constituent peoples are still ineligible for election to the Presidency of Bosnia and Herzegovina, and that the Serbs from the Federation of Bosnia and Herzegovina are prevented from being entitled to stand for the election to the Presidency in the same way the Bosniaks and Croats from the Republic of Srpska are.

The report of 2017 noted that the Constitutional Court of Bosnia and Herzegovina, by its decision U-23/14, established that certain provisions of the country's Election Law are not in conformity with its Constitution. These include the provision that "each of the constituent peoples shall be allocated one seat in every canton" as well as the provisions that stipulate the number and ethnic belonging of the delegates in the House of Peoples in the Parliament of the Federation of Bosnia and Herzegovina based on the 1991 census. The Constitutional Court ordered the Parliamentary Assembly of Bosnia and Herzegovina to harmonize the provisions with the Constitution no later than six months from the day of delivery of the decision. However, in July 2017, the Constitutional Court established that the Parliamentary Assembly had failed to enforce its decision within the given time limit, and, by its decision 54/17, rendered the provisions ineffective from the day following the ruling being published in the Official Gazette of Bosnia and Herzegovina.

Followed by this and amidst heated discussions and pressure from different stakeholders, the Central Election Commission of Bosnia and Herzegovina issued the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law. The instruction provides for the division of mandates in the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina according to the 2013 census. What makes this instruction controversial is that according to the Constitution of the Federation of Bosnia and Herzegovina, the constituent peoples and members of the group of Others shall be proportionately represented; however, such proportionate representation shall follow the 1991 census until Annex 7 of the Dayton Peace Agreement is fully implemented. To that end, the 1991 census shall be appropriately used for all calculations requiring demographic data until Annex 7 is fully implemented. There are two problems related to this.

First, a comparison between the census in 1991 and 2013 points out significant differences in ethnic composition before and after the 1992-1995 conflict. Some cities and municipalities that were once predominantly populated by one constituent people are now almost entirely populated by another. Some cities and municipalities became unpopulated. The population that was once mixed became territorially distributed in such way that ethnic belonging became territorially embedded. That would surely affect the distribution of mandates according to the decision U-23/14 of the Constitutional Court of Bosnia and Herzegovina and the instruction of the Central Election Commission.
Second, Annex 7 of the Dayton Peace Agreement regulates the return of refugees and displaced persons in Bosnia and Herzegovina after the conflict. In order to be considered as implemented, it is necessary that, in line with Annex 10 of the Dayton Peace Agreement, the Office of the High Representative for Bosnia and Herzegovina deliver a decision to confirm this. Since the Office has not made any decision so far, Annex 7 is not considered to have been implemented, which means that, in accordance with the Constitution of the Federation of Bosnia and Herzegovina, only the 1991 census can be used as a basis for the calculation. Nevertheless, one cannot disregard that the ruling of the Constitutional Court of Bosnia and Herzegovina ordered the Parliamentary Assembly to harmonize the provisions with the Constitution, and when the Court established that the Parliamentary Assembly had failed to do so, it rendered the provisions ineffective.

The saga further developed in January 2019, when the applicants (27 representatives in the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina) required a review of the constitutionality of the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in Bosnia and Herzegovina under the Election Law. The Constitutional Court rejected the request as inadmissible since it was not competent to take a decision (*case U-24 18*). The Court concluded that the challenged Instruction on Amendments is an implementing regulation, passed by the Central Election Commission in order to implement the Election Law in the process of administering indirect elections for the bodies of authority in Bosnia and Herzegovina, which determined the preliminary number of delegates to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina to be elected from cantonal assemblies. Accordingly, and taking into account the fact that it concerned a temporary provision, the Court concluded that the subject in the case did not consist of a general act, the constitutionality of which could be reviewed by the Constitutional

[1] Sejdić and Finci v. Bosnia and Herzegovina, App no 27996/06 and 34836/06 (ECtHR, 22 December 2009).
[2] Zornić v. Bosnia and Herzegovina, App no 681/06 (ECtHR, 15 July 2014).
[3] Pilav v. Bosnia and Herzegovina, App no 41939/07 (ECtHR, 9 June 2016).

Court. Moreover, taking into account the content of the request in the case at hand, the Constitutional Court did not find any reason why the contested implementing act of the Central Election Commission would raise an issue of violation of human rights and fundamental freedoms. Therefore, the Constitutional Court, taking into account the mentioned circumstances and in particular the jurisprudence related to the interpretation of its jurisdiction, concluded that it was not competent to decide on the review of the constitutionality of the impugned act of the Central Election Commission.

III. CONSTITUTIONAL CASES

The core activity of the Constitutional Court of Bosnia and Herzegovina in 2018 was the same as in 2017. The Court was lodged by a large number of appeals with regard to the right to a fair trial, notably with regard to the failure to take a decision within a reasonable time. To that end, the Constitutional Court ordered the competent judicial bodies to complete their proceedings urgently. In its sessions, the Court highlighted the failure to meet the requirement of deciding within a reasonable time as a problem that is very much present in the judicial practice in the country. Apart from this, the focus of this report is on several decisions that raised constitutional issues in several different fields.

1. U-5/18: The Law on Excise Duties in Bosnia and Herzegovina

This case challenged the constitutionality of laws on excise duties, revenues, and taxes that have been adopted by the Parliamentary Assembly of Bosnia and Herzegovina. The applicants (19 representatives of the House of Representatives of the Parliamentary Assembly) filed a request for a review of the constitutionality of the Law on Amendments to the Law on Excise Duties, the Law on Amendments to the Law on Payments into the Single Account and Distribution of Revenues, and the Law on Amendments to the Law on Indirect Taxation System. The applicant claimed that the challenged laws are in contravention of the Constitution of Bosnia and Herzegovina. The applicant also stated that the challenged laws were adopted in a summary procedure in the course of the first reading and then in the course of the second reading. The applicant claimed that this procedure may be applied only in the case of a law of lesser scope or degree of complexity and that the aforementioned simplified procedure does not apply to the challenged laws. The applicant also argued on the authorized proponents of laws, claiming that the second chamber undertook the prerogatives of the executive power by putting forward the challenged laws. In line with this, the applicant claimed that under the course of the chosen procedure, the only proponent of the law could be the Council of Ministers of Bosnia and Herzegovina and not the House of Peoples of the Parliamentary Assembly.

Deciding in this case, the Constitutional Court dismissed the request as it established that the challenged laws are in conformity with the Constitution. The Court established that the challenged laws were approved by both chambers of the Parliamentary Assembly by the majority of those present and voting, respecting the necessary majority for adoption. It also established that the laws did not take effect before publication in the Official Gazette and that the transcripts of deliberations were published and that the public aspect of their sessions was secured. The Court could not accept the claims with regard to deliberation in the course of an urgent legislative procedure and the claim that the principle of separation of powers was violated as well founded. The Court was aware of the fact that it is undisputed that the second chamber may be a proponent and that is sufficient for it to conclude that there was no violation of the principle of separation of powers as well as no violation of the appropriate provisions of the Constitution in regard to compliance with the principle of the separation of powers.

2. U-8/18: The principle of the constituent peoples and the principle of non-discrimination

This case challenged the application of several provisions of several cantonal constitutions in the Federation of Bosnia and Herzegovina with regard to the principle of the constituent peoples and the principle of non-discrimination. The applicant (the Deputy Chair of the House of Representatives of the Parliamentary Assembly) filed a request for review of the constitutionality of several articles of the Constitution of the Posavina Canton, the Constitution of the Herzegovina-Neretva Canton, the Constitution of the Zenica-Doboj Canton, the Constitution of the Bosnian-Podrinje Canton, and the Constitution of the Western Herzegovina, claiming that they are not in compliance with the principle of the constituent status of peoples and principle of non-discrimination. The applicant claimed that all three constituent peoples—the Bosniaks, Croats, and Serbs—should be constituent on the whole territory of Bosnia and Herzegovina without discrimination. The applicant then cited the articles from the aforementioned constitutions that refer only to the Bosniaks and Croats as constituent peoples as well as the articles that define only the Bosnian and Croatian language as the official languages and the Latin alphabet as the official alphabet in these cantons. According to the applicant, this was contrary to the preamble of the Constitution of Bosnia and Herzegovina since the Serbs were discriminated against. Apart from this, the applicant questioned the competence of the Constitutional Court of the Federation of Bosnia and Herzegovina to decide in this case, arguing that the Constitutional Court of Bosnia and Herzegovina, as a central-level constitutional court, should decide as a constitutional court of a sub-national entity.

The Constitutional Court of Bosnia and Herzegovina declared the request inadmissible as it was not competent to take a decision. It also referred to the Constitutional Court of the Federation of Bosnia and Herzegovina as a competent authority to decide in this case. The Constitutional Court also noted in the reasons for its decision that there were no circumstances indicating that the Constitutional Court of the Federation of Bosnia and Herzegovina interpreted and applied the Constitution of the Federation of Bosnia and Herzegovina contrary to the Constitution of Bosnia and

Herzegovina. This is especially taking into account the previous relevant case-law of the Constitutional Court of the Federation of Bosnia and Herzegovina. Moreover, the Constitutional Court referred to its decision U-5/98, known as the "constituent peoples" decision, which established all three constituent peoples as constituent on the whole territory of Bosnia and Herzegovina, regardless of the entities and cantons. By this decision, the Court also struck down as unconstitutional all provisions of the Constitution of the Federation of Bosnia and Herzegovina that did not reflect the principle of the constituent peoples. The Court then considered that since the provisions of the cantonal constitutions have to be harmonized with the Constitution of the Federation of Bosnia and Herzegovina, the principle of the constituent peoples also applies in this case.

3. U-15/18: Authorized officials in the criminal procedure

This case concerned the scope of authorized officials in the criminal procedure determined by the Criminal Procedure Code of Bosnia and Herzegovina. The applicant (the Second Deputy Chair of the House of Representatives of the Parliamentary Assembly) filed a request for review of the constitutionality of the provision of the Criminal Procedure Code referring to the authorized officials under the authorization of the Prosecutor's Office. The applicant challenged the provision that considers expert associates, as well as investigators working for the Prosecutor's Office under the authorization of the Prosecutor, as authorized officials. The applicant claimed that under this provision the authorized officials are all persons authorized under the scope of police forces, including the State Investigation and Protection Agency; the Border Police of Bosnia and Herzegovina; the court, financial, and military police; customs and taxation authorities, etc. However, the applicant also claimed that this provision was imprecise, unclear, and against the rule of law since the number of authorized officials was widened to include expert associates and investigators of the Prosecutor's Office working under the authorization of the Prosecutor. The applicant believed that this was against the provisions of the Law on the Prosecutor's Office of Bosnia and Herzegovina since the scope of the work of this office is performed by the chief prosecutor, four deputy chief prosecutors, and prosecutors. The Law did not mention the possibility of employing authorized officials. This is important since potential authorized officials did not possess adequate training and knowledge, and direct supervision by the prosecutor could not compensate for this.

The Constitutional Court of Bosnia and Herzegovina established that the challenged provision of the Criminal Procedure Code was compatible with the Constitution. The Constitutional Court, among others, established that the above provision in the challenged part meets the "quality of law" requirement in terms of its precision and clarity and foreseeability, thereby not leaving room for arbitrary decision-making and possible abuses. In other words, it was compatible with the rule of law principle under Article (I)(2) of the Constitution. Authorized officials, regardless of their authorization, perform their duties under the supervision of and by informing a prosecutor. It follows that the relationship between the prosecutor and the authorized officials is hierarchical, in which the prosecutor is the supreme authority running the investigation while the authorized officials act on his order. The Court was not convinced that this rendered the challenged provision imprecise and unclear.

4. U-7/18: The constitutionality of the Law on Land Registry

This case challenged the constitutionality of the Law on Land Registry in the Federation of Bosnia and Herzegovina. The applicants (29 representatives of the National Assembly of the Republic of Srpska) filed a request for review of the constitutionality of the Law on Land Registry of the Federation of Bosnia and Herzegovina. The applicant claimed that the provisions are against the right to property. The reasons were that the characteristics of the registration of real estate in Bosnia and Herzegovina were based on two registers, the land registry and cadaster, while many European countries joined these two registries under a single institution. The applicant claimed that the challenged provisions introduced the protection of the property that was not acquired on a valid legal basis because it enabled the current beneficiaries to register as owners even when they did not have any legal basis to possess the particular property. The challenged provisions also allowed for the procedure to be conducted on bulletin boards, meaning that the person did not necessarily have knowledge of the actions that were carried out in the process of establishing or replacing land registers and ownership rights. The applicants were convinced that this was against the principle of legal certainty, which is a prerequisite for the development of democratic societies. It has been pointed out that it was exactly the opposite of legal security.

Deciding on the request, the Constitutional Court of Bosnia and Herzegovina established that the challenged provisions of the Law on Land Registry of the Federation of Bosnia and Herzegovina were in accordance with the Constitution of Bosnia and Herzegovina and the European Convention on Human Rights. The Court pointed out that there was no established standardized organizational structure of real estate registration in Europe. Also, the registration in land registers was not carried out solely on the basis of a factual situation, but all other relevant documents and evidence, which were also taken into account, could serve when determining ownership and other rights and limitations on real estate. Therefore, the Court found that challenged provisions did not violate the right to property. Finally, the legislator prescribed public announcements through daily newsletters that are distributed throughout Bosnia and Herzegovina as well as through the Official Gazette of Bosnia and Herzegovina, all with the aim of including persons who hold certain property rights that are subject to registration in land registries. Accordingly, it followed that the legislator had taken reasonable measures to ensure that persons involved were included in this proceeding.

IV. LOOKING AHEAD

As predicted in the previous report, the 2018 elections intensified relations in political life in Bosnia and Herzegovina. On one side, the pressure that was put on the Parliamentary Assembly to amend the Election Law has now transferred to the Election Commission, who took the initiative to implement the decision of the Constitutional Court of Bosnia and Herzegovina. On the other side, the European Commission and the American Embassy in Sarajevo expressed their support for the Central Election Commission. The point at issue, then, is what role the Constitutional Court will play further.

Setting aside the cases based on a tendency to preserve individual interests of each constituent people along territorial lines in Bosnia and Herzegovina, in 2019 the Constitutional Court will most likely continue to be overburdened with applications requesting it to examine whether the constitutional rights (the right to a fair trial, the right of access to court, the right to an effective legal remedy, etc.) have been violated or disregarded, and whether the application of the law was, possibly, arbitrary or discriminatory.

V. FURTHER READING

Patricia Popelier and Maja Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism, Managing Multinationalism in Multi-tiered Systems* (Springer International Publishing, 2019).

Patricia Popelier and Samantha Bielen, 'How courts decide federalism disputes: legal merit, attitudinal effects, and strategic considerations in the jurisprudence of the Belgian Constitutional Court' [2018] Publius 1.



Brazil

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I. INTRODUCTION

2018 was certainly one of those years Brazilian constitutionalists will remember for generations. First, the year marked the 30th anniversary of the 1988 Constitution. The Constitution symbolized the transition from dictatorship to democracy. Since it was enacted, Brazil has accomplished several extraordinary achievements: monetary stability, institutional stability (despite having gone through two impeachment processes and massive corruption scandals) and deepened social inclusion (with income distribution and the reduction of extreme poverty and inequalities). The endurance of Brazil's Constitution despite the economic, political and social turmoil of recent years should be celebrated.

Yet, 2018 was also a stress test for Brazil's democratic institutions. The 2018 presidential elections were the most polarized and turbulent in the country's recent history. Inevitably, the Judiciary was a central player in political disputes. The conviction of ex-President Lula on appeal barred him from running in the presidential race. Regardless of how well based the conviction may have been, it certainly affected the outcome of the elections, paving the way for Jair Bolsonaro's poll victory. Several observers fear that the election of the far-right candidate as president of Brazil may trigger a process of democratic backsliding in the country and produce setbacks in the protection of minority rights.

Finally, the Supreme Court (STF) itself faced strong criticism by different dissatisfied sectors. The Court was often divided in the complex struggle against systemic corruption, not always corresponding to society's expectations. The centrality of the Court and its public exposure amplified its structural deficiencies, notably the Justices' power to issue unilateral/monocratic decisions with massive political impact without immediately subjecting them to the Plenary for ratification.

Despite these challenges, this report demonstrates that the STF still played a relevant role in several cases of strong political impact. Its most impactful decisions in the 2018 term displayed the Court's tendency to focus on the exercise of its major role—to protect and promote fundamental rights, which may prove to be crucial in the 2019 term.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Following the already turbulent years of 2016 and 2017, when Brazil endured a presidential impeachment and a considerable political crisis involving the whole political class, in 2018, the country elected the far-right President Jair Bolsonaro. With his election, Brazil was once again in the international spotlight, as Latin America's biggest economy and the world's fourth biggest democracy was seemingly adhering to an illiberal mindset that is gaining traction in various parts of the globe. 2018 was the year when the three branches of power were

strongly challenged: President Michel Temer saw his popularity sharply plummet, leaving office with 62% of Brazilians deeming his government bad or very bad (a slight improvement from August, when the number was 82%[1]); Congress endured a severe legitimacy crisis, which may continue in 2019 despite the largest number of first-elected congressmen in decades;[2] and the Supreme Court was engulfed by the political crisis and saw its authority largely questioned.[3]

Such a context naturally raises some concerns about the capacity of Brazilian institutions to protect democracy. On the one hand, the 2018 elections, when the President, State Governors, Federal and State Representatives, and 2/3 of the Federal Senates were elected, did not put an end to the political crisis. In fact, many features of the so-called "new policy" Bolsonaro's government and his affiliates in Congress aim to implement have been portrayed as a bad omen for democracy elsewhere.[4] On the other hand, in such a scenario, many Brazilians saw the Supreme Court as the last institutional resort to defend Brazil from potential attacks on its democratic credentials. However, in the 2018 term, the Supreme Court made more visible its internal divisions and the difficulties in dealing with the challenges that would soon knock on its door.

Firstly, the so-called Operation "Car Wash"—a corruption probe involving many political bigwigs and businessmen[5] —challenged the Supreme Court's role as a criminal court in cases where it has original jurisdiction to try politicians ("privileged jurisdiction"). Although the Supreme Court restricted the scope of such prerogative (see below),[6] the pace of its rulings on the matter has been slower than society expects. In a growingly polarized political environment, the comparison of such cases with the one incriminating former President Luis Inácio Lula da Silva, who does not owe such a privilege, would naturally become an argument against the judicial system as a whole by Lula's many supporters. Unlike most Operation "Car Wash" cases in the Supreme Court, Lula was convicted by a federal judge in July 2017 and had this conviction upheld on appeal in January 2018, a few months before the start of the electoral campaign, in which he was planning to run for president.

Lula's conviction inescapably thrust the Judiciary, and more specifically the Supreme Court, into the heart of the political dispute. Lula filed a petition for habeas corpus before the Supreme Court to prevent him from start starting to serve prison time. In April 2018, by a 6 to 5 majority, the Court rejected Lula's habeas corpus, following recent rulings that set the precedent that defendants who have their prison sentence affirmed on appeal serve jail time immediately. This decision and Lula's arrest sparked protests among supporters. Moreover, the so-called "Clean Records Act"[7] bars political candidates who have had their convictions upheld by an appellate court from running in elections. Despite this legal impediment, the Workers' Party (PT) registered Lula as its presidential candidate. By that time, ex-President Lula was the front-runner in opinion polls. Ultimately, the Superior Electoral Court ruled that the Clean Records Act bars the former president from being nominated as a candidate in the 2018 presidential bid.[8] Fernando Haddad, a relatively unknown politician by then, replaced Lula in the polls a few weeks before the first round. Although reaching 44.9% of the votes in the runoff, Mr. Haddad was defeated by Jair Bolsonaro, whose political platform was boldly shaped by attacks on PT and Lula.

In the upcoming term, the Supreme Court will certainly be challenged by a new type of dispute. For instance, during the presidential campaign, in addition to many controversial statements against minorities, Mr. Bolsonaro suggested the possibility of packing the Supreme Court by increasing its size from 11 to 21 justices. The idea lost steam, but still, how the STF will react to the foreseeable attacks on Brazil's democratic credentials will be the key for its success or failure. And this will come at a time when the Court is under pressure both from the political establishment and civil society.

III. CONSTITUTIONAL CASES

In this section, the STF's most relevant rulings in the 2018 term are summarized. The cases are presented in chronological order.

1. HC ("Habeas Corpus") 143.641, decided 02/20/2018: Collective *habeas corpus* granted to pregnant women and mothers of young children held in pre-trial detention

[1] 'Após reprovação recorde, Temer encerra governo com rejeição em queda, mostra Datafolha' (Folha de S. Paulo, 22 December 2018) https://www1.folha.uol.com.br/poder/2018/12/apos-reprovacao-recorde-temer-encerra-governo-com-rejeicao-em-queda.shtml accessed 30 January 2019.

[2] See André Shalders, 'Eleições 2018: Câmara e Senado terão a maior renovação das últimas décadas, estimam analistas' (*BBC Brasil,* 8 October 2018) <https://www.bbc.com/portuguese/brasil-45780660> accessed 30 January 2019.

[3] See 'O ano do Supremo - e o que esperar para 2019' (JOTA, 24 December 2018), <https://www.jota.info/stf/do-supremo/o-ano-do-supremo-e-o-que-esperar-para-2019-24122018> accessed 2 February 2019.

[4] See Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018); Tom Ginsburg and Aziz Z Huq, *How to Save a Constitutional Democracy,* (University of Chicago Press, 2018); Mark A Graber, Sanford Levinson, and Mark Tushnet (ed.), *Constitutional Democracies in Crisis?* (Oxford University Press, 2018).

[5] 'Operation Car Wash: Is this the biggest corruption scandal in history?' (The Guardian, 1 June 2017) <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history> accessed 6 February 2019.

[6] STF, Ação Penal n. 937, Rel. Min. Luís Roberto Barroso, DJ 3 de Maio de 2018.

[7] See Juliano Zaiden Benvindo, 'Moralizing Brazilian Elections: A Judiciary's Role?' (Int'l J. Const. L. Blog, 3 March 2018) <http://www.iconnectblog.com/2018/03/moralizing-brazilian-elections-a-judiciarys-role/> accessed 5 February 2019.

[8] See Mariana Lopes, 'Brazil's jailed former president Lula barred from running again by electoral court' (the Washington Post, August 31, 2018) <https://www.washingtonpost.com/world/europe/brazils-jailed-former-president-lula-barred-from-running-again-by-electoral-court/2018/08/31/88cfcb7c-ac9b-11e8-9a7d-cd30504ff902_story.html?noredirect=on&utm_term=.40fa6e1d214c>, accessed 5 February 2019.

The second panel of the Supreme Court admitted for the first time the possibility of filing a collective petition for *habeas corpus* to ensure access to justice for the most vulnerable social groups and prevent the violation of their rights. The panel, by majority vote, granted the collective writ of *habeas corpus* to determine the release from pre-trial detention and placement under house arrest of all women prisoners who are either pregnant or mothers of children of up to 12 years of age, or mothers of persons with disabilities (regardless of their age). The majority of the Court held that the remedy was necessary on the grounds that these women and their kids are systematically subjected to degrading conditions of detention for being deprived of prenatal and postpartum healthcare. The order granted did not exclude the application of non-custodial measures.

2. RE ("Extraordinary Appeal") 670.422 and ADI 4.275, decided 03/01/2018: Transgender persons' right to official documents that reflect their gender identity

The Plenary of the STF unanimously held that transgender people have the right to change their name and gender marker on their official documents without undergoing gender reassignment surgery or any other medical treatment. The Court also established, by majority vote, that such change may be effected administratively, before a civil registry office, regardless of prior judicial authorization. The Brazilian Supreme Court found that the right to official documents reflecting gender identity derives from the constitutional principles of equality, human dignity and liberty, and that the surgery requirement would also violate the right to physical and mental integrity of transgender persons, since it is a highly invasive and high-risk procedure.

3. ADI ("Direct Action of Unconstitutionality") 5.617, decided 03/15/2018: Public funding for women candidates

A few months before the start of the 2018 election campaign period, the Supreme Court struck down as unconstitutional the provision of the 2015 electoral reform law which limited public funding to women candidates to 15% of each party's share of funding. Since 1997, Brazil has adopted a legal quota requiring parties to nominate 30% of women candidates for the Lower House. Yet this policy had a low impact on increasing women's political representation: by 2017, the country still had less than 15% of female representation in Congress. In view of this reality, the STF held that the constitutional principles of equality between men and women, human dignity and political pluralism require that parties allocate at least 30 percent of their share of public funding to electoral campaigns of female candidates.

4. HC 152.752, decided 04/04/2018: Enforcement of criminal sentence against President Lula after first appellate ruling

The Supreme Court voted 6 to 5 to reject the petition for *habeas corpus* filed by ex-President Luís Inácio Lula da Silva seeking to invalidate the decree of arrest issued against him after his prison sentence was affirmed on appeal. The Court then reaffirmed three decisions issued in 2016 (which became binding upon every court) holding that defendants who have their prison sentence affirmed on appeal can serve time provisionally even if an appeal to a superior court is still pending: HC 126.292, decided 02/17/2016; ADC43-MC (injunction order at the direct action of constitutionality), decided 10/05/2016; and ARE 964246-RG (appeal in extraordinary appeal with "general repercussion"), decided 11/10/2016.

5. AP ("Criminal Action") 937 QO, decided 05/03/2018: Limitation of the scope of the "privileged jurisdiction" for public authorities

At the criminal trial of a former federal deputy accused of electoral corruption while he was the mayor of a small town, the STF narrowed the scope of the "privileged jurisdiction," whereby high courts have original jurisdiction to try more than 30,000 authorities. The privileged jurisdiction, in its former scale, contributed to the inefficiency of the criminal justice system, since judges are better equipped than high courts (especially the Supreme Court) to conduct criminal proceedings at an appropriate speed. The majority of the Court held that the "privileged jurisdiction" is applicable only to offenses committed by officials in the course of their duty and while in office. Justice Luís Roberto Barroso, the rapporteur of the case, argued that this restrictive interpretation better harmonizes the prerogative of original jurisdiction with the constitutional principles of equality, republic, probity and administrative morality, and was in line with the Court's precedents.

6. ADI 5.508, decided 06/20/2018: Plea bargain agreements with the Federal Police

The majority of the STF held constitutional the negotiation of plea bargain agreements by the chief of police during police investigations. The Court found that (i) this possibility does not interfere with the power of the Public Prosecutor's Office to file criminal charges, (ii) the Public Prosecutor's Office has to issue an opinion about the agreement in such cases, and (iii) the Judiciary has to approve the benefits (e.g., reduction of criminal sentence) granted by the plea bargain agreement entered into with the Police.

7. ADI 5.794 and ADC 55, decided 06/29/2018: Labor law reform – Optional union contributions for employees and employers

In 2017, Congress passed sweeping reforms to Brazil's labor laws advancing President Michel Temer's reform agenda to kickstart the economy. One of the many contentious changes to the legal framework governing employment relations was the extinction of the mandatory union contribution for employees and employers. The reform conferred an optional character to the tax requiring express authorization of the employees to allow the discount of the amount from their paychecks. The Supreme Court, in a 6 to 3 decision, upheld the constitutionality of such reform. The Court found that freedom of association allows employees and employers to choose whether or not to join a union and to make union payments. According to the majority, Congress has the power to regulate the matter, which is political in nature, thus

being entitled to greater judicial deference. It also emphasized the paternalistic and corporatist character of the former union system in Brazil, made up of more than 11,000 unions of employees and 5,000 unions of employers, which are generally unrepresentative.

8. ADPF 324 and RE 958.252, decided 08/30/2018: Labor law reform – Constitutionality of unrestricted outsourcing

As part of the labor law reform, Congress also passed a law allowing for unrestricted outsourcing. Prior to the reform, the outsourcing of a company's core business activities was prohibited by rulings of the Superior Labor Court (*Tribunal Superior do Trabalho* [TST]). Only the outsourcing of ancillary activities, such as cleaning, courier and surveillance services, was permissible. By a 7 to 4 vote, the Plenary of the STF held lawful the authorization of outsourcing of all contracting companies' activities. The majority of the Court found that outsourcing does not in itself represent more precarious working conditions for outsourced workers nor a violation of human dignity or other workers' rights. It nevertheless held that the contracting company is both responsible for verifying the outsourcing company's suitability and economic capacity, and is subsidiarily liable in cases of non-compliance with labor standards or social security regulations.

9. RE 888.815, decided 09/12/2018: Homeschooling outlawed

The Court discussed whether or not a family has the right to homeschool their children in view of the state's constitutional duty to provide education. Justice Barroso, the rapporteur of the case, considered that homeschooling—a practice that is often associated with a family's religious freedom—is a constitutional modality of education. Two dissenting justices deemed the practice unconstitutional. Nonetheless, the Court, by majority, held that although home education does not violate the Constitution, it is not allowed due to the absence of legislation regulating it.

9. RE 888.815, decided 09/12/2018: Homeschooling outlawed

On the eve of the second round of the 2018 presidential election, the Supreme Court unanimously struck down Electoral Court judges' decisions authorizing a series of raids in more than 40 universities all over the country to censor political speech of students and professors on the grounds that it constituted illegal negative campaigning against the candidate Jair Bolsonaro. The Court held that decisions allowing officers to enter universities to (i) confiscate flyers and teaching materials defending democracy and democratic values, (ii) seize hard drives of computers, (iii) suspend classes, lectures and public events against fascism or related to the 2018 election, and (iv) remove banners with the inscriptions "antifascist" and "dictatorship never again" violated freedom of expression, academic freedom and universities' constitutional autonomy.

IV. LOOKING AHEAD

The new political landscape that came out of the 2018 elections should lead the Supreme Court to an increasingly active role in 2019, at least in theory. In such a polarized political landscape, it is foreseeable that many political disagreements will knock on the Court's door. The question is, however, whether the Court will be willing to exert such a role after the stormy year of 2018. The Court has discretionary power to define its agenda and the timing of decision-making. Its Chief Justice, Dias Toffoli, suggested that the Court will adopt more self-restrained behavior and let political matters be decided by political players.[9] While this may sound prudent, depending on the degree of self-restraint, it may also be interpreted as a sign that the Court is washing its hands of politics when Brazil may need it the most to defend core democratic values. This is the dilemma that lies ahead for the Supreme Court, and much of its legitimacy and authority will rely on how it will deal with it.

V. FURTHER READING

Revista de Investigações Constitucionais – *Journal of Constitutional Research* (2018) 5(3) – Special edition: 'The 30th Anniversary of the 1988 Brazilian Constitution' <https://revistas.ufpr.br/rinc/issue/view/2717>

Luís Roberto Barroso and Aline Osorio, 'Democracy, Political Crisis, and Constitutional Jurisdiction. The Leading Role of the Brazilian Supreme Court,' in Christine Landfried (ed.) *Judicial Power: How Constitutional Courts Affect Political Transformations* (Cambridge University Press, 2018)

Juliano Zaiden Benvindo, 'Brazil in the Context of the Debate over Unamendability in Latin America,' in Richard Albert and Bertil Emrah Oder (eds.), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018) 345, 365.

Diego Werneck Arguelhes and Thomaz Pereira, 'What Does a Bolsonaro Presidency Mean for Brazilian Law? Part 1 Reforms from the Far Right' (*VerfBlog*, 24 October 2018), <https://verfassungsblog.de/what-does-a-bolsonaro-presidency-mean-for-brazilian-law-part-1-reforms-from-the-far-right/>

Luís Roberto Barroso, 'Special Contribution to I-CONnect – Brazilian Supreme Court Justice Luís Roberto Barroso – The Republic that is Yet to Be' (*Int'l J. Const. L. Blog*, 8 November 2018) <http://www.iconnectblog.com/2018/11/special-contribution-to-i-connect-brazilian-supreme-court-justice-luis-roberto-barroso-the-republic-that-is-yet-to-be>

[9] See Diego Werneck Arguelhes and Felipe Recondo, 'O Supremo e o governo Bolsonaro: o que esperar de 2019' (JOTA, 4 February 2019), <https://www.jota.info/stf/supra/o-supremo-e-o-governo-bolsonaro-o-que-esperar-de-2019-04022019> accessed 6 February 2019.

[2] Zornić v. Bosnia and Herzegovina, App no 681/06 (ECtHR, 15 July 2014).

[3] Pilav v. Bosnia and Herzegovina, App no 41939/07 (ECtHR, 9 June 2016).



Bulgaria

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I. INTRODUCTION

Despite a lack of both constitutional amendments and nationwide elections, the year 2018 in Bulgaria was highly interesting from a constitutional perspective. The first half of 2018 was shaped by Bulgaria's presidency of the Council of the European Union. The "European Presidency" was given highest priority by the government because smaller member countries such as Bulgaria can use it to influence the EU agenda and present themselves on the European stage. Domestically, the government showed increasing signs of instability. Here, the ruling coalition consists of four parties, including the center-right party of Prime Minister Boyko Borissov, "Citizens for a European Development of Bulgaria" (GERB), and three small extreme right-wing parties that formed the "United Patriots" alliance. Four ministers from each coalition partner resigned due to several scandals during the second half of the year.

Two problematic trends have emerged in relation to the latest constitutional developments. First, Bulgaria meets a poor and decreasing standard of media freedom. According to the 2018 World Press Freedom Index, the country scores worse than any other in the EU (ranking 111th of 179 studied countries worldwide).[1] There is also widespread corruption and collusion in politics, media companies, and within a restricted circle of a few oligarchs. Second, the state political branches continue to endanger the rule of law, fundamental rights, and judicial independence. Most prominently, the Supreme Judicial Council, whose majority is *de facto* controlled by the parliament, began its preliminary investigations into Chairman of the Supreme Court of Cassation Lozan Panov. This may lead to Panov's impeachment. While the Chairman has vocally criticized both the government and the politicization of the Bulgarian judiciary, he has cynically been charged with infringing on judicial independence.

Parliament also adopted an amendment to the Criminal Code on December 13, 2018, that allows a delay of up to 48 hours (24 in cases involving children) before notifying third parties about an arrest. This would deny an imprisoned person access to legal assistance during that time. It also entails that relatives (parents when the case involves children) of the arrestee will not initially be informed of their whereabouts. Bulgarian President Rumen Radev (an independent who was nominated in 2016 by the main opposition party, the Bulgarian Socialist Party/BSP) vetoed the amendment, but the parliament overturned this action on January 16, 2019, by an absolute majority against the votes of the BSP.

In this context, the Bulgarian Constitutional Court (BCC) is anything but a bulwark of fundamental rights and the rule of law. There were only three judgments (i.e., Nos. 2, 10, and 14/2018) among the 17 decisions issued in 2018 in which the BCC contributed to protecting those constitutional principles and values (see section III). Its most debated ruling also attracted considerable international attention. Here, the Court did the opposite of ensuring protections by declaring the Council of Europe's "Istanbul Convention" un-

[1] Reporters Without Borders, 'Bulgaria: Corruption and Collusion Between Media, Politicians, and Oligarchs is Widespread', <https://rsf.org/en/bulgaria> accessed 29 January 2019.

constitutional (see section II). This data may be explained by the very restricted access to the BCC and a high degree of politicization associated with judicial appointments.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS: REJECTION OF THE "ISTANBUL CONVENTION"

The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the so-called "Istanbul Convention") was concluded in 2011. It aimed to provide a comprehensive legal framework for the prevention of gender-based and domestic violence, to protect victims, and to ensure the prosecution of such violent offenders. The Bulgarian government signed the Convention in April 2016.

Ratification of the Convention entered the parliamentary agenda in late 2017. A fierce debate arose at this time. In particular, there was a heated argument in Bulgaria over the translation and meaning of the word "gender."[2] Many political and religious groups (especially the Bulgarian Orthodox Church) attacked the Convention on this basis. These groups argued that it would encourage young people to identify as transgender and thereby lead to the legal introduction of a third sex and same-sex marriage in Bulgaria. Politicians from many parliamentary parties joined in this criticism, particularly those from the ruling coalition United Patriots and oppositional BSP. The Socialists even proposed that the parliament (the National Assembly) hold a referendum on the Convention's ratification.

This harsh criticism mirrored widespread homophobia and the prevalence of socially conservative and patriarchal values in Bulgarian society. However, it contradicted the fact that Bulgaria shows the highest level of violence against women among all EU member states.[3] While Prime Minister Boyko Borissov initially defended the Istanbul Convention, he and his party (GERB) finally deferred to the massive societal and parliamentary opposition. Instead of advocating for the Convention, which the previous government (also led by Borissov and his party) had signed, GERB deputies requested that the Constitutional Court review the Convention's constitutionality.

Notably, the deputies did not argue for the Convention's unconstitutionality, but instead referred to the large amount of societal criticism that had reached the parliament. The applicants stated that "the social significance of the Convention, the high public interest and the high degree of political engagement of the society" had motivated them to appeal to the BCC.[4] Specifically, they cited some of the main points raised by the Convention's critics regarding use of the terms "gender" and "stereotyped roles" as socially-defined categories, which may contradict the biological terms "sex," "man," and "woman" as used in the Bulgarian Constitution. The debate on the Istanbul Convention entirely neglected to focus on protecting women and children against violence because of these developments, instead discussing the self-conception of Bulgarian society with regard to gender roles.

In their *amicus curiae* letters, the Ministries of Foreign Affairs and of Jurisprudence (both led by GERB politicians) and the State Agency for Child Protection argued for the constitutionality of the Istanbul Convention. The Ministry of Healthcare (also led by a GERB politician) issued an undecided opinion, while President Rumen Radev argued for its unconstitutionality.

The Constitutional Court issued its highly controversial decision on July 27, 2018. Although it recognized that "countering violence against women is a matter of fundamental importance for Europe and part of the core European values," the BCC declared the Istanbul Convention unconstitutional. While four of the 12 judges dissented, the BCC substantially adopted the position of the Convention's conservative critics.

The Court criticized the Convention as self-contradictory because it used the biological terms "men" and "women" while also referring to the social concept of "gender." They asserted that this would not only lead to inconsistent interpretations but also compromise the rule of law. The BCC went as far as to argue that the Convention would destroy any possibility of preventing violence against women, as follows: "By defining 'gender' as a social construct, the Convention compromises the boundaries of the two sexes—man and woman—as biologically determined. However, if the society loses its ability to differentiate between a woman and a man, combating violence against women would remain a rather formal, but non-dischargeable commitment."

Usage of the social concept of "gender" was also seen as contravening the Bulgarian Constitution. The BCC opined that all Bulgarian law was based on a biological differentiation between women and men and that there were biological definitions for the different social roles based on these sexes. The judges particularly referred to Art. 6, § 2 Const., which bans any "privileges or restriction of rights on the grounds of […] sex ["*pol*"]," and Art. 47, § 2 Const., which states the following: "Mothers shall be the object of special protection on the part of the State and shall be guaranteed prenatal and postnatal leave, free obstetric care, alleviated working conditions and other social assistance."

Although the Istanbul Convention obviously provides a more modern approach to gender relations than the more traditional conception of the Bulgarian Constitution (adopted in 1991), the judgment did not indicate how

[2] The translation provided by the Council of Europe uses the Bulgarian word *пол (pol),* which means "sex," instead of the term *джендър* (*dzhendăr,* or "gender" in English), which has been commonly used in Bulgaria for a couple of years.

[3] European Institute for Gender Equality, 'Gender Equality Index 2017: Violence Against Women, The Most Brutal Manifestation of Gender Inequality', <https://eige.europa.eu/sites/default/files/documents/20175822_mh0417775enn_pdf.pdf> accessed 29 January 2019 [data are from 2012].

[4] Bulgarian Constitutional Court: Decision No. 13/2018. All cited judgments are available in Bulgarian at <http://constcourt.bg/bg/Acts> accessed 29 January 2019 (all translations were done by the author).

adoption of the Convention would cause any concrete unconstitutional consequences. The Istanbul Convention does not depart from the traditional binary gender order at any point, not least in its definition of "gender," which deliberately leaves room for country-specific interpretations by the national legal orders. According to Art. 3, lit. c of the Convention, "'gender' shall mean the socially constructed roles, behaviors, activities and attributes that *a given society* considers appropriate for *women and men.*"[5] These aspects were also mentioned in the dissenting opinions of the four BCC judges.

A main consequence of the decision was that the BCC obstructed ratification of the Istanbul Convention, which could have been an important step in the fight against gender-based and domestic violence in Bulgaria. This was not the first time the BCC appeared to act as a highly politicized body. Instead of defending key constitutional principles, e.g., human dignity (Art. 6, § 1 Const.) or the special protection of mothers (Art. 47, § 2 Const.), the Court bowed to pressures from the political majority and vocal social groups.

III. CONSTITUTIONAL CASES

The BCC has been criticized as a politicized body for a long time. Such criticism comes from experts in the political and legal sciences as well as the Bulgarian media.[6] The BCC's politicization is mainly derived from its appointment rules for judges and configuration of the types of procedure. First, the Court consists of 12 judges who are appointed for a non-renewable term of nine years. Four judges are appointed by the President of Bulgaria, four are elected by the National Assembly through a simple majority, and four are elected by the joint meeting of the judges of the two highest ordinary courts (i.e., the Supreme Court of Cassation and the Supreme Administrative Court, also with a simple majority). This allows for politically motivated appointments for at least eight of the 12 bench posts. Indeed, the 2018 BCC was dominated by judges who were appointed through a GERB majority in parliament and by former GERB President Rossen Plevneliev (served from 2012–2017).

Second, political actors can easily access the BCC, but it is largely inaccessible to ordinary citizens. Its caseload is also dominated by abstract review proceedings and so-called "constitutional interpretations." This is a peculiarity of some post-socialist constitutional courts, where certain state authorities are entitled to request interpretations of constitutional provisions without any specific prerequisites. In contrast, there is no individual constitutional complaint and only the two Supreme Courts (none lower) are allowed to initiate concrete review proceedings. Although the Ombudsman (or -woman) of the Republic of Bulgaria (since 2006) and the Supreme Bar Council (since 2015) may address the BCC with questions related to human and citizen rights, this has not led to a significant increase in the number of cases brought before the Court. Together, these rules lead to a comparatively low caseload, but result in a high degree of politicization in court decisions.

Nevertheless, 2018 was the most active year for the BCC since 2001 with 17 issued decisions. Six cases were brought before the Court by the two Supreme Courts, five by parliamentarians, three by the Supreme Bar Council, two by the Ombudswoman, and one each by the President and the Prosecutor General.[7] The following passages will describe the most important decisions of the Bulgarian Constitutional Court (except for its ruling on the "Istanbul Convention," which was examined above).

1. Decision No. 7/2018: The Comprehensive Economic and Trade Agreement (CETA)

The Istanbul Convention was not the only international treaty that was placed on the Bulgarian Constitutional Court's table in 2018. President Rumen Radev and the Socialist Party have also openly criticized the Comprehensive Economic and Trade Agreement (CETA) between Canada, the EU, and its member states for a considerable amount of time. CETA was concluded in 2014. It was approved by all contracting parties (including Bulgaria) in 2016/17. Substantial sections have been provisionally applied since September 2017.

Although President Radev did not openly challenge CETA before the BCC, he requested a binding interpretation of several constitutional provisions and equipped this request with some questions related to CETA. He thereby attempted to defeat ratification of the treaty. Radev specifically asked about the conditions under which so-called "mixed treaties" jointly concluded by the EU and its member states with a third country become part of Bulgarian law. Additionally, he asked whether CETA constituted a transfer of national sovereignty rights, which would require ratification according to Art. 85, § 1, No. 9 Const. Although not explicitly mentioned, this referred to the establishment of an Investment Court System for investment protection and dispute resolution. Since the aforementioned constitutional provision requires a two-thirds majority of all deputies for ratification, this would provide the oppositional BSP with its current 79 of 240 seats in the National Assembly, almost a blocking minority against CETA's ratification.

Despite four dissenting votes questioning the admissibility of Radev's request, the constitutional judges unanimously rejected the President's implicit claim for the unconstitutionality of CETA. On April 17, 2018, the BCC declared that mixed treaties referred to the external relations of the EU (and its member states) with other countries. Such treaties do not therefore "confer to the European Union powers ensuing from this Con-

[5] Emphases added.

[6] Michael Hein and Stefan Ewert, 'How Do Types of Procedure Affect the Degree of Politicization of European Constitutional Courts? A Comparative Study of Germany, Bulgaria, and Portugal' (2016), 9 *European Journal of Legal Studies* 62; Polina Paunova, 'Kak KS stana političeski organ' [How the Constitutional Court Became a Political Body] *Deutsche Welle* (26 October 2018) <https://p.dw.com/p/37EGY> accessed 29 January 2019.

[7] Two claims by the Supreme Court of Cassation and the Supreme Bar Council were jointly decided (No. 6/2018; see below, subsection III.5).

stitution" as stipulated in Art. 85, § 1, No. 9 Const. and can be ratified by an ordinary parliamentary majority. The BCC also ruled that mixed treaties (as with any other international treaties ratified by Bulgaria) were part of national law and thus supreme to national legislation. On December 6, 2018, the National Assembly finally and almost unanimously ratified CETA with 102 supportive votes, one negative vote, and 10 abstentions (the latter 11 votes were cast by BSP deputies).

2. Decision No. 1/2018: Employees' rights

In its first decision issued in 2018, the BCC submitted a January 16 ruling on a case filed by Ombudswoman Maya Manolova against a provision of the Labor Code stemming from 1992. According to Art. 245, § 1 of the Labor Code, employers must "guarantee" their employees 60% of their contractually agreed salary as long as the payment is at least equal to the statutory minimum wage. This provision was designed to allow companies to overcome economic difficulties by lowering salary payments. Manolova argued that the provision contradicted several constitutional provisions, including Art. 48, § 5 Const., which states that "employees shall be entitled to […] remuneration for the actual work performed." She also pointed out that it violated the social state principle in the constitutional preamble.

The BCC rejected these claims in a controversial decision. While six judges ruled that the claim was unfounded and two argued for inadmissibility, four dissenting judges (including Court Chairman Boris Velchev) ruled that it was founded. The first six judges decided that Art. 245, § 1 of the Labor Code did not give employers the discretion to pay less than contracted remuneration. This was based on an interpretation in conformity with the constitution and a review of the historical motives of the parliament from 1992. The challenged provision guarantees employee rights (even in cases of economic or financial difficulty) in the sense that payments can only be lowered to a certain extent. Thus, the provision does not constitute a subjective right for the employer.
In a reaction to this judgment, Ombudswoman Manolova submitted a draft amendment to the Labor Code to the parliament. If passed, it would limit the possibility to pay less than the contractually agreed salary to a one-month period. The National Assembly had not yet considered this proposal at the end of 2018.

3. Decision No. 2/2018: Resignation of a deputy

Deputy Delyan Dobrev (GERB) issued his resignation on October 3, 2017. This was a reaction to the so-called "Kumgate" scandal, which revealed that Dobrev had placed his cousins and groomsmen in key city administration positions in his hometown of Haskovo in his former capacity as Minister of Economic Affairs (served in 2012/13). However, the parliamentary majority refused to accept Dobrev's resignation. Dobrev's mandate as deputy thus remained active. This move by the governing parties to protect an affiliated politician was brought before the Constitutional Court by the oppositional Socialists.
The Court followed their claim, according to which a deputy's "resignation presented before the National Assembly" (Art. 72, § 1, No. 1 Const.) is an individual decision of the deputy and cannot be rejected by the parliament. The judgment was highly disputed amongst all 12 judges and only reached a seven-to-five majority (the narrowest possible). Since the five dissenting judges had all either been appointed by former President Plevneliev (GERB) or elected by a GERB majority in parliament, politicization along party lines may explain the stark controversy among the judges in an otherwise clear case.

4. Decision No. 16/2018: Removing a Vice-President of the National Assembly

Another conflict occurred between the ruling and oppositional parties regarding an internal parliamentary decision. This also reached the Constitutional Court in 2018. The National Assembly voted Vice President Valery Zhablyanov (BSP) out of office on February 21. This decision was supported by the ruling parties (GERB and the United Patriots), which reproached Zhablyanov for criticizing Bulgaria's friendship treaty with Macedonia (signed in August 2017), describing the totalitarian "People's Courts" (which were established by the Bulgarian communists in 1944) as part of a "necessary and inevitable wartime justice," and violating order in the parliament on February 1 during a tribute to the victims of the communist regime.

A total of 60 BSP deputies challenged Zhablyanov's removal before the BCC. They argued that the decision did not conform to Art. 5, § 1, No. 2 of the Standing Orders of the National Assembly because Zhablyanov did not "systematically exceed" his rights as stated in the motives of the parliamentary decision. They argued that the decision would therefore breach several constitutional provisions, including the rule of law (Art. 4 Const.) and the constitutionality and legality of the decisions of the National Assembly (Art. 73. Const.). The court's decision was again highly disputed among the judges, this time without revealing an obvious party pattern. The BCC rejected the claim by a 7-to-5 majority on November 6, 2018, thereby subscribing to the majority opinion in parliament.

5. Decision No. 6/2018: Code of Criminal Procedure I

As mentioned in the beginning of this report, Bulgaria has received regular criticism for its lack of success in combating corruption. In early 2018, the National Assembly changed the Code of Criminal Procedure (CCP) to fulfill the European Union's ongoing demand to improve the legal framework for fighting high-level corruption and organized crime. An extension of the competencies of the Specialized Criminal Court was particularly contested. This body was established as a special anti-corruption court in 2011. An amendment of Art. 411a CCP gave the court competency to judge members of the government, deputies, judges, prosecutors and investigators, mayors and deputy mayors, and several other categories of high state officials not only in cases of corruption and a variety of other crimes.

The Supreme Court of Cassation and the Supreme Bar Council challenged this amendment before the BCC by arguing that a court competent for a certain group of suspects (and not for certain crimes) was not a "specialized court" as allowed for by Art. 119, § 2 Const., but an "extraordinary court," which was banned by Art. 119, § 3 Const. This was therefore in breach of the constitutional principles of the rule of law and equality before the law.

The Constitutional Court unanimously rejected this claim on March 27, 2018. It declared that "specialized courts" may also be courts with jurisdiction over a specific group of subjects. It not only referred to similar courts in France, Slovakia, and the Ukraine but also to the competencies of the City Court in the Bulgarian capital Sofia, which is (except for corruption crimes) the first instance court on crimes committed by members of government, members of parliament, and magistrates. However, the Constitutional Court did not outline any general distinctions for a constitutional "specialized" court as opposed to an unconstitutional "extraordinary" court. Regardless, it remains to be seen whether this amendment will cause visible and sustainable results in the fight against high-level corruption in Bulgaria.[8]

6. Decision No. 14/2018: Code of Criminal Procedure II

The Supreme Bar Council also challenged a large number of other amendments to the Code of Criminal Procedure that were adopted by the governing coalition in November 2017. The Constitutional Court accepted 19 of the 21 challenged amendments on October 9, 2018, but annulled the remaining two. It first declared a provision in Art. 247c CCP unconstitutional. This provision allowed hearings without the assistance of a lawyer. The BCC then annulled a restriction on legal recourse in Art. 351 CCP, according to which material breaches of procedural rules in pre-trial proceedings were excluded from recourse to courts. The Constitutional Court thus strengthened the rule of law and the right to legal defense.

7. Decision No. 10/2018: Suspension from office of civil servants

The final BCC case presented in this report involves a Supreme Court of Cassation challenge to Art. 214, § 2 of the Law on the Ministry of Interior. This provision stipulated that a civil servant would lose their salary and social insurance while serving a temporary suspension from office due to disciplinary proceedings resulting from suspicions of malfeasance. The Supreme Court of Cassation argued that the challenged provision contravened several constitutional principles, specifically, the legal protection of labor (Art. 16 Const.) and the right to social security and social assistance (Art. 51, § 1 Const.). The Constitutional Court unanimously accepted this claim on May 29, 2018, thereby declaring the challenged provision unconstitutional and strengthening the social rights of civil servants.

IV. LOOKING AHEAD

Four newly elected judges began their nine-year terms with the Bulgarian Constitutional Court on November 1, 2018. Notably, law professor Atanas Semov was appointed by President Rumen Radev. Thus, for the first time since 2009, one of the new judges appointed by the political branches was not nominated by GERB. Nonetheless, significant depoliticization of constitutional justice in Bulgaria is not expected in the near future. In political terms, 2019 will likely be characterized by the European elections in May and the local elections in autumn. Both elections will be important tests for the fragile coalition between GERB and the United Patriots. There is thus a chance that the coalition will dissolve throughout the year or Prime Minister Boyko Borissov will resign (as he did in both 2013 and 2017). Either case would most probably result in the fourth snap election in Bulgaria since 2013.

V. FURTHER READING

Martin Belov, 'Bulgaria,' in A. Alen and D. Haljan (eds.), *International Encyclopaedia of Laws: Constitutional Law,* Suppl. 132 (Kluwer Law International, 2018).

Radosveta Vassileva, 'Bulgaria's Constitutional Troubles with the Istanbul Convention,' *Verfassungsblog* (2 August 2018) <https://verfassungsblog.de/bulgarias-constitutional-troubles-with-the-istanbul-convention> accessed 29 January 2019.

[8] This judgment also reviewed (and accepted) another minor amendment to the CCP.



Cameroon

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I. INTRODUCTION

Since the last major constitutional overhaul in 1996,[1] Cameroon has awaited the effective establishment of institutions provided by the Constitution.[2] This is true of the Constitutional Council, created by the Constitution of 18 January 1996 but delayed in handling cases until 2018—twenty-two years after its creation. Though this Cameroonian constitutional adjudication body is important to the legal apparatus, it still did not fulfill expectations in 2018, as the crisis in the two English-speaking regions was getting worse.[3] This State form-based crisis, started in October 2016,[4] was apparently not critical enough for the government to engage in constitutional reform that would put an end to it and lead to peaceful cohabitation between Anglophone and Francophone regions of the country.[5]

On the contrary, 2018 resulted in the government's infra-constitutional responses to a crisis having an obvious constitutional nature. However, senatorial and presidential elections have been the main constitutional activities of the year that conveyed some steps forward, though they did not lead to a political landslide. Indeed, as major constitutional developments, those elections resulted in the beginning of the second Senate and particularly the issuance of the very first Constitutional Council rulings. The electoral proceedings resulted in some decisions which will enrich the case law of this organ in charge of constitutional adjudication. 2019 will also be an electoral year for legislative, regional and municipal elections that were postponed because the country could not financially hold three major elections in 2018.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Though constitutional systems are intended to be rooted in time to guarantee their reliability, sometimes the legal and institutional framework may need to be reconsidered in order to suit the changes of present-day societies. This is undoubtedly, to a certain extent, the justification and the merit of the present annual report of the *Global Review of Constitutional Law* of the I•CONnect-Clough Center. This one questions the major constitutional developments carried out by country over a specific year. However, there is no need for substantial disruptions to set a value on a constitutional system. It is continuous-

[1] The Constitution of Cameroon, usually known as the Constitution of 18 January 1996, is actually an amendment of the Constitution of 2 June 1972, though there has always been a controversy as to whether it is a new constitution or an old one.

[2] The current Constitution of Cameroon came into force on 18 January 1996 and was amended on 14 April 2018.

[3] The Constitution does not differentiate between the ten (10) regions of Cameroon according to their linguistic identity because the country, legally known as bilingual, practices English and French as official languages. The reference of "English-speaking regions" here is typically sociological due to the fact that in these two regions English is the dominant language, as French is in the eight others.

[4] See C.M. Fombad, "4 "Developments in Cameroon constitutional law," 2016 ICONnect/Clough Center Global Review of Constitutional Law 37 (2017).

[5] Cameroon, which had been colonised by Germany in 1884, is a bilingual country practising English and French inherited from British and French dominance, after the country was placed under the aegis of the UN in 1946 following the defeat of the German army during the Second World War.

ly tested by its own application. The major constitutional developments that have taken place in Cameroon during 2018 fall in line with this. The cases that were looked at did not allow for either a major breakthrough of the existing constitutional system or its reinforcement, though that reinforcement can be inferred from the implementation and application of constitutional and political events provided within the constitutional text. The current report can therefore be based on three main events, namely the senatorial and presidential elections that respectively took place on 25 March and 7 October 2018, and a third event related to the effective establishment of the Constitutional Council, whose very first rulings dealt with the electoral disputes stemming from both sets of elections.

Senatorial elections held in March 2018 mark the beginning of the second composition of the chamber.[6] The history of the Upper House of the Cameroonian Parliament is similar to the other political institutions laid down within the constitutional Act of 18 January 1996, whose effective establishment occurred more than two decades later. Beyond the simple fact that they opened the second term of the Senate, these elections provided an opportunity to assess the first mandate of this chamber whose mission, pursuant to Section 20, Paragraph 1 of the Constitution, is to represent regional and local authorities. The least that can be raised on this point is that, since the first elections held on 14 April 2013 setting up the effective functioning of the Senate, the process of decentralization has stagnated under conflicts as regards the prerogatives between national institutions and local ones. Worse still, the establishment of regions as regional and local authorities, in other words as decentralized local collectivities, within which senators are supposedly being elected and appointed,[7] is still pending. The absence of regions skewed the election of senators since they are supposed to be voted by an electoral college comprising both regional councilors (who still do not exist) and municipal councilors, who are the only electors who have cast their ballot for the first two elections to the Senate.

The second major political event held in 2018 was the election of the President of the Republic for a seven-year term.[8] The incumbent President, Paul Biya, who has held office since 6 November 1982, faced eight other candidates. Among them are some resounding names such as Maurice Kamto, an internationally known law professor; Akere Muna, a lawyer whose reputation crosses borders; and Josua Osih, who inherited the chairmanship of the historical opposition party Social Democratic Front (SDF) ruled until then by Ni John Fru Ndi. Following results made public by the Constitutional Council, the reigning party, known as the Cameroon People's Democratic Movement (CPDM), of the incumbent President Paul Biya won the election with 71.28% of the vote, followed by the Cameroon Renaissance Movement (CRM) of Maurice Kamto with 14.2% and in third position, the Universe Party of 39-year-old Cabril Liibi with 6.28%. The SDF, long considered the primary opposition party, came in fourth position with a disappointing result of 3.35%. While these official results do not really surprise the observers of the Cameroonian political scene, they nonetheless help draw some lessons.

The main lesson was the electoral litigation conducted before the Constitutional Council, whose proceedings were only the second time this court has sat as constitutional judge and as judge of electoral operations.[9] Among the seventeen petitions submitted before the Constitutional Council by the defeated candidates seeking the cancellation of the presidential election, the Council noted the relevance of some arguments brought forward by the petitioners. Furthermore, the proceedings were broadcast live on State television and private television stations. Those public hearings, seen by some as democracy in progress, tended to call national and international attention to the accountability and transparency of the electoral process in Cameroon. However, they were etched into memory and resulted in some non-negligible decisions that will henceforth be part of the constitutional case law.

III. CONSTITUTIONAL CASES

The very first decisions of the Constitutional Council rendered following disputes of the elections held in 2018 were not what one would have expected. The seventeen petitions lodged before the Constitutional Council by five defeated candidates pleading for the partial or total cancellation of the presidential election have either been dismissed or declared inadmissible. The same outcome resulted with petitions submitted during the post-electoral dispute of senatorial elections. If some petitions looked trivial, there were others—though held inadmissible—that raised important legal matters. This report discusses two of these petitions that can be considered representative of some major stakes of the electoral process and the underlying problem of the ongoing crisis in Cameroon. The first one, lodged by Maurice Kamto, beyond the legal relevance that can be inferred from some pleas in law put forward, purported to undermine the electoral process of Cameroon. The second petition, related to post-electoral disputes of senatorial elections, raised the question of voter turnout in areas that suffer from instability.

1. Kamto Maurice v. Constitutional Council: Disqualification and discharge for legitimate suspicion

This case was lodged on the occasion of the post-electoral disputes by Maurice Kamto, defeated candidate in the 7 October 2018 presidential election, where he asked for the recusal of some members of the Constitutional Council. These petitions were intended to support other requests that targeted the partial or total cancellation of pres-

[6] TIn Cameroon, the Senate is comprised of 100 senators, 70 of whom are elected by indirect universal suffrage and 30 appointed by the President of the Republic.

[7] According to Section 20, Paragraph 2 of the Constitution and Section 214 of the Electoral Code, each region shall be represented in the Senate by ten (10) senators, seven (7) of whom elected by indirect universal suffrage on a regional basis and three (3) appointed by decree of the President of the Republic.

[8] Since the amendment of the Constitution of 14 April 2008, the President of the Republic is elected for a term of 7 years. He shall be eligible for re-election.

[9] The Supreme Court previously acted as the electoral judge, according to the provisions of Section 64, Paragraph 4 of the Constitution.

idential election results due to irregularities that have been recorded, according to the petitioner, during electoral operations. The six concerned petitions[10] were examined by the Council following formal requirements and ruled inadmissible for procedural reasons. Nonetheless, Kamto's petition sought to recuse some members of the Constitutional Council and therefore provoke their discharge for legitimate suspicion. If these claims surprised many legal theorists and practitioners because neither the Electoral Code[11] nor the law laying down the functioning and the organization of the Constitutional Council provided for the disqualification and the discharge of members of this institution, the audacity of these petitions should be recognized. However, having looked closely at the issue, one can honestly admit that they raised substantive matters which cannot merely be swept away on the sole basis of their illegality.

Within his first five petitions, Maurice Kamto requested the disqualification of six members of the Constitutional Council, namely Clément Atangana (President of the Council), Emmanuel Bonde, Ahmadou Tidjani, Jean Baptiste Baskouda, Joseph-Marie Bipoun-Woum and the late Jean Foumane Akam, who recently passed away. He based his request on the fact that those members of the Constitutional Council have been for some, and are still for others, members of the ruling party CPDM. He wanted the Council to disqualify its own members because they were neither independent nor impartial to ensure the regularity, sincerity and transparency of the presidential election. He therefore requested their replacement by the authority in charge of their designation.[12] He pleaded to the Council to have "jurisdiction of its jurisdiction," in accordance with Section 18 of Law No. 2004/005 of 21 April 2004, laying down the status of members of the Constitutional Council as amended by Law No. 2012/016 of 21 December 2012.

This section provides that: "The Constitutional Council ruling by a majority of (2/3) two-thirds of its members may, on its own motion or at the request the authority of designation, terminate, after the completion of a contradictory procedure, duties of an incumbent member who might have shirked his commitments [or] breached the regime of his incompatibilities…"

Kamto's petitions require attention to a number of observations concerning Cameroonian substantive law in order to understand the grounds for their rejection by the Constitutional Council. In the first instance, following the disqualification of members, irrespective of the fact that the Council, by joining all the petitions due to their connection,[13] declared them as inadmissible because the author lacks standing,[14] ruled on the substance by declaring that the purpose of these requests are "a preliminary question which should be decided through a special procedure the petitioner did not initiate."[15]

Lawfully arguing, it should be understood that it is not possible, in the current positive law of Cameroon, for a petitioner to recuse the members of the Constitutional Council. This is an institution that enjoys a peculiar political stature inherited from the French model, unlike some other countries where constitutional justice is exercised through judicial bodies. The political past of some members who are not acting as judges, even though some are career magistrates,[16] cannot justify their disqualification for the sheer fact that only sitting magistrates,[16] namely judges, can be recused under Cameroonian law. Indeed, in accordance with Section 591 of Law No. 2005/007 of 25 July 2005 to lay down the Criminal Procedure Code, any sitting judge can be recused for any of the reasons restrictively specified by that law. Furthermore, once designated, as stated implicitly by Law No. 2004/005 of 21 April 2004 laying down the status of members of the Constitutional Council, all members of the Council are said to be discharged from their political duties.[17]

It is on the basis of this request for disqualification that Petition 355 intervened. Its purpose was related to the discharge for legitimate suspicion of the above-mentioned members of the Constitutional Council. The preliminary motion filed in this petition sought the referral of the post-electoral litigation of the presidential election to another judicial body because of legitimate suspicion towards the members of the Constitutional Council. This request also fell in line with inadmissibility and was declared unfounded because no statutory law in Cameroon expressly allowed the discharge of a member regarding electoral disputes before the Constitutional Council, which is the last-resort body in the matter of presidential, senatorial and legislative elections.

2. Njenje Valentine Kleber v. Elecam, CPDM, ANDP, UNDP

The petition lodged before the Constitutional Council by Njenje Valentine Kleber, [18] repre-

[10] Petition Nos. 350, 351, 352, 353, 354, 355/SRCER/G/SG/CC of 15 October 2018.

[11] Law No. 2012/001 of 19 April 2012 relating to the Electoral Code, as amended and modified by Law No. 2012/017 of 21 December 2012.

[12] The eleven (11) Members of the Constitutional Council are designated for a term of office of six (6) years as follows: (3) three, including the President of the Council, by the President of the Republic; (3) three by the President of the National Assembly after consultation with the Bureau; (3) three by the President of the Senate after consultation with the Bureau; (2) two by the Higher Judicial Council. Besides the eleven members provided for above, former presidents of the Republic shall be ex officio members of the Constitutional Council for life.

[13] Petitions Nos. 350, 351, 352, 353 and 354.

[14] Kamto v. Constitutional Council (n 024/CE/CC/2018) 16 October 2018.

[15] Ibid.

[16] Among the eleven members of the Constitutional Council, two, including the President, are career magistrates.

[17] Section 5, Paragraph 1.

[18] Petition No. 007/CCES/2018 of 28 March 2018.

sentative of the party SDF within the Regional Supervisory Commission[19] of the South-West region during the senatorial elections of 25 March 2018, is similar to the request made on the occasion of post-electoral disputes of presidential polling by Josua Osih.[20] In this petition, he requests from the Council the cancellation of senatorial elections within the Division of Lebialem, especially in the Kupe-Manengouba Subdivision and by extension within the region of the South-West as a whole. According to the petitioner, these elections were severely affected by incidents that could have struck down the outcome of senatorial polls in this electoral constituency.

To meet this goal, the litigant based his request on Section 132, Paragraph 2 of the Electoral Code, which states: "The Constitutional Council shall rule [on] all petitions filed by any candidate, any political party which took part in the election or any person serving as a representative of the Administration for the election, requesting the total or partial cancellation of electoral operations."

He argues that:

> This is predicated upon hard, incontrovertible and compelling facts and evidence garnered before, during and after 25 March 2018 senatorial elections in the various polling stations throughout the South-West region. He illustrates some cases that will guide the members of the Constitutional Council in reaching *a reasoned decision that will uphold the rule of law, fairness, equity and justice, to Wit.*

For the cases that have been illustrated, the petitioner sought to demonstrate that an election could not be held in suitable conditions within a context of instability due to the ongoing crisis. Concerning the first case illustrated in the Kupe-Manengouba electoral district, he argued that there was no gain saying that no election took place in some places of this subdivision. According to him, there was cogent evidence that all along, terror and horror gripped the locality as there was a sustained exchange of gunfire between unidentified assailants and forces of law and order, causing civilians to flee for their safety. In order to challenge the validity of the election in this electoral constituency, he referred to irregularities related to the sole signature on result reports by representatives of the ruling party. He concluded from the above that no election took place in Kupe-Manengouba and that the electors were simply disenfranchised because of the "series of attacks by unidentified gunmen."

The second case illustrated by the petitioner concerned the Lebialem electoral district. He argued that there is evidence according to which thirteen voters of the Wabane and Alou areas were locked up in Dschang in the West region and conveyed by helicopter to Menji in order to cast their ballot in an empty city. From this allegation, he tried to show that this was constitutive of the violation of laws and fundamental freedoms, which are key conditions for free, fair, transparent and credible elections, and a violation of the South-West governor's instructions prohibiting all movements on polling day. In a polling station, the applicant noted that only twenty-seven people effectively cast their ballot compared to ninety-three people enrolled on the electoral list. Moreover, he reportedly claimed that this polling station had been closed at 4:30 pm instead of 6:00 pm as provided by the Electoral Code. The other argument invoked by the plaintiff was that two political parties, namely ANDP and UNDP, a coalition to the ruling party, did not appoint their representatives in the Regional Supervisory Commission of votes as required by the electoral law. The petition points out that in the Manyu Division, all one hundred voters[21] were locked up and cut off from any communication with the other participating political parties, with the exception of the ruling party CPDM. They were supposedly housed in different hotels around the electoral ward two days before the polling date.

Although the Constitutional Council declared the petition of Njenje Valentin Kleber to be "inadmissible for lack of *locus standi*" and for lack of reliable evidence of irregularities presented to the Council, a core question still emerged from this request: whether an election can reasonably be held within a difficult security environment.[22] In answering the question, the nature of the election at stake should be taken into account. As far as the presidential election is concerned, where the electoral constituency is nationwide, the issue of the coverage rate of votes validly cast by district or region may appear anecdotal. This is what the Constitutional Council acknowledged within its rulings on facts alleged in a similar petition lodged on the occasion of the 7 October 2018 presidential election.[23] It is the same argument that was raised by the lawyers of the body in charge of elections, namely Elections Cameroon (ELECAM), and those of the winning party in response to Maurice Kamto's and Josua Osih's petitions: an election having a nationwide constituency cannot be partially annulled.

IV. LOOKING AHEAD

In 2019, there should be no constitutional developments that will substantially change the underlying problems Cameroon is facing today. The year will also be marked by the holding of elections that were supposed to take place in 2018 but were postponed because of cost reasons. These are communal

[19] According to Section 237, Paragraph 1 of the Electoral Code, the Regional Supervisory Commission shall ensure the counting and verification of vote-counting operations on the basis of reports forwarded by polling stations.

[20] *Josua Osih v. Elecam CPDM* (n 025/CE/CC/2018) 17 October 2018.

[21] Pursuant to Section 222, Paragraph 1 of the Electoral Code, senators are elected by regional and municipal councilors.

[22] Njenje Valentine Kleber v. Elecam, CPDM, ANDP, UNDP (n 008/CE/CC/2018), 3 April 2018.

[23] Josua Osih (n 025/CE/CC/2018).

elections to elect local councilors and legislative ones that should start another five-year term of office for members of parliament. More importantly, regional elections, if they are held for the first time, will significantly contribute to setting regions in place in a definitive way as decentralized local authorities.[24] The hope surrounding these regional elections would be to put an end to the hyper-centralization of the State, which if it endures will jeopardize the decentralization process and exacerbate local tensions.

V. FURTHER READING

Charles M Fombad (ed), *Constitutional Adjudication in Africa* (Oxford University Press, 2017), published online (14 June 2018).

[24] A region in Cameroon has a double status. On the one hand, it is an administrative unit, i.e., an extension of the central government headed by an appointed governor; on the other hand, it is a decentralized collectivity where the regional executive should be elected be the local community.



Cape Verde

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I. INTRODUCTION

The Cape Verdean (CV) constitutional system is rather recent because the country only achieved independence from Portugal in 1975,[1] and from then until 1990 it had a one-party system.[2] The Constitution in force was enacted in 1992,[3] establishing a democratic liberal system based on the rule of law, basic rights and people's sovereignty, which adopts the values of human dignity, freedom of the individual, equality and solidarity. [4]The country has a semi-presidential system of government[5] with independent courts: three superior courts, the Constitutional Court (CC), the Supreme Court of Justice (SC) and the Auditors Court as well as two regional appeals courts and district courts in almost all municipalities of the Archipelago.

Between independent rankings and studies[6] and a political regime that has been celebrated in the early twenty-first century,[7] the health of liberal democracy in Cabo Verde, despite some criticism from political parties that circumstantially happen to be in the opposition, is not bad, at least when compared with African neighbors and some other countries in the developed world. This report aims to present political, legislative, jurisprudential and doctrinal developments of CV Constitutional Law in 2018.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2.1. At the political and social levels, 2018 was marked by the announcement of a new composition of the Executive that expanded the numbers of ministers and secretaries of state,[8] with the addition of a Deputy Prime Minister and a Minister of State. This development was understood as a sort of abjuration of 2016 election campaign pledges of the current ruling party. That was the result of 2016 election campaign pledges. Constitutional controversies between the Government (GR) and the President of the Republic (PR) emerged

[1] Richard Lobban, Jr., Cape Verde. From Criolo Colony to Independent Nation (Westview Press, 1995).

[2] Humberto Cardoso, O Partido Único em Cabo Verde. Um Assalto à Esperança (INCV, 1993); Mário Silva, Contributo para a História Político-Constitucional de Cabo Verde, 1974-1992 (Almedina, 2015).

[3] Constitutional Law Nº 1/1992, of 25 September, consolidated version republished after its third revision, OJ, I-S, n. 17, n. 12, 03.05.2010, pp. 394-457, and, for a presentation in English, Aristides Lima, 'Cape Verde' in: Gerhard Robbers (ed.), Encyclopaedia of World Constitutions (FoF, 2007) vol I, 174-178.

[4] José Pina-Delgado, 'Constituição de Cabo Verde de 1992 – Fundação de uma República Liberal de Direito, Democrática e Social' in José Pina-Delgado and Mário Silva (eds.) Estudos Comemorativos do XX Aniversário da Constituição de Cabo Verde (Edições ISCJS, 2013), 113-159.

[5] Octávio Amorim Neto and Marina Costa Lobo, 'Semi-presidentialism in Lusophone Countries: Diffusion and Operation', 21 Democratization, 434-457.

[6] See Democracy for All? V-Dem Annual Democratic Report 2018 (V-Dem Institute, 2018), 94, where it is classified as a liberal democracy; Democratic Index 2018: Me too? Political Participation, Protests and Democracy (EIU, 2019), 36, ranking 26 globally and second in Africa in the up-tier of flawed democracies, and the 2018 Freedom House Report <https://freedomhouse.org/report/freedom-world/2018/cape-verde>, accessed 12 February 2018, appearing with the status of free.

[7] Peter Meyns, 'Cape Verde: An African Exception' (2002) 13 JoD 153-165, and Bruce Baker (2006), 'Cape Verde: the Most Democratic Nation in Africa?' 44 JMAS 493-511.

[8] Presidential Decree [PD] No 2/2018 of 4 January, OJ, I Serie [I-S], n. 2, 04.01.2018, 26.

on matters of foreign policy related to the constitutional division of powers between the two branches, with the Head of State arguing that the GR has a duty to consult with him on negotiations with foreign powers in order to conclude a treaty. The country also experienced some social unrest with major strikes, in particular a controversial one promoted by the national police union that resulted in disciplinary proceedings and the dismissal of some of its members from the corporation,[9] and the organization of semi-autonomist marches in the Northern Islands of the Archipelago aimed at increasing the decentralization of power;

2.2. It was also a year of consolidation of important Constitutional Institutions including the CC, the Ombudsman and the National Authority on Data Protection, though in the last cases the consolidation was combined with complaints of budgetary and staff problems in conducting their respective missions.[10] There was continuous political strife in the Parliament (*Assembleia Nacional*) involving different constitutional interpretations of the role of the opposition and the limits of the parliamentary majority powers. The controversies included the Speaker's conduct as an impartial umpire, and acrimonious discussions between the center-right, pro-business and pro-Western majority party (MpD) and the center-left, more statist and Afro-nationalist main opposition party (PAICV)[11] as well as with the junior parliamentary party, center democratic-Christian UCID. This was the case when the Minister of Foreign Affairs and National Defense announced a new security partnership with the US that led to the approval of a SOFA,[12] and the enactment of amendments to the Foreigners Act in order to exempt nationals of EU member countries from visas to enter the country, where the main source of revenue is the tourism industry.[13] Verbal confrontations between the two main parties moved to an unseen event in the country when two MPs entered into physical engagement at Parliament House.[14]

2.3. Despite this, relevant legislation was approved in domains important for Constitutional Law:

2.3.1. In the rights protection system, important substantive developments are noteworthy, such as the enactment of the Code of Execution of Criminal Sentences, [15] which substituted the previous statute of 1988, approved before the Constitution of 1992 and embedded in a more authoritarian criminal philosophy, and the Right to Food Act,[16] which recognizes this right of individuals and collectivities to continuous access to food in sufficient quantities. In the labor and social security domains, other measures included the Student-Worker Statute;[17] the Telework[18] Act, which extends Labor Code protection to teleworkers; an amendment to the Minimum Wage Law to increase the base amount;[19] and an act to protect the legitimate expectations of workers as a result of unforeseen and detrimental effects of an amendment to the general law on social security.[20]

At the institutional level, 2018 led to the approval of the Regulation of Labor Inspectorate[21] and of the Regulation of the Ombudsman Office.[22] It also saw the promulgation of a decree to regulate media companies and media outlet registration, allocating these powers to the independent National Media Regulation Authority,[23] and the passing of a law to designate the National Commission on Human Rights and Citizenship as the national preventive mechanism for purposes of the Optional Protocol to the Convention Against

[9] See Inforpress, 17/07/18, available at <https://www.inforpress.publ.cv/pm-denies-that-punishment-of-sinapol-leaders-is-a-way-of-conditioning-trade-unionism-in-cabo-verde/?lang=en>, accessed 9 February 2019 (All press articles quoted in this report were accessed on the same day).

[10] See Inforpress, 28.11.2018 <https://www.inforpress.publ.cv/ombudsman-has-planned-a-budget-of-33-million-escudos-but-needs-52-million-escudos-to-operate-in-2019/?lang=en>.

[11] See Inforpress, 16.04.2018, <https://www.inforpress.publ.cv/former-cabo-verdean-pm-criticizes-the-government-unbridled-neoliberalism-lusa/?lang=en> and Inforpress, 17.04.2018 <https://www.inforpress.publ.cv/pm-responds-to-jose-maria-neves-stating-that-the-dilapidated-socialism-of-his-predecessor-led-tacv-to-bankruptcy/?lang=en>.

[12] Approved for 'ratificaton' by the National Assembly Resolution No 87/IX/2018 of 13 July, OJ, I-S, n. 47, 13.07.2018, pp. 1219-1222. See also Inforpress, 12.08.18 <https://www.inforpress.publ.cv/sofa-government-says-cabo-verde-has-not-given-in-to-all-the-demands-of-north-americans/?lang=en>, and Inforpress, 21.06.2018, <https://www.inforpress.publ.cv/prime-minister-refutes-the-paicv-leader-statments-and-says-that-sofa-agreement-is-clear-and-explicit/?lang=en>.

[13] Inforpress, 04.05.2018 <https://www.inforpress.publ.cv/former-cabo-verdean-pm-criticizes-the-government-unbridled-neoliberalism-lusa/?lang=en>, Inforpress,04/05/2018 <https://www.inforpress.publ.cv/government-approves-the-amendment-of-the-decree-for-the-materialization-of-the-visa-waiver-law/?lang=en>, and Law-Decree No 46/2018 of 13 August, OJ, I-S, n. 54, 13.08.2018, 1350-1371, which was subsequently challenged in the CC by PAICV MPs focusing on the norms that increased the Airport Security Fee.

[14] Inforpress, 15.11.2018 <https://www.inforpress.publ.cv/mpd-parliamentary-group-challenges-moises-borges-to-resign-from-the-positions-and-functions-he-occupies/?lang=en>.

[15] Legislative-Decree, No 6/2018, of 31 October, OJ, I-S, n. 70, 31.10.2018, 1678-1749.

[16] Law No37/IX/2018 of 16 August, OJ, I-S, n. 55, 16.06.2018, 1384-1392.

[17] Law No 41/IX/2018 of 16 November, OJ, I-S, n. 75, 16.10.2018, 1800-1802.

[18] Legislative-Decree No 11/2018 of 5 December, OJ, I-S, n. 79, 05.12.2018, 1920-1923.

[19] Decree-Law No 15/2018 of 19 March, OJ, I-S, n. 15, 19.03.2018, 434.

[20] Decree-Law No 69/2018 of 20 December, OJ, I-S, n. 15, 20.12.2018, 2080-2081.

[21] Decree-Law No 55/2018 of 24 October, OJ, I-S, n. 24, 24.10.2018, 1619-1630.

[22] Decree-Law No 24/2018 of 14 May, OJ, I-S, n. 29, 14.05.2018, pp. 670-679.

[23] Decree-Law No 47/2018 of 13 August, OJ, I-S, n. 54, 13.08.2018, 1371-1377.

[24] Government Resolution No 98/2018 of 24 September, OJ, I-S, n. 61, 24.09.2018, 1546-1547.

Torture, granting it powers to visit places of detention and also to receive individual complaints (Article 2).[24] In addition, also coming from an international source, Parliament authorized accession to the WIPO Copyright Treaty of 1996;[25] to the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled of 2013;[26] and, with a rather unorthodox procedure, 'accession' to the Open Government Declaration.[27]

2.3.2. Rules of Parliament[28] were also enacted in June and entered into force in October, inserting new precepts providing for bimonthly sessions rather than monthly ones as before; for the obligation of the PM to present himself, once a month, for debates with the opposition; for the strengthening of the specialized committees role; for the establishing of an ethics commission and for a rationalization in time available for speeches. The ambitious bill of regionalization, which required a two-thirds majority, narrowly passed a first reading vote, but it is not certain if it will attract enough support from opposition party benches to be definitively approved.

2.3.3. Some developments occurred in the field of the system of justice with the enactment of the Auditors Court Law,[29] granting the organ expanded powers of oversight and leading to the appointment of new judges to replace predecessors whose term of office had long since expired.[30] It is also worth mentioning that Ms. Costa and Mr. B. Delgado, elected, respectively, to an ECOWAS Court of Justice judgeship and a Judicial Council Chairmanship, left their functions as substitute judges of the CC.[31]

III. CONSTITUTIONAL CASES

The CC, composed of three permanent justices, was created by a 1992 amendment of the Constitution, but only started operating in 2015, delivering its first ruling in 2016. In 2018 it maintained close to 30 decisions a year.

Despite the Court having broad jurisdiction, comprising decentralized and centralized judicial review of legislation (both pre- and post-promulgation), constitutional complaint for violation of civil and political rights by public powers (including the judiciary) and settlement of electoral, parliamentary and intra-party disputes, of the 29 collective decisions of 2018, 24 involved constitutional complaints. Nonetheless, some of the rulings were mere decisions conceding to the complainants the possibility of correcting their memorials, standard opinions on admissibility written by the CJ (*Borges v. SC; Ezeonwu and Duru v. SC; CIMA v. SC; Barros et al. v. SC; Zirpoli v. District Court of Praia; Semedo v. Director of the Central Penitentiary of Praia and Minister of Justice*), or merit opinions written by Justice Pina-Delgado on a matter—invocation of violation of the presumption of innocence in a dimension of the in dubio pro reo clause in reason of error in analysis of evidence—that, despite some initial divisions, are by now reasonably settled between the judges in the sense that the CC only intervenes to grant relief if the trial court and the appellate court act arbitrarily or in a contradictory manner (*Barbosa v. SC; Fonseca v. SC; Ezeonwu and Duru v. SC*).

Other rulings included minor decisions (*R. 18 and 19/2018*) related to the confirmation of causes of cessation of functions of its substitute justices written for the Court by Justices Lima and Pina-Delgado, respectively, and to a post-opinion request related to clarification and alleged omission of a 2017 ruling that led to R 9/2018, authored by Justice Pina-Delgado. There were also relevant rulings included, namely an admissibility decision where the CC, in an opinion written by the CJ Semedo, granted its first provisional measure involving the decision of a request to revert the freezing of assets determined by the Public Prosecutor's Office; another—R 10/2018: *Joaquim Wenceslau v. SC*—written on behalf of the Court by the same Justice in order to adopt an injunction to declare null and void a disciplinary procedure where a public employee was dismissed from office without the possibility of contesting a change in the indictment; an opinion written for the Court by Justice Pina-Delgado on a constitutional complaint—*Nascimento v. SC*—in which, despite not granting the relief sought, considered that the appellate court may have applied an unconstitutional rule that conditioned appeal on previous payment of court fees, which should be scrutinized following a request by the Attorney-General; and, finally, Ruling 23/2018, written by Justice Pina-Delgado with Justice Lima dissenting, concerning judicial review of legislation referred by the Attorney-General where it followed a precedent established in a similar case decided in 2016 when it developed the test it generally applies in cases of rules challenged on the basis of the principle of legitimate expectations, both in situations of pure retroactivity and of mere retrospectivity of laws.

[25] Resolution No 92/IX/2018 of 29 October, OJ, I-S, n. 69, 29.10.2018, 1660-1667.

[26] Resolution No 93/IX/2018 of 29 October, OJ, I-S, n. 69, 29.10.2018, 1667-1676.

[27] National Assembly Resolution No 75/IX/2018 of 2 March, OJ, I-S, n. 15, 02.03.2018, pp. 369-371.

[28] OJ, I-S, n. 41, 21.06.2018, pp. 1060-1095.

[29] See Law No 24/IX/2018 of 2 February, OJ, I-S, n. 7, 02.02.2018, 95-120.

[30] PD No 28/2018 of 24 October, OJ, I-S, n. 67, 24.10.2018, 1618, appointing Mr. da Cruz, a jurist and career auditor at the Court, as the CJ; Ms. Reis, a career judge; Mr. Cardoso, a ministry of finance career inspector; Mr. V. Monteiro, a senior career auditor; and Mr. C. Monteiro, a specialist in finances.

[31] Declaration of Cessation of Functions of the Substitute Justices of the CC of 9 October 2018, OJ, I-S, n. 65, 19.10. 2018, 1615.

[32] OJ, I-S, n. 21, 11.04.2018, 505-530.

Major Decisions

1. R 7/2008 - Monteiro v. National Electoral Commission [NEC] – Electoral Appeal [32]

Despite this decision being adopted by the CC as an Electoral Court, it dealt with important constitutional matters, such as the principle of participatory democracy and the principle of equality. It followed a challenge promoted by Mr. Monteiro, a candidate in the last presidential election who had his request for reimbursement of electoral campaign expenses denied by the NEC on grounds that he failed to reach the threshold of 10% of votes established by the Electoral Code. The CC, in an opinion written by Justice Pina-Delgado with Justice Lima concurring, understood that it was approached not to exercise its role as constitutional jurisdiction but as an electoral one and in order, as any court under the mixed CV judicial review model,[33] to set aside legal rules contrary to constitutional principles. In that position, it dismissed the argument brought by the plaintiff that the principle of participatory democracy was breached by the limit imposed by ordinary legislation, stressing, after an examination of the preparatory works and the political context of the adoption of the Constitution, that the correct interpretation of that principle did not lead to a positive obligation to support all candidacies in an equal manner, but only to underline the principles of a competitive and multiparty democracy to contrast the principle of revolutionary democracy that was one of the pillars of the previous one-party system. Nonetheless, it found a violation of the principle of equality insofar as it understood that the threshold was too high and disproportionate after inserting for the first time a test of proportionality in the framework of the equality scrutiny.

2. PR Referral for Ex-Ante 'Advice' on the Constitutionality of the Amendment Act of the Law on Essential Public Services – Judicial Review [34]

The PR wanted 'advice' on the constitutionality of a norm inserted in the Law of Essential Public Services that expanded its coverage to reach solid urban waste, but allowed the service to be charged on the same invoice of other public services, leading to a situation where failure to pay the former would suspend the continuous delivery of electricity, water or phone services. The CC found that such a norm infringed the clauses that obliged the state to take into account the economic interests of the consumers as well as the principles of justice—in this matter, overcoming an internal division between two of its justices concerning the meaning and reach of the clause—and good faith in the relations between the administration and private persons.

3. Teixeira v. SC I and II – Constitutional Complaints

These two decisions are related to the same case linked with Mr. Teixeira, who was subjected to pre-trial detention for allegedly murdering a person in circumstances that he understood were classifiable as self-defense. In the first decision, R 8/2018,[35] written by Justice Pina-Delgado for the Court with Justice Lima dissenting, the CC dealt, firstly, with the question of whether the absence of a decision by the SC on a post-trial request challenging the omission of the Court in answering one of the pleas violated the plaintiff's right to a speedy trial, and, after drafting a test discussed in the framework of leading cases of the ECHR, the SCOTUS and the Spanish CC, concluded that the appeal court breached that constitutional guarantee; secondly, it used the right of self-defense recognized with the right of resistance by Article 19 of the Constitution to consider that the SC violated the plaintiff's rights when it did not consider the effects of that norm in interpreting a rule of the Code of Criminal Procedure that exempted suspects of having committed a crime in circumstances that may preclude wrongfulness of being subjected to pre-trial detention. In the second decision (R 25/2018), written by CJ Semedo for the Court,[36] the CC dealt with the related matter of establishing whether the SC breached the constitutional clause of presumption of innocence and the guarantee of not being kept in pre-trial detention outside the temporal limits of the law when it twice extended its duration by appealing to the special complexity of the matter and ruled that the rights of the complainant were violated because the facts did not point to an objective complexity and because the reasoning of the SC, as far as it stressed that the maintenance of Mr. Teixeira in pre-trial detention was necessary because the matter was causing 'social alarm,' was incompatible with his right to freedom of the body and to the value of human dignity.

4. PR Referral for Ex-Ante 'Advice' on the Constitutionality of the Enabling Act to Review the General Commercial Companies Code (GCCC) and to Enact the Corporations Code (CorC) – Judicial Review

This referral dealt directly with the constitutional distribution of legislative powers between the National Assembly and the GR in the framework of an Enabling Law approved by the former granting powers to the latter to edict amendments to the GCCC and to enact a new CorC. This took place because the PR understood that the matter fell under the regime of concurrent legislative competence and thus the GR could approve legislation without that act. The Court's Advice (2/2018),[37] written by Justice Pina-Delgado, followed a different path, finding that the enabling act was not unconstitutional because the parameters inserted in it would inevitably lead to the approval of rules that limit the right to property, that incriminate conduct, and that establish administrative sanctions, all matters included in the set of competences of the National Assembly, though delegable by an enabling act.

5. Borges v. SC – Constitutional Complaint

[33] See also Judicial Review Systems in West Africa. A Comparative Analysis (IDEA, 2016).
[34] OJ, I-S, n. 28, 11.05.2018, 655-664.
[35] OJ, I-S, n. 25, 02.05.2018, 574-604.
[36] OJ, I-S, n. 88, Sup, 28.12.2018, 11-26.
[37] OJ, I-S, n. 44, 02.07.2018, 1141-1156.

Mr. Borges, after being arrested by the police, was submitted to pre-trial detention by a judge order and subsequently convicted and sentenced for drug-trafficking, arms possession and conspiracy by the trial court. He did not appeal his convictions on the first two counts, but he argued that when the district public prosecutor challenged all the items of the ruling on the grounds that the penalty was too light, Mr. Borges should have been notified by the judge. The fact is that the trial judge admitted the appeal but did not communicate this to Mr. Borges, who, for that reason, failed to present his defense at the SC, which subsequently ruled that even if that were the case it could not be acted upon because the plaintiff did not react in the three days established by the law and that the lack of notice was only a minor irregularity and not an insurmountable nullity that could be argued at any time until the end of the procedure. The CC in R 24/2018,[38] written by Justice Pina-Delgado with Justice Lima dissenting, disagreed, considering that the lack of notification was a grave breach of procedure and due to the right to contest accusations, of judicial defense and of due process, it had to be interpreted as constituting an unsurmountable nullity void of effects, and ordered the repetition of the procedure starting with the decision of admissibility by the trial judge and the notification of the suspect. In addition, the plaintiff also pleaded to be released because in his opinion he was kept in pre-trial detention for more than 30 months by the time he complained to the CC, challenging the interpretation of the SC that he had been convicted by a stable decision that was already res judicata, and concluding that he was no longer in pre-trial detention, but instead had already started to serve the criminal sentence. The CC adopted the understanding that considering the Constitution establishes a subjective right to the constitutional complaint, it is not possible to consider that a ruling of the SC, provided that it is still subject to an appeal to the CC, was a final decision for the purposes of ending status as a pre-trial detainee. Thus, the temporal limits attached to the status were applicable, meaning that the plaintiff had to be released pending re-trial of the district prosecutor's appeal because by that time the term for maintenance of a person in that condition had already been exceeded.

6. Hills v. SC – Constitutional Complaint

This case dealt specifically with privacy and data protection in the framework of criminal investigation, being filed by Mr. Hills, a Nigerian national resident in CV convicted of drug-trafficking, who alleged that the appeals court did not exclude evidence obtained in contravention of his rights to inviolability of home and protection of correspondence and communications. This occurred because the criminal police entered his house, accessed a mail package and read the contents of his cellphone without judicial warrant and without his voluntary consent. In R 27/2018,[39] written by Justice Pina-Delgado, the CC recognized a general right to privacy which in its reasoning is linked to a myriad of constitutional guarantees, concluding that the SC should have excluded the evidence obtained without proper judicial warrant in situations in which the criminal police could not authorize themselves to enter people's homes or to interfere with their correspondence, communications or personal data for purposes of investigation. Thus, it declared the breaches and granted relief by an injunction to exclude all evidence obtained by illegal means.

IV. LOOKING AHEAD

Certain negative reactions from ordinary court judges to those CC decisions on criminal matters have meant that next year could lead to tense situations between the two jurisdictions, similar to other countries where CCs can scrutinize the way the ordinary courts apply the law. At any rate, the CC will be busy with major constitutional challenges that were submitted, namely related to the constitutionality of certain provisions of the US-CV SOFA and of the Airport Security Fee Act.

Though uncertain, 2019 could also be the year of the approval of important constitutional or legislative acts, namely amendments to the Constitution and to the Electoral Code, and the enactment of the Regionalization Law as well as the election of two new substitute judges of the CC to replace the ones that left functions; of the reappointment of the Attorney General for another term in office or the replacement of the holder of the office by a new one.

V. FURTHER READING

José Pina-Delgado, 'O Direito Internacional Público no Direito Cabo-Verdiano' in Jorge Bacelar Gouveia and Francisco Pereira Coutinho (eds.), *O Direito Internacional Público nos Direitos de Língua Portuguesa* (CEDIS 2018), 81-176.

Edalina Sanches, *Party Systems in Young Democracies. Varieties of Institutionalization in Sub-Saharian Africa* (Routledge, 2018), chap. IV (CV).

[38] OJ, I-S, n. 88, 28.12.2018, 2132-2157.
[39] OJ, I-S, n. 11, 31.01.2019, 146-178.



Chile

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I. INTRODUCTION

Our previous 2016 and 2017 reports have shown examples that aim to identify and illustrate two trends that the Chilean Constitutional Court (*Tribunal Constitucional de Chile*—from now on, the 'CC') has developed. First, the CC has become a consequential body that can challenge existing legislative majorities by declaring the unconstitutionality of important legislative bills when the judges believe that those bills, or parts of them, violate the Constitution.[1] Our reports claimed that the critical judicial mechanism that the CC used to assert its review power against legislative majorities is, although not exclusively, the ex-ante judicial review mechanism. It is worth noticing that, in the Chilean constitutional system, the President can influence the Congress's legislative agenda, and the Congress can hardly enact any new piece of legislation without the President's consent. Thus, the CC typically uses the ex-ante judicial review against bills sponsored by the President, a fact that increases the public visibility of the decisions that declare the unconstitutionality of the bills using the ex-ante review procedure. An initial version of that power was introduced first by the 1970 amendment to the 1925 Constitution,[2] but its current version is the one implemented by the 1980 Constitution, which partly followed the French model.[3]

Our previous reports also briefly described a second CC trend: that the *inaplicabilidad* mechanism—an ex-post and concrete judicial review power the CC uses to declare that a specific ordinary court should not use certain legal provisions to solve contingent legal controversies—is triggering relevant litigation aimed at protecting fundamental rights, such as the right to due process and equal protection of the law.[4]

This 2018 report confirms and expands on the two trends stated in our previous 2016 and 2017 reports. As we will illustrate by examining a group of selected rulings, first, the CC has continued to assert its judicial review power in ex-ante procedures during legislative procedures. Second, the CC is consistently growing a significant forum for fundamental rights litigation through its ex-post judicial review power, partly due to the considerable number of *inaplicabilidad* cases that litigants and judges bring to the CC.

[1] Iván Aróstica, Sergio Verdugo and Nicolás Enteiche, 'Developments in Chilean Constitutional Law' in Richard Albert and others (eds), *2016 Global Review of Constitutional Law* (I·CONnect-Clough Center 2017); Iván Aróstica, Sergio Verdugo and Nicolás Enteiche, 'Chile: The State of Liberal Democracy' in Richard Albert and others (eds), *2017 Global Review of Constitutional Law* (I·CONnect-Clough Center 2018).

[2] On the first ex-ante judicial review power introduced in Chile, see Enrique Silva C., *El Tribunal Constitucional de Chile* (1971-1973), vol 38 (second edition (2008), Cuadernos del Tribunal Constitucional 1977); Sergio Verdugo, 'Birth and Decay of the Chilean Constitutional Tribunal (1970–1973). The Irony of a Wrong Electoral Prediction' (2017) 15 *International Journal of Constitutional Law* 469.

[3] Probably the most influential English-written work discussing the French model is the work by Alec Stone, 'The Birth and Development of Abstract Review: Constitutional Courts and Policymaking in Western Europe' (1990), 19 *Policy Studies Journal* 81; Alec Stone, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective* (Oxford University Press, 1992).

[4] See Aróstica, Verdugo and Enteiche, 'Developments in Chilean Constitutional Law' (n 1) 49; Aróstica, Verdugo and Enteiche, 'Chile: The State of Liberal Democracy' (n 1) 58.

The year 2018 has been particularly crucial for the *inaplicabilidad* because the number of *inaplicabilidad* legal actions has been drastically elevated. A search using the CC's online research engine shows that in 2018, 1663 new cases arrived, compared to 916 in 2017 and 357 in 2016.[5] *Inaplicabilidad* legal actions triggered 1618 cases in 2018 compared to 883 in 2017 and 299 in 2016. As we will explain later, part of the reason why the number of *inaplicabilidad* cases has escalated is related to the way the doctrinal positions of the CC in critical cases like the ones in *Weapons* and *Emilia*, discussed in our previous reports,[6] have invited more litigation on specific issues.

To be sure, the Chilean *inaplicabilidad* mechanism is probably not as relevant as the prominent Colombian *tutela* mechanism used by the Constitutional Court of that country (nor is it a similar legal action). [7] Compared to the Colombian tutela, the Chilean *inaplicabilidad* has procedural constraints that limit its doctrinal impact on the way the Courts of Appeals and the Supreme Court engage with fundamental rights litigation.[8] Despite that limitation, our examples illustrate the fact that the *inaplicabilidad* can still be a valuable device for rights protections, as it is frequently used to consolidate or reiterate specific fundamental rights interpretations.

We selected six decisions to illustrate the course of the two trends stated above during the year 2018. Those rulings solved high-profile cases that attracted the attention of the media. Three out of the six judgments were pronounced by the CC using its ex-ante judicial review power, and three decisions are *inaplicabilidad* cases. Since this report must be brief, we will not mention separate judicial opinions, ignoring dissents and concurrences.

The next section provides some context by briefly exploring the state of the Chilean political system and by describing some events that are relevant for the CC. Then, this report dedicates two sections to summarize and analyze the most high-profile cases of the year 2018. The first one focuses on the most important decisions released as a result of the ex-ante judicial review procedure, and the second one on the other decisions that we selected.

II. THE STATE OF CHILEAN DEMOCRACY AND THE CONSTITUTIONAL COURT

The Chilean democratic system seems to be in good shape. Elections are competitive; there is uncertainty on which political alliance will win the next elections; conflicts are generally solved by institutionalized means; politicians respect judicial rulings; and elections have been held on a regular and uninterrupted basis since democracy was reestablished in 1990. If we use Jack Balkin's definition of what constitutes a constitutional crisis,[9] drawing from Sanford Levinson's work, Chile is far removed from such a crisis. Although a group of politicians, including former President Michelle Bachelet, have promoted the enactment of a new constitution, Chilean institutions are respected and the debates on whether the Constitution should be reformed have been channelized through the current constitutional amending procedures. Even though Chilean political and judicial institutions seem to be strong, the violent events that have occurred in the southern Araucanía region, in the context of the conflict over indigenous demands, posit one of the key challenges that the country is currently discussing.

In March 2018, President Bachelet ended her presidential term. Sebastián Piñera, the leader of the center-right political alliance, became the new President of Chile and will finish his term in the year 2022. A few days before leaving the presidential office, former President Bachelet submitted a bill to the Congress proposing to replace the Chilean Constitution with an entirely new constitutional text.[10] That project offered many changes to the Constitution, including a proposal to redesign the CC. It is worth mentioning that the 2005 constitutional reform had established the current institutional model of the CC, which was pushed by the former Socialist President Ricardo Lagos and approved by a bipartisan political agreement. The Lagos reform had increased the number of judges, changed the judicial appointment mechanisms and expanded the powers of the CC. The 2005 Court is, indeed, a different court compared to the one established by the 1980 Constitution.

Today, some politicians promote reforms to the CC. President Piñera's platform—published in 2017—had suggested to reform the way CC judges are appointed. There seem to be ongoing political negotiations on whether the CC's powers should be modified and on whether the judicial appointment mechanisms should be reviewed, but no consensus has pushed for specific reforms yet (we are writing this report in early February of 2019). Changes to the regulation of the CC are a challenging political task, as they require a bipartisan agreement broad enough to achieve the legislative supermajorities needed to modify the Constitution's Chapter

[5] https://www.tribunalconstitucional.cl/buscador [accessed 2/11/2019].

[6] Aróstica, Verdugo and Enteiche, 'Developments in Chilean Constitutional Law' (n 1) 49; Aróstica, Verdugo and Enteiche, 'Chile: The State of Liberal Democracy' (n 1) 58.

[7] On the way the *tutela* cases have produced important doctrinal trends in Colombia, see generally Manuel José Cepeda Espinosa and David E Landau, *Colombian Constitutional Law: Leading Cases* (First edition, Oxford University Press, 2017).

[8] See some illustrative cases in the book by Gastón Gómez Bernales, *Las Sentencias Del Tribunal Constitucional y Sus Efectos Sobre La Jurisdicción Común* (Ediciones Universidad Diego Portales, 2013).

[9] Jack M Balkin, 'Constitutional Crisis and Constitutional Rot,' in Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press, 2018).

[10] See *Proyecto de reforma constitucional, iniciado en mensaje de S.E. la Presidenta de la República, para modificar la Constitución Política de la República,* Boletín N° 11.617-07.

VIII.[11] Moreover, no partisan coalition presently dominates the legislative agenda, as the current political composition of the Congress considers the existence of three political alliances and some independent legislators.

In the meantime, the CC has continued to use its powers. As we will show in later sections, in 2018 the CC reviewed some legislative bills that were originally sponsored by former President Bachelet, and other bills promoted by the current Piñera administration. Despite the importance of the ex-ante judicial review mechanism in evaluating legislative bills,[12] most of the CC's work focused on the *inaplicabilidad* cases.

The year 2018 was also important for the CC because of changes in its composition. Judge Carlos Carmona, who had been appointed to the CC by former President Bachelet during her first presidential term, ended his judicial term on April 9, and Marisol Peña, who had been nominated to the CC by the Supreme Court, completed her term on June 10. Both Judge Carmona and Judge Peña served their full nine-year judicial terms. Also, they both served as Chief Justices of the Court. In Chile, constitutional judges cannot be reappointed, and the Chief Justice is elected by her peers. Judge Peña was the first female Chief Justice to head the CC in its history. To replace Judge Carmona and Judge Peña, President Piñera appointed Miguel A. Fernández, and the Supreme Court nominated María Pía Silva, respectively. Both Judge Fernández and Judge Silva are constitutional law scholars that have lectured at the P. Universidad Católica de Chile.[13]

III. MAJOR CONSTITUTIONAL DEVELOPMENTS OF THE EX-ANTE JUDICIAL REVIEW POWER

1. The Controversy Over the New Powers of the Government's Tax Agency (STC 5540)

The CC reviewed parts of a legislative bill that aimed to modernize the institutional framework of the Chilean banking system and the Financial Market Commission. Among several amendments to existing associated regulations, the bill included provisions intended to empower the Chilean Tax Agency (in Spanish, the *Servicio de Impuestos Internos*, hereinafter, the 'SII'), which is the Chilean equivalent to the American Internal Revenue Service. The legal issue at stake was associated with the fact that the bill provided for expanding the SII powers over the taxpayers in different ways. The SII's new powers were supposed to be reviewed by the CC because they were considered to be 'organic laws,' as they somehow related to judicial matters. According to Article 77 of the Constitution, legal provisions regarding the organization or the powers of the judiciary are 'organic laws' and, therefore, they are supposed to be reviewed by the CC in the ex-ante judicial review procedure.

One of the rules that the CC declared unconstitutional consisted of a provision that aimed to allow the SII to require banks and other institutions to communicate payments and wire transfers from Chilean accounts to accounts located abroad or of incoming funds to the country from a foreign account that exceed US$10,000. This SII power, as stated by the bill, could be exercised without the need of obtaining previous judicial authorization.

According to the CC, the need for judicial authorization in these cases is constitutionally required by the due process clause (Article 19, No. 3, Par. 6 of the Constitution). The CC's doctrine states that the clause includes the fundamental right to access courts of law if an administrative agency is imposing an unfavorable decision against a private party. Once the SII has obtained the information, it is too late to repair the harm made to the taxpayer's rights. The CC established that 'the prior judicial authorization is constructed as a manifestation of due process since it denotes the existence of its elements: access to justice and the bilateral nature of the process. As a result of the absence of any of these elements, the legal provision under examination must be declared unconstitutional.' (our translation of c. 67 of the ruling).

This ruling is relevant at least because of three reasons. First, the CC expanded and deepened its understanding of the scope of the due process clause by confirming that these sorts of procedures need previous judicial authorization and that the legislative bodies must introduce this guarantee if they intend to empower an administrative agency in these cases. This decision connects with a broader doctrine that was previously outlined by the CC in earlier rulings, such as the *Dirección General de Aguas* case (STC 3958) that we examined in our 2017 report.[14] The new decision finds a new application for that doctrine while detailing it further. Second, the CC has consistently defended the powers of ordinary judges to review administrative

[11] According to Article 127 of the Chilean Constitution, the chapter regulating the CC (Chapter VIII) can only be modified if both chambers of Congress achieve a two-thirds majority. Also, the organic statute detailing the content of Chapter VIII and supplementing the Constitution on this matter requires a legislative supermajority vote. According to Article 92 of the Constitution, modifications to the CC's organic statute require the approval of four-sevenths of both chambers of Congress.

[12] We explained the reasons that justify the ex-ante judicial review mechanism, and described the way it operates, in our previous report. See Aróstica, Verdugo and Enteiche, 'Chile: The State of Liberal Democracy' (n 1) 55. Also, see Sergio Verdugo, 'Control Preventivo Obligatorio. Auge y Caída de La Toma de Razón Al Legislador' (2010), Año 8, No 1 Estudios Constitucionales 201; Felipe Meléndez Ávila, *El Control Preventivo En La Constitución Actual: El Temor Al Desborde En La Función Legislativa* (Editorial Jurídica de Chile, 2017).

[13] Another change in the CC's composition was the nomination of two substitute judges. We will refer to these two appointments in our 2019 report, as they were confirmed in January of that year.

[14] Aróstica, Verdugo and Enteiche, 'Chile: The State of Liberal Democracy' (n 1) 56.

actions in the past, while understanding that judicial intervention is many times required should state officers want to impair the activity of private citizens. This new ruling confirms and strengthens that approach.

The final reason why this ruling is important is that cases like this one are typically situated in a relevant and broader debate involving the scope of the executive branch's power to intervene or influence independent administrative agencies that possess regulatory powers and that are able to punish private citizens. The issue usually is not only to preserve judicial authority but to delineate the correct balance between the President's powers and the powers that these sorts of agencies can employ, and how to preserve their independence. As is commonly framed in Chilean legal academia, although the President's powers over these sorts of agencies are generally justified by the constitutional provision stating that the President is the state's chief (Article 24 of the Constitution), these institutions are also supposed to have a relevant degree of independence. Chilean scholars typically debate on what the right scope of the President's powers is, and on how to balance the need to protect the autonomy of these agencies with the President's constitutional obligations.[15]

2. Reviewing the Bill that Aimed to Modify the Consumer Protection Law Agency (STC 4012).[16]

The CC reviewed a legislative bill whose purpose was to strengthen the organizational structure of the administrative agency in charge of enforcing the Consumer Protection Law (in Spanish, the *Servicio Nacional del Consumidor*, hereinafter, the 'SERNAC'). The SERNAC aims to ensure compliance with consumer regulations and to promote and provide information on the rights and duties of the consumer. Among many modifications the bill sought to implement, legislators also aimed at transferring some jurisdictional powers to the SERNAC, which is why the CC understood that the bill included 'organic law' provisions and reviewed these new powers using the ex-ante review procedure—the explanation of the above case is also applicable in this case.

The judicial powers granted by the bill were related to the consumers' right to present and process consumer protection claims, and who could decide whether to file those claims directly to the SERNAC or the courts. The CC understood that the option to submit claims to the SERNAC involved an unconstitutional exercise of judicial powers by an administrative agency. The CC defined judicial power as an activity aimed at the solution of a conflict of legal relevance between interested parties and argued that the Constitution prevents those kinds of disputes from being solved by an agency such as SERNAC. For that reason, the CC further claimed that the related provisions included in the bill harmed the power of the judiciary by violating the judicial power clause included in Article 76 of the Constitution, and Article 19, No. 3 of the Constitution, Subsections 5 and 6. The CC also reasoned that the bill partly violated the separation of powers principle, and prevented the promulgation of the parts of the bill that infringed on the Constitution.

Among other relevant considerations made by the CC, the ruling stated that its decision is not necessarily analogous to other cases in which different agencies are empowered to punish private citizens (c. 39). The resolution also reaffirmed the 'principle of access to justice' of all those affected in matters related to Consumer Protection Law (c. 42). Finally, the CC declared the unconstitutionality of the SERNAC's power to enact regulations. The CC argued that those regulations could only be passed by legislators following the corresponding legislative decision-making process because, under Chilean constitutional law, all the regulations regarding fundamental rights should be made by the corresponding parliamentary procedure (c. 43).

The CC's decision triggered a relevant discussion among Chilean legal scholars, partly aimed at defining the boundaries among the powers of the judicial, executive and legislative branches of government, and it is critical for understanding the way parts of the separation of powers debates have taken place in Chile.

3. Reviewing the Legislative Bill Regulating the Gender Identity Statute (STC 5385)

The CC reviewed a bill intended to recognize and regulate the gender identity right. The bill aimed to adapt existing regulations to accommodate that right. Parts of the bill allowed people to change the registration of their gender in the records of the *Registro Civil*, an agency in charge of registering and providing certificates such as marital status documentation and birth certificates, among many others. That way, the bill tried to accommodate the legal identification officially provided by the state with the gender identity that each person possesses.

During the legislative debates, some legislators argued that parts of the gender identity bill were unconstitutional, using arguments such as the ones considering the types of 'family' that are protected by the Constitution (Article 1 of the Chilean Constitution protects the 'family'), and the scope of the equal protection clause (Article 19, Nº 2 of the Constitution). These legislative debates triggered a larger discussion that attracted the attention of the media, different civil society organizations, and even celebrities.

[15] On this debate, see, for example, the following papers: Nicolás Enteiche Rosales, 'Superintendencias: Una Necesaria Autonomía Constitucional' in Julio Alvear T. and Ignacio Covarrubias C. (eds), *Desafíos Constitucionales. Propiedad, Debido Proceso, Libertad Religiosa, Régimen Político y Administrativo* (Tirant lo Blanch, 2017); José Francisco García G. and Sergio Verdugo R., 'De las superintendencias a las agencias regulatorias independientes en Chile: Aspectos constitucionales y de diseño regulatorio' (2010) 22 *Actualidad Jurídica* 263; José Manuel Díaz de Valdés J., 'Anomalías Constitucionales de Las Superintendencias: Un Diagnóstico' (2010) 8 *Estudios Constitucionales* 249; Luis Cordero Vega and José Francisco García, 'Elementos para la Discusión sobre Agencias Independientes en Chile. El Caso de las Superintendencias' (2012), *Anuario de Derecho Público* 415.

[16] See a useful summary released by the CC of the CC decision in http://www.tribunalconstitucional.cl/wp-content/uploads/Comunicado-de-prensa.pdf [accessed 2/11/2019].

Parts of the bill connected to the powers that previous laws had given to Family Judges, so the CC understood that those parts were 'organic laws' and had a legal reason to review the bill. Nevertheless, the CC did not have the power to review all the parts of the bill, as the legislators that had argued that the bill violated the Constitution did not present a formal claim.

As a result, the CC only reviewed the parts of the bill that were associated with judicial powers. The CC declared that those parts did not violate the Constitution with a relatively brief ruling.

IV. OTHER RELEVANT CONSTITUTIONAL DEVELOPMENTS

This section summarizes three *inaplicabilidad* decisions. It is useful to keep in mind that, even though the *inaplicabilidad* rulings do not produce a binding precedent, as the challenged legal provisions remain legally valid and applicable to other cases, the *inaplicabilidad* decisions can still trigger a persuasive precedent able to push for relevant jurisprudential trends. If the CC's judicial majority can gather eight votes out of a total of ten judges, it can even eliminate the unconstitutional legal provision from the corresponding statute. The importance of the cases that we will briefly summarize in this section is that the first decision solved a first-impression case, and the other two rulings reversed previous judicial doctrines. All the cases involved litigation on fundamental rights issues.

1. The Optometrists' Case (STC 3519 and STC 3628)

The Chilean *Código Sanitario*, a statute regulating some issues related to healthcare, prohibits medical consultations or medical eye technicians from providing consultation inside establishments that sell eyeglasses (Article 126, Par. 2 of the *Código Sanitario*). The ban harmed the rights of such establishments and optometrists—healthcare professionals without a medical doctor degree—because of such prohibition. The CC received two petitions that asked the Court to declare the inapplicability of the prohibition and questioned whether there was a reasonable justification for such a ban. The CC decided that the prohibition of practicing a medical profession or medical technology in these cases, within such establishments, had no justification (c. 11), and that it violated Article 19, No. 2 of the Constitution, which prohibits public officials to establish arbitrary differences.

2. The Labor Code and Public Employees Case (STC 3853)

The Chilean Labor Code, which is the primary statute regulating the workers' and unions' labor rights, establishes that public employees are subject and can benefit from the provisions of the Code only when certain matters are 'not regulated by their respective statutes' (Article 1, Par. 3 of the Labor Code). That way, if a specialized norm regulates the specific matter concerning specific public employees, that norm—and not the Labor Code—should be applied. The Code also establishes that workers can file legal actions when their employers have infringed on their fundamental rights. This legal action is the procedural justification for specialized labor judges to decide whether firing an employee or other employer actions violate the workers' fundamental rights (Article 485 of the Labor Code).

San Miguel's local government had removed an employee who was subject to a specific regulation (Law No. 18.833, regulating the *Statute of Municipal Officials*), and that employee had petitioned a labor judge to declare that the removal was unjustified and that it violated her fundamental rights. The labor judge accepted the petition and used the Article 485 procedure to establish that the San Miguel local government should pay compensation to the employee. The San Miguel Court of Appeals had also ruled in favor of the employee. San Miguel's local government asked the CC to declare the inapplicability of Article 485 and argued that the specific regulation—and not the Labor Code—should control the case. In 2017, the CC had rejected a similar petition (STC 2926), but this new case provided an opportunity to revise the previous doctrine. The CC accepted the *inaplicabilidad* petition and argued that the specific law that applied to the San Miguel case was justified under a constitutional clause referring to the regulation of the public sector (Article 38, Par. 1 of the Constitution) and that a general statute for public employees already existed. As a result, the CC claimed that the Labor Code could only be applied if the specific regulation explicitly said so (c. 8) and that in the case in point there was no rule referring to the Labor Code. If a new piece of legislation wanted to extend the Labor Code rights to public employees, it should say so explicitly (c. 10-11).

3. The Public Procurement Cases (STC 3570 and STC 3702)

A rule of the statute regulating the procedure by which the state can purchase goods and services (the Public Procurement Law or, in Chile, the *Ley de Compras Públicas*) establishes that anyone who has been sentenced for anti-union practices or for violating the employees' human rights, or for bankruptcy crimes established by the Criminal Code, are not allowed to pact contracts with the state for a period of two years (Article 4, Par. 1). Two universities that had been sentenced under Article 4, the Pontificia Universidad Católica de Chile and the Universidad de Chile, presented petitions of *inaplicabilidad* to the CC. Among other arguments they made, both universities alleged that Article 4 did not guarantee a fair and rational procedure and violated the Constitution's due process clause.

In the past, the CC had decided that Article 4 did not violate the Constitution (STC 1968, STC 2133, STC 2722-2729), but the CC revised its doctrine and decided in favor of the petitioners. The CC claimed that Article 4 prohibition provides for a penalty that is automatically assigned, preventing a previous procedure that can allow businesses to defend themselves. Moreover, the employers were already punished by the labor law or the bankruptcy law, so Article 4 imposes a new penalty without a trial, violating the due

process clause (Article 19, No. 3, Par. 6 of the Constitution). Likewise, the CC claimed that the Article 4 prohibition does not allow differentiating situations that may, in fact, be different, violating the equal protection clause (Article 19, No. 2, of the Constitution).

V. LOOKING AHEAD

This report showed three key cases that exemplify how the ex-ante judicial review power has been used in high-profile cases. In them, the CC proved to be a consequential actor capable of influencing the legislative decision-making process, although in the last case the CC avoided declaring any rule as unconstitutional. We also briefly examined three *inaplicabilidad* decisions that illustrate how the CC is becoming a relevant forum for concrete judicial review litigation in cases concerning fundamental rights. To be sure, all the cases, even the ones decided through the ex-ante review procedure, involve a fundamental rights reasoning, such as equality and due process. But the ones of the *inaplicabilidad* petitions do not only include abstract reasoning on fundamental rights but also provide the CC the opportunity to decide controversies and impact the way ordinary judges in specific fields, such as Labor Law, solve specific legal conflicts.

Even though there is an ongoing debate on how the CC will be reformed, and when, the observed trends will probably continue to be deepened in 2019.



Colombia

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I. INTRODUCTION

The Colombian Constitutional Court faced four key questions in 2018. First, how to balance constitutional principles with the aims of transitional justice in the constitutional review of constitutional amendments, acts, and legislative decrees that implemented the peace agreement signed by the Colombian Government and the FARC Guerrillas. Second, how to achieve effective protection of social rights and the accomplishment of goals of the social state, in particular, under the circumstances of massive immigration of Venezuelans. Third, in a country in which mining products amount to more than half of the total exports, how to solve collisions arising between public participation, environmental rights, and rights of the indigenous peoples on the one hand, and rights and interests linked to mining on the other. Fourth, how to catalyze deliberative democracy, in particular, by means of the participation of citizens in abstract processes of constitutional review and concrete procedures of constitutional complaints (*tutela*). This report undertakes a critical analysis of the way the Constitutional Court approached those issues in the most relevant 2018 cases.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Transitional Constitutionalism

In November 2016, the Colombian Government and the FARC Guerrillas signed a peace agreement that put an end to one of the most long-lasting conflicts in the hemisphere. A challenge of the agreement was to secure the demobilization of former combatants and, at the same time, to guarantee justice, truth, reparation to victims, and non-repetition of the atrocities. The Constitutional Court has played a major role in solving the tensions between those goals, and in articulating the peace process with the structural principles of the 1991 Constitution. Since 2014, the Court has built an original corpus of transitional constitutionalism.

The peace agreement is a political commitment. Accordingly, Constitutional Amendment 1/2016 created a special fast-track procedure for legal implementation of the Agreement via constitutional amendments, acts, and legislative decrees. It also empowered the Constitutional Court with the competence to undertake an automatic abstract constitutional review of those norms. The Court reviewed most of them in 2018. They concern amnesties or reduced sentences in favor of former combatants, limitations on their political rights, the procedures for criminal justice under the Special Jurisdiction for Peace (a jurisdiction created for rendering accountable the participants in the conflict), the use of FARC assets for reparation to the victims, and the guarantees to political opposition which aim to strengthen deliberative democracy and create disincentives for the use of violence to pursue political ends. In the most relevant decisions, the Court infused flexibility into some standards of constitutional review for the sake of facilitating the transition.

2. Social State

In 2018, the Colombian Constitutional Court addressed three major issues regarding the achievement of goals of the social state. First, whether the Constitution grants social rights, or at least a fundamental right to humanitarian attention, to undocumented aliens. In the last few years, Colombia has been facing the largest migration crisis in its history. According to the Ministry of Foreign Affairs, over one million Venezuelans have crossed the border in the past three years. Most of them are still undocumented and endure circumstances of vulnerability. As a consequence, they have been requesting access to housing, health, education, and financial aid from the Colombian Government. This comes during a public budgetary deficit and severe infrastructure limitations. Thus, the Government has denied services demanded by the immigrants. As a response, numerous Venezuelans have filed constitutional complaints (*tutelas*). The Constitutional Court has acknowledged the financial limitations argued by the Government. However, it has also found that the principle of solidarity, which is at the heart of the concept of the social state, grounds the protection of some fundamental rights to undocumented aliens; above all, the right to receive humanitarian aid.

The second issue related to the right to equality of women. The Court reviewed the constitutionality of a section of Act 1819/2016 that imposed a levy on feminine hygiene products (Judgment C-117/2018). The Court declared the unconstitutionality of the provision at stake with the argument that the levy targeted irreplaceable goods of exclusive female use. Hence, it held that the measure was discriminatory against women. Moreover, it considered that it was particularly harmful to women and girls with low income or who were in a state of vulnerability.

The third matter concerned the challenge of choosing appropriate remedies for achieving the most effective realization of economic and social rights. That realization typically involves the design and implementation of public policies and the investment of financial resources. Both of them are traditionally subject of legislative and executive powers. In order to realize economic and social rights while respecting the separation of powers, the Court has begun to employ dialogical remedies involving a meaningful engagement between the claimants and the competent authorities for determining the most effective measure for the case at hand.

3. Public Participation, Environmental Rights, Indigenous People's Rights, and Mining Activities in Colombia

Due to its economic and social relevance, the Colombian Government has declared mining an activity of public interest. As a result, there has been an influx of mining projects all over the country. Stakeholders have stressed that, under conditions of legal certainty, this industry could generate annual revenue of $1.5 billion. However, since 2013 some communities have hosted popular consultations and voted against the development of mining projects in their territories. This has elicited the question of whether people are constitutionally empowered to ban mining activities by means of participatory mechanisms. In a landmark 2018 case, the Court ruled out this possibility.

In addition, Colombia is a party of the Convention ILO 169. According to Section 6, indigenous people—and other ethnic groups—hold a right to consultation concerning the development of projects that could directly impact their land. This right has also limited mining undertakings. Constitutional judges have suspended mining operations to ensure that consultation processes are carried out. Furthermore, indigenous people have filed *tutelas* for claiming compensation for environmental damages caused by mining activities. Within this context, in 2018 the Colombian Constitutional Court redefined the constitutional scope of the rights to public participation in environmental decision-making and to prior consultation regarding mining projects.

4. The Constitutional Court and Its Deliberative Endeavor

Deliberation matters remarkably for constitutional courts. It plays at least two core roles within these bodies. First, deliberation is a source of legitimacy, which alleviates the democratic deficit attributed to those constitutional courts. To this extent, constitutional courts are expected to engage in deliberation in order to achieve the best decision based on the best argument. Both usually emerge from a reason-giving process open to all the relevant stakeholders. Second, deliberation brings about public contestation. Rather than stating the last word about all constitutional issues, constitutional courts should play a dialogical role in the framework of contemporary constitutional democracies. To this concern, constitutional courts catalyze deliberation and action of public and private actors, and open a space in which civil society can render officials accountable.

During the last 5 years, the deliberative performance of the Colombian Constitutional Court has been outstanding. This is true regarding external deliberation, which implies the reason-giving engagement between the Court and external actors. Apart from the traditional *amicus curiae*, the Court has held public hearings in some of the most important cases. In them, the Court has used this device for involving the relevant stakeholders and igniting public deliberation on pressing constitutional issues, in the pre- and post-decisional phases. Between 2014 and 2018 (5 years), the Court held 24 public hearings, which is the same amount held by the Court between 1992 and 2013 (21 years). In particular, in 2017 and in 2018, the Court held 13 public hearings, which denotes a significant growth of this deliberative practice.

The Court held 6 public hearings in 2018: 3 pre-decisional and 3 post-decisional. The pre-decisional public hearings related to 3 of the most relevant cases brought to the Court that year, which concerned the tension between popular consultation and mining (A-138 of 2018), urban planning and brothel regulation (A-444 of 2018), and bilateral investment treaties (in particular, the treaty concluded between Colombia and France (A-707 of 2018). The post-decisional public hearings were about the 3 main structural cases in which the Court retained supervisory jurisdiction; that is to say, prisons (A-631 of 2018), forced displacement (A-634 of 2018), and public health (A-668 of 2018).

The 3 pre-decisional public hearings were intended to enable the Court to identify clearly what issue was at stake, to gather technical information, and to clarify the main arguments behind each case. The public hearing held by the Court in case A-138 of 2018 gathered public officials, mining actors, public officials from municipalities, and nongovernmental organizations to discuss whether local communities are constitutionally empowered, through participatory mechanisms, to ban mining projects from their territories. The rationale behind the public hearing in case A-444 of 2018 was to launch "a forum for civil society organizations to participate; in particular those which work on the issue of the rights of victims and survivors of sexual exploitation, with the aim that they are heard and taken into account." In the public hearing developed in case A-707 of 2018, the Court tackled the technical information behind customary bilateral investment treaty clauses such as most-favored nation, national treatment, indirect expropriation, and the very investor-state dispute settlement, among others. It is too early to determine whether and to what extent those public hearings enriched the final decisions in those cases.

The 3 post-decisional public hearings were sessions in which the Court followed up on the compliance to the remedies issued in the cases T-025 of 2004 (forced displacement) and T-760 of 2008 (public health) as well as T-338 of 2013 and T-762 of 2015 (prisons). In those follow-up hearings, the Court interacted with central and local public officials, as well as civil society organizations, for deliberating about the hurdles to comply with remedies issued in structural cases.

Up to 2018, the Court had held 34 follow-up public hearings related to forced displacement, 22 regarding public health, and 2 concerning prisons. The effectiveness of this strategy is an open question. The risks at stake are undisguisable. Rather than dialogical, it seems that those public hearings have become a sequence of monologues prepared by public authorities to submit before the Court. Rather than a catalyst of public contestation, the Court has assumed a role of general administrator of public policies related to forced displacement, public health, and prisons. Rather than being judicial, those public hearings have become a forum of political accountability, where administrative authorities come to the Court as mere "account renders." There is not reliable data on the benefits of those hearings over the effective protection of rights of victims of forced displacement, patients, and inmates.

III. CONSTITUTIONAL CASES

1. Transitional Constitutionalism

1.1. Judgment C-007/2018

Act 1820/2016 regulated the conditions to grant amnesties to former combatants. In decision C-007/2018, the Court reviewed the constitutionality of that statute and held that most of its provisions were compatible with the Constitution. To reach this conclusion, it distinguished two types of crimes. First, in the case of politically motivated crimes—as well as some other crimes connected to them—the Court ruled that granting amnesties or ceasing prosecution were reasonable measures to attain peace. Second, the Court reiterated that some international crimes—such as war crimes, crimes against humanity, and genocide, among others—cannot be fully pardoned, given that this would infringe on the rights of victims. Nevertheless, to strike a balance between peace and victims' rights, the Court recognized that those who committed those serious offenses can (under some conditions) receive alternative and reduced sanctions.

1.2. Judgment C-018/2018

In April 2018, by means of Judgment C-018/2018, the Constitutional Court upheld the "Opposition Statute." This is an act that grants relevant political rights to politicians who declare themselves as part of the opposition or as independent. Those rights include entitlements to state funds for political campaigns, and to special conditions to access the media. The Court acknowledged the importance of promoting the peaceful exercise of the function of political opposition within a constitutional democracy, and in the midst of the implementation of a peace agreement, a timeframe in which former guerrillas were becoming political agents. The Court upheld the declaration of political opposition by political parties as a fundamental right, protected by an administrative injunction and exceptionally by the judiciary. However, the Court declared unconstitutional extending such protection to the social movements with representation in the Parliament and local collegiate bodies, with the argument that the Colombian Constitution aims at strengthening the protection of institutionalized political parties. Moreover, the members of social movements engaging with political activities enjoy protection under the individual constitutional right to political participation.

1.3. Judgment C-071/2018

In July, the Constitutional Court upheld the majority of the provisions contained in Decree 903 of 2017, which regulates the destination of FARC assets (Judgment C-071 of 2018). In accordance with the judgment, all FARC's assets ought to be used exclusively for the reparations of the victims of the armed conflict. Also, acknowledging the importance of the victims' rights, the Court declared unconstitutional the possibility of using those assets to finance the reincorporation to civil society of former FARC members. Finally, the Court stated that due process should be granted in case *bona fide* third parties claim that their assets were included in the inventory of FARC assets without justification.

1.4. Judgment C-080/2018

Some months later, the Constitutional Court reviewed the constitutionality of a bill governing key aspects of the so-called Special Jurisdiction for Peace. The newly created Special Jurisdiction for Peace is a central piece in the apparatus designed to implement the peace agreement. It is empowered to determine the criminal liability and potential sanctions applicable to former combatants. In one of the most consequential decisions for the implementation of the peace agreement (Judgment C-080/2018), the Court endorsed the constitutionality of the bill. However, it also addressed and clarified certain

contested issues, and held that: (a) the application of amnesties or reduced sanctions is possible only if the perpetrators commit to the restitution of victims' rights; (b) the right to participate in government is allowed only for those former combatants who, at the outset of the proceedings, explicitly recognize their criminal responsibility and contribute to restoring victims' rights; (c) the extradition of former combatants who committed crimes before the peace agreement's signature is prohibited, while in other cases (i.e., crimes that occurred after its signature and certified as such by the Special Jurisdiction for Peace), the President and the Supreme Court must consider the state's duty to prosecute serious crimes and protect victims' rights before authorizing their extradition; and (d) noncombatants who were involved in the conflict may request to be tried by the Special Jurisdiction for Peace. This judgment elicited severe criticism concerning the intervention of the Court in the procedure for extradition, and the possibility that sexual offenders of minors might receive lenient criminal treatment under the Special Jurisdiction for Peace.

2. Social State

2.1. Judgment T-210/18

In Judgment T-210/18, the Court protected the right to health of two undocumented Venezuelans. The first was a single mother who had been diagnosed with cervical cancer in Venezuela. Initially, a hospital in Colombia provided her radiotherapy and chemotherapy. However, the hospital told her that since she did not have Colombian health insurance, they could not assist her anymore. The doctors gave her a medical order and warned her that she needed to continue with the treatment elsewhere. The second plaintiff was the mother of a two-year-old Venezuelan boy who suffered from a hernia. She requested medical attention for her son. She claimed to be in the process of regularizing their migration status. The hospital, however, denied surgery because they were not yet enrolled in the Colombian health system.

The Court ruled in favor of both plaintiffs. It argued that the principle of solidarity is a pillar of the Constitution. In virtue of that principle, the state must guarantee the minimum conditions of living to all human beings, especially to those who are vulnerable, regardless of their migration status.

2.2. Judgment T-027/18

In Judgment T-027/18, the Court decided a case regarding the protection of persons with disabilities and their right to public higher education. The petitioner stated that a public university denied her rights to education and equality by not adjusting its curriculum to her hearing disability. The University argued that its programs complied with inclusive education regulation, even by the employment of a sign language interpreter.

The Court experimented with methodology to balance the levels of realization of positive economic and social rights grounded on the principles of rationality and proportionality. When applying this methodology, the Court granted certain reasonable and proportional claims. Regarding other claims, even though the Court determined that the intended level of realization was unreasonable, it ordered the University to implement alternative measures to effectively guarantee the petitioner's right to access and remain in a higher education institute.

2.3. Judgment T-091/18

Following that trend, in Judgment T-091/18, the Court applied the above-mentioned proportionality methodology for economic and social rights to address an issue concerning education. In this case, the petitioners claimed that the Secretary of Education of *Caquetá* disavowed the rights to education and equality by not authorizing the opening of high school grades at the rural public school of *Salamina*. The Secretary argued that the number of students demanding secondary education in the school was not sufficient to open new grades, according to applicable legal criteria. The Secretary also mentioned that there were two alternative schools to guarantee the right to education of the students. The Court considered that there were multiple plausible and reasonable alternatives to protect the right of the plaintiffs. Thus, it ordered a dialogue be established between the petitioners and the authorities as an appropriate judicial remedy. For the Court's part, it had to determine the most appropriate alternative to guarantee the effective access of the petitioners to secondary education. The dialogue successfully led to the enrollment of most of the students in one of the schools available.

3. Public Participation, Environmental Rights, Indigenous People's Rights and Mining Activities in Colombia

3.1. SU-095/2018

In this judgment, the Court declared the unconstitutionality of the judicial decision that authorized the Municipality of Cumaral, Meta, to initiate a public consultation process to ask its citizens whether they wanted to allow mining activities in their territory. The petitioner, a mining company that had an effective mining right to exploitation, argued that the result from the public consultation implied in fact a veto to exercise legal mining activities.

The Court declared that, even though participation is a fundamental right (granted by Sections 40 and 79 of the Constitution), it ought to be exercised within its constitutional limits. According to the Court, the municipalities lack constitutional power to veto or annul the exercise of a national constitutional competence via public consultation. Issuing mining and oil regulations is an exclusive competence of the National Government. Nevertheless, the Court admonished the Congress to legislate on a participation mechanism that allows communities to participate on mining issues without granting them a veto power.

3.2 SU-123/2018

In this case, the petitioner was an indigenous community (Awa La Cabaña) that was acknowledged to be at risk of physical extermination due to the armed conflict and the fact that it had suffered massive dispossession of its lands. The petitioner claimed that the National Environmental Licensing Authority and two oil companies were bound to consult on a specific drilling project based on its direct impact on their rights to a healthy

environment and to access to and enjoyment of culture.

The Court unified its case law on prior consultation to the indigenous population. This decision set some rules regarding the application of relevant elements of prior consultation, for instance: *(i)* the notion of direct affectation; *(ii)* the scope of indigenous territory; *(iii)* the relations between prior consultation and environmental justice; and *(iv)* the right of indigenous peoples to be compensated with an ethnic perspective. As a result, the Court ruled in favor of the petitioner community. It determined that, in application of the above-mentioned criteria, and of the Ruggie Principles on Business and Human Rights, the state has a duty of diligence to ensure prior consultation given the impacts that drilling activity may have on the community's bio-cultural rights.

3.3 A-616/2018

In judgment T-733/2017, the Seventh Chamber of the Constitutional Court, comprised of 3 justices, decided a tutela presented by an indigenous community against *Cerro Matoso,* the largest nickel mine in Colombia. The petitioners claimed a violation of their right to prior consultation. The Chamber established a violation of the rights to prior consultation, health, and a healthy environment of the petitioners. Hence, the Court ordered the company to not only create a consulting process with the claimants but also: *(i)* to compensate for damages caused by the operation, including lost profit and non-pecuniary loss; *(ii)* to create a compensation fund with an ethnic perspective; and *(iii)* warned *Cerro Matoso* that non-compliance to these orders would empower the constitutional judge to halt the mining operation.

The company requested the Court to partially annul the decision because, in its opinion, it violated its right to due process. In this annulment instance, the plenary of the Court decided to annul orders *(i), (ii),* and *(iii)* on three grounds. First, the decision disavowed the constitutional precedent concerning the tutela as a remedy to protect fundamental rights and not to obtain reparations. Second, the decision did not motivate the need for the creation of an ethnic compensation fund. Third, order *(iii)* constituted a sanction not provided by the legal order. This infringed the due process of law of the defendant.

IV. LOOKING AHEAD

In 2019, the Constitutional Court will issue relevant decisions on whether bilateral investment treaties are according to the Constitution, whether the use of glyphosate for eradication of illicit drug fields is allowed under the right to a healthy environment, and whether traditional possessors of vacant lands should be constitutionally entitled to own them.

Moreover, the deliberative endeavor of the Court concerning public hearings will be fulfilling the expectations of positioning it in a better epistemic status to decide, and promoting public discussion on highly contested issues. However, the risks of misusing this deliberative device will undermine the credibility of the Court if the hearings do not upgrade the protection of fundamental rights, creating polarization and glossing over deficient government performance. A challenge of the Court for 2019 is rationalizing public hearings for achieving their aims. In particular, the Court should assess the efficiency of follow-up public hearings for purposes related to the exercise of supervisory jurisdiction in structural cases.

V. FURTHER READING

Vicente F. Benítez R., 'Judicial Review of Peace Amendments in Colombia: Towards Supraconstitutional Rules and Plurality Opinions?' *Int'l J. Const. L.* Blog, Oct. 31, 2017, at: http://www.iconnectblog.com/2017/10/judicial-review-of-peace-amendments-in-colombia-towards-supraconstitutional-rules-and-plurality-opinions

Carlos Bernal, 'Introduction to I-CONnect Symposium–Contemporary Discussions in Constitutional Law–Part II: The Paradox of the Transformative Role of the Colombian Constitutional Court,' *Int'l J. Const. L.* Blog, Oct. 31, 2018, at: http://www.iconnectblog.com/2018/11/introduction-to-i-connect-symposium-contemporary-discussions-in-constitutional-law-part-i-the-paradox-of-the-transformative-role-of-the-colombian-constitutional-court

Magdalena Correa Henao, 'I-CONnect Symposium–Contemporary Discussions in Constitutional Law–Part VIII: Popular Consultations Regarding Mining Projects in Colombia,' *Int'l J. Const. L.* Blog, Nov. 7, 2018, at: http://www.iconnectblog.com/2018/11/i-connect-symposium-contemporary-discussions-in-constitutional-law-part-viii-popular-consultations-regarding-mining-projects-in-colombia



Commonwealth Caribbean

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I. INTRODUCTION

In constitutional terms, 2018 was an eventful year for the region on a number of different levels. At the political level, the year began with the election of the first-ever female president in the Republic of Trinidad and Tobago, Madame Justice Paula-Mae Weekes, a former Court of Appeals judge in the Turks and Caicos. President Weekes, who had been nominated by the Prime Minister, Keith Rowley, and whose nomination was endorsed by the leader of the opposition, Kamla Persad-Bissessar, was indirectly elected by an electoral college comprised of all the members of the House of Representatives and the Senate. The election of President Weekes was followed shortly thereafter by the appointment of only the second-ever female governor general of Barbados, Dame Sandra Mason. In elections in May, Barbados also elected a new female prime minister, Mia Mottley, the leader of the Barbados Labour Party, which won all 30 of the available seats in the House of Representatives. The elections also resulted in the largest number of female members (six) being elected to Parliament. Though this was the first- ever clean sweep of an election in Barbados, clean sweeps are not uncommon in the region, and the year saw the Antigua Labour Party and the New National Party winning clean sweeps in elections in Antigua and Barbuda and Grenada, respectively. Elsewhere, the Government of St Vincent had to face down a vote of no-confidence, which it won by the narrowest of margins (8 to 7 votes) while the coalition Government, the APNU (Alliance for Change, in Guyana), narrowly lost a vote of no-confidence towards the end of the year when a Government backbencher, Charandass Persaud, crossed the floor of the House of Representatives.

At the level of constitutional reform, the citizens of Antigua and Barbuda and Grenada simultaneously voted in referendums to reject an amendment of their respective Constitutions to replace the Judicial Committee of the Privy Council (JCPC) with the Caribbean Court of Justice (CCJ). Meanwhile, in Trinidad and Tobago, a Joint Select Committee (JSC) composed of members of both houses of the Trinidad and Tobago Parliament has been reviewing a draft bill—the Constitution (Amendment) (Tobago Self-Government) Bill 2018—which provides for a decentralized system of government for Trinidad and Tobago.

Finally, at the juridical level, the High Court of Trinidad and Tobago ruled that laws that criminalise homosexuality are unconstitutional[1] while the CCJ, in two landmark judgments,[2] ruled that the law providing for a mandatory death penalty in Barbados and a law criminalising cross-dressing in Guyana are both unconstitutional. Also noteworthy was the announcement of the withdrawal by the Roman Catholic Church of its appeal against the decision of the High Court of Belize in *Caleb Orozco v Attorney General of Belize*[3] that section 53 of the Belizean Criminal Code, which criminalised homosexuality, was unconstitutional. With the withdrawal of the appellants it would appear

[1] Jason Jones v Attorney General Trinidad and Tobago, H.C.720/2017. CV.2017-00720 (unreported).

[2] Nervais v The Queen [2018], CCJ 19 (AJ), and McEwan et al v Attorney General Guyana [2018], CCJ 30 (AJ). Available at http://www.ccj.org/judgments-proceedings/appellate-jurisdiction-judgments

[3] In the Supreme Court of Belize, Claim No. 668 of 2010. Unreported but available at http://cnslibrary.com/wp-content/uploads/Belize-Court-of-Appeal-Judgment-Caleb-Orozco-v-AG-et-al.pdf. Last accessed 5 January 2019.

that homosexuality in Belize has effectively been decriminalised.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Since I have previously discussed the ongoing attempts across the region to replace the JCPC with the CCJ in my "2016 Year in Review," I will not discuss here the issues arising from the failed referendum attempts in October of 2018 to replace the JCPC with the CCJ in Antigua and Barbuda and Grenada. I will instead focus on efforts to redefine the relationship between Trinidad and its sister island, Tobago, and the passage of "The Constitution (Amendment) (Tobago Self-Government) Bill 2018" (hereinafter "the 2018 Bill").

Though relatively small, with a land mass of 116 square miles and a population of 60 000, the island of Tobago has been agitating for several decades for greater autonomy from its larger and wealthier sister island, Trinidad. The most recent manifestation of Tobago's desire for autonomy culminated in the 2018 Bill, which has been the subject of review by the JSC. Since there is not enough space within this short piece to comment on every detail of the 2018 Bill, I will instead highlight five of its main provisions.

The first is a proposed amendment to the preamble of the 1976 Constitution that would recognise the right of the people of Tobago to determine their political status and freely pursue their economic, social and cultural development.

The second is a new constitutional provision that would provide for the equal status of the two islands.

The third is the creation of a new Tobago Legislature consisting of the President of Trinidad and Tobago, a House of Assembly (comprising 15 *elected* members and four Councilors) and a People's House (a second chamber composed of 13 elected members). The Tobago Legislature would have power to make laws for the peace, order and good government of Tobago with respect to all matters except those listed in the Fourth Schedule of the Bill, which would be the exclusive responsibility of the central government. Those matters would include national security, foreign affairs, immigration and the appointment of the most senior public officials, which will continue to fall under the purview of the central government.

The fourth is the establishment of a Tobago Executive Council, comprising the Chief Secretary, a Deputy Chief Secretary and a number of other Secretaries appointed in accordance with the advice of the Chief Secretary from among members of the House of Assembly, which would have direction and control of the Tobago Island Government and which would answer to the Tobago Legislature.

Fifth, and finally, the President, when exercising his functions under the Constitution or any other law, must do so in accordance with (unless otherwise stated by the Constitution or any other such law) the advice of not only the Cabinet but also the Tobago Executive Council. In return, the Chief Secretary must keep the President informed concerning matters of the Tobago Island Government.

The system of government envisaged by the 2018 Bill may be described as "quasi-federal" and is akin to that of a constitutionally decentralized union. It is basically unitary in form, but incorporates a constitutionally protected subnational unit of government that has functional autonomy. There will thus be a regional government for Tobago, but not for Trinidad. This arrangement resembles the relationship between the Westminster Parliament in the UK and Scotland under the Scotland Act 1998 and gives rise to the problem of what has come to be known as "the West Lothian question," since the national Parliament must contain at least two MPs from Tobago. The West Lothian question refers to the anomaly caused by asymmetric devolution, in which devolved legislatures have law-making powers for some parts of the country, but the shared Parliament is also solely responsible for the government as a whole.[4] What, then, is to happen when the national Parliament votes on measures that affect Trinidad only? Is the intention that the two Tobagonian MPs will be excluded from voting on these issues? If so, this could be problematic, given that the Government presently has a narrow majority in the elected House (holding 23 of the 42 seats), which includes the two MPs from Tobago. If these two MPs were not allowed to vote on matters that affected Trinidad only, the Government would no longer have a majority when these matters were voted upon.

There is also the problem of lack of representation of Tobagonians in the upper House of the national Parliament, which comprises 31 senators appointed by the President: 16 on the recommendation of the Prime Minister; six on the recommendation of the Leader of the Opposition; and nine by the President in his discretion from outstanding persons from economic or social or community organizations and other major fields of endeavour. There is no specific requirement that this number should include senators who represent the interests of Tobago and the 2018 Bill makes no provision for this.

Finally, there is the larger question of Tobagonian influence on matters reserved to the central Government under the 2018 Bill, such as national security, foreign affairs, etc. While the 2018 Bill provides for mandatory quarterly meetings between the Chief Secretary and the Prime Minister and the Chief Secretary may be invited to "air" Tobagonian matters at cabinet meetings, this is at the discretion of the central Government. As Tobagonians become accustomed to a measure of self-government, will they be satisfied with being excluded from decision-making in relation to such matters as national security and foreign affairs? The current standoff between the Scottish Government and the UK Government regarding Brexit is illustrative of the kind of tensions that can arise from such an asymmetrical relationship.

The JSC was due to submit its report on the 2018 Bill to the national Parliament by 31

[4] Jason Jones v Attorney General Trinidad and Tobago, H.C.720/2017. CV.2017-00720 (unreported).

July, but the report has not yet been made publicly available. It is not, therefore, clear when, if ever, the Bill will be approved by Parliament. The 2018 Bill is supported by the current Prime Minister of Trinidad and Tobago, Keith Rowley, himself a Tobagonian native, but since it will entail amendments to a number of the most entrenched provisions of the Constitution it will need to be approved by three-quarters of members of the House of Assembly of Trinidad and Tobago and two-thirds of the Senate. This is a formidable hurdle, which perhaps explains why efforts to introduce greater autonomy for Tobago have been so protracted. Given that the incumbent Government is already over three years into the life of the current Parliament, there must be a concern that if the Bill is not passed within the next two years and Prime Minister Rowley, who has thus far championed the 2018 Bill, does not win the next election, the Bill will eventually fall by the wayside.

III. CONSTITUTIONAL CASES

Though it is of undoubted significance, the declaration of the High Court of Trinidad and Tobago in Jason Jones that laws which criminalise homosexuality are unconstitutional is currently the subject of an appeal to the JCPC. I will, therefore, instead focus in this section on two landmark judgments of the CCJ: *Nervais v The Queen and McEwan et al v AG Guyana.* I will first briefly explain the CCJ's approach in each case before proceeding to offer a critique of the CCJ's approach, which is common to both cases.

1. Nervais v The Queen

This case was concerned with the constitutionality of the mandatory death penalty in Barbados. This very issue had previously been considered by a nine-panel member of the JCPC in 2001 in *Boyce and Another v Attorney General Barbados*.[5] On that occasion, the JCPC had determined that the law-making provision for the mandatory death penalty (s2 Offences against the Person Act 1861), being a pre-existing law, was saved from constitutional challenge by the general savings clause to be found in s26 of the Barbados Constitution. This is because s26 provides that nothing contained in or done under a law enacted prior to the date of independence (being 30 November 1966) shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 of the Constitution (which list the rights and freedoms guaranteed by the Constitution). In other words, the effect of s26 is to immunise all pre-independence laws from challenge on the grounds that they violate any of the rights and freedoms listed in sections 12 to 23 of the Constitution. Accordingly, the JCPC refused to deploy the modifications clause contained in s4(1) of the Independence Order-in-Council, under which the Constitution was enacted, to modify the mandatory death penalty provided by s2 OAPA 1861 to bring it into conformity with the Constitution by substituting a discretionary for the mandatory death penalty.

The CCJ, however, took a quite different approach to this issue. Unlike the JCPC, the focus of the CCJ in Nervais was directed towards the question of the *enforceability* of a quite different provision of the Constitution, s11, which provides as follows:

> Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the individual rights and freedoms of others and for the public interest, to each and all of the following, namely:
> (a) Life, liberty and security of the person;
> (b) Protection for the privacy of his home and other property and from deprivation of property without compensation;
> (c) The protection of the law; and
> (d) Freedom of conscience, of expression and of assembly and association,
> The following provisions of this Chapter (ss12-23) shall have effect.

The answer to the question of whether s11 of the Constitution was separately enforceable was critical because, unlike the rights and freedoms guaranteed by sections 12 to 23 of the Constitution, s11 was not subject to the immunising effect of the general savings clause in s26. Previously, the JCPC had treated clauses like s11, which are common to constitutions throughout the region, as mere preambles to the rights set out in the chapter guaranteeing fundamental rights and freedoms. Thus, for example, in *Olivier v Buttigeig,* the JCPC observed of a similar provision found in the Constitution of Malta:

> It is to be noted that the section begins with the word "Whereas." Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow.[6]

Notwithstanding this precedent, Sir Dennis Byron, delivering judgment for the majority in *Nervais,* held that it would be irrational to attribute a meaning to the word "whereas" that would make s11 impotent, i.e., unenforceable. The fact that s11 was omitted from the savings provisions in s26 did not, in his view, mean that s11 was preambular only. Rather, "the view that better accords with the protection of fundamental rights is that the Court is not prevented from holding that existing laws may be inconsistent with the rights and freedoms set out in s11."[7]

Having decided that s11 was separately enforceable, the majority had little difficulty in finding that the protection of the law guaranteed by s11(c) included the right not to be subject to a mandatory death penalty. The

[5] [2004] UKPC 32.
[6] [1967] 1 AC 115, 128F.
[7] [39].

question then arose as to whether the Court had jurisdiction to grant a remedy for this violation. Though it was acknowledged that s11 is omitted from the redress clause contained in s24, which empowers the Court to remedy violations of the rights and freedoms guaranteed by the Constitution, this was not a reason in the majority's view to assume that the rights guaranteed by s11 were not separately enforceable. The duty of the Court was "to give effect to the interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms."[8] This meant deploying the modifications clause contained in s4(1) of the Independence Order-in-Council to modify the mandatory death penalty provided by s2 OAPA 1861 to bring it into conformity with the Constitution by substituting a discretionary for the mandatory death penalty.

In conclusion, Sir Dennis Byron, on behalf of the majority, declared that the Court was under a duty "to construe the conflicting provisions of the Constitution, with a view to harmonizing them, where possible, through interpretation, and under its inherent jurisdiction, to fashion a remedy that protects from breaches and vindicates those rights guaranteed by the Bill of Rights."[9]

2. McEwan et al v AG Guyana

This case was concerned with the constitutionality of a pre-independence law in Guyana, s153(1)(xlvii) of the Summary Jurisdiction (Offences) Act, which makes it a crime for a man to dress in female attire, or for a woman to dress in male attire, in a public place, for an improper purpose. Though the case raised a number of distinct constitutional issues concerning the compatibility of s153(1)(xlvii) with the right to equality and the right to freedom of expression, for present purposes the most important issue was the preliminary question of whether the CCJ was barred by the general savings law clause contained in Article 152 of the Constitution from testing the constitutionality of s153(1)(xlvii).

In answering this question, the CCJ, reiterating the views it had previously expressed in *Nervais*, declared:

> A Constitution must be read *as a whole.* Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution *in a manner faithful to its essence and its underlying spirit.* If one part of the Constitution appears to run up against an individual fundamental right, then, in interpreting the Constitution *as a whole,* courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest (emphasis added).

With this objective in mind, the CCJ identified "four broad and interlocking approaches" that it could take in order "to ameliorate the harsh consequences of the application of the saving laws clause." The first was to construe the savings law clause in Article 152 as narrowly as possible. The second was to apply the saving laws clause only to challenges to the stipulated human rights provisions, i.e., in Guyana, Articles 138 to 149. The third was to avoid an interpretation of domestic law that places a state in breach of its international obligations. The fourth was to apply the modifications clause contained in s7(1) of the Constitution Act to the relevant pre-independence law before attempting to apply the savings law clause.

Applying each of these approaches, in turn, the CCJ reached the following conclusions. Firstly, that the savings law clause did not apply to s153(1) because that provision had been amended so many times it was no longer an "existing law." Secondly, since the Constitution is based on the implied principle of the rule of law, s153 could be struck down not because it violated the fundamental rights and freedoms guaranteed by the Constitution but because it violated this implied principle on account of its vagueness. Attacking s153 in this way enabled the CCJ to circumvent the limits imposed on its jurisdiction by the savings law clause in Article 152. Thirdly, that there was an onus on the courts to interpret the savings law clause as narrowly as possible to place it in compliance with Guyana's obligations under the American Convention of Human Rights and the jurisprudence of the Inter-American Court of Human Rights, which had repudiated savings law clauses for denying the right to seek judicial protection against violations of guaranteed human rights. Fourthly, that the modification clause to be found in s7(1) of the Constitution Act, which brought the Constitution into force, must be read together with the savings law clause to bring pre-independence laws such as s153 into conformity with the rights guaranteed by the Constitution.

Having concluded that, for all of the above reasons, the Court should not be deterred by the savings law clause from testing the compatibility of s153 with the fundamental rights guaranteed by the Constitution, the CCJ then proceeded to find that s153 was incompatible with both the right to equality and the right to freedom of expression.

3. A critique of the CCJ's approach

As the CCJ declared in *Nervais*, the main purpose of establishing the CCJ was to promote the development of a "Caribbean" jurisprudence. What that might mean in practice has never been precisely defined, but in one of its earliest judgments,[10] *Attorney General Barbados v Joseph and Boyce,* the CCJ explained how it would go about developing its jurisprudence:

> [W]e shall naturally consider very *carefully and respectfully* opinions of final courts of other Commonwealth countries and particularly, judgments of the [JCPC] which determine the law for those Caribbean states that accept the [JCPC] as their final appellate court.[11]

[8] [39].

[9] [68].

[10] [2006] CCJ 1 (AJ). Available at http://www.caribbeancourtofjustice.org/judgments-proceedings.

[11] [7].

In *Nervais,* the CCJ added that the development of its jurisprudence would require "*evolution* and change in relation to the approach of decisions of the [JCPC]."[12] The CCJ's judgment in *Nervais* is, however, neither respectful nor evolutionary.

Sir Dennis Byron, for example, delivering judgment for the majority, castigates Lord Hoffman (who delivered judgment for the majority in *Boyce and Joseph*) as suffering from "the *imperial taint* of the view that what was done under the colonial regime cannot be struck down."[13] Sir Dennis Byron then proceeds to accuse Lord Hoffman of "undermining the concepts of independence and sovereignty,"[14] and ascribes to Lord Hoffman a view which the latter has never professed; namely, "the unacceptable idea that colonial law as applied to colonial subjects contained all the fundamental rights to which they were entitled."[15] There are, undoubtedly, principled objections to the majority judgment of the JCPC in *Boyce and Joseph* (see, for example, the dissenting judgment of Lord Bingham in that case), but this is simply *argumentum ad hominem.*

The argument that s11 of the Constitution of Barbados is separately enforceable is also far from evolutionary. There is simply no precedent for this argument in the jurisprudence of the JCPC. Instead, the majority in *Nervais* rely on an article by Tracy Robinson and Arif Bulkan,[16] which argues, controversially, that the JCPC has previously misconstrued such clauses. Notwithstanding the novelty of this proposition, there is no attempt to grapple with the omission of s11 from both s24 and s26. As Justice Anderson observed, in his dissent in *Nervais*:

> There is no explanation of how to reconcile a separate justiciability of s11 with the architecture of the constitutional provisions.

Similarly, the reliance by the CCJ in *Nervais* and *McEwan* on the modifications clause, which had been so emphatically condemned by Lord Hoffman in *Boyce and Joseph,* demands some explanation, but none is forthcoming. Lord Hoffman's approach is simply dismissed as being based on "mere conventional wisdom." The CCJ prefers instead to rely on the approach adopted by the JCPC to the modifications clause in the Constitution of The Bahamas in the later case of *Bowe (Junior) and Anor v The Queen,*[17] even though the terms of the appeal in *Bowe* were expressly framed so as to preclude re-argument of the points decided by the Board in *Boyce and Joseph.*

Because of the decisions in *Nervais* and *McEwan,* the CCJ now finds itself at odds with the jurisprudence of the JCPC. This is uncharted territory for all concerned. Given the size of the panel in *Boyce and Joseph,* it is difficult to conceive of the JCPC overruling that decision any time soon, but for so long as it does not there will be two parallel human rights systems in the region. On the one hand, the judges of those countries that subscribe to the CCJ's appellate jurisdiction will now be able to modify the entire body of pre-independence law to bring it into conformity with the Constitution. On the other hand, the judges of countries that continue to subscribe to the JCPC will remain bound to give effect to pre-independence law even where it violates the rights and freedoms guaranteed by the Constitution. In light of the decisions of the voters in the two most recent referendums in Antigua and Grenada, in 2018, to reject a proposal to replace the JCPC with the CCJ, and in light of the political deadlock in Jamaica and Trinidad and Tobago over the same question,[18] it seems likely that this bifurcation in the jurisprudence of the CCJ and JCPC will continue for the foreseeable future.

IV. LOOKING AHEAD

As a result of the no-confidence vote in Guyana, elections will be held a year earlier than expected unless the Government wins its constitutional challenge to the no-confidence vote, which is currently pending before the Supreme Court.

The Government of Trinidad and Tobago has also announced that it intends to appeal to the JCPC against the decision of the High Court in *Jason Jones.* This will be the first time that the JCPC will have an opportunity to rule on the constitutionality of laws criminalising homosexuality, which are pervasive across the region. Justifying the decision to appeal, Trinidad's Attorney General, Faris Al-Rawi, argued that "if you leave this matter simply to the High Court judgment level you may run the risk of another High Court judge with a contradictory point of view. The Government's role, therefore, is important in appeal (sic) so that law ought to be settled."[19]

[12] [65].

[13] [67].

[14] [67].

[15] [67].

[16] 'Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and the Caribbean Bill of Rights,' MLR 2017, Vol. 80, No.3, 380.

[17] [2006], UKPC 10.

[18] See D. O'Brien, 'The end of the Caribbean Court of Justice? On failed constitutional referendums in Grenada, and Antigua and Barbuda.' Available at http://constitutionnet.org/news/end-caribbean-court-justice-failed-constitutional-referendums-grenada-and-antigua-and-barbuda

[19] Rachel Espinet, 'Trinidad and Tobago sodomy law struck down,' Washington Blade, April 30 2018. Available at https://www.washingtonblade.com/2018/04/13/trinidad-tobago-sodomy-law-struck/



Croatia

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I. INTRODUCTION

This review presents key events in the constitutional order of the Republic of Croatia that took place in 2018. The Freedom House "Freedom in the World 2018 Report" regards Croatia as a free country and rates it 1.5 / 7 ("1=Most Free, 7=Least Free").[1] Political rights protection is rated 1/7 and civil liberties 2/7. In this light, nothing changed with respect to 2017. The electoral process is awarded the highest ratings, which is supplemented by the assertion that the head of government was elected in a free and fair election, as were the national legislative representatives. The electoral laws are given the same ratings and deemed as being impartially implemented by "relevant election management bodies".

In 2018, the Constitutional Court received 4,868 cases, most of which belonging to two categories: 162 cases referred to procedures for assessment of the compliance of laws with the Constitution, and 4,514 cases related to proceedings initiated following a constitutional complaint for the protection of human rights and fundamental freedoms guaranteed by the Constitution.[2] In the same year, the Constitutional Court resolved 4,875 cases, out of which 278 referred to procedures for assessment of the compliance of laws with the Constitution and 4,396 to proceedings initiated following a constitutional complaint aimed at human rights and fundamental freedoms protection.[3] In regards to the structure of the cases received from the establishment of the Court in 1991 to 31 December 2018, 93,211 cases (87%) relate to constitutional complaints and 12,864 cases to constitutional and legality review.[4] In 2018, the main issues dealt with by the Constitutional Court involved popular initiatives for constitutional amendment and the proper role of the state in country economics.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

At this point, the issue of a citizen-initiated referendum needs to be touched upon. In 2018, two civil initiatives collected a rather large number of citizens' signatures to make the Croatian Parliament call a constitutional referendum. One of them was aimed at the amendment of the Croatian electoral system concerning parliamentary election and the other one to transferring the right to make the final decision on entering into international treaties to the citizens. As part of its competencies referring to constitutionality and legality review, the Constitutional Court had the key role in resolving the procedural issues relating to referendum implementation since the Referendum and Other Forms of Personal Participation in the Exercise of State Power and the Local and Regional Self-government

[1] Freedom in the world 2018. Croatia. <https://freedomhouse.org/report/freedom-world/2018/croatia> accessed 30 January 2019. All the translations from Croatian into English are mine unless noted otherwise.

[2] Pregled primljenih predmeta u razdoblju od 1990. do 31.12. 2019. https://www.usud.hr/sites/default/files/dokumenti/Pregled_primljenih_predmeta_u_razdoblju_od_1990._do_31.12.2018.pdf > accessed 30 January 2019.

[3] Pregled riješenih predmeta u razdoblju od 1990 do 31. 12. 2018. <https://www.usud.hr/sites/default/files/dokumenti/Pregled_rijesenih_predmeta_u_razdoblju_od_1990._do_31.12.2018.pdf> accessed 30 January 2019.

[4] Constitutional Court of the Republic of Croatia. Statistics. <https://www.usud.hr/hr/statistika> accessed 30 January 2019.

Act (hereinafter: Referendum Act)[5] does not regulate all relevant issues.

The text below offers a brief overview of the constitutional provisions on referenda.[6] The first Croatian Constitution,[7] adopted in December 1990, envisaged only facultative referenda.[8] Article 87, Paragraph 1 stipulated that the Croatian Parliament (at that time, the Croatian Parliament was a bicameral body and the Chamber of Representatives exercised this power) is entitled to "call a referendum on proposals to amend the Constitution, a bill or any such other issue as may fall within its purview". The Croatian president may also call a referendum on a Government's proposal, but such an initiative shall include a countersignature of the prime minister and revolve around "a proposal to amend the Constitution or any such other issue as he/she may deem to be of importance to the independence, integrity and existence of the Republic of Croatia" (Article 87, Paragraph 2).

A referendum is valid if "the majority of all registered voters in the Republic of Croatia" turn up to vote. A referendum decision shall be made by the majority of the votes cast at a referendum (Article 87, Paragraph 3). Such a decision is binding for the Government (Article 87, Paragraph 4). It should be stressed that neither the Croatian president nor the Croatian Parliament has ever exercised their constitutional powers and called a referendum for constitutional amendment.[9] The amendment of the Croatian Constitution of 9 November 2000 provided the citizens with a pure novelty called "popular constitutional initiative".[10] This is the "most radical instrument", which empowers citizens to shape constitutional provisions independently.[11] Article 87 was supplemented with Paragraph 3, which reads as follows:

> "The Croatian Parliament shall call referenda on the issues specified in Paragraphs (1) and (2) of this Article in accordance with law when so requested by ten percent of the total electorate of the Republic of Croatia".

The first ten years following the above amendment of the Constitution did not see the application of that instrument. It was the year 2010 when the instrument became "a high priority political and legal issue".[12] Not long before the Croatian accession to the European Union, it came to a significant change relating to the conditions for referendum organization.[13] Article 87 (now Article 86) of the Constitution faced a major change in its Paragraph 4, which does not require "a majority turnout any more" for the referendum to be legally binding but sets forth that the respective decision shall be made by the simple majority of the votes cast.

The subsequent period brought out various civil initiatives and their goals. The only successful civil initiative was called "In the Name of the Family" (*U ime obitelji*). That initiative was supported by the Catholic Church when it promoted the organization of a referendum for incorporation of the definition of marriage as a union of a man and a woman into the Constitution, aiming to prevent legalisation of same-sex marriage in the Croatian Parliament.[14] The initiative resulted in the amendment of Article 62 of the Constitution.[15]

Other civil initiatives were not so successful, as highlighted by Ana Horvat Vuković, mostly because they did not succeed in collecting the number of signatures required for calling a referendum, or because the Constitutional Court declared their referendum questions substantially unconstitutional.[16] However, civil initiatives have disclosed some flaws in Croatia's referendum system, from procedural issues to issues relating to substantial compliance of referendum questions with the Constitution.[17] The Constitutional Court has indicated those issues in a number of its cases.[18] All those problems culminated in 2018 when two civil initiatives, "The People Decide" (*Narod odlučuje*) and "Truth about the Istanbul Convention" *(Istina o Istanbulskoj*), managed to collect a vast number of signatures.

Civil initiative "The People Decide" required a comprehensive electoral reform.[19] It aimed to amend Article 72 of the Constitution significantly. First, the reduction of the number of total deputies was required. In compliance with the current formulation of Article 72 of the Constitution, "the Croatian Parliament shall have no less than 100 and not more than

[5] "Official Gazette" no. 33/96, 92/01, 44/06, 58/06, 69/07, 38/09, 100/16, 73/17.

[6] This brief review heavily relied on Robert Podolnjak's text: "Abolishing All Mechanisms for Fixing Elections": The Citizens' Initiative to Change the Electoral System of Croatia (2015), 52 *Croatian Political Science Review* 104-106.

[7] "Official Gazette" no. 56/1990.
English translation: <http://www.sabor.hr/sites/default/files/uploads/inline-files/CONSTITUTION_CROATIA.pdf> accessed 23 January 2019.

[8, 9, 10, 11] Podolnjak (n. 6), 105.

[12] Ana Horvat Vuković, "Ustavni sud Republike Hrvatske i referendumi narodne inicijative 2013.-2015.: analiza i prijedlozi" ("Constitutional Court of the Republic of Croatia and Citizen-Initiated Referenda in the 2013-2015 Period: Analysis and Proposals") (2016), 37 Zb. Prav. fak. Sveuč. Rij. 805, 806.

[13] "Official Gazette" no. 71/2010.

[14] For more details, see Podolnjak (n. 6), 105.

[15] "Official Gazette" no. 5/2014.

[16] Horvat Vuković (n. 12), 806.

[17] Ana Horvat Vuković, "U ime Ustava" – materijalne granice promjene ustava ("In the Name of the Constitution – Substantive Limits of Constitutional Change") (2015), 65 Zbornik PFZ 481, 483.

[18] For example, Decision U-VIIR-4696/2010 from 20 October 2010 ("Official Gazette" no. 119/10).

[19] Judging by its goal, this initiative can be said to have succeeded the "In the Name of the Family" initiative that tried to launch an electoral reform in October 2014. It almost repeated the success of the referendum on the incorporation of the definition of marriage into the Croatian Constitution since it gathered 380,649 out of the required 404,252 signatures (Point II of the decision) quoted according to Horvat Vuković (n. 12), 806, note 4. See also Podolnjak (n. 6), 103.

160 deputies". The respective referendum question suggested that there shall be no more than 120 deputies. The initiative also called for a reduction in the number of representatives of national minorities from eight, as prescribed by the current electoral legislation, to six.[20] Furthermore, it demanded preference voting for election of candidates to the Croatian Parliament, decrease of the electoral threshold from 5% to 4% of valid ballots, a new manner of defining electoral constituencies, introduction of postal and electronic voting, and limited capacity for entering into political alliances.[21] Besides the reduction in their total number, representatives of national minorities would be prevented from casting a vote of confidence and deciding on the state budget. That was the second question proposed by this civil initiative, and its goal was to supplement the Constitution with Article 72a.

Not far from the truth is Robert Podolnjak's assertion that the most radical item of the proposed electoral reform was the constitutionalization of the electoral system. Its fundamental principles, which are currently only prescribed by the law, would have been incorporated into the Constitution.[22] The goals of this civil initiative were directed towards the so-called electoral engineering of big political parties, which benefit from such a system at the detriment of citizens and therefore are not interested in system amendment.[23] As detected by Podolnjak, a large share of Croatian citizens feel that the electoral system is, although being given high ratings by foreign observers, such as in the "Freedom House" report, unfair and partial.[24]

A civil initiative called "Truth about the Istanbul Convention" was engaged in gathering voters' signatures for denunciation of the Council of Europe Convention on preventing and combating violence against women and domestic violence (hereinafter: Istanbul Convention). [25] Apart from the issue of denunciation of Istanbul Convention, this civil initiate also proclaimed amendment of the Croatian Constitution in a way that its Article 133 should be supplemented with a paragraph which would read as follows: "The Croatian Parliament shall decide on denunciation of international treaties subject to ratification thereof or withdrawal from international organizations and alliances with the same majority as the one required for ratification of international treaties and assignment of powers to international organizations or alliances. Such issues may be subject to a national referendum". [26]

Both initiatives were collecting signatures from 13 to 27 May 2018 and afterwards expressed their doubts about the action of the bodies in charge of referendum implementation due to a lack of regulation of the subject matter, and consequently submitted their applications to the Constitutional Court.

III. CONSTITUTIONAL CASES

Ruling No. U-VIIR-3592/2018 of 18 December 2018 and Ruling No. U-VIIR-3260/2018 of 18 December 2018 – review of the constitutionality and legality of a national referendum

After members of the "The People Decide" civil initiative had submitted the collected signatures calling for a referendum to the Croatian Parliament, the Parliament then requested the government to verify the collected signatures or, in other words, to check whether the signatures were collected in compliance with Article 8c of the Referendum Act. In its conclusion of 2 August 2018, the Government assigned the Ministry of Public Administration to coordinate activities related to checking the number of collected signatures and their validity. The Ministry forwarded the task to the Information Systems and Information Technologies Support Agency LLC - Apis IT LLC (p. 2).

On 3 August 2018, the initiative submitted to the Ministry of Public Administration a request for participation in the procedure for signature verification, adding that it, as the organizer, represents an interested party and thus should be enabled to participate in the procedure (p. 3). The request was rejected, and the initiative submitted a constitutional complaint to the Constitutional Court on 3 October 2018. The applicant required the Constitutional Court to abolish the conclusions of the Croatian Parliament and Government and order the Parliament to call a referendum and, "subsidiarily", order the Government, Ministry of Public Administration and Ministry of Interior to permit participation of initiative representatives in the signature verification procedure (p. 1.1).

The applicant's objections (p. 4-4.2) can be summed up in the following way. The applicant held that its participation in the signature verification procedure was "necessary... due to the protection of a public interest and particularly the elimination of a doubt about the regularity and transparency of the procedure". The Ministry of Public Administration violated the applicant's right to a response to the submitted request for participation in the above procedure. The Government did not provide an answer, and the Ministry of Public Administration gave it in an improper form, a form different from that of an administrative act, so the applicant was not able to file a legal remedy and hence, its constitutional right to an effective legal remedy laid down in Article 18 of the Constitution had been violated.

[20] Article 16, Paragraph 2 of the Act on the Election of Representatives to the Croatian National Parliament, consolidated text, "Official Gazette" no. 116/99, 109/00, 53/03, 69/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 120/11, 19/15, 104/15.

[21] "The People Decide" <https://narododlucuje.hr/> accessed 11 February 2019.

[22] Podolnjak provided the assertion within the context of the "The People Decide" civil initiative, but it bears relevance for both initiatives for their similarity. Podolnjak (n. 6), 103-104

[23] Ibid 103.

[24] Ibid 104.

[25] "Official Gazette – International Treaties", no. 3/18.

[26] "Truth about the Istanbul Convention" <http://istinaoistanbulskoj.info/> accessed 11 February 2019.

Moreover, the applicant believed that neither the Constitution nor the Referendum Act sets out either power or obligation of the Croatian Parliament to entrust the Government with the task of verifying the number of signatures and their authenticity. Since such a decision is ill-founded, it can be deemed as arbitrary action, and as such, it is contrary to Article 19 of the Constitution.

On 18 December 2018, the Constitutional Court delivered Ruling No. U-VIIR-3592/2018 on the dismissal of the constitutional complaint of the "The People Decide" civil initiative. It held that the conclusions of the Government and the Parliament were not acts governed by Article 62, Paragraph 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: Constitutional Act)[27] since they were not aimed at deciding on the constitutional rights of the applicant and thus cannot be subject to contestation before the Constitutional Court (p. 7. 1). On the contrary, those acts were aimed at defining the obligations of the Government and the Ministry of Public Administration.

The "Truth about the Istanbul Convention" civil initiative had similar remarks to the action of the government bodies in charge of national referendum implementation and consequently submitted a petition to the Constitutional Court on 4 September 2018. The petition had the form of a constitutional complaint and was directed towards the "statement" of the Ministry of Public Administration, in which the initiative's request for participation in the procedure for verification of the signatures collected to initiate a referendum on the denunciation of the Istanbul Convention was declined (p. 2).

The applicant claimed that the Referendum Act does not stipulate the manner of conducting the signature verification procedure, and therefore there were no obstacles to the participation of initiative representatives therein. The applicant added that the procedure should be subject to general principles applied in electoral activities and advocated for an analogous application of the Act on the Election of Representatives to the Croatian National Parliament (p. 3.1; 4.1).[28] Furthermore, the applicant expressed its doubt about the "transparency and objectivity of the process" since the Government and Ministry of Public Administration had criticized the referendum questions on several occasions. A three-month delay in the initiation of the signature verification procedure was considered "unfair action of the authorities" (p. 3. 1).

The Constitutional Court established that the applicant complained about the action of the authorities after she had already submitted an application calling for a referendum to the Croatian Parliament, and added that due to its content, the petition was more of an application for review of the constitutionality and legality of national referendum implementation than a constitutional complaint (p. 3).

The Ruling elaborated on the Court's powers relating to review of the constitutionality and legality of the referendum process and referred to the relevant case law (p. 5-6), highlighting the criteria for conducting a judicial review of the national referendum, stated in Article 96 of the Constitutional Act (p. 7). The Court noticed that the applicant based its claims on "general allegations" of violation of the democratic procedure, "ultimately reduced to a lack of competences of the legislative and executive bodies for signature verification" (p. 9).

After examining the above facts, the Constitutional Court concluded that the applicant did not provide "factually substantiated, clear and convincing reasons which would impose activation of the powers vested by Article 96 of the Constitutional Act or reasons indicating that the action of the Government and its Ministry of Public Administration was of such a nature that it would represent a severe breach of democratic procedure rules or factual abolishment of the civil rights relating to the decision-making process at a referendum". (p. 12). The Constitutional Court emphasized the importance of the principle of minimum confidence in the authorities competent for national referendum implementation based on the Constitution.

In the end, it should be noted that although neither initiative has succeeded in collecting the required number of signatures, they were very close to achieving that. In its decisions, the Constitutional Court discussed procedural issues and if the initiatives had collected the required number of signatures, their content would have been probably challenged in terms of its compliance with the Constitution, particularly the part relating to the reduction of national minority rights. According to the Ministry's report, the "Truth about the Istanbul Convention" civil initiative managed to collect 345,942 valid signatures while the "The People Decide" civil initiative collected 371,450 valid signatures for the first question relating to the amendment of Article 72 of the Constitution of the Republic of Croatia and 367,169 valid signatures for the second question referring to the supplement of the Croatian Constitution with Article 72a.[29] In order to call a referendum, 374,740 valid signatures were required.[30]

Ruling of the Constitutional Court of the Republic of Croatia no. U-I-1694/2017 and others of 2 May 2018 (Lex Agrokor) – the procedure for assessment of the conformity of an act with the Constitution

In early 2017, the Agrokor Group, which included over 70 legal entities, was facing a major liquidity and solvency crisis. The rea-

[27] The Constitutional Act on the Constitutional Court of the Republic of Croatia, consolidated text, "Official Gazette" no. 99/99, 29/02, 49/02.

[28] "Official Gazette" no. 116/99, 109/00, 53/03, 167/03, 44/06, 19/07, 20/09, 145/10, 24/11, 93/11, 19/15, 104/15.

[29] Report on the Completed Signature Number Check, Verification of Signature Authenticity and Lawfulness of the Signature Collection Method, relating to the "The People Decide" civil initiative's application for calling a referendum on amendment of Aricle 72 of the Croatian Constitution and on its supplementation with Article 72a and to the "Truth about the Istanbul Convention" civil initiative. <https://uprava.gov.hr/UserDocsImages/Referendum/Izvje%C5%A1%C4%87e%20Povjerenstva%20o%20provjeri%20broja%20i%20vjerodostojnosti%20potpisa%20bira%C4%8Da%20iz%20zahtjeva%20za%20raspisivanje%20dr%C5%BEavnog%20referenduma%20gra%C4%91anskih%20inicijativa%20%E2%80%9ENarod%20odlu%C4%8Duje%E2%80%9C%20i%20%E2%80%9EIstina%20o%20Istanbulskoj%E2%80%9C.pdf> accessed 29 January 2018

son why its survival was a serious issue for the Government and the wider public was the fact that the concern had over 56,000 employees, which makes 4.78% of the total number of people employed by legal entities in the Republic of Croatia (p. 26. 2). The fear that the crisis in this massive company would spill over to the entirety of the Croatian economy was the direct cause for the enactment of the Act on Emergency Administration in Companies of Systemic Importance to the Republic of Croatia (dubbed by the media as Lex Agrokor).[31]

In the Draft Act, sent to the Croatian Parliament on 31 March 2017, the Government explained the reasons for its enactment as follows: "(…) because the existing solutions from the Bankruptcy Act ("Official Gazette" no. 71/15 and 104/17) and the Act on Financial Operations and the Pre-Bankruptcy Settlement ("Official Gazette" no. 108/12, 144/12, 81/13, 112/13, 71/15, and 78/15) have not proven to be sufficiently efficient in managing the risks that affect the stability of the Croatian economy in circumstances of deep financial difficulties for companies with systemic importance for the Republic of Croatia" (p. 13). The systemic importance of these companies, according to the Draft Act, "results from their size regarding the number of employees, their business relationships with other business entities within the economy, the distribution of their business activities in the entire territory of the Republic of Croatia, and/or their dominant economic position in one part of the territory of the Republic of Croatia..." (p. 13).
Since 1991, the year in which the Republic of Croatia gained its independence, this has been the first case of a downfall of a "too-big-to-fail" legal entity.[32] The subject of this Act has been determined as "the measure of extraordinary administration for companies of systemic importance". The specific procedure set out in this Act "is urgent, and during the period of emergency receivership it is forbidden to initiate either the liquidation of the debtor's property or pre-bankruptcy and bankruptcy procedures."[33] The parties for the management of extraordinary administration procedures are "the court, emergency commissioner, advisory body and council of creditors" (Article 9). The court appoints the commissioner proposed by the Government (Article 11). The emergency commissioner has the rights and obligations of "the bankruptcy trustee"[34] (Article 12).

An application for assessment of the constitutional merits of this Act, or some of its provisions, has been submitted by 12 petitioners. There were numerous objections by the applicants, and the Ruling of the Constitutional Court alone is 184 pages long. The Constitutional Court has divided the objections into two groups. The first group includes issues related to the lack of formal conformity between the Act and the Constitution. The most important objection emphasized by the applicants regarding this is that the Act has not been enacted by following the regular legislative procedure, moreover, it has not even been scheduled in the annual plan of legislative activities. An emergency procedure was implemented instead, "signed by the President and announced in the Official Gazette of the Republic of Croatia on the same day it was voted through by the Croatian Parliament, and it came into effect on the first day after it was published" (p.17. 1).

Among the numerous objections categorised as substantial non-conformity (p. 17. 2), the following needs to be pointed out: all the petitioners emphasized that the Act has no legitimate goal, and the Government has not stated the "objective and justified reasons" for its implementation in the Draft Act. Many petitioners pointed out that the problem regarding the Agrokor Group could be resolved by appropriate application of existing legal provisions, and if those were not satisfactory, those provisions should have been amended.

The legal definition of "companies of systemic importance", according to some applicants, is arbitrary and discriminatory, because it only includes joint-stock companies. Some of the applicants claimed that this Act has "enabled the implementation of a single procedure of extraordinary administration over a parent company and its subsidiaries and affiliated companies, which resulted in an 'unconstitutional' breach of the legal status of the debtors, as well as subsidiaries and affiliated companies" (p. 17. 2).

In its assessment of the constitutional merits of the Act, the Constitutional Court accepted as relevant the statement of the Government that the prevention of risks for the Croatian economy represented by these companies constitutes "a particularly justified reason" that provides the option to the legislator to determine the *vacatio legis* differently than what is regulated as a rule, i.e., eight days following the publication of an act in the "Official Gazette" (Article 90, Paragraph 3) (p. 27.1).

Regarding the substantial non-conformity between the Act and the Constitution, the Constitutional Court established that based on the constitutional provisions regarding the welfare state (Article 1) and the principle of social justice (Article 3), the legislator in the "circumstances of unfavourable economic and financial conditions…with an inappropriate and inefficient existing legal model" does not only have the option, but is obligated to implement "the essential economic policy measures" (p. 29. 7).
After that, the Constitutional Court considered whether the Act meets the proportionality requirements from Article 16 of the Constitution, regarding the legitimacy of its goal, necessity, appropriateness and proportionality *stricto sensu* for accomplishing the legitimate goal, and if the enactment of the Act had imposed an excessive burden on the debtors and the creditors (p. 30).

[30] This was determined pursuant to the decree of the Ministry of Public Administration on total eligible voters on 13 May 2018 at 00, 00 h. <https://uprava.gov.hr/vijesti/potrebno-prikupiti-374-740-potpisa-za-raspisivanje-referenduma/14766> accessed 15 January 2018.

[31] "Official Gazette" no. 32/17.

[32] Ivan Rubinić, Dejan Bodul, "Regulation of the "too-big-to-fail" entities in the Republic of Croatia" (2018) 69 Ekonomski pregled, 298 and 310.

[33,34] Ibid 306.

Regarding the legitimacy of the goal of the Act, the Constitutional Court accepted as relevant the statements of the Government that the goal of the Act to ensure the continuation of business activities for the companies of systemic importance and the "maximisation of their total value" for all the interested parties (debtors, their employees, creditors, the economy as a whole) is justified (p. 31. 3). Regarding the proportionality of the disputed measure, to evaluate its appropriateness, the Constitutional Court compared "the effects of the initiated bankruptcy and pre-bankruptcy proceedings" and the measures that have been accomplished so far for Agrokor (p. 32.1). Government reports and the monthly reports from the emergency commissioner had convinced the Constitutional Court that the effects of the implemented extraordinary administration measure for Agrokor demonstrated the appropriateness of the measure for accomplishing the goals of the Act, without encroaching on the state budget (p. 34. 6).

When considering the matter of the necessity of the measure, the Constitutional Court held that its necessity results from a legal void—a "lack of a legal framework for insolvency" for "systemic companies" undergoing financial difficulty (p. 35). The Constitutional Court also established that this legal measure does not impose an excessive burden on the debtor and the creditors (p. 2.2.3). The "primary goal of the Act", to "protect the sustainability of the company of systemic importance", is "the prerequisite for the successful reimbursement of the creditors" (p. 40. 4). For those reasons, the final evaluation of the Constitutional Court was that the extraordinary administration procedure meets the proportionality requirements (p. 41). For that reason, the Constitutional Court issued a ruling on the dismissal of the application for initiation of the procedure for assessment of the conformity of the Act with the Constitution as a whole as well as the conformity of the specific provisions of the Act.

IV. LOOKING AHEAD

The Government's legislative agenda and action plan for the year 2019 envisages adoption of a new Referendum Act in the first quarter of the year.[35] It is evident that many problems relating to the implementation of the referenda proposed by the two civil initiatives arise from the existing legal *lacunae*. Gaps in the legislation are evident in rules on the collection of signatures to initiate a referendum and their verification. The first meeting of the working group set up to draft the new legislation took place in October 2018. The spokeswoman of the Ministry of Public Administration made a statement that the new law would focus on the elimination of the flaws in the extant regulation and streamlining the process. Some of the flaws that should be corrected concern deadlines for collection and submission of signatures for verification as well as the subsequent timeline for calling a referendum by the Croatian Parliament. The legislation is expected to define bodies competent for the organization of activities that take place before the referendum, such as campaigning, and to deal with the issue of financing civil initiatives.[36] Questions on certain subject matter may be explicitly prohibited from a referendum. The importance of regulating this issue is indicated by the current activities of the Association of Croatian Trade Unions, which is considering the collection of signatures needed for calling a referendum against the pension reform package adopted by the Croatian Parliament in December 2018.[37]

V. FURTHER READING

Đorđe Gardašević, "Historical Events in Symbols and the Freedom of Expression: The Contemporary Constitutional Debate in Croatia" (2008), 55 Politička misao 147

Robert Podolnjak, "Formiranje vlade u Republici Hrvatskoj u komparativnoj perspektivi – jedan prijedlog ustavne promjene" (*Forming a Government in the Republic of Croatia in Comparative Perspective – a Proposal for a Constitutional Change*) (2018), 34 Pravni vjesnik 55

Ivan Rubinić, Dejan Bodul, "Regulation of the "too-big-to-fail" entities in the Republic of Croatia" (2018), 69 Ekonomski pregled 298

Ivana Tucak, "Hohfeld's Analytical Scheme and Constitutional Economic and Social Rights", in Marko Novak and Vojko Strahovnik (eds.), *Modern Legal Interpretation, Legalism or Beyond* (Cambridge Scholars Publishing, 2018) pp. 160-192

[35] 2019 Legal Agenda and Action Plan.
<https://zakonodavstvo.gov.hr/UserDocsImages//dokumenti//Plan%20zakonodavnih%20aktivnosti%20za%202019.%20godinu.pdf > accessed 20 February 2019.

[36] https://www.jutarnji.hr/vijesti/hrvatska/u-ministarstvu-uprave-odrzan-prvi-sastanak-radne-skupine-za-izradu-novog-zakona-o-referendumu/8299694/> accessed 20 February 2019

[37] <https://www.matica-sindikata.hr/sindikati-nastavljaju-s-pripremama-za-referendum-o-mirovinskoj-reformi/> accessed 20 February 2019.



Cyprus

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I. INTRODUCTION

The 1960 Constitution of the Republic of Cyprus established a unitary yet bi-communal state, with the Greek-Cypriot and the Turkish-Cypriot communities forming the axis upon which the constitutional arrangements operated. Following the collapse of the political compromise between the two communities in 1964 and the withdrawal of the Turkish-Cypriots from the government,[1] Cypriot constitutional law has evolved by the application of the doctrine of the law of necessity.[2] Consequently, the law of necessity is always present in Cypriot constitutional discourse; nevertheless, it is continuously coupled with the counterbalancing effect of principles that ensure that the state is governed under the principle of separation of powers and with adherence to constitutionalism as well as with a persistent and effective guarantee of fundamental rights.

Looking back at the year 2018, the constitutional developments in Cyprus were relatively limited. In 2018, the Supreme Court addressed the lack of a constitutional procedure for filling parliamentary seats vacated before the commencement of the parliamentary term. Additionally, the Administrative Court issued two decisions relating to the reduction of benefits of civil servants and of pensions of former public servants as fiscal measures to reduce public expenditure. Finally, in 2018 three references were resolved by the Supreme Court under Article 140 of the Constitution, i.e., a procedure of preventive review of constitutionality that forms the primary method for ensuring separation of powers.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year 2018 witnessed a few notable constitutional developments and court decisions. The most remarkable constitutional development was the Supreme Court's decision in *Andreas Michaelides a.o. v. Chief Returns Officer a.o. (Electoral Petition 1/2017)*,[3] where by a narrow majority (6-5) it held that the Amending Law 82(I)/2017 was unconstitutional as it was inconsistent with Articles 65, 66, 69 and 71 of the Constitution as well as the principle of popular sovereignty. This decision gave rise to a major constitutional issue and created a new deadlock similar to the one created by *Andreas Michaelides a.o. v. Chief Returns Officer a.o. (Electoral Petition 2/2016)*.[4]

Electoral Petition 2/2016 and its consequences

Following the parliamentary elections of May 2016, the chairperson of the Solidarity Movement, Dr. Theocharous, had won a seat. Yet she chose to keep her seat in the European Parliament, thus her term of office in the House of Representatives never commenced. The Chief Returns Officer (CRO) granted the vacated seat to the Solidarity Movement's runner-up, Mr. Papadopoulos. Mr. Michaelides, a

[1] P. Polyviou, Cyprus on the Edge: A Study in Constitutional Survival (Nicosia, 2013), pp. 5-26.

[2] A. Loizou, The Constitution of the Republic of Cyprus (Nicosia, Cyprus, 2001); C. Kombos, The Doctrine of Necessity in Constitutional Law (Sakkoulas, 2015); C. Tornaritis, Cyprus and Its Constitutional and Other Problems (2nd, Nicosia, 1980); S. Papasavvas, La justice constitutionnelle à Chypre (Economica, 1998); C. Paraskeva, Cypriot Constitutional Law: Fundamental Rights and Freedoms (Nomiki Vivliothiki, 2015).

[3] Andreas Michaelides a.o. v. Chief Returns Officer a.o., Electoral Petition 1/2017, 30 April 2018.

[4] Andreas Michaelides a.o. v. Chief Returns Officer a.o., Electoral Application, 2/2016, 31 May 2017.

candidate of the Democratic Rally, filed *Electoral Petition 2/2016* to the Supreme Court, in its capacity as the electoral court,[5] challenging the procedure and arguing that a by-election should have been held instead of granting the seat to the party's runner up.

The election of the House of Representatives, including the replacement of vacant seats, is regulated by the Constitution and Law 72/1979, as amended.[6] Article 66(2) of the Constitution establishes that "[w]hen a vacancy occurs in the seat of a Representative such vacancy shall be filled within a period not exceeding forty-five days of its occurrence, in such manner as a Law may provide".[7] Article 35(1) of Law 72/1979 further provides that if a seat is vacated during a parliamentary term, the vacant seat shall be assigned, within a maximum of forty-five days by the CRO, to the next candidate from the same political party having obtained the highest number of votes in the elections. In the event that the procedure of Article 35(1) cannot be applied, Article 35(2) calls for by-elections.

The respondents argued that their decision to assign the seat to Mr. Papadopoulos was based on the fact that Article 35 of the Law and Article 66 of the Constitution were not applicable in the present case, since the vacancy of Dr. Theocharous's seat did not take place during the parliamentary term but prior to the commencement of the new term. By analogy, they chose to act on Article 35(1) as the best and only available option. The Supreme Court unanimously held that the assignment of Mr. Papadopoulos as an MP was null and void. Specifically, the Court said that the CRO could not have acted on the basis of Article 35 since that provision regulates the procedure for filling a seat during the parliamentary term, and not before. And while one could argue that the initial approach of the CRO was correct, as his decision safeguarded the existing proportional electoral system in Cyprus, which a by-election could disrupt, the CRO reached a deadlock, as there was no constitutional or legislative solution for filling a seat that was vacated before the commencement of the parliamentary term.

Electoral Petition 1/2017

In the aftermath of the decision in *Electoral Petition 2/2016,* the House of Representatives amended Article 35 with Amending Law 82(I)/2017[8] in such a way as to allow seats vacated before an elected member of the Parliament has been sworn in to go to the runner-up of the same party. In an attempt to overcome the existing vacancy, the Amending Law further provided for the retroactive effect of the amendment so as to cover seats that were not filled or were vacant on or after its entry into force. Accordingly, the CRO granted the seat once again to Mr. Papadopoulos.

In Electoral Petition 1/2017, the same petitioner argued that the Amending Law, providing for the filling of non-occupied seats, was unconstitutional and therefore the nomination of Mr. Papadopoulos as an MP was null and void. With a majority of six votes to five, the Supreme Court found the Amending Law contrary to Articles 65, 66, 69 and 71 of the Constitution, but also to the democratic principle of popular sovereignty that is diffused in Part IV of the Constitution (regulating the House of Representatives) and which requires the election of representatives by the people. In particular, the majority indicated that Articles 66 and 71 relate to the vacancy of a seat and the replacement of MPs. Thus, since a person becomes an MP only after their public affirmation, as per Article 69 of the Constitution, the notion of non-occupation of a parliamentary seat is unknown to the constitutional provisions. Finally, the majority held that Articles 65 and 66 of the Constitution—expressly providing for the "election" of the House and for "general elections"—safeguard the principle of popular sovereignty by neutralizing the possibility of electing as an MP a person who, without securing the seat and without giving the necessary affirmation, declines it.

On the contrary, the minority indicated that the fact that the Constitution itself does not regulate the filling of a "non-occupied" seat nor authorizes the legislator to regulate this issue, cannot be interpreted as depriving the Parliament of its constitutional authority to exercise legislative power in all matters.[9] The minority held that the inexistence of the notion of "non-occupied" seats in the Constitution does not hinder the House of Representatives from regulating this issue and thus it cannot raise the question of unconstitutionality. Thus, the minority judges concluded that, since a different approach would amount to a limitation of the exercise of the legislative power as per Article 61 of the Constitution, the petition should have been rejected.

The response of the House of Representatives to this development was rather immediate. In June 2018, a new bill was voted into legislation, amending the procedure for filling a parliamentary seat when an MP does not take up his/her duties by giving the necessary affirmation. The President referred this law to the Supreme Court and the referral awaits adjudication. Consequently, the 56th seat of the House of Representatives still remains vacant.

III. CONSTITUTIONAL CASES

1. Human Rights

On 12 November 2018, the Administrative Court examined in *Christodoulidou a.o. v.*

[5] The Supreme Court, acting as an electoral court, has exclusive jurisdiction to hear and determine petitions concerning the interpretation and application of the electoral laws. See Article 145 of the Constitution of Cyprus, which provides: "The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on any election petition, made under the provisions of the Electoral Law, with regard to the elections of the President or the Vice President of the Republic or of members of the House of Representatives or of any Communal Chamber".

[6] The Elections of Members of the House of Representatives Law of 1979.

[7] This provision was amended with the Law relating to the Second Amendment of the Constitution (Law 115(I)/1996).

[8] See Elections of Members of the House of Representatives (Amending) Law (Law 82(I)/2017).

[9] See Article 61 of the Constitution.

the Republic a.o. the constitutionality of allowance reductions and allowance abolitions of 211 applicants working the 24-hour shift system in public service (firefighters and nurses) and the police by virtue of the Law concerning the Budget of 2014.[10] The plenary of the Administrative Court rejected almost all applications, with the exception of seven submitted by nurses that had been found to be in breach of the principle of equal treatment. All applicants argued that the reductions and abolition of benefits should be declared contrary to Articles 9 (right to decent living), 24(1) (equality of persons in contributing in public burdens) and 28 (equality) of the Constitution as well as Article 1 of the First Additional Protocol to the ECHR. The Administrative Court examined the facts before it and the events that led to the abolition or reduction of the relevant allowances and indicated that the state was in a great financial crisis and had an obligation to implement the Memorandum of Understanding on financial assistance to Cyprus in order to cope with the financial crisis. In particular, *Troika* requested from the Cypriot government to abolish anachronistic allowances, to reduce the remaining allowances of civil servants by 15% and to review the formula for calculating the overtime allowance, and achieve additional savings from allowances as a *quid pro quo* for receiving financial assistance. The Court held that the intervention to the right of property, via the reduction and abolition of allowances, was justified on grounds of public interest as such intervention was necessary and appropriate to achieve cost savings and a balanced budget for government expenditure. Additionally, the Court found that the 25% cut in shift allowances and 33.3% in the overtime allowance calculation formula was not a disproportionate restriction on the property right of the total remuneration, taking into account the financial benefit resulting from that restriction and the fact that a variety of other cuts in the wages, allowances and pensions of all categories of civil servants and public pensioners have ensured the saving of millions and a reduction in the budget deficit. As a result, the Court found that the reductions and abolition of certain allowances were constitutional.

In relation to the seven successful applications, the Administrative Court held that "the abolition of an allowance to hospital staff which would be paid only to nursing staff of Mental Health Services employed in closed hospital units, either in the Psychiatric Hospital or elsewhere, violates the constitutional principle of equality and Article 28(1) of the Constitution which does not allow for arbitrary differentiations in reduction of the allowance between civil servants of the same category".[11] More specifically, the Court indicated that the distinction between nurses in closed hospitals for which the allowances remained the same and other nurses had as basis the sole fact that expenditure for the former was limited. Thus, the Court held that in the absence of any study establishing the distinction to justify such distinction, the different treatment was discriminatory and in violation of Article 28 of the Constitution.

Two weeks later, in *Avgousti a.o. v. the Republic a.o.,*[12] the Administrative Court examined 115 applications submitted by pensioners who previously worked in the public and wider public sector and who argued that their pension deductions were unconstitutional. The applicants claimed, inter alia, that the Law concerning the Reduction in Emoluments and Pensions of Officials, Employees and Pensioners of the Public Service and of the broader Public Sector (Law 168(I)/2012), on which the contested reductions were based, contravened Article 23(3) of the Constitution. In particular, they supported that Article 23(3) sets out specific grounds for which a law may impose limitations or restrictions on the right to property; however, Article 23(3) does not enlist public interest as a ground legitimizing limitation to the right to property. On the other hand, the respondents claimed that the enactment of the contested Law was necessary, as illustrated by its preamble, since during that period the Republic was in a difficult financial situation, and in order to avoid a further deterioration of the fiscal situation, it was necessary to reduce the expenditure of the public and the wider public sector.

The Administrative Court ruled that deduction made by the state, as part of the fiscal measures adopted in December 2012 to support the Cypriot economy following a preliminary agreement reached between Troika and Cyprus in November 2012, was indeed unconstitutional. Specifically, the Court referred to its case law in which pensions were considered an asset and a property right and according to which the completion of the service in a pensionable post gives rise to pension; a contractual, acquired and crystallized right.[13] Article 23(3) allows restrictions or limitations which are absolutely necessary in the interest of public safety, public health, public morals, town and country planning or the development and utilisation of any property to the promotion of public benefit or for the protection of the rights of others. Therefore, Article 23(3) does not permit limitations for budgetary considerations, consolidation of public finances, for streamlining pensions, nor for the rather general ground of public interest. As a result, the Administrative Court found in favour of the applicants and declared the pension reductions as unconstitutional and in breach of Article 23(3).

The *Avgousti* case caused alarm to the Ministry of Finance as the implementation of the decision would mean that the government would be obliged to reimburse the reductions, costing the state €30-€40 million per year. Consequently, the Attorney-General of the Republic and the Minister of Finance decided to appeal against the decision of the Administrative Court, and the appeal is awaiting adjudication.

[10] Christodoulidou a.o. v. the Republic a.o., Joined Cases 441/2014 a.o., 12 November 2018.

[11] Translation by the author.

[12] Avgousti a.o. v. the Republic a.o., Joined Cases 898/2013 a.o., 27 November 2018.

[13] See Koutselini-Ioannidou a.o. v. the Republic a.o., Joined Cases 740/2011 a.o., 7 October 2014. See also Charalambous a.o. v. the Republic a.o., Joined Cases 1480/2011 a.o., 11 June 2014.

2. Separation of powers

In 2018, the Supreme Court reviewed the constitutionality of three laws passed by the House of Representatives prior to their promulgation, as per Article 140 of the Constitution.[14] In *Reference 1/2017*,[15] the Supreme Court issued an opinion on whether Community Secondary Schools Law,[16] as amended by Amending Law of 2017,[17] is contrary and inconsistent with the principle of the separation of powers and the Constitution of Cyprus. It was the applicant's view that the provision of Article 11A, which is added by Amending Law of 2017, violates the principle of separation of powers. In particular, Article 11A provides that the Ministry of Education and Culture may issue regulations stipulating school holidays, school celebrations and anniversaries. Additionally, it provides that the Ministry of Education has the authority, "after consultations with the Parliamentary Committee on Education and Culture", to determine school anniversaries in which messages are read or discussions in classrooms are held. However, the issuance of regulations by virtue of an authorizing law shall be deposited with the House of Representatives for approval, as per Article 3 of Law 99/1989. Thus, Article 11A, read in conjunction with Article 3 Law 99/1989, violates the principle of separation of powers, as it enables the House of Representatives to interfere with the executive power. With a majority of 7 to 4, the Supreme Court held that the mandatory consultation of the executive with legislative power on a matter falling within the sphere of exclusive competence of the executive was unconstitutional and should be deleted in order for the Amending Law to be promulgated. Consequently, after the deletion of the reservation "after consultation with the Parliamentary Committee on Education and Culture", the Amending Law of 2017 was consistent with the Constitution and the principle of separation of powers. The minority judges found the Amending Law unconstitutional in its entirety. Specifically, the minority indicated that since the need for consultation was deemed unconstitutional and contrary to the principle of separation of powers, the whole of Article 11A was unconstitutional on the same ground, since Article 11A could not be separated in a reasonable and legitimate way.

On the same day, the Supreme Court issued its opinion on *Reference 2/2017*[18] on whether the 2017 Law Repealing the Law regarding the Regulation of Issues of Privatisation of 2014 (Repealing Law) is contrary and inconsistent with the Constitution of the Republic and the principle of separation of powers. The Repealing Law essentially abolished the privatisation unit, a unit set up in 2014 to put in place a framework for the privatisation of state-owned entities and utilities, as per one of the conditions of international support agreed between Cyprus and Troika following the financial crisis of 2013. The applicant argued that the Repealing Law was in violation of the separation of powers and further interfered with the Council of Ministers' authority to supervise and dispose the property of the Republic, envisaged in Article 54(e) of the Constitution. By a narrow majority (6 to 5), the Supreme Court found that the House of Representatives acted within its power to legislate on all matters, as per Article 61 of the Constitution, and consequently could lawfully enact legislation abolishing the unit if it was of the opinion that the unit was no longer functional. Particularly, the Supreme Court held that Article 54(e) of the Constitution does not confer exclusive competence to the Cabinet to administer state-owned property; the legislative power affords to the Council, via law, the authority to produce secondary legislation and, thus, the said law prevails over regulations and decrees in accordance with the principle of hierarchy of legal norms, deriving from the rule of law. The minority was of the view that the Repealing Law was contrary to Article 54 of the Constitution and the principle of separation of powers, as the abolition of the Law deprives the executive of its right to exercise its constitutional authorities. It is noteworthy that the minority's decision drew on *Reference 8/2016*, a case with similar facts where the Supreme Court held that a 2016 amending law was in violation of Article 54(e) of the Constitution and the principle of the separation of powers, since the Council of Ministers issued decrees in accordance with the Constitution and the existing law in relation to the supervision and the disposal of the Republic's property and the 2016 amending law neutralized those regulations.[19]

The last opinion issued by the Supreme Court, via the procedure of Article 140, was *Reference 1/2018,* where the Court unanimously found the Immovable Property (Tenure, Registration and Valuation) (Amending) (No. 4) Law of 2017 consistent with the Constitution of Cyprus and the principle of separation of powers. The 2017 Amending Law introduced Article 75A to the basic law (Cap. 224), obliging all authorities (such as the land registry) to personally inform property owners of any significant change in the value of their property by virtue of any decree or court decision. The applicant argued that the Amending Law, if promulgated, would remove from the executive the exclusive competence to exercise the general management and control of the state's governance,

[14] Article 140 of the Constitution provides "(1) The President and the Vice-President of the Republic acting jointly may, at any time prior to the promulgation of any law or decision of the House of Representatives, refer to the Supreme Constitutional Court for its opinion the question as to whether such law or decision or any specified provision thereof is repugnant to or inconsistent with any provision of this Constitution, […]. (3) In case the Supreme Constitutional Court is of the opinion that such law or decision or any provision thereof is repugnant to or inconsistent with any provision of this Constitution […] such law or decision or such provision thereof shall not be promulgated by the President and the Vice-President of the Republic." The application of Article 140 after 1964, and since the post of the Vice-President is vacant, is enabled via the law of necessity.

[15] President v. House of Representatives, Reference 1/2017, 5 February 2018.

[16] Community Secondary Schools Law (Law 6/1961GCC).

[17] The Community Secondary Education Schools, as amended by Articles 3(2) and 4 of the Transfer of the Exercise of the Authorities of the Greek Community Chamber and the Establishment of the Ministry of Education (Amendment No. 2) Law (Law 130 (I)/2018).

[18] President v. House of Representatives, Reference 2/2017, 5 February 2018.

[19] See President v. House of Representatives, Reference 8/2016, 2 May 2017.

as well as the coordination and supervision of all public services, as safeguarded by Article 54(d) of the Constitution. The Supreme Court held that Article 75A of the Amending Law introduced a general obligation of the relevant authority to disclose any decisions that may significantly affect the value of the property; yet, the question of what is likely to significantly affect the value of immovable property is left entirely at the discretion of the relevant authority. Therefore, the House of Representatives did not interfere with the executive power and did not breach the principle of separation of powers.

IV. LOOKING AHEAD

A significant development expected in 2019 is the third decision relating to the saga of the 56th parliamentary seat. In the event that the 2018 Amending Law is also found incompatible with the Cypriot Constitution, the only remaining and valid option would be a constitutional amendment; namely the amendment of Article 66 of the Constitution so as to introduce the notion of "non-occupied" seats. Additionally, judicial reform is also expected in 2019. The reform of the judicial system, through the creation of new courts and procedures, has been under discussion for more than two years in an attempt to speed up the dispensation of justice. In the wake of serious allegations concerning conflict of interest among Supreme Court judges as well as allegations of collusion between them and prominent law firms, discussions seem to have speeded up. Indeed, the government has prepared nine bills, *inter alia,* for the creation of a Supreme Constitutional Court, an Appellate Court and a Commercial Court, and talks relating to the composition of the Supreme Council of the Judicature are also underway.



Czech Republic

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I. INTRODUCTION

From the perspective of Czech constitutional law, the year 2018 was marked by two important anniversaries: the 25th anniversary of the Czech Constitution (it came into force on 1 January 1993) and the 100th anniversary of the republican state on Czech territory (the First Czechoslovak Republic was founded on 28 October 1918).

In terms of constitutional developments, the year 2018 was not significantly different from the year 2017. We observed continuation of several trends that had already started in previous years, such as growing populism, polarization of the political scene, increasing pressure on independent media and journalists, excessive use of presidential powers leading to changes in long-standing constitutional practice, and negative effects of growing concern about the conflict of interest of the Czech Prime Minister. The outcome of these trends is a phenomenon not present in the Czech Republic since 1989: the government supported by the votes of deputies of the Communist Party.

However, there was one important new theme in 2018: judicial independence. There were difficult negotiations about the selection of a new president of the Supreme Administrative Court between the President and representatives of the judiciary, and it became public that the head of the President's office was trying to influence the judges of the Constitutional Court ("CC") and Supreme Administrative Court in their decision-making in cases related to the President or Presidential Office.[1]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

After the parliamentary election of October 2017 won by a margin of more than 18% by the party of Andrej Babiš (ANO), the process of government creation was complicated. We already reported last year about the first government of Andrej Babiš, nominated by President Zeman in December 2017 without even having a chance to pass a confidence vote in the Chamber of Deputies. However, this situation was untenable in the long term, so Andrej Babiš continued negotiations. After excluding all other possibilities, he decided to create a government of ANO and social democrats, supported by the Communist Party. This government received a confidence vote in July 2018. Of course, the Prime Minister had to make several concessions to the Communist Party for their support, such as proposing the bill on taxation of church restitutions or granting places in committees and boards for Communist Party nominees.

Even this government was not without trouble. President Zeman refused to appoint the social democratic minister of foreign affairs,

[1] Ondřej Kundra, Andrea Procházková, Pozor, volá Mynář: jak se pravá ruka prezidenta snaží ovlivnit soudce (Watch out! Mynář is calling: How is the head of the president's office trying to influence the judges?), available at respekt.cz, published on 5 January 2019, accessed on 19 February 2019, https://www.respekt.cz/tydenik/2019/2/vola-mynar

allegedly because of his positive attitude to refugees, but more likely because in the 2018 presidential campaign, he supported Zeman's rival. This situation demonstrates the uneasy position of the Czech Prime Minister, who normally should select the ministers at his will but does not have any ready-to-use constitutional means of overcoming rejection of his nominees by the President. This means that there is a gradual shift of the Czech model of separation of powers towards the semi-presidential system, also in part because Prime Minister Babiš does not counteract President Zeman.

As previously mentioned, the year 2018 brought judicial independence to constitutional practice in the Czech Republic. In October 2018, the term of the long-standing president of the Supreme Administrative Court, Josef Baxa, expired. Since there is no constitutionally embedded representative body of judicial power, the presidents of three high courts (CC, Supreme Court, and Supreme Administrative Court) sought an audience with the President, who, with the consent of the Prime Minister, appoints the president and vice-president of the Supreme Administrative Court.

After long negotiations, Court presidents were able to persuade the President that the most suitable nominee would be the current vice-president of the Supreme Administrative Court, Michal Mazanec. In return, President Zeman expected that a judge close to his administration would be appointed as a vice-president of the Supreme Administrative Court. However, the law prevents appointing the vice-president from judges outside the Supreme Administrative Court, so in the end, another suitable candidate from within the Supreme Administrative Court was appointed, Barbara Pořízková.

Not long after this, in January 2019, Josef Baxa and Vojtěch Šimíček made public in an interview with the prominent liberal journal *Respekt* that they were approached by the head of the office of President Zeman, Vratislav Mynář, several times between 2015 and 2018 in order to influence their decisions in cases related to the President or his administration. This information indicated that the President tried to deal with the judiciary on a quid pro quo basis, which is by some perceived as unconstitutional. The parliamentary subcommittee investigating this issue did not find any infringement of judicial independence, but the revealed facts are very troubling.

It is paradoxical that probably the most critical "development" has a rather stagnant or unchanging character. We refer to a massive conflict of interest of the Czech Prime Minister, Andrej Babiš. Babiš is an oligarch, owner of major newspapers and radio stations, and one of the largest Czech companies, Agrofert (comprising around 200 food production, agriculture, chemical, and media companies). He has been Prime Minister since 2017, and although he was forced to transfer his enterprise to a trust fund to comply with new legislation against conflicts of interest (commonly known as "Lex Babiš"), this does not diminish the fact that he remains a beneficiary of the fund while he takes part in decisions about providing agricultural subsidies and tax relief to Agrofert.

But there has been an important breakthrough in this regard: an initial administrative decision ruled that the Prime Minister is breaking conflict of interest rules by owning media outlets, including national newspapers and the country's biggest commercial radio station. The Prime Minister has already filed an appeal against this decision, claiming there is no conflict of interest in his case. Besides that, Mr Babiš has been criminally prosecuted for subsidy fraud related to illegally obtaining European funding for building his residence, the so-called Stork Nest Farm. This situation poses a major threat to the rule of law and also for the independence of relatively new democratic institutions in the Czech Republic, especially prosecutors and police. The case was also investigated by the European Anti-Fraud Office ("OLAF"), which concluded that the rules for funding were breached. To receive funds for building Stork Nest Farm, Mr Babiš transferred the farm project from Agrofert to his children, who are important witnesses in his case. His son, who has not yet been interviewed by the police, was living in Switzerland and Crimea in 2018, without knowledge of the investigation. Such situations create significant security threats for the Czech Republic. Also, the European Commission is investigating the subsidies that Agrofert has received since 2013. Mr Babiš withstands negative publicity in all these difficult situations thanks to considerable back-up from media he owns, which tend to downplay accusations against him and not cover matters negatively related to him at all.

The negative effect of this situation on human rights and the legislative works of the Parliament can be demonstrated by the example of a proposed amendment to the Right to Information Act. The original version of the government proposal aimed, among others, to exclude from the scope of the Act all information about criminal cases (apart from the final judgment) and information on ongoing proceedings on infringement of obligations deriving from EU membership of the Czech Republic. Both these exclusions would significantly benefit Mr Babiš by reducing public availability of information related to his criminal prosecution and misuse of European funds. Thanks to concerns raised in public debate, deputies of opposition parties identified this threat and passed amendments to the bill. They not only remove these exclusions but also include a new instrument for more efficient enforcement of the right to information. The final vote on this bill is expected in spring 2019. This situation demonstrates that extra-legal control mechanisms such as parliamentary opposition and civil society are a effective counterweight to the government.

III. CONSTITUTIONAL CASES

1. Social Rights

Judgment Pl. ÚS 7/17 of 27 March 2018 - Constitutionality of a complete ban on smoking in restaurants and other provisions of "Anti-Smoking Act"

A group of senators requested the CC to annul (besides other things) provisions of the so-called Anti-Smoking Act prohibiting smoking inside the premises of catering service establishments. The senators mainly

contested its paternalistic nature, resulting in a breach of a general right to freedom, the protection of property, and the right to private enterprise.

At the outset, the CC stated that the Act follows various legitimate aims, such as protection of the health and life of individuals as well as certain vulnerable groups such as children, adolescents, and pregnant women. Moreover, it also might have a positive effect on the environment and reduce state expenditures on healthcare. Subsequently, the CC has stated that finding a solution to the conflict between the rights of smokers and those who are exposed to tobacco smoke is above all a matter for the legislature. The role of the CC in this respect is limited to assessing whether the chosen solution constitutes an inadmissible interference with any constitutional rights. The CC stated that the Act does not have such a deleterious effect on constitutional rights that would warrant its intervention. Thus, the CC concluded that the negative effect of smoking, whether active or passive, on human health is a fact that does not need to be demonstrated. Therefore, the ban on smoking pursues a legitimate aim. Moreover, the separation of the premises and establishment of smoking rooms does not suffice to prevent the negative effects of smoking. In addition, the health of employees of catering businesses is damaged even in premises with smoking rooms (e.g., when cleaning such rooms). In general, smoking rooms neither protect the health of the population nor guarantee the enforceability of the Act, at least in a manner comparable to the contested ban. From a comparative point of view, the complete ban is a standard solution in other countries as well. It does not violate the freedom of smokers, as they can still smoke in the outdoor areas of catering facilities, or in the street (outside the facilities).

Judgment No. I. ÚS 2637/17 of 23 January 2018 – Obligation of the regional authority to provide a disabled person with access to proper social services

In this case, the CC annulled the decision of the Supreme Administrative Court, which dismissed the complaint of a severely mentally disabled person claiming that regional authorities failed to fulfill their positive obligation to provide him with appropriate social services. The complainant suffered from autism and lived in a small apartment with his also-handicapped mother and his (at that time) 80-year-old grandmother. Notwithstanding that the whole family was involved, it was hardly manageable for them to take care of the complainant. Thus, they repeatedly contacted providers of social services and local and regional authorities asking to institutionalize him, but all their efforts were to no avail.

The CC found that disabled people in dire straits have the subjective right to access appropriate social care services. This right stems from both statutory (Section 38 of the Social Services Act) and constitutional provisions (right to health, right to an adequate standard of living, and right to live independently and be included in the community). Subsequently, the CC stated that the above-mentioned right calls for a positive obligation of the government to guarantee access to appropriate social care services to every disabled person in dire straits. This right, however, does not guarantee a person's access to social services on demand, but rather to such services that are adequate to their state of health and situation and capable of assuring them a dignified life with inclusion to society, independence, and personal autonomy to the fullest possible extent. In addition, the CC reiterated that regional authorities have a wide margin of discretion in selecting the means to fulfill these obligations. Moreover, the obligations are progressive by their very nature. This means that it is not necessarily a violation of the right in hand when an individual is not provided with services needed in the short term. The violation occurs only when the regional authorities remain completely inactive, or when they fail to take reasonable actions to fulfil the right in hand. In this respect, the authorities cannot disregard the fact that the more severe or untypical the handicap, the more demanding that social services are required in return.

2. Procedural guarantees in criminal matters

Judgment No. Pl. ÚS 15/16 of 16 May 2018 – Responsibility of the vehicle operator for the administrative offences of the driver

This judgment is one of the most controversial of 2018. The CC dismissed the motion for annulment of Sections 10 (3) and 125f (1) of the Act on Road Traffic constituting an administrative offence that commits an operator of a vehicle (owner of the vehicle or a person authorized by the owner to use the vehicle) by non-securing that the driver abides by road traffic regulations.

The CC put the Act under review and found no violation of the Constitution. It stated that impugned provisions set down objective liability of the vehicle operator by means of constituting his/her culpability for the administrative offence. It admitted that individual guilt and culpability is a ground rule in the construction of public law offences, but the justified exception can be set out due to an efficiency of regulation over certain areas of human conduct. And, in this case, the CC found that the impugned measure was justified because it is the operator him/herself who drives the vehicle or authorizes its usage by a third person. Thus, the main aim of the measure is not to punish a particular offender but to have a preventive effect on drivers. It presupposes that the operator will exert a pressure on a driver to abide by the road traffic regulations or he/she will be liable for the offence. Moreover, it is only the right to private property that is infringed. The operator could only be imposed with a minor fine for the offence, which has no stigmatizing effect. This infringement, stated the CC, is perfectly justified, particularly in the situation of heavy vehicular traffic where the public authorities lack efficient means to investigate these offences. Frequently, it is evident that the offence was committed, but public authorities have no means to track down the driver. Usually, drivers "dodge the bullet" of the conviction by relying on the right to remain silent and not incriminate themselves or people they are intimate with

(Art. 37 (1) Charter). On top of that, the CC also found no violation of the right to the presumption of innocence. Notwithstanding the CC considered the offence as a criminal one, it stated that the presumption of innocence is rather a procedural rule that—unlike substantive constitutional rights—does not have any effect on the decision of the legislator to criminalize certain human behavior and the constitution of an offence as such.

What makes this case so controversial is how the CC disregarded the right to the presumption of innocence both as a subjective right and also as the objective value of a society. But what is even more striking than the reasoning provided by the CC is the lack of opposition to it. It is noteworthy that no justice of the CC dissented from the opinion of the majority.

3. Right to private and family life

Judgment No. I. ÚS 1099/18 of 8 November 2018 - Assisted fertilization from deceased husband

The applicant and her husband signed informed consent for extracorporeal fertilization consisting of cryopreservation of the husband's sperm, which was later meant to be inseminated into the applicant's genetic information. Before the process was finished, the applicant's husband died, and the clinic refused to complete it. It claimed that according to the Health Services Act, it could only proceed with a complete couple, which wasn't the case of the applicant.

The applicant filed a claim to the district court, requiring the clinic to finalize the procedure. However, the district court confirmed the clinic's approach and stated that it could not anticipate the husband's will in the process of artificial insemination. In the following proceedings, the appellate court confirmed the clinic's approach. The Supreme Court, in its extensive judgment, distinguished the applicant's case from the case of Evans vs. the UK (from 10 April 2007, application number 6339/05) since in the pending case the applicant still had a chance of having a child, only not with her deceased husband. Besides that, the clinic is required to finalize the process only as a cure to an infertile couple, which does not apply in this case. The procedure at hand is therefore only applicable inter vivos and to a couple as a treatment for infertility.

The applicant filed a complaint to CC. CC agreed with the Supreme Court and stated there was no violation of the applicant's right to privacy and family life under Article 8 of the Convention and Article 10 (2) of the Charter. CC concluded that common courts ruled in accordance with the applicable legislation. Justice David Uhlíř expressed a very persuasive dissenting opinion in the case, claiming that the common courts should have investigated in more detail the wish of the deceased husband, especially since if an anonymous donor provided the sperm, it could be used even after the donor died. The distinction between anonymous and non-anonymous donor was unreasonable. The law shall serve the society and not vice versa, and courts should find ways to interpret the law in accordance with constitutionally guaranteed rights of individuals.

4. Judicial independence

Judgment No. III. ÚS 4071/17 of 31 July 2018 - Eligibility of secret recording of court deliberation as evidence

In a criminal matter, the defendant challenged the impartiality of one of the judges deciding his case based on an unauthorized recording of deliberation of the judicial panel. In the recording, the judge made offensive remarks about the defendant and his attorney. The challenge was denied by appellate court based on the fact that the recording was made without knowledge of the judges and was therefore inadmissible as evidence.

CC recognized that there is a conflict between the right to a fair trial of the defendant and the right to privacy of the judge and conducted the test of proportionality to balance them. It noted that the recording might have contained parts where the judicial panel was deliberating and/or voting, and that this type of information is confidential. However, such information was not part of the evidence during the determination of impartiality of the judge because the judge's comments were definitely not part of deliberations or voting of the panel. CC concluded that the recording could not be excluded from evidence on this basis.

It understood the recording as a piece of valuable information concerning the impartiality of the judge and stated that in this particular situation, there were no other possible pieces of evidence of similar information value that would interfere in a lesser amount with the judge's right to privacy. According to the CC, without the recording, the right to a fair trial of the defendant would be almost impossible to enforce effectively, while the intensity of interference with the right to privacy of the judge was minor because the judge's remarks were made during the decision-making process. Also, the CC noted that the recording effectively cast doubt on the objective element of judicial independence: the public trust in independent decision-making of that particular judge, in this case, was diminished. For this reason, the CC concluded that the previous decisions infringed the defendant's right to a fair trial and annulled them.

5. Attorney-client relationship

Judgment No. II. ÚS 644/18 of 17 August 2018 - Professional responsibility of attorney advising a client to present misleading or false evidence

The CC only rarely decides cases related to the professional regulation of lawyers. However, in this case, the nature of the facts and inappropriate response of other courts led the CC to intervene. At the beginning of this case, an attorney represented a client in a civil suit. After initiating the civil suit, the client transferred its claim to a company specializing in the non-judicial recovery of claims. The result of this was, however, that the client was no longer an eligible participant of the civil suit.

The client's attorney claimed in front of the court that the claim was returned to the client, even though he knew it was not true. He also asked the client to sign an ante-dated contract confirming the return of the claim, which the

client refused. Later, the client also refused to sign an ante-dated contract allowing her to recover the claim instead of the company it was transferred to, which was again proposed by her attorney. This lead to the dismissal of the client's claim. The client then sued her attorney for damages incurred by not informing her about the risks related to transferring the claim to a third party. The courts have rejected the attorney's liability for damages, stating that the client herself caused her civil suit to be dismissed by not providing necessary cooperation to her attorney.

The CC found this conclusion unconstitutional. The Ethical Code of the Czech Bar Association explicitly prohibits attorneys from presenting or proposing misleading or false evidence, even if their client would require it. According to the CC, if an attorney suggests to their client to follow unlawful procedure and the client refuses to apply it, it cannot be later held to their detriment, and thus it cannot allow the attorney to eliminate their liability. It is the client's constitutionally protected right to refuse to act unlawfully. At the same time, the courts did not properly address all arguments brought by the client, especially that the attorney did not inform the client about the consequences of the transfer of the claim and possible loss of standing in court proceedings. Because of this, court decisions were not properly justified and therefore violated the right to fair trial of the client.

IV. LOOKING AHEAD

We are expecting all the above-stated problems to continue. The conflict of interest of Prime Minister Babiš will be further discussed and investigated as well as the criminal charges against him. We are also eagerly awaiting further developments regarding the head of the President's office and his trying to influence judges of the CC and Supreme Administrative Court's decision-making in cases related to the President or Presidential Office. There is also an expectation that the Communist Party is going to be displeased with the Minister of Foreign Affairs, who visited Ukraine at the end of 2018. One seat is vacant on the CC, as Justice Jan Musil stepped down as of 31 January 2019 and his successor has not yet been appointed. An election to the European Parliament is due in late May 2019. One of the most prominent CC cases will be the law on taxation of church restitution, which, in case it gets adopted by the Parliament, will be certainly challenged by a group of opposition deputies due to its retroactive nature.

V. FURTHER READING

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David Kosař, Jan Petrov, "Determinant of Compliance Difficulties among 'Good Compliers': Implementation of International Human Rights Ruling in the Czech Republic." [2018] 29(2) *The European Journal of International Law*

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Denmark

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I. INTRODUCTION

There were two opposing tendencies in Danish constitutional law in 2018.

In some ways, Danish democracy became more inclusive. A new regulation made it possible for citizens to get the parliament to vote on proposals if 50,000 citizens backed them. Such an initiative is a small step in the direction of a more direct democracy. Four proposals received enough signatures during 2018 to be considered by the parliament. However, at the end of the year, the parliament had rejected two of them while the other two were still under consideration.

Similarly, in a move to expand voting rights, Denmark found a way to bypass a constitutional rule that had removed voting rights for legally incapacitated individuals.

However, in other areas Danish politicians appeared willing to challenge the limits of constitutional rights. For the first time since the Second World War, an organization was banned. It now rests with Danish courts to decide if this is unconstitutional. Similarly, in several issues related to immigrants and minorities, Denmark changed direction in 2018. The burqa was banned and social benefits for people who have lived less than seven years in Denmark were reduced to such a low level that it might be unconstitutional. To acquire citizenship in Denmark, a handshake is now required (enacted in response to certain religious Muslims who do not shake hands with the opposite gender) and several rules were enacted to more strictly regulate socially vulnerable neighbourhoods. Finally, a major Danish political party declared that their understanding of the Danish constitution was that it only grants rights to people with Danish citizenship and not to anyone else who lives in Denmark. This goes against an otherwise uncontested interpretation of the constitution.

Another important constitutional development was the reopening of the so-called Tibet Commission. During official visits from China, Danish police have illegally prevented Tibetan protesters from being visible to Chinese officials. The inquiry into who gave this order was reopened due to new information.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. A more inclusive democracy

In January 2018, it became possible for citizens to get the parliament to vote on a proposal if 50,000 citizens backed it. The system is very similar to the European Citizens' Initiative in the EU. Practically, the website www.borgerforslag.dk was launched, on which citizens, using their digital ID, can declare whether they support proposals made by other citizens. If 50,000 citizens support a proposal, it will be sent to the parliament. Technically, the parliament is under no obligation to consider such proposals, but seven of the nine political parties in the parliament have promised to present them there, even if they do not support their content. The first proposal to get 50,000 supporters was aimed at removing an existing regulation that limits the possibilities of taking more than one university education. The second proposal to receive enough support proposed removing

the special pensions that ministers and their children receive. Both proposals were subsequently rejected in the parliament. Two other proposals received enough support during 2018 to reach the parliament but were still under consideration at the end of 2018. They suggest prohibiting circumcision on healthy children younger than 18 years and making everyone over the age of 18 automatic organ donors.

According to the Danish constitution, a citizen—following certain conditions—"shall have the right to vote in parliamentary elections, provided that he has not been declared incapable of conducting his own affairs". This wording has been interpreted to mean that the parliament cannot grant such people parliamentary voting rights. Around 2,000 people in Denmark have been placed in a guardianship due to impaired functional capacity, with the aim of protecting them from getting into financial problems due to their own actions or exploitation. These people have automatically lost their voting rights in parliamentary elections following the wording of the constitution (while keeping their voting rights to both local elections and EU-parliamentary elections). Four citizens had sued the Danish government, claiming that this loss of voting rights was against their human rights, but the Supreme Court decided in favour of the government in January 2018. However, the case convinced Danish politicians to change the rules. Due to the difficulty in changing the Danish constitution, this was not seen as an option. Instead, the legislation on guardianship was changed, making it possible to be declared only partially incapable of conducting one's own affairs. The government's interpretation of the constitution is that this solution prevents the loss of voting rights. The interpretation is unlikely to ever be challenged in court.

B. Challenging the limits of constitutional rights

The Danish constitution, section 78, allows for prohibiting and dissolving organizations if they employ violence to attain their aims. However, the office of the Director of Public Prosecutions had earlier abandoned attempts to prohibit the motorcycle club Hells Angels due to the difficulty in proving that it is the organization itself that acts through violence and not just the individual members that are involved in violent activities on their own. Following several shootings in Copenhagen between various gangs, the Director of Public Prosecutions decided to instigate proceedings against the group "Loyal to Familia" with the aim of banning it. This was backed by the parliament, which simultaneously made a law detailing the consequences of an organization being prohibited. The group has now been prohibited but is awaiting a court decision on whether the prohibition is unconstitutional.

Discussions on immigration and especially on the presence of Islam have for several years been at the forefront of political debate in Denmark. Several new laws were passed during 2018 concerning these topics. Most debated was probably the prohibition against covering the face in public. The intention of several politicians behind the law was to ban the burqa; however, due to regulations on religious freedom, the law was made more general.

Special rules were also enacted in socially vulnerable neighbourhoods—called "ghettos" by the government—which have a higher proportion of immigrants. These include the possibility of doubling the punishment for crimes committed in these areas. The exact same crime committed in two different areas of Denmark can thus lead to two different punishments. The new laws also include rules that will economically punish parents in these areas if their children as young as one year of age do not attend obligatory classes for 25 hours per week. Finally, the new rules include a plan which will lead to parts of the "ghettos" being demolished, thus moving existing inhabitants. Questions have been raised concerning whether some of these rules contradict basic principles of equality before the law or regulations against discrimination.

According to the Danish constitution, a foreigner can only become a Danish citizen if an act is passed in the parliament, which—mentioning the foreigner by name—grants the citizenship. This has been interpreted by governments to mean that the parliament is never obligated to grant citizenship to anyone. In this view, the parliament can fully decide which rules—if any—they will apply for granting citizenship. However, a new rule implemented in 2018 is probably the most unusual one that the parliament has ever implemented in this regard. It is now a condition for getting citizenship that the applicant shakes hands—without wearing gloves—with a representative of the government (originally proposed to be the local mayor, but at the first of these official handshake ceremonies it was the Minister of Immigration and Integration who had the honour). It is no secret that the politicians behind this new rule implemented it specifically for those religious Muslims who refuse to shake hands with the opposite gender.

Section 75 of the Danish constitution states that "Any person unable to support himself or his family shall … be entitled to receive public assistance". In earlier cases, the Supreme Court stated that this means that the government must guarantee anyone in such a situation a minimum subsistence level. However, the exact level has not been made clear by the court. In 2018, the section received new attention. Anyone who has lived less than seven years in Denmark within the last eight years receives a lower amount of money from the government in case of need than others – the so-called "integration allowance". Based on an analysis of the situation for families receiving this allowance, the Danish Institute for Human Rights concluded in October 2018 that there were good reasons to assume that some of these families received less than the minimum subsistence level, which would be unconstitutional. The reaction from the government was less than positive to this claim. One month later—November 2018—the government made an agreement with the Danish People's Party to lower the integration allowance further.

Thus, it was a year in which the government and the parliament were willing to thread new paths and challenge the limits of constitutional provisions. It should be noted that Denmark does not have a constitutional court and no automatic review of wheth-

er a law is unconstitutional exists. Instead, an individual affected by a law can choose to institute proceedings in the normal Danish courts to have the law evaluated. Only if someone instigates such proceedings will the constitutionality of these laws be tested.

A further comment could be made about the fact that the Danish People's Party—the second largest party in the parliament—announced in November 2018 that their understanding of the Danish constitution is that it only grants rights to people with Danish citizenship and not to anyone else who lives in Denmark. This view was strongly criticized by several legal scholars and it is without a doubt an interpretation that goes against all established interpretations of the constitution.

C. Existing commissions

The president of China visited Denmark in 2012. During his visit, demonstrations were carried out in Denmark against the Chinese policies in Tibet. Demonstrators accused the Danish police of hiding the demonstrators to prevent the Chinese officials from seeing them. In 2015, a commission, the Tibet Commission, was established to look into this matter, and in 2017, the Commission concluded that illegal orders had been given within the Copenhagen police department. However, the Commission found no evidence that ministries or even the management of the Copenhagen police department had made such orders or had any knowledge of them.

During 2018, these conclusions came under heavy criticism. Various media reported that the Commission had not had access to emails from former employees in the police department or in ministries, which included the entire management of the Copenhagen police department as well as a significant amount of the relevant employees in ministries. Simultaneously, former police officers explained to the media that it had been a general practice to hide such protesters during Chinese state visits. Due to this new information, it was decided to not only reopen the Tibet Commission but also to widen the mandate, so now the Commission will look at all Chinese state visits since 1995. This investigation is still ongoing.

The Tibet Commission is not the only commission looking into highly political topics. Denmark has had several tax scandals in recent years, with the authorities not noticing massive tax fraud while also appearing unable to collect debts owed to the state. A tax commission has been tasked with investigating these events.

III. CONSTITUTIONAL CASE

Supreme Court Decision of 18 January 2018 in case 159/2017: No violation of constitutional or international obligations in relation to loss of voting rights.

This case concerned four plaintiffs who had been deprived of their legal capacity under a guardianship order, cf. section 6 of the Danish Guardianship Act. The Danish Parliamentary Election Act, section 1, states that in such circumstances, a person loses the right to vote for parliamentary elections. The plaintiffs argued that this was in breach of the Danish constitution, the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities. The Supreme Court found that this was not a breach of the Danish constitution. Section 29 of the Danish constitution states that a person who is "incapable of conducting his own affairs" does not have the right to vote. Based on a detailed analysis of the historical development of the Danish constitution, as well as an analysis of the preparatory work to the Danish Guardianship Act, it was found that a person deprived of their legal capacity, cf. section 6 of the Danish Guardianship Act, was to be treated as a person "incapable of conducting his own affairs". Thus, in reality it was the Danish constitution that prevented the plaintiffs from having voting rights. Based on this, the Supreme Court declared that even if international obligations had been breached, it could not lead to section 1 of the Danish Parliamentary Election Act being invalid, since the rule was a consequence of the constitution. However, the Supreme Court also found that the rule did not breach international obligations. This was based on an analysis of decisions from the European Court of Human Rights, especially the Case of Alajos Kiss v. Hungary in which a violation of Article 3 of Protocol No. 1 was found. The Danish Supreme Court noted that the ECHR had found that ensuring that only citizens capable of assessing the consequences of their decisions and making conscious and judicious decisions participate in public affairs was a legitimate aim. However, the ECHR had found that the Hungarian provision was not proportional since it was an absolute bar on voting by any person under partial guardianship, irrespective of his or her actual faculties. In contrast with this, the Danish Supreme Court found that the Danish provision was proportional since it was a significantly narrower scheme than the one in Hungary, and since Danish law operated with another guardianship which did not cause a loss of voting rights. The Supreme Court also made reference to the fact that a number of other European countries have similar regulations. Thus, the Supreme Court concluded that there had not been a breach of international obligations.

IV. LOOKING AHEAD

Elections for the European Parliament will be held in May. Elections for the Danish parliament are due at the latest in June 2019. Political parties in Denmark have for decades been divided quite firmly between two blocs, but recently several political parties have challenged the traditional alliances, making it difficult to foresee how a government constellation will look after the elections.

Both the Tibet Commission and the Tax Commission are ongoing and have potential implications at a major political level. The case on the banning of Loyal to Familia is also ongoing. Further, if the elections lead to a change of government, it is possible that a new government will open investigations into the background of the Danish decision in 2003 to join the war against Iraq.



Ecuador

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I. INTRODUCTION[1]

The year 2018 was one of fighting against corruption and reshaping several public offices, including the Council of the Judiciary and the Ecuadorian Constitutional Court (ECC). This might signal an important turning point in the country's constitutional history. Following the popular referendum in February, the Ecuadorian people agreed to appoint a transitory Council for Public Participation and Social Control (CPPSC-t) and grant it extensive powers to evaluate virtually all public offices in Ecuador. The main constitutional development in 2018 was undoubtedly the dissolution of the ECC and the beginning of the process for the appointment of new justices.

We closed last year's report wondering whether the elected authorities would be able to "stir the country towards the rule of law, or will it be just another type of rule of man that is more temperate?" This is still hard to say. In the public eye, the discharge of duties by the CPPSC-t has been received along party lines. On the one hand, *Correistas* have been against every move by the CPPSC-t and unwilling to assume any responsibility. On the other hand, *anti-correistas* have been willing to overlook the shortcomings of the evaluation process. Outside this dichotomy, some have regarded this as a *sui generis* case of transitional justice.[2] It is still too soon to evaluate, and the CPPSC-t will continue in office until March 2019.

Besides the three-month-long constitutional vacancy, Ecuador has witnessed several other turbulent moments with regard to the restructuring of the judiciary and corruption charges against numerous public officers, mainly from the government of President Correa. Many former authorities have been convicted, some of whom are serving time, others fugitives in foreign countries.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Popular Referendum

Last year, President Moreno submitted seven referendum questions to the ECC for approval. The questions were about sensitive political and constitutional issues, like the indefinite reelection of the president or the redesign of the CPPSC. The decision on the approval of the questions posed a challenge to the ECC, as in 2015 it already dealt with the issue of the indefinite reelection of the president, and it was considered as a measure to expand the sphere of voting rights. This time, however, the referendum aimed at abolishing the indefinite reelection. Finally, the ECC refrained from deciding whether the referendum question was constitutional or not, and ducked the issue by simply letting the deadline pass.

By the time the referendum was held, President Moreno had made clear that he was

[1] We are thankful to Sebastián Abad, Irina Burgaentzle and Sol González from University of San Francisco de Quito for their generous help. The responsibility regarding the final text is only ours.

[2] Simeon Tegel, 'A referendum in Ecuador is another defeat for South America's left-wing populists,' *The Washington Post* (5 February 2018).

distancing himself from Correa both in style and in substance. The constitutional referendum[3] was held on February 4, and all the questions of the referendum[4] were decided affirmatively. This will mark the beginning of a set of reforms to rebuild the rule of law and its institutions over the year, but even more important than that, the outcome of the referendum reassured that popular support for President Moreno was still strong.

2. The transitional Council for Public Participation and Social Control

Following the popular referendum, the Legislative appointed seven counselors to the "transitory" CPPSC (CPPSC-t) from shortlists by President Moreno. The CPPSC-t was granted via referendum the authority to evaluate the major public authorities and was in charge of the oversight and accountability of every other public official within the next year. The CPPSC-t also received the powers to dismiss those authorities that neglected their responsibilities or were corrupt.

The referendum was neither explicit nor carefully drafted to give precise powers to the CPPSC-t. The CPPSC-t read the powers granted by referendum broadly to fulfill the popular mandate for reforms and transparency. For instance, it vindicated the competence to appoint provisional authorities and to call for the appointment of definitive ones. At the same time, it tried to draft its regulations as precisely as general principles of public law, such as due process of law, require.[5]

The discharge of duties of the CPPSC-t was not free from criticism, especially at the outset. On the one hand, public officials that were supposed to perform as comptrollers had pervasively concealed unthinkable acts of corruption for over a decade. The stakes were too high just to let go of the position with archives, files, and other evidence (if there was any left). Thus, the CPPSC-t faced every possible political and judicial incident. Even the Inter-American Commission was called to intervene, which went as far as asking for provisional measures from the Inter-American Court. It had to spend its first months under heavy fire—none of the targeted authorities truly stand a chance after a decade of a general perception of abuse of power, impunity, and biased decisions in favor of Rafael Correa's *Alianza Pais*.

The first to be evaluated were the five members of the National Electoral Council. Throughout the terms of Correa, the Electoral Council was accused of electoral fraud, gerrymandering, and disqualifying political parties of the opposition, among others. The CPPSC-t gave the assurances of due process of law, but finally dismissed all of them in a 99-page report and appointed five transitory members.

After a rocky start, CPPSC-t continued following its rules of procedure, and granted every evaluated authority the right to be heard and produce evidence in its favor. The fierce opposition from sympathizers of Correa faded more and more. The CPPSC-t evaluated several state organs, such as Ombudsman, the Public Defender, the General Attorney of the State, General Comptroller of the State, Contentious Electoral Tribunal, the Attorney General, the Superintendents, the Constitutional Court, and finally the Judicial Council. All the procedures finished with the removal of the heads of the evaluated institutions and were followed by the designation of new leaders.

The CPPSC-t and its decisions were widely supported by Ecuadorian society, especially its president, the iconic public figure Julio César Trujillo[6] The CPPSC-t relied on the backing of the National Assembly, which requested all state organs to cooperate with the evaluation procedure carried out by the CPPSC-t.

3. An arbitrary Constitutional Court goes vacant

In May, the CPPSC-t began to evaluate the ECC. Following the procedure, the justices of the ECC as well as civil society were offered to present their reports and complaints about the performance of the ECC and its justices. After the assessment procedure in August, the CPPSC-t decided[7] to cease the functions of all nine ECC justices[8] for irregularities in their selection and appointment in 2012, for not complying with their constitutional function to guarantee fundamental rights, and for misusing public funds designated to the ECC.

In connection with the selection and appointment of the justices, the CPPSC-t highlighted that neither the written nor oral part of the evaluation of the selected candidates was in line with an objective, transparent, and meritocratic assessment of the candidate's professional knowledge and skills set forth by the Ecuadorian Constitution[9] and by the jurisprudence of the Inter-American Court. The CPPSC-t found that the ECC did not fulfill its constitutional review functions

[3] Official Registry, Supplement No. 180 (February 14, 2018).

[4] The questions were about the following: 1) if corruption should be sanctioned by withdrawal of political rights; 2) if all the directly elected public officers should be able to be reelected only once; 3) if the CPPSC should transitionally have the power to evaluate the performance of certain public authorities; 4) if crimes of sexual violence against children and adolescents should never be prescribed; 5) if metal mining should be prohibited in protected and urban areas; 6) if the law on the capital gains tax should be repealed; 7) if the area for oil extraction should be reduced inside the Yasuní National Park. The highest popular support was given to the question regarding sexual violence.

[5] See, No. PLE-CPCCS-T-O-009-03-2018. Every document on each evaluation procedure is publicly available here: http://www.cpccs.gob.ec/designacion-de-autoridades/

[6] According to the last surveys of CEDATOS, 73% of Ecuadorian society supports the actions of the CPPSC-t. http://www.cedatos.com.ec/detalles_noticia.php?Id=372

[7] Resolution No. PLE-CPCCS-T-O-089-23-08-2018. (August 23, 2018).

[8] Emma Roxana Silva Chicaiza, Pamela Martínez Loayza, Victor Francisco Butiña Martínez, Wendy Molina Andrade, Tatiana Ordeñana Sierra, Marien Segura Reascos, Ruth Seni Pinoargote, Manuel Viteri Olvera, and Alfredo Ruiz Guzmán.

[9] Constitution of 2008, Art. 434.

and left the country without effective control of constitutionality. The CPPSC-t emphasized that the ECC decided its cases arbitrarily and violated the principles of due process, foreseeability, and the rule of law. Furthermore, the CPPSC-t resolved that the arguments used in the ECC's cases were selected in a discretional fashion and were driven by the self-interest of the president of the ECC. Finally, the CPPSC-t established that the ECC did not properly manage the public funds allocated to exercise its functions, especially in the field of public contracting. Ecuadorian public opinion welcomed this outcome with satisfaction, which mirrors a long-standing and general negative judgment towards the ECC.[10]

After removing the nine justices from the ECC, the CPPSC-t declared a 60-day-long constitutional vacancy.[11] Following the resolution, all the pending cases and their deadlines were declared dormant for the period of the constitutional vacancy and it was decided they were to be analyzed by the newly selected and appointed constitutional justices. In November, after a rigorous selection procedure, the CPPSC-t approved the list of the new candidates[12] for the ECC. Among others was Hernán Salgado, previous judge of the Constitutional Tribunal and the Inter-American Court, as well as other prestigious law professors and professionals.

4. Corruption

The breadth and depth of corruption scandals unveiled during 2018 were astonishing. The judiciary itself and its inability to adjudicate impartially for over a decade was the center of the turmoil. Since 2013, the Council of the Judiciary, presided by Gustavo Jalkh, had been pervasively accused of directly interfering with the independence of judges on a nationwide scale.[13] In May, the Legislature impeached Jalkh, and the CPPSC-t found extensive evidence on the systemic arbitrariness in judicial decision-making, which generally favored the interests of Correa's government and relatives. The "inexcusable miscarriage of justice" was the legal term of choice by the Council of the Judiciary to reprimand and dismiss disloyal judges with a chilling effect over the rest. The dismissal of judges under this figure paved the way for the Council of the Judiciary to appoint judges that would avail themselves to tailor the decisions that the regime would require. In the face of all the evidence, Jalkh and the rest of the members of the Council of the Judiciary were dismissed by the CPPSC-t.[14] The CPPSC-t appointed five transitory members to the Judicial Council and created a sort of Sub-Committee for Truth and Justice (*Mesa de Verdad y Justicia*) to hear complaints against judges, prosecutors, and clerks. The Sub-Committee heard over 800 cases and decided to dismiss 175 of the defendants.[15]

The task of the transitory Council of the Judiciary was key to mending the rule of law in Ecuador. Under the particular circumstances, the task to evaluate judges without making them feel the type of undue pressure that had become usual was almost impossible. Among the transitory authorities appointed by the CPPSC-t, perhaps the transitory Council of the Judiciary was the one that faced more external criticism and internal division. According to a certain public perception, it was resorting to similar grounds of dismissal for judges and prosecutors as its predecessors, which was questioned by a minority among its members.[16]

Corruption and lack of impartiality within the judiciary reached the level of covering up and leaving in impunity cases of political violence. During 2018, a new National Attorney found evidence of a state crime in connection with the kidnapping of a political activist and ex-congressman in 2012. The evidence pointed in the direction of the General of the National Police and the Secretary of Intelligence Services under Rafael Correa.[17] Both of them were sentenced to prison,[18] and the National Court of Justice issued a red arrest warrant against President Correa because of evidence that could incriminate him. Interpol declined to arrest and extradite Correa from Belgium, and the criminal proceedings in Ecuador have halted until he appears before the Court.

Corruption has also tainted much of the public works built during the past ten years. The National Court of Justice found the Comptroller General, Carlos Pólit (now fugitive), and his son guilty of extortion and bribery. They were sentenced to 6 and 3 years of prison, respectively, due to crimes related to the Odebrecht scandal.[19] In the oil sector, the National Court of Justice found that the former Minister of Oil[20] and the former CEO[21] of the Ecuadorian oil company Petroecuador

[10] Santiago Basabe, 'Corte Constitucional = inoperacia+corrupción+pusilanimidad' [Constitutional Court = ineffectiveness + corruption + pusillanimity] (*4Pelagatos*, 7 August 2018). https://4pelagatos.com/2018/08/07/corte-constitucional-inoperancia-corrupcion-pusilanimidad/ accessed 22 February 2019.

[11] Resolution No. PLE-CPCCS-T-O-095-31-08-2018. (August 31, 2018).

[12] Hernán Salgado Pesantes, Daniela Salazar Marín, Ramiro Ávila Santamaría, Teresa Nuques Martínez, Agustín Grijalva Jiménez, Alí Lozada Prado, Pablo Herrería Bonnet, Carmen Corral Ponce, and Karla Andrade Quevedo.

[13] Santiago Basabe, 'Consejo de la Judicatura: hacemos de la corrupción una práctica diaria' (4Pelagatos, 2 October 2018). https://4pelagatos.com/2018/10/02/consejo-de-la-judicatura-hacemos-de-la-corrupcion-una-practica-diaria/ accessed 22 February 2019.

[14] Resolution No. PLe-CPCCS-T-O-037-04-06-2018.

[15] Resolution of the Judicial Council No. 094A-2018. http://www.funcionjudicial.gob.ec/index.php/es/saladeprensa/noticias/item/7094-mesa-de-verdad-y-justicia-investiga-casos-de-judiciales-destituidos.html

[16] Fermín Vaca, 'Las claves para entender las pugnas en la Judicatura' (*Plan V,* 17 September 2018). http://www.planv.com.ec/historias/politica/claves-entender-pugnas-la-judicatura accessed 22 February 2019.

[17] Press release, FGE Nº 132-DC-2018. https://www.fiscalia.gob.ec/fiscalia-presento-19-elementos-de-conviccion-para-vincular-a-dos-personas-al-caso-balda/

[18] Criminal Proceeding No. 17721-2018-00012 (June 15, 2018).

[19] Criminal Proceeding No. 17721-2017-00222.

[20] Criminal Proceeding No. 17721-2016-1564 (June 12, 2018).

[21] Criminal Proceeding No. 17294-2017-01641 (July 3, 2018).

were guilty of illicit enrichment, traffic of influences, and other charges of corruption.

III. CONSTITUTIONAL CASES

1. Case Satya: gender identity[22]

The case was about a child, Satya, who was born in 2011. Her biological mother sought to register Satya under her family name and that of her female partner.[23] This, however, was not possible according to the Ecuadorian Constitution and civil registry statutes. Satya was already legally recognized as the daughter of the lesbian couple in Great Britain. In Ecuador, the case had been dismissed in the final instance, but the Ombudsman's Office brought the issue to the ECC alleging that there had been violations of constitutional rights in the course of the judicial decision.

Besides the heated issue in regard to same-sex parenting, this case touched upon the erratic jurisprudence of the ECC on the extraordinary judicial remedy or *acción extraordinaria de protección.* The ECC has contradictory jurisprudence on when such a remedy is admissible, what sort of right might be violated in a judicial procedure, and whether the ECC has the power to overrule previous judicial decisions. The nature of the extraordinary judicial remedy and the powers of the ECC when deciding such cases will have to be clarified by the next composition of the ECC, especially because the overwhelming majority of cases in the backlog of over ten thousand pending cases are extraordinary judicial remedies. In practice, the extraordinary judicial remedy has been abused as if it were a sort of another instance and it has created a great deal of uncertainty. In this case, the ECC ruled that the Office of Civil Registry must register Satya as requested by her biological mother.

2. Case of the Río Blanco: illegal mining and rights of nature[24]

The decision of the Provincial Court of Justice of Azuay on halting mining activities by the *Río Blanco River* was considered a landmark for the protection of the rights of nature and the local community. The local community of Molleturo, in the southern province of Azuay, have opposed for a long time the mining project by Ecuagoldmining, owned by the Chinese Junefield Group. The project would take place in the biosphere reserve of *Macizo del Cajas.* UNESCO declared this to be a biosphere reserve in 2013 due to the exuberant biological diversity of this region, which includes moorland, wetland, mangroves, and a marine ecosystem. The community of Molleturo filed a judicial remedy (*acción de protección*) that seeks to declare null and void all the mining licenses issued by the Ministry of Mining and Environment for drilling and gold mining by the *Río Blanco River.* They also seek to recover damages and other forms of reparation for the harm already caused to nature and the community.

The decision of the Court provided an analysis of the constitutional principle of *sumak kawsay* (Quechua for "living well" or "fullness of life") and the right to prior consultation to the community. The Court found that whereas Article 408 of the Constitution declares an inalienable property of the State all nonrenewable natural resources, including mineral deposits and biodiversity, the State must respect the environmental principles laid down by Article 395 when administering such natural resources.

The decision also considers the right to prior consultation of the affected communities in the planning and implementation of mining activities (Article 57, No. 7 of the Constitution). The Court recalled that in the popular referendum in February, Ecuadoreans voted in favor of restricting mining activities. The Court further reasoned that the 2008 Constitutional paradigm mandates developing a "non-extractivist" economic model and replacing the anthropocentric approach to the protection of the environment with a biocentric or "ecocentric" approach, according to which human beings shall not be placed at the center of the legal protection (as under liberal constitutionalism) but instead the ecosystem as a whole (which is a novelty in Andean Transformative constitutionalism). According to the Court, this ecocentric approach was adopted when the Ecuadorian Constitution of 2008 recognized "nature as a bearer of rights" and the *sumak kawsay* as the central principle of the Ecuadorean constitutional order. Under such reasoning, the Court decided that the Ministry had not abided by constitutional standards on prior consultation and that the rights of the local communities had been violated.

3. Case of the 2015 unconstitutional constitutional amendment[25]

This was the first time that the ECC reviewed the constitutionality of an already promulgated constitutional amendment. The challenged constitutional amendment[26] was adopted while Rafael Correa was still in office in 2015, and its central question was the indefinite reelection of the President. The challenge was brought on formal and substantial grounds by several plaintiffs. The ECC was criticized for not being willing to take the heat while it was still a relevant issue but only when a second amendment had already made the issue moot.

The ECC declared that it has the power to ex post review the constitutionality of constitutional amendments, following Articles 436.2 and 75(1.a) of the Constitution and Article 106 of the Organic Law of Jurisdictional Guarantees and Constitutional Review.[27] Ac-

[22] Judgment No. 184-18-SEP-CC, ECC.

[23] According to the naming pattern in Ecuador, a child's given name is to be followed by, in the first place, the father's family name and in the second place by the mother's family name.

[24] Decision of the Provincial Court of Azuay, No. 01333201803145 (August 3, 2018).

[25] Judgment No. 018-18-SIN-CC, ECC.

[26] Supplement, Official Registry No. 653 (December 21, 2015).

[27] Supplement, Official Registry No. 52 (October 22, 2009) The competence of reviewing the constitutionality of constitutional amendments is mentioned expressly only in the Organic Law, not in the Constitution. This, however, did not appear as an issue in the decision of the ECC.

cording to the Organic Law, the ECC is only allowed to review the constitutionality of amendments on formal grounds. Therefore, the ECC focused on possible errors during the amendment procedure, and it did not adjudicate anew on whether the selected procedure for the constitutional change in 2015 was in line with the Constitution. In its ex ante review from 2015,[28] the ECC considered that giving way to indefinite reelection of the President was not considered either an "alteration of the fundamental structure of the Constitution" or a "constitutive element of the Constitution," and it did not "restrict any fundamental rights or guarantees" that allowed for a simpler amendment procedure. [29] According to Article 441, the amendment that the ECC had approved had to be initiated by at least one-third of the members of the National Assembly, and for its adoption, it was enough to secure two-thirds of the votes of the National Assembly.

In 2018, the ECC decided that the amendment was initiated by the necessary number of members of the National Assembly, and that the final text of the amendment was adopted by the required two-thirds majority as well. However, the ECC found that the applicable procedure mandated that the National Assembly had to vote separately for each article, but the Assembly decided in a single vote. The ECC found this practice contrary to the principle of constitutional supremacy and rigidity. The ECC ruled that voting in blocks about different provisions to amend the Constitution violated the freedom of the electors and the democratic principle of deliberation; therefore, it was unconstitutional. The ECC clarified that the formal unconstitutionality of the said amendment did not affect its normative force.

This decision was one of the last judgments of the ECC before its dissolution by the CPPSC-t. Under normal circumstances, a judgment on the unconstitutionality of a constitutional amendment might have been approached as a historic step in a country's constitutional development. Nevertheless, this judgment has not received any attention in professional or general public discourse. One reason to explain this disinterest could be that the professional community considered this a strategic move of the ECC to prove its legitimacy and impartiality while it was under the evaluation of the CPPSC-t. Another reason seems to be that the decision does not have any major impact on the contested amendments.

IV. LOOKING AHEAD

In October, the chairman of the CPPSC-t announced[30] that the Council had fulfilled its mandate to evaluate the performance of several state organs to strengthen the constitutional institutions in Ecuador. The members of the CPPSC-t encouraged the Ecuadorean people to abolish this institution from the Constitution, hinting to include another referendum in the elections for local authorities that will take place in 2019. The reason is that the powers that the Constitution gives to the CPPSC to remove and appoint authorities could easily be abused once again, and it may be better to give back those constitutional powers to the Legislative, as it used to be before the 2008 Constitution.

The National Electoral Council has already[31] called for elections on March 24, 2019. They will not include a referendum, but new members to the CPPSC will have to be elected. Public opinion seems to support the abolition of the CPPSC and encourages voting null on the elections.[32] Their outcome will be important to consolidate the work of the CPPSC-t, which was not free from faults but pointed the country in the direction of unveiling corruption and abuse of power, and rebuilding the institutions needed in a liberal democracy.

V. FURTHER READING

Juan Pablo Aguilar Andrade, *El Mito del Nuevo Paradigma Constitucional* (Corporación de Estudios y Publicaciones, 2018)

Mauricio Maldonado Muñoz, *Los Derechos Fundamentales*. Un estudio conceptual (ARA Editores, 2018)

Andrés Martinez Moscoso – Teodoro Verdugo Silva (coord.), *Tensiones y contradicciones de la democracia ecuatoriana* (Universidad de Cuenca, 2018)

Sebastián López Hidalgo, *Reflexiones acerca de la legitimidad democrática de la justicia constitucional en Ecuador* (CEP – Universidad Andina Simon Bolivar, 2018)

[28] Judgment No. 184-18-SEP-CC, ECC.

[29] In 2015, the decision of the ECC was criticized because it did not consider seriously how, in the circumstances of the moment, the indefinite reelection of the President could affect the principle of political rotation (*principio de alternabilidad en el gobierno*) and political rights.

[30] Press release No. 248 (October 19, 2018). See http://www.cpccs.gob.ec/2018/10/cpccs-t-explico-su-actuacion-y-propuesta-de-eliminacion-de-la-institucion/

[31] Resolution of the National Electoral Council, No. PLE-CNE-3-21-11-2018. http://cne.gob.ec/images/d/2018/Elecciones__2019/convocatoria_modificada.pdf

[32] Santiago Basabe, 'Voto nulo = eliminar el Consejo de Participación Ciudadana' [Null vote = eliminating the Council of Citizens' Participation]. 4 Pelagatos. February 19, 2019. https://4pelagatos.com/2019/02/19/voto-nulo-eliminar-el-consejo-de-participacion-ciudadana/



Egypt

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I. INTRODUCTION

Between brand new issues and continuous developments of the last years, the constitutional status of Egypt in 2018 was rich and controversial. The emergency status was extended— again—with new relevant procedural orders. A law addressing the rights of the disabled was passed,[1] a decision regulating the situation of a number of churches was delivered,[2] and a new Chief Justice of the Supreme Court was appointed,[3] while the battle over the appointment of female judges in the state council continued. In another context, a number of interesting decisions were issued by the Supreme Court addressing—among other matters—the regulation of pharmaceuticals, the interpretation of the Islamic Sharia,[4] the sovereignty acts,[5] the former Supreme Court judges' status, and the previous civil associations law.[6] After the explanation of the most salient constitutional developments, the reviewer, where applicable, presents a brief comment.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most prominent constitutional development of 2018 was rooted in one of the essential features of the constitutional system in Egypt, namely the problematic emergency status. Egypt has been under a "roughly" continuous emergency status since 1981 under the rule of the former president Mubarak. This was suspended for a while after the revolution, given it was one of its major demands. However, after August 14, 2013, the date of the dispersing of Rabaa sit-in, Egypt has been witnessing a sequence of declarations and extensions of the emergency status, giving the army and the police forces exceptional powers over citizens.[7]

According to Article 154 of the Egyptian 2014 Constitution, the President has the power to declare the emergency status, as regulated by law, and after consultation with the cabinet. The proclamation has to be approved with a simple majority and has to be submitted to the House of Representatives within 7 days. The Constitution limits the duration of the emergency status to three months. This limitation can be renewed for only one time with the approval of the Par-

[1] For more about this law see: The Official Gazette, Issue (17) repeated (b), May 1, 2018.

[2] For more about this decision see: The Official Gazette, Issue (22) repeated (i), June 6, 2018, p. 54-61.

[3] Decision of the President of the Arab Republic of Egypt number 339 of year 2018, The Official Gazette, Issue (29) repeated (c), July 21, 2018, p. 2.

[4] For more about these decisions see: The Official Gazette, Issue (15) repeated (f), April 16, 2018, p. 13-20, and The Official Gazette, Issue (22) repeated (i), June 6, 2018, p. 40-53, and The Official Gazette, Issue (19) repeated (b), May 13, 2018, p. 116-125 & p. 146-160.

[5] For more about this decision see: The Official Gazette, Issue (22) repeated (i), June 6, 2018, p. 62-67.

[6] For more about this decision see: The Official Gazette, Issue (22) repeated (i), June 6, 2018, p. 26-39.

[7] Yussef Auf, 'The State of Emergency in Egypt: An Exception or Rule?' (*Atlantic Council*, MENASource, 2018) <https://www.atlanticcouncil.org/blogs/menasource/the-state-of-emergency-in-egypt-an-exception-or-rule> accessed 7 February 2019.

liament with a two-thirds majority. In 2018, Egypt experienced two declarations of the emergency status, and two extensions, all according to the given constitutional procedures.[8] Moreover, according to the last declaration of the emergency status in October 2018, the Prime Minister issued a decision that obliges the General Prosecution to defer specific cases to the State Security Emergency Courts (a type of exceptional court) instead of the ordinary courts. These cases included felonies harming the security of the government from outside the country or internally, and crimes related to unlawful assembly, explosives, disruption of transportation, a number of press- and opinion-related crimes, the violation of peace, supply and compulsory pricing, arms and munition, the preservation of places of worship, the violation of labor liberties, facilities sabotage, the regulation of assembly rights and peaceful demonstration, and terrorism.[9]

Whether the constitutional deficit lies in the constitutional text itself or in its application is debatable. One may say the real circumstances can require an exceptional status that rightfully lasts for more than six months. However, the problem is with the laws regulating the emergency state themselves.[10] As long as these laws adopt a broad and elastic formulation, this will give the President, the Parliament, and the Executive huge discretionary power, and courts in charge of interpreting and applying these laws will play a limited role. This turns the emergency status into a normal status in the Egyptian constitutional scenario, while the exercise of powers of constitutional adjudication paradoxically turns into an exceptional event.

III. CONSTITUTIONAL CASES

The most important constitutional law cases in Egypt 2018 vary in their fields between the different relevant questions of the protection of civil freedoms and restrictions or powers of the state. Although not all the interesting cases can be included in this review, the most prominent ones are, keeping in mind variation between the relevant subjects. Other cases can be found in the Further Readings section.

1. Basel El-Aalaily v. The Prime Minister & Others: The Regulation of Pharmacies Ownership

The plaintiff challenged the constitutionality of clause (30) of law no. 127 of 1955 modified by law number 253 regulating the practice of the pharmacy profession. This constitutional issue originated from a controversy concerning the decision of the head of the central administration of pharmaceutical affairs declining the plaintiff's request of issuing a license to open a public pharmacy in El Shorouk City. The administration rejected the issuance of the license, arguing that the mentioned clause forbids that a pharmacist be an owner or a partner of two pharmacies, and this would have been the case.
The plaintiff argued that these limitations breached the constitutional protection of private property rights, as it consisted of an unreasonable restriction of these rights. Moreover, he claimed that the contested decision limited the social role of property rights by endangering public service and putting possible jobs at risk.

The court rejected these arguments and upheld the constitutionality of the addressed clause on the basis that property rights are not absolute, and they have to be subject to the evaluation of their social roles. The legislator has the discretionary power to regulate these rights with the aim of guaranteeing social needs. It is within this discretionary power that the legislator might and should balance the potentially conflicting constitutional interest. With its regulation, the legislator considered that pharmacies provide an aspect of health care protected by Article 18 of the Constitution, and provide a viable balance of the constitutional interests involved. These interests include the protection of the profession of pharmacists from the mere application of free market self-regulation to guarantee that customers get the best possible quality and lower prices. Moreover, the contested regulation aimed at preventing illegitimate competition within this profession, and at keeping it away from the mere profitable commercial attitudes given its close relevance to health care and the right to life. The Supreme Constitutional Court, then, held that the regulation of the legislator in this context was reasonable and logically connected to the objective of the law, and did not violate Articles 33 and 35, regulating property rights. Regarding the alleged breach of the right to labor protected by Articles 12 and 13 of the Constitution, the Court also rejected the claim on the basis that this right is not absolute, elaborating on the dimension of the right to labor as a public duty. In the Court's view, the legislator drew a reasonable balance between constitutionally relevant interests, such as the protection of public health, the prevention of unfair competition, and the guarantee of a real and effective supervision of the owner on the activity of the pharmacy.

The Court, accordingly, decided that the regulation of the law did not violate the origin and essential core of the regulated rights, and consequently upheld the contested legislation.[11]

In our opinion, however, the Court could have considered whether the current regulation had reached its goals during the years of application, or even whether the contested

[8] Decision of the President of the Arab Republic of Egypt number 647 of year 2017, The Official Gazette, Issue (52) repeated (d), December 31, 2017, p. 7-8.
Decision of the President of the Arab Republic of Egypt number 168 of year 2018, The Official Gazette, Issue (15) repeated, April 14, 2018, p. 2-3.
Decision of the President of the Arab Republic of Egypt number 266 of year 2018, The Official Gazette, Issue (25) repeated (a), June 24, 2018, p. 2-3.
Decision of the President of the Arab Republic of Egypt number 473 of year 2018, The Official Gazette, Issue (41) repeated (a), October 15, 2018, p. 3-4.

[9] Decision of the Prime Minister number 2124 of year 2018, The Official Gazette, Issue (41) repeated (a), October 15, 2018, p. 7-8.
Penal Code number 58 of year 1937, https://manshurat.org/node/14677

[10] See last year's report: Eman Muhammad Rashwan, 'Egypt: The State of Liberal Democracy' in Richard Albert and others (eds), *2017 Global Review of Constitutional Law (2018)* <www.bc.edu/cloughcenter>.

[11] The Official Gazette, Issue (22) repeated (i), June 6, 2018, p. 54-61.

regulation prevented a sole owner from being *de facto* owner of more than two pharmacies. This is highly doubtful from our point of view.[12] Of course, any deficits in the competition in the pharmacy market in Egypt cannot simply be overcome only by legal means. However, whatever the most appropriate means to regulate the matter at hand, we hold that the legitimacy of a given law does not only depend on its "rationality" and "logic" "in the books" but also on its functionality "in action". This could be food for thought for the Supreme Court in its future decisions.

2. Tiran & Sanafeer Cases

The Case of Tiran & Sanafeer Islands, connected to the international treaty between Egypt and Saudi Arabia on the Red Sea borderlines, started in 2016, when a number of activists and lawyers took it to the judiciary. [13] In 2018, two decisions were delivered by the Supreme Court on this issue.

The first was in the case filed by *The President of the Republic, The Prime Minister, The Head of the Parliament, The Minister of Defense, The Minister of the Interior, and the Minister of Foreign Affairs v. Ali Ayoub (Lawyer) & Others.* The applicants filed this case as an "Execution Dispute" to ask for an urgent suspension of the execution of a decision delivered by the State Council. The constitutional challenge concerned the jurisdiction of the State Council over the dispute on the competence to sign and conclude the relevant treaty. The State Council declared that the contested acts were null and void, basing the decision on Article 151 of the Egyptian Constitution, which prohibits the conclusion of any treaty that entails the cession of parts of the state's territory.

The applicants alleged that the challenged decision by the State Council prevented the application of earlier decisions by the Supreme Court, which categorized similar acts by the Government as "Sovereignty Acts", and thus not subject to any judicial review.[14]

First, the Supreme Court rejected the applicants' argument based on the fact that the matter was *res judicata.* The Supreme Court affirmed that the *res judicata* was limited to the peculiar circumstances of the cases decided, and that the cases at hand involved a different, though similar, subject. Accordingly, the Court affirmed that the challenged decisions of the State Council did not *per se* preclude the application of the sovereignty acts principle laid out by the Supreme Court, because the State Council decided the contested acts were not to be considered as *sovereignty acts* but as administrative acts, subject to judicial review. Whether this consideration by the State Council was correct or not is not the subject matter of this first case.

The second case was decided on the same day by the Supreme Court (*The President of the Republic & Others v. Ali Ayoub [Lawyer] & Others*). This decision, unlike the first one, tackled the question of whether the subject matter of the case was falling into the category of sovereignty acts or not.

After the decision of the State Council courts—referred to earlier—an urgent case was filed before an ordinary court (not an administrative one, and therefore not under the jurisdiction of the State Council). The action aimed at the urgent suspension of the execution of the decisions delivered by the State Council on the basis that the subject of the dispute was a sovereign act that should be out of judicial review jurisdiction. The urgent court decided to stop the execution and considered the decisions of the State Council as null and void. This decision was later upheld by the relevant court of appeals. Consequently, the situation came into a conflict between two judicial decisions from two different jurisdictions. In fact, the applicants asked the Supreme Court to disregard the decisions delivered by the State Council and to give immediate application to the decisions delivered by the ordinary courts.

The Supreme Court decided that both the ordinary and administrative courts have no jurisdiction over the subject of the case.

Although the very complicated details of the case entailed an extremely detailed decision that could be a reference for many legal issues, the most important aspects of the Court's decision may be listed as follows: (a) The Court rejected the defendants' argument that there is no *actual* conflict between the two jurisdictions, as the administrative courts already had delivered their decisions and exhausted their jurisdiction over the case before a new case was filed before the ordinary courts. It decided that this simultaneous litigation does not generate a conflict that falls within the Supreme Court's attribution; (b) Although the Parliament and the President had approved the treaty after filing the case before the Supreme Constitutional Court, and before this Court delivered its final decision suspending the earlier State Council decisions, this does not mean that the parties no longer benefit from the Supreme Court deciding the case. First, because the non-execution of the conflicting judicial decisions that are the subject matter of the conflict case is not a condition provided by law for the Court to be able to rule over the conflict. And second, even if a decision delivered by an incompetent court was executed, this can only be considered a mere material barrier in the way of the execution of the competent court's decision, and in such case this barrier should be removed; (c) The Court held that the signature and conclusion of an international treaty is a sovereign act and does not fall within any court's jurisdiction; (d) The Court held that it is the Parliament that should decide whether a treaty is tackling one of the *State Sovereignty Rights* and—in the affirmative case—it is the Parliament that is empowered to call a referendum to

[12] See for instance: Mohamed Fatouh, 'الإمبراطور الجدد في سوق الدواء.. قباقنة الصيدلية تخطف الصحة" بالوزارة و"ربح الو س ال" تتولى سياسة "الصيدلية" الدواء: الحكومة تعامل مع الأزمة بشكل فاشل' ('The emperors of the pharmacy chains are taking over the drug market. The Pharmacists' Syndicate is addressing "health" and the ministry with no replies. 'The right to medicine: The government dealt with the crisis in a failed manner' (*Ahl Masr*, 2017) <https://www.ahlmasrnews.com/203193> accessed 8 February 2019.

[13] For more about the previous developments and details of the issue, see: Eman Muhammad Rashwan (n 10) 85.

[14] The Official Gazette, Issue (9) repeated (c), March 7, 2018, p. 3-20.

approve the international treaty (according to Article 151 of the Constitution); (e) The Court held that after the final approval of the treaty and its publication in *The Official Gazette* (what had already happened in the case at hand), the review over the treaty becomes an exclusive jurisdiction for the Supreme Court, its jurisdiction being limited to assessing the compatibility of the procedures of approving the treaty with the procedures explained in the Constitution, and to the adherence of its content to its principles, the same power it has over ordinary laws;[15] (f) However, the Court finally refused to review the question on the competence, as it held that the question was not relevant to the case at hand, which only concerned the conflict of jurisdiction between two courts.[16]

However, in our opinion, the Court disregarded a crucial deficit in procedural Egyptian law, which gives a person the opportunity to preclude the execution of a final judicial decision by filing an opposite case over the same dispute before a different jurisdiction, even if he/she already knows that this second jurisdiction has no competence over the case. In deciding these conflicts, the Court should have considered the intention of the litigants by investigating possible cases of "abuses of law". In fact, the core dispute at hand did not concern a conflict of jurisdiction between administrative and ordinary courts, but the justiciability of the act itself. In fact, the decision of the Supreme Court, declaring the invalidity of both the ordinary and administrative court decisions, supports this claim.

3. Justice Tahani El-Gebali v. The President of the Republic & Others: Supreme Court Justice Reappointments

The 2012 Constitution reduced the number of justices of the Supreme Court to 10 (keeping the most seniors on the bench). This constitutional regulation was interpreted as revenge by the Islamists against the Court.[17] One of the judges affected by this constitutional regulation was justice El-Gebali, who filed the reported case.

The applicant requested the cancellation of the President's decision dismissing her. She based her request on the constitutional principle of judicial independence and on the prohibition of the judges' dismissal, and on the change of political circumstances, which enabled the reappointment of most of the judges who were dismissed in the same context.[18]

The Court rejected her application, arguing that the applicants requested the cancellation of the reappointment of a number of the impeached judges; nonetheless, she had no interest in such a decision. Moreover, the Court rejected the request of reappointing herself, as this matter falls into the discretionary power of the Court;[19] finally, the Court noted that the 2014 Constitution explicitly preserved the legal consequences of the 2012 Constitution for reasons related to the stability of law. Consequently, the 2014 Constitution chose the ways through which it corrects the invalid consequences of the 2012 Constitution.[20] The reappointment of the dismissed judges was not part of this and so not addressed by the 2014 Constitution.

As a final note, it may be of interest that Justice El-Gebali was the only female judge among the Supreme Court justices.

IV. LOOKING AHEAD

The main constitutional question that awaits Egypt in 2019 is whether the 2014 Constitution will be amended, mainly to enable the current President, Abdel Fattah El-Sisi, to be re-elected for a third term.

As expected,[21] in January 2019, a coalition in the Parliament submitted a constitutional amendment draft, including: (a) the extension of the presidential term from 4 to 6 years; (b) the recognition to the current President of an exception through a transitional clause that accords him the right to run for presidency for two more terms added to the current term that is supposed to end in 2022, which gives him the chance to be a president for twenty sequential years; (c) the concession of additional presidential powers over the judiciary, including the appointment of the heads of judicial authorities, while the State Council's powers are severely reduced; (d) the broadening of the powers of the military, including "the protection of the Constitution and democracy, and preservation of the main pillars of the state and civil society, the acquired interests of the people and rights and liberties of individuals;" (e) the broadening of the jurisdiction of military courts; (f) the addition of the vacancy of the vice-president; (g) the creation of an upper chamber of the Parliament, named "Senate;" (h) the establishment of a 25% quota for women in the house of representatives, and (i) the guarantee of an "adequate" representation in the Parliament and municipalities for Christians,

[15] For more about the Supreme Constitutional Court power over reviewing treaties, see article (151) of 2014 the Constitution.

[16] The Official Gazette, Issue (9) repeated (c), March 7, 2018, p. 21-51.

[17] جابر نصار, 'المحكمة الدستورية العليا في مشروع الدستور بين عداء غير مبرر وانتقام غير مسبوق' - The Supreme Constitutional Court in the Constitution Draft Between an Unreasoned Hostility and Unprecedented Revenge جريدة الوطن (2012).

[18] For more about the dismissal details see: 'تشكيل المحكمة الدستورية: 7 قضاة يعودون إلى محاكم أخرى وهيئة المفوضين والمحامة' *Almasry Alyoum* (25 December 2012) < https://www.almasryalyoum.com/news/details/267317>

[19] Article (193) of the 2014 Constitution stated that the Supreme Constitutional Court shall be formed from a chief justice and "sufficient" number of vice chiefs. This gives the decision whether the Court appoints new judges or not, and the selection of these judges to the Supreme Court itself.

[20] The Official Gazette, Issue (22) repeated (i), June 6, 2018, p. 180-187.

[21] 'Egypt Mulls Changing Constitution to Keep Sisi in Power' (*news 24*, 2019) <https://www.news24.com/Africa/News/egypt-mulls-changing-constitution-to-keep-sisi-in-power-20190101> accessed 8 February 2019.

people with disabilities, laborers, farmers, the youth, and Egyptians residing abroad (even though the latter minorities are not guaranteed with a specific quota). Finally, the constitutional amendment draft aims at introducing an amendment to the amendment procedures of the articles regulating the presidential terms or the principles of freedom and equality unless the amendment is related to further guarantees. However, this final amendment did not appear in the draft submitted later to the general committee of the Parliament.[22]

The amendments met the required majority in the general committee of the Parliament in February 2019, passing the first step for their approval.[23] They now have to be voted through by a two-thirds majority of the Parliament, and then approved by the majority of the "correct participating votes" in a public referendum.

V. FURTHER READING

Nahed El-Mannai and others, الدساتير والقطاع الأمني في مرحلة ما بعد ٢٠١١ - *Constitutions and the Security Sector in the Phase of Post 2011* (Arab Association of Constitutional Law 2018) <http://www.dustour.org/images/Second-Academy-papers-2.pdf>

Shams El-Din El-Haggagi, Sarah El-Ghamdi and Omar El-Naas, دور القضاء في عمليات وضع الدساتير - The Role of the Judiciary in Constitution Making Processes (Arab Association of Constitutional Law 2018) <http://www.dustour.org/images/First-Academy-papers-1.pdf>

Randa Mustapha, 'التعيينات في الهيئات القضائية.. فصل جديد في أزمة الرئاسة مع استقلال القضاء' - "Appointments in the Judicial Authorities". A New Chapter in the Crisis of the Presidency with the Judicial Independence' (Mada Masr, 2018) <https://madamasr.com/ar/2018/12/19/feature/السياسة/التعيينات-في-الهيئات-القضائية-فصل-جديد/?fbclid=IwAR31VPJ-3dCwPYxwkJm5Ai9tsFHnGRCbY2_Wtc-49TyM-bcvmXvJrhlzCvAQU> accessed 11 February 2019

Shahira Amin, 'Egypt Looks to Remove Religion from ID Cards—but Is It Too Little, Too Late?' (*Al-Monitor*, 2018) <https://www.al-monitor.com/pulse/originals/2018/11/egypt-remove-religion-national-id-cards-coptic-christians.html> accessed 11 February 2019

Radwan Alaa, 'كيف تصدت المحكمة الدستورية العليا لقضية «المرأة والقضاء» بعد مد دستورية المادة 104؟' - How Has the Supreme Court Addressed "The Woman & The Judiciary" Case through the Unconstitutionality of Article 104?' *Sout AlOmma* (6 December 2018) <http://www.soutalomma.com/Article/846776/كيف-تصدت-المحكمة-العليا-الدستورية-لقضية-المرأة-والقضاء-بعد-مد-دستورية-المادة-104?fbclid=IwAR1Za1ZBo3RZxpDsNpkux6QLzqcBrHJK3siV9kOwxbfIv7o-IlF7zs74XWI>

[22] 'البرلمان في بيان رسمي: اللجنة العامة اتفقت على تنحية مقرر اللجنة الاقتصادية الدستورية من الثلاثاء' Shorouk News (3 February 2019) <http://www.shorouknews.com/news/view.aspx?cdate=03022019&id=31f54e9a-9552-4036-9d35-517fb72cd6cc&fbclid=IwAR2DzxBBgq2VCOpXPRCraF0ib3_wLQu1YGO5VM9WMlUaWwDJ7rHEN21cdUY>

[23] 'Egyptian Parliament Advances Motion to Amend Constitution' (*Asharq Al-Awsat,* 2019) <https://aawsat.com/english/home/article/1577746/egyptian-parliament-advances-motion-amend-constitution> accessed 8 February 2019



Finland

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I. INTRODUCTION

This report discusses developments in Finnish constitutional law during 2018. It focuses on the most significant developments, including a major reform of the healthcare and social services system as well as reform of legislation related to civil and military intelligence. In addition, important opinions by the Constitutional Law Committee of Parliament and major cases by the highest courts—the Supreme Court and the Supreme Administrative Court—and other important bodies are discussed.

The intelligence legislation package, including a constitutional amendment related to the package, continued to be one of the most important themes on the Finnish scene of constitutional and political life in 2018. Another pressing topic was the reform of the Finnish healthcare and social welfare system. Aside from their constitutional significance, the political and societal importance of these two topics must be emphasized, not least because the Government was already close to collapse due to the failure of healthcare and social welfare reform in 2015. Given also looming parliamentary elections and European Parliament elections in the spring of 2019, 2018 was vibrant and intensive in Finnish constitutionalism and politics.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2018, the Constitutional Law Committee of Parliament, the primary authority of constitutional interpretation and review of legislation in Finland, issued 64 opinions on legislative proposals or other matters, including proposals for EU measures, concerning their compatibility with the Constitution of Finland as well as international human rights obligations binding upon Finland.[1]

In-depth reform of the healthcare and social services system

In 2017, the Government submitted to Parliament extensive legislative proposals that healthcare and social services should be run by larger entities instead of municipalities, which are currently responsible for providing healthcare and social services. In addition, a central proposed change was related to opening up more opportunities for the private sector to provide healthcare and social services. The reform is needed because of problems related to the current healthcare system as well as the aging population. While the Constitutional Law Committee took the view that the reform is necessary, it also identified a number of constitutional problems, especially insofar as the role of private actors within the so-called freedom-of-choice model was concerned. In addition, the Committee took the view that the schedule of the entry into force of the

[1] The Finnish system of constitutional review was discussed in more detail in the 2016 report on Finland, see Laura Kirvesniemi, Milka Sormunen and Tuomas Ojanen, 'Developments in Finnish Constitutional Law: The Year 2016 in Review', in Richard Albert, David Landau, Pietro Faraguna and Šimon Drugda (eds.), *The I-CONnect Clough Center 2016 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2017)

reform jeopardized everyone's right to adequate social, health and medical services.[2]

After the opinion of the Committee, the legislative proposals on the reform were amended, and the Government submitted its new proposals to the Parliament in 2018. In 2018, the Constitutional Law Committee gave a new opinion on the reform in which it continued to stress the importance of paying attention to equal treatment of the inhabitants of municipalities in different parts of the country and their factual access to services necessary for the realisation of their fundamental rights. The Constitutional Law Committee took the view that the proposed legislation was still incompatible with the Constitution in several ways.[3] Therefore, the Social and Health Committee of Parliament amended the bills, and now they are again pending before the Constitutional Law Committee, which is expected to give its final opinion on the compatibility of the proposed legislation in February 2019. It seems uncertain whether the reform will take place before the parliamentary elections of April 2019.

Constitutional amendment concerning secrecy of confidential communications for the purpose of allowing the enactment of civil and military intelligence legislation

In 2018, the Constitution of Finland was amended for the first time in its history according to the urgent procedure for constitutional enactment in which an amendment is passed without acceptance from two subsequent Parliaments.[4] The amendment was adopted for the purpose of allowing the enactment of legislation on civil and military intelligence, including their legal and parliamentary oversight, before the end of this Government term. The constitutional amendment entered into force on 15 October 2018. As 2018 came to an end, the proposed legislation on civil and military intelligence and on the oversight of intelligence gathering was still pending before Parliament.

Previously, section 10 of the Constitution provided that the secrecy of correspondence, telephony and other confidential communications was inviolable. Before the amendment, national security was not included in the grounds for limiting the secrecy of confidential communications. After the amendment, section 10 provides that provisions on limitations to the secrecy of confidential communications that are necessary for the purpose of gathering intelligence on military operations or other such activities that pose a serious threat to national security can be laid down by an ordinary act. The threat directed at national security must be serious, and secondly, it is required that interfering with the secrecy of communications must be necessary for the purpose of intelligence gathering.

III. CONSTITUTIONAL CASES

Helsinki Court of Appeal prohibited discrimination in military service

Section 127 of the Constitution of Finland states that every Finnish citizen is obligated to participate or assist in national defence, as provided by an act. Provisions on the right to exemption, on grounds of conscience, from participation in military national defence are laid down by an act. It follows from current legislation that all adult men are liable to perform either military or civil service. The sentence for refusal is 173 days of imprisonment.

Since 1987, however, Jehovah's Witnesses have been exempted from conscription by an act due to reasons of conscience based on their religious beliefs. Because the act conflicted with the Constitution, it was passed according to the procedure for constitutional enactment to assume the status of the so-called *exceptive enactment.* Exceptive enactments constitute a traditional peculiarity[5] of the Finnish constitutional system as they allow the adoption of legislation that in substance derogates from the Constitution without amending the text thereof, subject to the proviso that such legislation is approved in the procedure applicable for constitutional amendments. Since its adoption in the 1980s, the act exempting Jehovah's Witnesses has continuously been subject to criticism by, e.g., international human rights treaty bodies.

In the case before the Helsinki Court of Appeal (23.2.2018 no. 108226), the defendant, who was not a Jehovah's Witness, had been ordered to perform his civil service. He had refused and claimed that major reasons of conscience prohibited him from performing military or civil service. The District Court sentenced him to imprisonment.

Contrary to the District Court, the Court of Appeal found that sentencing the defendant would constitute a violation of section 6 of the Constitution, according to which everyone is equal before the law and no one shall, without an acceptable reason, be treated differently from other persons on the grounds of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person.

In examining the question of conscription and alleged discrimination, the Court of Appeal made reference to several cases of the European Court of Human Rights and the Human Rights Council. The Court found that since Jehovah's Witnesses had been

[2] Constitutional Law Committee Opinion 26/2017; Milka Sormunen, Laura Kirvesniemi and Tuomas Ojanen, 'Finland: The State of Liberal Democracy', in Richard Albert, David Landau, Pietro Faraguna and Šimon Drugda (eds.), *The I-CONnect Clough Center 2017 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2018), 90–91

[3] Constitutional Law Committee Opinion 15/2018

[4] For more information on the normal and urgent procedures for constitutional enactment in Finland, see previous report concerning Finland, *supra note* 2, 90

[5] Between 1919-2000, 888 exceptive enactments were adopted with the outcome that some constitutional provisions actually became "empty shells", as they were hollowed out by numerous exceptive enactments. Since the reform of the constitutional system of 1995, the constitutional doctrine has been that exceptive enactments should only be used for incorporating international treaties that conflict with the Constitution. Consequently, their use has drastically diminished. In addition, the new Constitution of 2000 introduced a material limit for exceptive enactments by requiring that the derogation from the Constitution must remain "limited".

exempted from conscription due to reasons of conscience, sentencing the defendant would be in evident conflict with section 6 of the Constitution, when interpreted in the light of Finland's international human rights obligations. According to section 106 of the Constitution, if the application of an act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision of the Constitution. Consequently, the Court of Appeal rejected the charges. The fact that the act that exempted Jehovah's Witnesses from conscription had been enacted in the procedure for constitutional enactment had no bearing on the Court's finding. It voted on the outcome of the case.

In September 2018, the Government submitted to Parliament a proposal to repeal the act that exempts Jehovah's Witnesses from conscription.[6] The bill was still pending before Parliament when 2018 came to an end.

Turku Court of Appeal upheld ban on Nordic Resistance Movement in Finland

On 28 September 2018, Turku Court of Appeal upheld the decision of the Pirkanmaa District Court to ban the Finnish branch of the neo-Nazi Nordic Resistance Movement.[7] Like the District Court, the Court of Appeal found that the activities of the Nordic Resistance Movement ran counter to existing laws and good practice. Consequently, a warning would have been insufficient and a ban was necessary.

The Court of Appeal based its decision partly on the fact that racial discrimination has a central role in the activities of the Nordic Resistance Movement. The Court also noted that the movement idealizes fascism, is anti-Semitic and aims to infringe on the rights of sexual minorities. The Court stated that the movement has embraced violence and criminal offences committed in the name of the organisation and its values. The Court therefore ruled that the movement does not enjoy protection of constitutional rights such as freedom of speech and freedom of association.

The ruling is not yet final because the Nordic Resistance Movement has appealed the decision in the Supreme Court. The ruling will become final if the Supreme Court does not grant leave to appeal.

Helsinki District Court on hate speech online

In what can be considered an exceptional case, the Helsinki District Court found the owner of a racist media website, MV-media, guilty of 16 different crimes related to the activities of the site. In addition, two other persons involved in the activities of the website were found guilty of some of these crimes. The crimes included, among others, ethnic agitation and several aggravated defamations.
The District Court noted that MV-media had been publishing and distributing racist, insulting and defamatory content for several years. The published content had included false information and disparaging insinuations as well as issues related to the private lives of the plaintiffs. The District Court held that from the point of view of freedom of speech, publishing the material could not be defended for public interest or any other acceptable cause. The defamation was so severe that limiting freedom of expression was justified. The published content had disparaged the plaintiffs in an extremely offensive manner, and the motive behind publishing the writings had been to destroy their reputation.

The District Court considered important that the owner of MV-media was the owner, editor-in-chief and overall person responsible for the content on the website. According to the Court, the owner decided on all content that had been published on the site regardless of who had originally written the material.

The owner received a jail sentence of one year and ten months. The two other persons received suspended sentences. Together, the compensations amounted to 184 000 euros.

Supreme Court on the freedom of speech and right to privacy

In a case before the Supreme Court (KKO:2018:51), the defendant had posted in an open Facebook group a news article about a person who had four months earlier been sentenced to imprisonment for aggravated sexual abuse of a child. The post had included a photo of that person, taken from the person's Facebook profile. The Supreme Court held that the defendant was guilty of dissemination of information violating personal privacy.

The Supreme Court referred to several cases of the European Court of Human Rights and the Court of Justice of the European Union in examining the alleged conflict between the freedom of speech and the right to privacy. The Court concluded that the defendant had disseminated information concerning the private life of another person so that the act had been conducive to causing that person damage and suffering and subjecting that person to contempt. While the Court found that sexual crimes were serious and as such the defendant's Facebook post was a part of the consideration of a matter of general importance, it also found that the combination of the link, a personal photo of the plaintiff and the fact that the news article had been published several months before the Facebook post clearly exceeded what could be deemed acceptable.

Supreme Administrative Court on the right to be forgotten

The Supreme Administrative Court assessed in KHO 2018:112 whether Google had to remove from search results URL links containing personal information concerning a man convicted of murder. Information concerning the man was also accessible via Google searches that did not contain his name. The man had been found to have diminished responsibility for the

[6] Government Bill 139/2018

[7] See previous report concerning Finland, supra note 2, 89; see also https://yle.fi/uutiset/osasto/news/ban_on_neo-nazi_group_upheld_by_turku_appeal_court/10429858, last accessed 15 February 2019

murder he had committed, meaning that he had a mental condition and so was not fully liable. The man had first asked Google to remove his information but Google had refused. After this, the Finnish Data Protection Ombudsman put forward a request for removing the data.

In what can be considered an important precedent, the Supreme Administrative Court considered that the data in question was sensitive information. The Court referred to the Google Spain case of the Court of Justice of the EU (C-131/12) on the "right to be forgotten" online. In that case, the CJEU ruled that when considering removal of links from search results, a fair balance should be sought between the legitimate interest of Internet users and the data subject's right to respect for private life (article 7 of the EU Charter of Fundamental Rights) and right to protection of personal data (article 8 of the Charter). As a general rule, the data subject's rights override the interest of Internet users, but the balance may depend on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

According to the Supreme Administrative Court, even though the crime in question was serious, the man's right to privacy and personal data protection outweighed public interest in receiving information.[8]

Non-discrimination and Equality Tribunal on the use of automated scoring system in issuing loan decisions

The National Non-discrimination and Equality Tribunal is an impartial and independent judicial body supervising compliance with the Non-discrimination Act as well as with the Act on Equality between Women and Men. The mandate of the Tribunal is to give legal protection to anyone who considers that they have been discriminated against. The Tribunal may handle cases related to both private activities and public administrative and commercial activities.[9]

In a case concerning a rejected loan (Case No. 216/2017, Decision of 21 March 2018), the Non-discrimination and Equality Tribunal took a stand on the use of an automated scoring system on loan decisions issued by a credit company. The applicant, a Finnish-speaking man in his thirties, complained that the use of the automated system constituted prohibited discrimination because the decision had been based on factors such as his place of residence, sex, age and mother language.

The Non-discrimination and Equality Tribunal held that using the automated scoring system had led to a situation where statistical information concerning other persons was used as a basis for making assumptions about the applicant. The factors used in the assessment were prohibited grounds for discrimination, and using these factors had led the credit company to assess the eligibility of the applicant more negatively than it would have based on information related to the applicant personally. The use of the automated scoring system was not proportionate and therefore constituted discrimination.

The Office of the Parliamentary Ombudsman on the rights of the child in substitute care

An unannounced inspection to a children's home by the Office of the Parliamentary Ombudsman identified a number of major deficiencies in the treatment of children and the use of restrictions. The Office asked municipalities and the regional supervisor to report on the reasons that had led to the violations.
The reports indicated a shortage of social service resources and an unreasonable workload among social workers responsible for children's affairs. A large number of client families under the responsibility of social workers was preventing or at least hampering the supervision of substitute care places. According to the inspection findings and reports received, the legal right of children placed in care to a personal discussion with their own social workers had not been satisfied in every case. The right of a child in substitute care to obtain the necessary care had been seriously compromised.[10]

Constitutional Law Committee on the constitutional environmental right

The Constitution of Finland contains a constitutional environmental right. According to section 20 titled "Responsibility for the environment", nature and its biodiversity, the environment and national heritage are the responsibility of everyone. Public authorities shall endeavour to guarantee everyone's right to a healthy environment and possibly influence decisions that concern their own living environment. Section 20 is exceptional in that it is the only provision in the Constitution providing a responsibility.

In its Opinion 55/2018, the Constitutional Law Committee assessed a legislative proposal according to which coal-fired power and heating generation would be banned as of 1 May 2029.[11] The coal ban is part of Finland's National Energy and Climate Strategy for 2030. In the proposal, the Government referred to the need to ban coal in order to reach the aims of the Paris Agreement and to combat climate change. According to the Government bill, coal would be the first fossil fuel to be banned, with the overall goal of Finland gradually stopping use of fossil fuels in energy generation and moving towards an emission-free energy system. It is estimated that the coal ban would cut carbon dioxide emissions in Finland by approximately one million tons a year.

[8] https://yle.fi/uutiset/osasto/news/finnish_court_issues_precedent_right_to_be_forgotten_decision_for_google_to_remove_data/10358108, last accessed 15 February 2019

[9] https://www.yvtltk.fi/en/index.html, last accessed 15 February 2019

[10] Finland, Office of the Parliamentary Ombudsman, Press release, 2 October 2018, https://www.oikeusasiamies.fi/en_GB/-/sosiaalityontekijoiden-kohtuuton-tyotaakka-vaarantaa-sijaishuollon-valvonnan-ja-kodin-ulkopuolelle-sijoitetun-lapsen-oikeuksien-toteutumisen, last accessed 10 February 2019

[11] Government Bill 200/2018; Constitutional Law Committee, Opinion 55/2018

The Constitutional Law Committee assessed the proposal from the perspective of equality (section 6 of the Constitution), protection of property (section 15) and the freedom to engage in commercial activity (section 18). The Committee held that the aims of the proposal were well in accordance with section 20 on the constitutional environmental right since the proposal aims at protecting the climate and the environment. In assessing the proportionality of the limitation of the freedom to engage in commercial activity, the Committee took the view that as remarkable as the limitations may be, they have to be balanced with the aims of the limitation that have to be considered especially weighty. Similarly, the Committee held that the proposed limitations to the protection of property were both acceptable and proportionate, especially when taking into account section 20 of the Constitution. Consequently, the Committee held that the proposal could be passed in the ordinary legislative procedure.

New Maternity Act

The Parliament adopted an entirely new act called the Maternity Act (253/2018) concerning legal recognition of motherhood. The act was adopted in April 2018, and it will enter into force in April 2019. The Government bill was based on a citizen's initiative.

Under current legislation, the partner not giving birth to the child is required to adopt the child in order to be recognised as a parent, which is a procedure that can be considered both cumbersome and discriminatory. The current situation is problematic from the perspective of the rights of the child, e.g., if the mother giving birth dies before the adoption procedure has been completed. The child would then have no legal parents. The new act ensures that two women as a same-sex couple are legally recognised as mothers from the moment their child is born. If the child is born as a result of a fertility treatment, both women can be recognised as mothers before birth. The Maternity Act does not, however, enable a child to have more than two legal parents.

Government bill prohibiting child marriages

The Government submitted a legislative proposal amending the Marriage Act. The legislative proposal aims at prohibiting persons under 18 years of age to marry, which has previously been possible upon a dispensation granted by the Ministry of Justice for special reasons.[12] This possibility has been criticized, inter alia, by the Ombudsman for Children.[13]

IV. LOOKING AHEAD

In early 2019, Finland is preparing for two upcoming elections: parliamentary elections in April 2019 and European Parliament elections in May 2019. Year 2019 is also important from the perspective of international collaboration. Finland holds the presidency of the Committee of Ministers of the Council of Europe until 17 May 2019. Finland's third EU Presidency period of six months begins on 1 July 2019, and the national presidency programme regarding the presidency will be published in June 2019.

It seems very likely that one of the major constitutional issues in 2019 will continue to be social welfare and healthcare reform. In addition, questions related to the urgency of preventing climate change are likely to affect legislative proposals.

In recent years, the Nordic countries, including Finland, have also witnessed the rise of populism, including neo-Nazi and anti-immigration movements. Given also people's attitudes towards immigration in the aftermath of the suspected crimes in Oulu,[14] as well as subsequent plans of the Government to review international human rights obligations binding upon Finland,[15] it can't be ruled out that such developments may mutate into legislative proposals and other measures that give rise to serious human rights concerns during 2019.

V. FURTHER READING

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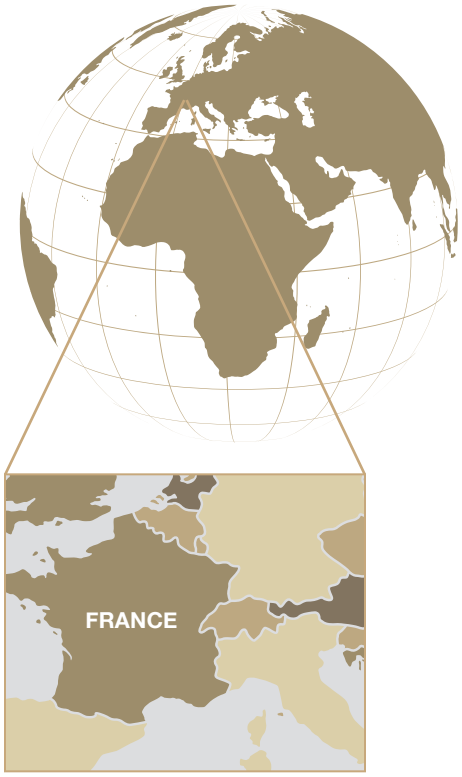
Tuomas Ojanen, 'Human Rights in Nordic Constitutions and Impact of International Obligations', in Helle Krunke and Björg Thorarensen (eds.), *The Nordic Constitutions – A Comparative and Contextual Study* (Hart Publishing, 2018)

[12] Government Bill 211/2018

[13] Finland, Ombudsman for Children, Press release, 24 July 2015, available at http://lapsiasia.fi/tata-mielta/tiedotteet/tiedotteet-2015/lapsiasiavaltuutettu-lasten-avioliitot-kiellettava/, last accessed 10 February 2019

[14] https://yle.fi/uutiset/osasto/news/minister_urges_deportation_loss_of_citizenship_for_immigrant_sex_offenders/10552905, last accessed 15 February 2019

[15] http://newsnowfinland.fi/politics/government-examining-international-treaty-obligations-in-light-of-child-abuse-allegations, last accessed 15 February 2019



France

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I. INTRODUCTION

There was something special about 2018 because it was the 60th anniversary of the Constitution of the Fifth Republic. It was also supposed to be the year of a major constitutional change. Among other things, the number of MPs as well as the number of terms they could serve were supposed to have been reduced. The parliamentary procedure should have been modernised in order to allow for a faster adoption of statutes and for the improvement of Parliament's functions of control and assessment of public policies. The powers of the High Council of the Judiciary should have been increased in order for judicial independence to be more effectively secured. Finally, regarding the Constitutional Council itself, the amendment of the Constitution should have put an end to the membership of former Presidents of the Republic. Depending on the topic, a constitutional bill, an organic bill and an ordinary bill were tabled. However the President had to postpone this reform, which was discussed during the summer, because of the "Benalla scandal." Indeed, Alexandre Benalla, one of his aides, was suspected of committing violence and impersonating a police officer. Because it was also suspected that there were attempts from the Executive to cover up the affair, the standing committees of both the National Assembly and the Senate decided to investigate this case and review the general administrative organisation of the presidency. Although it is difficult to delineate what powers the Parliament and the Judiciary, respectively, have to shed light on these facts, this was the first of a series of events that complicated President Macron's political action. Several ministers, among whom many important ones, decided to resign in September, and an important social movement, the "Yellow Vests" protest, led the Government to suspend several of the reforms it had planned. Thus, 2018 was a tricky year for French constitutionalism, and so it was a busy year for the Constitutional Council. Indeed, it continued controlling the results of the 2017 elections for the National Assembly and the Senate. Among the decisions it rendered regarding constitutional review, special emphasis should be placed first on a ruling whereby the Council gave new life to the maxim of the Republic, "Liberty, Equality, Fraternity," and second on one about personal data protection, which seems to be a major source of concern for constitutional judges everywhere in the world, and for years to come.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The first major ruling was Decision No. 2018-717/718 QPC, in which the Constitutional Council gave full effect to the maxim of the Republic. Until then, only Liberty and Equality had been clearly used as parameters for assessing the validity of statutes. Fraternity was ordinarily regarded as too vague to allow proper jurisdictional control. The case involved two persons who had been convicted for helping migrants to stay and circulate on French territory. Pursuant to sections L. 622-1 and L. 622-4 of the Code for Entry and Residence of Foreigners and Right of Asylum, facilitating the irregular entry, circulation and stay of foreigners is an offence. The only persons who could benefit from an

exemption are close relatives of the foreigner and other persons whose help "has not given rise to any direct or indirect compensation and consisted in providing legal advice or catering, accommodation or medical care to ensure dignified conditions of life to the foreigner, or any other help to preserve her dignity or bodily integrity." The two activists contended that their exclusion from these categories violated the principle of fraternity, which had until then been somehow under-enforced.[1] The Constitutional Council accepted the argument, thus clearly making the three values of the Republican maxim a parameter of constitutional review. According to the Council, although no constitutional rule confers any right to enter national territory and stay on it, "Pursuant to Section 2 of the Constitution: 'The maxim of the Republic shall be "Liberty, Equality, Fraternity."' The Constitution also refers, in its Preamble and in Section 72-3, to the 'common ideal of liberty, equality and fraternity.' It follows that fraternity is a principle of constitutional value. From [this] principle follows the freedom to help another person for a humanitarian purpose, irrespective of the legality of her presence on the national territory." This principle needs to be balanced against others, such as the protection of public order. The principle of fraternity immediately proved efficient. First, the Council struck down provisions of Section L. 622-4. Because they forbade any humanitarian form of assistance, they did not strike an adequate balance between fraternity and public order. Secondly, the Council extended the scope of the penal exemption through a reserve of interpretation. Under the Constitution, it could not but be interpreted as including every act of humanitarian assistance. Once it was read this way, the said provisions could not be criticised for violating the more traditional constitutional principles of criminal law (legality of offences and sanctions, necessity and proportionality of sanctions). Both holdings led the Council to exercise legislative power, first by quashing a legislative provision, thereby acting according to Kelsen's idea of a "negative legislator," and second by choosing a new interpretation for the remaining provisions, thus engrafting its own understanding of the law onto the pre-existing text. The Council considered that less than six months should be given to Parliament in order to remedy these defects. In the meantime, the Council decided to establish transitory norms. These made it obligatory to consider that penal exemptions should apply to all humanitarian acts facilitating the circulation and stay of (even irregular) foreigners as opposed to their entry on the territory, which results in the direct creation of an illegal situation. The delay given to the legislator may seem to have been shorter than usual. That can be explained by the fact that when the decision was adopted, Parliament was already discussing a bill on immigration and asylum. An amendment to meet the Council's demands was thus quite easy to introduce. The legislator rapidly obliged, and the Council confirmed the validity of the new legislation.[2] The exemption in Section 622-4 now includes "any natural or legal person whose action has not given rise to any direct or indirect compensation and has consisted in providing legal, linguistic or social advice or support, or any other aid provided for an exclusively humanitarian purpose." This ruling cancelling what activists called the "offense of solidarity" was highly commented upon, even in the press. Whereas some vehemently criticised the Council for using vague principles to usurp Parliament's power to define the immigration policy, others praised the judges for reviving the promise of French Constitutionalism. In terms of normative creation, one might consider that this ruling is no more nor less activist than many others. It simply makes more explicit, from a realist viewpoint, the extent to which any constitutional court necessarily contributes to crafting the parameter, the object and the results of its control. The ruling can moreover be interpreted as an act of judicial communication. The Council had been criticised slightly before for favouring fundamental rights that mostly benefit firms and taxpayers. More generally, illiberal forms of democracy in Europe are being reinforced, especially when issues regarding immigration are at stake. In this context, since it is based on the value of solidarity, the Council's decision may be appealing to those who believe that another form of constitutionalism is possible.[3]

Another important ruling was Decision No. 2018-765 DC on the act on the protection of personal data. In 1978, France was among the first countries to pass laws on the protection of personal data. It created a new independent administrative authority, the National Commission for Information Technology and Liberties (CNIL), which is in charge of enforcing the protection of citizens in that area. Since then, the European Union has also adopted regulations to that end. On 27 April 2016, a regulation on the protection of natural persons with regard to the processing of personal data (General Data Protection Regulation) and a directive protecting personal data when used by the police and criminal justice authorities were adopted. The French Parliament passed a law adapting the domestic legislation to this regulation and transposing the directive. This bill was referred to the Constitutional Council by senators who criticised several of its provisions. One of the main interests of this decision lies in the type of control the Constitutional Council exercises on this sort of legislation. Pursuant to Section 88-1 of the Constitution, Parliament has an obligation to transpose directives into domestic law or adapt them to European regulation. The Constitutional Council is responsible for making sure that this requirement is fulfilled, except if the European rules conflict with a principle inherent to France's constitutional identity, which would require a former modification of the Constitution.

The Council decided that it should not control domestic legislative provisions that merely draw the necessary consequences of the unconditional and precise provisions of a

[1] Michel Borgetto, *La notion de fraternité en droit public français. Le passé, le présent et l'avenir de la solidarité*, (LGDJ 1993).

[2] Decision no. 2018-770 DC of 6 September 2018, *Loi pour une immigration maîtrisée, un droit d'asile effectif et une intégration réussie.*

[3] For further details, see Guillaume Tusseau, "Le Conseil Constitutionnel et le 'délit de solidarité': de la consécration activiste d'une norme constitutionnelle sous-appliquée à la révélation d'une stratégie contrainte de communication juridictionnelle?", *Revue critique de droit international privé*, 2019, forthcoming.

directive, as this would imply that it would rule on the directive itself. It only ensures that no domestic provision is obviously incompatible with the directive. However, it exercises full control on the provisions for which the directive allows for a more flexible implementation. If there is any doubt about the compatibility of domestic law with a directive, the Council cannot refer it to the European Union Court of Justice because of the limited time frame it has to make its decisions. It belongs to the administrative or judicial courts to review this question and, if needed, refer the case to the ECJ.

European regulations are normally directly applicable and require an adaptation of the domestic legislation. That is why until now the Council has only checked whether legislative provisions were in accordance with the regulation. But, unlike this rule, the regulation on data protection gives Member States flexibility in more than fifty areas. The Council thus decided to apply the principles that apply to directives. Section 21 of the act, which extends the cases in which a decision having legal effects with regard to a person, or significantly affecting her, may be based on an automated processing of personal data—a so-called "algorithm"—is among the most interesting ones. Section 22 of the European regulation gave Member States flexibility to determine the appropriate measures to safeguard rights and freedoms and the legitimate interests of the persons concerned. The applicants stressed that through such a process, the administration would renounce its power of assessment over individual situations, especially in the case of "self-learning" algorithms, which can revise the rules they apply. This would infringe on the principle of constitutional value governing the exercise of regulatory power. They also insisted that such algorithms, the functioning of which cannot be determined in advance, would violate the principle of the public nature of regulations. Lastly, they considered that, due to its complexity, this provision contradicted the objective of constitutional value of the accessibility and understandability of the law.

It was also important for the Council to check whether such a measure threatened rights and freedoms. First, the Council considered that using an algorithm to take an administrative decision was only permitted based on rules and criteria defined in advance. It could not authorise the administration to adopt decisions that would be deprived of any legal basis. The Council did not find it incomprehensible either. Regarding the guarantees provided, the Council highlighted that an algorithm could be used only under certain conditions, some of them explicitly stated by the law, others emphasized by the decision itself. First, according to provisions of the Code on the relationship between the public and the administration, any administrative decision must mention the fact that it is based on an algorithm, whose main characteristics must be disclosed, on his request, to the person concerned. Since those elements cannot be communicated when they could imperil national defense or State security interests, no administrative decision can be exclusively based on an algorithm in such matters. Secondly, since any administrative decision was subject to administrative review, the Council stressed that, in such a case, the administration should rule without deciding only on the basis of the algorithm, which would then make it obligatory to scrutinize the situation with conventional means. Furthermore, if the case is submitted to a court, the judge may ask the administration the main characteristics of the algorithm to control its compliance with legal prescriptions. Thirdly, the European regulation, as well as the domestic legislation, excluded the use of algorithms for sensitive personal data that refer to an alleged racial or ethnic origin; political opinions; religious or philosophical beliefs; trade union membership; and genetic, biometric or health data as well as data related to the sexual life or orientation of a person. Finally, the Council focused on the fact that the capacity to explain how the data processing was implemented excluded the use of "self-learning" algorithms. These conditions appeared sufficient to rule that disputed Section 21 did not violate any right or freedom protected by the Constitution.

III. CONSTITUTIONAL CASES

1. Decision No. 2018-763 DC – Student Guidance and Achievement Act

In Decision No. 2018-763 DC, the act referred to the Constitutional Council provided that enrollment in undergraduate courses taught in public higher educational establishments were tied to a nationwide pre-enrollment procedure which was administered via the "Parcoursup" platform. The Constitutional Council dismissed the claim that these provisions breached the principle of equal access to education because they would allow for a differential treatment of candidates in the same group, depending on the institution. In particular, it determined that by allowing those establishments to take into account course characteristics, which are in any case regulated by a "national framework" laid down by ministerial order, and the candidates' prior experience and skills, in order, where appropriate, to make their enrollment conditional on their acceptance of support and training arrangements, the legislature has adopted objective and rational criteria, the content of which it has spelled out in sufficient detail. The same is true of the legislature's intention to require that enrollments be approved with due regard to the extent to which the candidate's training plan, experience and prior training are compatible with the key aspects of the course to be taken. The Constitutional Council also declared that the scope of the information provided to candidates during the pre-enrollment procedure did not undermine the guarantee of academic independence, a fundamental principle enshrined in the laws of the Republic.

2. Decision No. 2017-687 QPC Wikimédia – Image rights of the national estate

In Decision No. 2017-687 QPC, the Act on Freedom of Creation, Architecture and Heritage introduced a system of prior authorisation for the commercial use, on any medium, of images of buildings belonging to the national estate. The authorisation issued by the operator of the domain may be subject to financial conditions, in which case the fee

shall take into account any benefits, irrespective of their nature, accruing to the holder of the authorisation. These provisions were challenged, mainly with regard to freedom of enterprise and property rights. The Constitutional Council found these provisions to be in conformity with the Constitution. It noted in particular that in adopting them, the legislature had pursued a twofold objective of general interest, namely the protection of image rights of the national estate to prevent any harm being done to the character of property having an exceptional link with the history of the Nation and owned, at least in part, by the State; and the economic enhancement of the heritage of these national estates. It further noted that the prior authorisation of the national domain manager is not required where the image is used for commercial purposes and where there is also an activity linked to a cultural, artistic, educational, teaching, research, information, news illustration or public-service objective.

3. Decision No. 2017-694 QPC – Mr. Ousmane K.: Statement of reasons for decisions in jury trials

In Decision No. 2017-694 QPC, the Constitutional Council ruled that the principle of the individualisation of sentences, which derives from Sections 7, 8 and 9 of the Declaration of the Rights of Man and of the Citizen of 1789, implies that a criminal sanction can only be applied if the judge has expressly imposed it, taking into account the specific circumstances of each case. For the first time, the Council inferred from the aforementioned constitutional requirements an obligation to state reasons for courts' decisions regarding both guilt and sentencing. The Code of Criminal Procedure explicitly provides that the reasons underlying a judgment that is handed down by the criminal court (*cour d'assises*) must include, in respect of each of the offences, a statement of the main elements of the charges against the accused which have convinced the court, at the end of its deliberations, that he is guilty. However, according to a settled interpretation by the Court of Cassation, the Code prohibits the criminal court from stating reasons for the sentence it imposes. For these reasons, the Constitutional Council declared Section 365-1 of the Code of Criminal Procedure to be unconstitutional. In view of the obviously excessive consequences which the immediate application of that decision would have had, it postponed the date of that repeal to 1 March 2019, while specifying that for trials begun after the date of its decision and without waiting until 1 March 2019, the law should be interpreted as also requiring the *cour d'assises* to indicate, in its statement of reasons, the main elements which have influenced it in relation to the determination of the sentence in jury trials.

4. Decisions No. 2018-774 DC and 2018-773 DC – Act relating to the fight against the manipulation of information

In Decisions No. 2018-774 DC and 2018-773 DC, the Constitutional Council dismissed the claims that the provisions of the act relating to the fight against the manipulation of information violated the freedom of expression and communication and failed to respect the constitutional principle of the legality of criminal offences and penalties and, in particular, that the introduction of a new interim proceeding would be neither necessary nor appropriate or proportionate. However, the Council considered that the challenged provisions complied with French constitutional principles, provided the inaccuracy or misleading nature of the alleged facts or accusations were obvious.

5. Decision No. 2017-695 QPC – Mr. Rouchdi B.: Administrative measures against terrorism

In Decision No. 2017-695 QPC, the Constitutional Council found the contested legal provisions regarding administrative measures to combat terrorism constitutional. More specifically, the judge held that the French prefect, in order to secure a place or an event exposed to terrorist risk, is entitled to establish a security area, within which the freedom of access and movement of individuals is partly restricted (security pat-down, visual inspection, search of luggage and/or vehicles). The legislator can freely determine the criteria according to which these operations take place, provided they respect the principle of non-discrimination. Moreover, whenever private individuals are allowed to conduct the aforementioned control operations, they shall be placed under the supervision of a judicial police officer who exercises effective control over them. Last but not least, the Constitutional Council considered that the Constitution permits the administration to temporarily close places of worship as well as to impose individual measures of administrative control, like the prohibition to meet certain persons, in order to prevent the commission of terrorist acts.

6. Decision No. 2018-706 QPC – Mr. Jean-Marc R.: Glorification of terrorism

In Decision No. 2018-706 QPC, the Constitutional Council declared the constitutionality of Sections 421-2-5, 422-3 and 422-6 of the French Criminal Code, which establish and punish the crime of glorifying terrorism. Pursuant to the constitutional ruling, the contested legal provisions did not violate the principles of the legality and proportionality of criminal offences and penalties nor freedom of expression. Specifically, the provisions were considered to be precise enough, and the imposed penalties respectful of the nature of the repressed behaviour and thus not patently disproportionate. As a consequence, the restriction of freedom of expression and communication caused by the contested provisions is necessary, appropriate and proportionate.

7. Decision No. 2018-737 QPC – Mr. Jaime Rodrigo F.: Granting of the French nationality to legitimate children born abroad

In Decision No. 2018-737 QPC, the Constitutional Council held that the fact that the granting of the French nationality to the legitimate child of a French mother and a foreign father was upon the condition that it was born in France, whereas the legitimate child of a French father is French whatever its place of birth, violates both the principle of equality before the law and gender equality. The children of a French mother born abroad between 16 August 1906 and 21 October 1924 to whom French nationality has

not been granted yet may claim it as unconstitutional. Their descendants may also claim it as unconstitutional in all the proceedings that have been started since the date of publication of this decision.

8. Decision No. 2018-744 QPC – Mrs. Murielle B.: Juvenile delinquency

In Decision No. 2018-744 QPC, the Constitutional Council found the contested legal provisions relative to juvenile delinquency unconstitutional. The judge held that the legislator does not offer sufficient guarantees to ensure that the human rights of individuals who are placed in custody, especially those of minors, are respected. The councilors considered that, with these provisions, the legislature failed to ensure a balanced conciliation between the need to prosecute offenders and the respect of constitutional freedoms. The legislator thus violated Sections 9 and 16 of the Declaration of Rights of Man and the Citizen of 1789 as well as the constitutional principles relative to juvenile justice. The aforementioned lack of constitutionality can be claimed in all pending cases.

IV. LOOKING AHEAD

Since November 2018, huge demonstrations and protests have taken place. They have led the President to change his political agenda, and especially to postpone his institutional reforms yet again. In order to restore public confidence, the Government resorted to an exceptional public consultation from January 15th to March 15th. Four topics should be addressed by local popular gatherings, which are to be filtered and aggregated into proposals: (1) taxes and public spending, (2) the organisation of public administration and action, (3) the ecological transition, and (4) democracy and citizenship. Regarding the last topic, many institutional and constitutional propositions will no doubt be expressed and debated. Depending on how they are taken into account by the Government, e.g., leading to a multi-question referendum, they may result in important changes regarding, for example, the right to vote, and the structure of political assemblies. The results of the European elections in May 2019 will also reveal if and to what extent the President has managed to regain legitimacy. One-third of the Constitutional Council will be renewed.

V. FURTHER READING

Dominique Chagnollaud de Sabouret, *Les 60 ans de la Constitution: 1958-2018* (Dalloz, 2018)

Antoine Chopplet, Thomas Hochmann (eds.), *Les anciens Présidents de la République au Conseil constitutionnel* (Epure, 2018)

Arnaud Le Pillouer (ed.), *La protection de la constitution: finalités, mécanismes, justifications* (Université de Poitiers, Presses universitaires juridiques, 2018)

Wanda Mastor (ed.), *Penser le droit à partir de l'individu* (Dalloz, 2018)



Gambia

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I. INTRODUCTION

With the peaceful transition after 22 years under an authoritarian regime that began in July 1994, 2018 saw the new government of The Gambia, headed by President Barrow, take measures to restore good governance, rebuild public confidence in key institutions and uphold human rights in the context of transitional justice.

This is happening twofold: first, dealing with past human rights violations and abuses; and second, ensuring that the governance architecture upholds the highest standards of respect for human rights, the rule of law and justice. To this end, 2018 saw the activation of transitional justice mechanisms: the Truth and Reconciliation and Reparations Commission, Constitutional Review Commission and National Human Rights Commission with the goal of consolidating democracy and aligning governance architecture with regional and international human rights standards.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constitutional review process

The formal process of reviewing the 1997 Constitution and drafting a new one started in June 2018 with the appointment of eleven members (comprised of 5 women, including the vice chairperson) as commissioners of the Constitutional Review Commission (CRC). According to section 9(1) of the Constitutional Review Commission Act, 2017,[1] the Commission shall be in existence for a period not exceeding eighteen months. Where the need arises, the President may extend the term of the CRC for a period not more than six months, upon the recommendation of the chairperson of the CRC.

In discharging its responsibilities, the Commission is required according to section 6 of the Act to seek the opinion of citizens both within the country and abroad. Thus, the Commission is currently on a lengthy process of public consultation and deliberation on a number of matters contained in the Issues Document. The CRC, where it deems it necessary, can also invite persons, including representatives of professional, civic, political and other organisations, to appear before it to make such presentations as those representatives consider relevant or make presentations on topics the Commission may specify.

The main functions of the CRC are to review and analyse the current 1997 Constitution, draft a new constitution and prepare a report in relation to the new constitution. This report will provide the reasoning for the provisions contained in the new constitution. Section 21 of the Act empowers the Commission, upon submission to the President, to publish the draft constitution and the report in the Gazette and in such other manner as the Commission deems fit. This serves as a safeguard against tampering.

Dealing with past human rights violations

Following the enactment of the Truth, Reconciliation and Reparations Commission (TRRC) Act 2017,[2] the Commission was formally launched. The TRRC Act provides

[1] Constitutional Review Commission Act, No. 7 of 2017, available at: https://www.lawhubgambia.com/constitutional-review-commission-act [accessed 5 January 2019].

for the establishment of the historical record of the nature, causes and extent of violations and abuses of human rights committed during the period July 1994 to January 2017 and for the consideration of granting reparation to victims. The Commission's mandate includes initiating and coordinating investigations into violations and abuses of human rights; identifying persons or institutions involved in such violations; identifying the victims; and determining what evidence might have been destroyed to conceal such violations.

The hearings, which began on 7 January 2019, serve as an initial first step towards securing justice, truth and reparations in The Gambia.[3] The TRRC provides a foundation, if executed properly, to not only address the structures and causes of violations but also assure victims of past violations of non-repetition.

Building a human rights culture

Establishment of the National Human Rights Commission

After over two decades of authoritarian rule characterised by gross human rights violations including torture, enforced disappearance, arbitrary arrests, detention without trial, and murder perpetrated by state agents, the new government has made strides towards building a human rights culture.

Following the enactment of the National Human Rights Commission (NHRC) Act, 2017,[4] the National Assembly has recently approved the nomination of five candidates with proven records of respect for human rights who are to be sworn into office on 14 February 2019. The establishment of the Commission addresses the need for a legal and institutional framework to which a human rights culture will be anchored. The NHRC is authorised to investigate and consider complaints of human rights violations in The Gambia committed by the state, private persons and entities.

Access to the African Court

In fulfillment of its regional and international human rights obligations, on 23 November 2018, The Gambia became the ninth African country to make the declaration under article 34(6) of the Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (African Court) to allow individuals direct access to the Court. The declaration allows the Court to trigger its jurisdictional competency under article 5(3) of the Protocol to allow access for non-governmental organisations (NGOs).

Ratification of key UN human rights treaties

On 28 September 2018, The Gambia also ratified important UN human rights treaties including the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), the Convention for the Protection of All Persons from Enforced Disappearance (CED) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).[5]

While these ratifications are commendable, the State is yet to ensure individual access to a majority of the UN human rights treaty bodies.[6] The Gambia has still not abolished the death penalty in accordance with its international obligations. The last executions were carried out on 27 August 2012, when nine death row inmates—eight men and one woman—were executed, allegedly by a firing squad.[7] According to the news report, "all persons on death row have been tried by the Gambian courts of competent jurisdiction and thereof convicted and sentenced to death in accordance with the law. They have exhausted all their legal rights of appeal as provided by the law."[8]

The executions were the first in The Gambia since 1985. The death penalty was abolished in 1993 by the Death Penalty (Abolition) Act 1993 but reinstated in 1995 by Decree No. 52, entitled the Death Penalty (Restoration) Decree, in 1995. Among the reasons given for the restoration of the death penalty were that "since the abolition of the death penalty in The Gambia there has been a steady increase of cases of homicide and treasonable offences which, if not effectively checked, may degenerate into a breakdown of law and order" and that the duty dawned on the "State to provide adequate mechanisms for the security of life and liberty of its citizenry, thereby maintaining law and order and ensuring greater respect for individual human rights."

Despite section 21 of the Constitution prohibiting torture, inhuman or degrading punishment or other treatment and the ratification of CAT, the absence of torture as a criminal offence in the Criminal Code inhibits the prosecution of perpetrators under the transitional justice system.

Human Rights Committee's review of the state of civil and political rights in The Gambia

In July 2018, the Human Rights Committee reviewed the implementation of the ICCPR in The Gambia. The Gambia submitted a report in response to the list of issues in lieu of

[2] Truth, Reconciliation and Reparations Commission (TRRC) Act, No. 9 of 2017, available at: https://www.lawhubgambia.com/truth-reconciliation-reparations-commission [accessed 5 January 2019].

[3] 'TRRC hearings begin today' *The Point* 7, January 2019.

[4] National Human Rights Commission Act (NHRC) Act, No. 8 of 2017, available at: https://www.lawhubgambia.com/national-human-rights-act [accessed 5 January 2019].

[5] UN International Human Rights Instruments Ratification Status for The Gambia, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=64&Lang=EN [accessed 5 January 2019].

[6] At the moment, individual access to UN Treaty Bodies is limited only to the Human Rights Committee.

[7] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns 'Mission to The Gambia', A/HRC/29/37/Add.2 (11 May 2015) para. 25.

[8] S Nabaneh, 'The Gambia: Commentary' in R Wolfrum, R Grote & C Fombad (eds.) *Constitutions of the World* (Oxford University Press, 2017) 10.

its second periodic report.[9] The Committee raised concerns that section 18 of the Constitution and sections 15 (A) and 72 of the Criminal Code allow for a great deal of discretion in the use of force by law enforcement officials, and that section 2 (a) and (b) of the Indemnity Act (as amended in 2001) exonerates all public officials from civil or criminal liability for the exercise of their duties with respect to unlawful assemblies, riotous situations or public emergencies.[10] The Committee made recommendations to The Gambia to revise its laws with a view to bringing them in line with international standards.[11]

It is important to note that The Gambia is yet to withdraw the reservation it made upon ratification of the ICCPR on 22 March 1979 in respect to article 14(3)(d) to the effect that "for financial reasons, free legal assistance for accused persons is limited in our constitution to persons charged with capital offences only."[12] To further promote access to justice, The Gambia should take steps to withdraw its reservation to the ICCPR, thus bringing it in conformity with the spirit and intent of the Legal Aid Act, 2008.[13]

Use of force: The Faraba incident

A deadly clash between personnel of the Police Intervention Unit (PIU) and the community of Faraba Banta on 18 June 2018 led to two men being shot dead and nine others injured. An outcry led to the swift establishment of a Commission of Inquiry, which was mandated to investigate the circumstances, deaths, injuries, destruction, those who may have ordered the shootings, those who fired the shots and any possible failure or breakdown in the police chain-of-command that led to the shootings, among others.[14]

The Commission was mandated to operate for a period of one month, but was extended to 31 August 2018. Upon completion of its work on 27 August, the Commission presented its findings and recommendations in the form of a report to the President.[15] The *Faraba Report* is particularly important in that it deals with the duty to investigate human rights violations. The Commission held that there was no evidence that the police had taken any steps to vet and/or screen PIU officers who had been involved and/or suspected to have been involved in past human rights abuses nor were they made aware of any programs in place to train and or reorient PIU officers in operating under a democratic dispensation.[16] It reiterated the urgent need for a security sector reform. The *White Paper on the Report of the Faraba Banta Commission of Inquiry* has since been published, and the government is criminally prosecuting the perpetrators.[17]

While these positive strides are encouraging, some of the questionable legislative procedures are seen as regressive steps underscoring the need for vigilance. An example was the contentious Supplementary Appropriations Bill, which was tabled by the Minister of Finance and Economic Affairs on 11 December 2018 after seeking approval of one billion dalasis (approximately over 21 million USD) from the National Assembly for additional payments from the Consolidated Funds.[18]

Upon presentation of the Bill, a group of citizens dubbed #OccupyNA staged a protest at the National Assembly grounds to demand for rejection of the government's controversial supplementary appropriation estimates. The PIU, in full riot gear, denied the group entry. The National Assembly, after extensive deliberations and debate, rejected the Bill.

A revised budget was later tabled in which at least 16 parliamentarians rejected it, leading to a deadlock that was broken by a vote from the Speaker of the House in favour of the Bill on 20 December 2018.[19] Given that this approval did not follow the procedure laid out in the Constitution and is not fiscally prudent, there is urgent need to promote economic policies that enhance judicious financial management.

III. CONSTITUTIONAL CASES

1. Bai Emil Touray and Two Others vs. the Attorney General: Freedom of speech

In *Bai Emil Touray and Two Others vs. the Attorney General,*[20] the Supreme Court con-

[9] Human Rights Council, 'Replies of The Gambia to the list of issues', CCPR/C/GMB/Q/2/Add.1, 12 June 2018. See also, Human Rights Committee 'List of issues in the absence of the second periodic report of The Gambia', CCPR/C/GMB/Q/2, 11 December 2017.

[10] Human Rights Committee, 'Concluding observations on The Gambia in the absence of its second periodic report', CCPR/C/GMB/CO/2 (30 August 2018), para. 29.

[11] As above, 30.

[12] United Nations Office of the High Commissioner, Status of Ratification of Interactive Dashboard, http://indicators.ohchr.org/ [accessed 11 February 2019].

[13] See Institute for Human Rights and Development in Africa (IHRDA) Legal Aid in The Gambia: An introduction to law and practice (2012), https://www.ihrda.org/wp-content/uploads/2012/04/Legal-Aid-in-The-Gambia-layout-2012-website-download.pdf [accessed 11 February 2019].

[14] The establishment of the Commission was gazetted on 1July 2018 and all the Commissioners were sworn before his Excellency on Thursday 5 July 2018.

[15] Report of the Faraba Banta Commission of Inquiry into the events of Monday 18 June 2018 at Faraba Banta, West Coast Region (2018).

[16] As above, p 59.

[17] Gambia Government 'White Paper on the report of the Faraba Banta Commission of Inquiry' Supplement 'A' to The Gambia Gazette No. 33 of 28 November 2018, Legal Notice No. 47 of 2018: 11-12. Supplementary Appropriation is governed by Section 153 of the 1997 Constitution, which reads: (1) Subject to section 154, if in respect of any financial year

[18] Supplementary Appropriation is governed by Section 153 of the 1997 Constitution, which reads: *(1) Subject to section 154, if in respect of any financial year it is found that the amount appropriated under the Appropriation Act is insufficient or that a need has arisen for a purpose for which no amount has been appropriated by that Act, a supplementary estimate showing the sums required shall be laid before the National Assembly before the expenditure has been incurred. (2) Where a supplementary estimate or estimates have been approved by the National Assembly, a supplementary appropriation Bill shall be introduced into the National Assembly for the appropriation of the sums so approved.*

[19] Salieu Taal, 'Was the recent Supplementary Appropriation Estimate 2018 presented by the Minister of Finance in accordance with the dictates of the law and Constitution?', *Law Hub Gambia Blog*, 20 November 2018, at https://www.lawhubgambia.com/lawhug-net/is-supplementary-appropriation-constitutional [accessed 5 January 2019].

sidered the constitutionality of various provisions of the Criminal Code (Cap 10:01) of the Laws of The Gambia and the Information and Communications (Amendment) Act 2013. The plaintiffs in 2017 sought declaration that sections 178 (defining libel), 179 (defining defamatory matter), 180 (defining publication) and 181A of the Criminal Code and section 173(A) (1) (a) & (c) of the Information and Communications (Amendment) Act 2013 (relating to matters committed over the Internet) were inconsistent with numerous provisions of the Constitution and therefore void and unconstitutional.

The Court held that sections 178, 179 and 180 of the Criminal Code and section 173 (A) (1) (a) & (c) of the Information and Communications (Amendment) Act 2013 were inconsistent with the rights and freedoms enshrined under sections 25 (freedom of speech, including freedom of the press and other media), and 207 (freedom and independence of the media and other information media) and 209 (which outlines limitations relative to that guaranteed freedom) of the Constitution.[21] The Court noted that the restrictions placed by these three sections were neither reasonable nor necessary in a democratic society. It subsequently declared them *ultra viles* of the Constitution and therefore invalid.[22]

2. Gambia Press Union and Two Others vs. the Attorney General: Freedom of expression

In *Gambia Press Union & Two Others v the Attorney General*,[23] filed in 2014, it was argued that various sections of the Criminal Code, in terms of sections 51 (definition of seditious intention), 52 (offence for committing seditious intention), 52A (power to confiscate printing machine on which seditious material is published), 53 (statutory time for initiating prosecution), 54 (require evidence to warrant conviction), 59 (publishing or reproducing statement or rumour or report that is likely to cause fear or alarm to the public or to disturb peace) and 181A (false publication and broadcasting) violated freedom of speech and expression including freedom of the press and other media.

On 9 May 2018, the Supreme Court held that the protection accorded to the holder of the Office of the President is reasonable and necessary, while the protection accorded to government as an institution is not reasonable and not necessary. The Court rejected the argument with little hesitation on the basis that:

> the vicissitudes and trappings of the Office of President and as the Office serves first and foremost as the foundation for national cohesions and stability, coupled with the need for the holder of such office to concentrate on State affairs and not to be unduly distracted, it is reasonable that the holder of such Office is protected. This protection is, in the context of The Gambia and the values attributed to such leadership position in the country, considered necessary and thus has a legitimate aim.[24]

It thus partially limited the scope of the offence of "seditious intention" (section 51(a) of the Criminal Code) by removing the availed protections for government as an institution but leaving the protection for the President intact.[25]

It is submitted that while the decision of the Court in limiting the scope of 51(a) of the Criminal Code and consequently the offence of seditious intention is commendable, in essence, it retains criminal measures for defamation against the head of state. Put at its simplest, the Court did not show that there is sufficient proportionality between the harm done by the law (the infringement on freedom of speech) and the benefits it is designed to achieve (protecting the President from hatred, contempt or dissatisfaction). The purpose of this limitation does not contribute to an open and democratic society that is based on human dignity and equality.

The rest of the sections were also maintained as they were deemed to be reasonable and necessary in a democratic society for preserving the interest of national security and public order insofar as they do not relate to the severed first limb of section 51(a) (on sedition applying to the government).[26] The Supreme Court also upheld section 181A of the Criminal Code, which proscribes the so-called publication or broadcast of "false news," as well as section 59. With this stance, the Court missed another opportunity to bring its media laws in line with accepted regional and international standards on free speech, as its limited judgment was directly contrary to the decision made by the ECOWAS Court of Justice in *Federation of African Journalists and Others v. The Republic of The Gambia*[27] three months prior to the GPU case.

The plaintiffs argued that the state had violated their fundamental rights by failing to protect the rights of citizens in accordance with the international instruments that had been signed by The Gambia, including the ECOWAS Revised Treaty, the African Charter and the ICCPR.[28] It was submitted that security agents of The Gambia arbitrarily arrested, harassed and detained the journalists under inhumane conditions, and forced them into exile for fear of persecution as a consequence of their work.

The Court upheld the claim, finding that The Gambia had violated the journalists' rights to freedom of expression, liberty, freedom of movement and prohibition against torture.[29] As such, it awarded six million dalasis in compensation to the journalists (approximately 21,352 USD). The Court further or-

[20] SC Civil Suit No: 001/2017, 9 May 2018.

[21] As above, paras. 4 & 6.

[22] As above, para. 54.

[23] SC Civil Suit No: 1/2014, 9 May 2018.

[24] As above, para. 52.

[25] As above, para. 54.

[26] As above, paras. 55-62.

[27] *Federation of African Journalists and Others v. The Republic of The Gambia,* ECW/CCJ/JUD/04/18, 13 March 2018, https://www.mediadefence.org/sites/default/files/blog/files/FAJ and Others v The Gambia Judgment.pdf [accessed 9 January 2019].

dered The Gambia to immediately repeal or amend its laws on criminal defamation, sedition and false news in line with its obligations under international law.[30] The government has yet to implement the judgment of the Court relating to legislative reform and compensation for the victims.

3. Emil Touray v Saikou Jammeh (represented by IHRDA & Sagar Jahateh) v Republic of The Gambia (2018): Freedom of expression association and speech

Following the immensely unpopular decision of the Supreme Court on 23 November 2017 dismissing claims of unconstitutionality of section 5 of the Public Order Act, holding that the section was reasonable and constitutionally legitimate,[31] a communication was subsequently submitted to the African Commission on Human and People's Rights (African Commission).[32] The complainants averred that the Public Order Act, 1961 unlawfully restricted the scope of freedom of expression (article 9(2)), freedom of association (article 10) and freedom of assembly (article 11) as protected under the African Charter on Human and People's Rights (African Charter).[33] They further requested that the African Commission address the communication.[34] The Commission has accepted the matter and the case is now at the admissibility stage.

In summary, the key constitutional challenges in 2018 concerned freedom of speech, assembly and association. The Supreme Court must bear in mind that its approach to the application, interpretation and limitation of constitutional cases have serious implications with respect to human rights, rule of law and democratic consolidation in The Gambia. The change in leadership and President Barrow's commitment to undertake legal reforms to enable greater protection of fundamental rights and freedoms presents an opportunity to revisit existing laws. For instance, the Non-Governmental Organisation (NGO) Act undermines the freedom of association in The Gambia through a cumbersome registration process governed by the NGO Affairs Agency.

Under the law, there is a two-tier system for registration. First, if an organisation meets the criteria set out, the NGO Affairs Agency grants a clearance certificate prior to the entity's registration with the Registrar of Companies, which is located within the Office of the Attorney General. In exchange for an annual fee and continued compliance, registered NGOs receive limited-duty waivers and permission to register with The Association of NGOs (TANGO). The civic space under Jammeh's regime was very much restricted as the Act placed the Agency firmly under the ambit of the Executive. It was located at various times under different government ministries during its operations and was finally located, following a decision in 2010, at the Office of the Presidency.

In 2013, the government introduced a new NGO Bill without any consultation with relevant stakeholders and ignoring TANGO's 2010 proposal for an NGO Bill that would be consistent with the Constitution. However, the 2013 proposal by the government did not progress in the National Assembly. In 2017, the NGO Affairs Agency was moved to the Ministry of Local Government. It is vital that the government repeals the NGO Act and expeditiously enacts a comprehensive measure that is in full compliance with international standards.

IV. LOOKING AHEAD

Despite the excitement and enthusiasm that greeted the onset of multiparty democracy following decades of authoritarian rule, The Gambia's democracy remains fragile. There are concerns regarding the absence of comprehensive anti-discrimination legislation and existing repressive laws.

An important undertaking should be about exploring whether the TRRC presents an opportunity to discuss the old regime's attitude towards minority groups such as lesbian, gay, bisexual, transgender and intersex (LGBTI) persons in The Gambia. As part of a deliberate nurturing and consolidation of democracy, a key question then arises: does the transitional justice process provide space to have conversations and chart better legislative protection on controversial issues such as sexual minority rights and liberalisation of abortion?

[28] Suit No. ECW/CCJ/APP/36/15.

[29] As above, pp. 60-61.

[30] As above, p. 62.

[31] *Ousainou Darboe & 19 Others v Inspector General of Police, Director General of National Intelligence Agency & the Attorney General,* CML SUIT NO: SC 003/2016. See, G Sowe & S Nabaneh 'The Gambia: The state of liberal democracy' in R Albert, et al, *The I·CONnect-Clough Center 2017 Global Review of Constitutional Law* (July 19, 2018) 99-100.

[32] Communication 705/18, *Emil Touray v Saikou Jammeh (represented by IHRDA & Sagar Jahateh) v Republic of The Gambia* (2018), para. 4.

[33] The Gambia ratified the African Charter on 8 June 1982.

[34] Communication 705/18 (n. 32 above), para. 12.

[35] Cap 50:04, Vol. 7, Revised Laws of The Gambia 2009.

[36] Amendments to the NGO Bill 2010 by The Association of NGOs in the Gambia https://drive.google.com/file/d/1AfW7P3afK7jQQn0M_OeRTekqlmG4VbPX/view [accessed 15 January 2019].

[37] S Nabaneh, 'Crusade to root out homosexuality like malaria', *AfricLaw* 7, April 2014 https://africlaw.com/2014/04/07/crusade-to-root-out-homosexuality-like-malaria/ [accessed 5 February 2019].

[38] S Nabaneh, 'The unspoken: Unsafe abortion in The Gambia and the necessity for legal reform', AfricLaw 13 March 2018 https://africlaw.com/2018/03/13/the-unspoken-unsafe-abortion-in-the-gambia-and-the-necessity-for-legal-reform/ [accessed 5 February 2019].



Georgia

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I. INTRODUCTION

This report provides a brief introduction to the Georgian constitutional system, with a particular emphasis on the final constitutional amendments in Georgia, last direct presidential election and main challenges of the judiciary. It provides an overview of landmark judgments of the Georgian Constitutional Court in 2018. The final section examines developments expected in 2019 related to Court vacancies, Constitutional Court cases and other related events.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The end of constitutional reform

On March 23, 2018, the Parliament of Georgia adopted constitutional amendments. In fact, this was a new edition of constitutional amendments adopted in 2017, which was updated according to the Venice Commission's comments. With these changes, certain constitutional deficiencies were corrected in the Constitution. Especially significant was an amendment related to removing a bonus system that impacted the proportional distribution of votes among parties and participation of election blocs in parliamentary elections.

In addition, in 2018 the Parliament adopted a new edition of the Constitution of the Autonomous Republic of Adjara,[1] which was based on the new status of autonomy adopted by Parliament on 13 October 2017.[2] The Constitution of the Autonomous Republic determined the rules of forming and regulating the authorities of the autonomous republic and improved certain procedural deficiencies, but there were also important issues (e.g., the transition to a fully proportional electoral system) that the autonomous constitution did not decide independently.

The last direct presidential election

The last direct election of the President of Georgia was held in 2018. Beginning in 2024, the President will be elected by an electoral collage. This election was important because it was the first time in the history of the country that a second round of presidential elections was utilized. The elections were also distinguished by an unprecedented number of candidates.

The Central Election Commission registered 25 presidential candidates, 6 of which were independents.[3] Acting president Giorgi Margvelashvili refused to participate in the election.[4] The ruling party did not nominate a candidate and[5] supported so-called "indepen-

[1] The Organic Law of Georgia on Approval of the Constitutional Law of the Autonomous Republic of Adjara on the "Amendment to the Constitution of the Autonomous Republic of Adjara", *The Legislative Herald of Georgia*, 24/05/2018 <https://matsne.gov.ge/ka/document/view/4184116?publication=0> accessed February 14, 2019

[2] Constitutional Law of Georgia on the "Autonomous Republic of Adjara", *The Legislative Herald of Georgia*, 19/10/2017, <https://matsne.gov.ge/document/view/3811829?publication=0> accessed February 14, 2019

[3] Malkhaz Nakashidze, Georgia – The Presidential Election: Candidates and the Campaign, October 3, 2018, <http://presidential-power.com/?p=8708> accessed February 14, 2019

[4] Giorgi Margvelashvili will not take part in the presidential elections, https://www.radiotavisupleba.ge/a/29463535.html

[5] Ivanishvili: My position is not to nominate a presidential candidate, <http://liberali.ge/news/view/38640/ivanishvili-chemi-pozitsiaa-rom-ar-davasakhelot-prezidentobis-kandidati> accessed February 14, 2019

dent" candidate Salome Zurabishvili.[6] The Central Election Commission announced that Salome Zurabishvili had won 38.64% in the first round and Grigol Vashadze 37.74%. Davit Bakradze from the European Union came third with 10.97%.[7] These results were somewhat unexpected for the ruling party, and the outcome of the election was thus a protest against its policies. On November 28, 2018, the second round of the presidential elections was held in Georgia, and the so-called "independent" candidate, Salome Zurabishvili, was elected. The Central Election Commission announced that Vashadze had won 40.46% and Zurabishvili 59.54%.[8] The first round showed that the opposition had a real chance to win the contest in a free and fair election.[9] The second round campaign was quite tense. Victory was a strategic goal for the ruling Georgia Dream team and they mobilized all kinds of resources to win. For example, the government removed bank debt from 600,000 citizens.[10] The decision was denounced by international observer organizations as voter bribery.[11] The opposition said that this was not a fair election. They do not recognize the results[12] and have demanded early parliamentary elections with a fully proportional electoral system.[13] Despite the opposition's protest, the inauguration of the President was scheduled for December 16, 2018, but ruling party changed its location [14] from Tbilisi to Telavi.[15] Thus, the inauguration of 2018 was specially designed to prevent opposition protest in Tbilisi. The police blocked the road and opposition supporters were unable to enter Telavi. Some people were injured as a result of clashes between the opposition and police, and one of the leaders of the opposition was arrested. National and international organizations indicated that significant violence was observed.[16] Observers noted that the elections were competitive, free, but unfair.[17] This election has intensified polarization in Georgia and also caused significant damage to the country's democratic image internationally.[18]

Main challenges to the judiciary

In 2018, judicial power was a key topic. Suddenly, the chairman of the Supreme Court, with whom the new government was reinforcing new judiciary reforms, resigned.[19] After his resignation, the President of Georgia began extensive consultations to select a new chairman of the Court.[20] However, the parliamentary majority did not participate in the discussion, the consensus did not take place and the candidate was not named.[21] The President's decision was harshly criticized by the NGO coalition.[22]

In 2018, the High Council of Justice came to the attention of the public. On December 24, 2018, the Council chose 10 candidates for lifetime judges on the Supreme Court. The decision was particularly condemned by non-judge members Anna Dolidze[23] and Nazi Janezashvili,[24] who pointed out that the Council of Justice chose them through hasty, non-transparent procedures. The NGO Coa-

[6] Georgian Dream will support Salome Zourabichvili during the presidential elections, <https://on.ge/story/27412-ქართული-ოცნება-საპრეზიდენტო-არჩევნებზე-სალომე-ზურაბიშვილს-დაუჭერს-მხარს> accessed February 14, 2019

[7] Malkhaz Nakashidze, Georgia – Presidential election: First-round results and expectations for the second round, November 5, 2018, <http://presidential-power.com/?p=8861> accessed February 14, 2019

[8] According to preliminary results of the presidential elections, Grigol Vashadze - 40.46%, Salome Zurabishvili received 59.54%, 2018-11-29, <http://www.new-press.ge/saprezidento-archevnebis-winaswari-shedegebit-grigol-vashadzem---40-46-salome-zurabishvilma-59-54-miiro> accessed February 14, 2019

[9] Malkhaz Nakashidze, Georgia – The results of the presidential election, December 20, 2018, <http://presidential-power.com/?p=9185> accessed February 14, 2019

[10] Premier: More than 600,000 citizens on black list will be dealt with debts, November 19, 2018 <http://www.tabula.ge/ge/story/139950-premieri-ets-shav-siashi-mkof-600-000-ze-met-moqalaqes-valebi-gaunuldeba> accessed February 14, 2019

[11] Malkhaz Nakashidze, Georgia – The results of the presidential election, December 20, 2018, <http://presidential-power.com/?p=9185> accessed February 14, 2019

[12] Grigol Vashadze: We do not recognize the election results, November 29, 2018, <https://www.radiotavisupleba.ge/a/29628429.html> accessed February 14, 2019

[13]United Opposition's meeting in Philarmony, November 29, 2018, <https://www.radiotavisupleba.ge/a/გაერთიანებული-ოპოზიციის-შეკრება-ფილარმონიაში/29628705.html> accessed February 14, 2019

[14] Zourabichvili's inauguration: Many versions are discussed, including in the countryside, December 4, 2018, <http://www.tabula.ge/ge/story/141002-zurabishvili-inauguraciis-adgilze-ganixileba-bevri-versia-mat-shoris-qalaqgaret> accessed February 14, 2019

[15] Zurabishvili: Telavi did not vote ... I want to show that everybody is president, December 5, <https://on.ge/story/31037-ზურაბიშვილი-თელავმა-ხმა-არ-მომცა-მინდა-ვაჩვენო-რომ-ყველას-პრეზიდენტი-ვარ> accessed February 14, 2019

[16] Second round of elections and sharp preliminary assessments of international observers, November 29, 2018, <https://www.radiotavisupleba.ge/a/არჩევნების-მეორე-ტური-და-საერთაშორისო-დამკვირვებლების-მკვეთრი-წინასწარი-შეფასებები/29628549.html> accessed February 14, 2019

[17] International election observation mission press conference, 29 November 2018, Tbilisi <https://www.facebook.com/osce.odihr/videos/2264573423788554/> accessed February 14, 2019

[18] Malkhaz Nakashidze, Georgia – The results of the presidential election, December 20, 2018, <http://presidential-power.com/?p=9185> accessed February 14, 2019

[19] The resignation letter of the Supreme Court of Georgia and the Chairman of the High Council of Justice Nino Gvenetadze, 02/08/2018, <http://www.supreme-court.ge/news/id/1769> accessed February 14, 2019

[20] President of the Supreme Court chairperson's resignation, 02-08-2018, http://web2.rustavi2.ge/ka/news/110488

[21] The President of Georgia will not presumably nominate a candidate for the Chairperson of the Supreme Court, 24.08.2018, <https://1tv.ge/news/saqartvelos-prezidenti-uzenaesi-sasamartlos-tavmjdomareobis-kandidats-savaraudod-aghar-waradgens/> accessed February 14, 2019

[22] The Coalition Calls on President to Change the Decision to Refuse Chairperson of the Supreme Court Decision 31 August, 2018, <https://www.transparency.ge/ge/post/koalicia-moucodebs-prezidents-shecvalos-uzenaesi-sasamartlos-tavmjdomaris-kandidatis accessed February 14, 2019 >

[23] The President appointed Ana Dolidze as a member of the High Council of Justice, 08.01.2018 <https://www.president.gov.ge/ka-GE/pressamsakhuri/siakhleebi/prezidentma-ana-dolidze-iusticiis-umaglesi-sabchos. aspx> accessed February 14, 2019

[24] Resolution of the Parliament of Georgia on Nazibrola Janezashvili as the Member of the High Council of Justice of Georgia, June 21, 2017, <http://www.parliament.ge/ge/ajax/downloadFile/70043/1093> accessed February 14, 2019

lition[25] and Ombudsman[26] were against the decision. After the protest, the chairman of the Parliament stated that the selection of the candidates would be conducted in accordance with preset procedures and criteria.[27] While the 10 judges of the Supreme Court rejected their candidacy,[28] it was announced that in 2019 the law will set up the selection criteria for the list of judges.[29]

III. CONSTITUTIONAL CASES

1. LEPL "Evangelical Baptist Church of Georgia" and others V. The Parliament of Georgia Decision (Judgment No. 1/2/671, 3 July 2018)

In this case, seven different churches and the Muslims Union disputed the words "by order of the Patriarchate of Georgia" of the Tax Code of Georgia. According to the Code, the construction, restoration and painting of the temples and churches ordered by the Patriarchate of Georgia would be exempt from the VAT tax. The claimants were non-entrepreneurial (non-commercial) legal entities and religious organizations registered as legal entities of public law engaged in religious activities. The applicants claimed that the above-mentioned norm of the Tax Code is unconstitutional because it establishes unequal treatment between the Georgian Autocephalous Orthodox Church and other religious organizations. In particular, unequal treatment is demonstrated since the Tax Code of Georgia imposes an exemption for the Orthodox Church or in its favor. The main purpose of the disputed norm is to create a prerequisite condition for the Georgian Patriarchate as a representative of a particular religion, which contradicts the principle of a legal state. The respondent referred to the legitimate aims of the disputed norm as proper legitimacy, maintenance, restoration and restoration-conservation of culturally and historically valued temples with historical-cultural and archaeological-architectural value and ecclesiastical treasure. It also based its argument on Article 9 of the Constitution of Georgia and on the same article on the realization of the normative framework envisaged by the Constitutional Agreement concluded with the Georgian Orthodox Church. The Court ruled that the Constitution does not require the first paragraph of Article 9, and since the norm under the differentiation has no rational relation to the respondent party by any legitimate objective, it is discriminatory and therefore should be declared unconstitutional.[30]

2. LEPL "Evangelical Baptist Church of Georgia and others V. The Parliament of Georgia" (Judgment No. 1/1/811, 3 July 2018)

In this case, the claimants were the four ecclesiastical and Muslim divisions registered as legal entities of the Public Law. The claimants complained about the norm of the Law on "State Property," according to which state property could be transferred to the Georgian Autocephalous Orthodox Church free of charge. The claimants considered that the disputed norm establishes the unequal treatment of the peculiarly equitable persons—between the Orthodox Church of Georgia and other religious organizations—to enjoy state property free of ownership, which is guaranteed only for the Georgian Orthodox Church. The respondent argued that the legitimate aim of the controversial regulation is to promote the special relationship between the state and the Orthodox Church and underline the status of the Church within these relationships. The State of Georgia has a special legal relationship with the Orthodox Church, confirming Article 9 of the Constitution of Georgia and the constitutional agreement between the state and the Orthodox Church. Consequently, the controversial regulation is based on the above-mentioned legal relationship. The Court ruled that differentiation was not required by the Constitution, and it establishes differential treatment on religious grounds that do not have sufficient, objective and reasonable justification. Thus, the provision contradicts the requirements of Article 14 of the Constitution of Georgia.[31]

3. Georgian citizen Nana Parchukashvili V. The Ministry of Penitentiary and Probation (Judgment N2/4 / 665,683, 26 July 2018)

The subject of this dispute was the constitutionality of the provision of instructions approved by the Minister of Penitentiary of Georgia that the accused/convict shall be obliged to expose body parts after an order made by an authorized person. The claimant believed that such treatment leads to humiliation, is insulting and should be used only in extreme cases. The claimant noted that with the development of technology, electronic scanning capabilities were also improved and today can detect any items that the person has. According to the claim, the scanner can detect metal items, plastic, ceramic, explosives and other hazardous items. The claimant believed that such a scan of the human body, unlike a physical, does not cause a person's humiliation and spiri-

[25] Coalition for "Independent and Transparent Judiciary" responds to the developments in the court and initiates the campaign "I want Wendo Court" March 01, 2018, <https://www.transparency.ge/ge/post/koalicia-damoukidebeli-da-gamchvirvale-martlmsajulebistvis-sasamartloshi-ganvitarebul-movlenebs> accessed February 14, 2019

[26] Ombudsman demands to stop the process of reviewing judges of the supreme judiciary, 2018-12-26 <http://pirveliradio.ge/index.php?newsid=119158> accessed February 14, 2019

[27] Parliament will discuss at the spring session of the Supreme Court Judges, 26/12/2018, <https://civil.ge/ka/archives/272474> accessed February 14, 2019

[28] The 10th Supreme Court Judge addresses the Parliament and does not consider their candidates, 21.01.2019, <https://1tv.ge/news/uzenaesi-sasamartlos-mosamartle-obis-10-ve-kandidati-parlaments-mimartavs-mati-kandidaturebi-ar-ganikhilon/> accessed February 14, 2019

[29] The new criteria will be submitted to the Parliament by the renewed list of judges, January 12, 2019, <https://imedinews.ge/ge/saqartvelo/92748/parlamentshi-akhali-kriteriumebit-mosamartleta-ganakhlebul-sias-tsaradgenen> accessed February 14, 2019

[30] LEPL "Evangelical Baptist Church of Georgia" and others V. The Parliament of Georgia Decision [2018], No. 1/2/671, <https://www.matsne.gov.ge/ka/document/view/4252828?publication=0> accessed February 14, 2019

[31] LEPL "Evangelical Baptist Church of Georgia" and others V. The Parliament of Georgia" [2018], No. 1/1/811, <https://www.matsne.gov.ge/ka/document/view/4252883?publication=0> accessed February 14, 2019

tual suffering. The Court partly satisfied the claim and established the unconstitutionality of the norm in respect of Article 17, paragraph 2 of the Constitution of Georgia. The Court pointed out that the measures taken in the Penitentiary Establishment Establishing the Rights of Persons Act should not cause pain, discomfort, psychological suffering and shame more than necessary for a person experiencing a penalty or other restrictions. Otherwise, the event will violate Article 17 of the Constitution of Georgia and, therefore, will be unconstitutional. Based on all the foregoing, it was necessary to determine the essence of the measure provided by the disputed norm, its legitimate aim and proportionality.[32]

4. Georgian citizens Marine Mizandari, Giorgi Chitidze and Ana Jikuridze V. The Parliament of Georgia (Judgment No. 2/6/1216, 27 July 2018)

This dispute was related to the constitutionality of norms of the law of Georgia on "Cultural Heritage." The constitutional claim states that on the basis of the disputed norm, if the owner and/or legitimate beneficiary of the monument of cultural heritage is a religious entity, the Ministry can not give the owner or user an alert or penalty when it violates the rules of maintenance of the monument. The claimant considered that these norms violate the right to guarantee the protection of cultural heritage. The claimants argued that the disputed provision does not have a legitimate aim, since it is a blanket policy, without any criteria and without conditions. In addition, in the case of a legitimate aim, the impugned norm is a disproportionate way of restricting the right. According to the representative of the respondent, the legitimate aim of the controversial regulation is to coordinate efforts and to distribute responsibilities between the state and religious confessions in the field of cultural heritage protection. It is important to note the relationship between the state and religion characteristic to Georgia, the legal specifics and the context. In particular, religious entities have a special legal status. The Parliament of Georgia considers that the state should interfere with such religious cultural heritage only if the fact of deliberate damage is present. The Court held the relevant provisions partially unconstitutional based on Article 14 and Article 34, paragraph 2 of the Constitution.[33]

5. A citizen of Georgia and Canada, Giorgi Spartak Nikoladze V. The Parliament of Georgia (Judgment No. 2/10/1212, 7 December 2018)

The subject of the dispute was a provision of the Civil Procedure Code of Georgia that constituted the Court's authority to prohibit a parent from withdrawing his child from the borders of Georgia under Article 22, paragraphs 2 and 3 of the Constitution of Georgia by using a temporary decree. According to the constitutional claim, the Tbilisi City Court issued a temporary decree that held Giorgi Spartak Nikoladze was prohibited from withdrawing his son from the borders of Georgia until the final decision of the family dispute in court. According to the claimant, the child thus did not receive a number of benefits that he is entitled to as a Canadian citizen living in Canadian territory. The respondent noted that the formal basis for limiting the right of movement outside the country is protected and the legitimate aim of the regulation is to protect the rights of children, in particular the best interests of children, which are derived from paragraphs 2 and 3 of Article 36 of the Constitution of Georgia. The state is responsible for the family and well-being of women and children's rights. The Court observed that juveniles cannot decide independently for a short period of time to leave Georgia, and so the use of this right by juveniles depends on their parents. Thus, the impugned norm is not a restriction of the right protected by Article 22 (2) of the Constitution of Georgia and the constitutional claim is not satisfied.[34]

6. "Giant Security Ltd." and "Safety Company Tigonisi Ltd." V. The Parliament of Georgia and the Minister of Internal Affairs of Georgia (Judgment No. 2/11/747, 14 December 2018)

The subject of this dispute was the constitutionality of the norms and provisions of the law of Georgia on "Private Defenders" and regulations of the Security Police Department in relation to Article 30, paragraph 2 of the Constitution. The claimant argued that the disputed norms on the Security Police Department perform one of the functions of controlling private security organizations, and themselves carry out defensive activities. This implies harsh interference by the state in private security organizations, which makes it impossible to have a free and competitive environment in this sphere and puts it in a preferential position in comparison with other entrepreneurial entities. The respondent pointed out that the Security Police Department is equipped with appropriate knowledge and skills as well as the standards of independence and impartiality which are supported by regulatory legislation. In addition, in case of disproportionate sanctions and subjective decisions, the entrepreneur may apply to the Court to protect his or her right. The Court pointed out that free competition and market structure threatens any event carried out by the state which puts in place the advantage of any economic agent and creates unequal conditions for market participants. Any such intervention should be justified by a legitimate public interest. The Court has ruled that the implementation of the two functions at the same time by the Security Police is not a necessary means of achieving a legitimate aim of effective con-

[32] Georgian citizen Nana Parchukashvili V. The Ministry of Penitentiary and Probation [2018], N2/4/665,683, <https://matsne.gov.ge/ka/document/view/4280646?publication=0> accessed February 14, 2019

[33] Georgian citizens Marine Mizandari, Giorgi Chitidze and Ana Jikuridze V. The Parliament of Georgia [2018], No. 2/6/1216, <https://matsne.gov.ge/ka/document/view/4280693?publication=0> accessed February 14, 2019

[34] A citizen of Georgia and Canada, Giorgi Spartak Nikoladze V. The Parliament of Georgia [2018], No. 2/10/1212, <https://matsne.gov.ge/ka/document/view/4390502?publication=0> accessed February 14, 2019

trol of private security, the restriction imposed by impugned norms is incompatible and obstructs constitutional norms.[35]

7. Georgian citizens Zurab Japaridze and Vakhtang Megrelishvili V. The Parliament of Georgia (Judgment N1 / 3/1282, 30 July 2018)

The subject of this dispute was the constitutionality of the normative contents of Article 45, part 1 of the Code of Administrative Offenses and the use of the term "and/or without the purpose of the doctor," which provides for the use of drugs for marijuana consumption. The claimant pointed out that the use of marijuana was not the act of carrying out a public threat. Punishment which is directed at acts that do not cause dangerous consequences for the public has no legitimate purpose. Marijuana consumption may only cause damage to the health of the customer, who will be responsible if it does. In addition, marijuana consumption does not create a significant risk for human health. On the basis of ethical autonomy, people are not obliged to prove the objective value of any action taken within their freedom. According to the respondent, the legitimate aims of the disputed norms are to protect human health as a way to protect the individual as well as the entire population and public safety, and to prevent dependence of the population on narcotic drugs. In order to achieve the stated goals, the legislator imposes administrative responsibility for such actions that are harmful to human health, but it is not characterized by a threat that would justify criminal liability for the individual. The Court found that the prohibition of the general and bloc nature of the use of marijuana is a disproportionate interference in the protection of personal autonomy, not necessarily for any legitimate aim in a democratic society, and the impugned rule was declared unconstitutional.[36]

IV. LOOKING AHEAD

One of the major challenges in 2019 will be the independence of the judiciary, the composition of the Supreme Court, the lifelong appointments of judges and the selection of one judge for the Constitutional Court. Also, a decision should be announced on *Citizen of Georgia Revaz Lortkipanidze V. The Parliament of Georgia*, and the Court should consider these important cases: *Georgia Democratic Initiative and citizen of Georgia* Eduard Marikashvili V. The Parliament of Georgia on the law on "accumulative pensions," *Levan Alalishvili and Alapishvili and Kavlashvili – Georgian Bar Group V. The Parliament of Georgia and the Government of Georgia* on the constitutionality of provision "112" on payment of service fees, *Tamaz Mechiauri V. The Parliament of Georgia* on the no- confidence vote in the Mayor by the City Council, *Georgia's Democratic Initiative V. High Council of Justice of Georgia* on the interviewing of judicial candidates in a closed session and *Guram Imnadze and Mariam Begadze V. The Parliament of Georgia* on the initiation of police control without adequate grounds.

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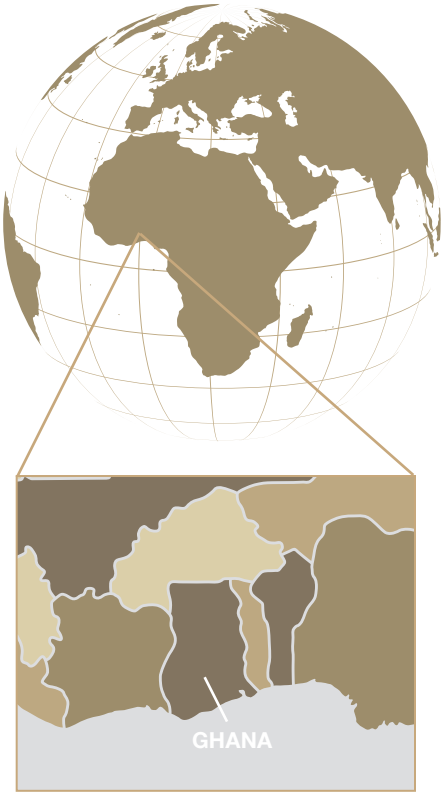
[35] "Giant Security Ltd." and "Safety Company Tigonisi Ltd" V. The Parliament of Georgia and the Minister of Internal Affairs of Georgia [2018], No. 2/11/747, <https://matsne.gov.ge/ka/document/view/4415506?publication=0> accessed February 14, 2019

[36] Georgian citizens Zurab Japaridze and Vakhtang Megrelishvili V. The Parliament of Georgia [2018], N1/3/1282, <https://matsne.gov.ge/ka/document/view/4283100?publication=0> accessed February 14, 2019



Ghana

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I. INTRODUCTION

One of the most exciting things about having such a constitutionally young state is the number of firsts one gets to witness. 2018, like the year before it, had a number of important firsts. It is not at all certain that all these constitutional firsts inure to Ghana's interests in the long term. Be that as it may, they have definitely provided some constitutional growth in the form of previously uncharted territory. As can be expected, the Supreme Court was in the thick of it. It received new members and is currently—though temporarily—at the largest it has ever been under this Constitution. It grappled with a novel constitutional question. For the first time, the executive made use of some of its most neglected but, it turns out, contestable powers. The quality of Ghanaian legislators was questioned from within the legislature itself, reviving a long-standing debate about the separation of powers mechanisms under the Constitution. All in all, it was a most eventful constitutional year.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

President Akufo-Addo became the first President to use the provisions of Chapter 2 of the Constitution. He undertook the not insignificant task of organizing six separate referendums to determine the creation of six new regions. Both because the constitutional provisions on how new regions may be created are simultaneously over-specific and vague, and because there are deep-seated issues of territory-related resentment dating perhaps to pre-independence times, the process, though completed in a surprisingly short time, was fraught and acrimonious. Some scholars and critics called the exercise an unnecessary expense. Allegations of deliberate exclusion, gerrymandering and election rigging were rife. Though threats of violence were, by and large, not realized, it is worrying how frequent and how earnest they were. There was a resurgence of secessionist sentiment in the Volta region. The Supreme Court was called on to rule whether all persons in the entirety of a region that was to be split were entitled to vote; contrary to the government's view that the persons contemplated by Chapter 2 were the persons who lived in the areas that would become the new region. Those remaining in the old regions were not considered to be affected. The Court endorsed the government's view and Ghana now has a new map. Notwithstanding the derision with which the decision was received in some quarters, it is hard to fault the Court's reasoning. Beyond having to reorient themselves to the borders of their region, the people remaining in a region that was to be split had no legitimate interest in the creation of the region. Ghana is a unitary, not a federal, state. So even the argument that the source of a resource on which all the people in that region are dependent will be in the new region is not an argument of exclusion. It can be no more than an observation. Furthermore, regional borders may create new Houses of Chiefs, but they do not interfere with traditional territorial allegiances. Indeed, as the case of Republic v Judicial Committee of the Brong Ahafo Regional House of Chiefs shows, practice, prudence and tradition have worked out a solution in cases where the traditional allegiances and the House of Chiefs jurisdictions do not so tidily overlap. The greater concern this exercise has raised is that for the first time, we have regional boundaries that appear to coincide with sometimes contested ethnic or trib-

al territory. It defeats the integration function of the state administrative units for them to lend themselves to being used interchangeably with ethnicity. It is hoped the executive will proceed cautiously as it is creating precedent of how the state functions in and relates to the traditional authorities of these new regions.

The Supreme Court welcomed four new appointed members: Prof Kotey from the Legal Academy, Nene Amegatcher from the Bar and Justices Marful-Sau and Agnes Dordzie, who were promoted from the Court of Appeal. They fill the vacancies left by Justices Wood, Atuguba and Akamba. The four new appointments brings the current number of Supreme Court judges to 15; a larger number than the Court has historically had. However, a few retirements are anticipated in 2019. The number will thus return to 13 shortly. In the heat of the aborted Constitutional Review exercise a few years ago, there was some agitation that the number of Supreme Court Justices be capped at 15 to prevent the possibility of an executive packing the Court. It does not appear that a cap is necessary. In the three governments since then, the Supreme Court has never exceeded 15.

President Akufo-Addo has retreated from a decentralisation promise that would have inured to the benefit of the liberal democracy. In the lead-up to his election, he promised he would willingly limit presidential powers over local government, and rather than appoint all the heads of local assemblies as per Article 243, allow them to be elected. The self-imposed deadline for the implementation of this promise was 2018. But the year ended with no sign of the promised elections. More worryingly, the Minister for Local Government announced that it was not within the contemplation of the government to implement changes in 2019 either. Two things made the promise appealing and the disappointment crushing. First, the appointment system breaks important accountability loops in terms of the transparency of local government. The spending officer of local councils is not accountable to the local area whose money he is spending. Secondly, there was no requirement that the President's choice to head a local area be in any way connected to the area. The difficulties involved in having a stranger administer this most basic unit of the state are self-evident: a lack of understanding of or even concern with the issues most pressing to the residents; a lack of co-operation from a hostile local assembly, etc. The President's withdrawal of a promise that would have rectified the error of the drafters of the Constitution does little to advance liberal democracy in Ghana.

Ghana's first female electoral commissioner became the first in that position to be removed by the President in Ghana's history. Ms. Charlotte Osei was accused of flouting procurement law in her administering of some donor funds. The President set up a Commission of Enquiry as required by the Constitution and, acting on that commission's recommendations—again as per the Constitution—removed her from office. The editor of a prominent newspaper filed a public interest action challenging the work of the commission as not meeting the constitutional standards before the Supreme Court. A decision is expected on the cases shortly.

The Majority Leader in Parliament revived a debate on the impact of ministerial duties on the performance of parliamentary duties and vice versa. This is a debate that has been in the public sphere since the earliest days of the Fourth Republic and is one in which all seem to be on the same side but no action to address it has actually happened. The Constitution requires that a majority of ministers of state be drawn from the legislature. As the majority leader pointed out, ministerial duties are so consuming, they compel the MPs so appointed to participate only peripherally in legislative affairs. Former President Kufuor complained during his tenure that the constitutional provision saddled him with under-efficient ministers. The Committee of Experts, in its report, recommended this arrangement for the purpose of increasing the collegiality between the two arms without entirely merging them. But it does not appear to have been successful. What is new about the Majority Leader's complaint is the effect of having the more senior MPs on his side in executive positions. He observed that it has weakened the caliber of parliamentary engagement on the majority side. This is worrying since that is who is making a large chunk of the decisions. As an entrenched provision, it is not an easy one to change. But this government has shown by the referendums that it has the ability to achieve difficult constitutional changes when it has the will. We hope the Majority Leader and other key members of Parliament and the executive will act upon this agreed problem and organise the necessary referendum to change it.

One of the most encouraging developments of the year was that following the seminal case of *Occupyghana v Auditor-General* discussed in last year's report, the Auditor-General, in November, issued for the first time in the history of the Constitution a report in which he disallowed unjustified charges on public accounts and surcharged the public officers involved. It will be recalled that the Supreme Court acceded to *Occupyghana*'s request to compel the Auditor-General to exercise his power to disallow such charges. The Auditor-General had, since 1993, detailed in every annual report significant amounts of money lost to the state through the malice or negligence of public officers but had never sought to recover any of those sums. The civil society group had argued that this was a breach of his constitutional duty. The Auditor-General's immediate compliance with the Court's decision is most heartening constitutionally and useful financially. According to the Auditor-General's report, over fourteen million USD was saved or recovered in this first effort. As *Occupyghana* pointed out in its statement, however, the drive cannot be properly called completed until the Attorney-General takes steps to prosecute those officers whose acts amounted to criminal conduct.

III. CONSTITUTIONAL CASE

Republic v. Baffoe-Bonnie and Ors
(unreported; Decided 7 June 2018)

This far-reaching decision of the Supreme Court has yet to draw the attention it deserves. The Court clarified the meaning of Article 19(2) (e) and (g) of the 1992 Con-

stitution, which grant an accused person the right *to* "adequate time and facilities" to prepare his defence, and the facilities to call and examine all necessary witnesses. It held that an accused person facing a summary trial was entitled to full pretrial disclosures, including all documents and evidence the prosecution had in its possession as well as those that the prosecution did not intend to rely on. The only limitation the Court put on these rights was in instances such as for witness protection, police intelligence protection, public interest and national security. However, the Court hastened to add that the state's determination of these matters was not incontestable, and a court could review and override such decisions in appropriate cases. The practice until this case was for the state to only furnish the defence with the evidence in its possession in trials on indictment. Since, as the Court noted, the majority of criminal trials are actually summary trials, the state has wielded an unhealthy and unfair surprise power in most criminal trials.

This decision does much to engrave fair trial rules into the ethos of a country with a long history of unfettered executive power. The practice this decision ends predates this Constitution and its two immediate predecessors and is therefore deeply ingrained. It is most heartening to see it abolished. The Court must be commended also for preventing the state from using what is an unquestionably reasonable limitation on a right to defeat that right by retaining unto the courts the power to determine finally when disclosure ought not to be made.

IV. LOOKING AHEAD

Government has begun the largest compulsory acquisition of real property thus far endeavoured under the 1992 Constitution: a 13,000-acre parcel of land at Afienya. Departing from previous regimes on the matter, the 1992 Constitution mandates "prompt payment of fair and adequate compensation" for property compulsorily acquired. Such a large acquisition will no doubt be very costly. All eyes will be on the government to see if it will abide by the constitutional provisions willingly or whether the Court's assistance will be required to leave behind the dark days of the state seizing property without payment

Chief Justice Akuffo will retire in 2019 and Ghana will once again be looking for a chief justice.

Meanwhile, the legal community will be eagerly awaiting the Supreme Court's judgment in the National Cathedral case, in which some citizens are contesting the constitutionality of the president's proclaimed project: the building of a 5,000-seat national cathedral. It triggers some unease in scholars of constitutionalism that the sitting President—himself a lawyer and former attorney-general—had no hesitation about the constitutional compatibility of the project, such as singling out his religion for state endorsement under a constitution forbidding discrimination and guaranteeing equal religious rights.

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Greece

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I. INTRODUCTION

Reflection on the constitutional developments in Greece during 2018 is closely interrelated to the anticipation of what 2019 will bring. The initiation of the revision process marks 2018. Throughout the financial crisis, the Constitution was at the heart of public constitutional dialogue, malfunctions surfaced under the stress, and yet no formal changes were made. The amending formula demands an exceptional degree of consensus and provides for a five-year mandatory time lapse between the completion of one revision process and the initiation of a new one. Many factors shall determine whether this revision process shall be concluded, and if so whether it shall be a limited corrective intervention or long-discussed issues shall also be addressed.

At the moment, a heated dialogue on the interpretation of formal amendment rules with regard to whether and how the decision of the first Parliament is binding upon the second, which is mandated to amend the Constitution following the intervening general elections, is characteristic of the political climate. Jurisprudence is faced with the repercussions of the financial and refugee crises. The Council of State (Supreme Administrative Court) is still trying to tackle the constitutionality of salary and pension cuts. Setting precedent for future decisions, rulings with retroactive effect may add strain on the state budget. A second line of decisions deals with the rights of refugees. The refugee crisis challenges pre-conceptions of the rule of law guarantees in multiple ways. Lastly, a ruling of the Council of State, according to which the Constitution dictates that religious education in primary and secondary education must be an indoctrination in the Orthodox Christian dogma, is a reminder that the fight for rights is a never-ending project.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Ever since the financial crisis erupted, many calls for constitutional reforms were made from all political parties. Still, although the consensus that changes must be made existed, there was little agreement with regard to their content. The Constitution underwent important informal change, and yet, even after a formal revision was procedurally possible in 2013, a long time of inertia followed. In March 2017, a "dialogue committee on the constitutional reform" launched an electronic deliberation process attempting to involve the citizens, who were invited to complete multiple-choice questionnaires and/or make amendment proposals. This process, which was not provided for by the Constitution, did not become central in political life, nor is it clear whether and how it shall impact the revision process. The initiation in November of the long-awaited constitutional revision process marks 2018. Nonetheless, it is far from certain that it shall be successfully concluded. The ratio of the amending formula, which is expressed through the way the required majorities are laid down, demands a degree of consensus which is very difficult to reach within a polarized political system. Article 110, para. 2-6 of the Greek Constitution sets out very strict procedural limits.

Constitutional revision takes place in two phases, between which general elections are held. The amending process has no influence over the timing of general elections. During the first phase, the need for a constitutional revision is ascertained by resolution of Parliament, adopted following the proposal of

at least one-sixth of the members of Parliament either by a three-fifths majority or by an absolute majority of its members in two ballots, held at least one month apart. This resolution defines specifically the provisions subject to revision. During the second phase, the next Parliament amends the provisions that are to be revised. In case a proposal for amendment of the Constitution receives the absolute majority of the votes of the total number of members but not the three-fifths majority, the next Parliament shall proceed with the revision of the proposed provisions by a three-fifths majority of the total number of its members, and vice versa. Revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision.[1] Several eternity clauses exist excluding from revision (among other material limits) the provisions defining the form of government.

The ruling SYRIZA party proposal puts forth four axes targeting the architecture of the form of government, the relationship between state and church, the enhancement of popular participation through referenda and the enhancement of social rights protection. Of crucial importance is that proposals do not include certain provisions whose change is considered a priority by the center-right opposition party, which according to polls will probably win the intervening elections. For example, a much-contested provision establishes a ban of private universities, triggering tensions with EU law. The largest opposition party has issued its own proposals, which includes numerous articles and has different aims than the proposals by SYRIZA. Where will this lack of consensus lead to?

Formal amendment rules are the basic determinant. As a rule, the first Parliament avoids giving proposals a supermajority, since this would give carte blanche to the second Parliament, and therefore to a different political landscape. It is thus not coincidental that the opposition party would prefer that a wide range of articles would be proposed for revision (preferably voted on by an enhanced majority). By contrast, SYRIZA, which will probably be the opposition in the Revision Parliament, insists that the decision of the first Parliament is binding upon the second not only with regard to the provisions to be revised but also with regard to the content of the future amendment.

The mandatory time lapse is also an important factor. If the second Parliament reaches consensus only on very few articles, this excludes from change the rest of the provisions for the next 10 years. This can be used as a strategy: in case the basic aim of a political party is to shield certain articles from future revision, it may deliberately try to put forth a mini-revision in order to exploit the mandatory time lapse. The revision process is in this case used (or manipulated) in order not to effect change but adversely to fetter change.

An interesting aspect is that in parallel with the discussion on the substance of the proposed amendments, a debate on the extent to which the first Parliament can bind the second Parliament is ongoing, centered around the interpretation of the formal amendment rules, and more precisely how binding the decision of the first Parliament is upon the second. The landscape is not clear. As there has never been a case of a court annulling a constitutional amendment deemed unconstitutional, the only existing precedent is one thought expressed in Judgment no. 11/2003 of the Supreme Special Court.[2] According to this isolated thought, in view of the limits of judicial review of the constitutional revision process, the direction towards which a provision was to be amended was not binding because it was not included in the final decision of the Parliament following the two parliamentary votes provided for in Article 110, para. 2 of the Constitution. According to the Court, in the contested decision of the Parliament, the constitutional provisions to be revised were only enumerated without any limitation with regard to their content. This thought seems to imply two things: firstly, that the courts have competence to review unconstitutional constitutional amendments and secondly, that in case the decision of the first Parliament includes the direction towards which a specific provision should be amended, this direction is binding and therefore reviewable.

This discussion on procedure betrays the deep divide between the political parties in a climate of deep polarization. Revision becomes a power game instead of the envisaged consensual procedure. Scenarios include the possibilities that the second Parliament does not conclude the procedure, opting to initiate a new one, or that a minimal revision takes place, amending the few articles where consensus can be reached, which would freeze the rest of the amendments for another decade.

III. CONSTITUTIONAL CASES

1. Decision 431/2018 Council of State (Plenary Session): retroactivity and salary cuts

Decision 431/2018 of the Council of State ruled that provisions introducing retroactive salary reductions of National Health System doctors were in violation of the Constitution. According to the Court, such reductions violate Article 21 (3) GrConst, according to which the State must take care for the health of citizens, of the principle of a special wage regime for doctors serving in the NHS, and the principles of proportionality and equality in public burdens. Doctors who work in the NHS are subject to a special regime and special conditions compared with other civil servants, since they start working at an older age and have exclusive employment. The State has the obligation to provide a special wage regime for NHS doctors as well as the obligation to provide high standard health care for citizens, for which NHS doctors are responsible. The extend of wage cuts brings about a reversal of the current wage regime and cannot be effected without prior assessment of the financial benefit in relation to the impact that this reduction will have on the operation of the National Health System and in particular without assessing if the reduction is necessary, or could be achieved through other

[1] See Xenophon Contiades and Alkmene Fotiadou 'Models of Constitutional Change', in Xenophon Contiades (ed.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA* (Routledge, 2013) 417.

[2] Judgment no. 11/2003, the Supreme Special Court, Thought 6.

measures that have a similarly effective result burdening less the medical staff. Due to the severe financial crisis and budgetary problems faced by the Greek State, this decision is applicable only to the plaintiffs and to hospital doctors who have already brought their cases before the courts. Retroactive remuneration and the return to salary status before August 1, 2012, applies only to them. For all other doctors of the NHS, salaries shall be adjusted for the future.

This is an important precedent with regard to future decisions pending before the Council of State and other courts with regard to salary and pension cuts and the issue of retroactivity. Underlying it is an important question with regard to the extent to which the judiciary should intervene in state budgetary policy. As Greece is still facing a financial crisis, such decisions have a potentially immense impact on the State budget. On the other hand, in case the State does not abide by court decisions, rule of law issues are raised. Such constitutional dilemmas are interrelated with the role of the judiciary and are quite difficult to address. Having entered a more "mature" era of crisis litigation, the courts show less self-restraint, yet the degree in which they should interfere with budgetary issues, striking down law as unconstitutional, is contested.

2. Decision 1694/18 Council of State (Plenary Session – pilot judgment): granting asylum to Turkish officers

The story of the eight Turkish military officers who had fled to Greece seeking asylum after the July 2016 failed coup is still unfolding. In 2017, the Court of Cassation (Areios Pagos) had turned down an extradition request by Turkey, concluding that a fair trial and the protection of fundamental human rights could not be guaranteed there. In Decision 1694/18, the Council of State rejected the petition made by Greece's migration minister to rescind the asylum that had already been granted to Suleyman Ozkaynakci.

The rationale of this decision is also applicable to the other seven officers, since this was a pilot judgment. In its decision, the Plenary Session of the Supreme Court of Cassation invoked the Geneva Convention, according to which to establish a legitimate fear of being persecuted for his political beliefs, it is not necessary for the applicant to express those beliefs; it suffices that the persecutor, in this case Turkey, holds the applicant responsible for such beliefs. According to the Court, it was not proved that the officer in question participated in the coup of July 15, 2016, nor that he belonged to the movement to which the Turkish Government attributes the organization of the coup. The officer is therefore eligible to receive travel documents. According to the Court, the contested decision of the Asylum Committee, which had granted asylum to the Turkish officer was sufficiently justified, as there exists a causal link between the fear of persecution of the officer, in his country of origin and the beliefs attributed to him there.

Following this decision, the ruling Turkish party spokesman tweeted that it is "Crystal clear that Greek judiciary sided with Turkey's enemies and coup plotters with this decree. This is much more serious and shameful than supporting terrorism."[3] The courts in this developing situation are challenged to uphold the rule of law guarantees regardless of repercussions.

3. Decision 805/2018 Council of the State: on the restriction of movement of refugees

The Council of State annulled the Decision of the Director of the Asylum Service imposing restrictions on the free movement within Greece to applicants for international protection entering the Greek islands after the date of the publication of the judgment.[4]

According to the Court, the disputed restriction on free movement by the Greek State is not prohibited by the Constitution or by other supra-constitutional laws; however, the restrictive measures must be justified by specific reasons. This restriction results in the concentration of refugees in specific regions, not allowing their distribution across the entire Greek territory, which excessively burdens those regions. Indeed, the islands of Lesbos, Samos, Chios, Leros, Rhodes, and Kos are expected—in the midst of the severe financial crisis—to manage the entry and accommodation of a significant number of persons applying for international protection using the existing infrastructure. This may lead to social upheavals, and creates public order problems in areas that are also tourist destinations.

The Court referred also to Article 31(2) of the Geneva Convention, which permits the imposition of only the necessary restrictions on applicants for international protection. The Court ruled that no serious and imperative reasons of public interest and migration policy that could justify the imposition of restriction on the freedom of movement of applicants for international protection entering the Greek territory were established.

4. 470/2018 Council of State (Third Section): refugee child education

In an important decision, the Council of State had to face xenophobic populist activism triggered by the refugee crisis. Parents and parental associations sought the annulment of a decision by the Minister of Education on the designation of school units of the Primary and Secondary Education Departments of the Prefectures of Central Macedonia, Attica, and Sterea Ellada for the school year 2016-2017, where the Reception Facilities for Refugee Education operate. The Court held that applicants lacked a legitimate interest as they invoked only their status as residents of the district of the schools where the impugned decision was enforceable and because the application of the decision with regard to the education of refugee children does not affect them.

The Court stressed that the Greek State, taking into account the 2016 report of the Scientific Committee to assist the work of the Committee for the Support of Children of

[3] http://www.ekathimerini.com/231922/article/ekathimerini/news/turkish-ruling-party-lashes-out-at-greek-judiciary, accessed on 5 February 2019

[4] https://www.asylumlawdatabase.eu/en/case-law/greece-council-state-fourth-section-decision-8052018-17-april-2018s, accessed on 7 February 2019

Refugees, considered that the optimal solution for the education of refugee children at the present stage is the establishment of special facilities aimed at the smooth integration of refugee children in Greek schools. Thus, existing structures were not used, nor was the direct integration of these children into the Greek schools opted for because the children's emotional and psychological conditions, after their many months of suffering and war experience, created difficulties to their integration in a new social environment. For these reasons, the Greek State, through the Ministry of Education, created educational programs that ran in the afternoon hours in existing schools, where the children of the applicants go earlier in the day. Refugee children could then learn the Greek language in a school environment and in classes made for them that also conveyed a feeling of normal school life, with the ultimate aim being their smooth reintegration into the scholastic social environment. The choice of the school units hosting the reception classes had taken into account both the number of children and the availability of rooms, and also the precondition that the vaccination program for these children had been followed.

It is clear that courts can play a distinct role in handling the delicate side effects of the refugee crisis by maintaining a firm stance in matters of human rights protection.

5. 660/2018 Council of the State (Plenary Section): religious education in schools

The Church and State relationship in Greece is not an easy one. Greece has been convicted several times by the European Court of Human Rights for violations of freedom of religion. The Constitution refers to the prevailing religion of Greece—which leaves the door open to interpreting Article 16, which renders the State responsible for the "development of religious conscience," to dictate that religious education in schools should take the form of indoctrination. Over the years, a discussion about amending the Constitution to rule out the possibility of such interpretation has been ongoing; still, the necessary consensus does not seem to exist. The following decision is characteristic of this type of interpretive approach. The Plenary of the Council of State (with a minority of five members out of 17) found unconstitutional the decision of the Minister of Education with regard to religious education in Primary and Middle Schools. According to the majority opinion, the contested decision violates:

> (a) the provision of Article 16 (2) GrConst, because the curriculum distorted the purpose of religious education set by this provision, which is to develop the orthodox Christian conscience of the students belonging to the prevailing religion of the Eastern Orthodox Church;
>
> (b) the provision of Article 13 (1) GrConst, which enshrines the freedom of religious conscience; [According to the Court, the curriculum encouraging pupils (ages 8 to 15) to reflect on religious matters may unsettle faith in the orthodox Christian religion, formed by the students in the context of their family environment before they began school. This constitutes proselytism, as it could interfere with students from orthodox Christian conscience.]
>
> (c) the provision of Article 2 of the ECHR, because it violates the right of Orthodox Christian parents to ensure the education and training of their children in accordance with their own religious beliefs; and
>
> (d) the constitutionally guaranteed authority (Article 4 (1) S) and Article 14 (in conjunction with Article 9) of the ECHR, since it deprives students of the Orthodox Christian doctrine of the right to be taught exclusively the doctrines, moral values, and traditions of the Eastern Orthodox Church, whereas the legislation provides that Roman Catholic, Jewish, and Muslim students may be taught exclusively the doctrines of their faith by teachers proposed by their own religious community.

IV. LOOKING AHEAD

In May 2019, municipal elections and elections for the European Parliament will be held while general elections will also take place within 2019, as dictated by the Constitution. This will bring about alterations in the political landscape. It is in this context that the revision process shall continue, since the new Parliament will be a revision Parliament. So far, the revision process is in the first stages, and there seems to be a convergence between the two major parties on 6 points:

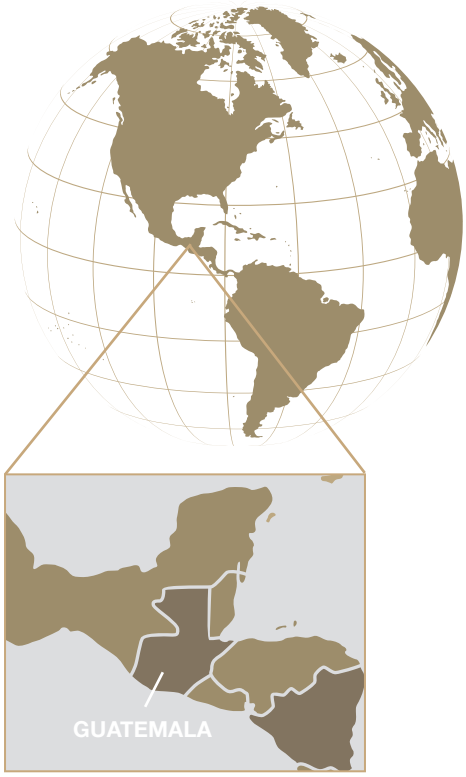
> (a) Article 96, which renders the guarantees of judicial independence for the military courts the same as those in place for ordinary courts,
>
> (b) Article 32, amending the President of the Republic election process and abolishing the possibility of early dissolution of the Parliament,
>
> (c) Article 54, which provides for the election of up to five MPs by Greek emigrants,
>
> (d) Article 86 on the liability of ministers abolishing the limitation period within which prosecution is allowed,
>
> (e) Article 62 on parliamentary immunity limiting the scope of protection to offenses directly related to the exercise of parliamentary duties, and
>
> (f) Article 101A on the election of members of Independent Authorities.

Does this suffice for reaching the wider consensus required for a revision? It is hard to tell how the process will unfold. Given the stringency of the amending formula, if disagreement results in a limited revision in scale, the possibility of formally changing other constitutional provisions will be postponed for a long time.

V. FURTHER READING

Philippos Spyropoulos and Thodoros Fortsakis, *Constitutional Law in Greece* (3rd edn, Kluwer Law International, 2017)

Xenophon Contiades and Alkmene Fotiadou, 'The Resilient Constitution: Lessons from the Financial Crisis', in Alexia Herwig and Marta Simoncini (eds), *Law and the Management of Disasters. The Challenge of Resilience* (Routledge, 2017)



Guatemala

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I. INTRODUCTION

The 2017 report on Guatemala highlighted the role of the International Commission Against Impunity in Guatemala (CICIG) and the Guatemalan Constitutional Court in moving towards greater accountability of those holding power. However, this report shows how 2018 was marked by the backlash against the CICIG and Constitutional Court by Guatemala's Executive. Part II shows how the President of Guatemala launched a series of political and legal attacks against the CICIG and Constitutional Court, including denouncing the treaty that created the CICIG and launching impeachment proceedings against the judges of the Constitutional Court for their "unconstitutional" judgments that sought to limit the Executive's powers to act against the CICIG. These actions provoked a constitutional crisis that is still unresolved. Moving away from the year's relevant constitutional events, Part III discusses three of the most important constitutional cases of the Guatemalan Constitutional Court since its establishment in 1986. In the first case, the Constitutional Court declared unconstitutional an attempted self-coup in 1993 in which the then-President attempted, through emergency powers, to dissolve the Congress and Courts. The second case regards how in 2003 the Constitutional Court failed to apply the constitutional prohibition on people who have led a coup running for election to the presidency, allowing dictator Efraín Rios Montt to run for president even though previous judgments of the Constitutional Court and Inter-American Commission on Human Rights had forbidden him from doing so. The third and last case this report reviews is the introduction of the doctrine of the "Constitutional Block" (*Bloque de Constitucionalidad*), which marked a new era for the litigation and promotion of human rights in Guatemala. Finally, Part IV looks ahead to future events in the country, such as the presidential and congressional general elections in October 2019 and the election of judges to the Supreme Court of Guatemala.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

This part details the backlash against the CICIG and the Constitutional Court by the Guatemalan Executive. The CICIG is an independent body created by a treaty between Guatemala and the UN.[2] It is led by a commissioner appointed by the UN Secretary-General, with a mandate to investigate and prosecute corruption.[3] As discussed in last year's report, in August 2017, the Constitutional Court declared unconstitutional the Executive's decision to declare the CICIG Commissioner "non-grata" and deport him. Following this, the President announced his decision to revise the treaty creating the CICIG.[4]

[1] We would like to thank Anna Dziedzic for her fantastic edits and comments in the realization of this report
[2] Carlos Arturo Villagrán Sandoval, 'Guatemala: The State of Liberal Democracy,' eds. Richard Albert, et al, *Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy, 2018) 126.
[3,4] Ibid.

On 1 February 2018, the Ministry of Foreign Affairs met with the UN Secretary-General to discuss the CICIG's mandate.[5] The Guatemalan Government accused the CICIG of exceeding its mandate, violating the human rights of the people it investigated, and threatening the judicial system.[6] The UN Secretary-General's response to these accusations came on 23 May 2018 at the Debate Marking 15th Anniversary of Adoption of United Nations Convention Against Corruption, held in New York. The Secretary-General stated: "There are several ways the [UN] Organization can support Member States to combat corruption, from sharing good practices to supporting the capacity of national anti-corruption institutions. The International Commission against Impunity in Guatemala is a case in point".[7]

After this response from the UN Secretary-General, the Guatemalan Executive started lobbying strongly against the CICIG's main financial donors: the United States and Sweden. The result came in early May 2018, when US Senator Marco Rubio delayed funding for the CICIG[8] in the belief that it had been "manipulated and used by radical elements and Russia".[9] The second move came against the Swedish ambassador to Guatemala. On 11 May 2018, the Guatemalan government requested the removal of the Swedish ambassador, accusing him of interfering with domestic issues.[10] The Swedish ambassador had announced a large donation to the CICIG in January 2018.[11] In response, the Human Rights Ombudsman filed a constitutional injunction against the Executive proceeding with the removal. On 29 May 2018, the Constitutional Court granted the injunction on the grounds that the decision of the Ministry of Foreign Relations to remove the ambassador had violated principles of international law protected by the Guatemalan Constitution.[12]

On 31 August 2018, the Guatemalan President made public his decision not to renew the CICIG's mandate, which expires in September 2019. On this day, the Government displayed its military force, which surrounded the CICIG's compound and the US Embassy.[13] On 14 September 2018, the Government decided that it was in the "interests of the nation" that the CICIG Commissioner, Ivan Velásquez should not be allowed back into the country.[14] However, on 16 September 2018, the Constitutional Court declared the executive's decision to forbid the CIGIC Commissioner entry to Guatemala unconstitutional.[15] The following day the Ministers of Interior and Foreign Relations and Solicitor-General resisted the Constitutional Court's ruling by demanding the UN Secretary-General to designate a new CICIG Commissioner.[16] However, on 19 September 2018, the Constitutional Court issued a clarification, requiring that the government permit Ivan Velásquez as CICIG Commissioner to re-enter the country.[17]

The government's response to these rulings of the Constitutional Court came on 11 October 2018, when it announced that the working visas of the CICIG's personnel would not be extended. Between 21 and 27 December 2018, the Constitutional Court delivered a series of judgments that ordered all government institutions to allow the re-entry of the CICIG's personnel.[18] However, on 5 January 2019, CICIG personnel were detained in the airport by immigration officials, acting on direction from the executive. In response, the Constitutional Court issued an order making known that non-compliance with its rulings are criminal offences and public officials are liable to removal from office for non-compliance.[19]

On 7 January 2019, the Guatemalan Executive announced its decision to denounce the treaty that established the CICIG. The Executive claimed that the CICIG, in its 11 years of existence, had violated national sovereignty and the human rights of the people that it had investigated for corruption, and that the UN Secretary-General was ignoring the petitions of the Guatemalan Government.

[5] El Periódico, Ayuda de Memoria Reunión de Ministra de Relaciones Exteriores de la República de Guatemala con el Secretario General de las Naciones Unidas, Jueves 1 de Febrero de 2018, https://drive.google.com/file/d/1iGNmK-W9WtW02KcYzv7WVPSeiE5YQKxS/view

[6] See: Carlos Arturo Villagrán Sandoval, Cancillería versus el sistema de justicia: Análisis de las críticas del Gobierno a la Cicig ante la ONU, Plaza Pública, https://www.plazapublica.com.gt/content/cancilleria-versus-el-sistema-de-justicia-analisis-de-las-criticas-del-gobierno-la-cicig

[7] United Nations Secretary-General, Remarks at High-level Debate Marking 15th Anniversary of Adoption of United Nations Convention Against Corruption, https://www.un.org/sg/en/content/sg/speeches/2018-05-23/15th-anniversary-adoption-un-convention-against-corruption-remarks

[8] Elisabeth Malkin, Guatemala Corruption Panel Has New Foe: U.S. Senator Marco Rubio, the *New York Times*, https://www.nytimes.com/2018/05/06/world/americas/guatemala-corruption-marco-rubio.html

[9] Nina Lakhani, Corrupt Guatemalan officials find help from an unlikely source: Marco Rubio, *The Guardian,* https://www.theguardian.com/world/2018/may/17/guatemala-marco-rubio-corruption

[10] Reuters, Guatemala asks Sweden, Venezuela to remove ambassadors over 'interference', https://www.reuters.com/article/us-guatemala-diplomacy/guatemala-asks-sweden-venezuela-to-remove-ambassadors-over-interference-idUSKBN1IC06Y

[11] Ibid.

[12] Corte de Constitucionalidad, Expedientes Acumulados 2198-2018 y 2201-2018, 29 Mayo 2017, 7.

[13] Carlos Arturo Villagrán Sandoval and Héctor Oswaldo Samayoa Sosa, 'Investigaciones de corrupción y disminución de la impunidad en delitos contra la administración del Estado y de la Justicia' (Informe de situación en Guatemala) (2018) 150 *Revista Análisis de la Realidad Nacional,* 28, 37.

[14] Ibid, 43.

[15] Corte de Constitucionalidad, Expediente 4207-2018, 16 Septiembre 2018.

[16] Villagrán Sandoval and Samayoa, (n 13) 43.

[17] Corte de Constitucionalidad, Expediente 4207-2018, 19 Septiembre 2018.

[18] Corte de Constitucionalidad, Expediente 5443-2018, 21 Diciembre 2018.

[19] Corte de Constitucionalidad, Expediente 5346-2018, 6 Enero 2019.

The UN Secretary-General strongly rejected the Government's action against the CICIG.[20] The Guatemalan Constitutional Court has accepted a constitutional amparo challenging the denouncing of the treaty and suspending its effects pending a final determination.[21] On 12 January 2018, the CICIG Commissioner made public a letter addressed to the UN Secretary-General that rebuts all of the Government's allegations.[22] Today, CICIG personnel have left the country and its commissioner, Ivan Velásquez, is still not allowed back.

In a parallel move, the Executive and its supporters in Congress have sought to impeach judges of the Constitutional Court. On 9 January 2018, the Supreme Court of Guatemala resolved that there are grounds for impeaching the judges of the Constitutional Court on the basis that they exceeded their constitutional mandate in the Swedish ambassador case and the CICIG matters, unconstitutionally intruding on issues within the sole competence of the Executive, such as foreign relations.[23] The judges face the prospect of impeachment in Congress, where the President's party holds a majority. The impeachment attacks the core of judicial independence. These events are leading Guatemala towards a constitutional crisis, sparking public protests but with no clear resolution in sight.

III. CONSTITUTIONAL CASES

The Guatemalan Constitution of 1965 established a Constitutional Court that served as a non-permanent tribunal, convening only when necessary. This Court was composed of members of the Supreme Court. The model proved to have little success at hearing constitutional disputes, as it lacked independence from the Judicial Branch.[24] This is why the new Constitution of 1986 created a permanent and independent Constitutional Court to be the highest court in constitutional matters. The Constitutional Court of Guatemala has played a pivotal role in the country as guardian of the constitutional order and as promoter and protector of human rights. It is because of the Court's jurisprudence that international labor law standards, women's rights, and indigenous people's rights, among other relevant topics, have been able to progress in Guatemala. However, its history has not been without pitfalls. Among its landmark decisions, it is important to note the following three cases that have shaped Guatemala´s constitutional development.

Re-establishment of constitutional order after attempted self-coup

Jorge Serrano Elias was elected President of Guatemala in 1991, becoming the second President democratically elected under the current Constitution after a history of recurring authoritarian and military governments. The official party did not have high representation in the legislative branch and the alliances that were initially made in Congress did not last. This, coupled with public discontent due to rising living costs and poorly planned public policies, led to a difficult scenario for the President, who decided to take extreme and anti-democratic measures. In 1993, Serrano Elias attempted a self-coup. By a presidential decree under the name of "Temporary Rules of Government", Elias suspended certain constitutional provisions that protected individual rights and ordered the dissolution of Congress to assume legislative powers himself. In addition, he ordered the removal of the Justices of the Supreme Court and the Constitutional Court of Guatemala, to be able to unilaterally name new members of these courts. He also ordered the removal of the Attorney General and Ombudsman of Guatemala.

These measures were an evident rupture of Guatemala's constitutional order and an authoritative move in order to expand his powers. The Constitutional Court played a pivotal role in the re-establishment of constitutional order. In an unprecedented manner,[25] and risking their personal safety at the time,[26] the Justices of the Court decided to review the decree on the same day that it was passed and declared that its provisions were unconstitutional.[27] In this ruling, the Court determined that the order to dissolve Congress was contrary to the Constitution and that members of the judicial branch cannot be removed from their position during their tenure, except in the specific situations established by the law.[28] Moreover, the President does not have the faculty to remove serving judges unilaterally, which rendered his decree unconstitutional, evidencing a breakdown of Guatemala's constitutional order, which the Court could not let happen. It is important to note that the Court's decision to act *ex officio,* which is not expressly allowed in the Constitution or laws of Guatemala, reflected the Court's understanding of the gravity of the situation and its duty to act in an unequivocal and compelling manner in defense of the Constitution and Guatemala's young democracy. There has been no other issue since that has forced the Court to act *ex officio.*

[20] UN News, Guatemala: UN anti-corruption body will continue working, as Constitutional Court blocks Government expulsion, https://news.un.org/en/story/2019/01/1030142

[21] Corte de Constitucionalidad, Expedientes Acumulados 96-2019, 97-2019, 99-2019, 106-2019 y 107-2019, 09 Enero 2019.

[22] UN News, UN anti-corruption body in Guatemala rebuts government's reasons for expulsion order https://news.un.org/en/story/2019/01/1030372

[23] *Los Angeles Times,* Crisis builds in Guatemala as its legislature seeks to impeach judges, https://www.latimes.com/world/la-fg-guatemala-corruption-crisis-20190110-story.html

[24] Adolfo Gonzalez Rodas, La Corte de Constitucionalidad de Guatemala, https://archivos.juridicas.unam.mx/www/bjv/libros/1/219/3.pdf, p. 20.

[25] ElPeriódico, A 25 años del Serranazo, https://elperiodico.com.gt/opinion/2018/05/25/a-25-anos-del-serranazo/

[26] Rodolfo Rohrmoser Valdeavellano, De cómo viví el Serranazo, XV *Opus Magna Constitucional,* 2018.

[27] Prensa Libre, 1993: Guatemala retorna a la institucionalidad, https://www.prensalibre.com/hemeroteca/serrano-abandona-la-presidencia-de-guatemala/

[28] Corte de Constitucionaldidad, Expediente 225-93, 25 May 1993.

During the days that followed the Court's ruling, Serrano Elías was still in power, but the strong social opposition to the attempted self-coup and the backing of Guatemala's Army and economic sector allowed the Court's decision to be enforced. On 31 May 1993, the Minister of Defense addressed the nation to announce that following the Court's ruling, President Elías had stepped down.[29] This ruling has been analyzed and applauded at a domestic and regional level as the single most transcendent decision of Guatemala's Constitutional Court.

Acceptance of Rios Montt's presidential candidacy despite constitutional prohibition

Efrain Rios Montt was a military leader, politician, and founder of the right-wing Frente Republicano Guatemalteco party. After the 1982 coup that struck down the then-President Romeo Lucas Garcia, Rios Montt was proclaimed the new President of Guatemala. When the current Constitution was passed in 1985, it established different prohibitions to run for President to prevent a return to authoritarian governments and anti-democratic events. Among these prohibitions, Article 186 of the Constitution provides that no former leader of a coup d'etat or anyone who has "significantly altered the constitutional order" of the country by a similar movement can be a presidential candidate.[30] Given this prohibition, when Efraín Rios Montt decided to run for President[31] in the 2003 elections, his candidacy was denied by the Guatemalan electoral authorities.

Ríos Montt filed a writ of amparo to have this decision reviewed. The Supreme Court of Guatemala upheld the denial of his candidacy due to the constitutional prohibition. This ruling caused much unrest among Rios Montt's followers and on 24 July 2003, party leaders and members led a massive protest, which turned violent and resulted in the unfortunate death of reporter Hector Ramirez. A week later, the Constitutional Court, on appeal, overturned the Supreme Court's decision, allowing Rios Montt to run for the presidency. In its judgment, the Court recognized that it is publicly known that Rios Montt assumed the presidency of Guatemala after the coup that overthrew President Romeo Lucas Garcia in 1982. However, the Court centered its analysis on determining whether the constitutional prohibition that would apply in Rios Montt's case would produce retroactive effects, given that the facts that caused him to be barred from being a presidential candidate happened before the Constitution was passed in 1985. The Court acknowledged the constitutional history of Guatemala and the authoritarian governments and events that led Constitution-makers to include such a prohibition, but it also cited Article 15 of the Constitution, which establishes that the law shall not have retroactive effects. The majority of the Court concluded that constitutional norms were made to have effect only in the future, and so applied only to events that occurred after 1985, when the Constitution was passed. Thus, Article 186(a) could not be applied to Rios Montt's presidential candidacy, as this would mean that it has unconstitutional retroactive effects.[32] The Court's decision that Rios Montt should be allowed to run for the presidency was contrary to a previous ruling[33] by the Constitutional Court that had determined that he could not run for President in the 1990 elections and was contrary to the interpretation of this issue by the Inter-American Commission of Human Rights.[34]

The decision was very polarizing. The Court's resolution was not unanimous as three of the seven members of the Court presented dissenting votes. This became relevant in 2006, when a petition to annul the ruling was presented to new members of the Constitutional Court. It is important to note that the Guatemalan legal system does not contemplate any proceeding by which a citizen, who was not a party in the original case, can ask a Court to annul a ruling after it has been decided and duly executed. However, the Court indicated, in a far-reaching interpretation of the principle of *pro actione,* that a citizen should be allowed to seek access to constitutional justice, even through procedures that are not expressly established in the Constitution or applicable law. Thus, the Court proceeded to analyze the petition and determined that the Court's ruling on the presidential candidacy of Rios Montt was wrongly decided, not only because the textual interpretation of the constitutional prohibition was inadequate but also because the decision failed to adhere to precedents in other cases on retroactive application. Consequently, the Court declared that the ruling should have no jurisprudential effect. This resolution constitutes the only one of its kind in the history of the Guatemalan Constitutional Court.

Recognition of the "Constitutional Block"

In 1985, Guatemalan Constitution-makers established two articles to give wide recognition to human rights. Article 44 provides that the rights expressly established in the Constitution do not exclude other rights that are inherent to human beings. Article 46 indicates that International Human Rights Treaties have a special place in the hierarchy of legal norms, prevailing over "internal law". This provision represents a clear intention of give special prominence to International Human Rights Law, a shared characteristic among many other Latin American Constitutions. However, its meaning has been subject to much academic debate over the years, and the Guatemalan Constitutional Court, in many of its rulings since the 1990s, has interpreted the phrase

[29] Midori Papadópolo, Del 25 de Mayo hasta las reformas a la Constitución, http://biblio3.url.edu.gt/Publi/Libros/2013/papadopolioo.pdf, 4.

[30] *Constitution of Guatemala,* article 186.

[31] See: ElPeriódico, Efraín Ríos Montt: una historia controversial y polémica, https://elperiodico.com.gt/nacion/2018/04/02/efrain-rios-montt-una-historia-controversial-y-polemica/

[32] La Nacion, Efraín Ríos Montt ya es candidato, https://www.nacion.com/el-mundo/efrain-rios-montt-ya-es-candidato/2MXJLHTHAND5FN6NDQ76JEYKB4/story/

[33] Corte de Constitucionalidad, expediente 280-90, 19 Octubre 1990.

[34] Comisión Interamericana de Derechos Humanos, Informe No. 30/93-Caso 10.804 Guatemala, 12 Octubre 1993.

"shall prevail over internal law" to mean that Human Rights Treaties are superior to ordinary Guatemalan legislation, but inferior to the Constitution.[35]

The doctrine of the Constitutionality Block, which originated in Europe, gained importance among academics in the Latin American region and slowly obtained recognition among courts in some countries, including Panama, Costa Rica, Colombia, and Peru.[36] This, coupled with the strong influence of the Inter-American Court of Human Rights' jurisprudence, made way in 2012 for the Guatemalan Constitutional Court to recognize the doctrine of the Constitutional Block, and thus to overturn its original interpretation of Article 46. Up to this point, the Court had held that since Human Rights Treaties were inferior to the Constitution, they could not be used as a parameter to determine the validity of ordinary legislation. In other words, inconsistency with a Human Rights Treaty was not a ground to strike down a law. In this leading case,[37] the Court overturned this previous interpretation and acknowledged that Human Rights Treaties should be at the same hierarchical level as the Constitution. Consequently, they should also be a constitutional parameter for judicial review. The case that allowed for this recognition involved the review of a legislative omission in the Guatemalan penal code in which the article establishing the crime of torture omitted certain important elements mandated by treaties ratified by Guatemala, notably the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Inter-American Convention to Prevent and Punish Torture.* This decision was innovative from a procedural perspective as well, since it was the first ruling in which the Court decided that it was feasible to review not only norms passed by Congress but also *legislative omissions.*

In its decision, the Constitutional Court determined the extent of the Constitutional Block that allows for incorporation into the Constitution those international norms that refer to human rights, even when the rights and liberties guaranteed by them do not figure expressly in the Constitution. This interpretation is based on the acknowledgment of the difference between a formal Constitution, limited to what is expressly written in the text, and a material Constitution, encompassing other rights and liberties that seek to protect human dignity and place individuals at the Constitution's center and reason of being. Moreover, this ruling established that the Constitutional Court of Guatemala, as the highest tribunal in constitutional matters, is competent to determine the international instruments that are part of the Constitutional Block.

By recognizing the Constitutionality Block, the Constitutional Court of Guatemala made way for a new era in its jurisprudence, allowing for rigorous conventionality control and a broader protection of human rights through international law standards.

IV. LOOKING AHEAD

The tension between the Guatemalan Government, the CICIG, and the Constitutional Court of Guatemala is set to continue in the near future. Despite the Court's recent ruling, which stated that the Commission must be allowed to end its mandate without Government interference, CICIG officials have left the country, and the Commission will surely be limited in its work until the termination of the agreement between Guatemala and the UN. The Constitutional Court will face different challenges. Five judges are facing impeachment charges in Congress. The Court will need to strengthen institutionally in the face of a highly divided society. The enforcement of its decisions is proving to be another important challenge for the Court at the hands of a government with authoritarian tendencies that places the obtainment of its objectives over the respect and promotion of the rule of law.

2019 is an election year in Guatemala. Citizens will elect the next President, municipal authorities, and members of Congress. The outlook is grim in regards to a true renovation of the political elite in Guatemala that can allow for a process of transformation in governance and the eradication of corruption. The Constitutional Court will have to be prepared to hear cases regarding electoral issues. One such issue will be whether members of Congress who have switched political parties will be able to run for re-election, as a reform to the legislative branch's laws resulted in the prohibition of transferring to different parties. Party hopping has been a strategy used to advance personal and political objectives and had become a systemic issue among members of Congress who seek to align with the party that best serves them at any one moment, without regard for the party's ideology or stance on important issues. Another issue that may come before the Court concerns the candidacy of Zury Rios, daughter of former General Rios Montt. Rios will seek the presidency through a newly established conservative party that aligns with the same values and ideology that her father's Frente Republicano Guatemalteco once did. However, she is also subject to a constitutional prohibition, as Article 186(c) establishes that close relatives of people in her father's situation may not be presidential candidates either.

From a procedural point of view, the Court will seek to continue recent efforts to control the rising number of writs of amparo that come before it by strengthening its procedural requirements. Many of these actions are filed in an attempt to delay the underlying issues, and the Court cannot formally dismiss cases

[35] Corte de Constitucionalidad, expediente 280-90, 19 octubre 1990; Corte de Constitucionalidad, expediente 199-95, 18 mayo 1995; Corte de Constitucionalidad, expediente 334-95, 26 marzo 1996.

[36] Manuel Eduardo Góngora Mera, La difusión del Bloque de Constitucionalidad en la Jurisprudencia Latinoamericana y su Potencial en la Construcción del Ius Constitutionale Commune Latinoamericano, http://www.corteidh.or.cr/tablas/r31277.pdf, p.303.

[37] Corte de Constitucionalidad, expediente 1822-2011, 17 Julio 2012.

that it deems unworthy of an analysis on the merits. Thus, by applying criteria reiterated in previous cases, it will continue to seek to decongest the extremely heavy load of issues that come before it.

V. FURTHER READING

Villagrán Sandoval, Carlos Arturo, and Héctor Oswaldo Samayoa Sosa, "Investigaciones de corrupción y disminución de la impunidad en delitos contra la administración del Estado y de la Justicia" (Informe de situación en Guatemala) (2018) 150 *Revista Análisis de la Realidad Nacional,* 28.



Hong Kong

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I. INTRODUCTION

Hong Kong is a Special Administrative Region of the People's Republic of China governed under a Basic Law adopted pursuant to the Chinese Constitution. In this report, we will report on developments in three main areas: 1) the constitutional relationship between China and Hong Kong; 2) sexual minority rights; and 3) political rights.

II. Major Constitutional Developments: Constitutional relationship between Central Authorities and Hong Kong Special Administrative Region

Two events in 2018 had important implications on the constitutional relationship between the Central Authorities and Hong Kong. One concerned the application of Chinese laws and jurisdiction in Hong Kong and the way the Central Authorities may issue binding decisions on the territory. The other concerns the disqualification of candidates or legislators for their inability (actual or perceived) to observe the ritual of oath-taking. In both cases the matter found its way to the courts.

The first event concerned the co-location of immigration, customs and quarantine clearance facilities of both Hong Kong and Mainland China at a newly built train station in Hong Kong.

The train station and the associated railway were constructed to connect Hong Kong with China's high-speed rail network.[1] The Hong Kong Government announced in 2017 the implementation of a co-location arrangement that would deploy Mainland Chinese officers at a "Mainland Port Area" of the Hong Kong station to conduct clearance procedures for passengers in accordance with Mainland Chinese laws.[2]

This ignited an intense debate in Hong Kong on the validity of the co-location arrangement, not least because the Basic Law states that Chinese laws shall not apply to Hong Kong except for those listed in Annex III of the Basic Law (the latter to be limited to defence, foreign affairs and other matters outside of the autonomy of Hong Kong [3] On 18 November 2017, Hong Kong's Chief Executive and the Governor of Guangdong Province signed the Co-operation Arrangement for implementing the

[1] Information Service Department, '10 projects to boost economy, add jobs' (10 October 2007) (at: https://www.news.gov.hk/isd/ebulletin/en/category/infrastructureandlogistics/071010/html/071010en06002.htm) (last accessed on 26 February 2019).

[2] See Department of Justice, Transport and Housing Bureau and Security Bureau of the HKSAR Government, 'Customs, Immigration and Quarantine Arrangements of the Hong Kong Section of the Guangzhou-Shenzhen-Hong Kong Express Rail Link' (LC Paper No CB(2)1966/16-17(01)) (July 2017) (at: http://www.legco.gov.hk/yr16-17/english/hc/papers/hccb2-1966-1-e.pdf) (last accessed on 26 February 2019).

[3] For discussions, see P Y Lo, 'Hong Kong's Unique "Co-Location" Arrangement', *Int'l J. Const. L.* Blog, Oct. 17, 2017 (at: http://www.iconnectblog.com/2017/10/hong-kongs-unique-co-location-arrangement) (last accessed on 26 February 2019); Lin Feng, 'Constitutionality of the Co-Location Arrangement at the West Kowloon High-Speed Rail Terminus' (2017) 47 *HKLJ* 499; Po Jen Yap and Jiang Zixin, 'Co-Location is Constitutional' (2018) 48 HKLJ 37.

co-location arrangement.[4] On 27 December 2017, the National People's Congress Standing Committee (NPCSC) adopted a decision to approve the Co-operation Arrangement. In June 2018, Hong Kong's Legislative Council passed the implementing local legislation.

Section 6 of the Ordinance states: "(1) Except for reserved matters, the Mainland Port Area is to be regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of: (a) the application of the laws of the Mainland, and of the laws of Hong Kong, in the Mainland Port Area; and (b) the delineation of jurisdiction (including jurisdiction of the courts) over the Mainland Port Area; and (2) Sub-section (1) does not affect the boundary of the administrative division of the [Hong Kong Special Administrative Region] …".

Legal challenges against the Ordinance were lodged.[5] Two of the applicants applied unsuccessfully to halt the commencement of the Ordinance.[6] The co-location arrangement came into operation on 22 September 2018. The hearing of the challenges came afterwards in October 2018.

The Court of First Instance dismissed all these applications.[7] Although the judge outlined the main arguments on why the Ordinance was inconsistent with Basic Law provisions, he ruled in favour of consistency without evaluating them, preferring to say that on a fair reading of the Basic Law and having regard to its context and purpose, it was open to the Hong Kong legislature to enact the Ordinance. He also considered the NPCSC's Interpretation to be of conclusive weight, despite there being no specific basis in the Basic Law for the NPCSC to issue such a decision. Further, he refused to entertain arguments based on the doctrines of "basic structure" and "unconstitutional constitutional amendments". We suggest that this judgment failed in two respects. First, the judge "fails to notice the fundamental breach of Article 11 of the Basic Law … that no law enacted by the legislature of the HKSAR shall contravene [it], whose provisions form the basis of the systems and policies practised in [Hong Kong], including the system for safeguarding the fundamental rights and freedoms of its residents, the judicial system, and the relevant policies."[8] Second, he did not grapple with the Central Authorities' *de facto* suspension of the operation of Basic Law provisions by the NPCSC decision purporting to endorse the co-location arrangement. The implication of this, when considered alongside the NPCSC's final power of interpreting the Basic Law under Article 158 of the Basic Law, is that the Basic Law does not pose any constraints on the Central Authorities.[9]

The other controversy related to the disqualification of candidates and elected legislators who supported or did not dismiss the idea of Hong Kong becoming an independent state, or the idea of self-determination, on the ground that they failed to observe, or could not satisfy an official that they intended to observe, the promissory oath they were or would have been required to take on assuming office.

The NPCSC issued an interpretation of Article 104 of the Basic Law ("Interpretation") on 7 November 2016 to deal with the disrespectful actions of two elected legislators in taking their oaths to assume office. Article 104 provides that certain officers shall take an oath to swear to uphold the Basic Law and bear allegiance to the Hong Kong Special Administrative Region when assuming office. The Interpretation went beyond the usual interpretative function of clarifying or explaining the terms of a provision; it stipulated the manner of taking an oath and the consequences of failing to take one, matters that had previously been provided for in local legislation. The Interpretation also added that persons *standing for election* in Hong Kong must meet the legal requirements and preconditions of upholding the Basic Law and bearing allegiance to the Hong Kong Special Administrative Region. The Court of Appeal held that this Interpretation was "unquestionably binding", refusing to entertain a request to consider whether it went beyond the limits of an interpretation allowed by the Basic Law. The Court of Final Appeal declined to grant leave to appeal. The implications of this on political rights of access to participate in public affairs is discussed in Section III(2) below.

III. CONSTITUTIONAL CASES

1. Sexual Minority Rights

Recent years have seen an increasing number of individuals challenging the Hong Kong government on sexual minority rights issues through judicial review. This section summarizes two key judgments in 2018—*QT v Director of Immigration*[10] and *Leung Chun Kwong v Secretary for Civil Service*[11]—and makes observations that will be relevant to the numerous pending cases on sexual minority rights, including one that challenges the non-availability of civil partnership and marriage to same-sex couples. Given the government's unwillingness to offend majoritarian views on sexual mores, it is expected that affected individuals will continue to take the government to court.

[4] See the HKSAR Government's press release on 18 November 2017 (at: http://www.info.gov.hk/gia/general/201711/18/P2017111800419.htm).

[5] Namely, HCAL 1160, 1164, 1165, 1171 and 1178/2018.

[6] See *Re Leung Chung Hang Sixtus & Ors* [2018] HKCFI 1869 [2018] 5 HKC 138 (CFI).

[7] See *Re Leung Chung Hang Sixtus & Ors* (No 2) [2018] HKCFI 2657 [2019] 1 HKC 104 (CFI).

[8] Ibid

[9] See Cora Chan, 'Thirty years from Tiananmen: China, Hong Kong, and the ongoing experiment to preserve liberal values in an authoritarian state' (2019) 17(2) *International Journal of Constitutional Law* (forthcoming).

[10] [2018] HKCFA 28 (2018) 21 HKCFAR 324.

[11] [2018] HKCA 318 [2018] 3 HKLRD 84.

Leung is a civil servant who has entered into a foreign registered marriage with his same-sex partner. He challenged the government's existing policy on tax and other benefits for the spouses of civil servants. This policy recognizes only spouses in marriages that are given legal status in Hong Kong, i.e., heterosexual and monogamous marriage. The Court of Appeal affirmed the two-stage approach to finding discrimination: first, is the applicant in a comparable position to the comparator (the comparator stage)?; if so, then the court proceeds to assess whether the differential treatment passes the four-stage proportionality test that asks whether the differences in treatment pursue a legitimate aim, are rationally connected to the aim, are no more than necessary for achieving the aim and strike a fair balance between the harm to the individual right and the benefit to society (the justification stage).[12] More importantly, the court affirmed the "core rights and obligations" approach that one of its judges (Cheung CJHC, as he then was) previously developed in the Court of Appeal judgment of *QT.* According to this approach, insofar as differences in treatment between married and non-married couples are concerned, the comparator stage enquires whether the benefit denied goes to the "areas of life which are, whether by nature or by tradition or long usage, closely connected with marriage" such that any denial of such benefits to non-married couples need not go through the justification stage. Divorce, adoption and succession were given as examples. The Court of Appeal held that although tax and other spousal benefits are not rights that are core to marriage, the denial of such benefits to same-sex spouses is a proportionate measure to protect the uniqueness of the status of marriage in Hong Kong, which the court deemed to be a legitimate aim.

Shortly after the Court of Appeal handed down its judgment in *Leung,* the Court of Final Appeal in QT held that the government's policy of denying dependent visas to spouses in foreign registered same-sex partnership was discriminatory. The Court of Final Appeal rejected the Court of Appeal's "core rights and obligations" approach. It reiterated a point that Ma CJ previously made in *Fok Chun Wa v Hospital Authority:*[13] that the two-stage approach was not a strait-jacket—it would be rare for the court to be able to rule whether the two persons have enough of a relevant difference to justify the differential treatment without going through the proportionality test.[14] The court criticized the "core rights and obligations" approach as being circular and subjective. It was not clear, for example, why adoption or succession should be exclusively reserved for married couples. The correct approach should be to subject "every alleged case of discrimination" to the proportionality test. Applying this approach, the court found that the denial of dependent visas to spouses in same-sex partnerships was not rationally connected to the aim of striking a balance between attracting talent to Hong Kong and maintaining stringent immigration control.

A number of observations regarding these two cases are worth highlighting. First, although the Court of Final Appeal stated that all alleged cases of discrimination have to go through the proportionality test, hence seemingly doing away with the comparator stage, it is clear that the court still has to apply some test to see if the comparators are in an analogous position such that a *prima facie* case of discrimination has been made out. In fact, the court itself assessed that homosexual civil partners and heterosexual married couples were analogous because they were capable of "having equivalent interdependent and interpersonal relationships". The judgment's rejection of the "core rights and obligations" approach should therefore not be taken to have overruled the two-stage approach to finding discrimination altogether. To show a *prima facie* case of discrimination, the applicant would still need to show that there is a relevant similarity between him and the comparator. What the government cannot do is defend differences in treatment between married and unmarried couples simply on the basis that the former are unmarried.

Second, although the courts in *QT, Leung* and a previous landmark case, *W v Registrar of Marriages1*[5] (which allowed post-operative transsexual persons to marry in their post-operative gender), all accepted that the right to marry under the Basic Law extends only to heterosexual couples, and the court in Leung stated that protecting the traditional concept of marriage is a legitimate aim, these propositions were in fact common ground between the parties in these cases. It is open to applicants in the future—including Leung in his final appeal—to dispute these propositions, which are not uncontroversial.

Third, the Court of Appeal stated that whether a right is core to marriage is determined by, *inter alia,* tradition and social usage, and would often be a matter of "common sense", "representing nothing other than one's 'intuition' or 'instinct'".[16] One problem with this approach is that the court allowed social views to define minority rights and may enable entrenched social prejudices against minority groups to persist, contrary to it's role to guard minority rights against majoritarian intrusion. Despite the Court of Final Appeal's rejection of the core rights approach, the jurisprudence shows that social views will continue to play key roles in determining what rights sexual minorities enjoy. In *Leung,* social views were relevant in determining whether the second to fourth stages of the proportionality test were passed: second stage – the court reasoned that if a non-core right has nevertheless been long associated with married couples, opening it up to non-married couples may weaken the status of marriage; third and fourth stages – the court held that given the societal preference for heterosexual marriage, courts should be slow to conclude that these stages

[12] At [96]. *QT v Director of Immigration* [2017] 5 HKLRD 166 at [14].
[13] (2012) 15 HKCFA 409 at [58].
[14] At [83].
[15] (2013) 16 HKCFAR 112.
[16] *QT v Director of Immigration* [2017] 5 HKLRD 166 at [14] [16] [18].

were not passed. These propositions survived QT, where the court did not have to assess the measure at stake against the legitimate aim of protecting the traditional concept of marriage. Indeed, the Court of Appeal and Court of Final Appeal in QT refused to speculate on what the outcome of the case would be if the legitimate aim had been phrased as such. Social views would also be relevant in determining who is entitled to get married. All of the jurisprudence on sexual minority rights so far (including the judgments that extended sexual minority rights, such as QT and W) emphasized that it is for society, not the court, to determine whether same-sex couples may get married. Hence, despite the overruling of the "core rights and obligations" approach, social views will continue to play a crucial role in determining sexual minority rights.

This brings us to the fourth point. Despite the Court of Final Appeal's recent liberalisation of rights for sexual minorities (that fall short of granting same-sex marriage), it has remained extremely cautious in extending the definition of marriage to cover same-sex couples. It is clear that unless there is clear evidence of changes in societal views in favour of same-sex marriage, the court will not affirm and uphold such right. The courts have been careful to avoid the core issue of same-sex marriage, but they will have to face this issue head-on in the pending cases of *MK v Government of HKSAR,*[17] *TF v Secretary for Justice*[18] and *STK v Secretary for Justice.*[19]

2. Political Rights: Right to Participate in Political Affairs

Article 26 of the Basic Law sets out that all residents "shall have the right to vote and to stand for election in accordance with law". In the past year, there have been a number of high-profile restrictions imposed on access to elections. As discussed in Part I, one of these incidents involved the disqualification of duly- elected members of the Legislative Council (LEGCO) on the basis that they had improperly taken the oath required to confirm their office. Following those cases, the Court of First Instance adjudged that four more legislators were disqualified because of their inappropriate oath-taking manner.[20] Subsequently, the Court of First Instance dismissed the election petition of a pro-independence individual whose nomination was invalidated because the returning officer was not satisfied that he intended to uphold the Basic Law (including Article 1, which states that Hong Kong is an inalienable part of China).[21]

Candidates standing in Hong Kong elections that were held during the reporting period had their nominations scrutinized by returning officers who "took account" of the Interpretation by the NPCSC discussed in Part I.

This section focuses on a newer restriction on access to the political arena: restrictions on political parties and their members because they are advocating self-determination. As a result of the oath-taking decisions, Agnes Chow, Lau Siu-lai and Eddie Chu all had their respective nominations for standing for election ruled invalid because each had previously expressed support for "self-determination" of the Hong Kong people.[22] All three are seeking to challenge the returning officer's decision by election petition. Eddie Chu's case was the most curious, since he was a sitting legislator who sought to run for election as a rural representative of a village in a locally governed district in Hong Kong, which was not one of the offices referred to in Article 104 (which was the subject of the NPCSC's interpretation referred to in Part I).

In the case of *Chan Ho Tin v Lo Ying Ki Alan & Ors,*[23] the petitioner challenged—by way of an election petition—the decision of the returning officer to invalidate the nomination of the petitioner, who was the convenor of the Hong Kong National Party. The invalidation was done on the grounds that the petitioner — and his party—advocated the independence of Hong Kong from the People's Republic of China, which had the aim of nullifying the Basic Law. Pursuant to Section 40(1)(b)(i) of the Legislative Council Ordinance (Cap. 542), a valid nomination by a candidate requires a declaration that they will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region. The petitioner did not provide confirmation of his declaration. The returning officer accordingly decided that his nomination was invalid and that, based on the publicly held views of the petitioner, he was not going to uphold the Basic Law. The petitioner challenged this decision on the basis that the returning officer's invalidation was unlawful. Specifically, that the returning officer took into account irrelevant considerations. The consequence of the petitioner's application was the invalidation of the subsequent election of various candidates to their relevant seats in the LEGCO. The petitioner further argued that the appropriate remedy was not to invalidate his nomination, but to subject him to relevant criminal consequences under the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation

[17] HCAL 1077/2018.

[18] HCAL 2648/2018.

[19] HCAL 2682/2018.

[20] One of the four, Leung Kwok Hung, appealed unsuccessfully against the judgment appeal ([2019] HKCA 173).

[21] See P Y Lo, 'Enforcing an Unfortunate, Unnecessary and "Unquestionably Binding" NPCSC Interpretation: The Hong Kong Judiciary's Deconstruction of Its Construction of the Basic Law' (2018) 48 HKLJ 399.

[22] See *Chow Ting v Teng Yu-yan Anne & Anor* (HCAL 804/2018) (at: https://www.scribd.com/document/378535140/Agnes-Chow-election-petition#download&from_embed); Holmes Chan, 'Hong Kong bans democrat Lau Siu-lai from standing in legislative by-election', Hong Kong Free Press (12 October 2018) (at: https://www.hongkongfp.com/2018/10/12/breaking-hong-kong-bans-democrat-lau-siu-lai-standing-kowloon-west-election/); and Tom Grundy, 'Hong Kong bans pro-democracy lawmaker Eddie Chu from running in village election', *Hong Kong Free Press* (2 December 2018) (at: https://www.hongkongfp.com/2018/10/12/breaking-hong-kong-bans-democrat-lau-siu-lai-standing-kowloon-west-election/) (last accessed on 3 March 2019).

[23] [2018] 2 HKC 213.

(Cap. 541D) for making a false declaration. If convicted under this regulation, a returning officer has the power to retroactively disqualify a candidate pursuant to Section 42(B)(4) of the Legislative Council Ordinance. The petitioner also argued that the returning officer lacked the power to disqualify a nomination on grounds of formal versus substantive validity. It would, in fact, be unlawful for the returning officer to look into substantive matters, such as whether the nominee had a genuine intention to uphold the Basic Law. Finally, the petitioner raised various constitutional grounds, including the fact that the returning officer's decision infringed on his right to stand for election and the voters' right to vote on the basis of their beliefs.

In response to the petitioner's arguments, the Court of First Instance held that the Interpretation by the NPCSC issued under Article 104 of the Basic Law clearly indicated that the declaration for nomination as an electoral candidate was a substantive requirement. The substantive purpose of the declaration was plain: members of the LEGCO were to serve Hong Kong within the constitutional framework established by the Basic Law. Fundamental to this duty was the upholding of the establishment of Hong Kong as a special administrative region of China and the maintenance of the "one country, two principles" ideal.[24] Interpreting the requirements of the Section 40(1)(b)(i) nomination as just a formal requirement would also result in an "absurd" interpretation of the provision. It would be absurd for a nominee to submit a formally valid declaration but act in a way that indicated they had no intention of upholding the Basic Law. Such irrationality could not have been intended by the drafters of the legislation. The returning officer accordingly did have the power to assess the substantive compliance of any nomination as well as its formal compliance.

More so, any constitutional arguments (based on the right to stand for election) must be read in light of the requirements of Article 104 (as interpreted by the NPCSC). The relevant rights relied on by the petitioner were not absolute and could be subject to a proportionality assessment. This required assessing: (a) whether any restriction on the right to stand for election was legitimate; (b) the restriction was rationally connected to a legitimate aim; (c) the restriction was no more than reasonably necessary or was not manifestly without reasonable foundation to achieve the aim; and (d) a reasonable balance had been struck between the benefits of the restriction and the encroachments on the relevant rights.[25] This test was satisfied in the present case. The legitimate aims of the restrictions (imposed by the declaration for a valid nomination that the candidate will uphold the Basic Law) were to protect the overall constitutional order, maintain public confidence in LEGCO and maintain public order. The requirement for a candidate to make a truthful declaration only denied candidacy to those who advanced the negation of constitutional order, and there was thus a rational connection between the restriction and legitimate aim of the former. In these circumstances, the court was unable to imagine alternative modes of achieving the legitimate aim and it was, in fact, consistent with the constitutional order of the Hong Kong Special Administrative Region that such a restriction should be maintained.

For the benefit of the petitioner, the court did hold that any nominee must generally be accorded a reasonable opportunity to respond to any materials that the returning officer was relying on as negating the nominee's intention to uphold the Basic Law.

The development of a system of direct elections was a significant focus during the Sino-British negotiations prior to Hong Kong's handover to China.[26] The provisions of the Basic Law set out the parameters for reforming the mode of electing the Chief Executive and the members of the LEGCO, respectively. The process for reform (in terms of the requisite majority in LEGCO, the consent of the Chief Executive and the role of the legislative body of the People's Republic of China (NPCSC) is also set out in the text. Annexes I and II of the Basic Law state that any changes should "be reported to the [NPCSC] for the record" (in the case of the election of members of LEGCO) or "for approval" (in the case of the election of the Chief Executive).[27] While Annexes I and II make clear that the NPCSC has a role to play in political reform, this is only at the end of the reform process once any reform package has been voted on by LEGCO and approved by the Chief Executive. Paragraph 7 of Annex I states that any amendments to the method for selecting the Chief Executive "shall be reported to the [NPCSC] *for approval*" (emphasis added). Paragraph (III) of Annex II states that any amendments to the method for selecting LEGCO "shall be reported to the [NPCSC] *for the record*" (emphasis added). The political reform process was therefore envisaged as one that would be primarily locally initiated, driven and led. However, through various interpretations and decisions relating to the relevant provisions of the Basic Law, the NPCSC created a new role for itself at the *inception* of the reform exercise and then exercised this role in problematic ways. The distinction between a "decision" and an "interpretation" by the NPCSC is unclear. The NPCSC has provided no indicators or guidance on when it will issue one over the other on a particular issue, but the purported effect of both instruments appears to be the same from their texts: they are promulgated as authoritative positions on a particular provision of the Basic Law. These various interpretations and decisions on the meaning and implementation of provisions of the Basic Law arguably augment and amend the provisions outside the proper constitutional amendment procedures set out in the Basic

[24] Relying on *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council* [2016] 6 HKC 541, [2017] 1 HKLRD 460 considered (paras 53-56).

[25] *Hysan Development Co Ltd v Town Planning Board* [2016] 6 HKC 58 at [152].

[26] See Michael Davis, *Constitutional Confrontation in Hong Kong – Issues and Implications of the Basic Law* (Palgrave Macmillan, 1990) especially 27-29. See also, Swati Jhaveri, 'Reconstitutionalizing Politics in the Hong Kong Special Administrative Region' (2018) 13(1) Asian *Journal of Comparative Law* 27-57.

[27] Annex II, Part III and Annex I, para 7, Hong Kong Basic Law.

Law. The gradual increase in input from the NPCSC on the interpretation of the Basic Law could be detrimental from the perspective of furthering interpretations that are sensitive to the rule of law as practiced and understood in Hong Kong.[28] Dissatisfaction with the progress of electoral reform towards universal suffrage has led to mass movement—such as the Umbrella Movement and the establishment of pro-independence parties.

IV. LOOKING AHEAD

First, in the area of sexual minority rights, how the mentioned cases and those pending will play out concerning rights that fall short of marriage and civil union (e.g., challenging the ineligibility of same-sex couples for public housing,[29] decision to remove some LGBT-themed children's books from public libraries[30] and Leung's final appeal) may be affected by, *inter alia,* changes on the bench of the highest court. Tang PJ has been replaced by Cheung, the judge who developed the "core rights and obligations" approach and who elaborated extensively on why the relaxation of some rights would undermine the special status of marriage. It will be interesting to see how Cheung PJ will rule in these cases as a member of the highest court.

A recent study shows that Hong Kong courts are generally less deferential on issues of moral controversy and more so in politically sensitive cases.[31] Whether there is a causal connection between these two observations has yet to be tested, but a plausible hypothesis is that courts are more activist in sexual minority cases in order to compensate for the legitimacy they lost by being deferential in politically sensitive cases (e.g., the oath-taking cases and co-location case, outlined elsewhere in this report). It would be interesting to test this hypothesis empirically.

In terms of rights of access to the political arena, the constitutional issues will largely be more systemic in their impact on political parties generally. The barriers on Hong Kong National Party members from running for election in the LEGCO were subsequently felt on the party as a whole. In July 2018, they received a notice under the Societies Ordinance that the police were likely to ban the party. This was on the grounds that they were (or likely to be) engaging in seditious activity due to their beliefs. Key members of the party appealed the ban to the Chief Executive of Hong Kong and the Executive Council. The bans were officially upheld by the Executive Council (Cabinet) of Hong Kong in February 2019. The issue of party-wide bans is likely to become an increasingly live one. Article 23 of the Basic Law of Hong Kong mandates the enactment of national security legislation to prohibit, among other things, treason, secession, sedition and subversion against the Central People's Government. Earlier attempts to introduce this legislation were highly unpopular, leading to the shelving of the government's proposals.[32] However, the enactment of such legislation is inevitable. Indeed, the issue has recently become a live one, with local government coming under increasing pressure to enact national security legislation.[33]

Ultimately, controlling the scope and operation of national security legislation and its impact on political participation rights will need to be a multi-event and multi-actor effort. This will include upstream efforts during legislative debates on any proposed legislative restrictions and associated civil society movements to, for example, lobby members of the LEGCO to raise questions during debate. There will also need to be a concerted effort on the part of administrative authorities (such as the police and returning officers) to be cautious in the exercise of their discretion to restrict access to the political arena.

More broadly, it has to be recognised that the court's position on matters that implicate the role of the Central People's Government's role in relation to Hong Kong may ultimately be precarious. As a matter of political reality, the NPCSC and the Central People's Government are unlikely to be invisible in the interpretation of the Basic Law. This is not the direction in which local-central government relations are going, with ever-increasing involvement in the political governance and autonomy of Hong Kong. If the courts take a stronger role in pushing back against or re-interpreting NPCSC interpretations, they might lose their perceived legitimacy and influence once they are viewed as being more active in constitutional adjudication in this area. This could lead to pushback from the NPCSC, who may issue retaliatory interpretations of the Basic Law. Worse still, the NPCSC may issue a "clarifying" and perhaps contrary interpretation of Article 158 on the conditions for their interpretation of it. This could ultimately lead to the diminishment of the judicial role, as the courts would become bound by more interpretations of the Basic Law from the NPCSC in future cases. The result might be an irreversible position in the absence of any democratic or constitutional mechanisms to combat any unilateral constitutional usurpation by the NPCSC.

[28] See Albert Chen, 'National security and the rule of law under "One Country, Two Systems"', in Fiona De Londras and Cora Chan (eds), *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart Publishing, forthcoming).

[29] *Nick Infinger v Hong Kong Housing Authority,* HCAL 2647/2018.

[30] *Lee Tak-hung,* HCAL 1196/2018.

[31] Cora Chan, 'Rights, Proportionality and Deference: A Study of Post-Handover Judgments in Hong Kong' (2018) 48(1) *Hong Kong Law Journal* 51.

[32] See Fu Hualing, Carole J Petersen and Simon NM Young, *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny* (Hong Kong University Press, 2005).

[33] See, for example: 'National security law looms over Hong Kong freedoms', 27 September 2018, *South China Morning Post* <last accessed 23 October 2018>.

V. FURTHER READING

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Hungary

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I. INTRODUCTION

In 2018, for the third time, the Fidesz-KDNP party coalition secured a two-thirds majority in the Hungarian Parliament in the general parliamentary elections. The old-new Government, led by Prime Minister Viktor Orbán, adopted the Seventh Amendment to the Fundamental Law that obstructs the accommodation of migrants, limits the freedom of assembly and establishes the High Administrative Court, outsourcing administrative justice from the ordinary judiciary to special courts administered partly by the Minister of Justice. These constitutional developments point towards creating a non-reversible political system based on authoritarian rule. The autonomy of the social subsystems is gradually being eliminated: media, culture, science, education, etc., are captured by the State. In 2018, the Government continued to reorganize education and science, the Central European University was forced to give up a part of its activities in Budapest and the Hungarian Academy of Sciences, which is an autonomous institution according to the Fundamental Law, is under forced restructuring. Some education programmes, such as the gender programmes, were prohibited at universities. Research activities will be influenced by centrally defined research projects. State capture extends to the principles of liberal constitutionalism, such as the separation of powers, the independence of the judiciary or legal certainty. Legislation is not introduced duly in advance, official negotiations do not influence the outcome of political decisions and implemented law is often not clear and consequent. Independent State institutions, such as the Constitutional Court, are losing power and relevance. Due to the transformation of its competences and the lack of petitions from State authorities, as well as the appearance of loyalty regarding certain politically sensitive questions, the Constitutional Court is not the watchdog of constitutionalism any more. This report describes the Seventh Amendment to the Fundamental Law as the major constitutional change, and explains important cases from Constitutional Court jurisprudence to show the lack of outstanding decisions that would balance the Government's policy.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Government, using its two-thirds majority in Parliament, adopted the Seventh Amendment to the Fundamental Law in 2018.

The original 2011 text of the Fundamental Law used the concept "historical constitution" as a reference point to constitutionalism in the National Avowal (Preamble) and also as a method of interpretation. However, as Hungary has a written constitution, the role of these provisions were still not clear, and many scholars attributed a purely symbolic force to this, although there were Government attempts to emphasize its central role. Finally, the Seventh Amendment declared that the original text, which says, "We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation," shall be supplemented in the National Avowal with the following text: "We hold that it is a fundamental obligation of the

State to protect our self-identity, rooted in our historical constitution." As explained in our 2016 report, the concept of constitutional identity was introduced by the Constitutional Court (CC) in its Decision 22/2016 (XII. 5). The CC primarily functions as a shield against the implementation of EU Law by protecting the fundamental rights laid down in the Fundamental Law as well as Hungary's inalienable right of disposal related to its territorial integrity, form of government and governmental organisation. Furthermore, since the Amendment, all state organs shall protect the constitutional self-identity of Hungary. The Seventh Amendment, and also the new case law of the Constitutional Court, highlights that constitutional self-identity is to be protected through respect for the achievements of the historical constitution. This blurs the boundaries of the concept of the written constitution.

As to the development of fundamental rights, privacy received elevated protection by the Seventh Amendment by prescribing that the exercise of freedom of expression and the right of assembly shall not harm others' private and family life and their homes. This provision, however, limited the freedom of assembly that also appeared in the codification of the new act on freedom of assembly. It is problematic that the original *raison d'être* of this new regulation might have been a personal demand of leading politicians not to be disturbed by assemblies in front of their homes. New case law has yet to be born, but this constitutional environment undoubtedly changes the attitudes of the people.

The Government also reacted to the most topical issue of migration by amending the Fundamental Law to declare that no alien population will be settled in Hungary, and that immigration will be based only on individual applications. A major human rights controversy is the challenge of migration. Hungary has decided to respond to it with a constitutional amendment that is contradictory at least to the spirit of European human rights standards by being clearly exclusive and paternalist towards Hungarian inhabitants.

Concerning the separation of powers, a great change has been introduced into the Hungarian legal system by the Seventh Amendment. This is the introduction of separate administrative courts. At the end of 2018, a new act was adopted by the two-thirds majority in Government. Separate administrative courts have their roots in Hungarian constitutional history, but the safeguards of independence are quite weak in the new system to be introduced in 2020. The administration of this branch of judiciary is, e.g., separate from ordinary administration and the Minister of Justice has competencies in the appointment and removal of judges.

Finally, the Seventh Amendment that provided for a new constitutional framework in 2018 introduced not only structural changes in matters of adjudication but also influenced matters of interpretation. It is quite rare that constitutions provide for specific clauses on the mandatory methods of interpretation. In Hungary, the Fundamental Law contained such provisions and these were supplemented with others in 2018.

According to the new rule, "In the course of the application of law, courts shall interpret the test of the legal regulations primarily in accordance with their purposes and with the Fundamental Law. Primarily, the preamble of the legal regulation, and the reasoning of the legal regulation or its amendment, shall be taken into account when the purposes of the legal regulations are established. When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good." [Article 28]

In sum, the Seventh Amendment to the Fundamental Law adopted in 2018 by the two-thirds Government majority in Parliament changed the constitutional framework of human rights and the separation of powers and rule of law significantly. We will consider the case law of the Constitutional Court in this changing constitutional environment.

III. CONSTITUTIONAL CASES

1. 3199/2018. (VI. 21.) CC order and 3200/2018. (VI. 21.) CC order: postponing the decision-making on lex CEU

The Amendment of the National Tertiary Education Act, adopted in one week, introduced new conditions for the operation of universities accredited outside the European Economic Area (EEA) in Hungary and is applicable also to existing higher education institutions, including the Central European University (CEU). It has given rise to much criticism, both domestically and internationally, including by the Council of Europe Parliamentary Assembly and the Venice Commission. In our report of 2017, we explained that the constitutional complaint of the CEU and the ex-post review initiated by one-fourth of the MPs had been before the court for months and it applied procedural tools (otherwise very rare) to postpone the decision: it created an ad hoc committee consisting of the law clerks of the court to "prepare the decision-making procedure" of the case. On the proposal of the committee, the court asked further clarification from the claimants and several state institutions. We also predicted that the court would have to decide this case in 2018, even if it is politically sensitive. It has decided—but not in an expected way. In June 2018, the Constitutional Court suspended its procedure until the decision on the infringement procedure against Hungary at the Court of Justice of the European Union (CJEU). The court justified its decision by the obligation of the cooperation of courts within the European Union: as the fundamental rights in the Fundamental Law that were violated according to the motions are closely related to the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union, the court had to postpone its decision. This reasoning, which may otherwise be well founded, begs questions in that the practice of the Constitutional Court usually does not follow the practice of the CJEU, and did not find it necessary to make similar steps in previous cases when procedures before the CJEU were in progress. As Justice Stumpf stated in his concurring

opinion, the requirement of the suspension was not fulfilled, as the case did not depend on the decision of the CJEU, and it was not justified by legal certainty, a particularly important interest of the petitioner or any other particularly important reason, as the Act on Constitutional Court requires. Therefore, it seems that the court rather wanted to avoid political conflict with the Government, or at least postpone it again.

2. 23/2018. (XII. 28.) CC decision: constitutional complaint of a state institution

While this decision seems to deal with a mere bagatelle case, it shows that to favor a State institution, the Constitutional Court is ready to confront the ordinary courts, overcome its decades-long practice, internal rules, and even the logics of reasoning.
The topic of the 8:7 decision is a simple interpretation of a statutory provision that prescribes the decision on the board of directors of the Hungarian National Bank (HNB) in an investigation but makes it possible to delegate the "issuance"—the question is whether this issuance means only signing or also delegated decision-making (the vice president decided in this case). The ordinary courts, and in the end the Curia as the highest forum, decided that it was clear from systematic interpretation that it meant only signing, so it annulled the decision of the HNB and ordered a new procedure. The HNB submitted a constitutional complaint, stating that by not looking at the reasoning of the bill (which suggests the opposite interpretation of the statutory provision), the Curia did not follow Article 28 of the Fundamental Law that prescribes that courts shall interpret the acts primarily by their purposes.

The decision is problematic in many ways. As some of the dissenting opinions pointed out, the Constitutional Court set itself against its previous practice (and even its Rules of Procedure) by deciding in a case where the Curia annulled the judgment and ordered a new procedure. This not only made the CC decision premature but also interfered with the normal decision-making of the ordinary judicial system by excluding the possibility of changing its decision. The other aspect of the interference with the ordinary courts' function is that the court reviewed the decision based on the interpretative methods used by the judge. As Justice Czine concurred, this is contrary to the principle that the courts interpret the statutes independently, and the Constitutional Court has to limit itself to establishing the constitutional limits of the interpretation instead of deciding the case on its merits. Finally, the most problematic point is guaranteeing the right of initiating a constitutional complaint about State institutions. Previously, the decisions of the Constitutional Court, based on the dogmatical standpoints elaborated by the German Federal Constitutional Court, made it clear that State institutions do not have fundamental rights, as these rights are guaranteed to individuals against the State. This decision ignores this dogmatical clarity and opens a way for the Constitutional Court to become a guardian of the interest of State institutions instead of protecting the fundamental rights of individuals.

3. 13/2018. (IX. 4.) CC decision: real constitutional standards in a neutral case

The Constitutional Court declared unconstitutional the amendment to the "Act on Water" (Act LVII of 1995) based on the proposal for preliminary norm control of the President (the head of the State). The purpose of the challenged provisions was to facilitate private water well drilling up to 80 m in depth. In the case of private consumption, such works could be performed without State authorization—contrary to the previous regulation, which required an official permit. The new provisions of the act authorized the Government to enact a decree regulating this field and prescribing those activities which do not require State authorization. The court asked for the opinion of the Hungarian Academy of Sciences, the ombudsman for future generations (deputy commissioner for fundamental rights) and the minister of interior. The court also referred to the opinions of other professional organizations (university departments, associations, etc.).

The court accepted the arguments expressed by the President, finding the duty of the State to protect the environment follows from the provisions of the Fundamental Law. When interpreting these provisions, the court referred to international standards of environmental protection (non-derogation, precautionary principle) and reached the conclusion that the proposed change of the regulation is in conflict with the right to a healthy environment, as the State intends to play a more limited role in the protection and conservation of groundwater. The court did not examine the second question expressed by the President, namely whether the bianco authorisation of the Government to regulate this field is in accordance with the rule of law principle. Five justices attached dissenting opinions to the decision.

Two comments should be added. First, the ex ante review initiated by the President (presidential veto on constitutional ground) always has special relevance in the Hungarian governmental system. As we emphasized in our reports on 2017 and 2016, there is a trend that shows that the President turns to the Constitutional Court in politically less-sensitive cases. This case is part of this trend as environmental protection is not part of the daily political agenda but rather a personal commitment of the President. Second, in this case, the court used, in an open manner, procedural techniques which can promote the deliberation of the concurring arguments of the debate (requesting opinions from the stakeholders and referring to the opinions of other professional organizations)—a practice which is not common in politically sensitive cases.

4. 3130/2018. (IV. 19.) CC decision: permissive approach towards the political majority

The Constitutional Court declared unconstitutional the Resolution of the Curia taken in an electoral dispute related to the 2018 parliamentary elections. The original case related the placement of a billboard during the electoral campaign that depicted the prime minister and contained the slogan, "For us Hungary is the first!" The billboard was published by the governing party (Fidesz), one of the electoral contestants. This fact was not evident, as it was indicated in extremely small letters that were visible only from a distance of one meter. Moreover, all the visual elements of the billboard were identical to those used by the Government in its commu-

nication. According to the objection filed by another party that took part in the electoral contest, the billboard was misleading and contrary to the procedural electoral principles of fairness and exercising rights in good faith, in accordance with their purpose. The Curia declared infringement in its decision, but only in the case of one billboard, placed near a highway. Identical billboards were placed at public spaces across the country.

The publisher of the billboard in question, the Fidesz party, filed a constitutional complaint against the decision of the Curia, claiming that the decision caused a disproportionate limitation of its freedom of speech in relation to the electoral campaign. The claimant also emphasized that the "visibility requirement" related to billboards and other electoral materials is not explicitly prescribed by law. The Constitutional Court did not include a detailed argumentation in the reasoning part of its decision. There is no substantive assessment of the proportionality requirement related to the possible limitation of freedom of speech and of the similarities between the Government's and governing party's messages. The Constitutional Court declared that the Act on Electoral Procedures contains limitations on the publication of posters and billboards during electoral campaigns based on timing and their physical placement. In the court's argumentation, it is a decisive argument that the act does not explicitly prescribe the "visibility" requirement of the imprints on billboards. It declared that the visibility requirement does not follow from the principle of the fairness of elections, and neither does the placement of the imprint on billboards. According to the court, if voters are in a position to identify the political actor whose interests are supported by the billboard, the principle of fairness is respected. The latter statement was criticized by one of the six concurring opinions.

Based on the decision, one can question whether the Constitutional Court accords due significance to procedural electoral principles by maintaining a misleading communication practice which blurs the differences between the Government and the governing party. The latter is one of the electoral contestants, which therefore is in an overwhelmingly advantageous position compared to other parties. The blurry dividing lines between the Government and the governing party also raise questions on the legal entities who are entitled to submit constitutional complaints. The decision can be evaluated also in the light of the debates between the Constitutional Court and the Curia, referred to in our report on 2017.

5. 3029/2018. (II. 6.) CC and 19/2018. (XI. 12.) CC decisions: protecting the interests of the State

In Decision 3029/2018. (II. 6.) CC, the Constitutional Court rejected a constitutional complaint claiming the limitation of the right to property and other related rights in a case in which the Hungarian National Bank refused to issue a permit for a natural person living outside Hungary to acquire a qualifying holding in a financial enterprise. The reason for the refusal was the interpretation of the act regulating this field, which prescribes that in the case of such acquisitions the source of the payment must be certified. Even though the claimant presented certifications issued by her personal bank and the tax authority indicating the sources of her income, the HNB (as the state organ responsible for financial supervision) required a continuous certification of all transactions from the previous years that indicated the utilization of the specific amount of money planned to be used as payment for the acquisition. The decision of the HNB was upheld by the Administrative and Employment Court of Budapest and later by the Curia.

The claimant based her petition on three arguments: the limitation of the right to fair trial in relation to the ambiguity of the regulation, the limitation of the freedom of enterprise and the limitation of the right to property. In her view, the law prescribes only a single certification of the source of the payment, while requiring the certification of all transactions beginning from the time of entry of the amount of money in question into one's property until the proposed acquisition is a *contra legem* interpretation and impossible to comply with. The Constitutional Court did not accept these arguments. In the longest part of the reasoning, the court expressed that the right to property in private relations does not protect assets which are not acquired at present. The court accepted the interpretation of the law of the HNB and other judicial instances stating that these are in accordance with the possible purpose of the law (stable and prudent functioning of financial enterprises and lowering business risks). The court thus did not accept the arguments related to the limitation of fair trial in this case. In relation to the freedom of enterprise, the court stated that starting certain business activities is not limited by law in this case.

One of the justices attached a concurring opinion to the decision, arguing that the court should have examined the limitation of the affected fundamental rights in detail based on substantive standards.

In Decision 19/2018. (XI. 12.) CC, the Constitutional Court declared certain provisions of the Act on National Security unconstitutional based on the proposal for ex post review of the prosecutor general. Based on the challenged regulation, certain public professions and positions (including prosecutors) can only be held after the preliminary examination of national security risks. In this case, as was stated by the national security services, the given position can be occupied or sustained only with the individual approval of the leader of the State organ in question. According to the prosecutor general's view, it is problematic that the leaders of State organs are not informed of this and of the facts that cause national security risk, and that the law does not contain any aspects to be considered when deciding on appointments or sustaining the appointments of those persons affected by such examination. These controversies could cause a conflict with the requirement of clarity of norms (as part of the rule of law principle) and the freedom of occupation as well as the separation of powers, as the regulation limits the sphere of action of the prosecution service as an independent state organ. Moreover, the prosecutor general claimed that the system of appeal against the statements of the national security service is not in accordance with the right to legal remedy.

In the last question (system of appeal), the Constitutional Court recalled the arguments expressed in a very similar former case (initiated by the president of the Curia), and based on these, annulled certain provisions of the examined act. In the given case, it is much more relevant that the court declared certain provisions of the examined act unconstitutional due to the fact that these contradicted the independence of the prosecution service, ensured in the Fundamental Law. However, the court did not refer to other provisions of the Fundamental Law and did not examine the position of the prosecution service within the system of the separation of powers.

As a result of both decisions described above (constitutional complaint regarding the decision of the Hungarian National Bank; posterior norm control initiated by the prosecutor general), the Constitutional Court played a significant role in protecting the interests of state organs—a controversial issue, taking into consideration the function of constitutional courts in protecting constitutional principles and individual rights.

IV. LOOKING AHEAD

Recently, the decisions of the Hungarian Constitutional Court have become quite unpredictable. Nevertheless, two interesting cases are foreseen in 2019. The court should decide on the initiatives of four judges who, suspending the cases before them, challenged the statutory amendments penalizing homelessness. One-fourth of the MPs initiated an ex post review of the amendment of the Labor Act because it was adopted among critical circumstances in the Parliament (MPs of the opposition managed to hinder the regular procedure).

While the politically relevant European parliamentary elections do not promise too much constitutional upheaval, an upcoming vacancy in the court may. Considering the high number of 8:7 decisions, the election of the new member will have a crucial impact. As the governmental coalition has the two-thirds majority in the Parliament to elect the justice without the opposition, we do not have many illusions.

V. FURTHER READING

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India

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I. INTRODUCTION

Despite being a parliamentary democracy, the legislature in India is not supreme; the executive, legislature, and Indian Supreme Court manage a complex and delicate balance of powers that rests on the basis of a written Constitution. The Supreme Court of India is the custodian of the Constitution, with wide-ranging powers to hear appeals on civil and criminal matters, to exercise judicial review over administrative and executive action and over legislation, and to enforce fun-damental rights. It sits at the top of a federal judicial structure, and acts as an arbiter of disputes between federal units as well. The Constitution that it guards, implements, and interprets is long and detailed, and its drafters have justified this on the grounds that the textual foundation is fun-damental to the 'diffusion of constitutional morality.'[1] Although it has been amended over 100 times, the Constitution's core, i.e., its 'basic structure,' remains unamendable by virtue of the Court's jurisprudence over decades.

In 2018 Indian constitutional law was the subject of deep public interest, as the Supreme Court sat in large benches of five judges or more to pronounce on multiple and significant constitu-tional questions. Progressive opinions resulted in tremendous advancements in the field of indi-vidual rights, with the Court finally decriminalizing 'intercourse against the order of nature' and thereby affirming basic freedoms for India's LBGT+ population. The offence of adultery, de-fined to deny married women any agency or remedy, was also struck down, and the Court ruled in a controversial opinion that religious authorities had to allow menstruating women access to worship at the Sabarimala Temple in India. At the same time, the Court chose to uphold the gov-ernment's controversial biometric identification system, Aadhar, despite procedural and legal concerns about how the system was implemented as well as deeper substantial concerns regard-ing privacy and surveillance. This review outlines key developments in 2018.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2018 saw a rich legacy of major constitutional pronouncements from the Supreme Court. The Indian Supreme Court may consist of up to 31 judges, but never sits en banc; rather, judges sit in disparate benches of twos and threes to hear questions related to civil and criminal appeals, federal disputes, and questions of statutory interpretation. In cases of conflicting opinions be-tween benches, the judicial practice is to refer the dispute to a larger bench; precedent establishes that larger benches' opinions bind smaller benches, and smaller benches may not overrule larger ones.

When it comes to issues that involve 'a substantial question of law as to the interpretation of [the] Constitution,' Article 145(3) requires the Court to sit in benches of a minimum of five judges, i.e., Constitution benches, in order to provide authoritative pronouncements. In practical terms, the creation of a Constitution bench is fraught with difficulty, as an overburdened Court struggles with a massive

[1] B.R. Ambedkar, Speech (4 November 1948), Official Reports of the Constituent Assembly Debates, vol VII (Lok Sabha Secretariat, 5th reprint, 2009) 38

docket that must be managed in order to permit a Constitution bench to sit.[2] 2018 was significant, chiefly because a semi-permanent Constitution bench headed by the then-Chief Justice of India, Justice Dipak Misra, sat from January 2018 right until the end of his tenure in October 2018 to hear and decide on a number of significant constitutional questions that had been awaiting judgment. The consequent legacy of six major Constitution bench deci-sions in 2018 will form binding precedent not only on all equal and smaller benches in the Indian Supreme Court but also on every other court in India.

While the Court's determination to hear and address questions of constitutional significance is undoubtedly positive, procedural concerns about the Chief Justice's unilateral power to deter-mine bench composition were raised within the Court itself, with judges of the Court publicly protesting in 2018 about being excluded from hearing matters of constitutional significance.[3] These and other procedural irregularities in establishment of the Constitution benches have been criticized as unfairly burdening the parties to the cases,[4] and have been accompanied by calls for a permanent Constitution bench instead.[5] Moreover, procedural concerns were not limited to the creation of the Constitution benches alone but to the manner in which they determined cases as well. In two of the six Constitution bench judgments, the Court disregarded precedent and over-ruled a bench of co-equal strength, which would ordinarily set a troubling precedent if it were not for the fact that it effectively constitutes a disregard for precedent. In *Common Cause v Un-ion of India*[6] the Court legalized passive euthanasia, but in doing so, attempted to overrule a pre-vious decision also decided by a Constitution bench. Similarly, in *Jarnail Singh v Lachhmi Na-rain Gupta and others,*[7] the Court was specifically faced with the question of whether it needed to refer a matter to a larger bench for reconsideration. It refused to do so, but nonetheless still attempted to overrule a bench of co-equal strength.

Despite these concerns, the Supreme Court's consideration of significant constitutional questions in some of these Constitution bench cases has been timely with regard to long-pending disputes. A notable decision is the Court's ruling upholding India's biometric identification system, known as Aadhar, in the *Puttaswamy* case.[8] Despite claims that the government had misused par-liamentary procedure to implement Aadhar as a money bill and not ordinary legislation, the Court held that the Aadhar law withstood judicial scrutiny for the most part. The Court articu-lated a new standard of proportionality, applying it to strike down certain limited provisions of the Aadhar legislation that infringed on the right to privacy while upholding the law in general terms. A powerful dissent from Justice Chandrachud, however, articulated concerns about pri-vacy, surveillance, and the proportionality standards that the Supreme Court had sought to im-plement in *Puttaswamy.*

Additionally, in three cases, the Court grappled with India's colonial legal legacy, choosing to adapt it in one instance, and wholly reject it in two others. In *Navtej Singh Johar v Union of In-dia*,[9] the Indian Supreme Court decriminalized carnal intercourse 'against the order of nature' and in doing so, effectively decriminalized sexual relations for India's LBGT+ citizens. Section 377 of the Indian Penal Code, framed in 1860 on the recommendations of Lord Thomas Babington Macaulay, was read down in *Navtej Singh* so that it no longer covered consensual sexual acts between adults. This decision undid a historical harm, as well as a new one: in 2014, the Indian Supreme Court had refused to decriminalize this provision, with a bench of two judges refusing to address a legal inequality that in their words, only affected a 'minuscule fraction' of the popu-lation.[10] *Navtej Singh Johar*'s case articulated a test of direct as well as indirect inequality under the Indian Constitution, and affirmed personal liberties that had been previously framed as part of the right to privacy. A Constitution bench in *Joseph Shine v Union of India*[11] also decriminal-ized adultery: Section 497 of the same penal code allowed a husband legal remedy against an-other man for having consensual intercourse with his wife. The text of the provision effectively treated women as their husband's chattel, and was struck down on grounds of equality under the Indian Constitution. Finally, in *Govt. of NCT of Delhi v Union of India & another*,[12] the Supreme Court tackled the legacy of the institution of the Lieutenant-Governor—a former colonial post designed with powers to allow the empire control over the colony—and reframed its position within the Democratic Republic of India to allow the elected government in Delhi to conduct its work.

[2] See Nick Robinson and others, 'Interpreting the Constitution: Supreme Court Judges since Independence' [2011] 46(09) Economic and Political Weekly 27

[3] Bhadra Sinha, 'Supreme Court crisis: Senior Judges not in bench for key cases', Hindustan Times (Delhi, January 15, 2018) < https://www.hindustantimes.com/india-news/supreme-court-crisis-senior-judges-not-in-bench-for-key-cases/story-D8L7jaeHUG7yAhmT6R0gXO.html> accessed 22 February 2019

[4] See Shreya Munoth, 'Constituting Constitution Benches: The Dipak Misra year(s)', Indian Constitutional Law and Philosophy (30 October 2018) <https://indconlawphil.wordpress.com/2018/10/30/constituting-constitution-benches-the-dipak-misra-years/> accessed 22 February 2019

[5] 'Justice Chelameswar favours restructuring of SC, permanent Constitution Bench', The Tribune (9 April 2018) < https://www.tribuneindia.com/news/nation/justice-chelameswar-favours-restructuring-of-sc-permanent-constitution-bench/571235.html> accessed 22 February 2019

[6] (2018) 5 S.C.C. 1 (9 March 2018, Supreme Court of India)

[7] (2018) 12 S.C.C. 396 (Supreme Court of India)

[8] Justice KS Puttaswamy and another v Union of India and others (2019) 1 S.C.C. 1 (26 September 2018, Supreme Court of India)

[9] (2018) 10 S.C.C. 1 (6 September 2018, Supreme Court of India)

[10] Suresh Kumar Koushal v Naz Foundation (2014) 1 S.C.C.1, para 66 (per Justice G.S. Singhvi)

[11] (2018) S.C.C. Online 1676 (27 September 2018, Supreme Court of India)

[12] (2018) 8 S.C.C. 501 (4 July 2018, Supreme Court of India)

The focus on constitutional developments in 2018 has accordingly been on the Indian Supreme Court and its pronouncements, but in public institutions, the Constitution continues to be con-tested as well. The 102nd Constitutional Amendment[13] was passed by Parliament in August 2018, giving constitutional status to an executive body known as the National Commission for the Backward Classes (NCBC). The function of the NCBC is to protect the interests of 'socially and educationally backward classes' of people, to investigate legal safeguards for them, and ex-amine specific complaints about deprivations of their rights as well as advise the government on steps to implement these safeguards and improve their socio-economic development.[14] While approval for this constitutional amendment was nearly unanimous, a fierce debate continued through 2018 about proposed amendments to India's constitutional provisions concerning citizenship, with the bill currently being reviewed by a joint parliamentary com-mittee.[15]

III. CONSTITUTIONAL CASES

1. Justice KS Puttaswamy and another v Union of India and others:[16] Judicial Review, Pri-vacy

A long legal contestation over the legality of India's biometric identification system, Aadhar, drew to a close in September 2018. The Indian Supreme Court ruled by a Constitution bench that the legislation on which this biometric system stood was validly enacted, despite challenges raised to the use of a financial (money) bill (usually intended for budgetary purposes) instead of ordinary legislation to establish Aadhar. The Court tested the Aadhar legislation on various grounds, including proportionality, before striking down certain limited provisions, particularly those that allowed private parties access to Aadhar data and those that restricted legal remedies for individuals whose rights under the Aadhar legislation had been violated. An extensive dis-senting opinion by Justice D.Y. Chandrachud continued to voice concerns about surveillance and exclusion, holding at variance from the majority on proportionality, equality, and privacy.

The Court's holding that Parliament may, in fact, use money bills to pass substantive legislation is one that raises significant concerns for the functioning of the Indian legislature in the future, as money bills stand a lower test of legislative scrutiny than ordinary legislation, and can be used accordingly to avoid safeguards built into the parliamentary process. More generally, the major-ity in *Puttaswamy* articulates a modified proportionality test to be applied when evaluating claims to privacy rights in India, but there remains some lack of clarity about the legal basis for this modified test as well as on the precise manner of its application.

2. Indian Young Lawyers' Association v State of Kerala and others:[17] Freedom of Religion, Equality)

The Sabarimala Temple in the State of Kerala traditionally prohibited entry to female worship-pers between the ages of 10 and 50, an exclusionary practice based on beliefs linking menstrua-tion and impurity. This practice was permitted first under state legislation, and later by a ruling by the state High Court as well. It was challenged on the grounds that it infringed on the relig-ious rights of female devotees who wished to worship at the temple. In opposition, temple authorities argued that the exclusion of menstruating women from the temple was an 'essential religious practice' and was so protected under their religious rights. The Supreme Court heard and allowed a challenge to this prohibition, holding by a majority of 4:1 that the right of female devotees to worship at the temple must be upheld. In considering the conflict between the relig-ious rights of a group of worshippers against the religious rights of the individual, the Court ruled, in this case, that the legal rights of female devotees to worship at the temple had greater weight than the customary right of the temple authorities to exclude them.

3. Navtej Singh Johar v Union of India:[18] decriminalization of homosexuality

In 2014, the Indian Supreme Court refused to strike down a colonial-era legal provision criminal-izing 'carnal intercourse against the order of nature,'[19] noting that only a 'minuscule fraction' of the population was affected by this discriminatory law.[20] Following great contestation, in 2018, the Court took the step of overruling their own decision in this case. The Supreme Court held unambiguously in *Navtej Singh Johar* that LBGT+ citizens were equally entitled to all funda-mental rights under the Indian Constitution, and ruled that Section 377 of the Indian Penal Code, insofar as it criminalized consensual acts between adults, was unconstitutional as it violated the rights to equality as well as to life and personal liberty. While the basis of the ruling lies in judi-cial review triggered by the enforcement of constitutional rights, concurring opinions addition-ally held that a presumption of constitutionality could not be upheld for laws enacted before the Indian Constitution was adopted,[21] and recognised that the constitutional right to equality must

[13] The Constitution (One Hundred and Second Amendment), Act 2018 (India)

[14] Constitution of India 1950, art 338B

[15] 'Citizenship (Amendment) Bill, 2016: Joint Parliamentary Committee fails to reach consensus' Economic Times (28 November 2018) < https://economictimes.indiatimes.com/news/politics-and-nation/citizenship-amendment-bill-2016-joint-parliamentary-committee-fails-to-reach-consensus/articleshow/66837492.cms>

[16] (2019) 1 S.C.C. 1 (26 September 2018, Supreme Court of India)

[17] (2018) S.C.C. Online 1690 (28 September 2018, Supreme Court of India)

[18] (2018) 10 S.C.C. 1 (6 September 2018, Supreme Court of India)

[19] Indian Penal Code 1860, sec 377

[20] Suresh Kumar Koushal v Naz Foundation (2014) 1 S.C.C.1, para 66 (Supreme Court of India, per G.S. Singhvi J)

[21] Navtej Johar (n), para 361 (per R.F. Nariman J., concurring)

protect against indirect as well as direct discrimination.[22]

4. Joseph Shine v Union of India:[23] decriminalization of adultery

In Joseph Shine, the Indian Supreme Court decriminalized the offence of adultery and struck down as unconstitutional another colonial legal provision: Section 497 of the Indian Penal Code. Section 497 criminalised adultery for men who had sexual intercourse with a married woman, and did so without the 'consent and connivance' of the husband. In striking down this provision as violating the constitutional guarantee to equality, the Court ruled that this section had the ef-fect of treating married women as subordinate to their male spouses, and failed to recognize them as equal citizens. Testing this against the constitutional right to equality under Articles 14 and 15 of the Constitution, the Court struck down Section 497, holding it to be 'manifestly arbitrary.'[24]

5. Common Cause v Union of India:[25] euthanasia

The Supreme Court in Common Cause ruled that passive euthanasia for terminally ill patients was legally permissible, laying down extensive guidelines for the framing and execution of ad-vance directives concerning medical treatment and withdrawal of care for such patients. The Court upheld the right to choose a dignified death as a facet of the right to life and personal lib-erty under Article 21 of the Indian Constitution, and in doing so, continued to prohibit active euthanasia, defined as a positive intentional act to cause death, as opposed to passive euthanasia, defined by the withdrawal of life-prolonging care and resources. In doing so, the Court referred to, but diverged from a previous decision by a bench of equal strength: it had previously held in *Gian Kaur v Union of India*[26] that the 'right to life' did not include within its ambit the 'right to die.' Although the ruling in *Common Cause* was unanimously in favour of permitting passive euthanasia, it creates no little amount of ambiguity on what passive euthanasia entails, particu-larly as five judges chose to express their unanimous decision in four separate opinions, all of which contain minute variance on specific aspects of the enforcement of this right.

6. Jarnail Singh v Lachhmi Narain Gupta and others:[27] affirmative action

To address historical inequalities perpetrated by the system of segregation and discrimination on the basis of caste in India, the Indian Constitution provides for affirmative action in various forms, including reservations in matters of public employment under Article 16 of the Indian Constitution. The implementation of this affirmative action, and in particular, the identification of the groups of castes and tribes who are eligible for reservations, has resulted in a complex his-tory of litigation. In *Jarnail Singh v Lacchmi Narain Gupta*, the Indian Supreme Court was asked to refer to a previous decision in *Nagaraj v Union of India*[28] for reconsideration. *Nagaraj* re-quired two conditions for granting affirmative action to certain groups: first, that the government would have to collect quantifiable data proving disadvantages before providing affirmative ac-tion, even if the groups had already been found eligible for reservation, and second, that within groups entitled to reservation, the most advantaged members of these groups (the 'creamy layer') should be identified, and denied, affirmative action. The Court declined to refer *Nagaraj* for re-consideration by a larger bench, holding that the Court's precedents were sufficiently clear on both points of law.

Relying on these precedents, it did not differ with *Nagaraj* on the question of the 'creamy layer'; however, it overruled *Nagaraj* on the requirement of gathering quantifiable data for eligible categories. In overruling *Nagaraj,* the Supreme Court in Jarnail Singh encountered, but failed to address, a significant issue. *Nagaraj* and *Jarnail Singh* were both decided by benches of equal strength, and so it was not open to the Supreme Court to overrule *Nagaraj* on any point at all.

7. Shafin Jahan v Asokan KM:[29] personal liberty

In *Shafin Jahan*'s case, the Supreme Court closed a chapter in an extraordinary case of curtail-ment of personal liberty. Hadiya, a medical student aged 24 years, married Shafin Jahan, a Mus-lim man, and converted to Islam following her marriage. Her father, opposing the marriage and her conversion, approached the Kerala High Court with a *habeas corpus* petition, alleging a criminal plot to abduct, confine, and convert his daughter.[30] The Kerala High Court granted this petition, annulled the marriage, and removed the adult Hadiya from her marital home to parental custody, against her consent. On appeal by her husband to the Supreme Court, the Court over the course of a year held multiple hearings, overseeing a national security investigation into her fa-ther's claims, and later transferring her to the custody of her medical institute to allow her to con-tinue her education.[31] Following much public criticism, the Supreme Court finally ruled in

[22] Navtej Johar (n), para 438-9 (per DY Chandrachud J., concurring)
[23] (2018) S.C.C. Online 1676 (27 September 2018, Supreme Court of India)
[24] Joseph Shine (n 23) para 32
[25] (2018) 5 S.C.C. 1 (9 March 2018, Supreme Court of India)
[26] (1996) 2 S.C.C. 648 (Supreme Court of India)
[27] (2018) 10 S.C.C. 396 (26 September 2018, Supreme Court of India)
[28] (2006) 8 S.C.C. 212 (Supreme Court of India)
[29] (2018) S.C.C. Online 343 (9 April 2018, Supreme Court of India)
[30] MS Asokan v Superintendent of Police (2017), SCCOnline Ker 5085 (Kerala High Court, India)
[31] Shafin Jahan v Asokan (S.L.P. Crl. 5777/2017, Supreme Court of India, 27 November 2017) < http://supremecourtofindia.nic.in/supreme-court/2017/19702/19702_2017_Order_27-Nov-2017.pdf

2018 that the annulment of Hadiya's marriage and her removal to parental custody was unlawful. The Supreme Court upheld the right to choice in religion as well as in marriage as being essential to the right to life and personal liberty under Article 21 of the Indian Constitution. In a concurring opinion, Justice D.Y. Chandrachud noted that the curtailment of liberty through the exercise of state power could have a chilling effect on freedoms, and further called for restraint by judicial authorities when exercising powers in the guise of acting as *parens patriae* while dealing with competent adults.[32]

8. Govt. of NCT of Delhi v Union of India & another:[33] federalism

The National Capital Territory (NCT) of Delhi occupies a unique place within the federal struc-ture: Delhi is neither an independent state nor a federally controlled territory. Constitutionally allocated powers are distributed between a locally elected government and the Union Govern-ment at the Center, which exercises its authority through an appointed Lieutenant-Governor. The Constitution provides that the Lieutenant-Governor, although the nominal head of the state, is to act on the aid and advice of the elected government and their cabinet, and in cases of any matter of dispute or conflict is empowered to refer the matter to the President for a binding decision.[34] The matter before the Supreme Court concerned the scope of these constitutional provisions. The Court's judgment established two clear principles. Firstly, the Lieutenant-Governor, as the titular head of the state, was bound to act on the aid and advice of the cabinet of ministers constituted by the elected government. This, the Court held, was in keeping with constitutional provisions but also underlying constitutional principles of representative democracy. Secondly, in situations where the Lieutenant-Governor was in conflict with the advice of the council of ministers, he could refer to the President—but the Court was unanimously of the view that 'any matter' did not mean 'every matter.' It held that the practice of referring every decision of the elected gov-ernment to the President would have the effect of entirely obviating democratic governance in Delhi. However, the bench of five judges, in three different opinions, had different views on what circumstances would, in fact, justify a reference to the President.

9. Public Interest Foundation v Union of India:[35] separation of powers

The Indian Constitution provides disqualifications for membership to Parliament and state legis-latures, and empowers Parliament to frame laws with additional disqualifications. The Represen-tation of People Act 1950, therefore, disqualifies candidates on various additional grounds, in-cluding those who have been convicted of certain offences. The petitioners in *Public Interest Foundation* approached the Supreme Court, seeking a ruling that such disqualification should operate not only when a candidate was convicted but prior to that, when such candidate was charged with a disqualifying offence. In their support, they cited a number of scholarly and pub-lic comments advocating this position, including a report from the Law Commission of India. The Court, sitting in a Constitution bench, accepted that the petitioners' concerns about the criminalization of politics had weight, but nonetheless ruled that it could not go beyond the text of the Constitution and statutory law to create an additional ground of disqualification. Citing the principle of separation of powers, the Court refused to infringe upon legislative territory, noting that it was the responsibility of Parliament to frame appropriate legislation on this subject. None-theless, the Court did concede part of the petitioners' claims and directed the Election Commis-sion of India to implement limited reforms that would improve documentation and transparency concerning pending criminal charges against electoral candidates.

10. Swapnil Tripathi v Supreme Court of India:[36] transparency

In response to a public interest petition filed by a group of citizens calling for greater access and transparency in Supreme Court proceedings, a bench of three judges agreed to direct the Su-preme Court Registry to allow live-streaming of judicial proceedings. It laid out guidelines for this, initially agreeing only to stream certain cases that it deemed to have 'national importance,' with prior approval of the Court, along with a time-delay to allow the Court to edit broadcasts if necessary. While the actual streaming of proceedings is still being implemented, this is an impor-tant step in providing greater access to the Supreme Court as well as towards providing accessi-bility to its proceedings.

IV. LOOKING AHEAD

In 2019, scholars of Indian Constitutional law will be closely watching the progress of constitu-tional amendments proposed to India's citizenship provisions as well as the hearings in several ongoing Constitution bench cases, including a politically sensitive one concerning the demolition of a mosque.[37] Chief Justice Ranjan Gogoi began his tenure in October 2018 as India's 46th chief justice, and will continue to hold office until November 2019. He faces the challenge of settling controversies that arose during his predecessor's tenure. Most significantly, in April 2019, India will hold its next general election to elect members to Parliament, and the formation of a new government will undoubtedly transform constitutional politics in the immediate future.

[32] Shafin Jahan (n) para 95, 96 (per D.Y. Chandrachud, J.)

[33] (2018) 8 S.C.C. 501 (4 July 2018, Supreme Court of India)

[34] Constitution of India 1950, art 239AA(3)(a), art 239AA(4)

[35] (2018) S.C.C. Online 1617 (25 September 2018, Supreme Court of India)

[36] (2018) 10 S.C.C. 639 (26 September 2018, Supreme Court of India)

[37] 'CJI Ranjan Gogoi-led Constitution bench on Ayodhya, hearing starts Jan 10', Indian Express (9 January 2019) < https://indianexpress.com/article/india/cji-ranjan-gogoi-led-constitution-bench-on-ayodhya-hearing-starts-jan-5529449/> accessed 22 February 2019

V. FURTHER READING

1. Ornit Shani, *How India Became Democratic* (Penguin Random House India, 2018)

2. Rohit De, *A People's Constitution* (Princeton University Press, 2018)



Indonesia

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I. INTRODUCTION

This report offers an overview of the Indonesian Constitutional Court's case law in the term of 2017/2018.[1] The term also marked the transition of leadership from the fifth chief justice, Arief Hidayat, to the sixth, Anwar Usman. Usman won the election by a 5 to 4 majority vote on April 2, 2018.[2] The 2011 Amendment to the Constitutional Court Law prescribes that the chief justice has a limited term of two and half years, which means that Anwar Usman will be a chief justice until 2020.

The last term also marked the complete transition from the second-generation Court to the third-generation Court with the departure of Justice Maria Farida Indrati. Justice Indrati was appointed as the first female justice of the Constitutional Court in August 2008. She was appointed with five other justices to replace the first-generation justices. While all of her colleagues either retired or resigned in disgrace, Justice Indrati served her two full five-year terms until her retirement in August 2018. On August 13, 2018, President Jokowi appointed Erni Nurbanigsih, a law professor from Gadjah Mada University, as an associate justice to succeed Justice Indrati.

Most of the decisions of the Indonesian Constitutional Court have not been officially translated into English. This report offers a quick overview of the Court's decisions for comparative judicial scholars who are interested in the Indonesian Constitutional Court's case law. The primary focus of the report will be on statutory review, in which seven cases are examined, mostly centered on the judicial review of electoral laws, judicial review of marriage law, and religion-related cases.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In recent years, the Indonesian Constitutional Court has transitioned from an interventionist Court, especially the first- and second-generation Courts, to a non-interventionist Court. But it has not retreated under pressure or chosen to compromise to avoid clashes with other branches of government. Rather, the Court's judges see its role as being more limited, following the orders of the Constitution and the political branches of government.

The Court's non-interventionist approach is evident in the *Presidential Threshold XV* case. Blame may lie with the Court because it issued a decision that precipitated the current crisis of the presidential election, and, moreover, it refused to intervene when the constitutional stakeholders asked the justices to resolve the crisis.[3] It arose when the Joko Widodo administration passed the General Election Law, which states that a presidential candidate could be nominated by a political party or a coalition of political parties who hold at least 20 percent of seats in the House

[1] A Term of the Constitutional Court begins in mid-August, and usually Court sessions continue until early August in the following year.

[2] Marguerite Afra Sapiie, 'Anwar Usman elected as new Constitutional Court chief justice,' The Jakarta Post, April 2, 2018. https://www.thejakartapost.com/news/2018/04/02/anwar-usman-elected-as-new-constitutional-court-chief-justice.html.

[3] For a detailed analysis of this issue, please see Stefanus Hendrianto, 'The Indonesian Constitutional Court and the Crisis of the 2019 Presidential Election', Int'l J. Const. L. Blog, Sept. 19, 2018. http://www.iconnectblog.com/2018/09/the-indonesian-constitutional-court-and-the-crisis-of-the-2019-presidential-election/

of Representatives or have obtained at least 25 percent of the popular vote in the last general election.[4] Considering that the law stipulates that the 20 and 25 percent requirements must be based on the 2014 general election result, no political parties are able to nominate candidates unilaterally. That the Court refused to resolve the crisis and condoned the presidential nomination system, which is based on outdated legislative election results rather than new ones, makes little sense.

Lack of command and reasoning also characterized the Court's performance in the last term. For instance, in the DPD membership case, it declared that a candidate for Regional Representative Council (*Dewan Perwakilan Daerah* - DPD) must not be a member of a political party. Some DPD candidates who held positions in political parties refused to comply with the Court's decision. In response to the decision, the General Election Commission (*Komisi Pemilihan Umum* - KPU) issued Regulation No. 26/2018, in which it canceled the candidacy of several DPD candidates who were members of political parties, including the DPD speaker, Osman Sapta Odang.[5]

Odang objected to the decision and challenged the KPU regulation in the Supreme Court. The Constitution maintains that the Constitutional Court has the authority to review the constitutionality of statutory regulations, and the Supreme Court has the authority to review ordinances and regulations made under statutes. So Odang filed a judicial review against the KPU regulation to the Supreme Court, and the Court, surprisingly, accepted his petition and nullified the KPU regulation.

As of this writing, there has been no resolution to the conflict, and it continues to escalate. Odang remains defiant, and will neither resign from his party, Hanura, nor step back from his candidacy. In the meantime, the KPU insisted on following the Constitutional Court ruling, pushing Odang to tender his resignation with the party in order to be listed as a candidate. What was most jarring about this conflict was that the Constitutional Court was content to let the conflict evolve without any attempt to clarify the effect of its decision. Apart from the Supreme Court's decision, the Administrative Court and the Election Supervisory Board (*Bawaslu*) have also issued favorable decisions to Odang. While these cases concerned the administrative violations related to Odang's nomination, in some ways the decisions also undermined the Constitutional Court's decision.

From the second-generation Court, there has been decreasing reasoning behind the Constitutional Court's decisions.[6] The trend seems to be continuing in the current Court under the chairmanship of Anwar Usman. It continues to overrule its previous rulings, with questionable reasoning. An apt example is the *Marriageable Age II* case, in which the Court overruled its previous ruling without a convincing argument. The circumstances of the two cases are different, but in essence both involved the constitutionality of similar provisions, namely the marriageable age for women. In the *Marriageable Age I* case, the Court ruled that it will not intervene in religious domain on the requirement of marriage, especially on the age limit. But in the *Marriageable Age II* case, the Court reversed its previous ruling and moved to declare the provision unconstitutional.

The last term also marked the new era of the chairmanship of Anwar Usman. Usman was sworn in as the sixth chief justice on April 2, 2018, and has faced a tough job restoring public confidence in a Court that has been hit by controversies and doubts, and is seen to be increasingly non-interventionist. Usman was appointed by the Supreme Court in 2010 to be an associate justice of the Constitutional Court. Looking at his background, he is not a lifelong constitutional scholar or lawyer. He served as the administrative clerk for the Supreme Court justices (1997–2003), and then became head of the Bureau of Personnel of the Supreme Court (2003–2006). In 2005, he had the same position at the Jakarta High Court. Clearly, Usman's long administrative career in the judiciary equipped him only with an understanding of the legal technicalities and internal mechanisms of the Court, not sufficient knowledge of constitutional matters. Whether he will be able to show strong intellectual and social leadership remains to be seen.

III. CONSTITUTIONAL CASES

1. The *Presidential Threshold XV* case (Decision No. 49/PUU-XVI/2018)

In this case, the Court was reviewing the constitutionality of Article 222 of Law No. 7 of 2017 on General Election, which states that a presidential candidate could be nominated by a political party or a coalition of political parties who hold at least 20 percent of seats in the House of Representatives or have obtained at least 25 percent of the popular vote in the last general election (in this case, the 2014 general election). Since 2008, the Court has reviewed the presidential threshold requirement multiple times (14 cases) and it has consistently argued that the policy is constitutional as it is considered the legal policy of legislators.[7] The petitioners in this case, however, came out with a different argument, pointing to the fact that the result of the previous election could not be used as a reference or requirement for the presidential threshold. The Court, however, rejected the claimants' argument entirely and reaffirmed its precedent that the presidential threshold was an open legal policy and there was no compelling reason for the Court to undo its previous decisions.

[4] Law No. 7 of 2017 on General Election, art. 222.

[5] Marguerite Afra Sapiie and Nurul Fitri Ramadhai, 'DPD speaker in hot seat for calling Constitutional Court "stupid"', The Jakarta Post, August, 2, 2018. https://www.thejakartapost.com/news/2018/08/02/dpd-speaker-in-hot-seat-for-calling-constitutional-court-stupid.html

[6] See Theunis Roux and Fritz Siregar, 'Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court', 16 (2) Australian Journal of Asian Law, Article 2 (2016).

[7] Constitutional Court Decision No. 49/PUU-XVI/2008 (hereinafter the Presidential Threshold XV case), page 43, para. 3.13.

2. The *DPD Membership* case (Decision No. 30/PUU-XVI/2018)

The crux of the matter in this case is Article 182 §1 of Law No. 7 of 2017 on General Election, which provides that a member of the Regional Representative Council (*Dewan Perwakilan Daerah* - DPD), the second chamber of Parliament, must not be a practicing lawyer, public accountant, public notary, or provide any services related to state finance, or be a member of another profession that creates a conflict of interest. The issue is whether the term "other profession" is considered to include a member of a political party. The Court ruled that based on its original intent, the DPD was established as an institution that could represent the aspirations of people at the regional level. The Court held further that it was not appropriate for members of a political party to become members of DPD because there would be binary representation if party members were allowed to participate as members of DPD while the parties already had their representatives in the House of Representatives (DPR). The Court finally declared that a candidate for DPD must not be a member of a political party.

3. The *Congressional Summons* case (Decision No. 16/PUU-XVI/2018)

This case involved the constitutionality of several provisions of the so-called MD3 Law:[8] first, the provision that stated the House of Representatives has authority to compel anyone before it and give testimony as needed, and to have them detained for up to 30 days if they failed to comply with the summons.[9] Second, the Court also reviewed the constitutionality of the provision that allows the House Honorary Council (*Mahkamah Kehormatan Dewan* - MKD) to take any legal action against individuals, groups, or legal entities that insult the House or members of the House.[10] The Court first held that the House does not have the authority to compel someone to testify nor to detain someone for 30 days; that it only has legislative and budgeting authority. Second, the Court held that the Honorary Council is part of an internal mechanism within the House, so it has no authority to take any legal action against anyone. The Court then declared the challenged provisions unconstitutional. Interestingly, in the *Susduk Law* case,[11] which was decided over a decade ago, the Court issued an advisory opinion that the act of compelling someone to testify before the House was still within the corridors of legislative power as long as it was carried out through a legal mechanism and due process. But the current Court did not seem obliged to follow this opinion because the previous Court had already rejected the petition on the ground of the claimant's lack of standing, but it inserted advisory opinion in its decision.

4. The *Congressional Oversight* case (Decision No. 36/PUU-XV/2017)

This case originated from the provision on congressional oversight power under the MD3 Law. Article 79 (3) provides that the DPR (House) has oversight power to investigate the implementation of a statute and/or governmental policy that relates to essential and strategic aspects, and the broader implication to society at large.

The issue arose when the DPR formed a special oversight committee to investigate the Anti-Corruption Commission (*Komisi Pemberantasan Korupsi* - KPK) in retaliation for the KPK's investigation of several members of the DPR concerning the corruption case of Electronic ID's project (e-KTP). The issue was whether the KPK was part of the executive branch and if the DPR had authority to investigate the KPK.

The Court majority declared that the KPK is part of the executive,[12] and, therefore, the KPK is not immune from congressional oversight as part of the checks and balances mechanism.[13] There were four Constitutional Court justices who wrote dissenting opinions, namely I Gede Palguna, Maria Farida Indrati, Saldi Isra, and Suhartoyo. The Court minority argued that the original scope of the congressional oversight was intended for the President, Vice President, Cabinet ministers, Attorney General, Chief of National Police, and the head of a non-ministerial governmental department.[14] It argued further that the KPK was not part of the executive because it was an autonomous governmental institution.[15] Justice Maria Farida Indrati, however, issued a separate dissenting opinion, in which she argued that the KPK was part of the executive. Nevertheless, Justice Indrati opined that the KPK must file an annual report to the President, the DPR, and the Auditor General's office. Thus, the KPK itself can be held accountable by the DPR, and there is no need to investigate the institution.

5. The *Blasphemy IV* case (Decision No. 76/PUU-XVI/2018)

This case involved the constitutionality of anti-blasphemy provisions[16] in the Criminal Code (Articles 156 & 157) and Law No. 1 of 1965 on the Prevention of the Misuse/Insulting of Religion (Blasphemy Law). The

[8] Law No 2 of 2018 regarding the Amendment to Law No. 17 Year of 2014 on Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah dan Dewan Perwakilan Rakyat Daerah – People's Consultative Assembly, People's Representative Council and Regional Representative Council, and Regional People's Representative Council (commonly known as 'MD3 Law').

[9] Ibid., art 73 (3), (4), and (5).

[10] Ibid., art 122 (l).

[11] Constitutional Court Decision No. 014/PUU-I/2003 (hereinafter the Susduk Law case).

[12] Constitutional Court Decision No. 36/PUU-XV/2017 (hereinafter the Congressional Oversight case), para. 3.23.1.

[13] Ibid., para. 3.23.2.

[14] Ibid., page 120.

[15] Ibid., page 125.

[16] Constitutional Court Decision No. 140/PUU-VII/2009 (the Blasphemy Law I case), Constitutional Court Decision No. 84/PUU-X/2012 (the Blasphemy Law II case), and Constitutional Court Decision No. 56/PUU-XV/2017 (the Blasphemy III case).

Court has issued three decisions related to the challenged anti-blasphemy provisions and rejected the petitions to nullify them.

The petitioners in this case challenged the provisions on the ground of religious diversity, in which there is a diversity of religious beliefs in Indonesia, and, therefore, the anti-blasphemy law can be misused or abused for personal and political gain. The petitioners argued that the blasphemy charges are routinely abused and the Court must end such manifest injustice. The Court addressed the petitioners' concern based on the religious freedom clause in the Constitution (Art. 29 § 2). It argued that the provisions are necessary to guarantee religious freedom because they do not allow any insults or defiling of religious teachings or books, which become a source of religious beliefs.[17] Regarding the petitioner's concern on the potential abuse of the application of the blasphemy provisions, the Court believed that such concerns were not a matter of the constitutionality of the law but instead about the application of laws.[18]

6. The *Blasphemy III* case (Decision No. 56/PUU-XV/2017)

In this case, some members of Ahmadiyah challenged the constitutionality of some provisions of the Blasphemy Law. Ahmadiyah is a religious movement that originated from India in the mid-1880s as part of the revival of Islam and Islamic missionary efforts. The teachings, however, differ from traditional Islamic doctrine in several important ways. The Ahmadiyah movement has been present in Indonesia since the 1920s.

In the past decade, the Ahmadi often get inappropriate treatment from other Muslims. Moreover, many administrative regulations prohibited any Ahmadiyah activity based on the Blasphemy Law.[19] The claimants argued that their religious practice had been hampered by many administrative regulations based on the allegation that Ahmadiyah is a deviant sect of Islam. The Court, however, utterly rejected the claimants' petition and argued that the main problems were related to the implementation of these administrative regulations and not the constitutionality of the challenged statute. The Court held that Cabinet ministers and local governance have the authority to issue administrative regulations related to Ahmadiyah. It then second-guessed the claimants' main concern of vigilantism or persecution against the Ahmadi instead of the constitutionality of the Blasphemy Law. The Court then recommended that the issue be addressed by revising the Blasphemy Law so that it can provide better protection for citizens.

7. The *Marriageable Age II* case (Decision No. 22/PUU-XV/2017)

In the *Marriageable Age II* case, some women challenged the constitutionality of Marriage Law No. 1 of 1974's provision that provides the minimum marriageable age of 16 years for women.[20] They argued that the provision discriminated against girls due to the different minimum age of marriage for boys (19 years old). They argued that their marriage age was also inconsistent with the statutory regulation on child protection, which defines a child as being a person below the age of 18 years.[21] The Court granted the petition by stating that the phrase "age 16 (sixteen) years" in Article 7, paragraph (1) of the Marriage Law is unconstitutional and must be changed, especially on the minimum age requirement for women, within a maximum period of 3 years after the case is decided.[22]

In its decision, the Court moved to overrule its own precedent in the *Marriageable Age I* case,[23] in which it rejected the petition to invalidate the minimum age requirement for women to marry. Basically, in the *Marriageable I* case, the Court ruled that it will not intervene in religious domain on the requirement of marriage, especially on the age limit.[24] Moreover, the Court ruled that there was no guarantee that with increasing the age from 16 to 18 there will be a reduction of divorce rates, health improvements, and reduction of other social problems.[25] At that time, the Court ruled that it was not the domain of the judiciary to increase the age limit of marriage but rather the domain of the legislative branch.[26]

IV. LOOKING AHEAD

With the 2019 general election looming, the Court's docket will be filled with disputes, even likely presidential election disputes. As the justices may well be preoccupied with regional election controversies, the Court has to face the challenge of focusing its time and energy to solving statutory reviews rather than delaying its ruling on many important statutory review cases.

Finally, at the end of March 2019, two Constitutional Court justices, Aswanto (one name only) and Wahiduddin Adams, will complete their first five-year term. They have both decided to re-seek nomination from the House, where they have to compete with other candidates through the selection process in the House Judiciary Committee. So there is a high probability that the House will appoint two new justices by spring 2019.

[17] Constitutional Court Decision No. 76/PUU-XVI-2018 (the Blasphemy IV case), para. 3.15.

[18] Ibid., para. 3.17.

[19] Ibid., pages 18–19. The Ahmadis are prohibited from performing any religious activity according to policy regulated by the Minister of Religious Affairs, Attorney General, and Minister of Home Affairs. Several decrees are also published to prohibit Ahmadiyah activity.

[20] Law No. 1 of 1974 on Marriage, Article 7 (1).

[21] Law No. 23 of 2002 on Juvenile Protection.

[22] Constitutional Court Decision No. 22/PUU-XV/2017 (the Marriageable Age II case), pages 58–59 para. 3.17.

[23] Constitutional Court Decision No. No. 30-74/PUU-XII/2014 (the Marriageable I case).

[24] Ibid., para. 3.13.2.

[25] Ibid.

[26] Ibid.

V. FURTHER READING

Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (first published 2018, Routledge, 2018) 291

Björn Dressel and Tomoo Inoue, 'Megapolitical Cases before the Constitutional Court of Indonesia since 2004: An Empirical Study', *Constitutional Review*, Volume 4, Number 2, December 2018

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Iran

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I. INTRODUCTION

The hybrid constitution of the Islamic Republic of Iran (1979, rev. 1989) finished its 39th year of endurance. In the fusion of Islamic, liberal and democratic tendencies and also as a consequence of malfunctions, it is reaching crucial points of disharmony. This report highlights detailed aspects of the jurisdiction.

The constitution has borrowed democratic concepts in a complexity of Arabic and Persian wording. E.g., "The powers of government in the Islamic Republic are vested in the legislature, the judiciary, and the executive powers, functioning under the supervision of the absolute wilayat al-'amr and the Leadership of the Ummah."[1] The article camouflages a set of independent powers functioning under the absolute supervision of an indirect elected leader who is defined as the leader of not only the national community but also the international one. This allows for the formation of a single world community referred to by Quranic verse, stated in the preamble. The camouflage has negated the constitution's republican foundations since its establishment. Iran is a republic by way of constituting the government but not in the choice of governing; this has been noted in the drafters' debates and books along with current Assembly of Experts (AE) member courses.[2]

Section II below covers the example of a long-awaited interpretation to let women be presidential candidates, and later in the constitutional cases, Special Courts on Financial Crimes and Edict on a Law Revision are practical examples of the constitutional camouflage.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Developments in Iran's jurisdiction included improvements in interpretation and legislation. The first in regard to presidential electoral law, and the second in favor of religious minorities. Interpretation took a small step towards clarification of women's status in presidential elections and the reform towards the republican rather than the Islamic side of the constitution.

The first development was a long-awaited interpretation of article 115 of the constitution, particularly on a term to determine the sex of the presidential candidate. It happened in March 2018, following one and a half years of announcing general election policies by the leader. Art. 115 defines the candidate as a religious and political personality, which in written language is the term "Rijal." The word comes from Arabic, and now is in use in both Arabic and Persian legal and especially constitutional language. It brought conflicts in translation and interpretation about the sex of the candidate and whether female candidates are allowed. Some referred to it as only for a male, and others hoped an interpretation might expand its jurisdiction. Since its establishment, the Guardian Council (GC) has never approved a female candidate.

While this qualification for the second highest office has been conflicted since its drafting, it has never resulted in a constitutional interpretation. Moreover, in practice, there has never been a female candidate in the election debates, although in registrations some have applied for candidacy.

[1] Article 57 of the constitution.

[2] Seyed Mohammad Hosseini Beheshti, Wilayat, Leadership, Clergy, Boqeh publication, 2009, 400. Persian.

However, ordinary laws under the current jurisprudence outlawed women from prominent decision-making positions such as judges and severely underrepresented them in senior government posts. The constitution, instead of using an explicit expression to ban female candidates, used exclusions that relied on other means. During the past 40 years, the GC found female applicants unqualified and kept them out of races, avoiding significant backlash.

The first interpretation in this regard defeated expectations for a timely change for transparent application of the constitution. It defines the term through the quote "Rijal are those Rijals" and thus passes over the key question. The determination of specific details, including the exact age of presidential candidates, should be determined in the law approved by the Islamic Consultative Assembly (ICA).

The second development of Iranian jurisdiction was a balance concerning the democratic side of the constitution. A reform of the electoral law of the city councils had been made after disputes between the ICA and GC, resulting in interference by the Nation's Exigency Council (NEC)[3] in favor of the parliament rather than Islamic jurisprudence of the current fuqaha in GC. After nine months of legal disputes among MPs and members of the GC, NEC and Court of Administrative Justice (CAJ), this happened in late July 2018. The law was reformed to support the presence of religious minorities as representatives of Muslim majority cities.

This reform states that Iranian religious minorities—Zoroastrians, Jews and Christians—are eligible to run in elections even in regions with a Muslim majority, and represent them.[4]

The issue returned first to the nullification of a paragraph of the electoral law of June 1996 that was not clear enough: whether religious minorities may be elected as councilors of a region with a Muslim majority, and second, to the suspension of activities of an elected member of the City Council of Yazd.

In 2017, an elected city councilor of Yazd, Spanta Niknam, a religious minority of Iran's ancient Zoroastrian religion, was suspended via an interim order from the CAJ on the ground that non-Muslims cannot represent Muslims. He was elected for the first time to the city council in 2013 in accordance with the election law of the councils approved in June 1996. However, in 2017, his presence was attacked in a case brought to the CAJ. The court order referred suspension to its substantive hearing. Later, the GC nullified a paragraph of the June 1996 electoral law that previously had been approved both by the ICA and GC. The GC used the authority given by article 4 of the constitution that all regulations must be based on Islamic criteria, which applies absolutely to all articles of the constitution as well as to all laws, and the fuqaha of the GC are judges in this matter. The GC argued that this paragraph was against the opinion of the founder of the Islamic Republic of Iran, and therefore Islam. Immediately, the ICA passed a bill clarifying the 1996 law on religious minorities and allowing them to stand for council elections in their towns even when there is a majority of Muslims. The GC found it against Islam and by the insistence of the ICA, the matter was sent to the NEC for final decision, which resulted in a ruling in favor of the democratic side of the constitution.

III. CONSTITUTIONAL CASES

1. Critiques on Leader Qualifications

On January 8, leaked footage brought new pieces of evidence on critiques of the legality of the appointment of the supreme leader and revealed the selection process for the first time. At the time of the selection of the current leader, the constitution was under an official amendment discussion via an appointed (not elected) commission. The enforced constitution, however, had two limited options: either an accepted Marja taqlid by the overwhelming majority of the people like the previous leader and founder of the Islamic Republic of Iran, or a council of three/five Marja taqlid as the office of leadership, determined and introduced by the AE. The AE determined a temporary leader in a secret session without any public announcement, and later through the amendment removed the term Marja taqlid. In another secret session, it omitted the word "temporary" from the leader and made it unconditional.

While these two secret sessions and temporal leadership were secrets for the past 30 years, the leader has been introduced to the public from the first appointment as an entirely constitutional and qualified entity. At the time, there were critiques that his qualifications did not match a Marja taqlid. Governmental debates always denied those allegations without mentioning the secret appointments. Therefore, it seems the critiques were right since there was a temporary leader for a period but the constitution was amended to remove that term.

The AE is the only constitutional organ with the authority to determine a leader's incapability of fulfilling duties or loss of qualifications.

2. Judicial Order on Blocking the Top Messenger Service, Telegram

In May 2018, the Iranian Judiciary issued an order via the Second Branch of the Public Prosecutor's Office of Culture and Media that all Internet providers take steps to block the app Telegram as of April 30. The platform was in use by some 40 million active users in the jurisdiction, within a country of 82 million people. By 2018, this app was in use in most tracks of life in Iran, including communications, education, business, news, politics, healthcare, art and culture and social life. It was foreign owned, based outside the country, and previously targeted for censorship because of its secure private calls.

Later, following the widespread anti-government protests in late 2017 and early 2018, Telegram, along with Instagram, the other pop social app, was temporarily banned. The ban was meant to maintain peace after

[3] Article 112.
[4] Article 13.

claims of encouraging offensive conduct, use of Molotov cocktails, armed uprisings and social unrest through the app.[5]

President Hassan Rouhani tried to criticize blocking decisions in other blocked social media in case the highest level of the judicial system decided to restrict or prevent the communication of the people.

Some lawyers called for the ban to be lifted not only in a civil law case but also a criminal one, referring to the denial of individual rights of the people and their deprivation of the rights conferred by the constitution by the issuance of a general order outside the jurisdiction of a judge. They grounded the debate on a law that says any government official who deprives individuals of the right to liberty or deprives people of the rights outlined in the law, in addition to dismissal from service and government employment, will be sentenced to prison. They also based their claims on other rights under the constitution, through which those who earned income on Telegram and lost their jobs through the issuance of the order could seek compensation from the issuing judge.

The constitution prohibits the inspection of letters, the recording and disclosure of telephone conversations and the disclosure of telegraphic and telex communications. Censorship, or all forms of covert investigation, are forbidden except as provided by law.[6]

3. ICA Question to the President

Whenever at least one-fourth of the total MPs sign a question posed to the president on a subject relating to his duties, he is obliged to attend the ICA in not more than a month and answer it.[7] Iran's jurisdiction had not applied a question to a president since the eighth ICA, in March 2012. Even after the first such question was raised, there was a taboo. The MPs canceled the second in 2014 upon the leader's call, that said continuing this legal action in time is not expedient. The second application to ask a question to the president happened in summer 2018, regarding the administration's economic performance.

The parliament summoned the president. Lawmakers had questions about the Rouhani administration's handling of the country's economic issues, including a high unemployment rate, slow economic growth and a devaluation of Iran's rial currency as well as goods and currency smuggling. The MPs were also critical of the ongoing sanctions against banking despite the 2015 Joint Comprehensive Plan of Action (JCPOA) as part of the international nuclear deal. The president called this questioning against the constitution and not in due time and circumstances, but to prevent any dispute between the powers and respect for the ICA, he attended the parliament in due time.

On August 28, after the president's explanations, the results of a vote conducted at the end of the session showed that the lawmakers were not convinced by the answers on four out of the five questions. They only found the president's answer to the issue of banking sanctions satisfying. If the majority of representatives present at such a meeting are not satisfied with the president's response to their questions, a statute of the ICA provides that this is a violation of the law or the failure of the law. The matter will then be sent to the judiciary. Accordingly, after hearing the case, it reports to the parliamentary committee. However, in another session, the committee concluded that, since the questions asked were not law and the questioners did not mention this in their questions, the referral of the matter to the judiciary was not relevant.

4. Special Courts on Financial Crimes

Through a letter on August 8, the head of the judiciary asked the leader for authorization to act within the framework of the penal code of disrupters of the economic system of the country and the Islamic Penal Code to set up tribunals in the face of exclusive economic conditions. He mentioned the current special economic conditions as a kind of economic war, and that those disrupting and corrupting the economy also provide for the enemy's goals and commit crimes that require urgent and rapid action. The letter asked for authorization especially on:

1) Special open tribunals for two years and directed to hand down maximum sentences;
2) Prohibition of any suspension or mitigation of the sentences;
3) The court branches being composed of the Islamic Revolutionary Tribunals;
4) Members of the court being made up of three judges with at least 20 years of judicial experience, a judge, and two judicial advisors;
5) The trial being run with the attendance of two members; and
6) All legal timelines specified in the procedure law, such as notification, appeals and protest, be set at a maximum of 5 days.

It also demanded that all court rulings except the death penalty be final, with death sentences subject to appeal at the Supreme Court within a maximum of 10 days.

The leader authorized and mentioned that the purpose of the courts should be to punish corrupt financial criminals swiftly and fairly. Earlier, the leader described "outright and unequivocal" treatment of economic corruption as one of the judiciary's primary duties, stressing that confronting economic corruption must be decisive and effective.

The requests and the issuance of permits for their content were not only challenging from the perspective of the constitution and the powers of its correspondences but also from the following dimensions:

1. Subjective matters and territorial jurisdiction of the courts;
2. Procedural timelines, such as time to appeal set at 5 days;
3. In the event of a research flaw, the Race Court shall proceed to its completion;

[5] Ilya Khrennikov, 'Telegram Loses Bid to Block Russia From Encryption Keys' (Bloomberg, 20 March 2018) <https://www.bloomberg.com/news/articles/2018-03-20/telegram-loses-bid-to-stop-russia-from-getting-encryption-keys> accessed 15 January 2019.

[6] Article 25.

[7] Article 88.

4. Suspensions and other discounts in sentences prohibited;
5. The term of detention is not objectionable, and only the judge shall determine that; and
6. All decisions of the courts other than the death penalty are final.

These requests are illegal and in violation of the legal principles and standards of human and constitutional rights, including the right to a fair trial. The principle of the rule of law, the legality of crimes and penalties, the separation of powers and a fair trial are all neglected.

Statistics show special tribunals set up in Tehran have so far handed down various sentences to 35 economic offenders. Three were sentenced to death for "spreading corruption on earth," and their convictions were upheld by the Supreme Court. Thirty-two other defendants received up to 20 years for economic corruption.

The defendants were found guilty of illegal dealings in coins and currency, while there is no prohibition and limitation for this under any laws. Some parts of the trials were broadcast on national television along with documentaries of the confessions of the executed felons. The legality of the trials and their fairness are under question. Amnesty International condemned the process as show trials with abhorrent executions and called these actions flagrant violations of international law and a display of disregard for the right to life.

5. Edict on a Law Revision

In the eyes of the current constitution, the leader is equal with the rest of the people of the country. In September, the ICA ratified a new retirement law meant to abolish a decades-long practice of re-employing public sector managers who are past retirement age. However, there is a vast exclusion. It explicitly excluded the leader, the president, presidential deputies, the judiciary chief, MPs, members of the GC, top military commanders and those who could get an exemption from the country's leader. Some retired through this law, such as Tehran's last mayor, Mohammad Ali Afshani; however, others got the exemption of the leader.

The leader, Ayatollah Ali Khamenei, addressed this matter in a speech. He called on the parliament to review the law and possibly revise it with more general exceptions so there would be no need to ask for exemptions from his office. A few hours later, the ICA speaker, Ali Larijani, directed the ICA research body to draft the revision.

The leader's remarks raised an old debate on his powers and whether the article 57 wording, "absolute wilayat al-'amr and the Leadership of the Ummah," along with others, provide him such power. Some interpreted articles 57 and 110 of the constitution as meaning that the leader enjoys the power to issue so-called "leadership commands," or special edicts that could reverse any law approved by legislators. Others refer to constitutional limitations that are not mentioned in the constitution. In practice, the first opinion is in force.

Edicts have long histories not only in the past constitutional history of Iran but also in the recent one. This was true under the monarchy and has continued under the Islamic Republic, which has no clear written term on them.

IV. LOOKING AHEAD

The constitution will be the source of large-scale legal events, and more importantly, significant amendments in the upcoming years. In 2019, the appointment of the seventh chief of the judiciary will take place, earlier than usual. Sadiq Larijani, who has been in charge of the judiciary since 2009, is an AE member and also one of the six fuqaha members of the GC. He was simultaneously appointed as the head of the NEC after Mahmoud Hashemi Shahroudi's death in December 2018. The next chief of the judiciary is said to be someone who tried to be head of another power in the 2017 presidential election, Sayed Ebrahim Raisol-Sadati, who carries a long history of judicial service.

These two facts, first placing the current head of the judiciary in charge of the NEC, and second, appointing the chief of the judiciary earlier than usual, fuel speculation about the AE electing a new leader in the near future. The current leader turns 80 in 2019 and has been ruling for the past 30 years. The NEC is a significant office that is composed of three heads of power, all GC members and official individuals of some organs.

After several rounds of ping-pong between the ICA and the GC on ratifying Combating the Financing of Terrorism (CFT) and Palermo Convention, which ICA passed and GC rejected, it is now the NEC's turn to decide which side to take in 2019.[8]

V. FURTHER READING

Sahar Maranlou, *Access to Justice in Iran: Women, Perceptions, and Reality,* Cambridge University Press, 2017, 275

G. W. Bowersock, *The Crucible of Islam*, Harvard University Press, 2017, 220

Medea Benjamin, *Inside Iran: The Real History and Politics of the Islamic Republic of Iran,* OR Books, 2018, 256

[8] The CFT bill is one of the four Financial Action Task Force (FATF) bills which seek reform in the money-laundering rule and change in the funding terrorism law.



Ireland

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I. INTRODUCTION

Just as it was for the 2016 and 2017 reports, the issue of abortion loomed large over Irish constitutional politics in 2018. The big difference for this year's report, however, is that 2018 marked the culmination of the various review processes discussed in previous years with the holding of the long-anticipated referendum on the issue.

These processes—from Citizens Assembly through parliamentary committee and onto referendum—have attracted considerable attention from overseas commentators. Much of the commentary, marvelling in its apparent capacity to persuade a deeply Catholic Ireland to support change, have looked to the Irish experience as a model for constitutional deliberation.

The reality of the abortion referendum—like the marriage equality amendment before it—may, however, be more nuanced and less revelatory than this commentary assumes.

2018 was also noteworthy in that it saw the Supreme Court's entry into the abortion debate for the first time in recent years. The decision of the Court clarified an outstanding—if somewhat arcane—question in the Irish case law on abortion. Of more long-term interest may be what the manner of the Court's entry into the debate indicates about its self-perception as a political actor.

While the abortion issue attracted the most attention, the year was also noteworthy for the Government's continued interest in constitutional change. A referendum was held in late 2018 on blasphemy, while the Government has also announced its intention to hold referendums on divorce, extending certain voting rights to citizens living abroad, and on the future of the Constitution's current recognition of woman's "life within the home". This would mean there will be seven referendums in four years, after only 33 in the previous 70 years, something which suggests that recourse to referendums may be becoming an increasingly settled part of Ireland's constitutional politics.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major constitutional development was the holding of a referendum on the amendment of the provisions of the Constitution of Ireland concerning the rights of the unborn. Article 40. 3. 3 of the Constitution, which was inserted into the constitutional text by a referendum in 1983, previously provided that:

> "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

The 8th Amendment (as it was more commonly known) was introduced as the result of a campaign by groups expressing concern that an Irish court could follow the example of the English courts in R. v Bourne[1] or US Supreme Court in Roe v Wade[2] and interpret the relevant statutory or constitutional provisions in a manner which made abortion more widely available than was the case under the then

[1] ?

[2] Geoghegan J., in Roche v Roche [2010] 2 IR 321, para 210.

legislation. The aim of the Amendment was "to prevent the introduction of abortion either by legislation by the Oireachtas or by judicial decision".[3] This meant, in effect, that it was generally regarded as impossible to introduce a broad "decriminalisation of abortion without the approval of the people as a whole".[4]

The proposal which was put to the people in May 2018 was to replace Article 40. 3. 3. with the following text:

> Provision may be made by law for the regulation of termination of pregnancies.

The aim of this was to confirm the entitlement of the Oireachtas (parliament) to introduce legislation providing for abortion, thereby addressing a concern that there could be legal constraints on the expansion of abortion services—or, at the very least, lengthy litigation asserting the existence of legal constraints—notwithstanding the repeal of the 8th Amendment.

This concern is discussed further in the next section.

The proposal was put forward by the Government at the end of a process which had featured involvement by various bodies. First of all, the question was one which had become increasingly difficult for the political establishment to ignore as the result of a visible and effective campaign for the repeal of the 8th Amendment by activists.

This led ultimately to the establishment of a 100-person Citizens Assembly in 2016 to consider the issue. Its recommendations, issued in late 2017, were for the 8th Amendment to be replaced with text confirming the entitlement of the Oireachtas to legislate on this issue. The referendum proposal largely followed this recommendation.

The Assembly also made detailed recommendations concerning the legislation which, in its view, ought to be introduced after the referendum.

For those interested in deliberative assemblies and the politics of constitutional change, it is this aspect of the Assembly's work, rather than its more obviously "constitutional" effects, which might merit most scrutiny. If there were any aspect of the Assembly which shifted public or political opinion (and this remains open to debate), it was the Assembly's recommendations on legislative rather than constitutional change.

This is where some consideration of the specific social and political context becomes important. While the international perception of Ireland can be of a deeply religious society, this is arguably years, if not decades, out of date. That is not to say that there are not parts of Irish society, especially amongst older generations, that remain heavily influenced by religious belief. That is also not to overlook the fact that Irish society is, in many respects, more visibly—or anecdotally—Catholic than many other states. Religion certainly features prominently in many of the familiar rituals of family or social life. However, the one-time capacity of the Catholic Church to influence political or social life has long been in significant decline, especially since the child abuse scandals of the 1990s. To give one example, at the time of the 1983 referendum, 87% of Catholics were estimated to attend Mass weekly. By 2012, this was estimated to have fallen to around 30-35%, with some parishes in Dublin reporting only 2% weekly attendance.

In terms of the specific issue of abortion, it is a distortion to suggest that either the referendum campaign or the Citizens Assembly brought about a shift in deeply held views. This not only underplays the efforts of activists for many years prior to these formal deliberative processes but also overlooks polling data on the abortion issue. Opinion polls for several years prior to the Assembly and referendum had consistently shown comfortable majorities for both a repeal of the 8th Amendment and increased access to abortion. This casts serious doubt on the cause-and-effect assumptions implicit in some of the more optimistic accounts of the Assembly's role.[5]

In reality, the "dramatic" results of the marriage equality, abortion, and (perhaps) blasphemy referenda are more to do with the delayed acknowledgement by an innately risk-averse political class of changes in majority social attitudes that happened—or began to happen—20 or 25 years ago.

However, it is amongst this group of political representatives where the Assembly's deliberations did seem to have some effect. Its legislative recommendations were initially greeted with significant skepticism as too liberal to command public support. Nonetheless, it ultimately proved highly influential in shaping the legislative proposals announced by the Government in 2018. The Assembly recommendations set the agenda for the consideration of the issue by a parliamentary committee. Moreover, while the committee did not endorse all of the Assembly recommendations, they seem in general to have given them a presumptive weight in their deliberations. That this committee's report (which was, again, more liberal than might have been assumed a few months previously) was largely adopted by the Government as the basis for its proposed legislative regime in 2018 can arguably be seen as concrete evidence of the Assembly model having practical political effects.

The second referendum on constitutional change in Ireland in 2018 involved the re-

[3] Hardiman J., in Roche v Roche [2010] 2 IR 321, para 181.

[4] ?

[5] See, for example, Anni Pottorff, 'Lessons from the Irish Citizens' Assembly: Deliberate, Even When it's Difficult' ("Ireland's recent citizens' assembly and resulting referendum on abortion rights highlights the history-changing impact citizens' assemblies can have…. Not only did the Assembly spark a long-awaited public discussion on abortion rights, it helped set the stage for last month's national referendum on May 25."); Patrick Chalmers, 'How 99 strangers in a Dublin hotel broke Ireland's abortion deadlock', The Guardian, March 8, 2018 ("A referendum was scarcely imaginable when the idea of an assembly was first mooted in 2016. Back then, few politicians dared even raise the subject of a public vote, let alone voice support for abortion rights.").

moval of the criminal offence of blasphemy from the text. This was, again, a provision with conspicuously religious origins but with significantly less practical effects. Article 40. 6. of the Constitution had provided (in part) that:

> 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality:
>
> i The right of the citizens to express freely their convictions and opinions.
>
> ….
>
> The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law.

However, while the Constitution thus required that blasphemy be an offence, it did not itself define what this meant or how the offence might be committed. That this made it difficult to apply in practice in the absence of legislative intervention was confirmed in *Corway v Independent Newspapers*.[6] There, a private individual applied to the High Court for permission to bring a prosecution for blasphemous libel. The application related to a newspaper cartoon about the 1995 referendum on divorce. The courts refused the application. The Supreme Court pointed out that the legislation which referred to blasphemy provided "no statutory definition of blasphemy … [and] assume[d] that the crime exists without defining it." The Court pointed out that there was uncertainty over which religion or religions were protected from blasphemy. There was also uncertainty over how a person might commit blasphemy, and of how an offence of blasphemy might interact with the Constitution's protection of freedom of expression and freedom of conscience. The Court concluded that the offence existed but that there was significant uncertainty over what it involved.

This uncertainty was addressed by the Defamation Act 2009. The justification for its introduction was a perceived rule-of-law requirement that political actors ought to comply with the obligations imposed by the Constitution rather than to introduce *de facto* an amendment by constitutional desuetude. This meant that the legislation was specifically stated by its sponsors to be designed to be difficult to prosecute. Under the Act, a person could be found guilty of blasphemy if they published or uttered "grossly abusive or insulting" matter on "matters held sacred by any religion"; their action caused outrage among a substantial number of members of that religion; and they intended to cause that outrage.

One curious, if little-remarked, feature of the referendum was that it was widely justified and celebrated as a victory for freedom of expression even though it specifically re-enacted the obligation in Article 40. 6. 1 to provide for criminal offences of obscenity and sedition. From a freedom of expression perspective, these are arguably as objectionable and constitutionally unorthodox as the previous blasphemy requirement. Nor would there appear to be any great public or political demand for their retention in the constitutional text. It seems most likely that they were retained as an afterthought (if even that) to the political objective of "dealing with" a blasphemy issue that had attracted a degree of media and civil society criticism. This is broadly consistent with the point already made about the extent to which the programme of constitutional change in recent years reflects a decline in religious influence in Irish society. It may also point to aspects of contemporary Irish constitutional politics that may be of interest or influence in the medium-term. In particular, it raises a question as to whether there is a perceived political dividend from constitutional modernization—especially one defined in secular terms—by supplanting the habitual caution of the Irish political class towards referendums and socio-religious issues over the last two decades. If that is the case, then the prevalence of Catholic symbolism in the 1937 text suggests that there may be many more referenda in the years to come.

III. CONSTITUTIONAL CASES

1. M v Minister for Justice and Equality [2018] IESC 14: Abortion – right to life – popular sovereignty – natural law

These proceedings involved a leapfrog appeal to the Supreme Court from the decision of Humphreys J. The High Court ruling had addressed a range of constitutional issues, several of which have been the subject of contention for many years. These included the meaning of family under Articles 41 and 42 as well as the constitutional rights of the unborn.

The latter issue is one which, while the subject of considerable public, judicial, and academic attention since the 1970s, had never been comprehensively resolved. It had been suggested by several judges prior to the 1983 referendum that at least some of the rights protected by the Constitution might apply before birth. For example, Walsh J. expressed the view in G. v An Bord Uchtála [1980] IR 32 that "a child … has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth" (at 69). It was never definitively clarified either before or after the 1983 referendum whether this represented the law on this issue, and therefore whether the 8th Amendment created the right to life of the unborn or was declaratory of it.

With reform of Article 40. 3. 3. under serious consideration, this became a key issue. It was prominent in discussions before the Citizens Assembly and seemed to have influenced that body's recommendation that an express enabling amendment be included in any constitutional reform. This appeared to be intended to deal with the potential for an argument to be made that the unborn continued to enjoy constitutional rights even after the repeal of Article 40. 3. 3.

The Court stated in M that the unborn has no rights under the Constitution other than those contained in Article 40. 3. 3. This was

[6] [1999] 4 IR 484.

generally expected as a result, especially given the very expansive interpretation of the unborn as holding full Article 42A rights that had been advanced by the High Court judge in the decision under appeal.

The Court engaged in a relatively detailed review of the various occasions in which judges had suggested that the unborn may enjoy some degree of wider constitutional protection. It concluded that these suggestions were all *obiter dicta.* It also relied to some degree on the reference in the constitutional text to "citizen" or "person" as defining the scope of the constitutional "rights holder",[7] and on the fact that the 13th and 14th Amendments seemed to regard Article 40. 3. 3 as an exhaustive statement of right. This meant that "the only right of the unborn child as the Constitution now stands … is that enshrined by … Article 40. 3. 3" (para 10. 62).

However, and in keeping with its somewhat obtuse finding in the immigration law portion of its ruling that regard must be had to the rights of the unborn-once-born, the Court then immediately went on to suggest that the unborn retains some degree of constitutional "visibility". This was partly linked to Article 40. 3. 3. In addition, though, it noted that "the fact … that the Minister must take into account of rights which will be acquired on birth … recognise[s] and protect[s] the interests of an unborn child", adding that "the State is entitled to take account of the respect which is due to human life as a factor which may be taken into account as an aspect of the common good in legislation". Although it is expressed in enabling terms that the State is "entitled to take into account", the reference to the "respect which is due to human life" has the potential to be seen as a basis for constitutional challenges or limitations in the future.

While the case attracted significant attention at the time, the constitutional effects of the decision are arguably quite limited, at least as far as the abortion issue is concerned. This is most obviously because the decision was concerned with text that was removed shortly thereafter. However, it is also because the decision was ultimately delivered after the Government had already announced the wording of the proposed amendment. The decision clarified a legal issue which had generated doubts over whether Article 40. 3. 3 should be repealed or replaced. It confirmed, in effect, that the Article could be repealed—but after that decision had already been made.

What may be more interesting about this, however, is the fact that the Supreme Court appeared prepared to intervene in this debate at all. From a procedural and political perspective, there was no necessity for them to do so. The proceedings had long become moot by the time that an appeal was sought to the Supreme Court. Nevertheless, the Court not only agreed to hear the matter but did so on an expedited basis for the express purpose of addressing the issue prior to the referendum being held. Furthermore—and possibly unrelatedly—the decision was the first (and so far only) occasion on which the delivery of the ruling by the Supreme Court was broadcast on television. The Court's decision is, it should be noted, careful to repeatedly disclaim any political dimension to its ruling. Nonetheless, the deliberate nature of the Court's intervention is somewhat out of keeping with the traditional conservatism of the Supreme Court on sensitive issues. It is arguably the clearest indication of a shift that has debatably been occurring since the Court acquired control of its own caseload in 2016, moving from a traditionally reactive common law court to a more self-consciously proactive role as a constitutional actor.

2. C v Minister for Social Protection [2018] IESC 57: Remedies

This decision is important for its consideration of the circumstances in which a suspended declaration of invalidity may be appropriate. As discussed in the 2017 report, the Supreme Court, in keeping with this sense of a shifting role, has begun to experiment with suspended declarations of invalidity. However, it had provided little clarity as to when or in what circumstances they might be available. C marked the first occasion on which the Court gave a more detailed insight into the rationale for this new departure, and the parameters of its exercise. There is some evidence in the decision of differing levels of enthusiasm amongst the members of the Court. In general, O'Donnell J. seemed mindful of the potential issues with this form of remedy but attracted to the flexibility which it provides. By contrast, McMenamin J. seemed more sceptical. Overall, all agreed with Clarke J. that this was an exceptional remedy; that an immediate declaration was the norm; and, in particular, that Ministers should not seek to engage with the Court for advice on what responses might be appropriate after a declaration was made.

IV. LOOKING AHEAD

Constitutional change again looks likely to be a significant theme of the year ahead with referendums proposed on a number of issues including voting rights for emigrants, divorce, and the current constitutional reference to the role of women in the home. The latter two are in keeping with the nature of the amendments in recent years, being proposals to address aspects of the text that bear the particular imprint of Catholic teaching.

The 1937 Constitution originally contained an absolute prohibition on divorce, but this was modified by a referendum (which passed with a narrow majority) in 1996 to permit divorce subject to certain conditions. One of these was that the couple had to have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years. The proposal is that this would be reduced or, perhaps, removed from the Constitution in its entirety.

The other Catholic-influenced provision at issue for 2019 is Article 41. 2 of the Constitution. This provides that:

> 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without

[7] This may have implications for other issues, including the question of the extent to which certain rights may or may not be reserved to citizens.

which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

The provision has had little, if any, impact on constitutional litigation in Ireland but has long been criticized for its symbolic anachronism. However, the Government's initial proposal to abolish the Article encountered some opposition in Parliament from some members who argued in favour of re-drafting it to make it gender neutral, or otherwise recognize the value of caring to society. This led to the postponement of the referendum from 2018 to 2019 in order to further consider the issue.

In terms of the courts, the most anticipated judgment(s) of 2019 (so far) is the Supreme Court's ruling in the linked cases of Kerins v McGuiness[8] and O'Brien v Clerk of Dail Eireann.[9] These were heard in March 2018 and judgment is expected in the first quarter of 2019. The first concerns a claim by a witness that her constitutional rights were infringed by the manner in which she was treated by a parliamentary committee. The second relates to a complaint that the Dáil's (lower house) omission to sanction a TD (member of parliament) who had revealed information which was the subject of an injunction breached the constitutional rights of the party who had obtained the injunction. The previous case law on the scope, extent and justiciability of parliamentary privileges under the Constitution is less than clear—something it is hoped the decisions will address.

The other issue of note in the judicial domain is whether there is any further progress on the Government's controversial proposals for reform of judicial appointments. These proposals (which were discussed in previous reports) have generated significant, if not unprecedented tensions between the political and legal branches. They also remain government policy and, perhaps more relevantly, a particular priority of a party on whose support the minority government is dependent. There is likely to be further controversy if the Judicial Appointments Bill proceeds without amendment in 2019.

V. FURTHER READING

1. G. Hogan, G. Whyte, D. Kenny & R. Walsh, Kelly: *The Irish Constitution* (5th edition, Bloomsbury, 2018): The first update in over 15 years of the constitutional textbook relied on by generations of Irish practitioners. Running to over 2,500 pages, this is the most comprehensive work available on the Constitution of Ireland.

2. F. de Londras & M. Enright, *Repealing the 8th: Reforming Irish Abortion Law* (with postscript) (Policy, 2018): A commentary on as well as a contribution to the major event in Irish constitutional politics in 2018.

3. O. Doyle, *The Constitution of Ireland* (Bloomsbury, 2018): The Irish entry in Hart's Constitutional Systems of the World series, this work provides a contextual analysis of constitutional governance in Ireland.

4. D. Coffey, *Drafting the Irish Constitution,* 1935–1937 (Palgrave, 2018): Pioneering a new method of draft sequencing, this tracks the comparative constitutional influence on the process of drafting the 1937 Constitution.

5. E. Carolan (ed), Judicial Power in Ireland (IPA, 2018): A collection of essays on the theory and practice of judicial power in Ireland with a particular focus on recent controversies over judicial independence and appointments.

[8] An appeal from [2017] IEHC 34.

[9] An appeal from [2017] IEHC 179.



Israel

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I. INTRODUCTION

Israel's Supreme Court is a major influential player in the field of judicial politics.[1] After 2017 marked a year with significant judicial decisions, *inter alia*, invalidating a law based upon procedural flaws and issuing a notice of invalidation to a basic law concerning the biennial budget,[2] 2018 was a relatively moderate year with not a single invalidation of a primary law or part thereof.

In this report, we highlight major constitutional developments, mainly the enactment of a new chapter in the Israeli constitution—Basic Law: Israel as the Nation State of the Jewish People—and amendments to Basic Law: The Government on waging war. Furthermore, we summarize the central constitutional cases dealing with security, law and religion, delegation of authority and judicial review of basic laws.

One additional notable development within the judiciary is the appointment, by the Judicial Appointments Committee, of two new justices to the Supreme Court—Prof. Alex Stein and Prof. Ofer Grosskopf. Prof. Grosskopf was previously a central district court judge, and Prof. Stein has been a professor of law in the US since 2004 and taught at Cardozo, Yeshiva University's Law School, until moving to Brooklyn Law School in 2016. The two new justices replaced retiring Justice Yoram Danziger, who was appointed as a full professor at Tel-Aviv University, Faculty of Law, and Justice Uri Shoham, who was appointed Ombudsman of the Israeli Judiciary on November 2018.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most important development in Israeli constitutional law in 2018 was probably the enactment of the Basic Law: Israel as the Nation State of the Jewish People.[3] On July 19, 2018, in the very last day of the Knesset's summer session, it passed a new Basic Law stating that Israel is the Nation State of the Jewish people by a majority of 62-55 members. As the Israeli constitution-making process is an incremental one, conducted in stages through the enactment of Basic Laws,[4] this new Basic Law is a new 'chapter' in Israel's constitution, dealing with the identity of the State.

[1] On the Supreme Court's legacy, see Pnina Lahav 'Israel's Supreme Court', in Robert O. Freedman (ed), *Contemporary Israel - Domestic Politics, Foreign Policy, and Security* Challenges (Routledge, 2008).

[2] See Justice Uzi Vogelman, Yaniv Roznai, Ron Goldstein, Maya Gazit and Michael Herscovici, 'Israel', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *2017 Global Review of Constitutional Law* (I·CONnect-Clough Center, 2018) 151-155; Yaniv Roznai, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset' (2019) 51(4) Verfassung und Recht in Übersee (forthcoming).

[3] For a translation of the Basic Law, see https://knesset.gov.il/laws/special/eng/BasicLawNationState.pdf

[4] We elaborate on this feature in Israeli constitutional law in our 2016 report. See Justice Uzi Vogelman, Nadiv Mordechay, Yaniv Roznai, and Tehilla Schwartz, 'Developments in Israeli Constitutional Law', in *2016 Global Review of Constitutional Law* (Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), I·CONnect-Clough Center, 2017), 105-109.

The Nation-State Basic Law states that Israel is the 'national home of the Jewish people', stating that 'The exercise of the right to national self-determination in the State of Israel is unique to the Jewish People.' It includes eleven clauses, anchoring the State's symbols such as its name, flag, national anthem and emblem anthem, official language and national holidays. It states that 'Jerusalem, complete and united, is the capital of Israel', that 'Hebrew is the State language' and that Arabic, which had a formal status, now has 'a special status in the State… Nothing in this article shall affect the status given to the Arabic language before this law came into force.' Thus, Hebrew is now Israel's sole official language. The Basic Law further states that 'The State shall be open for Jewish immigration, and for the Ingathering of the Exiles', and elaborates on the connection of the State with the Jewish People. It also provides that 'The State views the development of Jewish settlement as a national value, and shall act to encourage and promote its establishment and strengthening.' It further includes provisions regarding the official calendar, Independence Day and Memorial Days, Days of Rest and Statutory Holidays. This Basic Law is formally entrenched and may be altered or repealed by a majority of 61 members (out of 120) as opposed to a regular majority of members present, as is the case for ordinary laws.[5]

The Basic Law was at the center of public debates,[6] and various petitions against its constitutionality were submitted to the High Court of Justice (HCJ). The President of the Supreme Court, Honorable Justice Esther Hayut, has announced that a panel of 11 justices will hear the petitions, which are currently pending.

Another important constitutional change dealt with war powers. On May 2, 2018, Basic Law: The Government was amended to allow the transfer of authority to launch military operations and declare war from the government to the smaller Security Cabinet. The amendment also included a provision according to which a decision in the Security Cabinet would be adopted with a quorum of half of the Cabinet's members. However, in extreme and urgent conditions, the Prime Minister and Minister of Defense can decide to adopt such a decision with a narrower quorum.[7]

The constitutional provision that allowed the Prime Minister and Minister of Defense to decide, in extreme conditions, on war or on a substantive military operation on their own—without the approval of the Cabinet—was abolished only two months later, in July 2018. The rationale behind the abolishment was that 'It is appropriate that a decision of the Ministerial Committee regarding starting a war or taking significant military action that may at a high level of certainty lead to war be adopted by as wide a panel as possible.'[8] The question of war powers is extremely important in Israel, which has been in a state of emergency since its establishment in 1948.[9]

III. CONSTITUTIONAL CASES

1. HCJ 2964/18 Parents Circle – Families Forum, Bereaved Families for Peace v. Minister of Defense (April 17, 2018): Entry of Palestinians to Israel for a Memory Ceremony

This petition was directed against the decision of the Minister of Defense not to allow Palestinian residents of the West Bank to enter Israel in order to participate in a private memorial service organized by the petitioners, a grassroots organization of families on both sides of the Israeli-Palestinian conflict who have lost immediate family members in hostilities. The ceremony has been held annually for the last 12 years with the purpose of joining together bereaved families who believe in reconciliation. It is attended by several thousand Israelis and takes place on the same day as the national Israeli Memorial Day, which commemorates Israel's fallen soldiers and victims of terrorism. For the past 12 years, except for one year in which the permit was denied for security reasons, the Minister of Defense allowed the entry of Palestinians into Israel so that they could take part in the ceremony.

The Petitioners argued that the Defense Minister's decision was unreasonable, based on extraneous considerations, and would constitute a violation of the freedom of expression of both the organizers and the participants. They also noted the worthy, altruistic and positive values behind the ceremony and that without the participation of Israelis and Palestinians side by side, the ceremony would be meaningless. On their part, the respondents argued that the Defense Minister has a wide discretion, including consideration of the anticipated harm to the public's feelings and bereaved Israeli families who were outspoken in their opposition to the ceremony. In addition, it was argued that non-citizens of Israel have no vested right to enter the country and that the petitioners have a reasonable alternative and can conduct the ceremony in the West Bank.

The Court accepted the petition, ruling that the Defense Ministers' discretion is not unlimited and must be exercised in a reasonable manner and in accordance with the rules of administrative law. In its decision, the Court

[5] For the full text of the Basic Law, see: https://m.knesset.gov.il/EN/News/PressReleases/pages/Pr13978_pg.aspx

[6] On the Basic Law, see, e.g., Suzie Navot, 'A new chapter in Israel's "constitution": Israel as the Nation State of the Jewish People', VerfBlog, 2018/7/27, https://verfassungsblog.de/a-new-chapter-in-israels-constitution-israel-as-the-nation-state-of-the-jewish-people/, DOI: https://doi.org/10.17176/20180727-124823-0; Tamar Hostovsky Brandes, 'Israel's Nation-State Law – What Now for Equality, Self-Determination, and Social Solidarity?' (October 1, 2018), https://ssrn.com/abstract=3270476; and especially this collection of essays: Simon Rabinovitch (ed.), *Defining Israel – The Jewish State, Democracy, and the Law* (Hebrew Union College Press, 2018).

[7] Amichai Cohen, 'Who Can Declare War on Behalf of the Israeli People?' IDI (May 06, 2018), https://en.idi.org.il/articles/23444

[8] 'Knesset rescinds law allowing PM, DM to declare war' (July 17, 2018), http://www.israelnationalnews.com/News/News.aspx/249082

[9] See generally, Suzie Navot, 'Emergency as a State of Mind—the Case of Israel' in Pierre Auriel, Olivier Beaud, and Carl Wellman (eds.), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer, 2018), 185-212.

took into consideration, among other things, that entry permits had been issued in the past. The Court pointed out that the respondents had not explained why the Defense Minister had decided to deviate and adopt a different policy. The Court also found that while the Defense Minister had considered the feelings of certain bereaved Israeli families and part of the Israeli public who were against the ceremony, he had failed to consider the feelings of the bereaved families and the Israeli public that did wish to conduct the ceremony and who identify with its goals. As an additional consideration, the Court took into account the position of the professional echelon in the Ministry of Defense, who were of the opinion that the bereaved Palestinian families should be issued temporary entry permits in order to attend the ceremony.

2. HCJ 5744/16 Adv. Shachar Ben Meir v. The Knesset (May 27, 2018): An Unconstitutional Amendment to a Basic Law?

These petitions, which were discussed in an expanded bench of nine justices, were directed against amendments to the Basic Law: The Knesset that allows the removal from the legislature of lawmakers whose actions constitute incitement to racism or support for an armed struggle against the State of Israel. Pursuant to the amendments, the process of removal from office includes several stages: The proposal to remove an MK from office must enjoy the support of 70 MKs, of whom at least 10 must belong to a Party which is not a member of the coalition government. It must then be approved by the Knesset Committee and then adopted by the Knesset plenum by a majority of 90 of the 120 MKs. As an additional precaution, an MK whose service has been terminated may appeal to the Supreme Court.

According to the petitioners, the amendment, commonly referred to as the 'Removal Law', significantly violates the principle of separation of powers and basic democratic principles, including the right to vote and to be elected, the right to equality and freedom of political expression. Accordingly, its adoption constitutes a misuse of the Knesset's constituent powers. On the other hand, the respondents argued that the petition was not yet ripe, as the powers invested in the Knesset by the amendments had yet to be exercised. Moreover, these were not exceptional circumstances that could justify the Court's intervention in a Basic Law, *inter alia*, since the amendment was consistent with restrictions that apply to banning political parties and nominees, and in light of the mechanism's internal checks and balances.

All justices on the bench agreed that the petitions should be dismissed, but for differing reasons. According to the main opinion, written by the President of the Supreme Court, Honorable Justice Esther Hayut, the law unavoidably violates fundamental democratic principles and constitutional rights, a matter which can be determined even before the law is applied. As an amendment to a Basic Law, it is clear that the manner of reviewing its constitutionality is not equal to that of a regular law. Whereas in some legal systems the doctrine of 'Unconstitutional Constitutional Amendments' exists, in the context of the 'Removal Law', there is no need yet to address and decide the question of the applicability of this doctrine in Israel, considering that the constituent body has not yet completed its constitution-making process, and that the law does not negate the basic principles of the Israeli legal system. This is also in view of the checks and balances contained therein and the legitimate purpose of the law—preventing the use of democratic tools to advance anti-democratic goals.[10]

3. FHHCJ 3660/17 General Association of Merchants and Self-Employers v. Minister of the Interior (October 26, 2017): Legality of a Municipal By-Law Authorizing the Opening of Minimarkets on the Sabbath

A seven-justice bench held an additional hearing on an amendment to the Municipal By-Law of the City of Tel Aviv-Jaffa that authorizes the opening of minimarkets in the city on the Sabbath (Friday evenings and Saturdays). In 2014, the Minister of the Interior exercised his authority and halted the publication and execution of the amendment. After the minister's resignation, the decision on the matter by his successors was deferred again. The municipality appealed the suspension of the by-laws and the Court accepted its petition. This current request for an additional hearing was accepted as the Court held that the matter has broad implications, mainly the nature of the Sabbath in the public sphere. In his decision, the minister had concluded that the amendments should not be adopted considering the scope of damage they would purportedly cause to the social and religious-national values that underlie the Sabbath.

The Court held by a majority opinion that the subject of the additional hearing should not be interfered with. Despite the grounds for dismissing the petition *in limine*, all the justices discussed the questions that arose on their merits. According to the Honorable President (ret.) Justice Miriam Naor, who wrote the main opinion of the Court, the minister's position is unreasonable in the absence of proper weighting for the autonomous status of the municipality. According to the interpretation of the relevant legislation, the minister's authority cannot replace the municipality's discretion, which stems from the need to balance conflicting interests in a diverse society. According to the minority opinion, the minister's decision should not be interfered with.

In January 2018, in response to the Court's ruling, amendments were made to the orders authorizing the municipalities to enact by-laws. These amendments, commonly referred to as the 'Minimarket Law', include a demand for the consent of the Minister of

[10] On the applicability of the 'Unconstitutional Constitutional Amendment' in Israel, see Aharon Barak, 'Unconstitutional Constitutional Amendments' (2011) 44(3) *Israel Law Review* 321; Yaniv Roznai, 'Constitutional Unamendability in Israel: Remarks Following Professors Baxi, Hoque and Singh' (2018) *Indian Journal of Constitutional & Administrative Law* (2018) 33; Mazen Masri, 'Unamendability in Israel – A Critical Perspective', in Richard Albert and Bertil Emrah Oder (eds.), *An Unconstitutional Constitution? Unamendability in Constitutional Democracies* (Springer, Forthcoming 2018), https://ssrn.com/abstract=2840941; Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019), *European Journal of Law Reform* (forthcoming).

the Interior as a condition for the validity of by-laws regarding the opening and closing of businesses on days of rest. At the time of this writing, petitions submitted by a number of municipalities against the new authority of the minister are pending.

4. HCJ 4113/13 The Coordinating Bureau of the Economic Organizations v. The Minister of the Interior (March 26, 2018): The Legality of Municipalities to Delegate the Collection of Municipal Taxes to Private Companies

The basis of this petition questions whether municipalities have the authority to delegate the collection of municipal taxes and other compulsory payments to private companies in the absence of specific statutory legislation's explicit authorization. During the discussion, the justices examined the actions taken by the private collection companies in order to decide whether this is a technical action or an action requiring discretion. The current petition was submitted in 2013, and for several years no decision was given in light of the State's announcement that the matter at hand was just before legislative regulation. However, the legislative process did not progress for many years, and thus the time came for a decision to be made upon the matter.

The HCJ accepted the petition, stating that local municipalities should not be allowed to delegate their authority to collect taxes and other payments to private companies without being regulated by an authorized legislation. The Court ruled that private collection companies carry out actions that cannot solely be regarded as 'technical matters'. The Court concluded that in accordance with the existing law, performing collection actions through private companies is a forbidden delegated authority using discretion, and is not merely technical assistance. The Court stated that according to Section 249(31) of the Municipalities Ordinance, the municipality is entitled to carry out its functions 'together or in partnership' with other parties, but this provision does not justify the transfer of discretion to those entities. In order not to 'shock' the existing systems and allow the respondents reasonable additional time to advance the legislative process, the HCJ gave a period of a year to complete legislation regulating the status of the collection companies, if the Knesset so wishes.

5. HCJ 3003/18 Yesh Din et al. v. IDF Chief of Staff et al (May 24, 2018): Lawfulness of the IDF's Rules of Engagement During the Recent Events on the Gaza border

Since Palestinian 'Land Day' on March 30, 2018, thousands of Palestinians staged large-scale, violent demonstrations in the area of the security perimeter between Israel and the Gaza Strip. The petition challenged the rules of engagement governing the use of force by the Israeli security forces in the violent clashes in the area of the security fence between Israel and the Gaza Strip.

The petitions argued that the rules of engagement allowing the Israeli security forces to use lethal force against persons deemed 'primary inciters' even when such persons did not present an imminent, actual threat to human life, are prohibited. The respondents argued that the rules of engagement are consistent with Israeli and international law as well as with the case law of the Supreme Court.

A three-justice panel unanimously dismissed the petition. According to Justice Melcer, deputy president of the Supreme Court, who wrote the primary judgment, the HCJ could not examine the means employed by the IDF in response to the events, both because of the great restraint required in judicial review of military operations that are not *prima facie* unlawful, and particularly in circumstances in which the requested review is of the implementation of operational policy occurring in real time.

IV. LOOKING AHEAD

There are several questions awaiting Israel both in constitutional law and constitutional politics. As for the latter, this year is an election year. Elections for the 21st Knesset will be on April 9, 2019.

As for constitutional law, there are 14 challenges submitted to the HCJ concerning the above-mentioned 'nation state law', which will be heard this year and which have instigated a public debate on the authority of the HCJ to review basic laws, i.e., laws of a constitutional status.

V. FURTHER READING

Yoav Dotan, 'Impeachment by Judicial Review: Israel's Odd System of Checks and Balances' (2018) 19(2), *Theoretical Inquiries in Law*, 705-744

Gideon Sapir, *The Israeli Constitution: From Evolution to Revolution* (OUP, 2018)

Adam Shinar, 'Israel's External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction' (2018) 57(3), *Virginia Journal of International Law* ,735-767

Yaniv Roznai and Liana Volach, 'Law Reform in Israel' (2018) 6(2), *The Theory and Practice of Legislation* (2018), 291-320

Rivka Weill, 'The Strategic Commonlaw Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding' (December 5, 2018), https://ssrn.com/abstract=3296578



Italy

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I. INTRODUCTION

The Italian Constitutional Court (hereafter ICC or "the Court") has long characterized its position within the constitutional system by exercising a significant effort in coordinating its powers both with other constitutional institutions ("horizontal relationality") and with international and supranational law ("vertical relationality"). Accordingly, our report on constitutional developments in 2016 primarily focused on aspects of vertical relationality, while our 2017 report focused on horizontal relationality. These dimensions remained crucial in 2018: in particular, the Court intensified its capacity of relationality with civil society by organizing an unprecedented number of visits by constitutional judges to public schools and prisons.[1] Last year's case law also stands out for an apparent judicial engagement on fundamental rights. The Court reasserted its crucial role in one of the most classical and characterizing fields of constitutional adjudication. While this concern emerges more clearly in crucial developments concerning limits to the judicial enforcement of rights (and focusing in particular on significant decisions reported in Part II concerning the mitigation of correctional harshness, alternatives to mandatory sentences, and end-of-life choices), it runs through many other segments of the 2018 ICC's case law (Part III).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The ICC's activism on rights manifested itself on many fronts, and along many dimensions. The three rulings selected here share two traits: they all concern delicate substantive issues; they also present some long-standing problems connected to the limits of judicial review.[2]

The ICC's judicial review "excludes any consideration of a political nature as well as any control on the discretionary powers of the Parliament": each ruling should rest on purely legal grounds; no choices should be made if they entail political assessments. Moreover, the Court is bound to the specific issues raised before it. When it annuls a law, the ICC has some room for manipulation, but only to a limited extent. These circumstances—by no means exclusive to the Italian model—can hinder the judicial enforcement of constitutional rights, as the cases here demonstrate.

The cases are in order of increasing difficulty of the relevant problems as well as increasing boldness of the ICC in dealing with them.

The first judgment[3] concerned life sentences for persons convicted of kidnapping victims for a ransom and causing their death. Due

[1] See the official website (www.cortecostituzionale.it) in the section "Viaggio in Italia – La Corte costituzionale nelle carceri – La Corte costituzionale nelle scuole". The initiative is ongoing; a new round of visits in schools was announced on 4 February 2019.

[2] For a general outline, see Vittoria Barsotti, Paolo G Carozza, Marta Cartabia and Andrea Simoncini, *Italian Constitutional Justice in Global Context* (OUP USA, 2016) 54 ff, 82 ff.

[3] Corte costituzionale, Judgment of 11 July 2018, No. 149.

to the extreme seriousness of the offence (normally connected with organized crime), this sentence precludes most of the benefits (leaves, work-release, day-release) which usually reward the convicts' gradual progress towards rehabilitation. The benefits become accessible only after 26 years of prison time; but at that point, if not earlier (thanks to cooperation with justice), inmates may be entitled already to conditional liberation (parole), which is far more favorable. And yet, as an additional paradox, liberation (as well as day-release) might be denied precisely because of the lack of previous, more limited, and successful release experiments.

According to the ICC, this regulatory framework is unconstitutional. The Court put three main arguments at the basis of its decision:

1) The Constitution requires correctional flexibility, i.e., rewarding social rehabilitation with a progressive pattern through time;

2) The offenders' commitment to rehabilitation should not be discouraged by putting rewards beyond a very distant horizon;

3) Such harshness is due only to the offence committed, without any regard for the offenders' personality, behavior, and social dangerousness (or lack thereof). The Italian Constitution assumes that the offender's personality is never irreversibly marred, however heinous a crime may be. The offender has the responsibility to engage on a path towards critical revision and rehabilitation; society, on its side, must allow and stimulate such progress. Therefore, the ICC removed the rigid legal barrier.

There is an inconvenient issue here: because of the effect of the decision, benefits become accessible for life sentences, but not for fixed-term sentences (e.g., 30 years) for similar offences (e.g., kidnapping for ransom which does not cause the victim's death). In a sense, the former sentences become more flexible than the latter. The ICC is aware of this but feels unable to extend the scope of its ruling, which is bound to the specific question raised.

And yet the Court is undeterred: an annulment shall not be denied only because it creates abstract inconsistencies within the legal order. It is for the legislator to address and resolve these problems. Of course, one may add, nothing prevents a similar constitutional question from also being raised before the ICC on fixed-term sentences, in separate proceedings.

The second judgment[4] concerned the punishment for bankruptcy; not the main sanction (prison time), but the additional sanction, namely the prohibition from owning any commercial enterprise (and holding managing offices within one). This prohibition is mandatory and always lasts 10 years.

In principle, all punishments should have a duration comprised between a minimum and a maximum, to be calibrated by the judge in each single case. Only exceptionally may the term be directly and precisely fixed by law, and only if it reasonably fits the whole scope of behaviors which the criminal provision aims at punishing. This is not the case with bankruptcy; it has several legal variants, each of them applicable to a wide range of situations. However, a further issue emerges: what should be the duration of these additional sanctions, if the fixed 10-year duration is unwarranted? Neither law nor logic gives "one right answer." A whole range of options is theoretically available.

In these situations in the past, the ICC would issue an inadmissibility ruling: there is a univocal constitutional problem, but no equally univocal constitutional solution (no "set rhymes" for replacing the wrong "verse" in the law); only the Parliament may choose one. Here, the ICC takes a less deferential stance. It notes that the Parliament has not heeded the ICC's own call (in a judgment of 2012[5]) for a general reform of additional sanctions. It is unbecoming to wait any longer. Now, according to the ICC, it is necessary, but also sufficient, to seek within the existing legal system a plausible alternative to the 10-year fixed term[6]. In this case, the alternative is the "up to 10 years" duration established for the same punishment in different but comparable economic crimes. This gives the judge enough discretion to make the punishment fit the crime and to preserve the distinctive dissuasive effect of this type of additional sanction. The Court eventually notes that the Parliament may still amend the law if it seems appropriate.

Arguably, the most surprising novelty of the year came in the third case, concerning the criminal indictment of assistance to suicide.[7] For the ICC, the prohibition of such assistance is constitutionally sound, in general. But a distinction must be made when specific conditions are met: the relevant illness is irreversible and causes intolerable physical or psychological suffering or the patient survives only due to life support but is still capable of free and fully conscious decisions. In these tragic instances, patients already have a statutory right to refuse life support (and obtain continuous deep sedation); therefore, for the ICC, it is unreasonable to deny them the right to request assistance in anticipating their own death when they find this option more dignified and more merciful for their loved ones.

Here a serious problem arises. The option for assisted suicide should be exercised only within a specific and carefully crafted legal framework. The issues in need of regulation include the relevant preliminary assessments; the medical enactment of the assistance, possibly only in public hospitals; and the conscientious objection of doctors and paramedics. Also, every patient must have effective access to palliative care before alternatives are even considered. All these issues have substantial political implications and, therefore, should be settled by the Parliament.

[4] Corte costituzionale, Judgment of 5 December 2018, No. 222.

[5] Corte costituzionale, Judgment of 31 May 2012, n. 134, Giur. cost., 2012, III, 1850 (It.).

[6] The ICC also builds on its Judgment of 10 November 2016, No. 236, Foro it. 2017, I, 97 (It.), in our 2017 report (p. 158, fn. 10).

[7] Corte costituzionale, Order of 16 November 2018, No. 207.

In the past, when this kind of problem arose, normally the question would be dismissed as inadmissible, in deference to the legislative discretion of the Parliament; if the latter would not intervene, and the same question happened to be raised again at a later point, the ICC might abandon its self-restraint and lay hands on the relevant legislation (see also above). This time, the ICC took a different stance: it still refused to immediately take action and strike down or manipulate the law as things stood (*allo stato*); but it did not conclude the judgment (with an inadmissibility ruling) and instead postponed it to a later date (24.09.2019) to see if the law would be amended through a political process. This was an attempt at imitating techniques employed by other constitutional tribunals: the decision explicitly quotes the Supreme Court of Canada in *Carter v Canada*;[8] and a study by the ICC's Research Office (Comparative Law Unit) refers to similar practices by the Austrian and German constitutional tribunals.[9] There is a fundamental difference: the ICC neither struck down a legal provision while suspending the ruling's effects nor set a binding term for the legislator; it simply delayed its judgment, keeping it entirely open in its outcome, albeit on grounds that might support a final annulment.

III. CONSTITUTIONAL CASES

1. Judgment No. 5 of 2018: Mandatory vaccination imposed by law

In this case, the Court considered two applications from the Veneto region contesting a decree-law laying down urgent provisions concerning mandatory vaccinations imposed by national law. The provisions listed 10 mandatory vaccines for all minor children under the age of 16, four of which were already mandatory, and six of which were elevated from recommended to mandatory status. Under the decree-law, the mandatory vaccines were a requirement for access to early childhood educational services, making enrollment contingent upon the presentation of a certificate of vaccination. Noncompliance could also result in administrative fines. The Court ruled that urgent provisions were appropriate given the preventive nature of vaccinations and the declining level of coverage in Italy. Second, the Court clarified that the choice of tightening up legislation to compel vaccinations was not unreasonable, as, in medical practice, recommendation and obligation are conjoined concepts, and a shift from the latter to the former is justified by the growing concerns on vaccination coverage. Third, it stated that requiring a certificate to enroll in school and imposing fines was reasonable, not least because the legislator had provided for initial steps that included one-on-one meetings with parents and guardians to inform them about vaccine efficacy. Finally, it noted that epidemiological conditions must be constantly monitored and that in the future, depending on the relevant findings, it could be possible to experiment with downgrading certain vaccines from mandatory to suggested status.

2. Judgment Nos. 81 and 183 of 2018: Subnational minorities and symbols

These decisions deal with two separate regional legislative initiatives originating from the Veneto region (which has recently been particularly active in constitutional litigation).

In the first case, the Court considered a direct application from the President of the Council of Ministers challenging a Veneto regional law classifying the "Veneto people" as a national minority under the international Framework Convention for the Protection of National Minorities. The Court struck down the whole regional law as unconstitutional. The Court's main argument was based on the fact that protection of minorities, as an expression of the principle of pluralism, is to be included among the supreme principles of the constitutional system. Within this framework, both regional and State legislation are called to ensure the objective of the concrete effectiveness of such protection. However, the Court held that the identification of national minorities is an exclusive competence of the State legislator. Regions may not classify their own population as such and automatically as "national minorities." This would undermine the unity and indivisibility of the Republic, as safeguarded in Article 5 of the Constitution.

In the second case, the Court decided on a constitutional issue concerning another regional legislation adopted in Veneto. This regional law required State bodies and entities to display certain regional flags outside of buildings and on certain vessels within the regional territory. The Court struck down these provisions as unconstitutional, and held that "the contested legislation encroaches upon the exclusive legislative competence of the State over the legal and administrative organisation of the State and of national public bodies." Interestingly, the Court drew a parallel between State-region relations and the EU-Member State relations. As Member States display the EU flag on governmental buildings but may not impose the display of Member States' flags on EU governmental buildings, regions are required to display national symbols, but may not require national authorities to display regional symbols.

3. Judgment No. 115 of 2018: Taricco saga (final episode)

With this judgment, the ICC wrote the last chapter of an important saga that called the ICC and the Court of Justice of the European Union into a historical judicial dialogue.

The stake at issue derives from the so-called "Taricco case" of the CJEU (Case C-105/14, *Taricco and others*), originating a saga consisting of multiple decisions.[10] With this last episode, the ICC ruled on the applicability of the so-called "Taricco rule" within the Italian legal system. This rule—interpretatively drawn by the CJEU from Article 325 TFEU—implied for national courts the obli-

[8] Carter v Canada (AG), 2015 SCC 5.

[9] Maria Theresa Rörig (ed.), 'Le pronunce di incostituzionalità e di incompatibilità costituzionale nella giurisprudenza costituzionale tedesca e austriaca', October 2018, Comp. 242, in https://www.cortecostituzionale.it/documenti/convegni_seminari/242_incompatibilita_Germania_Austria.pdf

[10] For an overview of the preceding episodes of this saga, see our 2016 and 2017 reports.

gation to set aside national legislation on the limitation of offences, which, in the situations and under the circumstances described by the CJEU, compromises the efficacy of the penalty. This consequence was particularly problematic in the Italian legal system, as statute of limitation is considered an institution of substantive criminal law, and falls therefore within the scope of the principle of legality in criminal matters. Thus, some Italian judges, when called to apply the "Taricco rule" after the CJEU decision, claimed that by disapplying the national legislation concerning the limitation they would have violated Italian constitutional identity, and in particular the principle of legality in criminal matters. The ICC, called to decide on these constitutional questions, made a reference for a preliminary ruling to the Court of Justice, substantially sharing the referring judges concerns, but giving a chance to the CJEU to settle the issue by means of (re-)interpretation of the "Taricco rule." The CJEU accommodated the ICC's concerns and revised its previous decision: national courts were given the chance to scrutinise the level of determination in the individual case in order to avoid any possible clash with the higher level of protection that is ensured to the principle of legality in criminal matters in the Italian legal order, and in particular by safeguarding the prohibition of retroactive application of criminal law. With its Judgment no. 115 of 2018, the ICC closed the saga by acknowledging the CJEU's re-interpretation. Moreover, the ICC held that in no case could the "Taricco rule" apply in the Italian legal order, even if the application of the rule turned out to be not retroactive, as the "Taricco rule" violated the constitutional principle of legal certainty in criminal matters. In fact, the Court held that the rule was overly vague and indeterminate. However, because the violation of the principle of legal certainty in criminal matters served as an absolute bar on the introduction of the "Taricco rule" into the Italian legal system, the Court held that the Italian legal provisions that would otherwise work to incorporate the rule into the legal system did not do so; therefore, the questions raised by the referring courts were unfounded.

4. Judgment No. 120 of 2018: Legal status of the ECtHR and European Social Charter

In this case, the Court heard referral orders challenging the constitutionality of legislation that prohibited the establishment of trade unions by members of the armed forces with reference to ECtHR case law and the European Social Charter. As a matter of sources of law, the ICC held that decisions of the European Committee of Social Rights do not entail the same status as ECtHR case law in the Italian legal system. On the contrary, as the Charter is to be labeled under the general umbrella of international law under Article 117(1) of the Italian Constitution, the European Committee decisions are merely "authoritative." However, the Court found that the contested legislation—in the part in which it prohibits, independently and in general, the trade union freedom of the Italian military—was incompatible with the ECHR and the European Social Charter, but that these instruments allowed for the imposition of restrictions in relation to certain special categories, such as the armed forces. The Court also held that Italian constitutional law required the regulation of these restrictions—and the restrictions' limitations—by law. Therefore, the Court instructed the legislature to adopt suitable legislation, balancing all constitutional interests involved. In the meantime, considering the utmost importance of the constitutional rights in discussion, the Court held that their effectiveness could not be conditioned to legislative action (or inaction), and therefore found that certain provisions regulating military bodies, already in force, could be applied pending the enactment of a new legislative framework.

5. Judgment Nos. 106, 107 and 166: Social rights of legal immigrants

In three judgments, the ICC reiterated its long-established finding that Article 3 (principle of equality) of the Italian Constitution is a bulwark against policies that rely on continued presence in a territory as a requisite for accessing social benefits, in a thinly veiled attempt at excluding recent immigrants from welfare. As a matter of principle, situations of need or hardship, directly related to the human person as such, are the foremost prerequisite for enjoying social benefits: when legal immigrants incur such a situation, they should not be discriminated against. In theory, some benefits could require a stronger and more stable integration in the local territory and community. This might happen for social housing, as frequent changes in tenancy would aggravate and hamper administrative action. But such limiting choices must not be arbitrary or unreasonable. The ICC also relied on anti-discriminatory EU law as a significant complement in the judicial enforcement of equality. Two of the three rulings concerned access to, respectively, social housing and kindergartens; non-EU citizens were entitled only if they had been legal residents in the region for a long time (respectively, 10 and 15 years).[11] The third judgment struck down analogous national provisions concerning support for housing expenses.[12] Indeed, in this field, the ICC's scrutiny was far from deferential towards both regional and national laws.

6. Judgment Nos. 174 and 186 of 2018: Prisoners' rights

Judgment No. 149 (see above) was not the only one in the year dealing with prisoners' rights, even when they are convicted of serious offenses. In another instance, a mother of three (two 5-year-old twins and one 3-year-old child) was serving a sentence for drug trafficking. Several law provisions allow mothers of young children to avoid detention in prisons, but only one provision, concerning prison leaves, was applicable in the specific situation. Yet the sentence for the relevant offence was among those precluding leaves, both for working and taking care of young children, until one-third of the prison time had been served. For the ICC, this violated Article 31 of the Italian Constitution: the children's interests have a special constitutional status and deserve a distinct protection; therefore, care-leaves cannot be equalized with work-leaves, where only the offender's right to resocialization is at stake. It is true that

[11] Corte costituzionale, Judgment of 24 May 2018, No. 106, and of 25 May 2018, No. 107.

[12] Corte costituzionale, Judgment of 20 July 2018, No. 166.

convicted parents may still obtain leaves if they cooperate with justice (or if cooperation is proved to be impossible, irrelevant, etc.) and that this condition is not, in principle, an unreasonable measure for fighting organized crime. But no rule should rigidly sacrifice children's best interests in the name of social defense. Therefore, again, the ICC removed the rigid legal barrier and allowed each case to be individually assessed.

Another judgment concerned high-security detention, where special limitations to prisoners' rights were adopted to prevent contacts with criminal organizations, and also interactions with inmates belonging to the same or different (allied or hostile) organizations. In 2009, a new limitation, previously considered only in administrative guidelines, was imposed by statutory law: the prohibition to cook raw food. This limitation was entirely unreasonable for the ICC; it served no purpose for either internal security or the fight against crime. Therefore, it had a merely afflictive character, whereas those detained in high-security conditions "must retain access to small gestures of ordinary life, particularly precious as they are the last residues where their individual freedom can expand." The measure was struck down as both unreasonable and incompatible with the humanity prescribed by Article 27 of the Italian Constitution for all punishments.

7. Judgment No. 194 of 2018: Labor law reform, unjustified dismissal

In this case, the Court considered a referral order challenging a legislative decree on permanent employment contracts with increasing protection over time (known as "jobs-act"), which made provision for compensation within fixed bands in the event of unfair dismissal based solely on the length of service of the dismissed employee. According to the contested provisions, the compensation consisted of two months' wages for each year of seniority of the employee (between the minimum of six and the maximum of 36 months' salary). The Court struck down the contested legislation as partly unconstitutional, as it was incompatible both with national constitutional law and with the European Social Charter. Specifically, the ICC struck down those norms that automatically tied the amount of compensation to the length of service of the dismissed employee. The Court ruled that, in treating different situations identically, the criterion in question violated the principle of equality: "the detriment caused in various cases by unfair dismissal depends upon a variety of factors. Whilst length of service is certainly relevant, it is thus only one of many." The Court also held that the lack of flexibility rendered the mechanism for establishing compensation unreasonable. In addition, the mechanism failed to achieve a balanced settlement between the respective interests of the employer and the employee.

IV. LOOKING AHEAD

In September 2019, the next stage of the proceedings on the right to assisted suicide will take place. As noted above, a new, experimental decisional technique has been created. The actual mix of activism and restraint will become clear only at the end of this controversial case.

An important judgment will concern the 2018 budget law. Its entire text has been rewritten by the Government with a last-minute amendment (after extensive negotiations with the European Commission) and has been approved by the Senate with a particularly hasty procedure. Some opposition senators have challenged the deliberation before the ICC (in a conflict of attribution), arguing that in such a short time it was impossible to read and understand the text before voting on it. The preliminary stage of this litigation should be completed in January 2019.

Many other issues are on the rolls for 2019, e.g., the rights of offenders, including those who are mentally ill or have a life sentence for very serious crimes (barring access to most benefits: see above); those of sex-workers, in the light of the criminal prohibitions concerning prostitution; stepchild adoption in same-sex couples; and on a more technical note, the capacity of the antitrust administrative authority to challenge laws in incidental proceedings as if it were a judicial authority. Furthermore, some questions on the relationship with the Court of Justice of the European Union remain open after the evolutions in 2017.

V. FURTHER READING

Antonia Baraggia and others, 'I·CONnect Symposium–The Italian Constitutional Court on Assisted Suicide' <http://www.iconnect-blog.com/2018/12/introduction-to-i-connect-symposium-the-italian-constitutional-court-on-assisted-suicide/> accessed 8 January 2019

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Tania Groppi and Irene Spigno, 'The Constitutional Court of Italy', in András Jakab, *Comparative Constitutional Reasoning* (Cambridge University Press, 2017)

Giovanni Piccirilli, 'The "Taricco Saga": The Italian Constitutional Court Continues Its European Journey: Italian Constitutional Court, Order of 23 November 2016 No. 24/2017; Judgment of 10 April 2018 No. 115/2018 ECJ 8 September 2015, Case C-105/14'; Ivo Taricco and Others, 5 December 2017, 'Case C-42/17, M.A.S. and M.B.' *European Constitutional Law Review* 1

Armin von Bogdandy and Davide Paris, 'Building Judicial Authority: A Comparison between the Italian Constitutional Court and the German Federal Constitutional Court', MPIL Research Paper Series No. 2019-01, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313641&download=yes> accessed 8 February 2019 and forthcoming in Vittoria Barsotti and others (eds), D*ialogues on Constitutional Justice: Comparative Reflections on the "Italian Style"* (Oxford University Press, 2019)



Japan*

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I. INTRODUCTION

In 2018, the project of authoritarian constitutionalism pushed by the Abe administration was frustrated by unexpected domestic and international events. Even so, Abe was eager to challenge the status quo of both "large-c" Constitution and "small-c" constitution. In this situation, the judicial branch in the 2018 term did not play a leading role. Rather, the 2018 term showed how important public opinion and the extra-judicial system were as guardians of the Constitution. In the end, Abe's attempt towards constitutional amendment came to a standstill because of a failure to get broad public support. Furthermore, the governmental action to introduce a website-blocking system also suffered a setback in the pre-legislative process. On the other hand, the controversy between Okinawa and the central government over relocation of the US military base is entering into a new stage of *Ackermanian constitutional politics.*

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Movement towards constitutional amendment

The Constitution of Japan has never experienced any amendment since its creation on May 3, 1947. Prime Minister and President of the Liberal Democratic Party (LDP) Shinzo Abe has nonetheless shown a strong desire to amend it. For amendment, the Constitution requires the support of two-thirds (a supermajority) of both houses of the Diet and a simple majority of voters of the Japanese people. However, this hasn't become much of a great obstacle for Abe. On July 10, 2016, in the regular election of members of the House of Councillors (the upper house of the Diet), the LDP and other pro-amendment parties gained a supermajority. Subsequently, in the general election of members of the House of Representatives (the lower house of the Diet) on October 22, 2017, the governing coalition of the LDP and Komeito retained a supermajority.

Soon after the general election in 2017, the LDP released a paper setting out four items for amendment: (1) clarification of constitutionality of the Self-Defense Force (SDF), (2) introduction of emergency powers, (3) fixing prefectures as fundamental districts for House of Councillor elections and (4) enhancement of education. Concerning the first point, the government has repeatedly made statements that the SDF is not unconstitutional even under the current Article 9 of the Constitution. Nevertheless, Abe claims that the amendment of Article 9 is required in order to eradicate views regarding the SDF as unconstitutional. The paper presented two options to clarify the constitutionality of the SDF. The first option was to keep all of the present Article 9 and just add wording stipulating the status of the SDF. The second option was to delete Article 9 (2) as well as add the stipulation wording. Of these two options, Abe has placed the first as the most workable alternative. Based on this paper, the LDP aimed to present a draft of the amendment to the Diet in 2018.

However, the movement toward the amendment began to lose momentum at the beginning of 2018. In February 2017, a scandal broke out when media reported that Abe and his wife might have been involved in the

* We thank Professor Yasuo Hasebe (Waseda University) for valuable advice and Professor Keith Carpenter (Kobe University) for language editing.

improper disposal of state-owned land to a school operated by an acquaintance of theirs. Abe strongly denied their involvement in sessions at the Diet. However, in March 2018, a further scandal broke when media reported that the Finance Ministry had tampered with official documents submitted to the Diet to make their content consistent with Abe's responses in the Diet. After this new scandal broke out, discussion at the Diet on amendment stopped, and the approval rating of the Abe administration dropped to nearly 30 percent. In addition to this, the détente created by the North Korea–United States Singapore Summit on June 12 extinguished the intense feeling of anxiety people had for national security. Finally, the LDP was forced to abandon their initial plan to present a draft amendment to the Diet in 2018.

2. Website-blocking controversy

There was a heated argument over the pros and cons of legislation on website blocking in 2018. Piracy websites offering manga and anime for free inflicted serious damage on the content industries. Although copyright holders could seek legal remedies such as injunctions and compensation from infringers, the industries argued that these remedies were not enough because operators of the piracy websites were anonymous and the online locations of these websites were outside Japan. They requested the government to introduce legal measures that oblige Internet Service Providers (ISPs) to block access to the piracy websites by an executive or judicial order.

In EU law, arguments against website blocking are based on human rights; in particular, freedom of expression and free access to information. On the other hand, in Japan, the arguments on blocking are based on not only these rights but also the secrecy of communications. However, the underlying logic is somewhat complex.

Article 21(2) of the Constitution provides "the secrecy of any means of communication [shall not] be violated." Traditional interpretation of this article has been that the "acquisition" of information without consent of the communicators corresponds to a "violation" prohibited by Article 21(2) and that even if the information is acquired legitimately, "using" it or "leaking" it to others against the will of communicators is also regarded as a "violation." It is not clear whether this constitutional protection of the secrecy of communication has *horizontal effect*. However, because Article 4 (1) of the Telecommunications Business Act (TBA) also provides "The secrecy of communications being handled by a telecommunications carrier shall not be violated," ISPs as telecommunications carriers are prohibited by law from violating the secrecy of communications. A violator of this prohibition incurs criminal sanction.

Under the above legal rule, Japanese law regards website blocking as an infringement of the secrecy of communications for the following reason. Generally, ISPs cannot carry out their Internet connection service without "acquiring" and "using" information such as the hostname, IP address and URL of the website to which their customer wants access. This "acquiring" and "using" in itself does not correspond to a "violation" of the secrecy of communications insofar as it is conducted only to the extent necessary for legitimate business activity. In the case of blocking, however, the ISPs use the information from the communications not for a website connection which the customer requests but for blocking access to the website against their will. Even if the process of blocking proceeds automatically based on an algorithm, such usage is regarded as "using without permission," which the TBA prohibits.

The development of blocking disputes in 2018 can be divided into two stages. The first stage was a move leading up to an executive opinion issued on April 13. As described above, voluntary blocking by ISPs is prohibited by the TBA. However, blocking child pornography websites has been considered a justifiable "emergency action" (Kinkyu-hinan) permitted under the Criminal Code to protect the personal rights of children. Although conventional wisdom has considered that blocking justified as "emergency action" can only be applied against child pornography, on April 13, the Intellectual Property Strategy Headquarters, headed by Prime Minister Abe, issued an opinion without sufficient discussion that ISPs should block access to three specified piracy websites as "emergency action." Although the legal characteristic of this opinion is obscure, NTT (the largest telecommunications operator in Japan) immediately introduced a policy to block access to the websites mentioned by the April 13 opinion.

This sequence of events was fraught with serious problems from the perspectives of the separation of powers and the rule of law because while the Diet has protected the secrecy of communications of individuals by legislating the TBA, the April 13 opinion undermined this right significantly without due legal process. Critics argued that if this approach applied to other targets like defamation, false rumor and terrorism, freedom of communication on the Internet will disappear.

However, the direction drastically changed in the second phase, which is a move towards legislation on blocking. Soon after releasing the April 13 opinion, the government established a task force (Anti-Piracy Websites Task Force) to determine the appropriate direction of legislation on blocking. The members of the task force consisted of stakeholders, lawyers and legal academics but no politicians. It is noteworthy that the members included not only those who support blocking but also many others who oppose it. It can be inferred that the government needed to include members who oppose blocking because the legislation on it requires professional knowledge, which such opponents have, and the government was unable to ignore public opinion against blocking.

Under the Constitution of Japan, the constitutionality of blocking by executive order is suspect on the grounds of being "censorship," which is prohibited. On the other hand, a blocking injunction by judicial order is considered to be constitutional provided there are no alternative means. However, many members of the task force pointed out that there are effective measures other than blocking, e.g., advertising regulation, to cope with piracy websites. As a result, the

task force could not produce a report within the scheduled deadline. The legislation on blocking stumbled at the entry stage, and its completion is nowhere in sight.

It is not unusual that such a professional committee plays an important role at the beginning of the legislative process in Japan. Rather, as this case indicates, it can be said that such a pre-legislative process constitutes a significant constitutional guarantee in the Japanese governmental system.

III. CONSTITUTIONAL CASES

2018 was a year that saw few constitutional cases before the Supreme Court that could be considered landmarks. Although the Grand Bench of the Supreme Court decided two cases, they did not make any monumental change to the landscape of constitutional review. Japanese judiciary has both active and passive faces, like Janus. It might be said that the passive face dominated in 2018. However, this result is largely due to the nature of the cases with which the Supreme Court dealt. It seems premature to think that it reflects a long-term trend.

1. Judge Okaguchi Case: Judge's freedom of expression to tweet

The first Grand Bench decision in 2018 was the *Judge Okaguchi Case*.[1] In this case, the Grand Bench made a judgment on a dispute between the freedom of expression to tweet and the official duty of a judge.

The Constitution and other laws give judges specially enhanced protection for their status to guarantee their independence. Pursuant to Articles 64 and 78 of the Constitution, judges are not to be removed except by proceedings of an impeachment court set up by the Diet. However, "If a judge has violated his/her official duties, neglected his/her jobs or degraded himself/herself, that judge shall be subjected to disciplinary action by judicial decisions" (Article 49 of the Court Act). While the disciplinary action is only a "reprimand" (Kaikoku) or a "non-penal fine" of not more than 10,000 yen, for a judge such disciplinary action is widely considered to be as serious as a criminal penalty. The problem is that the meaning of "to degrade himself/herself" is not clear. In particular, until the Judge Okaguchi Case, there had been no precedent on what kind of expressions this disciplinary rule covers.

Kiichi Okaguchi is a Tokyo High Court Judge. He has a Twitter account that acquired more than 40,000 followers. He occasionally posted tweets containing sexual expressions and words, and these tweets had given rise to public censure. The Chief Judge of the Tokyo High Court gave him strong warnings on two occasions. The first was an oral warning against three tweets including a photograph of Judge Okaguchi wearing only white briefs. The second was a warning in writing against a tweet which described a victim of sexual crime as "a 17 years old woman who was murdered mercilessly by a man having aberrant sexual propensity" and provided the URL of the court website where the judgment of this criminal case was posted.

These warnings were still not disciplinary action under the Court Act. However, after he posted a tweet on May 17, 2018, proceedings for disciplinary action against Judge Okaguchi were initiated. This tweet was about a civil law case as follows. The plaintiff left her dog behind in a park because her boyfriend did not like dogs. The defendant had found the dog and nurtured it carefully for three months. The plaintiff ended the relationship with the boyfriend and then requested the defendant to return the dog. The defendant denied this request, and therefore the plaintiff filed a suit requesting the return of the dog based on her property right. The Tokyo District Court allowed the plaintiff's claim. On May 17, Judge Okaguchi, posting a link to a news website which reported this civil case, tweeted as follows. "One picked up a dog which had been left at the park and took care of it as a pet. Then three months later, the original owner appeared and said, "'Please give it back to me.'" "What? You? You abandoned it, didn't you? Even though you have left it for three months,…." "The result of this trial is…."

The plaintiff, who had read this tweet, complained to the Tokyo High Court. Accordingly, the Tokyo High Court filed a petition for disciplinary action against Judge Okaguchi in the Supreme Court on the ground that by his tweet on May 17 he had "degraded himself" under the Court Act. The judgment of a disciplinary action case against a High Court judge is made by the Grand Bench of the Supreme Court. However, the hearing is held in camera, and a judge who is subjected to disciplinary action by the Supreme Court is not given further opportunity to appeal in the form of a contentious case, for which a public hearing is guaranteed.

Judge Okaguchi and his counsel contended that he had only introduced the civil case to the public; hence, if such a tweet is subject to disciplinary action, judges will hesitate to publish even commentaries on legal cases. Moreover, they argued prohibition of such a tweet infringes the freedom of expression guaranteed by Article 21 of the Constitution.

Regarding free speech cases, in the *Horikoshi Case* in 2012,[2] the Supreme Court showed a sign of shifting from an old, deferential constitutional review paradigm established by the *Sarufutsu Case* in 1974 to a new, stricter one.[3] Thus, the *Judge Okaguchi Case* attracted academic attention concerning how this paradigm shift might be reflected in the judgment.

In this case, the reasoning of the Grand Bench of the Supreme Court was very simple. Initially, it showed its interpretation of Article 49: "'to degrade himself/herself' prescribed in the Article can be construed to mean every behavior, regardless of whether an official act or purely private act, which

[1] The Grand Bench decision of October 17, 2018, 72 *Minshu* (forthcoming).

[2] Second Petty Bench Judgment of December 7, 2010, 66 *Keishu* 1337.

[3] Grand Bench Judgment of November 6, 1974, 28 *Keishu* 393; see also Yasuo Hasebe, 'The Supreme Court of Japan, One Step Forward (But Only Discreetly)' (2018), 16 ICON 672.

undermines public confidence in judges or invokes doubts of a fair trial." Subsequently, the Grand Bench denounced Judge Okaguchi on the basis that he conveyed to the public without adequate explanation a unilateral evaluation that the filing of suit by the plaintiff was unjust; that such behavior gave rise to public suspicion that judges make judgments based only on superficial information; and that such behavior also wounded the sensibility of a private citizen guaranteed the right of access to the courts. In conclusion, the court declared that Judge Okaguchi's behavior should be regarded as having "degraded himself" as prescribed in Article 49 and issued him a reprimand as disciplinary action. Although the Grand Bench touched upon the problem of free expression, the reference was surprisingly short. After it held "each judge enjoys the constitutional guarantee of free expression and is entitled to free expression as an ordinary citizen," it left only one sentence: "Judge Okaguchi's behavior overstepped the permitted limit of judges' freedom of expression."

Because this decision was entirely based on the specific facts of the case, the range where it functions as a precedent will be very small. On the other hand, the Supreme Court failed to show clearly the scope of application of Article 49. Therefore, from now on, there is a possibility that such ambiguity will make judges hesitate to express their views, and will invite political intervention when they do. However, it may be evaluated positively that the Grand Bench did not rely on the old *Sarufutsu* paradigm in spite of being able to do so.

2. 2017 General Election of the House of Representatives Case: equality in terms of the value of a vote

The second Grand Bench case in 2018 was a suit by voters to seek invalidation of the general election of members of the House of Representatives on October 22, 2017, based on the grounds that the demarcation of constituencies for this election created inequality in the value of votes between districts and was therefore unconstitutional.[4]

In Japan, constant population movement has caused disparity in the value of votes between rural and urban districts. Such mal-apportionment is a chronic disease of the Japanese election system. However, the LDP had been reluctant to resolve the mal-apportionment, which would entail a reduction in the number of seats in rural areas where the LDP is stronger. Therefore, whenever a general election is carried out, voters have challenged the election and election system, as in this case.

Since a 1976 Grand Bench judgment, the Supreme Court has understood that the Constitution requires equality in the value of votes notwithstanding a lack of provision that explicitly requires it.[5] However, at the same time, the Supreme Court has not regarded equality in the value of votes as the absolute criterion for determining the design of an election system. When establishing specific constituencies, the Diet is allowed to take into account various factors, including the size, population density, composition of residents, transportation conditions and geographical situations of the respective areas in addition to equality in terms of the value of votes as long as it is "reasonable."

Moreover, even when the Diet considered factors to be "unreasonable," the Supreme Court has not immediately held that an election system is unconstitutional or that the election following the election system should be invalidated. Thus, according to the Supreme Court, even if unreasonable disparity in terms of the value of votes is in a state contrary to the constitutional requirement (this is generally called "a state of unconstitutionality"), such a state is not in violation of the Constitution (this is literally called "unconstitutionality") as long as the Diet does not fail to take corrective action within "a reasonable period of time." Furthermore, even in the case that an election system was "unconstitutional," the Supreme Court has only declared that the election based on such a system was illegal, without invalidating the election.

Since 1994, what had been employed as a criterion for the demarcation of single-seat constituencies for members of the House of Representatives was the so-called "rule of reserving one seat per prefecture," which apportioned at least one constituency to each prefecture regardless of its population. It was clear that this rule had increased the disparity between constituencies in terms of the value of votes. A 2011 Grand Bench judgment found this rule to be unconstitutional.[7] Following this judgment, in 2012, the Diet enacted the 2012 Amendment Act, which abolished the "rule of reserving one seat per prefecture." However, the determination of new alternative criteria for demarcation was postponed. For a while, without clear criteria, the Diet had made ad hoc revisions of the demarcation towards satisfying the constitutional requirement in relation to the disparity in the value of votes. While avoiding a declaration of unconstitutionality, both 2013 and 2015 Grand Bench judgments continued to conclude that demarcation was in "a state of unconstitutionality."[8]

With this background, in January 2016, the Research Commission on the Election System, established by the House of Representatives, submitted a report suggesting the "Adams' Method" as the best criterion to achieve both the principles of proportion to population and consideration to rural areas.[9] Although the opposition parties argued that this

[4] Grand Bench Decision of December 19, 2018, *Minshu* (forthcoming).

[5] Grand Bench Judgment of April 14, 1976, 30 *Minshu* 223.

[6] Grand Bench Judgment of November 6, 1974, 28 *Keishu* 393; see also Yasuo Hasebe, 'The Supreme Court of Japan, One Step Forward (But Only Discreetly)' (2018), 16 ICON 672.

[7] Grand Bench Judgment of March 23, 2011, 65 *Minshu* 755.

[8] Grand Bench Judgment of November 20, 2013, 67 *Minshu* 1503; Grand Bench Judgment of November 25, 2015, 69 *Minshu* 2035.

[9] Adams' Method is a method of apportionment that US President John Adams once proposed.

Adams' Method should be adopted immediately, reflecting the strong preferences of the LDP, the Diet enacted the 2016 Amendment Act prescribing the introduction of the Adams' Method after the 2020 national census.

The demarcation of the 2017 general election challenged in this case was not based on this new Adams' Method. However, there was no constituency in which the maximum disparity exceeded 1:2 and the maximum disparity between constituencies had been reduced to 1:1.979 as a result of the gradual reforms. In this case, following the traditional framework, the Grand Bench held that the demarcation was not in "a state of unconstitutionality" for the first time since the 2011 Grand Bench judgment. The main factors that this 2018 Grand Bench judgment took into consideration were that the introduction of the Adams' Method is scheduled to be implemented after 2020 and the disparity had been reduced to 1:1.979. There are criticisms of this judgment in that it is logically impossible to include a future plan as a factor of judgment on whether a current demarcation is in "a state of unconstitutionality" or not and that disparity still exists even if it is below 1:2. Anyway, the 2018 Grand Bench judgment showed the incremental approach of the Supreme Court. The Court does not try to impose the constitutional ideal as long as the Diet continues to make gradual reforms.

IV. LOOKING AHEAD TO 2019

In 2019, the abdication of Emperor Akihito and the enthronement of Crown Prince Naruhito are scheduled events that are constitutionally and socially important. Under prevailing legislation, the emperor was not allowed to abdicate, but in 2016, Akihito, at the age of 82, appealed to the public, citing the difficulties of performing his duties due to being elderly. Accordingly, in 2017, a revision of the law that would allow Akihito to abdicate was been made. Under the terms of the Constitution, the Emperor has no political authority, but the social influence of the imperial succession is great. For example, the Japanese era name (*Gengo*) will change from *Heisei* to a new one. In addition, a religious ritual called *Daijo-sai,* based on the Shinto religion, will be performed by the new Emperor. Public money is to be used for the *Daijo-sai,* and it is likely to stir some controversy because it violates the principle of separation of state and religion prescribed in the Constitution.

In the judicial field, there is a pending case that challenges the current civil law restriction on marriage to heterosexuals. In a judgment on January 23, 2019, the Second Bench upheld the constitutionality of the law requiring the removal of gonads to change gender based on a sexual identity disorder. The grounds of the decision were the undesirability of sudden changes to gender distinction. This case reinforces the expectation that the courts will avoid a judgment that alters the conservative concepts of family and gender in a pending case on the status of a same-sex marriage.

Furthermore, development of friction surrounding American military bases in Okinawa will be unmissable as *Constitutional Politics.* The central government is planning construction of a new military base for the United States in Henoko Bay in Okinawa. Although the prefecture has challenged this plan in lawsuits, it has lost every case. However, Denny Tamaki, who has opposed the central government's plan, won the 2018 Okinawa gubernatorial election and has scheduled a referendum in 2019 by the people of Okinawa concerning the central government's plan.

V. FURTHER READING

Yasuo Hasebe, 'The Supreme Court of Japan: A Judicial Court, Not Necessarily a Constitutional Court', in Albert H. Y. Chen and Andrew Harding (eds.), *Constitutional Courts in Asia: A Comparative Perspective* (Cambridge University Press, 2018)

Yukiko Nishikawa, *Political Sociology of Japanese Pacifism* (Routledge, 2019)

Robert J. Pekkanen, Steven R. Reed, Ethan Scheiner and Daniel M. Smith, *Japan Decides 2017: The Japanese General Election* (Palgrave Macmillan, 2018)



Kenya

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I. INTRODUCTION

2017 was an election year. Kenya begins to fight one election the moment the previous one is ended, so 2022 dominated headlines in 2018—but not this paper.

A dominant theme in politics is a continued struggle to maximise the opportunities for power that the constitution presents: governors pitted against county assemblies, National Assembly against the other house of Parliament, the Senate, and a general unwillingness on the part of the President to accept the constraints of office, and on the part of the national government to give full rein to the counties. Some of these issues are reflected in the cases considered here.

2018's major constitution-related developments (elaborated below) included the "swearing-in" of an opposition leader as "People's President" and a curious rapprochement a few months later between him and the President. The constitutional ramifications of this are most likely to be felt in 2019.

Another issue, still rumbling on, is the failure to achieve the constitutionally promised "no more than two-thirds of either gender" among members of public bodies, especially those elected.

And the President's apparent desire to be seen as combatting corruption has had various constitutional spin-offs.

Meanwhile, though sometimes in response to these broader political currents, the process of giving meaning and life to the Constitution continues, especially the system of devolution reintroduced in 2013. Some county governors seem to be making genuine efforts to make use of the possibilities for development it offers. But massive corruption at that level has continued.

This paper does not go into the many election petitions from the 2017 elections. But issues of human rights and executive overreach are prominent in the cases.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Raila Odinga, the candidate who had been announced as the main loser in the 2017 presidential election and, when that election was declared constitutionally defective and rerun in October 2017, boycotted the rerun, was "sworn in" as the "People's President" (January 30, 2018).[1] (Three major television stations were taken off air by the government in an attempt to prevent the event from getting media coverage.[2] At the end of 2018, the constitutionality of this action was before the courts.) The swearing-in was part of an opposition campaign to undermine the government. Negative impacts on the economy and elsewhere of this campaign may explain the later development: "After months of insults during a divisive and deadly election, these two heirs of Kenya's most powerful political dynasties stood side by side, shook

[1] See retrospective, *Standard* newspaper, January 30, 2019, at https://www.standardmedia.co.ke/ureport/article/2001311339/on-this-day-last-year-raila-odinga-was-sworn-in-as-people-s-president

[2] BBC, 'Kenya TV stations to remain off-air after Odinga "inauguration"', at https://www.bbc.com/news/world-africa-42888904

hands and pledged reconciliation"[3] (the "handshake"). Opinions on this event were still divided, and its implications unclear. For various individuals, including Kenyatta (in his last possible term as President) and Odinga (who has long aimed at the presidency), the possible implications are central. The reconciliation generated an inadequate debate on constitutional change, especially from a presidential to a parliamentary system for the purpose of "inclusion" on the basis that such a system (with a number of senior posts available) would prevent the tension and even violence of most Kenyan elections. Also aired was altering the system of devolution to introduce a middle government tier, between the national government and that of the 47 counties.

The other development (or non-development) was the constitutional amendment that did not happen. The Constitution requires that no more than two-thirds of the members of any elected or appointed body be of the same gender. In 2012, the Supreme Court directed that this be legislatively achieved by 2015. By the end of 2018 it had not been done. Unable to agree on any method within the framework of the Constitution, MPs have focussed on changing it. Their preferred method is one that adds enough women to both houses of Parliament to achieve the two-thirds rule. This method is used for the county-level legislatures. MPs have repeatedly failed even to muster a quorum to pass the amending legislation. In 2018 this happened again, complicated by the reluctance of MPs to go along with the change despite pressure from the President, because the President indicated he would not sign a bill, even if passed, that would unconstitutionally allow MPs to fix their own allowances. There is a likelihood that 2019 will see a resurrection of litigation designed to have Parliament dissolved for failure to do something demanded by the Constitution.

There are frequent complaints of tendencies to try to exceed constitutional powers or undermine constitutional safeguards. One or two of the cases in Section III touch on these. One example of presidential behaviour that in our view undermines the independence of constitutional offices but which has not been challenged in court, and would probably not be held technically improper, relates to the appointment of constitutional office holders to non-protected posts. In August, the President appointed a Cabinet Secretary (Minister) as the Director of Public Prosecutions (DPP). The DPP had only about one year of his independent, but time-limited office left. At the same time, the President of the Court of Appeal was appointed as Attorney General. Both the DPP and superior court judges are posts in which the incumbents are supposed to be unaffected by concerns about how the political leaders perceive their work. Yet, especially for the DPP, who does not have life tenure, the way is now open for these office holders to be appointed to political or quasi-political office—but only if the President is pleased with them.

These appointments are linked to a new presidential commitment to deal with the grave problem of corruption (in addition to his "Big Four" of water, housing, food security and industrialisation). Among the constitutional spin-offs of this is some tension between the DPP, the police and the courts. Constitutional provisions on the right to bail (Article 49(1)(h)) unless there are compelling reasons, and their application by the courts, and prosecutorial competence are involved in the "blame game", to use the Chief Justice's phrase.

III. CONSTITUTIONAL CASES

The Supreme Court (the final court of appeal) ended 2017 on a high note with its decision declaring the mandatory death penalty unconstitutional. 2018 was largely concerned with election petitions, and cases on when the Court's jurisdiction can be invoked. Thus no Supreme Court cases are discussed here.

1. Miguna Miguna v Fred Okengo Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government; Kenya National Commission on Human Rights (Interested Party) [2018] eKLR: Citizenship; abuse of office[4]

The petitioner is a lawyer who "officiated" at Odinga's "swearing in" (above). He also claimed to lead the "National Resistance Movement", an amorphous and largely hypothetical opposition movement that had been declared a prohibited organisation. The government tried to deport him on the basis that he was no longer Kenyan, having automatically lost his citizenship when he became Canadian under the previous constitution, which did not permit dual nationality. He resisted deportation and was detained for some days at the airport in deplorable conditions. Before that, the government arrested him after attacking his house with force, and then took him from court to court, trying to avoid High Court orders. He was eventually deported.

The court held first that he remained a Kenyan citizen, under the former constitution, section 97:

> (3) A citizen of Kenya shall, … cease to be such a citizen if -
>
> (a) having attained the age of twenty-one years, he acquires the citizenship of some country other than Kenya by voluntary act (other than marriage) ….

The court held that this applied only to citizens other than by birth. Citizenship by birth was inalienable. Alternatively, the court held that Miguna's acquisition of a Canadian passport was not voluntary because he was compelled to do it by the refusal of the Kenyan government to issue him one.

Miguna was held entitled to compensation for his abusive treatment. The judge

[3] Nic Cheeseman, 'With a handshake, Kenya leaves behind divisive poll', *Nation*, April 10, 2018, at https://www.nation.co.ke/news/politics/Uhuru-Kenyatta-and-Raila-Odinga-handshake/1064-4379964-os1fhtz/index.html

[4] http://kenyalaw.org/caselaw/cases/view/163893/ (Justice Chacha Mwita)

observed that "Where overzealous public servants commit a wanton violation of the Constitution and the law, any awards arising from such violations should not be vested [sc. imposed?] on the public". He awarded considerable damages against the Cabinet Secretary (Minister), Director of Immigration, the head of the police and three other senior police officers personally.

We have grave doubts about the correctness of the first decision on citizenship. The other decision on liability is interesting, but may leave untouched those who were most determined to clamp down on the opposition and Miguna specifically.

2. Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR: Rights to environment, culture[5]

A huge government infrastructure project is having major impact on a world heritage site, local fishermen and local communities, including indigenous people. Despite its being a constitutional petition (usually decided on the basis of law), the court did receive a great deal of evidence, including expert evidence, and even conducted a site visit.

The court decided [para. 221] that public participation in environmental issues was not only something required by the Constitution, but was a rule of customary international law, making it part of Kenyan law under Article 2(6). It also pointed out [para. 225] that sustainable development is a value of the Constitution, and spelled out its generally accepted elements. The court concluded that the public had not been adequately involved. Interestingly, they indicated that to limit public involvement would require justification in terms of Article 24 (on limiting human rights) [para. 238], though participation is not explicitly included as a recognised human right. The right to information (Article 35) had also been violated to some extent in the Strategic Environmental Assessment process, and the right to a clean environment was in imminent danger of being violated (based on the judges' own site visit).
In the court's view, traditional fishermen had a right to continue to fish that had the status of a fundamental right—building on Articles 26 (right to life), 28 (dignity), 40 (property), 43 (economic, social and cultural rights) and 70 (environmental rights). It could be limited only if permitted via Article 24, and even then compensation must be paid. As indigenous people, their rights must be given sensitive and priority consideration. Yet, they had been discriminated against in compensation arrangements.

The scheme's implementers had not used the "due diligence required to consult the indigenous residents of Lamu Island on the impacts of the Project on their culture. This lack of consultation led to an inadequate cultural impact assessment, and equally insufficient cultural impact mitigation measures", thus the right to enjoy their culture (Article 44) had been violated.

The court ordered that an elaborate plan be drawn up to rectify these various flaws and to ensure the development of a World Heritage Management Plan, and required a report back within six months. The court also ordered that compensation of roughly US$17,600,000 be paid to the fishermen, and awarded costs to the petitioners for expert witness expenses, which is unusual in public interest litigation cases.

3. JOO (also known as JM) v Attorney General [2018] eKLR): Rights to health and dignity[6]

The petitioner complained of poor treatment at a local public hospital when giving birth. The court identified three forms of violation of her rights. One was the inexcusably abusive treatment. The second was by the unavailability of the most basic equipment. The third was by a failure of care. The first was dealt with mainly as a violation of the petitioner's dignity (Article 28). The others were treated as violations of Article 43, which recognizes the right to the highest attainable standard of health, including reproductive health. The court also invoked, albeit briefly, international instruments, including the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and People's Rights, which, by virtue of Article 2(6) of the Constitution, are part of Kenyan law.

Interestingly, the judge who wrote the opinion held that governments, at both the national and county (devolved) level, were in violation of the right to health by a failure to establish policy guidelines to ensure effective implementation of national (actually presidential) directives on free maternal care, or to monitor performance.

This is one of the few cases to even address issues about the allocation of resources, and the promotion and fulfilment of an economic or social right, as opposed to the failure to respect those rights. However, the analysis lacks depth, including in the judge's use of the concept "maximum available resources", which is not clear in the Constitution.

4. Okiya Omtatah Okoiti v Communication Authority of Kenya [2018] eKLR and *Kenya Human Rights Commission v Communications Authority of Kenya [2018]* eKLR: Privacy[7]

These cases, decided the same day, concerned the first respondent's plan to install a device management system on mobile phone networks, ostensibly to detect stolen, counterfeit and unapproved types of phones.

The main legal issues were whether the petition was premature, because the system was not yet in operation, and whether any infringement of users' privacy was justified by Article 24 of the Constitution (essentially a proportionality issue).

The judge decided that Article 22(1), allowing actions for the protection of human rights even if a violation is "threatened", made concerns about the "ripeness" of the action irrelevant, and in fact was intended to do so.

[5] http://kenyalaw.org/caselaw/cases/view/156405/ (High Court; five-judge bench)

[6] http://kenyalaw.org/caselaw/cases/view/150953/ (High Court; Justice Abida Ali-Aroni

[7] Respectively, http://kenyalaw.org/caselaw/cases/view/151117/ and http://kenyalaw.org/caselaw/cases/view/151191/ High Court; Justice John Mativo)

The evidence was that the system would allow the identification not only of the phone and whether it was counterfeit, etc., but also of the subscriber's identity, phone number and the number called, date and time and duration of the call.

The judge held that this went further than necessary for identifying counterfeit phones. He observed that laws and institutions on importation, on counterfeit goods, on standards, on taxing and police and customs "have not been shown to be insufficient". Another objection to the decision was the absence of public participation and involvement of subscribers. There was thus also a violation of Article 10 on national values and principles, one of which is public participation.

5. Law Society of Kenya v National Assembly of the Republic of Kenya [2018] eKLR: Judicial Service Commission[8]

The Constitution (Article 171) provides that six members of the Judicial Service Commission (JSC), which selects most superior court judges, be elected by various bodies of judges or lawyers while the Public Service Commission nominates one. Two non-lawyers are appointed by the President (with National Assembly approval) to represent the public. Most commission appointments must be approved by the National Assembly (Article 250). The decision focussed on the appointment of the Court of Appeal's elected member (Justice Warsame). The President had forwarded his name to the National Assembly. The court held that Article 171 applied, not 250, and no approval by the National Assembly was required. The court stressed the need to take a holistic view of the Constitution.

This case has significance because of some perceived hostility between the judiciary and other arms of government, and attempts by the latter to control the former. In January 2019, the same judge held that Warsame (who had still not been sworn in) neither needed to be formally appointed nor sworn in.

6. Simeon Kioko Kitheka v County Government of Machakos [2018] eKLR[9]

This is one of a growing number of cases giving some specificity to the constitutional requirement that the public be able to participate in the work of legislative bodies. It related to a charge for sand harvesting, in the form of a fee-per-lorry trip. The County Assembly bill had proposed KShs (Kenya shillings) 1,300 per trip while the bill as passed imposed KShs5000 per trip. The judge said that "by introducing new and substantial amendments to the Act which were not in the Bill, the Assembly not only set out to circumvent the constitutional requirements of public participation but, with due respect, mischievously short-circuited and circumvented the letter and the spirit of the Constitution" [para. 120].

This was the only formal decision, and the judge ordered that any money paid over and above KShs1300 per trip be refunded. His further observations included, "To inform the public to air their views on a Bill whose contents are not disclosed without informing them how and where to access the Bill, and proceeding to limit the period for transmission of the views to two days in respect of a Bill so crucial to the public ordinarily cannot, in my view, amount to reasonable opportunity for the public to participate in the process of enactment of the Bill in question".

7. Transparency International (TI Kenya) v Attorney General [2018] eKLR: Auditor-General; President as a lawmaker?[10]

The Constitution has fairly standard provisions on the Auditor-General (Au-G). There is particular emphasis on the independence of the office: Article 249 stresses that it is an independent office not subject to any direction. The Kenyan branch of an international NGO challenged legislation that diminished the separateness of the office from control by the Public Service Commission, and in various other ways seemed to limit its powers or independence.

The court held the statute unconstitutional in that it made the office a "statutory head" (while being a constitutional office); subjected any issue of appointment of staff to the Public Service Commission; allowed appointment of an Acting Au-G; allowed for secondment of Au-G staff to other public bodies, which would be audited by the Au-G; set up an audit advisory board to advise the Au-G, including heads of public bodies that are audited by the Au-G; and provided that the Au-G should not question the merits of a policy objective of a government or any public entity. Another provision would have restricted the power to audit the security forces. It required the Au-G to meet national security organs to agree on areas that might touch on national security and on how to ensure confidentiality of the information. All or part of nine sections of the Public Audit Act were held unconstitutional.

A very different point failed. The Constitution (Article 115) allows the President to refer a bill back to Parliament for reconsideration, noting any presidential reservations. Parliament may then (using normal legislative procedure) amend the bill adopting the President's views, or pass it again without adopting them, and if it does so by a two-thirds majority, the President must assent. Parliament has always passed a new version with the President's reservations accommodated. The practice has been for the President to return bills with language that he wished to see enacted. The judge held that this was not unconstitutional. He did add that "… should the President make substantial recommendations that significantly alter the character of the Bill as earlier passed, [he] has to consider whether public participation will be necessary before passing those recommendations".

The Kenyan provision on assent is treated as meaning that Parliament has only two choices: to accept the President's view or insist on its own by a two-thirds vote. In other words, the reference back does not mean that the bill otherwise lapses. The authors, on reflection, are not sure this is right. In the US, the use

[8] http://kenyalaw.org/caselaw/cases/view/157657/ (Justice Chacha Mwita)

[9] http://kenyalaw.org/caselaw/cases/view/157582/ (High Court: Justice Odunga)

[10] http://kenyalaw.org/caselaw/cases/view/147941/ (High Court: Justice Chacha Mwita)

of the presidential veto kills a bill. A recognition of this possibility might prompt earlier addressing of disagreements and improve the legislative process.

8. Kenya Human Rights Commission v Attorney General [2018] eKLR: High Court: legislation restricting courts' contempt power; public participation[11]

The petitioner NGO (KHRC – not the official commission on human rights) argued that the 2016 Contempt of Court Act included provisions limiting the power of the courts to punish for contempt. The court held that such a power was derived from the Constitution and indeed it went as far as casting its power as inherent, not even constitutionally derived.[12] It invoked Articles 2(1) (supremacy of Constitution), 159 (judicial authority is derived from the people) and 160 (judicial independence). The courts could, therefore, hold unconstitutional provisions that limit their contempt power.[13] This court held that provisions that made it procedurally harder to prosecute public officers for contempt and imposed a more lenient maximum sentence were both discriminatory and shackled the courts' contempt power. This included "no state officer [senior elected and appointed officers] shall be convicted of contempt of court for execution of his duties in good faith". The same was true of a section that barred contempt proceedings against a Speaker of a House of Parliament for any decision or directions in the performance of his official role.

However, the court then held that the entire Act was unconstitutional on the basis of lack of public participation (specifically required for the work of Parliament by Article 118(1)). In fact, it seems that the respondent mounted no defence to this—the judge found there was "no attempt on the part of the respondent to show that there was any semblance of public participation in the legislative process".

This is the first time that national legislation has been held unconstitutional for want of participation. It is unfortunate that the State Law Office did not see fit to take the issue seriously. There was a bit of an "own goal" for the KHRC: the judge also held that a strict liability offence for publications about proceedings actively before a court, which created a "substantial risk" of seriously prejudicing the course of justice, was justifiable. The general public might be influenced, and that could prejudice the right to a fair trial (though Kenya does not have juries or lay justices trying cases). The Act also enshrined the "scandalising the court" form of contempt, done away with in many countries.

9. Wanuri Kahiu v CEO Kenya Film Classification Board (High Court; Justice Okwany): Censorship

This has so far involved only an interim order. The Film Classification Board had banned a film because of its lesbian content. The application was for a temporary lifting of the ban pending the final resolution of the case so it could be shown briefly in order to be an eligible candidate for the Oscars.

The application was successful. The judge said, "One of the reasons for artistic creativity is to stir the society's conscience even on very vexing topics such as homosexuality". The film was shown at various venues for seven days (but not picked as an Oscar nominee).

IV. LOOKING AHEAD

Two themes are likely to be prominent in 2019. One is the continuing tension between the executive/legislature and the judiciary. Already, two of the judges whose decisions "against" government featured here have been moved from the Constitutional and Human Rights Division. The Chief Justice is being accused of having given in to presidential pressure.

The other theme will be constitutional amendment, with an increasing number of issues being raised for debate, but with no clear process. One party is about to submit proposals with one million signatures supporting amendments to trigger a popular initiative (Article 257).

V. FURTHER READING

Jill Cottrell Ghai, "Wanjiku's Constitution: Women's participation and their impact in Kenya's constitution building processes", in Tania Abbiate, Markus Böckenförde and Veronica Federico, eds., *Public Participation in African Constitutionalism* (Routledge, 2018) pp. 220-242

Jill Cottrell Ghai and Yash Ghai, "The Contribution of the South African Constitution to Kenya's Constitution", in Rosalind Dixon and Theunis Roux, eds., *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution's Local and International Influence* (Cambridge University Press, 2018) pp. 254-293

Rose Macharia and Yash Ghai, "The role of participation in the two Kenyan constitution-building processes of 2000-2005 and 2010: Lessons learnt?" in Tania Abbiate, et al, *Public Participation in African Constitutionalism* (Routledge, 2017), pp. 86-99

[11] http://kenyalaw.org/caselaw/cases/view/162352/ (Justice Chacha Mwita)

[12] Citing *Equity Bank Limited v West Lnk Mbo Limited* [2013] eKLR.

[13] Citing the Indian Supreme Court cases of *Bar Association vs. Union of India* [1998] 4 SCC 409 and *Sudhakar Prasad v. Government of Andhra Pradesh* [2001] SCC 516.



Latvia

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I. INTRODUCTION

On 18 November 2018, the State of Latvia celebrated its centenary. This celebration served as a long-term investment into strengthening the loyalty towards the modern Latvian state and for the further integration of the single political nation, based upon shared constitutional values and common social memory. At the same time, this anniversary helped to present Latvia to the world as a modern European state of the 21st century. The international conference organised by the Constitutional Court (hereinafter also CC, the Court) on "The Role of the Constitutional Courts in the Globalised World of the 21st Century" attested to the CC that Latvia is part of a global debate on the increasing impact of rulings of constitutional courts beyond national borders. Also this year, main developments in the area of constitutional law were triggered by the legislator (the *Saeima*) and the CC.

In Part II of this report, we reflect upon general constitutional developments, examining amendments to regulatory enactments, the relevant trends in political processes and the development of the judicial system as well as the work of the CC in 2018 and the impact of its case law on further development and change within the legal system. All these activities can be considered important steps towards strengthening the rule of law; however, in general, we can speak about the continuity and stability of the democratic processes. The report provides an overview (Part III) of the main cases decided by the CC of the Republic of Latvia in the past year that may be of interest to an international audience.

Finally, an overview looks ahead to some developments and most important constitutional issues expected to unfold in 2019 related to the elections and pending constitutional court cases (Part IV).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year 2018 witnessed a few notable constitutional developments and court decisions. A general election to the *Saeima* (Parliament) took place. Regretfully, this election was characterised by the lowest activity of voters in the recent history of the state. As a result, seven parties and associations thereof were elected to the *Saeima.* Less than 30% of all voters expressed their support for the parties represented in the government. The former major government parties of the *Saeima*—"Unity" and "Union of Greens and Farmers"—became the minority. Three new, centre-right political forces entered the *Saeima.* Against the background of elections in a number of EU Member States, the results of the *Saeima* elections look nevertheless positive. The new players represent conservative and liberal values, and none of them has questioned Latvia's Euroatlantic identity. The process of forming the government was the longest

in Latvia's history. The government was approved only 109 days after the election of the 13th *Saeima,* with 61 MPs among 100 voting in favour of it.

On 4 October 2018, the *Saeima* adopted amendments to the Constitution (the *Satversme*). These amendments entered into force on 1 January 2019. The procedure of electing the President was altered, providing that the *Saeima* elects the President (similar to other highest officials of the state) by an open vote instead of the secret ballot as formerly. The vote for the President of the State was the only secret ballot left in the *Saeima.* Discussions on the procedure of electing the President continue. A draft law regarding the President elected by the people has been submitted to the *Saeima.*

As for the system in force, a draft law has been adopted by the *Saeima* in the first reading, extending the period between proposing candidates for the President's office and the voting at the *Saeima* on these candidates.[1] A longer period between the proposing of candidates and the vote would ensure the possibility of holding open discussions, where members of the *Saeima* would have the opportunity to also hear public opinion. Likewise, debates between the proposed candidates in the public space could be held.

The work to strengthen the effectiveness of the judiciary and judicial independence continues, although slowly. By introducing amendments to the law "On Judicial Power", the legislator has diminished the influence of executive power on the organisation of courts' work and expanded the competence of the Council for the Judiciary in appointing the chairpersons of the courts and in determining a judge's career. The Council for the Judiciary not only will appoint to the office the chairpersons of the district (municipal) and regional courts but will also establish the procedure for proposing candidates for the chairperson's office and for appointing them to office. The competence of the Minister for Justice to transfer a judge to an open vacancy also has been deleted from the law. The work of the Judicial Qualification Board has been made more effective, and the process for assessing judges' professional activities has been improved. The territorial reform of courts has been completed.

This year, five out of seven elected members of the Council for the Judiciary were re-elected (together with *ex officio* members, the Council for the Judiciary comprises 15 members).

In 2018, the *Saeima,* responding to the CC's judgment by which the norms that regulated judges' remuneration were recognised as incompatible with the *Satversme,* introduced changes to the system of judges' remuneration. It remains to be seen how successful and compatible with the Satversme this regulation will be. As the case law of the CC thus far shows, the enforcement of previous judgments by the CC in cases regarding judges' salaries has not been successful.

The CC's judgments illustrate topical social processes in Latvia and also the extent to which the legislator, the executive and the local governments, by regulating these processes, comply with the constitutional framework. Compared to 2017, the number of judgments delivered by the CC increased by 13% in 2018, whereas the number of examined legal norms (acts) remained unchanged.

Due to restrictions on length, only some issues will be examined in this report (separate cases will be reviewed in the following part of the report). The case law of the CC of 2018 can be found in the Report on the Work of the CC of the Republic of Latvia in 2018.[2]

As in previous years, the CC confronted questions on the quality of the legislative process. In a case on an enforced lease,[3] the legislator's obligation to duly assess and substantiate the established restriction on a person's fundamental rights as well as the obligation to abide by the previous findings made by the CC was examined. In several cases, the CC focused on the legislator's discretion.

In 2018, the CC delivered four judgments in the field of taxes and budget.[4] In two cases, it examined the compliance of taxes not only with the *Satversme* but also the relevant European Union law. The issue of the constitutionality of legal acts issued by local governments had an important role in the Court's work in 2018. Legal acts issued by local governments were examined in four judgments.[5] In the case regarding restrictions on standing for *Saeima* elections (examined in the following part), the CC expressed important findings regarding the principle of militant democracy and the intertemporal application of the law.[6]

The CC is an active participant in a European judicial dialogue. In more than one-third of the judgments delivered in 2018, the CC made references to case law of the ECtHR, and in several of them noted that the standard of human rights protection in an area at issue was higher in Latvia compared to that established by the European Convention for the Protection of Human Rights and

[1] The intended amendments provide that candidacies for the President's office must be submitted to the Presidium of the Saeima no sooner than 60 days and no later than 55 days before the term of office of the incumbent President expires. Currently, the law provides that the candidacies must be submitted no sooner than 50 and no later than 45 days before the term of office of the incumbent President expires.

[2] Annual Report 2018 http://www.satv.tiesa.gov.lv/en/

[3] CCRL 12.04.2018, 2017-17-01 - Note: Unless indicated otherwise, all Judgments and Decisions referred to in the footnotes are by the Constitutional Court of the Republic of Latvia (CCRL). The full texts in English are available here <http://www.satv.tiesa.gov.lv/en/cases/>

[4] CCRL 11.04.2018, 20017-12-01; 29.06.2018, 2017-28-0306; 18.10.2018, 2017-35-03; 18.10.2018, 2018-04-01

[5] CCRL 29.06.2018, 2017-28-0306; 29.06.2018, 2017-32-05; 18.10.2018, 2017-35-03; 15.11.2018, 2018-07-05

[6] CCRL 29.06.2018, 2017-25-01

Fundamental Freedoms. The ECtHR, in turn, addressed the CC in two of its judgments in 2018. Firstly, in its decisions of 22 May 2018 in the case *Soročinskis v. Latvia,*[7] the ECtHR noted that, in certain cases, the CC had to be regarded as an effective legal remedy that had to be used prior to turning to the ECtHR. Secondly, in the decision of 4 September 2018 in the case *Kvasņevskis and others v. Latvia,*[8] the ECtHR referred to the case law of the CC in the "rent ceiling" cases.[9]

In 2018, the CC concluded the first case in its history in which the procedure of preliminary ruling in the Court of Justice of the European Union had to be used. The CC received the preliminary ruling on 7 August 2018 from the Court of Justice of the European Union in case C120/17, by which it answered the questions referred to it by the CC in case No. 2016-04-03 regarding inheritance of farmers' early retirement benefit paid by the EU by heirs.

In 2018, the CC examined the compliance of legal norms with various fundamental rights: the right to stand for election,[10] the right to a fair trial,[11] the right to private life,[12] the right to property,[13] the right to the freedom of religious conviction and association,[14] the right to the protection for a family[15] and the right to equality.[16]

To ensure that everyone can effectively defend his or her rights before the CC, amendments to "State Legal Aid Law" were adopted in 2018 and have been in force since 1 January 2019, providing the possibility to receive legal aid, paid for by the state, to submit a constitutional complaint to the CC.

III. CONSTITUTIONAL CASES

1. Case No. 2017-17-01: Compulsory land lease case[17]

The regulation restricting landowners' right to receive a freely agreed-upon lease on their land where, during Soviet occupation, apartment buildings were built was examined in this case.

The case was initiated by a number of constitutional complaints. It was noted in the complaints that the applicants owned land plots on which apartment buildings owned by other persons were located. The relationship of compulsory lease existed between the applicants and the owners of the respective buildings or apartments therein. It was alleged that the contested norms considerably lowered the amount of lease and, thus, disproportionately restricted the applicants' right to property.

Firstly, the CC recognised that the right to property also comprised a person's right to lease his immovable property as he deemed it necessary. However, this right could be restricted, in particular, in the field of housing, which is an important element of social and economic policy in contemporary society. Setting the maximum amount of lease payment in the legal relationship of a compulsory lease is one among such restrictions.

Secondly, the CC noted that in adopting the legal regulation in the area of compulsory leasing, the legislator had to balance the opposite interests of persons and ensure justice, abiding by the findings made in judgments by the CC. The legislator must monitor, to the extent possible, whether a proportionate balance exists in this legal relationship throughout its existence, and should avoid adopting a regulation that is aimed at protecting the interests of one party. In particular, in such cases where the CC has examined the constitutionality of the norms that regulate this legal relationship already, the legislator must ensure such process of legislation that builds towards the conviction that the chosen solution is fair. Thus, in planning to include in legislation a new restriction on the amount of the compulsory lease payment, the legislator had to ensure proper analysis and substantiation of the constitutionality of such possible regulation, *inter alia,* also in the context of the established case law of the CC in the matters of the compulsory lease.

Thirdly, the CC found that the *Saeima* had not examined the impact of the restriction on fundamental rights of the landowners properly and had not substantiated the compliance of the intended solution with the CC's case law on this legal relationship. Hence, the contested norms had not been adopted in proper legislative procedure and thus were incompatible with Article 105 (right to property) of the Satversme.

Fourthly, the CC recognised that a legal norm that has not been adopted in the proper legislative procedure is *ultra vires.* However, in exceptional cases, where recognising the contested norm as void *ab initio* would create a situation that was even more incompatible with the *Satversme,* another date for the norm to become void could be set. If in the particular case the CC were to rule that the contested norms should be recognised as

[7] Soročinskis v Latvia App no 21698/08 (ECHR 22 May 2018)

[8] Kvasņevskis and others v Latvia App no 50853/06 (ECHR 4 September 2018)

[9] Ibid., Para 54.

[10] CCRL 29.06.2018, 2017-25-01

[11] CCRL 15.03.2018, 2017-16-01, 14.06.2018, 2017-23-01, 23.05.2018, 2017-20-0103

[12] CCRL 11.10.2018, 2017-30-01

[13] CCRL 11.04.2018, 2017-12-01, 12.04.2018, 2017-17-01, 06.06.2018, 2017-21-01, 18.10.2018, 2018-04-01, 23.05.2018, 2017-20-0103

[14] CCRL 26.04.2018, 2017-18-01

[15] CCRL 15.02.2018, 2017-09-01

[16] CCRL 15.05.2018, 2017-15-01, 29.06.2018, 2017-25-01, 18.10.2018, 2017-35-03, 29.06.2018, 2017-28-0306.

[17] CCRL 12.04.2018, 2017-17-01, <http://www.satv.tiesa.gov.lv/en/cases/?page=3>

being void as of the moment of their adoption or any other past date, then the amount of compulsory lease fee would not be defined in regulatory enactments altogether. A ruling like this could create a significant threat to the rights and lawful interests of the parties to the legal relationship of the compulsory lease rather than ensure legal stability, clarity and peace in society. Therefore, the contested norms were recognised as void as of 1 May 2019.

2. Case No. 2017-25-01: Restriction to be elected in the Parliament[18]

The prohibition of persons who, after 13 January 1991, had been active in the Communist Party of Latvia or other organisations directed against the independence and democratic state order of Latvia to run in *Saeima* elections was examined in this case.

A constitutional complaint initiated the case. It was noted in the application that the applicant had been active in the Communist Party of Latvia after 13 January 1991. Thus, the contested norm deprives her of the right to run for the *Saeima.* The applicant argued that the restriction on election rights determined a long time ago is no longer legitimate and is incompatible with the principles of proportionality and equality.

Firstly, the CC established that the restriction aims to protect the democratic state order, national security and the territorial unity of Latvia. This norm should be interpreted to mean that it prohibited to stand as a candidate for the Saeima a person who, by being active in the prohibited organisations after 13 January 1991, by her actions posed a threat and continued to pose a threat to the independence of the Latvian State and the principles of a democratic state governed by the rule of law.

Secondly, the CC found that the compliance of the contested norm with the legal norms of higher legal force had been examined already in 2000 and 2006. However, the claims included in the application cannot be deemed as already adjudicated because the interpretation of the contested norm evolves over time with the evolution of social relations it is aimed to regulate. Moreover, such arguments that had not been examined in the previous judgments were included in the application.

Thirdly, the CC recognised that the exercise of a person's rights and freedoms was most efficient in a democracy. However, such exercise may not be directed against the independence of the state and the principles of a democratic state governed by the rule of law. Hence, it may be necessary for the state to take special defencive measures to guarantee the stability and effectiveness of its democratic system. Moreover, loyalty to statehood and democracy has not yet become sufficiently consolidated in Latvian society—democracy is far from being considered self-evident.

Fourthly, the CC noted that the internal and external threats to the state should be taken into consideration in examining the proportionality of the restriction on election rights. The fact that persons who previously were active in the organisations referred to in the contested norm, and continue to express opinions and take actions that can be seen as contrary to the national security and interests, ought to be considered as a threat to democracy. The most significant external threat, in turn, is caused by Russia's aggressive foreign policy. These threats are a significant factor that justifies the retention of the restriction on fundamental rights included in the contested norm.

Fifthly, the CC found that the benefit to society provided by the restriction included in the contested norm outweighed the adverse consequences that a person incurred as a result of this restriction. However, if the political situation in the state changes and foreign policy threats decrease, the legislator has an obligation to review the restriction included in the contested norm and to decide on amendments to the *Saeima* Election Law. In view of these findings, the CC recognised that the contested norm, if appropriately interpreted, complied with Article 1 and Article 9 of the *Satversme.*

Moreover, the aforementioned norm was recognised as being compatible also with Article 91 (right to equality) of the *Satversme* since the Court concluded that persons referred to in the application were not in similar and comparable circumstances.

3. Case No. 2017-18-01: Restriction to establish a religious community (e.g., a church)[19]

The prohibition for newly founded congregations[20] to establish a religious association (a church) prior to the expiry of the re-registration period of ten years, as well as the restriction to establish more than one religious association (a church) in one denomination, were examined in this case. It was initiated by an application by the Supreme Court.

Firstly, the CC recognised that the right to religious freedom is closely linked to the right to freedom of association and thus must be interpreted with a view to their systemic relationship. Secondly, the CC noted that the re-registration requirement had been set to newly established congregations to prevent abuse of the status of a religious association. Hence, this requirement was directed towards protecting other persons' rights and public order. However, these legitimate aims of the restriction on fundamental rights could be reached, at least by the same quality, by measures that are less restrictive upon a person's rights. I.e., law enforcement institutions are supervising the compliance of the activities conducted by religious organisations. This measure is an alternative to the obligation of annual re-registration; moreover, it is individualised and applicable

[18] CCRL 29.06.2018, 2017-25-01, <http://www.satv.tiesa.gov.lv/en/cases/?page=2>

[19] CCRL 26.04.2018, 2017-18-01, <http://www.satv.tiesa.gov.lv/en/cases/?page=3>

[20] Congregations that commence their activities for the first time in the Republic of Latvia and that do not belong to any religious association (churches) that already have been registered in the state, in accordance with the terminology used in Section 8 (4) of the law "On Religious Organisations".

exactly to those religious organisations that endanger the rights of other persons and public order. Hence, the contested norms, which envisage re-registration of the newly established congregations, were incompatible with the principle of proportionality, and thus also with the *Satversme.*

Thirdly, the CC found that the restriction that prohibited congregations from registering more than one religious association within the framework of one denomination had been established to decrease the schism within religious organisations. However, in a democratic society, it is not necessary for the state to take measures to ensure that religious communities are subject to united leadership. In the case of a schism within a religious community, the state has an obligation to remain neutral and refrain from any measures that would give priority to one or another religious leader, and its aim should be forcing the religious community, contrary to its wishes, to be subject to one leadership. Therefore, the state does not have the right to refuse registration of a religious association to a religious community that identifies itself with a denomination, in the framework of which a religious association as the legal person of private law already has been registered in the state. Moreover, the legislator has ensured that a religious organisation, upon registration, may not deceive society as to its affiliation with another religious organisation, *inter alia,* by providing that the name of the religious organisation must differ from the names of other religious organisations. Hence, the contested norm that envisages the restriction allowing the establishment of only one religious association within the framework of one denomination lacks a legitimate aim and is incompatible with the *Satversme.*

4. Case No 2017-28-0306: Real estate tax rate applied to foreigners[21]

A procedure by which reduced tax rates were applied to the payers of real estate tax in Riga if the place of residence was of a foreigner[22] had been declared in the city, and was examined in this case.

The case was initiated with regards to an application submitted by the Ombudsman. It is noted in the application that the Binding Regulation of the Riga City Council envisages different rates of the real estate tax, *inter alia,* the basic rate and the reduced rate. Pursuant to the contested norm, if a foreigner's place of residence has been declared on the property, the reduced tax rates are allegedly applied only if the foreigner's place of residence in Latvia had been declared on 1 January seven years prior the respective taxation year. However, if the place of residence of a citizen or a non-citizen of Latvia is declared in the respective taxation object, an additional requirement like this is not set. Thus, the reduced tax rate is applied to the payer of the real estate tax in whose property the place of residence of a citizen or a non-citizen of Latvia or a foreigner who meets the requirement set in the contested norm has been declared. Whereas the basic real estate tax rate is applied to the payer of the real estate tax in whose property the place of residence of a foreigner who does not meet the requirement set in the contested norm has been declared. Allegedly, this legal regulation violates the principle of the prohibition of discrimination.

Firstly, the CC noted that in accordance with the EU Treaty, EU citizenship was one of the criteria included in Article 91 of the *Satversme* as prohibited grounds for discrimination. However, establishing differences on the basis of citizenship status as such could be justified in certain cases.

Secondly, the CC recognised that the requirement included in the contested norm differentiates in a comparable situation between EU citizens[23] and the citizens and non-citizens of Latvia. This requirement is incompatible with the essence of the right to free movement in the EU and violates the principle of the prohibition of discrimination.

Thirdly, the CC found that the differential treatment established by the contested norm had no legitimate aim. The Riga City Council had not substantiated the existence of such an aim, nor the objective differences between the taxpayers that would require different tax rates. Likewise, the Court was not provided with a reasonable explanation on how the requirement of a prolonged and permanent link of the aforementioned foreigners to Latvia ensured or facilitated the performance of those functions and tasks of the municipality, the fulfilment of which being the reason the real estate tax was collected. In view of these findings, the CC recognised the contested norm as being incompatible with Article 91 of the *Satversme.*

IV. LOOKING AHEAD

Two important elections will take place in 2019. First, in May, Latvia is going to elect its representatives to the European Parliament, and later in the summer, the Saeima will have to appoint the President of the Republic.

In 2019, the CC will have to decide on the constitutionality of education reform affecting the use of minority languages in public and private schools. Another case

[21] CCRL 29.06.2018, 2017-28-0306, <http://www.satv.tiesa.gov.lv/en/cases/?page=2>

[22] A foreigner is a citizen of another Member State of the European Union, a state of the European Economic Area or the Confederation of Switzerland, or a person who has received a permanent residence permit in Latvia.

[23] Citizen of another Member State of the European Union, a state of the European Economic Area or the Confederation of Switzerland, or a person who has received a permanent residence permit in Latvia.

to be noted is the dispute whether making public the salaries of all employees in public law institutions is compatible with the EU General Data Protection Regulation and the constitutional right to privacy. One more case involving EU law concerns the question whether universities may employ academic personnel on the basis of fixed-term contracts, which need to be renewed every six years. The last case which merits attention is a case involving the constitutional right to know one's rights in criminal proceedings for illegal possession of a dual-use device.

V. FURTHER READING

Report on the Work of the Constitutional Court of the Republic of Latvia in 2018

Selected Case-Law of the Constitutional Court of the Republic of Latvia: 1996-2017 (The Constitutional Court of the Republic of Latvia, 2018)
http://www.satv.tiesa.gov.lv/other/2018-ST-Zelta-gala%20versija.pdf

Ineta Ziemele, *"Constitutional Courts as Lock-Gates in the World of International-National Tension"* (Humboldt-Reden zu Europa, Berlin, 1 February 2018)
https://www.youtube.com/watch?v=pJf9l-Fqv84

Sanita Osipova, "The borders of the legislator's freedom in the legislative process" (Warsaw, 22 September 2018)
http://www.satv.tiesa.gov.lv/en/articles/speech-by-the-vice-president-sanita-osipova-of-the-constitutional-court-sanita-osipova-at-the-fontes-conference-in-poland/

Sanita Osipova "The Financial Security of Judges in the Context of the Principle of the Separation of Powers" (Andorra, 12 July 2018)
http://www.satv.tiesa.gov.lv/en/articles/speech-by-the-vice-president-of-the-constitutional-court-sanita-osipova-at-the-international-conference-in-andorra/



Liechtenstein

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I. INTRODUCTION

Liechtenstein took advantage of the 40th anniversary of its Council of Europe membership in autumn 2018 to hold a well-attended event on the European Court of Human Rights (ECHR). Throughout their speeches, judges and academics emphasized the importance of the ECHR and its jurisprudence.[1] Liechtenstein's respect for human rights is also reflected by the fact that several delegations of the Council of Europe visited the country during the last few years.[2] The country takes their recommendations seriously and implements them, whether through legislative amendments[3] or alterations of the administrative process.

In 2018, no amendments of the Constitution were voted for by Parliament. Yet, one amendment was discussed and will be voted on in early 2019.[4]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Throughout 2018, the Parliament was preoccupied with a number of questions concerning its own organization.

The Splitting of a Political Party

In summer 2018, one Member of Parliament (MP) of the party "The Independents" (*Die Unabhängigen*) lost their membership in it after having discussed the best method of party organization. As a consequence, two other MPs joined him and left the party on their own. After the summer break, the parliamentary group of the The Independents consisted of only two MPs. The by-law of the Parliament (*Geschäftsordnung für den Landtag*) demands three MPs to form a parliamentary group. As the Constitution and the laws do not contain any special regulation for this new situation, the President of Parliament proposed an accord—in touch with all the political parties. The accord was voted for unanimously by Parliament on 5 September 2018. Among other things, it stated that the The Independents would lose their status as a parliamentary group. On the other side, the three dissidents (who have meanwhile founded a new political party named "Democrats in Favor of Liechtenstein" (*Demokraten pro Liechtenstein*) would form another parliamentary group. One of them would take a seat on the board of Parliament while the member of The Independents would have to leave the board. The Independents would continue to

[1] The third issue of the Liechtensteinische Juristen Zeitung has been devoted to the ECHR membership anniversary: LJZ 3 [2018] 103-156.

[2] See for 2018: European Commission against Racism and Intolerance (ECRI): Fifth report on Liechtenstein (adopted on 22 March 2018, published on 15 May 2018), ECRI(2018)18. Group of States against Corruption (GRECO): Third evaluation round, Compliance Report, published on 30 May 2018, GrecoRC3(2018)3. Action against Trafficking in Human Beings (GRETA): Combined 1st/2nd Evaluation Round, Government's Reply to GRETA's Questionnaire, submitted 28 August 2018, GRETA(2018)24.

[3] See chapter II (Implementation of the GRECO-Recommendations).

[4] See chapter II (Abolition of the principle of rotation).

receive public funding, as the financing of Liechtenstein's political parties is based on the results of the elections and not on their constitution as a parliamentary group. The Parliament then nominated six members to build a special commission. The commission was tasked to propose amendments to the Constitution and to parliamentary laws to regulate the consequences of party splitting and MPs dissenting prior to the next parliamentary elections.

To be precise: It is the first time in history that members of five political parties are represented in Parliament. The Independents had run for election in 2013 for the first time and immediately won four seats out of 25, and five seats in 2017. Until 1993, only two political parties had sent members to the Parliament. Up to 2018, no political party that had made it into Parliament was dropped.

The Composition of the Joint Body for the Selection of Judges

After the elections in March 2017, the Parliament nominated four members of the Joint Body for the Selection of Judges (*Richterauswahlgremium*), regulated by Art 96 of the Constitution. Each of the four political parties represented in the Parliament made a proposal for one MP. Johannes Kaiser was elected for the "Progressive Party of Citizens" (*Fortschrittliche Bürgerpartei*). After a disagreement with the Prime Minister (who happened to be a member of the same party) and with the board of the party, Johannes Kaiser quit the party in March 2018.

But he did not accept leaving the Joint Body. Therefore, the question arose as to whether the Joint Body was properly composed. The wording of Art 96 of the Constitution provides that: "The Reigning Prince and Parliament shall avail themselves of a joint body for the selection of Judges. The Reigning Prince shall chair this body and have the casting vote. He may appoint as many members to this body as the number of representatives delegated by Parliament. Parliament shall delegate one of its Members for each electoral group represented in Parliament (…)."

The Constitution itself does not use the words "political party". Instead, the term "electoral group" is used (similar to Art 96 of the Constitution), which refers to the statute regulating the elections (*Volksrechtegesetz*). In this statute, 30 persons signing an electoral list are labelled as "electoral group". For the running members of a political party, the representatives of the respective political parties are supposed to sign the electoral list. Given that the concept of the *Volksrechtegesetz* theoretically allows a group of 30 friends to sign a list without possessing a party-like structured organization (membership fees, board), the term "electoral group" does not function as a synonym for "political party". Furthermore, Liechtenstein law does not provide a legal basis on which MPs sitting in commissions can be recalled.

The President of the Parliament then asked a Liechtenstein lawyer to provide an expert opinion. The answer remains unpublished, but clear: Nobody may force an MP to leave the Joint Body or any commission before the end of their term. Immediately thereafter, the Hereditary Prince informed the Parliament about his fear that the composition of the Joint Body for the Selection of Judges might be unconstitutional if the Progressive Party of Citizens continues to be unrepresented in the Joint Body, but rather an independent MP makes part of it. For this reason, the Parliament voted on 2 May 2018, for an MP of the Progressive Party of Citizens to re-join the Joint Body. At the same time, the Parliament decided to require a second expert opinion to answer the questions of the Hereditary Prince. The second expert did not follow the first one's opinion. On 4 June 2018, Johannes Kaiser declared his resignation as a member of the Joint Body.

Even if the situation seems to be resolved, the question of how to deal with crossbenchers as members of commissions remains to be discussed and hopefully answered by the Special Commission formed after the splitting of the The Independents.

Implementation of the GRECO-Recommendations Concerning Party Funding

An amendment to the statute regulating public funding of political parties[5] will be voted upon by Parliament in spring 2019. The amendment is not linked to the splitting of The Independents, but rather motivated by the recommendations made by GRECO in 2016[6] and 2018[7] during their third evaluation round "transparency of party funding".

The sum spent on political parties will not be changed. Political parties will have to publish their accounts (to show all their sources of income). Receiving anonymous donations will no longer be legal, but the parties will not be required to publish the names and addresses of their donors.[8]

Abolition of the Principle of Rotation from Case to Case for the Alternate Judges of the Constitutional Court and the Administrative Court

Art 102 para 4 of the Constitution and the Constitutional Court Statute (*Gesetz über den Staatsgerichtshof, StGHG*) will be amended in 2019.[9] In September 2018, the Parliament passed the amendments without any further discussion during the first

[5] LGBl 1984 Nr 31 LR 162, https://www.gesetze.li/konso/1984.31.

[6] Group of States against Corruption (GRECO): Third evaluation round, Evaluation Report, published on 2 June 2016), GrecoEval3Rep(2016)2Theme II.

[7] Group of States against Corruption (GRECO): Third evaluation round, Compliance Report, published on 30 May 2018), GrecoRC3(2018)3.

[8] Government of Liechtenstein, 'Bericht und Antrag' BuA Nr 55/2018 (3 July 2018) < http://bua.gmg.biz/BuA/?buanr=55&buajahr=2018> accessed 5 February 2019.

[9] Government of Liechtenstein, 'Bericht und Antrag' BuA Nr. 51/2018 (12 June 2018) < http://bua.gmg.biz/BuA/?buanr=51&buajahr=2018 > accessed 5 February 2019 and BuA Nr 88/2016 (9 October 2018) < http://bua.gmg.biz/BuA/?buanr=88&buajahr=2018 > accessed 5 February 2019.

reading. As a consequence, one may expect new rules on the call for alternate judges of the Constitutional and Administrative Courts to be passed in early 2019.

The new wording of Art 102 obliges the two Courts to adopt their own rules of procedure. In them, they will have to describe the selection mechanisms of alternate judges. Until now, Art 102 para 4 stated that the substitution shall be undertaken "by the principle of rotation from case to case".

The previous rule resulted in a situation in which alternate judges were called up alphabetically without respect to their special skills or their disposability, thereby provoking delays. The amendment will make proceedings in front of the Constitutional Court and Administrative Court resemble those in front of ordinary courts. Therewith, the amendment is part of a series of adaptations inspired by the government's search for more efficiency and standardisation.

Dispute on Parliament's Right to Information vis-à-vis the Government

In December 2017, a number of MPs raised an initiative to extend their right to information vis-à-vis the government. The proposal to amend the Administrative Control Statue (*Geschäftsverkehrs und Verwaltungskontrollgesetz*) was modelled after Art 7 of the Swiss Parliament Statute.[10]

The decisive proposal was contained by Art 20 Sec 1, suggesting that all MPs should obtain the right to request the government and the state administration to provide them with any information and documents necessary to perform their parliamentary mandates. The government considered the proposal as unconstitutional given that Art 63 of the Constitution would only subject the government to parliamentary control but not the entire administration. References to Art 7 of the Swiss Parliament Statute left the government unimpressed, given that information rights provided by Liechtenstein's Constitution could not be compared with its Swiss counterpart.[11]

On 1 March 2018, 13 out of 25 MPs decided to consider the initiative as constitutional. However, 15 out of 25 MPs decided—during the same session—to refer the initiative to a special parliamentary commission. The latter has not yet reported on the issue and as a result, one might expect a prolonged and lingering conflict between the Parliament and the government.

III. CONSTITUTIONAL CASES

1. StGH 2017/82 and StGH 2017/83

In their 2017 report, the authors Bußjäger/Gamper referred to several judgments of the Liechtenstein Constitutional Court[12] concerning the access to law. They mentioned that the Constitutional Court on 4 December 2017 examined the constitutionality of Art 83 para 1a Asylum Act[13] on this provision. The Constitutional Court then asked the government explicitly how a complainant who was not assisted by a lawyer could be expected to lodge a complaint in line with the necessary legal requirements if the remedy could only be expected to be effective if it had been given sufficient legal aid (as according to Art 43 Constitution).

On 27 March 2018, the Constitutional Court issued its decision. The facts of the case are summarized below.

The applicants, asylum seekers from the Republic of Macedonia and the Republic of Serbia, had made an application for asylum in the Principality of Liechtenstein. The member of government in charge then declared these applications inadmissible in his decisions of 24 April 2017 and 24 May 2017. Against these decisions, the applicants made a writ to the Head of the Administrative Court, including an application for legal aid. In his orders from 27 June 2017 and 28 June 2017, the Head of the Administrative Court qualified these writs as formal complaints, confirmed the member of government's decision and dismissed the applications for legal aid.

In a constitutional complaint, the applicants alleged that the qualification of the writs as formal complaints constituted a violation of their right to legal aid and the prohibition of arbitrary. Only by mentioning the intention on making a complaint in the writ, the writing cannot be qualified as such. The applicants argued that under these circumstances they would be deprived of the possibility of submitting a complaint meeting all legal requirements. Under the law of the Principality of Liechtenstein, there would be no possibility to get access to aid for the comprehensive conduction of a complaint against the decision of the member of government, especially not for the formulation of the complaint itself.

Under the amended Art 83 para 1a Asylum Act, the application for legal aid could be made the earliest together with the introductory writ (i.e., the application for asylum) or the complaint (against a negative decision), and the application for legal aid would be treated during deciding on the principle cause.

The Constitutional Court acknowledged the intention of the lawmaker to accelerate asylum proceedings and pointed out that restrictions to the right to legal aid are permissible as long and as far as the constitutional right to an effective complaint will be maintained. Yet, the Constitutional Court maintained that this is the case only if the applicant is rightfully represented by a

[10] Parliament of Liechtenstein, 'Gesetzesinitiative Informationsrecht' (4 December 2017) <https://www.landtag.li/files/medienarchiv/Gesetzesinitiative_Informationsrecht.pdf.> accessed 5 February 2019.

[11] Government of Liechtenstein, 'Bericht und Antrag' BuA Nr. 1/2018 (16 January 2018) <http://bua.gmg.biz/BuA/?buanr=1&buajahr=2018 > accessed 5 February 2019.

[12] Peter Bussjäger, Anna Gamper, *Global Review of Constitutional Law* (2018), 181 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215613> accessed 6 February 2019.

[13] LGBl. 2016 Nr. 411, https://www.gesetze.li/chrono/2016.411.

lawyer while filing the introductory writ or the complaint including the application for legal aid.

However, the primary objections of the Constitutional Court concerned more common cases in which a lawyer does not rightfully represent the applicants. Before Art 83 para 1a Asylum Act had entered into force, the treatment of the application for legal aid before the introductory writ could be guaranteed the right to complaint, since a positive decision on the question of legal aid beforehand ensured the payment for legal representation. Under the current legal situation, the applicant faces the risk of not finding a lawyer filling out his complaint because payment cannot be guaranteed.

According to the Constitutional Court's constant jurisdiction, the right to legal aid (which derives from the constitutional right to complain and the principle of equality) is not only of procedural but also of substantive character. This substantive character cannot be undermined. While restrictions to the right of complaint can be permissible if they are of public interest and in accordance with the principle of proportionality, Art 83 para 1a Asylum Act restricts the right excessively. The prevention of the possibility to first decide on the question of legal aid and only afterwards on the principal question undermines the right to legal aid in asylum cases. As a result, this legal allegation would make a positive decision on the granting of legal aid ineffectual, since the principal claim has already been decided.

Therefore, the Constitutional Court revoked Art 83 para 1a Asylum Act as unconstitutional. Nevertheless, it noted, that the aim behind this legal allegation would be justifiable if the lawmaker would abolish the obligation to a concurrent decision on the application for legal aid and the complaint (Art 83 para 1a phrase 1). Thereupon, after a final positive decision on the granting of legal aid, an appointed legal representative can complement the complaint within a newly set time limit.

With the amendment of the Asylum Act of 5 October 2018,[14] the lawmaker introduced the unprecedented right of asylum seekers to not only require translations of the decisions of their cases but also information and consultations on the applicable law and the changes of success of judicial remedies.

2. StGH 2018/074

In this case, the Constitutional Court had to deal with the question of the indirect application of fundamental rights in disputes under private law. The applicant, a deputy senior medicinal officer of the department of internal medicine, claimed that the appellee had dismissed him unlawfully after he had made a criminal charge against a senior medical officer based on the suspicion that the latter had conducted active euthanasia on several patients. Whereas the Court of First Instance had dismissed the applicant's action, the Court of Second Instance followed the applicant's complaint. The Court stated that given that the freedom of expression protects the reporting of grievances, there was no such misfeasance found that could justify a dismissal without prior notice. However, the Supreme Court varied this decision and found the dismissal legal.

In a constitutional complaint, the applicant alleged that the Supreme Court's decision constituted a violation of his constitutional right of freedom of expression, the principle of equality and prohibition of arbitrary decision-making. By reporting sincere grievances to the state attorney, he saw himself in the role of a whistle-blower. Therefore, the qualification of his conduct as a constitutive ground for dismissal would infringe the above-mentioned constitutional rights. The freedom of expression, guaranteed by Art 40 of the Constitution and Art 10 of the ECHR, implies the freedom of communication as well as (political) opinion making.

First of all, the Constitutional Court analysed if the freedom of expression could have been affected in the case. Even though the dismissal of the applicant was part of a civil law dispute and there was no general grounding for third-party effects of fundamental rights in the ECHR, the right of freedom of expression reaches beyond the classic understanding as a protective right against the state. Thus, by implying effects on third parties in civil law, a dismissal on the grounds of the exercise of one's constitutional right is unlawful. In consequence, the state also needs to guarantee the freedom of expression in employment relationships, which in this case means interpreting labour laws in favour of the freedom of expression, especially Sec 1173a Art 53 and Art 4 of the Civil Rights Code.

The Constitutional Court further acknowledged the applicant's perspective to see himself as a whistle-blower and thus akin to the constitutional protection of the freedom of expression. The Constitutional Court has pointed out that a whistle-blower is understood as an employee who reveals serious misconduct in his work environment out of mostly altruistic reasons.

Even though freedom of expression is affected in this case, and even though Sec 1173a Art 53 and Art 4 of the Civil Rights Code thus need to be interpreted according to the Constitution, further considerations need to be taken into account, namely the public interest, duties and responsibilities of the whistle-blower as well as possible damages. The Constitutional Court did not doubt the public interest of the information released. However, it remains questionable whether the conduct of the applicant fulfilled the high demands that come along with the severity and sensitivity of the accusations and consequences for those involved. By not taking all reasonable measures for validating the reliability of the accusations (in this case additionally looking at the paper patient file when knowing about the incompleteness of the electronic version), the Constitutional Court had followed the Supreme Court's opinion that in such context, the applicant acted recklessly.

[14] LGBl 2018 Nr 270, https://www.gesetze.li/chrono/2018.270.

As a consequence, the Constitutional Court declared that there had not been any violation of the freedom of expression. Additionally, the Constitutional Court found that no violation of the principle of equality had taken place. The Supreme Court had declared that the noticing period can depend exemplarily on the sensibility of the manner and can therefore vary among different cases. Correspondingly, this special case must not be compared with other dismissals with a shorter noticing period, hence not harming the principle of treating equal things equally and unequal things unequally.

IV. LOOKING AHEAD

On Sunday, 24 March 2019, elections will be held in all of the 11 municipalities. The citizens have to elect mayors and six to 12 members of the municipal councils. The big question is if more women will be voted for than in 2015, when 85 men were elected as members of municipal councils, but only 19 women. If not, women's organizations can be expected to re-voice claims for a women's quota.[15]

V. FURTHER READING

Janine Bürzle, *Das Legalitätsprinzip im Spannungsfeld zwischen Politik und Recht: Eine Untersuchung der höchstgerichtlichen Judikatur in Liechtenstein,* Schriftenreihe UFL, Editions Weblaw, Bern 2018

Liechtenstein-Institut (ed.), Kommentar zur Liechtensteinischen Verfassung. Online-Kommentar, Bendern 2016, www.verfassung.li (notes on more Articles of the Constitution have been put online)

Patricia M. Schiess Rütimann, 'Die Freiheiten des liechtensteinischen Gesetzgebers beim Einfügen der EMRK in die nationale Rechtsordnung', *LJZ* 3/2018, 143

Patricia M. Schiess Rütimann, 'Juristische Gutachten im Gesetzgebungsprozess,' *LJZ* 2/2018, 69

Sebastian Wolf, Peter Bussjäger, and Patricia M. Schiess Rütimann, 'Law, small state theory and the case of Liechtenstein', *Small States & Territories,* Vol. 1, No. 2, 2018, 183

[15] Peter Bussjäger & Anna Gamper, 'Liechtenstein', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *The 2017 I-CONnect-Clough Center Global Review of Constitutional Law* (2018) 177, 181.0.



Malaysia

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I. INTRODUCTION

For the first time since independence in 1957, Malaysia experienced a change of government at the federal level following the 14th General Election (GE14) on 9 May 2018. The *Pakatan Harapan* ('Pact of Hope', or PH) alliance of parties successfully unseated the *Barisan Nasional* ('National Front', or BN) coalition in a peaceful transition that reaffirmed Malaysia's commitment to constitutionalism and democracy. This presented a unique opportunity for Malaysia to forge a new direction following a particularly scandal-ridden period epitomized by allegations of massive corruption surrounding state investment fund 1Malaysia Development Berhad (1MDB) and its dealings worldwide.[1]

The change of political leadership heralded the opportunity to reform the country's laws and institutions, which was indeed a central feature of the incoming coalition's promise to an electorate fatigued by decades of corruption and mismanagement at state institutions.[2]

An interesting—if somewhat ironic—feature of the aftermath of GE14 was the return of 93-year-old Tun Dr Mahathir Mohamad as Prime Minister. This is the second time Dr Mahathir has held this position, following his first premiership from 1981 to 2003 at the head of BN—a period that was also beset with significant issues including the undermining of the judiciary, authoritarian-style politics, and the entrenchment of crony capitalism. This time, however, Dr Mahathir leads a very different political coalition, with his Cabinet comprising some leaders who were previously his bitter adversaries, as well as more conservative elements who defected from BN on the eve of GE14. Given this eccentric mix of new and old, the extent to which Malaysia can and will reform itself following the watershed of May 2018 remains an open question.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The change of government is particularly significant because, although there have previously been changes of prime minister within the ruling party, essentially the same coalition had governed for 61 years since independence, first as the Alliance and later as the BN. During this time, numerous repressive laws—particularly on sedition and internal security—were enacted, granting the executive branch very wide powers to interfere with fundamental liberties guaranteed by the Federal Constitution. The office of the Prime Minister also became a powerful institution, encompassing control over no less than 42 federal departments and agencies. The lack of effective checks and balances

[1] See, e.g., Hannah Ellis-Petersen, '1MDB Scandal Explained: A Tale of Malaysia's Missing Billions' (*The Guardian*, 25 October 2018) <www.theguardian.com/world/2018/oct/25/1mdb-scandal-explained-a-tale-of-malaysias-missing-billions> accessed 16 February 2019.

[2] Pakatan Harapan, '*Buku Harapan* ('Book of Hope') Rebuilding Our Nation, Fulfilling Our Hopes' <https://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf> accessed 16 February 2019.

was further aggravated by the recent practice of the Prime Minister also concurrently holding the position of Finance Minister.

This situation facilitated opaque dealings and alleged abuses of power by the ruling party, most notably the recent 1MDB scandal, which attracted worldwide regulatory investigations.[3] The previous government's control over the levers of power—including Parliament, given the Westminster-model 'fusion of powers' practised in Malaysia—was also used to stymie local attempts at securing accountability, and to gerrymander electoral boundaries in an (ultimately unsuccessful) attempt to shore up the ruling coalition's position prior to GE14 (see last year's *Review*).

Against this backdrop, the PH coalition campaigned on a promise to repeal repressive laws, reform the government by decentralizing power from the Prime Minister's Department (PMD), strengthen parliamentary checks-and-balances, and enhance the credibility of the judiciary. Indeed, soon after the election, the new PH government appeared to have consolidated its agenda by securing the resignation of the country's top two judges, the Chief Justice and the President of the Court of Appeal, who had been appointed by the previous administration in 2017 under highly dubious circumstances.[4] These justices were swiftly replaced by the next most senior judges in the judicial hierarchy. The new government also appointed a new Attorney-General, replacing the incumbent who had infamously absolved the previous government of any wrongdoing in the 1MDB saga despite mounting evidence to the contrary.[5] The appointment of the new Attorney-General, however, was delayed for weeks amidst rumours that the new appointee—a double minority (i.e., a non-Malay and non-Muslim)—was not acceptable to the then King, whose position still commands significant deference in Malaysia's political culture.[6]

Highlighting its commitment to reform, the new government established an Institutional Reforms Committee (IRC), which was comprised of eminent personalities and tasked with providing recommendations for the reform of key national institutions. Within 100 days of the change of government, the IRC reported back with a set of recommendations based on the pledges made in the PH's electoral manifesto for the Cabinet's consideration and approval; this report, however, has yet to be made public.[7] Also, in a landmark move, the new government announced its intention to abolish the death penalty and imposed a moratorium on pending executions until changes to the legal framework were implemented.[8] Furthermore, in July, the new government announced plans to devolve power from the PMD by placing several critical bodies, such as the Election Commission, the Public Services Commission, and the Judicial Appointments Commission¬ under the oversight of Parliament, and transferring certain agencies to other ministries.[9]

The government has, however, faced serious difficulties in implementing its reform agenda. Its attempt to repeal the Anti-Fake News Act 2017 in September failed: the bill to abolish the Act was passed in the popularly elected lower house of Parliament but it was rejected in the Senate—the upper house of Malaysia's bicameral legislature—where appointees of the previous government still held a majority. This rejection—unprecedented in the history of Malaysia—means that pursuant to the Federal Constitution, the repealing bill is now on hold for at least a year before the Senate's rejection can be bypassed, if the lower house re-enacts the measure.[10] PH will eventually gain a majority in the Senate under the appointments system, and the Senate is not constitutionally empowered to block money bills.[11] Nonetheless, this episode amply illustrates the obstacles that remain—at least for the short term—in the path of reform measures that do not enjoy bipartisan support. Another issue is the new administration's lack of a two-thirds majority in either house to amend Malaysia's Federal Constitution, which will be required if some of the coalition's promises, such as the separation of the Attorney-General's functions from that of the Public Prosecutor and the reform of the judicial appointments process, are to be realized.

A deeper undercurrent of resistance to the new administration's reform agenda was illustrated by the failed proposal for Malaysia to ratify the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 2018. Following an inspiring speech at the United Nations in which Dr Mahathir pledged to 'ratify all remaining core UN instruments relating to the protec-

[3] Malaysia's 1MDB Scandal' (*South China Morning Post,* 5 February 2019) <www.scmp.com/topics/malaysia-1mdb-scandal> accessed 16 February 2019.

[4] See the case discussion in Part III(4) below; see also George Varughese, 'Legal Action Filed to Seek Declarations that the Appointments of the Chief Justice and the President of the Court of Appeal are Unconstitutional and Void' (Malaysian Bar, 17 October 2017) <www.malaysianbar.org.my/press_statements/press_release_%7C_legal_action_filed_to_seek_declarations_that_the_appointments_of_the_chief_justice_and_president_of_the_court_of_appeal_are_unconstitutional_and_void.html?date=2018-08-01> accessed 25 February 2019.

[5] 'A-G: 1MDB Did Nothing Wrong' (*The Star,* 14 October 2015) <www.thestar.com.my/news/nation/2015/10/14/ag-1mdb-did-nothing-wrong-no-offence-to-act-on-says-apandi/> accessed 16 February 2019.

[6] Notwithstanding these rumours, in this matter the King (*or Yang di-Pertuan Agong*) as a constitutional monarch was in fact required to act on the advice of the Prime Minister; Federal Constitution of Malaysia, Arts 40(1A), 145(1).

[7] 'Institutional Reforms Committee submits final report to CEP, PM's Dept' (*Malay Mail*, 7 August 2018) <www.malaymail.com/news/malaysia/2018/08/07/institutional-reforms-committee-submits-final-report-to-cep-pm-dept/1659975> accessed 16 February 2019.

[8] 'Malaysia to abolish death penalty' (*Al Jazeera*, 11 October 2018).

[9] Royce Tan, 'Massive overhaul in PM's Dept with MACC, EC among agencies placed under Parliament' (*The Star*, 1 July 2018) <www.thestar.com.my/news/nation/2018/07/01/massive-overhaul-in-prime-ministers-department-with-macc-ec-among-agencies-placed-under-parliament/> accessed 16 February 2019.

[10] Federal Constitution of Malaysia, Art 68(2).

[11] Ibid, Art 68(1).

tion of human rights',[12] attention turned to the issue of ratifying ICERD, which could have raised questions regarding Malaysia's long-standing affirmative action policy in support of the Malay and other indigenous communities, who form a significant majority in the country. Amidst coordinated protests from the (now opposition) United Malay National Organization (UMNO) and the Islamic Party of Malaysia (PAS), a mammoth gathering galvanizing the Malay majority was scheduled for 9 December in Kuala Lumpur. The increasing tension, which had begun to take on ominous ethnic undertones, was only defused by the new government's announcement that it would not ratify ICERD after all, and the rally (which turned into a 'celebratory' event) passed without incident. This episode, which leaves Malaysia as one of only 14 countries in the world that have not signed or ratified the Convention, illustrates the precarious nature of the new administration's reform agenda, particularly when ethnic and/or religious considerations enter the fray.

III. CONSTITUTIONAL CASES

1. Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Negeri Perak & Ors: Basic Structure Doctrine and the Judicial Power of the Courts

In *Indira Gandhi*, the Federal Court examined the legality of the conversion of three minor children by their father without the knowledge or consent of their non-Muslim mother. The father had converted to Islam and become estranged from his Hindu spouse, the applicant in this case. Apart from the issue of the claimant's constitutional right to determine the religion of her offspring, this case also raised the important question of whether the civil (or ordinary) courts have jurisdiction to determine legal questions concerning the religious status of Muslim converts.

Under Article 12(4) of the Federal Constitution, the religion of a person under the age of eighteen years 'shall be determined by his parent or guardian'. The High Court had interpreted this provision to mean 'parents' in the plural, not least to avoid the absurd situation whereby one parent could convert a child to a particular religion on one day, only for the other to convert the child to another religion on a later day. Conversely, the Court of Appeal adopted a literal interpretation of Article 12(4) and allowed the father's conversion of the children to the Islamic faith. If that conversion was valid, however, it would be difficult for the applicant to convert the children back to the Hindu faith, since conversions out of Islam require the prior approval of the Syariah (Islamic law) courts in Malaysia. The validity of the purported conversion of the children thus assumed paramount importance—and the question was whether the civil courts or the Syariah courts had jurisdiction to determine this. This question also engaged Article 121(1A) of the Federal Constitution, an amendment inserted in 1988 which provides that the civil courts 'shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.' This provision had been cited by numerous cases since 1988 to justify repeated instances of the civil courts deferring to the *Syariah* courts on questions involving the status of Muslim converts.

The Federal Court held that the civil courts had jurisdiction to rule on the legality of the purported conversions in this case. In the first place, the Court stridently asserted that the amendment of the Federal Constitution in 1988 that removed 'the judicial power of the Federation' from Article 121(1), the provision establishing the judiciary in Malaysia, does not have the effect of ousting the power of judicial review, which is 'essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution.' This invocation of the 'basic structure doctrine', which follows the Federal Court's acceptance of the doctrine in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Others*[13] in 2017, means that despite the constitutional amendment to the power-vesting clause of the Federal Constitution, the judicial power of the Malaysian courts did not—and could not—become subordinated to legislative *diktat.* In contrast, the *Syariah* courts are creatures of state legislatures as permitted by the Federal Constitution, and they do not have inherent judicial powers. Their jurisdiction must be expressly conferred by state legislation, and cannot be expanded by implication.

Thus, the Federal Court held that Article 121(1A) does not oust the jurisdiction of the civil courts in interpreting the Constitution and reviewing the lawfulness of state action (here, the conversion of the minor children by the State of Perak Registrar of Converts) and that there was no express statutory provision conferring jurisdiction on the *Syariah* courts to determine the validity of conversions to Islam. The Court found that the action of the Registrar of Converts in converting the minor children without the knowledge or consent of their mother was unlawful and in contravention of the mother's constitutional right to determine the religion of her children. Accordingly, the Court quashed the certificates of conversion, which was the basis upon which the *Syariah* courts had proceeded to issue ancillary orders, such as those granting custody of the children to their father.

The *Indira Gandhi* judgment has been hailed as a 'restoration of the proper hierarchy between the civil and Syariah courts'.[14] This is an important development in the 'jurisdictional imbroglio' between the civil and Syariah courts that has dogged Malaysia since the constitutional amendments of 1988, and it provides some vindication for non-Muslim

[12] 'Dr M addresses UN General Assembly' (*The Star*, 29 September 2018) <www.thestar.com.my/news/nation/2018/09/29/dr-m-addresses-un-general-assembly/> accessed 16 February 2019.

[13] [2017] 5 CLJ 526 (Federal Court).

[14] Jaclyn Neo, 'Return of Judicial Power: Religious Freedom and the Tussle over Jurisdictional Boundaries in Malaysia' (I·CONnect, 15 March 2018) <www.iconnectblog.com/2018/03/return-of-judicial-power-religious-freedom-and-the-tussle-over-jurisdictional-boundaries-in-malaysia-i-connect-column/#_edn5> accessed 25 February 2019.

spouses who have often found themselves without legal recourse as a result of civil courts routinely declining jurisdiction to hear their applications for relief.[15]

Importantly, the *Indira Gandhi* decision also reaffirmed the application of the 'basic structure doctrine' in Malaysia, whereby Parliament cannot amend certain basic, fundamental characteristics of the Constitution even if the stipulated constitutional amendment procedure is complied with. This brings Malaysia in line with Commonwealth jurisdictions such as India, Bangladesh, and Pakistan, where the doctrine has been judicially recognized and applied.

2. Chong Chieng Jen v Government of the State of Sarawak & Anor: State Governments Can Sue Individuals for Defamation

In *Chong Chieng Jen*'s case, the Federal Court affirmed that the principle propounded by the UK House of Lords in *Derbyshire County Council v Times Newspapers Ltd*[16] does not apply to state governments and similar public authorities in Malaysia. The so-called Derbyshire principle provides, as a matter of common law, that although public authorities can sue and be sued, this does not extend to the ability to sue for defamation. Conversely, the Federal Court held that public authorities such as the State Government of Sarawak (the plaintiff in this case) are regulated by the Government Proceedings Act 1956 (GPA), section 3, which provides for the power of these authorities to sue without qualification. Therefore, public authorities can institute suits for defamation, as the Sarawak Government did in this case against a leader of the state-level opposition, who had insinuated corruption and mismanagement of state funds on the part of the Sarawak Government. In so holding, the Federal Court also made reference to the limited nature of the freedom of speech secured under Article 10(1) of the Federal Constitution, which can be limited by laws passed by Parliament under Article 10(2). Indeed, Article 10(2) refers specifically to the ability of Parliament to legislate restrictions on the freedom of speech in order to provide against defamation. Thus, the Federal Court ruled that the *Derbyshire* principle must give way to the provisions of the domestic statute—in this case the GPA—which allows public authorities to institute defamation suits.[17]

3. Hassan bin Marsom & Others v Mohd Hady bin Ya'akop: Irregularly Obtained Remand Order Is a Violation of Constitutional Rights and Occasions Damages for False Imprisonment

In *Hassan bin Marsom* the Federal Court dismissed an attempt by a group of policemen, who had assaulted a detainee in custody, to challenge an award of exemplary damages against them on the basis that a magistrate had lawfully ordered the detention. It was asserted on their behalf that the act of the magistrate in issuing the remand order was a judicial act that could not of itself give rise to a claim for damages under the Courts of Judicature Act 1964. Alternatively, it was asserted that even if the remand order had been improperly obtained (which indeed it had), the remand order remained valid once issued and it had never been set aside.

The Federal Court held that because the evidence showed that the remand order had been issued without complying with the requirements of the Criminal Procedure Code (specifically section 117) and the Chief Justice's Practice Direction No. 3 of 2003, the detention was unlawful *ab initio* and in violation of the constitutional right to liberty secured by Article 5(1) of the Federal Constitution. The Federal Court observed that the courts' constitutional role is to be the ultimate bulwark against excesses in administrative action, and that assault in police custody is a clear violation of the most fundamental liberty guaranteed under the Federal Constitution.[18] Hence, the award of exemplary damages was not only maintained but also enhanced. *Hassan bin Marsom*'s case thus marked an important vindication of the right not to be deprived of liberty without due process of law by the apex court.

4. Malaysian Bar & Others v Government of Malaysia: Controversial Extension of Chief Justice's Tenure

On 24 September, the Federal Court decided the suit brought by the Malaysian Bar and the Advocates Associations of Sabah and Sarawak seeking to invalidate the appointments of Justice Raus Sharif and Tan Sri Zulkefli Ahmad Makinudin as Chief Justice and President of the Court of Appeal, the two highest-ranking positions in the Malaysian judicial hierarchy, respectively. The duo had been controversially appointed to these positions by the previous administration in 2017, despite both having passed the retirement age stipulated in the Federal Constitution. This was achieved via the unprecedented and constitutionally doubtful route of first appointing both as 'Additional Judges' of the apex court. Apart from the Bar Associations, Dr Mahathir (then a 'former Prime Minister') and a component party of the PH coalition had also challenged the legality of these appointments (both ultimately unsuccessful; see last year's *Review*).

Following the change of government in May, however, both appointees resigned in July—though not before both had been controversially 'summoned' to meet the chairman of the advisory Council of Eminent Persons (CEP), set up by the new administration.[19] A new Chief Justice and President of the Court of Appeal were swiftly sworn into office through the regular appointment process.

Given these developments, the Federal Court declined to provide the much-awaited

[15] Thio Li-ann, 'Jurisdictional Imbroglio: Civil and Religious Courts, Turf Wars and Article 121(1A) of the Federal Constitution', in Andrew Harding & HP Lee (eds), Constitutional Landmarks in Malaysia: The First Fifty Years 1957-2007 (LexisNexis, 2007) p.197.[16] [1993] AC 534.

[17] [2018] MLJU 1649.

[18] [2018] MLJU 1294, para 121.

[19] 'Lawyers express concern over meeting between top judges and Daim' (*The Star*, 10 June 2018) <www.thestar.com.my/news/nation/2018/06/10/lawyers-express-concern-over-meeting-between-top-judges-and-daim/> accessed 16 February 2019.

answer to the question of whether Raus and Zulkefli's appointments had been validly made. Holding that the matter had become 'academic' now that the judges in question had resigned, the Federal Court sidestepped the questions of constitutionality posed by the applicants, reiterating that 'it is not the function of the courts to decide hypothetical questions which do not impact on the parties before them.'[20] This was an unfortunate decision that spurned an unprecedented opportunity to rule on the legality of using the 'Additional Judge' mechanism to appoint top judicial office-holders and thereby establish guidance on the issue in case a future government is tempted to repeat this maneuver.[21] The decision also failed to address the uncertainty surrounding the legality of the duo's actions and decisions during their disputed tenure in these positions.

5. A Child and Others v Jabatan Pendaftaran Negara & Others: Religion and Administrative Power

In November, the Federal Court deferred its decision on the appeal arising out of the judicial review action to compel the National Registration Department (NRD) to change the surname of 'bin Abdullah', appended as a matter of procedure to a child born to a Muslim family who was illegitimate under Islamic law (see last year's *Review*). Last year, the Court of Appeal had held against the NRD, affirming that the agency is not entitled to rely on a *fatwa* (religious decree) to defeat the provisions of ordinary law (in this case the Births and Deaths Registration Act 1957), which permit other ways of determining the child's surname.[22] This is an important ruling which affects the relationship between the ordinary 'civil' law and 'Islamic law', which co-exist somewhat uneasily in the Malaysian legal system.

On appeal by the NRD and a coalition of Muslim organizations, the Federal Court ultimately reserved the judgment it had been scheduled to deliver, agreeing with the government's counsel that the matter required a careful solution from the legislative and executive branches.[23] This was a curious position given that no legislative or executive proposal to resolve the impasse is currently in the public domain, and the matter raises the issue of the primacy of one source of law over the other, which is an issue of substantial public interest.

6. Sisters in Islam v Selangor Fatwa Committee & Others: Courts' Jurisdiction to Review Religious Fatwa

This judicial review application by the non-governmental organization 'Sisters in Islam' (SIS) against a *fatwa* by the *Fatwa* Committee of the State of Selangor, which had proclaimed SIS a deviant organization due to its close association with the ideologies of 'liberalism' and 'pluralism', raised the important—albeit extremely sensitive—issue of whether the civil courts enforcing ordinary Westminster-model principles of constitutionalism could judicially review proclamations of an Islamic religious body purporting to rule on questions of Islamic law.

Previously, the Court of Appeal had overruled a High Court decision that it had no jurisdiction to perform such judicial review (see last year's *Review*). On appeal by the *Fatwa* Committee, the parties reached a consent judgment before the Federal Court whereby the case would be remitted to the High Court for all issues, including the question of jurisdiction, to be ventilated and adjudicated upon.[24] This case will once again invite Malaysia's judicial authorities to deal with the difficult question of the overlapping authorities of secular and religious bodies in the country.[25]

IV. LOOKING AHEAD

Apart from the question of whether, and to what extent, the new government will deliver the promised reforms, a major uncertainty on the horizon is how the numerous corruption cases against former prime minister Najib Razak and his associates will be handled. In view of the election result, public opinion clearly demands that those responsible for the 1MDB scandal be brought to justice as soon as possible; however, the reality is that these complex cases will take at least another year to conclude.

The ability of the new PH government to maintain public support for its reform agenda will also be tested as anti-incumbent fatigue and global economic factors beyond its control begin to chip away at its popularity. This will be an important determinant of whether Malaysia continues on its current trajectory of reform or reverts to a version of the *ancien regime.*

The promised handover of power from current Prime Minister Dr Mahathir to the 'prime minister-in-waiting', Anwar Ibrahim, is also an event to watch for. While this was a central plank of the incoming administration's promise to the electorate, there is

[20] 'Court: It's purely academic now' (*The Star,* 25 September 2018) <www.thestar.com.my/news/nation/2018/09/25/court-its-purely-academic-now-case-on-judges-appointments-dismissed/> accessed 16 February 2019.

[21] V Anbalagan, 'Ex-judge: Federal Court must rule on appointments of Raus, Zulkifli' (*Free Malaysia Today*, 29 June 2018) <www.freemalaysiatoday.com/category/nation/2018/06/29/ex-judge-federal-court-must-rule-on-appointments-of-raus-zulkefli/> accessed 16 February 2019.

[22] [2017] 4 MLJ 440.

[23] Maizatul Nazlina, 'Federal Court postpones decision in "bin Abdullah" case, following Govt request for adjournment' (*The Star*, 22 November 2018) <www.thestar.com.my/news/nation/2018/11/22/federal-court-postpones-decision-in-bin-abdullah-case/> accessed 16 February 2019.

[24] Khairah N Karim, 'Sisters in Islam to have day in court, to legally challenge the "deviant group" label' (*New Straits Times*, 25 September 2018) <www.nst.com.my/news/crime-courts/2018/09/414813/sisters-islam-have-day-court-legally-challenge-deviant-group-label> accessed 16 February 2019.

[25] Maizatul Nazlina, 'MAIS declaration that Sisters in Islam is "deviant"—High Court to decide' (*The Star*, 2 October 2018) <www.thestar.com.my/news/nation/2018/10/02/high-court-to-decide-on-mais-declaration-that-sisters-in-islam-is-deviant/> accessed 16 February 2019.

undoubtedly no love lost between the two leaders, not least because of the dismissal and jailing of the latter by Dr Mahathir in the 90s.

In the courts, the ability—and willingness—of the Federal Court to maintain the 'basic structure doctrine' articulated in *Indira Gandhi* and earlier cases will determine the trajectory of constitutional adjudication in Malaysia. The eventual resolution of the *bin Abdullah* and *Sisters in Islam* cases will also reflect on the courts' willingness to exercise judicial oversight in matters involving an element of religious law.

On a wider canvas, cases involving an Islamic law element, particularly those engaging the freedom of religion, are likely to take on even greater significance in the coming years with the resurgence in political fortunes of the Islamic Party of Malaysia (PAS), which won control of two state administrations in GE14. The enthusiasm of the new PAS-led governments for an uncompromising application of *Syariah* was underlined by the public caning of two women in the northeastern state of Terengganu in September for the offence of 'attempting to have lesbian sex'.[26] This trend may also portend future conflict between the PAS-led state governments and the PH-led federal administration, given that the administration of *Syariah* law falls primarily within state jurisdiction.

V. FURTHER READING

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2. Andrew Harding, 'Malaysian Reform Dynamics' (East Asia Forum, 6 December 2018) www.eastasiaforum.org/2018/12/06/malaysian-reform-dynamics/?fbclid=IwAR1dkexY9ErDsAZ-gtmzZIBwokEx5CPw2oyfmwsvRYRiRwT7mfUO1XUSLRo.

3. Jaclyn L Neo & Wilson Tay, 'Restoring the Independence and Integrity of Malaysia's Judiciary: Proposals for Reform and Challenges Ahead' (ConstitutionNet, 14 November 2018) www.constitutionnet.org/news/restoring-independence-and-integrity-malaysias-judiciary-proposals-reform-and-challenges-ahead.

4. Jaclyn L Neo, 'Definitional Imbroglios: A Critique of the Definition of Religion and Essential Practice Tests in Religious Freedom Adjudication' [2018] 16 *International Journal of Constitutional Law* 574.

5. Richard Foo & Amber Tan, 'Separation of Powers in "New Malaysia": Hope and Expectations' [2018] 5 *Journal of International and Comparative Law* 529.

[26] Yiswaree Palansamy, 'Terengganu duo publicly caned six times over lesbian sex attempt' (*Malay Mail*, 3 September 2018), <www.malaymail.com/news/malaysia/2018/09/03/terengganu-duo-publicly-caned-six-times-over-lesbian-sex-attempt/1668766> accessed 16 February 2019.



Mexico

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I. INTRODUCTION

2018 witnessed important developments and advances in constitutional law. Among the most significant ones, we must include the entry into force of the Constitution of Mexico City and the declaration of unconstitutionality of the Internal Security Law.

Important changes in constitutional law have also been registered in terms of human rights, one of the main issues on the political and legal agenda. In this sense, 2018 was the year in which the Mexican Supreme Court of Justice (hereinafter the Court or the Supreme Court) recognized the right of homosexual couples to become parents through assisted reproduction, facilitated gender reassignment proceedings in public administration and annulled the internal legislation that favored the militarization of public security. Laws and judgments on women's rights also deserve special mention.

2018 saw outstanding judgments that protected those who work double days, both at a job and at home. The Supreme Court also reinforced laws on femicide and ratified the implementation of gender perspective in the investigation of crimes. Additionally, several proposals that limited the rights of women to freely decide over their bodies were defeated, and others that fought for equal pay between men and women were approved by broad majorities.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2018 there were two major developments in Constitutional Law. The first one was the entry into force of the Constitution of Mexico City on 17 September 2018. The second one started on December 2017 with the publication of the Internal Security Law and culminated with its declaration of unconstitutionality by the Supreme Court of Justice on November 2018.

The call for a Constitution of Mexico City was long-standing, and its publication on 5 February 2017 has been regarded as a democratic and federalist exercise. However, there are two main reasons why this is debatable. First, it is worth noticing that the Constituent Assembly was made up of 100 representatives, 60% of whom were elected and 40% appointed by political elites. Of the 40 appointed representatives, 6 were appointed by the former President (from the *Partido Revolucionario Institucional* - PRI), 6 were appointed by the former Head of Government of Mexico City (from the *Partido de la Revolución Democrática* - PRD), and 28 by the Mexican Congress.

The two parties that benefitted the most by this arrangement were the PRI and the PRD. Apart from their 5 representatives elected by popular vote, the PRI—Mexico City's fourth political force prior to the formation of the Constituent Assembly—got 10 additional

representatives appointed by the Congress and 6 more by the former President. For its part, the PRD got 4 representatives appointed by the Congress and 6 representatives appointed by Mexico City's former Head of Government apart from its 19 representatives that were elected by popular vote. In this sense, since the very beginning, the Constituent Assembly was not a place for popular deliberation in a full sense, but rather an agreement among political elites.

The second reason for debate concerns the content of Article 122 of the Mexican Federal Constitution, which was last reformed in January 2016. Said disposition regulates in great detail the Constitution of Mexico City. Our Federal Constitution is one of detail, and Article 122 is no exception. The body of federal constitutional reform strongly limited the content of the Constitution of Mexico City by deliberately providing its scope in said article.

Indeed, Article 122 of the Mexican Constitution establishes rules related to the Legislative, Executive and Judiciary Powers, which involve the election of their holders as well as their duties, attributions and more. It also describes the process for approval of amendments to the Constitution of Mexico City. Besides, it provides guidelines for real estate taxes, exemptions and subsidies, among other financial matters. Likewise, Article 122 enshrines the characteristics and attributions of municipalities, Mexico City's public administration, the city's public finance and autonomous constitutional organs such as the Tribunal of Administrative Justice, etc. Finally, said disposition dictates how labor relations between Mexico City and its workers must be regulated and the functions of the federal branches of government in Mexico City.

In this way, Article 122 limited substantively the Constituent Assembly's field of action. Maybe there won't be another Constituent Power in the short run, but we should learn from the experience of the Constitution of Mexico City that to get the citizenry involved in constitutional matters. We should take care also of the way in which representatives are elected and stress the necessity to obtain the direct approval of citizens by referendum. Moreover, we should rethink which matters would be better served to have a Constitution of detail and which where a Constitution of principles would be more adequate.

The second major development in Constitutional Law that we want to mention is the publication of the Internal Security Law in December 2017, which was declared unconstitutional by the Supreme Court in November 2018. This law militarized public security in Mexico and authorized the Executive branch to use the military as a regular force for public security instead of the police, in contravention to what Articles 21 and 129 of the Mexican Constitution currently prescribe.

Nowadays, perhaps the most important debate going on in Mexico concerns the use of armed forces as a public security body. Fortunately, a lot of citizens, NGOs, the government and the Federal Congress are taking the implications of using armed forces as a security body seriously. We'll have to wait and see what happens.

III. CONSTITUTIONAL CASES

1. Amparo Directo en Revisión 4883/2017: Double shift of working hours

The First Chamber of the Supreme Court decided a case in which a woman sued her ex-husband for compensation for half of the assets that were acquired during their marriage. In the procedure, it was determined that such compensation was not due, since the plaintiff failed to prove that throughout her marriage she had dedicated herself exclusively to housework and the care of their children, while it was shown that, in addition to domestic work, she was employed at a workplace.

A federal circuit court which reviewed the previous judgement stated—based on Article 267, section VI, of the Civil Code of Mexico City, valid until June 2011—that the woman should have proven that she dedicated herself exclusively to the care of their children and home during their whole marriage.
The Supreme Court determined that the interpretation by the circuit court was unconstitutional, since the purpose of the compensation was to mitigate the inequity suffered by a spouse as a result of her dedication to housework and to the care of the children. Therefore, double shifts of work (that is, undertaking family responsibilities in addition to paid employment) cannot be an obstacle to access to such compensatory mechanisms.

2. Amparo Directo en Revisión 6181/2016 and Amparo Directo en Revisión 5490/2016: Domestic violence

In its decision of 7 March 2018, in the *Amparo Directo en Revisión* 6181/2016, the First Chamber of the Court ruled that judges must take into account the context of violence suffered and judge them under a gender perspective paradigm in cases where women who had suffered domestic violence faced criminal charges for assaulting their perpetrators. In this case, the appellant pointed out on several occasions that she suffered domestic violence. However, the authorities never considered such allegations.

The application of gender perspective on this kind of case implies an imposition on judges to identify whether a case involving a possible context of power based on gender is able to generate a situation of prejudice and disadvantage for the appellant. Judges must order the obtainment of whatever evidence is necessary for discarding any gender stereotype or prejudice as well as for visualizing any situations of disadvantage caused by sex or gender conditions. Evidence may include expert opinions of the psychological and physical condition of the affected person as well as expert evaluations of her psychosocial environment, experiences and circumstances.

The gender perspective approach was also adopted in the *Amparo Directo en Revisión* 5490/2016, which recognized the capacity of a woman and her son to sue for reparation of damages from their aggressor as victims of domestic violence. According to the Court, pecuniary and moral damages suffered by victims of domestic violence must be repaired economically by the perpetrator in a fair and proportional manner. In this sense,

the judgement established that domestic violence constitutes an unlawful act that generates civil liability, given its harmful effects on the physical, emotional or psychic sphere of a family member. It is a transgression of the right to live in a family environment free of violence, which derives from the rights to life, health, the dignity of people, equality and to the establishment of conditions for personal development.

3. Acciones de Inconstitucionalidad 10/2014 and 11/2014: National Code of Criminal Procedures

The Supreme Court resolved the *Acciones de Inconstitucionalidad* 10/2014 and 11/2014 with a decision issued on 22 March 2018, on the constitutionality of the provided faculties of the police and public prosecutor in the investigation of crimes. In 2014, the National Human Rights Commission (hereinafter CNDH from its name in Spanish, *Comisión Nacional de Derechos Humanos*) and the then Federal Institute of Access to Public Information and Data Protection presented an action of unconstitutionality, demanding the invalidation of 13 articles of the National Code of Criminal Procedures (hereinafter CNPP, from its name in Spanish, *Código Nacional de Procedimientos Penales*), enacted that same year in the framework of the reform to the criminal justice system.

The action of unconstitutionality was based on the alleged ambiguity and vagueness of the contested articles, which would allow for authorities to apply them according to their own discretion and subjective judgement. Among the various provisions challenged, the core of the issue in the Court's discussion was the constitutionality of the competence of the police to carry out inspections on people and vehicles in the context of a criminal investigation without requiring any form of judicial control.[1]

Likewise, the Court declared the constitutionality of several provisions: Article 148 of the CNPP, which establishes a limit of up to 24 hours of detention for persons detained *in flagrante delicto* without a formal complaint being filed by the entitled party; Article 155, section XIII, of the CNPP on home security as a precautionary measure, establishing that while this precautionary measure is not expressly provided for in the Constitution, it is consistent with the principles that pervade the criminal process. The first paragraph of Article 153 of the CNPP, on the duration of precautionary measures, refers to "the absence of a term or temporary catalog for the imposition of a precautionary measure does not imply establishing or granting arbitrary or excessively discretionary powers to the control judge"; and the last paragraph of Article 434 of the CNPP on international legal assistance at the request of the defendant, in particular the part establishing that legal assistance can only be invoked in order to obtain evidence through an order of an investigating or judicial authority, and not for evidence offered by the defense.

4. Acciones de Inconstitucionalidad 122/2015, 124/2015 and 125/2015: Right of reply

On 1 February 2018, after six sessions of discussion, the *Pleno* of the Supreme Court resolved the *Acciones de Inconstitucionalidad* 122/2015, 124/2015 and 125/2015 filed on the Law of the Right of Reply, published in the Official Gazette of the Federation in November 2015, declaring unconstitutional its Article 10. This provision established a period of no more than five business days following the day of publication or communication of information for an interested party to rectify or respond to it. Additionally, the Court recognized the constitutionality of the rules requiring that those interested in requesting a reply must prove the existence of the respective disseminated information.

According to the Court, the deadline set by the Congress for requesting a reply could make this right nugatory, mainly because some of the media cannot be consulted daily, which would force the interested person to be aware of all media disseminating information. Although a majority of seven judges considered that the possibility of appealing the ruling of a judge in relation to a reply could prevent the correct exercise of this right (since the reply is more effective when published closer to the time of the original publication), *Acciónes de Inconstitucionalidad* was dismissed on this point for not reaching the minimum of eight votes necessary for a qualified vote.

5. Acción de Inconstitucionalidad 15/2017: The Constitution of Mexico City

The Supreme Court upheld large parts of the Constitution of Mexico City's provisions, the first in its political history. The relevance of this case constrains not only the capital's legal system but this abstract judicial action represents a leading precedent in defining the relationship between the federal government and the states' powers on fundamental rights law.

The first important point addressed in this case was Mexico City's recognition as a political entity enabled to extend human rights beyond the Federal Constitution and international treaties. In fact, some of the rights recognized therein were completely new and, consequently, different from those enshrined at the federal constitutional level.

Such was the case of the right to medical and therapeutic use of marijuana in the capital's territory. The Court found this provision compatible with the federal legislative competence in public health matters and with the federation reserved powers on drug regulation. The legitimate mention to that right in the local Constitution does not imply a regulation but merely a recognition of use without interfering with federal laws.

Another outstanding discussion was the right to die with dignity. The disposition under analysis literally provides that: "The right to a life with dignity implicitly contains the right to a death with dignity". This right was considered part of the freedom of self-individual autonomy. This provision does not necessarily mean euthanasia or assisted suicide. Instead, it is understood to provide the possibility of taking care of patients with terminal diseases, or the development or im-

[1] This competence is provided in Articles 132, section VII, 147, 251, sections III and V, 266 and 268 from the CNPP.

provement of the quality standards of medical care and psychological support in the last stages of a terminal life.

Another right declared constitutional by the ruling was the inalienable right of access to water and sanitation for personal and domestic use. According to the Court, this provision didn't violate an exclusive federal competence.

The Court also upheld sexual and reproductive rights in the City's Constitution. The legislative competence to recognize those kinds of rights has a concurring basis in the Mexican political system: at a federal level, the legal system must provide rules for scientific and technical criteria, but that doesn't imply a prohibition on the states to recognize these rights and to provide public services regarding family planification.

6. Acción de Inconstitucionalidad 6/2018: Internal Security Law

For many reasons, this case could be one of the most important judgments since the 2011 constitutional reform. Such reform created a powerful constitutional basis for human rights law.[2] The Court ruled that the entire so-called "Internal Security Law" was unconstitutional. In doing so, the judiciary struck down a statute that was promoted by Enrique Peña Nieto's government and approved by both federal chambers to face a profound Mexican social crisis: organized crime in matters of drug trafficking and other serious crimes.

Basically, the statute regulated the intervention of armed forces to combat "internal security" threats. The law allowed the President to declare the existence of such threats in state territories or determined regions of the country. This declaration would have generated federal forces action, including military operations.

The Court ruled that the use of military force to intervene in public security was not allowed not only by the constitutional order but by international human rights law. Also, some judges considered that the Federal Congress was not constitutionally able to legislate in matters regarding so-called "internal security".

7. AAmparo en Revisión 533/2018: Same sex-couples' right to assisted reproduction

Through a subrogated maternity technique, a same sex-marriage achieved the procreation of a child. They intended to officially register him as their biological son. A governmental office in Yucatán state denied the registration on the basis of local civil legislation. The law did not provide such possibility, given that it could only be applied to an existing relationship by consanguinity.

In the case, a federal judge ruled that it was impossible to recognize the filial link between the child and the couple. According to the judge, there was no proof of minimal legal requirements of a subrogated maternity. The civil registration of the child must previously be supported by a judicial authorization and an adoption procedure.

The Court's First Chamber ruled that the child must be registered as the couple's son on the basis of his right to a family name and to a civil personality. Also, both parents have the right to a private life, to no discrimination based on sexual preference and to access to assisted reproduction techniques. Finally, the biological mother also has a right to privacy and a free development of her own personality.

The Court decided that, under assisted reproduction technique circumstances, the child's filiation does not need a proved biological link. His official recognition by civil authorities through paternity or maternity presumptions was legally possible. The biological mother's explicit consent was also important in this case, and her recognition of the biological father and his partner as legal parents. Therefore, there were no doubts about their responsibility coming from that condition.

8. Amparo en Revisión 1049/2017: Right to life and health of a child vs. parents' religious beliefs

A six-year-old girl with leukemia was hospitalized in emergency conditions. The doctors indicated urgent blood transfusions. Her parents denied the treatment because of their religious beliefs. A family prosecution office started a guardianship procedure in order to provisionally authorize the transfusions.

The parents reclaimed their right to freely decide about their daughter's health. A federal judge recognized, on one hand, that right. On the other hand, he decided that the family prosecutor must respect the parents' conviction about alternative medical treatments. Additionally, the judge ordered blood transfusions only in urgent cases.

The Court revoked that decision on the basis that the Constitution protects children's rights to life and health. Both rights are considered as a "preponderant constitutional interest". Thus, this interest means a restriction to the parents' autonomy to decide about their children's rights. The state can intervene in the parents' autonomy in certain cases.

There are two cases in which an alternative medical treatment can risk the health or the life of a child: when there is an emergency or urgent situation and when the alternative treatment is not equally effective to recover the child's health.

In this sense, firstly, the Court ordered the duty of giving a child protection procedure. Secondly, the Court ruled that the public authority could authorize successive blood transfusions in case there is a medical indication for them. It also indicated that in such supervision, public authorities must provide a fair and respectful treatment to the girl's parents.

[2] The constitutional reform published on June 10, 2011, recognized that international treaties on human rights law have the same hierarchy as the Constitution itself within the Mexican legal system. See: Herrera García, Alfonso, La interpretación de los derechos humanos y sus garantías por la Suprema Corte de Justicia. Una aproximación jurisprudencial, México, CNDH, 2015, pp. 27-39.

9. Amparo Directo en Revisión 9/2018: Non-discrimination of domestic women workers

The Social Insurance Law provided that employers had no obligation to include domestic workers in the social security system. The Supreme Court's Second Chamber declared that this legal exclusion violated the right to non-discrimination in terms of social insurance.

The Court concluded that there was no reasonable justification to exclude domestic workers from a mandatory social security regime. This circumstance mostly affects women workers in a disproportional way, since statistically nine out of ten domestic workers are female. The Court explained that domestic work has been traditionally exposed to inadequate labor conditions, long working days and low salaries. Nowadays, this historical discrimination prevails, which is quite far from the concept of working with dignity.

The Court ordered the Mexican Social Security Institute to implement a complete social insurance system program, providing both guarantees to domestic workers and correlative employers' obligations.

10. Amparo en Revisión 163/2018: Prohibition of cockfights

On 31 October 2018, the First Chamber of the Supreme Court issued the *Amparo en Revisión* 163/2018, in which it determined that Articles 2, second paragraph, 3 and 28 and fractions V, VIII and X of the Animal Protection Law of the State of Veracruz were constitutional because they provided an appropriate and necessary measure to guarantee animal welfare, which is the prohibition of cockfights. In said resolution, the First Chamber established that no practice that entails unnecessary suffering and ill-treatment of animals can be considered as a cultural expression protected by the Constitution.

Hereof, the Chamber underlined that the achievement of the purpose of said Articles compensates the infringement of property rights over fighting birds and the freedom of labor of the people involved in those activities. Also, the sentence settled that the right of equality before the Law does not protect the claim to include cockfights in a list of permitted activities that also imply animal mistreatment, such as bullfights, because plaintiffs cannot benefit from the fact that the legislator was incongruous to include one activity and not the other.

IV. LOOKING AHEAD

2019 is an important year for the Mexican judiciary. From 1 December 2018, there has been a new federal government headed by Andrés Manuel López Obrador, who ran for the third time and won with over 53% of the vote. During the campaign and after the elections, he presented himself as an agent of economic, political and social change. During his six-year presidential period, President López Obrador has the responsibility of appointing three new justices to the Supreme Court. Last December, the Senate confirmed Justice Juan Luis González Alcántara Carrancá, replacing Justice José Ramón Cossío Díaz, and in January 2019, Justice Arturo Zaldívar Lelo de Larrea was elected by his colleagues as the new President of the Supreme Court and the Federal Judiciary Council. It is expected that during February 2019 the Senate will confirm one female justice. The next vacancy will take place in 2021.

This year, the Supreme Court will solve an important lawsuit against a controversial statute: the Public Servants' Salaries Law. This statute, promoted by the new major political party, reduces public salaries, including those applied to the judiciary. One of the main arguments against this statute is the violation of judicial independence.

Another central public issue that will take place throughout 2019 is the expected constitutional reform that will create the so-called "National Guard". Given the apparent military elements that underlie this public security body, the debate will again put on the judicial table a fascinating topic: the possible unconstitutionality of a constitutional reform.

V. FURTHER READING

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Moldova

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I. INTRODUCTION

Analysis of the developments in the Constitutional Law of Moldova in 2018 illustrates the trans-formation the political system has gone through over recent years, both substantively as well as procedurally.[1] It also represents the complex and economically difficult social reality of the country with a torn national identity between East and West. The complicated separation of power, involving the rising power of the Constitutional Court to mediate between the President and the Parliament to enforce their duties, is analytically fascinating but highly problematic for the country's future. The level of democracy of the Republic of Moldova has been on a negative trajectory for some years now. The year 2018 was no different and concerned all aspects of the political system. Any constitutional development that could have had a positive effect on the level of democracy was strangled by an inter-institutional deadlock between the President, Prime Minister and parliamentary majority.

This deadlock, starting in 2017, became one of the dominant stories in Moldovan politics and remains a big constitutional crisis. It started with the refusal of President Igor Dodon from the Socialist Party of the Republic of Moldova (PSRM)[2] to confirm the new Minister of Defense. This was followed by the President's refusal to sign laws despite his constitutional obligation to do so. To break this deadlock, the Constitutional Court started to temporarily suspend the Presi-dent from his duties for several minutes until the Interim President signed the laws or appointed the ministers. This has happened five times so far, most recently in November 2018. The indi-vidual laws that were blocked by President Dodon will be discussed below. I give preference to these decisions over other activities of the Court.

The conflict between the core institutions of the political system overshadowed other important political and constitutional developments. One such development involved EU financial assis-tance. Despite the claim that the temporary suspension of the President was done to foster the relationship with the European Union, this relationship significantly deteriorated to a point where EU financial assistance was blocked or significantly reduced.[3]

Each of the sections below details how the substantive issues continue to grow: identity conflict, procedural issues and role enforcement. The new judicial activism is colliding with presidential interests, and the decisions by the Constitutional Court in the inter-institutional conflict will sub-stantively alter the political process in the coming years.

[1] The Constitutional Court of the Republic of Moldova (CCM) provides important information on the Court in Eng-lish, including a comprehensive documentation of current and past cases and a description of the proceedings. This can be found on the Court's website, <http://www.constcourt.md>. A complete documentation of all decisions and the applications for judicial review is available here, <http://www.constcourt.md/ccdocs.php?l=ro>

[2] *Partidul Socialiştilor din Republica Moldova.*

[3] Rikard Jozwiak, 'EU Cuts Moldova Funding Amid Rule-of-Law Concerns' (Radio Free Europe/Radio Liberty, 15 November 2018) <https://www.rferl.org/a/eu-cuts-moldova-funding-amid-rule-of-law-concerns/29603052.html ac-cesses 15 February 2019> accessed January 15, 2019.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constitutional development in the Republic of Moldova often centers around two topics: the role of the President of the republic and the tension arising from a torn national identity between East and West. Within these two areas, different constitutional developments can be observed in the last 25 years. What is so special about 2018 is that in this year, the two areas start to overlap strongly.

The role of President in the constitutional system of Moldova is one of intense struggles. The 1994 constitution failed to establish a clear separation of power, with the role of President a re-curring theme of constitutional amendments and Constitutional Court decisions. As a result, the political discussion takes on the style of a ping-pong game,[4] going back and forth between a par-liamentary and semi-presidential system. In 2016, the game moved back to a semi-presidential system.[5] This change was not based on a constitutional amendment but a decision of the Consti-tutional Court to declare the 2000 amendments unconstitutional.[6] At a time when the country was reeling from massive protests after a corruption scandal and bank heist in the course of which the country lost approximately 1 billion USD,[7] the Constitutional Court showed an un-precedented level of judicial activism. This activism became apparent when the Court decided to declare a 16-year-old amendment unconstitutional, and as we have seen throughout 2018, no iso-lated case. It was the start of parts of the Moldovan ruling elite relying on the Constitutional Court to help solve inter-institutional conflicts, and preserve its hegemonic status.[8] However, this was a new direction for the Court. The country had experienced an intense inter-institutional im-pass before, in a 900-day deadlock from 2009-2012 during which the Parliament could not elect a President,[9] but the Court was not involved. At that time, it refrained from substantial activism, instead asking the Venice Commission for an opinion on the relevant provisions of the constitu-tion.[10] But that changed.

In more recent years, the activism of the Court has often targeted the presidency, yet the suspen-sion of the President in October 2017 and again in January and November of 2018 added a whole new chapter to the already complicated relations between the President, government and parlia-mentary majority.

In October 2017, the Moldovan Constitutional Court suspended the President temporarily. The reason was Dodon's refusal to appoint Eugen Sturza as Minister of Defense, an appointment process that had already started in December 2016. Early in 2017, the Constitutional Court had issued an interpretation of Article 98 of the constitution, whereby the President can only reject the nomination of a cabinet member once.[11] Thus, the repeated refusal to appoint Sturza led the government to appeal to the Constitutional Court again. The Court first decided that the refusal to confirm a cabinet nomination is considered a violation of the constitution and can lead to a temporary suspension. This suspension was issued by the Court and was in force until the acting President (the head of Parliament) appointed the new minister. Yet the constitutional procedure stipulated by Article 89 would have been entirely different, requiring a 2/3 majority in Parlia-ment. A temporary suspension was thus an invention of the Constitutional Court that set a dan-gerous precedent. But we should not forget that the President was in clear violation of his duties when he refused to promulgate laws. The constitution only stipulates a suspensive veto right ac-cording to Article 93.

This newly found instrument of temporarily getting rid of the President as a veto player has pro-found institutional and legal ramifications, and questions the power of the directly elected Presi-dent (Dodon's direct election is an argument he frequently uses to justify his refusal to sign laws he deems unconstitutional). The October 2017 decision also proved not to be a unique occurren-ce—the government, as well as members of Parliament, started to use this method to handle the disadvantages of so-called cohabitation and to pursue their interests.

III. CONSTITUTIONAL CASES

Temporarily suspending the President: Immediately following the first presidential election un-der the reinstated constitutional order that took place in November 2016, it was unclear how con-frontational the relationship between the President, parliamentary majority and Prime Minister might be. Since then, we have seen an "inter-institu-

[4] With thanks to Nicole Gallina, who described a similar process in Ukraine as a ping-pong game (see Fruhstor-fer/Hein 2016). Anna Fruhstorfer, 'Moldova', in Anna Fruhstorfer and Michael Hein (eds), *Constitutional Politics in Central and Eastern Europe. From Post-Socialist Transition to the Reform of Political Systems* (Springer VS, 2016).

[5] Anna Fruhstorfer, 'Consistency in Constitutional Design and Its Effect on Democracy' [2019 (forthcom-ing)], Democratization (forthcoming).

[6] *Hotărâre* no.7 (CCM Judgement) of 4 March 2016.

[7] Daniel Brett, Ellie Knott and Mihai Popsoi, 'The "billion dollar protests" in Moldova are threatening the survival of the country's political elite' (The London School of Economics and Political Science, 21 September 2015) <https://blogs.lse.ac.uk/europpblog/2015/09/21/the-billion-dollar-protests-in-moldova-are-threatening-the-survival-of-the-countrys-political-elite/> accessed 15 November 2016.

[8] Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' [2008] ARPS 1.

[9] Anna Fruhstorfer, 'Moldova', in Anna Fruhstorfer and Michael Hein (eds), *Constitutional Politics in Central and Eastern Europe. From Post-Socialist Transition to the Reform of Political Systems* (Springer VS, 2016), 372.

[10] Council of Europe (Venice Commission), 'Functioning of democratic institutions in Moldova' (Information note by the co-rapporteurs on their fact-finding visit to Chisinau, 2010) < http://assembly.coe.int/CommitteeDocs/2010/20100520_amondoc22rev.pdf> accessed 10 January 2019.

[11] Constitutional Court of Moldova, 'The President of Moldova may only once decline PM's proposal of Cabinet reshuffle' (Constitutional Court, 24 January 2017) <http://constcourt.md/libview.php?l=en&idc=7&id=938&t=/Media/Noutati/The-President-of-Moldova-may-only-once-decline-PMs-proposal-of-Cabinet-reshuffle/> accessed 14 January 2018.

tional deadlock"[12] that has culminated in five temporary suspensions of the President in the course of a little more than a year because of the laws described in the following section. These temporary suspensions were used in 2018 when the President did not confirm new members of the cabinet and also refused to sign various laws. These laws are not necessarily the most important law cases in the jurisdiction, but as they are the key pawn in an intense power struggle between the President, Parliament and the Court, it seems only useful to discuss their content briefly.

1. The amendment to the audio-visual code in January 2018

On January 4, 2018, the Court decided to temporarily release the President of his duties when Dodon refused to sign an amendment to the broadcasting code of the Republic of Moldova.[13] It was confirmed in Parliament on December 22, 2017, after the President vetoed it, citing concerns over the constitutionality of the law, in particular with regard to the freedom of the press.[14] The law as such was not unique in the region, as several countries moved to limit the influence of Russian news broadcasts (arguably limiting disinformation and pro-Russian propaganda).[15] But the content of the law was obviously a contentious policy as it targeted the tension between the self-proclaimed European-oriented government and the Russian-friendly President. Upon Presi-dent Dodon's refusal to sign the law, Deputy Serghei Sârbu filed a complaint with the Constitu-tional Court and asked it to determine the justifiable circumstances to temporarily release the President and allow the Interim President to do the signing. The President's refusal was not in coherence with the provision of Articles 73 and 93, which stipulate his suspensory legislative veto. In its opinion, the Court argued:

"that given the imperative nature of Article 93 of the Constitution, in the case the Parlia-ment repeatedly votes a particular law, the President is under the obligation to promulgate it, de-spite any doubts in respect of the constitutionality of the adopted law (JCC No. 9 of 14 February 2014). The possibility to submit a complaint to the Constitutional Court to carry out the constitu-tionality review of the law prior to its publication has no direct impact on the promulgation pro-cedures. Thus, in the event of promulgation of the contested law until the delivery by the Consti-tutional Court of a ruling in regard thereof, the procedure of a *priori* control of the constitutional-ity of the law continues in the framework of a *posteriori* control."[16]

This was an important argument the Court made, signifying that the President cannot actually veto legislation either on procedural or substantive grounds but can only force another debate. In addition, the application for judicial review of legislation to the Court by the President—according to this opinion—had no impact on the promulgation procedure. With this, the Consti-tutional Court temporarily relieved the President of his duties and the Speaker of Parliament, Andrian Candu, signed the bill into law.[17]

Every hope of political observers of this being a unique or at least sparse occurrence was shat-tered right away. The day after, the government appealed to the Court to again temporarily sus-pend the President from office, because he refused to appoint seven new ministers. The Constitu-tional Court sided with the government and the Interim President appointed the new ministers.[18]

2. The Carabinieri Troops in November 2018

Related to the competences of the presidency in the area of national security, President Dodon asked the Court to review the constitutionality of two laws voted in Parliament regarding reform within the institution of the "Carabinieri Troops"; namely, their integration into the professional police system, resulting in a dual police system in Moldova.[19] The so-called "Carabinieri Troops" are a group with military character. The President initially vetoed the law. He suggested changes to it, in particular making the President (not the Prime Minister), on the recommendation of the Minister of the Interior, responsible for the appointment of the Commander for the General Inspectorate of the Carabinieri Troops.[20] In his application to the Constitutional Court, President Dodon referred to Articles 87 and 108 of the Constitution as well Law no. 345/2003 on national defense (in particular Article 9, Articles

[12] Mihai Popșoi, 'Moldovan President Igor Dodon Suspended by the Constitutional Court' (Moldavian Politics, 25 October 2017) <https://moldovanpolitics.com/2017/10/25/moldovan-president-igor-dodon-suspended-by-the-constitutional-court/> accessed 15 January 2018.

[13] *Avizul* (CCM Opinion) no. 2 and Sesizarea (Referral by Deputy) 1f concerning Law 257 [2018].

[14] Gabriel Leş, 'R. Moldova: Dodon a trimis la Curtea Constitutionala legea anti-propaganda, pe care ar fi trebuit sa o promulge' *HotNewsro* (4 January 2018) <https://www.hotnews.ro/stiri-esential-22207084-moldova-dodon-trimis-curtea-constitutionala-legea-anti-propaganda-care-trebuit-promulge.htm> accessed 13 February 19.

[15] Georgia, Ukraine, Lithuania, Latvia, and Estonia are among those countries that pursued a similar restriction of state-backed broadcasting from Russia. Liliana Barbarosie and Robert Coalson, 'Banning Russian TV, Moldova Is Latest Hot Spot Fighting Kremlin Disinformation', *RFE/RL News* (1 February 2018) <https://www.rferl.org/a/moldova-bans-reussian-tv-kremlin-disinformation/29013217.html> accessed 13 February 2019.

[16] *Avizul* (CCM Opinion) no. 2 and *Sesizarea* (Referral by Deputy) 1f; concerning Law 257 [2018].

[17] Constitutional Court of Moldova, 'The Court Has Ascertained the Circumstances Justifying the Interim Office of President of the Republic of Moldova in Promulgating a Law' (Constitutional Court, 5 January 2018) <http://constcourt.md/libview.php?l=en&id=1125&idc=7&t=/Media/News/The-Court-Has-Ascertained-the-Circumstances-Justifying-the-Interim-Office-of-President-of-the-Republic-of-Moldova-in-Promulgating-a-Law/> accessed 15 February 2019.

[18] In September 2018, the Constitutional Court of the Republic of Moldova decided again on the temporary suspension of President Igor Dodon for the fourth time after he refused to sign the decrees appointing two ministers. The application for judicial review was made by two deputies to Parliament, Serghei Sârbu and Eugeniu Nichiforciuc (*Sesizarea* no.131f) [2018].

[19] *Sesizarea* (application for judicial review) no. 177a [2018].

[20] In particular, he asked the Court to decide on Article 10, paras 2 and 3 of Law no. 219 as well as Article II, para 2, sec 3 of Law no. 220.

24-25 and Article 29), which stipulate the presidential role in matters of national defense. As expected, the Constitutional Court declared the applica-tion for judicial review inadmissible. In its reasoning, the Constitutional Court emphasized that Article 87 of the constitution does not give the President unlimited power to declare war or gen-eral mobilization but that he/she can only do so upon prior confirmation of Parliament. Thus, the appointment power with regard to the Carabinieri Troops was not automatically a presidential competence.[21]

3. Amendment of the labor code in November 2018

At the same time, the President asked the Court to declare an amendment to the Labor Code un-constitutional. Law no. 203 to amend Article 111 of the Labor Code establishes a "Europe Day" on May 9 alongside (not instead of) Great Victory Day.[22] But the President claimed that Great Victory Day should already represent the Moldavian State and citizens—which are not part of the EU—and that the introduction of paragraph g1 to the Labor Code was unconstitutional. In his application for judicial review, the President listed several reasons for this, primarily appealing to cultural differences and wanting to avoid tarnishing or somehow reducing the existing re-membrance day. In a legal sense, the addition to the Labor Code was not necessarily important; it also did not change the fact that May 9 is an official holiday. But it was another pawn in the in-stitutional crisis between the self-declared EU-friendly government and parliamentary majority and the Russian-oriented President. Again, the Constitutional Court declared the application for judicial review filed by the President inadmissible.[23]

4. Land transfer to build the U.S. Embassy in November 2018

Parliament repeatedly sent a law regarding the transferal of real estate property (the former Re-publican Stadium) to the U.S. to build their new embassy. President Dodon asked the Constitu-tional Court to declare this law unconstitutional. Aside from the misappropriation of Republican Stadium, the President also referred to problems with several private property constructions within the designated area. In its decision no. 148, the Court declared the application for judicial review inadmissible.[24]

5. New audio-visual code in November 2018

After amending the audio-visual code in January 2018, Parliament also prepared a new law on the audio-visual code that was supported by the Council of Europe and drafted with the assis-tance of the Joint EU-CoE Project "Promoting Media Freedom and Pluralism in the Republic of Moldova".[25] But the President deemed the law unconstitutional. It states similar provisions as the amendment to the code in January 2018. After he vetoed the law and it was confirmed in Parlia-ment, he referred it to the Constitutional Court for an abstract constitutional review.[26] In its deci-sion, the Court declared the application for judicial review inadmissible. As part of a five-law package, this new audio-visual code was signed by the Interim President after the decision of the Court.

6. Judicial review on national security

Next to the decisions and application for judicial review described earlier, the Court also decided on different issues that were important for the constitutional development in the country, yet did not receive widespread attention—not even in the local media, and certainly not beyond Moldova. One example is the application for judicial review no. 108. In it, President Dodon asked to assess the constitutionality of several articles regarding which institutions share/have the responsibility of national security, and deemed unconstitutional the parliamentary decision from June 19, 2018, on the National Security Strategy and Action Plans for 2018-2022. In its judge-ment no. 33 on December 21, 2018, the Court explicitly defined the relevant competences.[27] It ruled that Parliament has an exclusive legislative competency over matters of national defense, national security policies, strategies and plans, while the President does not have any responsi-bilities on these matters and can only take actions and measures according to the laws. The deci-sion furthermore declared the strategy adopted by Parliament on June 19, 2018, constitutional.[28]

7. Minorities and Russian as an interethnic communication language

Disputes over the identity of the polity are one of the most important issues in the Moldovan po-litical discourse. The ideologized approach towards topics such as the official language drives the political debate. The heterogeneity and its resulting disunity of the different population groups already became apparent before Moldovan independence. But the variety of language laws and the politically supported strengthening of identification with the Romanian language and Romania resulted in a substantive ethnic polarization. This was only exacerbated by a so-called frozen conflict, namely in Transnistria.[29] These "competing local identities"[30]

[21] *Decizia* (Decision) no. 146 [2018].

[22] Labor Code (28 March 2003), <http://lex.justice.md/md/326757/> accessed 15 January 2019.

[23] *Sesizarea* (application for judicial review) no. 178a, *Decizia* (Decision) no. 147 [2018].

[24] *Sesizarea* (application for judicial review) no. 179a, *Decizia* (Decision) no. 148 [2018].

[25] Council of Europe, 'New audiovisual legislation elaborated with support of the Council of Europe, adopted by Moldovan Parliament' (Council of Europe Portal 18 October 2018) <https://www.coe.int/en/web/freedom-expression/-/new-audiovisual-legislation-elaborated-with-support-of-the-council-of-europe-adopted-by-moldovan-parliament> accessed 15 February 2019.

[26] *Sesizarea* (application for judicial review by President Dodon) no. 180 a [2018].

[27] *Hotărârea* (Judgement CCM) no. 33 [2018].

[28] Madalin Necsutu, 'Moldova President Threatens to Block New Security Strategy' (Balkan Insight 3 July 2018) <https://balkaninsight.com/2018/07/03/dodon-threatens-to-block-a-new-national-defense-strategy-07-03-2018/> accessed 15 February 2019.

are repre-sented by an ongoing constitutional struggle on the official language. Article 13, para 1 of the 1994 constitution stipulates the official language to be Moldovan with a Latin alphabet (distin-guishing it from Romanian). Article 13, para 2 specifies the recognition and guarantee of the pro-tection, preservation and freedom of use of Russian and other languages. This issue has remained important up until today, for example with the 2013 decision of the Constitutional Court giving the text of the independence declaration in which Romanian is described as the national language primacy over the Constitution.[31] Despite several attempts to change the Constitution, Article 13 was not successfully amended until 2018. Reviving this discussion, six parliamentary deputies asked the Constitutional Court to assess the constitutionality of several individual laws. Their reasoning stated that all the phrases mentioning Russian as an interethnic communication lan-guage, and as a language for the official documents, were unconstitutional and that the individual provisions in the five different laws ranging from 1989 to 2001 had to be changed.[32] In their ap-plication for judicial review, they also argued that all national minorities should have the right to speak their own languages (Bulgarian, Ukrainian, Gagauz, etc.) and not Russian. Although this is provided for with the Moldovan Language Law, Russian still maintains its status as the official language of communication within public services and official documents.[33] In its judgement, the Court declared the law regarding the use of languages obsolete, and two other articles unconsti-tutional.[34]

IV. LOOKING AHEAD

In 2019, the elections to the national Parliament will become an important litmus test for Moldo-van democracy. The widespread frustration among Moldovan citizens with its political leader-ship extends to all sides of the political spectrum. The decision between an orientation towards the West or the East will again be a big part of the election campaigns, but will be of little conse-quence. With the Russian presence in Transnistria and the increasing frustration of the European Union and other international actors with the stalled reforms, this friend-or-foe mindset seems like a distraction from the substantial challenges Moldova faces.

Probably the most important challenge ahead of the country is the need for judicial reform. This long-overdue reform stagnated in 2017. In 2018, the European Union Foreign Affairs Council prepared a draft recommendation urging the Moldovan Government to increase its fight against corruption and, in particular, to restore public trust in the judicial system by increasing judicial autonomy.[35] The process of seating a judge (appointment) and the President's involvement and ability to unseat or remove a judge (tenure) are vulnerable and have in the past been misused. This lack of any substantive reform when it comes to the judiciary and the fight against corrup-tion even led the European Union to reduce its financial support for judicial reforms.[36] This combination of a crippled rule of law, a stalled process for reform of the judiciary and increasing inter-institutional conflict is curbing democracy. It looms large over the upcoming parliamentary elections and the ensuing formation of a new government.[37]

V. FURTHER READING

Vladimír Baar and Daniel Jakubek, 'Divided National Identity in Moldova' [2017] JNMLP 11.1

Nadja Douglas and Stefan Wolff, 'Economic confidence-building measures and conflict settle-ment: The case of Transnistria' (ZOIS Work-in-Progress 1, 2018) < https://en.zois-berlin.de/fileadmin/media/Dateien/Work-in-Progress/Work_in_Progress_1b_2018.pdf > ac-cessed 15 February 2019

Judithanne McLauchlan Scourfiled, 'The impact of the European Court of Human Rights on Jus-tice Sector Reform in the Republic of Moldova' [2018] JLIA 4

Dawn Walsh, 'Moldova: Weak Autonomy, Central Government Neglect, and Mixed Interna-tional Impact' in Dawn Walsh (ed), *Territorial Self-Government as a Conflict Management Tool* (Palgrave Macmillan, 2018)

[29] Zabarah (n 28) 184183, 184.

[30] Roper (n 29), 513.

[31] Ria Novosti (n 30), accessed 15 February 2019.

[32] *Sesizsrea* (application for judicial review) 9a, *Hotărârea* (Judgement) no. 17 [2018].

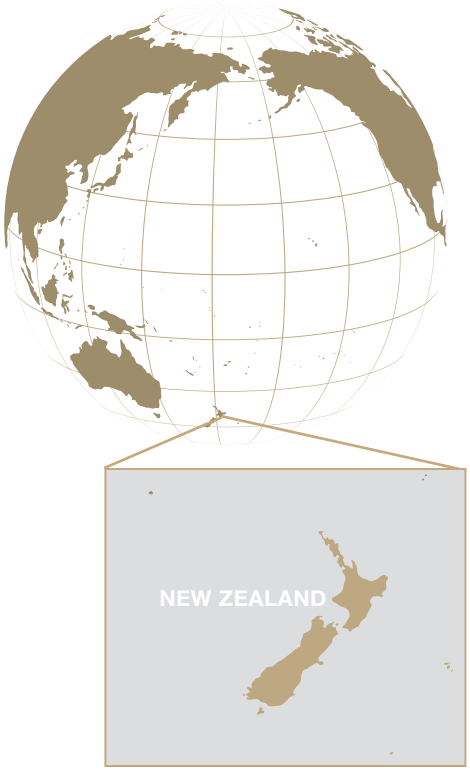
[33] *Hotărârea* (Judgement) no. 17 [2018].

[34] *Hotărârea* (Judgement) no. 17 [2018].

[35] Foreign Affairs Council, 'European Joint Development Cooperation Strategy (Joint Programming Document) for the Republic of Moldova' (11 November 2018) <https://cdn1-eeas.fpfis.tech.ec.europa.eu/cdn/farfuture/NKp1d1XM8-vRfXBJUjm2k48DzYDB7XSF-13vfoqzQfI/mtime:1541581110/sites/eeas/files/joint_response_moldova_february_2018_0_0.pdf> accessed 15 Feb-ruary 2019.

[36] Rikard Jozwiak, 'EU Cuts Moldova Funding Amid Rule-of-Law Concerns' (Radio Free Europe/Radio Liberty, 15 November 2018) <https://www.rferl.org/a/eu-cuts-moldova-funding-amid-rule-of-law-concerns/29603052.html> accessed 15 February 2019.

[37] Freedom House, 'Nations in Transit 2018, Moldova' (Freedom House, 2018) <https://freedomhouse.org/report/nations-transit/2018/moldova> accessed 15 February 2019.



New Zealand

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I. INTRODUCTION

Following the election in November 2017 of a new Labour-New Zealand First Government supported by the Green Party, 2018 was something of a consolidating year in New Zealand's parliamentary democracy. This new Government spent much of the year coming to terms with the fact that it had (somewhat unexpectedly) won office while the now-opposition National Party also grappled with its new status. As such, constitutional developments largely came via the judiciary, with some important (albeit restrained in their reach) decisions handed down by the nation's Supreme Court. These decisions touched on what are the two main issues in New Zealand's contemporary constitutional discussions: the relationship of the judicial and legislative branches and the rights of the indigenous Māori people under the Treaty of Waitangi.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Any constitutional arrangement involving some form of separation of powers inevitably will generate inter-institutional tensions. In New Zealand, such tensions commonly emerge through an ongoing negotiation of the relationship between a Parliament that remains theoretically sovereign in its command over the nation's laws, and courts that uphold rule of law values. Unlike systems deriving from a higher law constitutional document, this relationship does not involve questions of whether and when the judiciary will invalidate legislative enactments for straying beyond the bounds of competence accorded to the Parliament, or for trenching on fundamental individual rights guarantees. Orthodox constitutional understandings simply do not permit New Zealand's courts such a role. Instead, tensions emerge over the form that "comity" between the branches should take; in particular, the degree to which judicial decision-making should avoid matters that are more properly "parliamentary" in nature.

In 2018, variants of this question were addressed in three rulings from the Supreme Court regarding the courts' jurisdiction to grant relief. As these cases' details are discussed in the following section, only a brief summary of each is necessary here. *Ngāti Whātua Ōrākei Trust v Attorney General*[1] held that courts may issue declarations regarding the Crown's actions during Treaty of Waitangi settlement negotiations with Maori tribes, despite such settlements invariably being recorded in parliamentary enactments upon being finalised. This decision reversed previous rulings that any judicial intervention in such settlement discussions is constitutionally inappropriate due to their close connection with the legislative process. *Attorney-General v Taylor*[2] affirmed that a judicial "declaration of inconsistency" is an available remedy under the New Zealand Bill of Rights Act 1990 (NZBORA) with respect to legislation that unjustifiably limits guaranteed rights. Although such a declaration cannot affect the ongoing validity or application of the legislation in question, it represents an express curial judgment on the substance of Parliament's enacted policy. And *Ngaranoa v Attorney-General*[3]

[1] [2018] NZSC 84.
[2] [2018] NZSC 104.
[3] [2018] NZSC 123.

cautiously indicated, albeit without finally deciding, that legislation passed other than in accordance with relevant procedural requirements contained in a statute (a "manner and form" provision) would be invalid. This hint that the judiciary will enforce such provisions involves the courts determining the necessary prerequisites for Parliament to properly enact "law".

Two points may be made about this triumvirate of cases. First, the Court's approach in each was only cautiously expansionist. While the majority in *Ngāti Whātua Ōrākei* Trust found declarations could be made on some matters before it, it refused to do so on others it regarded as being too closely related to legislative proceedings. Thus, the Court recalibrated the line between those Treaty of Waitangi settlement matters that are solely for parliamentary consideration and those that remain amenable to judicial scrutiny rather than obliterating it completely. Equal-y, the majority in *Taylor* found the jurisdic-tion to grant declarations of inconsistency on a narrowly defined extension of the courts' general power to provide a remedy in the case of rights infringements.. And *Ngaranoa* only noted that "the pendulum has swung" towards the position that a parliamentary failure to comply with manner and form requirements will result in invalid legislation without finally deciding the matter.[4]

We may understand this caution as reflecting the somewhat unstable constitutional ground being trod. Each decision may be justified through a systemic need to ensure adequate rule of law mechanisms exist to police public power and respond to its improper use. However, as Matthew Palmer suggests,[5] the concept of the rule of law has a somewhat fragile footing in New Zealand's predominantly political constitutional culture. Consequently, when the courts expand their jurisdictional remit they face real legitimacy problems. In the absence of strong societal consensus that legal forms of accountability ought to trump political processes, what authorises such assertions of the judicial role into areas previously closed to it?

Nevertheless, the second notable point about these three decisions is the political branches' sanguine response to them. Previous extensions of judicial oversight sometimes have provoked sharp rebuke by members of the executive and legislature. So when in 2003 the Chief Justice cautiously suggested that parliamentary sovereignty may be subject to some limits of competency,[6] the then-Attorney-General responded with an orthodox Diceyan defence and warning that unelected judges should avoid politicising their role.[7] And in 2014, Parliament legislated to expressly reverse the holdings of two judicial decisions that narrowed the ambit of parliamentary privilege.[8] In contrast, the political branches expressed no disquiet at all in relation to 2018's Court rulings. Indeed, the Government announced even before the Supreme Court handed down its *Taylor* decision that it intends legislating to "provide a statutory power for the senior courts to make declarations of inconsistency under the Bill of Rights Act, and to require Parliament to respond".[9] This apparently relaxed attitude towards an expanded judicial role perhaps reflects the new Justice Minister's claim that "The Attorney-General … and I resolved some time ago that we are determined that ours will be a government that respects the rule of law, and will not over-reach" while recording his own view that "I now give much less weight to the absolute sovereignty of Parliament, and … believe there needs to be a stronger check and balance on it". Whether it marks a longer-term shift in inter-institutional relationships remains to be seen.[10]

III. CONSTITUTIONAL CASES

1. Attorney-General v Taylor: Declarations of Inconsistency

In 2015, Mr Taylor successfully obtained a declaration from the High Court[11] that New Zealand's legislative ban on all prisoners voting is inconsistent with the NZBORA, s 12 right to vote. The Court of Appeal upheld granting this declaration.[12] While the legislation's ongoing validity or application was unaffected by the declaration, the Crown nevertheless chose to appeal its issuance to the Supreme Court.

That appeal was not based on any disagreement with the lower courts' substantive conclusion on the rights question. The Crown conceded from the outset that a blanket ban on prisoner voting imposes an unjustifiable limit on the s 12 right. Rather, the Crown argued that as the NZBORA contains no express power to grant a "declaration of inconsistency", it simply is not an available judicial remedy.[13] Consequently, the appeal required the Court to consider both whether a declaration of inconsistency represents a real remedy for a rights breach and if granting such a remedy is consistent with the judicial function.

Two members of the Court, Susan Glazebrook and Ellen France JJ, traversed earlier

[4] *Ngaronoa v Attorney-General* [2018] NZSC 123 [70].

[5] Matthew Palmer, 'New Zealand's Constitutional Culture' (2007) 22 NZULR 565, 588-589.

[6] Dame Sian Elias, 'Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round' (2003) 14 PLR 148.

[7] Hon Michael Cullen, 'Parliamentary Sovereignty and the Courts' [2004] NZLJ 243.

[8] Parliamentary Privilege Act 2014, ss 3(2)(c)&(d).

[9] Hon Andrew Little and Hon David Parker, 'Government to provide greater protection of rights under the NZ Bill of Rights Act 1990', 26 February 2018 <https://www.beehive.govt.nz/release/government-provide-greater-protection-rights-under-nz-bill-rights-act-1990>

[10] Hon Andrew Little, 'Speech to the Law Foundation Awards Dinner' 8 December 2017 <https://www.beehive.govt.nz/speech/speech-law-foundation-awards-dinner>

[11] *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791 (HC).

[12] *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24. See Andrew Geddis, '"Declarations of Inconsistency under the New Zealand Bill of Rights Act 1990' (UK Constitutional Law Blog, 19 Jun 2017) <https://ukconstitutionallaw.org/2017/06/19/andrew-geddis-declarations-of-inconsistency-under-the-new-zealand-bill-of-rights-act-1990/> accessed 5 January 2019.

[13] *Taylor v Attorney General* [2018] NZSC 104 [25].

Court decisions that emphasised the importance of having some form of effective judicial response available when confronted with NZBORA inconsistent exercises of public power.[14] For their honours, nothing in the NZBORA then gainsays this general "no right without a remedy" approach when it comes to issuing a formal declaration of inconsistency.[15] Doing so also is compatible with the judicial function, as it "is a formal declaration of the law and, in particular, of the effect of the 2010 Amendment on the respondents' rights and status. It provides formal confirmation that they are persons who are disqualified to vote by a provision inconsistent with their rights".[16]

Consequently, their honours presented the declaratory power as little more than the natural extension of the ratio of existing case law. Glazebrook and France JJ also expressly distanced themselves from the Court of Appeal's quite expansive discussion of the basis for such declarations, which had:[17]

> canvassed the relationship between the political and judicial branches of government and the role of the higher courts under the New Zealand constitution. As is apparent, we have not found it necessary to undertake a similar exercise. We are accordingly not to be taken as endorsing the Court of Appeal's approach towards these matters.

Elias CJ wrote separately, largely concurring with Glazebrook and France JJ's reasoning. In contrast, William Young and O'Regan JJ dissented on the basis that "it is … problematic whether a declaration of inconsistency is really a remedy and, if it is, whether it is an effective remedy".[18] Its grant does not vindicate a rights breach as "a declaration binds no-one in relation to future actions and has no impact on the victim's position".[19] And for their honours, the courts should not invent a jurisdiction for themselves to give such an ineffective non-remedy.

2. Ngaranoa v Attorney-General: Manner and Form Provision

In a separate challenge, Mr Taylor and several other prisoners also claimed that the 2010 legislation was invalidly enacted because of a failure to comply with the *Electoral Act 1993* (NZ), s 268. This manner and form provision identifies various statutory provisions governing aspects of New Zealand's electoral process (the "reserved provisions") and states that they may only be altered by either a vote of 75 percent of all MPs, or a majority vote at a referendum. The immediate question for the courts was whether the 2010 legislation had amended one of these reserved provisions. If so, the prisoner challengers alleged the amendment was invalid as the necessary parliamentary majority had not been obtained.

Central to the case was the interpretation of s 268(1)(e), which reserves: "section 74, and the definition of the term adult in section 3(1), and section 60(f) so far as those provisions prescribe 18 years as the minimum age for persons qualified to be registered as electors or to vote". The High Court[20] and Court of Appeal[21] found that this provision only encompasses the age at which people may enroll to vote and none of s 74's other qualifications to vote. On further appeal, four members of the Supreme Court agreed with this conclusion, with Elias CJ issuing a strong dissent.

The majority did so having regard to the natural interpretation of the statutory provision,[22] its legislative history[23] and the purpose for its enactment.[24] In a nutshell, the majority believed the entrenchment provision could be read only one way, with Parliament quite clearly intending that it attach to but one narrow aspect of voter qualifications. Given that context, there was no room for the NZBORA s 6 interpretative mandate[25] to operate in order to expand the protection afforded to the right to vote. Nor did the fundamental importance of that right otherwise justify an expansionary reading of s 268's ambit in order to safeguard rights from majoritarian interference. Therefore, as the 2010 law change did not amend a reserved provision, no question as to its validity arose.

Furthermore, the majority refused to even fully commit to the consequences that would follow from a failure to comply with s 268. It noted only that:[26]

> The enforceability of entrenchment provisions like s 268 has been the subject of debate over a number of years both in New Zealand and in comparable jurisdictions. Those authorities indicate

[14] *Taylor v Attorney General* [2018] NZSC 104 [29]-[39].

[15] *Taylor v Attorney General* [2018] NZSC 104 [40]-[51].

[16] *Taylor v Attorney General* [2018] NZSC 104 [53].

[17] *Taylor v Attorney General* [2018] NZSC 104 [66].

[18] *Taylor v Attorney General* [2018] NZSC 104 [134].

[19] *Taylor v Attorney General* [2018] NZSC 104 [139].

[20] *Taylor v Attorney-General* [2016] NZHC 355, [2016] 3 NZLR 111 (HC).

[21] *Ngaronoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 (CA). See Andrew Geddis, 'Judicial enforcement of New Zealand's reserved provisions' (2017) 28 PLR 289.

[22] *Ngaronoa v Attorney-General* [2018] NZSC 123 [36]-[48].

[23] *Ngaronoa v Attorney-General* [2018] NZSC 123 [49]-[58].

[24] *Ngaronoa v Attorney-General* [2018] NZSC 123 [59]-[64].

[25] This reads: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

[26] *Ngaronoa v Attorney-General* [2018] NZSC 123 [70].

> the pendulum has swung in favour of enforceability but we would prefer that the issue to be resolved after argument on the point.

The problem is that, in keeping with the "pendulum [swing] in favour of enforceability", the Crown expressly had conceded that a failure to comply with s 268 renders legislation invalid. As such, it is difficult to see where "argument on the point" is going to come from in this or any future case.

3. Ngāti Whātua Ōrākei Trust v Attorney General: Reviewing Treaty of Waitangi Settlements

Ngāti Whātua Ōrākei is a hapū (sub-tribe) in Tāmaki Makaurau or Auckland, New Zealand's largest city. In 2006, as part of its negotiations to settle its claims for historical breaches of the Treaty of Waitangi, Ngāti Whātua Ōrākei entered into an agreement in principle with the Crown. The terms of that agreement raised the ire of other iwi (tribes) and hapū who had overlapping claims over the area in question, and so the Crown entered into another series of agreements which provided a process for addressing their concerns, eventually implemented by the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014. Meanwhile, Ngāti Whātua Ōrākei had settled its claims with the Crown and that agreement was implemented by the Ngāti Whātua Ōrākei Claims Settlement Act 2012. Against that legislative background, in 2015 and 2016 the Crown made decisions to transfer property to two hapū covered by the Collective Redress Act with a view to settling Treaty claims with those hapū. The transfer of the property required authorising legislation.

Ngāti Whātua Ōrākei applied for judicial review of the decisions to transfer property, seeking declarations from the Court that they were contrary to its legal rights arising from the 2006 agreement, the 2012 settlement legislation, customary law and the Treaty itself, and thus beyond scope of the Crown's power. The High Court struck out Ngāti Whātua Ōrākei's claim, and the Court of Appeal dismissed an appeal against that ruling. Both lower courts agreed that the Crown's decisions were non-justiciable; since the proposal was to enact them into force, Ngāti Whātua Ōrākei's claim essentially challenged proposed legislation and thus the principle of non-interference with Parliamentary proceedings was engaged.

The question for the Supreme Court was whether Ngāti Whātua Ōrākei's claim did challenge proposed legislation or instead seek clarification and recognition of its rights.[27] Since settlements between iwi and hapū invariably lead to legislation, such issues have come before the courts before. The difficulty is determining the point where a (permissible) challenge to the Crown's decision to enter into a settlement becomes a (impermissible) challenge to Parliament's right to enact the terms of that settlement as legislation. After traversing past cases on this issue, the Supreme Court demurred from "resolving the exact metes and bounds" of the principle of non-interference in parliamentary proceedings.[28] Crucially, however, they did limit the principle's effect in the present proceedings: just because a decision of the executive can be predicted to result in future legislation did not oust the Court's jurisdiction.[29] The potential for future settlements with other iwi and hapū meant it was important to clarify Ngāti Whātua Ōrākei's rights and the constraints on the Crown's power when making future decisions.[30] The majority reinstated the hapū's statement of claim to the extent that it focused on its rights qua these future issues (and not specifically with 2015-2016 decisions), and remitted it to the High Court for a substantive hearing.[31]

In a long, largely concurring decision, Elias CJ was far more bullish, holding that "recent restatements of the principle [of non-interference with Parliamentary proceedings] are unacceptably broad".[32] Indeed, the Chief Justice went as far as rejecting the proposition that "matters contemporaneously before Parliament are non-justiciable",[33] and held as long as the Court does not preclude Parliament's consideration of a matter, it may consider that same matter and the impact on the present rights of claimants. Such consideration is not an interference with parliamentary proceedings, nor is it an enlargement of the Court's constitutional function.[34] In the case at hand, Ngāti Whātua Ōrākei had a continuing interest in how the Crown should conduct itself; it was not attempting to injunct Parliament, and thus the lower courts had mischaracterised its claim: she would have allowed the appeal in its entirety.[35]

So while not entirely clarifying the limits of its power to consider matters engaged by proposed legislation, the Supreme Court confirmed the principle that even where legislation proposes to alter the rights of a party, the judiciary is not necessarily prevented from considering those rights. While the decision ought to have impact beyond Treaty jurisprudence, it has particular pertinence for this area. Without the complete ability to shield its decisions from review by stating they are subject to future parliamentary approval, the Crown's approach to "overlapping claims"—already the subject of an

[27] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [34].
[28] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [46].
[29] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [46].
[30] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [53].
[31] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [50]-[66].
[32] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [113].
[33] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [113].
[34] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [116].
[35] *Ngāti Whātua Ōrākei Trust v Attorney General* [2018] NZSC 84 [127].

urgent hearing before the Waitangi Tribunal[36] —likely will come under even greater scrutiny.

4. Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation: Interpreting the Principles of the Treaty of Waitangi

This decision of the Supreme Court also involved Tāmaki Makaurau, judicial review and the Treaty of Waitangi, but instead focused on the application of the Treaty's principles. The focus of the case was a decision by the Department of Conservation to grant concessions to two commercial operators to run tours to and on two motu (islands) in Auckland's Hauraki Gulf, which are part of the Crown-owned conservation estate. The Department made those concessions using its powers under Conservation Act 1987, s 4, of which states: "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".

The Ngāi Tai Trust represents the Ngāi Tai iwi, which has maintained (in agreement with the Court) that it has mana whenua (territorial customary rights) over the motu.[37] Alongside the two commercial operators, the Department of Conservation also granted the iwi a concession to conduct walking tours on the motu. When considering those various applications, it refused to consider whether it should decline the commercial operators' concessions in order to preserve and improve the economic benefit arising from Ngāi Tai's concession because there was no basis for giving Ngāi Tai preferential treatment.[38] The question before the Court was what s 4 of the Conservation Act required of the Department when considering concession applications relating to an area which an iwi or hapū has mana whenua.

The High Court held that the Department had committed an error of law, but the Court of Appeal reversed that finding. The Supreme Court agreed with the High Court: the Department's refusal to consider the economic benefit to an iwi with mana whenua ran contrary to previous case law and the principle of active protection under the Treaty of Waitangi. While s 4 of the Conservation Act did not operate in a vacuum and there were many factors to take into account when making such concession decisions, the Department failed to give it proper consideration and was thus in breach of its statutory obligations.[39] The Court went on to reject the argument that this breach was not material to the outcome: while the Court held that s 4 did not provide a veto to Ngāi Tai, in committing the breach, the Department did not put itself in the position to properly consider the iwi's submission, and thus it ought to reconsider its decision.[40] In a dissenting judgment, William Young J held that any error of law did not influence the final decision; he would have dismissed the appeal.[41]

In reaching this result, the majority confirmed the earlier precedent of *Ngai Tahu Maori Trust Board v Director-General of Conservation,*[42] and have clarified the impact of statutory provisions such as s 4 of the Conservation Act. The wording of such clauses—and particular the use of words "give effect"—means that they are "powerful" and demand more than procedural steps: it may require a change in substantive outcomes.[43] One such substantive outcome, and one way for the Crown to give practical effect to the Treaty principles, is to enable iwi or hapū to reconnect with their ancestral whenua (land).[44] That may mean declining other applications for concessions to access the same land. The decision is thus a firm restatement of the potential power of Treaty principles, and may force decision-makers bound by similar statutory obligations to alter their processes in order to properly give effect to those principles.

IV. LOOKING AHEAD

Perhaps the most interesting development in 2019 will be the announcement of the details of the Government's proposal to amend the NZBORA to "provide a statutory power for the senior courts to make declarations of inconsistency under the Act, and to require Parliament to respond". While informal consultation has taken place throughout 2018, there is no firm indication as to what the Government has in mind. In particular, it is not clear how Parliament might be "required" to respond to a judicial ruling that does not affect the validity of the relevant piece of legislation. Nevertheless, the proposal could have a significant impact on the role that the NZBORA plays in New Zealand's constitutional arrangements as well as alter the role that the judiciary and elected representatives play in defining and protecting individual rights.

V. FURTHER READING

Bruce Harris, *New Zealand Constitution: An Analysis in Terms of Principles* (Thomson Reuters, 2018)

Dean R. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018)

Geoffrey Palmer and Andrew Butler, *Towards Democratic Renewal: Ideas for Constitutional Change in New Zealand* (Victoria University Press, 2018)

[36] 'Overlapping claims probed at urgent Waitangi inquiry' (*Radio New Zealand*, 13 November 2018) <https://www.radionz.co.nz/news/te-manu-korihi/375845/overlapping-claims-probed-at-urgent-waitangi-inquiry> accessed 15 February 2019.

[37] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [61], [80].

[38] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [57].

[39] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [54].

[40] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [95].

[41] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [133].

[42] [1995] 3 NZLR 553 (CA).

[43] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [52].

[44] *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122 [52].



Nigeria

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I. INTRODUCTION

The ascension of the major opposition party, the All Progressives Congress (APC), into government in 2015 was considered an improvement in the key indicators of liberal democracy. Early manifestations of dictatorship were excused because the government was new. But recent developments point to a populist authoritarianism to the detriment of democracy and the citizens.[1] The violations of the minimum requirements for the conduct of transparent governorship elections in the states of Ekiti and Osun do not only reflect a growing 'gap between electoral and liberal democracy'[2] but also a possible relapse into dictatorship.

While the number of registered political parties grew to ninety-one, transparent electoral process, separation of powers, rule of law, judicial independence, and other mechanisms necessary to secure the continuing popular control and public accountability of government suffered reverses. The institutional protection of democracy, such as the legislature, the courts, and civil society groups, was intimidated, and procedural safeguards such as restraint in the exercise of public power, political tolerance, and due process of law weakened.

Given the initial hype about the ascension of the APC in consolidating democratic practices, the reverse experienced in 2018, indicative of a desperation to hold onto power, reminisces "democratisation backwards".[3] An election, or the mere existence of elected government, critical as it is, is merely the starting point in the quest for democracy.[4] Where the important variables like a free press, free and fair elections, respect for freedom of thought, freedom of association and opposition rights, and equality before the law are not improved upon, democracy loses essence and soon authoritarianism takes hold of the polity. A fact that the recent constitutional developments confirm is that opposition success at the polls does not by itself lead to the entrenchment of democracy. Rather, opposition parties when in government are susceptible to the allures of abuse of power and political dominance. Since democracy in its simplest form is a system of institutions, rules, and procedures for the exercise of power based on the consent of the people, a consolidated democracy is one in which these arrangements develop into autonomous institutions governed by justiciable rules.[5] It is increasingly becoming indisputable that democracies become consolidated only when all significant elites who are major players and an overwhelming proportion of citizens abide by stipulated rules.[6]

[1] Michael Wahman, 'Opposition Coalitions and Democratisation by Elections' (2013) 48 *Government & Opposition* 3.

[2] Larry Diamond, *Developing Democracy: Toward Consolidation* (Johns Hopkins University Press, 1999) 10.

[3] Richard Rose and Doh Chull Shin, 'Democratisation Backwards: The Problem of Third-Wave Democracies' (2001) 31 *British Journal of Political Science* 331-354, 332.

[4] Terry Karl, 'Imposing Consent: Electoralism versus Democratisation in El Salvador', in Paul W. Drake and Eduardo Silva (eds.), *Elections and Democratisation in Latin America, 1980-1985* (Centre for Iberian & Latin American Studies & University of California Press, 1986) 9-36.

[5] See Terry Karl, 'Dilemmas of Democratisation in Latin America' (1990) 23 *Comparative Politics* 1.

[6] See Juan J. Linz and Alfred Stephan, 'Towards Consolidated Democracies' (1996) 7 *Journal of Democracy* 14-33, 15.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Autonomy of the National Assembly

Separation of powers is an essential element in constitutional thought and a useful guide for institutional design.[7] From Locke to Montesquieu, separation of powers is necessary for the promotion of political liberty and the prevention of autocracy. Locke's three characteristic innovations in institution-planning are "civil" government, a supreme "legislative" power coupled with a responsible executive, and a vigilant "majority"; that is, a virile civil populace that elects a government and can also rebel against any non-popular government.[8] This division of power is constitutionalized in sections 4 (legislative), 5 (executive), and 6 (judicial) of the Constitution of 1999 in the style of the U.S. Constitution. The Nigerian courts have emphasized the importance of separation of powers as a constitutional doctrine under the various constitutional arrangements in Nigeria.[9] The combination of separation of powers with the concept of checks and balances provides an effective, stable political system that controls abuse of power.[10] The institutional arrangement of separation of powers suggests that no one branch of government should dominate the other, nor should one branch be undermined by others. Executive dominance over the legislature makes the latter weak and less effective. A less effective legislature is an empirically proven explanation for the failure to consolidate democracy.[11] A legislature is effective if it is independent of executive interference and intimidation in the choice of leadership, the planning of its agenda, and the discharge of its functions.[12]

There were a series of events which suggested interference and intimidation of the National Assembly in the year under review. The National Assembly comprises the Senate (109 members, selected three per state) and the House of Representatives (comprising 360 members elected by electoral districts delineated by population). On April 18, the plenary session of the Senate was disrupted by invaders who seized and took away the mace but it was subsequently recovered by the police. However, no arrest has been made even though the entire event was captured on camera and Senator Ovie Omo-Agege, who was on suspension, was widely suspected to have organized the invasion.

In what seemed to be a confirmation of the plot of the executive to surreptitiously effect a leadership change in the Senate, on July 24, policemen barricaded the exit road of the residence of the Senate President and that of his deputy. However, the Senate President beat the ambush and was able to reach the National Assembly for a plenary session.
Perhaps due to the failure of earlier attempts to convene a session in the absence of the Senate President or his deputy, on August 7, operatives of the Department of State Service (the secret police) barricaded the entrance of the National Assembly, initially allowing only legislators from the ruling party into the legislative building. Two days before this blockade, the Senate President had announced his defection from the ruling party to the main opposition People's Democratic Party (PDP).

2. Floor Crossing

In spite of the constitutional ban and judicial disproval of floor crossing, the phenomenon is growing in political practice in Nigeria. In a previous review, the futility of both a constitutional proscription and judicial sanction against the practice was explained.[13] This is principally because floor crossing remains a mechanism for consolidating, and recently, ascending to power in Nigeria. The ruling APC ascended to power partly because of the defection of lawmakers and governors from the then-ruling PDP into its fold. In like manner, on July 24, 2018, fourteen senators and thirty-seven members of the House of Representatives crossed from the ruling APC to the main opposition PDP. In what may have been an extension of the defection of leaders of the legislature experienced in 2013, in addition to the Speaker of the House of Representatives, the Senate President also changed party affiliation to the opposition PDP. Like in 2014, when five governors of the then-ruling PDP moved to the opposition APC, in 2018, three governors abandoned the current ruling party to join the opposition PDP. Against the current trend of party change, the leader of the opposition PDP party in the Senate, Godswill Akpabio, crossed to the ruling APC. Consistent with the earlier trend, the ruling party has responded by offering patronage to attract legislators from the opposition into its fold. With the general elections officially scheduled to be held on February 16 and March 2, 2019, it is expected that these defections will have an impact on the outcome of the polls.

3. Decline in Credibility of Elections

As was hinted in the 2017 review, elections for governor were held in two southwestern states, Ekiti and Osun. Contrary to expectations, the elections were a regression from the pattern that was established in 2015. The Ekiti election, held on July 14, 2018, was a straight contest between the APC and

[7] See Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press, 2013).

[8] Robert Faulkner, 'The First Liberal Democrat: Locke's Popular Government' (2001) 63 *Review of Politics* 5.

[9] *Lakanmi & Ors v Attorney-General (Western Region)* [1971] 1 UILR 20 at 218; *Unongo v Aku* [1983] 2 SCNLR 332; *Governor of Kaduna State v House of Assembly, Kaduna State & Anor* (1981) 2 NCLR 444.

[10] John P. Humphrey, 'The Theory of the Separation of Functions' (1946) 6 *University of Toronto Law Journal* 331.

[11] Ming Sing, 'Explaining Democratic Survival Globally (1946-2002)' (2010) 72 *The Journal of Politics* 438.

[12] Gabriel O. Arishe, *Developing Effective Legislature* (Paclerd Press, 2017).

[13] Solomon Ukhuegbe & Gabriel O. Arishe, 'Nigeria: The State of Liberal Democracy' (2017) *Global Review of Constitutional Law* 208, 2010; Gabriel O. Arishe, 'Proscription of Floor Crossing in Nigeria: The Limits of the Constitution and the Supreme Court' (2017) *African Journal of Comparative Constitutional Law* 126.

the PDP, the former being the ruling party at the centre. The APC won the election. Local and international observer groups deprecated the election as being below global standards, and one that should not be used as a template for the general elections due in 2019.[14] Observers reported incidences of ballot box-snatching, sporadic shootings, and the dispersal of some party agents as well as intimidation, oppression, and undue influence. The mass deployment of over 30,000 security personnel to the state was ostensibly to ensure peaceful polling but was also used for voter intimidation and the arrest of opposition party agents.[15]

The Osun governorship election was held on September 22, 2018, and was also a straight fight between the ruling APC and the main opposition PDP. The election recorded better transparency than that of Ekiti but was declared inconclusive because the margin that put the PDP ahead of the APC (353 votes) was less than the number of registered voters (3,498) in the seven polling units where elections were cancelled for malpractices or technical difficulties.[16] A supplementary election for the affected areas was held on September 27. This election was marred by reported "widespread misconduct by security agencies, including intimidation of accredited journalists, observers, and even voters of the opposition party".[17] It was against this background that the candidate of the APC was declared winner of the election.

The results of the elections in both states were challenged at the post-election tribunal, with that of Ekiti decided in favour of the declared winner, the APC candidate.[18] An appeal is expected. Although past electoral experiences in Nigeria teach us that perversion through falsification of results, rigging, and violence is widespread, judicial reversal of results of fraudulent polls is relatively common.[19] However, after 2015, there has been a noticeable decline in the number of election petitions by dissatisfied candidates or their parties as well as the number of successful Court challenges of election results.

The Electoral Act (amendment) Bill, which proposed far-reaching reforms, including an electronic format for documentation, placing legislative elections before the presidential poll, stricter regulation of the nomination process for candidates, and so on,[20] was refused assent thrice in a space of less than ten months by President Buhari, citing drafting errors.[21] On the fourth occasion, however, he refused ostensibly because assenting to a bill to change electoral law so close to the election (December 2018) could cause "some uncertainty about the applicable legislation to govern the process".[22] The last refusal seems to confirm that the President was not committed to any electoral reforms. Unfortunately, the legislature did not have the numbers to override the President's veto. The 2015 law will be used for the 2019 elections.

4. Freedom of the Press

The Nigerian Constitution of 1999 guarantees freedom of the press and the dissemination of information.[23] The Court has interpreted this right as extending to barring the harassment of journalists because of their news reporting.[24] There are public-owned media organisations and privately controlled ones in Nigeria. The privately controlled media expectedly are quite intrusive in covering government activities and have been helpful in unravelling alleged breaches of rights. These have exposed them to harassment by government agencies. Lately, the fight against terrorist groups has caused friction between journalists and security agencies as to permissible limits of information dissemination when weighed against national security considerations.

What appears to be repression of the press began on January 1, 2018, when three journalists were arrested and detained for at least two days by operatives of the Special An-

[14] Emmanuel Ani, 'Ekiti Election: Observers discredit Poll, say large deployment of Security Operatives marred Exercise' *Daily Post* (17 July 2018) < http://dailypost.ng/2018/07/17/ekiti-election-observers-discredit-poll-say-large-deployment-security-operatives-marred-exercise/> accessed 08/02/2019.

[15] Kamarudeen Ogundele, 'Ekiti: Election Fell Short of Global Standards, Say US Observer Group, Others' *Punch* (18 July 2018) < https://punchng.com/election-fell-short-of-global-standards-say-us-observer-group-others/> accessed 08/02/2019.

[16] Jide Ojo, 'An Observer's Intimate View of Osun Governorship Election' *Punch* (26 September 2018) <https://punchng.com/an-observers-intimate-view-of-osun-governorship-election/> accessed 08/02/2019.

[17] Samuel Ogundipe, 'Osun Decides 2018: Re-run Election Not Free, Fair or Credible – CDD' Premium Times (27 September 2018) <https://www.premiumtimesng.com/news/headlines/286854-osundecides2018-re-run-election-not-free-fair-or-credible-cdd.html> accessed 08/02/2019. See Jerry Emmanson, 'Osun Guber: Observer Group Releases Report...' *Leadership* (23 October 2018) <https://leadership.ng/2018/10/23/osun-guber-observer-group-releases-report-rerun-poll/> accessed 08/02/2019.

[18] Ikechukwu Nnochiri & Rotimi Ojomoyela, 'Ekiti Governorship Election Tribunal upholds Fayemi's Victory' *Vanguard* (29 January 2019) <https://www.vanguardngr.com/2019/01/ekiti-governorship-election-tribunal-upholds-fayemis-victory/> accessed 08/02/2019.

[19] See J. Tochukwu Omenma, Okechukwu O. Ibeanu & Ike E. Onyishi, 'Disputed Elections and the Role of the Court in Emerging Democracies in Africa: The Nigerian Example' (2017) 2 *Journal of Politics & Democratization* 28-55; *The 2015 General Election in Nigeria Compendium of Petitions* Available online: http://www.placng.org/situation_room/sr/wp-content/uploads/2017/07/Compendium-of-Election-Cases-in-Nigeria.pdf.

[20] See 'Factsheet on the Electoral Act Amendment Bill, 2018 as Passed by the National Assembly' February 2018 < http://placng.org/wp/wp-content/uploads/2018/02/factsheet-on-the-electoral-act-amendment-bill-2018-as-passed-by-the-national-assembly.pdf> accessed 08/02/2019.

[21] Henry Umoru, 'Signing Amended Electoral Act for 2019 Elections will create uncertainty, crisis – Buhari' *Vanguard* (7 December 2018) < https://www.vanguardngr.com/2018/12/signing-amended-electoral-act-for-2019-elections-will-create-uncertainty-crisis-buhari/> accessed 08/02/2019.

[22] Seun Opejobi, 'Electoral Act: Buhari finally breaks silence, reveals why he refused to sign Bill' *Daily Post* (8 December 2018) < http://dailypost.ng/2018/12/08/electoral-act-buhari-finally-breaks-silence-reveals-refused-sign-bill/> accessed 08/02/2019.

[23] S. 39.

[24] *Innocent Adikwu v Federal House of Representatives* (1983) 3 NCLR 394; Tony Momoh v Senate (1984) 4 NCLR 269.

ti-Robbery Squad unit of the Nigerian Police for allegedly criticising the Inspector General of Police.[25] In February 2018, Tony Ezimakor, a senior editor with the *Daily Independent* newspaper, was detained for about a week without charge by the DSS for what the security agency considered an offensive report on the missing Chibok girls.

In the 2018 World Press Freedom Index, Nigeria was placed 119th (on the global ranking of 180 countries), sandwiched between Afghanistan and Maldives.[26] Nigeria's latest ranking is a marginal improvement from the 122nd position it had in 2017. The accompanying report to the ranking published by Reporters without Borders (RSF) regretted that in Nigeria, journalists are often harassed by authorities when covering subjects with national security ramifications. The report also raised concerns that "the all-powerful regional governors are often the media's most determined persecutors and act with complete impunity".[27] This concern may not be unrelated to the March 13, 2018 arrest of Musa Kirshi, a correspondent with the *Daily Trust,* in the National Assembly premises for allegedly facilitating an advertorial against the interest of the governor of Jigawa State, Abubakar Badaru. On March 12, 2018, at least five privately owned newspapers with nation-wide coverage were prevented from covering President Buhari's visit to Benue State in the aftermath of suspected herdsmen killing unarmed villagers.[28]

In another show of might, on August 19, 2018, the Oyo State Government demolished the building in Ibadan housing *Fresh FM,* a private radio station, on the pretext that the building contravened physical planning law, though an independent report stated that the government's actions were based on political differences with the station proprietor.[29] The management of the media house claimed that it obtained all necessary government approvals before it built the radio house.[30] In contempt for the rule of law, the government brought down the building in defiance of a court order restraining it from doing so.

There has not been much improvement in the way private media organisations have been treated by the government. The importance of the press to the consolidation of democracy means that repressive acts against private media as recorded last year diminishes the prospect of strengthening democracy.

III. CONSTITUTIONAL CASES

Dasuki v FRN: Unlawful Detention

Mr. Sambo Dasuki, the former National Security Adviser, challenged his continued detention in spite of an order of an Abuja High Court on December 18, 2015, which granted him bail after his arraignment by the Economic and Financial Crimes Commission (EFCC). He was released on December 29, 2015 in obedience to the order of the High Court but immediately re-arrested by operatives of the DSS and kept in custody. The High Court and the Court of Appeal ruled separately that the government was not in breach by its action because there was no court order against the re-arrest of Mr. Dasuki. On March 2, 2018, the Supreme Court aligned itself with the two courts below it, affirming that Mr. Dasuki could be re-arrested by the same or different agency of government on suspicion of committing any crime, and ordered an accelerated trial.[31] Unfortunately, since then, the trial of Mr. Dasuki has not progressed significantly, which is in breach of the right to personal liberty and fair trial protected by the Constitution of 1999.[32] The comment of President Muhammadu Buhari that national security and the nation's interest are superior to the rule of law is a pointer to perhaps a deliberate policy of clamping down on freedom.[33]

Saraki v FRN: Accountability of Public Officials

The Constitution of 1999 prescribes a code of conduct for public officials, requiring them to declare their assets on assumption as well as on exit from public office.[34] An official in breach of the code is tried by the Code of Conduct Tribunal (CCT). The Senate President, Dr. Bukola Saraki, was charged in 2015 to the CCT for non-declaration and anticipatory declaration of assets from 2003 to 2011, when he was governor of Kwara State. The CCT ruled on June 14, 2017 that the prosecution failed to prove its case and acquitted Dr. Saraki. In the federal government's appeal against his acquittal, the Court of Appeal, on December 12, 2017, reversed the ruling of the CCT but reduced the charges from eighteen to three.[35] On appeal, the Supreme Court, on July 6, 2018,

[25] Wole Elegbede, 'Threat to Press Freedom and Democracy' Thisday (9 January 2019) < https://www.thisdaylive.com/index.php/2019/01/09/threat-to-press-freedom-and-democracy/> accessed 11/02/2019.

[26] Reporters without Borders, '2018 World Press Freedom Index' <https://rsf.org/en/ranking/2018> accessed 13/02/2019.

[27] Abdullateef Salau, 'World Press Freedom Day: Nigeria upped in Press Freedom Index but some subjects still off limits' *Daily Trust* (3 May 2018) < https://www.dailytrust.com.ng/world-press-freedom-day-nigeria-upped-in-press-freedom-index-but-some-subjects-still-off-limits.html> accessed 11/02/2019.

[28] Editorial, 'Police, SSS Unwarranted Media Crackdown' *Punch* (21 March 2018) < https://punchng.com/police-sss-unwarranted-media-crackdown/> accessed 11/02/2019.

[29] Chijioke Jannah, 'Real Reason Yinka Ayefele's Radio Station was marked for demolition – Ajiboye' *Daily Post (*18 August 2018) < http://dailypost.ng/2018/08/18/real-reason-yinka-ayefeles-radio-station-marked-demolition-ajiboye/> accessed 11/02/2018.

[30] Olufemi Atoyebi and Peter Dada, 'Outrage as Oyo demolishes Ayefele's N800m Radio Station, Studio' *Punch* (20 August 2018) < https://punchng.com/outrage-as-oyo-demolishes-ayefeles-n800m-radio-station-studio/> accessed 11/02/2019.

[31] *Dasuki v FRN (*2018) LPELR-43897 (SC).

[32] Sections 35 and 36(1), respectively.

[33] Ikechukwu Nnochiri, 'Rule of Law must be subjected to National Interest, Buhari insists' *Vanguard* (27 August 2018) <https://www.vanguardngr.com/2018/08/rule-of-law-must-be-subject-to-national-interest-buhari-insists/> accessed 13/02/2019.

[34] Para. 11(1), 5th Schedule to the Constitution of 1999.

[35] *Saraki v FRN* (2017) LPELR-43392.

affirmed the decision of the CCT. The Court ruled that the decision of the Court of Appeal to agree with the CCT in one breath yet order Dr Saraki to return to the CCT in another amounted to a "judicial summersault".[36] The trial of Saraki at the CCT may have had a political undertone than simply a quest to punish corrupt enrichment.

Hon. Justice Sylvester Ngwuta v FRN: Judicial Independence

Justice Sylvester Ngwuta of the Supreme Court was arraigned separately before the Federal High Court (Abuja) for money laundering and at the CCT for false and non-declaration of assets. On May 15, 2018, the CCT threw out the charges against Justice Ngwuta in deference to a recent Court of Appeal's precedent that the criminal prosecution of a serving judge for any offence bordering on professional misconduct can take place only after the National Judicial Council (NJC) has investigated and applied or recommended appropriate disciplinary actions.[37] Barely two months before this time, on March 23 2018, the Federal High Court struck out the charges against Justice Ngwuta relying on the same judicial authority.[38]

The Nigerian Constitution is consistent with international principles on judicial independence, such as the United Nations' *Basic Principles on Judicial Independence*[39] and the International Bar Association's (IBA) *Minimum Standards of Judicial Independence,*[40] that require judicial self-governance in matters of appointment and discipline of judicial officers.[41] Notwithstanding the constitutional guarantee of tenure, however, the two decisions above are hard to rationalize legally because the offences alleged were not actions carried in the course of performing a judicial function. Rather, they were violations of extant financial regulations and ethical standards required for public officers generally under the code of conduct contained in the Constitution. The decision of the CCT is especially hard to support because it is the body that has exclusive jurisdiction over a breach of the code of conduct for public officers contained in the Constitution. Relying on a judicial pronouncement to create a prerequisite for carrying out a constitutional duty is merely evasive. Assuming the reasoning in Nganjiwa's case is tenable, of what use is it if the Attorney-General prefers the charge after the retirement of the judge, as was the case against the Senate President discussed above? The CCT's excision of judicial officers from its jurisdiction using the pretext of Nganjiwa's case is an unwarranted abdication of its constitutional responsibility.[42]

IV. LOOKING AHEAD

The conduct of the February 16/March 2, 2019 general elections, especially the presidential election, will have a huge impact on political developments in Nigeria in 2019. The European Union and United States as well as several others have sent election monitors. Political campaigns have been acrimonious, in some instances raising serious concerns about possible pre- and post-election violence. The test elections in Ekiti and Osun have also cast a dark cloud on the sincerity of the government, the capacity of the electoral commission, and the neutrality of security agencies regarding the 2019 elections.

The outcome of the ongoing investigation and trial of the Chief Justice of Nigeria, Justice Walter Onnoghen, for suspicious assets will definitely redefine judicial independence and the relevance of the NJC. It is also possible that should the opposition emerge victorious in the presidential election, upon assuming office the trial will be terminated and all prior actions taken by President Buhari voided.

One vacancy was created in the Supreme Court in 2018 when Justice Clara Ogunbiyi retired mandatorily at seventy. The vacancy was filled with the appointment of another woman, Justice Uwani Musa Abba-Aji. She formally took her seat in January 2019. Until her appointment, she was one of the senior justices on the Court of Appeal, Nigeria's intermediate appellate court. This appointment follows the established pattern of filling Supreme Court vacancies with Justices of the Court of Appeal, and restores the number of women on the Supreme Court to four, a quarter of the bench. One vacancy by retirement is expected in 2019 (Justice Akaahs). Barring the resignation of the Chief Justice, no other vacancy is anticipated.

[36] Evelyn Okakwu, 'Updated: Supreme Court Dismisses Saraki's False Asset Charge' *Premium Times* (6 July 2018) <https://www.premiumtimesng.com/news/headlines/275242-updated-supreme-court-dismisses-sarakis-false-asset-charge.html> accessed 07/02/2018.

[37] *Hon. Justice Hyeladzira Nganjiwa v Federal Republic of Nigeria* (2017) LPELR-43391.

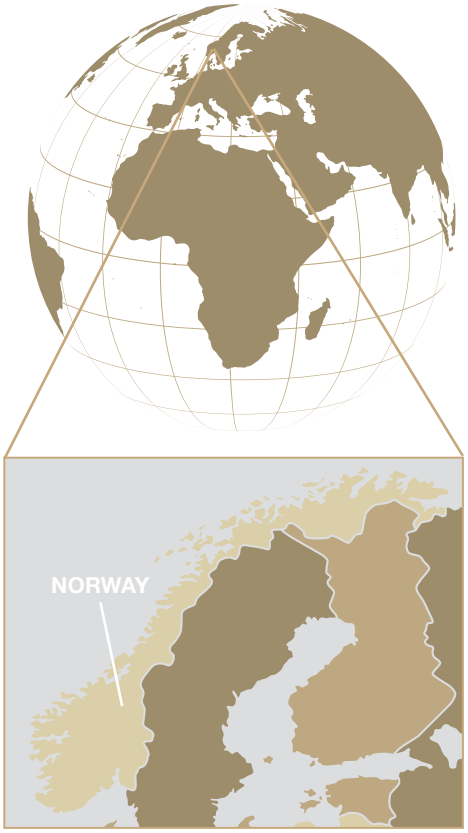
[38] Ade Adesomoju, 'False Assets Declaration: Court Strikes out Charges against Justice Ngwuta' Punch (16 May 2018) <https://punchng.com/false-assets-declaration-court-strikes-out-charges-against-justice-ngwuta/> accessed 07/02/2018; Bridget Chiedu Onochie, 'CCT Discharges Ngwuta over False Assets Declaration' Guardian (16 May 2018 <https://guardian.ng/news/cct-discharges-ngwuta-over-false-assets-declaration/> accessed 07/02/2018.

[39] Endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> accessed 12/10/2018.

[40] International Bar Association, *Minimum Standards of Judicial Independence* (Int'l Bar Assn., 1982), 46.

[41] Ss. 291, 292 & para. 20 of 3rd Schedule of the Constitution of 1999.

[42] See the critique of *Nganjiwa*'s case in Ukhuegbe & Arishe, 'Nigeria' [n 13] 206.



Norway

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I. INTRODUCTION

We described 2017 as a year of constitutional status quo in Norway.[1] 2018 has been more eventful, at least on the political scene. Here, developments have unfolded like a drama in three acts (fortunately not of Shakespearean dimensions; rather, with the subdued intrigues characteristic of many of Ibsen's plays).

In act one, the protagonist—Prime Minister Erna Solberg (Conservatives)—came one step closer to her goal of uniting all the center-right parties in a majority coalition, as the Liberal Party joined the Government in January. In the second act, however, Minister of Justice Sylvi Listhaug,(Progress Party), the main antagonist, entered the scene. In March, Listhaug, a controversial right-wing populist, published a much-criticized Facebook post chiding the Labour Party for siding with terrorists because they wanted courts, not administrative bodies, to make decisions about deprivation of citizenship in cases of national security. Facing the outcry of the opposition and position parties alike, she showed no remorse. This example of Listhaug's unwavering rhetoric was the final straw. The opposition submitted a parliamentary proposal for a vote of no confidence, a possible threat to the entire Government. The crisis was averted as Listhaug stepped down, grudgingly. This turn was but a prelude to the surprising final act, in which the spotlight turned to the Christian Democratic Party, holding the key to a majority Government. It had been set to exit from the political no man's land following terrible results in the 2017 general elections. In September, the party leader proposed a new center-left coalition, thus further threatening the Government's position. After a weeklong thriller of a national congress, the party decided instead to look right, towards a possible entry into the sitting coalition Government. The party became part of the Government in January 2019.

Paradoxically, then, Solberg ended up with a majority coalition and a strengthened position after a dramatic year. An impressive achievement and certainly a personal victory for her. It remains to be seen how historians will judge her and the process; a rather saddening episode was when Solberg, during the debates within the Christian Democratic Party, threw out the possibility of adjustments in the Abortion Act as bait for the conservative camp.[2] The episode illustrates Solberg's postmodern conservatism, where the only "principle" that seems to apply firmly is that of pragmatism.

With this overview of the political developments as a backdrop, we go on to consider significant legal constitutional developments in 2018.

[1] Anine Kierulf and Marius Mikkel Kjølstad, 'Norway. The State of Liberal Democracy' in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *The I·CONnect-Clough Center 2017 Global Review of Constitutional Law*, 2018 pp. 209–214.

[2] See Alex Matthews-King, 'Abortion demonstrations draw thousands across Norway after prime minister proposes tightening laws' (*The Independent*, 17 November 2018) <https://www.independent.co.uk/news/world/europe/abortion-norway-protest-oslo-storting-womens-erna-solberg-christian-democrats-march-a8638966.html.> accessed 6 January 2019.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In November 2018, the Government proposed a new Intelligence Service Act. The most significant part of the proposal is the establishment of a bulk interception scheme. If this scheme is enacted, considerable amounts of border-crossing communications data may lawfully be collected by the intelligence services. Case law from the European Court of Human Rights (ECtHR) indicates that bulk interception schemes aimed at protecting national security fall within the margin of appreciation of the Member States under the privacy protection ensured by Article 8, given that the regime offers sufficient procedural safeguards. Two cases decided in 2018 are now pending before the Grand Chamber.[3] In any case, even if *legally* permitted, the *desirability* of such an arrangement is a different question. The proposed regime will seriously compromise privacy rights, and the proposal is already under criticism from parts of civil society in the public consultation process.

Of legislation that *was* enacted, a ban on wearing garments that conceal the face—for all practical purposes *niqab* and *burqa*—in educational institutions is worth mentioning. The new legislation became particularly interesting when the United Nations Human Rights Committee later concluded that a general *niqab* and *burqa* ban in France violates the right to freedom of religion.[4]

International bodies and their jurisprudence are of considerable importance for human rights in Norway. As we explain in the next section, international influence on the national legal system is substantial. Here, some important developments pertaining to the ECtHR at the regional level are worth mentioning below.

Institutionally, the Copenhagen Declaration was a reminder of how diverging views of multilateral institutions pave way for processes wanting in careful regional groundwork. For analyzes of the Declaration, and the process leading up to it, we refer to writings elsewhere.[5] The Norwegian process was most notable for its complete silence—the Government offered its comments to the Draft Declaration without consulting or even informing Parliament or the public—until some commentators and MPs raised their voices. Only towards the very end of the process before the Declaration did the Government clarify that it would not support the paragraph that had come to be a central point in the critique against the Draft Declaration, namely the one telling the ECtHR to stop meddling in asylum cases.

Norwegian Supreme Court Justice Arnfinn Bårdsen was appointed as the new Norwegian judge to the ECtHR, beginning 1 January 2019. Bårdsen's profound knowledge of human rights law is witnessed both by his judicial decisions and extensive legal writing on the subject. He has been one of the justices most ready to use international legal sources in his reasoning, thus facilitating the judicial dialogue with the ECtHR.

On the substantial level, the ECtHR delivered three judgments against Norway. In the two first cases, one concerning collection of a lawyer's confidential communication in a criminal investigation and one the removal of parental responsibility and adoption without the parent's consent, the Court found no violations.[6] In a third case, also in the field of family life and the Norwegian child welfare system, the Court held that the refusal to allow a mother contact with her daughter, who had been taken into public care, violated her right to family life.[7] In this field, the Court also held Grand Chamber hearings in November in the case of *Strand Lobben v. Norway.*[8] The decision in this case is still pending, as are the hearings of five other cases in the same field. Child welfare cases raise extremely complex and sensitive issues, and the dissent in the Chamber judgment in *Strand Lobben* indicates that there are fundamentally diverging views within the Court as to the proper level of subsidiarity and the margin of appreciation. The total outcome of these cases will influence ongoing reforms of the Norwegian child welfare system.

III. CONSTITUTIONAL CASES

1. The Contraception case: Freedom of Conscience

The *Contraception* case received substantial public attention in 2018.[9] It concerned a general practitioner who in 2015 was dismissed by the municipality employing her because for reasons of conscience, she refused to insert copper IUDs (a contraception device). When she was hired in 2011, the parties had made an agreement that she could refuse to insert IUDs. Following heated debates in 2015 over the issue of general practitioners' right to reservation, in which a strong public demand to protect women's sexual and reproductive health and rights was predom-

[3] *Centrum för Rättvisa v. Sweden* App no 35252/08 (19 June 2018) and Big Brother Watch and Others v. the United Kingdom App no. 58170/13, 62322/13, and 24960/15 (13 September 2018).

[4] *Sonia Yaker v. France* Communication no 2747/2016 (decided 17 July 2018, published 7 December 2018). The ECtHR has, conversely, accepted such bans, see *S.A.S. v. France* App no 43835/11 (1 July 2014) and *Dakir v. Belgium* App no 4619/12 (11 July 2017).

[5] See, e.g., Janneke Gerards and Sarah Lambrecht, 'The final Copenhagen Declaration: fundamentally improved with a few remaining caveats' (*Strasbourg Observers Blog*, 18 April 2018) <https://strasbourgobservers.com/2018/04/18/the-final-copenhagen-declaration-fundamentally-improved-with-a-few-remaining-caveats/> accessed 6 January 2019.

[6] *Wolland v. Norway* App no 39731/12 (17 May 2018) and Mohamed Hasan v. Norway App no 27496/15 (26 April 2018).

[7] *Jansen v. Norway* App no 2822/16 (6 September 2018).

[8] App no 37283/13, decided by the Fifth Section on 30 November 2017.

[9] HR-2018-1958-A. Summaries of all of the Supreme Court's rulings from 2018 are available in English at <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/summaries-of-rulings/>. The Court's Annual Report is available in English at <https://indd.adobe.com/view/62b99133-2727-4c67-af56-bf1073316872> accessed 8 January 2019.

inant, a provision banning such reservation clauses was introduced.

For the Supreme Court, the case could be solved by the law of contracts: the general practitioner had a contractual right to make reservations, and the 2015 amendments did not retroactively void such a clause. As the public (and legislative) interest was in the more principled question of whether the prohibition against reservation clauses conforms with the right to freedom of conscience, as enshrined in Article 9 of the ECHR, the Court commented generally also on this issue in a rather extensive *obiter dictum.*

The Court, relying to a certain extent on the *Eweida* case from the ECtHR,[10] went far in accepting such prohibitions on a general level. It found the purpose of it, ensuring women's sexual and reproductive health and rights, to be a legitimate concern. Courts should thus be cautious about substituting their view on the balancing of legitimate interests for that of political authorities. However, the Court indicated that if, in specific cases, a woman can be guaranteed adequate health assistance by alternative means, the local authorities must undertake a more nuanced assessment, where the underlying values behind Article 9 must be balanced in the concrete.

The judgment and its rather vague wording indicate that the Court was caught between the ambition of being a court of precedent that ensures clarification of the law and the fact that there is no tradition for abstract judicial review of legislation in Norway. From a human rights law perspective, however, the Court's message of defiance to the political balancing of interest, while also reminding that specific circumstances might tip the scales in concrete cases, seems sound.

2. The *Nesseby* and the *Femund sitje cases:* Rights of Indigenous Peoples

The rights of the indigenous Sami people are protected by Article 108 of the Norwegian Constitution and several international human rights documents, most importantly Article 27 of the CCPR and no. 169 of the ILO Convention, concerning Indigenous and Tribal Peoples in Independent Countries. As in the previous year, the Supreme Court decided two cases concerning Sami rights in 2018.[11]

The *Nesseby* case, heard in plenary, concerned land rights.[12] Based on immemorial usage, a regional society had rights of use to a large part of a municipality in Finnmark, the northernmost county in Norway. The society claimed these rights also included the entitlement to manage the renewable natural resources in the area, i.e., fish and game, timber, etc. The Court disagreed. Based on relevant legislation, it found the competence of resource management belonged to the landowner, the Finnmark Estate Agency (FeFo). This led to the question of whether such a solution violated the requirements in ILO convention no. 169 Articles 6, 7, 14, and 15, pertaining to indigenous peoples' control over the rights of use and participation in the decision-making processes. The Court dismissed this claim, holding first that the Sami people were considerably represented in the board of the FeFo and, second, that the Sami Parliament had been involved in the drafting of the relevant legislation and that it had not objected to the framework.

The *Femund sitje* case considered whether the legal provisions on strict liability for damages caused by reindeer were discriminatory.[13] The alleged discriminatory element was that the stipulated form of joint and several liability is more extensive than when damages are caused by other kinds of grazing animals. The Court underlined the importance of Sami culture in assessing the question of alleged discriminatory effect but argued it would be very difficult for the plaintiff to identify what animal(s) in a large reindeer herd had caused damages, and that this circumstance justified the difference in regulation in this specific case. The Court did, however, signal to the legislator that in other cases, this form of liability might be too extensive. It pointed out that ten years ago, a commission had recommended legislative reforms, and that the UN Human Rights Committee has criticized Norway for inadequate implementation of these recommendations.

The Court has decided a total of five "Sami cases" over the last three years, all of them rejecting claims based on the rights of indigenous peoples. One possible consequence of this—well-founded or not—is that Sami rights are perceived to be inadequately protected. Another factor contributing to this, is that the Parliament voted down proposals to revise the wording of Constitution Article 108 to clarify (on a constitutional level) the recognition of the Sami people as an indigenous people.[14]

3. HR-2018-1909-A: Interpretation of Constitutional Rights

In 2014, the Norwegian Constitution was amended with a full-fledged chapter on human rights.[15] The new provisions were modeled on international conventions, and courts and scholars have since struggled to develop a workable approach to the dual and sometimes triple rights protection that exists under resembling, but different provisions. A central

[10] *Eweida and Others v the United Kingdom* App no 48420/10 (ECHR, 15 January 2013).

[11] For summaries of the 2017 judgments, see Kierulf and Kjølstad (2018) p. 211.

[12] HR-2018-456-P, available in English at <https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/rulings/rulings-2018/the-scope-of-collecetive-rights-of-use-to-land-in-nesseby-finnmark/>.

[13] HR-2018-872-A.

[14] This status is generally recognized, but not reflected in the wording of the Constitution. There are several reasons why none of the three proposals went through, some more technical than political. Article 108 currently reads "the Sami population", and the proposal was to change this to "the Sami people" or "the Sami indigenous people", which would have important symbolic value. On January 29, 2019, the Conservatives and the Progress Party blocked the required 2/3 majority, like they did in 2014.

[15] See Anine Kierulf, 'Developments in Norwegian Constitutional Law: The Year 2016 in Review' in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *The I·CONnect-Clough Center 2016 Global Review of Constitutional Law,* 2017 pp. 150–154.

normative issue is whether courts should tie their reasoning to the Constitution or to international instruments, or both, and if so, in what order. A doctrinal issue, among several, is whether an interpretation by the Supreme Court based almost exclusively on case law from typically the ECtHR, but where the constitutional provision is mentioned *en passant,* should be considered as a binding interpretation of the Constitution with the effect of requiring a constitutional amendment for legislative alterations. This would also have potential implications where the ECtHR later departs from its jurisprudence.

One decision illustrative of some of these questions of constitutional interpretation is HR-2018-1909-A. Due to different rules of evidence in criminal and civil cases, a defendant had been acquitted by the Court of Appeal for an indictment for sexual offences, but at the same time been ordered to pay civil redress. The Supreme Court held that the lower court had violated the right to be presumed innocent because of statements made under the assessment of civil liability that could cast doubt on the criminal acquittal.

The Court exclusively considered the case as a violation of the presumption of innocence under the Constitution, Article 96. It has considered similar previous cases under ECHR, Article 6, alternatively both the ECHR and the Constitution.[16] It gave no further reasons for its approach. Speculation ensued whether this indicates a new direction from the Court or a phalanx of the Court, a question that remains to be answered. Another interesting aspect of the decision is what was for sure a new "invention" by the Court: in previous cases, it has usually confined itself to state a violation as part of the decision premises, something that has been affirmed as a sufficient remedy under Article 13 of the ECHR.[17] In this decision, however, the Court chose to formulate a separate holding in the conclusion where it formally acknowledged that there had been a violation, but that this was now remedied by the Court's conclusion. At first glance, this might seem like a small detail. But the devil often lies in the (procedural) details. The Court's invention plays into a broader debate about whether separate claims to have human rights violations declared are directly actionable. The Civil Procedure Act *travaux préparatoires* and several authors have been reluctant about such an opening, whereas the Supreme Court at least in some cases has seemed more open.[18] An interesting question is whether this judgment indicates more of a general legal evolution, and whether we might eventually end up with the possibility of bringing separate claims for violations of the Constitution before the courts.

4. HR-2018-2096-A: UN Committees' Jurisprudence as Source of Law

Another methodological issue that has puzzled Norwegian courts and scholars over the last decade is the more precise legal significance impact of materials from UN committees in national legal reasoning. Through several decisions, the Supreme Court has clarified that even though the committees' jurisprudence is not strictly binding under international law, their interpretations of the conventions shall have considerable weight as a legal source under national law. One must, however, distinguish between the committees' (legal) interpretations and their more concrete recommendations.

HR-2018-2096-A illustrates how this may turn out in practice. At the age of 20, a man was convicted for sexual offences. The disputed question was whether the courts, in their sentencing assessment, were prevented from considering previous sexual offences committed when he was a minor under his right to privacy in Article 40 (2) (b) (vii) of the Convention on the Rights of the Child. The Court referred to the CRC Committee's General Comment (GC) no. 10 (2007). In paragraph 64 of the GC, the Committee interprets the scope of the provision—it concerns "all stages of the proceedings"—in a way that seems to imply that the privacy rights do not extend beyond the case against the minor. Accordingly, so the Court reasoned, the provision does not apply at all in later cases when the minor has become an adult. On the other hand, the Committee stated explicitly in paragraphs 66 and 67 that records of child offenders should not be used in adult proceedings and that the records should be automatically deleted when the minor turned 18 years old. But as these were mere *recommendations,* the Court disregarded them and fell back on the *interpretations* in paragraph 64. Thus, the Court concluded that Article 40 did not prevent it from considering earlier convictions in its sentencing.

5. HR-2018-2133-A: Right to Private Life for Refugees

HR-2018-2133-A considered whether a decision to withdraw the temporary residence permit of an Afghan woman and her daughter violated their right to respect for their private life. They had been granted refugee status and a three-year temporary residence permit upon arrival in Norway in October 2011. The basis for the refugee status was that the mother was a single woman without a male network in Afghanistan. When her husband later arrived in Norway, the grounds for the decision ceased to exist, and the residence permit was withdrawn in March 2014. The withdrawal was upheld in January 2016, and the Court had to decide whether the mother and her daughter at this point of time had established a protected private life in Norway.

The ECtHR's case law under ECHR Article 8 stipulates that primarily "settled migrants" have a protected right to respect for their private life. The Supreme Court held that as a main rule, temporary residence permits do not establish a protected right, even when they are prolonged consecutively. There is, however, an exception where the stay becomes long-lasting, but the Court did not indicate any time frame for what constitutes "long-lasting". Normally, only where a per-

[16] In Rt. 2014 p. 1292, the Court even held that there had been a violation of Article 14 of the CCPR.

[17] *A. v. Norway* No. 65170/14 (ECtHR, decision, 29 May 2018).

[18] Cfr. Rt. 2015 p. 93 and HR-2016-2178-U.

manent residence permit is granted will the person be regarded as a "settled migrant".

Under Norwegian migration law, one may apply for a permanent residence permit only after three years of legal stay. In addition, the migrant must have had his or her own income and not have received social security benefits over the last 12 months prior to the application, a requirement introduced in 2017. In practice, a great number of refugees will not be able to obtain a permanent residence permit until they have stayed in Norway for a considerable amount of years. Thus, it might well be that in the coming years, the Court will have to decide on the threshold for the protection of private life for refugees with temporary permits that have been prolonged several times.

6. HR-2018-104-A and HR-2018-699-A: Protection of Lawyer-Client Correspondence

Under Norwegian criminal procedure, lawyer-client correspondence is privileged and may, with only narrow exceptions, not be seized by the police. Such material is protected by the right to respect for correspondence in the Constitution Article 102 and the ECHR Article 8. When the police conduct a search and discover material that might contain lawyer-client correspondence, the material shall be sealed and handed over to a district court. The court will sort out confidential material and return the remaining documents to the police. This procedure, which is court-developed in the absence of any detailed legislation, was accepted by the ECtHR in a decision from May last year.[19]

In two court orders from January and April, the Supreme Court elaborated on details of the procedure in these cases.[20] The interesting part of these decisions is not the rather technical issues discussed but the way the Court reasoned: methodologically, the orders are model decisions. The Court, when deciding matters that are not settled by the legislator, bases its reasoning on the underlying principles behind the protection of privileged correspondence. It emphasizes how everyone seeking legal advice should be able to expect confidentiality, and, more broadly, that a strong relation of trust is necessary in order that lawyers may fulfill their role in a rule of law-based society, including their task to ensure private parties' right to a fair trial. Based on these principles, the Court in both cases reached conclusions that ensure a strong protection of lawyer-client correspondence.

IV. LOOKING AHEAD

In 2019, a central theme will remain how properly to finance the judiciary. Following strict "de-bureaucratization reforms", the courts' finances are stripped to the bones, and the backlog is increasing. In December 2018, Parliament requested the Government to ensure that the courts have sufficient finances to ensure the citizens' right to a trial within a reasonable time. An official commission working on the organization of the judiciary is at work and will deliver its white paper in 2020. Further, a Special Measures Commission is supposed to deliver to the Government a report in March on the issue of whether to extend the Government's emergency legislative powers in "extraordinary situations" in times of peace. And third, appellate court hearings in a prominent and very important climate litigation case will be held in November.[21]

On the international scene, the ECtHR's Grand Chamber decision in the *Strand Lobben* case will be followed closely.

V. FURTHER READING

Arnfinn Bårdsen, 'Deciding What to Decide: The Filtering Mechanism in the Norwegian Supreme Court', lecture held before the Icelandic Bar Association, Reykjavik, 16 February 2018. Available at <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/deciding-what-to-decide-bardsen-23.02.2018.pdf>

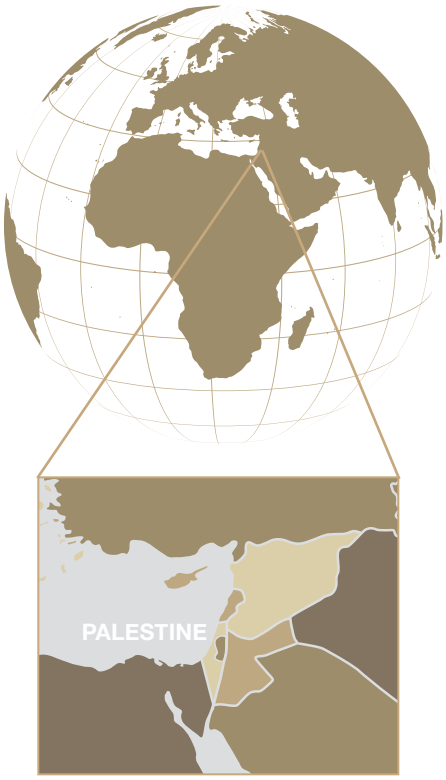
Anine Kierulf, *Judicial Review in Norway. A Bicentennial Debate* (Cambridge University Press, 2018). DOI: https://doi.org/10.1017/9781108617727.

Eivind Smith, 'Judicial Review of Legislation' in Helle Krunke and Björg Thorarensen (eds), *The Nordic Constitutions. A Comparative and Contextual Study* (Hart Publishing Ltd., 2018). DOI: https://doi.org/10.5040/9781509910960.ch-005.

[19] See footnote 6 above.

[20] HR-2018-104-A and HR-2018-699-A. The former is available in English at <https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2018-104-a-.pdf>.

[21] For details, see Kierulf and Kjølstad (2018) pp. 212-213.



Palestine

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INTRODUCTION

This review briefly introduces the Palestinian constitutional system. It then assesses key and significant constitutional developments that have taken place in Palestine since the endorsement of the institution of constitutional review and seeks to refract the status of liberalism and democracy through historical and political experiences.

The idea of drafting a constitution for the 'Palestinian state' was initially floated after the Palestinian National Council (PNC) passed the Declaration of Independence in Algiers in 1988. However, initial drafts were only circulated after the Oslo Agreements between the government of Israel and the Palestine Liberation Organization (PLO). The delay reflected both the intrinsic limitations of these agreements and the continued influence of external impediments, most notably the weak status of the Palestinian Authority (PA) and its limited jurisdiction during an interim period that was originally planned to last from 1994 until 1999.

In 1997, the Palestinian Legislative Council (PLC), the PA's parliamentary body, decided one year after its members were elected to adopt the Basic Law (BL). This decision was only endorsed by Yasser Arafat, the former PA president, in 2002, three years after the conclusion of the five-year Interim Period. The BL was amended in 2003, and its main change included the establishment of an Office of Prime Minister, and this in turn altered the role of the President, who, under the previous version of the BL, had presided over a Council of Ministers. A further amendment was added in 2005 to enable elections to take place every four years. The 2003 BL, including the 2005 amendment, is now established as the PA's valid constitution.[1]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year 2012 was a turning point for Palestine when it was recognized as a state by the United Nations General Assembly. In addition to other privileges, this meant that the Palestinian state could establish a constitution and was, within the context of international agreements, considered to be a participating member state.

After membership was established, a committee worked together to create a draft constitution with 273 articles, and this was completed by the end of 2015. The committee was established with the intention of building on all preceding work, and with completing a modern Palestinian constitutional project. It included members of the national and central council, in addition to parliamentarians and jurists, who were tasked with addressing problematic or unresolved issues that had arisen during the BL's lifespan. But at the time of this writing, no constitution has been put in place that establishes sovereignty and the pillars of statehood.

[1] All of this chapter's references to the BL relate to the 2003 version, unless otherwise stated.

In 2014, Palestine acceded to a number of international conventions and human rights treaties without making any reservations.[2] It had been difficult for the state to uphold its domestic and international obligations, and this issue was in turn raised in court on multiple occasions because the BL does not clarify the status of international law within the Palestinian domestic legal system. The only reference in the BL is Art. 10(2), which calls on the PA to accede, without delay, to international declarations and covenants that protect human rights.

1. The Constitutional Court

The BL called for the establishment of a Supreme Constitutional Court (SCC), but left the issue to be determined by a law (Art. 103). Law no. 3 (2006) subsequently established an SCC and was later amended by Decree Law no. 19 (2017). Both the BL and Law no. 3 establish the basis for a centralized 'judicial' body that is independent of the judicial branch. The Constitutional Court would mainly be tasked with constitutional review and interpretation.

Constitutional Review

There are various ways in which the Court can be engaged; firstly, by original and direct action by the aggrieved; secondly, indirect review of constitutionality after the request is, against the backdrop of concrete litigation, transferred by a court; *thirdly,* by the litigants themselves if certain conditions are met; and finally, by the Court itself if it is persuaded that an unconstitutional provision is linked to the dispute.

The President—authorized by law to propose the SCC's first panel—nominated the Court's nine judges in April 2016. Before this, Constitutional Court tasks were entrusted to the Supreme Court (Art. 101 of the BL). The appointment of SCC judges is a recurrent issue, and this reflects the fact that the power to appoint judges is absolutely limited to the President. This institutes an arrangement in which the authority of the executive is pre-eminent over the judiciary, with the consequence that it can influence its decisions while manipulating its (de jure) independence.

From November 2005 until the time of this writing, 58 constitutional decisions have been made, of which almost half (27) have been made by the Supreme Court taking on the function of a constitutional court in the aforementioned manner. Here it should also be noted that the Court preemptively dismissed many cases upon the basis of a technicality or formality, and therefore did not proceed to enquire into its substantive content.

2. Violations of the Basic Law

There have been several violations of the BL, which are often attributed to alternative interpretations or the lack of a provision in the first instance, occurring, for example, in relation to disagreement over the circumstances concerning when an election or referendum can be called or circumstances when the President or government can legitimately invoke emergency powers. When the President's emergency powers are discussed, further disagreements arise in relation to the relative privilege that should be accorded to the letter and spirit of the BL. The level of factional consensus required to amend existing constitutional arrangements has also created disputes.[3]

One of the main concerns is that Art. 43 of the BL has been overused as a law-making tool in the West Bank since 2007, a period when effective parliamentary oversight or scrutiny has, as a consequence of the PLC's operations being suspended, been entirely absent. Art. 43 establishes:

> The President of the National Authority shall have the right, in cases of necessity that cannot be delayed, and when the Legislative Council is not in session, to issue decrees that have the power of law. These decrees shall be presented to the Legislative Council in the first session convened after their issuance; otherwise they will cease to have the power of law. If these decrees are presented to the Legislative Council, as mentioned above, but are not approved by the latter, then they shall cease to have the power of law.[4]

The legitimacy of presidential decrees passed by the President after the expiration of his term in 2010 continues to create heated disagreement, as presidential and legislative elections have not been held in the State of Palestine since 2006. Very few of the decree-laws that have passed can be legitimately argued to meet the requirement of necessity that demands they be approved 'without delay'. Elections have not been held since 2007 because of ongoing political (Hamas-Fatah) and geopolitical (West Bank and Gaza Strip) divisions. Government authority, functions, and the legislature have become divided as a consequence. Since the Legislative Council has been unable to convene since 2007, Art. 43 was activated.

Although it is possible to invoke legal reasoning in support of such authorization, it is clear that the state must work to overcome these exceptional circumstances and maintain a separation of power. Evidence pro-

[2] The agreements signed in December 2014 are as follows: The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), The International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); Protocol Additional to the Geneva Conventions of 12 August 1949; Convention on the Law of Non-Navigational Uses of International Watercourses; Protocol on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons; Convention in Cluster Munitions; United Nations Convention on the Law of the Sea; and The Treaty on the Non-Proliferation of Nuclear Weapons.

[3] Khalil, Asem. 'Beyond the written constitution: Constitutional crisis of, and the institutional deadlock in, the Palestinian political system as entrenched in the basic law'. *International Journal of Constitutional Law* 11.1 (2013): 36.

[4] The unofficial translation is available at: http://muqtafi.birzeit.edu/en/Legislation/GetLegFT.aspx?LegPath=2003&MID=14138

duced to date suggests that the state of necessity has been an essential tool in the hands of the executive and, for this reason, there is no reason to believe it will be dissolved in the near future.

III. CONSTITUTIONAL CASES

1. Judgment 5/2017, March 12, 2018, *Constitutional Court's Interpretation of Art. 10 of the BL*

> The minister of justice requested an answer for four major questions that the BL fails to answer:
>
> 1. Who has the power to sign and ratify international agreements? What is the process of joining and how will it come into effect?
> 2. What happens when an international treaty contradicts a domestic law?
> 3. How does the State maintain and promote human rights?
> 4. What are the mechanisms used to integrate the international agreement and the legal status it occupies?

In order to reach a clearer understanding, decision (04/2017) must be briefly introduced. In November 2017, the SCC issued a short and vague decision that established international treaties were pre-eminent over national laws. The issue of the hierarchy of international treaties came before the SCC after a court of first instance referred a case in which UNRWA (United Nations Relief and Works Agency for Palestine) was a party. The agency pleaded immunity before the lower court by citing a headquarters agreement with the PA. The court was forced to ask if its recognition of this immunity breached Art. 30 of the Palestinian BL, which prohibits administrative decisions from being immunized from judicial review.

The decision in this case did not explicitly confirm if international law takes precedence over the Palestinian BL, and instead only established that international law should be accorded primacy over domestic law. This applies even if the proposed item is not published in the official Gazette, and the only exception is if it contradicts Palestinian religious, political, and cultural morals. While none of the treaties ratified by Palestine have yet been published, the state must nonetheless honor related obligations to the international community. In addition to concluding that international treaties supersede domestic laws, the decision also affirmed they are 'infra-constitutional' and, in so doing, added a new constitutional provision. In addition to highlighting the hierarchical status of international treaties within the Palestinian legal system, this decision also provided insight into the incorporation of international treaties into the Palestinian legal system along with Palestine's human rights obligations and responsibilities.

The decision surpassed the limitations of the BL by clarifying how to sign or ratify conventions and treaties. Practice provides further clarification by establishing that commissions that have been delegated the right to negotiate by the executive (in effect, the President) also have the authority to sign accession decisions. In so doing they do not prejudice the rights of the President, Prime Minister, and Minister of Foreign Affairs in this regard. Ratification is normally the responsibility of the head of state who, in verifying the treaty, ensures that it, and its implementation, is consistent with the interests of the state of Palestine.

In establishing the obligations of the state in relation to human rights, the decision established that treaties must be incorporated domestically in a way that takes religious and cultural identity into account. In the event of a conflict, it would not be enforced, even if a reservation were added to the treaty at the time of ratification.

In addressing the integration mechanism, the Court maintained that treaties are enforced by incorporation within domestic laws, which clearly contradicted its previous assertion that international treaties enjoy primacy in relation to domestic laws. Once Art. 27 of the Vienna Convention on the Law of Treaties is considered, this becomes problematic, as it establishes that states, in seeking to justify non-compliance with their international obligations, are prohibited from citing their national laws. Here it should also be noted that the decision further clarified that the declaration of independence (issued by the Palestinian National Council of the PLO in Algiers in 1988) enjoys primacy over the written BL adopted by the Palestinian Legislative Council.

2. Judgment 2/2018, July 12, 2018: *The Constitutional Court's Interpretation of the Term 'Military issue' and the Nature of the Police Force and the Prosecution of Its Members*

It should first be noted that the Court, in exercising its jurisdiction to respond to requests of interpretation, exceeds its scope by allowing itself to constitutionally review legislation before declaring it to be unconstitutional. The interpretation request was submitted to the Constitutional Court by the Minister of Justice. In its 12 September 2018 decision, the Palestinian SCC issued an interpretation decision relating to the provisions set out in Art. 84 and 102 of the BL and Art. 53 of Law No. 23. It thereby indicated its interpretation of the legal character of the terms 'military issue' and 'police', along with the importance that it ascribed to determining the competent court when trying police officers.

In the decision under review, the Court contradicted its previous interpretative decision (most notably 01/2017), which held that the police were a regular force of a special nature who exercised civil jurisdiction. Instead, the Court now argued that the police are a predominantly military apparatus with the capacity to specialize in civil cases. In referring to penal provisions, it further expanded its interpretation of 'military issue' and sought to make the military judiciary the rule rather than the exception.

The Court relied on the 1979 penal code of the PLO, and the Revolutionary Penal Code in particular, to determine the criteria (personal, venue, and objective) that needed to be present for the military court to exercise jurisdiction. These laws are, however, controversial and have been accused of being unconstitutional. Critics note, for example, that they are not published in the Official Gazette, as required by Art. 116 of the BL.

They also observe that these laws do not distinguish between civilians and the military as they were enacted in exceptional circumstances, when the PLO was establishing authority and exercising sovereignty over its territory by activating the jurisdiction of the Revolutionary Judiciary.

In the case at hand, the Court decided that the criteria must be met, without clarifying if one or all needed to be met. The decision was issued by a weak majority (four out of seven judges) and it led to Law No. 23 being revoked on the ground that it was unconstitutional to consider the police as a military rather than a civilian apparatus. It was held that the Court, in issuing this interpretation, had erred by considering the police as a military organ and by giving military courts the competence to prosecute its members. In doing so, it had overlooked the fact that these courts must be subject to their natural judge, who is always the regular, and not the military, judge.

This ruling sparked a subsequent lengthy debate, which was enriched by contributions from various civil society actors and specialists in the fields of public law and human rights. It ultimately forced the president of the Court to issue a statement that clarified the decision and negated the Court's stated intention to place civilians under the jurisdiction of military courts.

3. Judgment 10/2018, December 12, 2018: Interpreted Art. 47, 47)*bis*(and 55 of the BL to clarify if the Legislative Council is inoperative, with the intention of establishing if Legislative Council members should still receive salaries and benefits

The Minister of Justice requested this interpretation from the SCC after a request from the President of the Judicial Council, the President of the Supreme Court. The request highlighted that the Legislative Council had failed because it had not convened from the end of its first session on July 5, 2007 up until the end of its legal and constitutional term on January 25, 2010. The continuation of this situation in the absence of general elections violates the provisions of the BL and the law of general elections (and related laws), and also prejudices public and national interests. It also violates the basic right, held by all Palestinians of voting age, to periodically elect representatives.

In 2005, an amendment (Clause Three) was added to Art. 47 that established '[t]he term of the Legislative Council shall be four years from the date of it being elected and the elections shall be conducted once each four years in a regular manner'. Art. 47 (*bis*) also establishes that '[t]he term of the current Legislative Council shall terminate when the members of the new elected Council take the constitutional oath'.

This decision clarifies that the Legislative Council is the elected legislative authority and establishes that the Legislative Council is not just individuals or individuals who won the special elections; rather, it is one of three authorities entrusted with constitutional tasks and is, by virtue of this fact, one of the most important authorities in the country. The Legislative Council, elected on 25/1/2006, held only one session, on 5/7/2007. The Court, in registering this fact, proceeded to argue that the Council had 'refused' to carry out the role entrusted to it as a legislative authority and had refused to abide by the laws and regulations governing its work, including the second regular session convened by His Excellency the President in accordance with the law and their oath. As a result, it lost its status as a legislative authority and thus the status of Legislative Council. It finally observed that, although sessions have not been held, representatives still receive their salaries and benefits in accordance with Art. 55 ('A Member of the Legislative Council shall receive a monthly salary determined by law'), which places a further burden on the state of Palestine's budget.

In its interpretation, the Court decided on five main points, which are as follows:

- The legitimacy of the existence of the Legislative Council lies in the exercise of legislative powers and control; since this has not been held since 2007, it lost its legislative authority and, as a consequence, its Legislative Council status.

- Art. 47 (*bis*) shall not apply if the regular elections of the Legislative Council are not held every four years. This means that Art. 47 only applies in the presence of two Councils, a Council that has finished its mandate and a newly elected Council.

- Taking the text of Art. 55 into account, the SCC considers that there are no valid reasons for continued benefits to be provided to members, including financial entitlements and bonuses due from the date when the decision was issued.

- The Legislative Council is entirely absent and has not convened a session since 5-7-2007; its last term expired on 25/1/2010 and it remains inoperative; as such, the national interest requires the dissolution of the Legislative Council.

- The Council called on the President of the State to announce legislative elections within six months of the decision being published in the Official Gazette.

While the decision has a solid factual foundation, it cannot be claimed that the BL did not touch on the issue of the dissolution of the Legislative Council. This is established by Art. 113 of the BL, which clarifies that '[t]he Palestinian Legislative Council may not be dissolved or its work hindered during a state of emergency, nor shall the provisions of this title be suspended'. Taking into account the fact that the constitutional legislature prohibited the dissolution of the Legislative Council during a state of emergency, it is questionable if the decision of the SCC that dissolved the Legislative Council is itself constitutional. But Art. 47 (*bis*) provides clear evidence that the term of the Legislative Council may be extended under exceptional circumstances. This issue was raised in 2016 when the Supreme

Court, acting in its constitutional capacity, addressed itself to the termination of Mohammad Dahlan's official and private immunity, which derived from his status as a Legislative Council member.[5] The Court decided on this specific matter and did not extend its decision of the dissolution of the whole Council. The Court ruled that the President has the full authority to cancel the immunity of any Parliament member when the Legislative Council is not convened. It also decided that the President's decree was consistent with his legal authority.

The Court's decision is however contrary to the Amended Basic Law and Electoral Law, which establishes that presidential and legislative elections should be held concurrently. In fact, there is no need to dissolve the Legislative Council because the elections have been due since 2010; hence the real constitutional violation is the fact that the president is not calling for presidential or legislative elections!

The dissolution of the Legislative Council has been implemented as a consequence of political will, but it is not expected that the elections will be implemented – if elections do take place, there are no signs that this will be done in accordance with to the Basic Law and the Electoral Law (i.e. that presidential and legislative elections will be concurrent). The decisions of the Constitutional Court, if anything, envisage the restoration of the PLO's powers in all its councils.

IV. LOOKING AHEAD

The BL must not be burdened with the stigma of failure for these violations, as it was enacted as an interim constitutional alternative that was created within a particular framework and specific political, cultural and national circumstances. The constitutional court, however, is not entrusted with fulfilling the public's wishes, but is instead tasked with ensuring compliance with the constitution.

The Modern Palestinian constitution is expected to be revived and put back on the table, and the same applies to the various issues and gaps that this review has addressed. It is anticipated that the constitution will put in place a pluralistic parliamentary democracy that fully conforms with International Law and Human rights.

V. FURTHER READING

Asem Khalil, 'Impulses from the Arab Spring on the Palestinian State-Building Process' in Rainer Grote and Tilmann Röder (eds): *Constitutionalism, Human Rights and Islam after the Arab Spring* (OUP, 2016)

Asem Khalil, 'Beyond the Written Constitution: Constitutional Crisis of, and the Institutional Deadlock in, the Palestinian Political System as Entrenched in the Basic Law' (2013) 11 *International Journal of Constitutional Law* 34-73

[5] Supreme Court, Rammallah, 06/2012, 26/04/2016.



Peru

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I. INTRODUCTION

The year 2018 was marked by two serious corruption cases in Peru. The first one was the Odebrecht case, even though this was a topical case already in 2017. It forced President Kuzcynski, the winner of the 2016 presidential election, to step down from office.

The second corruption case regarded the judiciary. Journalists unmasked a broad network of corruption on the national level, which involved the top echelon of the judiciary (public prosecutors, judges, businessmen, parliamentary members).

Since March 23, 2018, former first Vice-President Martín Vizcarra has served as President, and has chosen to play an active role. He positioned himself as willing to push the necessary reforms forward against the corruption in the judiciary and political system, although he found himself in a weak position. Congress was (and still is) dominated by the Popular Force (*Fuerza Popular*), the party of Keiko Fujimori, who is the daughter of the condemned former President Alberto Fujimori, with the support of *Partido Aprista Peruano* (APRA). Thus, Vizcarra could not (and cannot) rely on a majority in Congress. This led to a situation where the executive and the legislative were confrontational right from the beginning, and the majority in Congress worked against the executive. Whereas according to opinion polls[2] Vizcarra maintains strong popular support, Congress uses its law-making powers and the means of parliamentary procedure in abusive ways, leading to its decreasing public support (which was reflected in a referendum). Therefore, it does not come as a surprise that 2018 was a rather turbulent year for Peruvian politics. This is also reflected in the developments in constitutional law and in the case law of the Constitutional Court.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Brazilian company Odebrecht admitted corrupting the government of Pedro Kuczynski. This was only the tip of the iceberg. Former Presidents Alejandro Toledo, Alan García and Ollanta Humala, as well as Keiko Fujimori, had also received money from Odebrecht. These events highlight the

[1] The research for this report was partly financed by Central European University Foundation, Budapest (CEUBPF). The theses explained herein represent the ideas of the author and do not necessarily reflect the opinion of CEUBPF.

[2] 'Aprobación del presidente Martín Vizcarra sube a 66 % tras referendum', *Diario Correo* (16 December 2018) <https://diariocorreo.pe/politica/aprobacion-martin-vizcarra-sube-66-referendum-859357/> accessed 24 January 2019.

vulnerability of the Peruvian political and democratic system. The reasons lie with the strong role of the President and the influence of factual economic powers. The neo-liberal economic Constitution of 1993 (PC) reinforces the problem.

Apart from the international Odebrecht case, a national corruption scandal became public. The leakage of wiretaps showed the weakness of the judicial branch and the public prosecuting service. The scandal put in doubt the effectivity of investigations of corruption cases in the past and increased public pressure on the streets.

2018 was furthermore marked by the political conflict between Congress and the executive branch. It all started when the leader of the Popular Force Party, Keiko Fujimori, did not accept her 2016 electoral defeat against Pedro Pablo Kuczynski (50.12% to 49.88%). With 36% of the votes for Congress, the Public Forces Party obtained an absolute parliamentary majority of 56%. The confrontation between the executive and the legislative led to the excessive use of legislative instruments. Congress aimed not only to control but also hassle the executive. This culminated in a call for the President to resign before his first year was over.

The Peruvian President enjoys immunity from criminal jurisdiction. Impeachment is only possible when the President commits infractions set forth in Article 117 PC, and even then only by extraordinary means. These are determined by Article 113 PC (permanent moral incapacity).

The Parliament installed an investigative commission against President Kuczinsky for the purpose of investigating the Odebrecht case. The President did not disclose his dealings with Odebrecht before the commission. As a consequence, the Parliament discussed a request for presidential vacancy (based on Article 113 PC).

The vote carried out by the Plenum of Congress on December 21, 2017 was not successful. This was thanks to the government's political negotiations with Congressman Kenyi Fujimori, who is the son of Alberto Fujimori (a former authoritarian president) and the brother of Keiko Fujimori (the head of the Popular Force Party). The negotiations resulted in a presidential pardon for Alberto Fujimori on December 24, 2017, and show that the Fujimori family is still very much involved in Peruvian politics. Soon after, the Odebrecht case emerged in the news again. The Popular Force leadership put pressure on Kuczynski. The President resigned on March 21, 2018.

First Vice-President Martín Vizcarra assumed the presidency on March 23, 2018. Another serious corruption crisis, which involved the heads of the judicial branch and members of the Popular Forces, led to protests in the streets. President Vizcarra then proposed a referendum in order to reform the Constitution.

The Constitution offers two possibilities for complete or partial reform (Articles 32 PC and 206 PC). The first one consists of the approval of the reform by the Parliament and the population. This requires an absolute majority of votes of the members of Parliament. The vote has to be confirmed by a referendum. The second possibility requires the approval of the constitutional reform without a referendum, but two positive votes of Parliament instead. The votes have to take place in two successive ordinary legislatures. Each vote requires a majority of more than two-thirds of Congress. Citizens can also ask for a referendum when they have initiated a bill and Congress modifies or rejects it. The basis for such a request is the Law on Participation and Citizens Control.[3] If citizens call for constitutional reform, the support of 0.3 percent of the electoral population suffices. In that case, citizens do not call for a referendum. They initiate the process of constitutional reform in Congress. As laid down above, this usually leads to a referendum.

Since President Vizcarra could not rely on a majority in Congress, he had to convince the Congress, with the support of public opinion, to approve the constitutional amendments. Without the consent of public opinion, the referendum would have been doomed to failure. The only option left would have been the collection of signatures of citizens. To avoid this, President Vizcarra chose another option. He asked Congress for its support through a motion of confidence (*cuestión de confianza*). According to Article 133 PC, the President of the Council of Ministers (Executive Power) can present a vote of no confidence to Congress. Congress can then accept or deny the vote of no confidence. The President can dissolve Congress and convoke new elections when the Congress expresses its mistrust twice. Congress had already denied confidence in the cabinet of former President Kuzcinsky once. Thus, a second approval of the vote of no confidence would have led to its dissolution. The dissolution of Congress would have led to new elections. Opinion polls predicted disastrous results for Popular Force if there were new elections. It does not, therefore, come as a surprise, given the circumstances, that the Parliament approved all constitutional amendments, even though by amending the original amendments. This allowed for the referendum to take place on December 9.

Yet, the approval had its price when Congress modified the proposed reforms. Among other amendments of the constitutional amendment proposal, the Parliament was turned again into a bicameral one, and this allowed congressmen in office to stand for elections to the new Senate. Moreover, the Congress eliminated the planned gender distribution of the members of the chambers. And, it increased the number of representatives in both chambers. Modifications were so remarkable, that President Vizcarra felt compelled to ask the nation to vote against his own proposal on the return to a bicameral Parliament. He continued to support the other constitutional amendments in spite of the modifications.

On December 9, 2018, the referendum took place. Four questions were raised: 1. Do you approve the constitutional reform on the conformation and functions of the National Board of Justice? (formerly the National Council of

[3] Ley de los Derechos de Participación y Control Ciudadanos, Ley Nº 26300, Articles 38, 41.

the Magistracy); 2. Do you approve the constitutional reform regulating the financing of political organizations?; 3. Do you approve the constitutional reform that prohibits the immediate re-election of parliamentarians of the Republic?; 4. Do you approve the constitutional reform establishing bicameralism in the Congress of the Republic? By a massive majority of more than three quarters (85%), Peruvians voted in favor of the first three reforms while rejecting the proposal on the establishment of a bicameral Parliament.

III. CONSTITUTIONAL CASES

1. Ollanta Moisés Humala Tasso y Nadine Heredia Alarcón: Arrest of former President Humala and First Lady Heredia

In 2017, former President Ollanta Humala and his wife Nadine Heredia were arrested, accused of money laundering related to the Odebrecht scandal. By a majority, the Constitutional Court declared the habeas corpus lawsuit of the Humalas founded and ordered their release (Exp. No. 04780-2017-PHC/TC and Exp. No. 00502-2018-PHC/TC, accumulated).

The Court held that when pretrial detention is discussed, no evidence can be analyzed with the aim of punishment. In fact, this would be incompatible with the constitutional principle of the presumption of innocence. Yet the Court stated that it was a very different matter to consider that the discharge evidence was not worthy of assessment at this stage. When assessing the justification of pretrial detention, all the elements, those of charge and those of discharge, had to be valued. The aim of the evaluation was not to decide about guilt or innocence, but to determine if there was a plausible link between the investigated persons and the criminal act.

The Constitutional Court found a violation of various fundamental rights. This encompassed the fundamental right to proof (as an implicit manifestation of due process (Article 139, paragraph 3 PC), the right to defense, and the fundamental right to personal liberty (Article 2, paragraph 24 PC).

The Court also pointed out that the refusal to assess the evidence provided by the defense led to a lack of reasoning. Whereas the decision whether a conviction was justified is a matter of ordinary jurisdiction, the control whether fundamental rights were violated falls into constitutional jurisdiction.

The Constitutional Court laid down rules for criminal judges when evaluating new elements in the context of a request of pretrial detention. According to the Constitutional Court, the judges had to assess all presented elements. These included not only the arguments presented by the Public Prosecutor's Office but also by the defense of the suspected person. At this stage, the competent criminal judge had to assess only whether there were elements that linked the accused with the crime. According to the Constitutional Court, its rules for criminal judges when evaluating new elements regarding a pretrial detention helped to safeguard the presumption of innocence.

The Court noted that the presumption of innocence also required another general rule. This rule was that any person subject to criminal proceedings had to be tried in freedom. Pretrial detention as the deprivation of freedom could be the only exception. This had been expressed already in Article 9, paragraph 3 of the International Covenant on Civil and Political Rights: "The pretrial detention of persons who are to be tried should not be the general rule....The Inter-American Court of Human Rights has also stated that the principle of the presumption of innocence gives rise to the State obligation not to restrict the liberty of the detainee beyond what is strictly necessary and proportionate to ensure that it will not impede the efficient conduct of investigations and that it will not evade justice." The Constitutional Court did not only quote the Inter-American Court of Human Rights, it also referred to the European Court of Human Rights in that respect.

2. Modification of Article 37 on the rules of procedure of Congress on the regulation of parliamentary groups

On August 29, 2017, the Constitutional Court issued a ruling (Exp. 0006-2017-PI/TC) on the so-called Anti-Transfer Law, which the Court found to be partly unconstitutional. This decision dates back to 2017 and was then followed by another decision in 2018 (Exp. 0001-2018-PI/TC) on a tightly connected case; therefore, these cases are presented together.

The 2017 decision entails an interesting analysis of the nature of representative democracy. It concerns the scope of the representative mandate of parliamentarians. The case dealt with some modifications of the rules of procedure of Congress (Legislative resolution N° 007-2016-2017-CR). The Fujimori parliamentary majority that approved them would have directly drawn benefits from their application. The main modifications consisted of the prohibition of members of Congress who resigned from their parliamentary group to form a new group. These modifications restricted the fundamental rights of politically dissident congressmen.
In the opinion of the Court, this measure was arbitrary and violated several fundamental rights, entailing the freedom of conscience, the freedom of association, and the right to participation. Thus, the Court found that the changes to the rules of procedure which prohibited the formation of new parliamentary groups through dissident congressmen were unconstitutional.

Given the public debate, the Fujimori bench quickly presented and processed a new bill. This new bill modified the regulation, even before the Court issued its ruling (P.L. 1874/2017-CR). An *interregnum* was the consequence. The ruling was published in the official newspaper, *El Peruano* on September 13. Four days later, Congress did the same with Legislative Resolution No. 003-2017-2018-CR. In the meanwhile, dissidents of the leftist parliamentary group Frente Amplio created a new group, named Nuevo Perú.

An action of unconstitutionality was filed against the new legislative resolution. The problem was that the previous ruling of the Constitutional Court (Exp. No. 0001-2018-PI/TC) was not fully respected. This time the Court did not declare the resolution unconstitutional. It issued an interpretive ruling

regarding Article 1 of Legislative Resolution 003-2017-2018-CR, which changed Article 37 of the Rules of Procedure of Congress. Article 37 must be interpreted as follows.

The resignation of members of Congress from political groups in the event of dissent for reasons of conscience is not prohibited. The Court stated (para 50), that the prohibition on forming a new parliamentary group or joining an existing one is not applicable in all cases. If a congressman resigns because of infringement of due process of rights contained in the rules of procedure of the respective group, the rule cannot apply. It weighs even stronger when it is the parliamentary group that is undergoing an ideological shift. When the congressman resigns because of that shift, the rule cannot apply either. Many internal rules of parliamentary groups do not foresee norms for those cases. This does not mean that congressmen can be deprived of their fundamental rights. Consequently, the Court upheld Articles 1 and 2 of legislative resolution 003-2017-2018-CR if interpreted consistently with the Constitutional Court decision.

3. Vote of no confidence and total cabinet crisis: Changes to the rules of procedure of Congress

This decision of the Constitutional Court (Exp. 0006-2018-P1/TC) originated from another change of the rules of procedure of Congress. The Popular Forces Party and *Partido Aprista Peruano* (APRA) wanted to change the rules on votes of no confidence. If the Constitutional Court had upheld the new regulations, the Parliament would have obtained a stronger position *vis-à-vis* the executive in case a no confidence vote was rejected. This would have mainly favored the Popular Forces Party and the APRA.

In March 2018, more than 25% of Congress filed an action of unconstitutionality against Legislative Resolution 007-2017-2018-CR (i.e., the norm approved by Parliament modifying Article 86, literal e) of its procedural rules) because it violated several articles of the Constitution (Articles 43, 103, 105, 132, 133, and 134 PC). The claimants argued that the modification affected the principle of division of power, the principle of balance of powers, and the political regime established in the Constitution because it incorporated three rules altering them. Those new rules foresaw that: a) If the Parliament rejected a confidence motion (requested by the President of the Council of Ministers), the new ministerial cabinet should be composed of completely new ministers; b) If this rule was not followed by the executive (i.e., the new cabinet was composed of old and new ministers), the rejection of the motion should not be counted when the above-mentioned condition of two denials of passed motions of no confidence were to be verified for the dissolution of the Parliament; and c) The President of the Council of Ministers should not be able to include the approval of laws or the approval of proceedings of parliamentary control in a vote of no confidence.

According to the defense of the Parliament, Legislative Resolution 007-2017-2018-CR established a valid and reasonable limitation to the vote of no confidence. The defense argued that a restriction applying to the Council of Ministers, or a ministry, regarding its possibility to request a vote of no confidence, connected with the approval of a legislative act, was reasonable since the approval of laws was an exclusive competence of the Parliament. At the same time, the defense of the Parliament added that it was unreasonable that a minister subject to an interpellation could introduce the interpellation as a matter of a vote of no confidence.

The Constitutional Court pointed out that the Constitution confers the competence of the *normación autónoma* (autonomous regulation) to Congress. This allowed Congress to establish independently its own rules of procedure; in that sense, the Congress is able to regulate its activities and its relationship with other institutions. However, the Court concluded that the modification of Article 86, literal e) of the Rules of Procedure (modifying the relationship between the executive and the Parliament) entered into matters that were not parliamentary in nature and, therefore, exceeded the scope of the *normación autónoma*, affecting the faculty of the Cabinet of Ministers to put forward a vote of no confidence.

Additionally, the Court noted that the principle of division of power limits any constitutional reform, as it forms part of the "hard core" of the Constitution. The Court also argued that the confidence motion was designed as a counterbalance to the mechanism of the censure of ministers (attribution given to the Parliament). Consequently, the Court found, that Article 86 literal e) and three specific rules included in the modification were unconstitutional.

4. "Ley Mulder": law regulating state advertising expenditure

An example of a law with a positive background at first sight, but then leaving a stale aftertaste, is the so-called "Law Mulder".[4] (The name derives from the APRA congressman who had proposed the bill, Mauricio Mulder.) This law aimed at reducing public spending on state publicity. This should have been achieved through the prohibition of state publicity in private means of communication. All state entities, including state businesses, were bound by the prohibition. State publicity, including information campaigns, was thus limited to state media.

Yet, state media cannot cover the whole territory of Peru. The consequence is that sending information to the population is only possible to a limited extent. This means that people in remote areas cannot receive information about public interest matters.

Members of Congress and the executive challenged the law before the Constitutional Court, which decided the case in October (Exp. 0012-2018-PI/TC and 0013-2018-PI/TC).

The main concerns pointed at the reduction of channels of information for the population, because the term "publicity" in the context of Law Mulder also encompasses "institutional publicity". In fact, institutional

[4] Ley que regula el gasto de publicidad del estado peruano, Ley Nº 30793.

publicity is advertising by the state to inform the population. It serves to disseminate information on matters of public interest.

Moreover, the claimants stated that the Internet as a means of information could not yet serve as such. Access to the Internet, especially in remote areas, is not yet guaranteed. The Court found a violation of the principle of proportionality with regard to the liberty of information. It held that there would have been other means to regulate publicity, such as more effective tools of public spending in this area. Instead of a complete prohibition, more proportionate solutions were available. Moreover, the Court found a violation of the freedom of contract and of the principle of criminal legality.

Thus, the Court struck down the law because of its content. Yet, it also examined formal arguments raised by the claimants. Congress had passed the bill using an accelerated procedure; therefore, the claimants argued that the bill had lacked proper discussion in Congress.

Relying on an earlier decision, the Court emphasized the importance of public debate for democracy. According to the Court, this implies that the "decision making must be based on a constant and rich exchange of arguments, which requires that all those involved have the necessary data to enable them to give an informed opinion that is geared to the needs of the community" (p. 25, para 19). The Court tested the law against this background but found no violation. Yet, the fact that it discussed the formal arguments in detail is a signal. It can be seen as a warning directed to Congress of the importance of taking public debates there seriously.

These decisions show one of the problems of the actual political situation. The power relations in Congress (majority with the Popular Force Party, supported by the APRA) allow the majority not only to dominate the law-making process but to use law-making power in an abusive way. Moreover, the use of accelerated law-making procedures results in less public discussion of proposed laws. An example for the problems mentioned is the bill on the "law establishing a humanitarian execution of prison sentences" (*Ley que establece la ejecución humanitaria de la pena, Ley N° 3533*). It is aimed at establishing the possibility of house arrest instead of a prison sentence for vulnerable people. It was passed in accelerated proceedings, just in time to be applied to Alberto Fujimori, whose pardon had been lifted a few days earlier. President Vizcarra, however, chose not to sign the bill and to send it back to Congress, where the parliamentary Commission on Justice and Human Rights had to issue a report taking into consideration the President's concerns.

IV. LOOKING AHEAD

One does not have to be a fortune teller to predict that the severe corruption cases will continue to hold the Peruvian people in suspense in 2019. People involved in corruption cases have usually been influential. This includes the leader of the Popular Force Party, Keiko Fujimori, who is currently in custody, and former Presidents Toledo, García, Humala, and Kuczynski, who are currently subject to judicial measures of restriction of liberties.

Apart from that, challenges arise from the further implementation of constitutional changes following the referendum. New legislation has to follow the amended Constitution. Like in the past, one question will probably have to be discussed once again: should Peru go back to a bicameral system or not?

V. FURTHER READING

Maria Bertel, 'Does the President have the Power to call a Constitutional Referendum in Peru?' (*ICONnect Blog of the International Journal of Constitutional Law*, 6 September 2018) <http://www.iconnectblog.com/2018/09/does-the-president-have-the-power-to-call-a-constitutional-referendum-in-peru/> accessed 24 January 2019

César Landa, 'Renuncia Presidencial y desborde de la corrupción (2017-2018)', in *Los derechos fundamentales en la jurisprudencia del Tribunal Constitucional 2008-2018.* Lima: Palestra editores, 2da. Edic., 2019 (forthcoming)



Philippines

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I. INTRODUCTION

Rodrigo Duterte was elected in 2016, riding on a "law and order" campaign that exploited popular anxieties about social disorder. Duterte promised to restore law and order in three to six months largely through the extrajudicial killing of criminals. Besides promising a quick fix to the growing crime problem, he also pledged to rebuild crumbling infrastructure and to end corruption. This helps explain why his support was middle-class driven, particularly strong among taxi drivers, small shop owners, and overseas workers who were worried their fragile economic gains after years of growth would be threatened unless order was restored by any means necessary.

Duterte is a new kind of politician who promises to use violence and strong-arm tactics in the quest to solve social and political problems; a platform known as "voting against disorder." Voting against disorder entails the emergence, within a democratic system, of support for a political platform that either implicitly or explicitly promises to undermine the rule of law—and with it, democracy itself.

Duterte and his allies have been brought before the Supreme Court, but they have never lost a single case. Rather than operate as the guardian of the Constitution, the Supreme Court rules in favor of the President, imperiling the separation of powers and consolidating power in the Executive Branch.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Philippine politics is presently dominated by two themes: constitutional change and the complicity of the judicial branch in democratic erosion.

A majority of Filipinos reject the shift to a federal system of government now. Only two out of ten agree that the 1987 Constitution should be revised at this time. Nevertheless, shortly after assuming power, Duterte signed an executive order (Exec. Ord. No. 10, Creating a Consultative Committee to Review the 1987 Constitution [Dec. 7, 2016]) creating a 25-member panel to propose specific amendments to the Constitution. On July 3, 2018, the Consultative Committee announced that it had accomplished its task and completed a draft constitution for a federal form of government. The draft was submitted to Congress supposedly to guide its work on constitutional changes.

The House of Representatives approved on the third and final reading its version of a federal constitution. This draft removes the term limits for House members and other local officials in the present Constitution. Unlike the draft commissioned by President Duterte, the House version does not have any provisions on the regulation on political dynasties, barely cloaking the attempt to keep themselves in power.

In the judiciary, the Duterte administration's campaign to remove constitutional checks continues to gain traction. Two Supreme Court decisions stand out: The first, *Lagman v. Pimentel III*, G.R. No. 235935, February 6, 2018, upheld the power of the President to extend the implementation of martial law for an entire year. This case continues the Court's consistent crusade to undermine checks on the President's power to declare martial law. The second case is *Republic of the Philippines v. Sereno*, G.R. No. 237428,

May 11, 2018. In this case, a majority of the Court granted a petition for *quo warranto* and removed the Chief Justice ostensibly on the ground that she had failed to submit complete statements of assets and liabilities.

The "Philippines" case is astonishing because the damage to the judiciary is self-inflicted. Without any overt threat, the Supreme Court has been ruling consistently for the President.

III. CONSTITUTIONAL CASES

1. Lagman v. Senate President, G.R. No. 235935, February 6, 2018

This case questioned the constitutionality of the extension of the proclamation of martial law and suspension of the privilege of habeas corpus in the entire Mindanao for an entire year, from January 1, 2018, to December 31, 2018. The Supreme Court once more ruled in favor of the government and held that the only limitations to the exercise of these powers are that the extension should be at the President's initiative; that there is an invasion or rebellion; that it is required by public safety; and that it is subject to the Court's review of the factual bases.

The Supreme Court has dismantled the constitutional checks on the President's power to declare martial law, many of which were placed in the 1987 Constitution as a response to the Philippine experience under Ferdinand Marcos. Under the new jurisprudence and quite contrary to the intent of the framers, the Supreme Court can review the factual basis of the declaration of martial law based only on the President's report, which does not need to be either complete or accurate. Congress does not have to convene to check the President's decision to impose martial law unless it will revoke the declaration. The President can extend the declaration of martial law for any length of time. The Court has facilitated this, oblivious to the country's horrific experiences during the time of Ferdinand Marcos. Its concluding words are telling, and betray a vision of a judicial role that supports the imposition of martial law:

> The imperative necessity of Martial Law as a tool of the government for self-preservation is enshrined in the 1935, 1973 and 1987 Constitutions. It earned a bad reputation during the Marcos era and apprehensions still linger in the minds of doubtful and suspicious individuals. Mindful of its importance and necessity, the Constitution has provided for safeguards against its abuses.
>
> Martial law is a constitutional weapon against enemies of the State. Thus, Martial law is not designed to oppress or abuse law abiding citizens of this country.
>
> Unfortunately, the enemies of the State have employed devious, cunning and calculating means to destabilize the government. They are engaged in an unconventional, clandestine and protracted war to topple the government. The enemies of the State are not always quantifiable, not always identifiable and not visible at all times. They have mingled with ordinary citizens in the community and have unwittingly utilized them in the recruitment, surveillance and attack against government forces. Inevitably, government forces have arrested, injured and even killed these ordinary citizens complicit with the enemies.
>
> Admittedly, innocent civilians have also been victimized in the cross fire as unintended casualties of this continuing war.
>
> These incidents, however, should not weaken our resolve to defeat the enemies of the State. In these exigencies, we cannot afford to emasculate, dilute or diminish the powers of government if in the end it would lead to the destruction of the State and place the safety of our citizens in peril and their interest in harm's way.

It is no wonder then that there are barely any checks on the President's emergency powers.[1] The Court does not see itself as an institution that checks constitutional powers but as a partner in the campaign against enemies of the State. The Supreme Court, in its own words "cannot afford to emasculate, dilute or diminish the powers of government if in the end it would lead to the destruction of the State and place the safety of our citizens in peril and their interest in harm's way." It misconstrues the purpose behind judicial review of the exercise of emergency powers.

On February 19, 2019, the Court, in the case of *Lagman v Medialdea*, G.R. No. 243522, upheld the third extension of martial law in Mindanao for another year.[2]

2. Republic of the Philippines v. Sereno, G.R. No. 237428, May 11, 2018

On May 11, 2018, the Supreme Court of the Republic of the Philippines promulgated a historic ruling. In an 8-7 decision, the majority removed Chief Justice Lourdes Sereno from office, abandoning in the process case law that had limited removal of justices of the Supreme Court to impeachment.

Article XI, section 2 of the Constitution states:

> SECTION 2. The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office, on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.

The Supreme Court has always interpreted the Constitution to mean that the public officials listed (which include the Chief Justice) can be removed only by impeachment.

[1] See Dante Gatmaytan, 'Duterte, judicial deference, and democratic decay in the Philippines' (2018) 28 Zeitschrift für Politikwissenschaft 553.

[2] Lian Buan, 'Supreme Court upholds 3rd extension of Mindanao martial law' (*Rappler*, 19 February 2019) <https://www.rappler.com/nation/223839-supreme-court-decision-3rd-extension-mindanao-martial-law> accessed 22 February 2019.

An impeachment complaint against the Chief Justice was filed in the House of Representatives but it was not gaining any ground. The case was so weak that incumbent and retired Supreme Court justices queued in the House of Representatives' committee hearings to shore up the case against the Chief Justice. The justices raised personal and some administrative issues but nothing remotely constituting an impeachable offense.

The Duterte administration then decided to try a different track: file a petition for *quo warranto* to skirt impeachment and trial at the Senate.

This strategy should have been disallowed as well. The Court has decades-old case law that barred the Solicitor-General from filing a *quo warranto* case against public officers a year beyond the time they took office. The Supreme Court has always held that in actions of *quo warranto* involving the right to an office, the action must be instituted within the period of one year from the time the cause of action arose. Sereno had been appointed six years before Duterte launched the campaign to remove her from office.

The justices who appeared before the House of Representatives refused to recuse themselves, contributing five of the eight votes towards removing the Chief Justice.

The Supreme Court's ruling was that an impeachment is not necessary because the Chief Justice's appointment was defective. It was defective because she did not posses "integrity"—a qualification for appointment to the Supreme Court. She did not possess integrity because she did not file a complete set of Statement of Assets and Liabilities.
The Court held as follows:

- The Court distinguished between impeachment and an action for *quo warranto.* Impeachment is a proceeding exercised by the legislature, as representatives of the sovereign, to vindicate the breach of the trust reposed by the people in the hands of the public officer by determining the public officer's fitness to stay in the office. An action for *quo warranto* involves a judicial determination of the eligibility or validity of the election or appointment of a public official based on predetermined rules.

- The Court held that *quo warranto* and impeachment may proceed independently of each other as these remedies are distinct as to (1) jurisdiction (2) grounds (3) applicable rules pertaining to initiation, filing and dismissal, and (4) limitations.

- A *quo warranto* proceeding is the proper legal remedy to determine the right or title to the contested public office or to oust the holder from its enjoyment. In case of usurpation of a public office, when the respondent is found guilty of usurping, intruding into or unlawfully holding or exercising a public office, position or franchise, the judgment shall include the following:

  the respondent shall be ousted and excluded from the office;

  the petitioner or relator, as the case may be, shall recover his costs; and

  such further judgment determining the respective rights in and to the public office, position or franchise of all the parties to the action as justice requires.

- The remedies available in a *quo warranto* judgment do not include correction or reversal of acts taken under the ostensible authority of an office or franchise. Judgment is limited to ouster or forfeiture and may not be imposed retroactively upon prior exercise of official or corporate duties.

- *Quo warranto* and impeachment are not mutually exclusive remedies and may even proceed simultaneously. The existence of other remedies against the usurper does not prevent the State from commencing a *quo warranto* proceeding.

- The causes of action in the two proceedings are different. In *quo warranto,* the cause of action lies on the usurping, intruding or unlawfully holding or exercising of a public office, while in impeachment, it is the commission of an impeachable offense.

- The controversy in *quo warranto* proceedings is the determination of whether respondent legally holding the Chief Justice position is to be considered an impeachable officer in the first place. On the other hand, impeachment is for respondent's prosecution for certain impeachable offenses. Respondent is not being prosecuted herein for such impeachable offenses enumerated in the Articles of Impeachment.

- Impeachment is not an exclusive remedy by which an invalidly appointed or invalidly elected impeachable official may be removed from office. Section 2, Article XI of the Constitution does not foreclose a *quo warranto* action against impeachable officers. The provision uses the permissive term "may," which, in statutory construction, denotes discretion and cannot be construed as having a mandatory effect. An option to remove by impeachment admits of an alternative mode of effecting the removal.

- The courts should be able to inquire into the validity of appointments even of impeachable officers. To hold otherwise is to allow an absurd situation where the appointment of an impeachable officer cannot be questioned even when, for instance, he or she has been determined to be of foreign nationality or, in offices where Bar membership is a qualification, when he or she fraudulently represented to be a member of the Bar. To construe Section 2, Article XI of the Constitution as proscribing a *quo warranto* petition is to deprive the State of a remedy to correct a "public wrong" arising from defective or void appointments.

- An action *quo warranto* is not barred by prescription. "A *quo warranto* action is a governmental function and not

a propriety function, and therefore the doctrine of laches does not apply. When the government is the real party in interest, and is proceeding mainly to assert its rights, there can be no defense on the ground of laches or prescription."

- The Court held that a member of the Judiciary must be a person of proven competence, integrity, probity and independence. Having filed an incomplete set of Statements of Assets and Liabilities (which is required by the Constitution), she could not rightfully claim to be a person of integrity.

Chief Justice Sereno filed a motion for justices who appeared at the House of Representatives impeachment hearings to inhibit themselves from the case, claiming that they were biased. The majority opinion denied the motion, holding that:

> We deem it baseless, not to mention problematic, the respondent's prayer that the matter of inhibition of the six Associate Justices be decided by the remaining members of the Court *En Banc.* The respondent herself was cognizant that the prevailing rule allows challenged Justices to participate in the deliberations on the matter of their disqualification. Moreover, exclusion from the deliberations due to *delicadeza,* or sense of decency, partakes of a ground apt for a voluntary inhibition. It bears to be reminded that voluntary inhibition leaves to the sound discretion of the judges concerned whether to sit in a case for other just and valid reasons, with only their conscience as guide. Indeed, the best person to determine the propriety of sitting in a case rests with the magistrate sought to be disqualified. Moreover, to compel the remaining members to decide on the challenged member's fitness to resolve the case is to give them authority to review the propriety of acts of their colleagues, a scenario which can undermine the independence of each of the members of the High Court.

The Supreme Court, instead of protecting its independence, crafted another avenue for the removal of a member of the Court. Despite its previous rulings on the use of impeachment as an exclusive remedy to remove a member of the Court; despite its previous rulings on the temporal limitations on the use of an action for *quo warranto*; despite its rulings on protecting impeachable officials from collateral attacks (disbarment, for example); and despite the fact that the Chief Justice's qualifications had been assessed and not found defective by the Judicial and Bar Council (the body that vets appointees to the judiciary), the Supreme Court still decided to hand over its Chief to the Chief Executive.

The Court denied a motion for reconsideration on June 19, 2018.

The implications of the Court's ruling are dire: Such logic could be applied to any government appointee, regardless of how long they have served. The ruling could even be applied to a President.

IV. LOOKING AHEAD

The Supreme Court already held oral arguments in *Pangilinan v. Cayetano*, G.R. No. 238875, where Senators are questioning the President's decision to withdraw from the International Criminal Court.

This case is extremely significant. If the Duterte administration prevails, then the decision would remove probably the only significant check on his "war on drugs," which some have argued is genocide.[3]

President Duterte continues to silence his critics. On August 31, 2018, he issued Proclamation 572 and voided the amnesty granted to Senator Antonio Trillanes IV, his most outspoken critic in the Senate. Trillanes ostensibly failed to comply with the requirements for a valid amnesty after he participated in a mutiny to protest corruption in the military in 2003.

In issuing Proclamation No. 572, Duterte assumed judicial functions by declaring the amnesty void and then ordering Trillanes's arrest. This case is already working its way up to the Supreme Court.

On February 13, 2019, the Philippine National Police arrested the CEO of Rappler, a news organization critical of the Duterte administration, for cyberlibel, a crime she allegedly committed in May 2012, even though the crime was not defined until September that year. The CEO, Maria Ressa, has a pending case for tax evasion, and Rappler is under investigation for allegedly being foreign controlled.[4]

V. FURTHER READING

Dante Gatmaytan, 'Duterte, judicial deference, and democratic decay in the Philippines' (2018) 28 Zeitschrift für Politikwissenschaft 553

Dante Gatmaytan, 'Abusive judicial review in the Philippines' (*New Mandala*, 24 August 2018) <https://www.newmandala.org/abusive-judicial-review-philippines/> accessed 15 February 2019

Thomas Pepinsky, 'Southeast Asia: Voting Against Disorder' (2017) 28 *Journal of Democracy* 120.

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[3] Dahlia Simangan, 'Is the Philippine "War on Drugs" an Act of Genocide?' (2018) 20 *Journal of Genocide Research* 68.

[4] Aie Balagtas See and Matthew Reysio-Cruz, 'Rappler CEO arrested; no bail recommended' (*Philippine Daily Inquirer*, 14 February 2019) <https://newsinfo.inquirer.net/1085561/rappler-ceo-arrested-no-bail-recommended> accessed 14 February 2019.



Poland

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I. INTRODUCTION

In the case of the Polish Constitutional Court ("the Court"), analysis of constitutional developments in 2018 must start with a recap of the period 2015-2017 to set the context.[1] One cannot simply go about analysing the case law of the Court in 2018 as if nothing had previously happened. Just as 2017 was, so 2018 continued to deliver on the promise of the capture of state and institutions that has been in full swing in Poland since 2015.[2] This legacy of the capture lives on, redefines the Court and its role, exerts perturbing effects on the judicial review and dramatically decreases the efficiency of the Court. Writing for the 2017 edition of the present book, it was remarked that the Polish Constitutional Court, "once a proud institution, and an effective check on the will of the majority, entered 2017 as a shell of its former self with constitutional scars. The latter affect not only the legitimacy of the institution but also the very constitutionality of the 'decisions' rendered by the new court in 2017 […]". 2017 analysis identified scars that had transformed the constitutional identity of the Court: i) unconstitutional composition, both at the level of the judges and the President and Vice President; ii) the "irregular judges" have not only been sitting on the cases heard by the Court in 2018 (see *infra*) but they have also validated *ex post facto* their selection to the Court; and iii) the statutory scheme of intricate legislative provisions adopted by the majority brought the Court to heel and paralysed its day-to-day functioning.[3]

In 2018, this sad state of affairs not only continued but also further aggravated the health of liberal democracy in Poland. 2018 added new plots, themes and manifestations. Last but not least, it invited us to step back for a moment and ask a more general question: how does the capture of the Polish Constitutional Court affect the tenets of liberal constitutionalism beyond Poland?

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The combined effect of the changes introduced in 2015-2016, the management of the Court's workload by the (irregular) President of the Court, Judge Julia Przyłębska and the continued adjudication by "irregular judges" marginalized the significance of the jurisprudence of the Court in the Polish legal order. Its overall institutional efficiency took a hit. The Court lacks in staff, the proceedings

[1] T. T. Koncewicz, 'Understanding the Politics of Resentment. Of the Principles, Institutions, Counter-Strategies and ... the Habits of Heart' (2019) 26(2) *Indiana Journal of Global Legal Studies* 501.

[2] W. Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', Sydney Law School Research Paper 18/01 at http://ssrn.com/abstract=3103491.

[3] T. T. Koncewicz, *Farewell to the Polish Constitutional Court*, at http://verfassungsblog.de/fare-well-to-the-polish-constitutional-court/. At the time of this writing, the ruling political majority in Poland has total control of the Court, as 9 out of 15 judges have been elected by the new Sejm after the parliamentary elections in November 2015. Three judges have been elected unconstitutionally since there was no vacancy on the Court at the moment of their appointment.

last longer and there is a problem with the execution of the judgments.[4] The number of cases filed with the Court, as well as those it decided, decreased significantly. Before the constitutional crisis, the Court accepted about 500-600 cases annually. In 2016, this number decreased to 360 cases, and in 2017 to 282 cases. The Court that was once known for its efficiency (in 2014 alone the Court rendered 119 judgments; and 173 decisions in the year 2015) has become an institution in slow motion: in 2016 and 2017, the Court issued 99 and 89 judgments, respectively.[5] In 2018, the number dropped to an all-time low of 65 decisions (36 judgments and 29 orders).[6] This is a picture of an institution in decline.

The practice of configuring adjudicating panels raises serious concerns. In general, in 2017, in 18 out of 36 cases, the Court consisted of unconstitutionally elected judges. In 2018, this situation occurred in 28 out of 65 cases.[7] In addition, the composition of the judicial panels has been anything but predictable. In January and February 2017, the President of the Court changed the compositions of the panels in an unprecedented 49 cases (53 orders). To make things even worse, the President acted *contra legem*: in all 49 cases, there was no statutory legal basis for making the changes to the adjudicating panel. In 21 cases, decisions were made without providing any grounds.[8] In one case, it was indicated by one of the irregular judges that it is possible to change the composition of the panels by, for example, "changing the rapporteur for the case as a result of the lack of acceptance of the composition of the presented draft judgment".[9] As a result of all this, the Court steered from within to minimise the uncertainty of a result and deliver on the expectations of the powers that be. The judges rushed to the bench by the ruling party were treated with preference. In 2018, the judges (both regular and irregular) elected by the current Parliament acted as rapporteurs and presided over 41 cases. Add to all this the personal attacks by irregular judges on the independent institutions still in existence in Poland, like the Ombudsman.

III. CONSTITUTIONAL CASES

While in 2018 the Court decided few non-controversial cases,[10] for the most part, it was a forum for political scuffles and "rubber-stamping" the illegal actions of the ruling party.

Case K 1/18[11] shows the operation of the legislative process in Poland under the right-wing government. The allegations concerned the course of legislative procedure followed by the Parliament. The deadline for consultations with representative organizations of employers, employees and the Social Dialogue Council has been shortened, but the Sejm (lower house of Parliament) adopted the act before the end of the designated period. The Court (irregular judges sat on this case) supported the position presented by the Prosecutor General (who is also the Minister of Justice) and the Speaker of the Sejm. It was stated that failure to complete the opinion-making procedure was a violation of the law, but not of a constitutional intensity. Violation of statutory provisions did not exclude

[4] D. Długosz, 'Tak PiS sparaliżował Trybunał Konstytucyjny' (This is how PIS paralysed the Constitutional Court), *Newsweek*, 13 February 2019, at https://www.newsweek.pl/polska/tak-pis-sparalizowal-trybunal-konstytucyjny/xf4shpr.

[5] Helsińska Fundacja Praw Człowieka,'Pracuje tak, jak powinien? Trybunał Konstytucyjny w 2017 roku', p.11 at https://www.hfhr.pl/wp-content/uploads/2018/03/HFPC-Pracuje-tak-jak-powinien-raport-TK-2017.pdf.

[6] The statistics come from the website: http://trybunal.gov.pl/.

[7] The question of the legality of the election of persons sitting on the Court was raised in a few cases and happened by way of dissenting opinions. Every time she sat on the bench with the judge appointed without legal basis, Judge Professor Sławomira Wronkowska-Jaśkiewicz signed a separate opinion in which she pointed out the procedural irregularity of the decision as a result of the defective composition of the Court. For example, see her dissents in case P 3/16, OTK ZU A/2018, item. 47 and case K 34/16, OTK ZU A/2019, item. 2. In turn, unconstitutional judge and unconstitutional Vice President of the Court Mariusz Muszyński retorted by alleging that Judge Wronkowska-Jaśkiewicz herself was sworn in an unconstitutional manner. First, he argued that her selection was contrary to the Rules of Procedure of the Sejm. Secondly, he questioned the validity of her oath given before the Speaker of the Sejm, who at that time performed presidential duties. It is to be noted here that the Speaker of the Sejm performed these duties in accordance with the Constitution after the presidential plane crash in Smoleńsk that claimed the life of President L. Kaczyński. See Muszyński's dissents in case U 1/16, OTK ZU A/2018, item 30 and in P 103/15, OTK ZU A/2018, item 44.

[8] For more details: Ł. Woźnicki, 'Raport z upadku Trybunału. Statystyki najgorsze od 10 lat' (Report on the collapse of the Court. Worst statistics in 10 years) Gazeta Wyborcza 15 February 2019; 'Funkcjonowanie Trybunału Konsty-tucyjnego w latach 2014–2017', *Raport Zespołu Ekspertów Prawnych Fundacji im. Stefana Batorego* (Warszawa, 2018), at http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Funkcjonowanie%20Trybunalu%20Konstytucyjnego.pdf. See also M. Gostkiewicz, 'Liczby nie kłamią. Po przejęciu przez PiS Trybunał Konstytucyjny pracuje gorzej' (Numbers do not lie. After the PiS acquisition, the Constitutional Tribunal works worse), at http://weekend.gazeta.pl/weekend/1,152121,22239134,pol-roku-dobrej-zmiany-w-trybunale-konstytucyjnym-duzo-spotkan.html and M. Pankowska, '"Pałac Nowosilcowa". TK Julii Przyłębskiej leniuchuje i lansuje elity PiS. Dwa lata Trybunału' (Two years in the life of the Court: The Court of Julia Przyłębska is lazy and promotes the elites PiS), at https://oko.press/palac-nowosilcowa-tk-julii-przylebskiej-oddala-sie-od-obywateli-i-lansuje-elity-pis-dwa-lata-trybunalu/.

[9] Case K 9/16, OTK ZU A/2018, item 48.

[10] By non-controversial cases, we mean cases of no political salience that take a backseat to political controversy. Every time the Court is called upon to adjudicate a non-controversial case, it is reflected in its composition. As a result, regular judges can be trusted and sit on such cases. It is always judge Przyłębska who has a final say in evaluating the cases lodged and their importance from the perspective of the powers that be. For an example of a non-controversial case, see SK 25/15. The Court decided that a minimal attorney's fee in the amount of 60 PLN (ca. 15 EUR) is consistent with the right to a fair trial, but regulation interfered inadmissibly in the right of property. In another case (K 2/17), the Court stated that a two-month limitation period for compensation claims was irreconcilable with the right of property. In turn, in case SK 18/17, the Court was called on to decide the constitutionality of the limitation period for bringing an action for denial of paternity. Polish law precludes a child's claim after three years from reaching the age of consent (regardless of when she or he found out about a different origin). In the Court's opinion, this regulation was unconstitutional.

[11] OTK ZU A/2019, item. 4.

compliance with legislative procedure at the constitutional level. The Court took issue with the procedure followed by the Senate, though. Doubts were raised whether Parliament adopted the act because some basic technical irregularities vitiated the act of voting. The Court had doubts as to whether the challenged act was adopted at all. It proved enough to find the act incompatible with Art. 7 of the Constitution. Three judges (elected after 2015) submitted a dissenting opinion. They pointed out that the Court violated the principle of *ne ultra petita.* They argued that the application did not concern voting irregularities, and as a result, the Court did not have jurisdiction to go beyond its scope.

Case K 9/17 provides the best example of the use of the courtroom as a shield by the majority as an extension of the political process.[12] It was a direct consequence of the 2015 pardons granted by the President to the Head of Special Forces and a high-level politician of the ruling party. The President decided to use his prerogative before a final conviction by the competent court. The District Court in Warsaw discontinued the proceedings. The Supreme Court, however, disagreed and recognized that "the application of the right to pardon before the date of the judgment's validity does not create procedural effects". The Court, for its part, pointed out that the right to grant pardons could take the shape of an individual amnesty (applied to a person who has been convicted) or individual abolition (applied to a person who has not yet been convicted). The Court interpreted the Constitution as granting the President large discretion to apply individual abolition and interfere with the pending cases. The decision was made by a majority of votes. Importantly, but purely symbolically, one of the judges (regular judge elected before 2015) filed a separate opinion. He considered that proceedings had to be dismissed as inadmissible. There were no grounds to conclude that the omission of the individual abolition from the list of negative prerequisites of the proceedings is inconsistent with the Constitution. The presidential prerogative of pardon covers only the repeal or reduction of a penalty made by way of a judgment that has become final. As long as the proceedings have not been completed, there is a presumption of innocence. This excludes the use of individual abolition. Otherwise, the jurisdiction of an ordinary court deciding a case would be rendered. He argued that individual abolition may violate the dignity of an accused person and limit his right to a fair trial. The accused has a right to a final judicial decision in his case. Undeterred discretion of the President to resort to individual abolition upsets the equilibrium between the judiciary and the executive.

The significant development of 2018 was the escalating warfare between one of the irregular judges, Marcin Muszyński, and the Polish Ombudsman. The Ombudsman kept pointing out the lack of a legal basis to change the adjudicating panel (see analysis *supra*) and consequently kept lodging applications for the irregular judges to be excluded from the panels.[13] Case K 9/16[14] is only one example. In this case, his application was rejected and as a result was withdrawn by the Ombudsman. In his opinion, decisions made by irregular judges are illegal and as such would lead to the non-existence of all judicial decisions taken afterwards. That would in turn deepen legal chaos in Poland. With no pending and valid application, the Court was no longer seised of the case, and as a result decided to discontinue the proceedings. Mariusz Muszyński submitted a scathing dissenting opinion. He considered the Ombudsman's decision to be unfavourable and incomprehensible to society; that the Ombudsman's requests to exclude persons from the panel were a manifestation of a "judicial barratry" that disturbs the functioning of the Court and have nothing to do with the Ombudsman's systemic role of protecting constitutional rights and freedoms. His dissent was a thinly veiled incitement addressed to the Sejm to capture such recalcitrant offices still roaming free in the space of an otherwise captured state.

IV. LOOKING AHEAD (AND BEYOND POLAND)

The picture painted here is one of a compromised institution that lost the ethos of inde-pendent and impartial constitutional adjudication. What N. Walker called the second lock of the control of the political system - the independence of the constitutional court - has been irreparably broken.[14] Cases are decided in camera, and the assignment of cases to individual judges is opaque and depends on the whim and caprice of an unconstitutionally elected President who tailors the composition of the bench to the political importance of cases. The more important the case from the perspective of the political majority, the more likely it will be heard exclusively by judges elected by the new Parliament. The Court decides less and fewer cases, as the cloud of unconstitutionality hangs over its decisions. The transparency of the proceedings has reduced to zero. Most important decisions are made by the one-man team of Judge Przyłębska, who, along with irregular Judge Muszyński, has become the most trusted guardian of the new unconstitutional order.

Granted, these are all momentous developments, and yet to stop here would be like focusing on the means while missing out on the journey. 2018 in the life of the Polish Constitutional Court corroborated that there was more to the destruction of judicial review, as the new authoritarians engaged to an increasing extent in constitutionalism and constitutional reform.[16] Constitutional talk

[12] OTK ZU A/2018, item 48. Judgment of the Court of July 17, 2018.

[13] In 2017, twenty applications were filed for the exclusion of a judge. The majority concerned irregular judges. None of them were granted. In three such cases, the members of the panels were themselves unconstitutionally sworn.

[14] Decision of the Court of March 22, 2018 in case K 9/16.

[15] 'Populism and Constitutional Tension', New York School of Law, Jean Monnet Working Paper 15/17, p. 9.

[16] P. Blokker, *Populist Constitutionalism and Meaningful Popular Engagement* (The Foundation for Law, Justice and Society, 2018).

was used and abused to cloak the illiberal agenda with the veneer of constitutionalism. A new constitutional doctrine of the politics of resentment, still on the rise in 2017, became entrenched in Poland in 2018. A core concept of the politics of resentment and populism is constitutional capture. Constitutional capture is a generic and novel concept. It connotes a systemic weakening of checks and balances and the entrenchment of power by making future changes in control difficult. Constitutional capture has an inherent spillover effect, and as such seemingly isolated constitutional capture in Poland and elsewhere risks the potential of adverse consequences throughout the entire continent.[17] It travels in time and space, and, just like the politics of resentment, it has its trajectory. As there is simply no place for a veto emanating from within the government other than from majoritarian parliaments, the "politics of resentment" target institutions that otherwise might be seen as a brake on the power of the people's representatives. Institutions are only accepted as long as they are seen as "their" institutions and translate only messages that the controlling parties believe to deserve to be in the public sphere. Such an understanding leads to an important tweak to the established narrative: institutions that have been channelling (for populists, "distorting") the rule of law must be dealt with as expeditiously as possible. With extreme majoritarianism as one of the cornerstones of the new doctrine, disabling constitutional courts and judicial review is the first order of the day for constitutional capture.[18] All institutions, domestic and supranational, stand in the way and are not part of the new populist constitutionalism.[19] Gaining power thus does not soften populist animus. Quite the contrary, once elected, populist leaders are ready to deliver on their promises, and they do so through a constitutional doctrine that competes with the dominant liberal constitutionalism. This new emerging doctrine includes the following, often interrelated, elements: (i) a new understanding of the role of the Constitution, no longer as protecting against the state, but as safeguarding the uniqueness of the state; (ii) the Constitution ceases to be the supreme law of the land; (iii) the Constitutional Court is not only incapacitated but also "weaponized" to be used as a tool against political enemies; (iv) the political dominates the legal; (v) the rule of law is seen as an obstacle to protecting the collectivity; (vi) the rule of law is to facilitate the expression of the will of the people; (vii) political power is no longer subject to checks and balances; (viii) supranational institutions are dismissed as enemies of the people; (ix) collectivity is trumpeted above individual citizens; and (x) human rights evolve from a dignitary conception to that of community.

2018 in the life of the Polish Constitutional Court evoked the dark legacies of what O. Kirchheimer famously called "political justice". Political justice aims to enlarge the area of political action by enlisting the services of courts on behalf of political goals.[20] It is only half true. Courts apply laws, so without carefully crafted legislative schemes, the courts would be like craftsmen without tools. Law must be adapted to enable the judges to mete out political justice. The correct law both circumscribes and empowers the judges in their mission. On the other hand, the law that traces its roots to, and espouses ideologies of, the old regime cannot be trusted. As political always prevails over the legal, law must reflect the political at all times, not the other way around. The resort to court thus becomes a mere technical device for disposing of a vanquished rebel. It may signify a more or less concerted effort to rid the community of its stock of political foes, or it may be directed towards creating effective political images.[21] So understood political justice is the domain of populist constitutionalism and chimes in well with the avowed objective of constitutional capture: taking over institutions and making them "our institutions". Political justice that is intuitive and plays on emotions and fleeting grievances along the lines of "we the righteous" will now go after the corrupt and rotten elites that have been oppressing the silent majority. The normal course of proceedings, following the rules, is derided as a ritual devoid of meaning, one that strips the popular sense of justice of its essence. People neither understand nor care. What matters is the visual: the guilty must be found and punished, and it must be in the public eye with pomp and circumstance. The contact between the political power and the people must be direct, immediate, instantaneous. Planned justice understood as following the rules is tainted by its uncertainty and slowness, both held in low esteem by the politics of resentment as mere legal technicalities that deceive the public and serve the wealthy.

In the trajectory of constitutional developments, 2018 in Poland was about much more than cases that were decided. It was as much about dangerous processes launched and snowballing abuse of judicial review. The Court accepted its new role to act as an extension of the will of the Parliament, whose main role is to minimise uncertainty and deliver decisions that are swift and predictable from the vantage point of the political majority. The most important and ominous constitutional takeaway from Poland in 2018 is that judicial institutions do indeed become increasingly relevant to political life in authoritarian polities.[22] The Polish Constitutional Court is the prime example of how courts matter to authoritarian regimes. The Court is now gripped by, and fully at the service of, political justice and the politics of

[17] T. T. Koncewicz, 'The Politics of Resentment and First Principles in the European Court of Justice', in in: F. Bignami, (ed.,), *EU Law in Populist Times. Crises and Prospects,* (Cambridge University Press, 2019).

[18] K. L. Scheppele, 'Autocratic Legalism' (2018) 85 *The University of Chicago Law Review* 545.

[19] For important clarifications, also P. Blokker, 'Populist Constitutionalism', *Verfassungsblog,* May 4, 2017, http://verfassungsblog.de/populist-constitutionalism/.

[20] O. Kirchheimer, *Political Justice. The Use of Legal Procedures for Political Ends* (Princeton University Press, 1961), p. 419.

[21] Ibid, p. 423.

[22] T. Moustafa, T. Ginsburg, 'Introduction: The Functions of Courts in Authoritarian Politics', in T. Ginsburg, T, Moustafa, (eds.), R*ule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2009), p. 2.

resentment. And 2019 shapes up already as a continuation of these dark dynamics and processes. Therefore, and unfortunately so, *"Polish capture story to be continued" ...*

V. FURTHER READING

T. T. Koncewicz, 'The Democratic Backsliding in the European Union and the Challenge of Constitutional Design', in: X. Contiades, A. Fotiadou, (eds.,), *Routledge Handbook of Constitutional Change,* (Routledge, forthcoming)

T. T. Koncewicz, 'Understanding the Politics of Resentment. Of the Principles, Institutions, Counter-Strategies and ... the Habits of Heart' (2019) 26(2) *Indiana Journal of Global Legal Studies* 501

T. T. Koncewicz, 'The Politics of Resentment and First Principles in the European Court of Justice', in F. Binghami (ed.), *EU in Populist Times. Crises and Prospects,* (Cambridge University Press, 2019)

T. T. Koncewicz, '"Existential Judicial Review" in Retrospect, "Subversive Jurisprudence" in Prospect. The Polish Constitutional Court Then, Now and…Tomorrow,' *Verfassungsblog,* October 7, 2018, https://verfassungsblog.de/existential-judicial-review-in-retrospect-subversive-jurisprudence-in-prospect-the-polish-constitutional-court-then-now-and-tomorrow/

L. Pech, K. L. Scheppele, Illiberalism Within: Rule of Law Backsliding in the EU, (2017) 19 *Cambridge Yearbook of European Legal Studies* 3



Portugal

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I. INTRODUCTION

2018 was a significant year, as the Portuguese Constitutional Court (PCC) repositioned itself as a non-deferent Court and as a faithful guardian of constitutional fundamental rights and liberties. As Jorge Pereira da Silva provocatively stated, "the Portuguese Constitutional Court is back!"[2] After years of what some labelled the "judicial activism" of the jurisprudence of crisis—during and after the 2011-2014 bailout—that, for better or worse, hit the news and scholarship internationally, the PCC seemed more silent and cautious towards the legislator. With Ruling no. 225/2018, the Court declared that the legislative power can change the legal framework of assisted reproductive techniques if protection to the most vulnerable parties to a contract of gestation by substitution—the children and the surrogate mother—is granted.

We can truly state that 2018 was the year of family rights, since many rulings consisted of major constitutional developments regarding the subjects of family life, development of one's personality, right to personal identity and human dignity.

It was foreseeable that 2018 would be the year of a much-awaited electoral system reform that would create more favourable conditions for a closer relationship between voters and their representatives within constituencies. Yet, the recent rejection of a popular initiative to reform the Portuguese electoral system shows that the main political parties are still strongly divided over the right path towards achieving that goal.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Surrogacy

Ruling no. 225/2018—"surrogacy"/"gestation by substitution"—can be considered a landmark in the Portuguese Constitutional Court's jurisprudence.[3] The rapporteur was Justice Pedro Machete, and out of the twelve remaining Justices, only one did not submit a concurring opinion regarding specific grounds of the decision. This comes as no surprise at all when a Constitutional Court faces very problematic subjects, since it is not immune to societal, religious, ethical and ideological worldviews.

The ruling, in tune with the PCC's ex post abstract review, is exhaustive (almost 100 pages in the publication of the official journal "Diário da República", or, in a normal Word document, around 200 pages[4]) and very well grounded, with significant Comparative Constitutional (case) Law references.[5]

[1] I am grateful to Justice Gonçalo Almeida Ribeiro (Portuguese Constitutional Court) for his helpful suggestions. The usual disclaimers apply.

[2] < https://www.publico.pt/2018/05/06/sociedade/opiniao/barrigas-de-aluguer-o-constitucional-esta-de-volta-1827235 > accessed February 2019.

[3] 24th of April, 2018 < http://www.tribunalconstitucional.pt/tc/en/acordaos/20180225s.html > accessed February 2019.

[4] < https://dre.pt/application/file/a/115227161 > accessed February 2019.

[5] See Catarina Santos Botelho, 'Is there a middle ground between constitutional patriotism and constitutional cosmopolitanism? The Portuguese Constitutional Court and the use of foreign (case) law', in G. F. Ferrari (ed.), *Use of Foreign and Comparative Law by Constitutional/Supreme Courts* (Brill/Nijhoff, 2019) 424. 2.

From 2006 onwards, any woman (regardless of her civil status or sexual orientation) could access assisted reproductive techniques, except surrogacy.[6] Ten years later, the new Law on Medically Assisted Procreation (hereinafter Law on MAP)[7] evolved from conceiving assisted reproduction as "a *subsidiary* conceiving mechanism" to "an *alternative* method of procreation for women."[8]

The first veto of the Portuguese President of the Republic, Marcelo Rebelo de Sousa, was precisely the veto on the introduction of surrogacy, grounded on the opinions of the National Council of Ethics for the Life Sciences and on the insufficiency of the protection of children's rights. After the veto, the President sent the law back to the Parliament for revision. However, many of the President's concerns were not fully taken into consideration. When the law was sent back to the President for promulgation, he neither vetoed the law nor did he start a preventive abstract review of constitutionality.[9]

It was instead a Group of Parliament Deputies from centre-right (PSD) and right (CDS) parties that requested an *ex post* abstract review of the constitutionality of the Law on MAP.[10] In question were the following issues: "(i) the insertion in the Law on MAP of a number of norms with regard to surrogate gestation; (ii) the rule of anonymity of donors and that of the surrogate mother *vis-à-vis* those born as a result of MAP methods; and (iii) the rule that waives the *ex-officio* investigation of the paternity of a child whose mother, regardless of her marital status and sexual orientation, has resorted to MAP techniques."[11]

On the first topic, the PCC had to decide on the admissibility of the right to start a family with recourse to surrogate gestation in cases where becoming a parent could not otherwise occur due to clinical grounds that were an impediment to pregnancy. In other words, the Court had to stand either in favour or against surrogate gestation. The PCC held that surrogate gestation did not violate the "dignity of the pregnant woman, of the child born as a result of this method or the obligations of the State towards the protection of children", since surrogacy is legalised as "an exceptional method of procreation, subject to the autonomous consent of the interested parties and decided upon by means of an altruistic agreement, subject to the prior authorisation of an administrative authority." More bluntly, surrogacy, which shares some similarities with the adoption figure (being, in this case, a "scheduled adoption") was considered constitutionally valid.[12]

Nevertheless, although surrogacy per se was not considered unconstitutional, the PCC invalidated several norms of MAP: (a) the norms that established the limits for the autonomy of the parties as well as the restrictions that could be imposed on the behaviour of the surrogate mother in the surrogate gestation agreement were too indeterminate, therefore violating the *principle of determinability of the law,* which is a corollary of the principle of the democratic rule of law;[13] (b) the norm that did not allow for the revoking of the consent of the surrogate mother from the beginning of MAP therapeutic procedures until the child was delivered to the beneficiaries was in breach of the *fundamental right to the development of one's personality,* interpreted in accordance with the principle of the dignity of the human person, and of the right to start a family;[14] (c) as the legal regime did not allow for a consolidation of legal positions of persons as a result of a surrogate gestation agreement being declared null and void—as parents, as son/daughter—nor differentiate according to the time or seriousness of the grounds invoked in order for the agreement to be declared invalid, it violated the *right to personal identity* and the *principle of legal certainty* arising from the principle of democratic rule of law.[15]

The Court therefore stated that the right to regret needed to be granted. If not, the surrogate mother would be shadowed and objectified to a mere live "incubator". This would degrade women's dignity as inferior to men's and therefore violate the equality principle.[16] It is worth mentioning that besides sanctioning the fact that the Law on MAP did not foresee a right to regret, the PCC also provided some guidelines for future legislative amendments that would be in tune with the Portuguese Constitution. If the separation of powers is the bulwark of democratic and balanced societies, it is not at stake when constitutional courts interact with sovereign organs (such as the legislator) in order to offer (and not to impose), in a cooperative dialogue, some guidelines or even a "guiding compass"[17] for hard cases.

As I have written elsewhere: "It is quite an illusion or a fallacy to separate, with a perfect dividing line, law from politics. We can perform conceptual divisions and undertake complex line-drawing manoeuvres, but in the end there will always be some kind of in-

[6] Law 17/2006, of 20 June.

[7] Law 32/2006, of 26 July.

[8] Teresa Violante, '(Not) Striking Down Surrogate Motherhood in Portugal' (*Verfassungsblog*, 2018), < https://verfassungsblog.de/not-striking-down-surrogate-motherhood-in-portugal/ > accessed February 2019.

[9] That could be possible through Articles 278 and 279 of the Portuguese Constitution.

[10] In accordance with Articles 281 and 282 of the Portuguese Constitution.

[11] < Available at: http://www.tribunalconstitucional.pt/tc/en/acordaos/20180225s.html > accessed February 2019.

[12] Paras. 12 to 17.

[13] Articles 8 (4), (10) and (11) and, therefore, Article 8 (2) and (3) of the MAP.

[14] Article 8 (8) in conjunction with Article 14 (5).

[15] Article 8 (12).

[16] See the articles of Paulo Otero and João Carlos Loureiro cited in the PCC ruling.

[17] Fernando Alves Correia, *Justiça Constitucional* (Almedina, 2019) 414.

tersection.[18] Notwithstanding areas of significant blurriness, the reign of politics should refrain from overpowering the reign of law. Macro-economic decision-making pertains to democratic deliberation and popular sovereignty, albeit fertile exchanges of ideas amongst state powers is always welcome".[19]

Regarding the rule of donor/surrogate mother anonymity, the PCC found no violation of the dignity of the human person. However, and in contrast with the position it had defended in Ruling no. 101/2009 and in tune with the dissenting opinion of Justice Benjamim Rodrigues,[20] the PCC highlighted the growing importance attributed to the right to know one's origins. In this sense, it ruled that "the legislator's option for the rule of the anonymity of the donors in the case of heterologous procreation, as well as that of the surrogate mother (...) although not absolute, imposed an unnecessary limitation on the fundamental *rights to personal identity* and to the *development of the personality* of persons born as a result of MAP techniques using donated gametes or embryos, namely in cases of surrogate gestation." In my perspective, this ruling should be praised for not ignoring children's right to their identity in order to protect donors or surrogates' anonymity. Furthermore, several North European states (except Denmark) and Anglo-Saxon states have either already reversed their legislation on donors/surrogates anonymity or altered it, adopting dual systems with the possibility of identification.

With regard to the fourth and last topic, the waiver of the *ex-officio* investigation of paternity in respect of a child born to a woman who has engaged in MAP individually (outside the context of a marriage or of a non-marital partnership) in order to get pregnant, the PCC found no violation of the constitutional principles and rights invoked (principle of the dignity of the human person, principle of equality and right to personal identity). It held that "in the specific circumstances where it was envisaged, such investigation would be pointless since the donor could not legally become the father of the born child even in the case where his identity was known".

It is very important to stress that the elimination of the norms deemed unconstitutional with a general binding force (Article 282 (1) of the Portuguese Constitution) would imply that all surrogate gestation agreements already authorised by the National Council for Medically Assisted Procreation (NCMAP) would have to be subsequently overruled. Nevertheless, using the possibility of restriction of effects given by the following paragraphs of Article 282, the PCC unanimously decided, on grounds of legal certainty and in compliance with the State's obligation to protect children, that "the effects of the declaration of unconstitutionality would not apply to the surrogate gestation agreements authorised by the NCMAP in execution of which the medically assisted procreation procedures referred to in Article 14 (4) of Law 32/2006, of July 26 had already been initiated."

This confusion could have been avoided if the President of the Republic had exercised his right to ask for a preventive constitutional review before the Law on MAP entered into force, in accordance with Articles 278 and 279 of the Portuguese Constitution.

2. Failed electoral reform in Portugal

The increasing level of electoral abstention and the declining levels of confidence in the political system and political actors are related to the citizens' lack of identification with the current party system.[21]

The debate over electoral system reform has gone on since the Portuguese transition to democracy (1976/78), but it has become more intense over the last two decades. Portugal has a "proportional representation system", and this proportional representation system is also found in an entrenchment clause, as stated in Article 288, *h*).[22]

Although the constitutional amendment of 1997 allowed proposals for a closer relationship between constituents and their representatives within constituencies that would change a *stricto sensu* proportional system to a mixed one (with single-member districts and a national constituency as compensation), there seems to be an obstacle. The main critique is the closed list system and the fact that some districts return a very large number of deputies.

The major political parties agree that the system must change, but in the end, they cannot reach consensus on the appropriate electoral reform path: A mixed-member system with some single member districts or a multiple-tier system with small multimember constituencies at the lower tier? Reduce the number of Deputies or maintain it (180 to 230 Deputies)? Studies show that the personalization of the vote raises political fears, such as "parochialism, clientelism and party-political polarization"; the fear of "losing control of the selection of candidates"; "intra-party divisions"; and the 'fear of the unknown'". As any constitutional amendment must be approved by "a majority of two-thirds of the Members of the Assembly of the Republic in full exercise of their office" (Article 286/1 of the Portuguese Constitution), a wide political consensus is needed.[23]

[18] Jutta Limbach, 'The Law-Making Power of the Legislature and Judicial Review', *Law Making, Law Finding and Law Shaping: The Diverse Influences* 174 (Oxford University Press, 1997).

[19] Catarina Santos Botelho, 'Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?' (2017) 3 (4) CALQ 87.

[20] < http://www.tribunalconstitucional.pt/tc/en/acordaos/20090101s.html > accessed February 2019. The Court stated that "the option which the legislative authorities chose when they established a mitigated regime governing donor anonymity cannot be criticised from a constitutional point of view".

[21] The think-action tank 'Portugal Talks' theme for 2018 was 'Voter Turnout in Portugal: diagnosis and possible solutions'. See < https://www.pttalks.pt/en/homepage-2/ > accessed February 2019.

[22] For a deeper understanding of the Portuguese entrenchment clauses, see Catarina Santos Botelho, 'Constitutional Narcissism on the Couch of Psychoanalysis: Constitutional Unamendability in Portugal and Spain' ((2019) 21 (3) EJLR 346) *European Journal of Law Reform*. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3242023 > accessed February 2019.

In 2018, the Association for Economic and Social Development and the Association for a Quality Democracy presented a popular initiative to reform the electoral system.[24] This new channel of political participation must be praised. A concrete avenue of change, it also had a major advantage: all the electoral reform proposals were designed to not require a constitutional amendment. In other words, the proposals were conceived within the Portuguese constitutional framework. Not surprisingly, though, the Parliament just recently rejected it and delayed this discussion until after the legislative elections.[25]

III. CONSTITUTIONAL CASES

1. Ruling 242/2018: Right of for-profit (or limited liability) legal persons to legal aid

At the request of the Public Prosecutor, the Constitutional Court declared Article 7(3) of the Law on Access to the Law and the Courts unconstitutional.[26] The norm under appreciation denies legal protection, which encompasses legal advice and legal aid, to for-profit (or limited liability) legal persons regardless of their specific economic situation.[27] No inquiry is done in order to understand if they objectively are in a condition to pay the proceedings costs in a timely manner.

Article 20 (1) of the Portuguese Constitution grants all subjects of law the right of access to the courts. A fundamental dimension of this right is, therefore, the prohibition of the denial of justice on account of one's insufficient financial resources.

If, previously, the PCC had excluded for-profit legal persons from the scope of protection of Article 20 (1) solely on the basis of their legal nature,[28] the PCC reversed its jurisprudence and applied the EU law and international regional law (European Convention on Human Rights) as more than *obiter dicta.* In fact, the PPC stated that "nothing in the case-law of the European Court of Human Rights (ECHR) precludes the granting of legal aid to for-profit legal persons" and then interpreted the Portuguese Constitution in consonance with the Charter of Fundamental Rights of the European Union, in particular "the latest developments in the interpretation of Article 47 (1) of the Charter of Fundamental Rights of the European Union (hereinafter Charter), on the right to an effective remedy and to a fair trial". In this sense, "the right to effective judicial protection guaranteed by Article 47 of the Charter may require (...) the granting of legal aid to for-profit legal persons, without this being considered as dysfunctional in relation to the competition rules in an efficient market".

2. Ruling 242/2018: Mental disabilities and equality principle

In a concrete review case, the PCC decided that the rule of Article 131 (1) of the Code of Criminal Procedure, which establishes the absolute incapacity to testify of a person with mental disability, even as a victim or offender of a crime, infringes the principle of equality (Article 13 of the Constitution) with regard to the prohibition of discrimination and the right to a fair trial, enshrined in Article 20 (4) of the Constitution in conjunction with the principle of proportionality (Article 2 of the Constitution).[29]

The Court considered that Article 131 (1) treats "all psychic anomalies radically and in the same way, regardless of the specific and concrete degree of their respective capacity to testify on any event in criminal proceedings, which is not subject to verification specified in the interdiction process.(…) It happens, however, that in many situations, the mental health of the person, and the respective degree of affection of cognition or volition, taken into account in the evaluation of the presuppositions of judicial interdiction, do not project relevantly on the capacity (…) to understand and respond with truth to the questions put to him, in order to obtain a reliable account of facts that he observed or experienced.(…) We are therefore faced with a legislative measure which not only violates the principle of proportionality, in its first two tests—suitability and necessity—but also proves to be discriminatory in relation to a category of persons—the victims of research crimes declared to be prohibited by psychic anomalies—showing as we have seen, lacking sufficient grounds for the different treatment that operates".[30]

3. Ruling 488/2018: Dismissal of paternity proceedings

In its Ruling no. 23/2006, the PCC ruled that the previous text of Article 1817 § 1 of the Civil Code,[31] which established a two-year time limit from the date of reaching the age of majority or the date of emancipation of the minor for the exercise of his or her right

[23] André Freire and Manuel Meirinho, 'Institutional Reform in Portugal: From the Perspective of Deputies and Voters Perspectives' (2012) *Pôle Sud* 107-125.

[24] < https://www.dn.pt/lusa/interior/associacoes-sedes-e-apdq-lancam-iniciativa-de-cidadaos-e-peticao-para-reforma-eleitoral--9945172.html > accessed February 2019.

[25] < https://www.dn.pt/edicao-do-dia/05-fev-2019/interior/ps-e-psd-chumbam-reforma-do-sistema-eleitoral--10534047.html > accessed February 2019.

[26] Law 34/2004 of July 29, amended with the wording of conferred by Law 47/2007 of 28 August.

[27] 8 May 2018. < http://www.tribunalconstitucional.pt/tc/en/acordaos/20180242s.html > accessed February 2019.

[28] Ruling 216/10. < http://www.tribunalconstitucional.pt/tc/acordaos/20100216.html > accessed February 2019.

[29] < http://www.tribunalconstitucional.pt/tc/acordaos/20180486.html > accessed February 2019.

[30] Para. 7.

[31] Adopted by Decree-law no. 496/77 of 25 November 1977.

[32] < http://www.tribunalconstitucional.pt/tc/acordaos/20060023.html > accessed February 2019.

to start paternity proceedings, violated the right to family and to know one's biological parents (Articles 26 § 1 and 36 § 1 of the Constitution).[32] Articles 1873 and 1817 § 1 of the Civil Code now determine that a claim for establishing paternity can be brought at any time until the child reaches the age of majority.[33] However, the right to seek paternity recognition by judicial decision lapses ten years after the person has attained the age of majority.[34]

After the legislative amendment of the previous short-time limit (the two-year time limit was upgraded to a ten-year time limit), the PCC was again called upon to rule on whether Article 1817 § 1 of the Civil Code was compatible with the Constitution.[35] The Court ruled (by seven votes to six) that the provision in question was not disproportionate in that it did not violate the constitutional right to know one's biological parents. The Court argued that "there was a public interest in having both biological and legal paternity established as soon as possible" and that "there was an interest in ensuring legal certainty in respect of the putative father and his family due to the personal and patrimonial consequences of the recognition of paternity".

In the case of *Silva and Mondim Correia v. Portugal,* the applicants alleged that the dismissal of the paternity proceedings constituted a breach of their rights under Article 8 of the Convention.[36] The European Court of Human Rights ruled that the applicants "had shown an unjustifiable lack of diligence in instituting paternity proceedings in that they had waited fifty and twenty-six years, respectively, since reaching the age of majority to seek to have their paternity legally established".[37] The Court found no violation of the right to respect for their private and family life under Article 8 of the Convention, "given the margin of appreciation afforded to States in respect of paternity proceedings legislation, the non absolute nature of Article 1817 § 1 of the Portuguese Civil Court, and the case-law of the Portuguese Constitutional Court".

In the recent Ruling 488/2018, the PCC, in a concrete review case, stated that Articles 1873 and 1817 § 1 of the Civil Code violated Articles 18 § 2, 26 § 1 and 36 § 1 of the Constitution on the grounds that the requirement for protection of the interests pertaining to the investigating party should not be limited, and that even if it were, such limitation was not justified when the proportionality of the various conflicting interests was weighed.[38]

According to Article 79 § 1 of the Law of the Constitutional Court, since in this concrete review ruling the Court decided "there has been unconstitutionality (…) in a manner different to what was previously adopted for the same rule by any of the Court's sections" (in the case, contrary to Ruling 401/2011), "an appeal can be made on this decision before the Court's plenary, compulsory for the State Attorney when he intervenes in the case as appellant or respondent".[39]

IV. LOOKING AHEAD

In 2019, there will be three main elections: the European Parliament elections (in May), the regional elections for the Parliament of Madeira (in September), and the elections for the Parliament of the Portuguese Republic (in October). Also, the Portuguese Constitutional Court will most likely decide on recent legislation (or legislative projects) regarding the following issues: (a) access to metadata (data about data) by information services of the Portuguese Republic; (b) legalisation of cannabis; and (c) legalisation of prostitution.

V. FURTHER READING

Catarina Santos Botelho, 'O Lugar do Tribunal Constitucional no século XXI: os limites funcionais da justiça constitucional na relação com os demais tribunais e com o legislador' (2018) JULGAR 111

Gonçalo Almeida Ribeiro, 'Constituição' (2018) *Dicionário de Filosofia Moral e Política*

Jorge Miranda, *Direito Eleitoral* (Almedina, 2018)

Jorge Pereira da Silva, *Direitos Fundamentais – Teoria Geral* (Universidade Católica Editora, 2018)

Jorge Reis Novais, *Direitos Fundamentais nas Relações entre Particulares – do dever de protecção à proibição do défice* (Almedina, 2018)

[33] Law no. 14/2009 of 1 April 2009, which amended the text of Article 1817 § 1 to its current version.

[34] Article 1817 § 3 of the Civil Code adds a supplementary three-year period in addition to the general ten-year time limit within which paternity proceedings can be instituted.

[35] Ruling no. 401/2011 of 22 September 2011. < http://www.tribunalconstitucional.pt/tc/acordaos/20110401.html > accessed February 2019.

[36] 3 October 2017. Applications nos. 72105/14 and 20415/15. < https://hudoc.echr.coe.int > accessed February 2019.

[37] Para. 68.

[38] < http://www.tribunalconstitucional.pt/tc/acordaos/20180488.html > accessed February 2019.

[39] < http://www.tribunalconstitucional.pt/tc/en/tclaw.html > accessed February 2019.



Romania

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I. INTRODUCTION

In Romania, the 2018 constitutional year came with a failed attempt to revise the Constitution. The trend of conflicts between the President and the Government we noted in 2017 experienced a dramatic escalation and resulted in further limitations to the powers of the President, while controversies related to the changes in the laws on the judiciary and to the case law of the Constitutional Court continued. Significantly more often than during previous years, the Constitutional Court went beyond the limits of its jurisdiction, overstepping the realm of ordinary courts or replacing self-regulatory tools provided by the constitutional system and getting involved in political questions.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Failed attempt to amend the Constitution through a popular initiative

The popular initiative to amend the Constitution started in 2016 and ended through a failed referendum in 2018. Indeed, 2,6 million citizens had signed an initiative to modify Article 48 of the Constitution as regards the definition of family to: "Family is based on the free consented marriage between a man and a woman" instead of the current formulation, "Family is based on the freely consented marriage between spouses". Parliamentary debates took place in 2017 and 2018 and encountered some procedural hurdles, including a misinterpretation of parliamentary standing orders duly noted by the Constitutional Court in Decision no. 431/2017. Following the adoption of the popular initiative with a two-thirds majority of the total number of members of each chamber, the draft law went *ex officio* to the Constitutional Court, a compulsory step in the constitutional amendment procedure. In Decision no. 539/2018, the Constitutional Court maintained its opinion on the substantive issues as expressed in Decision no. 580/2016, and stated that the new definition of the family is not contrary to the substantive limit of the revision of the Constitution set forth by Article 152 (2), which says that no amendment can be proposed if it suppresses fundamental rights and freedoms or their guarantees. Restricting the right of marriage to only heterosexual couples, excluding the same right for homosexual couples, was not considered by the majority of the Court as a "suppression" of a fundamental right or one of its guarantees, but declared a "mere precision" regarding the original intent of the constituent power. This last decision was accompanied by a separate opinion, in which a dissenting judge (Daniel Marius Morar) stated that "by replacing the gender-neutral expression 'between spouses' with 'between a man and a woman', [the text] is not only making a precision as regards the exercise of the fundamental right to marriage, as the majority claims. The express entrenchment of the condition of biologically different sex removes any other interpretation, by restraining in an impermissible manner the sphere of incidence of the institution of marriage and thus suppressing the right to marriage of same-sex couples".

Following the Constitutional Court's decision, the last step of the constitutional amendment procedure was organised, i.e., the compulsory referendum provided by Article 151(3) of the Constitution. The Government decided to convene the voters on two days—6 and 7 October 2018—but, despite

that, only 21% of the voters participated. As the turnout quorum of 30%, required by Referendum Law no. 3/2000, had not been reached, the referendum was invalidated and the draft law amending the Constitution was not approved.

The general approach of the Constitutional Court on this constitutional amendment seems to place the jurisdiction on the conservative side regarding same-sex couples' rights. However, it is important to stress that in 2018, on the same matter, the Court issued another decision which focused on the recognition in Romania of some effects (freedom of circulation within EU) of same-sex marriages concluded abroad and of a derived right of residence (see below III.3.). The outcome of this decision was heavily influenced by the ECJ case law and did not formally block the constitutional amendment procedure, although it brought substantial changes in the interpretation of the right to private and family life protected by the Constitution.

2. Conflicts between the President and the Government

The Romanian Constitution has provided for a directly elected President and a Government invested by the Parliament upon the proposal made by the candidate for the position of Prime Minister designated by the President (Article 85 of the Constitution). This requires cooperation between the two heads of the executive power while allowing for cohabitation in case they are not on the same side in political terms. A rather conflictual cohabitation has been taking place since the parliamentary elections of 2016, and in 2018 it reached a new peak. This is reflected not only in the statistics pertaining to the case law of the Constitutional Court referring to laws in 2018 (43 decisions on *a priori* judicial review against 9 in 2017) but also in the area of decisions on legal conflicts of a constitutional nature. Out of the six (compared to four in 2017) such decisions issued in 2018 at least two bear serious consequences on the functioning of the political regime in Romania.

In decision no. 875/2018, the Constitutional Court declared that a legal conflict of a constitutional nature did occur when the President refused to agree with the reshuffling of the Government proposed by the Prime Minister. Considering Article 85(2) of the Romanian Constitution, which provides that "In the event of government reshuffle or vacancy of office, the President shall dismiss and appoint, on the proposal of the Prime Minister, some members of the Government", the Court declared that the President does not enjoy discretionary powers in this respect and has to limit his evaluation only to legal considerations that might impede upon the reshuffle, otherwise s/he is obliged to follow the proposal made by the Prime Minister. Therefore, it ordered the President to immediately issue decrees for the vacancy of the respective positions of ministers and to provide the Government with written and argued answers as to why he is refusing to appoint the minister/s proposed by the Prime Minister. Thus, rather than being a complex political and strategic decision framed by constitutional provisions, the reshuffle of the Government has been transformed by the Court into a merely legal issue.

In decision no. 358/2018, the President was ordered to dismiss a specific person from the position of head of a prosecutor's office. In a procedure which, according to the law, is initiated by the Minister of Justice, has to receive an advisory opinion of the Superior Council of Magistracy and is ended through the decision of the President of Romania, the proposal made by the Minister of Justice to revoke the incumbent of the position of Head of the National Anticorruption Department faced a negative advisory opinion of the Superior Council of Magistracy and a rejection from the President. The Minister of Justice asked the Constitutional Court to decide whether the motivated refusal of the President to accept his order triggered a legal conflict of a constitutional nature able to create a blockage in the functioning of concerned public authorities. By declaring that such a conflict did exist and obliging the President to issue the revocation decree, the Constitutional Court trespassed several red lines: it accepted being notified by an authority that is not enabled by the Constitution to alert it with regard to legal conflicts of a constitutional nature; it interfered with and blocked powers of administrative courts which, according to the law, are the only jurisdictions able to decide upon presidential decrees; it established that a minister in an appointed Government enjoys greater discretionary powers than a directly elected President of the republic; and it further diminished the powers of the President by explicitly limiting his attributions to only a check of legality over the proposal of the Minister of Justice and expressly declaring that the President cannot perform his own evaluation of the activity of the said prosecutor. This decision of the Constitutional Court has been a turning point in the functioning of the political regime in Romania: while the guardian of the Constitution has, apparently, trespassed its boundaries, the President of Romania remained compliant with the principles of the rule of law and did issue the requested decree.

3. The saga of the new laws on the judiciary

The major debate on the revision of laws pertaining to the judiciary that started in the second half of 2017 unfolded all along 2018 and resulted in no less than 18 decisions of the Constitutional Court (spread between January and October), a debate in the European Parliament on the threats to the rule of law in Romania in February 2018 (https://multimedia.europarl.europa.eu/en/threats-to-rule-of-law-by-romanian-justice-debate_I150531-V_v), the first Ad-hoc report on Romania (Rule 34) adopted by GRECO at its 79th Plenary Meeting on 19-23 March 2018 (http://www.just.ro/wp-content/uploads/2015/09/Greco-AdHocRep20182-Final-eng-Romania.pdf), and Preliminary Opinion no. 924/2018 of the Venice Commission on the draft amendments to Law no. 303/2004 on the statute of judges and prosecutors, Law no. 304/2004 on judicial organization and Law no. 317/2004 on the Superior Council of Magistracy (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2018)007-e).

All these internal and external evaluations of the controversial reform of the judicial sector concluded that the measures intended would represent an important setback for the rule of law in Romania. At the European level, comparisons with the current situation in Hungary and particularly in Poland have been made, to no effect. Indeed, some solutions promoted by the Romanian package of laws pertaining to the reform of the judiciary resembled ideas promoted by Polish laws adopted in 2017, particularly that of the anticipated retirement of an important number of magistrates and the creation of a special unit within the General Prosecutor's Office for the investigation of deeds of magistrates.

An impressive number of decisions issued by the Constitutional Court found many provisions of these laws non-compliant with the Constitution. Thus, notified iteratively to the Court by the President of Romania, the High Court of Cassation and Justice and parliamentary opposition, Law no. 303/2004 on the statute of judges and prosecutors has been checked through Decision nos. 45/2018, 66/2018, 252/2018, 417/2018, 533/2018 and 583/2018 and found wanting in most of them. The same happened with Law no. 304/2004 on judicial organization through Decision nos. 33/2018, 67/2018, 250/2018, 357/2018, 457/2018 and 483/2018 and, respectively, with Law no. 317/2004 on the Superior Council of Magistracy through Decision nos. 61/2018, 65/2018, 251/2018, 385/2018, 530/2018 and 562/2018. In a nutshell, the Constitutional Court considered that the independence of magistrates was jeopardized, e.g., via provisions enhancing their professional responsibility and patrimonial liability; that the functioning of the judicial system was in peril, e.g., between the potential mass retiring of magistrates with only 20 years of seniority and 45 years of age and the new rules pertaining to becoming a magistrate; and that the constitutional guarantees of the judicial authority were endangered through the systemic weakening and segregation of the Superior Council of Magistracy.

None of these stopped the laws from coming into force, albeit slightly changed in comparison to the initial intentions of their promoters. Towards the end of 2018, the special unit within the General Prosecutor's Office for the investigation of deeds of magistrates was created while a huge haemorrhage of magistrates retiring or simply switching positions with barristers started to severely impair the functioning of the judicial system. Thorough effects of this reform are to be evaluated in the years to come.

In the process of discussing the package of laws on the reform of the judiciary, the Constitutional Court took the opportunity to further limit the powers of the President. In an attempt to limit the number of notifications it would receive on these controversial drafts, the Court created what it called a "hypothetical deadline" for the President to notify the Court with a draft law before its promulgation. Thus, if before Decision no. 67/2018 the President could wait for the draft to actually reach his office and only then calculate the deadline of 20 days, respectively 10 days within which he could notify the Constitutional Court for an *a priori* control of constitutionality (according to Article 77 of the Constitution), after the aforementioned decision the President has to act within 20 days, respectively 10 days after the Parliament ended the legislative procedure ("hypothetical deadline"), irrespective of the fact that the opposition might have deferred the law to the Constitutional Court, thus preventing it from reaching the office of the President.

4. The saga of the 5-judge panels of the Supreme Court

One of the consequences of the controversial changes of the judiciary laws was the "saga" of the 5-judge panels in the criminal law section of the High Court of Cassation and Justice (HCCJ), which are competent to rule on appeals against the Supreme Court's decisions pronounced as first instance. The matter at stake was the composition of the panels, a procedural step which could influence, if irregular, the outcome of important high-level corruption criminal cases against politicians. The changes brought in 2018 to the law on the organization of the judiciary required the draw of all members of the panels, whereas the current practice was the draw of only four members, with the fifth appointed *ex officio* according to a decision from 2014 of the HCCJ Ruling Board. The designation of the panels is made at the beginning of each calendar year by a draw made by the president of the HCCJ. This rule was maintained in 2018 despite the entry into force of the new laws on the judiciary. The Prime Minister addressed the Constitutional Court with a request to solve a "legal conflict of a constitutional nature" between the Parliament and the HCCJ on grounds that the Supreme Court refused to immediately apply a provision of a new law. The case raises some preliminary questions: Why did the Government decide to address the Court on a procedural matter that should and could be invoked and solved by the judiciary itself? Why has the Constitutional Court been seized by the Prime Minister and not by the Parliament, since the so-called "conflict" was one between the latter and the HCCJ? This is not an inadmissibility cause per se, but the answer to these questions may be linked to some of the corruption cases pending at the 5-judge panels, one of which regards the president of the Chamber of Deputies.

In its attempt to evaluate the legal or constitutional nature of the conflict (and establish its competence to solve it), the Constitutional Court declared that, by solving this conflict, it practically substituted ordinary citizens, who would otherwise be compelled to seek justice in courts due to allegedly unlawful conduct of the Supreme Court. Whether this is the role of a constitutional court in a rule of law and separation-of-powers-based state remains to be debated. The Court grounded its decision of acknowledging a constitutional conflict on the fact that "when an authority, by its concrete actions, opposes the legislative policy of the Parliament, it institutionally positions itself against the constitutional order, whose reestablishment can be achieved either by ordinary courts or by the Constitutional Court. (…) In the present case, potential individual actions before ordinary courts, besides being a disproportionate burden for ordinary citizens, impose that such requests be solved by the same instance that generated the conflict, namely the HCCJ". This was the justification of the Constitutional Court's intervention and final decision that there existed a conflict between the HCCJ and the Parlia-

ment and that the Supreme Court should immediately proceed to draw all members of the new 5-judge panels (Decision no. 685/2018). The story of this decision will continue in 2019, as there were voices that claimed that all cases decided by the 5-judge panels, including those solved by final judgments, should be reopened by means of new legislation with retroactive effects.

III. OTHER CONSTITUTIONAL CASES

1. The annulment of the Internal Ruling of the Constitutional Court on separate & concurrent opinions by the Bucharest Court of Appeal

Last year's report mentioned a controversial Internal Ruling of the Constitutional Court which was meant to draw "the limits in which a constitutional judge may exercise his/her legal right to write a dissenting or concurring opinion". The Constitutional Court took the precaution to declare this Internal Ruling of a jurisdictional nature, thus insulating it from potential administrative review. However, an administrative court in Bucharest took a different view. Based on a claim made by a young lawyer who argued that for the professional training of barristers, dissenting or concurring opinions of judges of the Constitutional Court are highly relevant and have to be published in the Official Journal at the same time as the decision they refer to, the administrative section of the Bucharest Court of Appeal proceeded to an in-depth analysis of the legal nature of the Internal Ruling and declared it to be an administrative act that contradicts imperative provisions on the procedure of judicial review. Therefore, the Bucharest Court of Appeal annulled the Internal Ruling of the Constitutional Court on 20 June 2018 and obliged the constitutional jurisdiction to publish in the Official Journal of Romania the dissenting opinion that had been censored in 2017, which was done in Official Journal no. 1002/27 in November 2018. The issue made it to the Venice Commission's Report on Separate Opinions of Constitutional Courts, adopted at the 117th Plenary Session on 14-15 December 2018. (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)030-e)

2. Organisation and functioning of state institutions

From the rich case law related to the functioning of state institutions we have selected cases regarding the term of office of constitutional judges and incompatibilities and integrity rules for public officers.

In Decision no. 136/2018, the Court declared unconstitutional the provision of a draft law aimed at modifying its own organic Law no. 47/1992. Despite the express provision of Article 142(2) of the Constitution, which states that the nine-year term of office of judges at the Constitutional Court "cannot be prolonged or renewed", the impugned provision of the law allowed a person who replaces a constitutional judge that ends his/her term of office before nine years to be reappointed for a full-term office. The Court stated that such a possibility given by the law contravenes to the imperative prohibition of extension and renewal of the term of office of the members of the Constitutional Court.
Another set of cases regarded the rules of integrity for public officers and dignitaries, including parliamentarians. Thus, Parliament changed Law no. 161/2003 on transparency in the exercise of public offices and dignitaries and on the prevention and punishment of corruption, also known as the "law on integrity", by abrogating the incompatibility between the quality of an individual trade-owner and that of a public officer. This proposed change was declared unconstitutional on grounds of lack of clarity and predictability of the law, not on substantive grounds, in Decision no. 104/2018. The Court held that the legal regime of incompatibilities is regulated in several laws that are not clear or coherent and therefore the proposed change contravenes to the "quality of the law" requirements indirectly set by the Constitution when it provides the principle of the rule of law. A similar reasoning was developed in Decision no. 682/2018, which declared the unconstitutionality of the changes to Law no. 176/2010 of the National Integrity Agency. The impugned changes aimed at decreasing the statute of limitations period for actions against the incompatibility and conflict of interest offences committed by public officers when exercising their functions. However, the Court did not base its decision on the situation itself but on the erroneous wording used by the legislator.

These two latter decisions are worth mentioning also for the Court's interesting remarks on the "constitutional identity" of Romania in the context of EU membership. The creation of the National Integrity Agency and the reinforcement of integrity legislation and anti-corruption measures were conditions imposed on Romania for its accession to the European Union, with progress to be monitored via the Cooperation and Verification Mechanism created by Decision 2006/98/CE of the European Commission. In the mentioned cases, the author of the unconstitutionality complaints—in both cases, the President of Romania—invoked the fact that by mitigating disciplinary sanctions and rules against conflicts of interest and other corruption offences as well as by reducing the realm of incompatibilities, the Romanian legislator would be in breach of the obligations assumed through the act of accession. The Constitutional Court answered that "since the meaning of Decision 2006/928/CE establishing a Cooperation and Verification Mechanism has not been clarified by the Court of Justice of the European Union as regards its content, character and temporal limit and whether all these are circumscribed to the provisions of the Treaty of acces-

[1] The relevant provisions of Article 148 CR read as follows: '(1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in joint sitting of the Chamber of Deputies and the Senate, with a majority of two-thirds of the number of deputies and senators. (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations, shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.' (source: official translation available on the site of the Chamber of Deputies, at http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=6#t6c0s0sba148)

sion (...), the Decision cannot be considered as a reference norm within judicial review by virtue of Article 148 of the Constitution".[1] It therefore refused to interpret extensively the notion of "provisions of the act of accession" stipulated by the aforementioned constitutional text. As a result, the Court stated that when changing the "law on integrity", save for total abrogation, the legislator is within its margin of appreciation given by the "constitutional identity" corroborated with national sovereignty and with the international obligations assumed under the Constitution.

3. Highlights of the Rights-based Review

The law on national security was analysed by the Court from the point of view of the clarity of the provisions restricting the fundamental right to privacy through communication surveillance and interceptions. Thus, the provision that such interceptions can be made against any person, provided they are suspected of crimes that "seriously violate the rights and freedoms of Romanian citizens", was deemed unconstitutional for lack of clarity and predictability and for being too extensive by reference to the restricted rights: "Given the fact that the law does not make any distinction, but refers generally to serious violations of rights and freedoms of Romanian citizens, regardless their quality as individual or collective victim, leads to the idea that any offence, with or without criminal connotation, can be circumscribed to such a violation" (Decision no. 91/2018).

A very important decision for the protection of fundamental rights concerned the recognition of same-sex marriages concluded abroad in conjunction with the freedom of residence on Romanian territory of EU citizens and their family members. The case had started in 2015, but in 2016 the Constitutional Court decided to address a preliminary question to the Court of Justice of the European Union in order to clarify, *inter alia,* the term "spouse" within the meaning of Directive 2004/38, read in the light of Articles 7, 9, 21 and 45 of the EU Charter of Fundamental Rights, and to answer if the Member States are required "to grant the right of residence in its territory for a period longer than three months to the same-sex spouse of a Union citizen" (see CJEU, Case C 673/16, Coman & Hamilton, Judgment of the Court, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN).

Following the positive answer of the European Court, which stated that "Article 21(1) TFEU is to be interpreted as meaning that, in circumstances such as those of the main proceedings, a third-country national of the same sex as a Union citizen whose marriage to that citizen was concluded in a Member State in accordance with the law of that state has the right to reside in the territory of the Member State of which the Union citizen is a national for more than three months. That derived right of residence cannot be made subject to stricter conditions than those laid down in Article 7 of Directive 2004/38". The Romanian Constitutional Court rendered its own decision (no. 534/2018) and held that "the relationship of a same-sex couple is included in the meaning of the notions of 'private life' and 'family life', just like the relationship of a heterosexual couple, which makes applicable the fundamental right to private and family life protected by Article 7 of the Charter of Fundamental Rights of the EU, by Article 8 of the European Convention on Human Rights and by Article 26 of the Romanian Constitution". Thus, the right of these persons to have their marriages concluded abroad be recognised for the purpose of granting permanent residence cannot be restricted by Romanian authorities, and the Court interpreted the impugned Civil Code article to be constitutional only insofar as it allows the right of residence on Romanian territory to the spouses in same-sex marriages concluded in a EU Member State.

IV. LOOKING AHEAD TO 2019

Some of the evolutions presented in 2018 will remain on the agenda during 2019 as well, particularly the large-scale reform of the judicial system, which goes well beyond the three laws on its organisation and functioning or criminal codes, and encompasses the still ongoing saga of the 5-judge panels at the Supreme Court and the recurrent issue of amnesty meant to absolve some politicians of criminal responsibility.

Relations within the executive will most probably remain tense, and this will also be noticed at the European Union since Romania will take over the rotating presidency of the EU Council as of 1 January 2019.

In addition, in June 2019 the Constitutional Court will see its composition renewed with three judges, one to be appointed by the President and two to be appointed by the two houses of Parliament.

Presidential elections are scheduled for December 2019, and the incumbent President has already announced his intention to run for office. According to most polls, he is favoured by the majority of voters.

V. FURTHER READING

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Russia

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I. INTRODUCTION

The 25th anniversary of the Russian Constitution was celebrated in December 2018. This is an opportunity to reflect both on the characteristics and 'solidity' of the Russian constitutional system and the role of its Constitutional Court, originally introduced on December 15, 1990. Between 1991 and 1993, the Constitutional Court acted within a constitutional framework and with competences that were different from its current ones. Furthermore, it demonstrated a more respectful attitude towards parliament. The role it plays within the context of the 1993 Constitution is different, especially in the new political era which started between the end of the 1990s and the beginning of the 2000s.

Since then, the Constitutional Court has experienced a not entirely positive evolution, considering both legislative limitations and trends in jurisprudence. In this regard, the Court has shown a rather obsequious attitude towards the policies of the executive, such as its legitimizing the Chechen war and the incorporation of Crimea, and its favouring the clash with the Court of Strasbourg in politically sensitive matters affecting important public interests, e.g., the Yukos case. A similar tendency can be observed in the case law on political rights, where the Court upheld the legislative restrictions on freedom of assembly and association while adopting a more assertive stance in economic and social rights, especially given the reduction of the latter as the Soviet welfare state disappeared.

In evaluating the context in which the Court has been operating over the past 25 years, we can observe the 'extraneousness' to the Russian legal system of a more considered approach to constitutional justice, working as a counterbalance to political power. This is evidenced by the supportive (or silent) behaviour of this institution when facing politically sensitive issues. At the same time, other courts and public authorities continue to ignore the constitutional case law. The overall authority of the Court is not comparable with that of its counterparts in Western countries. Despite this, or perhaps precisely because of it, it was decided to place on this Court the burden of responsibility to 'defuse' the rulings of the European Court of Human Rights that are unacceptable to the Russian executive.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

With regard to constitutional developments, the situation fluctuates between constitutional 'stagnation' and political calls for limited constitutional changes. Vyacheslav Volodin, the speaker of the State Duma and a prominent exponent of the party 'United Russia', has recommended a few constitutional changes.[1] He did not specify the content, but it is assumed that they are to legitimize the immediate re-election of the incumbent president at the end of his fourth non-consecutive term. Putin pretends indifference towards these initiatives, accepting that the modification of the fundamental law is not taboo and should be widely discussed within society.[2] In this climate, Valery Zorkin, President of the Constitutional Court, in a long interview given in October to the government newspaper *Rossijskaya Gazeta,*[3] put forward his po-

[1] Speech delivered at the December 25, 2018, celebration of the 25th anniversary of the Russian Constitution.

[2] Press conference, 20 December 2018: www.kremlin.ru/events/president/news/59455.

sition on the subject, admitting the possibility of minor or very specific changes to the Constitution. Zorkin made a number of philosophical observations around the concept of constitutional identity and the values underlying the Russian Constitution, which in his mind counterbalance the 'moral degeneration' being brought about by globalization. This is a trend that has been emerging from his speeches in the last few years, one which urges a 'nationalist' and conservative stance against Western criticism of Russia. Nevertheless, in the interview there were critical references to the current configuration of power in Russia.

Firstly, Zorkin advised caution regarding the many calls from all sides for 'cardinal' constitutional changes. At the same time, he recognized the flaws of the Constitution: 'the absence of appropriate checks and balances, a preference for executive power, lack of clarity over distribution of powers of the President and the Government, as well as over the competences of the presidential administration and the powers of attorney'. How such significant defects of the power architecture could be remedied with limited but specific changes is not clear, but this is what Zorkin has proposed. The president of the Court also suggested using the 'living Constitution' doctrine to interpret the text in terms of the socio-political realities of the day. The Constitutional Court uses this doctrine in its interpretation of the Constitution, thus avoiding subjecting the text to disruptive changes that would undermine its potential for 'social integration'. Within the international context, the Constitution is a very important factor 'to support and strengthen national identity, justified by the historical, socio-cultural and geopolitical peculiarities of Russia's development'.

Speaking on behalf of the Court, Zorkin supported a proposition that had been gaining popularity among Russian intellectuals as well as the political elite. The idea was that in highlighting traditional national peculiarities, it is necessary to reconcile the liberal-individualistic legal approach 'today dominant in theory and in world practice' with that of social solidarity. This legal approach 'to the maximum extent corresponds to the mentality of the people of Russia, to its legal and moral conscience'. According to Zorkin, the best solution would be 'to merge the popular collectivism with a competitive economic and political environment'.

As inferred from the petitions to the Constitutional Court, citizens are very worried about socio-economic problems, in particular the precarious protection of social rights. They were and are deeply concerned by social inequalities, and fatigued from three decades of reform much exacerbated by Western sanctions. This is an important aspect that cannot be ignored: many of today's socio-economic difficulties derive from the unbalanced privatization of state assets in the 1990s, thus leading to an unequal distribution of wealth. Given Russian cultural traditions (the 'community' peasant and the Soviet communist past), it is understandable why 30 years following market reforms there is an overwhelming desire to reject the individualistic idea of a lawless market as well as the inequalities caused by the concentration of public goods in the hands of very few. The same Constitutional Court is vigorous in protecting social and economic rights, especially those excluded from the privatization of assets of the former Soviet state.

In the last part of the interview, Zorkin focused on another subject that has become very popular in Russian legal doctrine in recent years, namely that of 'constitutional identity', which according to the judge is represented by the feeling the citizens experience by belonging to the same plurinational people who are united by 'the common destiny on their own land' (…preamble from the Constitution).

In some respects, this identity can also include a European dimension (a sort of 'regional' identity); in fact, however, it goes against a pan-European vision of shared legal values. At government level, Russian identity is the attempt to counter the erosion of national sovereignty and strengthen the constitutional identity of the state. According to Zorkin, citizens of the nation states are intolerant of supranational regulations as the democratic deficit of supranational bodies becomes increasingly evident. In this, he included international organizations for the protection of rights to which Russia adheres: 'we need to highlight the democratic deficit of supranational bodies for the protection of human rights, including the European Court of Human Rights'.

This last statement brings to mind the fact that the clash between the Russian Constitutional Court and the European Court of Human Rights began as far back as 2010. From that point on, the Russian Constitutional Court and parliament have repeatedly refused to adhere to the requirements of the European Court of Human Rights in terms of both individual and general measures to be adopted (famous examples are the *Markin, Anchugov & Gladkov* and *Yukos* cases). Over time, the scenario changed from a 'simple' controversy about the relationship between the jurisprudence of the two courts (and therefore between the national constitution and international treaties on human rights) and became a very complex debate about 'sovereign' countries, where the term sovereignism has become synonymous with 'authoritarianism'.

The position of the Constitutional Court is clear in asserting the unenforceability of the judgments of the ECtHR by resorting to rather convoluted legal reasoning. In fact, it does not challenge the European Convention itself, but rather its 'evolutionary' interpretation by the Court of Strasbourg. The Treaty was considered to be consistent with the Russian Constitution at the time of its signing and ratification.

[3] *Bukva i dukh Konstitutsii (*The letter and the spirit of the Constitution), 9.10.2018, www.rg.ru/2018/10/09/zorkin-nedostatki-v-konstitucii-mozhno-ustranit-to-chechnymi-izmeneniiami.html.

III. CONSTITUTIONAL CASES

1. General trends

As highlighted above, in recent years the Russian Constitutional Court has not addressed significant political issues, focusing instead on the protection of individual rights, especially in social and economic spheres. In fact, individual citizen petitions are predominant. In 2018, the Court issued 47 judgments and 3,489 ordinances. The majority of applicants were private citizens (including one foreigner from Vietnam). Other applicants included an association, a regional section of a political party, joint stock or limited liability companies and some courts. On only two occasions have regional public institutions resorted to the Court. The laws challenged were mostly federal (the most disputed being the statute on the status of the military) and there were only two cases that examined the laws of subnational units. In 18 cases, the disputed provisions were declared totally or partially unconstitutional. The most controversial case in 2018 was that of the internal border between the Republics of Inguscetia and Chechnya. The remaining cases concerned social rights (employment, pensions, assistance to victims of Chernobyl), economic rights (taxes), the status of the military and foreigners.

2. Review of the constitutionality of the Law of the Republic of Ingushetia: 'On Approval of the Agreement on Establishment of a Border between the Republic of Ingushetia and the Chechen Republic and the Agreement on Establishment of a Border between the Republic of Ingushetia and the Chechen Republic'

In its judgment of December 6, 2018, the Russian Constitutional Court was asked to resolve a rather thorny issue, namely the legitimacy of the agreement, reached following 26 years of negotiations between the (internal) Republics of Ingushetia and Chechnya,[4] that established an administrative border. During the Soviet period (from 1934), Chechnya and Ingushetia were part of a single 'Chechen-Ingush autonomous Soviet Socialist Republic'. Since their birth as two separate republics, which occured in 1992,[5] the administrative border has never been formally agreed to until the recent accord of 26 September 2018, promptly ratified by the parliaments of both republics. The agreement provoked many tensions and protests in Inguscetia, whose population felt itself disadvantaged. In fact they claimed that the agreement implied not a simple exchange of land[6] but instead meant the transfer to Chechnya of significant ancestral burial sites. There are political and economic motivations behind these ancestral claims, which are deeply felt by the Russian Caucasus, itself a powder keg on the verge of conflict. Among them are firstly that the territories ceded to Chechnya include oil fields (which should not be an economic advantage for Chechnya since natural resources fall under federal ownership), and secondly and most importantly, that the population of Ingushetia does not lose its administrative autonomy by being reabsorbed by the Chechen Republic, whose leader Kadyrov is a loyalist ally of the Kremlin.

Regarding the legal aspects of the matter, the Constitutional Court trivialized the dispute by claiming that the agreement was purely formal and did not change the existing border. However, the issue is more complex, and the Court's decision was both superficial from the point of view of legal arguments as well as hasty in that it ruled in record time, no doubt responding to civic unrest.

The Constitutional Court of Ingushetia had declared on October 30, 2018, at the request of a group of local deputies, that the agreement was not consistent with the Constitution of the Republic, arguing that it should have been subject to a referendum. Furthermore, the standing orders of the regional assembly would have been violated. The Russian Constitutional Court instead issued a rather Solomonian decision. Although this was necessary to put an end to long and complex negotiations, there are many contradictory aspects from the point of view of legal reasoning. First of all, the Court underlined a difference between the initial 'contours' of the border and its 'modification'. In the modifications to the border, both the Federation and its subjects should have been involved, especially the Council of the Federation and the local population. However, in this discussion, according to the Court, the main question was the definition of the 'original' border. Consequently, the procedures followed to ratify the agreement, i.e., a simple parliamentary majority, were legitimate. There had been no modification of the municipalities' contours, therefore no referendum was required. Furthermore, the subject of the contours was a federal constitutional competence, not a regional or local one.

The emphasis on distinguishing between tracing the original contours and modifying them seems to be based on weak legal arguments and is clearly aimed at avoiding breaking a fragile agreement. In fact, the border had existed for the last 26 years prior to the 2018 agreement, which *de facto* changed it, partly seeking to recover territory that had been taken from Chechnya. Furthermore, the procedure for tracing the border was not clear and the deadlines indicated by federal legislation had long since expired. It also seems quite ironic that the procedure for the modification of the border ended up be-

[4] At the request of the Head of the Republic of Inguscetia. The applicant asked for confirmation of the legitimacy of the act despite the decision of the Constitutional Court of Ingushetia.

[5] During the two Chechen wars in the 1990s, Ingushetia chose to remain part of Russia while Chechnya sought independence. Following these post-Soviet conflicts, the leaders of the two republics signed agreements about the contours of the border that provided for the attribution of those areas that are currently being disputed to Ingushetia. The absence of ratification of this agreement by either party fostered a climate of tension caused by reciprocal claims. The latest protests of Ingushetia follow another historical case involving their nation, namely the war between Ingushetia and North Ossetia for the control of some border territories. Also in this case, Ingushetia had to renounce the reassignment of its historical territory in addition to seeing the local Ingush population subject to a real ethnic cleansing.

[6] The agreement reassigned a mountainous and uninhabited area on the border, the Chechen district of Nadterechnyj, to Ingushetia. In exchange, an area of the Ingush district of Malgobyeksky was ceded to Chechnya (Chechnya acquired about 26,000 hectares of land while ceding only 1,000 to Inguschetia). www.eng.kavkaz-uzel.eu/articles/44880.

ing far more draconian than the one used for its original creation.

With regard to the inconsistency of the republic's laws with its Constitution, the Russian Constitutional Court, while admitting that it was not competent to settle this conflict, considered that the judgment of the Court of the Republic was not executable. It cited two reasons: first, the aforementioned features of federal constitutional law, and second, the inadmissibility of the appeal by local deputies for failing to meet the minimum number required.

Among the most obscure points of the decision is one concerning the violation of the standing orders of the republican assembly. Given the considerations made around the adoption of federal laws, the Russian Constitutional Court judged as legitimate a law adopted when 'fundamental procedural provisions are respected', notwithstanding 'minor' violations of parliamentary standing orders (three readings, secret vote, etc.).

Finally, the federal Constitutional Court claimed that the regional Constitutional Court could not examine a law ratifying an agreement since its proper role was to examine agreements before they enter into force, not to ajudicate on those already in force. However, it is worth noting that this is precisely what the federal Court did in 2015 when it examined the constitutionality of the law of ratification of the ECHR, and therefore the ECHR itself, at a time when the Accession Treaty was already in force.

3. Review of the constitutionality of Section 15 of Article 239 of the Code of Administrative Judicial Proceedings of the Russian Federation in connection with a complaint of the regional section of the political party 'Fair Russia' in the city of Saint Petersburg

In its judgment of November 15, 2018, the Court granted the regional section of a political party, but not its individual candidates, the right to challenge the violation of the right to register and participate in elections. The regional party list failed to be registered due to gross misconduct by a member of the electoral commission. This gross and criminally prosecutable misconduct, forgiven by subsequent amnesty, amounted to the appellant being delayed beyond the deadline for registering the party list and thus from taking part in the elections.

The challenged provisions allow an administrative appeal against the decisions of electoral commissions for a long series of applicants excluding unregistered candidates. Political parties can only appeal a formal decision by an electoral commission that refuses a party's registration, which was not the case in this event.

The electoral legislation and the Code of Administrative Judicial Proceedings of the Russian Federation do not provide a judicial remedy against the behavior of the members of electoral commissions who commit crimes and are subsequently forgiven by amnesty. The Court enabled political parties to challenge electoral commission decisions detrimental to the electoral rights of the party and its unregistered candidates on whose behalf the party must appeal. The Court therefore considered that 'The termination of the criminal prosecution of the official of the electoral commission for rehabilitation reasons makes unresolved the question (dispute) concerning whether the candidates or lists presented by the electoral associations were not registered precisely following the unlawful action of this official. In this case, the electoral association must be granted the right to appeal, even after the expiry of the deadline provided for by Article 240, Section 3 of the Code of Administrative Judicial Proceedings. This would be an administrative appeal asking to repeal the election commission's certification of the election results'. According to the Court, this is the best way to assess how violations of electoral legislation affected the free expression of the will of voters and the objective evaluation of the vote's results. At the same time, compensation mechanisms to reinstate the violated rights could be enforced.

What is astonishing in this decision is the reference to an international act concerning electoral rights that was outside the framework of the Council of Europe or OSCE, of which Russia is also a signatory, but within that of the Community of Independent States: the CIS Convention on the Standards of Democratic Elections.

IV. LOOKING AHEAD

Constitutional challenges in the coming years could include, as stated above, 'limited' constitutional amendments very likely related to the mandates of the head of state. But the risk of further 'sovereign' closures at a political and constitutional level are far more worrying. Such attitudes, endorsed by the Constitutional Court, may lead Russia even further away from the standards of the rest of Europe.

The failure of the Constitutional Court is a product of the environment in which it operates, characterized by a general weakening of the judiciary as evidenced by the elimination of the Higher Court of Arbitration. We would not be astonished either by the possible suppression of the Constitutional Court and the transfer of its competences to a Supreme Court chamber (as proposed in some of the constitutional projects in 1993) or by Russia's exit from the ECHR (as suggested by prominent Russian politicians). However, despite the difficulties encountered by the Constitutional Court in gaining authority in the country and the increasing tensions between Russia and the Council of Europe, it would be inappropriate to give up on such important defenders of the rule of law. Such a move would signify a departure from the European culture of fundamental rights in favour of a conservative Russian-style identity, one which hides liberal and popular (as opposed to populist) roots that are still present in the culture of Russia and whose citizens feel European.

V. FURTHER READING

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Serbia

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I. INTRODUCTION

In 2018, Serbia kept its proclamatory EU membership-oriented policy, but only four negotiation chapters were opened (vs. six in 2017): Chapter 13–Fisheries; Chapter 17–Economic and Monetary Policy; Chapter 18–Statistics; and Chapter 33–Financial and Budgetary Provisions. As was the case in numerous previous reports, the latest European Commission's Report on Serbia (April 2018) most often used the expressions 'is moderately prepared' (for example, in the area of public administration reform) and 'has some level of preparation' (indicated mostly for the judicial system), phrases of the EU bureaucratic jargon most often used when a country's progress is not satisfactory. One of the most positive developments was the November 2018 adoption of the Law on Free Legal Aid, but it remains to be seen how it will be implemented. In November, the Government also submitted to the National Assembly the proposition (initiative) for the adoption of constitutional changes, based on the amendments to the Constitution (fourth draft version) previously elaborated by the Ministry of Justice. Numerous controversies remain regarding the content of these draft amendments, and they will be more thoroughly examined in Chapter II. In 2018, the Constitutional Court adopted 708 various decisions, the majority of which (670) concerned constitutional complaints regarding issues such as the violation of the right to a trial in a reasonable time or the violation of the right to freedom and security. The Court also examined the constitutionality and/or legality of a certain number of legislative and regulatory acts. Some exemplary constitutional cases will be examined in Chapter III. Finally, it is not difficult to estimate that the most important issues in 2019 will remain modifications to the Constitution and strengthening the independence of the judiciary.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As was the case in 2017,[1] the ongoing procedure for the adoption of constitutional amendments represented the quintessence of constitutional developments during the entire year 2018. On November 30, the Government finally submitted to the National Assembly (NA) the proposition (initiative) for the adoption of constitutional changes.[2] This proposition was the result of the fourth draft version of constitutional amendments,[3] which, according to the Ministry of justice (MJ), were improved by the comments of legal experts and practitioners. In any case, the next procedural step[4] should be the ap-

[1] See *2017 Global Review of Constitutional Law,* I-CONnect-Clough Center 2018, Report on Serbia, p. 240-243.

[2] The term 'constitutional changes' is used because the Serbian Constitution makes no mention of the term 'amendment', but only the proposition (initiative) for constitutional changes (Art. 203-1). However, the entity submitting the initiative (according to Art. 203-1, it can be one-third of the MPs, the President of the Republic, the Government or 150.000 citizens) is entitled to motivate its initiative, therefore suggesting the content of the proposed changes.

[3] For the fourth and latest version of the constitutional amendments elaborated by the Ministry of Justice (in English), <https://www.mpravde.gov.rs/files/Pre%C4%8Di%C5%A1%C4%87en%20finalni%20tekst%20amandmana%20na%20engleskom%2012.10.docx>, accessed 26 January 2019.

[4] Art. 203 of the Constitution provides a complex procedure for the adoption of constitutional changes; this procedure includes five major phases: 1) adoption of the initiative for constitutional changes; 2) elaboration of the act on constitutional changes; 3) adoption of this act in the NA by 2/3 majority, potentially followed by 4) referendum (obligatory or not) and 5) proclamation of the act on constitutional changes.

proval of the NA, necessitating a two-thirds majority, regarding adoption of the initiative for constitutional changes. The NA is not formally tied by the content of the proposed amendments, given that it is formally entitled to autonomously elaborate the act comprising constitutional amendments (Art. 203-5 of the Constitution) once it adopts the initiative for constitutional changes (Art. 203-3). However, the stable governmental majority in the NA and the strong control of the ruling political party over parliamentary processes, as well as the overall absence of the political culture favourable to the independence of the parliament and the separation of powers, would, most probably, lead to the NA's decision to follow the fourth draft version of constitutional amendments elaborated by the MJ, at least when it comes to the most important provisions. Consequently, the focus of this chapter will be on draft constitutional amendments as they were formulated by the MJ. Numerous controversies remain regarding the content of these draft amendments, out of which the following three are giving rise to major concerns: 1) the composition of the High Judicial Council; 2) conditions for the first appointment of judges; and 3) provisions on the relations of the three branches of power.

1) According to draft constitutional amendment XIV, the High Judicial Council (HJC) 'shall be composed of ten members: five judges elected by the judges and five prominent lawyers elected by the National Assembly'.[5] *Primo,* this provision allows the substantial influence of the NA on the HJC and, consequently, on the appointment of judges, diminishing the existing level of guarantees for the independence of the judiciary. *Secundo,* the criteria for 'a prominent lawyer' are inexistent and leave considerable room for interpretation, potentially leading to purely political appointments, a situation that initially was one of the main motives of the intended constitutional changes. As some independent associations of judges have pointed out, it is possible that one half of the HJC would be 'an interconnected group of like-minded people under the influence of the ruling majority'.[6] *Tertio,* even the provisions related to the election of the members of the HJC do not guarantee the independence of the judiciary—if two-thirds majority in the NA is not obtained, a five-member committee elects the members of the HJC. Three members of this committee are not judges: the president of the NA, Chief Public Prosecutor and Ombudsman.

2) According to draft constitutional amendment VII, a person to be elected as a judge for the first time 'may be elected only if he or she has completed training at the Judicial Academy'. In the context of weak constitutional and legal guarantees of the independence of the Judicial Academy, this well-intended provision—officially aimed at raising the competences of newly elected judges—could jeopardize the independence of the judiciary.

3) Finally, the draft constitutional amendments, in some important aspects, contain unclear and potentially worrying provisions regarding the relationship between the three branches of power. For example, the first draft amendment provides that this relationship be based on 'mutual control' (*proveravanje* in Serbian) while the English translation is 'checks and balances'.[7] Apart from the fact that the translation is inadequate, the noun (in Serbian) used in the draft amendment is very unusual in national constitutional terminology and inappropriate to describe the relationship between the three branches of power that should lead to their separation. Finally, some experts[8] have also noticed that this term only appeared in the fourth draft version of the constitutional amendments and was not submitted to the Venice Commission, as was the case of previous versions. In conclusion, one can only reiterate the assessment given in our report for 2017—the path before the initiated constitutional changes in Serbia is still long and unpredictable.

III. CONSTITUTIONAL CASES

In 2018, the Constitutional Court of Serbia (CCS) adopted 708 various decisions, out of which the overwhelming majority (670) concerned constitutional complaints, while other decisions treated the issues of the constitutionality and/or legality of laws and general acts adopted by the National Assembly (11) and the constitutionality or legality of other general acts (27), either by-laws or acts adopted by the authorities of local self-governance. Within the group of constitutional complaints, numerous decisions were taken regarding the violation of the right to a trial in a reasonable time (Art. 32 of the Constitution), while some CCS decisions treated the issue of violation of other rights, including the right on freedom and security (Art. 27 of the Constitution). Concerning the issue of the constitutionality of laws, in one of its most interesting decisions, the CCS examined the amendments to the Law on Copyright and Related Rights. Finally, within the group of CCS decisions on the constitutionality or legality of other general acts, 17 out of 27 rulings concerned various legal acts of cities and municipalities. In this chapter analysis will be made on the CCS decisions regarding 1) two constitutional complaints, 2) the constitutionality of one law and 3) the constitutionality and legality of one act adopted by the authorities of local self-governance.

[5] See note 3.

[6] Statement of the Judges' Association of Serbia, <http://www.sudije.rs/index.php/en/aktuelnosti/constitution/435-press-release-regarding-draft-constitutional-amendments.html>, accessed 28 January 2019.

[7] See <https://www.mpravde.gov.rs/files/Ustavni%20amandmani%20konacan%20tekst%20%2011.10.18.docx>, accessed 4 February 2019.

[8] See <https://www.danas.rs/drustvo/sporno-medjusobno-proveravanje/>, accessed 6 February 2019.

1. Case Už-5447/2016 – Constitutional complaint for violation of the right to a trial in a reasonable time: Judicial review

In May 2002 before the First Municipal Court in Belgrade, plaintiff D.S. initiated civil proceedings against his employer for wrongful dismissal, asking its annulation and his return to work. Two successive decisions of the First Municipal Court non-favourable to the plaintiff were annulled by the hierarchically superior Belgrade District Court. In April 2014, the lower court adopted the plaintiff's request and annulled the employer's decision, but this time the employer attacked it. In March 2016, after a lengthy procedure before three judicial instances, the Supreme Court of Cassation finally gave reason to the plaintiff. Considering that the entire judicial procedure was excessively lengthy, in July 2016 the plaintiff filed a constitutional complaint before the CCS for violation of the right to a trial in a reasonable time. Using the general formulations that are systematically reiterated in all similar cases, in its decision of 27 September 2018, the CCS first indicated that the reasonable duration of judicial process is 'a relative category and has to be estimated separately in every case, according to its specific circumstances'. More specifically, the CCS identified four relevant concrete elements to assess whether a trial is accomplished in a reasonable time: 1) the complexity of factual and legal questions in the concrete case, 2) the behaviour of the plaintiff as a party in the initial trial for which the plaintiff claims that it was not accomplished in a reasonable time, 3) decisions of the court during the proceedings and 4) the nature of the demand and its importance for the plaintiff. Moreover, the CCS underlined that the primary obligation of every court is to treat every case without protraction, to react timely and efficiently and to take all necessary measures in order to bring the proceedings to their end. When the CCS applied all those general principles to the concrete case, everything led to the conclusion that the plaintiff's right to a trial in a reasonable time was violated. The overall duration of 14 years for a civil proceeding on a labour-related dispute is, undoubtedly, unreasonably long, not only according to the criteria established in the internal legal system but also pursuant to the criteria of international organisations for the protection of human rights. In addition, the provisions of Serbian national legislation regarding court proceedings demand *expressis verbis* that all labour-related disputes be treated as urgent, which was blatantly disregarded in the plaintiff's case. Every annulation of the court's ruling by a superior judicial instance required additional time, while the repeated assessment by the lower court can, by itself, reveal some serious deficiencies in the national legal system. It is particularly important that, in this particular issue, the CCS refers to two decisions of the European Court of Human Rights (*Pavlyulynets vs. Ukraine* and *Cvetković vs. Serbia*). Consequently, by this decision, through its motivation and thanks to the reference to the ECHR's case law, the CCS has created a series of relatively precise and generally applicable standards for the assessment of a reasonable duration of a trial before all national judicial instances.

2. Case Už-3366/2016 – Constitutional complaint for violation of the right on freedom and security: Judicial review

On 28 March 2016, S.M. was arrested by the police in the city of Leskovac under the accusation of violent conduct; he was officially informed of the fact that he was under arrest more than 14 hours later, and was brought before the public prosecutor on March 29, more than 24 hours after being forcefully withheld. In April 2016, D.S. filed a constitutional complaint before the CCS, claiming that the fact he was detained in the local police station for more than 14 hours and, during that time, was not brought before the public prosecutor represents the violation of Art. 291 of the Criminal Procedure Code (CPC). According to the plaintiff, the police officers had been entitled to forcefully withhold him as long as they did (and up to 48 hours) only in compliance with Art. 294 CPC, which requires the approval of the public prosecutor. In view of all these circumstances, the plaintiff considers that his constitutional right (Art. 27 of the Constitution) on freedom and security was violated. In its decision of 8 November 2018, the CCS underlined that, from the aspect of the protection of human rights, the right to personal freedom is one of the fundamental rights guaranteed by the Constitution. However, this right is not absolute, and the act of arrest and detention represents a particularly sensitive measure of the lawful limitation of the right to personal freedom. This is why Art. 27 of the Constitution allows the arrest only for reasons and according to procedure specifically provided for by the law. At this point, the CCS specified that, for an arrest to be lawful, two conditions have to be cumulatively fulfilled: 1) the arrest has to be made for a reason specifically indicated by the law, and 2) the process of the arrest has to be carried out according to the procedural rules provided for by the law. According to the CCS, the motivation of this constitutional guarantee is to prevent arbitrary and unlawful arrest and detention. Further reasoning of the CCS was based on a separate and successive examination of the two conditions necessary for a lawful arrest. When it comes to the first condition, the CCS established that the plaintiff was arrested because there was a reasonable doubt that he committed the criminal offence of violent conduct (Art. 344-2 of the Criminal Code); moreover, the plaintiff was duly informed about his rights. In view of these circumstances, the CCS established that the police officers were acting within their authority and that the material conditions for the arrest had been met. On the other hand, the CCS had to examine more thoroughly the question whether the plaintiff was arrested and detained according to procedural rules. In this respect, the CCS observed two violations of the provisions of the CPC. Firstly, the police authorities had not issued to the plaintiff the formal decision on detention, in spite of the fact that he was *de facto* detained, and that is in clear violation of Art. 294-2 of the CPC. Secondly, the police officers held the hearing of the plaintiff in violation of procedural rules. As the CCS pointed out, the formal hearing of an accused person can only be effectuated by the public prosecutor, and not by the police (Art. 289 and 291-1 of the CPC). Moreover, even when the police officers are entitled to collect information from a person regarding whom exist the elements of doubt that he/she is a perpetrator of a criminal offence, the hearing can only be done in his/her capacity as a person charged with an offence,

with due information on his/her rights, and especially the right to have a defendant during the hearing (Art. 68-1 of the CPC). On the basis of all the established violations of the procedure of plaintiff's arrest and detention, the CCS came to the conclusion that his constitutional right on freedom and security was violated.

3. Case IUz-41/2016 – Constitutionality of the law amending the Law on Copyright and Related Rights

The examination of the constitutionality and/or legality of laws and other general acts adopted by the NA represents a relatively small, but very important portion of the CCS's work. One of the most interesting cases the Court treated in 2018 concerned the conformity with the Constitution and ratified international treaties of the law amending the Law on Copyright and Related Rights, adopted by the NA on December 15, 2012. In substance, the law introduced a new Art. 171a, entitled 'The determination of the fee in the tariff for public communication of musical works, interpretations and phonograms'. The introduced article comprised three paragraphs, out of which three (para. 1, 2 and 5) were already declared unconstitutional in 2016 by the CCS. When it adopted this decision, the CCS formed a special, independent case regarding the two remaining paragraphs (3 and 4). They provided that the fee for public communication of musical works, interpretations and phonograms was not to be paid in craft shops (para. 3), a 'craft shop' being considered every independent craft store or other place where retail or service providing business is taking place, provided that the craftsman is selling his own products (or independently providing services) and that the taxes paid by this craft shop are determined as a lump sum (para. 4). In such a context, the main constitutional question was to determine whether the provision of para. 3 introduces the unlawful limitation of the right of author, interpreter or producer of a phonogram to allow or prohibit the public communication of their musical works or other related rights subject matters (interpretations and phonograms). Copyright and related rights—as key components of a wider category of intellectual property (IP) rights—represent the exclusive rights over intangible values, and they are guaranteed by two important international conventions ratified by Serbia: 1) the Berne Convention for the Protection of Literary and Artistic Works and 2) the WIPO (World Intellectual Property Organisation) Copyright Treaty (WCT). Both Art. 9-2 of the Berne Convention and Art. 10-1 of the WCT allow certain limitations of copyright and related rights, but it still remains unclear if the provision of national legislation meets the criteria for lawful limitation of these rights set by international conventions. Apart from a potential violation of a ratified international treaty, the other important constitutional question was to know whether the disputed provision violated the principle of the interdiction of unequal legal treatment of economic operators in the market (Art. 84-1 of the Constitution), given that the owners of craft shops would not be obliged to pay the fee for public communication of musical works, interpretations and phonograms while all other economic operators would still have to pay this fee. After thoroughly considering both international conventions and national constitutional and legal provisions, the CCS determined that the provisions of Art. 171a (para. 3 and 4) are not unconstitutional because the public communication of musical works, interpretations and phonograms in craft shops 'cannot be causally related with products or services offered by craftsmen to their customers (and that) it is not relevant for the overall amount of income of a craft shop',[9] especially given that 'the customers come to those shops to buy a specific product or service, and not to listen to the music'.[10] When it comes to the issue of the possible unequal legal treatment of economic operators in the market, the CCS estimated that the abolition of the obligation to pay the fee for public communication of musical works, interpretations and phonograms is 'actually allowing to put the persons who perform the same professional activity in the same position'.[11] In spite of the alleged economic motivation of its reasoning, this decision of the CCS is, to say the least, problematic both from the point of IP rights and of equality of economic operators. Copyright and related rights are exclusive property rights, and their limitations can only be introduced with meticulous observance of the principle *exceptiones sunt strictissimae interpretationis*. Moreover, the CCS's assessment that customers do not come to craft shops in order to listen to music is applicable to many other economic operators (restaurants, hotels, shopping malls) for which the obligation to pay the fee was not abolished. If the motivation of the newly introduced provision of the Law on Copyright and Related Rights was to stimulate the economic survival of small craft shops, the legislator could have found numerous other ways to achieve this objective without harming exclusive IP rights.

4. Case IUo-173/2017 – Constitutionality and legality of an act adopted by the authorities of local self-governance

In September 2013, the president of the municipality of Bečej in northern Serbia adopted a municipal regulation on the criteria and procedure for financial support to churches and religious communities. According to the provisions of the national law on churches and religious communities adopted in 2006, the competent central and local authorities are entitled: 1) to allocate in their budgets certain financial resources for the construction, maintenance and renovation of buildings used for religious purposes (Art. 32-6) and 2) in order to improve religious freedom and cultural activities, to provide direct grants to churches and religious communities for their cultural and scientific institutions and programs (Art. 44). Consequently, *rationae materiae,* the local self-governance was entitled to adopt an act regulating its financial support to churches and religious communities. However, the municipal regulation was not adopted according

[9] Chapter III of the CCS decision in Case IUz-41/2016 (translated by U.Ć.).

[10] Ibid.

[11] Chapter III of the CCS decision in Case IUz-41/2016 (translated by U.Ć.).

to the provisions of the national law on local self-governance, according to which only the municipal assembly is entitled to adopt local legislative and other general acts (Art. 32-1, 6). Given that the regulation in question was undoubtedly a general act, the president of the municipality was not entitled to adopt it; and since it disregarded the provision of the law on local self-governance, the local regulation was adopted in violation of the constitutional principle of the hierarchy of national legal acts (Art. 195-2 of the Constitution). The importance of this decision of the CCS does not reside only in the differentiation between the competences of the authorities of local self-governance, on the one hand, and the concrete entity entitled to adopt municipal regulations on the other; it is also an example for all other local authorities on how to perform their regulatory activities in a constitutional and legal manner.

IV. LOOKING AHEAD

The most important issues during the forthcoming months in Serbia will remain the potential adoption of the modifications to the Constitution (see Chapter II) and further reforms of the judiciary in the context of the EU membership negotiation process (Chapter 23 of the EU acquis). The European Commission's Report, published in April 2018,[12] underlined that Serbia should, in particular, 1) make significant progress in strengthening the independence of the judiciary and the autonomy of the prosecution, 2) ensure that the High Judicial Council and the State Prosecutorial Council can fully assume their roles and 3) adopt and implement a human resources strategy for the entire judiciary.[13] It still remains to be seen whether and how the Law on Free Legal Aid, adopted in November 2018, will be effectively implemented.

V. FURTHER READING

Adam Fagan and Pert Kopecký (eds), *The Routledge Handbook of East European Politics* (Routledge, 2018)

Ana Knežević Bojović, *Continuity and Discontinuity in Serbian Legislation and Practice* – Selected Aspects (Institute of Comparative Law, 2018)

András Baka, 'The European Court of Human Rights and the Central and Eastern European States' (2018) *East European Yearbook on Human Rights*

Günter Frankenberg, *Comparative Constitutional Studies – Between Magic and Deceit* (Edward Elgar, 2018)

[12] <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf > accessed 8 February 2018.

[13] Ibid, 13, accessed 8 February 2018.



Singapore

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I. INTRODUCTION

The year 2018 saw courts further grappling with difficult issues concerning constitutional interpretation. Constitutional changes to the elected presidency and the subsequent elections held under the terms of those changes continued to reverberate in a case that challenged the government's refusal to call for a by-election to replace the parliamentarian who became the current president. Furthermore, there were several important initiatives to change the law with potentially significant implications on constitutional rights as well as the separation and balance of powers in Singapore. Nonetheless, one interesting phenomenon to note is the increasing reliance on public consultation as part of the law-making process. This is evidenced by the public consultation on the amendments to the Films Act as well as the Select Committee on Deliberate Online Falsehoods. This follows a trend in the past years, particularly with the invitation to the public to submit representatives to the Constitutional Commission in 2016.[1] Presumably, such public consultations could serve not only as a 'crowd-sourcing' of ideas but also to play a legitimating role in the final legislative product.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

There were three major legislative developments in 2018 impacting constitutional law—amendments to the Films Act, changes to the Criminal Law (Temporary Provisions) Act (CLTPA), and a proposal to introduce legislation regulating 'fake news'. There were concerns that these changes would broaden executive powers, which could adversely impact freedom of speech and expression as well as restrict access to justice.

The amendments to the Films Act were introduced and passed in Parliament in 2018 following consultation with industry stakeholders and the public. The entire consultation process took more than a year. The Films Act provides a regulatory framework for the distribution, exhibition and possession of films in Singapore. It is a form of prior restraint as, under the Act, distributors and exhibitors of films are required to obtain a licence from the Info-communications Media Development Authority (IMDA) and all films have to be classified by a Board of Film Censors. The use of a licencing framework to regulate speech is not uncommon in Singapore. Such regulation is often justified as seeking to strike a balance between freedom of speech and broader public interests such as the maintenance of racial and reli-

[1] Jaclyn L Neo, Jack T Lee, Ho Jiayun & Makoto Hong, 'Singapore: The State of Liberal Democracy' in Richard Albert, Simon Drugda, Pietro Faraguna & David Landau (eds), *I·CONnect-Clough Center: 2017 Global Review of Constitutional Law* (I·CONnect 2018).

gious harmony, national security and public morality as well as the protection of the young and vulnerable.[2]

The current regime has been criticized for restricting speech, particularly political speech. Under the Act, 'party political films' are absolutely banned. A party political film is defined fairly broadly to refer to 'an advertisement made by or on behalf of any political party in Singapore or any body whose objects relate wholly or mainly to politics in Singapore, or any branch of such party or body' or 'which is made by any person and directed towards any political end in Singapore'. During a parliamentary debate on the proposed changes to the Films Act, the government defended the continuing ban on the basis that such films 'seek to sensationalise or distort serious issues to evoke emotional rather than logical debate based on facts'.[3]

There were important changes and clarifications for free speech protection. For instance, in the revised section 21 of the Films Act, it remains an offence to distribute and publicly exhibit unclassified films, but it is no longer an offence to merely *possess* unclassified films. Furthermore, the IMDA clarified that the section does not cover *private* viewings with family members and friends, though the question of whether a viewing is private or public is subject to a certain degree of judgment. Another important clarification is that, in response to the criticism that the scope of the Films Act may even cover the sharing of 'home' videos, the IMDA stated that 'the online distribution of content over the Internet where there is no physical copy of the content does not fall within the ambit of the Films Act.'[4]

The second major legislative development is the enactment of the Criminal Law (Temporary Provisions) (Amendment) Act 2018 (No 12 of 2018), which 'clarified' the scope of the government's powers to detain without trial and the scope of judicial review by the courts. The Criminal Law (Temporary Provisions) Act[5] (CLTPA) empowers the Minister for Home Affairs to issue a detention order of up to 12 months if he is satisfied that the person 'has been associated with activities of a criminal nature', and where 'it is necessary that the person be detained in the interests of public safety, peace and good order' without a criminal trial having been held. While termed 'temporary', the law has been in force since pre-independence days, as it has been legislatively renewed every five years with little change. On 6 February 2018, however, Parliament made two important amendments to the law. First, the Act now spells out in a new Fourth Schedule the activities that are regarded as 'activities of a criminal nature'. This amendment appears to have been prompted by the Court of Appeal's judgment in *Tan Seet Eng v Attorney-General*,[6] which we discussed in last year's report.[7] In this case, the Court had struck down detention orders on the basis that they fell outside the scope of the CLTPA. Following the amendment, the CLTPA now sets out that '[p]articipating in, or facilitating, any organised crime activity as defined in section 48(1) of the Organised Crime Act 2015 (Act 26 of 2015)' falls within the scope of the Act. This includes 'any activity […] carried out by a person in Singapore that amounts to a serious offence and—[…] is carried out in furtherance of the illegal purpose of a group which the person knows or has reasonable grounds to believe is an organised criminal group'.[8] The definition of an 'organised criminal group' in section 2(1) of the Organised Crime Act includes a group that seeks to obtain a financial or other material benefit from the commission of any act outside Singapore that, if it occurred in Singapore, would constitute a serious offence as defined under the Act.

Secondly, the CLTPA amendments inserted a finality clause to the Act. A new section 30(2) reads: 'Every decision of the Minister on a matter in subsection (1) is final'. The Law Minister explained that this provision seeks to clarify that the Court is not to scrutinize the evidential basis for detention under the CLTPA. However, he emphasized that the finality clause is not intended to oust judicial review of detentions on the well-established grounds of illegality, irrationality and procedural impropriety.[9] This clarification is important as there is an argument that ouster of judicial review would violate the judicial power-vesting clause in the Constitution of the Republic of Singapore ('the Constitution').[10] The substantive provisions of the amendment Act came into force on 1 January 2019.

The third major development is the convening of a Select Committee on Deliberate Online Falsehoods, which invited propos-

[2] Ministry of Communications and Information/Info-communications Media Development Authority, 'Closing Note to Public Consultation on Proposed Amendments to the Films Act' (IMDA, 20 February 2018) <www.imda.gov.sg/regulations-licensing-and-consultations/consultations/consultation-papers/2017/public-consultation-on-proposed-amendments-to-the-films-act> accessed 15 February 2019.

[3,4] Yuen Sin, 'Ban on party political films should stay: Chee Hong Tat', The Straits Times (Singapore, 22 March 2018) <www.straitstimes.com/politics/ban-on-party-political-films-should-stay-chee-hong-tat> accessed 15 February 2019.

[5] Cap 67, 2000 Rev Ed (CLTPA).

[6] [2016] 1 SLR 779.

[7] See Jaclyn L Neo, Jack T Lee, Ho Jiayun & Makoto Hong, 'Singapore: Developments in Singaporean Constitutional Law', in Richard Albert, Simon Drugda, Pietro Faraguna & David Landau (eds), I·*CONnect-Clough Center: 2016 Global Review of Constitutional Law* (I·CONnect 2017) 175-180.

[8] CLTPA, s 48(1)(a)(ii).

[9] K Shanmugam (Minister for Law), speech during the Second Reading of the Criminal Law (Temporary Provisions) (Amendment) Bill, Singapore Parliamentary Debates, Official Report (6 February 2018), vol 94.

[10] Constitution of the Republic of Singapore, Art. 93. See also the discussion of this point by the Court of Appeal in Per Ah Seng and another v Housing and Development Board and another [2016] 1 SLR 1020.

als and conducted public hearings over two weeks in March 2018. The Committee hearings became highly contentious at certain points, particularly in exchanges with Facebook executives[11] and a contrarian historian-*cum*-civil society activist.[12] Besides the fireworks, key issues raised included how to define 'fake news' or 'deliberate online falsehoods', which is the term preferred by the government, and whether retransmission of such deliberate online falsehoods would constitute an offense. There were also important discussions about who has the final say on defining something as a 'falsehood' and whether the government is in the best position to determine truth from falsehood. The role of technology in fostering and accelerating the transmission of fake news was also widely debated. Following the public consultation and hearings, the Committee proposed wide-ranging policy measures,[13] which will have to be drafted into legislation before being debated in Parliament. What is interesting is that these policy measures took into account representations from the public and adopted a holistic rather than a strictly legalistic approach. The Committee emphasized, for instance, the need to nurture an informed public and to encourage fact-checking as well as to promote social cohesion and trust. It further refined its proposals to state that the laws should be targeted at deliberate falsehoods. Fearful of election meddling, the Committee particularly stressed the need to safeguard the integrity of Singapore's elections, prevent companies from advertising on platforms deemed to be spreading online falsehoods and for the government to 'swiftly disrupt the spread and influence' of false information and impose criminal sanctions on those who spread them. These policy measures, if adopted by the government as law, are likely to have constitutional implications for freedom of speech and expression, though they may be justifiable in light of recent events around the world.

III. CONSTITUTIONAL CASES

Wong Souk Yee v Attorney-General: Group Representation Constituencies

The case of *Wong Souk Yee v Attorney-General* raises important interpretive issues, particularly in the relationship between the constitutional text and a later statutory text. In particular, it raises the issue of whether it is appropriate to 'update' the Constitution to take into account more specific text contained in a more recently enacted statute.[14] When Singapore's current President, Madam Halimah Yacob, resigned her seat in Parliament to contest the 2017 presidential election, which she won, a question was raised as to whether it was necessary for the government to call a by-election to fill her seat. Madam Halimah was a Member of Parliament representing a Group Representation Constituency (GRC) together with three other candidates. The applicant, who was a voter resident in Madam Halimah's GRC, applied to the High Court for mandatory orders that the remaining MPs in that GRC vacate their seats and that the Prime Minister advise the President to call a by-election for the whole GRC. This case of *Wong Souk Yee v Attorney-General*[15] turns on the interpretation of Article 49(1) of the Constitution and its application to the GRC system (as opposed to the single-member constituency). Article 49(1) of the Constitution provides that whenever the seat of an elected MP becomes vacant for any reason other than a dissolution of Parliament, the vacancy must be filled by election 'in the manner provided by or under any law relating to Parliamentary elections for the time being in force', namely the Parliamentary Elections Act[16] (PEA). The PEA, on the other hand, states that all elections (including by-elections) in a GRC are to be held on the basis of the number of candidates designated for that GRC by the President. Further, section 24(2A) of the PEA requires all the members of that GRC to have vacated their seats in Parliament before a writ may be issued for an election to fill any vacancy in it. The application of Article 49(1) to GRCs was unclear because the GRC scheme, which was introduced by Article 39A of the Constitution, did not exist when Article 49(1) was enacted.

At first instance, the High Court held that the applicant's interpretation was unworkable because there is no basis in law to compel the three remaining MPs to resign. The fact that a seat in a GRC has been vacated is neither a ground to disqualify the remaining MPs in the GRC under Article 45 of the Constitution nor a ground to compel the vacation of their seats under Article 46.[17] Instead, the Court accepted the respondent's interpretation by applying an *updating construction.* This rule of statutory construction posits that the Court may fill a gap in a statute where an amendment to another statute gives rise to any ambiguity or uncertainty in the interpretation of the first statute. The key requirement is that what is missing must be self-evident within the overall spirit of the legislation, and is needed to give effect to the legislative intent. Applied to the facts, the Court held that references to 'the seat of a Member' in Article 49(1) should be interpreted to mean 'the seats of all the members' in the case of a GRC so that Article 49(1) reflects the changes introduced by Article 39A. Alterna-

[11] See e.g., Siau Ming En, 'Lively exchange between select committee and tech companies' (Today Online, 23 March 2018) <www.todayonline.com/singapore/lively-exchange-between-select-committee-and-tech-companies> accessed 16 February 2019.

[12] See e.g., Tang See Kit, 'Select Committee concludes hearings on fake news after 8 sessions marked by tense ex-changes' (Channel News Asia, 29 March 2018) <www.channelnewsasia.com/news/singapore/select-committee-concludes-hearings-fake-news-tense-exchanges-10086868> accessed 16 February 2019.

[13] Parliament of Singapore, 'Report of the Select Committee on Deliberate Online Falsehood' (20 September 2018) <https://sprs.parl.gov.sg/selectcommittee/searchPage?from=20-9-2018&to=20-9-2018> accessed 16 February 2019; see also Faris Mokhtar, 'Select Committee proposes wide-ranging measures to counter online falsehoods, including new laws and criminal sanctions' (Today Online, 20 September 2018) <www.todayonline.com/singapore/select-committee-proposes-wide-ranging-measures-counter-online-falsehoods-including-new> accessed 14 February 2019.

[14] See e.g., Rosalind Dixon, 'Updating Constitutional Rules' [2009] *The Supreme Court Review* 319.

[15] [2018] SGHC 80.

[16] Cap 218, 2011 Rev Ed.

[17] *Wong Souk Yee* [23]-[26].

tively, a rectifying construction may be applied to correct Parliament's inadvertent omission to amend Article 49(1) by adding language similar to section 24(2A) of the PEA.

The application of the updating construction rule raises further important questions about the hierarchy of norms in Singapore. The Constitution is declared to be the supreme law of the land. It is not an ordinary statute. Therefore, an account needs to be provided as to why an amendment to statute (ordinary law) could 'update' the Constitution (higher/supreme law). Nonetheless, the High Court in *Wong Souk Yee* held that this construction of Article 49(1) furthers its purpose with respect to the GRCs. The Court held that as Article 39A requires elections in a GRC to be held on the basis of a group of candidates as designated by the President, it follows that the legislative purpose is for all elections (including by-elections) to be held on the basis of such number of candidates, and that no by-election needs to be held to fill any vacancy in a GRC unless all the MPs in that GRC have vacated their seats.[18]

Two alternative arguments by the applicant that the Court examined are worth noting. The first is that voters have an implied right under the Constitution to be represented by an elected MP until the dissolution of Parliament, and the second is that a by-election must be held because the right to vote is part of the basic structure of the Constitution. On the first alternative argument, the Court took the view that voters in Madam Halimah's GRC have not lost their right to be represented in Parliament. This is because voters in the GRC vote not for individual MPs but for a GRC team, which represents the GRC in Parliament. On the facts, Madam Halimah's GRC has continued to be represented in Parliament by the GRC team, albeit with one fewer parliamentarian. On the second alternative argument, the Court held that it was unnecessary to decide whether the basic structure doctrine is part of Singapore law because the applicant was not challenging the validity of a constitutional amendment.[19] The appeal on this decision was recently heard by the Court of Appeal, which reserved judgment.

Attorney-General v Wham Kwok Han Jolovan: Freedom of Speech

Another constitutional law case that came up in 2018 implicates the proper relationship between freedom of speech and the public interest protected under the offence of contempt of court. Freedom of speech is protected under Article 14 of the Constitution, which also contains express qualifications, one of which is that Parliament may pass laws providing against contempt of court. Prior to 2016, however, contempt of court was defined in common law. In 2016, Parliament passed the Administration of Justice (Protection) Act (AJPA),[20] which came into operation on 1 October 2017. The proper application and interpretation of this new Act came up for consideration in the case of *Attorney-General v Wham Kwok Han Jolovan.*[21] The respondents were charged under the new Act for the offence of contempt by scandalising the court. Under section 3(1)(a), a person commits a contempt of court if the person intentionally publishes any matter or does any act that 'imputes improper motives to or impugns the integrity, propriety or impartiality of any court' and 'poses a risk that public confidence in the administration of justice would be undermined'.

The respondents challenged the constitutional validity of section 3(1)(a) of the AJPA, with the key issue being whether that section is consistent with Article 14(1)(a) of the Constitution. The respondents argued that if the 'risk' mentioned in section 3(1)(a)(ii) includes a 'remote or fanciful possibility' that public confidence in the administration of justice would be undermined, then this provision would violate a Singapore citizen's right to freedom of speech and expression under Article 14 of the Constitution and is therefore void. This is because the 'real risk' test at common law represented the balance under Article 14 that the constitutional framers carefully struck between the right to freedom of speech and expression and the protection of public confidence in the administration of justice.[22] The Court rejected the constitutional challenge. It held that the new law fell within the limitation set out in the Constitution itself. It was therefore within Parliament's legislative power and the purpose of Article 14 for Parliament to decide how the balance should be struck between this constitutional right and the protection of public confidence in the administration of justice.[23]

Nagaenthran a/l K Dharmalingam v Attorney-General: Judicial Power

As briefly mentioned above, Article 93 of the Constitution vests the judicial power of Singapore in the judicial branch. However, when, if at all, can legislation oust the Court's power to review discretionary executive action without violating the Constitution and the principle of separation of powers? This was the key issue before the High Court in *Nagaenthran a/l K Dharmalingam v Attorney-General ('Nagaenthran')*.[24] Under the Misuse of Drugs Act (MDA),[25] drug trafficking is a capital offense. However, a person charged and convicted of drug trafficking could escape the death penalty if he proves that he is a courier and also obtains a certificate from the Public Prosecutor (PP) stating that he had 'substantively assisted' in disrupting drug trafficking activities. Under

[18] Ibid [47]-[48].

[19] Ibid [54]-[57].

[20] No. 19 of 2016[2]

[21] [2018] SGHC 222.

[22] Ibid [22].

[23] Ibid [24].

[24] [2018] SGHC 112.

[25] Cap 185, 2008 Rev Ed. See s 33B(2)(b).

section 33B(2) of the MDA, the Court would then have the discretion to consider sentencing the applicant to life imprisonment and caning instead of death. The applicant challenged the PP's decision not to grant him a certificate of substantive assistance. The applicant alleged that the PP had reached his decision: (a) in bad faith; (b) unconstitutionally; (c) without taking into account relevant considerations; (d) without establishing facts precedent to his exercise of jurisdiction; and (e) irrationally.

Notably, section 33B(4) of the MDA ousted the Court's power to review decisions by the PP to issue such certificates except on the grounds of bad faith and malice.[26] Earlier cases had established that the PP's determination was reviewable on constitutional grounds as well. However, there was no conclusive determination as to whether the PP's decision was open to challenge on further grounds.[27] In *Nagaenthran,* the applicant argued that the ouster clause in section 33B(4) was unconstitutional because judicial power to review the executive's exercise of discretion could not be ousted or curtailed under the Constitution, and in accordance with the principles of separation of powers and the rule of law.[28] Further, the applicant argued that even if the ouster clause was valid, it would not protect a decision from review if it was a nullity because it was made on the basis of an error of law.[29]

The High Court ruled that section 33B(4) of the MDA ousted the Court's jurisdiction to review the PP's decision except on the grounds of bad faith, malice or unconstitutionality, but also that such ouster was constitutional. The vesting of judicial power in the judicial branch by Article 93 of the Constitution did not dictate that all legal disputes should be adjudicated by the judicial branch, but that *most* legal disputes should. Certain decisions that were 'intrinsically incapable of submission to an adjudication' could legitimately be vested in the executive branch.[30] The Court's position as a co-equal branch of government meant, in this context, that it was obliged to respect the legislature's vesting of certain decisions in the executive branch.

The controlling principle, according to the High Court, was that judicial review could be ousted for *non-justiciable* matters. Justiciability was to be determined by the subject matter of the decision in question, the need for democratic representation and accountability for that decision and the relative competence of the respective branches to take that decision.[31] In this case, the PP's discretion whether to issue certificates of substantive assistance was adjudged to be a non-justiciable determination. As the Court of Appeal has previously opined,[32] this determination is affected by operational considerations relating to the disruption of drug trafficking activities, which the courts are ill-equipped to examine. Far from being a violation of the separation of powers principle, the Court regarded this allocation of power as an exemplar of the separation of powers, noting that the ouster was only partial.[33]

One significant qualification, however, was that an ouster clause did not exclude the Court's power to review decisions for jurisdictional errors of law. Where a jurisdictional error of law is committed in the course of making a determination, that determination would be considered a nullity, with the effect that the Court's jurisdiction to review on the basis of this error is not ousted. This meant that, in addition to bad faith and unconstitutionality, it was open to the applicant to challenge the PP's determination on the ground of a failure to establish a jurisdictional precedent fact.

This revival of the legal concept of jurisdictional error of law is curious, as it is derived from English administrative law, which has long abandoned the distinction between jurisdictional and non-jurisdictional errors of law.[34] Nonetheless, the High Court is not wrong insofar as the Singapore courts have yet to renounce this distinction conclusively. The High Court's decision is cur-rently pending an appeal to the Court of Appeal.

Abdul Kahar bin Othman v Public Prosecutor: Judicial Power

Another case that raised the question of the scope of judicial power and the proper boundary between judicial and executive power was *Abdul Kahar bin Othman v Public Prosecutor.*[35] In prior proceedings, the applicant had been sentenced to the mandatory death penalty for drug trafficking and was adjudged to not qualify for the discretionary sentencing regime, which would have allowed the Court to sentence him to life imprisonment and caning instead of the death penalty.[36] This decision was affirmed

[26] Ibid s 33B(4): 'The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.'

[27] *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222, [35] (Court of Appeal).

[28] *Nagaenthran* (n 23) [31].

[29] *Anisminic Ltd v Foreign Compensation Commission and Another* [1969] 2 AC 147 (House of Lords).

[30] *Nagaenthran* (n 23) [85].

[31] Ibid [89], affirming *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 [98].

[32] *Muhammad Ridzuan bin Mohd Ali* (n 26) [66]; *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 [52] [78] [80] (Court of Appeal).

[33] *Nagaenthran* (n 23) [97]-[98].

[34] See e.g., In re Racal Communications [1981] AC 374 (House of Lords); O'Reilly v Mackman [1983] UKHL 1; R v *Visitor of the University of Hull*, ex p Page [1993] 1 All ER 97 (House of Lords).

[35] [2018] 2 SLR 1394.

[36] *Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 164; *Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 222.

on appeal.[37] On further appeal, the applicant sought to argue that the regime breached the constitutional principle of the separation of powers as it prescribed the PP's certification of substantive assistance as a precondition to the Court's discretionary sentencing powers. The Court of Appeal reiterated that this did not amount to an unlawful allocation of powers because the power to pronounce the sentence remained with the Court.[38] The PP's determination related only to the operational assessment of substantive assistance and was not premised on the PP's view of the appropriate punishment.[39] Further, it was not necessarily an intrusion into judicial power for legislation to enable the executive to make administrative decisions that had an impact on an accused person's sentence.[40]

IV. LOOKING AHEAD

The separation of powers and the need for checks and balances will remain significant in the coming year, particularly in determining the proper boundaries of judicial power. This is especially since two court challenges have been filed against Singapore's colonial-era sodomy laws, specifically section 377A of the Penal Code. In the 2015 judgment of *Lim Meng Suang v PP*,[41] the Court of Appeal had upheld the constitutionality of that provision on the basis that the law did not violate the reasonable classification test applicable to determining whether the Constitution's equal protection clause is violated. The Court of Appeal also further determined that the challenges based on the morality or sociological basis of the law are outside the scope of its judicial function, emphasizing that the courts are not to act as 'mini-legislatures'. This view of the judicial function and the boundaries between judicial power and legislative power serves to limit the scope of judicial review. It will be more than interesting to see how the courts address these two new challenges to the law.

V. FURTHER READING

1. Benjamin Joshua Ong, 'The Doctrine of Severability in Constitutional Review: A Perspective from Singapore' (2018) *Statute Law Review* 1.

2. Victor Leong Hoi Seng, 'Tan Cheng Bock v AG: Is Constitutional Interpretation As Settled As It Seems?' (January 2018) < https://lawgazette.com.sg/feature/tan-cheng-bock-v-ag-is-constitutional-interpretation-as-settled-as-it-seems/>

3. Jaclyn Neo, 'Autonomy, Deference and Control: Judicial Doctrine and Facets of Separation of Powers in Singapore' (2018) 5 *Journal of International and Comparative Law* 461.

4. Kevin YL Tan & Ang Peng Hwa, 'Amendments to the Films Act: Problems and Concerns', *Singapore Public Law* (30 December 2017) <https://singaporepubliclaw.com/2017/12/30/films-act/#more-1202> accessed 16 February 2019.

5. Po Jen Yap & Benjamin Joshua Ong, 'Judicial Rectification of the Constitution: Can Singapore Courts be "Mini-legislatures"?' (2018) 48 *Hong Kong* LJ 389.

[37] *Abdul Kahar bin Othman v Public Prosecutor* [2016] SGCA 11.

[38] *Abdul Kahar* (n 34) [39]; *Prabagaran a/l Srivijayan* (n 31) [65] [72] [76]; see also 'Developments in Singaporean Constitutional Law: 2016 Year-in-Review' (n 7) Section IV(A), IV(B)(2).

[39] *Abdul Kahar* (n 34) [40].

[40] Ibid [46]–[47].

[41] [2015] 15LR 26.



Slovakia

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I. INTRODUCTION

The year 2018 started on a high note after the resolution of a prolonged inter-branch conflict between the President, the Constitutional Court (CC), and the National Council (NaCo) over the appointment of constitutional judges.[1] President Andrej Kiska appointed judges Jana Laššáková, Mojmír Mamojka, and Miroslav Duriš to the Court late in December 2017, filling three vacancies that had opened up in 2014. With all 13 judges in place, the Court was finally able to start working at full capacity.

The resolution of the conflict in the C*C Appointments Case* carried a promise of improved relations between political branches of power, which was necessary in order to change the Constitution in time for the next CC appointments due in mid-February 2019. The Ministry of Justice initiated the drafting and consultation of an amendment to fix the selection and appointment mechanism for constitutional judges in the summer, ostensibly to make good on its promise in the Programme Proclamation of the Government. The government proposal was submitted to the NaCo after several months of public debate and critique, but efforts to change the Constitution failed after a dramatic late-night NaCo session in late autumn.[2] The selection and appointment mechanism did not change, and due to the failure, the relationship between President Kiska and the government coalition further deteriorated. Since the key constitutional moment of the year failed to deliver, we focus on the development of sub-constitutional rules governing the selection and appointment of constitutional judges. Changes to legislation still had an impact on the upcoming selection round, and we will review them in the next section.

At the time of writing this report, the CC has not yet published its annual statistics for the year 2018. However, the available data for the first six months provides us with a rough measure to estimate the judicial output of the Court for the whole year. The Court received 1 332 petitions (constitutional complaints and judicial review petitions combined) in the first half of 2018 and addressed 1 469 cases. These cases include all pending litigation, which kept accumulating during the time the Court had been incomplete.[3] A single judge decided 113 cases on average, with most being constitutional complaints handled by one of the four three-member Senates. The Plenum decided six cases of review of litigation on merits.[4] Three of the decisions found a statute in part or wholly contrary to, and one in conformity with, the Constitution. We review some of these cases, which may be interesting to a global audience, in the third section. The report con-

[1] See our contributions to an online symposium on 'The Slovak Constitutional Court Appointments Case' (I·CONnect, 23 January 2018) <http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-introduction/>

[2] Max Steuer, 'On the Brink of Joining Poland and Hungary: The Night of Surprises in the Slovak Parliament' (*Verfassungsblog*, 25 October 2018) <https://verfassungsblog.de/on-the-brink-of-joining-poland-and-hungary-the-night-of-surprises-in-the-slovak-parliament/>

[3] Press release no. 53/2018.

[4] Press release no. 61/2018.

cludes with two observations on the future development of Slovak constitutional law.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Late in October 2018, the Slovak National Council tried to amend the selection and appointment mechanism for constitutional judges. Two proposals were on the table at the time. The first was to raise the threshold for the NaCo selection vote, and the second proposal was to raise entry-level standards for the candidates. Just before the first debate on the draft constitutional amendment concluded, one of the government MPs filed a controversial substitute motion to change the bill's contents, but because of drafting irregularities that the motion created in the original proposal, the entire amendment failed. The controversy in the Parliament, however, generated enough buzz to put the CC at the centre of public attention.

Article 134 of the Constitution established the ground rules for the selection and appointment of constitutional judges, prescribing that:

> The President of the Slovak Republic shall, on the nomination of the National Council, appoint the judges of the Constitutional Court for a period of twelve years. The National Council shall propose a double number of candidates who are to be appointed by the President.

The threshold for the selection vote in the NaCo is not escalated, so the general rule applies. The NaCo selects candidates to the Court by a simple majority of the MPs present (39 votes with the lowest quorum). The proposal by the Ministry of Justice would raise the threshold to an absolute majority of all MPs (76 votes). The proposal would also raise the age of eligibility from 40 to 45 years and introduce qualitative criteria for the candidates. A candidate for the office of a constitutional judge was to be a "person of renown in the field of law, whose life provides a guarantee that she will perform her duties properly, honestly, independently and impartially". None of these changes passed the NaCo, but they still managed to frame the debate about judicial candidates in the upcoming selection. Even though the eligibility requirements did not change, many questions in the upcoming round of selection hearings of candidates to the Court showed that the MPs were looking for renowned legal professionals, or at least trying to flag those whose moral integrity lagged behind the standard expected of a constitutional judge.

1. Changes to legislation

Despite failing at the constitutional level, the NaCo successfully changed the sub-constitutional rules for the selection of candidates for the job, which are detailed in the new Act on the Constitutional Court[5] and parliamentary rules of procedure.[6] The selection and appointment process takes place at three levels: 1) the entry level where nominators present individual candidates for consideration; 2) the mid-level of the NaCo selection; and 3) the output level of presidential appointment. We speak of nominees at the entry level, candidates if they are selected in the NaCo floor vote, and finally CC judges who are appointed to the Court by the President. The new rules were meant to improve the throughput legitimacy of selections at the entry and mid-levels by live-broadcasting candidate hearings in the NaCo Constitutional Committee and several other minor changes.

2. Selection Hearings

The NaCo received 40 nominations by January 7, which was the deadline for nominators to support individual candidates for consideration. The Constitutional Committee of the National Council held, starting on Wednesday, 22 October, three rounds of selection hearings to question the nominees. The selection hearings were an interesting innovation that attracted a lot of attention. The Constitutional Committee had to make available audio-visual transmission of the hearings. Clips from the selection hearing were viewed thousands of times on streaming platforms such as YouTube, and also on the website of the National Council and media. The nominees appeared before the committee in alphabetical order. Robert Fico, a three-time Prime Minister, who surprised many by his last-minute application, spoke seventh. Each nominee had to present his or her (ratio 1:4) motivation to apply for the position; work experience; publications; attendance at lectures, seminars, and academic conferences; and professional accomplishments. MPs and the attending representative of the President then had time to question the nominee. The nominees received questions in blocks of three and had unlimited time to respond. The shortest presentation took less than 20 minutes, while the longest, including questioning, took two hours. All documents about a nominee were made available to members of the committee ahead of the hearing. The statutory period set by the parliamentary rules of procedure is 45 days, but this period was reduced to 15 days for all positions that vacated in 2019. So the background documents on each nominee and their applications were published online at the webpage of the National Council two weeks prior to the selection hearing.

III. CONSTITUTIONAL CASES

The following section examines four salient constitutional cases from the year 2018. We focus on cases of judicial review of legislation under Article 125 of the Constitution and leave out most constitutional complaints and electoral disputes. Constitutional complaints under Article 127 make up most of the Court docket but are generally of low salience.

Electoral disputes are unique in that they are seasonal; they follow an election taking place and require prompt resolution, so they do not stay on the docket for long. The Court has 90 days to resolve a complaint about unconstitutionality or illegality of local elections, according to Article 63(6) of the CC

[5] Act No. 314/2018 Coll. on the Constitutional Court.

[6] Act No. 350/1996 Coll. on the Rules of Procedure of the National Council of the Slovak Republic.

organising statute.[7] The last communal election took place on November 10, 2018. Since most of the constitutional judges were to end their term of office on February 16, the Court had to shift all of its decision-making capacity to the resolution of the sudden surge of electoral disputes arising out of communal elections. Had some of the cases been left unresolved after February, the results of many elections would invite distrust.

The Court managed to deal with all 92 electoral disputes by February 6, 2019. 87 challenges to communal elections across Slovakia were filed by individuals and five by political parties. The Court declared elections in six municipalities invalid and annulled results of three other elections wholly or in part. In five cases, the Court annulled the decision of the electoral commission on the winner of an election to pick individuals elected in their place.[8]

1. PL. ÚS 1/2017 on State Immunity in Domestic Execution Proceedings

One of the leading cases of last year concerned the permissible scope of State immunity in domestic execution proceedings. A district court challenged the constitutionality of two provisions of the Act on Heat Power Engineering that protected assets of concession holders on production and distribution of heat owned by the State or State-managed entity from execution. All claims against such entities in execution proceedings were recognised as mere natural obligations, which enjoyed broad protection. The Court found in decision PL. ÚS 1/2017 that the provision was unconstitutional.

In its reasoning, the Court relied on one of its previous decisions in which it concluded that similar statutory regulation, albeit in a different field, was unconstitutional.[9] The Court first stressed public interest in the energy industry and the importance of smooth production and distribution of heat to consumers, but on the other side, the Court also recognised the need for protection of assets of companies in the energy business. However, it held that such interest is subject to the proportionality test because it infringes on the right to property. While the Court was satisfied that the regulation had a clear legal basis, pursued a legitimate aim, was suitable to achieve the pursued aim, and also necessary in given circumstances (there were no other available and effective alternatives), it failed the balancing exercise. In the last step, the CC juxtaposed public interest with the right to property using the classic weighing formula conceptualised by Robert Alexy. While attaching high importance to public interest, it stated that the legal regulation rendered property rights illusory. *De jure* and *de facto* means at the disposal of a creditor to have his or her claim enforced against the State were limited to zero. The Court, therefore, ruled that regulation violated the right to property. The CC also suggested that the legislator must do a better job to reconcile public interest on the one hand with the right to property on the other. Aside from the finding of a violation of the right to property, the regulation was also found to be discriminatory, retroactive, and incompatible with the right to a fair trial because it deprived creditors of an effective legal remedy and access to the court of law.

2. PLz. ÚS 2/2018 on the Recall of Members of the Judicial Council

Another influential decision of the Court concerned the recall of members of the Judicial Council (JC). The Constitution stipulates that JC members are elected or selected for five years and also that they may be removed by the same entities that selected or elected them (the NaCo, President, government, and judges). However, neither the Constitution nor the Act on Judicial Council provides reasons for the removal of a JC member. This gap in the legal regulation became a subject of controversy when the new government recalled several members of the Judicial Council after 2011 and replaced them with new members. A JC member who was recalled filed a constitutional complaint to the Constitutional Court. One of the Senates dismissed the complaint, stating that absent any reasons for removal, and according to the theory of the rational legislator, the relationship between a member and the entity that selected him is based on political accountability. JC members serve as agents on behalf of the institutions that selected or elected them.

This approach was not met by the approval of other Senates of the Court, and several attempts to reverse the decision followed. In 2018, the Court succeeded and in judgment PLz. ÚS 2/2018, which was a unifying ruling by the Plenum, overruled the previous case law. The Plenum first stressed the independence of the Judicial Council and its members *vis-à-vis* other institutions based on legislative history, the principle of separation of powers, and its prior case law. JC members have terms of office that run independently from those of the institutions that select or elect them. Second, the CC interpreted the constitutional right to have access to a public office in a generous way as including also the right to stay in the office for a full term. And finally, the CC opined that removal from office without objective reasons is arbitrary and undermines the rule of law. According to the principle of legality, the gap or silence of legal regulation as far as specific reasons for removal are absent, and this has to be interpreted as prohibiting the recall of a member of the Judicial Council. Consequently, members of the Judicial Council enjoy liberty from removal before the expiration of their term of office unless the legislator passes a new regulation that will specify objective legal reasons for their dismissal.

3. PL. ÚS 11/2016 on Consumer Protection and Statute of Limitations

At the heart of the controversy in case PL. ÚS 11/2016 was the protection of the consumer. A district court initiated a challenge

[7] The old Act of the National Council of the Slovak Republic No. 38/1993 Coll. on the Organization of the Constitutional Court, on Proceedings before the Court, and on the Position of Its Judges.

[8] Press release no. 11/2019.

[9] PL. ÚS 111/2011.

to the constitutionality of a provision in the Act on Protection of Consumers that had established an automatic jurisdiction of courts and arbitrators to review whether legal actions stemming from consumer contracts are (not) time-barred. The CC declared the provision unconstitutional for violating the right to fair trial because it created a procedural inequality and imbalance in civil matters. The CC tested the provision, mainly utilising the test of necessity, which it failed to pass. The reasoning of the Court oscillated between arguments on the equality of parties and unwarranted protection of consumers by such drastic legal means. The necessity analysis was concluded by pointing out several other available, but less effective, alternatives that the legislator could have used instead of establishing an *ex officio* review, such as legal aid; notification requirements for consumers; different social and credit policy by the State; etc. An interesting part of the decision was devoted to a comparative analysis of the law of the European Union. After the analysis of the applicable case law, the Court concluded that the need for such an expansive regulation neither followed from the EU law (including the case law of the CJEU) nor was it required by the *effet utile* doctrine.

Another line of the argument criticised the challenged provision for confusing the terminology of two different civil law institutes: the legislator adopted time-bar regulation (natural obligation), but the result was the extinction of a right. The regulation was also found to be retroactive in its effect. For all of these reasons, the Court held that the challenged legislation violated principles of the rule of law.

In a follow-up, the legislator adopted a very similar provision but corrected the terminological confusion. The provision is a part of the Civil Code (Article 54(a)) and has not yet been challenged.

4. PLz. ÚS 1/2018 on Cumulation of Reasons for an Extraordinary Appeal

The decision in PLz. ÚS 1/2018 is an example of a unifying ruling, which is rendered when the legal opinion of multiple Senates of the Constitutional Court split. In a situation when such a unification of legal opinions is required, the Court decides in full composition, sitting in the Plenum. The decision of the Plenum binds all Court Senates.

The main legal challenge in the case at hand concerned the permissibility of invocation of multiple reasons for an extraordinary appeal before the Supreme Court, also known as "the cumulation of reasons for an extraordinary appeal". The extraordinary appeal in Slovakia is allowed exclusively to the Supreme Court and is strictly limited to specified circumstances defined by the Code of Civil Procedure (CPC). The Supreme Court had ruled, in a unifying decision of its own, that the practice of invocation of multiple reasons for extraordinary appeal (i.e., cumulation) by the appellant was not permissible. It stated that in the case of cumulation, the Supreme Court would only consider the most significant reason invoked. It linked the level of importance of these extraordinary appeal reasons to their chronological position in the CPC. In other words, in the case of cumulation, only the reason listed first in the CPC would be reviewed by the Supreme Court.

This highly controversial rationale with significant practical ramifications was challenged before the Constitutional Court on multiple occasions, mainly on the grounds of the constitutional right of equal protection of the procedural parties as well as the right to a fair trial. During the first challenge, the 2nd Senate of the Constitutional Court upheld the mentioned procedural rationale. After several months, however, the 1st Senate did not agree with the constitutionality of this approach. Thus, the final unifying decision by the Plenum was required to resolve the issue. The Plenum agreed with the opinion of the 1st Senate. It criticised the limitation of the reasons for an extraordinary appeal just for the sake of efficiency of the judicial proceedings. It labelled such an approach as a pure legal formalism with possible serious overreach into the constitutional right of access to the Court that could ultimately lead to the restriction of the fundamental right to a fair trial. Moreover, the Plenum condemned the logic of prioritising those reasons for an extraordinary appeal that were stated earlier in the CPC with no consideration of their intensity.

IV. LOOKING AHEAD

Two important events unfolded right at the time of the submission of this annual report. We briefly describe each in place of a prediction, because they are guaranteed to influence the development of Slovak constitutional law in the year 2019 and beyond.

On January 30, 2019, the CC, for the first time in the history of the republic, invalidated a direct amendment to the Constitution because it breached its material core. Direct amendments change the master-text Constitution and have until now been considered outside of the Court's scope of review. It was in theory recognised that some stand-alone (indirect) constitutional acts can in principle contradict the Constitution, such as constitutional acts on shortening the term of the NaCo, but even they were not reviewable. The Court established a new power for itself and found that the Constitution contains an implicit material core, with the basis in Article 1(1), which declares that the republic is "is a sovereign, democratic state governed by the rule of law". This important but potentially controversial ruling came in case PL. ÚS 21/2014, which involved a challenge to eligibility requirements for the appointment to and retention of judicial office in the form of "background checks". The Court held that the vetting of judges was in breach with the principle of judicial independence, which is a corollary to the rule of law. The direct amendment from 2014, already being part of the Constitution itself by 2019, was therefore unconstitutional.

Then on February 15, the National Council failed to select any candidates for appointment to the Constitutional Court. The next day, nine constitutional judges hung up their robes and retired from the bench, which has left the Court dysfunctional with only four remaining judges left to salvage the image of the institution as a co-equal branch of power. The next selection round was scheduled for the end of March, which will leave the Court depopulated and unable to decide on cases that constitutionally require the absolute majority of all judges (e.g., judicial review of legislation) for at least a month and

a half. The ruling coalition commands the majority in the NaCo, however, and can obstruct the vote. If it is successful in delaying the selection for long enough, the appointments could be made after a new president takes office in June. It is unclear how long the Court will remain dysfunctional, and whether the NaCo will choose to stymie the selection process. The political branches of power do not have amicable relations with one another, and it is plausible that they will engage in constitutional hardball tactics at the expense of the Court.

These two issues will likely be on the agenda in the upcoming presidential election that will take place in March 2019. The decision on constitutional unamendability put the spotlight on the CC, so the political battle to appoint the majority of the Court will be fierce. At the end of our report on constitutional developments in Slovakia in 2015, we expressed the hope that the difficulties with appointments will be resolved and the Court will soon have all 13 judges. Our hope for the upcoming year remains the same.

V. FURTHER READING

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Šimon Drugda, 'A Proposal for Gender Parity on Slovakia's Constitutional Court' (*I·CONnect*, 30 November 2018) <http://www.iconnectblog.com/2018/11/a-proposal-for-gender-parity-on-slovakias-constitutional-court/>

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South Africa

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I. INTRODUCTION

The 2017 review identified "the need for fundamental adjustments of government conduct and the reaffirmation of constitutionalism". 2018 did see a change of leadership of the governing majority (the ANC), allowing for confrontation with the immense challenges brought about in the preceding decade, now frequently referred to in the vernacular as "the lost years". Most of the developments in 2018, and realistically, most probably for some time to come, concern the need to deal with the aftermath of the Jacob Zuma years.

Functioning constitutionalism depends heavily on public access to information and transparency. Various facets of such transparency required the attention of the courts, including the decision-making procedures for selecting candidates for judicial appointment.

Given the upcoming general election in May 2019, litigation concerning the registration of voters and the transparency of the funding of political parties may be seen to have facilitated the timely correction of some shortcomings in the system.

The delinquency of the Zuma administration in its conduct of international relations was revealed in a case concerning the consequences of the neutralisation of the SADC Tribunal in support of land grabs by the Mugabe regime in Zimbabwe. South Africa's complicity in the matter was itself found to be unconstitutional.

The prospect of amending the Constitution to empower the government to expropriate property without compensation (EWC) loomed large following the leadership change in the ANC. It would appear that this was a last "success" of the Zuma faction in the ANC regarding policy determination, leaving the new leadership with the political obligation to plan the implementation of EWC, fortunately amidst the need to overcome stringent constitutional limitations. Although the courts were not seized with EWC as such in 2018, the findings of the Constitutional Court in a case concerning the land rights of a traditional community, balanced against the government's management of mineral resources, may later prove to be significant.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Section 25(1) of the Constitution prohibits arbitrary deprivation of property. Section 25(2) allows expropriation of property "for a public purpose or in the public interest" in terms of law of general application, subject to compensation. Since the adoption of the Constitution, it had been possible, in terms of Section 25(4), to effect land reform, *inter alia*, "to bring about equitable access to all South Africa's natural resources". A ministry, department and permanent commission for rural development and land reform had been established a number of years ago. Over time, however, the department and commission became notorious for their inefficiency, and much frustration exists regarding their unsatisfactory performance. This frustration was the (mostly unspoken) motivation for the populist faction in the ANC to push for a policy resolution to discard compensation for expropriation—in effect, to facilitate the nationalisation of property.

The announcement of EWC as a key component of ANC policy drew much public attention concerning its possible implications—economically, socially, politically and constitutionally. In February, the two Houses of Parliament mandated a joint committee to:

> [r]eview Section 25 of the Constitution and other clauses where necessary, to make it possible for the state to expropriate land, in the public interest without compensation, and propose the necessary constitutional amendments where necessary. In doing so, the Committee is expected to engage in a public participation process in order to get the views of all stakeholders about the necessity of, and mechanisms for expropriating land without compensation.[1]

For six weeks from June to August, the joint committee held town hall-type public hearings in various locations across the country where a sometimes rowdy campaign was evident in which dissatisfied local communities demanded relief from poverty by means of land allocation to the landless. The committee also called for written and oral submissions, which produced much more reasoned responses, the majority being critical of the project. Nevertheless, the (majority) recommendation of the committee was:

> a. That Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to Expropriation of Land without Compensation, as a legitimate option for Land Reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.
>
> b. That Parliament must urgently establish a mechanism to effect the necessary amendment to the relevant part of Section 25 of the Constitution.
>
> c. Parliament must table, process and pass a Constitutional Amendment Bill before the end of the 5th Democratic Parliament in order to allow for expropriation without compensation.[2]

On 6 December, the report was tabled in the National Assembly, which then resolved to establish an ad hoc committee to initiate and introduce legislation amending Section 25 of the Constitution. It consisted of 11 members, 6 of whom being members of the ANC. 31 March 2019 was set as the deadline by which the committee must report. Neither the Joint Committee Report nor the National Assembly proposed a concrete formulation for the amendment, leaving it to the ad hoc committee to develop the amending wording.

The procedure for amendment of the Constitution is complex and lengthy, involving publication of the draft bill for comment 30 days before tabling in both Houses of Parliament, the canvassing of public submissions, putting it to the vote at least 30 days after its introduction, etc. It was therefore unlikely that an amending bill would reach a stage where it could be passed by Parliament before the upcoming elections.

An amendment to the Constitution requires, *inter alia*, at least a two-thirds majority vote in the House of Assembly, and there are those that argue that an amendment of Section 25 may, in terms of Section 74(1), require the support of 75% of the members of the House because it would imply an amendment of Section 1, where the rule of law is entrenched as a founding value.

Another major development of constitutional significance that emerged in 2018 was the establishment of the Judicial Commission of Inquiry to Inquire into the Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State under the chairmanship of Deputy Chief Justice Zondo. Ironically, this commission was established under the signature of Jacob Zuma shortly before the end of his presidency. The initial procedural regulations would have rendered evidence presented to the commission inadmissible in later criminal proceedings, therefore allowing admissions of wrongdoing to become privileged, but before the commission's investigation got underway, this was amended by President Ramaphosa to limit the inadmissibility in court before Justice Zondo of evidence of self-incriminating statements by witnesses. Right from the outset, remarkable revelations came to light before the commission regarding the extent to which private entities had gained control over influential politicians, civil servants and governing bodies of state-owned companies. The work of the commission is scheduled to continue until 1 March 2020, and the impact of the evidence received by it in public and its eventual report can be expected to be profound, both legally and politically.

III. CONSTITUTIONAL CASES

1. Helen Suzman Foundation v Judicial Service Commission 2018 (4) SA 1 (CC): Deliberations of the JSC

Judges of the superior courts are, in terms of Section 174(6) of the Constitution, appointed by the President on the advice of the Judicial Service Commission (JSC). The JSC is composed, in terms of Section 178 of the Constitution, of serving judges, other lawyers and various political appointees, the latter category constituting the majority.

When the application for elevation to the bench of a widely experienced and respected senior counsel (both SC in South Africa and QC in the UK) did not obtain the support of the JSC in 2012, and another, relatively unknown candidate was put forward for appointment, an NGO (the Helen Suzman Foundation (HSF)) applied for an order to compel the JSC to provide it with a full recording of its post-interview delib-

[1] See the Joint Committee's Report dated 15 November 2018 <https://www.parliament.gov.za/storage/app/media/Docs/atc/a3985fff-84d0-4109-80f4-e89064c8dede.pdf> (accessed 7 February 2019), page 4.

[2] Ibid, pp 34-35.

erations to make a case for the review of the choice of candidates.

In review proceedings, it is settled law that all parties, including those seeking the review, must have identical copies of all relevant documents available to them. The JSC produced records of its proceedings, excluding, however, the recordings of the deliberations crucial to the HSF's case. The provincial division of the High Court denied the application of the HSF to obtain the recordings in 2015, and the Supreme Court of Appeal upheld the decision. On appeal to the Constitutional Court, however, the HSF succeeded, and the JSC was ordered in April 2018 to deliver the full recording of the proceedings to be reviewed.

Although this judgment concerned a procedural matter (the application was based on Rule 53 of the Uniform Rules of Court), it was clear from the majority and two minority judgments that its outcome turned on the weight that should be accorded the values of accountability, responsiveness and openness. According the the majority (paragraph 65):

> These values are of singular importance in South Africa coming—as we do—from a past where governance and administration were shrouded in secrecy. If we are truly to emancipate ourselves from that past, all our democratic constitutional institutions must espouse, promote and respect these values. The blanket secrecy that the JSC is advocating is at odds with this imperative. And this is especially so, regard being had to the fact that the JSC's claim to secrecy does not bear scrutiny.

The HSF stated that it was concerned with a growing perception that talented candidates for judicial appointment were being overlooked by the JSC for undisclosed reasons.

2. My Vote Counts NPC v Minister of Justice and Correctional Services Patriation Reference 2018 (5) SA 380 (CC): Access to information on private funding of political parties

Section 32(1)(b) of the Constitution grants everyone the right of access to information "that is held by another person and that is required for the exercise or protection of any rights". The Promotion to Access to Information Act 2 of 2000 (PAIA) was adopted to give effect to the right of access to information. A non-profit company, My Vote Counts, said to have been founded to improve the accountability, transparency and inclusiveness of elections and politics in South Africa, obtained an order from the Western Cape Division of the High Court in 2017 in which PAIA was declared constitutionally invalid due to its failure to regulate the recordal and disclosure of information on the private funding of political parties and independent candidates. In June 2018, the Constitutional Court confirmed the order and required Parliament to amend PAIA accordingly within 18 months.

The Court linked the need for the transparency of private funding with the right of every citizen in terms of Section 19 of the Constitution to make political choices, stating (in paragraph 34) that "[f]or every citizen to be truly free to make a political choice, including which party to join and which not to vote for or which political cause to campaign for or support, access to relevant or empowering information must be facilitated".

Unrelated to the attack on PAIA, which is the statutory instrument generally available to obtain access to recorded information, Parliament had in the meantime (June 2018) passed a new Political Party Funding Bill, which had not been signed and promulgated by the President by the end of the year. The bill purports to regulate public and private funding of political parties, inter alia, by requiring disclosure of donations above a set threshold that a political party receives, and prohibits political parties from accepting donations from foreign governments, foreign government agencies and South African state-owned enterprises. The statutory Electoral Commission (IEC), primarily responsible for the management of all elections, administers other public and private money received for the funding of political parties. The My Vote Counts case did not concern this bill, although the Constitutional Court did take note of it, distinguishing its content from the issue of access to the funding information held by political parties.

3. Electoral Commission of South Africa v Speaker of the National Assembly (CCT55/16) [2018] ZACC 46 (22 November 2018): Recording of addresses of voters

Originating in proven irregularities in the registration of voters during local government by-elections held in 2013 in Tlokwe (Potchefstroom), the Constitutional Court set aside the outcome of those elections in 2015 (*Kham v Electoral Commission* 2016 (2) SA 338 (CC)) and effectively ordered the IEC to obtain the addresses of all voters on the voters' roll before the next local government elections. The rectification of the voters' roll was necessary (paragraph 7 of the 2018 judgment) "to guard against bogus registrations, phantom voters and bussing-in—which is the large-scale transportation into a voting area, for vote-rigging purposes, of voters resident elsewhere". These practices have on occasion occurred in previous elections with little consequences due to the weaknesses in the system identified in these proceedings.

For the IEC to comply with the order would be no mean feat, especially in residential areas euphemistically known as "informal settlements" where street names and house numbers do not exist. In 2016, the Constitutional Court declared the failure of the IEC to have recorded voters' residential addresses to be inconsistent with its constitutional responsibilities, but the consequential invalidity of the voters' roll was suspended, subject to full compliance by 30 June 2018. The commission was required to report its progress to the Court every six months, which it did.
However, with the next general elections coming up in 2019, the commission urgently requested a further extension of the suspension of the order of invalidity in May 2018, when 21% of voters' addresses had not yet

been recorded. It was concerned that if the extension were not allowed, it would open the possibility of successful challenges to the validity of the 2019 election results. (Although the address issue concerned local government elections, it did not affect the general election, which uses a purely proportional list system with less scope for vote-rigging by bussing-in voters.) In opposition to this, it was argued that some scope for vote-rigging would remain regarding a voters' roll without all voters being associated with an address.

The Court stated (in paragraph 6) that its primary concern was to ensure that the 2019 elections fulfilled the electoral promises of the Bill of Rights, which allows every citizen's freedom to make political choices and the right to free, fair and regular elections. The outcome was an order extending the time for the commission to comply until 30 November 2019, subject, however, to two monthly progress reports to the Court in which the commission would set out "a means by which it proposes to indicate clearly on the voters' roll which voters have incomplete, inadequate or no addresses; require voters with incomplete, inadequate or no addresses who wish to vote to supply their addresses before voting on voting day; and enable political parties to access and scrutinise the addresses and any other details supplied in this way".

Two aspects of this judgment are remarkable: firstly, the active supervisory role that the Constitutional Court is prepared to take upon itself, and secondly the practical and creative manner in which the Court went about exercising its jurisdiction in terms of Section 172(1) of the Constitution to, when deciding a constitutional matter, "make any order that is just and equitable".

4. Law Society of South Africa v President of the Republic of South Africa (CCT67/18) [2018] ZACC 51 (11 December 2018): Withdrawal from SADC Tribunal Protocol unlawful

The systematic assault on constitutionalism by the Mugabe government in Zimbabwe is well known.[3] The South African government's complicity in this process, at least since the Mbeki presidency beginning in 1999, mostly took the form of implied approval by default. However, when Mugabe's actions were threatened by judicial restriction, President Zuma had no scruples to openly support him (the Court, at paragraph 45, described it thus: "Zimbabwe had a willing ally in South Africa, as represented by our President"). The Southern African Development Community (SADC) had established a tribunal in 2000 with jurisdiction to adjudicate disputes between individual citizens and member states. Having been deprived of all legal avenues for relief within Zimbabwe, a number of landowners approached the tribunal to review the government's expropriation of their land without compensation, which was granted in 2008.[4] However, in 2010, the SADC Summit of Heads of State decided to suspend the tribunal and adopted a protocol in 2014 in terms of which its jurisdiction would be reconfigured by excluding individual access to it.

The Law Society of South Africa obtained an order from the Gauteng High Court in March 2018 declaring President Zuma's participation in the SADC decision-making process and his decision to suspend the operation of the tribunal to be "unconstitutional, unlawful and irrational", and directing him to withdraw his signature from the Protocol signed in 2014. On 11 December 2018, the Constitutional Court confirmed the order. The Court was careful to point out that the presidential powers as head of state and head of government should not lightly be interfered with by the courts, but qualified this caveat in paragraph 3 of its judgment:

> All presidential or executive powers must always be exercised in a way that is consistent with the supreme law of the Republic and its scheme, as well as the spirit, purport and objects of the Bill of Rights, our domestic legislative and international law obligations. Our President is never at large to exercise power that has not been duly assigned. Crucially, public power must always be exercised within constitutional bounds and in the best interests of all our people.

The Court justified its findings by stating (at paragraph 77) that as long as fundamental rights such as the right to access to justice are protected by the Constitution and an international agreement, a president is not at liberty to neutralise those rights or to participate in a process that may threaten their protection.

Interestingly, and perhaps in anticipation of future litigation regarding expropriation (see the discussion below of the *Maledu* case), the Court interpreted this matter (paragraph 11 of the judgment) to be:

> fundamentally about challenging the expropriation of land without compensation and the intended removal of the Tribunal's jurisdiction to determine the validity of that kind of land expropriation that was done in terms of the Constitution of Zimbabwe.

5. Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited [2018] ZACC 41: Expropriation of land

In late December 2017, the ANC held a "national consultative conference" where it was crucially determined that a change in leadership of the organisation, and therefore of the presidency of the country, would take place: Zuma was replaced by Ramaphosa. Apart from the leadership issue, the most prominent outcome was the adoption of the resolution that the Constitution should be amended to allow private land to be expropriated without compensation. Consequently, in the course of 2018, very strong political focus was placed on the implementation of this resolution and its implications. Feverish public and parliamentary debate ensued, culminat-

[3] See, e.g., Martin Meredith, *Mugabe: Power, Plunder, and the Struggle for Zimbabwe's Future* (Jonathan Ball Publishers, 2002).

[4] *Mike Campbell (Pvt) Ltd v The Republic of Zimbabwe* [2008] SADCT 2.

ing in the adoption by the National Assembly of a committee report recommending the desired amendment against the recommendation of the majority of the written public submissions received by the committee (see II above for more detail). The wording of a possible amendment has not yet been put forward, but it is likely to weaken the protection of property entrenched in Section 25 of the Constitution in some way. The matter will inevitably take a central position in the political campaigns in the run-up to the national and provincial elections scheduled for May 2019. It is very likely that the constitutional validity of the parliamentary procedure will be challenged in the courts, and the capacity of the ANC to effect the amendment in terms of the entrenched procedures will depend on the outcome of the 2019 elections and possibly also its ability to garner the support of smaller parties.

The Constitutional Court has not yet been engaged to determine the constitutionality of the political intentions of the government regarding expropriation without compensation (EWC), but it did deliver a judgment in October 2018 which touched on the matter. Ironically, this case did not concern the diminution of property rights of the affluent (which is the clear goal of EWC). The case was concerned with the rights of a component of a larger traditional community. The component community have held the rights concerned for almost a century, protecting them from eviction. The government had, however, granted platinum mining rights to companies controlled by the traditional community of which the holders of the rights are a component. For present purposes, the tenor of the judgment, which annulled a high court eviction order, is noteworthy.

The judgment started with a quotation from a book by the radical Marxist and Pan-Africanist activist Frantz Fanon emphasizing the link between land ownership and dignity. Paragraph 2 of the judgment states:

> Currently, in South Africa, the clamour for redistribution of land has not only heightened interest in land but has also put at the centre stage the socio-political discourse raging on in the country.

The Mineral and Petroleum Resources Development Act 28 of 2002 effected the statutory transfer of rights to mineral resources from landowners, conferring such rights on the state "as the custodian of such resources on behalf of all South Africans". It was the exercise of this "custodianship" that caused the conflict with the rights of the applicants, rooted in customary law. The courts are required to apply customary law in terms of Section 211(3) of the Constitution "when that law is applicable". Based on Section 25(6) of the Constitution, which purports to ensure legally secure tenure of land to communities "whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices", the Court determined that the property rights of the applicant community trumped the mineral rights awarded by the state to others.

If EWC becomes a reality in the future, it is expected that the courts will be called upon to resolve many disputes that are as complex in nature as the Maledu matter, and beyond. Be that as it may, the outcome of the debate on EWC is directly related to and will severely test South Africa's commitment to constitutionalism.

IV. LOOKING AHEAD

Whether the ANC will be able to realise its intended weakening of the protection of private property by means of constitutional amendment will depend largely on the outcome of the 2019 elections. If not, the populist faction of the organisation, mostly supportive of the destructive approach institutionalised in the Zuma era, will be difficult to keep in check. If the outcome allows the incoming government to effect the constitutional amendment, it is certain that elements of civil society strongly inclined to defend constitutionalism will rely on the courts for relief. In any event, the level of maturity of South African democracy achieved over the past quarter century will be gauged by the upcoming ballot. Equally, the existence of the political will to prosecute wrongdoing related to "state capture" of all, including those in influential positions, will provide a clear indication of the survivability of constitutionalism in the country.

V. FURTHER READING

Catherine Albertyn, 'Getting It Right in Equality Cases. The Evaluation of Positive Measures, Groups and Subsidiarity in *Solidariteit v Minister of Basic Education'* [2018] SALJ 403

Clive Plasket, 'Judicial Review, Administrative Power and Deference: A View from the Bench' [2018] SALJ 502

Francois Venter, 'The limits of Transformation in South Africa's Constitutional Democracy' [2018] SAJHR 143



South Korea

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I. INTRODUCTION

In 2018, one year had passed since the departure of the Jae-in Moon administration in the previous year. After almost 10 years of conservative rule, Korea achieved leadership by a liberal party. Former President Geun-hye Park strongly antagonized the people towards the end of her reign, so initially, President Moon's new administration seemed to be well received by the people.

To resolve the popular discontent, Moon's administration pursued the previous administration's injustices. In 2018, former conservative President Myung-bak Lee (two presidencies before Moon) was arrested and charged, after Park's arrest.

Under the current administration's foreign policy, Japan-Korea relations have deteriorated significantly compared to that of previous governments. On the other hand, Moon's administration is persistently promoting Inter-Korean Summits with North Korea's leader Jong-un Kim. Kim promised that he would visit Seoul in the near future, but this has not yet happened.

Although Moon's administration has eagerly attacked previous leaders, the current administration has not succeeded in improving the Korean economy. Consequently, in December 2018, it showed high disapproval ratings. Public evaluation of Moon has grown negative.

The most prominent decision by the Constitutional Court in 2018 was that the Military Service Act did not conform to the Constitution, as it did not provide alternative services for conscientious objectors for religious reasons.

This article outlines the political trends in Korea and the significant cases on which the Korean Constitutional Court made decisions in 2018.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

(1) Eradication of Deep-Rooted Evils

In Korea, new governments tend to pursue the injustices of previous administrations in order to strengthen their legitimacy.[1] Since the Moon administration started in 2017, former conservative presidents have been arrested and prosecuted under the concept of *jeokpye cheongsan*, which means "eradication of deep-rooted evils."[2]

For example, former President Geun-hye Park was arrested for bribery in April 2017 after the Constitutional Court impeached her. On April 6, 2018, the Seoul Central District Court sentenced Park to 24 years' imprisonment and an 18 billion won fine.[3] Subsequently, the Seoul High Court sentenced Park to 25 years in jail with a 20 billion won fine on August 24.[4]

[1] Jin-il Byeon, Korea – *The Country that Kills Presidents* (Tokyo: Kadokawa Shoten, 2014 [in Japanese]), p. 212.

[2] For the English translation of the term *jeokpye cheongsan*, refer to Moo-jong Park, 'Eradication of deep rooted evils', the Korea Times, March 16, 2017, https://www.koreatimes.co.kr/www/opinion/2018/11/636_225839.html, retrieved February 3, 2019.

[3] 'South Korean court jails former president Park for 24 years', Reuters, April 6, 2018, https://www.reuters.com/article/us-southkorea-politics-park/south-korean-court-jails-former-president-park-for-24-years-idUSKCN1HD0MN, retrieved January 10, 2019.

[4] 'South Korean court raises ex-president Park's jail term to 25 years', August 24, 2018, https://www.reuters.com/article/us-southkorea-politics-park/south-korean-court-raises-ex-president-parks-jail-term-to-25-years-idUSKCN1L905P, retrieved January 10, 2019.

Furthermore, on March 23, former conservative President Myung-bak Lee was arrested for receiving bribes from the National Intelligence Service (NIS). The Seoul Central District Court imposed a prison sentence (15 years) and a 13 billion won fine on October 5.[5]

(2) Deteriorating Japan-Korea Relations

In 2018, the relationship between Japan and Korea deteriorated significantly. After the impeachment bill against former President Park was passed on December 9, 2016, the President's power was suspended. Under these circumstances, Korean society began to dismantle the "Comfort Women" Agreement, which had been reached in December 2015 during the Park administration. After the Moon administration began, the new government officially announced that the Japan-funded "Reconciliation and Healing Foundation" would be dissolved.[6]

On October 30, the Korean Supreme Court ordered Japan's Nippon Steel & Sumitomo Metal Corporation to compensate wartime laborers from the Korean peninsula.[7] The Supreme Court ruled that "the Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea", which was concluded in 1965, did not fully discuss the illegality of Japan's colonization of the Korean peninsula. Therefore, the Court decreed that wartime laborers could demand compensation for the "illegal" Japanese colonization.

After the decision, former Chief Justice of the Supreme Court Seung-tae Yang was arrested for abuse of power and delaying a decision on the wartime laborers issue during the Park administration. Yang's arrest can be considered a part of the "eradication of deep-rooted evils" regarding the previous administration.[8]

Furthermore, on December 20, Korean naval vessel *Gwanggaeto Daewang* locked its fire-control radar on a Japanese Maritime Self-Defense Force patrol plane in the Sea of Japan.[9] However, on January 2, instead of admitting that the vessel had locked its radar on the plane and making an apology to Japan, the Ministry of National Defense in Korea accused the patrol plane of threatening the vessel by flying at low altitude[10] and demanded an apology.

On January 10, President Moon confronted the Japanese government and argued that Japanese politicians' politicization of the wartime laborers issue was unwise.[11] Moon's statement aroused strong antipathy in Japan; currently, it seems almost impossible to mend Japan-Korea relations in the near future.

(3) Realization of Inter-Korean Summits

Due to the reinstatement of a liberal government in Korea, inter-Korean summits—long avoided by conservative administrations since former President Moo-hyun Roh's 2007 visit to Pyongyang—were revived. In 2018, President Moon held three inter-Korean summits in April, May, and September, respectively.

The first summit on April 27 was held at the inter-Korean Peace House (located on the south side of the Military Demarcation Line in Panmunjom). At this time, President Moon and Jong-un Kim, Chairman of the State Affairs Commission of the Democratic People's Republic of Korea (DPRK), signed a joint declaration called "Panmunjom Declaration for Peace, Prosperity and Unification of the Korean Peninsula". The declaration discusses three important matters: co-prosperity and independent unification; removing the danger of war; and cooperating to build peace and stability on the Korean peninsula.[12]

During the second summit, held on May 26 at Tongil Gak (located on the north side of the Military Demarcation Line in Panmunjom), Moon and Kim agreed to implement what they had signed in the Panmunjom Declaration in April and ensure the success of the US-DPRK summit,[13] which was to be held on June 12 in Singapore.

[5] '[Full Text] Former President Myung-bak Lee, Judgment of First Instance', YTN, December 5, 2018, https://www.ytn.co.kr/_ln/0103_201810051506269893 (in Korean), retrieved January 9, 2019.

[6] 'Seoul to dissolve Japan-funded "comfort women" foundation', The Mainichi, November 21, 2018, https://mainichi.jp/english/articles/20181121/p2a/00m/0na/023000c, retrieved January 31, 2019.

[7] Supreme Court 2013 Da 61381, October 30, 2018.

[8] 'Ex-Chief Justice of South Korea Is Arrested on Case-Rigging Charges', the *New York Times*, January 23, 2019. https://www.nytimes.com/2019/01/23/world/asia/south-korea-chief-justice-japan.html, retrieved February 5, 2019.

[98] 'Japan accuses South Korea of "extremely dangerous" radar lock on plane', Reuters, December 21, 2018. https://www.reuters.com/article/us-japan-defence-southkorea/japan-accuses-south-korea-of-extremely-dangerous-radar-lock-on-plane-idUSKCN1OK11O, retrieved February 5, 2019.; 'South Korea and Japan remain at odds over radar lock-on row', the *Japan Times*, January 15, 2019, https://www.japantimes.co.jp/news/2019/01/15/national/south-korea-japan-remain-odds-radar-lock-row/#.XFwSS-R7Idg, retrieved February 6, 2019.

[10] 'Seoul accuses Japanese patrol plane of threatening flight', the *Washington Post*, January 23, 2019. https://www.washingtonpost.com/world/asia_pacific/seoul-accuses-japanese-patrol-plane-of-threatening-flight/2019/01/23/9fc1c39c-1ee4-11e9-a759-2b8541bbbe20_story.html?noredirect=on&utm_term=.64c7bfefeb8d, retrieved February 5, 2019.

[11] 'South Korean President Moon Jae-in accuses Japan of politicizing wartime labor issue', the *Japan Times*, January 10, 2019, https://www.japantimes.co.jp/news/2019/01/10/national/politics-diplomacy/south-korean-president-moon-jae-accuses-japan-politicizing-wartime-labor-issue/, retrieved February 1, 2019.

[12] The English full text of the Panmunjom Declaration for Peace, Prosperity and Unification of the Korean Peninsula is available at the website of the Ministry of Foreign Affairs, Republic of Korea, http://www.mofa.go.kr/eng/brd/m_5478/view.do?seq=319130&srchFr=&amp%3BsrchTo=&amp%3BsrchWord=&amp%3BsrchTp=&amp%3Bmulti_itm_seq=0&amp%3Bitm_seq_1=0&amp%3Bitm_seq_2=0&amp%3Bcompany_cd=&amp%3Bcompany_nm=, retrieved January 9, 2019.

[13] 'President Moon to announce results of second inter-Korean summit', The World on Arirang, May 27, 2018. http://www.arirang.com/News/News_View.asp?nseq=217957, retrieved February 5, 2019.

The third summit was held on September 18 and 19 in Pyongyang, DPRK. At the third summit, Moon and Kim adopted the "Pyongyang Joint Declaration". The Declaration includes the following: ending hostile relations, developing economic exchanges and cooperation, reuniting separated families, propelling cultural exchanges, denuclearization of the Korean Peninsula, and a visit to Seoul by Chairman Kim in the near future.[14] Because of this declaration, the South Koreans expected Chairman Kim to visit Seoul, but this has not yet been realized.

(4) The "Jobs President": Failure to Raise Minimum Wage and Worsening Korean Economy

During the presidential election, President Moon made a public commitment to raise the minimum wage to 10,000 won by the year 2020 and increase employment opportunities. After inauguration, he pushed to raise the minimum wage, shorten working hours, and increase opportunities to attain full-time jobs, but this was ineffective; instead, it worsened the Korean economy.[15]

Because of the minimum wage raise, personnel expenses hindered companies, and employment opportunities decreased.[16] The minimum wage raise was especially fatal for small companies. Moon then withdrew his public commitment to raising the minimum wage to 10,000 won until 2020.

During Moon's administration, the Korean economy did not improve. In December 2018, Moon's disapproval rating exceeded his approval rating for the first time.[17] It was now time for Moon, who was expected to be the "jobs president", to show his capability.

III. CONSTITUTIONAL CASES

(1) Decision of Nonconformity to the Constitution regarding the Assembly and Demonstration Act, Article 11 (2013 Hun-Ba 322, 2016 Hun-Ba 354, 2017 Hun-Ba 360·398·471, 2018 Hun-Ga 3·4·9 [consolidated], May 31, 2018) (2015 Hun-Ga 28, 2016 Hun-Ga 5 [consolidated], June 28, 2018) (2018 Hun-Ba 137, July 26, 2018)

In 2018 (May, June, and July), the Constitutional Court made a decision of nonconformity to the Constitution regarding the Assembly and Demonstration Act.[18] Article 11 prohibits holding an assembly or a demonstration within a hundred-meter radius of places such as the National Assembly, presidential residence, and courts.

In May, the Constitutional Court made a decision against the act for nonconformity to the Constitution, as it prohibited assembling within hundred meters from the National Assembly under the principle of proportionality. The Court also made the same decision in the Prime Minister's official residence case in June and the case of courts in July.

Interestingly, the Constitutional Court had already made a decision of unconstitutionality against the act for prohibiting demonstrations within hundred meters of foreign countries' diplomatic offices in 2003.[19] Therefore, the act already provided specific provisions regarding demonstrations near diplomatic offices.

(2) Decision of Nonconformity to the Constitution regarding Military Service Act, Article 5 (1) (2011 Hun-Ba 379, 383, 2012 Hun-Ba 15, 32, 86, 129, 181, 182, 193, 227, 228, 250, 271, 281, 282, 283, 287, 324, 2013 Hun-Ba 273, 2015 Hun-Ba 73, 2016 Hun-Ba 360, 2017 Hun-Ba 225 [consolidated]; 2012 Hun-Ga 17, 2013 Hun-Ga 5, 23, 27, 2014 Hun-Ga 8, 2015 Hun-Ga 5 [consolidated], June 28, 2018)

The Korean Constitution stipulates the duties of the national defense in Article 39 (1). Furthermore, the Military Service Act, Article 3 (1), stipulates that male Korean nationals should serve mandatory military service. Article 88 (1) decrees that any person who does not enlist in the military without "justifiable grounds"—even after the enlistment date—shall be punished. Therefore, for a long time, there were discussions on whether religious conscientious objections could be considered "justifiable grounds."

In 2004 and 2011, the Constitutional Court did not recognize conscientious objectors' freedom of conscience because it prioritized national security above individual freedom of conscience.[20] Therefore, many conscientious objectors have remained incarcerated; in recent years, district courts have begun to acquit innocent people for conscientious objection. There was high interest, then, to see how the Constitutional Court would make a decision on conscientious objection under the new government.

On June 28, although the Constitutional Court considered the Military Service Act, Article 88 (1), constitutional, it made a decision of

[14] The English full text of the Pyongyang Joint Declaration of September 2018 is available at the website of the Ministry of Foreign Affairs, Republic of Korea, http://www.mofa.go.kr/eng/brd/m_5476/view.do?seq=319608&srchFr=&amp%3BsrchTo=&amp%3BsrchWord=&amp%3BsrchTp=&amp%3Bmulti_itm_seq=0&amp%3Bitm_seq_1=0&amp%3Bitm_seq_2=0&amp%3Bcompany_cd=&amp%3Bcompany_nm=&page=1&titleNm=, retrieved January 9, 2019.

[15] Economy continues to worsen…President Moon seeks a breakthrough through Regulatory Reform', Chosun Biz, August 9, 2018 (in Korean), http://biz.chosun.com/site/data/html_dir/2018/08/09/2018080900263.html, retrieved February 4, 2019.

[16] 'Most vulnerable hit hardest as positions vanish – Minimum wage rise is one factor in the sharp drop in available jobs', *Korea Joongang Daily,* November 20, 2018, http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3055843, retrieved February 4, 2019.

[17] 'Moon's disapproval rating exceeds approval for 1st time', *Korea Joongang Daily,* December 22, 2018, http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3057265, retrieved February 4, 2019.

[18] The English versions of Korean Acts are available at the website of the Korea Legislation Research Institute (KLRI): http://elaw.klri.re.kr/kor_service/main.do, retrieved February 6, 2019.

[19] Constitutional Court 2000 Hun-Ba67·83 [consolidated], October 30, 2003.

[20] Constitutional Court 2002 Hun-Ga 1, August 26, 2004; Constitutional Court 2008 Hun-Ga 22 et al., August 30, 2011.

nonconformity to the Constitution against it, as Article 5 (1)[21] did not provide for alternative service—that did not include military training—for conscientious objectors.

After the Constitutional Court's decision, the Supreme Court recognized conscientious objection and remanded the case to the lower court on November 1.[22] After its ruling, 57 conscientious objectors were released.[23]

(3) Decision of Constitutionality regarding Credit Information Use and Protection Act, Article 40, Item 4 (2016 Hun-Ma 473, June 28, 2018)

On June 28, the Constitutional Court made a decision of constitutionality regarding the Credit Information Use and Protection Act, Article 40. Under the Act, Item 4 of Article 40 prohibits finding out about a person's house or investigating their life if the investigating company is not a credit information company. Furthermore, the Article's Subparagraph 5 prohibits using titles such as "detective". Therefore, Korea does not recognize detective work as an occupation.

The plaintiff, a retired police officer, intended to become a detective, but the act prohibited the use of the title "detective". Thus, the plaintiff insisted that the act violated the freedom of occupation, which was secured in the Constitution (Article 15).

The Constitutional Court stated that some people were violating others' privacy by using devices such as candid cameras and Global Positioning System (GPS). Furthermore, the Court decided that the act was constitutional because some of the plaintiff's operations, such as finding lost property, were still allowed under the act.

Based on the Constitutional Court's decision, the Korean media cynically commented that Sherlock Holmes would not be able to use the title "detective" in Korea.[24]

(4) Decision of Constitutionality regarding Distribution Industry Development Act, Article 12-2
(2016 Hun-Ba 77, 78, 78 [consolidated], June 28, 2018)

The Korean Constitution, Article 119 (2), stipulates the democratization of economics and allows the government to intervene in the market in order to maintain a sound market economy. Since the hypermarket emerged in Korea, bankruptcy has threatened small privately run stores.

To protect them, the Distribution Industry Development Act was established. Under the act, Article 12-2, the mayor of a special self-governing city or the head of a basic municipality can order hypermarkets to restrict their business hours and designate mandatory days off for two days per month. Therefore, the plaintiff, who operated hypermarkets in several cities, such as Incheon, Bucheon, and Cheongju, insisted that the act violated the right to equality and freedom of occupation secured in the Constitution.

The Constitutional Court noted that the Constitution's Article 119 (2) allows the government to intervene in the market to democratize the economy. Furthermore, the Court decided that it is necessary to restrict hypermarkets' business hours in order to revive privately owned small stores and maintain sound competition.

(5) Decision of Nonconformity to the Constitution regarding Protection of Communication Secrets Act (2012 Hun-Ma 191·550, 2014 Hun-Ma 357 [consolidated], June 28, 2018; 2012 Hun-Ma 538, June 28, 2018)

Article 13 of the Protection of Communication Secrets Act allows prosecutors or judicial police who have the permission of the court to order telecommunications business entities to submit communication confirmation data. Furthermore, Article 2, Item 11 stipulates that "communication confirmation data" includes data on tracing the location of information communications.

The plaintiff insisted that narrowing the focus of the police dragnet by tracing the location of information communications violated their right to secrecy of communications and the due processes of law stipulated by the Constitution.

The Constitutional Court decided that it was a case of nonconformity with the Constitution because the articles of the act did not maintain the principle of proportionality and therefore violated the plaintiff's secrecy of communications.

(6) Decision of Nonconformity to the Constitution regarding the Act on the Establishment, Operation, etc., of Teachers' Unions (2015 Hun-Ga 38, August 30, 2018)

The Korean Constitution, Article 33 (1), protects workers' rights to independent association, collective bargaining, and collective action. Furthermore, the Trade Union and Labor Relations Adjustment Act (Article 5) decrees that workers have the right to establish a trade union or join one, but public officials and school teachers are subject to other acts.

[21] Military Service Act, Article 5 (1) provides five categories as follows: active duty service, reserve service, supplementary service, preliminary military service, and wartime labor service.

[22] Supreme Court 2016 Do 10912, November 1, 2018.

[23] 'South Korea releases 57 conscientious objectors after landmark ruling on military service', the *Washington Post*, November 30, 2018, https://www.washingtonpost.com/world/asia_pacific/south-korea-releases-58-conscientious-objectors-after-landmark-ruling-on-military-service/2018/11/30/9980686a-f4a2-11e8-80d0-f7e1948d55f4_story.html?noredirect=on&utm_term=.8524adefcbb3, retrieved February 13, 2019.

[24] 'Constitutional Court made a decision that disenables Sherlock Holmes to be a detective in Korea', *Huffington Post*, July 10, 2018, https://www.huffingtonpost.kr/entry/sherlock_kr_5b443e2ee4b048036ea1badc (in Korean), retrieved January 8, 2019.

However, the Act on the Establishment, Operation, etc., of Teachers' Unions, Article 2, only stipulates that the definition of "teachers" is the same as the definition in the Elementary and Secondary Education Act, Article 19 (1). Since the definition of teachers is equivalent only to that of elementary and secondary teachers, university professors are not included in the act, and they are not allowed to form trade unions. The plaintiff, a member of a trade union consisting of the faculties of higher education institutes, insisted that the article violates workers' rights to collective action and equality secured in the Constitution.

Although the Constitutional Court recognized the special nature of university professors compared to elementary and secondary school teachers, it decided that it was not rational to deny university professors entire rights to collective action. It made a decision of nonconformity to the Constitution in this case.

(7) The Constitutional Court's Best 30 Decisions in the Past 30 Years, as chosen by the People

Korea achieved democratization in 1987, and the Constitutional Court was established in the following year. The year 2018 was the 30th anniversary of its establishment. The Constitutional Court conducted a survey of 15,754 people to choose the best decisions made by the Court in the past 30 years.[25]
The most popular vote was for the decision of unconstitutionality regarding the government's inaction on the "comfort women" issue,[26] and 3848 people voted for this decision.[27] In second place was the impeachment of the President (both Moo-hyun Roh in 2004 and Geun-hye Park in 2017),[28] with 3113 votes. The decision of nonconformity to the Constitution regarding the Decree on Public Officials Appointment Examinations, which provided an age restriction of up to 32 years for the civil service examination,[29] came in third, with 2543 votes.[30] In fourth place was the decision of unconstitutionality regarding the Criminal Act, Article 241, which punished adultery,[31] with 1780 votes.[32]

The other ranked decisions are as follows: the unconstitutionality of the Act of Promotion of Information and Communications Network Utilization and Information Protection, etc., which enforced the use of real names on the internet[33] (1699 votes [fifth place]); nonconformity to the Constitution regarding the Civil Act that prohibited marriage between citizens sharing the same family surname and ancestral home[34] and nonconformity to the Constitution regarding the Protection of Communications Secrets Act, Article 6 (7) proviso, which allowed for exceeding the period of communication restrictions[35] (1502 votes [tied for sixth place]); constitutionality of the Improper Solicitation and Graft Act, which considers mass media and faculty members as "public officials"[36] (1317 votes [eighth place]); nonconformity to the Constitution regarding the Land Excess-Profits Tax Act[37] (1296 votes [ninth place]); and nonconformity to the Constitution regarding the Assembly and Demonstration Act, which prohibited demonstrations within a hundred-meter radius of the National Assembly[38] (1258 votes [tenth place]).[39]

IV. LOOKING AHEAD

In 2012, the Constitutional Court decided that prosecuting abortion under the Criminal Act was constitutional because it prioritized fetal right to life above women's right to self-determination.[40] However, after the reinstatement of a liberal administration, the people's demand for abortion legalization was strongly boosted,[41] and the Constitutional Court was widely expected to make a decision on abortion in 2018.

The current Mother and Child Health Act, Article 14, only allows limited abortion, such as in cases where the maintenance of

[25] The Constitutional Court's Most Popular Decision is the Decision Affirming the "Unconstitutionality of the Government's Inaction on the Comfort Women Issue'", Hankyoreh, August 26, 2018, http://www.hani.co.kr/arti/society/society_general/859225.html (in Korean), retrieved January 25, 2019.

[26] Constitutional Court 2006 Hun-Ma 788, August 30, 2011.

[27] Hankyoreh, supra note 25.

[28] Constitutional Court 2004 Hun-Na 4, May 14, 2004; 2016 Hun-Na 1, March 10, 2017.

[29] Constitutional Court 2007 Hun-Ma 1105, May 29, 2008.

[30] Hankyoreh, supra note 25.

[31] Constitutional Court 2009 Hun-Ba 17·205, 2010 Hun-Ba 194, 2011 Hun-Ba 4, 2012 Hun-Ba 57·255·411, 2013 Hun-Ba 139·161·267·276·342·365, 2014 Hun-Ba 53·464, 2011 Hun-Ga 31, 2014 Hun-Ga 4 [consolidated], February 26, 2015.

[32] Hankyoreh, supra note 25.

[33] Constitutional Court 2010 Hun-Ma 47, August 23, 2012.

[34] Constitutional Court 95 Hun-Ga 6·13 [consolidated], July 16, 1997.

[35] Constitutional Court 2009 Hun-Ga 30, December 28, 2010.

[36] Constitutional Court 2015 Hun-Ma 236·412·662·763 [consolidated], July 28, 2016.

[37] Constitutional Court 92 Hun-Ba 49·52 [consolidated], July 29, 1994.

[38] Constitutional Court 2013 Hun-Ba 322, 2016 Hun-Ba 354, 2017 Hun-Ba 360·398·471, 2018 Hun-Ga 3·4·9 [consolidated], May 31, 2018.

[39] 'The Number One Decision Chosen by the People is the "Unconstitutionality of the Government's Inaction on Comfort Women Issue'", *Legal Times*, August 27, 2018, http://www.legaltimes.co.kr/news/articlePrint.html?idxno=41993 (in Korean), retrieved February 12, 2019.

[40] Constitutional Court 2010 Hun-Ba 402, August 23, 2012.

[41] 'Blue House responds to petition for abortion rights with launch of fact-finding study', Hankyoreh, November 27, 2017, http://english.hani.co.kr/arti/english_edition/e_national/820904.html, retrieved February 18, 2019.

pregnancy endangers a woman's health, cases where the woman was raped, etc.[42] Furthermore, the Ministry of Health and Welfare amended the administrative rule to toughen punishments for physicians who assist in abortions.[43] Under these circumstances, the Korean Association of Obstetricians and Gynecologists (KAOG) insisted that punishing physicians and women without analyzing the causes of abortion and providing a better solution was unhelpful, and they officially refused their commitment to illegal abortions.[44]

According to KAOG, although 23 of the 30 OECD member countries have legalized abortion for economic reasons, Korea still has not recognized it, and Korean citizens travel overseas where abortion is legal.[45] Furthermore, it is reported that 90% of women who undergo illegal surgery belong to poor and minority communities.[46]

Although it was highly expected that the Constitutional Court would recognize women's right to self-determination, it did not make a decision in 2018. Therefore, the decision of the Court is still attracting keen attention in 2019.

V. FURTHER READING

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[42] 'Growing "controversy over abortion". Doctors reject surgery. Constitutional Court postpones decision of unconstitutionality.' Kyunghyang Shinmun, August 28, 2018, http://news.khan.co.kr/kh_news/khan_art_view.html?art_id=201808282236005 (in Korean), retrieved January 23, 2019.

[43] 'Doctors boycott abortion to protest "excessive" punitive measure', *Korea Biomedical Review*, August 28, 2018, http://www.koreabiomed.com/news/articleView.html?idxno=4057, retrieved February 3, 2019.

[44] Kyunghyang Shinmun, supra note 42.

[45] Ibid.

[46] Ibid.



Spain

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I. INTRODUCTION

From a political perspective, 2018 was marked by the change in Government on the 1st of June. Following a trial for corruption and sentencing involving important members of the Popular Party, the Socialist Group in Congress raised a motion of censure, which according to Article 113 of the Spanish Constitution is constructive. The alternative candidate for the position of president was Sr. Pedro Sánchez, who was sworn in as president after winning the vote by an absolute majority. This majority was possible thanks to the votes from the Socialist group, Unidos Podemos, Esquerra Republicana de Catalunya, the Democratic Party of Catalonia, the Basque Nationalist Party, Compromise, EH Bildu and New Canaries.

After losing the vote on the motion, Sr Rajoy resigned the presidency and his seat in Congress, and retired from political life. Some months later, following an intense primary process, Pablo Casado was elected as the new Secretary General of the Popular Party.

The other main focus of political attention continued to be Catalonia and the political and legal fallout from the constitutional breakdown following the approval of laws related to the self-determination referendum and the process of transition to independence in the Catalan Parliament in September 2017. These acts were declared unconstitutional and void by the Constitutional Court, along with the illegal referendum and the false unilateral declaration of independence. 2018 was a year of criminal investigation of the independence movement leaders, most of whom are in pre-trial detention, and some of whom remain abroad, seeking refuge from the action of the Spanish criminal justice system.

In the legal-constitutional field, the Constitutional Court had to grapple with significant topics such as universal justice, sex-segregated education and the scope of the right to be forgotten. Another significant judgment was the Constitutional Court pronouncing for the first time on the possibilities of parliamentary control of an acting government.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Two decisions stood out in 2018: 31/2018 and 58/2018. STC 31/2018 was in response to the appeal raised by the Socialist Parliamentary Group in Congress against various articles of Organic Law 8/2013, for the improvement of educational quality. The appeal of unconstitutionality was rejected entirely. With reference to sex-segregated teaching, the Constitutional Court stated that this pedagogical model was protected in the constitution by the right of creation of schools and by freedom of teaching. In consequence, sex-differentiated education may not be considered an obstacle to receiving public funds. With respect to the formula of choosing between subjects of religion and social values and civics or ethics, which the appellants claimed violated the principle of state neutrality, the judgment declared that the law includes cross-subject education in civics and the constitution in all subjects

during basic education. In this way, the relationship between the subjects of religion, social values, civics and ethics is not exclusive. The judgment included three dissenting opinions and one concurring opinion.

Judgment 58/2018 responded to an appeal of the violation of the right to honour, privacy and one's own image against the *El País* newspaper. In the 1980s, the newspaper published news of the appellants' conviction for drug trafficking, labelling them drug addicts. In 2007, *El País* established free access to their digital archives, so that entering the names of the appellants in Google gave this news story as the top result. The CC partially supported the appellants' claim. It declared the violation of personal data protection rights on the side of "the right to be forgotten", and ordered the suppression of that data since it was no longer necessary in terms of the original objectives. The court also declared the violation of the right to honour and privacy. The judgment affirmed that the passage of so much time reduced public interest in the matter, while the harm caused by the current diffusion of the news was particularly severe.

III. CONSTITUTIONAL CASES

1. STC 3/2018. Age discrimination.

The CC responded to an appeal for *amparo* (protection of fundamental rights) raised by a person with a severe psychological disability who requested to be included in an individualised care program in a care centre for disabled people in the Autonomous Community of Madrid. Their application was rejected because of the application of an age-related exclusion in the autonomous community regulations, as they were over 60, disregarding a medical evaluation of their condition and needs for specialised treatment. The CC recognised that this was age-related discrimination.

2. STC 10/2018. Judgment on the legislative proceedings in the Parliament of Catalonia.

The CC responded to an appeal for protection of fundamental rights raised by the socialist parliamentary group against the Mesa (governing body) of the Catalan Parliament, which rejected their request for a judgment by the Council for Statutory Guarantees regarding the proposed law for the referendum on self-determination. (The law was passed on the 7th of September and declared unconstitutional by the CC some months later.) The CC granted protection, stating that the possibility of requesting a judgment from the Council for Statutory Guarantees could not be abrogated without negatively affecting the essence of the legislative process. The CC declared that this had violated the rights of citizens to participate in public affairs through their representatives.

3. STC 12/2018. Calling a strike in education.

The CC responded to an appeal for protection of fundamental rights raised by a primary school teacher who was sanctioned for sending a letter to his pupils' parents informing them of a strike action and his intention to support it, along with his intention to spend ten minutes in his class telling his pupils his reasons for doing so. This was punished by the educational authorities as they considered this behaviour as personal use of public goods and resources, and an infraction of the requirement of neutrality. The CC granted the teacher protection because the type of information transmitted in the class and the little time spent explaining his reasoning could not be considered as personal use of public resources. Furthermore, the information in the letter sent to parents did not violate the public sector worker's need to remain neutral, and the information given to the students about his intention to support the strike did not in itself represent an intention to indoctrinate or bias the students.

4. STC 14/2018. State competences in education.

The CC addressed the constitutionality of various precepts of Organic Law 8/2013, for the improvement of educational quality, for supposed infringement on the competences of the Autonomous Community of Catalonia. The CC partially approved the appeal and declared unconstitutional and void: a) the carte blanche of the national government to establish, by regulation, multilingual education from the second stage of infant education up to students of 18 years old, because there was no criteria by which to determine what was basic in this subject, and b) the authority granted to the Ministry of Education to decide, if autonomous authorities fail to comply, on the schooling of pupils in private schools and to take on the expenses for the corresponding educational authority (local or at the autonomous community level), given that it does not respect the limits set out by the CC on school inspectors, nor does it satisfy the minimum guarantees of legal certainty about the fundamentals of the subject. Conversely, the CC ruled the constitutionality of state regulation on: a) common content of core subjects, and b) final evaluation tests, it being necessary to pass these tests to achieve academic qualifications, which is a competence of the state.

5. STC 17/2018. Healthcare for irregular immigrants.

With Royal Decree Law 16/2012, the national government removed free healthcare from immigrants with irregular status. The Parliament of Navarra, in law 8/2013, recognised the right of all resident persons in Navarra, including irregular immigrants, to access free healthcare from its public health system. The CC judged that the autonomic law violated the basic competences of the state and declared the Navarra law unconstitutional. The judgment had 5 dissenting opinions.

6. STC 34/2018 and 94/2018. Government budgetary veto.

The CC responded to an appeal by the national government against the Mesa of Congress. The government, in accordance with the power granted in the constitution, imposed a veto on the parliamentary legislative process which suspended the timetable for implementation of Organic Law 8/2013, for the improvement of educational quality. The reason for the government's veto was that the law represented a reduction of income planned in the current budget. The Mesa ignored the government's veto and decided to continue with the legislative process, believing that the government veto had insufficient objective justification, or sufficient reduc-

tion of budgeted income. The CC agreed with the Mesa, reasoning that the government a) must explicitly justify the connection between a measure they propose and budgeted income and spending, and b) the connection must be direct and immediate, not merely hypothetical.

In the second judgment, the CC dealt with a case in which the Mesa refused to process a law closing nuclear power plants in Spain, applying the government-imposed veto which alleged that this law would affect multi-year budgets. The CC, applying the same doctrine as the previous case, affirmed that the government could not limit the autonomy of *Las Cortes Generales* (the two chambers, Congress and the Senate) to adopt initiatives if they did not truly affect the current budget. In 2018, the "budgetary veto" was a particular protagonist in the CC as a consequence of the weakness of parliamentary support for the different governments in the last two legislations.

7. STC 46/2018. Appearance of the President of Catalonia and the secession process.

The court dealt with another case related to the Catalan secession process. It involved an appeal for amparo raised by Miquel Iceta and fifteen other deputies in the Socialist Parliamentary Group in the Parliament of Catalonia related to agreements made by the Mesa, which authorised the appearance of the President of the Generalitat of Catalonia "to evaluate the results of the referendum of the 1st of October and its effects, in accordance with Article 4 of the Law on the Referendum on Self-determination". The court judged that authorising the appearance of the president in the Parliament violated the rights of the appellant deputies to exercise their representative functions, as it acknowledged a parliamentary initiative that meant the application of a law that had previously been suspended by the CC and which affected the condition and institutional position of the autonomic legislative assembly.

8. STC 80/2018. Energy poverty.

The CC ruled as unconstitutional various precepts of Law 2/2012, on the social function of housing in the community of Valencia. Valencian law established the obligation for providers of gas and electricity who were cutting off a supply to request a report from municipal social services beforehand to determine whether the people affected were at risk of social exclusion. The court judged that this obligation contradicted the fundamental state rules on the matter. The judgment had dissenting opinions. In one, the magistrate Xiol Ríos disputed the majority opinion, stating that the rules for protection of energy consumers at risk of social exclusion set out in the law were not necessarily binding on the competences of the state in general economic planning and energy but rather in the areas of "consumption" and "social services", thus the measure in question should not have been ruled unconstitutional.

9. STC 85/2018. The law courts and the "right to the truth".

The CC responded to a petition raised by the president of the government against the 2015 law in the Autonomous Community of Navarra "of recognition and compensation for victims of politically motivated acts by extreme right groups or public workers". The law created a Commission of Recognition and Compensation with the responsibility to investigate events which had resulted in the death, or serious or permanent injury, of the persons concerned in the context of politically motivated violence since the 1st of January, 1950. In the opinion of the CC, setting up this commission, which is not part of judicial power, does not conform with the constitution, as it affects the constitutionally configured system of criminal justice. This judgment had four dissenting opinions. Three of those judged that there had been a failure to address the requirements of the so-called "right to the truth", referring to Resolution 2005/66 from the Commission on Human Rights, passed on the 20th of April, 2005. This is the first time that this question has come up in the court's deliberations.

10. STC 100/2018. Cannabis.

The CC ruled unconstitutional a law from the Parliament of Catalonia which regulated the supply and distribution of cannabis. The CC judged that this law granted legal cover to criminal behaviour, affecting the exclusive state competence to regulate what is considered a crime.

11. STC 111/2018. Paternity leave and non-discrimination.

The CC addressed an appeal presented by a father who had enjoyed the 13 days of paternity leave provided for in the law. The father had previously requested an increase of his paternity leave to 16 weeks to make it the same length as the legally recognised maternity leave available to the mother. The ordinary courts rejected this increase. The CC judged that this was not sex discrimination as the longer length of maternity leave in the law has an objective that does not exist in the case of fathers: to allow the physical recovery of the mother following childbirth. The judgment contains an interesting dissenting opinion that the majority decision of the court is, at its heart, discriminating against women. Recognising that mothers can always have longer maternity leave than fathers does not contribute to improving the traditional discrimination that some women face in the labour market. Firstly because it does not encourage hiring women, and secondly because it restricts prospects for advancement at work.

12. STC 124/2018. Control of the acting government.

The CC responded to an appeal raised by Congress against the government for having refused to submit to parliamentary control. The Socialist Parliamentary Group had requested the appearance of the Ministry of Defence in Congress to report on matters arising from the NATO Council of Ministers. The government was in an acting capacity following general elections and was waiting for the investiture of the new president by the newly elected Congress. The acting

government refused to submit to parliamentary control on the basis that it did not have parliamentary confidence in the new Congress, but in the previous Congress, which had been dissolved for the elections. The CC affirmed that the acting government also had to submit to parliamentary control.

13. STC 129/2018, 130/2018 & 131/2018. Judicial competence to try the actors in the Catalan secessionist process.

The CC addressed various appeals presented by those linked to the Catalan secessionist process, either in prison or in self-imposed exile outside Spain, who were being prosecuted for crimes of rebellion, sedition, misuse of public funds and disobedience. The appellants believed that the appropriate court to try them was not the Supreme Court, which had been declared the proper court, but rather the Catalan Superior Court of Justice. The CC rejected the appeals, reasoning that they had not exhausted all available resources in the Supreme Court to defend their claim.

14. STC 136/2018. The Catalan secession process and failure to comply with CC resolutions.

The CC addressed a complaint against resolution 5/XII in the Catalan Parliament from the 5th of July, 2018. In that, the Parliament reaffirmed its will to continue with the democratic actions to complete the process of Catalan independence. To that end, the parliamentary resolution urged the Catalan government to continue the application of various laws that had previously been annulled by the CC for violating the constitution. Specifically, the principle of popular sovereignty and the principle of the unity of the Spanish nation. The Constitutional Court declared resolution 5/XII from the Catalan Parliament unconstitutional for having again violated those principles.

15. STC 140/2018. Universal criminal justice.

The CC addressed a complaint presented against the amendment of Law 6/1985, on judicial power. This change would limit the initial universal jurisdiction of the Spanish courts to try, among other things, crimes of genocide, crimes against humanity and terrorism committed by Spaniards or foreign nationals anywhere in the world. The new text would limit the jurisdiction to prosecute those crimes and would only permit it where there was a point of connection with the Spanish state: a) if the suspect were a Spanish citizen or b) a foreign national present in Spain.

The petitioners believed that this limitation of universal criminal justice violated the constitution because it would restrict the ability of the courts to guarantee fundamental rights. They also believed that it breached international treaties in which Spain required extraterritorial persecution of those crimes. The CC judged that the limitation of judicial competence in the amended law did not violate the constitution, as it established that the competence of the Spanish criminal courts was guaranteed in terms recognised in the law. Therefore, the law could define the extent of universal criminal justice. The CC decision had one dissenting vote from the majority opinion.

IV. LOOKING AHEAD TO 2019

The 2019 calendar is marked by elections (municipal, autonomic and European Parliament elections in May) and by jurisprudential pronouncements.

Amongst those will be the extremely important pronouncements from the criminal courts related to the legal responsibilities of those responsible for the Catalan secessionist process. In relation to this, the Constitutional Court will have to respond to appeals raised by some of the secessionist leaders in pre-trial detention and deprived of the right to exercise their public office by judicial decision. We are also awaiting a decision on the constitutionality of the measures taken by the state, which determined the dismissal of these members of the Catalan government, the dissolution of its parliament, and the calling of elections. On a separate issue, the Constitutional Court will have to address such controversial questions as the current regulation of abortion (pending since 2010) and reviewable indefinite imprisonment (pending since 2015).

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Sri Lanka

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I. INTRODUCTION

2018 was one of the most eventful years in Sri Lankan constitutional history. While a fitful constitution-making process carried laboriously on within Parliament, and an unusual attempt was made by way of a Private Member's bill to transform the presidential constitution into a parliamentary model, by far the most significant events concerned those surrounding an attempted constitutional coup by the President of the Republic to illegally dismiss his own government and replace it with another. The constitutional crisis ended with the restoration of constitutional rule, with a mobilised public, Parliament, and the courts all playing prominent roles in the resistance to presidential authoritarianism. However, the aftermath of the crisis has been disappointing, with the President escaping legal and political accountability for his violations of the constitution, and providing no apparent impetus for further constitutional reform. In revealing the potential for both democratic backsliding and institutional resilience, the crisis revealed the paradoxical nature of Sri Lanka's political culture. That paradox teaches us that while strengthening democratic institutions is both worthwhile and effective, the ultimate challenge for democratisation lies in the more nebulous sphere of political culture, where authoritarian practices of the past might be more difficult to eliminate.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The process of drafting a new constitution, begun in 2016, continued throughout 2018, although by then due to its lack of transparency and public engagement, the process was increasingly marked by public indifference and apathy. The Steering Committee of the Constitutional Assembly (as Parliament is known from time to time when it sits in its constitution-making capacity) had published an Interim Report in November 2017. The Interim Report had been intended to reflect an agreed consensus on the principles of a new constitution between all the parties represented in the Constitutional Assembly. However, due to the deterioration of the relationship between President Maithripala Sirisena and Prime Minister Ranil Wickremesinghe, and thus a fraying governing coalition between the two largest parties, the Interim Report did not reflect a consensus. Virtually all its main recommendations were opposed in a separate dissent entered by the President's party. In order to overcome this impasse, the Steering Committee instructed the Panel of Experts (comprising lawyers and academics nominated by political parties) resourcing the process to produce a Discussion Paper that could bridge the differences. This was anticipated in November, but one of the most serious constitutional crises in Sri Lanka's post-colonial history erupted in October.

On the night of 26 October, the Presidential Secretariat made three announcements in quick succession that took the entire country by complete surprise. The first was that the President's party had withdrawn from the National Government, the second that the President had appointed Mahinda Rajapaksa MP (the former populist President Sirisena had defeated in the 2015 elections) as Prime Minister, and the third that stated that the President had removed Ranil Wickremesinghe from the office of Prime Minister.

Although caught unaware, Wickremesinghe swiftly responded that he remained the Prime Minister, as he continued to enjoy the confidence of Parliament and had not therefore been lawfully dismissed. The Nineteenth Amendment to the Constitution, which had been passed by the National Government of Sirisena and Wickremesinghe in 2015, had curtailed the President's power to dismiss the Prime Minister so long as the latter enjoyed the confidence of Parliament. The next day, the President prorogued Parliament to buy time to cobble together a majority for his nominee as Prime Minister, and from 29 October onwards, Sirisena and Rajapaksa started making appointments with the new Cabinet while pursuing strenuous attempts, including through patently corrupt means, to induce crossovers from Wickremesinghe's coalition to provide Rajapaksa with a parliamentary majority.

On 9 November, with still no majority in place, the President gazetted the dissolution of Parliament for an early election in January. On 12 November, the dissolution order was challenged by way of fundamental rights petitions before the Supreme Court by political parties and a civil society group. On the same day, the Supreme Court issued an interim stay on the dissolution order until the court could determine the legality of the action after a full hearing. In the wake of the Supreme Court's interim order that Parliament had not been legally dissolved, Parliament reconvened the next day and passed a vote of no-confidence in Rajapaksa's purported government. Although pro-Rajapaksa MPs tried to disrupt proceedings through violence and intimidation of the Speaker within the chamber, the vote was carried. On 16 November, due to the violence and lack of clarity during the previous sittings, Parliament passed a second vote of no-confidence in the purported Rajapaksa government, which was boycotted by pro-Rajapaksa MPs.

On 3 December, the 122 MPs constituting the parliamentary majority *against* the purported Rajapaksa government filed a petition in the Court of Appeal seeking a writ of *quo warranto* against Rajapaksa and his ministers. The purpose of the writ application was to determine the legal authority by which Rajapaksa and his ministers claim to act as a government. As with the separate action in the Supreme Court, the Court of Appeal also issued an interim order restraining Rajapaksa from functioning as Prime Minister until it had heard and determined the case. On 12 December, Parliament passed a vote of confidence in Ranil Wickremesinghe as the lawful Prime Minister, and on 13 December, the Supreme Court delivered its judgment on the fundamental rights applications against the purported dissolution of Parliament by the President on 9 November. The Court found the presidential action to be illegal and unconstitutional (the decision is discussed in more detail in the next section), and on the following day, the Supreme Court refused to vacate the stay order issued by the Court of Appeal in the *quo warranto* application. On 15 December, Mahinda Rajapaksa "resigned" as Prime Minister, and on 16 December, Ranil Wickremesinghe was reinstated by being sworn in before the President as Prime Minister.

As noted, the impugned presidential acts were carried out under previous unilateral presidential powers that were severely limited (e.g., dismissal/appointment of the Prime Minister) or removed (e.g., the dissolution of Parliament in the first four and half years of its five-year term, except by a resolution of Parliament passed by a two-thirds majority) by the Nineteenth Amendment. While it is inexplicable how Sirisena was advised he could exercise powers he no longer had, and that too by a constitutional amendment introduced no more than four years previously by his own National Government, it would appear that the Nineteenth Amendment passed the stress test of the crisis well. The improved framework for judicial appointments doubtless had a role in bolstering the independence and impartiality of the courts, and the improved framework for the de-politicisation of public services and independent bodies did have a more general effect in resisting presidential authoritarianism.

The President did not have the benefit of any legal uncertainty to even indirectly justify his actions; his actions were quite plainly unconstitutional on the face of the text after the Nineteenth Amendment. How he felt able to act this way begs deeper questions about a Sri Lankan political culture that permits, or at least tolerates this behaviour at the highest level. On the other hand, the crisis and particularly its denouement with the restoration of constitutional rule highlighted well-functioning checking mechanisms in Sri Lanka's constitutional system. Wickremesinghe's parliamentary majority held against severe odds, the Speaker felt able to assert the rights and privileges of Parliament against the depredations of the executive, and the courts stepped boldly into a political controversy they would normally have chosen to avoid. More broadly, the prominent role of social media activism during the crisis revealed a changing country, especially in the attitudes of younger sections of the electorate, who seem to be less motivated by blind party or ethnic loyalties than older voters, and more by democratic values. Spontaneous civic protests by ordinary citizens heralded a remobilisation of the middle class, which had generally retreated from the political sphere since the 1950s, around the defence of constitutional values. The international community, too, refused the legitimacy of recognition to the Sirisena-Rajapaksa power grab—not an inconsiderable factor in the defeat of the constitutional coup.

While the outcome of the crisis was, without any doubt, a clear victory for constitutional democracy, its aftermath is more amorphous. It has not acted as a spur to revitalise the flagging constitutional reform process, or even of the style and personnel of the government, and Wickremesinghe has missed a chance to rejuvenate the reforming zeal that inspired the country in 2015 in mandating a new constitution. Sirisena has almost entirely escaped accountability for the serious breaches of the constitution for which he is responsible, there being no two-thirds majority for a successful impeachment, and the only solace might be that his political career is most likely to be over by the next presidential election. Rajapaksa, too, was damaged, but did contrive to muster enough numbers to be recognised as the Leader of the Opposition in Parliament following the crisis. He is using this position as a platform for an electoral return, condemning among other things the Nineteenth Amendment

restraints on presidentialism as a fetter on strong government. But having been elected twice previously as President, the Nineteenth Amendment debars him from running again, and so he has a considerable dilemma about the choice of a proxy as President while he governs as Prime Minister.

III. CONSTITUTIONAL CASES

1. Twentieth Amendment to the Constitution Bill Special Determination (SC SD 29/2018 – SC SD 40/2018) – Pre-enactment Judicial Review of Constitutional Amendment to Abolish the Executive Presidency

Abolishing or curtailing the executive presidency has been an unfulfilled promise made by virtually every serious candidate to the office since 1994. The semi-presidential constitution of 1978 has been consistently criticised for the over-concentration and over-centralisation of power and authority in the hands of one person. The Nineteenth Amendment in 2015 made substantial reductions in the scope of presidential power, but it did not abolish presidentialism as originally intended. In July 2018, the Janatha Vimukthi Peramuna (JVP or People's Liberation Front), a minor leftist party in Parliament which has consistently advocated the abolition of the executive presidency, submitted a Private Member's bill titled the "Twentieth Amendment to the Constitution" aimed at achieving this end. The bill contemplated two central changes: first, the abolition of the direct election of the President as provided in Article 4(b) of the 1978 Constitution, and secondly, the curtailment of the President's substantive executive powers.

A bill for the amendment of the constitution is under the Supreme Court's sole and exclusive jurisdiction to determine whether it requires popular approval at a referendum (Article 120(a)). Twelve petitions invoked this special jurisdiction of the Supreme Court to determine if the Twentieth Amendment Bill required a referendum. The 1978 Constitution can be amended by a two-thirds majority in Parliament, save for the provisions entrenched by Article 83. Any amendment, repeal, or replacement of the entrenched provisions requires a referendum in addition to a two-thirds majority in Parliament. The petitioners argued that clauses 1 to 38 of the bill violated some of the entrenched provisions, including Articles 3, 4, and 30(2), and thus it required a referendum.

In holding with the petitioners, the Supreme Court, *inter alia,* stated that the "franchise that would be exercised at a Presidential election, a Parliamentary election, or a Referendum is a part of Sovereignty", and that "Sovereignty is inalienable". Therefore, if a bill is enacted removing the franchise of the people, which would be exercised at a presidential election, the principle enshrined in Article 3 that "Sovereignty is inalienable" would be violated. The Twentieth Amendment Bill's intention to remove direct election of the President would thus violate the entrenched Article 3, and therefore require referendum approval. The Court also determined that some clauses of the bill seeking to curtail the substantive executive powers of the President also violated Article 3 in that the presidential character of the 1978 Constitution would be transformed into a parliamentary executive, which would be a constitutional change that again required referendum approval.

No bill that has been declared by the Supreme Court to require a referendum has ever progressed any further, and that too was the fate of the JVP's Twentieth Amendment Bill. On its face, the text is a form of procedural entrenchment, but in practice it has become a substantive protection against certain categories of constitutional amendments.

2. Ranil Wickremesinghe & Others v Mahinda Rajapaksa & Others (CA (Writ) 363/2018) – Writ of *Quo Warranto* on the Legal Basis of the Offices of Prime Minister and Cabinet

This case arose from the constitutional crisis of October-December 2018 described in the previous section. As noted, the crisis was triggered by the President's attempt to remove and replace the serving Prime Minister. After the Nineteenth Amendment was enacted in 2015, the Prime Minister can only cease to hold office by death, resignation, by ceasing to be a Member of Parliament, or if the government as a whole has lost the confidence of Parliament by a defeat on the annual statement of government policy (throne speech), the budget, or a vote of no-confidence (Articles 46(2) and 48). Since the constitution after the Nineteenth Amendment specifies these ways in which the Prime Minister ceases to hold office, and has impliedly removed the previous power of the President to remove the Prime Minister at will, it follows that there are no other ways in which this can happen. In particular, the President can only appoint another Prime Minister where the serving Prime Minister has lost office in any one of these ways.

On 26 October, it was clear that the serving Prime Minister had not ceased to hold office in any one of these ways. Rather, the President had purportedly removed the Prime Minister from office by acting under the provisions of Article 42(4), which states that the President shall appoint as Prime Minister the Member of Parliament, who, in the President's opinion, is most likely to command the confidence of Parliament. The President seems to have taken these words rather too literally than is constitutionally permissible. When this provision speaks of the President's opinion, it contemplates not the subjective and personal opinion of the President as to which MP is best suited to be Prime Minister but an objective and constitutional view formed by reference to who can command the confidence of Parliament. This is usually, although not always, the leader of the largest party represented in Parliament. Prime Minister Wickremesinghe had survived a vote of no-confidence by a substantial majority earlier in the year. No other canvassing of Parliament's confidence had occurred since then, or before the purported appointment of Rajapaksa, and therefore it followed that the President could neither constitutionally remove a Prime Minister who has not lost the confidence of Parliament nor appoint another in his place. Article 42(2) also speaks only of the appointment of the Prime Minister by the President and says nothing about the removal of the Prime Minister by the President. While the power of dismissal could be assumed as inherent to the power of appointment in the constitution prior to 2015, the Nineteenth Amendment had changed this

by providing expressly for the specific ways in which the Prime Minister can be removed (under the previously noted Articles 46(2) and 48). That these procedures were not followed rendered the presidential acts on 26 October *prima facie* illegal and unconstitutional.

This resulted in the existence of two different "governments"—*de facto* and *de jure*—in the country. The ousted Prime Minister and the majority of MPs, including those not on government benches, declared the removal unconstitutional and demanded the immediate summoning of Parliament. This was followed by peaceful mass protests in the capital Colombo and elsewhere and international pressure to summon Parliament. Amidst mounting pressure, President Sirisena, by Gazette notification on 4 November, summoned Parliament to meet on 14 November. When Parliament met on that date, amidst the eruption of chaos in the house, standing orders were suspended, and a no-confidence motion against the unconstitutionally appointed Prime Minister Rajapaksa and his cabinet was passed by a majority. Despite the Speaker declaring the motion as passed, the President and Rajapaksa refused to yield. On 15 November, when Parliament convened again, the Speaker stated that in view of the no-confidence vote passed on 14 November, there was no government and that he did not recognise Rajapaksa as the Prime Minister. However, despite the no-confidence vote, Rajapaksa and his cabinet continued to function as the government, and thus on 16 November, Parliament once again passed a vote of no-confidence against the Rajapaksa government.

Given the blatant disregard for the will of Parliament by the executive, Ranil Wickremesinghe, otherwise a well-known advocate of parliamentary sovereignty, and 121 other MPs constituting the majority in the 225-member Parliament, were left with no alternative but to pray for a writ of *quo warranto* from the Court of Appeal, challenging Rajapaksa and his ministers from functioning as the cabinet. The Court of Appeal on 3 December granted an interim order preventing Rajapaksa from functioning as Prime Minister, and he and his cabinet from functioning as the government. In granting the interim order, the President of the Court of Appeal, Surasena J, stated that: "the damage that may be caused by temporarily restraining a lawful Cabinet of Ministers from functioning would in all probabilities be outweighed by the damage that would be caused by allowing a set of persons who are not entitled in law to function as the Prime Minister or the Cabinet of Ministers or any other Minister of the Government. The magnitude of the latter damage would be very high. Such damage would be an irreparable or irremediable one". Despite the interim order being immediately challenged before the Supreme Court by way of an appeal, the Supreme Court refused to vacate it.

3. Rajavarothiam Sampanthan v Attorney-General & Others (SC FR 351/2018) and 9 Other Applications (SC FR 352 to 361/2018) – Unconstitutional Presidential Dissolution of Parliament

President Sirisena's second major act of questionable constitutionality during the crisis was to attempt to dissolve Parliament on 9 November. This was challenged by way of fundamental rights applications before the Supreme Court on 12 November seeking to quash the dissolution and declare it unconstitutional. As noted, the petitioners also sought interim relief in the form of suspending the dissolution until the final determination of the case, which the Court granted.

The Nineteenth Amendment limited the President's power to dissolve Parliament by the proviso to Article 70(1), which categorically provided that "the President shall not dissolve Parliament until the expiration of a period of not less than four years and six months from the date appointed for its first meeting, unless Parliament requests the President to do so by a resolution passed by not less than two-thirds of the whole number of Members (including those not present), voting in its favour". In this instance, the President *ex mero motu* dissolved the Parliament before the expiry of four years and six months from the first meeting of the current Parliament, which is a conspicuous violation of the constitution.

Due to the significance of the issue and the prevailing constitutional chaos in the country, Chief Justice Nalin Perera appointed a seven-judge bench presided over by himself. The case was heard over four consecutive days from 4–7 December amidst extraordinary public interest in the proceedings. On 13 December, the Court delivered its unanimous decision that the presidential proclamation dissolving Parliament had violated the petitioners' right to equal protection of the law (Article 12 (1)), and quashed it. The leading judgment was delivered the Chief Justice, with whom five other judges agreed. However, Justice de Abrew, while arriving at the same decision based on similar if not identical reasoning, delivered a separate opinion.

A substantial portion of the 88-page judgment by Perera CJ was dedicated to questions pertaining to the jurisdiction and maintainability of the petitions, and a discussion of the constitutional limits of the President's powers. The Chief Justice rejected the Attorney General's contention that the President dissolving the Parliament was not an executive or administrative action falling within the purview of the fundamental rights jurisdiction of the Supreme Court, and was thus not justiciable. Perera CJ further highlighted that the President does not enjoy absolute legal immunity after the Nineteenth Amendment, and held that the pre-Nineteenth Amendment judgments of the Supreme Court pertaining to the immunity of the President were "of little relevance today". He also rejected the argument that the President enjoyed a plenary executive power, and stated that "the words 'plenary power' simply mean full power or complete power and should not be taken to and cannot be taken to mean a species of inherent unrestricted omnipotent power held by a Head of State which is akin to royal prerogative power". He unequivocally declared that the President is a creature of the Constitution, a Head of the State under the Constitution, his powers derive from the Constitution, and these powers are circumscribed by the provisions of the Constitution and the law.

One of the major points of contention arose from the convoluted drafting of the consti-

tution where the President was vested with the power to dissolve the Parliament in Articles 33(2)(c) and 62 of the constitution, but the limitation to it was provided for in Article 70(1), and the absence of any explicit link between the provisions raised a serious question pertaining to interpretation. This was compounded by a purported disparity between the English and Sinhala language versions of the constitution. In answering the question of interpretation, the Court opted for a harmonious, cohesive, and holistic approach enabling "the statute to achieve its purpose". Perera CJ reiterated the principles of "Supremacy of the Constitution", "Rule of Law", and "Separation of Powers", and stated that "our Law does not recognise that any public authority, whether they be the President or an officer of the State or an organ of the State, has unfettered or absolute discretion or power". He then held that, although Article 33(2)(c) vests the President with the power to dissolve Parliament, "the only provision in the Constitution which sets out the manner in which Parliament may be summoned, prorogued, or dissolved by the President is Article 70". It is Article 70 which enables the President to issue proclamations of dissolution, subject to the limitations set out therein. Consequently, the Court held that Article 33(2)(c) must be read along with Article 70, and the power vested by Article 33(2)(c) can be "exercised only within and in conformity with the provisions of Article 70". The Court also pointed out that a contrary interpretation would render Article 70 "redundant and superfluous and thereby offend the rule that statutory interpretation must ensure that no provision of the Constitution is ill-treated in that manner". In considering the contended language disparity, the Court held that there is "no appreciable difference between the text in Sinhala and English in Article 62 (2)".

The conclusion of the Court on the main point thus was that Article 70 "stipulates in no uncertain terms that the President shall not dissolve Parliament during the first four and a half years from the date of its first meeting unless the President has been requested to do so by a resolution passed by not less than two-thirds of the members of Parliament".

IV. LOOKING AHEAD

The crisis thus demonstrated both the weaknesses and the strengths of Sri Lanka's constitutional democracy. That a President felt able to act so egregiously contrary to the constitution showed the potential for democratic backsliding that remains inherent in the political culture. Yet the firm resistance against unconstitutional behaviour shown by Parliament, political parties, the courts, civil society, and social media activism also demonstrated the resilience of Sri Lanka's political system. This tells us that constitutional reform can improve and strengthen *institutional frameworks,* as through the Nineteenth Amendment, and while this is often difficult to achieve, it is not impossible. However, in the ongoing process of deepening constitutional democracy in Sri Lanka, the more difficult challenge seems to lie in transforming the prevailing *political culture* away from the often-unspoken authoritarian assumptions, tendencies, habits, understandings, attitudes, and practices towards those that can support the flourishing of democracy and constitutionalism.

That said, the developments of 2018 underscored a number of reform priorities. The conclusion of the courts in the two crisis cases further consolidated a line of judicial pronouncements that has reaffirmed the supremacy of the constitution against executive overreach as well as the judicial thinking of previous generations of judges steeped in the tradition of parliamentary sovereignty. In the public mind, President Sirisena's ill-advised peradventures have reinforced the view that constitutional democracy in the context of Sri Lanka's political culture demands a complete abolition of presidentialism. For that to happen, though, the reluctance of politicians to put the matter to a referendum will have to be overcome.

V. FURTHER READING

Asanga Welikala, "Paradise Lost? Preliminary Notes on a Constitutional Coup", Groundviews, 26 October 2018

Asanga Welikala, "Nailing Canards: Why President Sirisena's Actions Remain Illegal, Unconstitutional, and Illegitimate'', *Groundviews,* 31 October 2018

Asanga Welikala, "The Dissolution of Parliament in the Constitution of Sri Lanka", *Groundviews,* 11 November 2018

Asanga Welikala, "The Coup de Grace on the Coup d'Etat?", *Groundviews,* 14 November 2018

Asanga Welikala, "The Justiciability of Presidential Acts", *Groundviews*, 9 December 2018



Sweden

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I. INTRODUCTION

In Sweden, the principle of popular sovereignty (*folksuveränitetsprincipen*) is the fundament of the constitutional system (Instrument of Government (IG) 1:1). This means that the Swedish Parliament (*Riksdag*) is the most important constitutional actor. There is no constitutional court in Sweden, but all courts and public authorities have the power to engage in judicial review in concrete cases (IG 11:14 and IG 12:10). During the last couple of decades, the relationship between Swedish constitutional law and Sweden's international commitments, mainly through EU membership and through being a party to the European Convention on Human Rights and Freedoms (ECHR), has been the subject of ample debate. This background serves to explain why some of the constitutional cases included in this overview might not at first sight appear as overly "constitutional" in the eyes of a non-Swedish constitutional lawyer. Several of the cases accordingly focus on the relationship between Swedish law and the ECHR, which was incorporated into Swedish law in 1995. Additionally, the Swedish constitution prohibits the adoption of laws or other regulations that conflict with the ECHR (IG 2:19).

II. CONSTITUTIONAL DEVELOPMENTS

Parliamentary Elections

On September 9, 2018, Sweden elected a new parliament. The Swedish Parliament has 349 members. Seats are divided proportionately amongst registered political parties that have obtained more than four percent of the votes cast, IG 3:7. The Swedish system is a negative parliamentary system. Accordingly, it suffices that a majority of the Parliament *tolerates* (as opposed to *supports*) the prime minister. As a result, Sweden has a long tradition of minority governments. During the last decade, however, the political landscape has changed dramatically. First, a center-right alliance was created in 2006, breaking the political dominance of the Social-Democratic Party. In the 2010 elections, a new political party entered the Parliament, the Swedish Democrats. This political party, which has its roots in nationalist and fascist movements, has quickly grown to become the third largest political party in Sweden. In the 2018 elections, none of the traditional blocs (the left-center or the center-right) obtained a majority. As a result, Sweden was left without a government for 115 days, after which a new left-center government was installed. It is supported by two members of the former center-right alliance (the Liberals and the Center Party). In essence, this means that the logic of the old blocs has been swept away by the political turmoil caused by the major electoral success of the Swedish Democrats. This is the longest time in history that Sweden has not had an ordinary government after an election. The implications on budgetary issues have been substantial and the long-term political and legal consequences are hard to assess at this point.

Judicial Review

One of the main constitutional developments in 2018 is connected to the scope of judicial review by courts and the question whether a piece of legislation has been passed in a procedurally correct manner (IG 11:14). This

particular question has been debated since 2015. In 2018, two decisions were rendered that settled the matter. Constitutional review in Sweden builds on three main principles: First, in preparing draft legislation, the government is obliged under constitutional law (IG 7:2) to consult with the relevant public authorities, including local authorities and organizations and individuals, as necessary (*beredningstvång*). Second, an *a priori* and *in abstracto* constitutional review is exercised by the Council on Legislation (IG 8:21-22). The council is to assess, among other things, if legislative drafts are in congruence with the constitution. Third, courts can exercise judicial review when the law has been passed and is applied in concrete cases. Should a court find that a provision conflicts with the constitution or other superior statute, the provision should not be applied (IG 11:14). The same applies if the legislative process was wrought with a substantial procedural deficiency. Non-compliance with the procedure laid down in IG 7:2 could amount to such a procedural deficiency. Taking into consideration that Sweden is a parliamentary democracy with a tradition of weak courts and limited judicial review, the quality of the legislative procedure is especially important. Moreover, the *a priori* constitutional review conducted by the Council on Legislation serves as a justification for limited judicial review. Therefore, the recent trend (since 2015) of the Council on Legislation to harshly criticize the procedure leading up to the draft proposal, and the quality of the proposal per se, is noteworthy and important. Even more noteworthy is the frequency with which the government has chosen to disregard the criticism put forward by the Council on Legislation when presenting the proposal to the Parliament. Granted, the government is not constitutionally bound by the opinion of the council, but the recent trend is a clear shift away from constitutional tradition, a shift that might jeopardize the balance between the government, Parliament and courts. This development has not only provoked a heated political debate but has also forced the courts to rule on the scope of IG 11:14 in relation to the legislative procedure and requirements by IG 7:2.

In a decision adopted on September 28, 2018 (B 2646-18), the Supreme Court ruled that the procedure laid down in IG 7:2 does fall under the scope of judicial review exercised by courts according to IG 11:14. However, the precise content of the procedure and its details are not defined in the constitution, which means, according to the Court, that any deviation from the procedure must be significant. In addition, in their judicial review, courts should focus on whether issues of legal certainty (with important implications for individuals) have been sufficiently analyzed in the preparation of the draft proposal. A piece of legislation passed, absent such considerations, may be subject to judicial review. Moreover, the second paragraph of IG 11:14, which should be read as stating the prerogative of the legislature to assess constitutionality, must be taken into account. In this context, it means that if the Parliament has adopted the law it is presumed that the procedure has been correct, or at least not significantly in violation of IG 7:2. This is especially the case if the legislature refers to the opinion of the Council of Legislation. *Nota bene*, it is not required that the legislature change the proposal as a result of comments by the Council on Legislation. Finally, taking all of the above into consideration, the Supreme Court concluded that only in exceptional cases, where strong rule of law objections could be made, should the courts disregard the intention and will of the legislature. In a subsequent decision on September 25, 2018 (MIG 2018:18), the Supreme Migration Court came to the same conclusion.

III. CONSTITUTIONAL CASES

1. NJA 2018 s. 562 (The Facebook Case): Applicability of the Freedom of Expression Act

The Supreme Court held that criminal responsibility for the live transmission of a rape via Facebook could be determined in accordance with ordinary criminal law, and that the constitutional Freedom of Expression Act was not applicable to the transmission. Introducing a new definition of the concept "program", the Supreme Court determined that the Freedom of Expression Act is only applicable to live transmissions via the Internet if what is being transmitted conforms to the new program definition, which entails requirements relating to format, orientation and time. In the case at hand, the Supreme Court held that the Facebook transmission was too indeterminate for the Freedom of Expression Act to be applicable.

2. NJA 2018 s. 103 (Citizenship Case No. 2): Damages for violations of constitutional rights

In *NJA 2014 s. 323* (Citizenship Case No. 1), the Supreme Court decided that an individual whose citizenship had been revoked was entitled to damages—revocation of citizenship is not permitted under the constitution. This was groundbreaking since violations of the constitution had, prior to the ruling, not been thought to give rise to state liability in the form of damages. Citizenship Case No. 2 also concerned an individual claiming damages, his citizenship having been rescinded in violation of the constitution. The case raised two constitutional law issues before the Supreme Court: Firstly, what factors should be determinative when deciding on the level of damages? Secondly, should ordinary rules on statutory limitations apply to claims relating to violations of constitutional rights? The Supreme Court answered the first question by declaring that the level of damages was to be determined, primarily taking into account the duration of the violation (i.e., how long the citizenship had been rescinded). The Supreme Court's answer to the second question was that ordinary statutes of limitation do not apply in relation to claims for damages relating to violations of fundamental constitutional rights (the judgment, however, does not make clear which constitutional rights are fundamental in this regard). According to the Supreme Court, statutory limitations are to be calculated from the moment the relevant violation has *ceased*—not from the moment when the violation *occurs*, which is the general rule in Swedish law concerning civil claims. The ruling is significant, since it means that state liability for *ongoing* violations of fundamental constitutional rights cannot be subject to statutory limitations.

3. HFD 2018 ref. 17: Access to Information under the Freedom of the Press Act

The Supreme Administrative Court was faced with an access to information request, which related to files contained on a copy of a hard drive that had been seized by the police. The original hard drive had been declared forfeit by a court order and had subsequently been destroyed by the police. The copy of the hard drive, however, was still intact. The Supreme Administrative Court held that the files contained on the copy of the hard drive were public documents for the purposes of the Freedom of the Press Act. The fact that the original hard drive had been declared forfeit and destroyed in accordance with criminal procedural law was immaterial to this determination. This meant that the files were to be disclosed in accordance with the access to information request unless the files contained confidential information—a question that the Supreme Administrative Court ordered the Police Authority to assess.

4. HFD 2149-18: Public Order and Begging

Under a delegation laid down in a statute (*Ordningslagen 1993:1617*), Swedish municipalities are authorized to adopt regulations in order to uphold public order and security locally. Such measures must be narrow as to their impact and scope. In addition, they must be necessary to achieve the purpose at hand, i.e., to uphold public order and security. Thus, a proportionality test is built into and hence restricts the delegated powers. A municipality in southern Sweden amended its local regulations in order to prohibit begging in certain public places. The amendment was appealed to the County Administrative Board (*Länsstyrelsen*), which exercises review of cases like this. The County Administrative Board decided to abolish the amendment to the local regulation on the basis of it not serving the purpose of upholding public order and security. The municipality appealed the decision to the Administrative Court and the Administrative Court of Appeal. Both instances rejected the municipality's appeal and hence confirmed the decision by the County Administrative Board. The matter ended up in the Supreme Administrative Court (SAC), which had to rule on whether begging can be regulated by a local regulation. The first requirement on such a regulation is that it aims to uphold public order and security. Secondly, local self-determination is protected by the Swedish constitution. As a result, the SAC declared that a decision of the municipality should only be overruled in cases of overbreadth or violations of the principle of proportionality in the local context. Thirdly, the local regulation must be clear enough for it to be enforced. This means, for example, that it must be clear to the public in general what it entails; and for the authorities entrusted to enforce the rules, it must be clear when they have been violated. The SAC ruled that the amendment in question served to uphold public order and security, pointing out that there is no legal requirement on the municipalities to prove that begging *actually causes* disturbance to public order and security. The SAC further concluded that the measure was neither unnecessary nor disproportional. Its geographical boundaries were clearly defined and limited, and it did not lead to disproportional restrictions of individual rights. The final question was whether the measures were clear enough as to the understanding and definition of begging. The SAC ruled that it was. Hence the municipality was within its powers when it amended the local regulation.

5. AD 51-18: Discrimination, Freedom of Religion

In this case, the Swedish Labour Court (*Arbetsdomstolen*) held that it constituted indirect discrimination when a company discontinued an employment procedure with a Muslim woman who had, for religious reasons, refused to shake hands with a male representative of the employer. The relevant provision in the Swedish Discrimination Act (*diskrimineringslagen 2008:567*) implements an EU Directive,[1] and the Court interpreted it in light of the ECtHR's case law on freedom of religion guaranteed in Art. 9 of the ECHR. According to the Court, a religiously motivated refusal to shake hands with a person of the opposite sex is such a manifestation of religion that is protected under Art. 9. The Court maintained that such a refusal was accordingly also protected under the Discrimination Act's prohibition against an employer applying a provision, a criterion or a procedure that put people with a certain religion at a particular disadvantage. The company's policy that prohibited employees from refusing to shake hands with a person of the opposite sex was found by the Court to put Muslims, who for religious reasons refuse to shake hands with members of the opposite sex, at a particular disadvantage. The Court concluded that while the policy had legitimate aims that focused on promoting equal treatment between the sexes, it was neither appropriate nor necessary in order to achieve these aims. As a result, the policy amounted to indirect discrimination.

6. NJA 2018 s. 394: Judicial Review, Right to a Fair Trial

The question in this case was whether the application of a provision in the Swedish Road Traffic Offences Act (*trafikbrottslagen 1951:649)*, which, *inter alia*, makes it a crime to abscond from the site of a traffic accident without giving one's name and place of residence (*smitning*), violated the safeguards against self-incrimination in Art. 6 of the ECHR. A driver had been involved in a traffic accident that had resulted in damages on his car and a road sign, but not in any personal injuries. After the accident, the driver, who could be suspected of traffic offences in connection with the accident, ran away without leaving the information required by law. Both the District Court (*tingsrätt*) and the Court of Appeal (*hovrätt*) acquitted the driver, as they found that convicting him would have infringed on the privilege against self-incrimination in Art. 6. The Supreme Court (*Högsta domstolen*), however, concluded that the responsibility to give information about one's name and residence under such circumstances did not destroy the very essence of the right to not

[1] Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation.

self-incriminate. According to the Court, the driver could thus be prosecuted and convicted for absconding from the site of the accident without there being a violation of the right to a fair trial under Art. 6.

Decisions by the European Court of Human Rights

1. Case of X v Sweden: Expulsion of a permanent resident for national security reasons, Art. 3 ECHR

The Swedish Security Services had applied to the Swedish Migration Agency for X, a Moroccan citizen residing permanently in Sweden, to be expelled for national security reasons related to terrorism. The Swedish Migration Agency decided to expel X and rejected X's application for asylum in Sweden.

The question before the European Court of Human Rights and Freedom (ECtHR) was whether the decision to expel X was in violation of his rights under Art. 3 of the ECHR. X argued that there was a real risk of him being subjected to torture upon arrival in Morocco. The ECtHR found that taking X's personal situation into account, there was a real risk that he would be subjected to ill treatment or torture in Morocco due to the fact that the Moroccan authorities were made aware of the reasons why X was being expelled, and that Moroccan authorities still engaged in torture or ill treatment in national security and terrorist-related cases. The fact that the Swedish Migration Agency and Migration Courts were not provided the information that the Security Services had been in contact with Moroccan authorities rendered the ECtHR to raise concerns "as to the rigour and reliability of the domestic proceedings" (para 60). The ECtHR unanimously found the decision to expel X from Sweden to Morocco to violate X's Art. 3 rights.

2. Centrum för rättvisa v Sweden: Signal Intelligence and Art. 8 ECHR

Centrum för rättvisa, a non-for-profit organization representing individuals against the state, claimed that its rights under the ECHR had been violated by the signal intelligence regime set up by the Swedish state. The ECtHR unanimously held that there had been no violation of Art. 8, ECHR. According to the Court, it falls within the state's margin of appreciation to set up a bulk interception regime in order to identify threats to national security. However, the state's discretion when operating such a system is narrower. After reviewing the Swedish law regulating the collection of intelligence, including oversight mechanisms, the ECtHR found, after an *in abstracto* assessment, that it provided sufficient safeguards to protect the public from abuse. In February 2019, the case was referred to the Grand Chamber.

IV. LOOKING AHEAD

The constitutional protection of freedom of expression has a long history in Sweden and there are currently two fundamental laws that exclusively focus on safeguarding it: the Freedom of the Press Act (*tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (*yttrandefrihetsgrundlagen*). In January 2019, several amendments to both fundamental laws with the purpose of better adapting them to the exercise of freedom of expression online entered into force. Among the most debated changes are amendments concerning liability for Internet publications. One of the basic principles of the Swedish system is that all constitutionally protected media must have a responsible editor, who alone can be held liable for unlawful content. Until now, the responsible editor has been liable also for online content published before he or she assumed their role, provided that the content is still available. The new amendments limit the liability of the responsible editor for Internet content older than twelve months if the content is removed within two weeks after the responsible editor has been notified about its potentially unlawful nature.[2] In addition, balancing Sweden's long tradition of strong constitutional protection of freedom of expression against the increasing salience of privacy rights continues to be one of the main controversies in the field of constitutional law.

[2] The amendment has, for instance, been criticised for giving rise to situations where no one can be held liable for unlawful online content during a two-week period. See Mårten Schultz, 14 dagar av ostoppbar terror, SvJT 2018 s. 837.



Switzerland

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I. INTRODUCTION: THE "GLOBALIZATION PARADOX" IN CONSTITUTIONAL PRACTICE

Switzerland is the most globalized country in the world based on 43 variables reflecting the economic, political, and social dimensions of globalization.[1] Though not being a member of the European Union (EU), it is closely linked to the latter by a densely knit network of bilateral treaties allowing, among other things, for free movement of persons.[2] Switzerland furthermore undertakes to abide by the judgments of the European Court of Human Rights (ECtHR). The Court has construed the European Convention on Human Rights (ECHR) as a "living instrument" since 1978,[3] expanding the ECHR in both scope and relevance. At the same time, the Swiss Federal Constitution (Fed Const)[4] is a "popular constitution".[5] All amendments to the Constitution are subject to a referendum. Such referenda are abundant: In 2018 alone Swiss voters were called to the ballot box on four different occasions to vote on a total of eight constitutional draft amendments. Switzerland's constitutional design therefore emphasizes popular sovereignty and democratic self-governance. Being a small and open economy, Switzerland is, at the same time, vulnerable to changes in its political, economic, and legal environment, having only limited political clout to shape world markets and the rules and regulations thereof. It is thus often left with little choice but to flexibly adapt to changing circumstances.[6] The inherent tensions between self-governance, democracy, and economic globalization, for which Dani Rodrik coined the term "globalization paradox", are well known.[7] Constitutional developments of the past year in Switzerland bear witness of this globalization paradox.

[1] Savina Gygli, Florian Haelg, Niklas Potrafke and Jan-Egbert Sturm, 'The KOF Globalisation Index Revisited' (2019) *Rev Int Organ* <https://doi.org/10.1007/s11558-019-09344-2> (incl. the relevant ranking available under <http://www.kof.ethz.ch/globalisation> [instead of <https://www.ethz.ch/content/dam/ethz/special-interest/dual/kof-dam/documents/Globalization/2018/Ranking_2018_2.xlsx>). *All of the documents cited in this review were last accessed on 1 October 2019.*

[2] See Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [21 June 1999] O J L 114, 30/04/2002, 6-72.

[3] ECtHR, *Tyler v UK*, App no 5856/72 (25 April 1978).

[4] Federal Constitution of the Swiss Confederation of 18 April 1999 (unofficial English translation available at <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html>).

[5] Johannes Reich, 'Switzerland: The State of Liberal Democracy', in Richard Albert et al (eds), *2017 Global Review of Constitutional Law* (2018) 280-285, 280.

[6] See the seminal work on the matter by Peter J Katzenstein, *Corporatism and Change: Austria, Switzerland, and the Politics of Industry* (1984) 84, 112-132.

[7] See Dani Rodrik, *The Globalization Paradox* (2011) xviii (according to whom the term "globalization paradox" conveys that one "cannot simultaneously pursue democracy, national determination, and economic globalization").

[8] The results of all federal popular votes since 1848 can be accessed at the site of the Swiss Federal Chancellery in German, French, and Italian at <www.bk.admin.ch/ch/d/pore/va/vab_2_2_4_1.html>.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS[8]

1. "Self-determination Initiative": Choosing Economic Globalization and International Human Rights over "Taking Back Control"

The popular initiative "Swiss Law Instead of Foreign Judges (Self-determination Initiative)", put to a popular vote on 25 November 2018, illustrates the tensions embraced by the globalization paradox in an exemplary manner. The campaign in favor of the Self-determination Initiative stressed the relevance of democratic self-governance undeterred by international and supranational courts ("foreign judges"). Those opposing the constitutional draft amendment, including both the Federal Assembly (federal legislative branch) and the Federal Council (federal executive branch), underscored the importance of the ECtHR as an independent judicial authority in human rights law and Switzerland's reliability in the international arena.

In its Article 190, the Swiss Federal Constitution commits all courts to adhere to both Federal Statutes enacted by Federal Parliament and international law even in the event of a conflict with the Federal Constitution. As the ECtHR, in turn, monitors Switzerland's compliance with the ECHR unhindered by a similar clause limiting the scope of its review, the Federal Court (Switzerland's federal supreme court) held that the ECHR and other international human rights treaties take precedent over Federal Statutes.[9] In a controversial *obiter dictum* of 2012, the Court went further, stating that the ECHR could also "precede norms of the Federal Constitution itself".[10] Elevating this line of argument to the *ratio decidendi* of its case law would have far-reaching consequences given the Constitution's emphasis on popular sovereignty and democratic self-governance. The Federal Constitution allows for amending it by way of popular initiatives if 100,000 citizens, whose signatures must be collected within 18 months, back the draft amendment put forward by a committee of 7 to 27 citizens.[11] For the ECHR in its evolutive interpretation by the ECtHR to take invariable precedent over federal constitutional law "would transform the ECHR into an additional (supra-)constitutional layer above the actual domestic constitution",[12] limiting the scope of future constitutional amendments. According to the text of the Constitution, such amendments are merely confined by the "peremptory norms of international law" (*ius cogens*), such as the prohibition of genocide, torture, slavery, or inhuman and degrading treatment.[13]

The aforementioned Article 190, Fed Const, however, provides Federal Parliament with some margin of appreciation in making its own assessment of how to square conflicting obligations deriving from constitutional provisions and international law. Enshrined in a Federal Statute, such an assessment becomes binding on all domestic courts as a consequence of Article 190, Fed Const. With regard to the courts, the provision according to which the Swiss Federation "shall respect international law" (Article 5, Section 4, Fed Const)—consciously avoiding the verb "to precede"—provides courts with some leeway in their assessment of the relation between domestic and international law in their case law. In contrast, the constitutional draft amendment put forward by the Self-determination Initiative sought to establish an absolute and retroactive precedent of the Federal Constitution over international law with the sole exemption of the aforementioned peremptory norms of international law.

Whereas supporters of the Self-determination Initiative claimed that the constitutional amendment would save direct democracy and "re-establish" popular sovereignty (or in short, allow the People "to take back control"), opponents pointed out that an invariable precedent of constitutional over international law would seriously jeopardize not only Switzerland's treaty with the EU on free movement of persons given the constitutional obligation to restrict the "number of residence permits for foreign nationals in Switzerland (…) by annual quantitative limits and quotas"[14] but also, in view of the so-called "guillotine clause" declaring a number of bilateral agreements with the EU to be mutually dependent,[15] the treaties on areas such as technical barriers to trade, research, and civil aviation. It was furthermore questioned whether Switzerland could remain a reliable signatory state of the ECHR in view of an effective constitutional reservation to comply with judgments of the ECtHR. In that perspective, Swiss voters were offered a choice between the promise to re-establish direct democracy and self-government on the one hand and upholding both international human rights law and economic globalization on the other hand. Accustomed to such trade-offs at least since the rejection of the treaty on joining the European Economic Area in a popular vote on 6 December 1992, Swiss voters favored international human rights law and economic globalization over the promise of "taking back control" by a large margin: Two-thirds (66.2%) of the voters rejected the Self-determination Initiative. The proposal failed to prevail in any of the 26 Cantons (states).

2. Constitutional Draft Amendments: From Privatizing Public Broadcasting Service to Subsidizing Horned Cows

As to the other seven constitutional draft amendments put to a popular vote in 2018, the voters on 4 March 2018 approved pro-

[9] See BGE 125 II 417 para 4 (26 July 1999).

[10] BGE 139 I 16 para 5 (12 October 2012).

[11] See Reich, op. cit. 5, at 282.

[12] Reich, op. cit. 5, at 283.

[13] See Johannes Reich, 'Direkte Demokratie und völkerrechtliche Verpflichtungen im Konflikt' (2008) *Heidelberg J of Int L* 979, 1024–25 (available at <www.ivr.uzh.ch/reich>).

[14] Art 121a, Clause 2, Fed Const.

[15] See, e.g., Article 25, Clause 4, Agreement on Free Movement, op. cit. 2.

longing the powers of the Federation to levy direct federal tax and VAT beyond 2020 until the year of 2035 by a large margin of over 84%. On the same day, a popular initiative seeking to privatize public-service broadcasting by rendering federal subsidies in favor of TV and radio stations unconstitutional was voted down by a ratio of 3 to 1. The "Sovereign Money Initiative", aimed at limiting money creation to Switzerland's central bank and barring private banks from creating money, in particular through granting loans, met the same fate at the ballot box on 10 June 2018. Three months later, on 23 September 2018, the aforementioned tensions between self-governance and economic globalization again came to light, albeit merely limited to food and agriculture. The "Fair Food Initiative" sought to limit food imports to agricultural goods produced in compliance with high standards as to the environment, workers' rights, and animal welfare, whereas the "Food Sovereignty Initiative" aimed at limiting food imports to boost eco-friendly domestic production. Both constitutional draft amendments would have created tensions with obligations under international trade law. They were voted down by a margin of roughly 2 to 1. Contrary to these two popular initiatives, a constitutional draft amendment expanding the power of the Federation to enact "principles" with regard to bicycle paths (bikeways) and the financial support thereof was approved by three-quarters of the voters. Finally, a constitutional draft amendment put forward by the so-called "Horned Cow Initiative", launched by a mountain farmer without any support of political parties or interest groups, called for federal subsidies to farmers refraining from dehorning their cows, bulls, and goats. The initiative gained considerable sympathy but was nonetheless rejected by 54.7% of the voters and 20 out of 26 Cantons on 25 November 2018.

In sum, a mere two of the eight constitutional draft amendments put to a popular vote in 2018 were approved: one prolonging the powers of the Federation to levy direct federal tax and VAT, the other granting the Federation powers to enact guidelines in relation to bicycle paths. It is important to note that all of the popular initiatives put to a popular vote in 2018 were rejected. This underscores the low success rate of popular initiatives, currently standing at 10%, measured since the introduction of such initiatives at the federal level on 5 July 1891 until the end of 2018. Both of the successful amendments in 2018 were initiated by the Federal Government and both expanded the powers of the Federation at the expense of the Cantons.

3. Failed Reversal of Court Rulings on the Constitutionality of Electoral Systems

Recent case law of the Federal Court considerably limited the autonomy of the Cantons regarding the voting process applying to their parliamentary elections by committing them in principle to proportional representation.[16] This case law mainly drew criticism due to the lack of any clear textual basis in the Federal Constitution restraining the choice to be made by the Cantons between electoral systems. Two small Cantons brought a motion to the bicameral Federal Parliament, the Federal Assembly, seeking to reverse the relevant recent case law by way of a constitutional amendment. The motion won the support of the Council of States, the equivalent of the United States Senate, in which representatives of smaller Cantons are in a majority. The National Council, however, in which seats are allocated to the Cantons according to their relative populations, failed to lend its support to the motion. The Federal Court's case law on the matter thus remains in place.

III. CONSTITUTIONAL CASES

1. Khalaf M Al-Dulimi v Federal Department of Economic Affairs, Education and Research: Fair Trial and Targeted Sanctions by the U.N. Security Council[17]

Pursuant to Article 25 of the Charter of the United Nations (U.N. Charter), Switzerland is, like any other member of the United Nations (U.N.), under an obligation to "carry out the decisions of the Security Council". According to Article 103, U.N. Charter, obligations deriving from the U.N. Charter "shall prevail" when in conflict with any other "obligations under any other international agreement". The ECHR, in its Article 6, nonetheless commits Switzerland to provide for "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" in the determination of an individual's "civil rights and obligations or of any criminal charge".[18] Targeted sanctions imposed by the U.N. Security Council against individuals without adequate due process therefore result in a dilemma for Switzerland of being caught between conflicting obligations under international law. A case brought by Youssef Mustapha Nada, at the time a resident of the Italian enclave of Campione, surrounded by the Swiss Canton of Ticino,[19] ending with a decision by the ECtHR holding that Switzerland was in violation of its obligations under the ECHR,[20] brought this dilemma to light for the first time.

The case of *Khalaf M. Al-Dulimi* offered no escape from this dilemma but added yet another layer of complexity. Mr Dulimi was, according to the U.N. Security Council, the head of finance of the Iraqi secret services during the regime of Saddam Hussein. As a consequence and in accordance with the respective U.N. Security Council Resolution

[16] Reich, op. cit. 5, at 281.

[17] BGE 144 I 214 (31 May 2018), in French, accessible at <www.bger.ch>.

[18] Johannes Reich, 'Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267' (1999), *Yale Journal of International Law* 33 (2008) S. 505-511 (505-509).

[19] See Reich, op. cit. n. 18 at 507-509.

[20] ECtHR (Grand Chamber), *Nada v Switzerland,* App no. 10593/089 (12 September 2012).

1483 (2003) of 23 May 2003, the Swiss Federal State Secretariat for Economic Affairs (SECO), an administrative agency forming part of the Federal Department of Economic Affairs, Education and Research, froze both Mr Dulimi's own assets and economic resources in Switzerland and those of Montana Management, a company under his control, as they both directly or indirectly belonged to a senior official of the former Iraqi Government. Mr Dulimi remained unsuccessful not only in his attempts to be heard (through the Swiss Federal Government) by the U.N. Security Council sanctions committee in order to have his name deleted from the blacklist but also with regard to challenging the asset freeze in Switzerland's domestic courts. The Federal Court, in three decisions handed down on 23 January 2008, rejected Mr Dulimi's appeals, holding that the wording of the aforementioned Resolution 1483 provided the Swiss federal administration with no leeway but to implement the sanctions thereof in view of the aforementioned Article 103, U.N. Charter.[21] In defiance of Article 103, U.N. Charter, the ECtHR (Grand Chamber) undertook what it called a "harmonious interpretation"—or rather, as Judge Nussberger's memorable dissent puts it, a "*fake* harmonious interpretation"—of Resolution 1483 in light of both the ECHR and the U.N. Charter in its judgment of 21 June 2016.[22] The Court held that Switzerland would have been entitled to a limited review of arbitrariness of sanctions imposed by the U.N. Security Council against Mr Dulimi in spite of the unambiguous wording in which Resolution 1483 spelled out Switzerland's obligations. Switzerland, in the view of the Court, therefore violated Mr Dulimi's right to a fair trial guaranteed by Article 6, ECHR.

On appeal and in view of said decision by the ECtHR, the Swiss Federal Court, in a judgment dated 31 May 2018,[23] repealed its own aforementioned decisions of 23 January 2008 and handed the case back to the SECO. It will be for the SECO to gather all of the relevant information and assess whether imposing targeted sanctions against Mr Dulimi either amounted to an apparently arbitrary decision or rather appears permissible weighing all of the relevant factual and legal considerations in light of the limited review available to domestic authorities according to the ECtHR's harmonious interpretation approach.

The case of *Al-Dulimi* echoes the lessons of *Nada*:[24] it is for the U.N. Security Council to provide for due process with regard to sanctions targeted against individuals. The persistent failure of the Security Council in general and the "5P", its five Permanent Members, in particular to provide for adequate due process not only seriously undermines the U.N.'s reputation as a champion of human rights but carries the risk of further fragmenting the U.N. sanctions regime "along the borders of national and supranational jurisdictions".[25]

2. A. and Others v Federal Office of Public Health: Children's Rights and Public Awareness Campaign Aimed at Preventing HIV and Other STDs[26]

More than 40 years ago, in 1987, the Federal Office of Public Health (FOPH) launched its first public awareness campaign aimed at preventing the spread of the Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS), respectively. The campaign was soon extended to other sexually transmitted diseases (STDs). From its very beginning, the messages were at the same time realistic, sober, and straightforward. The campaign advised the use of condoms, whereas moral suasion to abstain from a promiscuous lifestyle or to commit to marital faithfulness took a backseat. Rather unsurprisingly, the campaign faced political headwind at times, yet the substantial decline in new infections with HIV and other STDs, at least partly attributed to the well-known campaign, silenced the criticism. When the campaign was relaunched in 2014 with a lower budget, it was designed to maximize its impact. The hedonic slogan "Love Life" was accompanied not only by a picture of a condom but by intimate and rather explicit images of aesthetic nude heterosexual and homosexual couples. A casting was advertised not for models but "normal couples" to feature on the posters and in the video clips of the campaign. In line with the laws of "attention economy", media outlets were all too willing to cover these events, claiming with feigned indignation that the FOPH would produce "pornographic material". This coverage multiplied the campaign's message at no further cost to the taxpayer.

A. and others, a group of conservative Christian children (or rather their parents), however, strongly objected to the relaunched campaign. Claiming that the campaign interfered with the constitutional provision according to which "children and young people have the right to particular protection of their integrity and to care for their development" (Article 11, Section 1, Fed Const), they formally petitioned the FOPH to immediately cancel the campaign. A. and others lodged an unsuccessful appeal with the Swiss Federal Administrative Court challenging the FOPH's refusal. Thereinafter the case reached the Federal Court. The Court found no violation of the aforementioned constitutional provision, holding that the images used in the campaign failed to amount to "pornography" in the meaning of the Criminal Code.
Narrowly framing the case, the Court left unaddressed the novel challenges raised by awareness campaigns by the public admin-

[21] BGer, 2A.783/2006, 2A.784/2006, and 2A.785/2006 (all of 23 January 2008).

[22] ECtHR (Grand Chamber), *Dulimi and Montana Management Inc v Switzerland,* App no 5809/08 (21 June 2016).

[23] BGE 144 I 214.

[24] See Reich, op. cit. n. 18 at 510-11.

[25] Reich, op. cit. n. 18 at 510.

[26] BGE 144 II 233 (15 June 2018), in German, accessible at <www.bger.ch>; for a detailed assessment, see Johannes Reich, 'A Bigger Bang for a Buck. Staatliche Warnungen und Empfehlungen zwischen Grundrechtsschutz, Kindeswohl und Aufmerksamkeitsökonomie', in: Ruth Arnet et al. (eds), *Der Mensch als Mass. Festschrift für Peter Breitschmid* (2019) 185-199.

istration designed at efficiently maximizing their message being indistinguishable from advertising campaigns in the private sector. Among these challenges is whether media coverage of an awareness campaign effectively amounting to a "public-private partnership *sui generis*" does indeed fail to be attributable to the public administration even if the latter intentionally designed its communication in a way to provoke such sensationalist media reports.[27]

3. Swiss Association of Public Servants v. Council of State of the Canton of Ticino: Trade Union Rights[28]

The Council of State of Ticino, the executive branch of the Canton of Ticino, took the decision to ban activities of trade unions from buildings occupied by the public administration. Trade union officials were thus prevented from entering such premises when acting in their capacity as trade unionists. Meetings taking place in premises of the public administration between trade union officials and public servants would, according to the decision by the Council of State, be only permissible outside of working hours, subject to approval by the state chancellery, granted or rejected on a case-by-case basis. The Administrative Court of the Canton of Ticino dismissed an appeal launched by the Swiss Association of Public Servants, a labor union representing public servants, holding that the right granted to employees and employers alike to establish professional associations (Article 28, Fed Const) would not grant the right for trade unions to enter premises occupied by the public administration. On appeal, the Federal Court acknowledged that the text of the Federal Constitution failed to provide any indication as to whether or not the right to enter buildings occupied by the public administration would form part of Article 28, Fed Const. Interpreted in light of international law, in particular Article 11, Section 1, ECHR and Conventions No. 87 and 98 of the International Labor Organization, said provision of the Constitution would, according to the Court, indeed entail such a right. The Federal Court therefore dismissed the regulation by the Council of State of Ticino as being disproportional and therefore unconstitutional.

IV. LOOKING AHEAD

On 20 October 2019, elections of the Federal Parliament will take place. At the beginning of the four-year term, elections of the Federal Council (executive branch) will be held in a joint session of the Federal Assembly in December 2019.[29] While gains and losses tend to remain relatively low in national elections and the five parties represented in the Federal Council have virtually remained the same since 1959, the dilemma captured by the globalization paradox is most likely to form a recurrent theme in the election campaign of 2019, as Switzerland and the EU have been in negotiations with regard to an "institutional agreement" since 22 May 2014. On 7 December 2018, the Federal Council took note of the outcome of said negotiations, refrained from initialing the draft of the respective "Agreement facilitating the bilateral relations between the EU and the Swiss Confederation with regard to the parts of the Internal Market in which Switzerland participates" ("Institutional Agreement"),[30] and launched a consultation thereof to be reviewed in spring 2019. The institutional agreement between the EU and Switzerland seeks to provide a legal framework for existing and future market access agreements between the two in order to enhance their equal application. Yet, such stable and predictable economic globalization comes at a price. Switzerland would have to commit to a "dynamic adoption approach" allowing for the regular update of the market access agreements in line with the EU's secondary legislation. Disputes between the parties would be referred to an arbitration panel. In all matters concerning the interpretation of EU law, said panel would have to request a ruling by the Court of Justice of the European Union (CJEU) and would then resolve the dispute based on its holding. While both of these elements might be difficult to square with democratic self-determination from a Swiss perspective, the Council of the EU reiterated that any further development of the sectoral approach, such as the conclusion of important treaties on electricity and financial services, would be conditional upon entering into an institutional agreement. Against this backdrop, the globalization paradox is likely to remain a defining feature of Swiss constitutional law and politics in 2019 and beyond.

V. FURTHER READING

Swiss Political Science Review 24 (4) (2018), Special Issue: *The 2015 Swiss National Elections*

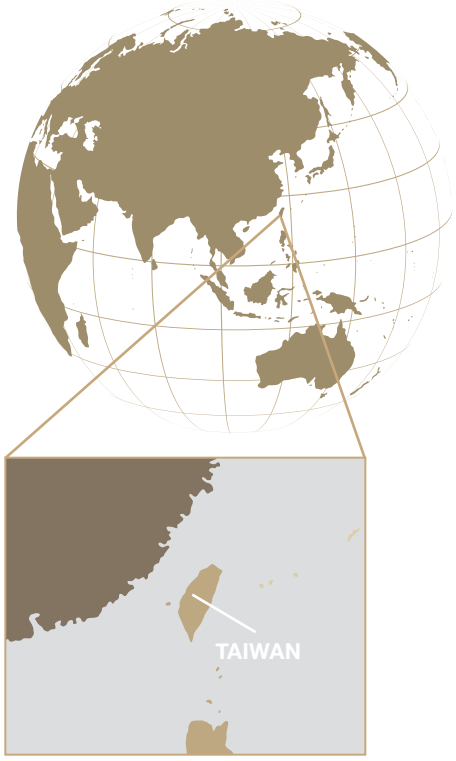
Matthias Oesch, *Switzerland and the European Union* (2018)

[27] Reich, op. cit. 26, at 196.

[28] BGE 144 I 50 (6 September 2017), in Italian, accessible at <www.bger.ch>.

[29] See Article 175, Section 2, Fed Const.

[30] 'Accord facilitant les relations bilatérales entre l'Union Européenne et la Confédération Suisse dans les parties du Marche Intérieur auxquelles la Suisse participe' (23 November 2018, available at <www.dfae.admin.ch/dam/dea/fr/documents/abkommen/Acccord-inst-Projet-de-texte_fr.pdf>).



Taiwan

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I. INTRODUCTION

2018 marked the inception of a new trend in Taiwan's winding road to constitutionalism. As noted in the inaugural *Year in Review,* elections have been the driving force of Taiwan's changing constitutional landscape in the past three decades.[1] The year 2018 was no exception. Yet, their constitutional significance has not hit home because of the local elections in November 2018 that redrew the political landscape and rocked the ruling Democratic Progressive Party (DPP) to the core. More fundamentally, an election, in the form of a citizen-initiated referendum, has shaken the foundations of the existing constitutional arrangement. As will be further discussed, the relationship between the people and the government is being reshaped, and the Taiwan Constitutional Court (TCC) as the constitutional guardian of Taiwan's democracy has arrived at a crossroads amid a tidal wave of popular constitutionalism.

Even so, 2018 was not to be defined exclusively by the theme of change. Against the backdrop of the popular force of referendum politics, it featured the TCC's institutional continuity, as manifested in not only its run-of-the-mill constitutional interpretations concerning fundamental rights and local government but also its fuller life as envisioned in the transformative Constitutional Court Procedure Act (CCPA). As will become clear, this institutional reform is historic in that the TCC is expected to be brought closer to the people with the CCPA's coming into force in early 2022 in the face of rising popular constitutionalism. Our story of Taiwan's 2018 constitutional evolution begins with a mix of change and continuity in the major constitutional developments outside judicial forum: game-changing referendums and the visionary statutory reform of the TCC.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Citizens' Initiatives, Referendum Politics, and the Rise of Popular Constitutionalism

As noted in the *2017 Year in Review,* the amendment of the Referendum Act in late 2017 threw a monkey wrench into Taiwan's constitutional politics by loosening the thresholds for citizen-initiated legislative proposals and for referendums to be legally binding. Not much to anyone's surprise, a variety of campaign groups soon took advantage of the new ease in triggering a referendum introduced by the 2017 amendment, initiating a good many proposals on legal principles and government policies.[2] They covered a diverse array of issues concerning domestic legislation and foreign relations, ranging from energy policies to the re-designation of the national Olympic team (currently Team Chinese Taipei) to Team Taiwan in the Tokyo Summer Games 2020. Eventually, ten initiatives gathered enough signatures to qualify to get before voters on November 24, 2018, Election Day, when local

[1] Jau-Yuan Hwang, Ming-Sung Kuo and Hui-Wen Chen, '"The Clouds Are Gathering": Developments in Taiwanese Constitutional Law–the Year 2016 in Review' (2017) 15 I•CON 753, 754.

[2] See Yen-Tu Su, 'Taiwan Is Revolutionizing Democracy', *The World Post* (5 October 2018) <https://www.washingtonpost.com/news/theworldpost/wp/2018/10/05/taiwan/?noredirect=on&utm_term=.4a170e904279>.

elections were to take place across Taiwan. Aside from the one concerning the Olympic team mentioned above, of the ten initiatives eventually placed on the ballot, one aimed to prevent the government from lifting the ban on the importation of Japanese food and agricultural produce from the prefectures affected by the 2011 Fukushima Nuclear Accident, three addressed energy policies, and five were prompted by the TCC's Interpretation No. 748 of 2017 on same-sex marriage.[3]

The institution of referendum holds a special position in Taiwan's constitutional politics, for its connotation of national self-determination in terms of international law.[4] Given that the current constitution has been made virtually unchangeable due to the extremely high threshold for constitutional amendment set in the 2005 constitutional revision,[5] constitutional reform through referenda gained currency by tapping into their association with popular sovereignty prior to the 2017 statutory change. Only in light of the constituent implications of a referendum to Taiwan's virtually eternal Constitution of 1946 can the constitutional significance of the tidal wave of citizens' initiatives in 2018 be fully appraised. While some of the citizens' initiatives convolutedly touched upon Taiwan's most sensitive issues, such as statehood and political identity as suggested by rebranding the Taiwanese Olympic team, the five initiatives prompted by the TCC's interpretation of the constitutional protection of same-sex marriage shed alarming light on how referendum politics can make an impact on constitutional development.

As discussed in the *2017 Year in Review,* the TCC, in Interpretation No. 748, declared unconstitutional the current statutory provisions governing the marriage institution in the Civil Code, paving the way for the legalization of same-sex marriage in two years' time after the interpretation.[6] Instead of settling the debate over same-sex marriage, Interpretation No. 748 provoked conservative and religious pushbacks against it and the fight against sexual orientation-based discrimination as well. Angered by the TCC's liberal stance as manifested in Interpretation No. 748, these groups took advantage of the citizen-friendly Referendum Act. They initiated two targeted proposals to chip away at the TCC's declaration of equal protection of freedom of marriage with respect to same-sex couples as well as another to curtail the existing LGBTQ-conscious curricula in primary and secondary education. As a countermeasure, gay rights activists also managed to place two initiatives on the ballot: one aimed at implementing Interpretation No. 748 in full, instructing the Legislative Yuan to recognize same-sex marriage through the amendment of the Civil Code; the other focused on the consolidation of the existing LGBTQ-conscious curricula that had received incessant invective from conservative and religious groups. In the meantime, the government balked and the legislative process of extending legal marriage to same-sex couples stalled. In the election, all three proposals initiated in reaction to Interpretation No. 748 became legislative instructions or policy directives with binding force, whereas the two counter-initiatives sponsored by gay rights activists were rejected in the referendum votes.

It should be noted that the two initiatives directly targeting Interpretation No. 748 were placed on the ballot with condition. They only received the green light from the Central Election Commission after they had been read down and confined to issues concerning the statutory form, whereby Interpretation No. 748 would be carried out without contradicting the TCC's declaration on the equal protection of freedom of marriage, despite their intention to the contrary. If these two initiatives passed, same-sex marriage could only be adopted in special legislation paralleling the Civil Code. As things stand, the extent to which Interpretation No. 748 is affected by the referendums is yet to be determined as the Legislative Yuan is hammering out the required legislation in response to the TCC's constitutional ruling and citizens' initiatives.

Nevertheless, it has become clear that both the public's fierce reaction and the political branch's lukewarm response to Interpretation No. 748 indicate that the TCC is arriving at a crossroads in its winding path to effective constitutional review. At the height of Taiwan's democratic transition, the TCC's intervention was not seen as interfering with democratic processes but considered to be facilitating the realization of political freedom—its rights-friendly interpretations were embraced by not only the political branch but also the people.

In contrast, the praise sung to the TCC has been drowned out with Interpretation No. 748 fading into the polemics of referendum politics. Instead of implementing the interpretation in good faith, both the government and the legislature turned to citizens' initiatives for guidance. The debate over same-sex marriage was thrown back into the streets again[7] until both its supporters and opponents took the battle from the streets to the polls.[8] With the debate carried over into the political arena following Interpretation No.748, the TCC's grip on the living constitution seems to have been loosened.

[3] For a complete list of the ten initiatives, see 'The 10 Referendum Questions Taiwanese Are Voting On', *Focus Taiwan* (24 November 2018) <http://focustaiwan.tw/news/aipl/201811240010.aspx>.

[4] See Jau-Yuan Hwang, Ming-Sung Kuo and Hui-Wen Chen, 'Taiwan: The State of Liberal Democracy – The Year 2017 in Review' in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds), *The I•CONnect-Clough Center 2017 Global Review of Constitutional Law* (I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston Collage, 2018) 286, 287.

[5] See Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart Publishing, 2016) 246-47.

[6] See generally Ming-Sung Kuo and Hui-Wen Chen, 'The *Brown* Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light' (2017) 31 *Columbia Journal of Asian Law* 72.

[7] Ibid, 89-90.

[8] Tzu-Yi Lin, Ming-Sung Kuo and Hui-Wen Chen, 'Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape' (2018) 48 *Hong Kong Law Journal* 995, 1021.

It might be argued that the TCC's loosened grip on the meaning of the constitution may pave the way for more constitutional dialogue and democratic deliberation, heralding the arrival of civic constitutionalism.[9] As the struggle over same-sex marriage is still unfolding, equal constitutional protection of freedom of marriage has already been shrouded in the mist of galvanised homophobia and populist emotion that steered the raucous campaign leading to Election Day. With the constitutional principles espoused in Interpretation No. 748 cast into uncertainty in the wake of referendums, the TCC's role as the constitution guardian is called into question amid the rise of uncivil popular constitutionalism.[10]

Notably, along with the pair sponsored by gay rights activists, the initiative on the rebranding of the Taiwanese Olympic team was also rejected. Eventually, seven of the ten initiatives passed the threshold to be legally binding. In a way, the people have spoken, mandating changes on the existing statutory plan to phase out nuclear power plants and a potential clash with the trade rules of the World Trade Organization as suggested in the initiative on the partial ban on the importation of Japanese food and agricultural produce. Through the citizen-friendly Referendum Act, the people have issued the government instructions on a wide range of issues, including energy security and international trade. As the referendum campaigns were co-opted by or allied with partisan forces and the results corresponded to party lines, popular constitutionalism may not bring the constitution closer to the people, although it does somewhat remove it from the TCC.

2. The Reformation of the TCC and the Constitutional Court Procedure Act (CCPA)

On December 18, 2018, the Legislative Yuan passed the CCPA, which will replace the existing Constitutional Interpretation Procedure Act of 1993 (CIPA) when it comes into force on January 4, 2022. As part of the grand judicial reform project, the CCPA came into being after a long gestation. Among the sundry procedural and institutional reforms, three features in the reform legislation merit special attention.

The first is to gear the TCC for the protection of individual rights through the judicialization of constitutional interpretation proceedings. Under the current CIPA, the TCC exercises jurisdiction over constitutional interpretation mainly in the form of abstract review.[11] As a result, the TCC does not have jurisdiction to adjudicate on the constitutionality of the rulings of the courts of last resort. The TCC has thus been criticized for falling short in the protection of individual rights. Drawing on the experience of the German Federal Constitutional Court, the CCPA will introduce the procedure of "constitutional complaints (*Verfassungsbeschwerde*)," through which claimants will be able to have the rulings of the courts of last resort reviewed by the TCC on the grounds of constitutional rights (Articles 59-64). Related to the shifting of focus to the protection of individual rights is the emphasis on transparent procedures, aimed at moving the privy council-like TCC closer to a full-fledged constitutional court. Although public hearings may not take place frequently, they will no longer be a ritualistic constitutional theatre and will be equipped with more procedural safeguards (Articles 25-29). The TCC will be made more accessible to citizen participation through procedural reform, including the adoption of *amicus curiae* briefs (Article 20).

Second, the reformed TCC as envisioned by the CCPA will be more efficient. Among the criticisms levelled at the TCC are the slow pacing of its decision-making and the obscurity of its rulings. They are interrelated. Under the CIPA, to render a general interpretation of constitutional principles or to decide on the constitutionality of statutes requires a two-thirds majority of the attending justices with a quorum of two-thirds of the total membership. The TCC's interpretation is rendered impersonal, representing the collective opinion. Specifically, each sentence in the holding (including the *ratio decidendi*) of a constitutional interpretation requires the agreement of at least two-thirds of the attending justices. To reach an agreement, the justices tend to choose general and abstract wording to accommodate differing individual opinions.[12] To rectify the slow pacing and obscurity of the TCC, the CCPA lowers the voting threshold for constitutional interpretation (Articles 30-32).[13] With the removal of the supermajority requirement, the slow-paced TCC will be able to improve its productivity. Moreover, to rid the TCC of obscurity, the CCPA introduces a reform in the style of judicial opinions, the third feature of the TCC reformation.

Departing from the current continental style of impersonal judicial opinions as noted above, the CCPA introduces the Anglo-American practice: judicial opinions will be authored by individual judges while the single-authored opinion that is joined by most judges will become the opinion of the court in the future (Article 33, para. 2). Once this new judicial style is adopted, the interpretation of the TCC will no longer be rendered impersonal, with the current collective voice replaced by majority opinions. From the signatures attached to the opinion of the court, observers of the TCC will then be able to pin down the author and the majority in each interpretation. In this way, the TCC can become even more transparent to the public. The proposed "personalization" will move the TCC further in the existing "plurivocal" direction,[14] bringing judicial review closer to the people. In sum,

[9] See Jiunn-rong Yeh and Wen-Chen Chang, 'An Evolving Court with Changing Functions: The Constitutional Court and Judicial Review in Taiwan' in Albert HY Chen and Andrew Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (CUP, 2018) 111-12, 137-38.

[10] Lin, Kuo and Chen (n. 8) 1020-22.

[11] Ibid, 1023.

[12] Ibid, 1024-25.

[13] Notably, the voting threshold varies among different procedures. See ibid, 1025, n. 149.

[14] Ibid, 1025-26.

the CCPA reform envisions the TCC as the people's court in the future.

III. CONSTITUTIONAL CASES

In 2018, the TCC received 492 new petitions for either constitutional interpretations (467 petitions, about 95%) or uniform interpretation of laws and regulations (25 petitions, about 5%). Among the new petitions, 441 (about 90%) were filed by the people, 39 by the courts, and only 12 by other governmental agencies. In response, the TCC dismissed 353 petitions and rendered 14 interpretations (Nos. 760 to 773).[15] About 93% of the dismissed cases (344 out of 353) were brought by the people. Of the 14 interpretations, only two (Nos. 772 and 773) were uniform interpretations. Among the other 12 constitutional interpretations, seven (Nos. 760, 762, 763, 765, 766, 770, and 771) declared unconstitutional the challenged statutes or regulations, in their entirety or in part. The remaining five (Nos. 761, 764, 767, 768, and 769) upheld the constitutionality of the challenged laws. In terms of decision outcomes, the TCC remained active in striking down unconstitutional laws, following its path since Taiwan's democratization began in the late 1980s.

Compared to the constitutional interpretations rendered in 2017, the TCC's decisions in 2018 lacked an iconic decision that would stand out as Interpretation No. 748 on same-sex marriage. Nevertheless, some of the 12 constitutional interpretations still touched upon several issues of importance that deserve focused attention.

1. Interpretation No. 760: Equal Protection

Interpretation No. 760 declared unconstitutional in part the pre-entry training program of police officers, for violation of equal protection. In Taiwan, all police officers are required to pass a state examination, including a written test and a pre-entry training program, before taking office. In practice, the government established a national police university to educate future police officers. For years, all police officers were graduates of this police university (hereinafter PU graduates). Beginning in the 1990s, the government opened up this examination for graduates of other universities (hereinafter non-PU graduates) in the hope of diversifying the educational backgrounds of police officers. In spite of the above legislative purpose, the national police administration developed a dual-track program for pre-entry police officer training: all PU graduates were required to receive about four months of training at the police university while all non-PU graduates were to go through about a two-year training program at another police educational institution at a junior college level. Consequently, after completion of their two-year pre-entry program, those non-PU graduates would be appointed as the lowest-ranked police officers at a much later time compared to those PU graduates passing the same police examination in the same year.

In its ruling, the TCC found that laws governing the state police examination did not mandate this different treatment. Instead, it was the result of the unequal implementation of laws by the examination and police agency collectively. Therefore, the TCC in Interpretation No. 760 declared unconstitutional in part such *de facto* discrimination against the non-PU graduates in their right to take state examinations and right to public offices, as provided for by Article 18 of the Constitution. Among the TCC's jurisprudence on equal protection, Interpretation No. 760 is the first constitutional interpretation that expressly recognized *de facto* discrimination as a type of discrimination that violates the constitutional provision of equal protection. The TCC held that a practice with systematic disproportionate impacts would trigger the intermediate review of equal protection in this case, as it involves the right to public offices. Nevertheless, the TCC left unanswered one important question on the requirements of *de facto* discrimination: whether a discriminatory purpose or intention behind the discriminatory practice is needed to establish an unconstitutional *de facto* discrimination.

2. Interpretation Nos. 762 and 763: Due Process of Law

On issues regarding the due process of law, the TCC, in Interpretation No. 762, declared unconstitutional the ban on pro se criminal defendants accessing court dockets. In Interpretation No. 763, the TCC created a notice obligation on the competent authorities taking any private land. This interpretation mandated the government to give the original landowners updated reports, in due time, on the actual use of their lands taken by the government.

3. Interpretation No. 764: Privatization and Discontinuity of Civil Servant Status

On the right to public offices, the TCC, in Interpretation No. 764, upheld the constitutionality of several provisions in the Statute of Privatization of Government-Owned Enterprises and its implementing rules. These provisions authorized the government to convert those government employees who voluntarily work with privatized enterprise into workers regulated by the Labor Standards Act, after paying due compensation based on their respective seniorities of service. Applying the standard of rationality review, the TCC found that the termination of their status as government employees did not violate their right to public offices under Article 18 of the Constitution.

4. Interpretation No. 768: Nationality and the Loyalty Required of Civil Servants

In Interpretation No. 768, the TCC also upheld the constitutionality of several provisions in the Medical Personnel Act, which limits the right to public offices of licensed medical professionals with dual nationality. The said act disqualifies any such person from holding the position of a department director or higher ranks at any state-owned medical institution or any health administration, as holders of such positions are considered civil servants.

[15] Statistics of the new and decided cases before the TCC in 2018 (in Mandarin) < http://www.judicial.gov.tw/constitutionalcourt/p05.asp >.

5. Interpretation No. 769: Political Accountability and Autonomy of Local Government

Interpretation No. 769 was the only interpretation touching upon the issues of government powers: the vertical division of powers between the central and local governments. It is a rare interpretation concerning local autonomy under the Constitution. In 2016, the national legislature amended the Local Government Law and changed the voting method of the election or recall of the speakers and deputy speakers of local councils from secret to open balloting. The Yunlin County Council petitioned the TCC for a ruling that such change infringed its legislative autonomy as protected under the Constitution. The TCC upheld the constitutionality of the above-amended national legislation. In terms of the constitutional basis, the TCC held that the Constitution and its amendments do include several provisions expressly authorizing the national legislature to regulate the overall structure of local governments. The office of local council speakers and their election shall be considered important items of such structure and be subject to necessary and proper regulation of national legislation. Applying a relaxed standard of review, the TCC found legitimate the purposes of the above 2016 legislative amendment that aimed to enhance political accountability and to reduce corruption related to the election of local council speakers in practice. As to the voting methods, the TCC recognized that it is within legislative discretion to choose either secret or open balloting for the election and recall of local council speakers.

6. "Deciding Not to Decide"

Of the 353 dismissed petitions in 2018, two decisions merited special attention. Both concerned the standing of governmental agencies to petition for constitutional interpretations: one concerning the minorities of the Legislative Yuan and the other on the Control Yuan (an equivalent of the Ombudsman Agency).

The CIPA allows one-third of the legislators or more to petition for constitutional interpretation after the enactment of a new or revised legislation. In the past, the TCC once held that only those legislators who were opposing the laws in dispute may join the petition (Interpretation No. 603 of 2005). However, the TCC has not further clarified the rather technical question of how to count who may be considered "opposing" the laws in dispute.

In a petition filed by exactly one-third (38) of the legislators challenging the first and second reading procedures of a controversial budget bill, the TCC dismissed this petition on the ground that the real number of opposing legislators did not meet the threshold of one-third of the legislators as required by the CIPA. The TCC found that one legislator did not attend any meeting of either committee deliberations or floor discussions of this bill. Though opposing at first, some or many of the 38 petitioning legislators changed their position and joined the majority to vote for many procedural items in dispute, or simply did not cast their votes. As none of the procedural items in dispute were opposed by one-third of the legislators, the TCC dismissed this petition for lack of standing. As this was the first dismissal decision ruled on such grounds, it remains to be seen if the TCC will apply the same test to similar petitions in the future, and extend to the petitions the substantive issues of laws as well.

In another dismissal decision, the TCC denied a petition by the Control Yuan challenging a recent statute of transitional justice (on the liquidation of illegitimate party assets of the former ruling party, the Kuomintang (KMT)) based exclusively on its investigative power without any connection to its impeachment, censure, or rectification powers. While acknowledging several precedents of granting admission to similar petitions in the pre-democratization era, the TCC chose to follow its recent practice of a more tightened scrutiny of such petitions after Taiwan's democratization. The TCC held that investigative power is only a subsidiary power to facilitate the Control Yuan's exercise of impeachment and other powers, and may not be cited as the only ground to support its standing to petition for constitutional interpretation. Otherwise, the Control Yuan would become a sort of "constitutional prosecutor" that can challenge any law or regulation at odds with its constitutional or political position.

IV. LOOKING AHEAD

Continuing with the development from 2016 on, same-sex marriage will remain on the constitutional agenda beyond 2018. As the government is introducing the bill "An Act to Implement Interpretation No. 748" before the Legislative Yuan, supporters and opponents of same-sex marriage are taking their battle from the ballot box to the legislative floor. As the unwieldy title of the government bill suggests, the $64,000 question of whether the prospective civil union of same-sex couples is marriage is deliberately left unanswered in the proposed statutory framework in response to the TCC's declaration on the equal protection of freedom of marriage and its critics. Under the bill, same-sex couples will receive the similar legal benefits attached to marriages of opposite sexes as provided by the Civil Code. This strategy of constructive ambiguity and the limited areas to which the bill applies may well satisfy neither side, setting the stage for another round of constitutional battles before the TCC. Apart from issues arising under the foregoing government legislative bill that may well have to be resolved by the TCC in 2019, both the contentious statutory reform on veterans' pensions, which was adopted in June 2018, and the above-mentioned special legislation on the liquidation of KMT's illegitimate party assets are now in the TCC's case docket pending its decisions. In 2019, the TCC will be engaged by the most contentious issues arising from the government reform agenda since the DPP's electoral victory in 2016.

Although 2019 is an election-free year in Taiwan's political chronology, the lead-up before the presidential and general elections in early 2020 will surely dominate the country's constitutional politics in 2019. Against this backdrop, it is worth close observation that the TCC will have new members in October 2019 when the eight-year term of four sitting justices comes to an end. With both the president and the Legislative Yuan approaching their

lame-duck stage before the expiry of their terms, who fills the TCC vacancies will have long-term implications for Taiwan's constitutional development beyond 2019.

V. FURTHER READING

Tzu-Yi Lin, Ming-Sung Kuo and Hui-Wen Chen, 'Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape' (2018) 48 *Hong Kong Law Journal* 995

Jiunn-rong Yeh and Wen-Chen Chang, 'An Evolving Court with Changing Functions: The Constitutional Court and Judicial Review in Taiwan' in Albert HY Chen and Andrew Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (CUP, 2018)

Judicial Yuan, *Leading Cases of the Taiwan Constitutional Court, Volume One* (Judicial Yuan, 2018) <http://jirs.judicial.gov.tw/judlib/EBookQry04.asp?S=X&scode=X-&seq=2>

I-CONnect Symposium: The 70th Anniversary of the Taiwan Constitutional Court (11-15 December 2018) <http://www.iconnectblog.com/2018/12/introduction-to-i-connect-symposium-the-70th-anniversary-of-the-taiwan-constitutional-court/>



Thailand

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I. INTRODUCTION

Although enacted in April 2017, the 2017 Constitution has yet to come into full effect. The long transitional period means that the National Council of Peace and Order (NCPO) could ignore much of the charter, e.g., the checks and balances and respect of liberties and rights.

Support for the NCPO has begun to wane. The junta has been plagued by corruption and inefficiency, yet has survived its dwindling popularity by reinforcing the network of elites. The NCPO controls all the constitutional mechanisms key to sustaining the regime. The junta has appointed its men to all watchdog agencies and raised their salaries.[1] As a result, it is well protected legally. The National Anti-Corruption Commission refuses to investigate corruption accusations.[2] The National Human Rights Commission has been silent about abuses on dissidents. Judicial reviews have been lenient. This has only further upset the public. The fight for rights and liberties remains an uphill struggle.

The general atmosphere, however, slightly improved as the NCPO prepared for the upcoming election, tentatively within the first quarter of 2019. The political ban was lifted in December. Despite running out of excuses to delay it, in 2018, the NCPO signaled to the National Legislative Assembly to extend the waiting period for 90 days and in 2019, it postponed the date by another month.[3] Thus, regardless of all the preparation and fanfare, an election remains an uncertain prospect.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Much of the constitutional debates in 2018 concerned the upcoming election. The 2017 Constitution decrees that the government, the NCPO, promulgate election laws within eight months, after which the Election Commission (EC) must hold an election within 150 days.[4] The date falls within the first quarter of 2019. This election would be the first in five years. The 2014 Election was obstructed by anti-democratic protesters, and later invalidated by the Constitutional Court, an act which paved the way for the coup d'etat.[5] The selling point of the 2014 coup was an electoral reform to build a truly democratic Thailand. This will be the final test for the junta after five long years in power. However, the NCPO leader, Prayuth Chan-ocha, has publicly expressed his interest in continuing the suppressive regime, this time constitutionally via the proxy Phalang Pracharat Party (PPRP).

[1] 'สี่ปี คสช. อนุมัติขึ้นเงินเดือนข้าราชการ ใช้งบประมาณมากขึ้น แต่ประสิทธิภาพไม่เปลี่ยนแปลง' [Four Years, NCPO raises salaries for government officers. More spending, same efficiency] (*iLaw*, 27 September 2018) <https://ilaw.or.th/node/4961?fbclid=IwAR3NYjC0d5oRpM-JgRdHsbDJ2ZLBeNSUjXUcqBQo_nPnYl2fjv30c4CYxmc> accessed 9 February 2019.

[2] 'Thai Anti-Graft Agency Drops Probe into "Rolex General"' (*The Strait Times*, 27 December 2018) <https://www.straitstimes.com/asia/se-asia/thai-anti-graft-agency-drops-probe-into-rolex-general> accessed 9 February 2019.

[3] '4 ปี คสช. เลื่อนเลือกตั้ง 4 ครั้ง จากปลายปี 2558 สู่กุมภาพันธ์ 2562' [Four years, NCPO Postpones election 4 times, from late 2015 to Feb 2019] (*The Standard*, 25 January 2018) <https://thestandard.co/4-years-election-postponed-4-times/> accessed 9 February 2019; Panarat Thepgumpanat 'Thailand must postpone election again, until March: officials' (Reuters, 15 January 2019) <https://www.reuters.com/article/us-thailand-politics/thailand-must-postpone-election-again-until-march-officials-idUSKCN1P90Y5> accessed 9 February 2019.

[4] Thai Constitution B.E. 2560 (2017) [2017 Constitution], sec 268.

[5] Const. Ct. Decision 9/2557 (2014).

The public has speculated whether the junta will naturally utilize a combination of constitutional and extra-constitutional means to coerce a desirable outcome, which unsurprisingly undermines the free and fair spirit of an election.[6] Thus, this election is proving critical to Thailand's democracy.[7]

The election is the joint work of the NCPO and the EC. Because the NCPO handpicked the Constitution Drafting Committee (CDC) and the National Legislative Assembly (NLA), the two bodies followed the NCPO's instruction in drafting the 2017 Constitution and relevant laws on political parties and elections. The EC is supposed to be an independent agency undertaking free and fair elections. However, its independence has also been compromised by the dictatorship. They have been driven by two motives: first is the desire to perpetuate the current regime, transforming it into a farcically democratic government; the second is a fanatical desire to have an absolutely free and fair election. The interplay of the two forces can be seen in the Constitution, organic laws, and regulations.

Election preparations exposed two problems surrounding the 2017 Constitution. First was the ill-intent in designing the electoral system. Under the pretext of producing an accurate representation, the CDC designed an electoral system that would result in a fractious parliament. A modified Multi-Member Apportionment (MMA) system allows a voter to cast a single vote.[8] Of 500 MPs, 350 are chosen directly from constituencies. Another 150 MPs are allocated proportionally to the remaining votes. Critics predicted that this arrangement would produce no big winner, as a party that wins in a constituency will automatically lose the right to a party list seat while a smaller party like PPRP would benefit.[9]

Becoming a candidate is not easy, as he and his party are subject to stringent criteria: a candidate must not be an owner or shareholder of a media company and must never have been convicted of corruption-related charges.[10] And a party under the influence of a non-party member faces dissolution.[11] These rules are specifically designed to defeat the NCPO's main rival, the Pheu Thai Party, controlled by Thaksin Shinwatra, himself in self-exile.

Moreover, the Organic Law on Political Parties demands unrealistically high involvement from members. A member must pay an annual fee to prove his sincerity in participating.[12] Also, a party must have a branch in that constituency in order to compete.[13] Initially, a party must recruit candidates through local primary elections, but this law has proven to be impossible to comply with so the NCPO granted an exemption for this election.[14]

Complications continue well after an election. For the first five years, the Senate and the House jointly vote on a candidate from a list submitted by political parties prior to an election. Should they fail, they may pick whoever is appropriate to be a PM.[15] The first 244 senators will be chosen by the NCPO, with six reserved seats for armed forces commanders.[16] That means the NCPO-backed Senate may determine the PM selection for two terms of actually eight—not five—years.

Another problem with the 2017 Constitution is its lengthy transition under which the NCPO retains dictatorial power from the 2014 Interim Charter.[17] Despite the constitutional guarantee of separation of power, the NCPO has invoked extra-constitutional power to issue several orders that give it an edge over rivals with absolute impunity. NCPO Order 53/2560 eliminates the membership of all political parties. Another NCPO Order (16/2561) allows the EC to gerrymander.[18] These orders directly interfere with the EC, an independent agency responsible for overseeing elections. Throughout 2018, the PPRP recruited local mafia and politicians through generous awards and blackmailing.[19] As a government, the NCPO has given, and promises to give more, highly substantial amounts of money to grassroots, a practice other parties have condemned as vote-buying in plain sight.[20]

[6] 'Nation cynical about election' (*Bangkok Post*, 28 January 2019) <https://www.bangkokpost.com/news/politics/1618794/nation-cynical-about-election> accessed 9 February 2019.

[7] Prajak Kongkirati, 'Why Thailand's generals fail to co-opt elections' (*New Mandala*, 15 January 2019) <https://www.newmandala.org/why-thailands-generals-fail-to-co-opt-elections/> accessed 9 February 2019.

[8] 2017 Constitution, sec 85 & 83.

[9] Natthakarn Amatyakul, 'ก่อนกา อย่าลืมอ่าน 'กติกา' และโปรดศรัทธาการเลือกตั้ง: สิริพรรณ นกสวน สวัสดี' [Read the Rules before Vote. Trust in Election: Siripannee Nogsuan Sawasdee Interview] (*The Momentum*, 20 August 2018) <https://themomentum.co/interview-political-scientist-siriphan-noksuan-sawasdee/> accessed 9 February 2019.

[10] 2017 Constitution, sec 98.

[11] Organic Law on Political Party B.E. 2560 (2017), sec 28.

[12] Political Party Law, sec 27.

[13] Political Party Law, sec 47.

[14] The National Council of Peace and Order (NCPO) Order 13/2561 (2018), sec 4.

[15] 2017 Constitution, sec 159 & 272.

[16] 2017 Constitution, sec 269.

[17] Interim Charter B.E. 2557 (2014), sec 44.

[18] Wassana Nanuam, 'Apirat defends EC order amid govt gerrymandering concern' (*Bangkok Post*, 20 November 2018) <https://www.bangkokpost.com/news/politics/1578690/apirat-defends-ec-order-amid-govt-gerrymandering-concern> accessed 9 February 2019.

[19] Pongpiphat Banchanont, 'เช็กแถวพลังดูดของ พรรคพลังประชารัฐ' [Checking Magnet Power of PPRP] (The Matter, 28 November 2018) <https://thematter.co/quick-bite/magnet-power-party/65909> accessed 9 February 2019.

[20] Mongkol Bangprapa & Aekarach Sattaburuth, 'EC to investigate cash handout spree' (*Bangkok Post*, 23 November 2018) <https://www.bangkokpost.com/news/general/1580474/ec-to-investigate-cash-handout-spree> accessed 9 February 2019.

Despite this, the EC raised no objections to the NCPO's trespassing into its jurisdiction. Normally, members of independent watchdog agencies would be nominated by an independent commission and confirmed by the Senate.[21] The system was designed to bar the prime minister's involvement for fear of undue political influence so watchdog agencies could remain independent to scrutinize the political branches. However, since 2014, the NCPO has dominated all branches of government. It handpicked the NLA so it was able to choose its men for the National Anti-Corruption Commission, the National Human Rights Commission, the Ombudsman, and, most importantly, the Election Commission. The EC cites the need to have a free and fair election to tightly control campaigns. However, the reason might simply be a pretext to favor the PPRP. In addition to the above incident, the PPRP failed to disclose its campaign finances and cabinet members were accused of conflicts of interest as they helped the PPRP's campaigning. Meanwhile, other parties were harassed by police and soldiers.[22] The EC refused to investigate these cases. On the contrary, it enthusiastically considered Prayuth's recommendation that a ballot should not contain any logos or names of candidates that would allow for easier rigging.[23]

The two forces have produced an overly complicated election, laden with unrealistic rules, costly to comply with, and unfair. The damage to the Constitution has been great. The handling of the upcoming election by the NCPO and the EC has displayed blatant disregard of constitutionalism. The NCPO saw the 2017 Constitution merely as an instrument to advance its interests—to perpetuate the regime—so the charter was drafted accordingly. Regardless of the form, the substance is hollow. Although it was approved in a referendum in 2016, the public has finally begun to feel its bite. All constitutional mechanisms have aimed at abusing the electoral process to undermine the people's general will and whitewash the autocratic regime. Moreover, the NCPO's arbitrary exercise of power puts the supremacy of the 2017 Constitution ever more into question. Flawed constitutional designs and biased watchdog agencies have quickly deteriorated the public's trust in it. Such resentment indicates that yet another round of constitutional crisis is being spawned.

III. CONSTITUTIONAL CASES

Most cases involved the Constitutional Court (CC). After four idle years, cases finally began to arrive, but still in significantly lower numbers than during the democratic government period. The CC was vested with two roles: first, as the protector of rights and liberties; and second, as the guardian of the constitutional order. These cases suggest that, while the CC performed the first role well, it failed to uphold a liberal democratic spirit. There seems to be a limit on what the CC understands as rights and liberties. In other words, the CC was more rigorous at protecting "private" rights than "public" ones. Worse, it was accused of being biased because of its perceived reluctance to scrutinize the junta regime.

1. Constitutional Court Decision 6-7/2561: Civil Rights

This is the first case under the 2017 Constitution which the CC proclaimed unconstitutional. Previously, Thai narcotic drug laws had a strict presumption that a person who possessed a certain amount of narcotic drugs was deemed to be a seller, whose punishment was significantly more severe than an ordinary user. The new Narcotic Drugs Act B.E. 2560 (2017) (6th Amendment) then allowed a judge to apply discretion, which would result in a more flexible and fairer sentencing. However, according to Section 8 of the 2017 NDA, the new procedure was not applicable in a case that had already been decided by the Court of First Instance. Two inmates whose requests for retrial under the new procedure challenged Section 8. Their cases were then referred to the CC.

The CC had to balance two interests: the defendants' interest in a fair trial, especially the presumption of innocence until proven guilty; and the need for legal certainty. If a case is still ongoing, even on appeal, the defendant's interest prevails. Denying a defendant of a fairer procedure fails the rule of law (Section 3), proportionality (Section 26), and presumption of innocence (Section 29) tests. The CC also cited the general principle of criminal law that as long as a case has not finished, the court must apply a new law if it is more beneficial to a defendant.

The ruling on presumption of innocence is consistent with the precedent. In recent years, the CC invalidated several laws that had presumption of strict liability.[24]

However, if the case is finished, the interest in legal certainty reigns. The prohibition is not an unfair discrimination against a convicted defendant. It is a proportionate restriction on an individual's right to a fair trial in order to maintain public order.

2. Constitutional Court Decision 4/2561: Political Membership

On 22 December 2017, shortly after the NLA enacted the Organic Act on Political Parties B.E. 2560 (2017), the NCPO issued Order 53/2560 (2017) to amend it. First, it ordered members of existing political parties to reconfirm their membership in writing and pay the fee within 30 days after 30 April 2017. Second, the order disbanded existing branches and forced parties to establish branches in every region and province anew as a precondition to being able to compete in an election. Failure to meet the requirement would result

[21] 2017 Constitution, sec 216.

[22] 'อนาคตใหม่' โวย ทหารตามติดลงพื้นที่อีสาน ทั้งที่ขออนุญาตแล้ว จี้ถามตู่-ป้อมรับรู้หรือไม่' [Future Forward monitored by soldiers despite permission] (*Matichon*, 26 October 2018) <https://www.matichon.co.th/politics/news_1196765> accessed 9 February 2019.

[23] 'EC downplays furor over ballot papers' (*Bangkok Post*, 10 December 2018) <https://www.bangkokpost.com/news/politics/1590694/ec-downplays-furore-over-ballot-papers> accessed 9 February 2019.

[24] Const. Ct. Decision 12/2555 (2012), 10/2556 (2013), 3/2559 (2016), and 1/2560 (2017).

in party dissolution. The two biggest parties—Pheu Thai and Democrat—challenged the order, claiming that it imposed excessive burden on existing parties, putting them at a disadvantage compared to newly founded parties. This is especially true if they are still under the ban of convening political gatherings. The main parties were implying that the NCPO's intervention favored the PPRP.

The CC upheld the constitutionality of both measures. The focus was on Section 45 of the Constitution, the right to form a political party. The CC reasoned that having a democratic party was a crucial component of political reform. It then described an ideal party as having transparent and participatory management as well as being independent from non-members' influence. Order 53/2560 did not terminate party membership. Instead, it allowed members to reconsider, at their free will, whether they still would like to participate in that party. The order also gave the party a chance to review and update its bookkeeping. Moreover, the order approved the EC to accept electronic submissions. Thus, the CC did not speculate as to excessive burden on an individual's right to participate or form a party. As expected, all main parties later lost a significant number of their members.

On the second count, the CC referred to the NCPO's objective, as stated in Order 53/2560, that it intended all parties to belong to the people, which meant they must have wide support from every constituency in which they wish to run. Therefore, a requirement for new branches was necessary as these new branches demonstrate a party's independence from a few politicians. Besides, the deadline could be extended should the EC deem it necessary. A political party may also later petition its grievance with the CC if it was disqualified. With remedies available, the CC believed that the new measure did not excessively restrict the political rights of the people.

There are two notable observations from the decision. First, the CC dismissed the claim of unfair discrimination but did not discuss the discrepancy between existing and newly founded parties. A new party enjoys more time to recruit members long after existing parties have updated their membership. Second, the NCPO and the CC emphasized the creation of a party independent from a non-member figure, a term largely believed to reference Thaksin Shinwatra. A need to create a mass-based, or popular, political party could possibly be a pretext to targeting Thaksin's party, Pheu Thai.

3. Constitutional Court Decision 5/2561: Conflict of Interest

The EC accused the Foreign Minister, Don Pramudwinai, of a conflict of interest. Under the 2017 Constitution, a cabinet member (Section 187) is prohibited from holding more than a 5% share in a business entity. The rest must be deposited in a trust. This provision also applies to a minister's spouse and minor children. Don had assumed the office in August 2015, when he was exempt from conflict of interest prohibition because he was appointed under the 2014 Interim Charter. The EC discovered that two months after the 2017 Constitution came into effect, Don's wife still held more than a 5% share in two companies. The EC filed a case with the CC to disqualify Don from his office.

The key issue was factual. Don argued that his wife had already complied with the conflict of interest rule. He then blamed the accountant's office for failing to submit all the paperwork necessary to the registrar. The delay was therefore only an administrative issue. The EC disputed the claim since it believed that the documentation presented to the CC was fabricated. The CC agreed with the defendant that his wife had duly met the deadline in transferring the excessive shares to their son as decreed by the Constitution, and Don was acquitted.

The case was decided by a majority. Three minority judges were not convinced, as they found many irregularities in the testimony and documents. The case will have further implications since four more cabinet members have been found to have breached a similar conflict of interest prohibition. Their conviction would be a severe blow to the NCPO's survival, providing them with an easy exit.

4. Supreme Court Decision 1688/2561: Rebellion

A group of democratic activists, known as the Resistant Citizens, accused the NCPO of rebellion under Section 113 of the Penal Code. The Court of First Instance and the Court of Appeal dismissed the case. Both courts reasoned that the 2014 Interim Charter prevented any action against the coup d'etat on 22 May 2014 and any subsequent acts. The Supreme Court upheld the dismissal.

The Resistant Citizens argued that Section 48 of the 2014 Interim Charter, which granted absolute impunity to the NCPO, was directly against the conscience and fundamental principles of justice; that it should not be recognized as a proper law. It was drafted in bad faith, they argued, as a criminal enacts the law to shield himself from liability. The Supreme Court disagreed. It followed a positivistic and pragmatic approach. The NCPO was able to successfully usurp power from the previous government so it was a *de facto* government when it made the law. Besides, when facing a legal dilemma, the Supreme Court would prefer to be practical in order to uphold statehood. Here, the Court was implying that rejecting the NCPO's order as law would mean rejecting the NCPO itself as a legitimate ruler, hence anarchy would follow. The NCPO continued to enjoy absolute protection even under the 2017 Constitution because Section 279 guarantees it legality as inherited from the 2014 Interim Charter.

The case came as no surprise. Shortly before the Supreme Court delivered its decision, the Court of Appeal, in another case, also ruled that the junta's order to ban public assembly was lawful. The Court of Appeal cited an absence of resistance as the sign of a successful coup and power transition. The defendant tried to claim his freedom to assembly under the International Covenant on Civil and Political Rights, but the Court of Appeal pointed out that Thailand was then in a stage of political instability, which was grounds for the restriction of such freedom. The judiciary has long been known for its conservativism and cozy relationship with the military, so the Court has always confirmed the junta's

legitimacy to rule.[25] The judiciary valued the practicalities of public order over ideological fairness.

5. Chiang Mai District Court: Academic Freedom

At the 13th International Conference on Thai Studies, academics and activists set up a sign— "An Academic Forum Is Not a Military Camp"—in protest of the NCPO sending soldiers to observe, and possibly intimidate, international and Thai scholars. Five people were then charged with political gathering according to NCPO Order 3/2558 (2015) banning a political gathering of five or more people. The case sparked international outcry as an encroachment on academic freedom.[26]

In December 2018, to ease tension in preparation for the election, the NCPO issued Order 22/2561 (2018), which lifted the ban but did not impact the prosecution of cases, proceedings, or actions according to the announcements and orders that were carried out prior to the nullifications. This was contrary to Section 2 of the Penal Code, which stipulates that if an act is no longer a crime, the accused must be relieved. Despite the NCPO's order, the Chiang Mai District Court followed the Penal Code and acquitted the five defendants.

Since the case was dismissed on a technicality, the Court never had the chance to rule on merit whether academic freedom included a protest against the junta. Again, this could be an example of the judiciary's inclination to protect an individual should the issue concern a more familiar subject, such as criminal law, than one more regarding "public" rights, such as academic freedom. At minimum, it could be a precedent for other cases. Currently there are at least 200 people charged under Order 53/2558.[27] Unfortunately, as merely a Court of First Instance, the decision had only persuasive, not binding, authority. It depends on each court to interpret Order 22/2561. Besides, the order would not benefit those who were charged with sedition, computer crimes, or public assembly laws. Therefore, the implication was quite limited.

IV. LOOKING AHEAD

Tension is expected to increase in 2019. In January, the NCPO pressured the EC to re-schedule the general election from late February to late March, raising the possibility that the EC might fail to meet the constitutional deadline. If the election is annulled, the ensuing deadlock might pave the way for another coup. Even if the election goes smoothly, public opinion suggests that most Thais are skeptical that it will be free and fair. A party winning the popular vote might be disqualified under the unrealistically strict rules applied by a prejudiced umpire.

No one believes that the 2017 Constitution will last very long. It is designed to limit the government's capacity as much as possible. The incoming government must navigate through an increasingly powerful bureaucracy and watchdog agencies. It is bound by the 20-year master plan prepared by the NCPO. Many pro-democratic parties have contemplated amending the Constitution. However, this requires absolute consensus, which is almost impossible to reach. Potentially, such an initiative will clash with the pro-junta faction and the judiciary.

V. FURTHER READING

Björn Dressel, "Thailand's Traditional Trinity and the Rule of Law: Can They Coexist?" (2018) 42, *Asian Studies Review* 268

Björn Dressel & Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016," *Journal of Contemporary Asia*, DOI: 10.1080/00472336.2018.1479879

Eugénie Merieau, "Buddhist Constitutionalism in Thailand: When Rājadhammā Supersedes the Constitution" (25 October 2018), *Asian Journal of Comparative Law* <https://doi.org/10.1017/asjcl.2018.16>

Khemthong Tonsakulrungruang, "The Constitutional Court of Thailand: From Activism to Arbitrariness," in Albert H. Y. Chen & Andrew Harding (eds), *Constitutional Courts in Asia: A Comparative Perspective* (CUP, 2018)

[25] See Piyabutr Saengkanokkul, 'ศาลรัฐประหาร: ตุลาการ ระบอบเผด็จการ และนิติรัฐประหาร' [Court Coup d'etat: Judiciary, Dictatorship, and Judicial Coup] (Samesky Books, 2017).

[26] 'ICTS13 attendees speak out for academic freedom in Thailand' (*New Mandala*, 18 August 2017) <https://www.newmandala.org/statement-participants-13th-international-conference-thai-studies-summons-accusations-fellow-participants/> accessed 9 February 2019.

[27] 'ศาลแขวงเชียงใหม่ยกฟ้องชูป้าย "เวทีวิชาการไม่ใช่ค่ายทหาร" เพราะไม่มีฐานความผิดนี้แล้ว' [Chiang Mai District Court Dismisses Academic Freedom Case as Offence Abolished] (*Prachatai,* 25 December 2018) <https://prachatai.com/journal/2018/12/80233> accessed 9 February 2019.



Turkey

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I. INTRODUCTION

2018 was another critical year in terms of affirmation of the supremacy of the Constitution in Turkey. Although the state of emergency declared after the unsuccessful coup in 2016 was lifted in mid-year, the country has not witnessed a normalization process since then. Restrictions on human rights and freedoms were retained in force by way of a law institutionalising and maintaining them that had been approved just before the state of emergency ended and prevented ongoing violations from being eliminated. The Constitutional Court ("the Court"), which left citizens alone in front of an unlimited and uncontrolled executive organ after the coup, tried to regain its position as a guardian of democracy through various individual application judgments in 2018. But when the judges of trial courts backed by the government refused to implement its orders to release critical journalists, the Court's reputation and supremacy, and the constitutional order in general, was damaged irreparably. Under these circumstances, the Court once again maintained silence last year about some hot topic cases and those pending before it for years, such as the cases of conscientious objectors. Along with the ever-increasing intimidation of the Court by the executive organ, early general elections organised under the state of emergency and the shift in political order from a parliamentary system to a Latin American-style presidential system were marked as the most important developments in constitutional law in Turkey. The new system gave the President of the country vast powers and weakened more and more the roles of the legislative and judiciary organs.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2018, the most important development in constitutional law in Turkey was the shift from a parliamentary system to a Latin American-style presidential system. The constitutional amendments approved by the 2017 referendum[1] went into effect with the early general elections organised on 24 June. With these amendments, new deputies of the Turkish Grand National Assembly (the seats of which increased to 600) were elected and the first round of the presidential election was held. President Recep Tayyip Erdoğan, the candidate of his Justice and Development Party (*Adalet ve Kalkınma Partisi*), received crucial support from the right-wing Nationalist Movement Party (*Milliyetçi Hareket Partisi*) by force of the amendments on the electoral laws, which were adopted just before the elections and which now allow alliances between political parties. He got more than 50 percent of the votes in the first round. Thus, he renewed his mandate, rendering a second round unnecessary. In the weakened Parliament, the Public's Alliance (*Cumhur İttifakı*), which was formed by the above-mentioned parties, obtained a majority but fell short of the majority required for a constitutional amendment. Right after the announcement of the results, Mr. Erdoğan, who became the embodiment of the entire executive branch of the State as the President, started to issue presidential decrees to implement the newly established system.

[1] The results of this referendum are still disputed. Officially, Yes prevailed over No by less than 1.5 million votes, but the main opposition party leader, Kemal Kılıçdaroğlu, announced three months after the referendum that according to the real results, No won with 51.2%.

By the first decree on 10 July, the Office of the President was organised. According to this decree, the President is the head of the State, and the power of execution belongs only to him/her. Sixteen ministries are established under the presidency. The ministers are appointed and can be removed from office only by the President; they are not accountable before the Parliament and no longer form a Council of Ministers as they did in the old system.

In this new presidential system, the Turkish Grand National Assembly not only lost its previous constitutional powers but also its psychological superiority stemming from the leadership role it played in the Independence War in the early 1920s. According to mecliste.org[2], only 323 of a total of 1,116 questions asked by the deputies have been answered in time by the ministers.[3] Considering that this is the only method left by which the Parliament can control the executive branch's policies, it is possible to state that the checks and balances system does not function anymore.

Within the context of this "lack of balance" in the system, one should also consider the weakening impact of the Turkish Constitutional Court, which continues to allow the misuse and abuse of power by the executive organ, especially since the failed coup. With its panel entirely composed of men, most of whom appointed by virtue of their connection to the Justice and Development Party and Erdoğan[4], the Court is now reserved to annulling laws relating to the main policies of the Government. Although some judgments on individual complaints are welcomed by Turkish society and the constitutional law community, the Court is no longer considered a stronghold of democracy in Turkey.

III. CONSTITUTIONAL CASES

1. Mehmet Altan and Şahin Alpay: Release of two journalists

At the beginning of 2018, the Court ordered the release of two journalists, Mehmet Altan and Şahin Alpay. The former wrote columns for the newspaper *Star*, and the latter for *Zaman*.[5,6] They argued that their pre-trial detention for over a year was in contravention of their constitutional rights; that they were not able to benefit from the guarantees of a fair trial; and that the essence of the charges against them actually related to their journalistic activities.

In these individual applications, the Court found that the right to personal liberty and security and the freedom of expression and press was violated and ordered the trial courts to remedy the violations. It was widely believed within the Turkish community that the case would set a legal precedent for the arrested and imprisoned journalists in Turkey. PEN International, which monitored the proceedings and intervened in the journalists' cases before the European Court of Human Rights, welcomed the decision[7] and the lawyers of the applicants sought their immediate release from prison. However, lower courts refused to comply with the Court judgment and, by alleging that the Court acted *ultra vires*, claimed that they were not bound by these decisions and refused to release Mr. Altan and Mr. Alpay. Such attitude by the trial courts has been rightfully described as a challenge to the authority of the Constitution, a revolt against constitutionalism and, most importantly, the start of a new phase of decay for the Turkish Constitutional Court.[8] At the time, the Secretary General of the Council of Europe alluded in one of his speeches[9] that the Government prevented the lower courts from releasing the journalists and expressed his concerns about the rule of law with regard to the noncompliance with the decisions of the Court. Freedom House also made a statement, pointing at Government officials acting outside the law with absolute impunity as the real force behind the empowerment of the lower courts to contradict the highest court in the country.[10] After the rejection by the lower courts, the lawyers of the journalists applied once again to the Court and demanded a judgment that imposed the applicants' immediate release. Despite its earlier ruling, the Court rejected this application, stating that such a request could only be approved in the case of a serious threat to life or material and moral integrity. Subsequently, Mr. Alpay's lawyer made a second individual application, arguing the violation of the right to personal liberty and security due to the lower courts' refusal to release his client. In this second application, the Court ruled on the violation of the alleged right due to the failure to redress the previously found violation and ordered the trial court to release Mr. Alpay, reminding it of its supremacy over the lower courts. Following the publishing of the reasoned judgment, Mr. Alpay was released in March. Mehmet Altan had to wait until June to be released.

[2] A non-governmental organization monitoring parliamentary activity.

[3] '7 bin 116 Önergenin 323ü Süresinde Yanıtlandı' < http://mecliste.org/mecliste-org-dan/7-bin-116-onergenin-323u-suresinde-yanitlandi > accessed 23 January 2019.

[4] Can Yavuz, 'Yeni Türkiye'nin Anayasa Mahkemesi' [2018] Güncel Hukuk 173.

[5] Which was considered to be the Gülen movement's flagship newspaper, now closed.

[6] Once an ally of Erdoğan, then labeled as a terrorist group by him and allegedly behind the failed coup in 2016.

[7] 'PEN International welcomes Constitutional Court decision regarding Alpay and Altan' < http://www.pen-international.org/newsitems/pen-international-welcomes-constitutional-court-decision-regarding-alpay-and-altan/ > accessed 24.01.2019.

[8] Başak Çalı, 'Will Legalism Be the End of Constitutionalism in Turkey?' (*verfassungsblog.de,* 22 January 2018) < https://verfassungsblog.de/will-legalism-be-the-end-of-constitutionalism-in-turkey/ > accessed 24 January 2019.

[9] Speech to the candidate judges and prosecutors of the Justice Academy, 16 February 2018, Ankara.

[10] 'Turkey: Obey Constitutional Court Ruling to Release Imprisoned Journalists' < https://freedomhouse.org/article/turkey-obey-constitutional-court-ruling-release-imprisoned-journalists#.WlzMkHIxjCQ.twitter > accessed 24 January 2019.

2. Umut Kılıç: First Individual Application Judgment regarding Insulting the President

The first judgment of the Court on Article 299 of the Turkish Penal Code, which criminalizes insulting the President, was adjudicated in 2018. Umut Kılıç accused his interviewers to be elected as a judge of being politically biased, yelling at them: "thief, murderer Erdoğan". He was sentenced to one year and six months in prison and the court decided to defer the announcement of the verdict. While finding unanimously that the application was manifestly ill-founded, the Court ignored not only the European Court of Human Rights' jurisprudence on Article 299 but also its own jurisprudence set in the Bekir Coşkun case regarding the deference of the announcement of a verdict concerning freedom of expression cases.

3. Gay soldier: Dismissal from Army is constitutional

A gay soldier's dismissal from the army was referred to the Court by judicial reference. The military court's judge argued that the article of the Military Penal Code permitting the dismissal of soldiers who practice, even in their private lives, "unnatural intimacy", violated the right to equality and respect to private life. The Court rejected the argument, stating that the purpose of the Military Penal Code is to protect military discipline and the continuity of public service. In this regard, taking into consideration the fact that the punishment was nothing more than a dismissal, the Court expressed that the legislative organ had the discretion to establish stricter rules for soldiers than for civilians. Therefore, the Court rejected the request and upheld the provision. However, the Vice-President of the Court, Hon. Engin Yıldırım, wrote a well-grounded dissenting opinion in which he argued that there are no scientific criteria to describe whether a relationship is natural and that dismissal on the ground of being gay without any proof of hindering military discipline violated the right to private life because it was neither proportional nor necessary in a democratic society.

4. Sex tapes of a soldier: Dismissal from Army is unconstitutional

In the course of a raid in his home within an investigation regarding military espionage, certain videos of Erdal Pektaş, a sergeant serving in the Turkish Army, having sexual intercourse with women were found on external hard drives. After an inquiry, Mr. Pektaş was dismissed from the army due to his immoral behaviour, which allegedly damaged the image of the Turkish Military Forces. He filed a lawsuit against this administrative act; however, the Military High Administrative Court ruled that recording sexual intercourse with women constituted a violation of moral codes, and Mr. Pektaş had to account for the publicisation of the said videos. The Court decided that in cases regarding intimacy and sexual life, the margin of appreciation of public officers was narrower. Besides, the tapes were seized in a raid in which the applicant was a victim; therefore, the publicisation of the videos was not his fault. The Court concluded that the right to respect of private life was violated.

5. Gezi protests: Violation of freedom of assembly

The Court found in two cases[11] related to the Gezi Park Protests of 2013 that the freedom of assembly was violated, stating that patience and tolerance by the State to peaceful demonstrations not threatening the public order was necessary in a democratic society. In the Özgürengin case, the Court also found a violation of the prohibition of ill treatment due to the continued beating of the applicant by a police officer. However, in two other cases,[12] although the applications were found admissible, the Court rejected the applications, saying that the decisions of the authorities to arrest the applicants were justified and necessary and the acts of the police officers were proportional and did not reach the threshold of ill treatment.

6. Rejection of prayer in Hagia Sofia: No violation

The applicant association[13] requested the opening of Hagia Sofia for one day for the practice of Islamic prayer (*namaz*), but this request was rejected by public authorities. They filed a lawsuit against this decision, which they lost. Subsequently, the association applied to the Court, arguing that its freedom of religion was violated. The Court announced that the rejection by the public authorities to open Hagia Sofia for prayer was of no concern to the legal personality of the association and declared the application inadmissible *ratione personae*.

7. Rejection of the request to hold his own Quran in prison: Violation of freedom of conscience and religion

Ahmet Sil, who was imprisoned on charges of being part of the failed coup, requested to keep his own Quran copy in his cell, but this was rejected by the prison administration due to a general ban for members of terrorist organizations receiving books sent by their families and delivered by cargo companies. The main justification for such a ban is to prevent prisoners from communicating with others with the help of certain secret cyphers hidden in the books. The applicant filed a lawsuit against this decision, but the Court of First Instance rejected the case, concluding that another copy of the Quran could be obtained from the prison library. The Court handled this case within the context of the freedom of thought, conscience and religion and in light of the freedom of expression. The Government sent various printouts of the online chatting application "ByLock" to prove that Mr. Sil was a terrorist. The Court ruled that on the basis of lack of evidence, the Government failed to prove that the chat

[11] Ali Orak-İrfan Gül and Özge Özgürengin cases.

[12] Mehmet Mutlu and Yonca Verdioğlu Şık cases.

[13] Sürekli Vakıflar Tarihi Eserlere ve Çevreye Hizmet Derneği.

[14] A smartphone application, which is believed to be used only by members of FETÖ, the terror organization which committed the coup.

belonged to Mr. Sil and a general ban on permanently holding a Quran in the cell without any objective criteria violated the freedom of religion.

8. Conviction of the leader of the main opposition party: Violation of freedom of expression

Kemal Kılıçdaroğlu, the leader of the Republican People's Party (*Cumhuriyet Halk Partisi*), alleged without giving names that certain members of the Kayseri municipality staff received bribes. He was convicted to pay non-pecuniary damages in seven different cases, and the Court of Cassation upheld these decisions. Mr. Kılıçdaroğlu applied to the Court, claiming that his freedom of expression was violated. The Court endorsed the application on the grounds that public officers should tolerate criticism more than ordinary citizens do; that the scrutiny of bribery allegations by the leader of an opposition party is natural; that Mr. Kılıçdaroğlu did not mention any name nor target anyone; and finally that the lower courts did not consider his speeches as a whole, but they handpicked some parts of the speeches and found the expressions to be "rude". The Court also stated that, though it could be suggested that some of the expressions used by the applicant were outrageous and obnoxious, it is a fact that politicians only aim to create controversies and produce a strong impact in society sometimes and this should be tolerated. Therefore, it found a violation of freedom of expression.

9. Appointing an administrator by the government to the company: No violation of the right to property

Relying on the reports prepared by the Financial Crimes Investigation Board (*Mali Suçları Araştırma Kurulu*, "MASAK") and the security directorates, the chief prosecutor's office initiated a criminal investigation against Hamdi Akın İpek, one of the co-founders of Koza İpek Holding A.Ş., for alleged offences of managing, propagating and financing the terrorist organization FETÖ, and embezzlement. The expert examination revealed certain fraud and irregularities. The chief public prosecutor, stating that the benevolence money collected by FETÖ was depicted as if it were gained through legitimate business activities engaged in by the holding companies and thereby laundered, requested the appointment of a trustee to the companies. The applicant alleged before the Court that he was deprived of the capacity to manage his assets because of the appointment of the trustee to his companies and that his right to property was violated. The Court decided that the measure of appointing a trustee had a legitimate aim and that administrative bodies had discretion in determining measures to be applied when combating organized crime. Taking into consideration the particular circumstances of the case, the panel ruled that the interference was in accordance with the law and necessary; thus there was no violation of the right to property.

10. Postponement of a strike: Violation of the right to a union

The Union of United Metal Workers and the Union of Turkish Metal Manufacturers did not reach an agreement during collective bargaining negotiations. The applicant union called for a strike; however, the Council of Ministers decided to postpone the strike on the ground of national security concerns. The lawsuit against this decision had been overruled by the State Council. The Court assessed that the Government did not present a concrete argument regarding the connection between the strike and national security concerns and stated that for such a postponement to be justified, it should have been convincingly demonstrated why and how the stay of production in workplaces that went on strike affected national security. In the Court's opinion, "economic security" cannot in itself be a reason to postpone a strike. Otherwise, all strikes could be considered as a threat to national security, and this would interfere with constitutional rights in an unnecessary and disproportionate manner.

11. The acquittal of a police officer: Violation of the prohibition of inhuman and degrading treatment.

Muhterem Turantaylak is the manager of a restaurant in Istanbul in which Kurdish folk and Turkish protest music plays. Four police officers came to his place to have something to eat, and as soon as they went in, they ordered the music to be changed. The dispute between the parties turned into the beating and insulting of the applicant by the police officers and one staff member outside the restaurant. The applicant obtained a medical report showing an injury to his shoulder, caused by a blow of a rifle's edge of one of the officers, against whom he filed a suit. All of the witnesses approved the testimony of Mr. Turanaylak in court, but the officer had been acquitted by the magistrates' court. The court ignored not only most of the witness testimonies due to their family or business relations with the applicant but also the testimony of a customer of the restaurant without any basis, despite taking into account the testimonies of the police officers who testified that their coworker did not beat the applicant. Consequently, the magistrates' court considered the injury to be a simple trace caused only by the police officer's holding of the applicant's shoulder. The Court criticised the differential treatment of the weight given to witness testimonies and the application of surpassing self-defense limits without any discussion. Finally, the Court ruled on the violation of the substantive and procedural limb of the prohibition of inhuman and degrading treatment.

12. Sara Akgül case: A U-turn from the veil in universities jurisprudence

Sara Akgül was a student who wore a headscarf at Boğaziçi University and had received a scholarship from the Ministry of National Education. When she was a senior, she was not able to continue attending her classes because of the headscarf ban in universities at that time, and consequently, she was expelled due to her absenteeism. By virtue of a pardon imposed by law, she was registered again in her faculty and graduated in 2012. But then, the Ministry required the reimbursement of the amount paid under the scholarship due to her dismissal from the university. After certain legal proceedings

that were of no consequence, she applied to the Court. The Court, which annulled in 1989 the law permitting female students to cover their heads on religious grounds; made an interpretation of the renewed law in the same direction in 1991; and decided in 2008 that students with headscarfs would harm "the secular atmosphere" in the universities by referring to the secular state principle, concluded in this case that the ban on veils in universities had no legal basis, and therefore the applicant's right to express her religious belief and to education was violated.

13. Annulment of certain provisions of the rules of procedure of the Turkish Grand National Assembly

The Court annulled some amendments to the rules of procedures of the Parliament which were aimed at limiting deputies' legislation prerogatives. One of the amendments obstructed the discussion in the General Assembly of the legislative proposals coming from the Members of Parliament (MP) who did not belong to any of the parliamentary groups; in other words, who were independent or members of a party without a group. The Court declared that regardless of being a member of a political party group, all MPs are entitled to submit a legislative proposal and found, therefore, the impugned provision incompatible with the principle of a democratic state. Another amendment set forth that one-third of a month's appropriation and travel expense of an MP who receives a reprimand and two-thirds of a month's appropriation and travel expense of an MP temporarily suspended from the Parliament shall be deducted. The Court, due to the ambiguous nature of the reason for the deductions, which it considered "expressions that are contrary to the administrative structure of the Republic of Turkey as it is set forth in the Constitution under the principle of indivisible integrity with its territory and nation", reasoned that the opponent MPs could face the risk of being punished and silenced by the majority by an abuse of this ambiguous, abstract and unpredictable provision. Therefore, the judges decided that this provision was, *inter alia*, incompatible with the principle of a democratic state and the deputies' freedom of expression and privilege to perform legislative tasks.

IV. LOOKING AHEAD

The major challenge faced by the Turkish Constitutional Court under the new political system is going to be the struggle not to lose its reputation and authority altogether within the judiciary. The rejection of the execution of its judgments by the lower courts created a psychological breakdown among the community of jurists. A majority of the judges of the country's highest court are loyal to the executive organ and abstain from ruling against President Erdoğan's will. While this timidity protects the Court from the Government's criticism, it also attacks and hinders the checks and balances mechanism, which has long been weak. As long as the Court does not show any intention to judge independently, impartially and with the purpose of restraining the executive power as due, rights and freedoms will become ever more weak and unprotected in the face of the executive organ and its continuing violations.

V. FURTHER READING

Başak Çalı, "'Academics for Peace' and their Freedom of Expression" (*Verfassungsblog*, 13 June 2018) < https://verfassungsblog.de/academics-for-peace-and-their-freedom-of-expression/ > accessed 30 January 2019

Cem Tecimer, "The Curious Case of Article 299 of the Turkish Penal Code: Insulting the Turkish President" (*Verfassungsblog*, 20 July 2018) < https://verfassungsblog.de/the-curious-case-of-article-299-of-the-turkish-penal-code-insulting-the-turkish-president/ > accessed 30 January 2019



Ukraine

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I. INTRODUCTION

Ukraine is stable in its political instability. The year 2018 was another year of political turbulence with three main components: Russian (Russia's ongoing hybrid war against Ukraine), European (European integration and the implementation of the Association Agreement), and Ukrainian (internal reforms, namely the shadow of 2019 presidential and parliamentarian elections).

The ongoing war in and around Ukraine's Donetsk and Lugansk regions, fomented and perpetuated by Russia, has never wholly ended despite numerous ceasefire attempts. Although through the year the Russia-Ukraine conflict remained predominantly frozen, the Kerch Straight confrontation threatened to turn it into all-out war in November 2018. Responding to an act of aggression in the Black Sea from Russia's side, Ukraine's government introduced martial law across ten regions on the Russia-Ukraine border.

In 2018, the Euro-Atlantic discourse of Ukraine's foreign policy got an additional push through the process of constitutional amendments to proclaim 'the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine'.[1] At the same time, the year witnessed tensions between Ukraine and its Western neighbors, as its attempts to shape Ukrainian identity through language and memory policy provoked a negative reaction from Poland and Hungary.[2] This trend seems to be long term and damaging for Ukraine's European and Euro-Atlantic aspirations.[3] Finally, the presidential and parliamentary elections, scheduled for March and October 2019, influenced Ukrainian political events and rhetoric of 2018.

This report provides a summary of the major constitutional developments in Ukraine in the context of Russia's hybrid war in the Donetsk and Lugansk regions, Ukraine's European and Euro-Atlantic integration as well as its internal reforms. Then, it gives a general overview of the judicial practice of the Constitutional Court of Ukraine (the Court)—its decisions and opinions adopted in 2018. Finally, it analyses one of the most important and controversial opinions of the Court regarding the strategic course of Ukraine to gain full-fledged membership in the European Union and the North Atlantic Treaty Organization.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2018 was marked by the fifth anniversary of the Euromaidan, which stimulated a public discussion about the success and failures of Ukrainian democracy.[4]

[1] Read more on UNIAN: https://www.unian.info/politics/10454316-constitutional-amendments-confirming-ukraine-s-path-toward-eu-nato-enter-into-force.html

[2] See, for instance: Cherviatsova A., 'Gravity of the Past: Polish-Ukrainian Memory War and Freedom of Speech', in *EJIL:Talk!* https://www.ejiltalk.org/gravity-of-the-past-polish-ukrainian-memory-war-and-freedom-of-speech/

[3] 'Ukrainian Foreign Policy: Results of 2018 and Prospects for 2019', International Center for Policy Studies http://www.icps.com.ua/en/studies-icps/foreign-policy/ukrainian-foreign-policy-results-of-2018-and-prospects-for-2019/

[4] Cherviatsova A., 'Lessons Learned? Fifth Anniversary of Euromaidan', in *Verfassungsblog,* 05/12/18 available at: https://verfassungsblog.de/lessons-learned-fifth-anniversary-of-euromaidan/#comments

The civil uprising, which sparked in November 2013, loudly called for immediate democratic reforms, demanding adherence to civil rights (primarily freedom of speech, peaceful assembly, fair trial, democratic elections), clearing the government of corruption, and signing the Association Agreement with the European Union. Out of all these demands, only the last one regarding European integration was completely fulfilled. On the other hand, the democratic reforms were not as successful. In 2018, Ukraine was still among the countries with widespread corruption. It also qualified as a 'partly free' state with a 'transitional government or hybrid regime'. According to the Corruption Perception Index of Transparency International, for instance, Ukraine moved from 144 in 2013 (with a score of 25 out of 100) to 120 (with a score of 32) in 2018.[5]

The Freedom House Report of 2018 states that, despite Ukraine's struggle with implementing anti-corruption reforms under the strategy approved after the 2014 Revolution of Dignity (the country had established several anticorruption institutions and had set up new mechanisms, including online publications of public-servant asset declarations and ensuring transparent public procurements), it has had 'little impact on citizens' lives'; public perceptions of corruption remains high (85 percent see no improvement in this sphere).

As for freedom of speech and freedom of the press, Ukrainian media remain under the control of Ukrainian oligarchs. In addition, restrictions to the freedom of speech were recently introduced under the guise of combating Russian propaganda. Nevertheless, according to the Freedom House Report, Ukraine has a better score in 2018 than it had in 2013 (4,86 in 2013 against 4,64 in 2018, whereby 1 is most democratic and 7 is least democratic).[6]

The beginning of 2018 witnessed fundamental shifts in Ukraine's approaches towards repulsing hostile aggression in Donbas and restoring its territorial integrity. On 18 January, Ukraine's Parliament, the Verkhovna Rada, passed the Law 'On Certain Aspects of State Policy on Securing State Sovereignty over the Temporarily Occupied Territories of the Donetsk and Luhansk Oblasts'.

The law—popularly known as the 'Donbas De-Occupation Law' or the 'Donbas Reintegration Law'—recognizes parts of the Donetsk and Luhansk regions as 'temporarily occupied territories' and labels Russia an 'aggressor state'. It places all military and law enforcement activities of Ukraine's forces aimed at repulsing hostile aggression in Donbas under the control of the top command of Ukraine's Army, a move that formally ended the so-called 'anti-terrorist operation' (ATO) exercised by the State Security Service (SBU) since April 2014. Thus, the law on de-occupation not only optimizes the command structure of the Ukrainian forces aimed at 'refuting and stopping' Russian armed aggression in the Donetsk and Luhansk regions but also changes political rhetoric: instead of 'Ukrainian crises', 'conflict in Ukraine', 'separatists', 'peoples' republics', and 'anti-terrorist operation', there is 'Russia's aggression', 'Russia's occupation', 'Russian regular troops, mercenaries, and irregulars', 'Russia's occupation administrations', and 'liberation of the temporary occupied territories of Ukraine.'

In the international context, the law on de-occupation (despite not referring to the Minsk Agreements) is an instrument to increase pressure on Russia. In the internal context, being initiated by Ukrainian President Petro Poroshenko, it fits well his plan to use patriotic and anti-Russian sentiments in the presidential campaign ahead.

In November 2018, for the first time during its history of independence and long-lasting conflict with Russia, Ukraine experienced the introduction of martial law. It was a response to Russia's act of aggression in the Black Sea, known as the Kerch Straight crisis, when Russian coast guard patrol boats fired and captured three Ukrainian naval vessels attempting to transit the Kerch Straight on their way from Odessa to Mariupol. It was a significant escalation in the long-running Russia-Ukraine conflict: since Russia's unrecognized annexation of Crimea in February 2014, this was the first time that Russian forces had openly engaged Ukrainian forces (the seizure of Crimea and military involvement in eastern Ukraine were carried out by troops without insignia).

On 26 November 2018, the day after the skirmish in the Kerch Strait, Ukraine's government introduced martial law across ten regions on the Russia-Ukraine border and along the Black Sea coast for 30 days (until 26 December 2018).[7] It should be noted that Poroshenko's original intent was to have martial law for 60 days, until the end of January 2019. That would automatically affect the presidential election campaign (under Ukrainian legislation, martial law excludes elections), which would normally start on 31 December 2018.

The prospect of having the presidential election postponed was not acceptable to Ukrainian society or Ukrainian elites. The timing of the introduction of martial law (just before the beginning of the election campaign, when there was not one day of martial law during almost five years of the Russian-Ukrainian conflict when Ukraine saw the loss of Crimea and parts of the Donetsk and Lugansk regions) and the way it was introduced (with a violation of parliamentary procedures that resulted in confusion regarding its effective days) prompted sharp criticism of Poroshenko's decision, including an open statement by three former Ukrainian presidents.[8]

One may speculate about the reasons that made Poroshenko step back and revise the proposed martial law (30 days instead of 60 days as originally planned), but, if pub-

[5] https://www.transparency.org/country/UKR

[6] https://freedomhouse.org/report/nations-transit/2018/ukraine

[7] https://zakon.rada.gov.ua/laws/show/n0012525-18#n2

[8] https://www.pravda.com.ua/rus/news/2018/11/26/7199370/

lic opinion is among these reasons, it means that the Euromaidan brought Ukraine closer to a democratic state. On 26 December 2018, martial law was terminated. Ukraine started 2019 with a presidential campaign.

III. CONSTITUTIONAL CASES

Although the end of 2017 found the Constitutional Court of Ukraine incomplete and internally divided,[9] by February 2018, it managed to overcome its internal crises and moved from the 2017 stalemate. On 21 February, the Court elected its chairman (Stanislav Shevchuk);[10] the next day, the Rules of Procedures of the Constitutional Court of Ukraine were adopted. On 27 February, the President of Ukraine appointed two judges (Serhiy Golovaty)[11] and (Vasyl Lemak).[12] In its turn, to fill the vacancies, the Verkhovna Rada of Ukraine appointed two judges to the Court (Oleh Pervomaiskyi[13] and Iryna Zavhorodnia[14]) on 20 September 2018.

In 2018, the Constitutional Court of Ukraine adopted 13 decisions[15] and delivered four opinions.[16]

The Court's decisions of 2018 fell into three main categories: (i) decisions regarding financial issues and social rights; (ii) decisions regarding civil rights; and (iii) decisions regarding constitutional order.

Decisions regarding financial issues and social rights. This category of cases deals with laws adopted in 2014 under the pressure of economic crises with the aim of cutting the state's social expenses. It includes cases on social guarantees for labor veterans and older people (22.05.18); on status and social protection of the Chernobyl catastrophe victims (16.07.18); on the social protection of veterans of war and members of their families (12.12.18); and on state-sponsored support for families with children (07.11.18). Two cases regarding social protection and social guarantees for judges follow a similar line: on taxation of pensions and monthly lifetime maintenance of retired judges (27.02.18) and salary and remuneration of judges (04.12.18).

It worth noting that in all cases except the case on state-sponsored support for families with children, the Court declared restrictions and cancellations imposed on social rights unconstitutional: the Constitution of Ukraine grants social rights of veterans, older people, and Chernobyl victims, so by limiting these rights the state neglects its constitutional obligations. Social guarantees for judges constitute an integral element of their status. Thus, taxation of their pension or reduction of their salaries poses a threat to the independence of both judges and the judiciary as a whole.

Contrary to these, the Court confirmed the constitutionality of the law that restricted state-sponsored support for families with children. Interestingly, reduction of childbirth and childcare assistance was introduced by a law with an engaging and promising title: the Law of Ukraine 'On Prevention of Financial Catastrophe and Creation of Preconditions for Economic Growth in Ukraine'. The Court claimed that, since state-sponsored support for families with children is not enshrined in the Constitution of Ukraine but determined by law within the state's social policy, the Verkhovna Rada is free to legislate on this issue (establish, modernize, or renew state assistance; change its size and the mechanisms for its calculation, etc.). Thus, the imposed restrictions are compatible with the Constitution of Ukraine.

The dissenting opinions on the case claimed that the Court's decision contradicts the

[9] Cherviatsova A., 'Ukraine: The State of Liberal Democracy', in Albert Richard, Landau David, Faraguna Pietro and Drugda Šimon (eds) *2017 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy, 2018, at 309. https://papers.ssrn.com/sol3/papers.cfm?abstract id=3215613

[10] See information about a judge: http://ccu.gov.ua/en/publikaciya/stanislav-shevchuk

[11] See information about a judge: http://ccu.gov.ua/en/publikaciya/serhiy-holovaty

[12] See information about a judge: http://ccu.gov.ua/en/publikaciya/vasyl-lema

[13] See information about a judge: http://ccu.gov.ua/en/publikaciya/oleh-pervomaiskyi

[14] See information about a judge: http://ccu.gov.ua/en/publikaciya/iryna-zavhorodnia

[15] Article 84. Decision of the Court:
'1. Decision of the Court shall be adopted by:
1) the Grand Chamber upon considering the cases upon constitutional petitions concerning constitutionality of laws of Ukraine, and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea, as well as concerning official interpretation of the Constitution of Ukraine, as well as upon considering the cases upon constitutional complaints in the event of relinquishment of jurisdiction by the Senate in the case of constitutional complaint in favor of the Grand Chamber;
2) the Senate upon considering the cases upon constitutional complaints'.
(Law of Ukraine 'On the Constitutional Court of Ukraine')

[16] Article 85. Opinion of the Court:
'1. An opinion of the Court shall be provided by the Grand Chamber in the cases concerning:
1) conformity to the Constitution of Ukraine of applicable international treaties of Ukraine or of international treaties to be submitted to the Verkhovna Rada of Ukraine for its consent to a binding nature thereof;
2) conformity to the Constitution of Ukraine (constitutionality) of the questions to be put to an all-Ukrainian referendum on a popular initiative;
3) observance of the constitutional procedure for investigating and considering a case on removal of the President of Ukraine from office through impeachment;
4) conformity of a draft law on amendments to the Constitution of Ukraine to the requirements of Articles 157 and 158 of the Constitution of Ukraine;
5) violation by the Verkhovna Rada of the Autonomous Republic of Crimea of the Constitution of Ukraine or laws of Ukraine;
6) conformity of normative legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea to the Constitution of Ukraine and laws of Ukraine.'
(Law of Ukraine 'On the Constitutional Court of Ukraine')

principle of social justice (once proclaimed, social guarantees should not be withdrawn; the necessity of any reduction should be based on economic calculation and proved beyond doubt),[17] and the principle of legislative predictability (in reducing childbirth and childcare assistance, the law did not give the families concerned enough time to adjust to the new social policy).[18] In addition, the Court was criticized for ignoring Articles 24 and 51 of the Constitution of Ukraine, which proclaim the obligation of the state to ensure legal, material, and moral support and protection of family, childhood, motherhood, and fatherhood. In this interpretation, families with children have a constitutional right to receive support from the state.[19]

Decisions regarding civil rights. This category includes five cases: on the competence of the State Criminal-Executive Service to investigate crimes committed on the territory or in the premises of the Service (25.04.18); on right of the Ministry of Finance of Ukraine to access personal data and bank information contained in the informational systems managed by public authorities (11.10.18); on appeals of persons declared incapacitated by the court (11.10.18); on procedures of administrative arrest (23.11.18); and on procedures of hospitalization of incapacitated persons to the institutions of psychiatric care (20.12.18). In these cases, the Court declared the legal provisions concerned unconstitutional to ensure the right to liberty and security, right to a fair trial, and protection of personal data (privacy).

Decisions regarding constitutional order. In 2018, the Court declared unconstitutional two laws important for Ukraine's constitutional system: the Law of Ukraine 'On the Principles of State Language Policy' (28.02.18) and the Law of Ukraine 'On All-Ukrainian Referendum' (27.04.18). Both laws were found unconstitutional based on procedural grounds: the Parliament violated constitutional procedures while passing them. It should be noted that these cases reflect one of the main problems of Ukrainian parliamentarism—disregard of the parliamentary rules and procedures by a parliamentary majority. This problem is so widespread that it creates a real danger for legislative collapse, as the constitutionality of a big piece of Ukrainian legislation can be questioned based on procedural grounds. For instance, in 2018, the Parliament violated its procedures for adopting the state budget, amending the Constitution of Ukraine, and approving martial law.

Several aspects of Ukraine's constitutional order were also analyzed in four opinions of the Court regarding the constitutionality of the draft laws on amendments to the Constitution of Ukraine (under Articles 157 and 158 of the Basic Law of Ukraine). Interestingly, two opinions (06.06.18 and 19.06.18) dealt with the amendments to Article 80 of the Constitution of Ukraine, which regulates parliamentary immunity. The question of immunity of people's deputies is permanently at the center of heated political debates in Ukraine. The promise to abolish immunity and ensure responsibility of members of Parliament has been used many times in different electoral campaigns by different political forces and politicians. From time to time, this discussion involves the Court: by 2018, it had delivered 8 (!) opinions, confirming constitutionality of different drafts aimed at limiting or abolishing parliamentary immunity. But none of these drafts became a law. In the opinions of 2018, the Court repeated its position: parliamentary immunity concerns the legal status of members of Parliament but not constitutional rights and fundamental freedoms, so it can be limited or abolished. At the same time, the Court warned Parliament about the political significance of immunity as it protected its members against political repressions and unlawful interference in their activities; thus, according to the Court, immunity is a guarantee of democracy.

Critics of the Court's position claim that without immunity, the Parliament can lose its independence, which, in its turn, can negatively affect human rights and freedoms. In addition, a controlled Parliament—no matter controlled by whom—is a bad representative of the people. In this regard, the abolishment of immunity threatens Ukraine's state sovereignty and national security. The Court was criticized for refusing to consider parliamentary immunity in this context.[20]

Russia's hybrid war against Ukraine brought new perspectives on the question of whether the Constitution of Ukraine can be amended in principle. It should be noted that according to Article 157(2) of the Basic Law, the Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency. The Court confirmed that, since the decision to introduce martial law or a state of emergency under the procedure established by Ukrainian legislation was not adopted, there were no legal obstacles for amending the Constitution. This position gave a reason to criticize the Court for ignoring Russia's aggression against Ukraine. From this point of view, the Court was obliged to introduce a moratorium on any changes to the Constitution until the conflict was solved instead of confirming the constitutionality of the amendments to the Basic Law of Ukraine.

This critique was repeated in the decision of the Court on amendments to the Constitution of Ukraine that proclaimed the 'irreversibility' of its European and Euro-Atlantic course. Taking into account that a question regarding Ukraine's membership in the EU and NATO has polarized Ukrainian society, the unusual way of introducing amendments to the Constitution (not to the main text but to the Preamble of the Basic Law), and the fact that the Court's position to confirm constitutionality of the draft law has been strongly criticized, this Court's opinion deserves special attention.

The Opinion of the Grand Chamber of the

[17] Dissenting Opinion of Judge Oleksandr Kasmin

[18] Dissenting Opinion of Judge Stanislav Shevchuk

[19] Dissenting Opinion of Judge Serhii Sas

[20] Dissenting Opinion of judge Serhii Sas, Dissenting Opinion of judge Mykola Melnyk, Dissenting Opinion of Judge Ihor Slidenko

Constitutional Court of Ukraine Regarding the Strategic Course of the State for Gaining Full-Fledged Membership of Ukraine in the European Union and the North Atlantic Treaty Organization: Amendments to the Constitution (No. 3-v/2018, 22 November 2018)

Summary. According to Article 159 of the Constitution of Ukraine, a draft law on introducing amendments to the Basic Law is a subject of scrutiny by the Constitutional Court of Ukraine, which should confirm its constitutionality in terms of Articles 157 and 158 of the Constitution. The Constitution of Ukraine shall not be amended if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented towards the liquidation of the independence or violation of the territorial integrity of Ukraine. It also cannot be amended in conditions of martial law or a state of emergency.

The draft law under consideration proposed to supplement paragraph five of the Preamble with the words 'and confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine' after the words 'civil consent on the land of Ukraine'. In addition, it suggested changing Articles 85, 102, and 116 to empower the Verkhovna Rada, the President of Ukraine, and the Cabinet of Ministry of Ukraine to implement the course on European and Euro-Atlantic integration and acquire full-fledged membership of Ukraine in the European Union and the North Atlantic Treaty Organization. The Court concluded that the draft law complied with Articles 157 and 158, thus the proposed amendments were constitutional. This position was criticized for being too simplistic and formal.

Critique. Dissenting opinions. The main concern of the critics was the Court's refusal to analyze the fact that the draft law amended the Preamble of the Constitution of Ukraine (to proclaim 'the irreversibility of the European and Euro-Atlantic course of Ukraine'). The Court did not take into consideration that in amending the Preamble, the Parliament circumvented constitutional procedures and avoided a referendum.[21]

The dissenting opinions raised several questions in this regard: (i) whether the Preamble can be amended in principle, and, if yes, what is the procedure to be followed? (ii) is the Preamble the right part of the Constitution for this type of amendment (taking into account the structure and content of the Basic Law of Ukraine)? and (iii) can the Parliament proclaim Ukraine's strategic course without a referendum?

The dissenting opinions demonstrated different approaches toward the first question: the fact that the Constitution of Ukraine does not regulate the procedure of amending the Preamble brought the judges to different conclusions. Judge Oleksandr Kasminin claimed that the Preamble cannot be changed; otherwise, the Constitution would foresee a special procedure for this. Judge Mykola Melnyk assumed that although there were no formal prohibitions to amend the Preamble, these changes contradicted the 'spirit' of the Basic Law of Ukraine. The Preamble reflects the historical and political conditions, values, aims, and reasons behind the constitutional process. It fixes the historical moment. Hence, any attempt to amend the Preamble distorts this historical moment and breaks the logic of the constitutional process. Judge Mykhailo Hultai admitted the Parliament's right to amend the Preamble but only after the Court's interpretation of constitutional procedure. According to him, the Court's opinion on the merits of the draft law was premature. In the first step, the Court had to provide the Parliament with instructions on how to amend the Preamble and then deliver its opinion on the constitutionality of the proposed amendments.

Regarding the second question, the critics of the Court's position emphasized that the course on European and Euro-Atlantic integration is a matter of Ukraine's civilization choice and as such should be regulated by Chapter I 'General Principles' of the Constitution of Ukraine. Thus, to proclaim this course the 'General Principles' should be amended. Instead, the Parliament has created a dangerous precedent of regulating fundamental issues outside Chapter I of the Constitution, going around constitutional procedures.[22] In addition, the fact that Ukraine's strategic course is proclaimed in the Preamble, instead of Chapter I, does not guarantee 'irreversibility' of this course, as a new majority of the Parliament can easily change it by introducing another portion of amendments to the Preamble.

Finally, the Court was criticized for allowing the Parliament to decide the fundamental question on the priorities of Ukraine's foreign policy without a referendum.[23] From this point of view, the Court's position contradicted the constitutional principle of people's sovereignty.[24] In addition, the amendments to the Preamble created an internal dissonance between its provisions. The problem here is that the Preamble refers to the Act of Independence of Ukraine declared on 24 August 1991 and approved by the national vote on 1 December 1991. It was adopted to implement the Declaration of State Sovereignty of Ukraine, declared on 16 July 1990. Thus, the Declaration of State Sovereignty is

[21] It should be noted that the Constitution of Ukraine foresees a special procedure for amending Chapter I 'General Principles', Chapter III 'Elections. Referendum', and Chapter XIII 'Introducing Amendments to the Constitution of Ukraine', which includes approval of the changes by an All-Ukrainian referendum

[22] Dissenting Opinion of Judge Mykola Melnyk

[23] Dissenting Opinion of Judge Oleksandr Kasminin. Dissenting Opinion of Judge Oleksandr Lytvynov. Dissenting Opinion of Judge Oleksandr Tupytskiy

[24] Article 5 of the Constitution of Ukraine reads:
'Ukraine is a republic.
The people are the bearers of sovereignty and the only source of power in Ukraine. The people exercise power directly and through bodies of State power and bodies of local self-government. The right to determine and change the constitutional order in Ukraine belongs exclusively to the people and shall not be usurped by the State, its bodies or officials. No one shall usurp state power.'

enshrined in the Constitution. Moreover, in December 1991, citizens voting for the Act of Independence approved the Declaration of State Sovereignty, including its provision about Ukraine's 'intention of becoming a permanently neutral state that does not participate in military blocs'. The recent amendments to the Preamble mean that Ukraine's strategic course should be fundamentally changed. These changes can be constitutional only if they are approved by referendum.[25]

IV. LOOKING AHEAD

2019 is expected to be another year of political instability, with two elections on the political agenda—the presidential contest at the end of March and the parliamentary vote in autumn. Considering the high level of internal political polarization, Ukraine could face significant political turbulence on the domestic front.

There is a concern that incidents such as the Kerch Strait crisis could happen again. The conflict reflects Russia's attempts not only to legitimize 'territorial waters annexation' by actions around the annexed Crimean Peninsula but also to control the Sea of Azov and destabilize the work of the Ukrainian ports Mariupol and Berdyansk, for which the Kerch Strait is the only means of access to the Black Sea (and hence the world's oceans).

V. FURTHER READING

1. Lawrence Freedman, *Ukraine and the Art of Strategy,* Oxford University Press, 2019

2. Tetyana Malyarenko, Stefan Wolff, The *Dynamics of Emerging De-Facto States. Eastern Ukraine in the Post-Soviet Space,* Routledge, 2019

3. Felix Jaitner, ⁦Tina Olteanu, ⁦Tobias Spöri (eds), *Crises in the Post-Soviet Space. From the Dissolution of the Soviet Union to the Conflict in Ukraine*, Routledge, 2018

[25] Dissenting Opinion of Judge Oleksandr Tupytskiy



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I. INTRODUCTION

How to review the year 2018 in the United Kingdom? Due to Brexit (i.e. the process to withdraw the UK from the European Union, triggered by a referendum on 23 June 2016), achieving a summary comprehensible to a global audience while remaining acceptable to all UK lawyers (as well as politicians, citizens, and EU lawyers) is surely a nigh impossible task. This report has been written with two certainties in mind: that we must nevertheless provide a useful account of Brexit; and that, despite Brexit sucking up much oxygen, we must also discuss other important constitutional matters. Brexit, and the other matters discussed in this report—spanning the failure to form a government in Northern Ireland, same-sex marriage, direct discrimination, and mass surveillance—together provide a partial and impressionistic snapshot of the sheer complexity of the UK's constitutional and territorial arrangements in the year 2018 during a period of intense and multi-level change. No doubt, many other issues could also have been covered.

For any non-UK reader to delve into this report, a range of key features of the UK constitutional order must be borne in mind: the UK has an unentrenched constitution, the bedrock principle of which is the supremacy of Parliament, which means courts are not empowered to invalidate legislation for unconstitutionality. The UK ratified the European Convention on Human Rights (ECHR) in 1951 and acceded to the full jurisdiction of the European Court of Human Rights (ECtHR) in 1966 (which can declare laws and State acts to be in breach of the ECHR). The UK joined the EU in 1973 (thereby accepting the jurisdiction of the EU's Court of Justice). 1998 began a process of devolving power to three of the UK's constituent nations (Scotland, Northern Ireland, and Wales) through establishment of national parliaments. In Northern Ireland, this was made possible by the Good Friday Agreement, an international peace treaty that ended a decades-long conflict between the nationalist and unionist communities (the former seeking union with Ireland; the latter wishing to remain in the UK) and established a consociational 'power-sharing' system in which both communities must be represented in government.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

This section focuses on two major constitutional developments: Brexit; and the ongoing failure to form a government in Northern Ireland.

Brexit: a pressing challenge for the Westminster Parliament

Throughout 2018, the UK Parliament wrestled with Brexit. Three principal constitutional issues stood out, each highlighting the pressing challenges posed for a national legislature dealing with a multi-layered constitutional crisis in the twenty-first century. First, Parliament struggled to get a grip on the Government's negotiations with the EU, which under the terms of the UK constitution

(and despite the UK Supreme Court's decision in *Miller*[1] in 2017, discussed in the 2016 Report) are conducted under the Crown's prerogative power with little bespoke parliamentary oversight. Second, Parliament enacted legislation, most notably the EU (Withdrawal) Act 2018, designed to provide legal certainty for all post-exit day outcomes. Third, Parliament attempted to constrain the Government's ability to use delegated or secondary legislation to prepare for Brexit.

Dealing with each of these issues has been made more difficult by the need to adapt to the political dynamic created by a minority Government (the 2017 General Election gave the Conservative Party 317 seats out of 650 in the Commons). This, combined with the task of delivering a referendum result that did not itself specify how the UK should leave the EU, made 2018 extremely challenging for a Parliament more used to being reactive than proactive in terms of resolving constitutional dilemmas.

The knottiest constitutional question for Parliament was to determine the role that the House of Commons (lower house) would play in approving the Brexit deal once the negotiations were concluded: the so-called 'meaningful vote'. The idea that the vote should be meaningful arose from the Government's opening offer: the Commons would be able to choose between 'deal' or 'no deal' (i.e., exiting the EU with or without a negotiated settlement). For many MPs, this choice was not meaningful. Instead, many MPs wanted the Commons to be able to say what should happen if and when the deal was rejected.

Matters were further complicated by the nature of Article 50 of the Treaty on European Union (TEU), which governs the exit process, with the result that the deal was in fact two distinct agreements: a detailed and comprehensive legally binding agreement on the terms of withdrawal (the Withdrawal Agreement) and a set of basic propositions for the future relationship (the Political Declaration). The Government maintained that the two were a package to be approved together despite their distinct constitutional effects. In June 2018, a compromise between the Government and Parliament was agreed to regarding the structure of the meaningful vote. The deal would need to be approved via a resolution of the Commons before being ratified. If the deal was rejected, the Government would have to present its plan on how it intended to respond to the Commons. The problem was that this mechanism did not alter the fact that the UK would leave the EU via Article 50, a legal provision, which the UK's sovereign Parliament could not change. In sum, a rejection or amendment to the plan would not change the fundamental nature of the choice on offer: leave with or without a deal.

When the final version of the deal was published and presented to the Commons, the constitutional mechanics of the meaningful vote were put to the test. It became obvious from the moment it was published that MPs were not interested in negotiating changes to the non-binding Political Declaration, but rather, intent on rejecting the deal outright. The vote, scheduled to take place on 12 December 2018, was cancelled at the last minute by the Government, which hoped to gain an advantage through control of the timetable. The gambit was unsuccessful: on 15 January 2019, the deal was overwhelmingly rejected by 418 votes to 218. Two weeks later, MPs voted on the Government's response, and passed two amendments, which highlighted the limits of the Commons' constitutional powers. They voted to rule out no deal and to ask for changes to the 'backstop' in the Withdrawal Agreement (designed to prevent a hard border between Ireland and Northern Ireland). Both amendments had no legal effect, and as of this writing, it was unclear whether either would happen before the UK is due to exit the EU on 29 March 2019.

The EU (Withdrawal) Act 2018 was enacted in June 2018. Scrutinising this gigantic and complex piece of constitutional legislation absorbed enormous amounts of parliamentary time and energy in both the House of Commons and the House of Lords. The complexity of the act underscored how difficult it is for a constitutional democracy to adjust to leaving a supra-national legal order as highly integrated as the EU. Further, the legislation did not enable MPs and Peers to debate or influence the very thing that most interested them: the negotiations on the deal.

The Withdrawal Act gained notoriety, even in the mainstream media, for its use of so-called 'Henry VIII powers' (delegated powers that enable the Government to make delegated or secondary legislation, which requires weaker parliamentary scrutiny than primary legislation). Such powers became normalised over the course of the twentieth century, but their use in the Brexit context proved especially controversial. Firstly, it was thought that the powers would be used to produce legislation on politically sensitive matters and, as such, would not be suited to the more truncated and opaque process of making secondary legislation. Secondly, such was the level of uncertainty over how the powers would be used, as regards the outcome of the negotiations, that many parliamentarians were worried about entrusting the Government with the powers proposed before knowing the shape that Brexit would take. In the end, Parliament accepted that such powers were justified in the Brexit context, and a series of powers were approved in the Withdrawal Act and in other Brexit legislation, although Parliament did force the Government to accept the case for certain legal limits on these powers and enhanced scrutiny procedures. The most notable is the creation of a European Statutory Instruments Committee, designed to 'sift' those instruments that the Government proposed would be subject to the most minimal scrutiny (the negative procedure) and to decide whether more robust scrutiny is needed.

In relation to each of the three issues canvassed here, Parliament has been influential but ultimately has not altered the fundamental constitutional dynamics that were in place before the referendum result and are likely to continue to exist well after the UK has left the EU.

[1] *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5.

The fallout from the collapse of the Northern Irish Executive continued throughout 2018

The collapse of the Northern Irish Executive in 2017 remained an ongoing issue throughout 2018. Negotiations between nationalist and unionist political forces did not yield any solution capable of allowing resumption of the power-sharing government. As a result, Northern Ireland remains without a government for more than two years.

Thus far, the UK has decided not to implement direct rule. Government departments in Northern Ireland were allowed to continue exercising their functions in the absence of a Minister in charge, leaving important decisions in the hands of senior civil servants. This led many such decisions to be challenged before the courts as to whether politically sensitive policy matters could lawfully be determined by senior civil servants who lacked any democratic legitimacy and accountability.[2] In addressing this question, the Court of Appeal in Northern Ireland held that it would be 'contrary to the letter and spirit of the [Good Friday] Agreement and the [Northern Ireland Act 1998] for such decisions to be made by departments in the absence of a Minister'.[3]

In response, the UK Government enacted the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018, which, controversially, provides civil servants with powers to 'exercise functions of the department if the officer is satisfied that it is in the public interest to exercise the function'.[4] The determination of the public interest is to be made by reference to guidance released by the Secretary of State (i.e., the minister of the UK Government with responsibility for Northern Ireland).[5] With little hope of a swift resolution to the stalemate between the unionist and nationalist parties, it seems that this practice will continue.

III. CONSTITUTIONAL CASES

This section provides summaries of five key constitutional cases from 2018. We have interpreted 'constitutional' broadly: as well as UK Supreme Court decisions, the *Wightman* case below involved a referral from the highest court of Scotland to the Court of Justice of the European Union (CJEU) concerning Brexit. The final decision below is from the European Court of Human Rights, but concerns fundamental issues of constitutional importance, primarily state surveillance, privacy, and free speech.

1. Wightman and others v. Secretary of State for Exiting the European Union: Revocation of Article 50

The petitioners included a group of members of the Scottish Parliament seeking clarification from Scotland's highest court (the Inner Court of Session) as to whether the UK could unilaterally revoke its notification of intention to withdraw under Article 50 TEU—to 'untrigger' Article 50, stopping the Brexit process—and whether this would change the state's current conditions of membership. The answer to this question was intended to provide a third choice of 'No Brexit' to Parliament as an addition to the existing binary choice between either adopting the Withdrawal Agreement negotiated by the Government with the EU or leaving the EU without any agreement (so-called 'hard Brexit' or 'no deal' Brexit) by automatic operation of Article 50(3) TEU on 29 March 2019.

As the matter concerned the interpretation of Article 50 (which was silent on the matter of revocation), the question could only be answered through a preliminary reference to the CJEU under Article 267 of the Treaty on Functioning of the European Union. Government lawyers attempted to block the reference, arguing that the question was merely hypothetical, advisory, and not a matter of dispute as the UK Government had shown no intention of revocation, while also making an objection to the CJEU's involvement in political matters.[6] The UK Supreme Court refused to give leave to appeal the Scottish court's decision to refer the question to the CJEU, and the UK Government's reasoning was also subsequently rejected by the CJEU, which found the question to be of constitutional importance.

The Scottish Inner Court of Session duly referred the question to the CJEU, which adopted an expedited process to deliver its judgment in barely three months following the request, sitting as a full court of 28 judges. This expediency was primarily in response to the planned 'meaningful vote' in the UK Parliament on the ratification of the Withdrawal Agreement between the UK and the EU, which was subsequently delayed (discussed in Part II, above).

In December 2018, the CJEU handed down its judgment,[7] ruling that a member state may unilaterally revoke notification, and that this possibility exists until either a withdrawal agreement has entered into force or the two-year period from date of notification and/or any agreed extension to that period has expired. Such revocation must be decided in accordance with the 'democratic process' of the member state (para 66). It is currently an academic question whether this would

[2] See, for instance, *Buick's application for judicial review* [2018] NICA 26.

[3] Ibid at [54].

[4] Ibid at 3(1).

[5] Ibid at 3(2) and 3(3).

[6] UK Government, *Wightman and Others v. Secretary of State for Exiting the European Union: Application for permission to appeal to the Supreme Court* Policy Paper: < https://www.gov.uk/government/publications/wightman-and-others-v-secretary-of-state-for-exiting-the-european-union-application-for-permission-to-appeal-to-the-supreme-court>.

[7] Case C-621/18 *Wightman and others v. Secretary of State for Exiting the European Union,* judgment of 10 December 2018.

require either primary legislation explicitly directing the Government to revoke notification or the Prime Minister acting under the European Union (Notification) Act 2017.

The CJEU held that such notification must be 'unequivocal and unconditional', meaning 'the purpose of that revocation is to confirm the EU membership of the Member State concerned under terms that are unchanged as regards its status as a Member State, and that revocation brings the withdrawal procedure to an end' (para 74). While unconfirmed, this seemed to echo Advocate General Campos Sánchez-Barona's Opinion, which interpreted the duty of 'sincere cooperation' among member states and the EU as requiring that such revocation must be in 'good faith'.

The Court reached the decision by first referring to revocation and withdrawal in the Vienna Convention on the Law of Treaties (para 3) before considering the relevant provisions of EU law (the principle of an ever closer Union in Article 1 TEU, fundamental values of the EU in Article 2 TEU, and Article 50 TEU itself). The Court also considered the relevant sections of UK law in the European Union (Notification of Withdrawal) Act 2017 and European Union (Withdrawal) Act 2018. The CJEU rejected the submissions of both the European Commission and the European Council that revocation must be predicated on the unanimous consent of the other member states, concluding that both the decision to withdraw and the unilateral revocation of that decision were the sovereign right of the state.

In response to the *Wightman* decision, and displaying a lack of understanding about one of the basic tenets of EU law, some UK Members of Parliament argued for an appeal of the judgment. There is no possibility of appealing a preliminary reference to a higher national court, as the question was a matter of interpretation of EU law, which is solely within the purview of the CJEU. Similarly, there was reported misunderstanding of the necessary 'unequivocal and unconditional' nature of revocation, with some MPs considering this as an invitation to revoke and then retrigger Article 50 to reset the two-year period for negotiation.

The *Wightman* case bookends the seminal 2017 Brexit decision in the *Miller* judgment (discussed in the 2016 Report), in which the UK Supreme Court held that it was for Parliament, and not Government, to exercise a royal prerogative; to 'trigger' the Article 50 process. *Miller* arguably hinged on the accepted assumption on both sides that Article 50 could not be revoked and that once triggered, the UK would inevitably withdraw from the EU. While both cases emphasised the sovereignty of the state and Parliament, *Wightman* established that inexorable withdrawal was a false assumption. *Wightman* may ultimately prove to be a white elephant, however. As of February 2019, while there is little certainty over how and when the UK will withdraw from the EU, it seems highly unlikely that the UK will revoke Article 50 and cancel withdrawal.

2. The European Union (Legal Continuity) (Scotland) Bill – A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64: Brexit and Devolution

While the European Union (Withdrawal) Bill 2018 ('UK Bill') was being discussed in the UK Parliament, the Scottish Government introduced its own EU Withdrawal Bill ('Scottish Bill') in the Scottish legislature. This was primarily due to concerns that the extensive Henry VIII powers granted to UK Ministers in the UK Bill would allow them to pass secondary legislation on matters of retained EU law that, if contained in a statute, would have fallen within the competence of the Scottish legislature. While the UK Parliament is bound by constitutional convention not to pass primary legislation that relates to devolved matters without the consent of the Scottish Parliament, there is no equivalent requirement for UK Ministers when passing secondary legislation on such matters.

Thus, the extensive Henry VIII powers in the UK Bill were viewed by the devolved governments as a power grab, a means for the UK Government to bypass the consent requirement and legislate freely on devolved matters by means of subordinate legislation. The Scottish Bill included a provision (Section 17) that purported to bar any such secondary legislation from taking effect without the consent of the Scottish Ministers. The bill was passed by the Scottish Parliament, but before enactment, was referred by the Attorney General and Advocate General for Scotland to the UK Supreme Court on the basis that it was outside the legislative competence of the Scottish Parliament. The UK Supreme Court found that the bill was within competence when passed, with the exception of Section 17. However, by that time, the UK's EU Withdrawal Act 2018 had already been enacted and was a statute that could not unilaterally be altered by the Scottish legislature. Therefore, key provisions of the Scottish Bill that conflicted with the 2018 Act would now also be considered outside Scotland's legislative competence.

Lee v Ashers Baking Company Ltd and others [2018] UKSC 49: Direct Discrimination

The US Supreme Court's judgment in *Masterpiece Cakeshop*[8] was not the only leading constitutional case concerning a bakery and same-sex marriage in 2018. This UK Supreme Court case related to a bakery's refusal to bake a cake carrying the message 'Support Gay Marriage' on the grounds of religious belief that gay marriage is inconsistent with biblical teaching. It was subsequently fined by the Equality Commission for Northern Ireland for refusing to provide this service. The Court found that the bakery's refusal did not amount to direct discrimination on the basis of sexual orientation, as the bakery

[8] *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission* 584 U.S. ___ (2018).

objected to the message on the cake, not the sexual orientation of the customer: the bakery would also have refused to bake a cake bearing such a message to a heterosexual customer.

The Court reached a similar conclusion when examining whether the bakery's refusal could amount to direct discrimination on grounds of political opinion, but it acknowledged that it may be difficult to disassociate the person from the political message in this instance. Examining the freedom of expression dimension of the case, the Court held that this freedom implicitly included the right not to express a specific opinion. Compelled speech, such as being forced to write a message on a cake against one's own religious convictions, would violate freedom of expression. The Court distinguished this case from the US Supreme Court's judgment in *Masterpiece Cakeshop*, as in that case the bakery had refused to provide wedding cakes for same-sex weddings altogether, regardless of the message on the cake.

4. R (on the application of Steinfeld and Keidan) v Secretary of State for International Development [2018] UKSC 32: Civil Partnerships

The appellants challenged the Civil Partnership Act 2004—which had been enacted to provide some form of recognition to same-sex relationships in the absence of same-sex marriage—as discriminatory on the basis that it only made provision for civil partnerships between partners of the same sex. Following the legalisation of same-sex marriage in 2014 in England and Wales (and in Scotland through an act of the Scottish Parliament), the applicants argued that while same-sex couples had access to both civil partnerships and marriage, different-sex couples only had access to marriage as a form of recognising their relationships.

The UK Supreme Court made a declaration of incompatibility under the Human Rights Act 1998 (which gives domestic effect to the ECHR) on the basis that the 2004 Act violated the right to private and family life taken in conjunction with the prohibition of discrimination. The Court was not convinced by the Government's arguments that the Court should not be too quick to make a finding of discrimination on the basis that the Government needed more time to decide on the future of civil partnerships, and that consultations were being carried out on whether to extend civil partnerships to different-sex couples or to abolish civil partnerships altogether. The Court held emphatically that 'the government had to eliminate the inequality of treatment immediately'.[9]

5. Big Brother Watch and others v United Kingdom (App. Nos. 58170/13, 62322/14, 24960/15, 13 September 2018): Mass Surveillance

The First Section (a first instance bench) of the European Court of Human Rights (ECtHR) delivered its eagerly awaited judgment on the UK's legal framework on mass surveillance and the bulk interception of communications carried out by the intelligence services. While the applicant NGOs won their case as the Court found that the framework did not comply with the right to privacy, the ECtHR did not deliver the rebuke to mass surveillance the applicants had hoped for.

The ECtHR dismissed the applicants' arguments that its surveillance case law should be updated to require authorities to provide objective evidence of 'reasonable suspicion' in relation to the persons whose communications were collected. The First Section also refused to accept that the right to privacy generated an obligation on states to subsequently notify individuals that they had been subject to surveillance measures. The section in this judgment affirmed that states will be granted a wide margin of appreciation in the area of surveillance, and based its finding of a violation on the narrow point that there was no independent oversight during the process of the 'selection of bearers for interception, the selectors and search criteria for filtering intercepted communications, and the selection of material for examination by an analyst'.[10] Additionally, the section found that the surveillance regime violated freedom of expression, as there were insufficient safeguards to protect journalists from unlawful surveillance. At the applicants' request, the case was referred to the Grand Chamber (the instance of final appeal).

IV. LOOKING AHEAD

It has been said that 'Trying to predict the future is like trying to drive down a country road at night with no lights while looking out the back window'.[11] As regards Brexit, the road is potholed, the windows are fogged up, and the drivers and passengers in acute disagreement. With the 29 March 2019 exit deadline looming in under 6 weeks at the time of this writing, there is no clear picture of what form Brexit will take, whether 'soft', 'hard', or otherwise. Other issues have returned, including the prospect of repealing the Human Rights Act 1998 once Brexit has been concluded.[12] Politics in Northern Ireland (and the possibility of a second independence referendum in Scotland) appears to be in a holding pattern until the Brexit process becomes clearer, but fresh elections have not been ruled out. In Wales, bills to create a formal body of Welsh law by organising legislation around subject matter and to accord the Welsh Assembly a Welsh-language moniker (the Senedd) point to a deepening of devolution.

[9] *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] at [50] per Lord Kerr.

[10] *Big Brother Watch and others v United Kingdom* (App. Nos. 58170/13, 62322/14, 24960/15, 13 September 2018) at [387].

[11] Attributed to Peter F. Drucker, a management consultant and writer: see https://www.cgu.edu/school/drucker-school-of-management/ peter-f-drucker/.

[12] Rob Merrick, 'Theresa May to consider axeing Human Rights Act after Brexit, minister reveals', *The Independent* 18 January 2019 https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html.

V. FURTHER READING

House of Lords Select Committee, 16th Report – 'The Legislative Process: The Delegation of Powers' (20 November 2018) https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22502.htm

House of Lords Select Committee, 15th Report – 'Northern Ireland (Executive Formation and Exercise of Functions) Bill' (29 October 2018) https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/211/21102.htm

European Union (Withdrawal) Act 2018, http://www.legislation.gov.uk/ukpga/2018/16/contents/enacted

'Report of the Independent Commission on Referendums' (July 2018) https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/182_-_independent_commission_on_referendums.pdf

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Vietnam

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I. INTRODUCTION

In 2013,[1] the National Assembly of Vietnam adopted a new Constitution.[2] The Constitution maintained the constitutional principle of the leadership of the Communist Party of Vietnam (CPV) while it recognized some new principles, such as the division, coordination and control of powers, and human rights protection.[3] The 2013 constitutional amendment, which was led by the CPV, aimed to both consolidate the leadership of the CPV and to solve practical problems of political power organization such as corruption, human rights violations and inefficiencies of control over public power. This paper examines how these principles and goals coexist, influence, and interact with one another within the framework of Vietnam's new Constitution. It does so through two remarkable events that happened in 2018: the concurrent holding of the State President seat by CPV General Secretary Mr. Nguyen Phu Trong and the CPV's unprecedented anti-corruption campaign.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

On September 21, 2018, the President of Vietnam, Mr. Tran Dai Quang, one of the most powerful leaders in the country, suddenly passed away due to illness. His death opened up a power vacuum in the communist country. According to the Constitution, the National Assembly elects the State President;[4] however, the CPV has a decisive role in choosing this position. After many speculations, the General Secretary of the CPV, Mr. Nguyen Phu Trong, became the State President. This development has generated a large amount of discussion and attracted great interest in political and academic forums as well as among the Vietnamese people.

The CPV organizational system is established along the state structure. Mirroring governmental institutions, the CPV has a nationwide organizational system from central to grassroots levels, and in social-political organizations and economic entities. The top leadership positions of the CPV and govern-

[1] There were four previous Constitutions prior to 2013: the 1946 Constitution, the 1959 Constitution, the 1980 Constitution, and the 1992 Constitution. In addition, in the south of Vietnam during the Vietnam War, the Republic of Vietnam issued two other Constitutions: the 1956 Constitution and the 1967 Constitution.

[2] The Constitution of the Socialist Republic of Vietnam (2013) [Unofficial Translation from Vietnamese by International IDEA], (ConstitutionNet) <http://constitutionnet.org/sites/default/files/tranlation_of_vietnams_new_constitution_enuk_2.pdf> accessed 6 December 2018.

[3] Nguyen Dang Dung, Trinh Quoc Toan, and Dang Minh Tuan, *Bình luận Khoa học Hiến pháp Nước Cộng hòa Xã hội chủ nghĩa Việt Nam năm 2013 [Scientific Commentary on the Constitution of the Socialist Republic of Vietnam 2013*], Vietnam National University, Hanoi 2016).

[4] The Constitution of Vietnam, Art. 70, para. 7.

ment are traditionally held by two different people: the General Secretary of the CPV and the State President, respectively. However, "integration" (*nhất thể hóa*)—the concurrent holding of two positions by one person[5]—has long been discussed in Vietnam. But it was not until the end of 2017 that this model of the concentration of power was piloted on a local scale under a CPV's resolution. At the end of 2018, it was implemented at the central level as the General Secretary was elected the State President.

This is not the first time that a person has held both top leadership positions of the party and the state in communist regimes. Under Jiang Zemin's administration in China in 1992, the State President was in charge of duties as the General Secretary of the Communist Party of China. After that, Laos integrated the title of State President with the leader of the Communist Party in 1998 under State President Khamtai Siphandon's tenure. In Vietnam, Ho Chi Minh also held the positions of head of the CPV and the state until his death in 1969. He was the last leader to hold both positions concurrently until 2018.

The political context of Vietnam boosted the process of integration. In a statement before a group of voters, Mr. Trong declared that integration was a temporary solution to fill the vacancy created by the sudden death of the former President.[6] Moreover, it does not require a constitutional amendment because the Constitution only stipulates that the State President must be a member of the National Assembly and be elected by the National Assembly.[7] As General Secretary, Mr. Trong already fulfilled the first requirement. More importantly, the reason for the large political consensus[8] for this policy was that under Mr. Trong's leadership, the CPV made significant efforts in weeding out corruption, notably cracking down on several high-profile officials[9] (a few cases will be presented in detail below). Mr. Trong also played a decisive role in leading a number of CPV reforms to more effectively control high-profile officials. These included a CPV's special resolution on power control, adoption of the Law on Anti-Corruption, and practice by the National Assembly to conduct more substantial votes of confidence for officials elected and/or ratified by the National Assembly.[10] Mr. Trong's leadership was perceived to improve the CPV's power and image, and so CPV members in turn supported the increase of his leadership role. Mr. Trong's expanded leadership is in line with the view of building a Developmental State,[11] a policy that has been discussed and implemented in recent years in Vietnam. In addition, after five years of implementation, the 2013 Constitution has provided the basis for the improvement of the legal framework for a state power organization, human rights, and economic issues.[12] Mr. Trong and the CPV have received wide public support thanks to their roles in creating these changes in the socialist political system.

Integration aims to formalize the General Secretary's role as the President of the Socialist Republic of Vietnam in external affairs with other foreign countries. It also enhances the power of the President in public governance, especially in the executive branch. Indeed, a constitutional amendment of the 2013 Constitution enhanced the role of the President in the executive branch: "the State President has the authority to request the government to hold meetings to discuss on issues which in consideration of the State President is necessary to exercise his duties and authorities."[13] Integration also facilitates the emerging idea of a semi-presidential republic, in which the President has the right to lead and decide policies, and the Prime Minister plays a role as a policy enforcer.[14] It is also in line with the CPV's policy[15] of reducing the state

[5] The person performs at the same time two independent roles as the General Secretary and the State President. The organizational structure associated with these two titles is also independent, not being merged into one.

[6] Thu Hang, 'Tổng bí thư làm Chủ tịch nước: Không phải vì nhất thể hóa, đây là tình huống [The General Secretary Becomes the State President: Not an Integration, But a Temporary Situation]' (*Vietnamnet*, 8 October 2018) <https://vietnamnet.vn/vn/thoi-su/chinh-tri/tong-bi-thu-lam-chu-tich-nuoc-khong-phai-vi-nhat-the-hoa-day-la-tinh-huong-481920.html> accessed 6 December 2018.

[7] The Constitution of Vietnam, Art. 86.

[8] 100% of the CPV's Central Committee members agreed to introduce General Secretary Nguyen Phu Trong to the position of State President while 99.79% of National Assembly deputies voted for him as the State President (only one voted against). See: Reporter, 'Đồng chí Nguyễn Phú Trọng được bầu làm Chủ tịch nước nhiệm kỳ 2016–2021 [Mr. Nguyen Phu Trong Is Elected as the State President in the Term 2016–2021]' (*Nhandan* online, 23 October 2018) <http://www.nhandan.com.vn/chinhtri/item/38009602-%C3%B0ong-chi-nguyen-phu-trong-duoc-bau-lam-chu-tich-nuoc-nhiem-ky-2016-2021.html> accessed 8 December 2018.

[9] Reporter, 'Corruption Perceptions Index 2018: Corruption in Vietnam's Public Sector Is Still Perceived as Highly Serious' (Towards Transparency), <https://towardstransparency.vn/en/cpi_vietnam_2018_en/> accessed 8 December 2018.

[10] The National Assembly has the authority to elect or ratify the State President, the Prime Minister and members of the government, the Chief Justice and the Supreme Court justices, the President of the Supreme Procuracy, the President of the National Election Council, the Head of the State Audit, and leadership positions of the National Assembly.

[11] The model of a Developmental State requires a certain concentration of power in order to lead and promote socio-economic development while requiring leaders to have a good political will and be ethical for the people.

[12] Le Minh Tung, 'The Report on the Vietnam National University School of Law's Conference on Assessment of the Implementation of the 2013 Constitution' (VNU School of Law, 01 October 2018) <http://law.vnu.edu.vn/article-news-24783-1158.html> accessed 18 December 2018.

[13] The Constitution of Vietnam, Art. 90, para. 2.

[14] According to the Constitution, the President does not have substantial power; however, he is powerful in leading and deciding policies with his new role as General Secretary. Meanwhile, according to the Constitution and practice, the Prime Minister and its government mainly exercise their tasks and powers as policy enforcers. They initiate polities and submit to the National Assembly and the CPV's central authorities for decisions.

[15] This policy was officially declared in Resolution No. 18-NQ/TW of the CPV's Central Committee on the reform and arrangement of the political system on October 25, 2017.

budget[16] on public personnel through the integration of titles and organization of the CPV and government. More importantly, the position of President provides legitimacy for the General Secretary in public governance. It has been argued that the CPV should exercise power through representation in the government. The motivation for integration is that the General Secretary of the CPV, arguably the most powerful person in Vietnam's political system, does not hold any proportionate position in the government.[17] A former senior member of the National Assembly put forward a bold proposal that Vietnam should adopt a bicameral legislature, with the National Assembly serving as a lower house and the CPV's Central Committee as an upper house.[18] Integration could allow the General Secretary and CPV officials and agencies to be more accountable to the people. As the constitutional norm of single-party leadership was increasingly contested, consolidation of party leadership has become the central issue of the CPV.[19] The CPV's accountability to the people is provided for the first time in the 2013 Constitution: "the Communist Party of Vietnam maintains closest with the People, services the People, submits to the People's supervision and is accountable to the People in its decisions."[20]

However, integration raises certain concerns about the risk of abuse of power that arises from the concentration of power. According to the Constitution, the President's authority is more symbolic than substantial, like most heads of state in parliamentary systems.[21] However, in practice, as a key member of the CPV's Political Bureau (Politburo),[22] the President is one of the most powerful persons in Vietnam's political system, and now the consolidated post of President and General Secretary is even more powerful. In China, the Chinese Communist Party's General Secretary, President Xi Jinping, led a constitutional amendment to abolish the restriction on term limits, paving the way for his re-election to the presidency for a third term. This raises the need to build mechanisms to control the power of the State President and the General Secretary. In terms of the state, the State President's power is limited by the Constitution and laws. Meanwhile, in terms of the CPV, the power of the General Secretary is mainly ruled by CPV regulations.[23] According to the Constitution, all organizations and members of the CPV operate within the framework of the Constitution and the law.[24] However, the Constitution is silent on a clear role for the party and the relationship between the party as an entity towards the law and all other state institutions,[25] and there is still no law or legislative regulation on the CPV. Although a proposal for such has long been discussed, its realization has faced many obstacles and challenges. Scholars tried to propose enhancing political control over the General Secretary within the CPV system (e.g., switching the role of selecting the General Secretary from the Central Committee to the National Congress of the party;[26] creating an independent inspection agency of the CPV; and enhancing public participation in the CPV's governance). However, as the state is under the CPV's leadership, it is difficult to implement constitutional control over it. When Vietnam was building the 2013 Constitution, a proposal for a constitutional council was presented before the constitutional drafting committee. But this proposal was rejected because of one main rationale—this kind of mechanism could challenge the leadership of the CPV. [27] The lack of a possible power control mechanism on the General Secretary is a challenge of integration; however, as argued above, integration itself is better for control of power. It can produce potential positive impacts in making political life more transparent and responsible, so it may be considered a long-term solution in the future.

[16] The budget for the CPV comes mainly from the state budget.

[17] The General Secretary only holds a public position as a member of the National Assembly. However, the National Assembly's members do not have much substantial power.

[18] Le Hong Hiep, 'Power Shifts in Vietnam's Political System' (Eastasiaforum, 5 March 2015) <http://www.eastasiaforum.org/2015/03/05/power-shifts-in-vietnams-political-system> accessed 16 January 2019.

[19] Bui Hai Thiem, 'Constitutionalizing Single Party Leadership in Vietnam: Dilemmas of Reform' (2016), Volume 11, Special Issue 2 (*Special Issue on Vietnamese and Comparative Constitutional Law*), 219-234.

[20] The Constitution of Vietnam, Art. 4, para. 2.

[21] The Constitution of Vietnam, Chapter 6.

[22] The Political Bureau, composed of the party's highest ranking members, is the party's supreme policy-making body; it possesses unlimited decision- and policy-making powers.

[23] According to the charter and other regulations of the CPV, the General Secretary is subject to the inspection and supervision of the National Party Congress, the Central Executive Committee, and the Politburo. Among these institutions, the Politburo leads, inspects, and supervises the implementation of the party's resolutions. The Central Inspection Committee assists the Politburo and other Central Party agencies in carrying out the tasks of inspection and supervision. The promulgation of the standards of the General Secretary is the basis for party agencies to supervise the enforcement of the power of the General Secretary.

[24] The Constitution of Vietnam, Art. 4, para. 3.

[25] Bui Hai Thiem, 'Constitutionalizing Single Party Leadership in Vietnam: Dilemmas of Reform' (2016), Volume 11, Special Issue 2 (*Special Issue on Vietnamese and Comparative Constitutional Law*), 219-234.

[26] The Central Committee—the party organization in which political power is formally vested—meets more frequently than the National Party Congress, at least twice annually in forums called plenums, and is much smaller in size (the current Central Committee consists of 180 full members and 20 alternate members). Like the National Party Congress, however, it usually acts to confirm rather than establish policy. In reality, the creation of policy is the prerogative of the Political Bureau, which the Central Committee elects and to which it delegates all decision-making authority.

[27] Bui Ngoc Son, 'The Discourse of Constitutional Review in Vietnam' (2014), 9 *Journal of Comparative Law,* 191-221.

III. CONSTITUTIONAL CASES

There are no constitutional cases in Vietnam in a strict sense because the courts are not empowered to solve constitutional cases and disputes. The power of constitutional review is mainly exercised by political organs[28] while the courts have only the right to request that these organs examine and decide on constitutional questions. However, in a broader sense, criminal cases against public officials touch upon many relevant constitutional issues. Indeed, these cases involved not only the judiciary but also linked with the leadership of CPV and law enforcement in Vietnam.

2018 was a special year, with a series of anti-corruption cases against high-ranking officials.[29] Among them, for the first time in Vietnam's history, a member of the CPV Politburo, Mr. Dinh La Thang,[30] was brought to trial.[31] The cases were part of the CPV's campaign against corruption, especially in the public sector, which has been perceived as highly serious.[32] Mr. Thang was convicted and subjected to severe punishments.

In this anti-corruption campaign, the CPV has played a decisive role in cases from investigation, to prosecution, to the trial stage. Cases involving high-ranking officials of the CPV and government are under its supervision and direction. Based on the direction of the CPV, public authorities will conduct the proceedings to handle cases in accordance with the law. The CPV usually provides its own disciplinary measures before legal proceedings are conducted. The case of Mr. Dinh La Thang was brought to trial in 2018 after a series of instructions by the CPV. In 2005, Mr. Thang started working at PetroVietnam before being assigned to several senior positions in the party and government. He held these posts until he was prosecuted and arrested in December 2017 for frauds committed while working for PetroVietnam.[33] Previously, from April 24 to 26, 2017 in Hanoi, the CPV's Central Inspection Committee met and decided to recommend the highest-level agencies of the CPV to consider and enforce sanctions against Mr. Thang. On May 10, 2017, the CPV decided to punish him, dismiss his Politburo member position, and demote him to an unimportant position in the party. Only after these actions were legal procedures initiated. On December 8, 2017, after the National Assembly's Standing Committee had approved the decision to prosecute and arrest Mr. Thang (he was still a member of the National Assembly), the Ministry of Public Security decided to prosecute the case and arrested Mr. Thang for his violations against the state's regulations on economic management. Afterwards, Mr. Thang was suspended from engaging in CPV activities. On August 1, 2018, he was brought to the Court for the First Instance Trial in Hanoi. After being sentenced on May 9, 2018, he was expelled from the CPV.

The party's leadership in the anti-corruption campaign has been formalized along with the establishment of a specialized mechanism on anti-corruption. The previous anti-corruption mechanism was established in the executive branch, but it proved ineffective because it lacked autonomy and independence from the CPV in dealing with crimes committed by public officials. Indeed, public authorities dealt with a few corruption cases despite growing awareness that corruption had become increasingly serious. That is why the CPV developed an anti-corruption mechanism to lead anti-corruption work. In 2013, the Central Steering Committee for Anti-Corruption under the Politburo, headed by the General Secretary, was established. Additionally, the CPV's central and provincial internal committees are empowered to advise the CPV on internal and anti-corruption affairs. Meanwhile, public authorities, with some changes, still exercise anti-corruption tasks based on the direction of the CPV. In a meeting of the Steering Committee on Anti-Corruption on November 10, 2018, Mr. Trong requested public authorities to complete investigations on 8 cases, issue indictments for 3 cases, open first instance trials for 2 cases, open appeal hearings for 5 cases, and complete verifications for 33 affairs in accordance with the plan set out by the CPV's Anti-Corruption Committee.[34]

This reform aims to transform the role of public authorities into CPV agencies in the campaign against corruption. The CPV's anti-corruption mechanism has come into operation and achieved positive results. The Steering Committee handles most corruption cases—hundreds since its establishment. Five hundred accused were sanctioned with strict sentences (10 accused, with 11 death sentences; 19 accused, with 20 life imprisonment sentences; and 459 accused, with im-

[28] Among the political organs, the National Assembly and its organs have the highest and most powerful authority in constitutional review of laws and regulations.

[29] Some important cases include the case of the former Politburo member Dinh La Thang, the high-tech gambling case involving high-ranking police officers, the Ut Troc case involving military generals, the AVG Selling case in connection with the Minister of Information and Communications, the case of the former Minister of Planning and Investment, and the case of Vu Nhom, involving many government officials.

[30] Mr. Dinh La Thang, before being tried by the Court, held many important positions in the CPV (the CPV's Politburo member and Secretary of Ho Chi Minh City), the government (National Assembly deputy and Minister of Transport), and state incorporations (chairman of PetroVietnam).

[31] Mr. Dinh La Thang was prosecuted and tried on charges of intentionally disobeying the state's regulations on economic management, causing serious damages and corruption of property, and was subjected to 2 sentences of 13 and 18 years in prison, respectively.

[32] Vietnam scored 33 points out of 100 on the 2018 Corruption Perceptions Index reported by Transparency International. The Corruption Index in Vietnam averaged 28.04 points from 1997 until 2018, reaching an all-time high of 35 points in 2017 and a record low of 24 points in 2002. See: Transparency International, 'Vietnam Corruption Perceptions Index 2018' (Transparency International) <https://www.transparency.org/country/VNM> accessed 26 January 2019.

[33] PetroVietnam is the trading name of Vietnam Oil and Gas Group (PVN). PetroVietnam is wholly owned by the Vietnamese central government and responsible for all oil and gas resources in the country, becoming its largest oil producer and second-largest power producer.

[34] Reporter, 'Tổng Bí thư, Chủ tịch nước chủ trị cuộc họp phòng, chống tham nhũng [The General Secretary – The State President Presides Over the Meeting on Anti-Corruption]', (Online newspaper of the Vietnamese Government, 11 November 2018) <http://baochinhphu.vn/Thoi-su/Tong-Bi-thu-Chu-tich-nuoc-chu-tri-cuoc-hop-phong-chong-tham-nhung/351753.vgp> accessed 26 January 2019.

prisonment spanning between 12 months to 30 years).[35] In the political context, the party's leadership and intervention in the state's activities play a very active role in detecting and handling violations in society, especially violations by public authorities and officials.

However, the decisive role of the CPV's agencies in leading the handling of corruption cases also poses the risk of its intervention in the management of public authorities, especially judicial agencies. Under the direction of the CPV, public agencies can lose their independence and proper power in adjudication under the provisions of the law. In the process of revising the Law on Anti-Corruption, it was proposed to establish an independent anti-corruption committee under the National Assembly, but it was unnoticed and unlikely to be feasible in the current political regime in Vietnam. Therefore, it was not included in the Law on Anti-Corruption adopted in late 2018.[36] Meanwhile, a number of reforms were implemented to promote the effectiveness, efficiency, and independence of public agencies, especially of judicial agencies. However, these reforms often challenged judicial independence. Although not being regulated by law, judges and prosecutors are CPV members. The courts are often more independent and autonomous in private affair cases (civil and commercial) than in public cases (administrative and criminal), especially in anti-corruption cases against senior officials. Although it is understood that the CPV only directs broad policy of judicial adjudication, the process and decision-making in a specific trial are under the jurisdiction of the relevant judicial authorities by the law, but delineating this relationship is not clear and difficult to identify. Similarly, the prosecutor is also dependent on the party. Public access to trials is limited; however, access to counsel is robust in corruption cases.[37] Lawyers play a more important and independent role in trials,[38] contributing to improved judicial independence and the legitimacy of the CPV's anti-corruption campaign.

The recent anti-corruption campaign also reflects the increasing role of the press in the discovery of corruption violations.[39] State media has gained an increasingly independent position, creating more space for discussions and information delivery to society, while social media plays a major role as a forum for public discourse. These changes were in line with a new approach by the CPV to the press when the CPV recognized the media's need to promote its role and raise its responsibility in the fight against corruption. The legal framework also amends a number of statutes governing the press and the adoption of the first Law on Access to Information. However, there have been many concerns about the barriers and challenges of the press, especially with social media since the adoption of the cybersecurity law.

IV. LOOKING AHEAD

The developments will occur in transition, so they will create many positive effects and results, but there will also be many problems and challenges. The issue of power control (between the power of the CPV and government; between public agencies in implementing legislative, executive, and judicial power; and between the state and local governments) will remain at the center of discussions to find feasible reforms in the framework of Vietnam's communist political system. Many global issues have appeared in Vietnam, such as human rights, security, and law in the context of the fourth industrial revolution. Constructing a developmental state will also continue to be one of the policy targets that needs to be a case study for reference over the next few years.

V. FURTHER READING

Bertelsmann Stiftung, *BTI 2018 Country Report — Vietnam* (Gütersloh: Bertelsmann Stiftung, 2018) <https://www.bti-project.org/en/reports/country-reports/detail/itc/VNM/> accessed 26 December 2018

BUI Ngoc Son, 'Constitutional Mobilization' (2018), *Washington University Global Studies Law Review*, Volume 17, Issue 1 <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1637&context=law_globalstudies> accessed 26 December 2018

[35] Reporter, 'Cuộc đấu tranh phòng, chống tham nhũng – 5 năm nhìn lại [The Anti-Corruption Campaign ¬– Looking Back for Five Years]' (Online newspaper of the CPV's Central Internal Committee, 21 August 2018) http://noichinh.vn/cong-tac-phong-chong-tham-nhung/201808/cuoc-dau-tranh-phong-chong-tham-nhung-5-nam-nhin-lai-304366/> accessed 26 January 2019.

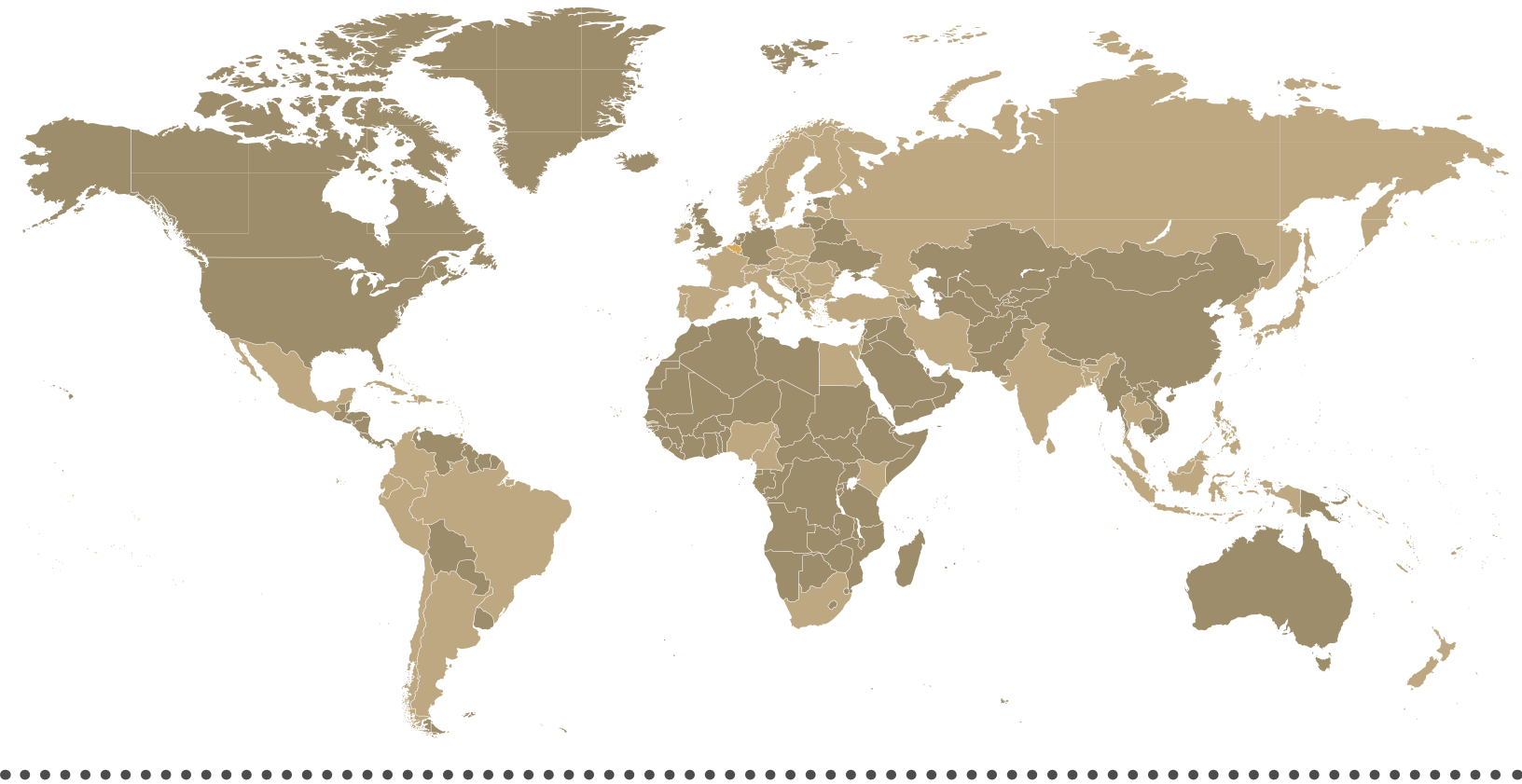
[36] The Law on Anti-Corruption of 2018 has new points related to the regulations on asset and income declaration of public officials with positions of authority.

[37] In the case of Dinh La Thang and Trinh Xuan Thanh, there were a total of 44 lawyers. See: Hoang Hiep, 'Có bao nhiêu luật sư tham gia phiên tòa xử Đinh La Thăng, Trịnh Xuân Thanh? [How many lawyers are there in the trial of Dinh La Thang, Trinh Xuan Thanh]' (*Viettimes*, 5 January 2018) <https://viettimes.vn/co-bao-nhieu-luat-su-tham-gia-phien-toa-xu-dinh-la-thang-trinh-xuan-thanh-152453.html> accessed 26 January 2019. Mr. Thang was defended by 5 lawyers.

[38] The principle of institute legal proceeding against is recognized in the 2113 Constitution (Art. 103, para. 5) in order to improve judicial independence and accountability. This principle was used for the first time in the case of Dinh La Thang.

[39] In some cases, the press has a decisive role in detecting and publicizing violations, as in the case of Trinh Xuan Thanh, who was later involved with Mr. Dinh La Thang. In this case, from the information of a private car with a state license number plate, the press informed that Trinh Xuan Thanh, the owner of this car, did not have the right to use this license, and then the press investigated and found many violations being committed.

SUMMARY



Argentina

In 2017, an ostensibly minor decision by the Supreme Court but with heavy implications regarding the policies of memory and justice concerning human rights violations had invited strong backlash. In 2018, the Court revisited it. Yet the most important constitutional discussion, concerning the legalization of abortion, transpired outside the courts.

Austria

In 2018, the centenary of the Austrian Republic, the new Federal Government launched several constitutional reform projects. The most important of these amends the federal allocation of powers and deregulates further issues. The Constitutional Court's decisions particularly concerned the violation of rights, such as equality or private life.

Bangladesh

Ten years after the last participatory elections, the 11th General Election was held, although its credibility and inclusiveness remain questionable. Two student movements were deplorably suppressed, indicating the poor state of civil rights. The judiciary was largely reticent on civil rights but showed activism against gender-based violence.

Belgium

During the last two months of 2018, Belgian politics were dominated by controversy whether Prime Minister Charles Michel could approve the Global Compact for Safe, Orderly and Regular Migration at the international level. The disagreement resulted first in a minority government and ultimately to the resignation of the government.

Bosnia and Herzegovina

The distribution of mandates after elections in 2018 proved to be a contentious issue in Bosnia and Herzegovina. Despite the decision of the Constitutional Court of Bosnia and Herzegovina, political stakeholders find that impugnable constitutional and legal provisions are still in effect.

Brazil

In 2018, Brazil celebrated the 30th anniversary of the 1988 Constitution, a symbol of its democracy, but it also elected a far-right president, who may trigger a process of democratic backsliding. How the Supreme Court behaved in 2018 speaks volumes about the challenges that lie ahead in Brazilian democracy.

Bulgaria

In its most debated judgment in 2018, the Bulgarian Constitutional Court declared the "Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence" (the so-called "Istanbul Convention") unconstitutional. The Court thus obstructed an important step in the fight against gender-based and domestic violence in Bulgaria.

Cabo Verde/Cape Verde

In 2018, the CC conducted a small constitutional revolution in criminal procedure, giving efficacy to the constitutional guarantees that were transposed to the Criminal Procedure Code but often applied rather reluctantly and in a very limited manner by both criminal investigation organs and ordinary courts.

Cameroon

The most important constitutional progress in Cameroon in 2018 was undoubtedly the effective establishment of the Constitutional Council, which, for the first time in its history, started ruling on matters pertaining to its jurisdiction. To that end, it ruled on presidential and senatorial elections held during year.

Caribbean

The most important developments were the decisions of the Caribbean Court of Justice in two cases—*Nervais v The Queen and McEwan et al v Attorney General Guyana*—in which the Court adopted a radically different approach to the interpretation of the region's constitutions from that of the Judicial Committee of the Privy Council.

Chile

Following the trend of recent years, in 2018 the Chilean Constitutional Court continued to use its ex-ante judicial review power to declare the unconstitutionality of parts of some legislative bills, and the number of ex-post cases that reached the Court increased significantly.

Colombia

The Colombian Constitutional Court faced four key issues in 2018. They concerned transitional constitutionalism; effective protection of social rights; solving collisions between participatory, environmental, and indigenous rights and rights and interests linked to mining; and catalyzing deliberative democracy in constitutional justice.

Croatia

In 2018, the main issues dealt with by the Croatian Constitutional Court concerned popular constitutional initiatives. Since the Referendum and Other Forms of Personal Participation in the Exercise of State Power and the Local and Regional Self-government Act does not regulate all issues relevant to the implementation of referenda, the Court had a key role in resolving procedural issues through judicial review.

Cyprus

The most important constitutional development in Cyprus for 2018, which still remains unresolved, concerned the judicial assessment of the absence of the notion of

"non-occupied" parliamentary seats in the constitutional text and the subsequent unsuccessful attempt to establish procedures for replacing seats vacated before the commencement of the parliamentary term.

Czech Republic

The year 2018 in the Czech Republic was marked by growing concerns about a conflict of interest concerning Prime Minister Andrej Babiš. Both Czech and European authorities confirmed its existence. Mr Babiš also remains under criminal investigation for fraudulently obtaining European funding for the so-called Stork Nest Farm.

Denmark

In Denmark, a constitutional rule was bypassed to allow an expansion of voting rights. However, in issues related to immigrants, strict policies were enacted. These included lowering social benefits to a potentially unconstitutional level as well as creating the possibility for "double punishment" for crimes in certain neighbourhoods.

Ecuador

Ecuador expressed a strong consensus about the need to fight corruption. The transitory Council for Public Participation and Social Control was set up to investigate the abuse of power and lack of impartiality in the judiciary. The result was the unveiling of corruption scandals and the dismissal of the Constitutional Court.

Egypt

The year 2018 witnessed a semi-continuous status of emergency, the origin of which goes back decades. Under this status, the Prime Minister issued a decision deferring a wide range of crimes to the State Security Emergency Courts (a type of exceptional court), raising serious challenges to the 2014 Constitution.

Finland

The Government's plans to introduce new intelligence legislation continued to be a prominent theme in 2018. The constitutional provision on the confidentiality of communications was amended in order to allow the enactment of the intelligence legislation package. Another pressing topic was the reform of the healthcare and social welfare system.

France

The Constitution should have been amended for its 60th anniversary, but that was postponed due to political circumstances. Meanwhile, the Constitutional Council upheld the applicability of the maxim "Liberty, Equality, Fraternity." Ensuring the protection of personal data, it clarified the relations between domestic and supranational norms.

Gambia

In order to consolidate democracy and align governance architecture with regional and international human rights standards, 2018 witnessed developments in improving human rights and addressing past human rights violations through transitional justice mechanisms (the Truth and Reconciliation and Reparations Commission, Constitutional Review Commission and National Human Rights Commission).

Georgia

This report on 2018 includes a brief introduction to the Georgian constitutional system, constitutional amendments, the last direct presidential election, main challenges of the judiciary, an overview of landmark judgments of the Georgian Constitutional Court, developments expected in 2019 related to Court vacancies, Constitutional Court cases and other related events.

Ghana

The creation of new regions was the single most significant political and constitutional development in 2018. The last time a region was created, it was by a dictator. The tensions that characterized the process, though disturbing, indicate how tangibly different a constitutional government acts from a dictatorial one.

Greece

The initiation of a long-due constitutional revision process marked 2018. It is an open question whether it shall be successfully concluded. Jurisprudence dealt with issues stemming from the continuing impact of the financial and refugee crises that Greece has been facing during recent years.

Guatemala

2018 was marked by a backlash against the International Commission Against Impunity in Guatemala (CICIG) and the Constitutional Court by the President of Guatemala. The President launched domestic and international legal action against the CICIG and Constitutional Court, creating a constitutional crisis months ahead of the general election.

Hong Kong

Hong Kong is a Special Administrative Region of the People's Republic of China, governed under a Basic Law adopted pursuant to the Chinese Constitution. The boundaries between the two jurisdictions are one of the major issues considered in this report.

Hungary

In 2018, the restructuring of the constitutional system continued. The Seventh Amendment to the Fundamental Law and new laws established further fundamental rights limitations and constraints on independent constitutional institutions, especially the courts. The Constitutional Court's

relevance within the system of separation of powers continued to decrease.

India

In 2018, the Indian Supreme Court, through a Constitution bench, allowed the Indian state to implement a national biometric identification system known as Aadhar. While striking down certain legal provisions that infringed privacy, the Court held that the law underlying Aadhar withstood judicial scrutiny and, in particular, a newly framed proportionality test.

Indonesia

The most intriguing case in 2018 was the *Presidential Threshold XV* case, in which the Court refused to intervene to resolve a constitutional crisis over a presidential election nomination, which required that a presidential candidate's nomination be based on outdated legislative election results rather than new ones.

Iran

The most important development of 2018 in Iran jurisdiction was the reform of an electoral law of city councils, allowing constitutional religious minorities, Zoroastrians, Jews, and Christians to run for elections even in regions with a Muslim majority, and also represent them.

Ireland

2018 saw the long-anticipated referendum on Article 40. 3. 3., the 1983 amendment that restricted access to abortion. 66% voted to replace the Article with one enabling Parliament to introduce legislation; legislation which, under the influence of the Citizen Assembly, was ultimately more liberal than previously expected.

Israel

In Israel, the most important constitutional development in 2018 was the enactment of a new chapter in the Israeli constitution concerning national identity: Basic Law: Israel as the Nation State of the Jewish People, anchoring the state's symbols and the Jewish People's right to national self-determination.

Italy

The Italian Constitutional Court's 2018 case law stands out for an apparent judicial engagement on fundamental rights. The Court reasserted its crucial role through many segments of its 2018 case law, particularly in the field of judicial enforcement of rights.

Japan

Prime Minister Shinzo Abe and the Liberal Democratic Party (LDP) wanted to present to the Diet a draft of an amendment to the Constitution in 2018. Following a succession of political scandals, however, the LDP had to abandon the plan, and the movement toward amendment lost momentum.

Kenya

The beginning of apparently serious discussions about amending the Constitution—unfortunately many ill-informed, and some motivated by the concerns of individual politicians—may be the year's biggest development. The biggest change was transitioning to a parliamentary system from a presidential one.

Latvia

The most noteworthy case in 2018 concerned the restriction of the right to be elected to Parliament for former members of the Communist Party. The case contained important findings on the principle of militant democracy and contributed to the judicial dialogue.

Liechtenstein

Liechtenstein's 40-year ECHR membership promoted scholarly engagement. The consequences of political party splits were debated throughout 2018. The GRECO recommendations to ban anonymous donations to political parties were implemented. The Constitutional Court increased asylum seekers' access to legal aid and demanded that whistle-blowers observe the accuracy of published information.

Malaysia

Malaysia experienced a peaceful, democratic transition of power at the federal level for the first time since independence, following the country's 14th General Election in May 2018. This change of government holds considerable potential for meaningful legal and structural reforms that will strengthen constitutionalism and the rule of law.

Mexico

The most important development in constitutional law concerned the Internal Security Law, published in December 2017 and declared unconstitutional by the Supreme Court in November 2018. This law authorized the Executive branch to use the military as a regular force for public security.

Moldova

A deadlock between the President, Prime Minister and the parliamentary majority that culminated in five temporary suspensions of the President by the Constitutional Court changed constitutional and political life beyond recognition. In the grey zone between East and West, this conflict has entrapped the country in democratic backsliding.

New Zealand

Constitutional developments largely came via the judiciary, with some important decisions handed down by the nation's Supreme Court relating to the two main issues in New Zealand's contemporary constitutional discussions: the relationship of Parliament and the courts, and the rights of Māori under the Treaty of Waitangi.

Nigeria

2018 was challenging for liberal democracy in Nigeria. A transparent electoral process, separation of powers, rule of law, judicial independence, and other mechanisms necessary to secure continuing popular control and public accountability of government suffered reverses. Government actions were not always compliant with procedural safeguards, such as due process.

Norway

While politically turbulent, 2018 was constitutionally more of an ordinary, yet varied year. Central cases concerned freedom of conscience, rights of indigenous peoples, protection of privacy, and constitutional interpretation where fundamental rights are protected both nationally and internationally. Concerning Europe, cases assessing the Norwegian child welfare system dominated.

Palestine

Palestine's accession to a large number of international treaties occurred in the absence of a constitutional provision that clarified their status within the domestic legal system. In 2018, the Supreme Constitutional Court unsuccessfully tried to fill this gap, and further exacerbated the problem it sought to resolve.

Peru

2018 was marked by the fight against corruption in the name of the rule of law. The key constitutional development was the constitutional reform of the judiciary through referendum. Moreover, this referendum raised questions about the relationship between the executive's and the legislative's power.

Philippines

Constitutional democracy eroded in the Philippines. President Duterte, miffed at the Chief Justice's independence, ordered her removal. Without a decent impeachment case, the government secured the removal through a petition for *quo warranto* instead. The Court surrendered the Chief Justice in a ruling that exposes all government employees to removal.

Poland

The combined effect of changes introduced in 2015-2016, management of the Court's workload by the (irregular) President of the Court, Judge Julia Przyłębska, and continued adjudication by "irregular judges" marginalized the significance of the jurisprudence of the Constitutional Court in the Polish legal order.

Portugal

2018 was a significant year, as the Portuguese Constitutional Court repositioned itself as a faithful guardian of fundamental rights. In Ruling no. 225/2018, the Court declared that the legislative power can change the legal framework of assisted reproductive techniques if protection to the children and the surrogate mother is granted.

Romania

The most important characteristics for the 2018 constitutional year in Romania are the active stance taken by the Constitutional Court in diminishing the powers of the President and the refusal of the population to endorse a conservative revision of the Constitution regarding the definition of marriage.

Russia

The current Russian Constitution was adopted at a time of extreme internal and international weakness. In 2018, there was no talk of major constitutional reforms, but Russia's continued distancing from European constitutional values set a troubling trend given the background of 'sovereignism' and constitutional identity.

Serbia

The Government submitted to the National Assembly the proposition (initiative) for the adoption of constitutional changes. The majority of the Constitutional Court's decisions concerned constitutional complaints regarding issues such as the violation of the right to a trial in a reasonable time.

Singapore

The year 2018 saw courts grappling with constitutional interpretation, particularly in determining the proper balance of powers among the different branches of government. There were several legislative initiatives with implications for constitutional rights. There was also continued reliance on public consultation as part of the government's law-making process.

Slovakia

2018 started on a high note after the resolution of a prolonged inter-branch conflict over the appointment of constitutional judges. The National Council tried to fix the selection and appointment mechanism before nine judges of the Court were to leave office in mid-February 2019, but failed.

South Africa

Pressed by a faction with socialist tendencies within the governing party, a process that may lead to the reduction of the constitutional protection of private property got underway. Parliamentary approval of the process was obtained, but its eventual implementation depended on the May 2019 elections.

South Korea

After inauguration, the Moon administration promoted the "eradication of deep-rooted evils." In 2018, former conservative President Myung-bak Lee was arrested, subsequent to Geun-hye Park in 2017. Under the Moon administration, Japan-Korea relations deteriorated significantly, whereas inter-Korean summits were held three times in 2018.

Spain

Judgment STC 58/2018 addressed the question of whether news stories published in the past could remain accessible on the internet. The CC judged that the passage of time diminished public interest in the information and its continued presence on the internet violated the right to privacy and honour. The CC recognised the right to be digitally forgotten.

Sri Lanka

2018 was very eventful in Sri Lankan constitutional history. Parliament engaged in a constitution-making process, an effort was made to transform the presidential system into a parliamentary one, and there was an attempted constitutional coup by the President of the Republic to illegally dismiss his own government and replace it with another.

Sweden

On September 9, 2018, Sweden elected a new parliament. None of the traditional blocs obtained a majority. As a result, Sweden was left without a government for 115 days—the longest time in its history—after which a left-center government was installed.

Switzerland

Switzerland has a small and open economy reliant on globalization while its Constitution emphasizes democratic self-governance. Constitutional practice in 2018 shed light on the inherent tensions between popular sovereignty and economic globalization, referred to as the "globalization paradox" (Dani Rodrik), in court cases and popular votes alike.

Taiwan

Taiwan's constitutional development moved in a new direction in 2018 following the 2017 statutory easing of the thresholds for citizens' initiatives. As the initiatives intended to curtail Interpretation No. 748 on same-sex marriage illustrate, the TCC arrived at a crossroads amid the rise of popular constitutionalism and referendum politics.

Thailand

The 2019 election was critical to the survival of the junta. The National Council of Peace and Order devised several tricks to win. The Constitution was ill-designed. The Election Commission collaborated by ignoring intimidation and bribery. The public then lost trust in this election and the Constitution.

Turkey

The weakening of the authority of the Turkish Constitutional Court continued in 2018 due to non-execution of its judgments by first-instance courts, the Court's silence in controversial cases and the new political system, which gives the executive organ nearly absolute power.

Ukraine

2018 was another year of political turbulence marked by the ongoing conflict with Russia, resulting in martial law for 30 days in 10 regions, and further cooperation with the EU. It was proposed to amend Ukraine's Constitution to proclaim 'irreversibility of the European and Euro-Atlantic course of Ukraine'.

United Kingdom

As in 2017, Brexit dominated constitutional debates in 2018. Contestation regarding the Government's exit negotiations with the EU, and new legislative powers for implementing Brexit tested Parliament's capacities and powers and spurred litigation between the devolved governments and parliaments against the UK's plans before sub-national, UK, and EU courts.

Vietnam

"Integration" stands for the concurrent holding of the offices of State President and General Secretary of the Communist Party of Vietnam (CPV). This reform aims to consolidate and legitimize the leadership of the CPV, but raises issues about the party's control over the government and the trouble delineating their relationship.

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