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Richard Albert, David Landau,
Pietro Faraguna and Simon Drugda
Editors

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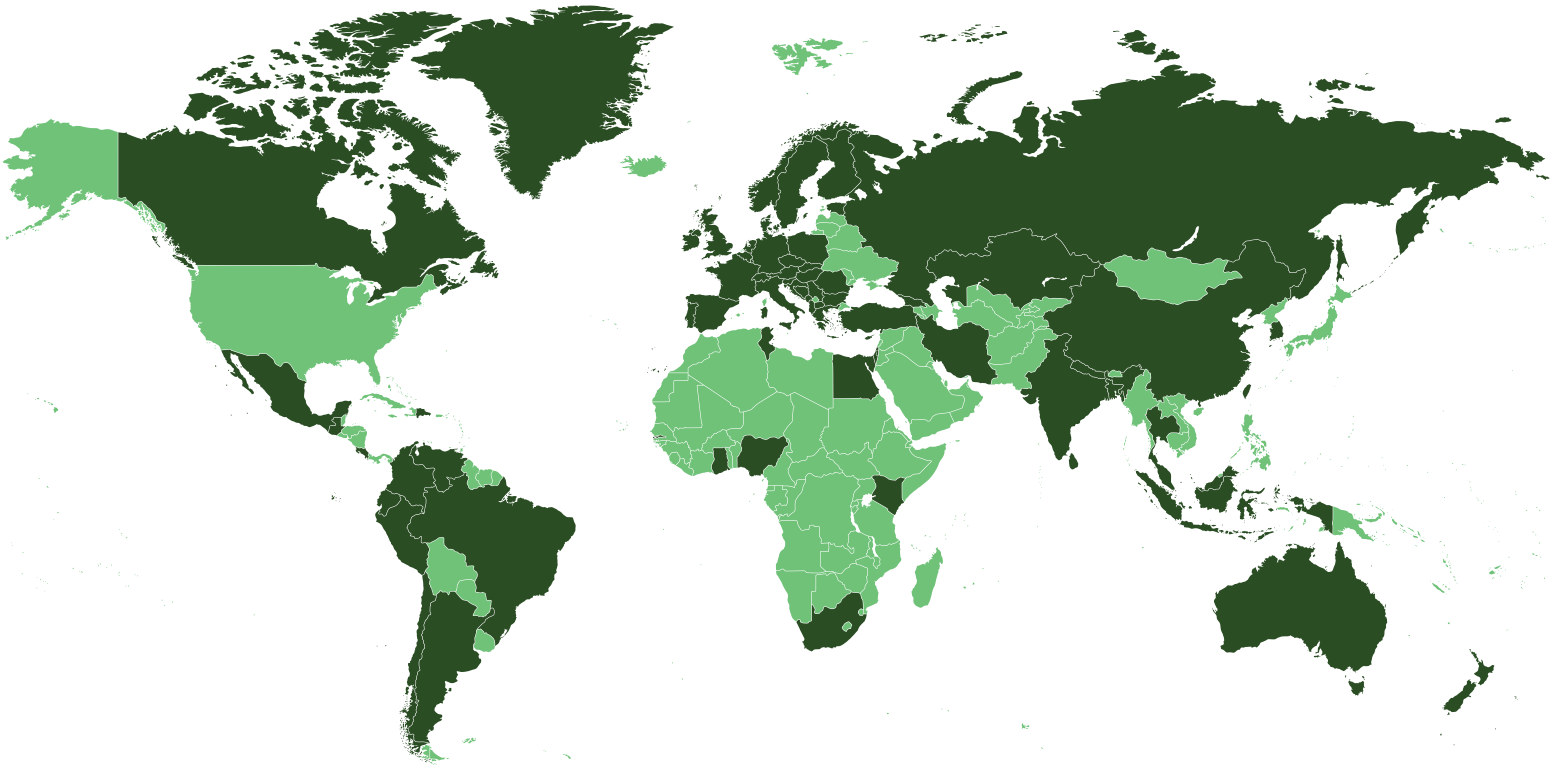


A RENEWED PARTNERSHIP IN SUPPORT OF CONSTITUTIONAL DEMOCRACY

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 and honored to join forces again with I-CONNect in providing this important resource to scholars of constitutional democracy around the world. I extend my deep gratitude to the editors of the Global Review. The work of commissioning, reviewing and compiling the reports into a coherent whole is demanding and time-consuming. The final product is, as in previous years, outstanding. One should not forget that this year's work was done under the difficult circumstances brought about by a global pandemic. I look forward to next year's report as the authoritative resource for how the legal systems of the world have absorbed this tremendous shock to the political, economic and constitutional fundamentals of our world.

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 – in person or, given the current situation, virtually - some of the world's leading jurists, historians, political scientists, philosophers and social theorists. 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.

I am grateful to the staff of the Clough Center, and especially Gaurie Pandey, for their work on the production of this Global Review. My friend Richard Albert continues to have my gratitude and admiration for identifying the need for such a resource and his original and bold vision for how to meet it.

YEAR FOUR OF THE GLOBAL REVIEW

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

Welcome to the fourth edition of the *I·CONnect-Clough Center Global Review of Constitutional Law*. We were unsure whether the worldwide public health emergency would permit its publication. We are therefore immensely grateful to our dedicated team of collaborators for making this possible.

The Global Review was born in 2017, with the publication of the 2016 Global Review. Our articulated goal at that time remains the same today: to offer readers systemic knowledge about jurisdiction-specific constitutional law that has previously been limited mainly to local networks. The Global Review seeks to increase the base of knowledge upon which scholars and judges can draw; we do this by making public law developments around the world available to all in an easily digestible format. Our ambition is to make our vast world smaller, more familiar, and more accessible.

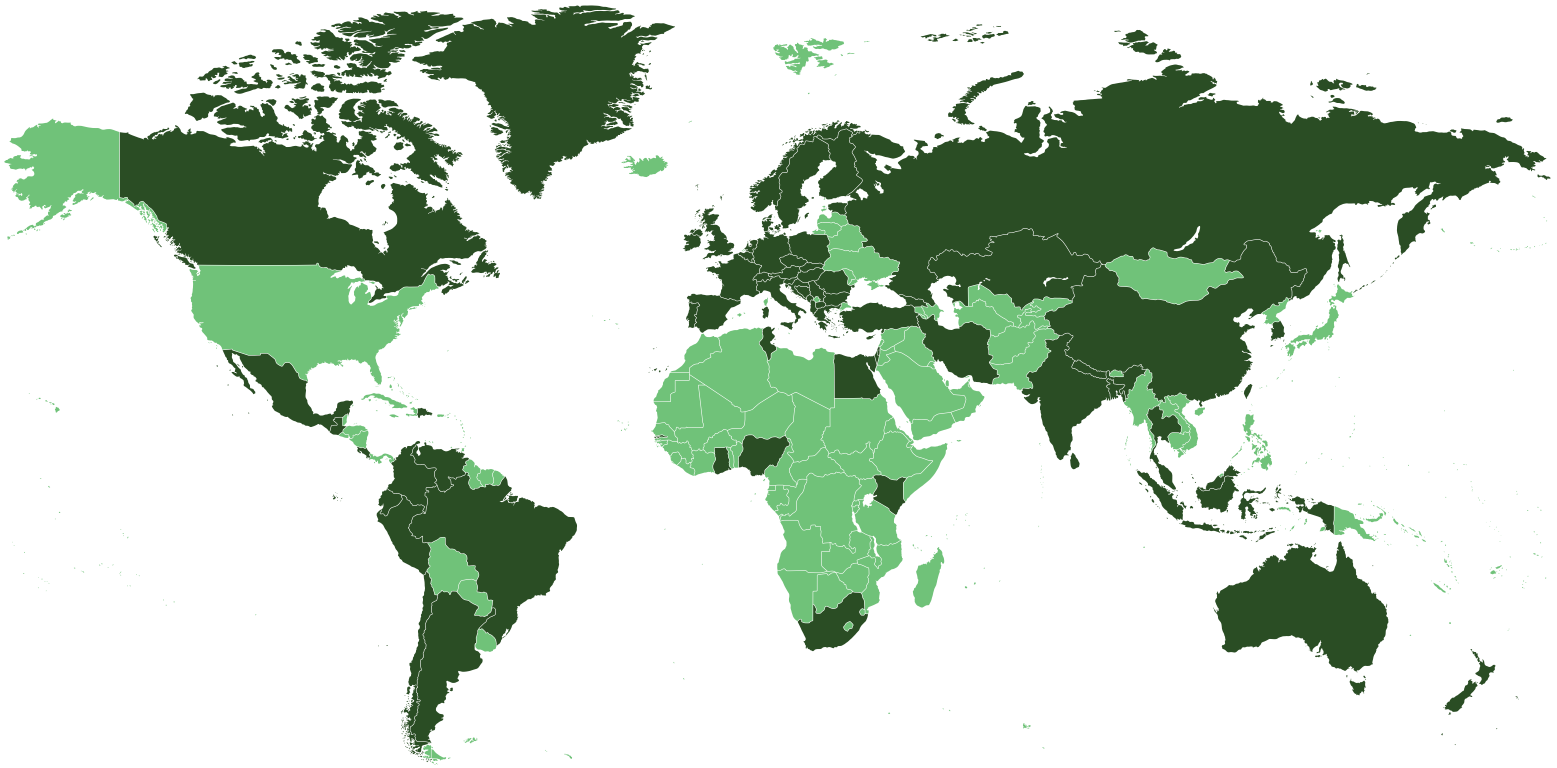
This year the Global Review features over 70 jurisdictions. We continue to grow, slowly but steadily. With the help of our current roster of contributors and with new interest from our readers and others, we hope every year to continue to expand our coverage of the world.

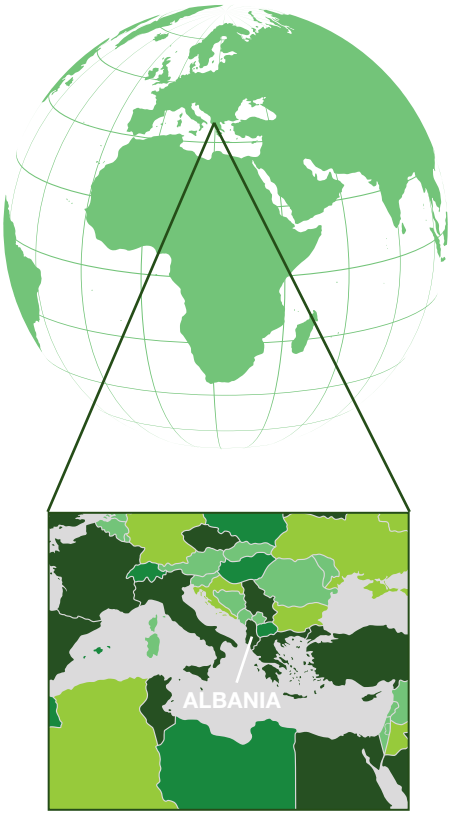
A project like this is not possible without a great team. We thank our contributors for preparing their outstanding jurisditional reports. We also thank the leadership team at the *International Journal of Constitutional Law*—Gráinne de Búrca and Joseph Weiler, Co-Editors-in-Chief, as well as Marcela Prieto Rudolphy and Sergio Verdugo, Associate Editors—for publishing a few contributions from this year's Global Review focused on Central and Eastern Europe. We express our sincerest thanks to Gaurie Pandey at the Center for Centers at Boston College for her tremendous work in designing this beautiful volume. And we thank Trish Do at the University of Texas at Austin for her assistance on this project from start to finish.

We extend a special word of thanks to Vlad Perju, Professor of Law and Director of the Clough Center for the Study of Constitutional Democracy at Boston College. He has been a global leader in constitutionalism, including as a convenor of scholarly programs of the highest importance, as a scholar whose work has elaborated and defended the values of constitutionalism, and as a public servant involved in helping countries, including his native Romania, rethink their constitutional arrangements in the service of the deepest commitments of constitutionalism. We thank him for partnering with us to produce the Global Review.

We invite interested authors from new jurisdictions to contact us via email at iconnecteditors@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





Albania

Arta Vorpsi
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I. INTRODUCTION

The year 2019 in Albania was characterized by political polarization. Parliamentary life was impaired by a prolonged boycott from opposition parties, which later relinquished *en bloc* their parliamentary mandates in February 2019. Furthermore, the opposition also boycotted the local elections on 30 June 2019. They intended to put pressure on the government with the boycott, but the strategy ultimately backfired.

In connection to the above, a conflict between the President of the Republic and the governing majority took place. The conflict was triggered by the initiative of the President to issue a decree on the postponement of local elections without any prior consultation with the major political parties. The main argument used by the President was the boycott by the parliamentary opposition. This unprecedented act of the President and also the appointment of a new constitutional judge contrary to the proper constitutional procedure served as the main arguments (evidence) for the governing majority to initiate an impeachment procedure against the President, which has not yet concluded.

This report will focus on the ongoing results of justice reform, such as the vetting process and the establishment or renewal of justice institutions (re)designed by the constitutional reform approved in 2016.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Controversial local elections

The political environment remained polarized throughout 2019. The opposition carried out repeated boycotts of parliamentary activities. These activities culminated in February 2019 when the main opposition parties decided to relinquish their parliamentary mandates *en bloc*. This led to delays in the approval of electoral reform and the adoption of amendments to the Law on the Status of Judges and Prosecutors, after a prior decision of the Constitutional Court, which declared as unconstitutional some of the legal provisions. More than half of the relinquished parliamentary mandates were reassigned by the Central Election Commission (CEC) from the list of respective political parties of the opposition. Consequently, quorum for the full functionality of Parliament was maintained. However, the opposition did not accept the new members of Parliament and excluded them as party members. The constitutionality of the replacement the 'old' MPs with 'new' ones from the lists raised the question of a democratic representation of the people, which is still unresolved since the Constitutional Court has currently no quorum to decide on the merit of a case (see below).

Following the boycott of the Parliament, the united opposition ultimately decided not to participate in the local elections of 30 June 2019. The reason for this decision was an

ultimatum by the opposition for the Prime Minister to resign from office and appoint a temporary (technical) government until both parliamentary and local elections took place. This request was ignored by the governing majority, which decided not to postpone the local elections despite the boycott of the opposition.

The political conflict became even fiercer when the President of the Republic, without being consulted by the political parties, issued a decree to annul the local elections, without setting any new date. The main argument used by the President was that the political parties had not found any compromise and that there could not be a democratic electoral process if only candidates from one party (governing party), meaning the socialist majority, entered the race. The socialist majority accused the President of the Republic of acting partially, because one of the opposition parties had been previously founded by the head of state, and is currently headed by the first lady. Taking into consideration his affiliation with the opposition, the President was in an obvious conflict of interest and could not be in a position to play the role of a neutral arbiter, as he should have been.

The parliamentary majority, as well as the CEC, ignored the act of the President. The CEC scheduled the local elections for 30 June 2019, as decided earlier in the year. The President of the Republic issued another decree, which set 13 October 2019 as the new date for holding the "postponed" local elections. The Parliament and CEC considered the presidential decree unconstitutional and thus did not update the new election date. The local elections were held on 30 June 2019, and for the first time since the democratic changes in 1990, they were uncontested in more than 90% of the municipalities, which led to a 100% win of all local governments by the socialist party and its allies.

President's impeachment process

The actions of the President of the Republic in issuing several decrees on the date of local elections as stated above gave the parliamentary majority a legal ground to initiate an impeachment procedure for the very first time in Albanian history. Further, earlier that year, in January 2019, the President of the Republic refused to appoint the Foreign Minister proposed by the Prime Minister, arguing that the candidate was not adequate and experienced enough to lead Albania toward European integration. The Prime Minister refused to propose another candidate and took the Foreign Minister portfolio himself, sending the President a clear message about his formal role in appointing members of the Cabinet. Based on these actions by the President, on July 2019, the majority decided to establish a parliamentary investigation committee, which had to collect facts and arguments proving 'severe breaches of the Constitution' by the President, which is one of the reasons for discharging him from duty.[1] If the Parliament concludes that there are severe breaches of the Constitution by the President, it might decide with a qualified majority to dismiss him. The decision of the Parliament has to be verified by the Constitutional Court.

In this instance, if the President overstepped his competences by not appointing the Foreign Minister, the Constitutional Court had to decide based on the request of the Prime Minister. Meanwhile, the investigation committee decided to seek an *amicus curiae* from the Council of Europe's Venice Commission; specifically, whether the actions of the President with regard to local elections could be classified as in conformity with the role of the head of state in a parliamentary democracy. The Venice Commission stated that the postponement of the elections was subject to clear conditions: the situations of emergency requiring such a measure are provided for in detail (war, threats to national integrity, natural disasters and so on) by the Constitution or by statute, and the President can only undertake the measure of postponing elections in circumstances that demonstrate the existence of one of these situations.[2] In the absence of a statutory provision on the issue, the President can only cancel elections for local government bodies in a situation that meets the criteria for taking emergency measures. Even then, the President needs a specific, ad hoc legal basis to do so.

This conclusion is supported by the general interpretative rule, according to which express regulation of emergency powers in the Constitution and laws restricts recourse to any complementary unwritten emergency powers to very exceptional situations; primarily to situations of factual or legal impossibility that are not explicitly provided for by written emergency law. Cancelling elections is possible only in situations that meet the requirement for declaring a state of emergency. However, the applicable constitutional rules for emergencies were not followed in this case. Neither was there a political consensus, which would have allowed for the establishment of an ad hoc legal basis. Cancelling elections also affects electoral rights recognized by international human rights instruments, and the mere application of *actus contrarius* is prevented by the requirement of proportionality of any interference. The absence of a legal basis and the availability of alternatives (postponing the elections according to emergency measures under Article 170 of the Constitution or the resumption of political dialogue after the elections) render the interference with the electoral rights disproportionate. The electoral boycott by political parties, even if they represent an important share of the electorate, cannot prevent regular elections from taking place. Otherwise, these parties would obtain advantage to forestall any elections completely.

The year 2019 will be remembered as the year of continued conflict between the President and the governing majority. Shortly after the delivery of *amicus curiae*, another unprecedented presidential act occurred. He appointed a judge to the Constitutional Court against constitutional and legal provisions, contrary to the whole newly adopted reform, especially the independence of the nomination of judges from political influences. After the unlawful nomination of the constitutional judge, the parliamentary majority proposed to widen the

[1] Art. 90, para 2, 3 of the Constitution.

[2] See opinion CDL-AD (2019)019, para 14.

object of the investigation against the President with another allegation and again seek the Venice Commission's opinion on whether this nomination conformed with European standards on the appointment of judges based on a deadlock mechanism.

Since the parliamentary committee is still in the process of collecting facts, it will be for the Assembly and finally the Constitutional Court to establish whether cancelling, then postponing the local elections, refusing to appoint a Cabinet's member and also nominating a judge without taking into consideration the anti-deadlock mechanism amount to a violation of the Constitution to the extent that necessitates an impeachment of the President.

The establishment of anti-corruption structure

After establishing two new justice institutions, the High Judicial Council (HJC) and High Prosecutorial Council (HPC), designed by the constitutional reform adopted in 2016,[3] the process for election of a new General Prosecutor and Anticorruption Structures (meaning a Special Prosecutor on Anti-Corruption and the Special Investigation Unit independent from General Prosecutor and also other state power), began.

The constitutional amendments introduced a new election formula for the General Prosecutor, which reduces the margin of appreciation of the Assembly. The HPC selects and ranks three candidates; then the list with the ranked candidates is forwarded to the Assembly, which shall elect one of the candidates by three-fifths majority of votes within 30 days from receipt of the list. If the Assembly fails to elect a candidate, the first ranked is *ipso jure* considered elected. These anti-deadlock mechanisms aim at motivating the Assembly to find an agreement on one candidate. Otherwise, another body, i.e., the HPC, will do the election. Three out of four candidates were magistrates, one a lawyer. Following a transparent call and fair screening procedure carried out by the HPC, on 5 December 2019 the new General Prosecutor was elected with a qualified majority.

As for the Specialized Prosecution Office, the HPC appointed the first eight prosecutors, who will investigate corruption allegations or other crimes against public officials. The process of electing the Head of the Special Investigation Unit and investigations officers is ongoing.

The difficult renewal process of the Constitutional Court

As a result of the implementation of the vetting process of all judges and prosecutors in Albania, the Constitutional Court has not been able to hear any case in full composition since spring 2018. From January 2019 to November 2019, the Court had only one judge. In November 2019, three new judges were elected.

An eligibility requirement for the position of judge on the Constitutional Court is the successful passing of the vetting (screening) process. Stakeholders and observers have perceived the vetting as going relatively slowly considering the five-year constitutional deadline and the total number of circa 800 cases. The main reasons for the pace of the process relate to the investigation phase, which does not have a time limit according to the law, as well as the inexperience or lack of professionalism of the Albanian institutions in charge of issuing information related to assessments. The main reason for dismissal is problems with asset declarations.

This process has impacted the renewal process of the Constitutional Court and the Supreme Court. In February 2018, the process began of nominating and electing three constitutional judges, whose mandate ended according to the law. Later in 2018 and in spring 2019, other vacancies (six in total, four full mandate and two partial) were announced since the former judges were dismissed from duty by the vetting institutions. The process of electing three new judges took more than a year and a half because not only judges and prosecutors on duty but also the candidates who would run for new vacancies at different justice institutions were 'obligated' to go through a screening process (meaning the verification process of their assets, background and professionalism).

The election of judges to the Constitutional Court has been a matter of political debate since its foundation. It should be mentioned that from 1992 until 1998 the constitutional judges were elected partly (4) by the President and partly (5) by the Parliament. After the entering into force of the new Constitution in 1998, their appointment was divided between the President and the Parliament. For several years, there was an ongoing conflict between the Parliament and the President about who has what power to appoint apex court judges. Even the Constitutional Court's case-law could not resolve this dispute since there was a need for political consensus. This led to an extension of the mandate of the judges who remained on duty for more than nine years or even 12 years. The solution came through the recent constitutional and legal reform on the justice system of 2016, including constitutional justice. The most important novelties were related to more detailed professional criteria as well as a new detailed procedure for appointment.

Following 2016's justice reform, it was proposed that the appointment process of constitutional judges be divided between three bodies to avoid the frequent blocking of the process by political clashes between the parliamentary majority and the President. According to the new system, each of the three bodies has an exclusive power to nominate judges: the Parliament elects three judges, the President of the Republic shall nominate three judges and the Supreme Court selects three judges.[4] The aim of this model of appointment is not only to avoid the blocking of process but also to minimize political influence during the nomination stage. For many years, the nomination of constitutional judges has been hijacked by political disputes between the President and

[3] See also the Albania Report of 2017.

[4] Article 125 of the Constitution and Article 7 of the Law on the Constitutional Court.

the Parliament, discouraging the best lawyers from running for any possible vacancy on the Constitutional Court because of the overwhelming fear of engaging themselves in the political whirlwind.[5]

Apart from the formal appointment process, another new development of the reform was the provisions on the professional and moral integrity criteria as well as the manner and procedure for their evaluation by a special body: the Justice Appointment Council (JAC), which is an ad hoc body constituted by judges and prosecutors at different levels of jurisdiction, elected by lot. The Justice Appointment Council[6] serves as a professional filter to rank the candidates according to their professional background. It sends this ranking list to three election bodies (Parliament, President and Supreme Court), which have to elect one of the three highest-ranked candidates. If one of the bodies or all three fail or refuse to choose one candidate, the candidate ranked first on the list shall be considered appointed (anti-deadlock mechanism, which is also found in other election processes regarding justice institutions). The whole process is meant to be characterized by transparency and publicity, the features that were previously missing from the process of appointing constitutional judges.[7] The JAC started to function properly in January 2018, two and a half years after the adoption of the Constitution, after its members went through a vetting process themselves.

After the announcement of the six vacancies on the Constitutional Court, the JAC began the screening process of the candidates, which lasted until early October 2019. At the end, there were only six candidates for four vacancies, and the other two vacancies reopened due to a lack of candidates. On 7 October, the JAC sent the President the lists for two vacancies, and on 14 October 2019, the lists for two other vacancies were sent to the Parliament to elect one of the three first-ranked candidates as a judge on the Constitutional Court. According to the law, the President has 30 days to appoint the judge from among the ranking list. The procedure of the Assembly invokes a hearing with the ranked candidates with the Law Committee and voting with a three-fifths majority; in any case, the Assembly shall complete this procedure within 30 days from the day of receipt of the ranking list. In both cases, the law foresees that if the candidate is not elected and appointed within 30 days, then the first-ranked candidate by the JAC is considered elected. Again, an anti-deadlock mechanism applies. This was also one of the goals of the justice reform of 2016.

What happened was far from what the constitutional and legal framework foresaw. After the termination of the 30-day deadline and after the President did not act, the JAC confirmed that the first-ranked candidate was nominated to be a judge on the Constitutional Court. Some days before the exhaustion of the 30-day time limit, the President made an allegation about the selection process carried out by the JAC, claiming it was not transparent, which was perceived by observers as a 'surprise move' since during the whole process a representative of the President's office was present, and never made this allegation in more than a year and a half. Based on the allegation, the President refused to invite the nominated judge (the first-ranked candidate) to take an oath. It should be mentioned that a judge may exercise his/her duty after he/she has taken the oath before the President (Article 129 of the Constitution). Given the facts, the nominated judge made a declaration in written form that contained the oath formula, signed it before a public notary and sent it to the President of the Republic, since the latter refused to invite her to take an oath officially. After this step, the President again acted unconstitutionally, putting the whole process of renewal of the Constitutional Court and its legitimacy in jeopardy: he nominated another candidate as judge and invited her immediately to take an oath. The nomination by the President took place after the expiration of the 30 days and the candidate nominated was not ranked as one of the first three, as the Constitution and the law stipulate. Furthermore, not only did the President nominate the candidate beyond the time limit foreseen by the law but she was also not part of the first three ranked candidates approved by the JAC. This process boiled down to constitutional violations by the President, which caused an unclear and confusing situation for the Constitutional Court. Because of all these actions, two lawyers were nominated for one vacancy on the Court. The Court itself was unable to decide on the matter because of the lack of a necessary quorum (there are only three judges and the minimal quorum to decide on the merit of a case is six).

Based on these developments, the Parliament approved a resolution through which it considered the nomination of another candidate by the President as unconstitutional, inviting all state institutions, including the Constitutional Court, not to consider this act of the President. The Parliament went further in widening the scope of the committee investigating the President for another potential constitutional violation. A further step was asking for a second opinion from the Venice Commission for another *amicus curiae*; the Parliament sought advice whether the acts of the President conform to the best European or international practice for nominating constitutional judges against the concept of an anti-deadlock mechanism, which serves to prohibit the dependence of this process from political influences or interests. It can reasonably be expected that the Venice Commission will issue an opinion by mid-March 2020.

III. CONSTITUTIONAL CASES

As mentioned above, the Constitutional Court has not been in a position to decide on the merits of cases since spring 2018 because of the lack of a quorum. Currently, only three judges are engaged with the screening of admissibility criteria.

[5] Decisions no.2/2001; no.20/2009; no.24/2011; and no.41/2012 of the Constitutional Court.

[6] Article 149/d of the Constitution.

[7] Articles 7, 7a, 7b and 7c of the Law on Constitutional Court.

Nonetheless, several applications await resolution, which are shortly presented below:

1. Prime Minister v. President of the Republic: Nomination of Cabinet's Member

More than a year after winning the election, the Prime Minister decided to replace the Foreign Minister with a new and younger 'face'. The President, who argued that the candidate was very young and inexperienced for the job, refused the proposal of the PM. This led to an open conflict between the President and Prime Minister, who refused to propose another candidate and decided to take over this portfolio himself. Meanwhile, he put in motion the Constitutional Court to decide on this matter, alleging a conflict of competence between the Government and the President because the latter has no power to impose the Prime Minister to choose his Cabinet's members, but only approve them, which conforms to the concept of parliamentarian regime. The case is pending before the Court to be decided on the merit.

2. The National Theater Law

The Municipality of Tirana, also supported by the executive, proposed a plan to build a new National Theater to replace the old building (situated in the center of Tirana), which, according to them, is severely damaged and reconstruction or repair is too expensive for the state budget. According to the proposal, the new building will be constructed and invested by a private enterprise based on a formula of public-private partnership. As a result, close to the new theater would also be constructed four skyscrapers. This proposal was controversially discussed and caused a strong public reaction not only among the actors but also by the civil society, claiming that the real reason behind the new plan is to gain profit by the business-inducing skyscrapers. Following the already open conflicts between him and the Prime Minister, the President of the Republic submitted a request to the Constitutional Court to declare the law on the demolition of the National Theater building unconstitutional.

3. Nomination of a Judge to the Constitutional Court

As explained above, the legitimacy of the nomination of the new judge by the President will be decided by the Court itself. The case constitutes a looming challenge for the Court as it will determine the future of the independence of the institution. It can reasonably be foreseen that by the end of 2020, the Court could be in full composition to decide which nominated judge has to take the seat on the Court.

IV. LOOKING AHEAD

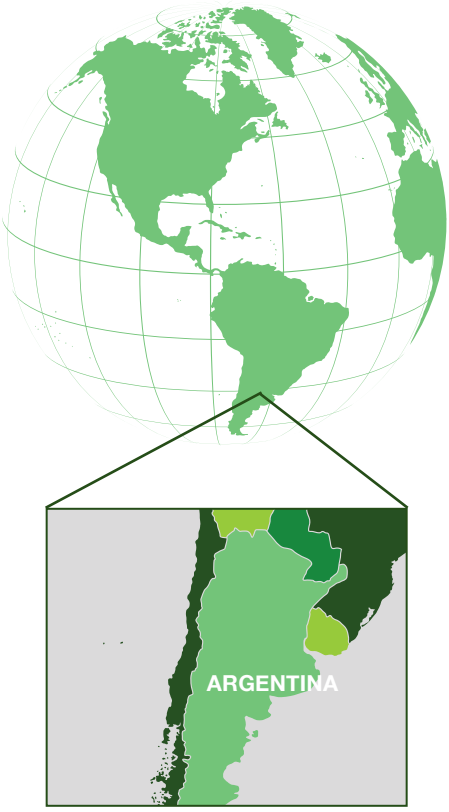
From the political point of view, the most important matter is the ongoing electoral reform, which requires the readiness and willingness of political parties to cooperate. Currently, the opposition is divided into two large groups: one represented in Parliament (also called 'parliamentary opposition') and the other taking actions 'outside' the Parliament. It remains unclear if there will be a successful electoral reform and if there will be a compromise to organize new elections, as the 'outside' opposition demands. At the same time, the 'outside' opposition cannot approve any drafts or take part in the lawmaking, as it is not represented in the Parliament. This is also a precondition for opening negotiations with the EU and should be done before May 2020, when discussions about EU enlargement will be held.

An equally important issue is the continued implementation of justice reform. The establishment or renewal of the justice institutions is taking a considerable amount of time, which has led to a complex situation affecting human rights of individuals seeking justice. The full functionality of both the Constitutional Court and Supreme Court is crucial for a democracy and the rule of law. There are pending cases (not so much before the Constitutional Court as before the Supreme Court) waiting to be adjudicated. This strongly affects the rights of the citizens, who need justice delivered within a reasonable time. There are already cases before the ECtHR against Albania claiming non-effective domestic remedies because both high Courts have been out of function for almost two years. Looking ahead in 2020, there is still hope that action will be taken to achieve the full composition or at least the minimal quorum for both Courts to decide on the merits of complaints. It should be taken into consideration that some representatives of state institutions constantly engage in conduct intended to slow down or even hinder and thwart the process of implementation of justice reform, which is showing its first effects on de-politicisation of justice institutions in Albania.

V. FURTHER READING

Arta Vorpsi, "The Constitutional Justice and Its Impact in Preserving the Rule of Law in Albania," in *Encyclopedia of Contemporary Constitutionalism* (Springer International, forthcoming 2020)

Opinion CDL-AD (2019)019 (https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)019-e)



Argentina[1]

Juan F. González-Bertomeu, UNAM
Ramiro Álvarez-Ugarte, UP/UBA

I. INTRODUCTION

We ended our 2018 report by saying that,

> [a]part 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.

The election in question returned a Peronist administration led by President Alberto Fernández and now Vice-President Cristina Fernández. This unfolded amidst yet another serious economic crisis and escalating poverty rates, which faded any hopes outgoing President Macri could have of getting himself reelected.

In this context, the Supreme Court was not at the front of public concerns, but some of its decisions during the year had wide implications. We will discuss a handful of cases from 2019 that hinted at trends that were beginning to solidify at a divided Court but that the new political reality may modify.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Several of the cases we review suggest a rift within the Court and the emergence of a majority coalition formed by Justices Lorenzetti, Maqueda and Rosatti – nicknamed by the press, accurately or not, the "Peronist" majority.[2] Reinforcing a tendency we noted last year, Justice Rosenkrantz (the Court's President) often voted by himself or dissented, and in some cases this was true of Justice Highton as well. While a full account of voting patterns escapes us here, this tentative trend may be explained by ideological reasons that coincided with the justices' distance to the government or a public perception of that distance, a perception that may be partly influenced by the decisions justices make.

In the cases that most heavily impacted governmental interests, as in 2017-2018, Justice Rosenkrantz dissented, showing some willingness to defer to the political branches on complex issues with financial implications. He also refrained from embracing broad constitutional constructions and seemed to adopt a narrow approach to adjudication. On the other hand, the above-mentioned coalition emerged in cases in which broad principles of law were used to protect rights against powerful governmental interests. That was the case in the pension cases we discuss next, but also in a handful of environmental decisions in which those justices sided with whatever party was making a stronger claim of protecting the environment.[3]

The political sea change of 2019 within the context of a raging economic crisis may affect these coalitions, putting the justices' consistency to the test – their approach both

[1] During Justice Rosenkrantz's confirmation process, González-Bertomeu submitted a letter of support.

[2] Rodríguez-Niell P, 'El germen de la «mayoría peronista» desvela a la Casa Rosada' La Nación (Buenos Aires, 4 November 2018) https://www.lanacion.com.ar/politica/el-germen-de-la-mayoria-peronista-desvela-a-la-casa-rosada-nid2188295 accessed 11 January 2020.

[3] *Barrick Exploraciones Argentinas* CSJ140/2011(47-B)/CS1 [2019]; *Nordi, Amneris Lelia* CSJ180/2010(46-N)/CS1 [2019].

to interpretation and their role, their commitment to rights protection, and the deference to political decisions in the face of an executive wielding, once again, emergency powers. In the last days of the year, Congress passed a package of emergency measures including delegations to the Executive. Exercising these powers, President Fernández froze a statutory pension update that was due at the end of the year. He chose to decide those updates discretionarily for 180 days, a period during which he is supposed to draft a new formula to be sent to Congress.

Pensions, taxes, and federalism

Because of myriad factors characterizing the country – recurrent economic crises, inflation, pension cuts – pensions have long been a central concern, and cases involving them have been a fixture at the Court. Decisions in these cases usually have severe financial implications. Last year we commented on one such case (*Blanco*). In 2019, a similar voting pattern to that in *Blanco* resurfaced in a case (*García*) concerning pensioners' duty to pay income tax.[4] A 79-year-old with health issues said that the rate she faced – equaling over one-quarter of her pension – was excessive and unconstitutional. A majority (Justices Highton, Maqueda, Lorenzetti, and Rosatti) sided with her, saying that the 1994 amendment had embedded a duty to offer special treatment to vulnerable sectors of the population, among them pensioners. It argued that the tax system had to be sensitive to the way it affected the people it regulated. The system only considered income levels without attention to pensioners' specific "condition of vulnerability due to old age or illness." In the majority's view, this placed plaintiff at a disadvantage because of her circumstances, even if her pension was much higher than the median. And it violated equality, which implies the need to treat different situations differently. The Court ordered the administration to stop demanding payment from plaintiff and asked Congress to enact measures singling out pensioners of advanced age or with health issues for favorable treatment apart from considering income levels. A series of similar decisions followed.

Dissenting, Justice Rosenkrantz said that it had not been shown the statute was unconstitutional. He claimed that in 2016, Congress had established that pensioners were expected to pay the tax only if receiving relatively high pensions, six times the minimum at the time, which was not a regressive measure. Plaintiff's pension was higher than this. Moreover, plaintiff had not shown that her payment of the tax affected her ability to afford her health and utility expenses. Rosenkrantz acknowledged the protections afforded pensioners but said that they were not incompatible with the duty to pay taxes. The justice cited the Court's case law, determining that Congress had discretion within reasonable boundaries to ponder all interests at play to determine how to tax. In his view, the notion that the government fell short of what each of us would wish it had done concerning pensioners could not be turned "into an argument against the constitutionality of a regime that … relies on value judgments, facts, and strategies…" that Congress is expected to ponder.

Another momentous decision involving taxes (*Entre Ríos*) featured clear federalism traits.[5] A majority stated that a (progressive) presidential decree lowering in practice the income tax rate for workers and the value-added tax rate for basic groceries violated the constitution since it detracted sums from the provinces that the latter had committed to ensure proper operation.

Since the early 1900s, the provinces have delegated taxing powers to the federal government.[6] A tax-sharing scheme was eventually adopted according to which the government collects most taxes and redistributes them to the provinces.[7] Today, a large portion of the provinces' budgets come from the government, and, at the same time, provinces provide the most basic services.[8] In 1994, a constitutional amendment mandated the distribution of tax funds not earmarked and the enactment of a statute to be approved by each province with criteria for distribution.[9] The statute has not been adopted; in its place, the system is guided by a collection of rules, including statutes passed by both Congress and the provinces.[10]

In *Entre Ríos*, a majority (Justices Maqueda, Lorenzetti and Rosatti) sided with a province seeking an interim order as plaintiff. The justices said that the decree unilaterally modified the tax distribution system, something that only Congress acting within its purview and with the provinces' approval could do. Also, the province had already committed those sums to the funding of its regular activities. The Court provisionally ordered the federal government to shoulder the difference in the sums collected before and after the decree.

Again, the decision found Justice Rosenkrantz dissenting alone. Apart from saying that the province lacked standing and interest to seek a declaration of unconstitutionality, he maintained that the legislation concerning distribution did not give provinces any right to determine the tax policy or to a specific level of resources. The statute only established provinces' right to receive the tax sums already *collected* by the federal government. Also, variations in those sums from

[4] *García, María Isabel* FPA7789/2015/CS1-CA1 [2019].

[5] *Entre Ríos*, *Provincia de* CSJ1829/2019/1 [2019].

[6] Juan González-Bertomeu, "The Constitution of Argentina", in: Conrado Hübner Mendes and Roberto Gargarella, *The Oxford Handbook of Constitutional Law in Latin America*, 2020.

[7] Id.

[8] Id. Alberto Porto, "Introducción" in Alberto Porto (ed), *Disparidades Regionales y Federalismo Fiscal* (EDULP 2004).

[9] Id. Constitution of Argentina, section 75.2.

[10] Id González-Bertomeu, id.

one year to the next were foreseeable and did not allow the simple assumption that a province had been irreversibly harmed as a result.

Assigning provinces the right to outright object to the federal government's decisions to levy taxes or set rates would seem to create an imbalance in the country's federal structure, tilting it toward a confederal arrangement. (This does not consider the fact that the change had been introduced by a *decree*, not a statute, in violation of the principle of legality.) However, this should not deny that provinces are in a tight bind. Having ceded most taxing power to the federal government, they heavily depend on the taxes the latter collects. If Congress or the Executive were free to eliminate a tax overnight without any rearrangement, a province would be forced to bear the brunt without many alternatives, since the federal government has shown hostility towards the provinces' full exercise of their taxing powers. Fair play seems to require some form of accommodation or negotiation involving the provinces.

III. OTHER CONSTITUTIONAL CASES

While our next focus is on elections, other relevant decisions concern free speech, criminal due process, and compensation for victims of state-sponsored terrorism. Now, the Court does not always provide a clear depiction of facts. More perplexing, the justices' opinions usually diverge in those depictions. This has long been a feature in the Court's decision making but it is high time it changes. It is hard to assess a decision without a full grasp of the facts, and the facts should be identical to everyone.

1. Elections

Since early on, the Court has embraced a set of "passive virtues" doctrines to dodge politically charged cases, although in recent decades it has moved towards a more relaxed stance concerning justiciability. Occasionally, the Court decides cases dealing with electoral institutions, often involving partisan strategies to achieve or hold onto power. In 2019, it intervened in two such cases.

In *Unión Cívica Radical*,[11] a local branch of the coalition then in power challenged an amendment to the constitution of the La Rioja province involving reelection. The constitution allows for one immediate reelection, including the case of a vice-governor who then runs for governor. The amendment aimed to remove the limitation for those who had first served as vice-governor before serving as governor, the case of the sitting governor. Amendments passed by the local legislature are to be ratified in a referendum coinciding with "the following general election"; with time ticking, the government rushed this process by calling a special election. The constitution also says that the amendment will be considered rejected only if a majority votes it down and if that majority represents at least 35 percent of registered voters. Twenty-five percent of such voters had voted "yes" but fewer than 35 percent had voted "no." The plaintiff also challenged this rule. In a decision signed by Justices Maqueda, Lorenzetti, and Rosatti, with concurring opinions by Justices Rosenkrantz and Highton, the Court sided with the plaintiffs.

The decision revolved around how to interpret both the term "the following general election" and the 35 percent requirement. The majority dealt quickly with the former; among other reasons, common sense dictates that "general" is the opposite of particular or special. It also said that the (literal) interpretation of the constitution the local bodies had selected meant that an amendment could be deemed approved even if a majority was against it since it presumed that those not voting were in favor of it. In this case, 75 percent of voters had not voted in favor. The majority concluded that the only interpretation of the clause that made it compatible with both the local and the federal constitutions' protection of popular sovereignty was to consider (in opposition to its plain meaning) that an amendment would be ratified if *supported* by a majority of at least 35 percent of registered voters. Citing a previous decision, the majority ended by saying that the country's history offered a plethora of attempts to force republican principles to advance a politician's interests, suggesting that it was time to stop.

The second case (*FPV*) involved a challenge by the Peronist-Kirchnerista coalition, then in the opposition, to an attempt by a governor (a government's ally) to run for reelection.[12] The governor had first been elected as vice-governor and, days later, was sworn in as governor after the governor died. He was then reelected. The local constitution included a clause identical to the one discussed above limiting a second immediate reelection, establishing that "[t]he governor and vice-governor can be reelected or succeed each other" (*recíprocamente*) only once. The governor was seemingly prevented from running again, and so did plaintiff claim. The province asserted that the local constitution's interpretation was reserved to the province's authorities. It added that the governor's case was outside the scope of the second reelection ban since the names in the complete governor/vice-governor ticket in each election had been different and the ban only applied if both officials had jointly succeeded each other.

A majority (Justices Maqueda, Lorenzetti, and Rosatti) agreed with the plaintiffs. The reelection clause was clear enough; the ban applied to the case of a governor or vice-governor reelected as such, who could not run for a third term, as well as to the case of an official serving in one position who then serves in the other, either joining a ticket with the same person as before or not. Interpreting otherwise would be tantamount to allowing for unlimited reelection if only one of the members of the ticket stands again, and this would clash with republican principles. The majority added that an originalist interpretation of the local convention debates suggested the same answer. It closed with the same paragraph concerning previ-

[11] *Unión Cívica Radical de la Provincia de La Rioja* CSJ125/2019 [2019].

[12] *Frente para la Victoria-Distrito Río Negro* CSJ449/2019 [2019].

ous attempts at forcing institutions.

Justices Rosenkrantz and Highton each dissented via similar votes. In line with long-existing standards, the respect for local autonomy demanded that the Court abstain from trumping the province's judges' interpretation of the local constitution if it did not involve a clear departure from the plain meaning of the text. The meaning of the reelection clause was not straightforward, and the province's interpretation was not unreasonable. The justices justified their seemingly different stance in the La Rioja case by saying that, in that case, it was plain that the election in question was illegitimate. Both also denied that an interpretation of the convention's debates backed the plaintiffs. According to Justice Rosenkrantz, it was not unreasonable to consider that those drafting the constitution wanted to limit the prospect of the two officials serving again in reverse order but not the prospect of only one of them doing it.

To us, the majority was right. The straightforward interpretation was that the clause referred to both the case of the two officials jointly succeeding each other or to *any* of them succeeding the other. The clause's target seemed to be the *person* running each time, not the complete ticket. If no one would claim that a governor can be indefinitely reelected if she picks a different running mate each time, why would this be different in the case of a vice-governor later serving as governor? But even if the portion of the clause "or succeed each other" could reasonably be interpreted as referring to the joint ticket simultaneously seeking reelection in reverse order, this would entail that the previous portion "[t]he governor and vice-governor can be reelected" *also* referred to the joint ticket, with clear implications for the case.

Consider a similar example: "Anne will be the coach in the 2020 season and Joan will be assistant coach; *their job can be extended only for another year* or *they can succeed each other only for another year*." If the second italicized passage is taken to mean that the extension regulation is only applicable if both take the other person's post, the first, by implication, could only mean that the extension regulation is applicable only if each person's job remains the same in the new term. Both cases share the sentence's subject ("the governor and vice-governor"). And the presence of the word *recíprocamente* (each other) does not change things, since, as the majority said, the word simply appears to clarify the verb "succeed" by establishing that it refers to any of the two officials seeking the other's job.

Thus, taking the province's interpretation to its logical conclusion, the reelection clause only regulated two cases: the case of the two officials succeeding each other at the same time and the case of the governor and vice-governor jointly seeking reelection without changing their posts. If so, the governor's case when running for his current term – a vice-governor then elected as governor without the former governor running for vice-governor – fell outside the scope of that regulation, which explicitly considered the post of vice-governor. (We are sorry for the mouthful.) But reelection can only be constitutional if an explicit clause allows it, which means that the governor's current term was…illegitimate! Granted, this is an odd result, but it is the corollary of the province's interpretation. The La Rioja governor did not seem to read a similar clause as already granting him the right to run again.

2. Freedom of Expression

Almost all the freedom of expression cases the Court decided depicted the proverbial scenario of public figures seeking damages for alleged defamation. The thread that links them is a growing gulf between the justices as to how already-settled tests to adjudicate freedom of expression cases apply in practice.

In *García*,[13] a majority opinion by Justices Rosenkrantz, Highton, and Rosatti employed the 1986 *Campillay* test.[14] The test states that no media outlet is to be held liable for erroneous information produced by a third party if the source was identified, a conditional mode was used or the name of the person involved was withheld. The majority extended *Campillay*'s first tenet to remove a news outlet's liability for defamation regarding the work of a freelance journalist not formally employed by it since the journalist himself was deemed the source. This decision, seemingly protective of speech, was not so, since it may have a chilling effect on freelancers, for under *García* the outlets they publish on would not stand by them in case of a claim. This was raised by Justices Maqueda and Lorenzetti, who reached a non-liability outcome through the analysis of the content of the objected news item, which they deemed as containing value judgments that "did not go beyond the … tolerance needed … when the issue is of public interest."

Other cases show that the distinction between tolerable and intolerable criticism can be difficult to manage. In *Martínez*,[15] a plurality found that remarks to the effect that a public official was "complicit" in an "impunity pact" were fair game; dissenting, Justices Maqueda and Lorenzetti each said that the official's honor had been compromised. In *De Sanctis*,[16] a different plurality considered that unearthing an old allegation of gender violence to criticize a political appointment was off-limits, since the allegation (for two justices a value judgment, and for one a factual claim) had been unnecessarily brought up in the context of a more general political criticism and interfered with the plaintiff's private life. Justices Rosenkrantz and Highton dissented. What made the criticism in *Martínez* acceptable and that in *De Sanctis* off-limits was unclear, and to us, both sets of remarks seemed to be covered by the constitution, what Justices Highton and Rosenkrantz rightly claimed.

[13] *García, Stella Marys y otro* CSJ395/2014(50-G)/CS1 [2019].

[14] *Campillay, Julio César* 308 Fallos 789 [1986].

[15] *Martínez de Sucre, Virgilio Juan* CSJ1109/2012(48-M)/CS1 [2019].

[16] *De Sanctis, Guillermo* CSJ498/2012(48-D)/CS1 [2019].

In short, while the Court's case law still seappears protective of free speech, the balancing approach that seems to be emerging is to be closely followed, as it may weaken the more rule-like adjudication techniques of *Campillay* and the actual malice test, both long accepted by the Court.

3. The Right to a Speedy Trial

In the 1980s, with the return to democratic rule, the Court displayed a liberal stance concerning criminal defendants' due process rights, a trend that wavered in the 1990s but gained renewed vigor in the early 2000s. We highlight three cases from 2019 related to the violation of the right to a speedy trial, a chronic problem.

In *Farina*,[17] a majority (no full dissents) ordered the definitive dismissal of proceedings against a woman sentenced in 2005 to two years plus a professional interdiction for involuntary manslaughter, a crime from 2000. A round of appeals against the conviction was still open in 2019, largely because of the Buenos Aires province judges' interpretation of the events that interrupted the national penal code's period of prescription (or statute of limitations). The judges had chosen an interpretation unfavorable to the woman that went against the Court's previous interpretation. The majority argued that the judges' stubbornness in holding to their view disrespected the Court's authority to set precedents to be followed and violated the woman's right to a speedy trial.

In *Espíndola*,[18] originating in the same province, the three voting justices overturned an appeals decision that upheld a sentence to seven years for robbery from 2007 and urged the local Supreme Court to speed up proceedings. Finally, in *Rojas*,[19] two convicted women for murder in the Misiones province had spent 9-12 years detained without a definitive sentence. A unanimous Court sided with defendants when they claimed that their right to an ample revision of the conviction had not been guaranteed. The Court found serious violations to the presumption of innocence, and, given the time elapsed, decided to acquit the defendants.

4. Compensation for Victims of the Dictatorship

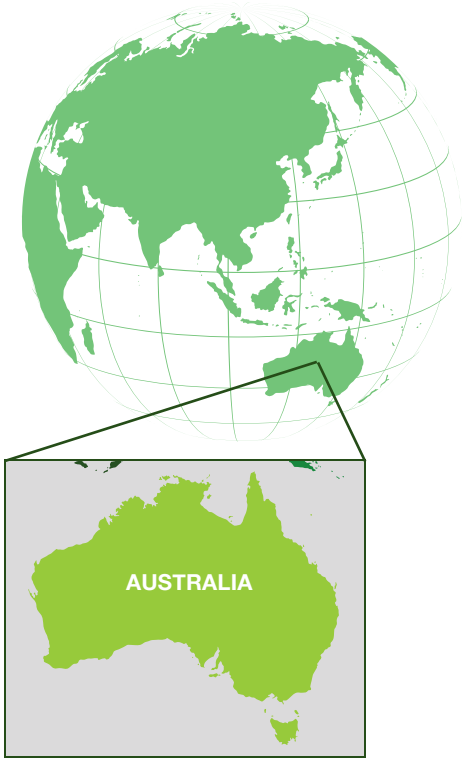
Apart from criminal proceedings against those responsible for grave human rights violations during the last dictatorship (1976-1983), the country has awarded victims of state-sponsored terrorism official compensation. On several occasions, the Court has intervened in issues dealing with them. In *Fernández*,[20] a person forced to leave the country sought compensation. The relevant statute's text provides it to those illegally detained, but in many decisions, the Court said that the statute covered cases of forced exile as well, and so it extended its application. Yet a ministry decided to afford exiled individuals only a quarter of the sum given to those detained. The Court (Justice Rosenkrantz did not vote) struck down such regulation, saying that only another statute could alter the interpretation repeatedly made by the Court.

In *Ingegnieros*, the daughter of a disappeared person sued for compensation from the company (Techint) where her father worked. She invoked the workplace injury labor law, arguing that her father had been abducted by state forces during his workday under the company's complicit stance. In her view, the statute of limitations had not elapsed since the compensation she asked originated in a crime against humanity that does not prescribe. Through three concurring opinions (Justices Rosenkrantz, Highton, and Lorenzetti), the Court denied her claim by invoking previous case law establishing that, while *criminal* proceedings regarding these crimes do not prescribe, civil actions involving compensation do. Justices Maqueda and Rosatti dissented. They underscored the seriousness of the offense, the violence displayed by the dictatorship towards unions and workers, and the complicity of the company. The Court had decided that crimes like the one against the plaintiff's father did not prescribe, so it was inconsistent to conclude that monetary compensation for those crimes did.

IV. LOOKING AHEAD

Speculating about future scenarios in unpredictable Argentina is pointless. Looming on the horizon is the constitutional validity of some of the emergency measures passed in 2019. But more interesting to us is the extent that the political change affects justices' behavior. The last three years of a Court serving under a non-Peronist government with two new appointees had begun to offer a picture of where things were headed. The political change may lead to realignments. Where will the chips fall next time?

[17] *Farina, Haydée* CSJ2148/2015/RH1 [2019].
[18] *Espíndola, Juan Gabriel* CSJ1381/2018/RH1 [2019].
[19] *Expte. N 48669/2015* CSJ 367/2018/C51 [2019].
[20] *Fernández, María* CAF3972/2017/CA1-CS1 [2019].



Australia

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I. INTRODUCTION

The triennial Australian federal election was held in May 2019 and saw the incumbent Liberal/National conservative coalition government re-elected for a third term with 77 seats in the 151-seat House of Representatives (an increase of 1 seat compared to the 2016 election) and a two-seat majority government. This was a surprise result as almost all polls predicted a change in government.

In 2019, the Australian citizenry enjoyed relative stability at the apex of the executive branch of government. The year under review was the first full calendar year in recent Australian history where a sitting prime minister was not under threat, perceived or actual, from internal leadership challenges. The catalyst was an earlier change in party rules of both major political parties in 2018 which restricted the ability to remove a party leader and sitting prime minister. This is a marked departure from the preceding term of coup culture resulting in five prime ministers in five years.

Despite this stability, a 2019 study produced troubling findings: 41% of voters are dissatisfied with the state of democracy in Australia (the highest dissatisfaction rate since the 1970s constitutional crisis); 75% do not trust the Australian government to do the right thing; and only 12% believe government is run for all of the people.[1]

At least some of the public dissatisfaction with government is likely due to what might be called the "press freedom" controversies of 2019. Such controversies included highly contentious police raids on a journalist's home and the offices of Australia's national broadcaster. These raids are generally understood to relate to government attempts to identify sources of leaked information about national security issues. Similarly controversial was the continued criminal prosecution of Australian lawyer Bernard Collaery and a person known only as "Witness K" for their whistleblowing on Australia's bugging of Timor Leste government offices during oil and gas treaty negotiations.

Against this background, several developments took place, including progress in the struggle for indigenous constitutional recognition and the drafting of a religious discrimination bill, both of which are expatiated on immediately below. A thematic string of judicial decisions relating to rights and other noteworthy cases is discussed further below.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Religious Discrimination

The Australian Constitution contains a religious freedom clause modelled on the First Amendment of the Constitution of the United States. However, unlike the United States, religious freedom is rarely litigated in Australian courts. This looks set to change with the imminent passage of a national *Religious Discrimination Bill.*

The *Religious Discrimination Bill* has its genesis in the May 2018 *Report of the Religious Freedom Review.* The first exposure draft of the Bill was released in August 2019 and received over 6000 submissions. As a result, a second revised exposure draft

[1] Sarah Cameron and Ian McAllister, *The 2019 Australian Federal Election: Results from the Australian Election Study* (Australian National University, December 2019).

was released in December 2019. The Bill is expected to be introduced to Parliament in February 2020.

Among other objectives, the Bill seeks to eliminate discrimination against persons on the grounds of "religious belief or activity" in a range of areas of public life (this is not to be confused with the public sector and simply refers to certain aspects of a citizen's interactions with society) and to allow people to make "statements of belief." Of course, there are limitations to these ideals.

A person will be able to exercise a right of complaint if four criteria are satisfied. First, the person must hold or engage in a "religious belief or activity" or be associated with someone who does. "Religious belief or activity" is defined as "(a) holding a religious belief; or (b) engaging in lawful religious activity; or (c) not holding a religious belief; or (d) not engaging in, or refusing to engage in, lawful religious activity." "Religious belief" is intentionally not defined to allow the encapsulation of emerging faiths over time as well as atheism and agnosticism. Similarly, "religious activity" is itself not defined and is broader than mere religious observances such as prayers and fasting. It must, however, be a lawful activity.

Second, the person must have been subject to direct or indirect discrimination on the grounds of religious belief or activity. Complaints of condition, requirement or practice under indirect discrimination are subject to the reasonableness test. Either aware of judicial challenges in applying this or wishing to usurp the task, the Bill sets out non-exhaustive factors needing to be weighed such as the nature and extent of the resulting disadvantage and the feasibility of overcoming it. In what has become known as the "Israel Folau clause,"[2] much publicity has been given to a clause prohibiting large employers from setting a rule that indirectly discriminates on religious grounds where the rule is "other than in the course of the employee's employment."

Third, the discrimination must occur in one of the enumerated areas of public life, which include work, education, access to premises, accommodation, sport and clubs.

Fourth, some specific exceptions and exemptions must not apply. For example, some types of otherwise discriminatory conduct in aged care facilities, religious hospitals, accommodation providers, religious camps, conference sites and other settings may not be discriminatory if certain tests are met, including that if a person could reasonably consider it to be in accordance with the religious group's or person's faith. However, this test is left to a person of the same religion as the group or individual whose conduct is in question. Arguably, this naively assumes intra-religion unanimity. The intent is to reflect the realities of society and preserve the "religious ethos" of the institution or gathering. Then there is a certain class of health practitioners who can conscientiously object to providing a health service (not a treatment) or dispensing certain drugs because of their religious belief or activity.

Additionally, under the Bill, a statement of belief will not amount to discrimination if it is held in good faith and if it is one that a person of the same religion (or non-religion) could reasonably consider to be consistent with that religion (or non-religion).

No doubt the Bill will be subject to considerable debate in Parliament in early 2020. However, it is very likely to pass into law with most of its central components intact. This will be a significant change to Australia's legal landscape and will supplement the already extant national legislation prohibiting discrimination based on race, sex, disability and age.

Indigenous Constitutional Recognition

The vexed, recurring, long-standing and unresolved question of how to constitutionally recognise indigenous peoples of Australia has haunted successive governments. Many have attempted to seize the opportunity without success. There has been no consensus on how this is to be achieved.

Should a simple act of Parliament be passed? Should a treaty be entered into? Or should, as appears to find current favour, an amendment to the Constitution of Australia be made? If so, should this recognition be confined to the preamble (which will be legally inconsequential and scenically symbolic) or should there be a substantive insertion into the Constitution itself (which would then fall to the courts to interpret)? What form should the recognition take, and what shall be its scope?

The current government made a pre-election commitment in May 2019 to recognise Aboriginal and Torres Strait Islander Australians in the Constitution. However, the Australian Constitution can only be amended with the approval of the Australian people. A proposed change must be approved by the Parliament and then be voted on by Australians in a referendum. A referendum is only passed if it is approved by a majority of voters in a majority of states, and by a majority of voters across the country. This high bar has resulted in a modest 18% success rate of constitutional amendments in Australia's 119-year history.

The unperturbed government, therefore, made a pre-election commitment to fund a $7.3 million consultation process with Aboriginal and Torres Strait Islander peoples of Australia to establish a clear model that will be taken to, and for ensuring a successful outcome of, the $160 million referendum for constitutional recognition.

In November 2019, the Minister of Indigenous Australians set up a Senior Advisory Group that will, in turn, oversee a yet-to-be-created Local/Regional Advisory Group and a National Advisory Group that will take carriage of the consultation and co-design process.

A referendum has been promised during the current 46th Parliament ending in 2022.

[2] Israel Falou, a footballer and fundamentalist Christian, posted to social media that homosexuals, among others, would go to hell. Rugby Australia terminated his contract and legal action ensued. A confidential settlement was reached in December 2019.

III. CONSTITUTIONAL CASES

1. Clubb v Edwards; Preston v Avery – freedom of political communication

In recent history, the High Court of Australia (Australia's highest court) has generally decided no more than one case invoking the implied freedom of political communication each year. In 2019, however, the Court decided five such cases, implicating as diverse topics as electoral donations and the regulation of social media use in the workplace. Arguably the most significant cases, which were heard together, were *Clubb v Edwards* and *Preston v Avery*.

In these two cases, the Court considered the constitutional validity of two similar laws, in the States of Victoria and Tasmania, which prohibit protests (or protest-type activities) in the vicinity of abortion clinics. Each of these two laws makes it a criminal offence to contravene the relevant prohibition. Mrs Clubb and Mr Preston were convicted of similar offences in their respective States and each sought to challenge their convictions on the basis that the law was invalid for infringing the Australian Constitution's implied freedom of political communication.

In a 180-page decision – the longest of all decisions delivered by the Court in 2019 – the Court found the laws to be constitutionally valid. While the final result was unanimous, the decision illustrates significant differences of opinion amongst members of the Court as to the details of the constitutional doctrine at issue. In particular, the Court was divided as to the appropriateness of "proportionality" testing to determine whether a law will offend against the implied freedom of political communication. While proportionality testing is orthodox in constitutional and public law in countries like Canada,[3] New Zealand[4] and the United Kingdom,[5] it is a subject of great controversy in Australia.[6]

The division of opinion over the utility of proportionality testing began in 2015 when the Court split four members to three in favour of proportionality.[7] In *Clubb*, the newest member of the Court expressed support for proportionality testing, taking the number of justices in favour to five (out of a possible seven). The remaining two justices – Gageler and Gordon JJ – continued to express strident criticisms of proportionality testing. While Gageler and Gordon JJ are unlikely to change their views any time soon,[8] *Clubb* may be taken to have authoritatively established that proportionality is now an aspect of Australian law with respect to the implied freedom of political communication. It remains to be seen whether proportionality testing will be imported into other constitutional or administrative law doctrines.[9]

2. Work Health Authority v Outback Ballooning Pty Ltd – inconsistency of laws

This case provided the High Court with the opportunity to reconsider the constitutional doctrine governing inconsistency of laws in the Australian federation. Clear rules to resolve conflicts of laws are essential to the functional co-existence of the federal jurisdiction and the six States and ten federal Territories (including three "internal" or mainland Territories).

Generally speaking, where an inconsistency arises between a valid federal law and a State or Territory law, the federal law prevails to the extent of the inconsistency. However, Australian courts have long struggled in determining whether two laws are inconsistent or capable of operating concurrently.

The facts giving rise to this case are tragic. A woman boarding a hot air balloon in the Northern Territory died when her scarf was sucked into the inflation fan and she was dragged into the machine. The ballooning company was prosecuted for failing to comply with a duty in the Northern Territory workplace health and safety legislation. The ballooning company argued that the Northern Territory law was invalid or inoperative because it was inconsistent with federal aviation law. The Court held, by a majority, that there was no inconsistency. In doing so, the Court appeared to move towards a streamlined test for the inconsistency of laws.

Since 1937, Australian courts have developed two complementary tests for determining inconsistency of laws – tests for "direct" and "indirect" inconsistency.[10] Direct inconsistency occurs where a State or Territory law would "alter, impair or detract from" the operation of federal law. Indirect inconsistency occurs where a State or Territory law purports to operate in an area in which a federal law "cover[s] the field." In *Outback Ballooning*, Gageler J described the direct/indirect inconsistency dichotomy as "conceptually problematic but stubbornly persistent."[11] In separate judgments, both Gageler and Edelman JJ suggested that a single test ought to be adopted, namely, whether the State or Territory law would "alter, impair or detract from the operation" of federal law.[12] While the remaining members of the Court retained the dual tests, it appears that Gageler and Edelman JJ may have planted the seed for a long-overdue simplification of this area of law. Notably, in a subsequent 2019 case concerning the inconsistency of laws, only one member of the High Court referred to the direct/indirect inconsistency dichotomy, and that was Edelman J, who again acknowledged the distinction to be "artificial."[13]

[3] *R v Oakes* [1986] 1 SCR 103 (SCC).

[4] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

[5] *Bank Mellat v Her Majesty's Treasury* (No 2) [2013] UKSC 39, [2014] AC 700.

[6] See generally Adrienne Stone, 'Proportionality and Its Alternatives' (2019) Fed L Rev 1.

[7] *McCloy v New South Wales* [2015] HCA 34, (2015) 257 CLR 178.

[8] See *Comcare v Banerji* [2019] HCA 23, (2019) 372 ALR 42.

[9] See Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27(2) Pub L Rev 10; Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43(1) Fed L Rev 59.

[10] *Victoria v The Commonwealth* [1937] HCA 82, (1937) 58 CLR 618.

In any event, a majority of the Court in *Outback Ballooning* ultimately held that there was no relevant inconsistency between the two laws, thus the Northern Territory law was valid and operative, and the prosecution could proceed. To reach its conclusion, the Court interpreted the federal law modestly, to preserve the operation of the Northern Territory law. This holding will be viewed with justified optimism for those lawyers, scholars and advocates who have sought to resist the century-long trend towards centralisation of Australian law-making power in the federal Parliament.

3. Minister for Immigration and Border Protection v SZMTA – judicial review

The border between administrative and constitutional law is indistinct, especially in Australia where the Constitution vests the federal courts with jurisdiction to grant administrative law remedies in respect of actions or decisions taken by the executive. Admittedly, most judicial review proceedings are now determined within statutory regimes rather than by constitutional writs. However, the concept of "jurisdictional error" – that is, a decision maker's error that renders the decision beyond power – remains of central constitutional significance to the judiciary's role in policing the exercise of government power. Perhaps surprisingly, the basic question of when an error is jurisdictional, as opposed to an error within the jurisdiction, has vexed the Court for a quarter of a century.[14] This question commonly arises when a party seeking to challenge an administrative decision asserts that they were denied procedural fairness (or natural justice) and that the denial constitutes jurisdictional error. Six such cases – all in the sphere of immigration law – arrived in the High Court in 2019, three under the shared case name of *Minister for Immigration and Border Protection v SZMTA*. This case provides a convenient vehicle for exploring the High Court's significant development of the law in this area.

In *SZMTA*, three applicants had their visa refusals confirmed by the relevant Tribunal without being informed of certain potentially relevant information provided to the Tribunal by the Department of Immigration and Border Protection. The visa applicants sought judicial review of the Tribunal's decisions to affirm the visa refusals, asserting that the decisions were infected by a jurisdictional error by virtue of denials of procedural fairness. The High Court unanimously held that there had been denials of procedural fairness. However, a majority of the Court held that the denials were not "material" and thus did not amount to jurisdictional errors.

In coming to this conclusion, the majority appears to have fortified the "materiality threshold" showing that must be met by parties seeking judicial review of administrative action for jurisdictional error.[15] The majority explained that a breach of procedural fairness will constitute jurisdiction error "if, and only if, the breach is material … in the sense that it operates to deprive the applicant of the possibility of a successful outcome."[16] In other words, an error "is material to a decision only if compliance could realistically have resulted in a different decision."[17]

Furthermore, the majority's reasoning establishes that materiality is a question of fact that must be proved by every party asserting jurisdictional error (assuming materiality is put in issue by the opposing party).[18] Nettle and Gordon JJ, writing together, rejected the idea that "materiality" must be shown for an error to be jurisdictional. Their Honours wrote that people affected by administrative decisions are entitled to "know where they stand" and this requires that decisions must be made "according to the statute and not … subject to some margin of error … described as 'materiality.'"[19]

The Court's decision is, in one sense, a highly technical decision relating to a rarefied and conceptual question of administrative law. Yet the decision will also have profound practical consequences for individuals seeking to challenge procedurally unfair government decisions. Given the newly-explained materiality requirement, individuals who have been treated unfairly in a very real sense may nevertheless be denied remedies because they are unable to show that the unfairness was "material" in the requisite sense. Nettle and Gordon JJ acknowledged as much; however, they were in the dissent on this point, and it must be accepted that materiality is now firmly entrenched in Australian law.

4. Vella v Commission of Police (NSW) – separation of powers

Australia is the only Western democracy without a constitutional bill of rights or national human rights legislation. However, the Australian Constitution's strict separation of powers has been interpreted by the High Court to render invalid certain laws that in other countries might offend against due process protections. In the seminal 1996 decision of *Kable v Director of Public Prosecutions* (NSW),[20] the High Court held that a law would be invalid as offending the constitutional separation of powers if it conferred upon a court a function that substantially impaired the court's institutional integrity as a repository of federal judicial power. Since that decision, several laws

[11] *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2, (2019) 363 ALR 188, para. [67].
[12] Ibid, paras [70]-[72], [105].
[13] *Williams v Wreck Bay Aboriginal Community Council* [2019] HCA 4, (2019) 363 ALR 631, para. [138].
[14] Kirsten Walker QC, 'Jurisdictional Error Since Craig' (2016) 86 Aust Inst for Admin L Forum 35.
[15] See also *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, (2018) 264 CLR 123, para. [29].
[16] *Minister for Immigration and Border Protection* v SZMTA [2019] HCA 3, (2019) 264 CLR 421, para. [2].
[17] Ibid, para. [45].
[18] Ibid, para. [4].
[19] Ibid, paras [88]-[89].

have been challenged on this basis, most commonly "preventative" laws that purport to allow courts to make orders restricting an individual's liberty absent any criminal finding of guilt. However, the promise of *Kable* has rarely been fulfilled, and most such legislative challenges have failed. *Vella* continues this trend.

In *Vella*, the "preventative" law at issue was one which gave the courts the power – in civil proceedings – to make orders restricting the liberty of persons convicted of or involved in serious criminal activity. Under a provision of that statute, the police had applied to the courts for orders restraining and prohibiting Mr Vella from engaging in certain activities, including prohibiting him from associating with certain persons, attending at certain places, travelling in any vehicle between 9pm and 6am, possessing more than one mobile phone and having access to any encrypted communications. In essence, the police asserted that the orders were necessary because Mr Vella was involved in serious criminal activity with "outlaw motorcycle gangs." Mr Vella challenged the validity of the law, arguing that it unconstitutionally enlisted the courts to do the executive's bidding in a manner that was inconsistent with the judicial function.

A majority of the High Court held the law to be valid, reasoning by analogy with "preventative" statutory regimes relating to terrorism, organised criminal activity and sexual offenders that had survived past *Kable* challenges. Ultimately, the majority held that the law did not enlist the courts to do the executive's bidding in a non-judicial manner, but rather required "the court to conduct an assessment of future risk and to balance criteria within a wide degree of judicial evaluation."[21] Gageler and Gordon JJ dissented, holding that the challenged law was invalid for effectively enlisting the judiciary "to perform a personalised legislative function at the behest of the executive."[22] Gageler and Gordon JJ were subtly critical of the majority's analogical reasoning, suggesting that the *Kable* doctrine had died a "death by a thousand cuts."[23] At least one academic writer has already echoed the dissenters' description of the "creeping normalisation" by which the institutional distinctiveness and independence of the judiciary is incrementally diluted.[24]

Vella stands as a warning to the limited individual rights protections contained in the Australian Constitution. For those who care about judicial rights protection in Australia, *Vella* will be disappointing, but it may also galvanise support for national human rights legislation to address the deficiencies in existing judicial protections.

IV. LOOKING AHEAD

Aside from likely further progress of the *Religious Discrimination Bill* and efforts for indigenous constitutional recognition, it is likely that 2020 will see the development of key themes in the 2019 High Court's jurisprudence. There are already cases on the High Court's docket relating to the separation of powers and the implied freedom of political communication. Press freedom, a controversial issue in public debate in 2019, will finally reach the High Court in 2020 in the form of a journalist's challenge to a federal warrant to raid her home in relation to an alleged offence relating to the communication of official secrets.

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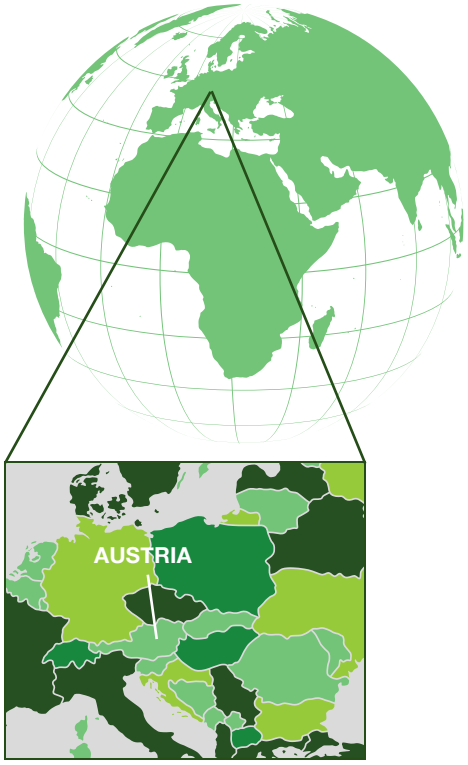
[20] *Kable v Director of Public Prosecutions* (NSW) [1996] HCA 24, (1996) 189 CLR 51.

[21] *Vella v Commissioner of Police* (NSW) [2019] HCA 38, para. [23].

[22] Ibid, paras. [179], [187].

[23] Ibid, paras. [146], [187].

[24] Daniel Reynolds, 'Creeping Normalisation: *Vella v Commissioner of Police*' (AUSPUBLAW 27 November 2019) <https://auspublaw.org/2019/11/creeping-normalisation-vella-v-commissioner-of-police-nsw/> accessed 24 January 2020; see also Vella (n 21), para. [145].



Austria

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I. INTRODUCTION

2019 turned out to be an almost dramatic year of constitutional developments. The main crisis concerned the succession of events after the so-called 'Ibiza scandal' in which Austria's then- Vice-Chancellor had been involved before he took office. The ensuing changes in the federal government, its final breakdown after a no-confidence vote in the National Council; the appointment of an expert government, headed by Austria's first female Federal Chancellor who had formerly been the first female President of the Austrian Constitutional Court; and elections of the National Council three years earlier than regularly provided came unexpectedly. Less unexpected was the fact that the Constitutional Court had to deal with a number of the former Federal Government's main political projects. In late 2019, the Court delivered several decisions that repealed major provisions in recently enacted legislation on digital surveillance and minimum social aid, while the Court was less critical on the fusion of previously self-governing social insurance agencies. Apart from the unexpected elections to the National Council, elections to the European Parliament took place in May 2019 and elections to the Land Parliament of Vorarlberg in October 2019. In Styria, the new Land Parliament was elected already in November 2019, while the regular schedule was set in 2020. All elections showed a similar trend: on the one hand, the conservative People's Party, led by the former Federal Chancellor Sebastian Kurz, won far ahead of all other parties. On the other hand, both the right-wing Freedom Party, which had formed part of the former Federal Government, and the Social Democrats lost a large part of their electoral support. The Greens, in their turn, returned to the National Council in which they had lost all their mandates two years before and will form the new Federal Government as a junior partner together with the People's Party in early 2020.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Several amendments to the fragmented Austrian Federal Constitution, which not only consists of the Federal Constitutional Act (Bundes-Verfassungsgesetz, hence: B-VG) but also of a large number of other constitutional documents, were made in 2019, the most important of which was enacted in January 2019.[1] Part of it, concerned with deregulation and the abolition of mutual approval rights of the federation and the Länder, respectively, has already entered into force, while its major part will enter into force at the beginning of 2020. This part will simplify the Austrian allocation of powers since most of the competences under Art 12 B-VG – according to which the federation is responsible to enact framework laws in a number of enlisted fields while the Länder enact implementing laws and execute them – are transformed into either exclusive federal or Land competences, with only some competences remaining as shared powers. Both the federation and the Länder will lose and win powers by means of this amendment, to which also the Social Democrat opposition in the National Council consented so that the constitutional majority of two-thirds could be reached. However, no opposition party was willing to contribute to a constitutional majority for the provision on a headwear ban regarding children in elementary schools. While the federation is re-

[1] BGBl I 2019/14.

sponsible for such legislation in elementary schools, the Länder had agreed to enact similar provisions relating to children in nursery schools in 2018.[2] Nevertheless, the provision on a headwear ban regarding children in elementary schools was enacted as part of an ordinary law[3] and afterwards challenged before the Constitutional Court, which will decide on its constitutionality in 2020. Further to the constitutional reform of January 2019, a new Art 30b was inserted into the B-VG dealing with the disciplinary law regarding civil servants working in the Administrative Office of Parliament, the Court of Auditors or the Federal Ombudsman.[4] A new state aim on water supply and water as a public good was moreover entrenched in the Federal Constitutional Act on Sustainability, Animal Protection, Comprehensive Environmental Protection, Safeguarding of Water and Food Supply and Research.[5]

Numerous other constitutional reforms with very different content and character were proposed by the political parties in the National Council after the breakdown of the Federal Government but none received the necessary majority. A constitutional act on a 'debt brake' targeted at the territorial tiers was indeed approved in the National Council, but did not receive the required majority in the Federal Council.[6] This constituted one of the few cases where the Federal Council, as the second chamber, commands an absolute veto right, since the concerned act would have curtailed Länder competences (Art 44 para 2 B-VG). The debt brake was, however, not opposed for truly federalistic reasons but because of party politics. The same goes for another exercise of the same veto power in February 2019, when the Federal Council did not approve a proposed amendment to the Ecological Power Act 2012.[7] Prior to these two cases, the Federal Council had never vetoed a bill under Art 44 para 2 B-VG. However, neither its previous silence nor these two vetoes are token of a particular federalism-mindedness of the Federal Council but rather of party allegiances.

The most important constitutional events in 2019, however, were triggered by the aforementioned 'Ibiza scandal' and ensuing consequences. On 17 May 2019, a secretly recorded video from summer 2017 was published that showed the Vice-Chancellor – who at that time was not Vice-Chancellor but just the leader of the oppositional Freedom Party – talking privately to several persons, one of whom was supposed to be related to a Russian oligarch but was actually a decoy. The discussion concerned Austrian media and possible donors to the Freedom party as well as future public contracts after the upcoming elections. While both the legality of the video itself, which was recorded by still unknown instigators, and the legality of the statements made in the discussion remain to be clarified by the courts, the political effects were enormous: on 18 May 2019, the Vice-Chancellor resigned from his office. On the same day, however, the Federal Chancellor announced his intention to have new elections, stating that he would be unable to continue his cooperation with the Freedom Party in the Federal Government. In the following days, the Minister of the Interior, who belonged to the Freedom Party, was removed from office by the Federal President on the proposal of the Federal Chancellor. Other Ministers belonging to the Freedom Party resigned from their offices on their own account shortly afterwards.

The Federal Chancellor proposed some new Ministers who were subsequently appointed by the Federal President. However, an ad hoc majority in the National Council, mainly consisting of members of the Freedom Party and the Social Democrats, motioned a vote of no confidence against the whole Federal Government – and for the first time ever in Austrian history, this motion was backed by a majority. The Federal President was thus compelled to formally dismiss the Federal Chancellor and remaining members of his government from office and to appoint an interim Federal Government just for a few days to allow the Federal President the necessary time to seek persons who could form an expert government capable of serving for a couple of months until the elections of the National Council had taken place and a new 'political' Federal Government could be appointed in accordance with the election results.

In these days, the Federal President commended the 'elegance and beauty' of Austria's Kelsenian Constitution, which still granted stability and an orderly legal management of the political events that rather suggested speaking of a 'governmental' than a 'constitutional crisis'.[8] It is indeed fascinating to see how many provisions of the Federal Constitution that had almost been regarded as 'dead law' had suddenly become effective in practice. The Federal President appointed Brigitte Bierlein, hitherto the President of the Constitutional Court, as the new Federal Chancellor; Clemens Jabloner, a highly renowned scholar of constitutional law and former President of the Administrative Court, as the Vice-Chancellor; and several other experts as further members of the Federal Government. All of them were still in office at the end of 2019 and continued to operate as Austria's first expert government until the new Federal Government was appointed in January 2020. While the expert government was highly commended for its professional authority and political self-restraint, the National Council, before and after its election, has shown sometimes immoderate legislative activity across the political parties, which, even despite the refreshing effect of an 'active' Parliament, bears serious risks of short-sighted and uncouth legislation.

[2] See Anna Gamper, 'Austria' (2019) *I·CONnect-Clough Center 2018 Global Review of Constitutional Law* 13, 14.

[3] § 43a Schulunterrichtsgesetz (School Education Act), BGBl I 2019/54.

[4] BGBl I 2019/57.

[5] BGBl I 2013/111 as amended by BGBl I 2019/82.

[6] 928/A 2 July 2019 (XXVI. GP).

[7] 505/A 22 November 2018 (XXVI. GP).

[8] Press Statement of 21 May 2019.

III. CONSTITUTIONAL CASES

In 2018, the Constitutional Court decided on 5,481 cases, while 5,665 new cases were filed, and 1,523 cases were still open at the end of 2018.[9] The statistical data for 2019 has not been published yet, but the number of cases has been rising continuously so that an even greater number of cases may be expected for 2019. Asylum cases, meanwhile, constitute more than half of the decisions, often consisting of prima-facie refusals, because they evidently appear to be without any chance of success regarding the merits of the case. However, in those asylum cases that the Constitutional Court admitted for a closer examination of the merits, it nearly always repealed the challenged decisions taken by the Federal Administrative Court because fundamental rights of the respective asylum seekers, such as family life or the right of equal treatment between foreigners, had been violated.

Apart from the large number of asylum cases, the Constitutional Court also dealt with several cases that had received particular attention in the public because they had been important political projects of the former Federal Government that had been composed by the People's Party and the Freedom Party. These cases were concerned with federal laws that were examined by the Constitutional Court under Art 140 B-VG. However, the Constitutional Court dealt also with several laws of the Länder and indeed repealed some pieces of their legislation. Moreover, due to the wide range of powers exercised by the Court, the majority of decisions were made under other constitutional provisions, in particular Art 144 B-VG, according to which the Constitutional Court examines decisions taken by the administrative courts (such as the aforementioned asylum decisions) whether they either violate constitutionally guaranteed rights and/or any rights because of the application of an illegal general norm, such as an unconstitutional law or an illegal regulation.

1. VfGH 18 June 2019, G 150-151/2018-34, G 155/2018-32: Non-smoker protection I

In this decision, which was based on both an appeal by the Land Government of Vienna and some individual persons, the Constitutional Court decided that the challenged provisions of the Tobacco and Non-Smoker Protection Act were constitutional. This Act had been amended several times over the past years, and the challenged version was the outcome of an amendment taken in 2018.[10] While an exception to the general smoking ban in restaurants should have expired according to the previous legislation, the amendment of 2018, politically demanded by the Freedom Party in the Federal Government, prolonged this exception in order to allow smoking under certain limited conditions in small restaurants or larger restaurants with several rooms if the main room had been dedicated for nonsmokers. The issue had been very controversial among people generally and restaurateurs specifically, and even been the object of a largely supported citizens' initiative ('stop smoking') in 2018, which, however, had not been followed by the desired legislative measures during the former Federal Government. The Constitutional Court upheld the challenged provision, arguing that even though smoking was a social phenomenon detrimental to health, the legal system allowed for many kinds of social behavior in a liberal society, even if detrimental to other interests that had to be balanced with them. According to the Constitutional Court, the lawmaker, being vested with wide discretion regarding this matter, had allowed exceptions from the general smoking ban specifically in restaurants as opposed to other public places where smoking was absolutely prohibited, but only under limited conditions which neither violated the principle of equality, nor any legitimate expectations nor Art 2 or 8 ECHR (which form part of the Austrian Federal Constitution).

2. VfGH 3 October 2019, G 189/2019-8; 4 December 2019, G 258/2019-4; 4 December 2019, G 267/2019-4: Non-smoker protection II

After the breakdown of the Federal Government, which was followed by a phase of coalition-free alliances and political majorities in the National Council, the People's Party sided with the other political parties, except the Freedom Party, in order to amend the Tobacco and Non-Smoker Protection Act once again.[11] This time, the aforementioned exception for restaurants was eliminated so that smoking would be absolutely prohibited in restaurants. This amendment, too, was challenged before the Constitutional Court, which refused the appeals in several decisions in a *prima facie* way. Remarkably, the Constitutional Court also found that an absolute smoking ban was constitutional. The Court shortly referred to its previous judgements, according to which the lawmaker had wide discretion to balance the various interests related to (non-)smoking in restaurants. Also, the equal application of the absolute smoking ban for restaurants, nightclubs and shisha bars – even though smoking is an inherent feature of the latter category of bars – was held to be constitutional. As a result, the Constitutional Court in one and the same year both found the exceptions to a general smoking ban and an absolute smoking ban constitutional provided that the lawmaker made use of its wide discretion in a non-arbitrary and proportional way. The case shows also that the Constitutional Court grants the lawmaker some political discretion but that it is not always predictable in which fields of law and under which conditions this discretion is larger or smaller, as also some of the following cases show.

3. VfGH 11 December 2019, G 72-74/2019-48, G 181-182/2019-18: Digital surveillance

In this decision, the Constitutional Court repealed, at the appeal of a number of members of the National Council according to Art 140 para 1 subpara 2 B-VG, some provisions of

[9] See the Constitutional Court's annual report 2018, https://www.vfgh.gv.at/downloads/taetigkeitsberichte/VfGH_Taetigkeitsbericht_2018.pdf.
[10] BGBl I 2018/13.
[11] BGBl I 2019/66.

the Security Police Act, the Road Traffic Act and the Code of Criminal Procedure. These provisions had been enacted with the intention of combatting crime and terrorism by new digital surveillance measures.[12] Firstly, the Constitutional Court held that a provision which had authorized the security authorities to identify traced vehicles and drivers secretly by the means of digital imaging violated Art 8 ECHR and § 1 Data Protection Act because they interfered too widely with private data and private life, even of third persons, and were thus disproportionate; similarly, the saving and further processing of such data as well as personal data originally derived by 'section-control' instruments on motorways for criminal law-related purposes were too unlimited and therefore unconstitutional. Further, the secret installation of spyware – the so-called 'Federal Trojan' – by the security authorities in order to control encrypted messages was found to be a violation of Art 8 ECHR because of lacking limits and, thus, violating the principle of proportionality. Finally, the constitutionally guaranteed sanctity of the home – protected by Art 9 StGG of 1867 and an act from 1862 for the Protection of the Sanctity of the Home, both of which still form part of today's Federal Constitution – was also violated by a provision that allowed the authorities to enter private homes in order to install the spyware. The Constitutional Court had no doubt that such measures would be highly useful for the detection and prevention of crimes as an important public interest, but at the same time held that an empowerment to exercise such instruments had to be much more limited in order not to establish a 'surveillance state'.

4. VfGH 13 December 2019, G 67-71/2019-53; 13 December 2019, G 78-81/2019-56; 13 December 2019, G 113/2019-27, G 116/2019-27, G 119-120/2019-22; 13 December 2019, G 211-213/2019-21: Social insurance reform

The Austrian (public) social insurance system had consisted of a large number of different social insurance bodies that were vested with the right to self-government (Art 120a-c B-VG). The former Federal Government decided to amalgamate some of these, in particular the territorial health insurance bodies situated in the nine Länder, which were transformed into the new Austrian health insurance agency. A number of appeals were lodged against this and other measures provided by the Social Insurance Organisation Act.[13] However, the Constitutional Court, in four decisions amounting to more than 600 pages, found the main part of the reform, namely the amalgamation as such, as well as some other measures, constitutional; among these, the equal representation of employers and employees in the new Austrian health insurance agency and other social insurance agencies, the elimination of health insurance agencies of individual enterprises and of the controlling councils of the previous social insurance agencies, the Federal Minister's right to supervision regarding the adequacy of the agency's self-administration, the composition of the new head agency and certain transfers from previous bodies and functions to others.

Only some comparatively minor issues were found unconstitutional; these include the provisions regarding capability tests required for the delegation of representatives of employers and employees in social insurance bodies, ministerial supervision over certain resolutions with a big financial impact, new controlling functions of taxing authorities over the social insurance agencies and the Federal Minister's right to bind the standing orders of the agencies to pattern standing orders, to require them to adjourn certain items on their agendas, to give certain instructions and to delegate certain functions or persons. However, the main corpus of this controversial reform was upheld; in particular, this concerned the amalgamation of existing self-governing social insurance agencies, the composition of the representative bodies and the extension of the Federal Minister's supervision, even though the Constitutional Court set some limits to it. Whether the reform will indeed realize the intended modernization and reduction of costs through amalgamation and unification, without being detrimental to part of the insured persons that had hitherto received different health insurance services depending on the respective Land social insurance agency to which they had belonged previously, will have to be seen in the next couple of years.

5. VfGH 12 December 2019, G 164/2019-25, G 171/2019-24: Minimum social aid

In 2019, the federation had for the first time made use of its competence to enact framework legislation regarding minimum social aid under Art 12 para 1 subpara 1 B-VG. Hitherto, the Länder had been competent to legislate fully on that matter, since the federation had abstained from using its framework legislative power. As a result, the Länder had enacted different laws regarding minimum social aid, some of which had been found partly unconstitutional by the Constitutional Court. The former Federal Government intended to reduce minimum social aid throughout the federal state, especially with regard to large families and persons entitled to asylum without adequate language capacities, and therefore enacted a framework law on social minimum aid[14] that, even though it may only regulate the principles of minimum social aid, is binding to the Länder that, in this case, are only allowed to enact implementing laws and execute these. The enactment of the federal framework law induced a number of members of the Federal Council to challenge many provisions of that law (together with some accompanying provisions) before the Constitutional Court under Art 140 para 1 subpara 2 B-VG that, however, repealed only part of them. As far as the distribution of powers was concerned, the Constitutional Court confirmed that the federation was indeed competent to enact such provisions under the respective subject matter in Art 12 para 1 subpara 1 B-VG and that there was still some discretion left for the implementing legislation of the Länder. With regard to the content of these provisions, however, some of them were held

[12] BGBl I 2018/27.
[13] BGBl I 2018/100.
[14] BGBl I 2019/41.

to be unconstitutional. The Constitutional Court granted that the lawmaker had wide discretion with regard to social measures in cases of need and was not obliged to give unlimited aid if undesired social consequences ensued. It was also held to be constitutional to basically provide only degressive aid in cases of families with several children. The challenged provision according to which maximum (but no minimum) quotas, amounting only to very small benefits, applied to the third, fourth, etc., child – other than in the case of adults – violated the principle of equality (Art 7 B-VG) as well as the children's right to optimal care for their welfare (Art 1 of the Federal Constitutional Act of the Rights of the Child). The provision according to which handicapped people received social minimum aid in accordance with the extent of their handicap was considered constitutional, though, as well as the limitation of money transfers to households with several people, since minors and non-cash benefits had been excepted by that law. However, part of the aid was only granted upon the condition of a high linguistic capacity that qualified for a job – B1 level in German or C1 level in English for all EU citizens, and B1 level in German for non-EU-citizens (apart from certain other social integration requirements, including persons entitled to asylum) – which was considered critically by the Constitutional Court. It violated the principle of equality in its various entrenchments (i.e., both with regard to the relationship between Austrian citizens and other EU citizens and with regard to persons entitled to asylum vis-à-vis non EU-citizens) since the Constitutional Court did not find it necessary that these persons should command such a linguistic proficiency in order to get a job. Still, the Constitutional Court admitted that the lawmaker could – in principle, though not excessively – make minimum social aid conditional on the willingness to qualify for a job, also in terms of language.

IV. LOOKING AHEAD

In January 2020, a new coalition government between the People's Party and the Greens was appointed by the Federal President. They will not command a constitutional majority in the National Council, which will make it difficult for them to enact constitutional legislation, quite apart from the large ideological gap between both parties. Further, Land parliamentary elections will take place in Burgenland and in Vienna. Since the former President of the Constitutional Court had to resign because she became the Federal Chancellor heading the expert government, the Court has been temporarily presided over by its Vice-President. The appointment of the new President, which needs a proposal by the Federal Government, was postponed until the new Federal Government takes office since the Federal Chancellor was reluctant to take part in a decision on her own successor. Finally, after the constitutional centenaries celebrated in 2018 (Republic of Austria) and 2019 (female suffrage and some constitutional jubilees in the Länder), the B-VG, enacted on 1 October 1920, will celebrate its 100th birthday in 2020.

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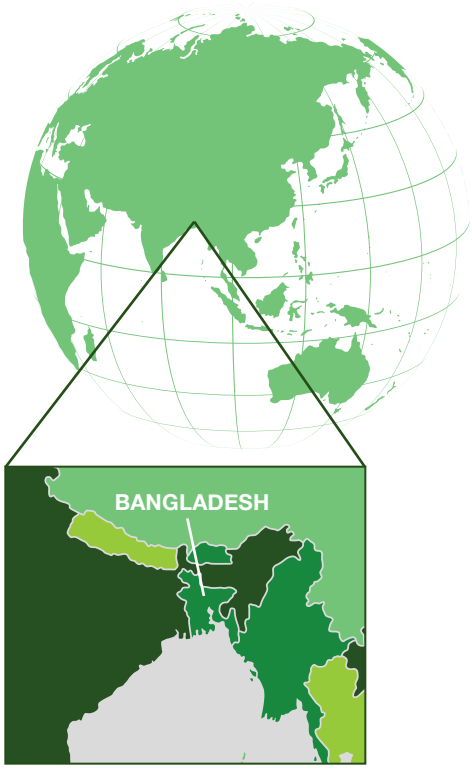

Bangladesh

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I. INTRODUCTION

The year 2019 was significant for Bangladesh democracy with the new Awami League government being installed. The status of participatory democracy has been in decline since 2014, when the major opposition parties started boycotting both national and local elections. The 11th general elections in December 2018 seemed to bring in a silver lining of hope for participatory and deliberative democracy, but it soon began to fade. The elections were marred by massive rigging, resulting in the citizens' loss of interest in voting, which was reflected in the local government elections held in 2019.

The judiciary remained occupied with hearing many bail petitions by the interned opposition members as well as some corrupt junior ruling party leaders. On a positive note, the Supreme Court continued with its selective activism, handing down several landmark judgments in the areas of gender violence, children's rights, environmental protection, and compensatory justice. Regrettably, however, the Court maintained its passivity on the questions of civic and political rights. Notably, the Supreme Court's strength increased in 2019 with new appointments to the High Court Division (HCD).

Interestingly, the last quarter of 2019 witnessed, in a rare fashion, several arrests of the ruling party members on charges of corruption and running illegal casinos. The government reiterated its commmitment against corruption, drugs, and terrorism. The newly formed parliament commenced its first session on January 30 with an 'official' opposition party, an electoral ally of the ruling party, which was not given a share in the Cabinet this time. Parliament enacted 19 bills, including one that allows trade unions and prohibits child labour in the Export Processing Zones.

Below, we begin with major constitutional developments in Part II that covers national and local elections and their aftermaths, lawmaking, and controversies in politics. The third part of this report analyzes some select constitutional cases, followed by the conclusion in Part IV.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

11th Parliament and the New Government

Following the 11th general election of 30 December 2018, the year 2019 began with a lot of controversies and media reports of vote rigging, opposition exclusions, and violence. In our 2018 report, we highlighted the tensions and controversies preceding the 11th national elections. The Awami League (AL) came to power for the third consecutive term with an unprecedented and controversial victory, claiming 288 out of 300 seats. The ruling party has been running the show since 2009. The major opposition, the Bangladesh Nationalist Party (BNP), which boycotted the previous 2014 elections, formed a strategic alliance called the *Oikya Front* (united front) with some other political parties. The alliance had won a total of just eight seats while the BNP secured six seats individually.

The first quarter of 2019 passed in uncertainty regarding the BNP and its alliance joining the parliament. The Constitution provides that if an MP-elect does not take the oath within 90 days of the first session of parliament, their seat will turn vacant. In January, the Secretary General of the BNP, who had won a constituency, declared that his party would not join parliament, claiming that the elections were a farce. However, an elected member of the BNP alliance took oath quickly. Following this dramatic event, all other MPs-elects but the BNP Secretary General joined the current parliament on 30 April. Therefore, one of the BNP seats was declared vacant for failure to take the oath within the deadline. In a by-election in June, another BNP leader won that seat and took the oath accordingly. The BNP is the main rival of the Awami League, and hence the ruling party saw the BNP's joining parliament as a source of legitimacy for the elections. There were even unsubstantiated reports that the government security agencies created pressure on the BNP and its alliance to join parliament.

The government, however, declared the Jatiya Party, an electoral alliance of the ruling party, as the official opposition in parliament. The head of the Jatiya Party, former military dictator and President General HM Ershad, was declared to be the opposition leader. After Ershad's death, his wife Rowshan Ershad succeeded to that position. It has been a curious, authoritarian development in Bangladeshi politics that the 'opposition party' is fully controlled and managed by the ruling party. Unlike the previous term (2014-2018), the official opposition party has been kept out of the current Cabinet.

Following elections, a new Cabinet was formed within a week. This has been the fourth Cabinet under the leadership of Prime Minister Sheikh Hasina. Interestingly, the current 55-member Cabinet has introduced a good number of new ministers, some from among the younger parliamentarians, with almost all senior leaders having been excluded.

Local Government Elections

As a unitary state, Bangladesh does not have regional or provincial governments. Local governments in Bangladesh are statutory bodies elected by direct votes, and they operate at several levels – union of villages, sub-districts, districts, municipalities, and cities.

In 2019, elections were held at the *Upazila* (sub-district) level for 491 *Upazila* Parishads (*Upazila* Councils), which are elected for five years. In 2019, the *Upazila* polls were held for the first time under political party nominations along with the party electoral symbols. Earlier, these elections were non-partisan, although political parties used to informally support their candidates.

The BNP officially boycotted the local government elections as a protest to the controversial 11th national election. Many newspaper reports claimed that over a hundred BNP leaders contested the polls as independent candidates, the majority of whom were expelled from the party for breaching party rules. Later in the year, when some seats of chairs of *Upazila* Councils became vacant in October, the BNP decided to participate in the polls.

Results of these local elections show the increasing party dominance of the ruling party in Bangladesh politics. The Awami League had won the majority of *Upazila* Councils. Around 130 independent candidates had won too, but most of them were indeed defecting members of the Awami League. Like the national elections, these local elections were also allegedly unfair and had witnessed many instances of violence. The polls resulted in an unprecedentedly low turnover, an average of around 35-40%.

When closely examined, both the national and local elections show an increasing democratic backsliding in Bangladesh.[1] Having the same party in power for over 11 years in a row through mostly controversial elections has gradually resulted in a sharp fall in participatory and deliberative democracy. Multiple reports and surveys suggest that rigged elections, violence, and the absence of an effective opposition in parliament for a decade have all contributed to Bangladesh's current problem of democratic backsliding.[2]

Strike on Illegal Casinos: Combating Corruption?

In the last quarter of the year, the government launched a sudden crackdown on illegal casinos that were being secretly run for years by the ruling party members, surprising the common people. The constitution does not prohibit gambling but requires the state to adopt measures against it. This state duty is to be found among the non-justiciable principles of state policy. However, an 1867 colonial law prohibits and penalizes public gambling, which does not cover modern forms of gambling including casinos. In a sudden move, the Prime Minister warned members of the ruling party-affiliated youth's party against their excesses and corruption. Police action soon followed against those who were running casinos and other illegal businesses. As a result, a good number of ruling party people were arrested and prosecuted.

Interestingly, none of the arrestees were prosecuted for running casinos unlawfully but on charges of money laundering or illegal possession of drugs and arms. Back in 2016, the HCD issued a *rule nisi* against the authorities, asking them to stop gambling in social clubs in Dhaka. The Appellate Division of the Supreme Court also asked the authorities to comply with the HCD's order within eight weeks. These orders went in vain until recently, and many have critiqued the police for their failure to take measures against the ruling party members involved in the illegal businesses. The Prime Minister's announcement of 'zero tolerance' on corrup-

[1] See, for example, Abu E. Sarker and Faraha Nawaz, 'Clientelism, Partyarchy and Democratic Backsliding: A Case Study of Local Government Elections in Bangladesh', 26(1) *South Asian Survey* (2019): 70.

[2] See, among others, William Milam, 'Democracy to Autocracy: Bangladesh in Context', *Friday Times*, April 19, 2019, at: https://www.thefridaytimes.com/democracy-to-autocracy-bangladesh-in-context/.

tion and illicit money thus received much acclamation.

New Judicial Appointments

In October 2019, the President appointed nine 'additional' judges to the HCD of the Supreme Court, turning the total strength of that division to 101 judges, of which 79 have been appointed during three regimes of the current ruling party since 2009. Like previous cases, the new 2019 appointments were controversial and based on political considerations. Of the nine new appointees, four were drawn from among the district judges. Two of them were presiding judges in politically sensitive corruption cases involving BNP leaders, including Begum Khaleda Zia, and delivered convictions with severe punishments ranging from various jail terms to the death penalty. They were appointed in supersession of over a hundred senior district judges. Other additional judges were drawn from among the practicing advocates, of whom two were deputy attorneys-general and the rest known to be associated with the ruling party politics at the Bar. Only one appointee was a woman.

New Legislation: The Export Processing Zones (EPZ) Labour Act 2019

Parliament enacted altogether 19 pieces of legislation in 2019, of which the above Act merits a special mention for its relevance to constitutional rights. After a long wait, the EPZ Labour Act 2019 was enacted to prohibit child labor and allow trade unions in the Export Processing Zones (EPZs). The premier labour law of the country (an Act of 2006) fails to give appropriate legal protection to workers in EPZs. In Bangladesh, EPZs that house foreign corporations are considered important industry zones essential to the country's growth. Because of this, trade unions and industrial actions remained prohibited in the EPZs on the assumption that unionists would hamper production.[3] As such, the workers in EPZs were somewhat denied the right to form unions and they had been facing discrimination vis-à-vis other workers in an ordinary factory/establishment. The 2019 Act now allows a limited right to join trade unions, without using the nomenclature. The Act prefers the term 'association' to 'trade union'. In addition, the 2019 Act completely bans child labor in an EPZ area, going a step further than the 2006 Labour Act that prohibits labor of children below the age of 14.

III. CONSTITUTIONAL CASES

1. Human Rights and Peace for Bangladesh (HRPB) v. Bangladesh: River as a Legal Person

A human rights organization, HRPB, brought a judicial review petition before the High Court Division in November 2016, seeking to prevent earth-filling and encroachments in the Turag River near Dhaka. A judicial enquiry ensued which found at least 30 illegal establishments in the Turag, and the Court issued a provisional injunction mandating the demolition of the so-detected illegal structures on the river. In February 2019, the HCD handed down its final decision[4] in the case, issuing several remedies and, interestingly, declaring that rivers have a legal personality and are entitled to enjoy the right to exist and flow. Bangladesh is arguably the first country in the world to accord to all of its rivers the same legal status as humans.

The Court exercised what can be seen as *parens patrae* jurisdiction. It endowed the National River Protection Commission (NRPC) with legal guardianship over Bangladeshi rivers. The Court seems to have been moved by the New Zealand parliament's recent decision to attribute the Whanganui River with legal personhood in 2017, and a similar Indian judicial decision according legal personality to the Ganges and Yamuna Rivers. However, the Indian decision was overturned by the Supreme Court based on the concerned government's argument of the unsustainability of the ruling in cases of natural calamities. In addition, Bolivia and Ecuador have enacted laws to provide for the rights of rivers.

The 283-page judgment on the rivers' legal personality has been hailed as 'historic' or 'momentous' for some extraordinary Court directives such as the one asking the government to initiate measures, within six months, to amend the relevant statute to make the NRPC an independent and efficient body so that it can play the role of guardian of the rivers. Another directive was to ask the Election Commission not to allow any person to run in elections if there was an accusation of river-grabbing against them. We, however, stand cautious in glorifying the rivers' legal personality judgment. Aren't mere judicial remedies pursuant to the relevant laws protecting the rivers and the water bodies enough so far as the Court is involved? We are, however, hopeful that the judgment will play an important catalytic role in ensuring the sustainable use of river resources and protect them from further degradation from pollution and human activities. That the government has already shown proactivity to restore some water bodies, rivers, and canals in Dhaka is a testimony to the probable impact of the judgment.

2. Compensation for Rape Victims

On February 6, a young woman was raped by two policemen in Manikganj inside the police station. The victim and her aunt went to the police station to get money back they had lent to an officer. The creditors were locked up in an adjacent guesthouse for days for showing the 'audacity' of claiming money back from a policeman. During her unlawful internment, the two policemen raped the young woman. The women were threatened that they would be killed if they lodged any complaint. Nevertheless, they brought suit, and the policemen were found guilty in an initial inquiry.

Later, two human rights organizations filed a public interest litigation (PIL) in which the HCD issued an interim compensation order

[3] See the EPZ Workers' Associations and Industrial Relations Act, 2004 (now repealed) and EPZ Workers' Welfare Associations and Industrial Relations Act, 2010.
[4] But the judgment was actually issued in July.

on March 10, 2019, asking the authorities to pay BDT 5 million to the victim. In the field of compensatory jurisprudence, this interim decision was a groundbreaking ruling in that the Court for the first time recognized the state's responsibility to provide reparations to rape victims. Rape and other forms of gender-based violence have been sharply increasing in the past few years. As reported in our 2018 report, the Supreme Court has been increasingly proactive in recent years in awarding compensation under constitutional judicial review jurisdiction, mostly over issues of ordinary wrongs such as road accidents, public negligence, medical negligence, and industrial accidents. Until this interim decision, gender-based violence had always been considered an individual criminal responsibility. Inspired by this decision, the HCD in June 2019 again awarded damages of BDT 5 million against the concerned authorities over a case of the deaths of two victims of rape. This time, the Court also asked the government to frame an interim scheme of rehabilitation and compensation for rape victims.

3. BLAST v. Bangladesh: Gender Equality in the Muslim Marriage Contract

Deciding a writ petition (judicial review) of 2014 by the Bangladesh Legal Aid and Services Trust (BLAST), the HCD on August 25, 2019 handed down a judgment declaring that the Bangla word *kumari* (meaning 'virgin') in the *Nikahnama* (the Muslim marriage contract) is violative of the constitutional principle of equality. A Muslim marriage is registered by way of registering the *Nikahnama*. A column in the *Nikahnama* asks whether the bride is a virgin or not. The Court directed the authorities to modify the *Nikahnama* by replacing that derogatory word with a Bangla equivalent of the term 'unmarried'. It also asked the government to amend the *Nikahnama*, requiring the disclosure of the marital status of both the parties to the marriage in order to ensure gender equality as guaranteed in the Constitution.

4. On Children's Rights

In 2019, the High Court Division delivered a couple of judgments on children's rights. In a notable *suo motu* action, prompted by a newspaper report on the internment of children in correction centres, the Court on October 31, 2019[5] issued an interim directive to immediately release all children under 12 who were given punishments by mobile courts. It also granted bails of six months to all children between 12 to 18 years of age. Later, the Court followed up to see whether those children were released by the authorities. In the *rule nisi* that remains pending at the time of writing, the HCD asked the government to explain why arrest, detention, and convictions of children by mobile courts should not be declared unlawful. Relevantly, mobile courts are conducted by executive magistrates for the summary trial of certain specific offences. The 2009 law establishing mobile courts was struck down by the HCD in 2017 for undermining the constitutional principle of judicial independence (see our 2017 report).[6] An appeal against this decision is now pending before the Supreme Court's Appellate Division.

In *CCB Foundation v. National Human Rights Commission (NHRC),* the HCD in a decision in November abashed the NHRC for its inaction and failure to discharge statutory obligations. It was a 2013 case of torture and brutality to a child domestic worker by her employer in Dhaka. The incident was widely reported and criticized at the time but the NHRC did not take any action in this horrendous instance of the breach of child rights. The constituent Act empowers the NHRC to investigate and take actions in relation to complaints of human rights violations. The CCB Foundation lodged a public interest litigation in December 2018 seeking to compel the NHRC to comply with its legal duties. The Court found that the NHRC was not doing enough in the protection of human rights of the people and asked the Commission to be a vigilant and proactive body. The decision, although it has limitations in terms of its impact on human rights, was hailed by many for its value as a wake-up call to the country's Human Rights Commission.

As the first case on children's rights above shows, the regime of juvenile justice and the state of children's rights in Bangladesh are riddled with problems of injustice despite the existence of the Children's Act 2013. In a criminal appeal (No. 7533 of 2019), the HCD expressed its concern over the inconsistency of a few laws relating to children with the premier child rights statute of 2013. The Court asked the government to amend those laws to remove the inconsistencies so children's rights are better protected. It also found several defects in the 2013 law that are contributing, in its opinion, to a 'chaos' in the adjudication of cases concerning children both at the apex and junior courts.

In an exceptional PIL by a lawyer and her nine-month-old boy, the HCD on 27 October 2019 issued a *rule nisi* and delivered an interim remedy by way of directing the government to set up breast-feeding and baby care corners at all workplaces such as shopping malls, airports, bus stops, and railway stations. This instance of judicial activism has been widely acclaimed by human rights organizations and the general public.

5. On the Right to Health and Others

In order to stop organ trades, the 1999 Human Organs Transplantation Act prohibits donation of human organs by non-relatives of the recipient. As a result, Bangladeshi patients are forced to travel overseas to get the organ transplantations done, which obviously everyone just cannot afford. The 1999 law has, therefore, been in question for violating the people's right to health and freedom of choice as part of the constitutional 'right to life'. In 2017, a writ petition before the HCD challenged the constitutionality of the impugned law. The Court heard seven specialist doctors as experts, all of whom endorsed the rationality of the law, as they feared that poor people would otherwise indulge in selling off their organs haphazardly. The Court

[5] Per Sheikh Hasan Arif and M. Mahmudur Hasan, JJ.

[5] *Kamruzzaman v Bangladesh*, WP No. 8437 of 2011 (HCD, Supreme Court, 11 May 2017).

took a different view and in a decision in December 2019 directed the government that measures be taken to amend the impugned law within six months. Further, the government was asked to stop illicit human organ trading as well as to enact regulations to ensure feasible and safe organ donations by non-relatives.

Earlier, in June 2019, in a PIL case by BLAST, the High Court Division ordered the government to form a committee with the task of issuing guidelines on Cesarean sections at all private and public hospitals and clinics to prevent medically unnecessary Cesareans, the number of which has been very large in the country. In another writ petition, the HCD in February issued a *rule nisi* along with an interim order requiring the government to adopt measures to ensure the health and medical facilities of prisoners. Later, the Court sought a report on existing medical facilities and available physicians from prison authorities, which they requested in November. As the report revealed, there were only 10 doctors in 68 prisons as against 131 posts, while 16 newly appointed doctors did not do any work.

IV. LOOKING AHEAD

In view of the absolute or 'brute' majority in the current parliament with no opposition party in the real sense of the term as a follow-up from the previous term, the ruling party's challenge in 2019 was to open space for wider political participation and democratic practices. This challenge remained largely unmet. Local elections, for example, became extremely controversial while the voters' turnover was at a remarkably low threshold.

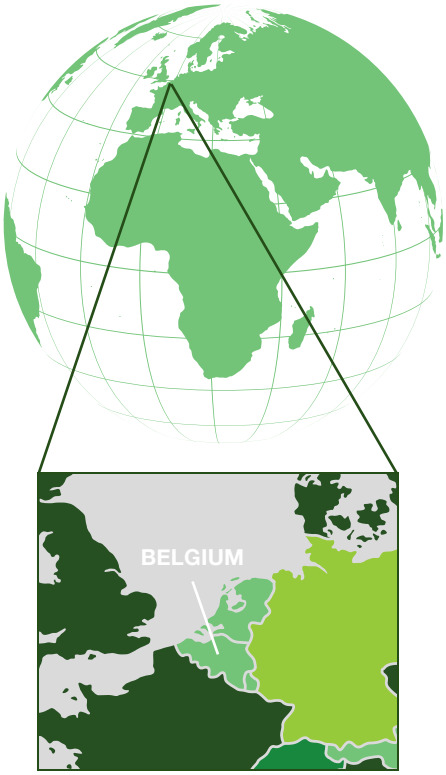
Particularly since 2014, Bangladesh's democracy has been on a sharp decline in terms of multi-party constitutional politics, electoral fairness, freedom of expression, and other democratic norms such as accountability. 2019 did not witness any major developments towards constitutional liberalization except for the real opposition's coming back to parliament. A good development was some instances of judicial activism vis-à-vis rights of the people, but the Court can be critiqued for being selective. Although on a small scale, the drive against corrupt party members merits appreciation. Democracy, after all, means ensuring the people's access to public resources and services without discrimination that corruption tends to deter.

The year 2020 will be a significant and critical one, should the government want to combine its 'development' vision with the people's right to live in a meaningful and quality democracy. Ensuring the creation of a multiparty political environment and means of accountability are all the more important as Bangladesh prepares to celebrate the 50th year of its founding in 2021. The present government has a developmental manifesto titled 'vision 2021', with some infrastructural developments and steady economic growth in mind. On the other hand, there is no denying that corruption and the absence of accountability in the governance system increasingly pose a serious threat to the realization of the founding goals of the nation.

Given the aforementioned action against corruption and illegal casino businesses by party members, we anticipate some law-making and judicial activity to tackle the problem of gambling and casinos. In 2019, reform in the higher education sector was a much-talked-about issue. We therefore also anticipate some major changes in this area, but ensuring academic freedom might prove a challenge if recent restrictions on it are any guide.

V. FURTHER READING

Abdullah Al Faruque & Hussain Mohammad Fazlul Bari, 'Arbitrary Arrest and Detention in Bangladesh', in 19(2) *Australian J. of Asian Law* (2019: Article 10, 2019): <https://ssrn.com/abstract=3396356>



Belgium

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I. INTRODUCTION

Two main evolutions are elaborated below since they constituted important constitutional developments in Belgium throughout 2019. Firstly, the (failed) attempt to amend Article 7bis of the Constitution to enable the adoption of a 'Special Climate Act for Belgium'. Secondly, the adoption of a list of constitutional provisions susceptible for amendment, the subsequent elections held on 26 May 2019 and the still ongoing arduous formation of a federal government. 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 as regards freedom of religion and worship, access to justice, (bio-) ethical questions, the fight against terrorism, environmental protection and freedom of establishment. Finally, the overview looks ahead to several interesting pending cases as well as a current and future vacancy on the Constitutional Court.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Climate Change and the Constitution

Following the important mobilisation around the climate crisis in Belgium (and around the globe) at the end of 2018 and towards the spring of 2019, a group of academics of various universities prepared a draft of a 'Special Climate Act for Belgium'[1] and presented it to the public on 1 February 2019.[2] The draft built on a series of academic seminars and a national dialogue on climate change governance organised in 2018,[3] and was meant to improve climate governance in Belgium. The competences to deal with climate change mitigation and adaptation are indeed scattered over the federal, regional and, to a lesser extent, community governments. The proposal concerned a special act – to be adopted by a two-thirds majority as well as by a majority of both linguistic groups in the Federal Parliament – that aims to strengthen the coordination of climate policies between the federal government and the federated entities of Belgium, to set long-term and ambitious climate policy objectives and to provide for a legal basis to implement Eu-

[1] http://hdl.handle.net/1854/LU-8600326

[2] http://www.usaintlouis.be/sl/actu/38240.html

[3] https://www.climat.be/fr-be/politiques/politique-belge/politique-nationale/gouvernance-climatique/

ropean Union (EU) Regulation 2018/1999.[4] That regulation provides, *inter alia*, that periodically, integrated national energy and climate plans be prepared and submitted to the European Commission, with national objectives, targets and contributions for the five dimensions of the Energy Union, subject to public consultation and in the framework of a national multilevel climate and energy dialogue. Furthermore, long-term strategies and integrated national energy and climate progress reports should be set up.

The proposal was immediately picked up by a series of parliamentarians from different parties, and a special parliamentary committee was set up to consider it.[5] The legislative section of the Council of State was of the opinion that an additional legal basis in the Constitution was needed to be able to include climate change policy principles and objectives in such a special act. Therefore, a proposal to complement Article 7bis of the Constitution, providing that in the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objectives of sustainable development, with a sentence saying '*in particular, they co-operate towards an effective climate policy in accordance with the objectives, principles and modalities established by a law adopted by a majority laid down in Article 4, last paragraph*', was introduced in Parliament.[6] It was adopted by a majority in the relevant committee but failed to obtain a two-thirds majority in the Plenary Assembly of the Chamber of Representatives on 28 March 2019 after a long and lively debate[7] that was intensely followed by climate activists.[8] This may be seen as temporary setback, as Article 7bis has again been included in the articles of the Constitution that can be amended in the current legislature.

2. Constitutional amendment, elections and government formation

After intense debate and controversy between Parliament and the minority government (that fell and turned it into a caretaker government with limited powers on 21 December 2018) regarding the latter's power to veto the list of Parliament with constitutional provisions susceptible to amendment, a (limited) list with constitutional provisions susceptible to amendment was approved by Parliament and the government. According to the constitutional amendment procedure of Article 195 of the Constitution, the approval of that list is necessary to be able to amend the Constitution with a two-thirds majority in the second reading after intervening elections.

Elections for the European Parliament, the Federal Parliament and the parliaments of the federated entities (the three Regions and the three Communities) were held on 26 May 2019. Within a few months, governments on the level of the Regions and Communities were established. However, on the federal level, the formation of a government again turned into a cumbersome process (after the 2010 elections it took 541 days, an unofficial world record). To explore the possibilities to form a government coalition, the King appointed Didier Reynders (MR) and Johan Vande Lanotte (SP.A) as *informateurs*, subsequently Geert Bourgeois (N-VA) and Rudy Demotte (PS) as *pre-formateurs*, followed by Paul Magnette (PS) as *pre-formateur* and then Joachim Coens (CD&V) and George-Louis Bouchez (MR) as *informateurs*. After months of exploring possibilities in vain, the puzzle seemed almost impossible, especially given the tension between the largest Flemish party, N-VA (right-wing and nationalist), and largest Walloon party, PS (left-wing), and from time to time even a veto to govern with each other.

III. CONSTITUTIONAL CASES

In 2019, the Belgian Constitutional Court delivered 206 judgments and handled 266 cases in total. Regarding the nature of the complaints, conflicts of competences between the federated entities and the federal state only represented 5% of the judgments in 2019. The majority of cases concerned the infringement of fundamental rights. In 2019, the principle of equality and non-discrimination was still the most invoked principle before the Court (54%), followed by review of compliance with the socioeconomic rights of Article 23 of the Constitution (8%), the right to private and family life of Article 22 (7%), the guarantees in taxation matters of Articles 170 and 172 (6%), the jurisdictional warranties of Article 13 (4%), the rights of the child of Article 22bis (4%), the personal freedom and legality of criminal charges of Article 12 (2%), the property rights of Article 16 (2%) and the freedom and equality in education of Article 24 (2%). References were made to the jurisprudence of the ECtHR in 58 cases. Moreover, the jurisprudence of the CJEU was also regularly reflected in the judgments of the Constitutional Court, with references to this case law in 27 cases. References to other sources of international law can be found in 34 cases. The Court also referred four cases for a preliminary ruling to the Court of Justice of the European Union (CJEU).

1. Freedom of Religion and Worship

A Walloon decree in May 2017 dealt with the recognition and the obligations of institutions entrusted with the management of the goods and incomes generated by recognised

[4] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council, *O.J.* N° 328 of 21.12.2018.

[5] https://www.dekamer.be/FLWB/PDF/54/3517/54K3517004.pdf

[6] https://www.dekamer.be/FLWB/PDF/54/3642/54K3642001.pdf

[7] https://www.dekamer.be/doc/PCRI/pdf/54/ip278.pdf 76 MPs were in favour, 66 MPs were against.

[8] https://www.commondreams.org/news/2019/03/25/ahead-key-vote-belgians-occupy-climate-demand-constitutional-amendment

religions. This decree established a procedure for the recognition of local religious denominations derived from religions recognised by the federal state. It also contained a registration procedure that applied to local religious denominations derived from both the religions recognised and non-recognised by the federal state. To be recognised, the religious denomination has to be registered as a legal entity for at least three years. In its judgment no. 2019/203, the Constitutional Court assessed whether the Walloon legislature (1) exceeded its powers, (2) violated the right to freedom of religion and worship and (3) acted in a discriminatory manner.

Regarding (1), the Court held that the Walloon Region was competent to adopt the contested decree based on its competence to manage goods and incomes generated by the recognised religions. However, the Court considered that the Walloon legislature, in view of the federal competence as to the recognition of religions, was not competent for the registration procedure for the religions not recognised by the federal state. The decree was only annulled as to this point. Regarding (2), the Court recalled that the right to freedom of religion and worship includes the organisational autonomy of religious denominations and that interferences with this right must be justified, proportionate to the legitimate aim pursued and necessary in a democratic society. The Court stated that the registration of local religious denominations and the requirement of having a legal structure three years before the application for recognition is submitted are legitimate objectives. Moreover, while the local religious denomination must register as a legal entity, it does not necessarily have to adopt a legal personality. Consequently, the Court ruled that the Walloon decree did not violate the right to freedom of religion and worship. Regarding (3), the Court did not consider the Walloon decree to be discriminatory, inter alia, because the requirement that an application for recognition must contain a solemn declaration concerning compliance with the fundamental rights and freedoms applies to all recognised religions.

Finally, the Court, called to decide on whether the Unstunned Slaughter Ban introduced in the Flemish Region is compatible with the freedom of religion, referred for a preliminary ruling to the EU Court of Justice (case no. 53/2019). The most important question was whether EU Member States are permitted under EU law to adopt rules such as those contained in the Decree of the Flemish Region.

2. Access to Justice

In judgment nos. 2019/129 and 2019/131, the Constitutional Court annulled the provisions of the Flemish Decree on Local Governance that had completely abrogated the right of one or more citizens to engage in legal proceedings on behalf of the municipality and province (the so-called right to 'substitution'). The right to substitution provides important procedural options for individual citizens in legal proceedings on environmental law, such as under the 1993 Act on the prohibitory injunction in the sphere of the environment. This act grants citizens a right to engage in legal proceedings for the protection of the environment (e.g., challenging an illegal permit) without having to provide a personal interest in the matter. In this case, the court can order a prohibitory injunction when practices cause serious damage to the environment.

In these judgments the Court ruled that, by abrogating these provisions, the legislature violated Article 23 of the Belgian Constitution (which enshrines social and economic rights, such as the right to a healthy environment). The Court referred to the 'standstill obligation', which imposes on the government the obligation to maintain the existing level of protection unless there are reasons of public interest for not doing so. The Court stated that by abrogating the provisions, the Flemish legislature had significantly reduced the level of protection provided by the right to a healthy environment without any reason of public interest. First, legal action by citizens on behalf of the municipality or province only aims to subject the lawfulness of an act to judicial review. This perpetuates the participation by citizens to a democratic state governed by the rule of law. Second, the existence of an alternative legal remedy does not constitute a reason of public interest that could justify a significant reduction of the existing level of protection, especially when it provides for a higher threshold for accessing justice, e.g., when citizens would be required to unite in advance. Third, it is up to the courts to impose sanctions for possible abuse by citizens.

3. (Bio-)Ethical Questions

In 2019, the Court delivered several judgments that addressed questions of a(n) (bio-) ethical nature. For instance, in case no. 89/2019, it upheld the differential treatment between the criminalisation of all sexual relations between an adult and a minor younger than 16, and the criminalisation of only those sexual relations between an adult and a minor older than 16 that happened without the latter's consent. In case no. 19/2019, the Court held for the first time that strict scrutiny is necessary in cases involving differential treatment based on sexual orientation. It had only done so before in relation to 'birth' and 'gender'.

In the groundbreaking judgment no. 99/2019, the Court found the federal Gender Recognition Act (GRA) of 25 June 2017 unconstitutional on several points. The case was brought before the Court by three Belgian LGBTIQ+ interest groups. The GRA had considerably facilitated the procedure to change one's officially registered sex by abolishing all requirements of a psycho-medical nature with which transgender persons primarily had to comply. In other words, the legislature based the new framework for legal gender recognition on the principle of gender self-determination. However, the Court considered that the Act contained a lacuna insofar as the sex registration was limited to the binary categories of male and female. From the perspective of gender self-determination, it found it not reasonably justified that persons with a non-binary gender identity were still required to accept a sex registration that did not correspond to their actual gender identity. Although the Court suggested some ways to implement its judgment – such as the addition of one or more categories for sex registration, or the removal of sex and gender as elements of the individual civil status – it falls solely upon

the federal legislature to remedy the unconstitutionality. In addition, the Court also annulled the GRA provisions that rendered legal gender recognition in principle irrevocable and only allowed for a single change of the first name for transgender persons. This means that gender-fluid persons will be able to repeatedly change their registered sex based on the same administrative procedure.

In case no. 122/2019, the Court also had to address the temporary exclusion from blood and plasma donation of, *inter alia*, men who have sex with men (MSM) during twelve months after their last sexual contact with another man. The legislature had ended the permanent ban of MSM in 2017, following a 2015 judgment by the EU Court of Justice in the Léger case. In its judgment, which thoroughly reviewed all scientific materials available to the legislature, the Constitutional Court upheld the exclusion of MSM from blood donation, yet annulled their exclusion from plasma donation, given the possibility to apply less restrictive means. It ordered the legislature to remedy the unconstitutionality within a time limit of two years.

4. Fight Against Terrorism

The fight against terrorism is a permanent concern for all public authorities. An article of the Code of Criminal Investigation introduced by the Act of 17 May 2017 on promoting the fight against terrorism sets out two separate obligations for members of staff of social security institutions bound by professional confidentiality. The impugned legislation requires them to report of their own accord to the public prosecutor any information gathered in the course of their duties 'that may constitute serious evidence of a terrorist offence' under the Criminal Code, provided that this does not involve personal medical data (active reporting requirement). The same persons are required to report without delay to the public prosecutor any administrative information which the latter requests and deems necessary to obtain in connection with the investigation of terrorist offences, even if such information is covered by the professional confidentiality by which the staff member who obtained it is bound (passive reporting requirement). The Act makes refusal to report the information a criminal offence.

In case no. 44/2019, the Court upheld the passive reporting requirement. It ruled that the exception to professional confidentiality resulting from the impugned reporting requirement is compatible with the right to respect for private life. The active reporting requirement, however, was considered to be incompatible with the principle of offences and penalties being established by law. Pointing out that the commission of a terrorist offence required, *inter alia,* criminal intent, the Court took the view that a member of staff of a social security institution had neither the skills nor the resources necessary for ascertaining whether another person intended to commit a terrorist offence. It accordingly concluded that the impugned legislation did not enable the professionals it covered to determine satisfactorily whether they were committing a criminal offence by reporting information because they wished to comply with the law in question. The Court consequently held that the impugned terms employed to define the active reporting requirement were too vague and therefore annulled the requirement.

In another case, the Court scrutinized the Act on the Intelligence and Security Service. The absence of an active a *posteriori* notification by that Service of the application of secret surveillance measures was found to be incompatible with the right to respect for private life. The Court considered that a mere notification 'on-demand' renders the possibility to challenge those measures by the person to whom they were secretly applied 'purely theoretical'. The use of mobile cameras in public places by agents of the Service, however, was found to be constitutional (case no. 41/2019).

In case no. 135/2019, the Court referred several preliminary questions to the EU Court of Justice in light of the review of the law requiring transportation providers and travel operators to communicate passenger information. The Court inquired, among other questions, whether the system of the PNR Directive, transposed by the contested law, is compatible with the right to respect for private life and the protection of personal data.

5. Environmental Protection

Local governments across the country are trying to improve air quality, among other measures, by setting up low-emission zones (LEZ). Access to a LEZ is limited or banned for the most polluting forms of motorised traffic. An ordinance passed by the Brussels legislature allowed its government to set up a permanent LEZ for the entirety of the Capital Region. In its judgment no. 37/2019, the Constitutional Court first adjudicated a competence issue. The general police of traffic and transport is a federal competence. The Court nevertheless agreed that setting up a LEZ was a matter of environmental protection and complementary traffic regulation, both belonging to the competences of the Regions. Second, the Court concluded that the right to property of car owners does not necessarily take precedence over environmental or health interests. Given Belgium's obligations under EU law to improve air quality, the limitation of property rights was not unreasonable. Third, taking into account a number of flanking measures, the LEZ policy was not discriminatory towards financially less well-off citizens.

6. Freedom of Establishment

Decades ago, the Belgian legislature adopted a particular arrangement for port labor. It is based on the principle that only recognised port laborers can engage in this economic activity so that whoever is in need of port labor is forced to recruit recognized port laborers. Not doing so is a criminal offence. The rationale for the monopoly was safety and specialisation. No such monopoly exists for labor, other than (un)loading ships, outside of port areas. Of course, this type of legislation raises both non-discrimination issues and concerns regarding freedoms of services and establishment under EU law. Limitations of these freedoms can only be justified under specific conditions. In its judgment no. 94/2019, the Constitutional Court referred two preliminary questions to the EU Court of Justice. The first question aimed at interpreting the freedom of establishment provided in Article 49 TFEU (Treaty on the Func-

tioning of the European Union). This would allow the Constitutional Court to assess the justifiability of the port labor system. The second question concerned the possibility of provisionally maintaining certain effects of the system in case it was found to violate EU law.

IV. LOOKING AHEAD

On January 1, 2020, 320 cases were pending before the Constitutional Court. Some of these cases are of interest to an international audience. Our report on 2018 already mentioned some important cases that were still pending at the end of 2019. The Court must still decide whether the Unstunned Slaughter Ban introduced in the Flemish and Walloon Regions is compatible with the freedom of religion, the separation of church and state and the freedom of labour and enterprise. Various pending cases concern the right to privacy; in particular, the obligation to communicate personal data (for instance, client data by Airbnb hosts and Air companies) to the authorities. Furthermore, cases are still pending on the Act to Combat Squatting and the act providing that there should be a minimum service of the railways in case of industrial action. Other internationally relevant pending cases since 2019 relate to the constitutionality of the digital fingerprint and the fireworks ban.

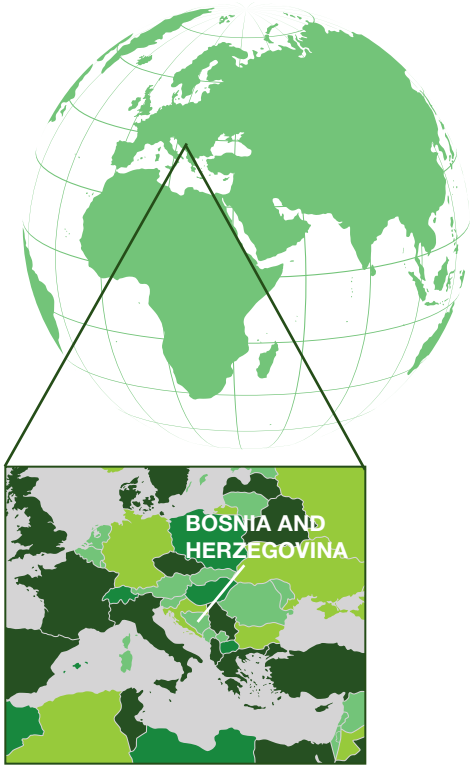
As reported in our 2018 contribution, Justice Erik Derycke, from the Dutch-speaking group of former MPs, retired from the Constitutional Court in October 2019. Yasmine Kherbache replaced him. She was, on the proposal of the Flemish Socialist Party (SP.A), nominated by a broad majority of the Chamber of Representatives, and subsequently appointed by the King. She announced shortly before the vote in Parliament that she had taken steps to renounce her second, Algerian, nationality, securing in that way the votes of the Flemish Nationalist Party (N-VA) that held an opinion that a Judge of the Constitutional Court could only be loyal to one nationality, and hence not to a second one.[9] With this appointment, the Court now counts four female judges, all belonging to the Dutch-speaking group, and thus meets the minimum gender balance requirement introduced in the Special Act on the Constitutional Court in 2014.

Justice Jean-Paul Snappe, from the French-speaking group of former MPs, retired in November 2019. The nomination of a successor, on a proposal by the French-speaking Green Party (*Ecolo*), by the Senate – according to an unwritten proportionality rule that should assure diversity of opinions amongst the justices of the Court – proved to be problematic. The proposed candidate, Zakia Khatabbi, former co-president of Ecolo, was depicted by the N-VA as an 'open border activist', overcritical of the policies of the former center-right federal government and not fit to become a justice of the Court, as she does not hold a law degree.[10] The Flemish Far-Right Party (*Vlaams Belang*) also took that position. During a second vote in the Senate on 17 January 2020, she missed the necessary two-thirds majority for the nomination by two votes, so the procedure has to start all over again with a call for candidates. Another replacement will be necessary when the Dutch-speaking President André Alen retires in September 2020. The various replacements and nominations of justices of the Court fueled public and academic debate about the current rules and procedures. The main critics and proposals argue that one should review the compulsory quota of six justices with a political background, whether a law degree should be required of former MPs and whether public hearings should be held by Parliament in the course of the nomination procedure.[11]

[9] https://www.dekamer.be/doc/PCRI/pdf/55/ip013.pdf, p. 27.

[10] The Special Act on the Constitutional Court does not require former MPs to hold a law degree in order to become a judge on the Constitutional Court.

[11] T. Moonen, *House of Courts?* De vernieuwing van het Grondwettelijk Hof, *Rechtskundig Weekblad*, 2019-20, 443-456.



Bosnia and Herzegovina

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I. INTRODUCTION

During 2019, the Central Election Commission of Bosnia and Herzegovina (B&H), which organizes and conducts the country's elections, was placed under full scrutiny. In 2016, the Constitutional Court of B&H ruled that several provisions of the Election Law were not in conformity with B&H's Constitution. To date, the Parliamentary Assembly has not taken steps to amend the Election Law. This is because several ethnic political parties continue to have a decisive influence in the Parliamentary Assembly. Decisions are then the result of balancing interests among constituent peoples. As in the case of the Election Law, established bargaining instruments and mechanisms have caused a status quo in decision-making procedures. The Central Election Commission has tried to apply the decision of the Constitutional Court by issuing an instruction. Ever since, the instruction has caused controversy and raised several constitutional cases in the Constitutional Court.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Election Law governs elections at all levels in B&H. The Central Election Commission organizes and conducts elections. In 2016, in its decision U-23/14, the Constitutional Court ruled that certain provisions of the Election Law were not in conformity with the Constitution. One of the provisions was that 'each of the constituent peoples[1] shall be allocated one seat in every canton'. Other unconstitutional provisions included those that define the number and ethnic belonging of the delegates of the House of Peoples in the Parliament of the Federation of B&H based on the results of the 1991 census.[2] Nevertheless, the Parliamentary Assembly failed to amend the Election Law within the stipulated time. This forced the Constitutional Court to render the provisions ineffective in 2017.

Meanwhile, the 2018 elections were approaching. Because of the complex situation, the Central Election Commission issued the Instruction Amending the Instruction on the Procedure for Administering Indirect Elections for the Bodies of Authority in B&H under the Election Law of B&H (the Instruction on Amendments). According to the Constitution of the Federation of B&H, the constituent peoples and Others[3] shall be proportionately represented. However, such proportionate representation should be based on the results of the 1991 census. In fact, all calculations requiring demographic data should be based on the 1991 census until Annex 7 of the Dayton Peace Agreement[4] is fully implemented. In the meantime, during 2013, the Central Census Bureau of B&H organized and conducted the first census after

[1] There are three constituent peoples: The Bosniaks, Croats, and Serbs.

[2] Others are those that are not constituent peoples (national minorities and nationally undeclared).

[3] The 1991 population census in B&H was the last census before an armed conflict in the country broke out in 1992. After the conflict, it was used as the basis to ensure proportional representation of the constituent peoples.

[4] The General Framework for Peace in Bosnia and Herzegovina contains 11 annexes, where Annex 4 is the Constitution of Bosnia and Herzegovina. It is also known by different names including the Dayton Accords, Dayton Agreement and the Dayton-Paris Agreement.

the armed conflict that took place between 1992 and 1995.

There are two problems related to this. Firstly, a comparison between the 1991 census and the 2013 census underlines the differences in ethnic composition before and after the 1992-1995 conflict. The comparison between the two censuses shows that ethnic belonging is territorially embedded. Some cities and municipalities that were once predominantly populated by one constituent people became almost entirely populated by another. Some cities and municipalities became unpopulated. Some cities and municipalities that once had a mixed population became almost entirely populated by one constituent people. Secondly, Annex 7 of the Dayton Peace Agreement regulates the return of refugees and displaced persons to B&H after the conflict. It is the Office of the High Representative that is authorized to deliver a decision to confirm that Annex 7 is fully implemented. Since the Office has not made this decision so far, Annex 7 is not considered to have been implemented. At the same time, one cannot disregard the ruling of the Constitutional Court. This raises a question about the distribution of mandates according to decision U-23/14 of the Court and the Instruction on Amendments. This is because there have been two conflicting opinions about which census should be applied as a basis for calculations. Because of this, several constitutional cases related to the issue were brought before the Court.

III. CONSTITUTIONAL CASES

1. U-24/18: Constitutionality of the Instruction on Amendments – Deciding on implementing regulations

This case challenged the constitutionality of the Instruction on Amendments. The applicant (27 representatives in the House of Representatives of the Parliament) wanted a review of the constitutionality of the Instruction on Amendments. The applicant specifically referred to decision U-23/14. As previously mentioned, this decision established that certain provisions of the Election Law were not in conformity with the 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 define the number and ethnic belonging of the delegates in the House of Peoples in Parliament based on the 1991 census. The Constitutional Court ordered the Parliamentary Assembly 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 Court established that the Parliamentary Assembly had failed to enforce its decision within the given time limit, and rendered the provisions ineffective the day after its ruling was published in the Official Gazette of B&H. The applicant argued that the Central Election Commission used the 2013 census when it issued the distribution of mandates. According to the applicant, this was contrary to the Constitution and the Election Law. Further, the applicant pointed out that the Instruction on Amendments outlines the distribution of mandates partly contrary to decision U-23/14. Because of this and because these are the issues arising from the Constitution, the applicant concluded that the case met the conditions for decision-making and review by the Constitutional Court.

The Constitutional Court rejected the request as inadmissible since it was not competent to make a decision. The Court concluded that the impugned Instruction on Amendments was an implementing regulation, passed by the Central Election Commission to implement the Election Law in the process of administering indirect elections for the bodies of authority in B&H, which determined the preliminary number of delegates to the House of Peoples of the Parliament to be elected from cantonal assemblies. Taking into account the fact that it concerned a temporary provision, the Constitutional Court concluded that the case was not about a general act, the constitutionality of which it could review. In the content of the request in the case at hand, the Constitutional Court did not find any reason why the impugned implementing act of the Central Election Commission would raise an issue of violation of human rights and fundamental freedoms. Therefore, the Court concluded that it was not competent to decide on the review of the constitutionality of the impugned act of the Central Election Commission.

2. U-1/19: Compatibility of the Instruction on Amendments – Deciding on the merits of a dispute pending before an ordinary court

This case challenged the compatibility of the Instruction on Amendments. The applicant (judge of the Court of B&H) filed a request[5] for a review of the compatibility of the Instruction on Amendments. The applicant stated that several plaintiffs (three political parties and the Sarajevo Canton) initiated an administrative dispute against the Central Election Commission that issued the Instruction on Amendments. The applicant argued that the statement of claim was based on a review of constitutionality and lawfulness of a bylaw. Based on this, the applicant concluded that the case met the conditions for decision-making and review by the Constitutional Court. Additionally, the applicant stated that this case was of fundamental importance because the aim was to resolve the issue of constitutionality completely.

The Court rejected the request as inadmissible since the it was not competent to make a decision. The Court concluded that the case was not about the situation referred to in Article VI(3)(c) of the Constitution.[6] In earlier cases, the Constitutional Court had judged that this jurisdiction of the Court (the possibility granted to any court in B&H to refer an issue to the Court) could not be interpreted that it had the jurisdiction to decide the merits of a dispute initiated before an ordinary court. The Constitutional Court established that it could decide on the compatibility of law with the Constitution if that law was to be applied by the ordinary court resolving the dispute under its subject matter jurisdic-

[5] Initially, the applicant filed two requests. The Constitutional Court took a decision on the joinder of the requests in respect of which the Constitutional Court conduced one set of proceedings and took a single decision.

[6] The Constitutional Court has appellate jurisdiction over issues under the Constitution of B&H arising out of a judgment of any other court in the country.

tion. The Court pointed out that its decision on the compatibility of law with the Constitution does not deal with the issue of whether and in which manner the ordinary court will apply the law in the case pending before it. Therefore, the Constitutional Court could not decide on the merits of a dispute pending before an ordinary court. Finally, the Court referred to the relevant views taken in its decision U-24/18.

3. U-3/19: Constitutionality of the Instruction on Amendments – Restating a previous decision

This case challenged the constitutionality of the Instruction of Amendments. The applicant (chair of the House of Representatives of the Parliamentary Assembly of B&H) filed a request for review of the constitutionality of the Instruction on Amendments. The applicant argued that the Instruction on Amendments was not in conformity to the Constitution of B&H, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). The applicant alleged that the Central Election Commission was not responsible for the adoption of the Instruction on Amendments as the Election Law of B&H does not provide for the possibility or authority based on which the Commission could do so. Thus, the applicant claimed that the Commission assumed the role of the legislator. Further, the applicant found troublesome that the implementation of Annex 7 of the Constitution had not been completed. Even in the event of the completion of the implementation of Annex 7, it was the legislator that was obliged to prescribe specific criteria based on which the seats of members of the House of Peoples of the Parliament of the Federation of B&H shall be filled. Then, the Central Election Commission may determine the number of delegates from each constituent people and the Others who are selected. The applicant claimed that the Constitutional Court, under the provision of Article VI(3)(a) of the Constitution[7] had jurisdiction to deal with this matter since the case relates to a dispute between the institutions of B&H.

The Constitutional Court rejected the request as inadmissible. The Court pointed out that it already decided the same issue and adopted its decision U-24/18, and it did not follow from the allegations presented in the request that there was a basis for adopting a different decision. The Court noted that in the present request, the applicant presented a different argumentation to a certain extent when challenging the instruction of the Central Election Commission. However, the Court held that the essential complaints were the same, although the applicant's starting point was different, and that the responses given in decision U-24/18 may apply to the present case. Having adhered to the views expressed in decision U-24/18, the Constitutional Court held that the applicant's arguments were not capable of calling into question the view which the Court expressed in its decision U-24/18, which may (also) be applied to the allegations expressed in the present request for review of constitutionality.

IV. LOOKING AHEAD

In 2019 the Constitutional Court had a handful of cases in which it decided on (1) a violation of the right to a fair trial in relation to the adoption of a decision within a reasonable time limit and (2) a violation of the right to effective legal remedies. In 2020, the Constitutional Court of Bosnia and Herzegovina will most likely continue to be overburdened with appellations that it 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.

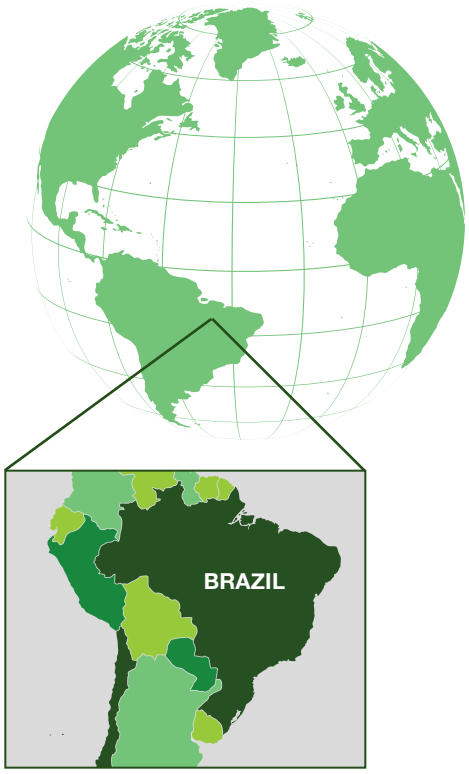
V. FURTHER READING

P. Popelier and M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism, Managing Multinationalism in Multi-tiered Systems,* Cham: Palgrave Macmillan (2019).

M. Sahadžić, 'Mild Asymmetry and Ethnoterritorial Overlap in Charge of the Consequences of Multinationalism. A Country Study of Constitutional Asymmetry in Bosnia and Herzegovina', in P. Popelier and M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism, Managing Multinationalism in Multi-tiered Systems,* Cham: Palgrave Macmillan (2019).

P. Popelier and M. Sahadžić, 'Linking Constitutional Asymmetry with Multinationalism. An Attempt to Crack the Code in Five Hypotheses', in P. Popelier and M. Sahadžić (eds.), *Constitutional Asymmetry in Multinational Federalism, Managing Multinationalism in Multi-tiered Systems,* Cham: Palgrave Macmillan (2019).

[7] The Constitutional Court of B&H has exclusive jurisdiction to decide any dispute that arises under the Constitution of B&H between the Entities or between B&H and an Entity or Entities, or between institutions of B&H.



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I. INTRODUCTION

In 2020, Brazil joined a growing list of countries governed by elected leaders with a populist and conservative profile. President Bolsonaro was elected on a political platform that included kick-starting the economy, embracing the law and order agenda (including easing restrictions on guns, cracking down on crime, and protecting police or military officers who kill on duty), and implementing conservative policies that particularly targeted indigenous, LGBT, sexual, and reproductive rights as well as environmental protection. During a first year in office described by most observers as turbulent and divisive, a set of constitutional questions emerged: Would democratic institutions defend themselves from potential attacks? Or would the country follow the path of democratic backsliding?

The good news is that the 1988 Constitution built a rather solid system of checks and balances with an extensive catalogue of fundamental rights that proved to be capable of limiting executive power. Interestingly, one of the characteristics of the Brazilian political system that has been subject to the most criticism, "coalition presidentialism" – requiring the President to form a stable legislative coalition allowing for governability in the context of a hyper-fragmented multi-party system – has served as a shield against illiberal setbacks.

Because Mr. Bolsonaro runs the country without a steady majority coalition in Congress (in part because he refused to do so, calling it "old politics"), Congress has taken a clear lead in policymaking and in checking the President's power. On the one hand, Congress has pushed ahead the President's economic reform. For instance, the passing of a major pension reform was mainly attributed to the efforts of the House Speaker, Rodrigo Maia. On the other hand, it rejected or amended provisional measures (temporary executive decrees which are submitted to Congress for analysis and approval) used by the President to advance his conservative political agenda. One of the most prominent cases was the rejection by Congress of the provisional measure that transferred the power over indigenous land demarcation from Brazil's National Indigenous Affairs Agency to the Ministry of Agriculture, in an effort to paralyze land demarcation.

In this context, while the Brazilian Supreme Federal Court (STF) was not the protagonist, it did not serve merely as a bystander. As this report demonstrates, in exceptional but relevant cases, the Court curbed overtly undemocratic measures (e.g., by prohibiting

the elimination of participatory councils) and sent clear signs that it would continue to uphold minority rights (e.g., by criminalizing homophobic acts). In all of these cases, Supreme Court decisions have been either unanimous or agreed to by a large majority of the Justices. Yet, as this report also reveals, the Court's most divisive decisions and most impactful workload continued to be devoted to examining criminal questions related to Operation Car Wash and the fight against corruption more generally.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In our review for the *2018 Global Review of Constitutional Law*, we concluded that the Brazilian Supreme Court would face a difficult dilemma in 2019, the first year of President Jair Bolsonaro's term. In view of the growing polarization in the country and the potential attacks on Brazilian democracy by a populist government associated with the defense of Brazil's last civil-military dictatorship (1954-1985) and contempt for minorities, the odds were that the Supreme Court would be a central player in constraining the executive's power. Despite this scenario, its Chief Justice, Dias Toffoli, suggested at the time that the Court would adopt more self-restraint and let political matters be decided by political agents. The dilemma was self-evident. As we argued, "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."[1]

2019 is over and that dilemma, in retrospect, may have become more nuanced still. It is not that the Court did not react to the government's visibly authoritarian impulses – it did in some relevant cases, as we discuss in the next session – or that it decided not to interfere in political matters. It is simply that the Supreme Court was offset by Congress, an unexpected scenario given that many congressmen were elected by riding the wave that also helped elect President Bolsonaro, and that wiped many traditional and left-leaning politicians off the map. The Brazilian Congress played an important role in blocking or slowing the advance of some governmental measures that were clearly aimed at disrupting the rule of law and subverting horizontal accountability.

It is a comparably striking phenomenon. Countries that have featured similar markers of "democratic decay",[2] such as populism, rising polarization, attacks on civil liberties and on the media, and a widespread anti-systemic and antipluralist rhetoric, have not found in their parliaments a safe guardian of democracy. In fact, in countries like Hungary[3] and Turkey,[4] we see quite the opposite. In such countries, constitutional courts become the last resource in which citizens can trust, though the courts' capacity to exert such a role has proven rather limited. In Brazil, instead, institutional design and longstanding practices – i.e., the high level of party fragmentation and so-called "coalitional presidentialism",[5] which raise the stakes of coordination between presidents and Congress – have placed Congress in a favorable bargaining position. Added to that is the government's staggering inability to negotiate its agenda with Congress, which it associates with corruption. The outcome is a rising countermovement towards strengthening legislative authority.[6] The new interactions between the executive and legislative branches have resulted in a set of the government's proposals being rejected in Congress or – what might even be politically less costly – deliberately not even brought to discussion.

This unexpected scenario demands a reassessment of the Court's dilemma. After all, beneath Chief Justice Dias Toffoli's suggestion of judicial self-restraint may lie a genuine concern with the growing politicization of the Constitutional Court. With an active Congress promoting a more effective, though imperfect, check on the executive's power, the consequence is that a politically engaged Supreme Court would be disruptive. Moreover, in a polarized environment, the stakes are naturally higher for a Court whose political capital has waned over the years[7] despite – or even because of – its rising political clout, and whose lack of collaborative decision-making has become standard practice.[8] Although the Court played a relevant role in protecting Brazilian democracy in 2019, its structural dysfunctionalities (mainly the justices' disproportionate individual power)[9] have negatively affected its capacity to present itself as a legitimate guardian of the Constitution and have downgraded the technical aura that usually surrounds constitutional courts.

This is particularly true when we explore the way the Court has behaved in the face of the so-called "Operation Car Wash",[10] the most

[1] L.R. Barroso, J.Z. Benvindo, A. Osório, Brazil, in: R. Albert et al., *2018 Global Review of Constitutional Law* (I-CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College 2019) 36.

[2] See Democratic Decay & Renewal (DEM-DEC) project at: https://www.democratic-decay.org/

[3] See Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, 'Hungary's Illiberal Turn: Disabling the Constitution' (2012), 23 *Journal of Democracy* 138, 138-46.

[4] See Berk Esen and Sebnem Gumuscu, 'The Perils of "Turkish Presidentialism"' (2018), 52 *Review of Middle East Studies* 43, 43-53.

[5] See S. Abranches, *Presidencialismo de Coalizão* (Companhia das Letras 2018), 440, 440.

[6] Juliano Zaiden Benvindo, 'The Party Fragmentation Paradox in Brazil: A Shield Against Authoritarianism?', *Int'l J. Const. L. Blog*, Oct. 24, 2019, at http://www.iconnectblog.com/2019/10/the-party-fragmentation-paradox-in-brazil-a-shield-against-authoritarianism/

[7] See Reynaldo Turollo Jr., STF é reprovado tanto quanto Bolsonaro, mas menos que Congresso, diz Datafolha (*Folha de S. Paulo*, 29 Dec., 2019), https://www1.folha.uol.com.br/poder/2019/12/stf-e-reprovado-tanto-quanto-bolsonaro-mas-menos-que-congresso-diz-datafolha.shtml

[8] Virgílio Afonso da Silva, 'Deciding without Deliberating' (2013), 11 *International Journal of Constitutional Law* 557, 557-84.

[9] See Diego Werneck Arguelhes and Ivar A. Hartmann, 'Timing Control without Docket Control' (2017), 5 *Journal of Law and Courts* 105, 105-40.

[10] See Tom Gerald Daly, 'Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro' (2019), International Human Rights Researchers' Workshop: 'Democratic Backsliding and Human Rights.

comprehensive criminal case ever in Brazilian history, which has significant impacts on the political landscape. Whenever the Court needed to decide matters associated with that operation, its dilemma gained new layers of complexity. One in particular should be singled out: since politicization can reach new highs in such landmark cases, the extent to which the Court is willing to balance constitutional guarantees with an alleged "social sentiment" has been a key factor in shaping much of its relevance as an effective institutional check. The dilemma then becomes the degree to which the Court aims to behave as a horizontal accountability institution and how such balancing may intertwine or conflict with a more active parliament and a highly polarized society.

The major developments in 2019 were part of this now-even-more-intense dilemma. The "Operation Car Wash" cases – and others associated with it – have all been crucial for understanding the Court's challenges that lie ahead. The most impactful case in 2019 was the new precedent determining that a convict may remain free until the criminal sentence is final and all appeals have been exhausted,[11] overturning, by a 6 to 5 majority, a precedent set in 2016. This decision resulted in freeing ex-President Luiz Inácio Lula da Silva from prison, with obvious impacts on the political context. The legal and political scenario was to a certain extent impacted by the leaks of personal communications between Sergio Moro, the former federal judge who was presiding over Operation Car Wash and who later became Bolsonaro's Minister of Justice, and federal prosecutors, which led the ex-President's lawyers and supporters to raise questions about the impartiality of such judgments.[12] The episode also raised an ethical discussion on the use of such materials, since they were the product of the invasion of private communications by hackers. The main arguments focused on the interpretation of an unamendable clause, on the one hand, and on the very meaning and credibility of the criminal justice system on the other. Yet it would be wrong to disregard that the Court was also dealing with the dilemma of how to present itself in such a turbulent political landscape. The balance between adopting more political behavior by listening to the "social sentiment" or, rather, acting towards preserving its capacity to independently exert horizontal accountability was visibly on the table. 2019 was thereby a challenging year for the Court, which the next section will explore further.

III. CONSTITUTIONAL CASES

In this section, we highlight the most important constitutional law cases decided by the STF in 2019. The cases are divided into two main topics – Fundamental Rights and Criminal Law – and presented in chronological order.

Fundamental Rights

1. RE 494.6017, decided 03/28/2019, Majority Opinion by Justice Edson Fachin: Animal sacrifice in African-derived religions in Brazil and free exercise of religious beliefs

The Plenary of the Supreme Court upheld as constitutional the provision of the Animal Welfare Code of the State of Rio Grande do Sul, which, in response to the escalation of religious intolerance targeting adherents of Afro-Brazilian religions, expressly stated that the free exercise of cults and liturgies of African-derived religions should not be considered animal cruelty. A relevant aspect, highlighted during the trial, was that animal sacrifice was not employed for entertainment purposes but rather for the exercise of a fundamental right: religious freedom.

2. RE 1.054.110-RG, Rapporteur Justice Luís Roberto Barroso; ADPF 449, Rapporteur Justice Luiz Fux, decided 05/09/2019: Prohibition of Uber and ridesharing apps by local laws

The Supreme Court, in a unanimous decision, struck down as unconstitutional local laws that prohibited or disproportionately restricted the urban transportation services provided by drivers registered on ridesharing applications (such as Uber, Cabify, and 99 Taxi). According to the Court, such restrictions violate the right to free enterprise, the "social value of work," and economic freedom, which are provided for in the Brazilian Constitution.

3. RE 657.718, Majority Opinion by Justice Luís Roberto Barroso, decided 05/22/2019: Constitutional right to healthcare and prescription of drugs without health agency approval

The Plenary of the Supreme Court discussed whether the constitutional right to healthcare creates a duty upon the State to provide patients with drugs that have not been approved by the Brazilian Health Regulatory Agency (Anvisa), the equivalent of the U.S. Food and Drug Administration (FDA). The case was prompted by the growing right-to-health litigation in Brazil, which, in practice, contributed to health inequalities, draining scarce budgetary resources from the public healthcare system to provide access to expensive, experimental, or unapproved drugs to individual claimants. The majority held that the State does not have a duty to supply patients with experimental drugs that are still at the stage of clinical trial and have not been evaluated for safety and efficacy. In addition, the Court found that only in exceptional cases, in which there is an unreasonable delay by the health agency in processing the drug approval application, judicial decisions may require the State to supply drugs that have not yet been approved, provided that certain additional criteria are met (e.g., the drug has already been approved by the FDA or other recognized health agencies).

4. ADO 26, Rapporteur Justice Celso de Mello; MI 4.733, Rapporteur Justice Edson Fachin, decided 06/13/2019: Criminalization of homophobic acts

The Supreme Court ruled that Congress failed its constitutional duty to enact legis-

[11] ADC 43, 44, 54, Rap. Justice Marco Aurélio (07. Nov. 2019).

[12] See Andrew Fishman et al., 'Breach of Ethics' (*The Intercept*, 9 June 2019), https://theintercept.com/2019/06/09/brazil-lula-operation-car-wash-sergio-moro/

lation criminalizing acts of discrimination and hate against gay and transgender people. As a remedy, the Court determined that the Anti-Racism Law (Law No. 7,716, 1989) shall apply to impose criminal penalties for discriminatory conduct related to sexual orientation and gender identity until legislation criminalizing homophobic acts is passed.

5. ADI 6.121 MC – Rapporteur Justice Marco Aurélio, decided 06/13/2019: Dissolution of participatory councils

The STF issued an injunction suspending part of a presidential decree aimed at dismantling more than 50 participatory councils, which provide civil society an institutional venue to contribute to policymaking and to the oversight of policy implementation in areas ranging from minority rights (e.g., rights of gay, indigenous, and disabled persons), health care, the environment, and public safety. The Supreme Court found that the principle of separation of powers prohibits the unilateral dissolution by the President of participatory councils which were created by laws enacted by Congress. Several justices also highlighted that the indiscriminate dissolution of participatory councils hampers social participation and control and, therefore, violates the democratic principle.

6. ADI 6.062 MC-Ref, Rapporteur Justice Luís Roberto Barroso, decided 08/01/2019: Indigenous land demarcation

The Supreme Court suspended the effects of a provisional measure by which President Jair Bolsonaro transferred the decision-making power over indigenous land demarcation from Brazil's National Indigenous Affairs Agency (FUNAI) to the Ministry of Agriculture, led by representatives of farmers. The Court found that the provisional measure was unconstitutional, since Congress had rejected an identical provisional measure in the previous month and the Constitution expressly forbids the reissuance, within the same year, of a provisional measure that has been rejected.

Criminal Law Cases

1. Inq 4.435 AgR-quarto, decided 03/14/2018, Justice Rapporteur Marco Aurelio: Electoral courts' jurisdiction over crimes connected to illegal campaign donations

The majority of the Supreme Court held that corruption investigations involving illegal campaign donations (in Portuguese, *caixa 2*, i.e., slush funds) should be tried by the Electoral Justice due to its specialized nature. The dissenting justices deemed that the Federal Justice should have jurisdiction to try such cases, since it is better equipped to conduct complex criminal proceedings at an appropriate speed.

2. ADI 5.874, decided 05/09/2019, Majority Opinion by Justice Alexandre de Moraes: Presidential power to grant pardons

The Plenary of the STF upheld as constitutional the Christmas pardon decree of 2017, signed by then-President Michel Temer. In 2018, Justice Rapporteur had suspended parts of the decree, which, for the first time, had extended the pardon to individuals convicted of corruption-related crimes. The majority of the Court found that the presidential discretionary power to grant pardons was exercised within the limits imposed by the Constitution and that the merits of the administrative act were nonjusticiable. The dissenting justices argued that the inclusion of white-collar crimes within the scope of the Christmas pardon decree violated the principle of proportionality and was therefore unconstitutional.

3. HC 166.373, decided 10/02/2019, Majority Opinion by Justice Alexandre de Moraes: Procedural rights of defendants when co-defendants enter plea bargain agreements

The STF held that defendants have the right to make closing arguments after hearing the closing arguments of co-defendants who have entered into plea bargains. While this procedural right was not provided for in the Code of Criminal Procedure, the majority found that the right of defendants who did not enter plea bargain agreements to respond to accusations from plea bargain testimony in their closing arguments stems from due process rights guaranteed by the Constitution. The Plenary ruling confirmed an earlier Second Panel decision, which overturned the conviction of a former president of Petrobras. This was the first time the Plenary of the Supreme Court overturned a Car Wash conviction on procedural grounds. The Supreme Court will still examine whether and under what circumstances the same grounds can be used to overturn other convictions.

4. ADCs 43, 44 e 54, decided 11/07/2019, Justice Rapporteur Marco Aurelio: Enforcement of criminal sentence after first appellate ruling

The Court's Plenary, by a close vote of six to five, overturned Court precedent set in 2016 (which became binding upon every court), which had held that defendants who had their prison sentence affirmed on appeal could serve time provisionally even if an appeal to a superior court was still pending. The majority of the Court ruled that the provision of the Code of Criminal Procedure that prevents anyone from being detained until an unappealable criminal sentence is issued does not violate the Constitution. The previous understanding considered that appeals to superior courts do not suspend the enforcement of sentences, since such courts are not allowed to revisit matters of fact and evidence. This reading was also based on the pragmatic argument that the enforcement of criminal sentences after the first appellate ruling was necessary to ensure the credibility of the criminal justice system and close the impunity loophole, since the Brazilian criminal justice system is fraught with statutes of limitations and an excessive number of appeals.

Following the decision, former President Luiz Inácio Lula da Silva was released from custody, since, although his conviction had been upheld by an appellate court in 2018, his appeal to superior courts was still pending.

5. RE 1.055.941, decided 12/04/2019, Rapporteur Chief Justice Dias Toffoli: Sharing of confidential financial data by the IRS / COAF with law enforcement authorities in criminal probes

The Supreme Court upheld the sharing of confidential financial data by the Internal Revenue Service (*Receita Federal*) and the Council for Financial Activities Control (*Conselho de Controle de Atividades Financeiras*, "COAF") – the agency in charge of enforcing money laundering regulations – with prosecutors and other law enforcement authorities without the need for prior judicial authorization. Observers praised the ruling for restoring the capacity of law enforcement authorities to fight corruption and money laundering in Brazil. The ruling allowed the resumption of money laundering investigations, which had been paralyzed since July 2019, when the STF's Chief Justice had granted an injunction to suspend all ongoing investigations based on confidential data shared by COAF after the agency launched money laundering investigations against President Bolsonaro's son.

6. RHC 163.334, Rapporteur Justice Luís Roberto Barroso, decided 12/18/2019: Recognition of the repeated failure to remit state sales tax as a crime

The Supreme Court ruled that the repeated and willful failure to remit state sales tax (ICMS) payments charged to the consumer of goods or services is a crime. The Court found that such recurring conduct is equivalent to tax misappropriation, which is considered criminal conduct under Brazilian Law 8,137/1990. However, it held that the taxpayer who only occasionally fails to pay the state sales tax is not subject to criminalization. According to the majority, the decision will positively affect the states' finances and promote free competition, since contumacious debtors derive undue competitive advantages and illicit profits from deliberately failing to pay taxes.

IV. LOOKING AHEAD

Two relevant movements may be crucial for the future developments of Brazilian constitutionalism. First, municipal elections will take place in the second semester of 2020, with an immediate impact on Congress. Municipal elections usually are an important predictor of the future federal and state elections, which will take place in 2022. As 2020 is an electoral year, Congress may be more reluctant to pass structural reforms and thereby the odds are that it may act as an even stronger barrier to the government's agenda. Moreover, depending on the election results, there may be a rearrangement of the government's support in Congress. In 2020, Justice Celso de Mello, a well-regarded judge who on several occasions has stressed the value of democracy, will be retiring. President Bolsonaro will then have the opportunity to appoint a new justice to the Supreme Court.

V. FURTHER READING

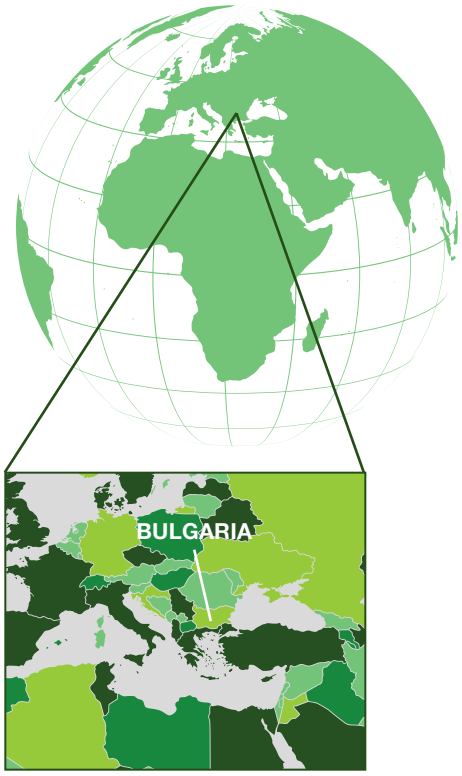
Oscar Vilhena Vieira, *A Batalha dos Poderes: Da transição democrática ao mal-estar constitucional* (Cia. das Letras, 2018)

Luís Roberto Barroso, 'Revolução Tecnológica, Crise da democracia e mudança climática: limites do direito num mundo em transformação' (2019) 5 *Revista Estudos Institucionais*, 1262, 1313

Juliano Zaiden Benvindo, 'The Party Fragmentation Paradox in Brazil: A Shield Against Authoritarianism?' (*Int'l J. Const. L. Blog*, Oct. 24, 2019) <http://www.iconnectblog.com/2019/10/the-party-fragmentation-paradox-in-brazil-a-shield-against-authoritarianism/>

Richard Albert, Carlos Bernal, and Juliano Zaiden Benvindo (eds.), *Constitutional Change and Transformation in Latin America* (Hart Publishing, 2019)

Ingo Sarlet, '*Os Direitos Fundamentais num Mundo em Transformação: tópicos Atuais aos 30 Anos da CF e 70 Anos da DUDH*' (Fi, 2019).



Bulgaria

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I. INTRODUCTION

Two nationwide elections took place in Bulgaria in 2019: for European Parliament in May and for municipal government in October. On both occasions, the ruling party Citizens for a European Development of Bulgaria (GERB) garnered sufficient support to retain its position as the leading political formation in the country, albeit by a small margin and facing severe opposition in the face of its major opponent, the Bulgarian Socialist Party (BSP). Against this background, the past year was marked by rising tensions among the highest echelons of State power. The confrontation between the government and the opposition on the occasion of the elections fueled the ongoing conflict between President Rumen Radev, initially backed by BSP, and the other branches of government. This conflict peaked at the end of 2019 in the context of the highly controversial appointment of a new Prosecutor General (PG) – an omnipotent and de facto unaccountable institution, inherited from the 1971 communist Constitution. Decade-long international pressure to reform this institution by introducing an effective mechanism for its accountability prompted a heated debate between GERB, the President and the new PG about the need for constitutional reform in this regard. Following a critical report of the Venice Commission, the government proposed the introduction of an independent prosecutor's office charged with investigating the PG, and eventually requested the Bulgarian Constitutional Court (BCC) to deliver on the constitutionality of this measure. Before turning to this and the other main cases before the BCC in Part III, the following section will consider the most significant constitutional controversies in 2019, which played out in the context of the appointment of a new Prosecutor General and the efforts to end the impunity of this office.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The appointment of a new PG

In October, Bulgaria's Supreme Judicial Council (SJC), the highest administrative body of the judiciary in the country, confirmed Ivan Geshev, who was the sole nominee for the post of PG, in a 20 to 4 vote and requested the President of the Republic to appoint him, in accordance with the procedure-regulated Art 129.2 of the Constitution. Geshev's uncontested nomination for PG was met with months-long protests, which questioned the lack of competition for one of the most powerful posts in the country as well as the sole candidate's integrity and independence. Succumbing to this pressure, President Radev exercised his prerogative to veto the appointment and returned it to the SJC for revision. He justified his decision with the lack of competition, which, in his view, could compromise the 'prestige and legitimacy' of the PG institution. The SJC, however, disregarded the presidential veto and repeated its initial vote. This move cemented Geshev's appointment, since Art 129.2 binds the President to accept a repeated proposal from the Council and to inaugurate the nominee within a reasonable time. Following this development, many expected that Radev would seize the BCC with a request for an interpretive decision defining the constitutional procedure in the case of a presidential veto. The main constitutional question in this regard was whether the SJC may disregard the President's objection and simply reconfirm the challenged candidate, as it did in the present case, or whether the

nomination procedure or the post should be revised in the first place. Eventually, the President decided against seizing the BCC, arguing that the Constitution already provides the answer to the question. Indeed, in its decision No. 2/2002, the BCC had already decided that the SJC has 'full operational independence' that entitles it, *inter alia*, to reconfirm a nomination irrespective of the President's disapproval in this regard, pursuant to Art 129.

Following a media request, an incumbent constitutional judge anonymously confirmed that the Court could speedily deliver a decision on this matter if seized by the President, alluding to a potential declaration of such a request as inadmissible *ne bis in idem* in light of the aforementioned decision. However, an inadmissibility declaration might have been avoided with a carefully worded request for the BCC to decide on whether an effective appointment by the SJC could take place only following a competition that involves more than one nominee. This requirement would not necessarily compromise the Council's operational independence as it would not prevent the latter from (re-)appointing its preferred candidate. Such condition would, however, put the onus on the government, which has the *de facto* say as to who gets nominated, to ensure a competitive procedure – something it had not done in the present case.

Without seizing the BCC, the President concurred with the decision of the SJC and Geshev was inaugurated as PG for a mandate of seven years in November. Shortly thereafter, the Bulgarian Parliament appointed Geshev's predecessor and vocal supporter, Sotir Tsatsarov, as head of the Commission for Combating Corruption and the Withdrawal of Illegally Acquired Property (KPKONPI) after prematurely dismissing its previous director. This maneuvering, which saw the tandem Geshev-Tsatsarov top the highest repressive offices in the country, raised concerns that it was undertaken to cater to governmental interests. These concerns echoed the allegations that the office of the PG has been using its powers, particularly its control over KPKONPI's specialized criminal jurisdiction for high-level corruption, to target functionaries of high political or economic powers at odds with the agenda of the government and potential oligarchic structures linked to it.

2. The impunity of the PG

The question of who heads the Bulgarian prosecution is especially relevant in light of the *de facto* impunity of the PG, which was the second constitutional issue at stake in 2019. The lack of accountability of this office is rooted in its institutional design, which is one of the features that the 1991 Constitution inherited from the 1971 communist basic law. The latter introduced a PG office in Bulgaria modelled after the Procurator General of the USSR. According to Art 126.2 of the current Constitution, the prosecutorial system in Bulgaria is subjected to the *de facto* unfettered oversight and control of the PG, who sits on top of this system. This arrangement mirrors the so-called vertical structure of the former Soviet prosecution. In 2017, the European Commission for Democracy through Law of the Council of Europe (CoE), known as the Venice Commission, reported that the Bulgarian PG is 'essentially immune from criminal prosecution and […] virtually irremovable by means of impeachment for other misconduct'. The unaccountable powers of this office are exacerbated though the significant role that it plays in the SJC, which, as seen above, is the body that effectively appoints the PG.

The lack of accountability of the PG has been under intense international scrutiny since the *Kolevi v. Bulgaria* judgment of the European Court of Human Rights (ECtHR) from 2009 (1108/02). This case was initiated in 2001 by Nikolai Kolev, a high-ranking prosecutor implicated in a serious conflict with then-PG Nikola Filchev, when the former challenged the lack of an effective remedy for an independent investigation of the latter's office under Bulgarian law. After Kolev's mysterious assassination in 2002 and Bulgaria's failure to investigate the accusations of Filchev's potential involvement in it, the Strasbourg court declared that the office of the GP is *de facto* unaccountable 'as a result of the hierarchical structure of the prosecution system and, apparently, its internal working methods', according to which 'no prosecutor would issue a decision bringing charges against the Chief Public Prosecutor' (para. 205).

Since this judgment, the structural impunity of the PG has been critically addressed on multiple occasions by several European bodies, including the Venice Commission and the Council of Europe's Committee of Ministers as well as the Commission of the European Union. The latter's Cooperation and Verification Mechanism (CVM) has been monitoring Bulgaria's piecemeal progress in the area of the rule of law, judicial independence and combatting high-level corruption since Bulgaria's accession to the EU in 2007. All of these bodies have persistently reiterated the need for Bulgaria to introduce effective accountability mechanisms for keeping the PG's powers in check, even if this would imply amending Art 126.2 of the Constitution. The Bulgarian government had remained oblivious to these demands until early 2019, when Minister of Justice Danail Kirilov proposed a controversial reform of all three top magistracy offices, i.e., the Presidents of the Supreme Administrative Court and the Supreme Court of Cassation (the two highest appellate bodies in the country) as well as the PG.[1] To this end, Kirov suggested a legislative amendment of the Criminal Procedure Code and the Judicial System Act that would allow the SJC to authorise a criminal investigation, accompanied by the temporary suspension from duty of either of these three office-holders following a two-thirds majority vote of its 25 members.

The inclusion of the Presidents of the two apex courts in this amendment puzzled national and international observers given that the requested reform concerned only the PG. The government's questionable choice of means led to allegations that it primarily targeted the President of the Supreme Court of

[1] Under the Bulgarian Constitution, the investigating magistracy is part of the judiciary and the structure of the prosecution corresponds to that of the courts, Art 128 and Art 126.1.

Cassation, Lozan Panov, who has had conflicts with the government since 2018, rather than at ending the impunity of the PG. In an advisory opinion requested by the Ministry of Justice, the Venice Commission deemed the draft legislation incapable of effectively implementing the desired reform of the PG's Office. On 9 December, the Commission urged the government to 'abandon the idea of extending the suspension mechanism to the two chief judges' (para 47) and focus on comprehensive reform, potentially including a constitutional amendment (paras 48, 70). It issued five concrete, and not mutually exclusive, recommendations on how such a reform could be achieved (para 68). These recommendations echoed the findings of an Interim Resolution, adopted by the Council of Europe's Committee of Ministers on 5 December, which addressed the execution of the *Kolevi v Bulgaria* judgment.

Following this advisory opinion, the Bulgarian government announced its intention to introduce, by means of ordinary legislation, the office of an 'independent prosecutor' tasked with investigating the potential misconduct of the PG. Such an office, the establishment of which was one of the recommendations of the Venice Commission, would be appointed for a term of seven years from a two-thirds majority of the Prosecutorial College of the SJC. This appointment procedure, however, puts the actual independence of this office in question, given the *de facto* superiority of the PG within this college. Moreover, according to the government's proposal, this new institution would occupy a specially designated inspectorate within the Supreme Prosecutor's Office of Cassation. This institution, however, is also subordinated to the oversight of the PG pursuant to Art 126.2. Therefore, while seemingly concurring with at least one of the recommendations of the Venice Commission, there remain serious doubts as to the willingness of the government to effectively put an end to the impunity of the PG.

III. CONSTITUTIONAL CASES

In 2019, the Constitutional Court heard 15 cases and delivered eight decisions. Four of these decisions concerned cases that were brought in 2018. Eight cases from 2019 are currently still pending before the CC.

1. Case No. 15/2019: The constitutionality of an independent prosecutor's office

In this case, the Council of Ministers (CoM) requested the BCC to provide a binding interpretation of Art 126.2, which establishes the hierarchical structure of the prosecution system and subjects it to the 'oversight' and 'guidance' of the PG at its pinnacle. This request was effectively aimed at establishing whether the introduction of the aforementioned office of an independent prosecutor would be constitutional or not. The CoM argued that only an organ that is part of the prosecution should be able to investigate the PG since any other arrangement would jeopardise the constitutionally protected independence of the judiciary and that of the prosecution as part thereof (Art 117.2 in conjunction with Art 128). Moreover, the Council claimed that an independent office charged with investigating the PG could be introduced without a constitutional amendment since Art 126.2 does not establish an 'absolute monopoly' of the PG and therefore does not prohibit another prosecutor from investigating his or her conduct without conflict of interests. The request focuses exclusively on the constitutional text and its historical interpretation, arguing that the PG is not unaccountable by virtue of the institutional design of his or her office *de jure*.

This position of the government, albeit not surprising, is oblivious at best, and intentionally ignorant at worst, of the critique concerning the *de facto* impunity of the PG due to the structural issues outlined in the previous section. Moreover, it is questionable to what extent an independent prosecutor's office can be introduced without changing the Constitution, as intended by the government. In light of the BCC's decision No. 3/2003, such reform might require the approval of a Grand National Assembly (GAS), which is elected following a cumbersome procedure after the dismissal of the current Parliament (see Article 161). In this decision, the Court argued for a broad interpretation of Art 158.3 of the Constitution, which stipulates that any changes in the form of State structure or the form of government are to be undertaken by a GNA rather than a regular one. In the Court's view, a broad definition of what constitutes the form of State structure encompasses, *inter alia*, the judicial system, which, as seen, includes the prosecution. Therefore, in the present case, the Court might find that the reform proposed by the government falls under the scope of this broad definition and can thus be achieved only after reaching the high threshold of a two-thirds majority in a constituent GNA, pursuant to Art. 157. Such an outcome, however, is in light of a later decision (No. 8/2005), according to which not all structural and organisational changes within the judicial system necessarily concern the form of State structure. Moreover, narrowing down the ambit of decision No. 3/2003 should be possible with the argument that it simply lists the independence of the judiciary as one of the peremptory elements of State structure but does not explicitly define how these elements ought to be organised internally.

Finally, it must be noted that a special inspectorate within the Supreme Prosecutor's Office of Cassation already operated between 2006 and 2013. The main function of this agency, which was introduced via ordinary legislation, was to investigate allegations of misconduct of ordinary prosecutors (not the PG). This inspectorate, however, was directly overseen by the PG and dismissed in early 2013 by Geshev's predecessor, Sotir Tsatsrov, shortly after his inauguration. This is yet another instance which casts serious doubts on the effectiveness of the government's idea for an independent prosecutor, regardless of whether it can be implemented by means

of ordinary or constitutional legislation. In light of the cited jurisprudence of the BCC, however, a comprehensive reform of Art 126.2 would likely require a constitutional amendment or even a new Grand National Assembly. At the end of 2019, the President initiated consultations on a potential constitutional reform in this regard, but both the government and the opposition have since rejected this possibility.

2. Decision No. 2/2019 (case No. 2/2018): The Panov-amendment

In this case of abstract judicial review, the Supreme Court of Cassation (SCC) challenged the constitutionality of an amendment in the Law on Judicial Power, which stipulates that the respective colleges of the Supreme Judicial Council may, and in certain circumstances are obliged to, temporarily suspend from duty a judge, a prosecutor or an investigator who is facing criminal charges. This challenge was initiated by the President of the SCC, Lozan Panov, who has been implicated in an ongoing conflict with the government due to criticizing it for systematically undermining the independence of the judiciary and the rule of law. This conflict escalated at the end of 2018 when Panov, exercising his competence in Art 114.9 of the Law on the Judiciary, ordered an inquiry into alleged administrative malpractice by the Specialized Criminal Court of Appeal. Shortly thereafter, the Judicial College of the SJC launched an impeachment inquiry against Panov pursuant to Art 129.3.5 of the Constitution on the ground of him undermining the reputation of the judicial system and thus compromising its independence.

These developments raised concerns that the legislation challenged in this case, nicknamed 'the Panov-amendment', was aimed at his immediate suspension from office in the case of a potential criminal investigation resulting from the process of his impeachment. In its decision, the BCC found that the challenged provision pursues the legitimate aim of protecting the 'specific authority', i.e., the prestige of the judiciary (protected in Arts 117, 118 and 120.1 in conjunction with Art 4.1 of the Constitution), rather than the integrity of the criminal process. Notwithstanding this legitimate aim, however, the Court decided that a provision that *binds* the SJC to suspend a magistrate deprives the Council of its discretionary power. This was seen as a violation of the principle of judicial independence, which the SJC is tasked with protecting by choosing whether to temporarily suspend from duty magistrates implicated in criminal proceedings or not. Therefore, the challenge was partially successful and reinstated full discretionary powers of the SJC to decide whether to suspend an accused magistrate or not. Four of the 12 judges dissented, arguing that the measure of granting to the SJC full discretion in this regard is disproportionate to the legitimate aim of protecting the judiciary, and stipulated that this should be possible only under a limited number of circumstances precisely defined by the legislator. Shortly after this decision, the SJC decided that Panov had not violated his duties, and ended the process of his impeachment. In October, however, 10 of the 14 members of the Council's Judicial College informally requested Panov's resignation on the occasion of another conflict between him and the Executive. It remains to be seen whether this will lead to another impeachment procedure for the judge.

3. Decision No. 8/2019 (case No. 4/2019): The constitutionality of GDPR

In another case of abstract review, 55 MPs challenged a provision in the Personal Data Protection Act (PDPA), which introduced certain criteria for deciding whether journalists have sufficiently protected personal data when accessing and disseminating information in the public interest. This law was adopted in order to facilitate the implementation of the General Data Protection Regulation (GDPR) of the EU (Reg 2016/679). Several provisions of the Act were vetoed by President Radev but nevertheless promulgated after the Parliament exercised their prerogative to overrule the President's veto (Art 101.3). This led the opposition MPs of the BSP, backed by the President, to seize the BCC, claiming that the concerned legislation introduced too vague criteria, which restrict the access of journalists to publicly relevant information in violation of, *inter alia,* the freedom of expression and its derivatives (Arts 39-41) as well as the corresponding provisions in international and European human rights instruments. The deputies argued that the PDPA requires the balancing between two sets of equally protected principles – the freedom of speech on one side and the privacy of personal data on the other. They claimed, however, that the Act prioritizes the latter by stipulating that the protection of personal data is the norm while the freedom to access information is the exception, which requires justification under the aforementioned vague criteria. The legislator had therefore established a hierarchical relationship in favour of the privacy of personal data, which the claimants saw as disproportionate and even amounting to censorship, prohibited by the Constitution in Art 40.1.

In an eight-to-four vote, the BCC decided that the challenged provision was unconstitutional. It noted that the protection of personal data, unlike the freedom of speech and its derivative, is not explicitly protected under the human rights catalogue of the Bulgarian Constitution. The Court also invoked international conventions, to which Bulgaria is a party, as well as the jurisprudence of the CJEU and the ECtHR, according to which these two sets of interests must be balanced very carefully and without automatically prioritising one over the other. The BCC found that the criteria outlined by the PDPA were indeed too ambiguous and that they entrust upon the Commission for Data Protection 'unpredictable power to interpret [them] not necessarily in the public interest demanding pluralistic information about the policies and activities of the government'. In the judges' view, this provision could, therefore, lead to hidden forms of censorship, such as self-cen-

sorship by the media, and jeopardise the constitutionally protected right to free dissemination of and access to information.

4. Further cases

Two further successful constitutionality challenges concerned amendments in the Corporate Tax Act, which were passed in 2018 despite a presidential veto. In the first decision (No. 7/2019), the Court struck down a provision that allowed senior Customs Agency employees to be fired with no prior notice by the agency's director and without the option of a judicial appeal. The Court found that this provision's ambiguity with regard to the criteria for dismissal could be misused to facilitate political interference in the work of the agency. The second challenged provision imposed a higher tax rate on properties in resort areas, targeting owners who avoid taxation by renting out their properties without registering under the Tourism Act. The Court found that this provision would allow the Executive to amend taxation levels by exercising its competence to designate areas as resorts, thus violating the constitutionally protected prerogative of the Legislator of being the only body allowed to make changes in taxation (decision No. 4/2019).

After another unsuccessful veto, President Radev also challenged a set of amendments to the State Property Act, aimed at facilitating the expropriation of land for major infrastructure projects of 'nationally-significant' interest. The challenge was partially successful (decision No. 9/2019) since the Court upheld the constitutionality of most of these amendments but invalidated the provision regulating the compensation for such expropriation for being too vague and therefore prone to inconsistent interpretation and application.

The offices of the President and the Ombudsperson brought another successful challenge (decision No. 3/2019) by independently attacking the same provision in the 2019 Budget Act, which prevented civil servants from holding positions in the State administration once they have claimed their pension. The Court decided that that the government's aim to open public posts to 'young highly-qualified candidates' through such a mandatory retirement did not constitute a sufficiently 'constitutionally-significant interest' and therefore found a violation of the rule of law and the social state provisions of the Constitution.

The last case under consideration concerns the Ombudsperson's challenge of a provision in the Electoral Code regulating the competences of the Central Electoral Commission. It stipulates that only 18 of the exclusively enumerated 49 types of administrative acts, which the Commission may undertake when exercising its mandate to conduct and supervise nationwide elections, can be challenged before a court. The Ombudsperson argued that this effectively deprives individuals, whose constitutional rights might be affected by the types of acts that cannot be judicially reviewed, from their constitutionally guaranteed right to seek protection against such violation. The challenge failed since the Court did not reach the majority of seven votes required in Art 151.1 (decision No. 6/2019).

IV. LOOKING AHEAD

2020 promises to be eventful from a constitutional perspective. The conflict among the top branches of the government reached new heights already in January after the newly inaugurated PG requested the BCC to interpret what constitutes 'high treason' by the President, which Art 103 of the Constitution foresees as an exception to the immunity of this office. Simultaneously, the PG publicly released potentially incriminating wiretaps against the President, alluding to high-level corruption and a forthcoming criminal investigation. This move, the legality of which was questioned on due process grounds, prompted Radev to lose confidence in the government. Another highly anticipated interpretive decision of the Court due in 2020 concerns the aforementioned case No. 15/20119 regarding the scope of Art 126.2 and the constitutionality of the office of an 'independent prosecutor'. 2020 will also show whether the European Commission will cease monitoring Bulgaria under the Cooperation and Verification Mechanism, as announced in its overall positive report on Bulgaria's progress from last October (see Further Reading below), or whether it will require further reforms of the PG's Office in light of the critical opinion of the Venice Commission. Another interesting development to follow is whether Lozan Panov will survive another year as President of the SCC.

V. FURTHER READING

Evgeni Tanchev and Martin Belov, 'The Bulgarian Constitutional Order, Supranational Constitutionalism and European Governance,' in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (Springer, 2019), pp 1097-1138.

Simeon Stoychev, 'This Is How Bulgarian Judicial Independence Ends…Not with a Bang but a Whimper,' Verfassungsblog (3 June 2019) <https://verfassungsblog.de/this-is-how-bulgarian-judicial-independence-ends-not-with-a-bang-but-a-whimper/> accessed 1 February 2020.

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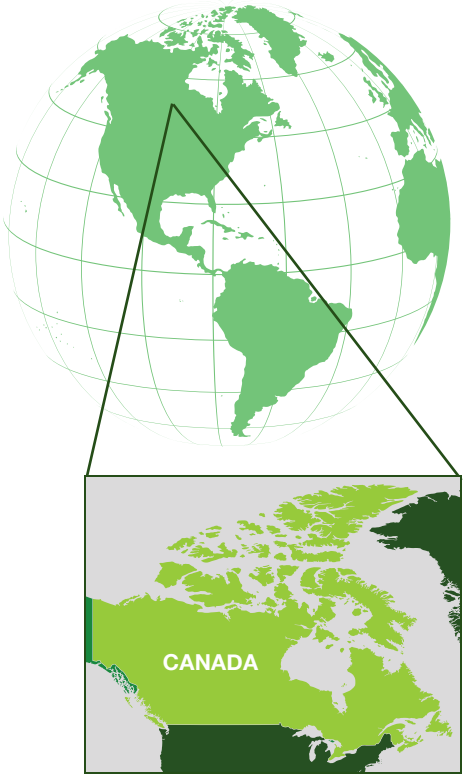
European Commission for Democracy through Law, 'Bulgaria Opinion No. 968/2019 on Draft Amendments to the Criminal Procedure Code and the Judicial System Act Concerning Criminal Investigations against Top Magistrates,' CDL-AD(2019)031 (9 December 2019) <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)031-e> accessed 1 February 2020.



Canada

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I. INTRODUCTION

2019 saw Prime Minister Justin Trudeau complete his first term in office embroiled in several major political-turned-constitutional dossiers that caused the Liberal Party to lose its majority in the Commons at the fall general election. Among them were the nationalized Trans Mountain Pipeline expansion project from Alberta to the Pacific Coast, the imposition of a nationwide carbon pricing system and the Prime Minister's exercise of unlawful influence on his Attorney General in the prosecution of an international bribery and corruption case of Libyan officials.[1] A month before the dissolution of Parliament, the government succeeded in filling a Supreme Court of Canada vacancy with the appointment of Justice Nicholas Kasirer, an appellate judge from Québec and a former civil law professor.

Except in criminal procedure, the Supreme Court decided fewer constitutional cases in 2019 than in previous years. The three selected for this report deal with the following questions: (i) the right to vote of long-term non-resident citizens in federal elections; (ii) the concurrent application of provincial environmental protection laws and federal bankruptcy laws to spent oil and gas sites; and (iii) the availability of *habeas corpus* to federal immigration detainees. However, probably the most constitutionally significant development of the year originates from the enactment of An Act Respecting the Laicity of the State, in which the government of the province of Québec decided to invoke the famous 'notwithstanding clause' of the Canadian Charter of Rights and Freedoms. The ensuing legal challenges to the Laicity Act added to a number of highly politicized cases that have been working their way up to the Supreme Court (or are already pending), giving the nine justices opportunities to revisit and reshape important parts of the Constitution and Canadian policy in the near future.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Return of the 'Notwithstanding Clause(s)'

The result of a last-minute political compromise in 1981 between the federal government and some provinces as a condition for adopting a constitutional bill of rights, s. 33 of the Canadian Charter allows the federal Parliament or a provincial legislature to include an override in an act stating 'that the Act or a provision thereof shall operate notwithstanding' the rights and freedoms guaranteed in ss. 2 or 7 to 15 of the Charter. Except for the omnibus override law passed by the Québec provincial legislature[2] to protest the adoption of the Constitution Act 1982 without its consent, use of the notwithstanding clause has been rare. Only fewer than two dozen instances have been reported to date, mainly originating from Québec.[3] However, after a hiatus of over a decade, resort to the notwithstanding clause (and equivalent clauses in provincial human rights legislation) seems to have picked up.

[1] See Office of the Conflicts of Interest and Ethics Commissioner, *Trudeau II Report* (2019).
[2] Act respecting the Constitution Act 1982.
[3] See PW Hogg, *Constitutional Law of Canada* (5th edn Carswell, 2007), 39-2-39-4 (looseleaf edn).

In 2018, Saskatchewan enacted an override provision.[4] Later in the year, Ontario tabled a bill that also included an override.[5]

On June 16, 2019, the Québec Legislature again used the notwithstanding clause (as well as the corresponding clause of the Québec Charter of Human Rights and Freedoms) in passing the Laicity Act, the main purpose of which is to prohibit public sector employees 'in a position of authority',[6] such as lawyers, police officers and school teachers, 'from wearing religious symbols in the exercise of their functions' (s. 6). The Act stems from a long-standing anxiety manifested in many parts of the population about the perceived increasing place taken by non-Christian religions in the public space, and more generally, from a fear by many Québecers of French-Canadian ancestry of the perceived threat from ethno-cultural diversity to their identity and values.[7] In 2008, a Québec governmental commission had already recommended that judges, Crown prosecutors and law enforcement officers be prohibited from wearing religious signs.[8] In 2013-14, the minority government of the Parti Québécois, a secessionist party, attempted to enact the ban on religious symbols[9] but was prevented from carrying the bill through the legislature after it called and lost a snap election.

Shortly after its enactment, the Laicity Act became the subject of four separate lawsuits by a labour union federation, an English public school board, a civic organization and civil rights groups. In *Hak v Québec*,[10] a Québec Superior Court judge dismissed the appellants' application for a provisional stay of the ban on religious symbols and the requirement that public sector employees exercise their functions with their faces uncovered. On appeal, the appellants submitted a new argument, namely that the impugned provisions violated a rarely used gender equality clause in the Charter that is out of reach of the notwithstanding clause. By a 2.1 majority decision, the Court of Appeal upheld the Superior Court decision.[11] The appellants have now sought leave to appeal to the Supreme Court on the stay application. When the laicity cases finally proceed on the merits, they will be the first Charter challenges involving the notwithstanding clause in more than 30 years.

The courts' anticipated interpretation of the notwithstanding clause could well have direct bearing on yet another intended use of the clause in New Brunswick. Following an outbreak of measles in a high school during the spring of 2019, the province's minority government introduced a bill that would require all children of school age to receive immunization for prescribed diseases. It later decided to insert a notwithstanding clause[12] in order to pre-empt Charter challenges by anti-vaccination groups and parents.

The recent intended and actual uses of notwithstanding clauses, along with a resurgence of minority governments across the country (federal, British Columbia, New Brunswick, Newfoundland, Prince Edward Island), can be interpreted as signs that Canada has not escaped from the current global divisiveness and polarization, in many democracies over public issues. A similar trend can also be observed at the Supreme Court. From a low of 21% in 2014, the proportion of split decisions has steadily increased to a high of 52% in 2018.[13] In fact, 2017 and 2018 have seen the highest number of split decisions since at least the turn of the century.[14] The most significant 2019 Supreme Court constitutional cases reported below follow the same trend.

III. CONSTITUTIONAL CASES

1. Frank v Canada (AG): Long-Term Non-Resident Citizens' Right to Vote

Section 3 of the Canadian Charter states that 'Every citizen of Canada has the right to vote in an election of members of the House of Commons.' In *Frank*, two Canadian citizens residing in the United States claimed that s. 11(d) of the Canadian Elections Act, which rendered citizens abroad ineligible to vote in federal elections if they had been absent from the country for more than five years, violated their right to vote under the Charter. By the time the case reached the Supreme Court, the government had conceded that the five-year residency condition was a breach of s. 3. As a result, the debate focused solely on whether it was a justifiable limit under the savings clause of s. 1 of the Charter. After the appeal was heard but a few weeks before the Court announced its judgment, Parliament repealed s. 11 of the Act.[15]

[4] The School Choice Protection Act 2018, s 2.2.

[5] In September 2018, the Ontario government introduced Bill 31, *Efficient Local Government Act, 2018*, to circumvent the effect of a Superior Court judgment in which a provincial statute reducing the number of Toronto City wards and councillors from 47 to 25 was declared a violation of the candidates' and voters' Charter right to freedom of expression. The government decided not to enact the bill when, a week later, the Court of Appeal stayed the Superior Court decision, thus allowing the city elections to proceed under the 25-ward structure.

[6] Minister of Immigration, Diversity and Inclusion and Government House Leader, 'Le projet de loi no 21 sur la laïcité de l'État est adopté – Une loi historique pour le Québec' (Government of Québec, 17 June 2019) <https://perma.cc/2UR5-MRHE>

[7] G Bouchard and C Taylor, *Building the Future: A Time for Reconciliation* (Consultation Commission on Accommodation Practices Related to Cultural Differences 2008) 18.

[8] Ibid 271.

[9] See Bill 60, *Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality between Women and Men, and Providing a Framework for Accommodation Requests* (2013).

[10] *Hak v Québec (AG)*, 2019 QCCS 2989.

[11] *Hak v Québec (AG)*, 2019 QCCA 2145.

[12] Bill 11, *An Act Respecting Proof of Immunization* (2019).

[13] Supreme Court of Canada, *2018 Year in Review* (2019), 15 <https://perma.cc/93VM-ZL3U>

[14] Ibid; Supreme Court of Canada, *Statistics 2000-2010* (2011), 9 <http://publications.gc.ca/collections/collection_2018/csc-scc/JU7-3-2010-eng.pdf>

[15] Elections Modernization Act 2018, s 7.

Delivering the majority judgment of the Court, Wagner CJ found that the government had not established that the five-year requirement was a reasonable limit on Canadians' right to vote. More specifically, in the view of the majority justices, the requirement failed both at the minimal impairment and proportionality stages of the s. 1 test. Absent any serious explanation on the part of the government, Wagner CJ considered the five-year limit to be overbroad and not carefully tailored to achieve Parliament's objective of preserving the fairness of the Canadian electoral system and ensuring that voters maintain a sufficient connection with Canada. For the government, that connection was manifested in citizens' commitment to the country and their subjection to Canadian laws. Wagner CJ opined that, in itself, long-term residency was not determinative of the extent of a citizen's commitment to Canada. Neither could residents' subjection to Canadian laws be considered an appropriate measuring stick of a citizen's connection, as diplomats, soldiers and other public sector employees posted abroad and their dependents accompanying them (as well as short-term non-resident citizens) should also be disenfranchised; however, these citizens living abroad are eligible voters under the law. Moreover, Wagner CJ gave little weight to the existence of residency requirements in electoral laws of other Westminster democracies, preferring the view that Canada was 'an international leader' in respect of universal enfranchisement. At the final proportionality stage, Wagner CJ opined that 'any salutary effects of ensuring electoral fairness, as asserted by the government, are clearly outweighed by the deleterious effects of disenfranchising well over one million non-resident Canadians who are abroad for five years or more' (para 77). According to Wagner CJ, the government had failed to demonstrate 'how the fairness of the electoral system is enhanced when long-term non-resident citizens are denied the right to vote' (para 78). Therefore, the majority of the Court concluded that the five-year residency requirement was unconstitutional.

In a concurring judgment, Rowe J argued that there was a rational connection between the residency requirement and electoral fairness as it was reasonable to believe that long-term non-residents are less connected to Canada and are less affected by Canadian laws than residents. However, he agreed with the majority justices that the government had failed to demonstrate that the salutary effects of the five-year requirement outweighed its deleterious effects of denying long-term non-resident citizens the right to vote. In reaching that conclusion, Rowe J gave weight to the fact that the electoral impact of that category of voters was negligible, as suggested by the number of international ballots cast in the 2011 election, which ranged between 0.05% to 0.2% of total registered electors in a constituency.

Côté and Brown JJ filed a lengthy dissent in which they argued that the Act's impugned residency requirement struck an acceptable balance between citizens' right to vote and the objective of ensuring that voters maintain 'a relationship of some currency to their communities'. For the dissenting justices, support for the centrality of geographical representation and, more generally, the reasonability of Parliament's choice could be found in eligibility requirements based on residency in other Westminster democracies, in particular New Zealand, Australia and the UK. Moreover, the deleterious effects of the limit on the right to vote were tempered by the fact that long-term non-resident Canadians could regain their right to vote immediately upon their return to Canada. Therefore, in the view of the dissenting justices, the temporary denial of the right to vote was outweighed by the Act's 'salutary effects of preserving the integrity of Canada's geographically based electoral system and upholding a democratically enacted conception of the scope of the right to vote in Canada' (para 172).

2. Orphan Well Association v Grant Thornton Ltd: Competing Application of Federal Bankruptcy Laws and Provincial Environmental Protection Laws to the Disposal of Spent Oil and Gas Sites

Led by the province of Alberta, Canada has risen to become the world's fifth largest producer of oil and gas. While the country's economy has greatly benefited from these natural resources, their intensive exploitation has come at a significant cost to the environment. According to the government of Alberta, an estimated 176,000 oil and gas wells were in operation on its territory in 2019, but an equal number were inactive or permanently dismantled.[16] In a November 2018 statement, the Alberta Energy Regulator calculated that total liability cost to clean up all the decommissioned oil and gas sites in the province would amount to C$58.65B.[17] Not all oil and gas sites that have ceased their activities have been safely closed and restored to their prior condition. As of 2019, there were approximately 10,000 of these 'orphan' wells, pipelines and other sites across the province, which had no legally responsible party financially able to decommission them properly.[18] When an oil and gas site turns orphan, the Regulator and its agent, the Orphan Well Association, are empowered under provincial law to enforce the end-of-life obligations of the company owners of the orphan sites.

In 2015, Redwater Energy Corp, a publicly traded oil and gas company with its principal activities and assets in Alberta, went into receivership. At the time, the company was the owner of 127 oil and gas assets but only 19 wells and facilities were still producing; the remaining ones had become inactive or spent. By the summer of 2015, the receiver for Redwater, Grant Thornton Ltd, had come to the conclusion that the cost of executing the end-of-life obligations for the spent wells would exceed the sale proceeds of the productive wells. Therefore, it informed the

[16] Government of Alberta, 'Upstream oil and gas liability and orphan well inventory' (2019) <https://perma.cc/2J67-MJGB>

[17] Alberta Energy Regulator, 'Public Statement' (1 November 2018) <https://perma.cc/3FDC-E2T2>

[18] Orphan Well Association, 'Orphan Inventory' (1 November 2019) <https://perma.cc/V34M-UQ3Z>

Regulator that it was taking possession of the productive sites and renounced the rest of Redwater's assets, including their associated end-of-life obligations. The Regulator countered by ordering the receiver (who was appointed trustee upon Redwater's bankruptcy) to fulfill all of the company's end-of-life obligations up to the value of the remaining assets in the Redwater estate. Grant Thornton opposed the Regulator's order by invoking the federal Bankruptcy and Insolvency Act (BIA) and the doctrine of federal paramountcy over provincial laws. More specifically, Grant Thornton argued that the provincial regulatory scheme, as applied in this case, conflicted with s. 16.06(4) of the BIA, which provides that 'notwithstanding anything in any federal or provincial law', the trustee is not personally liable for failure to comply with an order to remedy an environmental condition or damage if the trustee disclaims any interest or right in the property affected by the condition or damage.

The outcome of the case hung on the interpretation of s. 16.06(4) and the extent to which the Supreme Court justices could reconcile the federal rules with the provincial regulatory scheme. In a 5.2 majority judgment, Wagner CJ found that there was no conflict between the provincial scheme and s. 16.06(4), which was concerned with limiting the personal liability of the trustee upon disclaimer of the assets. It did not allow the bankrupt estate to avoid liability for its end-of-life obligations vis-à-vis the disclaimed assets. Moreover, the majority of the Court stated that, in seeking to accomplish a public duty for the benefit of citizens, the Regulator could not be considered a creditor, and that the performance of the end-of-life obligations was too uncertain to be subject to adequate determination and valuation. Therefore, those obligations stood outside the priority scheme established by the BIA. In another lengthy dissent, Côté J (Moldaver J concurring) disagreed with the majority justices' finding of absence of conflict between the BIA and the provincial scheme. In her view, the latter prevented the trustee from exercising its right to disclaim selected assets of the bankrupt estate and sell the estate's productive assets for the benefit of its creditors. Côté J also asserted that the Regulator should be considered as a creditor with a provable claim in bankruptcy against Redwater, namely the costs that will be incurred to remedy the environmental damage caused by Redwater.

In the end, the constitutional significance of the case may be second to its practical consequences. With sustained low oil prices on the international markets, the Canadian oil and gas industry will continue to have its share of struggles. For the first three quarters of 2019, the Office of the Superintendent of Bankruptcy Canada has reported five more oil and gas company bankruptcies, including four in Alberta.[19] It remains to be seen whether the Supreme Court's ruling applying a 'polluter pays' principle will bring the industry to bear a greater share of the burden of cleaning up its spent sites or cause oil and gas companies and their creditors to adjust their businesses in a way that will end up turning up even more orphan sites.

3. Canada (Public Safety and Emergency Preparedness) v Chhina: Federal Detainee's Right to File for Habeas Corpus in Provincial Superior Courts

The central place in Canada's judiciary has traditionally been occupied by the provincial superior courts, considered to be the descendants of the English central royal courts.[20] Over time, Parliament granted exclusive or concurrent jurisdiction on an increasing number of matters to federal statutory courts. Inevitably, the creation and expansion of a parallel federal judicial system alongside and partly overlapping provincial courts has generated an important volume of jurisdictional litigation.

In *Chhina*, the appellant, a convicted criminal, was detained by federal immigration authorities in a maximum security facility that kept inmates on lockdown 22½ hours a day. In accordance with the federal Immigration and Refugee Protection Act (IRPA), the Immigration and Refugee Board reviewed the detention on a monthly basis, each time maintaining it. Approximately six months into his detention, the appellant applied for *habeas corpus* – a right guaranteed by the Canadian Charter – in the Alberta Court of Queen's Bench rather than by way of judicial review in the Federal Court.[21] The chambers judge declined jurisdiction to consider the application on the grounds that the IRPA has put in place 'a complete, comprehensive and expert statutory scheme which provides for a review at least as broad as that available by way of *habeas corpus* and no less advantageous'(para 2). The decision was overturned on appeal. By the time the case reached the Supreme Court, the detainee was deported to Pakistan. Nevertheless, the Court agreed to hear the appeal.

In her majority judgment, Karakatsanis J ruled that the IRPA 'does not provide for review as broad and advantageous as *habeas corpus* where the applicant alleges their immigration detention is unlawful on the grounds that it is lengthy and of uncertain duration' (para 59). In detention review under the IRPA, the government need only make out a *prima facie* case for continued detention and is not required to explain or justify the length and duration of the detention. Then, on judicial review, the onus lies on the applicant to establish that the Immigration and Refugee Board's decision is unreasonable. By contrast, in a *habeas corpus* application hearing, the onus is on the government to justify the legality of the detention in any respect (once the applicant has raised a legitimate ground). In Karakatsanis J's view, the remedies available under the IRPA were also less advantageous than those available to an application for *habeas corpus*. Leave is required for judicial review of a detention de-

[19] Office of the Superintendent of Bankruptcy Canada, 'Business Bankruptcy and Business Proposal Statistics by the North American Industry Classification System by Province' (January 1 to September 30, 2019) <https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br01011.html>

[20] WR Lederman, 'The Independence of the Judiciary [2]' (1956), 34 CBR 1139, 1160, 1165-68.

[21] Under the *Federal Courts Act*, the Federal Court has no authority to issue a writ of *habeas corpus* except 'in relation to any member of the Canadian Forces serving outside Canada' (s. 18(2)).

cision and, if the application is successful, the judge will generally return the parties before the Board for a rehearing. By contrast, '[t]he writ of *habeas corpus* is not a discretionary remedy; it issues as of right' if the government has failed to justify the deprivation of liberty (paras 18, 65). Release of the applicant is then ordered immediately.

In her dissenting judgment, Abella J argued that, properly interpreted, the IRPA scheme for the review of immigration detention allows for at least the same substantive assessment as undertaken on *habeas corpus* review and offers a remedy to detainees that is as advantageous as review by way of *habeas corpus*. Whereas the detainee applying for *habeas corpus* must raise a legitimate ground upon which to question the lawfulness of the detention, the IRPA provides that the government bears the onus throughout of justifying the detention before the Board. The individual applying for *habeas corpus* who is able to show a legitimate ground would also meet the requirement for leave to apply for judicial review before the Federal Court. More generally, Abella J underlined the fact that the IRPA scheme and its application must comply with the Charter.

In 2021, the Federal Courts will celebrate the fiftieth anniversary of their creation since succeeding their predecessor, the Exchequer Court of Canada. Despite the Federal Courts' long-standing existence, *Chhina* illustrates a continuing preference of some parties (other than the federal government) to take proceedings before provincial superior courts instead of the Federal Court. Historical, legal and practical reasons, including the Federal Courts' narrower jurisdiction compared to that of their provincial counterparts as well as counsel's greater familiarity with provincial courts, explain the legal community's strong attachment to the provincial court system, especially for matters of individual rights and freedoms. In this regard, the place of Federal Courts in the Canadian judicial system differs from that of the US federal judiciary, where, incidentally, its district judges have authority to issue the 'Great Writ of Liberty'. The provincial superior court's retention of the (near) sole jurisdiction to grant *habeas corpus* is another reminder of the generally accepted view that, in Canada, it is 'the only court of general jurisdiction and as such is the centre of the judicial system'.[22]

IV. LOOKING AHEAD

There is no shortage of highly anticipated decisions that will be heard or decided in the coming months or year. Possibly at the top of the legal and political agenda is the March hearing of the constitutionality of the federal carbon tax system, which will give the Supreme Court a rare opportunity to revisit its four-decade-old landmark precedent on Parliament's general power 'to make Laws for the Peace, Order and good Government of Canada'. While the Court cleared a major roadblock for the C$4.5B Trans Mountain Pipeline project in January 2020 by unanimously ruling that it could not be subject to a discretionary provincial permit scheme on oil transportation,[23] several related cases against the government are pending, in particular concerning the Crown's duty to consult with the Indigenous peoples whose rights are adversely affected by the project. At the lower court level, the challenges of Québec's Laicity Act have the potential to break new constitutional ground in several areas in addition to the notwithstanding clause, including Parliament's exclusive jurisdiction over criminal law. In this respect, the Supreme Court may well have an early say on the outcome of those cases in an upcoming decision on the constitutionality of a federal statute that prohibits communication of a person's genetic test results without that person's consent.[24] Finally, among the possible upcoming constitutional developments is a curious case about the validity of Parliament's consent to (and, indirectly, the constitutionality in conventional terms of) the changes to the rules of succession to the Crown enacted by the UK Parliament in 2013.[25]

V. FURTHER READING

R Albert, P Daly and V MacDonnell (eds), *The Canadian Constitution in Transition* (University of Toronto Press, 2019)

J Baron and M St-Hilaire (eds), *Attacks on the Rule of Law from Within* (LexisNexis, 2019)

J Borrows, L Chartrand, OE Fitzgerald and R Schwartz (eds), *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (McGill-Queen's University Press, 2019)

C Mathen, *Courts Without Cases: The Law and Politics of Advisory Opinions* (Hart Publishing, 2019)

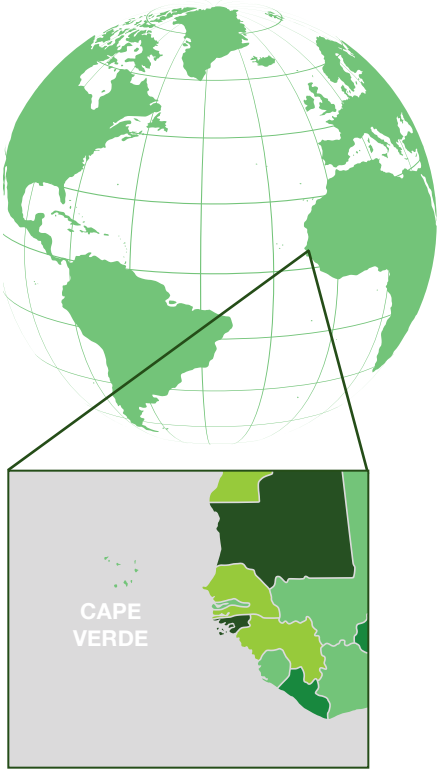
F Mathieu and D Guénette (eds), *Ré-imaginer le Canada: vers un État multinational?* (Presses de l'Université Laval, 2019)

[22] *MacMillan Bloedel Ltd v Simpson* [1995], 4 SCR 725 [37].

[23] *Reference re Environmental Management Act* 2020 SCC 1.

[24] *Canadian Coalition for Genetic Fairness v Québec* (AG), appeal heard 10 October 2019 (SCC 38478).

[25] *Motard v Canada (AG)*, leave to appeal filed 23 December 2019 (SCC 38986).



Cape Verde

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I. INTRODUCTION

The aim of this report is to present the political, legislative, jurisprudential and doctrinal evolution of Cape Verdean (CV) Constitutional Law in 2019. The state of the liberal democracy kept stable, at least according to major international indices[1] and perceptions on the ground. Thus, no major political frictions are noticeable, with the exception of a continuous internal rift in the main opposition party. Furthermore, the legislative agenda led to the approval of relevant acts, and the Constitutional Court of Cape Verde (CCCV) delivered important opinions and almost doubled the number of its decisions in comparison with 2018. Even at the doctrinal level, more scholarship works were published on political and constitutional matters.[2] The conclusion is that there was not any substantive change to the constitutional system.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year began with a political setback for the Cabinet when the President of the Republic (PR) refused to promulgate a legislative-degree for procedural reasons, namely because the temporal limit conceded by law was already expired when he received it.[3] However, Cabinet-presidential relations were smoother than the year before. Relations between political parties, especially in Parliament, were previously turbulent but improved considerably, though some controversies arose. One involved a Member of Parliament (MP) of the ruling *Movimento para a Democracia* (MPD) who was understood to be minimising the national role and status of the hero of independence, Amílcar Cabral – the founder of the current main opposition party *Partido Africano da Independência de Cabo Verde* (PAICV) (formerly *Partido Africano para a Independência da Guiné e de Cabo Verde* [PAIGC]) – but even his party leaders kept their distance from the comment.[4] Interestingly enough, the sourest political dispute of the year was the leadership context in PAICV. Initially with two contestants, the incumbent and a challenger, the challenger announced his withdrawal from the race, accusing his rival of manipulation of the party apparatus and abuse of power.[5]

Notwithstanding the more distended general political climate, parliamentary opposition – composed by the center-left PAICV[6] and center Democratic-Christian *União Ca-*

[1] The country is still classified as free by the Freedom House Report 2019 (available at <https://freedomhouse.org/report/freedom-world/2019/cape-verde>), scoring 90/100 and occupying thirtieth place in the *Democracy Index 2019. A Year of Democratic Setbacks and Popular Protest* (EIU 2019), 10.

[2] See list in Section V.

[3] *Inforpress,* 08-01-2019, <https://www.inforpress.publ.cv/pr-justifies-the-return-of-legislative-acts-with-expiry-of-legislative-authorization/?lang=en>

[4] *Inforpress,* 01-05-2019, <https://www.inforpress.cv/en/mpd-distances-itself-from-mp-emanuel-barbosas-statements-about-amilcar-cabral/>

[5] *Inforpress,* 07-12-2019, <https://www.inforpress.cv/jose-sanches-desiste-de-candidatura-a-lideranca-do-paicv/>

[6] *Inforpress,* 26-11-2019, <https://www.inforpress.cv/en/praia-paicv-elected-appoint-lack-of-security-and-unemployment-as-two-major-problems-of-the-county/>

bo-Verdiana Independente e Democrática (UCID)[7] – was firm in criticising government policies on employment, education, social protection, transportation and public security. Extra-parliamentary opposition was more acrimonious in its criticism. *Partido Popular* (PP) targeted not only the ruling party but also the system itself and most of its main institutions.[8] And the fringe *Partido do Trabalho e Solidariedade* (PTS) controversially issued a press communication about the introduction of the death penalty to Cape Verde and the use of the military to conduct targeted killing operations against drug traffickers who allegedly controlled the capital's slums, to exterminate them as parasites and cancers.[9] Those extreme measures were related to a sentiment of insecurity[10] that led to an apparent increase of homicides, including the assassination of a police officer during an operation in the main city of the archipelago, Praia,[11] and a murder attempt against the mayor of the capital.[12]

Other pertinent political developments that impacted the political system and/or generated heated debates were related to: a) the announcement by the Prime Minister (PM) that the Cabinet would promote the teaching of morals and religion in public schools in order to implement the concordat signed with the Vatican,[13] though allowing non-Roman Catholic students to opt out;[14] b) the use of public funds by the Cabinet to celebrate, through outdoors and spots, its own achievements;[15] and c) the passing away in office of the Deputy Minister of the Prime Minister for Regional Integration.[16]

At the general legislative level, despite having failed to approve the most important bill that it submitted to Parliament in order to promote regionalisation in the country[17] – one of the main demands of part of the population of northern islands – the Cabinet managed to promote legislation relevant for constitutional law. Namely: a) one that amended the Execution of Criminal Policy Act;[18] b) another that amended the Criminal Investigation Act.[19] This after changes were introduced subsequent to a ruling of unconstitutionality by the CCCV related to an initial version of the bill that led to a presidential veto;[20] c) one related to pensions due to torture victims of the One-Party System;[21] and finally d) one concerning the creation of a special procedure in order to facilitate payment of just compensation for expropriation of property possessed by private persons without a land title.[22]

Relevant legislation and public policy instruments related to the materialisation of constitutional social rights and protection of vulnerable persons were approved or amended as well. For instance, in the following cases: the increase of the non-contributory pension;[23] the programs of social reintegration of convicts,[24] of immigration and integration of immigrants,[25] and of the voluntary return of foreigners;[26] the National Housing Policy;[27] the subsidisation of housing for persons with disabilities;[28] the Prevention, Habilitation, Rehabilitation and Participation of Persons with Disabilities Act;[29] the amendment of the social tariff for electricity decree;[30] the revision and increase of the fees payed to attorneys by the public legal aid program;[31] and the diverse amendments to social security ordinances.[32]

[7] *Inforpress,* 27-03-2019, <https://www.inforpress.cv/en/government-and-mpd-consider-that-country-is-undergoing-recognized-reforms-paicv-contests-and-ucid-questions/>

[8] *Inforpress,* 11-10-2019, <https://www.inforpress.cv/en/cndhc-repudiates-and-is-astonished-with-the-statements-by-pp-president-who-considers-the-institution-a-farce-and-lie/>; Inforpress, 09-06-2019, <https://www.inforpress.cv/en/popular-party-criticizes-budget-for-the-president-of-the-republic/>

[9] *Mindelinsite,* 11-09-2019, https://mindelinsite.cv/lider-do-pts-defende-medidas-radicais-para-combater-gangsterismo-na-praia-e-anuncia-candidatura-a-cmsv/>

[10] *Inforpress,* 20-11-2019, <https://www.inforpress.cv/en/government-committed-to-consensual-solutions-to-improve-security/>

[11] *Inforpress,* 29-10-2019, <https://www.inforpress.cv/en/praia-crime-national-police-officer-killed-in-tira-chapeu/

[12] *Garda World News Alerts,* 29-07-2019, <https://www.garda.com/crisis24/news-alerts/253416/cape-verde-official-in-praia-wounded-in-shooting-july-29>

[13] See text in the Official Journal *[OJ]*, I Series [I-S], n. 68, 18.12.2013.

[14] *Inforpress,* 23-05-2019, <https://www.inforpress.cv/en/prime-minister-confirms-moral-and-religion-teaching-in-public-schools-starting-next-year-2/>

[15] *Inforpress,* 03-06-2019, <https://www.inforpress.cv/en/jorge-santos-refrains-from-commenting-on-alleged-government-political-propaganda/>

[16] *Inforpress,* 22-10-2019, <https://www.inforpress.cv/en/death-minister-autopsy-concludes-that-julio-herbert-died-of-acute-myocardial-infarction/>

[17] *Inforpress,* 04-07-2019, <https://www.inforpress.cv/en/parliament-article-seventh-of-the-regionalization-law-has-been-voted-down-twice/>

[18] Law 52/IX/2019, of 10 April, *OJ,* I-S, n. 41, 10.04.2019, 718-723.

[19] Law 56/IX/2019, of 15 July, *OJ,* I-S, n. 76, 15.07.2019, 1116-1125.

[20] See III.1.

[21] Law 67/IX/2019, of 6 September, *OJ,* I-S, n. 94, 06.09.2019, 1518.

[22] Law-Decree 25/2019, of 13 June, *OJ,* I-S, n. 63, 13.06.2019, 968-969.

[23] Council of Ministers Resolution (CMR) 2/2019, of 9 January, *OJ,* I-S, n. 2, 09.01.2019, 35.

[24] Approved by the Cabinet's Resolution 103/2019, of 9 August, *OJ,* I-S, n. 87, 09.08.2019, 1461-1473.

[25] CMR 3/2019, of 10 January, *OJ,* I-S, n. 3, 10.01.2019, 39-61.

[26] Law-Decree N 46/2019, of 18 October, *OJ*, I-S, n. 108, 25.10.2019, 1724-1727.

[27] CMR 51/2019, of 23 April, *OJ,* I-S, n. 45, 23.04.2019, 792-796.

[28] CMR 161/2019, of 12 December, *OJ,* I-S, n. 129, 30.10.2019, 2068-2097.

[29]Law-Decree 21/2019, of 24 May, *OJ,* I-S, n. 57, 24.05.2019, 922-936.

[30] Law-Decree 22/2019, of 4 June, *OJ*, I-S, n. 60, 04.06.2019, 944-945.

[31] Minister of Justice and Labour Ordinance 33/2019, of 16 September, *OJ,* I-S, n. 98, 19.09.2019, 1543-1544.

[32] See *OJ,* I-S, n. 69, 25.06.2019, 1019-1032.

Of all legal developments, arguably the most important and controversial was the enactment of the Parity of Access to Public Office Act, which prescribes that any list of candidacies to national or local collegial organs has to include a minimum of 40% of candidates of any gender, leading to the rejection of all the lists that do not meet these standards.[33] Another significant legal development was the approval of the Control of Access to Alcoholic Beverages Act, which, among other measures, limited access and consumption of alcohol in public places or at the workplace; established the possibility of public servants and workers being submitted to alcohol tests in office;[34] and restricted advertising of alcoholic beverages and activities of sponsorship by companies of the sector.

In regard to judicial and human rights protection developments, it is important to underline the appointment of a new Attorney-General (AG) to lead the Public Prosecutor's Office (PPO) by the PR after a proposal of the Cabinet[35] and of judges and advocates of the Military Court.[36] However, it is also important to highlight the inaction of Parliament in the filling of vacant positions, namely regarding the reappointment of the Ombudsman, whose term expired in the beginning of 2019, or his replacement by a new one; and the election of the two substitute judges of the CCCV and of non-magistrate members of the Judicial Council and of the Public Prosecutors Council (all terms expired in 2018). Also, a lack of adequate allocation of funds was grounds for concern for some important institutions, namely the Ombudsman's Office[37] and the Media Authority.[38]

In addition, it is worth mentioning that the Parliament gave its consent to the ratification of a number of important treaties, namely the Pelindaba Treaty, which created an African Nuclear-Weapons-Free Zone,[39] and a Protocol to Eliminate Illicit Trade of Tobacco Products.[40]

III. CONSTITUTIONAL CASES

The year 2019 was particularly prolific for the CCCV due to its number of decisions, almost doubling the near 30 decisions in 2018. Nevertheless, the majority were decisions on the admissibility of constitutional complaints (or *amparo*),[41] which, with rare exception – *Veiga et al. v. AG* (R40/2019), with Associate Justice (AJ) Pina-Delgado dissenting[42] and Chief Justice (CJ) Semedo writing for the majority – gathered the unanimous support of the Court. Additionally, constitutional complaint admissibility proceedings produced other related kinds of decisions, namely: a) to allow plaintiffs to correct their petitions (R-14/2019; R-32/2019); b) to adopt provisional measures (*Soares v. SC*[43]); and c) to request clarification or to argue nullity of non-admissibility rulings (R-10, R-11 and R-19/2019[44]).

The announced clash between the CCCV and the Supreme Court (SC) gained new developments in 2019, when the SC showed resistance in executing an injunction resulting from the *Hills* decision reported last year[45] and symbolically counterattacked when a plaintiff seeking remedy in a *habeas corpus* proceeding identified the CCCV as the coercing entity.[46] More formally, the Judge-President of the SC asked the legislative authorities – in the annual ceremony to mark the beginning of the 2019-2020 judicial term – to clarify the moment when SC decisions are deemed to be *res judicata*, especially in the framework of *amparo* proceedings.[47]

The aftermath of the *Hills* decision led to other litigation, in the sequence of which the CCCV, at the request of the plaintiff, clarified the effects of already-reported R-27/2018[48] through R-5/2019,[49] but for procedural reasons rejected the request of adoption of provisional measures (R-6/2019[50]). Subsequently, the appellant submitted a new *amparo*, reasoning that the SC violated his rights by not complying with the CCCV decision in his favour. The request was admitted, and the CCCV granted the provisional measure sought, ordering the SC to release

[33] Law 68/IX/2019, of 28 November, *OJ,* I-S, n. 118, 28.11.2019, 1916-1918.

[34] Law 51/IX/2019, of 8 April, *OJ,* I-S, n. 40, 08.04.2019, 692-703.

[35] Presidential-Decree 24/2019, of 14 October, *OJ,* I-S, n. 105, 15.10.2019, 1698.

[36] Presidential-Decree 25/2019, of 12 November, *OJ,* I-S, n. 117, 20.10.2019, 1906.

[37] *Inforpress,* 5/12/2019, <https://www.inforpress.cv/en/ombudsman-welcomes-governments-opening-to-revise-budget/>

[38] *Inforpress,* 5/12/2019, <https://www.inforpress.cv/en/arc-considers-2020-budget-insufficient-to-meet-needs-in-an-election-year/>

[39] National Assembly Resolution 123/IX/2019, of 15 May, OJ, I-S, n. 54, 15.05.2019, 875-887.

[40] National Assembly Resolution 122/IX/2019, of 15 May, OJ, I-S, n. 54, 15.05.2019, 844-875.

[41] *Baptista v. District Court of Paúl (DCP); Rodrigues v. Court of Appeals of Barlavento (CAB); Ferreira v. DCP; Graça v. Tax and Customs Court of Sotavento; Amado v. SC; Correia v. SC; Obire v. SC; Pereira et al. v. SC; Frederico v. SC; Monteiro v. SC; Silva v. CAB; Dias v. SC; Odo v. SC; Martins and Varela v. SC; Yannick v. SC; Firmino v. SC; Mendes v. SC; Igwemadu v. SC; Oliveira and Lima v. SC; Alves and Alves v. SC; Pereira v. SC II; Teixeira v. SC; Yannick v. Court of Appeals of Sotavento; Yannick v. SC II.*

[42] *OJ,* I-S, n. 6, 14.01.2020, 121-131.

[43] Bellow III.2.

[44] *OJ,* I-S, n. 29, 14.03.2019, 519-521; 521-523; OJ, I-S, n. 46, 24.04.2019, 838-839.

[45] *GRCL 2018*, 51.

[46] SC R11/2019 (not published, on file with author).

[47] On file with author, 13.

[48] *GRCL 2018,* 51.

[49] *OJ,* I-S, n. 28, 13.03.2019, 493-500.

Mr. Hills, the plaintiff, from his pre-trial detention, which was duly executed by the appellate judicial organ (R-9/2019[51]).

In addition to this follow-up, other minor opinions related to diverse proceedings of the jurisdiction of the CCCV were also released: a) appeals challenging the non-admission of concrete reviews of constitutionality request decisions taken by appellate courts (R-20/2019[52] and R-35/2019[53]); and b) appeals challenging the application of fines for electoral infractions (R-48/2019 and R-49/2019[54]). They were all written by AJ Pina-Delgado for a unanimous bench.

Major decisions

1. Advice 1/2019 (Referral by the PR on the Constitutionality of the Amendment Act to the Criminal Investigation Act) – Ex-Ante Review of Legislation[55]

The PR understood that a precept of an Amendment Act to the Criminal Investigation Act that gave powers to public prosecutors to authorise undercover operations without the intervention of a judge was of dubious constitutionality. The CCCV, in a unanimous opinion written by AJ Pina-Delgado, concluded that such rule was incompatible with the Basic Law (BL). The reason was that it had the effect of sidelining the only independent power – the judge – that does not have a specific interest in the conduct of criminal investigations and has a mandate to guarantee the protection of rights of suspects and accused persons. In addition, it replaced that independent power with an entity – public prosecutors – who have some interest in the matter because they accuse in the name of the State. By doing so, according to the CCCV, the challenged norm would debilitate the protection of basic rights and criminal procedural guarantees; namely, the rights to judicial protection, the general right to privacy and safeguards related to personal data protection, the privilege against self-incrimination, the right to life and the right to physical integrity.

2. R-1/2019 (*Soares* v. SC, Request of Adoption of Provisional Measures) – *Amparo*[56]

The *Soares* case concerned a person accused of homicide and maintained in pre-trial detention for a period longer than established by the Code of Criminal Procedure (CCP). Although the case is still pending on the merits, the CCCV – in an opinion written by AJ Pina-Delgado, with AJ Lima dissenting – ordered the release of the petitioner during a preliminary ruling, after admitting the request of *amparo*. The case presented an excellent opportunity to develop an understanding of the CCCV regarding the legal requirements prescribed to adopt provisional measures.

Affirmatively, the CCCV held that the adoption of provisional measures in *amparo* proceedings depended upon a test to verify if the requirements of the law are present, especially the presence of 'ponderous reasons' to grant the relief sought, which evaluate the following: the importance of the right; the strong probability that the request will succeed on the merits; the existence of precedents that support the plaintiff's position; the anticipation of the duration of the amparo proceedings; the individual circumstance of the plaintiff; and the impact of the alleged violation on his personal, familiar and professional life.

3. R-27/2019 (*Obire* v. SC) – *Amparo*[57]

The *Obire* opinion, written by AJ Pina-Delgado, related to the *vexata quaestio* of defining the effects of SC decisions in cases where a civil or political rights holder submits a constitutional complaint to the CCCV. The CCCV had already signalled in previous opinions – particularly in provisional measure decisions – that it didn't consider a decision of an ordinary court to be *res judicata* (i.e., a settled matter), while the SC held the view that its opinions were.

The CCCV grabbed the opportunity to stress and develop its initial findings: that as a result of the constitutional guarantee of presumption of innocence and of the right to *amparo* –which is also a subjective right according to its case law – the submission of a complaint lodged by a plaintiff that continuously appeals from ordinary court decisions, reacting consistently against its condemnation and in due time, suspends the effect of a decision taken by an ordinary court in a criminal procedure up until the final determination is taken.

The effect of those assumptions by the Court, as applied to the main issue of the case, was that the decision of an ordinary court is not sufficient to transform a pre-trial detention situation in a condemnation status. Thus, as far as the BL establishes a limit of 36 months for a pre-trial detention, this is still applicable while the CCCV decision is still pending.

4. R-29/2019 (*Teixeira* v. SC) – Concrete Review of Constitutionality[58]

In this matter, the main issue was whether a suspension by a 2005 statute of a CCP norm – that imposes the holding of public

[50] *OJ,* I-S, n. 28, 13.03.2019, 500-503.
[51] *OJ,* I-S, n. 29, 14.03.2019, 511-518.
[52] *OJ,* I-S, n. 79, 22.07.2019, 1214-1223.
[53] *OJ,* I-S, n. 110, 29.10.2019, 1813-1824.
[54] *OJ,* I-S, n. 14, 04.02.2020, 322-329, 329-337.
[55] *OJ,* I-S, n. 44, 18.04.2019, 763-790.
[56] *OJ,* I-S, n. 11, 31.01.2019, 178-188.
[57] *OJ,* I-S, n. 100, 26.09.2019, 1596-1608.
[58] *OJ,* I-S, n. 100, 26.09.2019, 1618-1653.

hearings in criminal matters in the SC – was unconstitutional. After analysing the preparatory works, especially the transcription of the Parliamentary debates, the CCCV – in an opinion written by AJ Pina Delgado, with AJ Lima partially dissenting – concluded that the promoters of the bill requested only a temporary suspension of the norm to create physical conditions at the SC due to the inexistence of traditional public hearings in apex courts, with the exception of *habeas corpus* proceedings.

For that reason, according to the CCCV, the maintenance of that situation could not be justified by appealing to the constitutional clause that permits proportional restriction of civil rights because it lacked any purpose consistent with the BL, nor by arguing that the Constitution allows suspension of fundamental rights because there was no duly declared judicial emergency in the country and no constitutional state of exception could have lasted so long. Thus, it found that that norm violated the right to public hearings in criminal matters and struck it down by declaring its unconstitutionality, despite restricting the effects of the ruling only to the present case and for the future.

5. R-30/2019 (*AGAM* v. AG) – *Amparo*[59]

In the unanimous Atlantic Global Asset Management (*AGAM*) ruling, written by AJ Pina-Delgado, the point of discussion was the powers of public prosecutors to order the freezing of bank accounts without judicial warrants. The CCCV understood that the interpretation of the Money Laundering Act, according to which they had such powers, violated the right of the plaintiffs to judicial protection in any criminal proceeding that impacts its procedural guarantees, namely because public prosecutors are responsible for accusing suspects of crimes; therefore, they could not be seen as a proper and independent entity to both promote and authorise such serious decisions that impact the assets of a company and eventually of persons (e.g., workers and members of their families) that depend on them without any overview or judicial appeal.

6. R-31/2019[60] and R-38/2019[61] (*BASTA* v. NEC) – Electoral Appeal

These decisions, written by AJ Pina-Delgado, were adopted into the framework of the electoral jurisdiction of the CCCV after a candidacy to the municipal election of 2016 challenged a fine that was imposed on it by the National Electoral Commission (NEC) for the infraction of not presenting its campaign finance report.

Their relevance results from two facts. First, the CCCV Act is very sparse in the regulation of appeals directed against the application of post-electoral fines by the NEC. So the CCCV had to define the applicable procedure by appealing first to the Administrative Infractions General Act and subsequently to the CCP, which led to the utilisation of an open procedure marked by the holding of a public hearing to listen to the plaintiff, the representative of the administrative agency that applied the fine and the Public Prosecutor's Office.

Secondly, because on the merits, the CCCV dealt for the first time with such post-electoral challenges. In this sense, it started to develop an understanding – duly followed in two subsequent related rulings (R-39/2019 and R-41/2019)[62] – that it was a very important and commendable step that the NEC finally took to hold electoral candidacies accountable for failures to obey such essential electoral norms for the protection of democracy, good governance as the ones that regulate candidacies' finances, but that, in this specific case, the amount of the fine was disproportional. Thus, it opted for its decrease.

7. R-50/2019 (*Firmino* v. SC) – *Amparo*[63]

Another challenge to the interpretation of norms of the CCP was raised by Mr. Firmino, who noted that an appellate court should have notified him personally – not just his attorney – of a ruling concerning an appeal lodged against his conviction by a district court. The attorney, without his knowledge, opted not to appeal further to the SC. Through R50/2019, written by AJ Pina-Delgado, the CCCV stressed the restrictive understanding of the SC. According to that understanding, when the legislator imposed an obligation to notify personally accused persons of criminal sentences, it only meant decisions of trial courts and not appeals courts. For the CCCV, this interpretation violated the right of an accused to defence in criminal trials and the right to appeal of the petitioner. In the sense that without having direct knowledge of the decision of an intermediary court concerning an appeal, the accused could not decide autonomously to appeal to higher courts nor fill a constitutional appeal with the CCCV.

8. Request for Recusal of an AJ[64]

Finally, it is worth mentioning a decision of CJ Semedo. It concerned a request of AJ Pina-Delgado to be authorised not to participate in the deliberation of a referral of MPs concerning the constitutionality of norms of the Status of Forces Agreement (SOFA) signed between Cape Verde and the United States of America. This on the grounds that as a scholar and consultant, he had signed an advice request by the Minister of National Defence concerning an initial draft of that bilateral treaty. The CJ refused the request, arguing that the norms were not exactly equal; that constitutional deliberation is not static because it depends on balancing dynamic elements, especially in fields like security

[59] *OJ,* I-S, n. 110, 29.10.2019, 1766-1789.
[60] *OJ,* I-S, n. 110, 29.10.2019, 1789-1795.
[61] *OJ,* I-S, n. 6, 14.01.2020, 88-106.
[62] Id., 106-121, 131-136.
[63] *OJ,* I-S, n. 14, 04.02.2020, 347-357.
[64] See <https://www.tribunalconstitucional.cv/index.php/2019/06/06/presidente-do-tc-decide-pedido-de-escusa-de-intervencao-do-juiz-pina-delgado-no-processo-sofa/>

and national defence; and that the successive review of legislation proceedings was objective. Thus, a justice has no subjective interests that hamper his ability to judge such requests impartially. Otherwise, it complied with the public interest that all available justices could participate in the deliberation of such referrals, especially if they are specialists in that specific domain.

IV. LOOKING AHEAD

For 2020, the decision concerning the SOFA referral, which is still pending at the CCCV, is expected in its first half. Moreover, it is probable that minor parties will launch a challenge to the Gender Parity Law. In addition, major legislation was already announced, namely in the field of decentralisation and devolution of powers to municipalities;[65] amendments to the Electoral Code, Criminal Code, the CCP and even to the BL are also expected or possible. Finally, it will be an electoral year with municipal polls, which will likely happen in the last quarter of the year.

V. FURTHER READING

Aristides Lima, 'O Sistema de Atos Normativos em Cabo Verde' (2019), 2 RCVCJS, 9-23

José Pina-Delgado, 'Data Protection in the Internet: Cape Verde's National Report', in Dário Moura Vicente and Sofia de Vasconcelos Casimiro (eds), *Data Protection in the Internet* (Springer, 2019)

José Pina-Delgado, 'Perspectivas de Participación de Instituciones Nacionales de Derechos Humanos en la Justicia Constitucional. Un análisis a partir del artículo 26 de la Carta Africana de Derechos Humanos y de los Pueblos', in Gonzalo Aguilar Cavallo (ed), *Estudios sobre Responsabilidad del Estado, Justicia Constitucional y Derecho Internacional de los Derechos Humanos. Libro Homenaje al Professor Dr. Domingos Hernández Emparanza* (Tirant, 2019)

João Pinto Semedo, 'La protection de l'élaboration des décisions constitutionnelles', in Dominique Rousseau (ed), *Les Cours Constitutionnelles, Garantie de la Qualité Démocratiques des Sociétés. Actes du Colloque organisé le 12 juillet 2018 par le Tribunal Constitutionnel d'Andorre* (LGDJ, 2019)

[65] *Inforpress*, 22/12/2019, <https://www.inforpress.cv/en/jorge-santos-confirms-entry-into-parliament-of-legislative-package-on-municipalities/>

Chile

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I. INTRODUCTION

Our previous 2016, 2017, and 2018 reports primarily focused on summarizing selected decisions from the Chilean Constitutional Court (Tribunal Constitucional de Chile – henceforth the CC).[1] In those reports, we described two trends: First, how the CC had increasingly become a politically consequential tribunal by using its ex-ante judicial review powers to check the legislative bills approved by Congress – most of which were sponsored and even initiated by the President. Second, how the concrete judicial review mechanism of the Chilean Constitution (the *inaplicabilidad*) is promoting relevant litigation on fundamental rights areas, such as the rights to due process and equality, turning the CC into a significant forum for solving rights disagreements. Even though the Chilean *inaplicabilidad* is far from becoming the powerful tool that other courts of the region use, such as the Colombian *tutelas*, the concrete judicial review mechanism as exercised by the CC is also far from incapable of protecting fundamental rights.

This report will be different than our previous accounts, as the year 2019 had political events that were too important for the Chilean constitutional system to ignore. As we will explain later, massive protests took over the streets and changed the country's political agenda. As a result, a bipartisan agreement was signed by most of the relevant political parties, aimed at opening a possible Constitution-making process that, if it occurs, will replace the entire Constitution in two years' time. Although we still need to engage with some of the most critical CC rulings, we cannot ignore the significant political events of 2019.

Our report is divided into two parts. First, we will briefly summarize the main political events of 2019 and the roadmap that the bipartisan agreement of November 15 planned for the year 2020. We will be as descriptive as possible. Second, we will address the CC and its main judicial decisions. Since we need to be brief, we will ignore dissents and concurrences, with only one exception. In particular, although not exclusively, we will focus on the apparent conflict that the CC had with the Supreme Court. Until October 2019, this conflict was probably the main constitutional discussion in Chile. Of course, everything changed in October.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Our 2018 account reported that Chile was not experiencing a crisis.[2] We also stated that Chilean institutions were respected and stable and that the debates on constitutional change had been channeled through pre-es-

[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); Iván Aróstica, Sergio Verdugo and Nicolás Enteiche, 'Chile: The State of Liberal Democracy', in Richard Albert and others (eds), *2018 Global Review of Constitutional Law* (I·CONnect-Clough Center 2019).

[2] Aróstica, Verdugo and Enteiche, 'Chile: The State of Liberal Democracy' (n 1) 53.

tablished institutional channels. In other words, if a constitutional change was going to happen, the parties were going to use the amending procedure included in Chapter XV of the Constitution. For most, the events that initiated in October 2019 were unexpected. Public intellectuals and academics are still discussing the exact causes of the massive protests, the riots and social unrest. Of course, theories abound, but there is no academic consensus on the causes. Despite this, politicians need to push for quick, urgent and relevant solutions.

In October of 2019, groups of people took over the streets of downtown Santiago to protest the rise in cost of the Santiago metro ticket. A campaign for using the metro without paying started to gain momentum. The protests grew, and social movements joined them. Violent groups attacked critical infrastructures such as metro stations and other institutions such as banks, pharmacies, an electric company, hotels and even a hospital. President Piñera declared a state of emergency and the armed forces took over the streets. Human rights institutions reported and denounced a significant number of human rights violations,[3] and some even called for reforming the Chilean Police.[4] The President's popularity dropped to levels never before seen in Chile's political polls.[5] The polls also showed that the popularity of all the political parties, the Congress and other institutions dropped significantly.

After President Piñera finished the state of emergency, the protests grew even more. The demonstrations were not only about the rise of the metro ticket, of course. They included different demands – such as the need to get higher retirement pensions – but no unified petition included all of them. A protest of more than 1,200,000 people met in downtown Santiago in late October.[6] No leaders were capable of centralizing all the demands and building an organic movement that could represent all the protesters. Later, groups of people complaining against a diverse range of policies, such as the tolls that private-run highways charge to drivers, also joined the protests. Eventually, the demand for a new Constitution gained momentum.

Although most of protesters were peaceful, violent organized groups also existed, and the levels of violence also grew. Eventually, President Piñera called the parties to achieve an agreement for peace, the new Constitution and the social agenda. It was the first time that an elected right-wing President called for a constitutional replacement. Following that call, on November 15, the parties with representation in Congress – except for the Communist Party and other movements – had a series of meetings and achieved a bipartisan agreement called "Agreement for the Social Peace and the New Constitution" (*Acuerdo por la Paz Social y Nueva Constitución*).[7]

The agreement included a timetable for the Constitution-making process: First, in April of 2020, there will be a referendum to decide on whether Chileans agree to replace the Constitution and, if yes, whether they prefer to call for either an elected constituent assembly (the agreement called it "constitutional convention") or a mixed convention consisting of an organ composed of both sitting legislators and a group of elected citizens. If the "yes" vote wins, then the elections for either the assembly or the mixed convention will take place in October 2020, along with local elections. Then, the Constitution-making organ will function for nine months – the possibility of an extension of three months exists – and will need to approve the new constitutional text by a two-thirds majority. The agreement implies that if the two-thirds majority is not achieved on specific issues, the 1980 Constitution will not operate as a default rule, but it does not solve the problem of what will happen with the themes that do not achieve the necessary supermajority support. After the new constitutional text is approved by a two-thirds majority, the citizens will need to confirm the new Constitution in a referendum that will be mandatory for all voters.

The political agreement left many details open, such as the total number of delegates and the regulations of the campaigns, among many others. Thus, the parties appointed a bipartisan "technical committee" to work on a full text that could propose all the regulations needed to make the process feasible. The committee proposed to amend the current Constitution to add all the relevant regulations. After the committee finished its work and offered detailed rules, the parties modified the current Constitution and enacted the new articles. Those articles formalized the timetable that will allow the Constitution-making process to take place. That way, the parties can try to achieve a balance between the need to signal institutional continuity and the necessity to respect the rule of law, and provide a strong signal that could serve as a way out of the crisis by allowing a constitutional replacement procedure.

On Tuesday, the 24th of December 2019, the constitutional reform establishing the procedure for total constitutional replacement was published in the Official Gazette.[8] The reform included many detailed norms that we cannot explain in this brief report, including rules limiting the power of the possible constitutional convention, establishing a procedure to solve conflicts and enacting electoral rules that resemble the ones that exist for electing the lower legislative chamber. Nevertheless, some important details were

[3] See, for example, https://www.hrw.org/world-report/2020/country-chapters/chile [accessed 1/31/2020], and https://www.indh.cl/bb/wp-content/uploads/2020/01/Reporte-15-enero-2020.pdf [accessed 1/31/2020].

[4] See https://www.hrw.org/news/2019/11/26/chile-police-reforms-needed-wake-protests [accessed 1/31/2020].

[5] See https://www.cepchile.cl/cep/site/edic/base/port/encuestasCEP.html [accessed 1/31/2020], and https://www.cadem.cl/ [accessed 1/31/2020].

[6] See https://www.bbc.com/mundo/noticias-america-latina-50190029 [accessed 1/31/2020].

[7] See the agreement in the document signed by most of the parties' leaders in https://www.senado.cl/senado/site/mm/20191114/asocfile/20191114134609/pdf_acuerdo_por_la_paz_social_y_la_nueva_constitucion.pdf [accessed 1/31/2020].

[8] Ley de Reforma Constitucional. Ley Núm. 21.200.

not addressed. Indeed, the parties could not achieve agreement on whether the Constitution-making organ should have reserved seats for indigenous peoples, whether it should have gender parity or a gender quota rule and whether there should be rules to help independent candidates to become more competitive. When we wrote these lines, the parties had not yet agreed on these items.

III. CONSTITUTIONAL CASES

According to the official statistics, in 2019, the CC received 2210 new cases.[9] Among them, 2181 were concrete review cases (*inaplicabilidad*) compared to the 1663 cases that arrived in 2018, 916 in 2017 and 357 in 2016. This confirms the trend that we identified in our previous reports regarding the importance this judicial review mechanism is gaining in Chile. Before the 2005 reform, Chile had a weak judicial review practice in the hands of the Supreme Court.[10] The 2005 constitutional reform pushed by President Ricardo Lagos transferred that power to the CC in the context of a larger set of modifications to the Constitution. Since then, the CC has used the *inaplicabilidad* power in ways that are historically novel in Chile.

In 2019, according to the CC's website, it released 1610 judicial decisions and, as expected, a large majority of those decisions were *inaplicabilidad* rulings.[11] Contrary to other years, the year 2019 had less ex-ante judicial review decisions triggered by parliamentary minorities. The decline in ex-ante judicial review cases may have an explanation: most cases that arrive from congressional minorities challenge legislative bills sponsored by the President, and President Piñera lacks a majority in Congress. Unlike former President Bachelet, who had a supporting coalition that gained a parliamentary majority, it seems that the opponents of President Piñera can build a majority to oppose the President's bills without the need to challenge those bills in the CC.

At least three important developments regarding the CC should be noted. First, Chief Justice Aróstica's term ended and the CC appointed a new chief justice: María Luisa Brahm. Justice Aróstica continues to serve at the CC, but Justice Brahm replaced him as chief justice. Justice Brahm is the second woman to become chief justice. She was originally appointed to the CC by President Piñera and, before serving as a justice, she was the President's chief of staff during Sebastián Piñera's first administration (2010-2014).

The second development was the political discussion on whether the CC should be modified or not. As we said in the 2018 report,[12] a discussion on the CC's powers and the justices' appointment mechanisms exists. During 2019, that discussion was taken up by an academic and bipartisan committee composed of scholars and political advisors. The committee proposed a specific set of changes to the CC,[13] including a proposal to reform the ex-ante judicial review mechanism and a revision to the appointment mechanisms. Regarding the concrete ex-post review mechanism (the *inaplicabilidad*), the committee's proposal provides for a mechanism that may help to prevent tensions between the CC and the Supreme Court. Legislators have not yet used this proposal to write and submit a legislative bill that could be approved by Congress.

The third development that was relevant for the CC was the 2019 tension that arose between the Supreme Court and the CC. These sorts of tensions are not new in Chile,[14] and they seem to be normal in constitutional systems that create a Kelsenian type of constitutional court that is separated from the judiciary, with two coexisting high courts.[15] If two courts have constitutional authority, and none of them is superior to the other, then a competition between the two may rise. In 2019, it was reported that tensions escalated due to a set of cases where the CC and the Supreme Court differed on the application and interpretation of the Labor Code for public employees. While the CC believed that the public employees have their regulatory statute, the Supreme Court argued that the Labor Code was applicable to them. We explain the CC decisions in the next section.

A decision from the Supreme Court reviewed a claim formulated against a ruling of the CC.[16] The relevant question was whether the

[9] See https://www.tribunalconstitucional.cl/estadisticas/estadisticas-ano-2019 [accessed 1/30/2020].

[10] Gastón Gómez Bernales, 'La Jurisdicción Constitucional: Funcionamiento de La Acción o Recurso de Inaplicabilidad, Crónica de Un Fracaso' (1999), 4 *Informes de Investigación* (Universidad Diego Portales) 67.

[11] When we wrote this report, the official statistics on the released decisions were not yet updated – they only included the decisions until August 2019. Thus, we are relying on the information given by the CC's website search engine. See https://www.tribunalconstitucional.cl/sentencias/busqueda-avanzada [accessed 1/30/2020].

[12] Aróstica, Verdugo and Enteiche, 'Chile: The State of Liberal Democracy' (n 1) 53-54.

[13] Grupo de Estudio de Reforma al Tribunal Constitucional, '25 Propuestas Para Un Tribunal Constitucional Del Siglo XXI' <https://www.cepchile.cl/documentos/Informe-Final-Grupo-Estudio-Reforma-al-TC.pdf>

[14] José Francisco García and Sergio Verdugo, *Activismo Judicial En Chile. ¿Hacia El Gobierno de Los Jueces?* (Libertad y Desarrollo, 2013) 132-140; Gastón Gómez Bernales, *Las Sentencias Del Tribunal Constitucional y Sus Efectos Sobre La Jurisdicción Común* (Ediciones Universidad Diego Portales, 2013).

[15] There is literature explaining the tension between high courts. See, for example: Pedro Cruz Villalón, 'Conflict between Tribunal Constitucional and Tribunal Supremo – A National Experience', in Ingolf Pernice, Juliane Kokott and Cheryl Saunders (eds), *The Future of the European Judicial System in a Comparative Perspective* (Nomos, 2006); Leslie Turano, 'Spain: Quis Custodiet Ipsos Custodes?: The Struggle for Jurisdiction between the Tribunal Constitucional and the Tribunal Supremo' (2006), 4 *International Journal of Constitutional Law* 151; Lech Garlicki, 'Constitutional Courts Versus Supreme Courts' (2007), 5 *International Journal of Constitutional Law* 44; Frank I. Michelman, 'The Interplay of Constitutional and Ordinary Jurisdiction', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011); Víctor Ferreres Comella, 'The Rise of Specialized Constitutional Courts', in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011); Nuno Garoupa and Tom Ginsburg, 'Building Reputation in Constitutional Courts: Political and Judicial Audiences' (2011), 28 *Arizona Journal of International & Comparative Law* 539.

[16] The CC decision is STC 3853, and the Supreme Court's ruling reviewing the claim against the CC ruling is SCS 21027-2019

Supreme Court's power in deciding *acciones de protección* – a sort of *amparo* (protective) procedure aimed at protecting constitutional rights – was constitutionally allowed to declare that a CC ruling violated fundamental rights. The Supreme Court also reasoned that the autonomy of the CC should not be put into question and rejected the claim but, in a sort of *dicta* argument, it established that, as long as it does not modify the CC decision, the Supreme Court is allowed to declare that the actions of the CC violate fundamental rights. In other words, the *acción de protección* should not modify a judicial decision from the CC but it can "determine whether the challenged action incurred in a violation of the Constitution and the law" (c. 4).[17] The CC's actions "carried out exceeding the powers given by law or the Constitution, can be controlled by the jurisdictional means of this constitutional procedure" [referring to the *acción de protección*] (c. 5).[18]

This apparent controversy ended up in a public statement enacted by the CC, and a response from the Supreme Court, in which both explained their powers. The CC claimed in a "public declaration" (which is not a formal judicial decision) released on October 8 of 2019 that it was "surprised" by the Supreme Court's reasoning, and reaffirmed that (1) the CC is the only court that can declare whether a legal provision is applicable or not, (2) that the *acción de protección* should not be used to review the CC's *inaplicabilidad* decisions and (3) that the CC did not exceed the scope of its powers.[19]

The reason for the possible tension between the CC and the Supreme Court is that both courts may intervene in the same judicial process, although with diverse functions. The CC's jurisdiction is limited to rule on whether the application of a specific legislative provision is contrary to the Constitution or not, without deciding on the case. Although the CC's decisions are supposed to be binding for the judge or court that is deciding the controversy, the Supreme Court is typically the last instance in determining the final outcome of the case. Thus, while the CC is supposed to have the last word on what the Constitution means, the Supreme Court might have the final word on deciding the actual case.

In the remaining part of this section, the report will illustrate three specific significant constitutional controversies.

1. The Labor Code and Public Employees Cases[20]

These cases connect with a case examined in the 2018 report,[21] and with this report's previous section, where we described the apparent tension between the CC and the Supreme Court. The cases referred to a rule of the Labor Code establishing that public employees can benefit from the Code's regulations only regarding matters that other statutes do not regulate (Article 1, Par. 3 of the Labor Code). In other words, if other pieces of legislation regulated those matters, then the Labor Code cannot benefit public employees in those specific matters. Among the rules that the Labor Code establishes, employees can activate a particular legal procedure – included in Article 485 – if their employer infringes fundamental rights. The question, then, is whether public employees can enable the Article 485 procedure against the State.

The jurisprudence of the Supreme Court had established that public employees could benefit from the Article 485 procedure. Nevertheless, in 2017, the CC declared that the statute regulating the public sector – and not the Labor Code – should be applied to the case, granting the inaplicabilidad in favor of the State, i.e., a local government in that particular case (STC 3853).

In 2019, a significant set of related cases arrived at the CC,[22] and it consistently granted the petitions of *inaplicabilidad* presented by State institutions against public employees, consolidating its previous jurisprudential approach. The CC argued that the Constitution contains a provision that refers to the regulation of the public sector (Article 38, Par. 1 of the Constitution), which serves as a justification for the existence of a general statute regulating the rights of public employees. That statute, which needs to be an "organic law" requiring special legislative supermajority rules and the ex-ante control of the CC, does not refer to the Labor Code. Also, a legislative bill initiated by the President can only modify that statute and, if the result of the procedure is that the State should provide compensation to the employee, then there needs to be an explicit statute financing it so that the public budget can be organized to make those payments. Moreover, the legal system provides for a specific mechanism to denounce rights violations against public employees – those employees can denounce those rights violations to the Comptroller General of the Republic, so they should not use the Labor Code procedure. The CC has used all or some of these arguments in the cases it decided during 2019.

2. The Optometrists' Case (STC 6597)

This section examines a decision that declared the unconstitutionality of a specific legal provision with general effects. This kind of decision is rare in Chile, as most of the CC rulings exercise the power of

[17] Article 94 of the Chilean Constitution establishes that no legal claims or remedies are admissible against CC rulings. Only the CC can rectify the factual errors of its decisions.

[18] Justice Sergio Muñoz's concurrent opinion in that decision made the case stronger, arguing that the Supreme Court could review the decisions of the CC if the CC violated fundamental rights.

[19] Tribunal Constitucional, 'Declaración Pública'.

[20] STC 5539, 5710, 5834, 5853, 5854, 5860, 5890, 5903, 5914, 5920, 5921, 5933, 5947, 5956, 5971, 5976, 5977, 5990, 6022, 6027, 6042, 6046, 6069, 6093, 6117, 6118, 6134, 6154, 6174, 6175, 6187, 6190, 6196, 6203, 6213, 6231, 6314, 6436, 6463, 6491, 6497, 6511, 6531, 6548, 6569, 6583, 6591, 6745.

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

[22] We calculate that these cases represent four percent of all the *inaplicabilidades* received.

concrete review (*inaplicabilidad*).[23] Nevertheless, although scarce, declarations of unconstitutionality – regulated by Article 93-7 – are stronger than *inaplicabilidades*, which are regulated by Article 93-6. While an *inaplicabilidad* ruling only produces legal effects for the case in point and is not legally binding for other cases (see Article 93-6 of the Chilean Constitution), the legal provisions that the CC declares unconstitutional using its Article 93-7 power "will be understood repealed from the moment of the publication in the Official Gazette of the ruling that accepts the complaint […]."[24] The reason why Article 93-7 decisions are rarer than Article 93-6 rulings is that they require a supermajority vote of four-fifths of the justices to strike down a legal provision – eight out of ten justices – while the *inaplicabilidad* only requires a simple majority of six out of ten justices.[25]

The provision declared unconstitutional was a rule included in the Chilean Health Code (*Código Sanitario*), which prevented medical consultations or medical eye technicians from giving consultation inside establishments selling eyeglasses. The ban strongly affected optometrists and healthcare professionals, as medical and technical consultations were banned inside those facilities (Article 126, par. 2 of the Health Code). As we documented in the Chile 2018 report, the CC had already declared the *inaplicabilidad* of that rule in two cases (STC 3519 and STC 3628).[26] In them, the CC argued that the rule lacked justification, declaring that it violated equality by prohibiting the practicing of a profession. Later, the CC received two more claims of *inaplicabilidad* against the same rule (STC 5106 and STC 5176), and the CC followed the criterion established by the first two cases.

On the ground of the previously cited rulings, the CC decided to open a procedure to examine whether the challenged rule merited an Article 93-7 unconstitutionality declaration. The CC held public hearings on July 4, 2019, to hear the arguments of any interested third party. After hearing arguments from twenty-one people, on November 14, 2019, the CC achieved the required supermajority and declared the unconstitutionality of the challenged legal provision – Article 126 of the *Código Sanitario*, second par., final part (STC 6597). In addition to the arguments made in the previous rulings, the CC argued that the prohibition was unnecessary, as its purpose – the need to avoid conflicts of interest of the technicians that work for establishments selling – can be achieved by other means that already exist in the *Código Sanitario* and that are less harmful (c. 57). According to the CC, medical technicians and optometrists exercise a legally protected activity, and they hold the rights not to be discriminated against (Article 19-2) and freedom of work (Article 19-16). Moreover, the State has a constitutional duty to secure equal opportunities for everyone (c. 54).

3. The Exceptional Acquisition of a Rural Real Estate (STC 6613)

A mother and her son claimed to own the same property as the defendant. The possibility of this duplicity exists in Chile regarding small rural real estate, as there is more than one way to acquire it: the special procedure of Decree-Law 2695 and the traditional Civil Code. Decree-Law 2695 provides for a less demanding process regarding the rules of publicity, deadlines for exercising actions and deadlines for claiming the acquisition of the real estate. In this case, the applicants to the CC reported having acquired the property in the manner established in the Civil Code, and the defendant via Decree-Law 2695.

The applicants argued that Decree-Law 2695 produced an unconstitutional result, and the CC partially accepted the petition by declaring that parts of that norm should not apply to the case. The CC stated that the administrative authority was constrained to follow meager procedures that violated the constitutional requirements of a fair and rational procedure. Thus, Decree-Law 2695 can violate the constitutional protection of private property using a different mean than the expropriation process, which is the only way an owner can lose property without infringing the Constitution's rules on the property right (Article 19-24). Although it is not certain that Decree-Law 2695 is unconstitutional in every case in an abstract way, it should be noted that, for the CC, Decree-Law 2695 is a "permanent threat" for the owners (c. 12).

This case is critical because it offers a diverse approach to the constitutional protection of property rights than the one advanced in previous property doctrines that the CC used in the past. Also, it is the first time that the CC declared the *inaplicabilidad* of this particular rule.

IV. LOOKING AHEAD TO 2020

This report described how the political parties tried to channelize the 2019 crisis by designing a Constitution-making process aimed at replacing the 1980 Constitution. That process will begin in April of 2020, with a referendum that will decide whether Chile will initiate a constitutional replacement. If yes, that plebiscite will also determine which kind of convention will exist, either an elected assembly or a mixed convention composed of both sitting legislators and elected citizens.

We expect the CC to continue operating and exercising its powers during 2020 within the constitutional framework. The decisions of *inaplicabilidad* and occasionally *inconstitucionalidad* will probably be the CC's primary task.

[23] It is important to consider that the *inaplicabilidad* can be the first step that leads to the declaration of unconstitutionality. In fact, the Constitution requires that, before declaring the unconstitutionality of a legal provision, the CC must have declared the *inaplicabilidad* of that same provision in a previous case.

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

Colombia

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I. INTRODUCTION

Colombian political authorities faced several key constitutional challenges in 2019: How to deal with President Duque's objections to the 2016 Peace Agreement achieved by former President Santos and the FARC guerrillas, which had been legally implemented during 2017 and 2018? How to solve the tensions between President Duque and the Congress, in which the Government lacks permanent majoritarian support? How to respond to novel limitations on the exercise of freedom on the Internet and in the public sphere? How to advance in reducing gender inequality and discrimination between nationals and migrants (after the migration of at least 1.000.000 of Venezuelans)? Finally, how to maintain relationships through occasional conflict between constitutional law and relevant subsystems of international law, such as international investment law and the inter-American human rights law?

In this report we will critically account for the way in which the Colombian Constitutional Court addressed those issues in its 2019 jurisprudence. However, beforehand, we will further illustrate the political context surrounding them.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

President Iván Duque took office on 7 August 2018. As a candidate of the Democratic Center Party, he promised to undertake several core amendments to the Peace Agreement. He was elected by a majority that had rejected the Agreement in the 2016 Plebiscite for Peace. At that time, despite the popular vote, the Congress ratified the Agreement in the name of the People, and during 2017 and 2018, the same Congress implemented it by means of constitutional amendments, laws, and legislative decrees. The Constitutional Court reviewed the constitutionality of the implementation norms and upheld most of them.

This was the case concerning the Statutory Law for the Special Jurisdiction for Peace. Constitutional Amendment 1/2017 created the Jurisdiction, and granted it the power to investigate, prosecute, and impose sanctions on former combatants for human rights and international humanitarian law violations perpetrated during the internal armed conflict. A Statutory Law structured the Special Jurisdiction for Peace and regulated essential substantial and procedural matters concerning its operation and relationships with other jurisdictions and branches of power. After the Congress approved the bill, the Constitutional Court reviewed its constitutionality. By means of Judgment C-080/2018, the Court upheld practically all the sections of the bill.

Since 1821, all Colombian constitutions have empowered the President to object to legislative bills and refuse sanctioning them on two grounds: constitutional and political convenience. Sections 165, 166, and 167 of the 1991 Constitution currently regulate that power. After the constitutional review of the

bill, President Duque raised six objections to the Statutory Law of the Special Jurisdiction. They referred to political convenience grounds: the lack of a clear obligation of former FARC members to compensate the victims; the lack of an empowerment to the Government to verify the list of recipients of special criminal law benefits; the lack of a precise demarcation between the powers of the Special Jurisdiction for Peace and the ordinary Criminal Jurisdiction; the existence of gaps possibly granting impunity to former combatants who had perpetrated crimes against humanity; the lack of a prohibition to the Special Jurisdiction for Peace to request and assess evidence before deciding on extradition requests for crimes committed by former combatants after the signature of the Peace Agreement; and the concession of the benefit of non-extradition to former combatants as an exchange of confessing the truth, regardless of the gravity of their crimes. With a scarce majority, the Congress rejected those objections and the President was forced to sanction the bill as it was upheld by the Constitutional Court.

This was not the only tension between the Government and the Congress. During his campaign, President Duque promised to break a historic practice of allocating pools of jobs in public administration and contracts to persons linked to opposition and independent parties in exchange for parliamentary support. As a response to a policy upholding that promise, opposition and independent parties declined collaboration with processing governmental legislative initiatives. Hence, a much-needed amendment to the budget (the State Financing Act) and the Development Plan were approved by the Congress with unstable and weak majorities. Using an *actio popularis,* which grants any citizen standing to request that the Constitutional Court review the constitutionality of any law, opposition leaders denounced the unconstitutionality of both laws. As explained below, in a decision with strong dissenting opinions by several justices, the Constitutional Court declared the unconstitutionality of the State Financing Act on procedural grounds.

The tension between the Government and opposition parties also expanded to public deliberation and to the streets. Opposition leaders have accused the Government of being negligent in protecting social leaders and former FARC members from constant attacks and homicides. Moreover, following the Chilean experience, since 21 November 2019, opposition members, unions, and students have carried out weekly protests demanding deep economic and social changes. In a handful of days, unrest proliferated in the streets. Several protesters, policemen, and citizens were killed or severely wounded. The Constitutional Court played the role of arbitrator concerning some of those issues.

Furthermore, the Court has been pivotal in achieving a balance between constitutional law rules and principles on the one hand, and state obligations grounded in international economic law, international investment law, and international human rights law on the other. According to Section 241 of the 1991 Constitution, the Constitutional Court has the power and the duty to review the constitutionality of international treaties, signed by the President and ratified by the Congress, before they become binding. In 2019, for the first time, the Court undertook a substantial review of bilateral investment agreements and free trade agreements to assure that Colombian international economy commitments are compatible with essential constitutional principles, such as equality and due process.

III. CONSTITUTIONAL CASES

1. Judgments on Individual Liberties

In 2019, the Constitutional Court issued two major rulings regarding freedom of expression in the context of the Internet. In judgment SU 355/2019, the Court reviewed a constitutional complaint (*tutela*) by Kika Nieto, a Christian YouTuber, who claimed that a journalist had violated her rights to good name and honor. On a well-known website, the journalist published a video with the title "Kika Nieto hates gays and lesbians, even though she denies it." The journalist expressed her views on some statements made by the petitioner when asked about the LGBTQ community. In a nutshell, the statements by the YouTuber highlighted that, according to the Bible, marriage should be between a man and a woman. At the same time, she invited Christians to love and not to judge gays and lesbians. The journalist claimed that behind those statements the YouTuber was somehow hiding hatred against the LGBTQ community.

In its judgment, the Court upheld a two-level analysis: one related to the content of the video and another related to its title. On the first, it ruled out a possible violation of the rights of the petitioner. According to the Court, the opinions of the journalist were based on public statements by the YouTuber. Thus, in an exercise of her free speech, the journalist had made a personal assessment of those statements. The Court concluded that the Constitution protected that assessment as an instance of the freedom of speech. On the second, the Court stated that the title of the video, and the description of the content, attributed certain beliefs and sentiments to the YouTuber that defaced what she said. Nevertheless, it discarded any possible violation. The title included the expression "even though she denies it," which suggested that content was an interpretation made by the journalist, but not a definitive statement about the plaintiff's conduct.

Bernal J and Pardo J dissented. They claimed that, without any justification, the journalist used abusive, slanderous, offensive, and denigrating expressions against the YouTuber, only because of the religious views of the latter. According to the constitutional jurisprudence, the use of those expressions violates the right to good name and honor. Furthermore, it violates the freedom of conscience and the religious freedom of the YouTuber, protected under Section 18 of the Constitution and under the American Convention of Human Rights.

Moreover, in judgment SU 420/2019, the Court decided four cases in which the petitioners requested the removal of certain

content published on digital platforms, such as Facebook and YouTube, because they believed it violated their rights to intimacy, honor, and good name. In that judgment, the Court addressed two issues: (i) the limits to the wide scope of protection of freedom of speech; and (ii) whether digital platforms have the responsibility of informing addressees of their rights. The Court stated that judges ought to undertake a strict proportionality analysis of the rights in conflict. In doing so, they ought to take into account criteria such as the level of impact of the message and the frequency of the questioned publication. Furthermore, the Court held that digital intermediaries are not responsible for content published by its users, yet they must remove the content when ordered by a judge.

In addition, in judgment C-253/2019, the Constitutional Court reviewed the constitutionality of two provisions included in Act 1801/2016. In that ruling, the Court concluded that the general prohibitions imposed on the consumption of alcohol and psychoactive substances in public spaces, such as parks and other places open to the public, as established in the bill, were unconstitutional and infringed on the right to free development of personality. The Court sustained that the provisions under review were unreasonable and disproportionate. They were unreasonable because the means – a general and extensive prohibition – was not necessary to achieve the goals sought by the legislator – a peaceful coexistence and the integrity of public space. They were disproportionate because the provisions granted comprehensive protection to peace and public spaces by placing a full restriction upon free development of personality.

Bernal J dissented. Concerning reasonableness, he claimed that the aims of peaceful coexistence and protection of the integrity of public space are constitutionally legitimate. Hence, the legislator can adopt suitable measures to protect them. He also stated that, in the context of fighting against drug micro-trafficking, it is not generally disproportionate for the Congress to prohibit drug consumption in streets and parks.

2. Judgments on Equality

In judgment C-372/2019, the Court determined the scope of nonresident aliens' right to equality vis-à-vis Colombian citizens with regards to organ donation. Section 10 of Act 1805/2016 states that nonresident aliens can be recipients of organs donated by Colombian citizens only if they are married and have lived for at least two years with the donor. Applicants argued that those requirements violated the right to equality of nonresident aliens because Colombian citizens were not subject to them.

The Constitutional Court dismissed the applicant's arguments and upheld the legislative provision. The Court acknowledged that the provision accorded a less favorable treatment to nonresident aliens in comparison to Colombian nationals. However, it found that such differential treatment was not discriminatory because it was reasonable and proportionate. It was reasonable because it pursued two legitimate aims: (i) giving Colombian citizens a preferential access to organs, which are *scarce goods;* and (ii) preventing organ trafficking. Furthermore, the provision was proportionate because it only imposed a temporal limitation to access organ donation to nonresident aliens.

Moreover, in judgment C-519/2019, the Court reviewed the constitutionality of Section 1 of Act 54/1989, according to which children ought to be registered under their father's surname, in the first place, and their mother's surname in the second place. Applicants argued that such provision was contrary to the principle of equality between men and women. The Court declared the unconstitutionality of the legislative provision. It noted that when handing down the family name, the child's father and mother were treated differently. Unlike the father, and in spite of an agreement between the spouses, the mother was unable to obtain authorization to transmit her family name to the child in the first place. After running an equality test, the Court ruled that such differential treatment was discriminatory because it lacked a reasonable justification. The Court noted that Section 1 of Act 54/1989 derived from a patriarchal understanding of the family and of the husband's powers, which was no longer compatible with the constitutional principle of equality between men and women.

3. Judgments on Separation of Powers

In decision C-252 of 2019, the Court reviewed the constitutionality of the Colombia-France bilateral investment treaty (BIT). Though the Court had previously reviewed 13 BITs signed by Colombia and other countries, this was the first time in which the Court exercised substantial judicial review on this kind of treaty, and therefore, actively intervened on the powers of the President to conduct international relations. After holding a public hearing – which gathered the Colombian government officials, the French ambassador, arbitrators, and experts – the Court declared the treaty conditionally constitutional. According to its ruling, several substantial provisions of the treaty would only be compatible with the Constitution in light of some specific interpretations. To enforce this decision, the Court ordered the Colombian President to advance negotiations with the French government in order to adopt a joint interpretative declaration that would clarify the scope of several standards and adjust them to the Constitution.

Drawing from doctrines displayed by the international investment arbitration tribunals as well as recent developments in international investment law, the Court upheld the constitutionality of the treaty under the condition that "none of its substantive rights will result in more favorable unjustified treatment towards foreign investors with respect to nationals." Regarding the fair and equitable treatment clause, the Court stated that both parties ought to limit its scope and prevent overly broad readings. This will prevent arbitration tribunals from adding new obligations. Concerning the national treatment and most-favored-nation clauses, the Court ordered the definition of the expressions "like circumstances" – concerning granting privileges to investors in certain economic fields in comparison to investment regulation in other areas – and "treatment" to avoid vagueness and secure legal certainty.

Furthermore, the Court highlighted that the investors' "legitimate expectations" could only be protected whenever they "(i) are derived from specific and repeated acts carried out by the Contracting Party that induce the investor to make or maintain the investment in good faith and (ii) are affected by public policy's abrupt and unexpected changes." Finally, the Court concluded that the "necessary and proportional" standard included in the indirect expropriation clause had to be compatible with the regulatory capacities of the national authorities.

In decision C-481 of 2019, the Court declared the State Financing Act unconstitutional. The recently elected President introduced this bill to the Congress as a vital instrument to increase the public national budget. Several citizens and leaders of opposition and independent parties argued before the Court that the House of Representatives had violated the principle of deliberative democracy during the Act's approval process. They noted that the Senate did not publish the bill after its approval. Hence, members of the House of Representatives did not have access to the bill, though they finally approved a proposition to pass "the bill approved by the Senate" on the following day. But the petitioners held that members of the House did not have access to the bill to research, discuss, and decide about it. This decision raised a significant public debate regarding the articulation of the new Government and the legislative branch.

This case was about whether the House of Representatives eluded the debate of the bill by approving the one passed by the Senate, without even having access to it. The majority concluded so, since the Senate did not publish the bill in the *Gazette of the Congress,* which is the official instrument for it.

Bernal J, Guerrero J, and Ortiz J dissented. Their opinions expressed that there was no violation of the deliberative democratic principle. According to this view, the members of the House of Representatives did have access to the bill as long as (i) some of them explicitly declared so; (ii) the Senate published the bill on the official website of the Congress; and finally (iii) the sponsoring Senator of the bill delivered a presentation about it to the members of the House of Representatives before they passed it. In light of this, the House did have access to the bill, so its decision did not violate the democratic principle. In this case, the Court was divided between a formalistic and a non-formalistic approach to the deliberative democratic principle.

4. Judgments on the Environment

In decision C-045/2019, the Constitutional Court declared sport hunting unconstitutional. The Court avowed that environmental protection under the 1991 Constitution encloses a duty to protect animal life and, specifically, the prohibition of animal cruelty and abuse. Hence, limitation to this prohibition ought to be reasonable and proportionate. In light of these considerations, the Court concluded that certain legislative provisions regulating sport hunting were not reasonable. They were unconstitutional because they did not contribute to achieving any legitimate constitutional goal. Sport hunting is not an expression of freedom of religion, is not meant to satisfy alimentary needs, is not practiced for medical and scientific experimentation, and is not a fixed cultural tradition in Colombia. Despite public acceptance of this ruling, it is clear that the Court failed to consider that sport hunting is an effective conservation tool and that it does pursue at least one constitutional goal: it is an expression of personal autonomy.

In decision T-236/2017, the Court ruled on the use of glyphosate for aerial spraying of illicit crops. This judgment was preceded by the decision of the National Narcotic Council (NNC) to suspend the official program for illicit crop eradication, which included obligatory aerial spraying using glyphosate. The Court sustained the suspension of the program as a precautionary measure because the NNC did not provide enough scientific evidence to demonstrate the program's harmlessness for human health and the environment. However, the Court stated that the program could be resumed if the NNC complied with a specific standard: to exhibit objective and conclusive scientific evidence that glyphosate poses no harm to human health and to the environment. With this background, in decision A-387/2019, the Constitutional Court upheld the orders handed down in judgment T-236/2017. Nevertheless, the Court introduced essential moderations to the order. The Government asked the Court to review this decision, claiming that it imposed an impossible standard. In the 2019 decision, the Court pointed out that this standard could not be construed as an obligation to exhibit "full scientific evidence" that glyphosate was "completely harmless." Therefore, the Court ruled that NNC could reinstate the program after (i) evaluating "all scientific and technical information available" on glyphosate risks for human health and the environment; and (ii) balancing those risks with the Government's anti-drug international and national commitments. At the end of 2019, the Department of Defense confirmed that the aerial spraying program will be resumed in 2020.

5. Judgments on the Relationship between Constitutional Law and Inter-American Human Rights Law

In judgment C-111/2019, the Constitutional Court upheld the *Procuraduría General de la Nación*'s (PGN) power to sanction popularly elected officials. The PGN is a specific Colombian institution empowered to supervise compliance to the law by public officials. The applicants claimed that the PGN's power to sanction popularly elected officials was contrary to Section 23 of the American Convention on Human Rights (ACHR), which states that "[t]he law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph [political rights] only on the basis of […] sentencing by a competent court in criminal proceedings." In the Court's view, Section 23 bars administrative authorities from sanctioning popularly elected public officials. According to the claimants, the PGN is not a judicial institution. Hence, it should be deemed to be an administrative authority.

The Court noted that Section 23 of the ACHR lacks supra-constitutional binding force and cannot be understood in textual isolation. Rather, it must be systematically interpreted with other constitutional provisions, such as the ACHR as a whole and the United Nations Convention against Corruption. In light of the

above, the Court stressed that state parties to the ACHR have a wide margin of appreciation to determine the way in which there can be limitations to political rights. Accordingly, the Court concluded that the PGN's power to sanction popularly elected public officials in administrative proceedings was compatible with the ACHR because: (i) the Colombian Constitution explicitly grants such power to administrative authorities; (ii) the PGN must respect the right to a fair trial in such proceedings; and (iii) in any event, its decisions are subject to judicial review. This decision is remarkable because it shows how the Constitutional Court construes human rights provisions and understands the relationship between constitutional and inter-American human rights law.

Finally, in Judgment SU 217/2019, the Constitutional Court determined the scope of the right to appeal in criminal proceedings. The case concerned a criminal proceeding in which the petitioner was accused of document forgery. In the first instance, the Judge of Neiva (a medium city in inner Colombia) rendered a verdict of acquittal. However, in the second instance, the Superior Tribunal of Neiva found the petitioner guilty and convicted him to four years of imprisonment. The Supreme Court of Justice ruled that such decision was not subject to appeal because the criminal procedural code did not grant the right to appeal decisions rendered in the second instance.

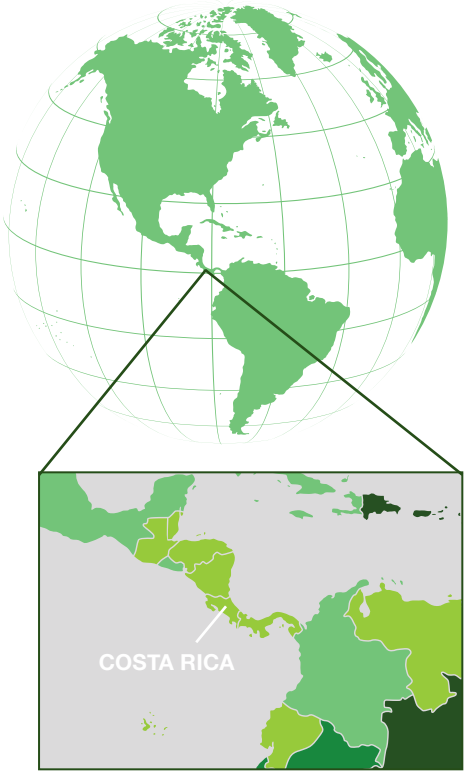
The Constitutional Court ruled that the Supreme Court of Justice violated the petitioner's right to appeal. The Court recognized that the criminal procedural code does not expressly provide for the right to appeal convictions rendered in the second instance. However, drawing from its previous decisions in judgments C-792/2014 and SU 215/2016, and several rulings of the Inter-American Court of Human Rights, the Court held that such right reasonably derived from Section 29 of the Constitution and Section 8.2(h) of the ACHR for two main reasons. First, the right to appeal cannot be narrowly construed. Neither the Constitution nor the ACHR limit the right's scope to first instance decisions. Second, the Court stressed that the right to appeal was different and independent from the right to a double instance, and therefore interpreting that second instance decisions could not be appealed would leave the right to appeal convictions rendered in them without *effet utile.*

IV. LOOKING AHEAD

2020 is a critical year for the Court. First, a vacancy is occurring because Justice Luis Guillermo Guerrero completes his eight-year tenure. Therefore, the Council of State is expected to nominate three candidates, among which the Senate shall elect the new justice. This appointment is crucial for the Court's majority, either liberal or conservative. Second, the Court's agenda includes controversial cases related to abortion, prior consultation to indigenous communities, and climate change. The first case reopens the debate about the constitutionality of both (i) establishing abortion as a criminal offence; and (ii) banning abortion under any circumstances. The second case (known as *Linea Negra*) is expected to define the scope of the right to prior consultation regarding mining and agricultural projects. The third case concerns whether a legal obligation to purchase 10% of the overall demand of energy from non-conventional renewable energy sources violates the freedom of contract of trade representatives in this sector.

V. FURTHER READING

Gustavo Prieto, "The Colombian Constitutional Court Judgment C-252/19: A new frontier for reform in international investment law," available at: https://www.ejiltalk.org/the-colombian-constitutional-court-judgment-c-252-19-a-new-frontier-for-reform-in-international-investment-law/#more-17376 (1.2.2020).



Costa Rica

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I. INTRODUCTION

In 2019, the Costa Rican Constitutional Court (*Sala Constitucional*, popularly known as *Sala IV*) commemorated its 30th anniversary with a series of videos and a new slogan, "The Sala Changed my Life." While the publicity campaign celebrated, highlighted, and humanized the court's impact on the lives of ordinary citizens in Costa Rica, other challenges were simultaneously being played out elsewhere. As this report notes, the court has received and resolved approximately 400,000 cases since its creation, mainly *amparos* (writs of protection) involving almost every article of the Constitution. In 2019, the court decided 25,818 cases, a record number for a single year. At the same time, its continued high profile has increasingly evoked political pushback against it. Politicians of all parties routinely use, as well as criticize, the court's constitutional review powers and citizens are increasingly vocal in opposition to the appointment procedures of its magistrates due to the opacity and lack of clear objective standards used to select candidates.[1]

Context and Background

Since this is the first time Costa Rica has been included in the *Global Review,* we briefly provide some historical background to contextualize the report. Before the creation of the Constitutional Chamber of the Supreme Court in 1989, constitutional control belonged to the Supreme Court sitting *en banc.* The pre-reformed court resolved all *habeas corpus* cases, but *amparo* cases were referred to the Criminal Jurisdiction. A recent study revealed that the pre-reformed Supreme Court was ineffective and generally showed great deference to the elected branches of government. For example, from 1918 to 1989, only 8% of the 13,500 habeas corpus cases were decided in favor or partially in favor of the affected person.[2] Several high-profile cases reveal that the Supreme Court was willing to legitimize the political prosecution of leftist leaders in the 1950s and other constitutional rights violations by the state. In the case of amparo claims, only 6% were decided in favor of the claimant out of 350 resolutions from the Supreme Court in that same period.[3]

The Constitutional Court was created in October 1989 as the fourth chamber (*Sala*)[4] of the Supreme Court, following a model of concentrated constitutional review that requires no previous judicial process to activate. No other judges can decide constitutionality questions, and its resolutions are *erga omnes* with retroactive effects[5] and are binding on everyone except for the Sala IV itself. It receives all habeas corpus, amparos,

[1] Civil Society, media, and even the United Nations' Special Rapporteur for Judicial Independence have demanded important changes in the mechanism used to elect Costa Rican Supreme Court magistrates, but to date neither Congress nor the Supreme Court has initiated the demanded reforms. <https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24699>

[2] Sala Constitucional, Proyecto de Recopilación de Sentencias de Habeas Corpus 1918-1989 (actualizado Junio 2019) <https://habeascorpus19181989.poder-judicial.go.cr/index.php/estadistica>

[3] Ley de Amparo [1950], No. 1161. This was eliminated with the new Constitutional Court.

[4] The three previous Salas are the specialized courts of cassation, being the upper level for appealing a judicial process. See more details in Ley Orgánica del Poder Judicial [1993], art 55-57.

and constitutional review claims, acting as a court of the first instance. Its resolutions are unappealable within Costa Rica, but can be appealed to the Inter-American Human Rights Commission, although this is very rare.

Soon after its creation, the Sala IV became a well-utilized legal opportunity structure (LOS)[6] with an open-access legal arena that allowed all inhabitants regardless of age, race, gender, citizenship, and income level to seek to reestablish or protect their fundamental rights through free, easy, quick access to constitutional justice without the need for lawyers. This stands in stark contrast to the pre-reformed Supreme Court.

The current Constitutional Court enjoys considerable financial and operational autonomy. Its seven "proprietary" magistrates are elected by a supermajority (two-thirds) vote of the 57-member Congress as part of the Supreme Court's 22 justices. Twelve substitute (*suplentes*) magistrates serve as needed to replace any unavailable proprietary magistrate. Law clerks (*letrados*) are assigned to work for specific magistrates and help prepare drafts for each resolution. Sala IV members elect their president every two years.

During its first decade, the Sala IV received an average of 9,000 cases per year, but over the last decade, its caseload more than doubled to an average of 20,000 cases per year. The overwhelming majority of cases filed with the court are amparo claims (over 80% every year, and in the last four years, more than 90%). Amparo cases tend to be focused on three main topics:[7] health, labor, and petition rights. In general, data from 2014 showed that a third of the issues were declared "Con Lugar" or "Con Lugar Parcial" in favor of the claimants. However, other studies show that results differ widely by topic and by time; amparos for medical treatment, for example, are the most likely to be successful.[8]

The creation of the Constitutional Court has led to a judicialization of politics, where it has fallen to the court to resolve polarized issues that have proven difficult to negotiate solutions to in the political arena. Some notable cases include presidential reelection,[9] the North America Free Trade Agreement with Central America (NAFTA-CA),[10] In Vitro Fertilization,[11] several new tax reforms, gender quotas for electoral participation, and same-sex marriage.[12]

The Sala IV has guaranteed human rights international obligations to which Costa Rica is a signatory, drawing on Article 7 of the Constitution, which considers these international legal instruments to be superior to national legislation and the Constitution itself (principle *pro homine*). Using this judicial reasoning, the court constructed several rights that are not explicitly stated in legislation or the Constitution, including health rights[13] and water rights.[14] The Sala IV interpretation includes the Inter-American Commission and Court of Human Rights (IACHR) jurisprudence and its consultative opinions as part of international law. In 2018, based on a consult from the IACHR, for example, the Constitutional Court ruled that the ban on same-sex marriage was discriminatory and mandated the Congress to legislate a resolution within 18 months. Because Congress failed to pass the necessary laws, same-sex marriage became legal in May 2020 (Sala Constitucional, Vote 2018-12782).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2019, appointments to the Sala IV were a major issue. In 2018, two vacancies had been empty for more than a year despite Congress's legal obligation to elect replacement magistrates within 30 days of a vacancy. The time taken by Congress to fill vacancies on the court has increased dramatically since 2000, in part due to the increasingly fragmented party system and the lack of majority parties in Congress that could elect magistrates[15] and in part as a result of deputies' growing recognition of the importance of the court's jurisprudence.

Compounding the court vacancy problem is

[5] Ley de la Jurisdicción Constitucional [1989], No. 7135. For more historical references of the constitutional law in Costa Rica, see for example, Jaime Murillo Víquez, *La Sala Constitucional* (first edition, San José, C.R. Editorial Guayacan, 1994); Ernesto Jinesta L., "La Sala Constitucional de la Corte Suprema de Costa Rica," in Eduardo Ferrer MacGregor (ed), *Crónica de Tribunales Constitucionales en Latinoamérica* (Marcial Pons Editorial, Buenos Aires, Argentina, 2009), 543; Rubén Hernández Valle, "Reseña histórica sobre la creación de la Sala Constitucional" (Revista de la Sala Constitucional, ISSN 2215-5724, No.1, 2019); J.C. Rodríguez C., "La Sala Constitucional y el equilibrio de poderes," in *Programa Estado de la Nación, Noveno Informe Estado de la Nación* (San José, Costa Rica, 2002), 36.

[6] Wilson, B.M. & J.C. Rodríguez, 2006, "Legal Opportunity Structures and Social Movements: The Effects of Institutional Change on Costa Rican Politics," *Comparative Political Studies* 39(3): 325-351.

[7] Poder Judicial, Annual Statistics Report <https://www.poder-judicial.go.cr>

[8] "Judicialización de la Salud," in *Programa Estado de la Nación, Primer Informe Estado de la Justicia* (San José, Costa Rica, 2015), 308; and "El control constitucional: patrones de votación de la Sala Constitucional," in *Programa Estado de la Nación, Segundo Informe Estado de la Justicia* (San José, Costa Rica, 2017), 344.

[9] Sala Constitucional, Voto 02771-2003 (Poder Judicial, 4 de abril 2003).

[10] Sala Constitucional, Voto 9469-07 (Poder Judicial, 2007).

[11] Sala Constitucional, Voto 1323-96 (Poder Judicial, 1996).

[12] Sala Constitucional, Voto 12782-2018 (Poder Judicial, 2018).

[13] Bruce M. Wilson, "Costa Rica: health rights litigation: causes and consequences," in Yamin and Gloppen (eds), *Litigating health rights: can courts bring more justice to health?* (Harvard University Press, 2011).

[14] E. Villarreal and B. Wilson, 2021 El agua como derecho humano: Una lucha creciente en Costa Rica. *Programa Estado de la Nación,* San José, Costa Rica.

[15] Between 1989 and 2013, the average length of time it took for Congress to appoint a new magistrate to the Constitutional Court was 64.7 days. In the period between 2014 and 2016, it took almost 260 days, and between 2017 and 2018 it took 440 days for Congress to fill a vacancy. "Capítulo 7, Nombramiento de Magistrados," in *Programa Estado de la Nación, Tercer Informe Estado de la Justicia* (San José, Costa Rica 2020) 343

that the reelection process has become increasingly difficult and contentious. Magistrates are elected to eight-year terms, which are automatically renewed unless two-thirds of the members of Congress vote not to renew the magistrate's position on the court. In practice, no magistrate who sought a second eight-year term has been denied by Congress, making magistrates' reelection virtually automatic. This stability has been regarded as a key principle for judicial independence of the Supreme Court. In 2019, during the reelection process of Magistrate Paul Rueda, a deputy in the national Congress announced that he had corralled the necessary two-thirds of the deputies to prevent Rueda's reelection. Some deputies justified their negative vote intention by pointing to several of Rueda's judicial rulings with which they disagreed. In response, a media campaign was launched by civil society organizations and a small number of congresspeople, who argued that the attempt to block the reelection of magistrate Rueda was a clear attempt to punish a Constitutional Court magistrate for doing his judicial reasoning and was a full frontal attack on Costa Rican judicial independence. Ultimately, the magistrate was reelected when the Congress failed to reach the minimum two-thirds vote required to deny him automatic reelection to another eight-year term on the Sala IV. The campaign to block Rueda's reelection was a clear signal of future battles over Sala IV nominations and the fragility of judicial independence, which will become more frequent due to a number of vacancies that will arise in the coming years because of retirements as well as the reelection of sitting magistrates seeking to extend their terms on the bench.

The political fights over the appointment and reappointment of magistrates is a particularly pressing issue since the court's increasingly divided votes amplifies the importance of any given magistrate's vote. For example, for Sala IV votes concerning previous constitutional reviews, a unanimous vote was recorded in only 46% of the cases.[16] A 2017 study of Constitutional Court magistrates' voting patterns reveals that their votes were not divided along ideological lines but tended to coalesce thematically. For instance, three magistrates might vote in very similar ways on environmental issues but might have irreconcilable differences on questions of trade agreements, and vote very differently from one another. These thematic coalitions are very unstable and unpredictable over time due to retirements of sitting magistrates and the election of new ones. Compounding the predictability of voting blocs is the use of *magistrados suplentes* (supplemental magistrates), who hear cases when a sitting magistrate is indisposed due to health, holidays, or a conflict of interest.

III. CONSTITUTIONAL CASES

1. Structural decision to correct waiting lists for surgical appointments in the state-funded and run Social Security Institute (Caja Costarricense de Seguro Social, CCSS), Vote 55605-2019

The judicialization of health rights has been a growing challenge for courts and health care providers across Latin America.[17] In Costa Rica, health rights litigation is one of the most important and most frequently sought remedies at the Sala IV.[18] Health rights cases represent approximately one-third of all cases on the Sala IV annual docket. Significantly, health rights litigants have historically been more successful than litigants in any other type of constitutional claim. An average of 30% of amparos are successful, but on average 58% of health rights claimants were successful between 2006 and 2013; some subcategories of health rights cases, such as cancer treatments, were even more successful, 79%, during the same period.[19]

A major cause of the massive caseload of health rights litigation is due to the inability of the state-run and funded health care system, Caja Costarricense de Seguro Social (CCSS), to schedule treatments for people's ailments. In response, patients increasingly harness the power of the Sala IV to demand shorter waiting times for their treatment, including medical appointments for surgery. Claims are also frequently filed to gain access to medications denied by the CCSS.
In September 2018, a 73-year-old woman, a patient in the CCSS, filed an amparo case with the Constitutional Court claiming a violation of her health rights: after her CCSS-affiliated doctor recommended surgery, a state-owned hospital put her on a waiting list but failed to specify a probable date when the surgery would take place. After many years and thousands of health rights cases related to waiting lists, the Sala IV selected this case to make a structural sentence to address the growing problem of delayed surgery appointments in the CCSS.

In Costa Rica, constitutional magistrates use structural sentences to obligate government authorities to execute specific administrative decisions and implement policies or actions to correct causes of a current violation. These decisions are designed to impact the general population, not just the litigant. By using this type of sentence, the court asserts that it has the constitutional power to effectively co-manage alongside the public institution through compulsory recommendations and a monitoring mechanism that it puts in place in its holding. Previously, the Constitutional Court utilized structural sentences for the CCSS to address issues of HIV/AIDS patients (1999), reactivate an organ transplant program (1994), create a universal vaccination program for pneu-

[16] Ibid.

[17] See Ana Sojo, *La judicialización del derecho a la salud: lecciones a extraer de Colombia para América Latina* (Taller de Judicialización de la Salud, Cepal, Bogotá, 2013).

[18] Wilson, B.M., 2011, "The Causes and Consequences of Health Rights Litigation in Costa Rica," in A. Yamin & S. Gloppen (eds), *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Harvard University Press, pp132-154); O. Rodriguez, S. Morales, O.F. Norheim & B.M. Wilson, 2018, "Revisiting Health Rights Litigation and Access to Medications in Costa Rica: Preliminary evidence from the Cochrane Collaboration reforms," *Health and Human Rights: An International Journal,* Vol. 20 (1): 79-91.

[19] "Judicialización de la Salud," in Programa Estado de la Nación, *Primer Informe Estado de la Justicia* (San José, Costa Rica, 2015), 308.

mococci (2009), and develop a unique file for each patient across all CCSS facilities (2012). In 2013, the Sala IV issued a holding to reduce waiting lists; the 2019 decision, then, is the second time the Sala IV has attempted to resolve the waiting list issue through a structural judicial decision.

In the current decision, the Sala IV took into consideration the increasing volume of similarly litigated complaints over CCSS waiting lists. The court mandated the CCSS to design an integrated system to reduce the waiting list for surgeries and specified the parameters that should guide its efforts to comply with the court's decision. The CCSS was mandated to create standards for waiting times according to the type of surgery, develop objective criteria that can be used to determine a patient's position on the waiting list, solve infrastructure and human resource deficits, and create a timetable of administrative actions to fulfill these goals as well as other more minor requirements.[20] The sentence gave the CCSS six months to design the system, and the court fixed a date for a public hearing to follow up the results. The Ombudsman's Office (Defensoría de los Habitantes) was to follow up *in situ* these measures and report back to the court on the CCSS's compliance with the holding.

In November 2019, during the public hearing, the CCSS president and directors presented the plan and showed that waiting lists for surgeries had already been reduced by three months. Civil society organizations that were part of the hearings, though, argued that the official data hides serious delays in particular cases and that the efforts are too little and too late to be a realistic solution to the waiting list problem. The court will follow up on the plan and the Ombudsman's report in 2020.

2. Fiscal reform, ex ante and ex post constitutional control (Votes 2018-19511 and hundreds of subsequent claims in 2019)

In 2017, Costa Rica's public deficit reached 6.2% of its GDP, and the state faced significant difficulties meeting its obligations to pay even its ordinary expenses. In May 2018, the new incoming government of President Carlos Alvarado (Partido Accion Ciudadana, PAC) set this problem as the number one public policy priority to avoid an economic crisis. The bill, "Law to Strengthen Public Finances,"[21] popularly known as the "fiscal reform bill," was sent to the Sala IV through *ex ante* control (*consulta previa*), a parliamentary procedure that requires a bill to be examined for its constitutionality by the Sala IV before Congress takes its final vote. Previously, in 2012, the Constitutional Court declared a newly promulgated tax reform law unconstitutional due to irregular proceedings during the legislative debate.

After the declaration that that particular fiscal reform bill was unconstitutional, other bills were debated in Congress, but all failed to become law, further compounding the country's fiscal instability. When the current bill was sent for constitutional review, one of the main discussions concerned the law's constitutional ability to regulate salaries and limit budget growth by imposing a unified renumeration standard for all public employees. Another controversy was that the Supreme Court voted that these laws affected judicial independence, and it was not previously consulted in the court, resulting in a procedural violation, and it would need a supermajority. The Sala IV gave the go-ahead in favor of the fiscal reform, saying it did not affect judiciary autonomy, which allowed Congress to pass the bill with a simple majority vote.

In 2018, public sector unions responded to this tax reform bill by carrying out one of the longest strikes in recent Costa Rican history. But despite this opposition, in December the bill became law. Immediately, the Sala IV started to receive claims against the implementation of the law via hundreds of amparos and several Constitutional Reviews. To date, all amparos related to the law have been rejected by the court, which has determined that the claims do not meet the requirements to be adjudicated through the abbreviated constitutional process. Instead, the court argued that this type of claim for individual cases must be filed through normal jurisdiction courts. Claims for Constitutional Review, on the other hand, are still under consideration at the Sala IV. These will solve many questions about the coverage and implications of the fiscal reform, in some institutions with constitutional autonomy from the Executive Branch, such as the state university system, municipalities, the judicial branch, and some agencies that are seeking exceptions from the reform.

3. New regulations for strikes, Vote 2019-20596

In September 2019, Congress approved a bill introducing new regulations for strikes.[22] Before its final vote in Congress, the bill was sent to the Constitutional Court for an ex ante review. This bill was written in response to one of the longest strikes in 2018 against the fiscal reform. It received considerable support in Congress due to the major disruptions the strikes caused, especially in the education and health sectors.

A major goal of the new law is to prohibit strikes in what are deemed to be essential services, such as the security and health sectors. Although education is not considered an essential service, it is considered one in which strike activity will be permissible, but with significant limits: strikes will not be allowed to last more than 21 consecutive days or 10 intermittent days. More harmful to the unions' interests, the bill allows salaries to be suspended on the first day of any strike

[20] Sala Constitucional, Press Note, <https://salaconstitucional.poder-judicial.go.cr/index.php/component/content/article/72-comunicados/405-sala-constitucional-ordena-a-ccss-disenar-en-6-meses-sistema-para-reducir-listas-de-espera-en-hospitales?Itemid=437>

[21] Asamblea Legislativa, Ley de Fortalecimiento de las Finanzas Públicas (Law No 9635, 2019).

[22] Asamblea Legislativa, Ley para brindar seguridad jurídica sobre la huelga y sus procedimientos (Law No 21907, 2019).

and will limit strikes protesting public politics. Those strikes will only be permissible if the public policy directly affects the economic and social interests of the workers involved in the strike. Even those strikes cannot exceed 48 hours and cannot be exercised repeatedly by the same group for the same reason. Finally, since it is the courts that determine the legality of a strike, one clause of the bill includes language to force courts to make their decision within 72 hours from the time a claim arrives on their desk.

Workers' movements and the business sector were polarized regarding this bill. Unions, for example, considered it to be an attack on their right to strike, which they argue is an internationally protected right (such as in the ILO Convention No. 87, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights). Business associations, on the other hand, publicly supported the bill and viewed it as a way of providing legal security for their businesses. In response to the bill, public sector workers staged a massive demonstration on September 3, 2019. On the opposite side, most private sector organizations issued press releases supporting the bill. This issue is seen as part of a wider confrontation in the country among the old and new economies, working standard flexibility, and employees' acquired rights and other work benefits.

In November 2019, a Constitutional Court resolution held that a majority of the articles in the bill were constitutional except for two parts. First, the Sala IV held that that part of the bill requiring the dissolution of unions if their leaders committed criminal acts was unconstitutional. The court noted that one person's criminal responsibility could not be transferred to an entire union. The second area deemed unconstitutional was in response to what the court viewed as a procedural error made by deputies as the bill progressed through Congress. This was because a prior consultation regarding the public services that should be considered essential should have the approval of the Supreme Court of Justice.

The resolution is complex and indicates that it was a contentious issue inside the Sala Constitutional. As mentioned before, this vote has several separated votes and annotations. The Sala IV magistrates did not unanimously support the whole of the judgment; some parts of the court's reasoning were only by a simple majority (four magistrates). The lawmakers erased the two articles that were contested by the court, and the bill became law on January 21, 2020, but the public unions announced their intention to take this resolution to the international level since it affects international labor law treaties signed by Costa Rica.

IV. LOOKING AHEAD

First, with several magistrates nearing retirement age and a current vacancy, the debate over how magistrates are elected will likely become even more contentious, which will likely lead to longer delays in the appointment process. Some in Congress appear keen to undermine judicial independence and elect magistrates friendly to their agenda.

Second, a new Programa Estado de la Nación project is using automated text analysis tools to investigate various aspects of the entire archive of all the decisions made by the Sala IV. The project's results will generate new insights into the jurisprudence of the court, the voting behavior of magistrates, and a clearer understanding of how the court functions.

Finally, in parallel with the fiscal reform mentioned above, a new public employment bill designed to cut public expenses and reduce the growing fiscal deficit will be sent to Congress and subsequently become a major topic for the court in 2020.

V. FURTHER READING

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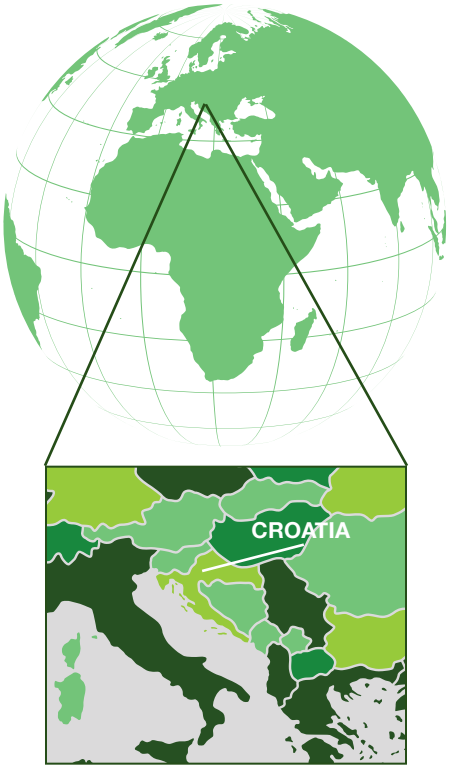
2. Sala Constitucional, Research projects of historical statistics before the Constitutional Court (2019). <https://salaconstitucional.poder-judicial.go.cr/index.php/proyectos-especialesv1>

3. Wilson, B.M. & Villarreal, E., "Water Rights and Social Mobilization Strategies in Costa Rica" (Paper presented at the Law and Society Association Annual Conference, Washington, D.C., June 2019)

4. Wilson, B.M. & Gianella, C., "Overcoming the Limits of Legal Opportunity Structures: LGBT Rights' Divergent Paths in Costa Rica and Colombia" (2019), in *Latin American Politics and Society,* Vol 61(2): 138-163

5. Morgan, L.M., "Human Life is Inviolable": Costa Rica's Human Rights Crucible (2019), in *Medical Anthropology,* Aug-Sep, 38(6): 493-507



Croatia

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I. INTRODUCTION

This review discusses the key events in the constitutional order of the Republic of Croatia that took place in 2019. The Freedom House *Freedom in the World 2019 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 and civil liberties 2. In this light, nothing really changed with respect to the *2018 Report.* Like in the year before, the electoral process was awarded the highest rating because the head of the Government and the national representatives were elected through free and fair elections. The *2019 Report* states that civil and political rights are generally respected, though corruption in the public sector is a serious problem. It also points out that the last couple of years have been marked by an increasing public concern about the presence of far-right groups and figures that espouse discriminatory values.

In 2019, the Constitutional Court received a total of 5,339 cases, of which 4,967 related to constitutional complaints for the protection of human rights and fundamental freedoms guaranteed by the Constitution, and 135 to proposals for assessment of the conformity of an act with the Constitution.[2]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Among other things, 2019 was noted for the unwillingness of the legislator to finally regulate certain areas with appropriate laws; specifically, the laws regulating referendum and abortion. No new referendum law was adopted nor was the existing one amended, despite the yearlong public, political and professional awareness of the need for appropriate referendum regulation, or more precisely, the need for defining matters which cannot be decided by a referendum (particularly if they could jeopardize the exercise of fundamental human rights) as well as the need for redefining the conditions for calling a citizen-initiated referendum and for harmonizing local and national referendum organization rules. And further despite the recurring warnings of the Constitutional Court on the need for the Croatian Parliament to coordinate the Law on Referendum and Other Means of Direct Participation in Administration of State Powers and Local and Regional Self-Government (hereinafter Law on Referendum)[3] with the Constitution or the 2010 Constitutional Amendment. Although in 2019 there was no civil initiative that tested and could have abused the current constitutional referendum framework (which, unfortunately, occurred in some earlier civil initiatives, i.e., the 2018

[1] *Freedom in the World 2019,* available at: https://www.nhri.no/wp-content/uploads/2019/10/ICON.pdf, accessed on 20 January 2020.

[2] Received cases in the period from 1990 to 31 December 2019, available at: https://www.usud.hr/sites/default/files/dokumenti/Pregled_primljenih_predmeta_u_razdoblju_od_1990._do_30._prosinca_2019.pdf, accessed on 1 February 2020.

[3] The Law on Referendum and Other Means of Direct Participation in Administration of State Powers and Local and Regional Self-Government, Official Gazette no. 33/96, 92/01, 44/06, 58/06, 69/07, 38/09, 100/16, 73/17.

citizens' initiative requiring electoral reform and the 2018 citizens' initiative requiring denunciation of the Istanbul Convention), it is very likely that some initiative will soon test the exercise of direct democracy in Croatia.

As far as the law regulating abortion is concerned (Law on Health Measures in Implementation of the Right to Freely Decide on Childbirth – adopted way back in 1978; hereinafter Abortion Law[4]), it should be noted that the Croatian Parliament was bound, based on the order of the Constitutional Court provided in the ruling of 21 February 2017,[5] to adopt a new law pursuant to the ruling's guidelines that highlighted the necessity of 'modernization' of the 1978 law. The ruling also stated that the legislator should prescribe educational and preventive measures and incorporate them into the new law, so that the termination of pregnancy should be an exception and not a rule. Moreover, the Constitutional Court instructed the Croatian Parliament to adopt the new law within two years of the ruling's date. However, the legislator did not comply with the order, despite the fact that Constitutional Law in the Constitutional Court of the Republic of Croatia[6] clearly sets forth in Article 31 that decisions and rulings of the Court are binding for all natural persons and legal entities, and all authorities and local and regional self-government bodies are obliged to enforce them within the scope of their constitutional and legal competences. However, disobeying an order of the Court regarding a specified deadline is unfortunately more the rule than the exception, and does not imply any other sanction but political accountability.

Bearing in mind the fact that the next parliamentary election is scheduled for the present year, it is to be expected that none of the above laws will be adopted in 2020.

III. CONSTITUTIONAL CASES

1. Rights of migrants
Decision of the Constitutional Court of the Republic of Croatia no: U-III-557/2019 of 11 September 2019

In its decision of 11 September 2019,[7] the Constitutional Court accepted the constitutional complaint of the applicant, a citizen of the Republic of Iraq, whose application for international protection was initially rejected as unlawful. The importance of this decision reflects the fact that the Constitutional Court held that the competent bodies, the Ministry of Interior and administrative courts, 'did not act in a way compliant with the guarantees for the protection of rights, stated in Article 23, paragraph 1 of the Constitution and Article 3 of the Convention' (point 5.14.).

The Court accepted the complaint of the applicant, who suffered domestic violence and experienced abuse by male members of her family in her homeland. It also ordered the competent bodies to remedy the detected flaws and enable the applicant to demonstrate her situation and circumstances, for which she sought international protection. Such a decision represented a turning point in the case law of administrative courts, which in principle do not regard domestic violence as an eligible reason for approving international protection. Nevertheless, the Constitutional Court explicitly cited the absolute nature of the rights protected in Article 3 of the Convention: 'international protection is not granted only due to a danger from members of a repressive state apparatus but also due to a danger from individuals or groups who operate beyond that state apparatus' (point 5.5.). It did not agree with the conclusions of the administrative courts, which claimed that the assertions of the applicant were not convincing enough. In that light, the Court assessed that the competent bodies did not take into consideration the well-known fact that physical, and particularly sexual violence or rape represents intensive traumatic experience with severe or devastating long-lasting consequences for every victim, and thus is qualified as abuse. Furthermore, the strong feeling of shame and fear as well as the omnipresent prejudices against the victims of such violence prevent them from reporting the perpetrators and seeking aid. The Constitutional Court believed that if those circumstances were accompanied by the cultural context of the case and the applicant's environment, then it was completely irrational to hold that the applicant could have communicated her traumas earlier. Moreover, she was supposed to convey her experience to two men. Accordingly, the competent courts should have evaluated her testimony in the context of all those facts (point 5.13.).

2. Rights of national minorities
Decision of the Constitutional Court of the Republic of Croatia no: U-II-1818/2016 of 2 July 2019 – the procedure for assessment of the conformity of an act with the Constitution

In its decision of 2 July 2019,[8] the Constitutional Court accepted the 4-year-old application for assessment of the conformity of an amendment of the Statute of the Town of Vukovar with the Constitution, which was submitted by the Parliamentary Committee on Human and National Minority Rights, and repealed parts of the 2015 Statutory Decision on the Amendment of the Statute of the Town of Vukovar.

The Statute of the Town of Vukovar had been subject to assessment of the Constitutional Court before the above decision. Indeed, in its decision of 12 August 2014,[9] the Constitutional Court repealed Article 22 of the 2013 Statutory Decision of the Vukovar Town

[4] Law on Health Measures in Implementation of the Right to Freely Decide on Childbirth, Official Gazette no. 614/78.

[5] Ruling of the Constitutional Court of the Republic of Croatia no. U-I-60/1991 et al. of 21 February 2017, Official Gazette no. 25/17.

[6] Constitutional Law on the Constitutional Court of the Republic of Croatia, Official Gazette no. 99/99., 29/02., 49/02. – consolidated text

[7] The Constitutional Court of the Republic of Croatia, decision no: U-III-557/2019 of 11 September 2019, available at: https://sljeme.usud.hr/usud/praksaw.nsf/fOdluka.xsp?action=openDocument&documentId=C12570D30061CE54C125847400330C25, accessed on 22 October 2019.

[8] Decision of the Constitutional Court of the Republic of Croatia no: U-II-1818/2016 of 2 July 2019, Official Gazette no. 78/2019.

[9] Decision of the Constitutional Court of the Republic of Croatia no: U-II-6110/2013 of 12 August 2014, Official Gazette no. 104/14.

Council, which stipulated that the territory of the Town of Vukovar shall be entirely exempted from enforcement of the Act on the Use of the Language and Script of National Minorities and from Article 12 of the Constitutional Act on the Rights of National Minorities. On the same day, the Constitutional Court made a decision[10] following an application of the Croatian Parliament for assessment of the conformity of the referendum question proposed by Citizens' Initiative 'Stožer za obranu hrvatskog Vukovara' (Headquarters for the Defence of Croatian Vukovar) with the Constitution, in which it laid down its viewpoints applicable to this concrete case, i.e., the Statutory Decision of the Vukovar Town Council, and bound the Vukovar Town Council to regulate, define and incorporate the individual right of members of national minorities to use their language and script in the Vukovar Town Statute itself within one year of delivery of this decision. It should be noted that the Vukovar Town Council did not regulate that right in the Statute but in a statutory decision. Nevertheless, the Constitutional Court accepted the reasons of the Vukovar Town Council for making a separate statutory decision due to 'special circumstances' (point 18). In the same decision, the Constitutional Court bound the Government of the Republic of Croatia to refer to the Parliament for consideration, within one year, the amendment of the Act on the Use of the Language and Script of National Minorities, which is supposed to include a legal mechanism convenient for cases in which the representative bodies of local self-government units do not meet their liabilities as set out in the said Act. Although the Government referred the amendment to the Parliament for consideration on 10 July 2015, it has not been put onto the agenda yet.

In its new decision, the Constitutional Court repealed Article 5, paragraph 1 of the Statutory Decision, whereby the representatives of the Serbian national minority in the Vukovar Town Council had to submit a written application for delivery of written material in the Serbian language and Cyrillic script. Now they can request it orally. The Constitutional Court held that the mandatory submission of the aforementioned written application by members of the Serbian national minority actually narrowed or restrained their rights and added that the exercise of rights of national minorities shall not be regulated in a troublesome way or shall not imply additional conditions (point 24.2.).

Furthermore, the Constitutional Court repealed Article 5, paragraph 2 of the Statutory Decision, according to which the right of the representatives of the Serbian national minority in the Vukovar Town Council to be provided with written material in the Serbian language and Cyrillic script depends on the funds foreseen for this purpose in the budget of the Town of Vukovar. Such a standpoint was assumed taking account of Article 22 of the Act on the Use of the Language and Script of National Minorities, which stipulates that all financial resources needed for enforcement of this Act and relating bylaws shall be ensured through the State Budget and the exercise of the rights of representatives shall not depend on funds in local self-government budgets (points 25.1. and 25.2.).

To conclude, the Constitutional Court ordered the Vukovar Town Council to make a decision on the possibility, or more precisely, on the need to extend the scope of the guaranteed individual and collective rights of members of the Serbian national minority living in the Town of Vukovar in October 2019 (in line with the Statutory Decision (point 29). In fact, even though it asserted that because of the historical-political situation in the Town of Vukovar (which is still affected by the consequences of the Greater Serbian aggression at the beginning of the 1990s), the Town Council 'is permitted' to arrange the collective rights gradually and in a way that respects the needs of the Croatian majority, the Constitutional Court stressed that meeting the respective liabilities cannot be prolonged indefinitely. However, the Vukovar Town Council announced on 18 October 2019 that the necessary requirements for introduction of the special rights of the Serbian national minority with respect to the equal use of languages and scripts had still not been met. As a response, the Constitutional Court asked the Vukovar Town Council to respect the Constitution and law, and all the stakeholders to open a dialogue with mutual respect to calm tensions. Surely, it will be interesting to see whether the Constitutional Court will autonomously initiate the procedure for assessment of the conformity of this regulation of the Vukovar Town Council with the Constitution.

3. Freedom of thought and expression
Decision of the Constitutional Court of the Republic of Croatia no: U-III-2944/2018 of 26 June 2019

In this case, the Constitutional Court accepted the constitutional complaint of the applicant, who blatantly responded to a television appearance of a Croatian historian in the reader response section of a respected Croatian daily newspaper.[11] The applicant accused the historian of historical revisionism and claimed that he is nothing but 'a notorious manipulator and ideologist of the Croatian version of fascism', after which the latter filed a lawsuit before the competent municipal court for compensation of non-pecuniary damage suffered due to violation of his right on personality. In the first instance judgement, the claimant's lawsuit was dismissed; the second instance judgement ordered the applicant to provide the claimant with the amount of 20,000 HRK (points 14 and 15). The applicant contested those judgements in a constitutional complaint.

In its decision, the Constitutional Court established that the applicant's objections touch upon violation of his freedom of thought and expression, stated in Article 38 paragraphs 1 and 2 of the Constitution in relation to Article 16, paragraph 2 of the Constitution, according to which 'any restriction of freedoms or rights shall be proportionate to the nature of the need for such restriction in each indi-

[10] Decision of the Constitutional Court of the Republic of Croatia no: U-VIIR-4640/2014 of 12 August 2014, Official Gazette no. 104/14 and 130/14.

[11] The Constitutional Court of the Republic of Croatia, decision no: U-III-2944/2018 of 26 June 2019, available at: https://sljeme.usud.hr/usud/praksaw.nsf/fOdluka.xsp?action=openDocument&documentId=C12570D30061CE54C125842A003E13F5, accessed on 10 October 2019.

vidual case' (point 19).[12] The Constitutional Court held that 'in circumstances in which a controversial utterance affects the reputation, honour, dignity or rights of other people, the "conflict" should be resolved by weighing the relevant factors relating to the following two protected values: on the one hand, the right to freedom of expression and on the other hand, the right to respect for the personal life of other people' (point 20). Both rights shall be equally protected and the courts shall be focused on achieving 'a fair balance between these rights' in concrete cases (point 20).

Within the framework of this case, the Constitutional Court was expected to handle the following four questions: 'Does the concrete case deal with interference with the guarantee of freedom of thought? Is the interference based on the law? Did it have a legitimate goal? Was it necessary in a democratic society?' (point 22). After having provided brief positive answers to the first three questions, the Constitutional Court concentrated on the fourth, which required the most comprehensive elaboration.

When assessing whether the interference with freedom of expression was necessary in the concrete case, the Constitutional Court was guided by the criteria established through the case law of the European Court of Human Rights (see *Axel Springer AG v. Germany* [Vv], no. 39954/08, judgement of 7 February 2012; and *Von Hannover v. Germany* (br. 2) [Vv], nos. 40660/08 and 60641/08, judgement of 7 February 2012). The Constitutional Court was supposed to provide an answer to the following questions: Does the case touch upon a discussion relevant for the public? To what extent can the person having suffered the damage be regarded as a public figure? What is the form of the posted comment and what are its consequences? How severe was the pronounced penalty? (point 28).

With respect to the criterion whether the applicant took part in a public discussion, the Constitutional Court held that in the concrete case, 'it is not doubtful that the applicant wanted to participate in a public discussion about World War II, fascism in Croatia in the mid-20th century and the way those events are perceived in the public today and how they are articulated' (point 30). The standpoint on this issue bears great relevance since it revolves around the possibility of restricting freedom of expression, and when it comes to a public discussion or political speech, this possibility is 'considerably narrowed' (point 30).

Similarly, regarding the criterion whether the claimant is a public figure or not, the Constitutional Court stated that 'the threshold of reasonable criticism is wider when it concerns politicians and public figures than when it is directed towards private parties since the former are willingly subject to public judgements and therefore, they are expected to show a higher level of tolerance for the criticism of their words and acts' (point 31). The fact that the claimant is 'a publicly, scholarly and politically exposed person' had already been confirmed by the second instance court in its judgement (point 32).

In regard to the content of the controversial text, the Constitutional Court underlined that 'the constitutional and conventional provisions on freedom of expression do not apply only to information or ideas that are benevolently accepted or deemed as non-offensive or imply no reaction but also to those which are offensive, shocking or disturbing. This is entailed by pluralism, tolerance and openness which represent prerequisites for a democratic society' (point 36).

The Constitutional Court also pointed out that when establishing 'a balance' between freedom of expression and the protection of honour, dignity and reputation, it is necessary to differentiate between facts and value judgements. This is particularly important for 'the right of a person to prove his/her assertions about facts and for greater freedom of expression when it comes to value judgments' (point 37). In terms of value judgements, demonstration of their veracity is not required, though they should be based on some facts too (points 20 and 37). Taking account of the above criteria, the Constitutional Court concluded that the second instance decision did not prove 'the pressing need for preferring the legal protection of the claimant's dignity, reputation and honour over the applicant's freedom of thought and expression, particularly if such preference would imply damage compensation in the amount of 20,000 HRK. The reasons behind the second instance judgement cannot be regarded as justified and sufficient for such interference with the applicant's freedom of expression' (point 40).

4. Freedom of thought and expression Decision of the Constitutional Court of the Republic of Croatia no. U-III-63/2017 of 26 February 2019

In this case, the Constitutional Court considered whether the applicants faced violation of their right to freedom of thought and expression, guaranteed in Article 38, paragraphs 1 and 2 of the Constitution, in relation to the right to lodge petitions and complaints, guaranteed in Article 46 of the Constitution.[13] Within the bankruptcy procedure, the applicants were imposed a pecuniary penalty due

[12] See the consolidated text of the Constitution of the Republic of Croatia as of 15 January 2014. Edited and translated by the Constitutional Court of the Republic of Croatia, available at: https://www.usud.hr/sites/default/files/dokumenti/The_consolidated_text_of_the_Constitution_of_the_Republic_of_Croatia_as_of_15_January_2014.pdf, accessed on 1 February 2020. When preparing this part of this report, relating to the protection of freedom of thought and expression, the following material was very useful for us: The Constitutional Court of the Republic of Croatia, National Report, XVIIIth Congress of the Conference of European Constitutional Courts. Answers to the survey questions for the XVIIIth Congress of the Conference of European Constitutional Courts (Prague, 26-29 May 2020) 'Human Rights and Fundamental Freedoms: The Relationship of International, Supranational and National Catalogues in the 21st Century', Zagreb, October 2019, pp. 13-16, available at: https://www.cecc2017-2020.org/fileadmin/Dokumenty/Pdf/Questionnaire/National_Reports/National/Croatia_-_Questionnaire_XVIII_Congress_of_CECC.pdf, accessed 1 February 2020.

[13] The Constitutional Court of the Republic of Croatia, decision no: U-III-63/2017 of 26 February 2019, available at: https://sljeme.usud.hr/usud/praksaw.nsf/fOdluka.xsp?action=openDocument&documentId=C12570D30061CE54C12583AF003A095B, accessed on 10 October 2019. *See also* The Constitutional Court of the Republic of Croatia, National Report, XVIIIth Congress of the Conference of European Constitutional Courts, loc. cit.

to contempt of court. The assessment of the bankruptcy judge of contempt of court was based on the allegations stated in the petition submitted to the Supreme Court of the Republic of Croatia entitled 'a complaint' (point 19).

In a complaint, the applicants highlighted that 'due to the unprofessional, illegal, improper and inefficient performance of the judge' in the concrete bankruptcy procedure and 'for "adjustment" of the documentation for the higher court as well as for other proceedings arising from and in regard with this bankruptcy case', they requested supervision over the judge's work and examination of her responsibility. The appeal against the first instance ruling was rejected by the High Commercial Court.

In this case, the Constitutional Court also referred to the case law of the European Court of Human Rights[14] and emphasized that courts can be, like any other public institution, subject to criticism and control '(…) except in the event of severe harmful attacks, basically ill-founded – bearing in mind that judges represent fundamental institutions of the state and as such, they can be subject to a well-substantiated critique by an individual and not only to a theoretical and general one' (point 16). Moreover, when they act in their official capacity, judges should be more tolerant in terms of criticism than ordinary people. The Constitutional Court also singled out the need for differentiating between criticism and insult. Unless the sole intention of some form of expression was to insult members of the court, sanctioning such conduct would not represent violation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

In its decision, the Constitutional Court claimed that imposing a pecuniary penalty on the applicants represents interference with freedom of expression, guaranteed in Article 38 of the Constitution (point 19). Moreover, it established that such interference has no legal ground. The Constitutional Court emphasized that the first instance court based its decision on the Civil Procedure Act (Article 110) despite the fact that the petition submitted to the Supreme Court was not the petition submitted to the trial court. The petition was just a form of the exercise of the right to lodge petitions and complaints, guaranteed by the Constitution (Article 46) and the Judiciary Act (Article 4, paragraph 3). Since that petition is not part of the civil procedure, it cannot be subject to Article 110 of the Civil Procedure Act and thus the trial court was not empowered to punish the parties for the expressions used in the complaint submitted to the Supreme Court (point 20). Therefore, the Constitutional Court concluded that since the interference with freedom of expression had no legal grounds in the concrete case, the applicants did, through the respective controversial decisions, face violation of their constitutional right to freedom of thought and expression in relation to their constitutional right to lodge petitions and complaints.

IV. LOOKING AHEAD

There is no doubt that the first half of the year 2020 will be highly important for the Republic of Croatia, which took over the presidency of the Council of the European Union for the first time in its history. The Croatian presidency represents a challenge for the European Union itself since it overlaps with the beginning of a new EU institutional and legislative cycle. The six-month presidency is based on four priority areas: 'A Europe that is developing', 'A Europe that connects', 'A Europe that protects' and 'An influential Europe'.

The beginning of 2020 (18 February) will be marked by the inauguration of newly elected Croatian President Zoran Milanović. Since he is a member of the main opposition party (Social Democratic Party), it is very likely that relations between the Croatian Parliament and the Croatian President will be anything but idyllic.

In the second half of 2020 (September), Croatia will see a new parliamentary election. Bearing in mind that fact, necessary steps forward in terms of legislation are not to be expected. This primarily refers to adoption and/or amendment of a number of laws in various areas – electoral system, referendum, abortion, healthcare and social welfare.

V. FURTHER READING

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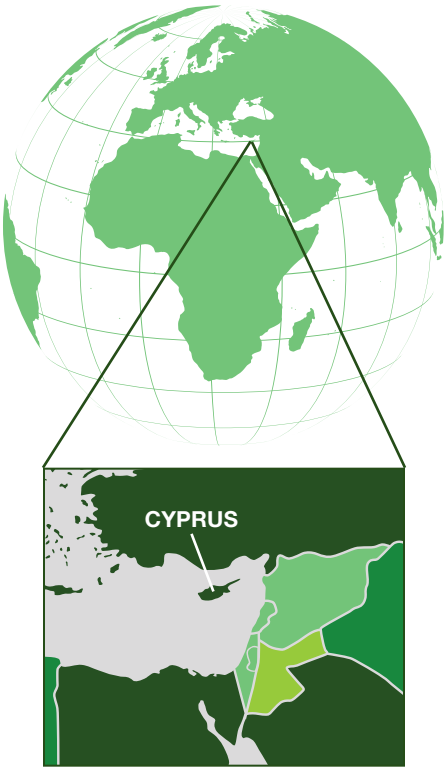
[14] Case *Skałka v. Poland,* no. 43425/98, section 34, 27 May 2003; Case *Morice v. France* [VV], no. 29369/10, section 131, 23 April 2015.



Cyprus

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I. INTRODUCTION

The Republic of Cyprus was declared independent and its Constitution came into existence on 16 August 1960. The Constitution of Cyprus established a unitary yet bi-communal State that was based on the requirement of cooperation and coexistence between the two communities on the island: the Greek-Cypriot community and the Turkish-Cypriot community. Following the collapse of the political compromise between the two communities in 1964 and the withdrawal of the Turkish-Cypriots from the organs of the State, Cypriot constitutional law has evolved – and survived – through the application of the law of necessity.

As discussed in the previous report, the year 2018 ended on a relatively atypical note for constitutional law. The 2019 report features three recurring themes from the 2018 report. First, the constitutional lacuna regarding the issue of non-taken parliamentary seats continued to cause ambiguity and uncertainty until the very last days of 2019. Second, the constitutionality of cuts and reforms introduced during the financial crisis continued to trouble Cypriot courts, and the issue has not yet been determined in a final manner. Finally, the impartiality and independence of the courts were heavily challenged following allegations of conflict of interest among Supreme Court judges. These are topics that will be discussed in the present report.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. President v. House of Representatives: continuing the saga of the 56th parliamentary seat

The 2018 report focused extensively on the two electoral petitions issued by the Supreme Court relating to the 56th parliamentary seat and the situation that arose following the 2016 parliamentary elections.[1] Specifically, in the aftermath of the 2016 parliamentary elections, one of the newly elected candidates chose not to take the seat, thus her term of office in the House of Representatives never commenced. The election of representatives, including the replacement of vacated seats, is regulated under Article 66(2) of the Constitution and Article 35 of the Electoral Law, as amended.[2] The term 'vacated seat', however, is understood as a seat that becomes vacant during a parliamentary term (i.e., after a representative gives the necessary affirmation). What was not regulated by the Constitution and relevant (enabling) legislation was the issue of 'non-taken seats', i.e., seats that cannot be regarded as vacated since they were never first occupied before the commencement of the parliamentary term.[3]

In two electoral petitions from 2017 and 2018, extensively analysed in the previous report, the Supreme Court reaffirmed that the notion of non-taken parliamentary seats

[1] See Constantinos Kombos, 'Cyprus', in Richard Albert and others (eds), *2018 Global Review of Constitutional Law* (The I·CONnect-Clough Center 2018) 74-75.

[2] Election of Members of the House of Representatives Law (72/1979).

[3] This issue is now regulated by the Constitution, which has been amended accordingly; see below on the 2019 constitutional amendments. See also, the Law concerning the Twelfth Amendment of the Constitution (Law 128(I)/2019).

is unknown to the Constitution. Moreover, it declined the possibility of granting the seat to a person who did not secure it through election, as this would contravene the principle of popular sovereignty.[4] As a response to these developments, the House of Representatives voted into legislation a new amendment to the Electoral Law that revised the procedure for filling a non-taken seat. According to the amendment, a seat vacated before the commencement of the parliamentary term is to be granted to the same party's runner-up. However, the President referred the amending law to the Supreme Court for a preventive review of its constitutionality prior to its official promulgation (Article 140 Constitution).

In its decision to this Reference,[5] the Supreme Court reaffirmed its previous finding that the terms 'vacated seat' and 'non-taken seat' differ and that Article 66(2) of the Constitution refers only to the former. Most importantly, the Court relied on the principle of popular sovereignty to find the law unconstitutional. According to the Court, the principle of popular sovereignty is expressed by the direct election of the members of the Parliament by the people, by virtue of Articles 65 and 66 of the Constitution. The only exception to this is Article 66(2), providing for the filling of 'vacated seats' by the next candidate from the same political party having obtained the highest number of votes in the elections.[6] Nevertheless, the issue of non-taken seats is not covered by Article 66(2), and by extension it cannot fall under the exception to the principle of popular sovereignty embodied in Article 66(2). Consequently, the contested amending law was found to be unconstitutional, violating the principle of popular sovereignty and Articles 31, 63, 64 65, 66 and 71 of the Constitution. Finally, the law was found contrary to the principle of separation of powers, as the legislative power intervened in an unacceptable manner with the final decision of the judicial power by essentially overturning the Supreme Court's decision in the 2018 electoral petition.

2. Constitutional amendments

Following these events, the House of Representatives proceeded to the only remaining option in order to deal with this peculiar and constitutionally unregulated situation of a non-taken seat. Specifically, on 3 October 2019, the House of Representatives proceeded to the twelfth amendment of the Constitution of Cyprus. The House of Representatives amended Article 66 of the Constitution by introducing the notion of 'renounced or non-taken parliamentary seat'. Moreover, through an addition to Article 71, the House introduced a new paragraph 2, which provides the following definition: '[a] parliamentary seat shall be deemed to be renounced or non-taken if an elected candidate, before his or her nomination/proclamation,[7] dies or refuses to exercise his or her right to give the necessary affirmation or, following his/her nomination/proclamation and prior to his/her affirmation by virtue of Article 69, declines or fails to assume his/her duties'.[8]

This was not the only constitutional amendment for 2019. On the contrary, the year 2019 was marked by an unprecedented number of them. At this point, it should be noted that due to the unique nature and bi-communal character of the Cypriot Constitution, amendments of non-basic articles can only be voted into legislation on the basis of a separate 'supermajority' comprised of at least two-thirds of the Greek-Cypriot representatives and at least two-thirds of the Turkish-Cypriot representatives.[9] The withdrawal of the Turkish-Cypriot community in 1964 from all constitutional posts, including the House of Representatives, meant that the amendment procedure was deemed legally impossible and politically dangerous. As a result, the House of Representatives, comprised only of Greek-Cypriot representatives, was reluctant to proceed to amendments. Such reluctance lasted for twenty-five years, when in 1989 the House of Representatives passed the first constitutional amendment validated on the basis of the doctrine of necessity.[10] Up until 2016, nine other constitutional amendments had been introduced.[11]

Beyond the amendment of Article 66, three other amendments were introduced in 2019. The eleventh constitutional amendment to the Cyprus Constitution was enacted on 19 July 2019 with the addition of two new paragraphs to Article 167 regarding the budget of the House of Representatives.[12] In particular, the eleventh amendment provided for the economic autonomy and independence of the budget of the House of Representatives

[4] *Andreas Michaelides a.o. v. Chief Returns Officer a.o.,* Electoral Petition 2/2016, 31 May 2017; Andreas Michaelides a.o. v. Chief Returns Officer a.o., Electoral Petition 1/2017, 30 April 2018.

[5] *President v. House of Representatives*, Reference 4/2018, 19 March 2019.

[6] Note that Article 66(2), read in conjunction with Article 35 of the Electoral Law, provides that parliamentary seats vacated during the parliamentary term are filled through the granting of the seat to the next candidate from the same political party having obtained the highest number of votes in the elections. There is no by-election for the nomination of a new representative.

[7] That means when the returning officer announces the outcome and states that the candidate is duly elected on the basis of the certified election count.

[8] Translation by the authors.

[9] Article 182(3) of the Cypriot Constitution. For an analysis of the Cypriot paradigm of constitutional amendments, see Constantinos Kombos, Athena Herodotou, '(Un-)Constitutional Amendments: The Cypriot Paradigm' (2019) 25(3) *European Public Law* 305.

[10] Law concerning the First Amendment of the Constitution (Law 95/1989). On the doctrine of necessity, see Constantinos Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas, 2015); Criton C. Tornaritis, Cyprus and Its Constitutional and Other Problems (2nd, Nicosia, 1980).

[11] Law concerning the Second Amendment of the Constitution (Law 106(I)/1996); Law concerning the Third Amendment of the Constitution (Law 115(I)/1996); Law concerning the Fourth Amendment of the Constitution (Law 104(I)/2002); Law concerning the Fifth Amendment of the Constitution (Law 127(I)/2006); Law concerning the Sixth Amendment of the Constitution (Law 51(I)/2010); Law concerning the Seventh Amendment of the Constitution (Law 68(I)/2013); Law concerning the Eighth Amendment of the Constitution (Law 130(I)/2015); Law concerning the Ninth Amendment of the Constitution (Law 69(I)/2016); Law concerning the Tenth Amendment of the Constitution (Law 93(I)/2016).

[12] Law concerning the Eleventh Amendment of the Constitution (Law 100(I)/2019).

as required by the principle of separation of powers and the paradigm of most European States for safeguarding independence in decision making and in the exercise of powers and competences.[13]

The thirteenth amendment imposed for the first time a limit to presidential terms of two consecutive terms.[14] This amendment aimed at strengthening democratic institutions, renewing and modernizing public life and safeguarding against the creation of an establishment due to longevity of service in the highest public office.[15] Finally, the fourteenth amendment extended the right of citizens to be nominated as members of the Parliament to the minimum age of 21 (from 25 years of age)[16] in order to adapt to modern social reality and perceptions.[17]

III. CONSTITUTIONAL CASES

1. The right to property in the aftermath of the economic crisis

The 2018 report examined two decisions of the Administrative Court assessing the constitutionality of cuts and reforms introduced to the salaries, pensions and allowances of employees and pensioners of the public and wider public sector.[18] These cuts and reforms were imposed as austerity measures on the ground of public interest. It should be reminded that in the *Avgousti* case, the Administrative Court held that the right to property – safeguarded by Article 23 of the Constitution – does not enlist public interest as a legitimate ground for limiting the right to property. Moreover, it held that the Constitution does not permit limitations for budgetary considerations, consolidation of public finances or streamlining pensions.

And while the appeal against the *Avgousti* decision was (and still is) pending, the Administrative Court issued three other equally important decisions on austerity measures. In particular, on 29 March 2019, the Administrative Court issued three significant decisions on the constitutionality of laws imposing different forms of cuts and reforms to the salaries of employees of the public and wider public sector, with potentially significant economic repercussions.

In the first decision, *Nicolaidi a.o. v. Republic,*[19] the Court was called to determine whether the 2012 legislative reductions in the salaries of the applicants (employees of the public and wider public sector) were in violation of Article 23 of the Constitution.[20] First, the Administrative Court found that salaries fell within the definition of 'property' of Article 23 and, therefore, were constitutionally protected.[21] Then, the Court examined the grounds on which the reductions were justified. According to the preamble of the contested legislation, the reductions were deemed necessary in order to limit public spending, to overcome the difficult financial situation of the Republic and to avoid any further deterioration of the fiscal situation. These reasons were interpreted by the Court as essentially amounting to grounds of public interest or public benefit. The Court noted, however, that Article 23(3) does not explicitly permit the limitation of the right to property on grounds of public interest or public benefit. Consequently, the limitation imposed on the right to property (in the form of reduction of salaries) was in violation of Article 23 and the contested provisions were unconstitutional.

In *Koundourou a.o. v. Republic,*[22] the second decision issued on the same day, the Administrative Court examined the constitutionality of the non-concession of the indexation increases and increases in salaries of the applicants (again employees of the public and wider public sector).[23] These measures were also adopted on the grounds of public interest in order to prevent any further deterioration of public finances and to maintain public service. The Administrative Court first affirmed that the indexation increases and increases in salaries were part of the employees' gross salary and fell within the definition of 'property' of Article 23. The Court, by adopting its reasoning in *Nicolaidi,* held that the non-concession of indexation increases and increases in salaries on grounds of public interest constituted an impermissible limitation and/or deprivation of the right to property. Therefore, the contested legislative provisions were also found unconstitutional.

Finally, in *Filippou a.o. v. Republic*[24] the Court examined the constitutionality of cuts of the gross salary of employees of the public sector as a contribution to the Consolidated

[13] Ibid, preamble.

[14] Law concerning the Thirteenth Amendment of the Constitution (Law 160(I)/2019).

[15] Ibid, preamble.

[16] Law concerning the Fourteenth Amendment of the Constitution (Law 161(I)/2019).

[17] Ibid, preamble.

[18] See *Christodoulidou a.o. v. the Republic a.o.*, Joined Cases 441/2014 a.o., 12 November 2018 and *Avgousti a.o. v. the Republic a.o.*, Joined Cases 898/2013 a.o., 27 November 2018, analysed in Constantinos Kombos, 'Cyprus' in in Richard Albert and others (eds) *2018 Global Review of Constitutional Law* (The I·CONnect-Clough Center 2018) 75-76.

[19] Joint Cases Nos 98/2013 a.o. (29 March 2019).

[20] Law concerning Reductions in Remunerations and Pensions of Officials, Employees and Pensioners of the Public and Wider Public Sector (168(I)/2012).

[21] Note that the Administrative Court had already found in the *Avgousti* case that the provisions of the legislation regarding the imposition of reductions to pensions were unconstitutional, as 'pensions' were also considered to fall within the meaning of 'property' under Article 23 of the Constitution.

[22] Joint Cases Nos 611/2012 a.o. (29 March 2019).

[23] Non-Concession of Increases in Salaries and of Indexation Increases of Officers and Employees' Salaries and of Pensioners' Pensions of the Public and Wider Public Sector Law (192(I)/2011).

[24] Joint Cases Nos 1713/2011 a.o. (29 March 2019).

Fund of the Republic,[25] with the aim of restraining the expenses of the public sector occupational pension scheme. The Administrative Court reaffirmed that the salary was a property right under Article 23 and held that the limitation to the right imposed by the contested legislation was essentially based on grounds of public interest, which are not permissible under the Constitution. Thus, the relevant provisions were deemed unconstitutional.[26] Furthermore, it is noteworthy that in all three cases, the Administrative Court reiterated that Article 23 of the Constitution afforded wider protection than Article 1 of the First Protocol to the ECHR since – contrary to the ECHR – Article 23(3) of the Constitution does not include the (rather general) public interest or public benefit in the permissible grounds for limiting the right to property.[27]

In conclusion, these three 2019 decisions of the Administrative Court reaffirmed that the adoption of legislation limiting the right to property of employees of the public and wider public sector on the grounds of public benefit or public interest as austerity measures was unconstitutional. Fearing the scenario of having to compensate employees with more than two billion euros, the Republic filed appeals against *Nicolaidi, Koundourou* and *Filippou*, in addition to the pending appeal against the 2018 *Avgousti* decision relating to cuts in pensions of pensioners of the public and wider public sector. Thus, the constitutionality of these social protection cuts and reforms introduced through legislation more than eight years ago are still pending before the Supreme Court.

2. Impartiality and independence of judicial power

The year 2019 started off turbulently for the judicial branch following serious allegations concerning conflict of interest among Supreme Court judges as well as allegations of collusion between them and prominent law firms. An important development that unavoidably influenced the discussions was the 2018 decision of the European Court of Human Rights (ECtHR) in *Nicholas v. Cyprus*.[28] In *Nicholas*, the applicant had brought proceedings for wrongful dismissal and defamation against his former employer before Cypriot courts. However, his action was dismissed by both the district court and the Supreme Court. Subsequently, he discovered that the son of one of the Supreme Court judges who had decided on his case was married to the daughter of the managing partner of the law firm representing the respondent and that the couple was working at this law firm. Therefore, he applied to the ECtHR, submitting that the proceedings before the Supreme Court had not been impartial and thus violated the right to a fair hearing (Article 6(1) ECHR).

The Strasbourg Court reiterated that impartiality denotes the absence of prejudice or bias, and that its existence or non-existence can be determined according to a subjective test (i.e., the personal conviction and behaviour of a particular judge) and an objective test (i.e., whether the composition of the tribunal offered sufficient guarantees to exclude any legitimate doubt in respect to its impartiality).[29] The Court held that the Supreme Court judge and the managing partner of the law firm representing the respondent had a family tie through the marriage of their children.[30] Thus, the objective test was not met, and the judge should have withdrawn from the case for personal reasons in accordance with domestic law even without having been challenged by the applicant.[31]

Moreover, the ECtHR noted that when a judge has blood ties with an employee of a law firm representing a party in any given proceedings, this does not automatically disqualify the judge from hearing the case. The disqualification depends on the circumstances of every case and a number of factors, such as whether the judge's relative was involved in the case, the position of the judge's relative in the firm, the size and internal organisational structure of the firm, the financial importance of the case for the law firm, any possible financial interest or benefit on the part of the relative, etc.[32]

Finally, the Court did not fail to overlook the fact that 'Cyprus is a small country, with smaller firms and a smaller number of judges than larger jurisdictions; therefore, this situation is likely to arise more often'.[33] The Court thus noted in paragraph 63 of its judgement that 'complaints alleging bias should not be capable of paralysing a defendant State's legal system and that in small jurisdictions, excessively strict standards in respect of such motions could unduly hamper the administration of justice'.[34]

Following the filing of the appeals against *Avgousti, Nicolaidi, Koundourou* and *Filip-*

[25] Retirement Benefits for Employees in the Public and Wider Public Sector Law (113(I)/2011). This Law was amended, abolished and replaced with the Retirement Benefits of Employees in the Public and Wider Public Sector, including the Local Authorities Law (Provisions of General Implementation) (216(I)/2012).

[26] See also the relevant case law in *Spiridaki v. Republic*, App No 830/2017 (28 June 20019), and *Petridi v. Republic*, App No 320/2015 (29 July 2019), which reaffirm *Charalambous, Koutselini-Ioannidou, Avgousti* and *Nicolaidi.*

[27] This finding was first reached in the *Koutselini-Ioannidou a.o. v Republic* Joined cases nos. 740/11 and others, 7 October 2014, as obiter and did not receive proper attention.

[28] *Nicholas v. Cyprus,* Application no. 63246/10, 9 January 2018.

[29] Ibid, para. 49. See also, *Morice v. France*, Application no. 29369/10, 23 April 2015, para. 73.

[30] *Nicholas v. Cyprus,* para. 60.

[31] Ibid, para. 60.

[32] Ibid, para. 62.

[33] Ibid, para. 63.

[34] Ibid.

pou, the appeals were brought before the full bench of the Supreme Court (thirteen judges) – rather than before the usual three-member Court of Appeals (comprised of Supreme Court judges) – due to the great constitutional importance of their final decisions. However, the appellants requested the disqualification of a number of Supreme Court judges for the following reasons: (a) six judges were spouses (or parents) of civil servants or retired civil servants; (b) six judges (three of whom are listed under (a)) appealed to the Administrative Court seeking annulment of administrative decisions to reduce their salaries, and; (c) the President of the Supreme Court had a judicial dispute with one of the appellants (the Cyprus Port Authority), the appeal to which was pending adjudication. In addition, another judge had two children working in a law firm involved in the appeals, whereas another judge had filed a personal recourse, on irrelevant matters, with a lawyer appearing in one of these appeals.

Thus, prior to the examination of the appeals, the Supreme Court issued a decision on the matter of disqualification.[35] Specifically, it recognized the duty of a judge to disqualify from hearing a case under certain circumstances in order to secure the objective and subjective impartiality of the Court. However, due to the number of requests for disqualification from the cases, it was deemed impossible to set up even a three-member Court of Appeals. Such extraordinary circumstances required the departure from the principle of disqualification and the application of the rule of necessity, which enables a judge, who is otherwise disqualified, to hear and decide a case where failure to do so may result in an injustice.[36] This rule of necessity was identified as forming part of English common law and as being adopted by the USA and almost all Commonwealth states.[37] With recourse to the Commentary on the Bangalore Principles of Judicial Conduct, the Court indicated that this doctrine of necessity applies 'where there is no other judge reasonably available who is not similarly disqualified, or if an adjournment or mistrial will cause extremely severe hardship, or if a court cannot be constituted to hear and determine the matter in issue if the judge in question does not sit. Such cases […] may arise from time to time in final courts that have few judges and important constitutional and appellate functions that cannot be delegated to other judges'.[38]

The Supreme Court explicitly referred to paragraph 63 of *Nicholas* and reached the conclusion that all members of the plenary were affected to the extent that it would be impossible to establish a Court. Moreover, the Supreme Court stated that the appeals pending before them were of such great importance that they should be judged by the plenary of the Supreme Court, with a full thirteen-member composition. In other words, the Court held that it was necessary for all judges to participate to the adjudication of such important matters despite any impediments. Thus, the requests for disqualifications were rejected by the Court.

IV. LOOKING AHEAD

The final decisions to the appeals against A*vgousti, Nicolaidi, Koundourou* and *Filippou* are expected in early 2020. These decisions are highly anticipated due to the severe consequences they may have on the national economy and the tens of thousands of employees and pensioners of the public and wider public sector in Cyprus. Furthermore, the reforms of the judicial system through the creation of new courts and procedures that were expected in 2019 are yet to be implemented. Thus, it is hoped that the plans to establish a Supreme Constitutional Court, an Appellate Court and a Commercial Court will eventually be realized in 2020.

V. FURTHER READING

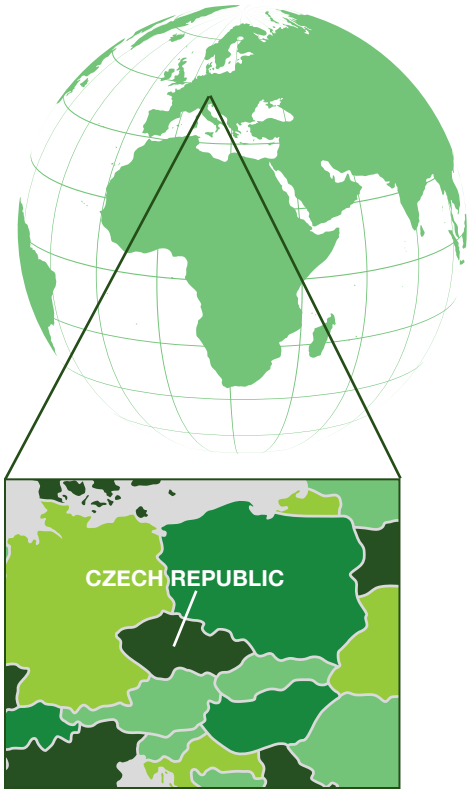
Constantinos Kombos, Athena Herodotou, '(Un-)Constitutional Amendments: The Cypriot Paradigm' (2019), 25(3) *European Public Law* 305

[35] *Ministry of Finance a.o. v. Avgousti a.o.,* Appeals against Administrative Court decision no. 177/18, a.o., 16 July 2019.

[36] This rule of necessity should not to be confused with the constitutional doctrine of necessity. It rather relates to the idea of a de facto organ having to take action, even if under normal circumstances it should not have, as there will otherwise emerge a gap in the exercise of entrusted powers since no other body can take over the matter.

[37] The Supreme Court referred to the following cases: *Dimes v. Grand Junction Canal Co*, 10 Eng Rep. 301, 313; *Evans v. Gore*, 253 US 245 (1920); *United States v. Will,* 449 US 200 (1980); *Teris R Ignacio v. Judges of the US Court of Appeals for the Ninth Circuit,* 453, F.3d 1160; *Ebner v. Official Trustee in Bankruptcy* (2000), 205 CLR 337; *Cleanae Party Ltd and other v. ANZ Banking Group Ltd* (2000), HCA 63, [2001] 2 LRC 369; Dickason v. Edwards (1910), 10 CLR 243, 259; *Builders' Registration Board of Queensland v. Rouber* (1983), 58 ALJR 376, 385-6, 392; and *Laws v. Australian Broadcasting Tribunal* (1991), LRC (Const) 848.

[38] UN Office on Drugs and Crime, 'Commentary on the Bangalore Principles of Judicial Conduct' (September 2007) para. 100.



Czech Republic

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I. INTRODUCTION

The developments in Czech Republic (CR) illustrate a broader phenomenon: erosion of liberal democracy and the rise of populism in politics. We thus have the CR captured by two men who dominate the political arena, President Miloš Zeman and Prime Minister (PM) Andrej Babiš. Zeman and Babiš formed a power structure that relies on parliamentary majority formed by populist and extremist parties. However, the stability of this power structure comes with severe drawbacks for the rule of law in the CR. Unfortunately, it enables both actors to follow their previously set behavioral patterns, by which we refer to the continuation and in some respects even deepening of the disregard for constitutional rules by President Zeman and growing conflicts of interest of PM Babiš.

Given that political atmosphere, the 2019 CR and state of its democracy can be well described with reference to the 'boiling frog' metaphor. The threats to democracy and rule of law are present on a long-term basis and their intensity is growing over time. Nevertheless, the majority of Czechs remain quite ambivalent towards these threats. The only question that remains is will the CR 'hop off the pot' or will it reach the breaking point towards illiberal democracy? The more the leaders of the executive power try to bend the Constitution, the more it puts the Constitution-safeguarding institutions (mainly public prosecutors and courts) to test. Fortunately, the institutions in the CR have so far been able to withstand the pressure, and power-hungry politicians were not able to undermine their foundations.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most remarkable constitutional development in the CR in 2019 was the impeachment of President Miloš Zeman. The constitutional charge[1] against him was prepared by the Senate, which approved it by a qualified three-fifths majority (48 out of 75 present Senators). However, the constitutional charge was not approved by the Chamber of Deputies, as only 58 out of 200 Deputies supported the impeachment, and 120 votes were required to initiate the proceeding before the Constitutional Court (CC).

The constitutional charge claimed that President Zeman committed repeated violations of the Constitution, citing eight different delicts dating from 2013 to 2019. They can be divided into three main groups. The first consists of two delicts interfering with the accountability of the government to the Chamber of Deputies. The earlier was the appointment of Jiří Rusnok, who was not a member of the Parliament or of any political party represented in the Parliament, for PM, even though there was clearly declared support by a majority of Deputies for another

[1] The text of the constitutional charge is publicly available (in Czech) at: https://www.zalobanaprezidenta.cz/wp-content/uploads/2019/07/U%CC%81stavni%CC%81-z%CC%8Caloba-na-prezidenta-republiky-pro-hrube%CC%81-porus%CC%8Ceni%CC%81-U%CC%81stavy_3.1_final-na-web.pdf

PM. Moreover, the President kept the government in power even though it did not gain a vote of confidence for more than seven months (25 June 2013 to 29 January 2014). By enabling the 'President's government', President Zeman shifted the Czech constitutional system from a parliamentary to a presidential model. The later delict in this group was the delay of appointing a new PM after the government assembled by Andrej Babiš in January 2018 did not get a vote of confidence from the Chamber of Deputies. The government without accountability was thus in office until June 2018.

The second group of delicts includes three related to the personal composition of the government: in 2017, President Zeman's interpretation of PM Sobotka's resignation as a mere change of the PM and not the rest of the government, and his refusal to dismiss Vice-Prime Minister Babiš. And in June 2018, President Zeman refused to appoint Miroslav Poche as the Minister for Foreign Affairs, without stating any relevant reason for this. Finally, on 31 May 2019, PM Andrej Babiš asked the President to dismiss Antonín Staněk from the position of Minister of Culture and to appoint Michal Šmarda in his stead. According to the Constitution, the President is required to accept the request of the PM to dismiss another member of the government, and he cannot unreasonably delay appointment of a new minister. However, after four weeks of inactivity, the President issued a statement demanding fulfillment of several conditions before dismissing Staněk. He finally dismissed Minister Staněk on 31 July 2019 after continued pressure from the PM and other government members, and threats of starting a competence dispute at the CC. However, he refused to appoint Šmarda, and asked the PM to find another, more qualified candidate. Finally, Lubomír Zaorálek was appointed as Minister of Culture by the President on 27 August 2019.

The third group includes just one delict, but perhaps the most serious. On 29 May 2018, President Zeman attempted to influence the decision-making of the Supreme Administrative Court in a particular case where he was a party by telling the president of the Supreme Administrative Court, Josef Baxa, that if he influences the decision in favor of President Zeman, Zeman will appoint him president of the CC. Baxa declined this offer as soon as it was made, saying that he has no influence over decision-making of other judges of the Supreme Administrative Court. He publicly described this situation in a newspaper interview later that year, and a similar experience was described by a judge of the CC, Vojtěch Šimíček, in relation to another case. The parliamentary inquiry into this issue did not lead to any concrete outcome besides stating that there was no breach of judicial independence, that representatives of executive power should refrain from any similar acts in the future and that judges should immediately report any such activities to the president of the Court or judicial council. The last two delicts represented less serious acts in the area of internal or external policy and are not described here in detail for the sake of brevity.

Overall, the constitutional charge was well prepared and substantiated and raised many serious allegations, so substantively, there were enough arguments to start the impeachment trial before the CC. However, the process was stopped by the Chamber of Deputies, mainly due to votes from the PM's party, ANO, their coalition partner the Social Democrats, the Communist Party and extreme right Party of Direct Democracy. The rejection of the constitutional charge confirmed that its current model makes it a purely theoretical instrument, which, in combination with the level of fragmentation of the political scene in the CR, precludes its real application in practice.[2] It can be well seen in comparison with the U.S. regulation of impeachment, which has less strict requirements for conviction (simple majority in the House of Representatives and two-thirds majority in the Senate) than the Czech regulation requires for initiation of a trial before the CC.

We now come to the other dominant political actor, PM Andrej Babiš. Mr Babiš is an oligarch, owner of media outlets and of one of the largest Czech companies, Agrofert, which benefits massively from public subsidies. Their amount has significantly increased since Mr. Babiš entered the government (in 2018 alone, Agrofert received at least €82 million in EU subsidies).[3] Meanwhile, the PM persistently ignores rules preventing conflicts of interest as he still 'calls the shots' in his enterprise. This provoked a reaction. Transparency International initiated several legal proceedings with the relevant authorities.

First, it initiated an administrative investigation at the national level. But, despite promising decisions of the Černošice Council (a small municipality where the PM lives), which repeatedly ruled that the PM is breaking conflict of interest rules by owning media outlets, the Regional Council for Central Bohemia – an appellate body – arrived at the opposite conclusion and halted the proceedings. This weakly substantiated decision was not surprising because the Regional Council is governed by one of the most loyal members of the PM's party, Jaroslava Pokorná Jermanová.

Second, the European Commission audited the use of EU structural funds in the CR and determined that Babiš was in conflict of interest because he remained the ultimate beneficiary of Agrofert while he was involved in decisions affecting EU subsidies. Unless the national authorities implement the Commission's recommendations, the government will have to return up to €17.6 million in sub-

[2] Maxim Tomoszek, 'Impeachment in the U.S. Constitution and Practice – Implications for the Czech Constitution' [2017], *International and Comparative Law Review* 145.

[3] Jennifer Rankin, 'EU leaders face legal action over Czech PM's alleged conflict of interest' (*The Guardian*, 31 October 2019) <https://www.theguardian.com/world/2019/oct/31/eu-leaders-face-legal-action-czech-pm-andrej-babis-alleged-conflict-of-interest> accessed 30 January 2020.

sidies to the EU. Babiš reacted by describing the Commission's opinion as 'nonsense' and ministers from ANO suppressed and downplayed the results of the audit, indicating that instead of pursuing the public interest, state authorities promoted the private interest of the PM.

These events have brought hundreds of thousands of Czechs to rallies against Babiš, making them the biggest protests since 1989. The organizer of these protests is a student-driven association called 'Million Moments for Democracy', which in 2019 alone organized more than 1.500 events across the whole CR. Czech society is strongly divided on this issue; some admire the activities of this association while others do not and even spread fake news about it. The PM himself was spreading false information that the participants were paid to protest. Consequently, one of the protesters has brought a civil action against Babiš, and the Court ruled that the PM lied and must apologize to the protesters. But the judgment is still not final because the PM appealed it.

Besides that, the PM is involved in several other scandals. The most serious one is a four-year-long criminal investigation for subsidy fraud related to illegally obtaining EU funding for building his residence, the so-called Stork Nest Farm. In this case, the European Anti-Fraud Office concluded that the rules for funding were breached. But again, investigation conducted by the national authorities fell behind. Nevertheless, it was unexpected that in September the Prague Prosecutor's Office decided to halt the prosecution. The decision came out of the blue because all the known facts implied that fraud had been committed. Later in the year, Attorney General Pavel Zeman annulled the decision and returned the case to the Prague Prosecutor's Office for further proceedings. However, PM Babiš was able to prevent or mitigate the negative publicity through media that he owns, so according to public opinion polls, his party remains the most popular one by far.

In this situation, the government's bill amending the law on public prosecutors raised severe criticism because it could be abused by the government to 'tame' public prosecutors and halt the prosecution of the PM. Above all, Attorney General Pavel Zeman, supported by the Legislative Council of the government, stated that the proposed seven-year-long term in office for chief public prosecutors was not justified. On the contrary, a ten-year-long term was preferable because it corresponds to the term for the chiefs of apex courts. In addition, criticism was aimed at the composition of the committee selecting chief prosecutors. The decisive vote would have the Ministry of Justice appoint three out of five members of the committee. Moreover, according to Prague's Supreme Prosecutor Lenka Bradáčová, it was unfortunate, and even unconstitutional, that one of the members appointed by the Ministry had to be a judge. Prosecutors came with the counter-proposal that they would appoint three members of the committee instead of two, but the Minister of Justice held her ground.

On top of that, Czech democracy is facing yet another challenge, the so-called hybrid threat of war that comes from countries like Russia and China. For these countries, the CR represents an 'entrance gate' to the EU. Thus it became a 'playground' for spreading their propaganda and misinformation for the sake of destabilization of the local political scene. A prominent example was a case in the Prague City District, which decided to put a little table in front of Marshall Koněv's memorial stating he was not only a WW2 hero but also a war criminal. Supporters of Russia started a big misinformation campaign, leading to a decision to take the memorial down.

Many Czech politicians don't hesitate to spread propaganda and undermine the credibility of national institutions that way. For instance, President Zeman called the National Cyber and Information Security Authority (NÚKIB) 'amateurs' for warning about the Huawei company being a threat to national security. The government removed the head of the NÚKIB supposedly for his inexperience and insufficient managing skills, but this explanation seems to be unsubstantiated. It is also worth mentioning the significant activities in China of Homecredit, a huge company providing short-time loans. It gave a donation to the Charles University in Prague and was also negotiating financial support to the 'China centre' at the University. However, it turned out that Homecredit paid for a course at the Faculty of Philosophy that was later recognised as merely propaganda, and the University was pushed by the academic community to sever its ties to Homecredit.

III. CONSTITUTIONAL CASES

1. Judgment no. Pl. ÚS 45/17: Data Retention

In this case, the CC reviewed the regulation of data retention, specifically the preventive retention of traffic and location data from electronic communications by telecommunication service providers, and their use by public authorities in order to protect security of the state as well as also provide oversight on the capital market. Such regulation was first adopted in 2008 as an implementation of the Data Retention Directive (2006/24/EC). In 2011, the CC reviewed this legislation and said that indiscriminate preventive collection and storage of data interferes with the right to privacy in intensity, which requires strict review. After applying the strict test, the CC abolished the law, especially due to its broad nature, vagueness and lack of transparency (Pl. ÚS 24/10). In 2012, the Czech Parliament adopted new legislation, which reacted to the judgment of the CC and reduced the retention period to six months, explicitly listed the entities authorized to request the retained data and included the purpose for which they may request it. Still, it required operators to retain information for six months on each telephone connection, text message, Internet connection or email correspondence. In 2014, the CJEU abolished the Data Retention Directive in the case *Digital Rights Ireland and Seitlinger and Others* (C-293/12 and C-594/12) for breach of fundamental rights, especially privacy, stating that general and blanket data retention is no longer possible. However, the Czech legislation remained in force and was challenged again.

In this case, the applicants claimed that monitoring, collecting and storing traffic and location data violated the right to privacy, since it was too broad and indiscriminate. However, the CC deemed data retention

compliant with the Constitution as long as its regulation upheld the requirements previously laid down by the CC and sufficiently preserved the right to privacy. Finally, the CC did not find grounds for repealing the data retention legislation, but it advised the legislature to consider the rapid development of modern technology. The current regulation does not reflect recent technological developments and social trends of electronic communication. For example, data retention obligation does not apply to OTT service providers like Facebook, WhatsApp or Skype. According to the dissenting opinion of Kateřina Šimáčková, the contested legislation does not provide sufficient safeguards against abuse. In her view, metadata is not adequately protected and there is lack of control over operators and public authorities in relation to data collection and use. Moreover, the individuals are deprived of protection against such interference since they do not have control over the extent to which their data is used.

2. Judgment no. Pl. ÚS 5/19 of 1 October 2019: Taxation of Church Restitution

As we noted last year, the government of Andrej Babiš passed the confidence vote in the House of Deputies only because of support from the Communist Party. In return, the government has supported a communist bill proposing taxation of the financial compensation churches received for property confiscated during the communist era, which cannot be restituted. The parliamentary majority passed the law despite it being *prima facie* unconstitutional and disregarding the expert opinions on the matter only because there was 'social demand'. Unsurprisingly, the opposition immediately challenged the law before the CC. The CC's judgment was highly anticipated and it was a true landmark case, not only for 2019 but for the CC's jurisprudence as a whole.

First of all, the CC reiterated that church restitutions promote two aims: they seek redress for the wrongs of the 'criminal, illegitimate and despicable' communist regime as well as pave the way for future financial independence of churches from the state. Moreover, the Act on Property Settlement (APS), which is a legal basis of the compensation, has remedied a long-standing unconstitutional negligence of the legislator (see Pl. ÚS 9/07). The CC appreciated that the state adopted APS with the intent of becoming a trustworthy partner for the churches and to compensate them for the confiscated property. The CC did not address the proportionality of the compensation itself because it had already considered it in detail in judgment no. Pl. ÚS 10/13, where it stated that the amount of the compensation was a political decision and could not affect the constitutionality of the APS.

The CC then emphasized that the APS was the legal basis for the government to settle on the compensation agreements with individual churches, which require financial compensation to be paid in thirty annual installments. The CC concluded that the taxation of these installments interferes in an impermissibly retroactive manner with the fundamental principles of rule of law, especially legal certainty and *pacta sunt servanda*. Moreover, the CC found that the law did not introduce taxation at all, but rather a *de facto* reduction of financial compensation, even though its amount was clearly determined by compensation agreements between the state and churches. By their conclusion, a legal entitlement and legitimate expectation of churches was established, thus the legislation also violated right to property. As a result of these findings, the CC struck the contested legislation down.

3. Judgment no. Pl. ÚS 39/17: 'Black Holes' in Judicial Review of Decisions Concerning Citizenship Applicants

The Supreme Administrative Court challenged the provision of § 26 of law No. 186/2013 Coll. on citizenship of the CR, which excludes judicial review of decisions based on § 22, para. 3 of the law on citizenship, which, in cases of applicants for Czech citizenship who, based on confidential information from the police or intelligence services are considered to pose a threat to national security, allowed the state to dismiss their application without any further substantiation of the nature of the threat.

The key issue in this case was related to Art. 36, para. 2 of the Charter of Fundamental Rights and Freedoms, which stipulates that judicial review cannot be excluded in cases related to fundamental rights guaranteed by the Charter. However, the CC stated that there was no fundamental right to citizenship, and therefore the law excluding such decisions from judicial review was compliant with the Constitution. Four justices submitted quite persuasive dissenting opinions, stating that denying citizenship was closely related to fundamental rights, and as with many fundamental rights, the status of the individual determines the extent of protection. Also, the dissenting judges criticized the majority due to lack of recognition of the principle of separation of powers because the final decision on granting citizenship in a state governed by the rule of law should rest with the court and not police or intelligence services.

4. Judgment no. I. ÚS 4037/18 of 21 May 2019: Freedom of Speech and Right of Journalist Not to Disclose Sources

As we have said above, as the political pressure on the democratic nature of the state grows, safeguards of democracy are put to the test. This can well be demonstrated by the case of a constitutional complaint of a prominent investigative journalist who published an article focused on the abuse of power by the current PM and his activities with regard to the Foreign Intelligence Service of the Czech Republic (FIS). Subsequently, the complainant was repeatedly summoned by the FIS. He was always served shortly in advance so he offered his apologies and suggested an alternative date. The FIS never responded. Later, the complainant was summoned again and at the same time was served with the decision by which the FIS imposed a fine of 20 000 Czech Crowns (appr. €785) on him for perverting the course of criminal proceedings and for offensive behaviour. This decision was upheld by the High Court, but the fine was lowered to 3 000 Czech Crowns (appr. €120). The complainant contested both decisions in his constitutional complaint, arguing that the FIS exerted pressure on him, acted abusively and

that the fine served as a means of extortion of obedience and intimidation.

The CC dismissed the complaint, but its reasoning was somewhat contradictory. On one hand, the CC emphasised the importance of a free press and protection of journalists' sources. In this regard, it found that neither the High Court nor the FIS took into account that the fine was imposed on the journalist and concerned his work. The CC concluded that prosecuting authorities should avoid any action that could indicate that journalists are treated in a different and stringent manner compared to other persons. Imposition of a fine in the middle of the amount rate stipulated by law for a first minor offence could be perceived as an attempt to influence and intimidate the journalist even before the very first question was asked. It could thus lead to a violation of the right of journalists not to disclose their sources. With respect to the context given, mainly actions of the complainant (his repeated apologies and the willingness to present himself at the FIS), the decision of the FIS seemed to be disproportionate. But on the other hand, the CC concluded that there was no need for its intervention because the High Court reduced the fine substantially, so it remained within reasonable boundaries.

IV. LOOKING AHEAD

What will the year 2020 bring us? We already know that on 30 January 2020, the Senate approved the President's nominee for a vacancy at the CC, Pavel Šámal, the current president of the Supreme Court. Consequently, a new chief of the Supreme Court will be appointed. We also anticipate further escalation and (hopefully) the resolution of the long-lasting issue of the PM's conflicts of interest. On the national level, the CC is going to put the law preventing conflicts of interest under review. On the EU level, negotiations on the EU's next seven-year budget are coming up, and it is the PM who is going to lead them on behalf of the CR. Thus, the 'million dollar question' is, What will be the position of other EU leaders? The answer will probably decide the political future of Andrej Babiš and his attitude towards the EU.

V. FURTHER READING

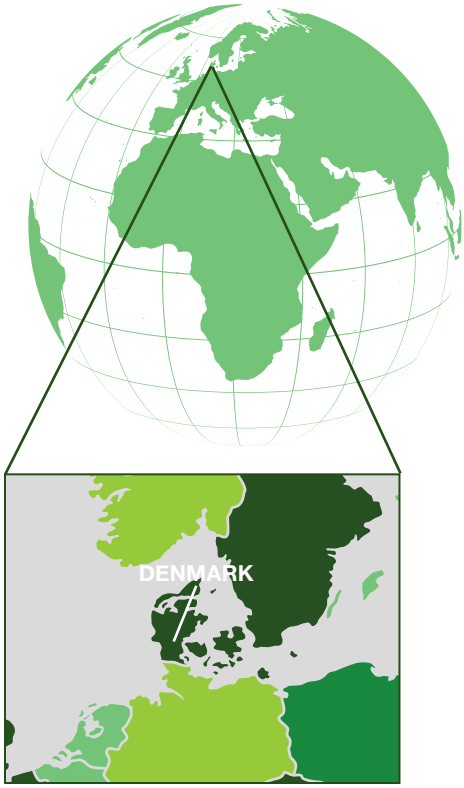
Vojtěch Šimíček and Marian Kokeš, 'Der Schutz der sozialen Grundrechte in der Rechtsordnung Tschechiens', in Julia Iliopoulos-Strangas (ed), *Soziale Grundrechte den 'neuen' Mitgliedstaaten der Europäischen Union* (Nomos Verlagsgesellschaft, 2019)

Jan Kratochvíl, 'Subsidiarity of Human Rights in Practice: The Relationship between the Constitutional Court and Lower Courts in Czechia' [2019], *Netherlands Quarterly of Human Rights* 69

David Kosař and Ladislav Vyhnánek, 'Constitutional Identity in the Czech Republic: A New Twist on an Old Fashioned Idea', in Christian Calliess and Gerhard Van der Schyff (eds), *Constitutional Identity in a Europe of Multilevel Constitutionalism* (CUP, 2019)

David Kosař, Jiří Baroš and Pavel Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' [2019], *European Constitutional Law Review* 427

Katarína Šipulová, 'The Czech Constitutional Court: Far away from political influence', in Kálmán Pócza (ed), *Constitutional Politics and the Judiciary Decision-making in Central and Eastern Europe* (Routledge, 2019)



Denmark

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I. INTRODUCTION

The parliamentary election in 2019 led to a change of government. The new government has focused on strengthening the state. The most significant changes concerned the legal framework for acquiring and retaining citizenship. A new law gave the government the power to administratively revoke the citizenship of individuals who are determined to have harmed the vital interests of Denmark as long as they will not be left stateless by the revocation. The regulation is primarily aimed at Danish citizens who have joined and fought for ISIS in Syria but does not require an actual commission of crimes. The legislation has been heavily criticized for transferring judicial power to the government and for having a retroactive effect and has been challenged in court. A related new law prevents children born in areas of armed conflict from acquiring citizenship at birth.

More than 95% of the members of the Parliament agreed to pass a new climate law, requiring both the current and future governments to work towards the goal of a 70% reduction in greenhouse gas emissions before 2030. The massive support for this law makes it unlikely to be changed after an election and could therefore practically give it an almost constitutional role. It will certainly play a prominent role in Danish politics for years to come.

For the first time since the Second World War, a Danish court found a ban of an organization, in this case a gang, to be constitutional. The decision from the city court has been appealed, but if the decision is upheld, it is expected to lead to more attempts at banning violent organizations.

Finally, an interest of the US and China in the self-ruling areas of Denmark, Greenland and the Faroe Islands has led to fears that Denmark will not be able to keep the realm united.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. A controversial election

The parliamentary election in June 2019 led to a change in government. Prime Minister Mette Frederiksen, from the Social Democratic Party, leads the new government.

For the first time since 1990, a total of 13 parties ran in the election (not counting parties in Greenland and the Faroe Islands). Four of these parties were not represented in the Parliament before the election. This development is due to a new system, established since the last election, which makes it possible for political parties to gather the signatures needed to participate in the elections through digital means. Earlier, political parties had to gather signatures physically, which required significant efforts from volunteers. In the new system, it became possible for the party 'Klaus Riskær Pedersen', named after its founder, to participate in the election despite being run by only one person.

Most attention in the campaign was given to two newly formed right-wing parties. One of these, Nye Borgerlige ('New Right'), demanded a stop to all grants of asylum in Denmark and deportation of all non-citizens who were convicted of committing a crime. None of the candidates for Prime Minister from other parties were willing to agree to this, since it would be against the Europe-

an Convention on Human Rights (ECHR). However, Stram Kurs ("Hard Line") had an even more controversial campaign, which primarily consisted of burning Qurans in the street while yelling slurs towards Muslims. The party demanded a ban on Islam, the deportation of Muslims and a stop to all immigration from non-Western countries. The election was a disappointment for most of the new parties. Only the New Right made it into the Parliament, but barely made it over the electoral threshold.

Thus, while the new digital system has allowed for more democratic involvement, it has also given extremists and fringe groups an easier route into the public eye. Both Klaus Riskær Pedersen and Hard Line have been accused of cheating the digital system while gathering signatures. Following the election, Hard Line was temporarily banned from gathering signatures for the next election while an investigation into these claims is carried out. These events show some of the challenges of making constitutional mechanisms digital.

Other parties also had a disappointing election. The established nationalist party, the Danish People's Party, was more than halved and the libertarian party only barely made it into the Parliament, with their chairman not getting elected.

B. The direction of Denmark following the election

The failure of the Danish People's Party in the election is likely because the Social Democratic Party adopted a more nationalistic approach. The new Prime Minister, Mette Frederiksen, has led her party in a direction focused on protecting Danish identity by establishing state mechanisms that some would say are controversial. Her following quote, which was used as a campaign slogan shortly after the election, confirms this observation: 'What drives me as Prime Minister is a desire to take care of Denmark. For me to do that, we have to use elements that we have previously neither needed nor wanted to use.' The statement concerned her proposal for a 'massive increase in the surveillance' in Denmark. The question is whether the new focus on a stronger state will weaken citizens' protections against the state.

Similar to many other European countries, Denmark has had internal debates over what to do with those Danish citizens who travelled to Syria to fight for ISIS (known as 'foreign fighters') who are now hoping to return to Denmark. This led to several changes in Danish legislation.

The Parliament approved the government's ability to administratively revoke Danish citizenship from anyone who has 'acted in a manner which seriously harms the vital interests' of Denmark as long as they either have double citizenship or are considered able to acquire citizenship in another country easily and will thus not be left stateless by the revocation. The legislation does not require that these suspected foreign fighters have committed any crimes, leaving it to the discretion of the government to decide who should lose their citizenship. The law has been criticized for transferring judicial power to the government. The law can also potentially have a retroactive effect by revoking the citizenship of an individual for actions carried out before the law was in force. The retroactive effect of the administrative sanction could bring the new rules in conflict with the ECHR.

The government wanted to give the affected individuals, who are mostly in Syria with no proper communication channels to Denmark, only four weeks to challenge the government's decision in court. Failure to do so within this time limit would result in the irrevocable loss of citizenship. The opposition managed to include a dispensation from this rule in the law. The legislation was approved by the Parliament only two days after having been officially proposed, which is highly unusual in Denmark, especially for legislation with such serious consequences for the rights of individuals. However, the law has been time-limited and will automatically end during 2021. At least three people have lost their citizenship due to the law, and at least one individual has challenged the revocation in court, claiming that the law is unconstitutional.

Another law was also proposed that prevents children of Danish citizens from automatically acquiring citizenship if they are born in an area where a terrorist organization is engaged in armed conflict, and if applying this law would not make them stateless. The law also prevents suspected foreign fighters from getting consular assistance from Danish authorities. The Parliament approved this law in January 2020.

Another example of the Prime Minister giving the state more power was found in her New Year's speech, in which she declared that the government would increase the number of forced adoptions, thus removing more children from their parents. The question is how far she can take it, given the fact that in September 2019, Norway was found in breach of ECHR due to an unjustified forced adoption.

Mette Frederiksen has similarly chosen to centralize power in the internal bureaucracy of the state. For several years, across different governments, the Ministry of Finance has been accused of having too much power within the state. Shortly after being elected, Mette Frederiksen targeted this by centralizing power around the Prime Minister instead. The most significant initiative was to give her advisor a special role, which to a large degree placed him as second in command under the Prime Minister in the government, and thus above most ministers in the internal hierarchy. However, since the advisor is not a minister, he is not bound by the same laws and cannot be made accountable by the Parliament. Such a role is not normal in the Danish constitutional tradition. The Prime Minister has been criticized for being too controlling of the other ministries by newspapers among others, claiming that ministers are avoiding contact with the press because their communication has to be coordinated with the Prime Minister's office. It certainly seems that the Prime Minister has decided to maintain much stronger control and management over civil servants and the government than recent prime ministers.

While the Prime Minister has certainly strengthened the state, and in some areas weakened citizens' protection against the

state, she has also signalled a strong focus on social policy, especially in regards to children. This, together with her having to compromise with other left-wing parties to maintain a majority in the Parliament, has led to the new government overturning some of the more controversial policies of the old government. As mentioned in last year's review, the social benefits for families who have been in Denmark for less than seven years have been criticized for being unconstitutionally low. The new government temporarily raised these benefits and is looking to do it permanently. Families with children will also be moved from a refugee center, which has been heavily criticized. Plans to move rejected asylum seekers to a deserted island was abandoned and Denmark will again receive UN resettlement refugees.

C. Citizens' initiative led to climate law

As mentioned in last year's review, Denmark implemented a new digital tool for citizens' initiatives in 2018. In 2019, this initiative was made permanent. One of the initiatives that gathered enough signatures to reach the Parliament proposed a new climate law. While this proposal itself was not implemented, it inspired politicians to draft a climate law.

The new Danish Climate Law has major historical importance. The law obligates the current and future governments to reduce Danish greenhouse gas emissions by 70% by 2030. Every year, a special council will assess whether the current government is following this plan, and the Minister of Climate will have to present himself in the Parliament to be questioned on whether the government is doing enough. While the law is technically no more binding than any other law, it is of huge importance that it has been agreed on by eight out of ten parties and by more than 95% of members of the Parliament. Because of this, it could in practical reality have almost constitutional status, since it is unlikely to be changed by future governments.

D. Developments for the courts and the Ombudsman

The most important constitutional case in Danish courts in 2019 was the case, described in last year's review, in which Danish authorities tried to get an organization banned for the first time since the Second World War. The case concerned the gang 'Loyal to Familia' (LTF), which was accused of being a central actor in recent shootings in Copenhagen. The Danish Constitution only allows for such a ban if the organization itself is found to employ violence to attain its aims. The fact that individual members of the organization have committed crimes is not in itself enough.

However, due to a significant scandal involving Danish prosecutors, this case and other cases were postponed. Danish prosecutors rely heavily on communication data, which show where a defendant's mobile phone has been at a specific time. However, during 2019 it was revealed that this data was imprecise, sometimes directly wrong. It is thus possible that people have been convicted based on wrongful information concerning their location, and therefore several cases might have to be reopened. It is similarly possible that criminals have walked free due to the data showing them not being at the scene of a crime.

After the postponement, the case concerning LTF was decided by the city court in January 2020. The court approved the ban. This was a historic decision in Danish constitutional law, but the case has been appealed to the Eastern High Court, and is likely to eventually be appealed to the Supreme Court due to its importance. Following the decision, both Danish police and politicians declared themselves willing to have more organizations prosecuted this way if the city court's decision is upheld.

The Danish Ombudsman stepped down during 2019 because he was appointed to the Supreme Court as a judge. The Parliament initially had difficulty in agreeing on a new Ombudsman, leading to them appointing a 'temporary Ombudsman' for approximately one month. Eventually, however, they agreed on appointing Niels Fenger, a former law professor and High Court judge.

E. External threats to the unity of Denmark

Finally, it should be mentioned that 2019 brought a stern reminder of the external constitutional threats to Denmark. The Kingdom of Denmark consists not only of the mainland in continental Europe. In the North Atlantic Ocean, both Greenland and the Faroe Islands are self-ruling territories of Denmark.

Denmark made headlines worldwide in 2019 when US President Donald Trump offered to buy Greenland. The Danish Prime Minister described this suggestion as 'absurd', causing a diplomatic crisis with Trump, who cancelled an upcoming meeting in Denmark. However, the US is not the only country taking an interest in Denmark. Both Greenland and the Faroe Islands have caught China's attention. Chinese companies have shown significant interest in investing in an airport, mines and infrastructure in Greenland, causing Denmark to actively work against such initiatives. The Faroe Islands also made headlines worldwide when it was made public that China apparently threatened to cancel a trade deal if the Faroe Islands did not agree to let a Chinese company build their Internet networks. Both territories are placed in important strategic areas, which could easily cause more confrontations between Denmark and the major countries in the world.

III. CONSTITUTIONAL CASES

1. Supreme Court, 21 January 2019: Prosecuting twice for the same crime was a breach of ECHR and the Charter of Fundamental Rights of the European Union

On Facebook, a woman had shared surveillance footage from a shop that showed a man exposing himself to her young daughter. Her

sharing this video was a breach of the Danish rules implementing GDPR. However, the prosecutors originally charged her based on a wrong provision in the law, which only regulated the shop owner, as the Data Controller of the footage. Thus, in the first case against the woman, she was acquitted, since the provision did not regulate her. The prosecutors then charged her based on another provision, which would have made it illegal for her to share the footage. However, the Supreme Court found that since this case concerned the exact same action for which she had already been prosecuted and acquitted, it would be a breach of both the ECHR and the Charter of the European Union to prosecute her again. The Court noted that she was not acquitted in the first case simply due to formalities, but only after an actual examination of the merits in the case. The High Court had reached the opposite result of the Supreme Court, based on the fact that the original case had only looked at whether she was the Data Controller or not. However, according to the Supreme Court, this was still an examination of the actual merits of the case, and thus prevented a new charge based on the same action.

2. Supreme Court, 1 April 2019: No legal basis for wiretapping in cases concerning the ban of organizations

The police asked the courts for permission to wiretap phones of two individuals as well as retrieve their communication data. The individuals concerned were considered to be leading members of LTF, and the information was to be used in the court case concerning banning this organization (described above). The Constitution limits the possibilities of infringing on the secrecy of postal and telephone matters, although to a very large degree Danish legislators can allow for such infringement through law. However, the Danish Procedural Code only allowed for such actions when there was reason to believe that 'suspects' were communicating through these phones, and when the information was needed for an investigation into crimes punishable by at least six years. Since the case concerned a ban on the organization, the two individuals were not suspects in the case, and the case did not directly concern a crime. However, another provision in the Procedural Code stated that cases concerning the ban of an organization were to be processed according to the same chapter in the law. The Supreme Court had to go back to the preparatory works to this provision from 1875 to interpret it. The Court found that these preparatory works did not give sufficient basis for derogating from the normal conditions for wiretapping. The Court also did not allow using an analogy of the rules. Thus, the request was denied.

3. Supreme Court, 14 May 2019: Prevention of family reunification for three years was not a breach of ECHR

Danish law states that individuals granted refugee status based on the general situation in their home country, and not due to individual persecution, are given temporary protection status. This especially applies to refugees from the civil war in Syria and similar events. Such individuals are prevented from applying for family reunification with their family members for the first three years of their stay in Denmark. The Danish Supreme Court approved this provision in 2017 in a case in which a Syrian refugee had been refused family reunification with his wife. That case is currently pending at the Grand Chamber of the ECHR. The 2019 case concerned three Syrian refugees who had not only been refused family reunification with their spouses but also with their children. The Supreme Court again approved the provision preventing family reunification. Following from their earlier decision, it found that making a three-year rule for family reunification was within the margin of appreciation that states have in this area since the separation of the families is only temporary. The Court did note concerns for what is best for the children, including the fact that the families could not be reunited in Syria. However, it also noted that the children were together with their mothers, who were their primary caregivers since their fathers left Syria. The Court also noted that the children lived their whole lives in Syria and had no connection to Denmark, and that neither children nor mothers had any disabilities that required special consideration. The Court especially noted that the Syrian refugees only had temporary status in Denmark, and thus were expected to return to Syria when the situation improved. Thus, it did not find it in the best interest of the children to transfer them to Denmark if they would then have to return to Syria shortly after. If the situation did not improve within three years, family reunification could take place. The fact that one of the children would be older than 18 at the end of these three years, and would thus very likely be unable to get family reunification at that time, did not influence the Court's decision.

4. Western High Court, 24 October 2019: Preventing union members from terminating membership is not a breach of ECHR

The Danish employment regulation is primarily made through collective agreements between unions and employers, both in the public and private sector. Often these agreements are entered into for three years at a time. During the following renegotiation of the collective agreement, the unions might order their members to strike and the employers might lock out union members, thus depriving them of their salary. In these situations, unions will give or lend money to their members. Thus, the system is dependent on strong unions and solidarity between members. In 2006, Denmark was found by the ECHR to have breached the right to not be a member of an organization due to a regulation that allowed employers and unions to agree that everyone working for the employer had to join a specific union. In the 2019 case, a union had experienced a lockout of some of its members and decided that the remaining members should pay an increased membership fee to cover the expenses of the lockout. The union had further decided that members paying this membership fee could

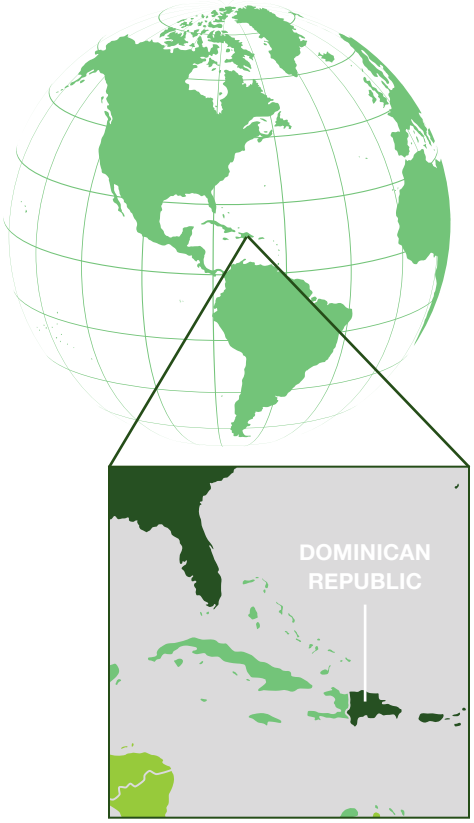
not leave the union until they had paid their share of the total expenses. This was in accordance with the union's own internal rules. The case concerned ten members who had tried to leave the union, and who in reality were asked to pay four years' membership fees before they could leave. The Court found that the members, who had voluntarily joined the union and had been informed of these rules prior to the lockout, had not been deprived of their rights in the ECHR. It argued that the rules did not prevent the members from leaving the union, but simply set certain conditions for them to be allowed to leave (payment of their share of the expenses).

IV. LOOKING AHEAD

Several important commissions are still ongoing, most of which were described in more detail in last year's review. The Tibet Commission was supposed to end its investigation in July 2020, but the work has been delayed and is unlikely to be concluded in 2020. The Tax Commission is also still ongoing. During 2019, a new commission was set up. This commission will look into a decision made by Inger Støjberg, the now former Minister of Immigration and Integration, that separated married asylum seekers from their spouses when one of the spouses was below 18 years of age. The decision was found illegal by the Ombudsman and Danish courts have awarded compensation to some of the couples. A central question is whether the Minister deliberately made an illegal decision. This commission is not expected to conclude until 2021. Last year's review mentioned that the former opposition, now in government, had considered establishing a commission to investigate Denmark's participation in the war against Iraq. However, the new government has decided against this.

As described above, the case concerning LTF is still ongoing and can have important ramifications if the High Court and/or Supreme Court also find that the organization can be banned. The case challenging the new possibilities for revoking citizenship will also be interesting to follow. The case at the Grand Chamber of the ECHR regarding family reunification for refugees will also be important for Denmark. Another interesting case is also making its way through the Danish court system. Currently, the Danish state requires telephone companies to retain information about all their users, including the location of the phone, whom they call, etc. The European Court of Justice declared this a breach of fundamental rights in a case against Sweden in 2016. The Danish government agrees that the Danish rules should be changed. However, more than three years after the decision by the ECJ, this has still not happened. The government is awaiting other cases currently pending at the ECJ that are expected to be concluded during 2020. A court case initiated against the Danish state is similarly awaiting the results of these cases.

Finally, in January 2020, it was announced that the Executive Director of Denmark's National Human Rights Institution is stepping down. His replacement is expected in early 2020.



Dominican Republic

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I. INTRODUCTION

The Dominican Republic's Constitutional Court (*Tribunal Constitutional*, hereinafter the 'Constitutional Court' or the 'Court') was created by the 2010 constitutional reform and started operating in January 2012. Article 184 of the 2010 Dominican Constitution states that the Court shall 'guarantee the supremacy of the Constitution, the defense of the constitutional order and the protection of fundamental rights'.[1] The Court's decisions are definitive and irrevocable, and constitute binding *erga omnes* precedents for all public powers and State bodies.[2]

The Court's composition features thirteen judges appointed by the National Magistracy Council (*Consejo Nacional de la Magistratura*[3]), which is the constitutional body entrusted with appointing judges for all three of the so-called Dominican 'High Courts'.[4] The Court's decisions require a qualified majority of nine out of the thirteen judges. Judges are appointed for a 9-year single term. However, the first judges were appointed with term limits ranging from 6, 9, and 12 years – to triennially stagger Court vacancies. The Court's judges were partially renewed for the first time in December 2018.

As will further be discussed throughout this report, some of the main constitutional developments that arose during 2019 were related to electoral questions in the run-up to the 2020 Dominican general elections. These electoral matters generated public and political controversies, academic discussions, and constitutional precedents.

Section II discusses some of the major constitutional developments in 2019, including the renewal of four of the Court's judges. Section III presents some of the main constitutional cases decided by the Court, including one case that annulled several articles of the Law of Political Parties and Associations in the run-up to the 2020 elections. Section IV looks at the upcoming vacancies that will lead to the Court's first full renewal, and the 2020 elections. Section V suggests further reading.

[1] Article 184 of the 2010 Dominican Constitution. The article's wording does not vary in the 2015 Dominican Constitution. Organic Law No. 137-11 (Ley Orgánica del Tribunal Constitucional y de los Procedimientos Constitucionales) created and regulates the Court.

[2] Ibid.

[3] See articles 178-183 of the 2015 Dominican Constitution. The National Magistracy Council has eight members: (i) the president of the Republic, (ii) the president of the Senate, (iii) one senator from the majority opposition, (iv) the president of the Chamber of Representatives, (v) a member of the Chamber of Representatives from the majority opposition, (vi) the president of the Supreme Court of Justice, (vii) a judge from the Supreme Court of Justice appointed by said court, and (viii) the Attorney General of the Republic.

[4] The other two 'High Courts' are the Supreme Court of Justice (*La Suprema Corte de Justicia*) and the Superior Electoral Tribunal (*Tribunal Superior Electoral*). The Constitutional Court is independent from the judiciary.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2019 was a very important year for the Constitutional Court. In 2018, the Court experienced its first four vacancies since its inception. This meant that four of the Court's thirteen judges were set to change, allowing for potential ideological shifts in both prospective and posited precedents.

In December 2018, the National Magistracy Council concluded the appointment of four new constitutional judges after a relatively transparent process that involved forty-seven preselected candidates who could be scrutinized by the public before the National Magistracy Council made their final choices.

This transition was particularly challenging for the Court, given that a considerable number of pending judgments decided throughout the year had to be vacated. These draft judgments had already been discussed by the plenary – including having received the input of the departing judges, or been prepared by them – and were ready for a final decision.

Not concluding this process with the departing judges meant that the judgments for these cases had to be reassigned to other judges, returning the cases to the deliberation or drafting stage and further delaying their resolution. This increased the Court's backlog and congestion rate, as well as reduced the clearance rate for the year 2018 and added to the year 2019, as the new judges completed their onboarding and adapted to the Court's work dynamic.

A total of 319 of these additional judgments for 2018 were published during 2019, raising the final statistical count for sentences issued during the year 2019 to 943 judgments, up from the 624 which had been announced by year-end 2018.[5] The Court's yearly clearance rate rose close to 122%, meaning that the Court resolved part of the backlog with the participation of the departing judges.

Finally, taking into account the Court's decision-making rules – where judgments require the agreement of nine out of the thirteen judges – the changeover of four judges implied the potential shift to the original Court's ideological stance.

Another major constitutional question discussed throughout 2019 concerned the possibility of the incumbent President, Danilo Medina Sánchez, to opt for an additional – and third – consecutive presidential term despite an explicit prohibition included in the 2015 constitutional reform that allowed him to opt for his second presidential term (2016-2020).[6] This prohibition was drafted as the 20th transitional clause (hereinafter, 'Transitional Clause No. 20') in the 2015 Dominican Constitution. The text singles out and precludes President Medina by stating that: 'In case that the president of the Republic corresponding to the constitutional term 2012-2016 is a candidate for the same position for the 2016-2020 constitutional presidential term, he shall be ineligible to present himself for the subsequent period, or any other term period, including for the vice-presidency of the Republic'.

From a political economy perspective, Transitional Clause No. 20 could be construed as a way to tackle the dynamic or time inconsistency associated with incumbent presidents' incentives to continuously extend presidential term limits for their own benefit.[7] Like Ulysses tying himself to the mast to enable himself to hear the sirens' chants without heeding the temptation to jump into the sea, during the political negotiations that led to the 2015 constitutional reform, President Medina consented to the inclusion of Transitional Clause No. 20 as a pre-commitment and a signaling device that assured he would step down after his second term without attempting another constitutional reform to try to retain the presidency.

Despite this bright-line constitutional rule, some academic commentators and political acolytes argued that Transitional Clause No. 20 was unconstitutional and discriminatory. A direct constitutionality review was brought before the Constitutional Court.[8] The Court swiftly declared it inadmissible. The final decision argued that the Court had no jurisdiction to strike down constitutional clauses by declaring them unconstitutional.[9] Despite this, in July 2019, President Medina put an end to the political uncertainty by stating that he would not attempt to modify the Constitution to seek a third presidential term. However, the constitutionality of Transitional Clause No. 20 lingers, as President Medina is the only citizen – including all living ex-presidents – with an expressed constitutional prohibition that precludes him from ever aspiring to the highest office again.

Another set of high-profile constitutional questions discussed throughout 2019 pertained to certain aspects of Law No. 33-18 on Political Parties, Movements, and Associations. After over a decade of discussion, the law was approved in late 2018, in the run-up to the 2020 Dominican general elections and primaries during 2019. At least ten direct actions of unconstitutionality have been raised against articles of Law No. 33-18. We discuss two of them below in addition to a third case affecting Law 157-13 on preferential voting. The Court has declared some articles as inconsistent with the Constitution, thus reshaping the rules that will apply for

[5] Cfr. Tribunal Constitucional de la República Dominicana, 'Estadística de la Carga Procesal', Trimestre octubre-diciembre de 2019, p. 14. *See also* Tribunal Constitucional de la República Dominicana, 'Estadística de la Carga Procesal', Trimestre octubre-diciembre de 2018, p. 13 <https://www.tribunalconstitucional.gob.do/transparencia/estad%C3%ADsticas-institucionales/>

[6] Marsteintredet L, 'How the Dominican Republic successfully resisted presidential term extension', Voices from the Field, ConstitutionNet <http://constitutionnet.org/news/how-dominican-republic-successfully-resisted-presidential-term-extension>

[7] See Tom Ginsburg, Zachary Elkins & James Melton, 'On the Evasion of Executive Term Limits', 52 *William and Mary Law Review* 1807, 2011.

[8] Constitutional Court Case No. TC-01-2018-0003.

[9] See Constitutional Court Judgment TC/0352/18.

the 2020 elections, and may still rule on the presidential candidacy of former president Leonel Fernández, which critics argue violates Law No. 33-18.

The constitutionality of other existing rules from said law has also been disputed. This includes Article 49.3 of Law No. 33-18, which attempts to ban party switching (*transfuguismo*) by including sore loser provisions that prevent unsuccessful primary candidates from crossing the floor to other parties. The provision became more controversial after the presidential primaries of the ruling *Partido de la Liberación Dominicana* (PLD) were decided by a difference of only 26,696 votes in favor Gonzalo Castillo, the candidate supported by President Medina, over ex-President – and then-PLD president – Leonel Fernández.

In October 2019, the results of the PLD primaries led to Leonel Fernández quitting the party with many of his acolytes and setting up a political coalition comprised of several political parties that supported his presidential bid, despite the sore loser provisions. Although the case was tried in the Supreme Electoral Tribunal in November 2019, which declared that there was no constitutional impediment to the presidential candidacy of Leonel Fernández for his new party, this contentious issue is yet to be decided by the Constitutional Court and remains a source of political uncertainty in the run-up to the 2020 Dominican elections.

III. CONSTITUTIONAL CASES

1. Constitutional procedural law – TC/0345/19

In sentence TC/0345/19, the Court reexamined the question of the legitimate procedures to make direct claims of unconstitutionality of the country's legal norms. In the words of the President of the Court, Milton Ray Guevara, the sentence consolidates what he called 'a citizen's tribunal'. Article 185.1 of the Constitution states that in addition to the President and one-third of the members of the Senate or the Chamber of Deputies, 'any person with legitimate and juridically protected interest can take direct actions of unconstitutionality of the country's legal norms'. In previous sentences, the Court lacked a unifying understanding of the concept of 'legitimate and juridically protected interest'. Yet with the argument that the citizens should have the right to control the constitutionality of State action without any major complications or procedural obstacles, the Court finally ruled on the principle stating that the Constitution entails the citizens' right to claim direct actions of unconstitutionality. As such, the sentence is a landmark precedent, opening the Court to claimants by giving the latter the power of direct action of unconstitutionality. The judges argued that: '(...) the direct action of unconstitutionality supposes a constitutional process (...) that gives citizens the real and effective opportunity to present a constitutional action against the laws, decrees, resolutions, orders and other acts that may contradict the Political Charter [Constitution] before the Court to preserve the supremacy of the Constitution, constitutional order and to guarantee the respect of fundamental rights'.

With sentence TC/0345/19, a claimant's 'legitimate and juridically protected interest' will be presumed when she submits a direct action of unconstitutionality as long as the Court can verify that the person in question is a citizen with her rights intact. If the plaintiff is a legal person or entity, their 'interest' in making a direct action of unconstitutionality will be accepted with two conditions: i) that the plaintiff is a legally registered and existing entity with the procedural capacity to stand before the Court; and ii) that a relation between the entity or the owner of the entity and the legal norm in question can be proven. This decision, however, still leaves undefined what 'legitimate interest' means when the action of unconstitutionality relates to administrative resolutions, which is a question the Court has not dealt with as yet. This fact did not go unnoticed by all the Court members, as two judges wrote a particular opinion on the matter. Despite the clear and relatively unrestricted rights in Article 185.1 of the Constitution, in earlier decisions, the Court has restricted the right of actions of unconstitutionality for legal entities to general legal norms with the sole exception of cases in which the unconstitutionality of the administrative act was arbitrary and patently contrary to existing constitutional provisions.

2. Constitutional interpretation – TC/0064/19

One of the novelties of the 2010 Constitution was its chapter on the principles of application and interpretation of the Fundamental Rights and Guarantees (Chapter III, Art. 74), which lays out the rules for interpreting and regulating the fundamental rights of the Constitutional Charter. Of particular interest is Art. 74.4, which states that 'The public powers [shall] interpret and apply the norms related to fundamental rights and their guarantees, in the sense most favorable to the person in possession of the same, [and] in the case of conflict between fundamental rights, they shall attempt to harmonize the assets and interests protected by this Constitution'. The goal of this article was to guide or bind the Court in its future interpretation of the Constitution so that the Court would not deviate too much from the black letter of the Constitution, thus eroding fundamental rights over time. The relevance of the decision is not the case itself, a revision of a sentence of judicial protection (*amparo*) involving the Dominican Association of Teachers (*Asociación Dominicana de Profesores*), but its interpretation of the Chapter on Fundamental Rights and Guarantees. In sentence TC/0064/19, the Court opts for what it called a 'strict consideration' of Article 74.4 when considering cases in which there are conflicts between different fundamental rights protected by the Constitution. The strict consideration means that in any given case treated by the Court where it has to decide on a conflict between rights protected by the Constitution, the ruling will not set a general precedent of a fixed hierarchy of rights. The Court argued that any precedent shall only be established for cases that are considered 'rigorously analogous' to the case being ruled on. The consequence of which is that for cases involving a conflict of rights protected by the Constitution, the concrete case will be given an important consideration and weight by the Court when applying the interpretive principles laid out in Article 74.4

of the Constitution. Although the Court can be criticized for creating legal uncertainty by this ruling, the decision avoids the trap of falling into the use of easy analogies to apply a precedent in the abstract. The latter is in line with the original intent of Chapter III of the Constitution, namely avoiding the erosion of fundamental rights and deviation from the letter of the Constitution. Considering each case in the concrete rather than in the abstract based on an established hierarchy of rights set by precedents, solving a conflict between rights protected by the Constitution should also help the Court interpret the conflict of rights 'in the sense most favorable to the person in possession of the same (…)', as stated by the Constitution.

3. Political parties and the electoral law – TC/0375/19, TC/0441/19, and TC/0214/19

We discuss here three judgments the Court decided in 2019 that are relevant to political parties, and party and electoral laws after direct actions of unconstitutionality were brought forward by politicians and political parties against the aforementioned laws regulating political parties and elections (Law No. 157-13 on Preferential Voting and Law No. 33-18 on Political Parties and Associations). In particular, Law No. 33-18 on Political Parties was very controversial among political elites, having been discussed in Congress for more than ten years when it was finally passed. The most important of these sentences, however, is TC/0375/19 on the binding vote. This Court sentence declared ballot free-riding or the dragging vote (locally known as *voto de arrastre*) introduced in Article 2 of the Law of Preferential Voting (Law No. 157-13) unconstitutional for congressional elections, and this has direct consequences for the 2020 national elections. Ballot dragging or free-riding meant that if you voted for one party's candidate to the Chamber of Deputies, this vote also counted as a vote for the same party's candidate to the Senate, basically constituting a single ballot for both chambers of Congress (i.e., the deputy would drag the senator, or from another perspective, the senator would free-ride on the deputy's vote). Ballot dragging had been heavily discussed and criticised on its democratic merits, and the Central Electoral Board (*Junta Central Electoral*) ruled first on May 7, 2019 (JCE Resolution No. 08-2019) that the coupled voting would only be kept in six of the country's thirty-two provinces.[10] The Court argued that Law No. 157-13 unreasonably restricted the citizen's right to freely elect their candidates by not allowing voters to split their votes, and that Article 2 of the Law of Preferential Voting violates the general right to vote that is expressed in Article 208 of the Constitution, and the citizen's right to elect candidates for all posts established in the Constitution (Article 22), and finally the citizen's right to freely elect the Senator and Deputy they prefer as established in the Constitution's Article 77. In particular, the Court pointed out that ballot dragging for the two chambers of Congress thwarted the voters' right to a direct connection between their vote and the chosen candidate (which would only be indirect in the case of the candidate to the Senate in the stylized example used before).

In sum, the Court argued that it would be unconstitutional and incompatible with the voters' right to freely exercise their suffrage not to allow voters to freely elect a candidate of one party for the Chamber of Deputies and at the same time vote for a preferred candidate of another party for the Senate. In the Court's words, the law impeded the 'citizens' right to vote freely by imposing on the voter the candidate for Senate without the voter having the possibility to express his or her will freely. This situation makes it clear that the voter cannot in any moment during the voting express his or her preference with respect to the choice of Senator, which means that the Senator will in effect be an imposition by the legal norm, and a restriction of the right to vote'. Finally, the Court argued that the legal provision in question also '(...) violates the principle of popular sovereignty', and is contrary to the bicameral model of Congress where different ideologies should be represented and expressed. Therefore, Article 2 of the Law of Preferential Voting also violated, according to the Court, the system of checks and balances because the dragging ballot 'pointed towards the concentration and predominance of one political force or political tendency within the National Congress'.[11] In a country where the incumbent party, the PLD, has held the presidency since 2004 and the majority in both chambers of Congress since 2002, the latter message from the Court is important.

Law No. 33-18 on Political Parties and Associations in part attempted to strengthen the system and party leadership vis-á-vis the candidates, representatives, and members of the party by among other things installing barriers against turncoat candidates and representatives (transfuguismo). Sentence TC/0441/19 was decided from a case brought before the Court by several minor parties that argued that the clauses in Law No. 33-18 on Political Parties of automatic expulsion of party members who criticize or make negative statements on candidates of their party were inconsistent with freedom of speech. The Court argued in this sentence that the automatic imposition of sanctions against party politicians (expulsion from the party) constituted a violation of the right to a public, oral, and fair trial in addition to violating due process. It did, however, point out that the party was entitled to sanction negative statements against candidates for popular election, but that any sanction would only be legal and valid if it were in accordance with the party's bylaws, and the disciplinary

[10] For most of the country's electoral history, voters only had one ballot for the presidential and congressional elections, meaning that split-ticket voting was impossible. Brea Franco J, 'Dominican Republic', in Nohlen D (ed), *Elections in the Americas: A Data Handbook*, vol 1: North America, Central America, and the Caribbean (Oxford University Press, 2005).

[11] Interestingly, since the action brought before the Court was restricted to the question of the dragging vote for the election of Congress, the Court did not consider the question of the dragging vote in local elections regulated by the same law (Law No. 157-13). Therefore, in the local elections for local deputies and mayors in February 2020, the dragging vote will be used in accordance with Law No. 157-13 and Organic Law No. 15-19 on the electoral regime so that a vote for a local deputy will bind the vote for mayor.

process observed all guarantees according to due process.

Also, sentence TC/0214/19 related to Law 33-18 on Political Parties and Associations. This case of direct unconstitutionality was brought before the Court by three individuals regarding Art. 45, par. III, which regulated which organ of the political parties had the right to decide which electoral register (padrón electoral) was to be used in the party primaries. The law stated that only the Central Committee, Executive Commission, Political Commission, National Commission, or the equivalent (i.e., executive bodies) could decide which electoral register to use for internal elections. The Court argued that Art. 45, para. III violated the Constitution, and in particular political parties' right to self-regulate their internal organizational affairs (Article 216). In its arguments, the Court emphasized that in comparative constitutional law, the criterion of freedom of internal organization and self-determination for political parties implied that the State, through the law, should only interfere minimally in the internal organization of political parties. Article 216 of the Constitution was there to safeguard this criterion of self-organization for political parties. The sentence further ratified the constitutional status of political parties and underlined the State's obligation to protect the parties' right to self-organize.

IV. LOOKING AHEAD

The onset of the 2020 Dominican general elections are set to pose many constitutional controversies to the Superior Electoral Tribunal, and subsequently, to the Constitutional Court. These elections will be one of the most complex in Dominican history, with over 17,500 candidates competing for 4,106 positions. For the first time, municipal elections will be held separately from national elections, as local elections are scheduled for 16 February 2020 while the congressional and presidential elections (first round) are scheduled for 17 May, with a potential presidential runoff 28 June.

The general elections will also have an impact on the Court's composition. In December 2020, four more vacancies will arise. Another five vacancies will occur in 2023 – marking the departure of all of the original judges, the Court's first full renovation. This means that the political party that presides during the 2020-2024 period has the potential to recompose the Court by spearheading the appointment of nine of its thirteen judges.

V. FURTHER READING

Acosta de los Santos H, 'Las garantías de la eficacia del precedente: especial referencia al ordenamiento jurídico dominicano', in Moscoso Segarra A (ed), *El precedente constitucional y judicial: análisis crítico Homenaje a Michele Taruffo* (Impresora Soto Castillo, 2019)

Cruceta Almánzar JA, 'El precedente constitucional vigente', in Moscoso Segarra A (ed), *El precedente constitucional y judicial: análisis crítico Homenaje a Michele Taruffo* (Impresora Soto Castillo, 2019)

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Ecuador

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I. INTRODUCTION

During 2019, Ecuador started a process of consolidating its institutions through the work carried out by the transitory Council for Public Participation and Social Control (CPPSC-t), aimed at achieving the 're-institutionalization of the country'. However, issues such as corruption, political division and an economic crisis looming have put into question the strength of rule of law and democratic institutions in the country. These efforts were interrupted by demonstrations in October, which were the first protests related to deficient economic and social circumstances and sharp inequalities in the region, and were followed by protests with similar motivations in Colombia, Chile, Argentina, Panama, Venezuela, El Salvador and Bolivia. In the midst of economic turmoil, serious structural problems and social discontent in several sectors, the redesign of constitutional institutions continued, first with the Ecuadorean justice system. In the framework of this endeavour, the appointment of new judges to the Constitutional Court was perhaps the most outstanding element.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The dusk of the Transitory Council for Public Participation and Social Control (CPPSC-t)

By the end of its term in March 2019, the CPPSC-t had opened 29 investigations for alleged acts of corruption in public contracts for the Pacific Refinery, the Manduriacu hydroelectric project and reconstruction of the coastal province of Manabi after the 2016 earthquake.[1] As we will see in the following sections, during 2019, the prosecution of corruption among the highest ranking officials, ministers and former President Correa himself were very prominent and served as the yardstick against which prosecutors and judges were held accountable.

In 2018, we reported that the CPPSC-t had 'evaluated several state organs, such as the Ombudsman, the Public Defender, the General Comptroller, Contentious Electoral Tribunal, the Attorney General, the Superintendents, the Constitutional Court, and finally the Judicial Council'. In the first trimester of 2019, the CPPSC-t wrapped up the remaining appointment procedures for the Ombudsman, the Attorney General and the National Public Defender, and it sent short lists of nominees for the Council of the Judiciary. In sum, the CPPSC-t removed 27 officials and appointed 31 authorities in 12 public institutions.[2]

Criticism regarding the legality of the CPPSC-t and its prudential choices continued during 2019. Perhaps the passing away of its chair, the renowned jurist and statesman Julio Cesar Trujillo, epitomizes the environment against which the CPPSC-t

[1] http://www.cpccs.gob.ec/wp-content/uploads/2019/05/informe-fin-de-gestion-del-consejo-transitorio-2018-2019-v-3.pdf

[2] http://www.cpccs.gob.ec/wp-content/uploads/2019/05/informe-fin-de-gestion-del-consejo-transitorio-2018-2019-v-3.pdf. Es importante aclarar que el CPCCSt no evaluó a la máxima autoridad de la Contraloría General del Estado, el cual es un organismo encargado del control de la utilización de los recursos estatales, y de las personas jurídicas de derecho privado que dispongan de recursos públicos.

discharged its functions. On May 13, 2019, during a closing event by CPPSC-t, a group of protestors (allegedly supporters of the Correa regime) broke into the auditorium and made it impossible for it to continue. As a particularly unfortunate coincidence, the next day, Trujillo (88 years old) suffered a stroke and died within few days. Statesmen and jurists from every side of the aisle joined to pay tribute to Trujillo's spotless and coherent public life.

The referendum that created the CPPSC-t clothed the procedures of revision and appointment with the colour of law. Yet, its persistent struggle to define the extent of its powers reminded its supporters and detractors that it was an extraordinary attempt to bring the rule of law and democratic institutions to the ordinary lives of Ecuadoreans. Only time will tell if this was a step towards consolidating the rule of law. Unfortunately, recent history in Ecuador is beset with failed attempts to reset from crises back (or forward) to the stability of the rule of law, and in the third section on the constitutional developments of 2019, there is already evidence of the sort of challenges that the decisions made during the transitional regime could continue to face.

2. Elections

On March 24, 2019, Ecuadoreans elected provincial and municipal authorities, as well as the seven individuals who will become the new members of the CPPSC, which in turn replaced the transitory regime.[3] The elections were uneventful, but it was noteworthy that all members of the CPPSC were elected with fewer than 3 million votes from an electoral roll of approximately 13 million people,[4] which undermined their legitimacy from the outset. One must understand this against the background of the ongoing call for a referendum to decide whether to eliminate the CPPSC from the Constitution.

The former chair of the CPPSC-t, Julio César Trujillo, led a non-governmental Committee for National Re-Institutionalization in order to undertake every effort necessary to convene a referendum to get rid of the CPPSC from the constitutional design. The rationale behind this proposal was that the CPPSC could be easily co-opted again. After Trujillo's passing, Pablo Davila Jaramillo,[5] took the banner and petitioned the Constitutional Court in May 2019 to adjudicate on the appropriate means for removing the CPPSC from the Constitution. Meanwhile, the elected members to the CPPSC-t were sworn into office on June 13, 2019.

3. The cracks of the transition regime

At its beginning, the CPPSC informed that the decisions of the transitory Council regarding all the officials it removed and appointed would be reviewed, despite ruling No. 2-19-IC/19 of the Constitutional Court.

This position was both criticized and supported by different sectors of society. For example, a group of constitutional lawyers informed the CPPSC that there was no protection for the actions of the CPPSC-t, provided there were vices of nullity in the process of designating each of the authorities. In contrast, the Minister of the Interior said that the CPPSC 'cannot go back and bring down the process of democratic institutionalization that Ecuador has lived'.

Nevertheless, and despite the decision of the Constitutional Court, on July 10, 2019, the CPPSC approved the creation of a commission to review the decision of the CPPSC-t about the appointment of the Constitutional Court. This led to an investigation initiated by the Attorney General's Office against the counsellors who approved this decision for the alleged crime of 'breach of legitimate decisions of competent authority' in relation to Sentence No. 2-19-IC/19.

The vehemence of the rejection of the CPPSC's plan to reverse the process of institutionalization brought the CPPSC to its knees, and on July 10, 2019, it revoked its decision. This, however, did not prevent the National Assembly from beginning a process of impeachment against CPPSC counsellors Jose Tuárez, Victoria Desintonio, Walter Gomez and Rosa Chalá for breach of duties, which ended with the dismissal of all the interpellated counsellors on August 14, 2019, when the National Assembly, with 84 votes in favour, 32 refusals and 8 abstentions, approved the above-mentioned motion.[6]

III. CONSTITUTIONAL CASES

On February 5, 2019, the Legislative appointed 9 new judges[7] to the Constitutional Court, who had been nominated by an ad-hoc selection committee appointed by the CPPSC-t. In spite of criticisms to the process of selection or to the elected judges, the present composition of the Constitutional Court is regarded as far more transparent and independent than its predecessors.[8]

The Constitutional Court faced several challenges from its start. First, it had to strengthen

[3] According to the referendum held on February 4, 2018, CPCCS members after the transitory regime had to be elected by universal and secret suffrage. See https://www.elcomercio.com/uploads/files/2017/10/03/Anexo%20pregunta%202.pdf

[4] Results: Rosa Chalá, 2 230 751 votes; Victoria Desintonio, 1 651 484 votes; Sofía Almeida, 1 716 231 votes; María Rivadeneira, 2 331 172 votes; Walter Gómez, 854 483 votes; Christian Cruz, 772 667 votes; and, Carlos Tuárez 942 850 votes.

[5] The request was submitted by Pablo Dávila, since Julio César Trujillo passed away on May 19, 2019.

[6] https://www.asambleanacional.gob.ec/sites/default/files/2019-08-14-r034.pdf.pdf

[7] For the names and profiles of the judges. See, https://www.corteconstitucional.gob.ec/index.php/quienes-somos/autoridades.html

[8] Several judges of the previous composition of the Court have been strongly criticized, not only for their close relationships with the Executive but also because of the criminal investigations on alleged cases of corruption. http://milhojas.is/612371-pamela-martinez-la-jueza-100-100.html https://www.elcomercio.com/actualidad/chats-influencia-pamela-martinez-corte.html
https://4pelagatos.com/2019/09/04/pamela-martinez-una-jueza-constitucional-100-puntos/ https://www.eluniverso.com/noticias/2019/01/31/nota/7166768/discrecionalidad-vinculos-riesgo-marcaron-corte-constitucional
http://www.cpccs.gob.ec/wp-content/uploads/2019/05/informe-fin-de-gestion-del-consejo-transitorio-2018-2019-v-3.pdf

its image as the highest body for interpretation and constitutional justice. Second, it had to navigate through the illiberal (or post-liberal) ideology behind the Constitution of 2008 (see our 2017 report). Third, the Court had to deal with a backlog of cases that accumulated not only during the months of vacancy but mainly because the previous Court carelessly halted cases for several years. From 2012 to July 19, 2018, the Court received 25,840 new cases, but only 15,326 had received an initial decision on their admissibility, about 14,000 cases were pending a decision on their merits and the remaining 10,514 were left without any formal response.[9]

In order to address the backlog of cases, the Constitutional Court implemented an electronic raffle of causes in order to distribute the workload evenly, efficiently and transparently among the new judges. The Court also amended its internal rules of procedures (Reglamento de Sustanciación de Procesos de Competencia de la Corte Constitucional) in order to ease procedural loopholes. In its first year, the Constitutional Court resolved 595 cases, which is approximately the same as the amount of cases decided by the previous Court in 10 years.[10]

1. Referenda and constitutional amendments to rid the Ecuadorean State of the CPPSC-t

As we have pointed out earlier, the elimination of the CPPSC from the Ecuadorean legal system caused great turbulence, which affected the Court in various aspects. First, the Court is a necessary institution in the process of constitutional change, as it has the competence to define the amendment procedure in case there is an initiative. In the Sentence No. 4-19-RC/19, the Constitutional Court determined that the appropriate way to eliminate CPPSC was constitutional reform through the National Assembly, which is the most rigid procedure among the three possible options offered by Articles 441-442 of the Ecuadorian Constitution.
Additionally, the Court determined that the redesign of the Legislative Function (in order to be bicameral) and the separation of the Attorney General's Office from the Judicial Function have to proceed as a partial reform. This procedure will include two debates in the plenary session of the National Assembly and then a subsequent referendum, in accordance with the provisions of Article 442 of the Constitution.

Talking about the constitutional jurisprudence regarding the elimination of the CPPSC, one has to lay emphasis on Sentence No. 2-19-IC/19, which was already mentioned above in the section on constitutional developments. This sentence was not only one of the first pronouncements of the Court but it existentially affected the Court, as it was requested that the Court clarify whether or not the definitive CPPSC can review the decisions taken by the CPPSC-t; among others, the dissolution of the very predecessor of the Court and the appointment of its own judges. The Court determined that no decisions taken in the exercise of the extraordinary powers granted to the transitory CPPSC shall be reviewed by the elected CPPSC.

2. State as bearer of rights

The underlying case is about freedom of expression and the obligation of the media to verify the information that is to be circulated in public. The complaint, however, alleging the violation of the freedom of expression, was not filed by a natural person but by a certain office of the presidency. Therefore, Sentence No. 282-13-JP/19 first analysed the question of whether the State or its organs could hold rights at all. The Sentence concluded that the State cannot hold fundamental rights, as they are inherent to human dignity – except for the case of nature as it is a subject of rights following the explicit recognition of the Constitution – and their classical role is to protect the citizens from the State. At the same time, the Sentence emphasized that this does not mean that the State could not have rights related to the guarantees of due process. Consequently, the State can only initiate a constitutional complaint in its name if there is an alleged violation to procedural rights.

3. Constitutionality of the state of emergency during the protests

During the first half of October, a wave of massive protests hit Ecuador. Some say that the cause dates back as far as March 21, 2019, when Ecuador announced an agreement with the International Monetary Fund. The government sought a line of credit worth 4.2 billion dollars in order to alleviate the fiscal deficit. In order to fulfill the IMF's conditions for the loan, on October 1, 2019, President Lenin Moreno decreed several economic measures, among which the most sensitive was the elimination of the fuel subsidy that had been in place for decades as an emblematic measure for the redistribution of oil revenue.

On October 2, different social movements, such as the Unitary Front of Workers, the Indigenous People's Confederation (CONAIE) and other unions and associations of public transportation called for a nationwide strike in order to reverse the elimination of the fuel subsidy. The intensity of the protests progressively increased throughout the week. Private businesses and public goods were looted, burnt or vandalized. The Comptroller's Office and a TV station (Teleamazonas) were set on fire, the protesters attacked the police in street fights and units of the Red Cross and threatened to loot random neighborhoods and houses.

The Executive decreed a state of emergency and later a curfew. The Constitutional Court declared the constitutionality of the state of emergency issued by the President, but – unlike previous decisions – it defined certain

[9] https://www.elcomercio.com/actualidad/corte-constitucional-procesos-jueces-asamblea.html

[10] Furthermore, other, intermediate decisions of the Court reached the thousands, following the statistics. See, Bulletin of Jurisprudence 2020, Constitutional Court of Ecuador, p.70-78.

limitations that the State had to meet in order to maintain the constitutionality of the emergency orders.[11]

Videos and images circulated in social media showing instances of abuse of force by the police as well as protesters using homemade anti-riot shields and rocket launchers. The country was completely paralyzed for almost a week. In the last three days of protests, different groups of indigenous peoples occupied the National Institute for Culture, which became the seat of a sort of parliament of indigenous peoples (mainly those associated with CONAIE). In different places, policemen were forcibly held and disarmed by indigenous peoples and protesters, who issued different demands in exchange for their freedom. Some eight policemen were withheld inside the National Institute for Culture by the indigenous people's parliament.

The demonstrations finished on October 12 in a negotiation sponsored by the Ecuadorean Conference of Catholic Bishops and the Resident Coordinator of the United Nations. After days of violent protests, the government had to yield and reinstate the fuel subsidy. The week of violence had serious economic, political and social consequences. There were several people wounded and killed by the excessive response of public forces as well as countless policemen and military kidnapped, battered and burnt. The protests generated (or further aggravated) polarization among Ecuadoreans. They also negatively affected the credibility and legitimacy of the central government (especially its Ministers of Interior and Defense), as its answers to the crisis were insufficient or abusive and, in any case, overdue.

4. Presidential veto and separation of powers: Criminal reform about abortion in cases of rape

On December 17, 2019, the legislature discussed the reforms to the Criminal Code (Código Orgánico Integral Penal). Among the most contentious issues there was a proposal to decriminalize abortion in cases of rape. After an intense legislative deliberation, this provision was not adopted. Yet, in the final version of the bill that the legislature sent to the Executive, it mistakenly contained a transitory provision that was meant to implement the provision on abortion had it been adopted.

The President rejected the bill on several grounds and tried to take advantage of the error in order to push the Constitutional Court to issue an opinion that would decriminalize abortion in cases of rape. The Constitutional Court ruled that it was just a drafting mistake by the legislature that did not warrant the President or the Court to have a say over the substance of the legislative decision.[12]

5. Same sex marriage

Finally, the Constitutional Court decided to make a decision in the question of same sex marriage. In Sentences No. 11-18-CN/19 and 10-18-CN/19, the Court recognized same sex marriage in Ecuador. Within Sentence No. 11-18-CN/19, the Court interpreted Article 67 of the Constitution of Ecuador (which defined marriage as a union between a man and a women), arguing that under the provisions of the advisory opinion of the Inter-American Court of Human Rights No. OC-24/7, Ecuador has an international legal obligation to guarantee the right to marry to same sex couples too. On the other hand, Sentence No. 10-18-CN/19 declared Article 81 of the Civil Code and Article 52 of the Law on Identity and Civil Data Management, which state that marriage shall only be between a man and a woman, unconstitutional as they allow discriminatory treatment against people of the same sex. The vote of the Court was not unanimous. In both decisions, four out of the nine judges argued that the appropriate way to recognize equal marriage should be through a political procedure involving a constitutional reform that falls under the competence of the legislature.

IV. LOOKING AHEAD

One could have mixed feelings about the year 2019 with regard to the consolidation and strengthening of institutions in Ecuador. On the one hand, there have been signs of hope on a legal and political level with respect to building stronger institutions and a more responsive justice system; at the same time, on a social and economic level, we could see that the rule of law edifice can be fragile too, and everything can turn upside down in the course of a few days.

2020, therefore, is another test period for complying with the objectives of creating and maintaining transparent and accountable institutions, such as the referendum that is to be organized about the elimination of the CPPSC. Furthermore, 2020 will also be about the assessment of the Constitutional Court. Entering into their second year, the new judges have the responsibility to seek broader acceptance and compliance with their decisions in society in order to consolidate the Court's jurisprudence and to maintain its independence and impartiality.

V. FURTHER READING

Ramiro Ávila Santamaria, *La utopía del oprimido. Los derechos de la naturaleza y el buen vivir en el pensamiento crítico, el derecho a la literatura* (Akal/Inter Pares, 2019)

Pamela Juliana Aguirre Casto, *El precedente constitucional: La transformación de las fuentes del ordenamiento jurídico* (Universidad Andina Simón Bolivar, Derecho y Sociedad 6. 2019)

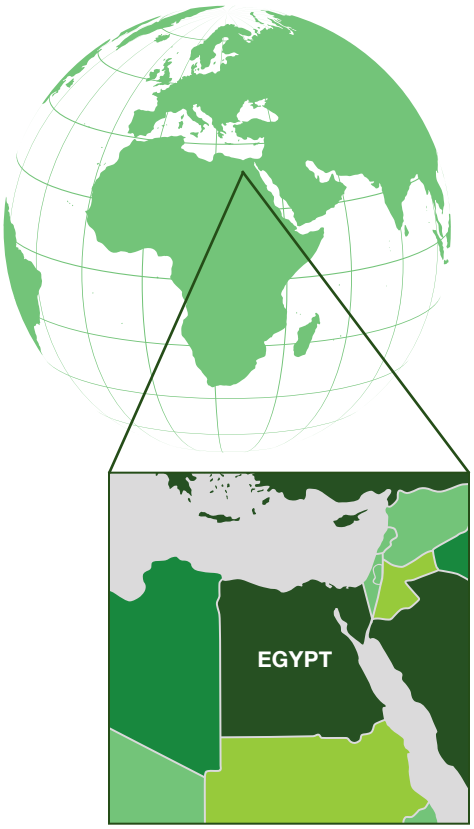
Mauricio Maldonado Muñoz, *La Democracia a partir de Bobbio* (Cevallos, 2019)

[11] The Court declared that during the state of emergency, law enforcement officers had to respect and protect humanitarian organizations as well as journalists. The Court asserted the obligation of public force officers to use the force proportionally, respecting the life and integrity of the protesters. Finally, the Court reaffirmed the duty of prosecutors and judges to respect and safeguard due process of all detainees. See, Judgment No. 5-19-EE/19.

[12] See, Sentence No. 4-19-OP/19.

Claudia Storini (ed.), *Refundación del constitucionalismo social. Reflexiones a los cien años de la Constitución de Querétaro* (Corporación Editora Nacional, Universidad Simón Bolivar, 2019)

Ismael Quintana, *Limitaciones y Control de la Reforma Constitucional* (Corporación de Estudios y Publicaciones, 2019)



Egypt

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I. INTRODUCTION

Since the adoption of the 2014 Constitution, the year 2019 was, undisputedly, the most significant year in the Egyptian constitutional path. A constitutional amendment was adopted in a referendum through which 14 articles were amended and 3 articles and a new seventh section were added. The constitutional structure of the state and its constitutional institutions were deeply changed, the function as well as the construction of the state's authorities were reshaped, and the principle of the separation of powers was extremely jeopardized. As for the executive branch, the most significant changes were the increase of the presidential term from 4 to 6 years and the widening of the scope of executive authority vis-à-vis the judiciary and the Parliament, with the latter's structure changing with the addition of a new lower chamber, the House of Senates. The judiciary lost some of its powers and jurisdictions. However, the most important reshaping of the judiciary was the amendment to the selection procedure for the heads of the judicial bodies and entities and the establishment of a new council that governs the judicial system in the state.

Meanwhile, a number of new controversial laws were passed, a new General Prosecutor was appointed, and a new head of the State Council was selected by the President according to the new process adopted in the Constitution after the amendments. An emergency status was declared four consecutive times by four executive orders.

In a different context, some interesting judgments were delivered whether from the Supreme Court or, more interestingly, from lower courts, touching on civil and constitutional rights.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A constitutional amendment was enacted in Egypt in 2019 upon a call from the Parliament. According to Article no. 226 of the Egyptian 2014 Constitution, an amendment request can only be submitted through one-fifth of the members of the House of Representatives, or the President. In all cases, the request has to be approved by a simple majority, and if approved, has to be debated[1] article by article and approved[2] by a two-thirds majority of the House. Accordingly, an amendment draft was submitted, debated, and approved. The President sent a letter to the National Elections Commission asking for a referendum. The Commission called for a referendum on the 17th of April by decision no. 26/2019.[3] Being that it was the Commission and not the President who issued the decision calling for the referendum, it created a constitutional issue. According to Article no. 157, it is the President who can call for the referendum, and according to Article no.

[1] 'برلمان مصر يوافق على تعديلات الدستور.. ماذا ينتظر البلاد؟,, The Egyptian Parliament Approves Ammending the Constitution, What Awaits Egypt?'.

[2] مجلس النواب المصري جلسة 16 إبريل 2019 , The Egyptian Parliament, the Session of April 16, 2019'.

[3] *The Official Gazette,* issue (15) repeated (c), April 17, 2019.

208, the Commission's jurisdiction is limited to the supervision and management of the elections' and referendums' processes and procedures.

The referendum took place over four days, from Friday, the 19th of April, through Monday, the 22nd. According to the second article of the Commission's decision, the first three days were set for citizens overseas to vote, and the last three days were for the locals.
The referendum included the amendment of 14 articles (102/1, 102/3, 140/1, 160/1, 160/5, 185, 189/2, 190, 193/3, 200/1, 204/2, 234, 243, and 244), the augmentation of three articles (150 bis, 241 bis, and 244 bis), and also included the addition of a new seven-articled seventh section under the name of the House of Senates. Those articles were related to the Parliament, presidential authority, the judiciary system, and the military. Some of them were demonstrated in the last report in the same way they were amended, and some of them were amended differently in the final amendment draft, while a few of them were not tackled in the last report. We will focus on the latter two categories.

The presidential term was extended from 4 to 6 years retroactively to the current President in office, who will enjoy the opportunity to be reelected for a third consecutive term as an exception from the constitutional rule that limits the consecutive terms to two. The President was given the authority to appoint a Vice President, who enjoys some of the authorities, powers, and jurisdictions of the Prime Minister before the amendment, especially acting in the place of the President in cases of temporary impediment.

As expected, presidential power over the judiciary was broadened including: a) the appointment of the Attorney General, b) the President was given the authority to chair the Supreme Council of Judicial Bodies, which is endowed with the power of supervising the judiciary system, including, inter alia, appointment of judges, promoting them, and the approval of the judiciary system's annual fund, c) the concession of discretionary power to the government to refer bills of legislative character to the State Council to review instead of being a mandatory obligation, and d) the appointment of the president as well as the deputies of the president of the Supreme Constitutional Court.

Concerning the military and the Parliament, the topic is covered in the last report in the same way it was delivered to the referendum except for narrowing the power of the President to choose the Minister of Armed Forces after 2022. The approval of the Supreme Council of Armed Forces is now a permanent condition for appointment in the given position.

On Tuesday, the 23rd of April 2019, the National Elections Commission declared the approval of the draft of the amendments by decision no. 38/ 2019, with a majority of 88.83% of the valid votes.[4]

In a quick application to the amendments on Articles 185, 189, and 193 of the Constitution, on the day after these amendments were approved in the referendum, the Minister of Justice sent three law drafts to the heads of the Egyptian judicial authorities.[5] The first two bills regulate the selection of the heads of the judicial bodies, including the public prosecution, the administrative prosecution, the court of cassation, the state council, the state lawsuits authority, the Supreme Constitutional Court, and the military judiciary. The third bill establishes and regulates the Supreme Council of the Judicial Authorities. While the Parliament passed the first two bills on June 26, 2019, the third bill was still under consideration as of the date this review was written.

The first law number 77 of the year 2019 unifies the selection of the head of all the judicial authorities, except for the public prosecution and the supreme constitutional law. The selected method is that the President chooses the head of the relevant authority among the most seven senior deputies of it. This head is appointed for four years, or until he/she retires, and is allowed to be appointed only once. Regarding the public prosecution, the law stipulates that the chief public prosecutor is to be chosen by the President among three candidates nominated by the Supreme Judicial Council. These candidates should be among the deputies of the chief of the court of cassation, the chiefs of the appeal courts, and the assistant general prosecutors. The nominations should be sent to the President 30 days before the end of the period of the last chief public prosecutor. In case nominations were not sent in on time or were out of the categories referred to earlier, the President has the right to choose the chief public prosecutor among these categories. Just like the other judicial bodies, the chief public prosecutor is to be appointed for four years or until he/she retires, and for only once during his/her service.[6]

The second law number 78 of the year 2019 modified the selection process of the head of the Supreme Constitutional Court. According to this law, the court chief is chosen by the President among the five most senior deputies of the court chief. The vice chief of the Court is also to be chosen by the President among two candidates; the general assembly of the Court nominates one, and the chief of the Court nominates the second.[7]

These amendments are the second wave of strengthening the power of the President versus the power of the judicial authorities in choosing their heads. The first wave took place back in 2017 through the debatable law of selecting the heads of judicial authorities – except for the chief public prosecutor and the chief of the Supreme Constitutional

[4] '*The Official Gazette,* issue (16) Repeated (f), April 23, 2019'.

[5] Rana Mamdouh, 'Concern Arises That Recent Constitutional Amendments Bring the Armed Forces into Egypt's Judicial System' (*Constitutionnet*, 2019) <http://constitutionnet.org/news/concern-arises-recent-constitutional-amendments-bring-armed-forces-egypts-judicial-system> accessed 9 January 2020.

[6] Law number 77 of year 2019, modifying law number 117 of year 1958 on the re-regulation of the administrative prosecution and disciplinary trials; law number 75 of year 1963 of the state lawsuits authority; law number 25 of year 1966 of the military judicia. 2019 3.

[7] Law number 78 of year 2019, modifying law number 48 of year 1979 of the Supreme Constitutional Court. 2019 6.

Court. The 2019 laws not only included all the judicial authorities but also limited the interference of these bodies in their head selection to a greater extent than that of the 2017 law. Both the laws of 2017 and 2019 represent a distinct step backwards in terms of the interference of the presidency within this process.[8]

The new amendments were already applied through the appointment of the new chief public prosecutor Justice Hamada El Sawy,[9] and the new chief of the Supreme Constitutional Court Justice Saied Marei.[10]

III. CONSTITUTIONAL CASES

1. Nasrallah v. Nasrallah & Nasrallah: Activation of Christians' Inheritance Laws

On November 24, 2019, the seventh circuit of Helwan Family Court of Personal Matters – Guardianship delivered its verdict in case number 3743 of the year 2019. The case was initiated by Huda Nasrallah, a lawyer and member of the Egyptian Initiative for Personal Rights. In her claim, Huda asked for nullifying the declaration of death and inheritance issued in case number 2793 of the year 2018 from the inheritance circuit of the Helwan court. She argued that the mentioned declaration was legally void because it breached the principles of the Constitution and the law, and that the court that delivered it gave the parties what they did not ask for. The declaration distributed the inheritance of the dead person in accordance with the Islamic Shariaa, which gives the brother twice the share of his sister from the same degree. However, the dead and his successors were from the same religion (Christian), Millia (Coptic), and sect (Orthodox), and there was no objection by the defendants regarding the application of the Christian Shariaa. These facts should entail the application of Article 245 of the Coptic Orthodox regulation of the year 1938. The mentioned regulation gives the same share of inheritance for both males and females. The applicant also argued that the declaration violates Article 3 of the Egyptian Constitution, which gives Christians the right to apply the principles of the Christian Shariaa in their personal matters.[11]

The court ruled in favour of the applicant, applying the articles of the Coptic Orthodox regulation and Egyptian Constitution referred to earlier.[12]

This rule is an important victory for the initiatives advocating for the application of the Christian and Jewish Shariaa in matters of inheritance on Christians and Jews in Egypt. As mentioned earlier, this right is protected by Article 3 of the Egyptian Constitution. However, for years the Egyptian courts applied the principles of the Islamic Shariaa on non-Muslims in contradiction to the law of inheritance of the year 1943 modified by law number 25 of the year 1944. This law gives non-Muslims the right to apply the Shariaa of the dead's religion if there is no objection by the survivors. However, the Egyptian courts used to ignore this law, depending on Article 875 of the Civil Code of the year 1948, which considered inheritance as one of the reasons of property deferral and put the Islamic Shariaa as the applicable law for inheritance matters.

This tradition of Egyptian courts is not built on a solid legal basis because it deactivates two specific legal texts over one general text. Regardless of the Constitution, which did not have that protection before 2012, the first is the inheritance law and the second is the regulation of personal matters. Unfortunately, this tradition was supported by court of cassation rulings, which decided that Islamic Shariaa was to be applied in matters of inheritance on both Muslims and non-Muslims as part of the public order. The non-Muslims used to resort to non-legal ways to avoid this. Accordingly, they used to agree on distributing their inheritance according to their Shariaa informally. This, of course, put the right of the Egyptian non-Muslim women in the hands of their male family members.[13]

The tradition started to be broken by another relevant rule by the Cairo court of appeal in

[8] For more details about the sequencing of previous laws governing this process, see Eman Muhammad Rashwan, 'Egypt: The State of Liberal Democracy', in Richard Albert and others (eds), *2017 Global Review of Constitutional Law* (2018) 83-85 <www.bc.edu/cloughcenter>

[9] 'Sisi Names Hamada Al-Sawi New Attorney General after Sadek' (*Egypt Today,* 2019) <https://www.egypttoday.com/Article/2/74685/Sisi-names-Hamada-Al-Sawi-new-attorney-general-after-Sadek> accessed 9 January 2020.

[10] 'President Sisi Appoints New Head of Egyptian Constitutional Court' (*Constitutionnet*, 2019) <http://constitutionnet.org/news/president-sisi-appoints-new-head-egyptian-constitutional-court> accessed 9 January 2020.

[11] 'تفعيلاً للمادة الثالثة من الدستور صدور الحكم بتطبيق مبادئ الشريعة المسيحية في الإرث والمساواة بين الأنثى والذكر, A Ruling Activating the Third Article of the Constitution Applies the Christian Shariaa Principles That Equals the Female and the Male in Inheritance' (*The Egyptian Initiative for Personal Rights*, 2019) <https://eipr.org/press/2020/01/تفعيلاً-للمادة-الثالثة-من-الدستور-صدور-الحكم-بتطبيق-مبادئ-الشريعة-المسيحية-في-الإرث?fbclid=IwAR3VamskeHxSUlOKfRdr3SdooKg1mtwWgfeqAE0wlmETlSF3wTZ4T18qLzY> accessed 13 January 2019; 'تنشر المبادرة المصرية للحقوق الشخصية اليوم نص مذكرة المحامية المحامية باب المبادرة المصرية للحقوق الشخصية، في الدعوى بطلان إشهاد الوفاة والوراثة الخاص بوفاة والده, The Egyptian Initiative for Personal Rights Publishes Today the Text of the La' (The Egyptian Initiative for Personal Rights, 2019) <https://eipr.org/press/2019/11/تنشر-المبادرة-المصرية-للحقوق-الشخصية-اليوم-نص-مذكرة-المحامية-هدى-نصر-الله-في-الدعوى> accessed 13 January 2020.

[12] 'تفعيلاً للمادة الثالثة من الدستور صدور الحكم بتطبيق مبادئ الشريعة المسيحية في الإرث والمساواة بين الأنثى والذكر, A Ruling Activating the Third Article of the Constitution Applies the Christian Shariaa Principles That Equals the Female and the Male in Inheritance' (n 11).

[13] 'تاريخ نظام توزيع الإرث عند المسيحيين في القانون المصري حتى ثورة يناير, The History of the Inheritance Distribution Regulation for Christians in the Egyptian Law until the January Revolution' (*The Egyptian Initiative for Personal Rights*, 2019) <https://eipr.org/publications/تاريخ-نظام-توزيع-الإرث-عند-المسيحيين> accessed 13 January 2020.

[14] '"مسيحيات في البطاقة... مسلمات في الإرث" حملة جديدة للمبادرة المصرية للحقوق الشخصية تطالب بحق المسيحيات المصريات في الاحتكام إلى مبادئ شريعتهن عند توزيع أنصبة المواريث, "Christians in the National ID... Muslims in the Inheritance" A New Campaign for the Egy' (*The Egyptian Initiative for Personal Rights,* 2019) <https://eipr.org/press/2019/07/إطلاق-حملة-مسيحيات-في-البطاقة-مسلمات-في-الإرث-تطالب-بحق-المسيحيات-في-الاحتكام-إلى> accessed 13 January 2020.

the year 2016, applying the Coptic Orthodox regulation in matters of inheritance.[14] This new ruling was another forward step after the 2016 ruling and 2014 Constitution. Some activists advocate for a unified law for personal matters of Christians in Egypt that abolishes any vagueness or conflict in the current laws.[15]

2. Polytechnical Designers Association v. Minister of Social Solidarity & Others: Freedom of assembly, association, and expression

This case was originally filed by the Polytechnical Designers Association against the Minister of Social Solidarity and the Governor of Cairo in front of the Court of Administrative Justice in late 2015. Claiming the illegitimacy of the second defendant's decision to dissolve the Association, the governor was delegated by the minister to make decisions according to Article 42 of Law 48 of the year 2002 as well as Articles 92-96 of its implementing regulation.

The second defendant, the Governor of Cairo, issued decision no. 9031 of the year 2015 to dissolve the association for violation of Article 42 and appointed a judicial liquidator to carry it out. The claimants filed the case, claiming the illegitimacy of the decision on the basis of the illegitimacy of its reasoning,[16] and that the association did not commit a violation to the said article. At that stage of the judicial dispute, the claimants did not challenge the constitutionality of the said articles but the court did.[17] On July 30, 2017, the court ordered a stay of proceedings of case no. 19726 of the year 2015 and referred to the Supreme Constitutional Court to determine the constitutionality of the aforementioned articles. The constitutional case was delivered to the Court and recorded under no. 84 of judicial year 39, on which the Court delivered its judgement on February 2, 2019. The first controversial question answered by the Court was the existence or absence of a direct interest for the claimants to proceed the case. The problem was the enactment of law no. 70 of the year 2017,[18] where the Court decided in favor of the claimants on two bases: the first was the nature of the unconstitutionality judgement and the fact that it was related to the interpretation of the Constitution's articles, so that it was important and crucial to the state's authorities to realize the limits that the constitutional article would put to it; the second was that the same limits would apply to the new law, so that the given judgement would form a judicial precedent applicable to the new law as it was related to the constitutional article, not the legal provisions.

The Court renounced the government's arguments calling for the constitutionality of the disputed articles on the claims that it was related to social and national security, that the power vested in the minister was not discretionary because it was confined to a number of specific reasons, and that the decision must be reasoned and can be challenged in front of the State Council. The Court did an assessment of the prevailing interest and whether it was governmental scrutiny over the association's activity or the protection of the right to assembly. It decided that the latter prevailed, and that the dissolution of associations is a type of power that cannot be abandoned to governmental conduct.

The article in question sets six cases in which the minister can decide to dissolve an association, namely: a) misappropriating funds, b) external financing, c) committing violations to public order, d) joining foreign associations, entities, or organizations, e) adoption of prohibited purposes, and f) raising funds in violation of Article 17. If the government claimed the existence of one or more of the aforementioned cases, the minister had the power, after hearing the defense of the general assembly of the association and consulting the General Association's Union, to dissolve the suspected association. But the latter had the right to file a case.

The Court did not underestimate the gravity nor the seriousness of the reasons set in the article. However, it deprived the government from the right to decide separately concerning those cases. It attributed the protection of associations not only to the principle of freedom of assembly but also to the principle of freedom of expression, as it considered associations one of the important ways for people to express, defend, and organize their opinions in specific fields and aspects of life. Depriving people of those rights cannot stand on fragile bases of suspicious accusations that may be found inaccurate.

It was clear in the eyes of the Court that the article in question gravely violated Article no. 75 of the Egyptian 2014 Constitution:
'Citizens have the right to form non-governmental organizations and institutions on a democratic basis, which shall acquire legal personality upon notification.

'They shall be allowed to engage in activities freely. Administrative agencies shall not interfere in the affairs of such organizations, dissolve them, their board of directors, or their board of trustees except by a judicial ruling.

'The establishment or continuation of non-governmental organizations and institutions whose structure and activities are operated and conducted in secret, or which possess a military or quasi-military character are forbidden, as regulated by law'.

[15] 'تاريخ تنظيم توزيع الإرث عند المسيحيين في القانون المصري حتى ثورة يناير', The History of the Inheritance Distribution Regulation for Christians in the Egyptian Law until the January Revolution' (n 13).

[16] According to the State Council Law, a governmental decision might only be challenged on one or more of five bases, namely: reasoning, violation to the law, purposes, violation to the required format, and jurisdiction.

[17] A constitutional case has one of three possible ways to be heard in front of the Supreme Constitutional Court, one of which is according to Article no. 29 of law no. 48 of year 1979, which states in cases where the question of constitutionality arises without an explicit plea from one or more of the parties of the dispute, the Court will order the stay of the proceeding and refer the case to the Supreme Constitutional Court.

[18] That law replaced law no. 48 of year 2002, and entered into force on May 24, 2017.

It also violates Article no. 92:
'Rights and freedoms of individual citizens may not be suspended or reduced.

'No law that regulates the exercise of rights and freedoms may restrict them in such a way as infringes upon their essence and foundation'.

The final and most solid ground the Court relied on was *stare decisis*. It had previously delivered a judgement of unconstitutionality of the same article on June 2, 2018, in case no. 160 of judicial year 37.[19]

IV. LOOKING AHEAD

One thing that awaits Egypt in 2020 is passing the third law applying the 2019 constitutional amendments related to judicial authority. This law is the one establishing and regulating the Supreme Council of the Judicial Authorities mentioned in Article 185 of the amended Constitution.[20]

On another note, two battles from previous years continue. The first is the issuance of the municipalities law according to the 2014 Constitution, which is a prerequisite for the municipalities' elections.[21] The second is the battle for Egyptian female law graduates to be appointed to all the judicial authorities, and the state council in specific.[22]

V. FURTHER READING

Eman Muhammad Rashwan, 'The Egyptian Civil Society as One of the Democratic Transition Constitution Makers; The Constitutional Moment Is Now', in Yussef Auf and Rawaa Salhi (eds), *Publications of the Fourth Session of Constitutional Law Academy* (The Arab Association of Constitutional Law, 2019).

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'Egypt's State of Emergency Is Extended for the Tenth Time' (*Egyptian Streets*, 2019).

'Sisi Ratifies Amendments to Law on Lawyers' (*Egypt Today*, 2019).

[19] *The Official Gazette*, Issue (22) repeated (i), June 6, 2018.

[20] Amr Mohamed Kandil, '14 Constitutional Articles Subject to Amendment: What Changed?' (Egypt Today, 2019) <https://www.egypttoday.com/Article/2/68426/14-constitutional-articles-subject-to-amendment-what-changed> accessed 9 January 2019.

[21] For more about the current draft see: Mira Ibrahim, 'إقرار التعديل الوزاري ورفض "المحليات".. تفاصيل جلسة عاصفة بالبرلمان, Approving the Cabinet Change and Rejecting "The Municipalities"… The Details of a Hot Session in the Parliament' (Masrawy, 2019) <https://www.masrawy.com/news/news_egypt/details/2019/12/23/1693157/إقرار-التعديل-الوزاري-ورفض-المحليات-تفاصيل-جلسة-عاصفة-بالبرلمان?fbclid=IwAR1yLPvY2XF_DFyucZH7gaS0W-jRiZMJVjgXrXniH-VerCxhfnbhIIaZqDvM> accessed 24 January 2020.

[22] For more about latest developments of this matter, see the page of the campaign: 'حقها المنصة Her Honor Setting the Bar'.

Estonia

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I. INTRODUCTION[1]

In terms of Constitutional law, 2019 was marked by the elections to the Estonian Parliament, the *Riigikogu,* held on 3 March. They had a decisive effect for the claims the Supreme Court had to deal with. Furthermore, their effects led into a year of conflicting constitutional views. The principal reason for this was the results of the coalition negotiations that followed elections and prompted POLITICO Europe to the headline, 'Estonia joins the far-right club'.[2]

2019 did not generate any constitutional amendments, but questions regarding their necessity gained public attention in the context of two comprehensive legal reports. One of them was published in February under the auspices of the Minister of Justice, who had formed a body of 12 experts of constitutional law to analyze a possible necessary renewal of the Constitution. The other report was published at the end of 2018 by the Foundation for State Reform (FSR), a think tank formed by 28 influential Estonian entrepreneurs and businessmen, to convince political decision-makers of the need for state reform.[3] It resulted, in the beginning of 2019 (just before Riigikogu elections), in eight out of the ten political parties running for office to sign a joint memorandum declaring that state reform should become a priority for the next government.

The following overview takes a closer look at the questions of state organization brought about by the integration of the far right into government, the main issues of the aforementioned constitutional reports and the key themes and most important decisions of the Estonian State Court in 2019.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Elections to the Riigikogu were won by the Estonian Reform Party.[4] The Reform Party's leader was tasked by the Estonian president to form a government, but failed to receive the necessary mandate from the Riigikogu, as the parties that had come in second, third and fourth allied to form a government. That meant that the Conservative People's Party of Estonia (EKRE), which garnered 17.8 percent of the vote, became part of the government. Founded in 2012, EKRE had gained quick fame rallying against immigrants and same sex partnerships, claiming the country was actually run by a 'deep state' and accusing the media of bias.

Being her constitutional duty, on April 24 the President appointed the new coalition government. She later said she discussed the President's scope of competence to do this with legal experts, coming to the conclusion that the head of state had the right to refuse the appointment of a minister only

[1] All Internet sources indicated in this article were accessed on 31.01.2020.

[2] Evan Gershkovic, 'Estonia joins the far-right club' (Politico, 30 April 2019) <https://www.politico.eu/article/estonia-tallinn-joins-the-far-right-club-martin-helme-mart-helme-kersti-kaljulaid-populism/>

[3] 'Riigikogu Toimetised' (Riigikogu Kantselei, 2019) <https://rito.riigikogu.ee/wordpress/wp-content/uploads/2019/06/RiTo_39_veebi.pdf> Riigikogu elections

[4] 2019 (Voting and election results) <https://ep2019.valimised.ee/en/election-result/index.html>

in the case where a member of government posed a danger to the constitutional order or national security.[5]

At the swearing-in of the government members before the Riigikogu, however, the President wore a pullover bearing the inscription 'speech is free'.[6] She later said she did this to encourage journalists.[7]

In August, Minister of the Interior and EKRE leader Mart Helme unexpectedly tried to dismiss the director general of the Police Board, although this competence falls within that of the government alone. Thereupon, the President summoned the Prime Minister and told him that in her opinion, Mart Helme posed a danger to the rule of law and should be dismissed.[8] While the President's attitude received much positive response, others called into question the her understanding of the limits of her competence. According to the Estonian Constitution (EC),[9] executive power in Estonia is vested in the government, headed by its Prime Minister. The institution of the President of Estonia is modelled on those of Germany and Austria and assigns the head of state a primarily representative role. However, the President does have the duty to proclaim all laws passed by the Riigikogu and the right to veto them. The President is seen as an important balancing power and custodian of the Constitution.

Integration of EKRE into government also had its impact on the coalition agreement.[10] One of EKRE's aims that found its way into it is the implementation of referenda, within the framework of which legislative projects can be initiated and adopted by binding referenda. However, as this aim requires the amendment of the EC, its realization during the current government term is unlikely. The coalition agreement's promise to conduct a referendum on the proposal to amend the Constitution to define marriage as a union between a man and a woman is another expression of EKRE's priorities.

2019 did not bring about any constitutional amendments. Since its adoption in 1992, the current Constitution has been amended in total only five times. One reason for this can be found in its relatively complex amendment procedure – it offers, *inter alia*, three procedural alternatives between which the Parliament must decide.[11] Also, in political terms there has been (until recently at least) a relative consensus that as far as possible, the Constitution should remain unchanged. This can be seen as one reason why in 2019, 27 years after the adoption of the Constitution, only two comprehensive reports on its state were published, causing an active social debate on constitutional issues.

According to the Minister of Justice, the current Constitution was functional and its fundamental principles did not require renewal.[12] Therefore, the experts of the Ministry of Justice's report were commissioned to work out solutions for single issues that had arisen after the adoption of the EC in 1992.[13] In contrast, the entrepreneurs' analysis had started from the position that the state needed a 'serious overhaul'.[14] Nevertheless, various key points in the two reports overlapped. For instance, both proposed to change the allowable term of the President, currently five years and re-electable, to a single seven-year term to strengthen the head of the state's political independence and give him/her sufficient time to implement his agenda. Both reports also suggested a reduction of the 101-member Riigikogu by 10-20 parliamentarians to cut costs and confirm the Parliament's will to reform. Beyond that, the entrepreneurs' proposals saw a need to reform executive power and increase its effectiveness by, *inter alia*, strengthening the role of the Prime Minister in relation to the government's ministers, ending the independence of ministries and placing them under a single 'government office', and reducing the number of officials by about 50 percent.

The report of the Ministry of Justice saw no need to restructure the state organisation. In order to strengthen democracy, it proposed i) a clause stating that amendments to the Basic Law must not contradict its basic principles, ii) a more precise formulation of the regulation of Estonia's participation in the EU and iii)

the strengthening of opposition rights. In addition to a more precise alignment with international and EU regulations, it proposed to complement the EC's fundamental

[5] Marko Tooming, 'President Kaljulaid: kinnitan valitsuse ametisse' (ERR, 23 April, 2019) <https://www.err.ee/932735/president-kaljulaid-kinnitan-valitsuse-ametisse>

[6] Mirjam Mäekivi, 'Piltuudis: president kandis valitsuse vande andmisel sõnumiga dressipluusi' (ERR, 29 April 2019) <https://www.err.ee/934721/piltuudis-president-kandis-valitsuse-vande-andmisel-sonumiga-dressipluusi>

[7] Interview with the President of Estonia, Kuku Radio (Tallinn, Estonia, 6 January 2020) <https://www.president.ee/et/meediakajastus/intervjuud/15648-naedala-tegija-kersti-kaljulaid-misogueuensed-kuesimused-tulebki-vaelja-naerda-kuku/index.html>

[8] 'Kersti Kaljulaid: Elmar Vaherit ebaseaduslikult kukutada üritanud Martin Helme ei sobi ministriks' (Õhtuleht, 19 August 2019) <https://www.ohtuleht.ee/974137/video-ja-fotod-kersti-kaljulaid-elmar-vaherit-ebaseaduslikult-kukutada-uritanud-martin-helme-ei-sobi-ministriks>

[9] Chapter V of the Constitution of Estonia (1992) <https://www.riigiteataja.ee/en/eli/521052015001/consolide>. The *Estonian State Gazette* is published online exclusively at <https://www.riigiteataja.ee/en/>

[10] 'Basic principles of the Government coalition of the Estonian Centre Party, the Conservative People's Party of Estonia, and Isamaa for 2019–2023' <https://www.valitsus.ee/sites/default/files/basic_principles_of_the_government_coalition_of_the_estonian_centre_party_the_conservative_peoples_party_of_estonia_and_isamaa.pdf>

[11] EC Chapter XV <https://www.riigiteataja.ee/en/eli/521052015001/consolide>

[12] Aili Vahtla, 'Body of experts to examine Estonian Constitution for problems' (ERR, 19 January 2017) <https://news.err.ee/120409/body-of-experts-to-examine-estonian-constitution-for-problems>

[13] The constitutional experts' proposals <https://www.just.ee/et/pohiseaduse-asjatundjate-kogu>

[14] The FSR's ideas and proposals <https://www.riigiuuendus.ee>

rights by an explicit right to data protection. In their joint memorandum of February, the political parties declared making state reform a priority without, however, defining its specific content and range. This aim also found its way into the coalition agreement and its action plan. As with various plans for the consolidation of state administration, draft legislation on fundamental changes in the organization of the state has not been submitted to Parliament.

III. CONSTITUTIONAL CASES

The Estonian judicial system does not have a separate constitutional court. Instead, the Supreme Court of Estonia (SC) has a Constitutional Review Chamber (CRC) competent to hear all petitions for constitutional review.[15] In 2019, the CRC handled in total 45 different constitutional cases, 32 of which were election complaints.[16] The reason for this was Estonian parliamentary elections in March and elections to the European Parliament in May. All of the electoral appeals were rejected by the CRC.

Other major topics on which the CRC had to decide concerned social welfare, nature conservation, same sex partnerships and prisoner's rights. The year also saw the President of Estonia using her veto right.

1. Substantial electoral complaints

1. RKPJKo 27 March 2019 5-19-17: Blanket ban on prisoners' right to vote and stand as a candidate in parliamentary elections[17]

In one of the most notable electoral appeals, the appellant, a prisoner sentenced to life imprisonment, filed an appeal against the electoral committee's decision to reject his request to annul the results of the Riigikogu elections and call for extraordinary elections. The appellant argued that the elections had been unlawful and unconstitutional, as according to Estonian law, a blanket ban prohibits all prisoners from both voting and standing as candidates in elections. He found that that this was inconsistent with Article 3 of Protocol No. 1 of the European Convention on Human Rights (ECHR), which obligates the contracting parties to hold free elections; Article 40 of the Charter of Fundamental Rights of the European Union, which states the right of both voting and standing as a candidate at municipal elections for all EU citizens; and the case law of the European Court of Human Rights (ECtHR) concerning similar judgments and decisions (*Hirst vs. United Kingdom* and others).

The CRC dismissed the case as inadmissible on procedural grounds. As the procedural requirements for the appeal were not met, the Court did not examine a possible infringement of fundamental rights

The SC already in 2015 assessed the constitutionality of the existing blanket voting ban for prisoners in another case.[18] In this judgment, the SC *en banc*[19] found the ban not to be unconstitutional in the specific case, since the crimes of the perpetrators were of such gravity that the Court considered the ban to be proportional also in case of an assumed discretionary decision. (It should be noted that such a discretionary decision is not provided for in current Estonian law.)

By way of an *obiter dictum*, the SC did, however, confirm the ban to be inconsistent with the case law of the ECtHR and affirmed the need for respective legal amendments.

2. Other electoral complaints

Several electoral complaints concerned procedural issues of e-voting. Estonia, in fact, became the first country worldwide to allow e-voting in parliamentary elections in 2005. The CRC did not agree with any of the complaints, but stated that the procedure for counting e-votes should be made more transparent and the rights of election observers in this regard clarified.[20]

2. Cases concerning social welfare

The almost 30 years since Estonia regained its independence have been marked by an increase in economic power, social prosperity and the average age of the population. This again is accompanied by increased challenges and demands on the Estonian welfare state.

2.1 RKPJKo 9 December 2019 5-18-7: Regulation of social services[21]

In the present case, the CRC, at the request of the Chancellor of Justice, declared several local regulations of the city of Narva on the provision of social services to be unconstitutional. The Chancellor of Justice[22] is an independent constitutional institution appointed for a seven-year term by the Riigikogu. The Chancellor has two main duties: i) To analyze the conformity of Estonian legislation with the EC. If the Chancellor considers a regulation to violate the Constitution, he or she can request the SC to declare it unconstitutional. ii) The Chancellor has an ombudsman function, monitoring whether state agencies and officials adhere to people's fundamental rights and the principle of good governance.

The obligation to provide social services

[15] The Supreme Court of Estonia <https://www.riigikohus.ee/en/supreme-court-estonia>

[16] All of the judgments made by the Supreme Court of Estonia can be found on <https://www.riigikohus.ee/et/lahendid>

[17] See ref 16.

[18] RKÜK 1 July 2015, 3-4-1-2-15. The judgment in English: <https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-2-15>

[19] The Supreme Court en banc, comprised of all justices of the Supreme Court, is the highest body of the Court. See ref 16.

[20] *PSJKo 18 June 2019 5-19-32.*

[21] See ref 16.

[22] More information regarding the Chancellor of Justice <https://www.oiguskantsler.ee/en>

has long been a problematic area, as this duty is shared by state and local authorities. This has previously led to various legal disputes over competences and has brought up the criticism that the provision of social services depends on the financial means of the respective municipality.[23]

According to the Social Welfare Act,[24] Estonian local authorities must establish appropriate procedures for the provision of social welfare assistance. Respective regulations had been adopted by the city of Narva, but an analysis by the Chancellor of Justice found several of the given conditions to be unlawful. Depending on the financial means and circumstances of the person in need, the right to obtain social services was limited. For example, domestic social services were made available only to people who did not have the financial means to pay for it, although such limitations weren't foreseen by the legal regulations providing for the corresponding service.

Overall, the SC agreed that irrespective of the specific social aid provider, the legislator is liable for providing social services to its citizens. This means also that the legislator has to ensure sufficient funding and supervision of the services provided. As social aid is an essential public service, its provision cannot depend on the financial assets of the local authority.

2.2 RKPJKo 30 October 2019, 5-19-25: Parental benefits[25]

Another noteworthy judgment regarded the unequal treatment of parents in the calculation of parental benefits. The specific case concerned the different calculation of the amount of parental benefit, which depended on whether the social security contributions had been paid by the employer or by the unemployment insurance fund and led in the case at hand to a difference of over 600 euros per month at the expense of the unemployed. The SC found the respective regulation of the Family Benefits Act[26] unconstitutional.

3. Cases concerning nature conservation

The global trend towards nature conservation also left its mark on last year's Estonian jurisdiction.

3.1 RKPJKo 18 January 2019 5-18-04: Planning of a pulp mill in southern Estonia[27]

In 2017, the Estonian government and the private company Est-For Invest OÜ had presented to the public the idea of Est-For building a pulp mill in southern Estonia. The plan was to build it near Emajõgi, one of Estonia's biggest rivers. Heated discussions regarding the environmental impact of the mill followed. The main arguments concerned noise, air and water pollution and forest protection. It was also argued that the government's support to build the mill infringed on the local municipality's constitutional right to manage all local issues autonomously. The case resulted in the government discontinuing the process of planning and strategic evaluation due to overriding public backlash.[28] The SC, however, did not find that the actions of the government had been unconstitutional by any means.

3.2 Other cases concerning nature conservation

Other decisions concerning nature protection were heard before the Administrative Chamber of the SC and concerned, *inter alia,* the extension of a peat mining area[29] and the application for a permit for limestone mining.[30] The mentioned cases confirmed that in matters of environmental law, all conflicting interests must be given due consideration.

4. Same sex partnerships

In 2014, the Estonian Parliament passed the Registered Partnership Act,[31] which allows different and same sex couples to register their partnership and form a legal union. It entered into force in 2016. However, the Riigikogu has not yet adopted its implementation act due to political disparities between the members of Parliament and contradictory public opinion. The undone work of the legislator has caused several legal problems that have been left for the courts to decide, the following judgments being therefore merely examples of two more important decisions.

4.1 RKÜKo 21 June 2019, 5-18-5: Same sex partnership and its connection with residence permit[32]

An Estonian citizen had registered his partnership with a same sex Sri Lankan citizen. When the Sri Lankan partner tried to apply for a temporary residence permit in Estonia, it was denied.

The SC *en banc* found in its decision that the Aliens Act is unconstitutional insofar as it does not grant a foreigner who has registered a partnership with an Estonian citizen the right of a temporary residence

[23] Vallo Olle, 'Valdade ja linnade korraldatavate kohustuslike kohalike sotsiaalteenuste probleeme' (2019), 1 *Juridica* 30 <https://www.juridica.ee/article_full.php?uri=2019_1_valdade_ja_linnade_korraldatavate_kohustuslike_kohalike_sotsiaalteenuste_probleeme>

[24] Social Welfare Act (2015) <https://www.riigiteataja.ee/en/eli/504042016001/consolide>

[25] See ref 16.

[26] Family Benefits Act < https://www.riigiteataja.ee/en/eli/523092016001/consolide>

[27] See ref 16.

[28] 'Puidurafineerimistehase püstitamiseks ja selle toimimiseks vajaliku taristu rajamiseks riigi eriplaneeringu koostamise ja keskkonnamõju strateegilise hindamise lõpetamine' (RT III, 14 November 2018) <https://www.riigiteataja.ee/akt/314112018001>

[29] *RKHKo 30 May 2019 3-17-563,* see ref 16.

[30] *RKHKo 9 October 2019 3-17-796*, see ref 16.

[31] Registered Partnership Act (2014) <https://www.riigiteataja.ee/en/eli/527112014001/consolide>

[32] See ref 16.

permit. It referred to the practice of the ECtHR, according to which ECHR Article 8, which protects family life, includes same sex marriages and relationships (*Schalk and Kopf v. Austria (2010) 30141/04; Pajić v. Croatia (2016) 68453/13*). From that, the SC concluded that durable and legal same sex partnerships fall under the protection of the family also in the sense of the EC. The Court ruled that not allowing a non-Estonian partner of a same sex registered partnership with an Estonian citizen to obtain an Estonian temporary residence permit led to discrimination on grounds of sexual orientation. In his dissenting opinion, Villu Kõve, the chairman of the SC, argued that neither the literal nor the historical interpretation of the EC allowed same sex partnerships to fall under the concept of 'protection of the family' provided by the EC. In his opinion, the regulation should have been declared unconstitutional based solely on the fact of unjustified unequal treatment.[33]

4.2 RKPJKo 18 December 2019 5-19-42: Registered partnership and health insurance[34]

In the case at hand, one partner of a registered partnership was the biological mother of a child whom her female partner had adopted. Both women were therefore registered as parents. One of the parents stayed home with the child. Arguing that the Social Tax Act allows to provide health insurance to the home parent of married couples only, the Estonian Social Insurance Board[35] refused to provide health insurance for the home parent of the same sex couple. The SC found the Social Tax Act to be unconstitutional to the extent it discriminates against registered partnerships, as there is no difference if the parent staying home with the child is married or in a legally registered partnership.

5. Other significant fundamental rights cases

5.1 RKÜK 11 June 2019 5-18-8/19: Right of persons in custody to take part in long-term visits[36]

In this case, the administrative court requested for the Imprisonment Act to be declared unconstitutional because it does not allow for persons in custody to take part in long-term visits with their spouse, parents, children or other relatives, a right provided for all other prisoners.

The complainant argued that the bond between him and his family weakened beyond repair, as he had not been able to see his child and family over the duration of the approximately one year and five months that he spent in custody. The Chancellor of Justice found the aforementioned prohibition to be in conflict also with the case law of the ECtHR in similar questions (*Varnas vs. Lithuania* and others).

The SC had assessed the constitutionality of the norm in question already in various previous cases and found it not to be in conflict with the EC. In the case at hand, after consideration by the SC *en banc*,[37] the norm in question was declared unconstitutional and void as it breaches the right to privacy and family life set out in the EC. In all cases, the Court carried out a concrete review of the standards. However, it had considered the prohibition to be appropriate in the previous cases due to a possible danger to the criminal proceedings.

5.2 RKPJKo 17 December 2019 5-19-40: Prison smoking ban[38]

Since 2017, there has been an absolute smoking ban in Estonian prisons. In 2019, the Tartu Administrative Court declared the norm in question unconstitutional and requested it to be reviewed by the CRC.

The Chancellor of Justice considered the ban unconstitutional as it breached the fundamental rights to property and free self-realisation. The CRC found the norm's legal restriction to be proportional and constitutional as it enhances the other prisoners' right to health protection and safety, lessens fire hazards and eliminates cigarettes as illegal currency in prisons. According to the CRC, tobacco products are not an essential commodity and as such not indispensable. The Court also argued that the current prison social care system offers counselling, substitution treatment and therapy to those prisoners who have a more severe nicotine dependency.

5.3 RKPJKo 9 December 2019 5-19-38/15: The Estonian President's veto on the bill of amendments to the Estonian Defence Forces Organisation Act[39]

2019 saw the President use her veto power to not promulgate a bill that sought to amend the Estonian Defence Forces Organisation Act.[40] The bill in question would have granted the defence forces – in urgent cases and within limited time and space – the right to covertly check personal data in the databases of public and private legal persons.[41] The President was of the opinion that the defence forces should not obtain the right to covert data processing during peacetime and that the bill infringed on privacy rights.

The CRC declared the bill unconstitutional, as it considered the procedural guarantees

[33] Dissenting opinion by Villu Kõve in case RKÜKo 21 June 2019, 5-18-5 <https://www.riigikohus.ee/et/lahendid?asjaNr=5-18-5/18>

[34] See ref 16.

[35] Republic of Estonia Social Insurance Board webpage <https://www.sotsiaalkindlustusamet.ee/en>

[36] See ref 16.

[37] See ref 19.

[38,39] See ref 16.

[40] Estonian Defence Forces Organisation Act <https://www.riigiteataja.ee/en/eli/ee/503062019005/consolide/current>

[41] Aili Vahtla, 'Top court: Bill seeking to expand EDF surveillance rights unconstitutional' (ERR, 19 December 2019) <https://news.err.ee/1015626/top-court-bill-seeking-to-expand-edf-surveillance-rights-unconstitutional>

concerning the assessment of the decision to not inform the individual of the surveillance activities insufficient, but did not agree with the President's other arguments.

IV. LOOKING AHEAD

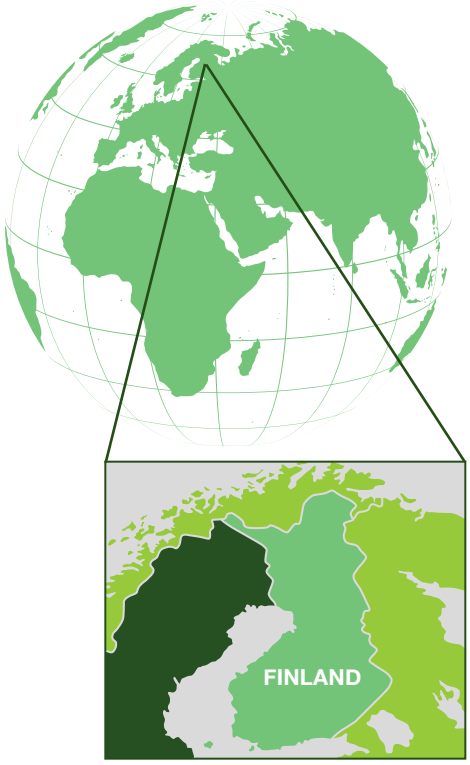
The year 2020 marks the EC's 100th birthday, as the first Estonian Constitution was adopted in 1920. Therefore, constitutional law is in the (legal) spotlight in 2020 with various conferences, contributions and projects.

For 2021, the coalition agreement foresees, concurrently with the elections of municipal councils, a referendum on the proposal of a constitutional amendment to define marriage as a union between a man and a woman. With regard to the question of the division of powers between the government and the President, it has to be noted that Estonian procedural law does not allow for proceedings on a dispute between supreme federal bodies. Therefore, it cannot be expected that the political tensions between the constitutional bodies will find a solution soon – except if the government breaks apart before the next presidential election in 2021.

V. FURTHER READING

Ivo Pilving, 'Parallele Anwendbarkeit von Grundrechtecharta der EU und nationalen Grundrechten' (2019) 28 JI <https://www.juridicainternational.eu/index.php?id=16028>

Madis Ernits and others, 'Estonia' in: Anneli Albi, Samo Bardutzky, *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (1st ed, Asser Press, 2019) <https://www.springer.com/us/book/9789462652729>



Finland

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I. INTRODUCTION

The first quarter of the constitutional year of 2019 in Finland was marked by the pressure to complete a number of legislative projects due to the parliamentary elections in April. Out of the two most significant legislative proposals on the table – reform of the healthcare and social services system and reform of legislation related to civil and military intelligence[1] – the latter was completed. The proposed legislation on civil and military intelligence and on the oversight of intelligence gathering was approved by the Parliament in March 2019. Instead, the reform of the healthcare and social services system could not be carried out within the parliamentary term of 2015-2019. This led to the resignation of the government only five weeks before the new parliamentary elections in April.

Since the formation of the new Government in May, there has yet to be any significant legislative proposal. From the perspective of fundamental rights and human rights, the new Government Programme[2] can be described as promising, at least on paper, as it includes a host of explicit references to fundamental and human rights in multiple contexts. According to the programme, the Government will examine, *inter alia,* the combined impact on legal protection of the numerous separate amendments made to the Aliens Act during the previous parliamentary term.[3]

During the second half of 2019, Finland was in charge of the presidency of the Council of the European Union. Strengthening the rule of law was one of Finland's key themes, and for that purpose it was promoting a comprehensive approach, meaning that the EU's rule of law instruments would be regarded as mutually complementary. In particular, Finland actively promoted a proposal for a regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the member states. The objective was to establish conditionality between receipt of EU funds and respect for the rule of law.[4]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2019, the Constitutional Law Committee of Parliament, the primary authority of constitutional interpretation and review of legislation in Finland, issued 56 opinions on legislative proposals or other matters, including proposals for EU measures, for their compatibility with the Constitution and international human rights obligations binding upon Finland.[5]

[1] Government Proposals 202/2017 and 203/2017.

[2] Programme of Prime Minister Sanna Marin's Government 10 December 2019 < http://urn.fi/URN:ISBN:978-952-287-811-3> accessed 20 January 2020, pp 88-89.

[3] The amendments to the Aliens Act are discussed in the 2016 report concerning 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.), *2016 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2017).

[4] See more on the theme: <https://eu2019.fi/en/backgrounders/rule-of-law> accessed 29 January 2020.

[5] The Finnish system of constitutional review was discussed in more detail in the 2016 report on Finland, supra note 3.

In-depth reform of the healthcare and social services system

The extensive reform of the healthcare and social services system was widely agreed to be absolutely necessary in order to improve equal access to services and to address financial pressure related to rising expenses due to the aging population. The reform had been prepared for several years, and it was supposed to enter into force before the parliamentary elections of 2019. It would have transferred the responsibility to provide healthcare and social services from local municipalities to larger regional entities. Furthermore, private sector actors would have gained much more opportunities to provide healthcare and social services. In fact, the reform would have entailed de facto privatization of healthcare and social services to a considerable extent.[6]

In 2017 and 2018, the Constitutional Law Committee had identified several constitutional problems in its opinions on the compatibility of the proposed legislation with the Constitution.[7] In February 2019, the Constitutional Law Committee gave its final opinion on the proposed legislation.[8] While the Constitutional Law Committee noted that the Government had tried to take into account the Committee's previous constitutional concerns in the legislative drafting process, the Committee still identified a number of concerns about non-compliance with the Constitution. For example, a better explanation of customer plans, a re-examination of the timing of regional elections, clearer service requirements for private facilities, requirements for social and healthcare quality monitoring, the resolution of some data protection issues, and further clarification of regional funding and compensation paid to municipalities were required. In addition, the Committee recommended that the Social Affairs and Health Committee of the Parliament should reconsider notification of the so-called 'freedom of choice' model in accordance with Article 107 of the Treaty on the Functioning of the European Union (TFEU) in order to ensure that the planned model would be compatible with EU state aid law.

In March 2019, the Government announced that the reform could not be carried out before the parliamentary elections in April. The Government resigned due to its failure to accomplish its major policy goal and stayed on in a caretaker capacity until the elections. The new Government has taken over the restructuring of health and social services,[9] but any details of the content of the renewed reform are yet to be given.

Proposed legislation on civil and military intelligence and on the oversight of intelligence gathering

The Parliament approved proposed legislation on civil and military intelligence and on the oversight of intelligence gathering in March 2019. Previously, Section 10 of the Constitution of Finland on the secrecy of confidential communications had been amended according to the urgent procedure for constitutional enactment (Section 73, paragraph 2 of the Constitution) for the purpose of allowing the constitutional basis for enacting the new legislation,[10] aimed at improving Finland's capabilities to protect against serious threats to national security and more effective oversight of intelligence gathering.[11]

Before the approval, in February 2019, the Parliament's Administration Committee withdrew the proposed legislation from the agenda following the emergence of concerns that it had neglected to fully take into account the constitutional concerns of the Constitutional Law Committee. The bills were sent back for the consideration of the Constitutional Law Committee. Less than two weeks later, the Constitutional Law Committee issued two opinions[12] in which it stated that the proposed legislation was in accordance with the Constitution. The Committee did, however, propose certain modifications pertaining, *inter alia,* to the phrasing of the prohibition of discrimination.

The new civilian and military intelligence legislation entered into force on 1 June 2019. Up until now, no information is available on whether the new legislation has been applied for the purpose of gathering intelligence on military or other such activities that pose a threat to national security.

Report on the need for constitutional renewal

In 2019, an assessment initiated by the Ministry of Justice on the need for constitutional renewal was completed. According to the report, no pressing need for the renewal of the constitutional system in general or of any particular sections of the Constitution exists. However, it was recommended in the report that the criteria of evident conflict in Section 106 of the Constitution ought to be removed.[13] According to this section, if in a matter being tried by a court of law the application of an act would be in evident conflict with the Constitution , the court of law shall give primacy to the provision in

[6] See previous reports on Finland: Milka Sormunen, Laura Kirvesniemi, and Tuomas Ojanen, 'Finland: The State of Liberal Democracy', in Richard Albert, David Landau, Pietro Faraguna, and Šimon Drugda (eds.), *2017 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2018) and Milka Sormunen, Laura Kirvesniemi, and Tuomas Ojanen, 'Finland', in Richard Albert, David Landau, Pietro Faraguna, and Šimon Drugda (eds.), *2018 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2019).

[7] Constitutional Law Committee Opinion 26/2017 and Constitutional Law Committee Opinion 15/2018.

[8] Constitutional Law Committee Opinion 65/2018.

[9] *Supra note 2,* p 163-166.

[10] See the 2018 report on Finland, *supra note* 6.

[11] Ministry of the Interior, Press release, 26 April 2019 <https://valtioneuvosto.fi/en/artikkeli/-/asset_publisher/1410869/laki-siviilitiedustelusta-voimaan-kesakuun-alusta> accessed 29 January 2020.

[12] Constitutional Law Committee Opinion 75/2018 and Constitutional Law Committee Opinion 76/2018.

[13] Mikael Hidén. 'Selvitys perustuslain toimivuudesta ja mahdollisista tarkistamistarpeista' (Oikeusministeriön julkaisuja, Selvityksiä ja ohjeita 2019:22), available in Finnish <http://urn.fi/URN:ISBN:978-952-259-760-1> accessed 29 January 2020.

the Constitution.[14]

III. CONSTITUTIONAL CASES

The United Nations' Human Rights Committee on the decisions of the Supreme Administrative Court on the the Sámi Parliament's electoral roll

In February 2019, the UN Human Rights Committee found in its decision[15] that the decisions of the Supreme Administrative Court of Finland from 2011 and 2015 violated Article 25 of the UN Covenant on Civil and Political Rights. In its decisions, the Supreme Administrative Court had allowed 93 persons to enter in the Sámi Parliament's electoral roll against the stand of the Sámi Parliament's Election Committee and Executive Board. The Committee found that the Supreme Administrative Court had departed from the consensual interpretation of the Sámi Parliament Act's[16] Section 3 by applying the so-called 'overall evaluation' instead of the objective criteria required by the Act. The Sámi Parliament Election Committee's assessments and decision to not include 93 persons in the roll had been based on the objective criteria. According to the Committee, the decisions of the Supreme Administrative Court amounted to a violation of Article 25 both alone and in conjunction with Article 27 on the rights of minorities as interpreted in light of Article 1 on the people's right to self-determination. The Committee emphasized the State's obligation to provide an effective and enforceable remedy when it has been determined that a violation has occurred.

In July 2019, the Supreme Administrative Court rejected the applications for annulment by the Board of the Sámi Parliament.[17] In its application, the Board had insisted that the legally valid decisions awarded by the Supreme Administrative Court on inclusion in the electoral roll of the Sámi Parliament should be annulled. The Supreme Administrative Court noted that out of the 97 above-mentioned decisions, 33 had been based on objective criteria listed in Section 3 of the Sámi Parliament Act and thus there were no grounds for annulment.[18] As for the 64 remaining decisions, while the Supreme Administrative Court did not question the opinions of the UN Human Rights Committee regarding the interpretation of provisions concerning the rights of indigenous peoples, it found that there were no grounds for annulment of its earlier decisions. The Supreme Administrative Court argued that, in light of the practice in international law, it could not be considered to have applied the law erroneously at the time of the decisions in question. The ambiguity with regard to the interpretation of the law did not constitute grounds for annulling the court's legally valid decision as prescribed by the Administrative Judicial Procedure Act.[19]

In August 2019, the Supreme Administrative Court decided that the Sámi Parliament's Election Committee could not remove a person from the electoral roll based on self-correction.[20] The inclusion in the electoral roll of the persons whom the Committee had removed had been based on the above-mentioned decisions by the Supreme Administrative Court. In September 2019, the Supreme Administrative Court found that an appellant, whose parents' inclusion in the electoral roll was based on the Court's earlier decisions from 2015, had the right to be included in the electoral roll as per Section 3 of the Sámi Parliament Act.[21]

N.A. v Finland: The European Court of Human Rights (ECHR) on the return of an asylum seeker

In November 2019, the Chamber of the European Court of Human Rights (the ECtHR) gave a judgement concerning Finland in the case of the return of an asylum seeker to Iraq.[22] The asylum seeker had sought international protection in Finland in 2015. The Finnish Immigration Service had rejected his application for asylum and residence permit. The Administrative Court upheld the decision, and the Supreme Administrative Court did not grant leave to appeal in the case. The asylum seeker returned to Iraq voluntarily while the case was still pending before the Supreme Administrative Court. According to the application to the ECtHR, he died in Iraq after returning there.

The Government argued that the circumstances of the case did not engage the jurisdiction of Finland because the asylum seeker had left Finland voluntarily. However, the ECtHR held that the asylum seeker would not have returned to Iraq if an enforceable expulsion decision had not been issued against him. Thus, his return had not been voluntary.

The ECtHR found a violation of Articles 2 and 3 of the European Convention on Human Rights (ECHR) by Finland when pro-

[14] *Supra note 5.*

[15] UN Human Rights Committee, 'Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2668/2015' (1 February 2019), UN Doc CCPR/C/124/D/2668/2015.

[16] Government Bill 975/1995.

[17] Out of the 97 decisions, the Supreme Administrative Court has published two decisions – Supreme Administrative Court 2019:89 and 2019:90 – as precedents.

[18] Supreme Administrative Court 2019:89.

[19] Government Bill 586/1996. See the English summary of the case Supreme Administrative Court 2019:90 <https://www.kho.fi/en/index/decisions/summariesofselectedprecedentsinenglish_0/2019/kho201990.html> accessed 20 January 2020.

[20] Supreme Administrative Court 1.8.2019 T 3561.

[21] Supreme Administrative Court 2019:123.

[22] *N.A. v Finland,* App no. 25244/18 (ECtHR, 14 November 2019). See also Ministry for Foreign Affairs, Press release (14 January 2019) <https://valtioneuvosto.fi/en/article/-/asset_publisher/european-court-of-human-rights-gives-judgment-concerning-finland-in-the-case-of-the-return-of-an-asylum-seeker-to-iraq> accessed 29 January 2020.

cessing the asylum application. According to the ECtHR, the quality of the assessment conducted by the Finnish authorities regarding the relevant facts and the risk had been insufficient in light of Articles 2 and 3 of the ECHR. The authorities and domestic courts were aware, or at least ought to have been aware, of the facts that indicated that the asylum seeker could be exposed to danger to life or to the risk of ill-treatment upon his return to Iraq. The ECtHR ordered the State to pay the applicant, the daughter of the deceased person, 20.000 euros in respect of non-pecuniary damage and 4.500 euros in respect of legal costs.

The ECtHR judgement is not yet final, as the three-month period during which a party may request that the case be referred to the Grand Chamber of the Court has yet to expire.

Recommendations from the European Commission against Racism and Intolerance

In September 2019, the European Commission against Racism and Intolerance (ECRI) published its fifth report on Finland.[23] ECRI acknowledged the many measures that had already been made or were in progress in Finland. At the same time, it presented 20 recommendations to combat racism and intolerance concerning, *inter alia,* the mandate and resources of the Non-Discrimination Ombudsman, the Equality Ombudsman, and the National Non-Discrimination and Equality Tribunal. The recommendations also included measures to combat hate speech and hate crimes, revising the provisions on family reunifications of refugees and beneficiaries of subsidiary protection, providing sufficient funding for National Roma Strategy, and increasing awareness of the Sámi culture among the majority population.

ECRI requested priority implementation for its recommendation concerning the amending of the Act on Legal Recognition of the Gender of Transsexuals[24] by removing the requirement that persons seeking recognition in a gender other than that in which they were originally registered should be infertile or should undergo sterilization as a precondition for legal recognition.

Repatriation of the Finnish children in al-Hol

In late 2019, Finland, among other countries, was considering potential courses of action regarding the repatriation of the children and women detained in the al-Hol camp in Syria. It was estimated that 10 Finnish adults and 30 Finnish children were detained in the camp. The situation was investigated by various authorities under the direction of the Ministry for Foreign Affairs. The Chancellor of Justice gave a decision on the situation on 10 October 2019.[25] According to the Chancellor of Justice, Finland's international obligations obliged the authorities to assist children whenever possible. However, the Chancellor of Justice further noted that the authorities' options to operate within the camp were limited. The decision left a certain amount of discretion to the Government as to any concrete actions to solve the situation.

The Ministry for Foreign Affairs appointed a special representative to resolve the situation. In late December 2019, the Government announced[26] that Finland would return the children 'as soon as possible' but that there was no obligation to assist adults at the camp. A few days later, the Ministry for Foreign Affairs announced that two Finnish children from the camp were in the care of authorities and were to be repatriated to Finland.[27]

There has been a rather heated domestic debate over repatriation of the Finnish citizens in Al-hol. The actions of Finland's Foreign Minister, Mr. Pekka Haavisto, have especially given rise to political debate, and in December 2019, the Chancellor of Justice's office received 20 complaints about them. However, the Chancellor of Justice decided not to investigate these complaints as the Constitutional Law Committee of Parliament also began to consider the legal responsibility of the Minister after a petition by 10 MPs in accordance with Section 115 of the Constitution regulating the initiation of a matter concerning the legal responsibility of a minister.

Supreme Court 2019:50: Child's right to be heard in the restraining order process

In the Supreme Court's case 2019:50, a parent had sought a restraining order against the other parent to protect the applicant and their two underage children. The District Court had issued a restraining order without identifying the opinion of the children. The Court of Appeal had not granted a leave for continued consideration.[28] Among other things, the Supreme Court had to consider whether the opinion of the children had been identified as required by Section 6.3 of the Constitution of Finland and Article 12 of the Convention on the Rights of the Child. The Supreme Court referred to General Comment 12 of the Committee on the Rights of the Child and held that the lower courts should have heard the children before deciding on the restraining order. The case was referred back to the Court of Appeal.

Supreme Administrative Court 2019:93: The

[23] Report on Finland (fifth monitoring cycle) (10 September 2019) CRI(2019)38 (ECRI). See also Ministry for Foreign Affairs, Press release (10 September 2019) <https://valtioneuvosto.fi/en/article/-/asset_publisher/recommendations-for-finland-from-the-european-commission-against-racism-and-intolerance> accessed 29 January 2020.

[24] Government Bill 563/2002.

[25] Chancellor of Justice (10 October 2019) OKV/998/1/2019.

[26] Ministry for Foreign Affairs, Press release (10 December 2019) <https://valtioneuvosto.fi/en/article/-/asset_publisher/finnish-authorities-preparing-to-receive-children-from-al-hol-camp> accessed 29 January 2020.

[27] Ministry for Foreign affairs, Press release (21 December 2019) <https://valtioneuvosto.fi/en/article/-/asset_publisher/two-children-from-al-hol-camp-in-the-care-of-finnish-authorities> accessed 29 January 2020.

[28] On the need for a leave for continued consideration, see <https://oikeus.fi/tuomioistuimet/hovioikeudet/en/index/asiankasittely/leaveforcontinuedconsideration.html> accessed 29 January 2020.

risk of female genital mutilation as a ground for international protection

In the Supreme Administrative Court's case 2019:93, a Somali woman and her underage daughter had applied for international protection. The Finnish Immigration Service had rejected the application and the Administrative Court had rejected the applicants' appeal. In their appeal to the Supreme Administrative Court, the applicants invoked as a new ground for international protection the fear of being subjected to female genital mutilation and reinfibulation if returned to Somalia. The Supreme Administrative Court stated that, as a rule, the applicant should have invoked all applicable grounds for international protection before filing an application. However, it further emphasized that the applicant was not necessarily aware of the nature of mutilation as a human rights violation. It could have also been difficult for the applicant to bring up the delicate issue. According to country information on Somalia, female genital mutilation was very common there. The underage daughter was in a particularly vulnerable position.
The Supreme Administrative Court referred to Section 22 of the Constitution of Finland, according to which the public authorities are obliged to guarantee the observance of basic rights and liberties and human rights, and to Finland's international human rights obligations. These human rights obligations entailed the Convention on the Rights of the Child and the Istanbul Convention on preventing and combating violence against women and domestic violence. The Court came to the conclusion that the Finnish Immigration Service should have considered *ex officio* the risk of being subjected to female genital mutilation if the applicant were returned to Somalia. The decisions of the Immigration Service and the Administrative Court were overturned and the case was referred back to the Immigration Service.

Parliamentary Ombudsman: Rights of placed children restricted without legal basis

Unannounced visits to child welfare units by legal advisers of the Office of the Parliamentary Ombudsman[29] revealed serious problems with the treatment of children placed outside their homes and with the decision-making concerning restrictive measures. The Deputy-Ombudsman emphasized that the use of restrictive measures always required case-by-case decisions and assessment of whether legal requirements were met. Restrictive measures cannot be used as a means of punishment. Each child must be informed about their rights and of any decisions relating to their case and the content of such decisions.

According to the Office of the Parliamentary Ombudsman, the number of complaints made personally by children increased substantially in 2019.[30]

IV. LOOKING AHEAD

In 2020, the need for the reform of the healthcare and social services system still exists. The extensive preparatory work from the previous parliamentary term has been examined in order to launch preparations for a new reform.[31] Also, a reform of the social security system is planned to be carried out during the current parliamentary term.[32] Both of these legislative projects include a number of constitutional questions which will require the attention of the Constitutional Law Committee once legislative proposals start pending before the Parliament.

Already in February 2019, the Parliament approved a Government proposal for the enactment of an act to ban the use of coal to produce energy from 1 May 2029 onwards.[33] The Constitutional Law Committee noted in its Opinion[34] that the aims of the proposal were in accordance with Section 20 of the Constitution on responsibility for the environment as well as with the Paris Agreement and with the EU's environmental policies and objectives. Moreover, any restrictions on other fundamental rights must be weighed against the responsibility for the environment. It seems very likely that Finland's ambitious climate change target of zero net carbon emissions by the year 2035 will raise new constitutional issues in the future.[35]

The rise of populism in Finland continued in 2019. According to the most recent opinion polls, the Finns Party – a Finnish right wing populist party[36] – is currently the most popular party in Finland. While the current Government pursues various actions that seek to improve the level of human rights and environmental rights, as well as the quality of legal aid and protection of asylum seekers, the possibility of increasing political polarization cannot be excluded.

[29] Parliamentary Ombudsman (18.3.2019) EOAK/4099/2019 and (20.5.2019) EOAK/5377/2018. Press releases on the decisions available in English <https://www.oikeusasiamies.fi/en_GB/-/lukuisia-ongelmia-rajoitustoimenpiteiden-paatoksenteossa> and <https://www.oikeusasiamies.fi/en_GB/-/sijoitettujen-lasten-oikeuksia-rajoitettiin-lainvastaisella-tavalla> accessed 29 January 2020.

[30] Parliamentary Ombudsman, Press release (24 October 2019) <https://www.oikeusasiamies.fi/en_GB/-/lukuisia-toimenpideratkaisuja-huostaanotettujen-lasten-kanteluihin> accessed 29 January 2020.

[31] See Sonja Manssila and Lotta Matsson, 'Final report of the regional government, health and social services reform – Experiences of the preparatory work, lessons and conclusions' (Ministry of Finance publications 2019:54) <http://urn.fi/URN:ISBN:978-952-367-036-5> accessed 29 January 2020.

[32] See *supra note 2*, pp 166-172.

[33] Government Bill 416/2019.

[34] Constitutional Law Committee 55/2018.

[35] For Finland's climate change target, see, e.g., <https://yle.fi/uutiset/osasto/news/finland_wants_to_be_carbon_neutral_by_2035_but_how_will_it_get_there/10988493> accessed 30 January 2020.

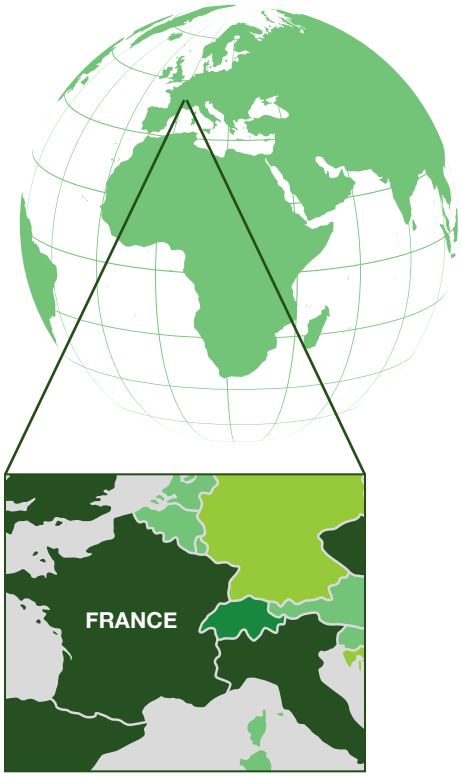
[36] See, e.g., < https://www.helsinkitimes.fi/finland/finland-news/politics/17150-finns-party-is-one-of-largest-populist-parties-in-western-europe-says-researcher.html> accessed 29 January 2020.

V. FURTHER READING

Tuomas Ojanen, 'Constitutional Unamendability in the Nordic Countries' (2019) 3 EJLR 385

Tuomas Ojanen and Janne Salminen, 'Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism', in Anneli Albi and Samo Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. National Reports* (Asser Press, 2019)

Sanna Koulu, 'Children's Right to Family Life in Finland: a Constitutional Right or a Side Effect of the "Normal Family"?', in Trude Haugli, Anna Nylund, Randi Sigurdsen, and Lena R.I. Bendiksen (eds), *Children's Constitutional Rights in the Nordic Countries* (Brill Nijhoff, 2020)



France

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I. INTRODUCTION

In the aftermath of the "Yellow Vests" movement of social protest, the government initiated the *Grand débat national,* which aimed at meeting the claims for an increased involvement of citizens in public decision-making. It consisted of a three-month round of local consultations and online participation on four topics: taxes, public spending and public action; administrative organisation; ecological transition; and democracy and citizenship. The *Conseil Économique, Social et Environnemental* – the third assembly with the National Assembly and the Senate – contributed to the diagnosis of the crisis and made innovative proposals.[1] That is why the new version of President Macron's planned constitutional amendment intends to change it to a *Conseil de la Participation Citoyenne* with enlarged powers. Most of the planned reform of parliamentary procedure has been abandoned due to Senate hostility. A reform of the National Assembly's standing orders was adopted in order to give more rights to the Opposition and to speed up the passing of statutes.

The European elections in May were an important test for President Macron's popularity and ability to move his agenda forward. Even though his party lost to the far-right *Rassemblement National,* the defeat was by a smaller margin than usually expected for the incumbent majority. Except for the environmentalists, the other parties were left in a considerably weakened position. As a result, the French political landscape was reshaped into a duopoly, which may foreshadow the next presidential battle in 2022.

At the same time, there was a significant evolution of the composition of the *Conseil Constitutionnel,* which welcomed three new members in March. All are men, with a political background as well as legal and/or institutional expertise: a former prime minister, a senator and former minister, and a senator. Moreover, one of the *ex officio* members, former President Jacques Chirac, who did not sit on the Council anymore for health reasons, died at 86. Among the decisions this body rendered, special emphasis should be placed first on the decision about the first activation of the mechanism of a joint Parliament- and citizen-initiated referendum (*referendum d'initiative partagée*) and second, on the decision about legislation regarding the right to protest.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The first major ruling was Decision No. 2019-1 RIP, which was, as the number indicates, the very first of its kind. One iconic demand of the Yellow Vests was the citizen-initiated referendum, which is not provided for in the Constitution. Pursuant to Article 11, the President of the Republic may, upon recommendation of the Government or upon a joint motion of the two Houses, put to a referendum a bill which deals with the organisation of public authorities, or with

[1] Michel Badré, Dominique Gillier, Fractures et transitions : *réconcilier la France. Avis du Conseil économique, social et environnemental* (DILA, 2019).

reforms relating to the economic, social, or environmental policy of the nation and to the public services contributing thereto, or which provides for authorisation to ratify a treaty. Under strict conditions, which led one to believe that the procedure would never be activated, a referendum may also be held upon the initiative of one-fifth (i.e., 185) of the Members of Parliament, supported within nine months by one-tenth (i.e., 4.7 million) of the voters registered on the electoral roll. This initiative takes the form of a Private Members' Bill and may not be used to repeal a legislative provision that has been promulgated less than one year before. If the bill has not been considered by the two Houses within a period of six months, the President of the Republic must put it to a referendum.

Unexpectedly, the procedure was activated on 10 April 2019. A coalition of 248 MPs, ranging from the far left to the right, gathered to table a Private Members' Bill aiming to recognise the "public utility" character of *Aéroports de Paris,* the company that manages France's most important airports. At the time, a Government Bill aimed at privatising this company was debated in Parliament. But strictly speaking, the relevant statute was not "adopted" until 11 April, let alone "promulgated" until 22 May. The initiative avowedly intended to block this reform. Was the use of Article 11 in such circumstances in line with the Constitution? For many people, given the spirit of the procedure, it was an illegitimate and unfair use of the joint parliament- and citizen-initiated referendum. The Council checked that the required number of MPs had presented the Private Members' Bill, and that the latter's content was within the scope of Article 11. Most importantly, it ruled that "When the Council's *saisine* was registered, [the proposed bill] did not tend to repeal a legislative provision promulgated less than one year before." Because the content of the bill was constitutional, even though it was but for a handful of days and even though its first use aimed to obstruct the Government's action, the letter of the Constitution had been respected. The period for online collection of popular support began the following month. Chronology was crucial to this saga. A few days later, the constitutional judge was asked to review the statute that authorised the privatisation of ADP. In Decision No. 2019-781 DC, it considered that there was no legal obstacle to this reform. Nevertheless, from a practical viewpoint, all governmental action to implement the privatisation was suspended until the end of the process that the Opposition had triggered – astutely or fraudulently, depending on the perspective.

The second most important ruling of 2019 was Decision No. 2019-780 DC on the act aiming to strengthen and guarantee public order during demonstrations, often referred to as the "anti-rioters' Act".

During most of the demonstrations related to the Yellow Vests movement, many acts of violence against police forces and destruction of public and private property were perpetrated. Some were committed by demonstrators themselves, but most of them were committed by agitators, also known in other countries as "black-blocks". A bill was passed to prevent those acts of violence and, according its authors, to protect the right to peaceful protest. Nevertheless, more than sixty members of the National Assembly and of the Senate referred the bill to the Constitutional Council. They were criticising some of its provisions, which, according to them, violated several constitutional rights. Moreover, the President of the Republic himself also referred the bill, requesting that the Constitutional Council rule on the constitutionality of some of its provisions with respect to freedom of assembly, freedom of expression, and freedom of movement. This was a very unusual proceeding, which was used only once by his predecessor. It was meant to meet the criticisms this act of Parliament had prompted.

The first debated provision allowed police officers, under certain conditions, to carry out visual controls and searches of bags as well as searches of vehicles in public areas at the location of a demonstration and in its immediate surroundings. The Constitutional Council ruled that there was a balanced conciliation between, on the one hand, freedom of movement and the right to collective expression of ideas and opinions and, on the other hand, the objective of investigating people who committed offences, which would seriously disturb the progress of a demonstration. Its decision was justified by the fact that the control of bags and vehicles could only be carried out to investigate and execute proceedings for the penal offence of participating in a demonstration or in a public gathering while carrying a weapon. Moreover, these actions had to be authorised by a warrant from the prosecutor – who is presented as an independent magistrate – who must specify the location and time frame in relation to those of the planned demonstration. Lastly, the party could only be detained for the time necessary for searches and controls to be carried out. Therefore, according to the Constitutional Council, this provision did not have the effect of restricting access to a demonstration or of impeding its progress. Consequently, it was declared constitutional. Another challenged provision intended to forbid demonstrators from voluntarily hiding all or some part of their faces within or in the immediate surroundings of a demonstration during which or after which public order had been, or may have been, disturbed. Such offenders could be sentenced to one year in jail and a fine of € 15,000. The applicants denounced the vague nature of the defining elements of the offence and thus considered that it violated the principle according to which offences and penalties must be clearly defined by law as well as the principle of the proportionality of offences and penalties. The Constitutional Council considered that the legislator had first focused on the circumstance in which an individual intended to hide her identity in order to avoid any possible identification. Secondly, by referring to demonstrations during which or after which public order had been disturbed, the legislator had precisely pointed out the period during which the offence could be committed. As a result, it had clearly focused on situations where the risk for such disturbance was important. It also pointed out that the legislator had excluded the repression of face-hiding when this was done for a legitimate purpose. Therefore, the Council decided that the contested provision did not violate the principle that offences and penalties must be clearly defined by law, nor the principle of the proportionality of penalties.

The last contested provision allowed the administrative authority, under certain conditions related to a threat of a specific gravity to public security, to prohibit a person from participating in a demonstration in a public space, and even, in some cases, anywhere on the national territory for a period of one month. The applicants contended that this provision went against the right to collective expression of ideas and opinions, freedom of movement, and freedom of assembly. They also pointed out that it was not necessary, since a person who has caused a disturbance in a demonstration can be imposed criminal penalties by the judicial authority and also prohibited from demonstrating. The applicant senators especially insisted on the possibility of issuing a prohibition to demonstrate on the entire territory for a renewable duration of a month and on the fact that the prohibition could be associated with an obligation to respond, at the time of the demonstration, to summonses from any administrative authority designed by the prefect.

The Constitutional Council first considered whether these measures provided the administration with the power to deprive a person of her right to collective expression of ideas and opinions. According to its jurisprudence, this would only be acceptable if it were appropriate, necessary, and proportionate. Yet, even if the threat of a specific gravity should be related to violent acts or actions, however far back in time, committed during demonstrations in which there was serious bodily harm or material damage, the legislator did not impose that the party herself cause this serious bodily harm or significant material damage. Therefore, the administrative authority would have had excessive discretion in considering the motives that were likely to justify the prohibition. Moreover, in some cases, the prohibition might be notified at any time, including during the demonstration, which would prevent any appeal in court against it. Lastly, in certain circumstances, the administrative authority could prohibit an individual from participating in any demonstration within the entire territory for a duration of one month. For those reasons, the Constitutional Council considered that the legislator had violated the right to collective expression and ideas and opinions in a manner that was not appropriate, necessary, and proportionate. Consequently, it declared the disputed provision unconstitutional, thus developing the constitutional framework of what, in the social context of 2019, proved to be one of the most important fundamental rights in France.

III. CONSTITUTIONAL CASES

1. Decision No. 2019-761 QPC, 1st February 2019, Association Médecins du Monde et autres

Several provisions resulting from the law aiming to strengthen the fight against prostitution and to help people working as prostitutes were disputed. Among the many objections they raised, the applicants reproached these provisions for punishing all purchases of sexual favors, including acts carried out freely by consenting adults in a private space. They also claimed that these provisions led to a violation of privacy as well as the right to personal autonomy, and the right to sexual freedom that follows from it.

However, the Constitutional Council deduced from (legislative) preparatory work that by choosing to punish persons purchasing sexual favors, the legislator intended, by means of depriving procurement of its source of revenue, to fight against this activity and against human trafficking for sexual exploitation, and criminal activities founded on force and slavery. The legislator had ensured the dignity of human beings was respected, safeguarding the latter from these forms of servitude, and had pursued the constitutional objective of preserving public order and preventing offences. The Constitutional Council thus found that the legislator had managed to strike a reasonable balance between, on the one hand, the constitutional objective of maintaining public order, preventing offences and safeguarding human dignity, and, on the other hand, personal freedom.

2. Decision No. 2018-768 QPC, 21 March 2019 M. Adama S.

Despite the criticisms against the constitutionality of Article 388 of the Civil Code, and its formulation which derived from the law relating to the protection of children, the Constitutional Council held that, given the guarantees that limited the use of X-ray bone exams for age estimation purposes, the legislator had not violated the requirement of protection of the best interests of the child set out in Sections 10 and 11 of the Preamble to the Constitution of 1946. The disputed X-rays were solely used to estimate a person's age and could not be carried out without her consent. They did not involve any internal surgical operation on the body and did not involve any painful or invasive procedure, or one that infringed on the dignity of the individual. Consequently, they lacked the characteristics of the objections made concerning the principle of safeguarding the dignity of the individual, and the inviolability of the human body.

3. Decision No. 2019-778 DC, 21 March 2019, Loi de programmation et de réforme pour la justice

On March 21, 2019, the constitutional judge examined the constitutionality of the 2018-2022 law relative to the reform of the French judicial system. Composed of 395 paragraphs, the decision in question is the longest ever issued by the Constitutional Council. The judge had the opportunity to declare the constitutionality of several legal provisions, such as the possibility of reaching an amicable settlement in certain civil disputes, the abolition of the obligation to hold a conciliation hearing in case of divorce without mutual consent, the establishment of a single national court for payment orders, the experimental introduction of a criminal court composed of professional judges, the creation of the national anti-terrorist prosecutor's office, the use of the delegated legislation (*ordonnances*) in order to reform the juvenile justice system, the amalgamation of two kinds of first instance courts (*tribunaux d'instance* and *tribunaux de grande instance)* into a single judicial tribunal (*tribunal judiciaire*), and the experimental creation of specialised courts of appeal.

Moreover, for the first time, the Constitutional Council deduced from Articles 6 and 16 of the Declaration of 1789 the principle of the publicity of hearings before civil and administrative courts.

On the other hand, the constitutional judge did not hesitate to strike down nearly fifteen articles, most of them of a criminal law nature. In particular, the article aiming to entrust family allowance funds with the delivery of enforceable titles relating to the modification of the amount of a contribution to the education of children was found unconstitutional. When the proceedings have taken place in camera for reasons relating to a risk of breach of privacy, third parties are automatically denied access to the entire judgment, and this provision was also considered to be in breach of the Constitution. The Council also quashed the modification of the conditions under which the judge can, in the context of an investigation or judicial inquiry, resort to the interception of correspondence transmitted by electronic communications. Legal provisions authorising the use of special investigative techniques in the context of flagrante delicto or preliminary investigation of any crime, not just organised crime and delinquency, were found unconstitutional as well. Finally, the provision of the Code of Penal Procedure allowing the public prosecutor to authorise police officers charged with executing the arrest warrant of a person to enter private premises between 6 am and 9 pm was found contrary to the Constitution.

4. Decision No. 2019-785 QPC, 24 May 2019, M. Mario S.

The constitutional judge rejected the existence of a fundamental principle imposing on the legislator to provide a statute of limitations for offences for which there is none, such as continuous crimes. The conditions for the recognition of such a constitutional principle not being met, the Council questioned the existence of another constitutional basis that required controlling the rules of prescription in criminal matters. The judge innovated and held for the first time that a new constitutional principle followed from the principle of the necessity of punishment, under Article 8 of the Declaration of 1789, and from the principle of the guarantee of human rights, established in Article 16 of the same Declaration. According to these principles, in criminal matters, it is up to the legislator to determine the rules relating to the statute of limitations, which would not be manifestly unsuitable depending on the nature and gravity of the offence.

5. Decision No. 2019-787 DC, 25 July 2019, Loi pour une école de la confiance

The Constitutional Council held that the existence of a difference in treatment between the municipalities, based on whether they funded nursery classes before the age of compulsory education was lowered from six to three, did not violate the principle of equality before the law and therefore complied with the Constitution.

6. Decision No. 2019-790 DC, 1 August 2019, Loi de transformation de la fonction publique

Although several provisions of the law relative to the reform of the administrative committees for social dialogue were criticised regarding the constitutional principle of worker participation, the Constitutional Council held that the adjustments made to the conditions governing the right to strike were not disproportionate in light of the objective pursued by the legislator and did not violate any constitutional requirement.

7. Decision No. 2019-811 QPC, 25 October 2019, Mme Fairouz H. et autres

Relying on two German precedents regarding a similar issue, the applicants challenged the 5% votes cast threshold for the distribution of seats in the election of representatives to the European Parliament in France. They claimed that the objective of reaching a stable and consistent majority was not relevant, since the number of European representatives elected in France would not, in itself, make it possible to form a majority within the European Parliament. Secondly, this threshold would have disproportionate consequences in that it would prevent large political movements from being able to access the European Parliament and would deny a great number of voters any representation at the European level. It would result in a violation of the principles of equality in voting and diversity of ideas and opinions.

The Constitutional Council explained that, on the one hand, the legislator intended to favour the representation of the main French political tendencies and opinions in the European Parliament, and thus to reinforce their influence within it. On the other hand, the legislator intended to support the advent and consolidation of European political groups of significant size. In doing so, the legislator sought to avoid a fragmentation of representation that would impede the proper functioning of the European Parliament. Therefore, the Council declared that, by setting the threshold for access to allocation of seats in the European Parliament at 5% of votes cast, the legislator applied methods that did not impact equality in voting in a disproportionate manner, and that did not excessively infringe on the diversity of ideas and opinions.

8. Decision No. 2019-809 QPC, 11 October 2019 Union nationale des étudiants en droit, gestion, AES, sciences économiques, politiques et sociales et autres

In its decision, the Constitutional Council deduced that the constitutional requirement of free admission, as established in the Preamble to the Constitution, applies to public higher education. However, this requirement does not preclude, at this level of education, low tuition fees from being levied, taking into account, when appropriate, the financial means of students.

IV. LOOKING AHEAD

Like last year, at the end of 2019, the government faced major social protests, this time against the reform of the pension system. Passing – or not – this reform in 2020 will be a major test for President Macron's political activism. His political strength will also be revealed by the local elections in March.

These elections moreover decisively condition the renewal of half of the senators, who are indirectly elected, in September. As a result, they will determine the prospect for overcoming the Senate's current resistance to the constitutional amendment the President has been planning since he took over. Ironically, among the salient aspects of this project, there is a new regulation of the RIP that makes it easier to activate, but expressly excludes its use not only for a recently promulgated statute, but also … for a currently debated one.

V. FURTHER READING

Véronique Champeil-Desplats, *Théorie générale des droits et libertés. Perspective analytique* (Dalloz, 2019)

Olivier Duhamel, Guillaume Tusseau, *Droit constitutionnel et institutions politiques* (Seuil, 2019)

Olivier Duhamel, Martial Foucault, Mathieu Fulla, Marc Lazar (ed.), *La Ve République démystifiée* (Presses de la Fondation nationale des sciences politiques, 2019)

Guillaume Tusseau (ed.), *La déontologie publique. Trajectoire et présence d'une notion ambiguë* (Institut francophone pour la justice et la démocratie, 2019)

Guillaume Tusseau (ed.), *Codification, religion et raisonnement pratique : sur les ambitions et les limites du paradigme benthamien* (Institut francophone pour la justice et la démocratie, 2019)

Gambia

Satang Nabaneh, Founder and Editor, Law Hub Gambia

Gaye Sowe, Executive Director, Institute for Human Rights and Development in Africa (IHRDA), Commissioner, Constitutional Review Commissioner

Maria Saine, Legal Fellow, Institute for Human Rights and Development in Africa (IHRDA), Adjunct Lecturer (Constitutional Law), University of The Gambia.

I. INTRODUCTION

The year 2019 saw The Gambia move from setting up key institutions such as the Constitutional Review Commission (CRC); Truth, Reconciliation, and Reparations Commission (TRRC); and National Human Rights Commission (NHRC) to actualising the key transitional justice standards required to restore the rule of law and democracy to the country. The year also saw the introduction of laws and policies that would arguably ensure that human rights are fully respected and protected. Looking back, most of the major constitutional developments in The Gambia were marked by ongoing transitional justice reforms taking place since 2017.

This report will discuss in brief the constitutional developments in relation to the CRC, major constitutional law cases, and, lastly, draw up some conclusions from 2019 and the way forward for The Gambia.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Dealing with past human rights violations

After a year of public hearings, and as we enter into the second and possibly final year of hearings, it can no longer be ruled out that gross human rights violations were committed in The Gambia between July 1994 and January 2017 under former President Yahya Jammeh, and that those identified by the TRRC will face certain prosecution in the most serious form.

Meanwhile, the Government continues to demonstrate its commitment to the welfare of the victims by making an initial payment of 50 million Gambian dalasis (approximately $100,000) to the TRRC Victims' Trust Fund, part of which was used to provide overseas medical treatment for some victims.

2. Draft CRC Constitution

The Constitutional Review Commission of The Gambia, established under the Constitutional Review Commission Act 2017, submitted its first draft Constitution in November 2019.[1] The draft constitution contains 20 chapters, three chapters less than what is in the 1997 Constitution, and a total of 315 clauses.

The Commission, under Section 21 of the CRC Act, is mandated to submit a draft Constitution and report to the President upon completion of its work. After delivering the draft, the Commission was involved in public consultations which lasted for about a month. This gave the people and concerned stakeholders the opportunity to make comments and further submit their observations and contributions on the Draft Constitution to the Commission before it was finally submitted to the President.

The Draft Constitution brought in new developments when compared to the 1997 Constitution. It contained provisions on the following:

[1] See full Draft Constitution https://crc220.org/wp-content/uploads/2015/12/CRC-DRAFT-CONSTITUTION.pdf (accessed 20 December 2019).

Term of office of President

Unlike the 1997 Constitution, the Draft Constitution introduces a two-term limit for the President. Section 100(1) states "Subject to subsection (3), the President shall hold office for a term not exceeding five years." Subsection (2) goes further to state that "No person shall hold office as President for more than two terms of five years each, whether or not the terms are consecutive."

Immunity of President from legal proceedings

Section 103 of the Draft Constitution gives the President immunity from any legal proceedings during their tenure in office in their personal capacity or in relation to their performance or function in office.[2] The immunity granted does not, however, extend to unofficial acts or omissions while in office.[3] The 1997 Constitution, on the other hand, restricts the courts from entertaining any action against the President in any civil proceedings in respect of any act done in their capacity as President after they have vacated the office.[4] Also, a criminal court shall only have jurisdiction to sue a President after they have vacated the office in respect to acts or omissions alleged to have been perpetrated by them while holding office if the National Assembly has resolved in a motion that is supported by not less than two-thirds of all the members that such proceedings are justified in the public interest.[5]

Appointment of Vice President and Ministers

In the Draft Constitution, the President is mandated to nominate and appoint a Vice President within thirty days of assuming office and Ministers of Government within sixty days, but subject to the confirmation of the National Assembly.[6] Here we see a shift from the 1997 Constitution, where the President appoints the Vice President and Ministers without confirmation from the National Assembly.[7]

Inclusion of economic, social, and cultural rights (ESCRs)

Section 60 of the Draft Constitution guarantees the economic, social, and cultural rights of every person in The Gambia. It states, inter alia, that every person has a right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care; accessible and adequate housing; and to reasonable standards of sanitation, etc. Subsection (2) buttresses that a person shall not be denied emergency medical treatment. In addition, there have been great strides on the right to education[8] and the right to development, which gives every person the right to enjoy economic, social, cultural, and political development.[9]

Section 31(5) of the Draft Constitution provides guidelines on the application of the ESCRs. It states, *inter alia*, that the right to education guaranteed under Section 55; economic, social, and cultural rights under Section 60; and the right to development under Section 64 shall be implemented in the absence of resources by a court, tribunal, and other tribunal using the guidelines laid down in Section 31(5)(a)(b) and (c).

The issue of secularism

In *Hon. Kemesseng Jammeh v. the Attorney General,*[10] the Supreme Court invalidated a substantial part of the Constitution Amendment Act,[11] which aimed at amending several provisions of the Constitution. The procedural requirements for amending the Constitution as provided in Section 226 (7) were not followed. Nevertheless, one change stayed despite the Supreme Court judgement finding it unconstitutional. This was the insertion of the word "secular" in Section 1 of the Constitution, which states "The Gambia is a Sovereign Secular Republic."

Upon the publication of the Draft Constitution, the exclusion of the word "secular" sparked a major debate and has divided the country into two camps. The anti-secularism camp argues that inclusion of the term would mean acceptance of same-sex relations, inability to practice Islam as it should, and destruction of mosques.[12] On the other hand, the pro-secularism camp argue that the exclusion of the term would make The Gambia somewhat of an Islamic State with the majority of decisions being in favour of Muslims.[13] This comes on the heels of former President Jammeh's unilateral declaration of The Gambia as an "Islamic Republic" on 11 December 2015, which has since been rescinded.[14]

[2] Section 103 of the CRC Draft Constitution.

[3] Section 103(3) ibid.

[4] Section 69(3)(a) Constitution of The Gambia, 1997.

[5] Section 69(3)(b) of the Constitution of The Gambia, 1997.

[6] Sections 108 and 113 of the CRC Draft Constitution.

[7] Section 70 of the Constitution of The Gambia, 1997.

[8] Section 55 of the CRC Draft Constitution.

[9] Ibid Section 64.

[10] *Hon. Kemesseng Jammeh v. the Attorney General* (2001), Supreme Court, Civil Case No 4.

[11] Act No. 6 of 2001.

[12] Gainako, Gambia Supreme Islamic Council (GSIC) Response to the Draft Constitution, http://www.gainako.com/gambia-supreme-islamic-counsel-gsic-response-to-the-draft-constitution/. (last accessed 5 February 2020).

[13] Foroyaa Newspaper, Christian Council Gives Position Paper in New Draft Constitution, December 11, 2019. Article available here: http://www.foroyaa.gm/christian-counsel-gives-position-paper-on-new-draft-constitution/ (accessed 5 February 2019).

[14] A Vines, 'The Gambia: Africa's new Islamic republic', *BBC,* 26 January 2016 https://www.bbc.com/news/world-africa-35359593 (accessed 5 January 2020).

The CRC plans on submitting the final Draft Constitution not later than March 2020.[15]

3. Continued debate on the validity of Section 5 of the Public Order Act

Gambians continue to debate on the legality of Section 5 of the Public Order Act, which gives the Inspector General of Police discretionary powers to grant and deny permits to citizens who want to demonstrate and assemble in The Gambia. In 2017, the Supreme Court of The Gambia, in the case of *Ousainou Darboe & 19 Others v. the Inspector General of Police and Others,* ruled that the limitations or restrictions under Section 5 of the Public Order Act on the exercise of the right to assemble and demonstrate are reasonable, constitutionally legitimate, and permissible under Section 25(4) of the Constitution, and that such limitations or restrictions are reasonably justifiable in any democratic society.[16]

In August of 2016, the case was filed at the ECOWAS Court, asking for among other things a declaration that Section 5 of the Public Order Act of The Gambia was in violation of Article 11 of the African Charter on Human and Peoples' Rights.

The Constitution grants every person in The Gambia the freedom of speech, conscience, assembly, association, and movement, but they shall only be exercised subject to the laws of the country, which impose reasonable restrictions on the exercise of rights and freedoms that are necessary in a democratic society and are required in the interest of the sovereignty and integrity of The Gambia. Whether or not the restriction of a right guaranteed by the Constitution should be decided on or left in the hands of the Inspector General of Police with discretionary powers continues be a major hindrance on the enjoyment of Section 25 of the Constitution.

4. Legislative reforms

In 2019, the government tabled for enactment before the National Assembly much transformative legislation that included an Access to Information Bill, an Anti-Corruption Commission Bill, a Women's Amendment of Discriminatory Laws Bill, a Sexual Offences Amendment Bill, and a Mutual Legal Assistance in Criminal Matters Bill.

5. Review of The Gambia's human rights record by the Universal Periodic Review (UPR)

The Universal Periodic Review (UPR) provides a unique opportunity to assess states' compliance with their international obligations.[17] The Gambia went through its first and second reviews in February 2010 and October 2014, respectively. On 5 November 2019, The Gambia was reviewed for the third time during the 34th session of the Working Group.[18]

In its first complementary report to the Human Rights Council, the National Human Rights Commission (NHRC) made submissions to the Working Group on the UPR relating to human rights of specific categories of people, namely women, children, persons with disabilities, LGBT, prisoners etc.[19] The NHRC is a permanent, independent body with a mandate to promote and protect human rights and fundamental freedoms in The Gambia, investigate human rights violations, and provide redress and remedial actions to victims.[20] Civil society also submitted complementary reports on issues around freedom of speech and assembly and same-sex relations.

Quite a number of the recommendations from the UPR have constitutional implications, including the following.[21]

Accepted Recommendations

- 127.18 Prioritize completion of the Constitutional Review process, taking into account the need for inclusive consultations (Uganda)

On freedom of expression:

- 127.28 Bring national legal provisions into line with international standards on freedom of expression under the International Covenant on Civil and Political Rights, *inter alia,* by repealing Section 173A of the Information and Communications Amendment Act (2013), and by amending Sections 25 (4) and 209 of the Constitution (Netherlands);

- 127.31 Pass legislation that promotes and guarantees freedom of expression, access to information, and media pluralism (Namibia).

On the death penalty

- 127.91 Abolition of death penalty in the legal system (Spain);

- 127.92 Abolish of the death penalty (Timor-Leste);

[15] Constitutional Review Commission Newsletter, December 2019-January 2020. Issue 7, Vol 7. Available here: https://crc220.org/wp-content/uploads/2015/12/CRC-NEWSLETTER-VOL-7-DEC-2019-JAN-2020.pdf. (accessed 5 February 2020).

[16] Civil Suit No. SC 003/2016.

[17] See UN Office of the High Commissioner for Human Rights, 'UN Human Rights Council: Universal Periodic Review' https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx (accessed 10 December 2019).

[18] Human Rights Council, Universal Periodic Review, 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Gambia', A/HRC/WG.6/34/GMB/1 (22 August 2019).

[19] National Human Rights Commission 'Report on state of compliance with international minimum standards of human rights by The Gambia under the Universal Periodic Review mechanism, third cycle' (2019).

[20] 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* (2018) 97-101.

[21] See Human Rights Council Working Group on the Universal Periodic Review, 'Report of the Working Group on the Universal Periodic Review: Gambia', A/HRC/43/6 (19 December 2019).

- 127.93 Continue to strengthen measures towards abolishing the death penalty in its national legislation (Argentina).

Noted Recommendations

- 128.1 Adopt comprehensive anti-discrimination legislation, including on the basis of sexual orientation and gender identity, and repeal any discriminatory laws (Iceland);

- 128.2 Amend legislation to decriminalize abortion in all circumstances as well as ensure that safe and legal abortion services and post-abortion care are available (Iceland);

- 128.3 Review national laws, including the personal law and the Women's Act of 2010, with a view to removing all provisions that are discriminatory towards women (Croatia);

- 128.4 Review the personal law and the Women's Act, with a view to removing the provisions that are discriminatory towards women with regard to marriage, divorce, inheritance, marital property, adoption, and burial (Honduras);

- 128.5 Amend discriminatory laws against lesbian, gay, bisexual, transgender, and intersex people (Myanmar);

- 128.6 Repeal all legislation that criminalizes same-sex activities, including Criminal Code Article 144 (Netherlands).

While merely noting recommendations is a good step, it does not go so far as signifying the state's political commitment to the protection of human rights of sexual minorities in the country and the full protection of women's rights.

III. CONSTITUTIONAL CASES

1. Ya Kumba Jaiteh v. Clerk of the National Assembly and Others: Removal of Nominated National Assembly Members

In *Ya Kumba Jaiteh v. Clerk of the National Assembly and Others,*[22] the plaintiff, Ya Kumba, challenged the revocation by the President of the Republic of her nomination to the National Assembly as invalid and sought various restraining orders against the defendant.

The plaintiff sought the following orders from the Supreme Court: to restrain the Speaker of the National Assembly from administering the oath of office onto the 3rd defendant, Foday Gassama, who had been nominated by the President to replace the plaintiff/applicant Ya Kumba Jaiteh in the National Assembly; to restrain the Clerk and the Speaker of the National Assembly from bestowing any right, privilege, or role on Foday Gassama as a member of the National Assembly; and an order restraining Foday Gassama from representing himself in any way as a member of the National Assembly.

Without having to deal with the legality or illegality of the revocation, the Supreme Court ruled that orders applied for by the plaintiff should not be granted. Having considered the submission of both parties, the Court ruled that the plaintiff should not interfere with the process or execution by the 3rd respondent of his duties. It also stated in its ruling that the reasons for the dismissal of the application will be incorporated in the final judgement of the Court.

2. Emil Touray & 6 Others (Represented by IHRDA) v. The Republic of The Gambia: Freedom of Expression, Association, and Speech

In 2018, the plaintiffs submitted a Communication to the African Commission on Human and Peoples' Rights (African Commission).[23] In it, the plaintiffs averred that the Public Order Act 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 Peoples' Rights (African Charter).[24] They requested the African Commission to seize the Communication and it was seized.[25]

In 2019, the case was withdrawn before the African Commission and a new Communication was prepared to be submitted at the African Court on Human and Peoples' Rights, alleging violations of Articles 1, 9(2), and 11 of the African Charter and Articles 19(2) and 21 of the International Covenant on Civil and Political Rights (ICCPR).[26]

IV. LOOKING AHEAD

2020 Prospects

Constitutional reform processes started in 2019 are expected to be completed in 2020, including the new Gambian Constitution. The constitutional reform process is envisaged to provide the country with a new constitutional framework to deal with perennial ills such as dictatorship, repression, human rights violations, corruption and mismanagement of state property, and poverty.

More legislation is also expected to be tabled in the course of this year, including comprehensive amendments to the Criminal Code and Criminal Procedure Code in order to sanitize the criminal justice system and bring it in line with modern criminal justice norms and practices.

[22] S.C. No 001/2019.

[23] Communication 705/18, *Emil Touray v. Saikou Jammeh (Represented by IHRDA & Sagarr Jahateh) v Republic of The Gambia (2018).* See also S Nabaneh & G Sowe, 'The Gambia: The state of liberal democracy', in R Albert, D Landau, P Faraguna & S Drugda, *The I·CONnect-Clough Center 2018 Global Review of Constitutional Law* (October 21, 2019), p. 107-111.

[24] The Gambia ratified the African Charter on 8 June 1982.

[25] Communication 705/18 (n 21 above), para 12.

[26] Ratified on 22 March 1979.

On addressing human rights violations, the Truth, Reconciliation, and Reparations Commission (TRRC) is expected to submit its report and recommendations to the state in 2020, as the Act mandates that it shall operate for a period of two years unless it is extended further by the President.

The Supreme Court is also expected to deliver a judgement on the *Ya Kumba Jaiteh v. Clerk of the National Assembly & Others* on whether or not her removal from the National Assembly was constitutional or not.

The Gambia has a historic moment looming to adopt a transformative constitution, as South Africa did. Transformation of Gambian society should include the dismantling of a plethora of sexist laws and institutions, redressing their legacy,[27] healing the divisions of the past, and building a new society committed to social justice and improvement in the quality of people's lives.

The key question in 2020 is whether The Gambia is capable of giving itself a constitution that will usher in a new society of democracy and good governance that will ensure social and economic justice and affirm the democratic values of human dignity, equality and freedom.

V. FURTHER READING

T Isbell & SM Jaw 'The Gambia's draft Constitution reflects citizens' preference for term limits, gender quota' *Afrobarometer Dispatch* No. 338 (2020)

Video: *Constitutional reform process in Gambia,* Centre on Law & Social Transformation, Christian Michelsen Institute (CMI), University of Bergen, Norway, November 27, 2019. Available at https://www.law-transform.no/news/video-constitutional-reform-process-in-gambia/

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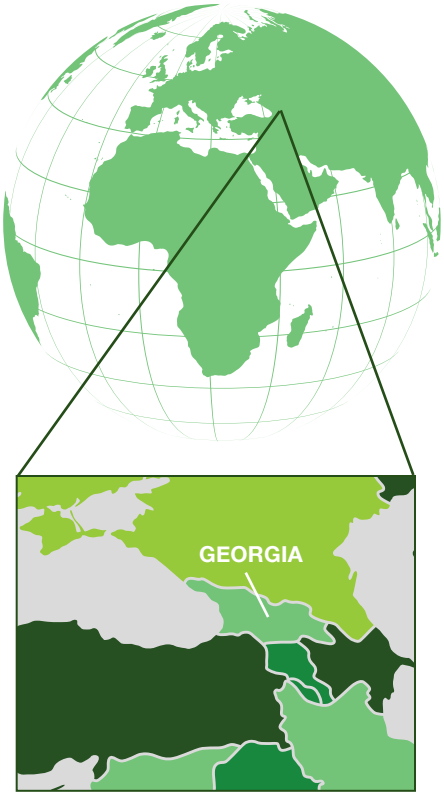
S Nabaneh 'The Gambia: Commentary', in R Wolfrum, R Grote & C Fombad (eds.) *Constitutions of the World* (Oxford University Press, 2017)

S Nabaneh 'The Gambia: Constitution', in R Wolfrum, R Grote & C Fombad (eds.) *Constitutions of the World* (Oxford University Press, 2017)

[27] See S Nabaneh, 'The Gambia's Political Transition to Democracy: Is Abortion Reform Possible?' (December 2019), 21(2) *Health and Human Rights Journal,* 167-179.



Georgia

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I. INTRODUCTION

This report provides a brief introduction to the Georgian constitutional system, including constitutional amendments, civil protest, local elections, the role of media and main challenges of the judiciary. It provides an overview of landmark judgments of the Georgian Constitutional court in 2019. The final section examines developments expected in 2020 related to parliamentary elections, court vacancies, Constitutional Court cases and other related events.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Appointment of Judges in the Supreme Court

One of the most important issues in 2019 was the appointment of judges to the Supreme Court of Georgia. The constitutional amendments of 2018 call for the lifetime appointment of judges to the Supreme Court, and they are elected by the Parliament upon the nomination of the Council of Justice. The independence of the judiciary in Georgia has been a critical issue for years. Following the change of government in 2012, the Georgian Dream government initiated several reforms to ensure the independence of the judiciary, but there were questions about the judicial system raised by judges dealing with various high-profile cases during the previous government. The situation was exacerbated in December, when the Justice Council sent Parliament a list of candidates for the Supreme Court's judiciary for approval, leading to widespread public and parliamentary scrutiny. The main demand was to suspend judges for life and release discredited judges from the judicial system. The ruling party suspended the process in response to criticism and adopted a law on the criteria and procedure for electing judges. After the law was passed, the process moved to Parliament, where public hearings of candidates were held throughout the year. The process revealed many shortcomings and showed that the majority of candidates did not even meet the minimum criteria of qualification and professional integrity. Nevertheless, the Georgian Parliament has appointed 14 candidates to the Supreme Court of Georgia for life. These appointments were made without the participation of the opposition and in the wake of protests by civil society organizations. The ruling party completed the Supreme Court of Georgia in a one-party manner, which can be described as an attempt to influence the Court.

Early and mid-term elections

Early and mid-term local self-government elections were held in 2019 as well as a by-election for a Member of Parliament in the capital, Tbilisi. Mayors were elected in five municipalities, and by-elections were held in eight municipalities. These elections were important in terms of testing opposition forces ahead of the 2020 elections, though all candidates for the government won. Observer organizations noted significant election irregularities.

Anti-occupation protests

2019 was marked by civil and political protest. The biggest protest started in June, when on the 19th, the 26th General Assembly of the Inter-Parliamentary Assembly of the Orthodox Church (I.A.O.) opened in Tbilisi. Protests were sparked by the arrival of the Russian I.A.O. delegation to the plenary hall of the Georgian Parliament, and the decision to let a Russian lawmaker, Sergei Gavrilov, temporarily sit in the chair of the

speaker. This act was considered very insulting by Georgian opposition members and the public at large, as the Russian Federation has occupied 20% of the territory of Georgia and Georgia does not have diplomatic relations with Russia. The opposition MPs protested the appearance of the Russian MP in the Parliament.[1] The government was forced to suspend the assembly and remove the Russian MP from the building, but citizens started gathering there. Finally, tear gas and rubber bullets were used against the protesters, but to no avail, and several hundred people were injured as a result of the violent dispersal, including police officers, journalists and peaceful protesters. Three rally participants lost their eyesight after being hit by rubber bullets. Later, protesters raised three demands: the resignation of the Interior Minister, the adoption of proportional representation for the next parliamentary elections and the immediate release of detainees. On the second day, Irakli Kobakhidze resigned from the Speaker of Parliament position and on June 24, 2019, the Georgian Dream coalition announced that the 2020 parliamentary elections would be conducted through a proportional system under a zero electoral threshold.

Rejection of the fully proportional electoral system

The ruling party's view of a switch to a proportional electoral system was seen as a major victory for protestors, and they hoped the legislation would actually lead to change. To change the Constitution of Georgia in one parliamentary session, the bill must achieve the support of three-fourths of the Members of Parliament; in the absence of such support, the initiative would be considered by the next elected legislature. The initiative put forward by both the opposition and the ruling party went through all the procedures and was set for a vote in Parliament on November 14, 2019. Parliament did not support the opposition's proposed bill, but expectations were high that the parliamentary majority would adopt a draft pledged by the ruling party in June. The poll found that 101 lawmakers voted in favor of the amendment and 3 opposed it. To pass the bill, 113 votes were required, and Parliament rejected a proportional system.[2] The parliamentary outcome drew widespread criticism from opposition parties, civic activists and NGOs; it was considered a failure by the ruling party in fulfilling its promise in June and that the ruling party's chairman, Bidzina Ivanishvili, should take the blame for it. The majoritarian MPs, who were never active in Parliament, were opposed to the proportional electoral system, but their independence was questionable, and this decision could be encouraged by the ruling party leadership.

The case of Rustavi 2

In 2019, the European Court of Human Rights ruled on the Rustavi 2 case and found no violation of the European Convention.[3] The court ruled that one of the most opposition-minded TV companies, Rustavi 2, belongs to Kibar Khalvashi,[4] a businessman closely linked to the government. Khalvashi claimed that the company belonged to him and was illegally seized under the previous government. Following the decision, some of the staff left the TV station, and some were dismissed. Nika Gvaramia, the company's director, created a new television station, "Mtavari Arkhi," and started broadcasting.

III. CONSTITUTIONAL CASES

1. Ltd SC v. Parliament of Georgia (No. 1/1/655, 18 April 18 2019)

The subject of this case was the constitutionality of the law of Georgia on State Procurement. According to the disputed norm, state procurement of postal and courier services by the procuring organization does not apply to the law. According to the claimant, the Parliament of Georgia, by the disputed norm, granted the Georgian Post Ltd exclusive authority and effectively excluded the participation of other economic agents in the Georgian postal and courier services market, thereby violating free competition and free entrepreneurship. The Court held that, under the impugned rule, only one economic agent was granted preference, which created the legal precondition for a monopolist to place the said economic agent in the postal and courier services market. The Court considered that the measure provided for in the impugned provision disproportionately restricted entrepreneurial freedom and declared the provision unconstitutional.[5]

2. Tiflis 777 Ltd v. Parliament of Georgia (No. 1/2/1250, 18 April 2019)

The subject of this dispute was the constitutionality of the law of Georgia on Insolvency Proceedings. The claimant party argued, under the impugned norm, that there was a real threat of the State's ownership of property, which was tantamount to confiscation of substantive property. Since property expropriation is a fundamentally different regime, the right to property is disputed by the disputed norm. However, there is no public interest that would justify the restriction of property

[1] Scandal in Georgian Parliament: Russian MP Speaks from Parliamentary Speaker's Chair, June 20, 2019, <https://jam-news.net/სკანდალი-საქართველოს-პარ/?lang=ka> accessed January 20, 2020.

[2] The plenary sitting of the Parliament voted on the bill on changes to the electoral code, November 15, 2019, <http://parliament.ge/ge/saparlamento-saqmianoba/plenaruli-sxdomebi/plenaruli-sxdomebi_news/parlamentis-plenarul-sxdomaze-saarchevno-cvlilebastan-dakavshirebuli-kanonproeqtis-kenchisyra-gaimarta.page> accessed January 20, 2020.

[3] Case of *Rustavi 2 Broadcasting Company Ltd and others v. Georgia* (Application No. 16812/17) Judgment, Strasbourg, 18 July 2019, <http://hudoc.echr.coe.int/eng?i=001-194445> accessed January 20, 2020.

[4] Grand Chamber Panel's Decision, ECHR 430 (2019), 10.12.2019, <http://hudoc.echr.coe.int/eng-press?i=003-6587761-8728186> accessed January 20, 2020.

[5] *Ltd SC v. Parliament of Georgia,* Decision [2019], No. 1/1/655, <https://matsne.gov.ge/ka/document/view/4544553?publication=0> accessed January 20, 2020.

rights. The Court decided that the impugned norm was not compatible with any of the legitimate aims pursued, there was no logical connection between the restrictive measure and the public interest, the challenged regulation failed to meet the requirements of fairness, disproportionately restricted the right to property and was unconstitutional.[6]

3. Irakli Khvedelidze v. Parliament of Georgia (No. 1/3/1263, 18 April 2019)

The subject of this case was Article 273 of the Code of Administrative Offenses of Georgia, according to which the resolution of an administrative offense can be appealed within 10 days of its submission. In the claimant's view, the 10-day deadline for appeal under the impugned norm was bound to be a moment of enactment and did not provide for the possibility of extending or suspending this term if the party failed to submit a reasoned resolution within the time limit prescribed by law. This would lead to a violation of the constitutional right to appeal a court decision. According to the claimant, due to the overcrowding of the judicial system, in most cases, the court does not give a reasoned ruling within the time limit prescribed by law. It was up to him to submit a well-reasoned appeal after acquaintance with the substantiated resolution within the time allowed by law. The Court ruled that the impugned provision was unconstitutional on the ground that in the event of failure to timely file a reasoned ruling on appeal, a person's discretion would be unreasonably restricted. However, if the impugned order was immediately invalidated, the time limit for appealing the court's decision would no longer exist. Accordingly, the party would have the opportunity to appeal the court's decision at any time.[7]

4. Remzi Sharadze v. Minister of Justice of Georgia (No. 2/2/867, 28 May 2019)

The constitutionality of the norms of the Order of the Minister of Justice of Georgia on "Approval of Forms, Rules and Procedures of Forced Auctions" was the subject of this case. The dispute related to the collateral that was used in a loan agreement to force real estate to be sold. In the claimant's view, the second repeated auction of the starting price of the property at zero lari created the opportunity for the sale of the expensive property to be carried out at a disproportionately low price. The impugned norm neglected the interests of the owner, and such public order constituted an unjustified interference with property rights. The Court ruled that by setting an adequate value at the first and first repeated auction, the value of the property could be created which, on the one hand, would at least provide an equally effective system. It divided creditors' rights, and on the other hand, made zero auctions a less restrictive means of the plaintiff's right. The Court, therefore, held that the impugned provision was contrary to the Constitution of Georgia.[8]

5. Giorgi Kartvelishvili v. Parliament of Georgia (No. 2/1/704, 28 May 2019)

The subject of this dispute was the constitutionality of the words of the Code of Imprisonment: "A convicted person placed in a special risk-taking facility for long periods of imprisonment." According to the claimant, the use of the long-term visitation right under the impugned order was restricted to a convict at a special risk facility and a prisoner under quarantine who had a disciplinary sanction and/or was subject to administrative imprisonment. The Court noted that the offender's contact with family members under the impugned measure was restricted because of the need for the security of the penitentiary institution, persons placed there and the interests of the general public. Such contact may increase the risk of items being banned from circulating in the facility. Communication between criminal groups may also be established (or easier). Accordingly, the impugned norm was a fair balance between private and public interests and the norm complied with the requirements of the principle of proportionality and was not unconstitutional.[9]

6. Media Development Fund and Institute for Development of Freedom of Information v. Parliament of Georgia (No. 1/4/693,857, 7 June 2019)

The subject of this case was the constitutionality of the General Administrative Code of Georgia and the Law of Georgia on Personal Data Protection. The claimant requested the Court to strike a verdict to enable a document to be processed and to identify the persons involved in the case, and later requested a summary verdict, but the Court did not decide because it considered that the names of the parties involved would be disclosed data. As a result, the claimant failed to disclose the reasoning of the Court and failed to identify the persons involved in the proceedings representing the State. The Court ruled that within the meaning of the constitutional order of value, given the importance of access to judicial acts, any decision taken in the course of justice should be open unless there is a justified need to limit its access. The balance established by the impugned norms is the opposite, as the personal data contained in court acts are usually closed unless the person concerned proves that there is a growing interest in the act's openness. In view of the above, the Court announced the disputed norms unconstitutional.[10]

[6] *Tiflis 777 Ltd v. Parliament of Georgia,* Decision [2019], No. 1/2/1250, <https://matsne.gov.ge/ka/document/view/4544515?publication=0> accessed January 20, 2020.

[7] *Irakli Khvedelidze v. Parliament of Georgia,* Decision [2019], No. 1/3/1263, <https://matsne.gov.ge/ka/document/view/4544474?publication=0> accessed January 20, 2020.

[8] *Remzi Sharadze v. Minister of Justice of Georgia,* Decision [2019], No. 2/2/867, <https://matsne.gov.ge/ka/document/view/4575266?publication=0> accessed January 20, 2020.

[9] *Giorgi Kartvelishvili v. Parliament of Georgia,* Decision [2019], No. 2/1/704, <https://matsne.gov.ge/ka/document/view/4575283?publication=0> accessed January 20, 2020.

[10] *Media Development Fund and Institute for Development of Freedom of Information v. the Parliament of Georgia,* Decision [2019], No. 1/4/693,857, <https://matsne.gov.ge/ka/document/view/4586009?publication=0> accessed January 20, 2020.

7. Besik Katamadze, David Mzhavanadze and Ilia Malazonia v. Parliament of Georgia (No. 1/5/1271, 4 July 2019)

The subject of the case was the constitutionality of the following words of the Code of Administrative Offenses of Georgia: "also posters, slogans, banners in places that are not properly allocated." The claimants dropped a banner from the roof of one of the buildings in the city with the inscription "Deceptive Government." All three activists were found guilty of administrative offenses because of this. The claimants also argued about the constitutionality of prohibiting the placement of a protest banner from their faction's office in the city hall building. The Court ruled that the freedom of expression of a Sakrebulo member to place information on the façade of a council building without the consent of the local self-government could not outweigh the growing interest of the local self-government in preventing its property from being used illegally. The balance between private and public interests in the disputed norm was not unfair. Accordingly, the disputed norm in this section was not contrary to the Constitution of Georgia. The Court ruled as unconstitutional a regulation that excluded the temporary placement of posters, slogans and banners by a proprietor on a privately owned object within the scope of a spontaneous protest.[11]

8. Levan Alapishvili, KS Alafishvili and Kavlashvili - Georgian Bar Association v. Government (No. 2/3/1279, 5 July 2019)

The subject of the case was the constitutionality of the Georgian Government's Decree on Approval of the Service Fees, Rates and Payment Rates of the Legal Entity of Public Law of the Ministry of Internal Affairs of Georgia. According to the impugned norm, the subscribers of "112" service fees are telephone subscribers and mobile subscribers, and the monthly fee is GEL 0.20 for individuals and GEL 0.50 for legal entities, organizations and institutions. The claimant alleged that the impugned norm violated constitutionally protected property rights. The constitutional lawsuit stated that the subscriber was subject to the "112" service charge regardless of their consent, without defining specific concurrent services. The Court ruled that the fee was constitutionally charged, and only the law can establish its rate. Parliament was entitled to delegate the authority to set the rate of the fee to another body if it established rate limits. In this case, the Parliament delegated the power to set the rate of "112" without setting the rate itself, which is not in accordance with the Constitution of Georgia.[12]

9. Alexander Mdzinarashvili v. Georgian National Communications Commission (No. 1/7/1275, 2 August 2019)

The subject of this case was the norms of the Regulations approved by the Resolution of the Georgian National Communications Commission on Approval of the Regulation on Provision of Electronic Communications Services and Protection of Consumers' Rights. The claimant disputed regulation set standards that provide for the blocking of an Internet domain issuer's site, as well as the user, for breaking the constitutionally protected freedom of expression. The claimant stated that the contentious regulation of freedom of expression was subject to the contentious norms. The legislator did not delegate to the Georgian National Communications Commission the power of substantive regulation of freedom of expression. The Court ruled that the Parliament of Georgia did not confer the power to restrict freedom of expression in the disputed issue with the Georgian National Communications Commission, and even if delegated at the same time, such a will of the Parliament would be unconstitutional.[13]

10. The Public Defender of Georgia v. Parliament of Georgia (No. 1/6/770, 2 August 2019)

The subject of this case was the constitutionality of the Code of Administrative Offenses of Georgia and the Criminal Code of Georgia. The challenged provision stipulated that a small amount of illegal purchase or possession of drugs without a doctor's prescription would be punishable by a fine, or in exceptional cases in the light of the circumstances and the nature of the offender's use if that would be inadequate, by administrative detention for 15 days. In the claimant's view, the small amount of illicit manufacture, purchase, storage and/or use of narcotics did not pose any risks that could result in administrative imprisonment. According to the Court, the impugned sanctions served the legitimate interest of the State to regulate the illicit traffic of drugs and thereby protect public health. Finally, the Court reviewed the constitutionality of the disputed norms only in relation to drugs, which cause aggressive behavior in case of rapid withdrawal.[14]

11. Badri Bezhanidze v. Parliament of Georgia (No. 2/4/1365, 20 September 2019)

The constitutionality of the provisions of the Law of Georgia on Amendments and Additions to the Criminal Code of Georgia was a matter of dispute in this case. The claimant had been convicted twice for premeditated murder before the enactment of the contested law, and both episodes were sentenced to one sentence. Notwithstanding the entry into force of the law, the conviction of the plaintiff in the general court was based on criminal law at the time of the offense, and

[11] *Besik Katamadze, David Mzhavanadze and Ilia Malazonia v. the Parliament of Georgia,* Decision [2019], No.1/5/1271, <https://matsne.gov.ge/ka/document/view/4610268?publication=0> accessed January 20, 2020.

[12] Levan Alapishvili, KS Alafishvili and Kavlashvili - *Georgian Bar Association v. the Government,* Decision [2019], No. 2/3/1279, <https://matsne.gov.ge/ka/document/view/4610285?publication=0> accessed January 20, 2020.

[13] *Alexander Mdzinarashvili v. Georgian National Communications Commission,* Decision [2019], No. 1/7/1275, <https://matsne.gov.ge/ka/document/view/4629943?publication=0> accessed January 20, 2020.

[14] *The Public Defender of Georgia v. Parliament,* Decision [2019], No.1/6/770, <https://matsne.gov.ge/ka/document/view/4629913?publication=0> accessed January 20, 2020.

the plaintiff's action was qualified as repeated intentional homicide. The claimant was sentenced to life imprisonment as a punishment. According to the claimant, if the crime committed by the claimant were assessed in the light of the amendments to the Code, his action would not qualify as a repeated offense because he was not a person previously convicted of the same act. This would lead to a relatively light sentence. The Court ruled that the impugned norm is discriminatory and contrary to the requirements of the Georgian Constitution.[15]

12. Zurab Svanidze v. Parliament of Georgia (No. 2/5/879, 14 November 2019)

The subject of this case was the constitutionality of the Law of Georgia on Enforcement Proceedings. The constitutional claim stated that the debtors were ordered to pay a sum in favor of claimant Zurab Svanidze. The specific immovable property listed on the debtor's name was registered to satisfy the creditors, including the claimant. According to the claimant, the regulation provided by the impugned norm, according to which in case of unsuccessful completion of the auction in accordance with the established rule, the property is released from seizure in favor of the creditor implementing the forced sale and is returned to the debtor, prevented the Court from enforcing its decision. The Court ruled that there are other, less restrictive means of achieving the legitimate aim of saving administrative resources, and the limitation provided by the impugned provision was broader than objectively necessary to achieve the legitimate aim. Accordingly, the disputed regulation did not meet the requirements of necessity, did not meet the requirements of the principle of proportionality and was contrary to the Constitution of Georgia.[16]

13. Stereo + Ltd, Luke Severin, Lasha Zilpimian and Robert Khakhalev v. Minister of Justice (No. 2/6/1311, 17 December 2019)

The subject of this case was the constitutionality of the Law of Georgia on Enforcement Proceedings and the Rules of Order of the Minister of Justice of Georgia on Approval of Forms, Rules and Procedures for Conducting Forced Auctions. The claimants were Stereo + Ltd, a licensed broadcasting company and its affiliates. The main purpose of the company is to operate in the field of broadcasting. According to the Court ruling, one of the partners of the claimant company was ordered to pay cash in favor of a company registered in an offshore zone and commenced enforcement proceedings, seizing a 50% stake in the company and auctioning it for sale. The claimant explained that the impugned norms allow the alienation of a licensed company's shares through the forced auction without the Commission's prior notice and consent. The Court decided that the challenged norms established an unfair balance of interests, violated the requirements of the constitutional principle of proportionality and are thus contrary to the Constitution of Georgia.[17]

IV. LOOKING AHEAD

The most significant political event in 2020 will be the parliamentary election, which marks the second term of the ruling Georgian Dream Party. The opposition is actively fighting for a fully proportional electoral system and for winning elections. 2020 will also see more judges appointed to the Supreme Court of Georgia. And two new judges will be appointed to the Constitutional Court, including a new chairman. In 2020, the Constitutional Court is also expected to rule on important cases, such as "Georgia's Democratic Initiative against the High Council of Justice of Georgia," where the issue of the selection of judges is subject to dispute. Other cases: "Eduard Marikashvili and A.D.," *Democratic Initiative of Georgia v. Parliament of Georgia, Public Defender of Georgia v. Parliament of Georgia, and Nana Rekhviashvili Sepashvili Ia v. the Parliament and the Minister of Justice.*

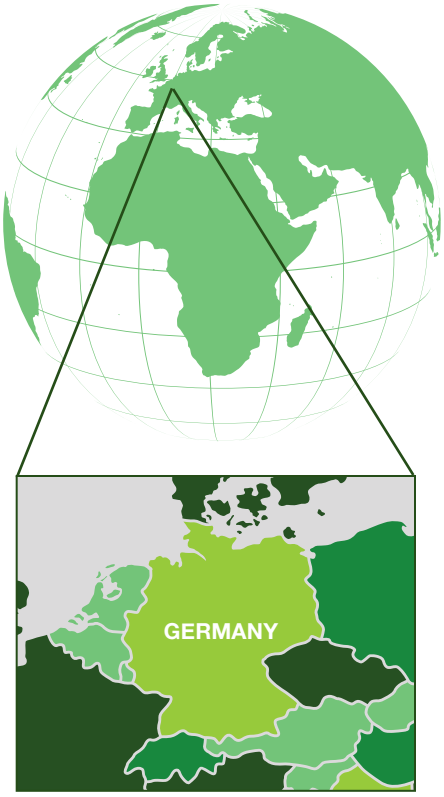
V. FURTHER READING

Richard Albert, Malkhaz Nakashidze, Tarik Olcay, "The Formalist Resistance to Unconstitutional Constitutional Amendments, *Hastings Law Journal,* Vol. 70, Issue 3, April 2019, 639-70

[15] *Badri Bezhanidze v. Parliament of Georgia,* Decision [2019], No.2/4/1365, <https://matsne.gov.ge/ka/document/view/4663376?publication=0> accessed January 20, 2020.

[16] *Zurab Svanidze v. Parliament of Georgia*, Decision [2019], No. 2/5/879, <https://matsne.gov.ge/ka/document/view/4706313?publication=0> accessed January 20, 2020.

[17] *Stereo + Ltd, Luke Severin, Lasha Zilpimian and Robert Khakhalev v. the Minister of Justice,* Decision [2019], No. 2/6/1311, <https://matsne.gov.ge/ka/document/view/4739467> accessed January 20, 2020.



Germany

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I. INTRODUCTION

Just as German public law discourse is shifting towards historical reconstruction and re-evaluation[1] of the early years of the Federal Republic and its Constitutional Court (FCC), the year 2019 produced a fair amount of novelty (see II). Some of the decisions selected here present real innovation (FCC applies EU fundamental rights now); some take up the thread of recent significant jurisprudence and add a new wrinkle to it (including horizontal fundamental rights duties, extraterritorial duty to protect). One of these quasi-innovative decisions even holds some share of regression (plain justification of banning veils in judicial office) – either seen from the stance of rights realization or considering the paucity of argument. Alongside novelty, the past year saw the continuity of right-wing populists taking their issues with multiple adversaries (including friendly fire from within[2]) to court, albeit mostly not to their avail (see also III.3).[3] A legal journal (*Kritische Justiz*) has launched a section entirely devoted to collecting those cases and assessing whether they serve right wing populism's rollback or further its ascent. A judgment of the Saxonian Constitutional Court, stirring some controversy, would probably be listed in the latter category. It partly reinstated an electoral list of the right-wing party Alternative für Deutschland (AfD) after an electoral commission cut most of the names from the list due to irregularities in the nomination process.[4] The Länder Court, for the first time, recognized the need to provide redress *before* an election in exceptional cases to ensure the fairness of the voting process (since the exclusive election scrutiny procedure is in fact only available *after* the election).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS: EU CHARTER OF FUNDAMENTAL RIGHTS PROMOTED TO CONSTITUTIONAL STANDARD OF REVIEW

FCC Decisions of 27 November 2019, 1 BvR 16/13 - Right to Be Forgotten I, and 1 BvR 276/17 - Right to Be Forgotten II

Establishing an instant classic of FCC jurisprudence, the Court recalibrated its stance towards European Union (EU) law in two sweeping decisions, both ruling for the first time on the digital right to be forgotten. In the first constitutional complaint (Right to Be Forgotten I), a person sought redress against the availability (e.g., through search engines) of decades old articles stored in a free online archive of a prominent news magazine, (still) identifying him as a convicted murderer by name. In accordance with conventional horizontal fundamental rights jurisprudence, the case came down to a balancing of the fundamental rights involved. The Court stressed the factor of time (the right to be forgotten), which may force

[1] See Florian Meinel (ed.), *Verfassungsgerichtsbarkeit in der Bonner Republik* (Mohr Siebeck, 2019).
[2] Constitutional Court of Schleswig-Holstein, 29 August 2019, LVerfG 1/19 – the expulsion of one prominent member of the AfD Länder parliamentary group.
[3] FCC, decisions of 17 September 2019, 2 BvQ 59/19 and 2 BvE 2/18; Constitutional Court of Baden-Württemberg, decision of 22 July 2019, 1 GR 1/19 und 1 GR 2/19.
[4] Constitutional Court of Saxonia, decision of 16 August 2019, Vf. 76-IV-19; Vf. 81-IV-19.

press organizations to restrict access to old articles. In this particular case, the right to be forgotten prevailed; the Court called on the lower court(s) to examine how to accommodate privacy interests while ensuring legitimate access by the public.

The significant doctrinal development, though, concerned less the substance of the case than the expansion of the Court's standard of review. In Right to Be Forgotten I, the expansion is modest: where EU law gives domestic law space for normative diversity (the media privilege in EU data protection law in the case at hand), the Basic Law (BL) rights remain the *primary* standard of review. It used to be the exclusive standard in those configurations. EU CFR rights provide only a *subsidiary* standard, coming into play if the BL rights fail to ensure an adequate level of protection when measured against the higher-ranking EU law. In that case, the Court will pay heed to the backup EU standard by interpreting BL rights in light of the CFR; only in improbably extreme cases of BL inadequacy would the CFR serve as direct standard of review.

Right to Be Forgotten II takes the impact of the EU CFR further. At the core of the dispute was a request by an individual to de-list a search result by Google; the unwanted link led to an unfavorable interview with a TV station. Again, the dispute was horizontal, again EU data protection law was applicable; yet, in contrast to the first judgment, the Court considered EU law fully harmonized, with no leeway for member states. Instead of waiving its jurisdiction – as it would have previously – the Court drew on the CFR as applicable law in constitutional complaint proceedings, and consequently applied the rights catalogue as standard of review (excluding, at the same time, BL rights). On the merits of the case, the balancing of the involved interests, including freedom of expression, by the broadcaster led to the rejection of the complaint. In variance to some European Court of Justice (ECJ) jurisprudence, privacy interests were not presumed to take precedence; and not enough time had passed to justify the interview as being forgotten.

The Court explained its innovation by pointing to the responsibility to ensure rights protection also in cases where EU law takes precedence, and, moreover, to a gap in legal protection due to individuals lacking direct access to the ECJ. As to the authorization to decide constitutional complaints, the Court read the standard "basic rights" in Art. 93.4a BL very broadly in order to be able to include *EU* fundamental rights. Despite its shaky reasoning, the judicial innovation will probably be accepted, likely for reasons other than doctrinal plausibility.

The previous jurisprudence negated the competence of the FCC by default when EU law was controlling a case and, in contrast, excluded the authority of EU fundamental rights in cases allowing for margins of member state discretion.[5] Due to this non-necessary self-commitment by the FCC, until the bombshell in November 2019, the principal interlocutors of the ECJ had been the lower and specialized (in short: all other German) courts – the FCC addressed the ECJ only in extreme cases when it challenged *ultra vires* acts of the EU, including the latter court's decisions (see, e.g., the Banking Union case, III.2), with only such cumbersome weapons as constitutional core and identity at its disposal.

In response to this increasingly impractical partition of decisional authority – with the influence of EU law growing – and leaving other tenets of its approach vis-à-vis EU law untouched (i.e., Solange and successors), the FCC took control over quotidian EU fundamental rights business as well as over its own destiny within the power dynamics of the network of European human rights institutions. The Court empowered itself to judge questions of EU human rights law, and therefore to influence future directions of human rights – either by making its voice heard within the framework of formal dialogue with the ECJ or by setting precedents of its own and finding ways around a preliminary ruling, as in Right to Be Forgotten II.

Nevertheless, in the aftermath of the newborn twin towers of FCC jurisprudence, a band of questions are still to be answered in future case law. For example, it will be highly interesting to see how the Second Senate – the FCC's other judicial body and main architect of the sovereigntist reading of the German Constitution (Solange) – will react to the tectonic shift put into effect by its sibling; in particular, how far the acceptance of the new standards goes. It is also not completely out of the question that new doctrine may spill over to other areas of EU law, beyond the CFR. Furthermore, the repercussions to the relationship between the FCC and the ECJ have to be watched. If nothing else, the FCC did not really hold back in expecting the Luxembourg Court to recognize and tolerate the variance in member state fundamental rights interpretation.

III. OTHER CONSTITUTIONAL CASES

1. FCC, Decision of 5 November 2019, 1 BvL 7/16: Welfare Cuts Induce Inherent Human Dignity Constraints

The root of this case can be traced back to the beginning of the 21st century and the first federal Social Democrat-Green Coalition, which inherited the task to reform the ailing social system; the highly unpopular "Agenda 2010" streamlined and cut back on welfare benefits, setting in motion the demise of the Social Democratic Party. The newly introduced welfare benefit called "Hartz IV" included a system of gradual sanctions to those benefits, which became the subject of one of the latest of prominent FCC judgments. These sanctions are imposed when recipients do not conform to certain requirements, e.g., do not show up to appointments, do not write applications, do not accept open positions offered to them.

Another source of the *problematique* of this case is the jurisprudence of the Court itself. The FCC based the duty to provide an existential minimum on the human dignity

[5] Decision of 24 April 2013, 1 BvR 1215/07, para. 88.

clause in conjunction with the social state objective (Art. 1.1 and 20.1 BL). Moreover, according to the jurisprudence of the Court, the guarantee of human dignity is absolute, i.e., encroachments on it cannot under any circumstance – in contrast to all other rights – be justified. Taking into account this established jurisprudence, it was hard to imagine how substantial cuts to social benefits, which represent the minimum *required* by human dignity, may be constitutional. Thus, the question before the Court was whether there could be a lawful minimum *within* a minimum, which essentially does not allow limitations.

The Court apparently utilized both sources of the right to an existential minimum and eventually found a compromise between absolute dignity and malleability of the social state clause (causing massive doctrinal headaches): although certain sanctions are not excluded by the human dignity clause, the Court quashed most of the harsh sanctions in place. The Constitution tolerates a benefit scheme which is only invoked as subsidiary assistance and which, consequently, expects recipients to play a part in restoring their ability to provide for themselves; therefore, proportional duties of cooperation may be enforced by proportionate sanctions, subject to strict scrutiny. In any event, any welfare cut must be tied to the legitimate purpose of overcoming the need to receive "Hartz IV" – only then may the implied dignity constraint be permitted under the BL.

2. FCC, Decision of 30 July 2019, 2 BvR 1685 and 2631/14 – European Banking Union Case

Here, the FCC decided upon constitutional complaints in which the claimants put forward that their right to democracy as enshrined in Art. 38.1 1st sent. BL had been infringed by both the participation of the German Parliament (*Bundestag*) and government in the adoption of EU secondary law (regulations) governing the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM) as well as by passing the act authorizing the SSM. The German government and the *Bundestag* remained within the *Integrationsprogramm* (EU integration agenda) established by Art. 23.1 BL when participating in the adoption of the SSM and SRM regulations, so the Court held.[6]

While declaring some parts of the complaints to be inadmissible, the Court ruled on the merits of the challenge against German participation in the adoption of the regulations on the SRM and SSM. It found that the "constitutional identity" of the BL remained untouched by the regulations in question. Basically merging identity and *ultra vires* review when the "right to democracy" is invoked,[6] the relevant test to be applied in that regard was one of a "manifest excess of competences", and both regulations did not exceed the limits of Art. 127.6 of the Treaty on the Functioning of the European Union (TFEU) in a manifest manner. The SSM regulation did not grant the European Central Bank full supervisory powers over all banks within the eurozone, instead, just over significant banks. While the compatibility of the competences conferred upon the Single Resolution Board (SRB) as an independent agency by the SRM Regulation with the principle of limited conferral appeared problematic, it did not interfere with the constitutional identity of the BL provided that the activities of the SRB remained within the limited competences assigned to it. The "identity core" of the democratic principle protected by Art. 23.1 3rd sent. and Art. 79.3 BL, which mark the limits of integration, allows for the establishment of independent agencies provided this occurs only in exceptional circumstances. The democratic deficit inextricably linked to the operation of independent agencies would be constitutionally acceptable if safety mechanisms ensuring democratic accountability were installed. This was the case with respect to the SRB, which was the FCC's major finding.

3. FCC, Decision of 27 August 2019, 1 BvR 879/12: Horizontal Human Rights Obligations of a Private Hotel Banning a Right-Wing Politician

The FCC has indirectly applied BL fundamental rights in horizontal cases almost since its inception, obligating state actors (i.e., courts) to take rights into consideration when applying open-textured legal norms to disputes between private actors. In recent years, more and more cases have come before the Court in which the question arose whether private actors occupying a dominant (market) position should have to be held to a more stringent fundamental rights standard, perhaps even without a normative anchor in statute law (while not being bound like the state). The recent leading case from 2018 concerned the league-wide stadium ban of a soccer fan; the Court held that (flowing from the right to equality, Art. 3 BL) minimum standards of procedural fairness and reasonableness may arise in specific situations of asymmetric power relations, e.g., in public forums conducive to one's self-realization.[7]

In the case commented on here, a hotel withdrew a booking for the former head of an extremist right-wing political party after learning of his identity. Because a hotel stay cannot be viewed as highly essential to a good life and since alternative accommodation was available, the Court could not identify a structural power advantage on the part of the hotel, and hence declined to confirm specific circumstances triggering the equality standard of Art. 3 BL. Even if that standard applied, the Court would not be convinced of a violation of the prohibition to treat another person differently on the basis of his or her political opinion (Art. 3.3 BL, an additional equality protection). In the eyes of the FCC, the lower courts struck a fair balance between the recreational interests of the politician and the business interests of the hotel owner. Thus private actors are held to a less rigorous standard than the state (that, in those cases, could not resort to balancing since the ban on differential treatment is strict). The future will tell how the Court will develop and apply the criterion of specific circumstances and equality stan-

[6] See *https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-052.html*
[7] See para. 205 of the decision.
[8] Decision of 11 April 2018, 1 BvR 3080/09, para. 41.

dards, especially in the digital sphere.[8]

4. FCC, Decision of 17 September 2019, 2 BvE 2/16 – Anti-IS Mission by the German Armed Forces: Denial of Judicial Review

The FCC ruled on an application (*Organstreit*) by *Die Linke* parliamentary faction, which claimed that German participation in the operations of the *Global Coalition* against Daesh infringed on the Parliament's rights stemming from Art. 59.1 in conjunction with Art. 24.2 BL (requiring parliamentary approval). In that course, the FCC addressed the legality of the military efforts of the *Global Coalition* on Syrian territory, which the involved states justified by reference to the right to collective self-defence as enshrined in Art. 51 UN Charter, while stressing that the *Organstreit* does not allow for a general review of the "objective constitutionality of an organ's specific actions". The FCC employed a strategy of judicial self-restraint in terms of the compatibility of the *Global Coalition*'s endeavors in Syria and the participation of Germany therein. The relevant test to be applied was – considering the margin of appreciation to be granted to the executive – that of "untenability". In that regard, the FCC came to the conclusion that the interpretation of Art. 51 UN Charter regarding the exercise of the right to self-defence against non-state actors put forward by the intervening parties and shared by the German government would be untenably broad. In reaction to this decision, it is already being discussed whether to provide the FCC with jurisdiction to review military operations.

5. Higher Administrative Court of North Rhine-Westphalia, Decision of 19 March 2019, 4 A 1361/15 - German US Drone Strike Hub: Abetment and Extraterritorial Duty to Protect

The US drone program and the question of its legality has reached German courts: in the case of *Jaber v. Federal Republic of Germany,* the claimants argued that Germany violated its positive obligation to protect human life stemming from Art. 2.2 1st sent. BL by not actively restraining the use of the US military base Ramstein as a relay station for steering the operation of drones in Yemen. In 2015, the Administrative Court in Cologne held the application to be inadmissible (decision of 27 May 2015, 3 K 5625/14). At the basis of this decision, the Court found that claimants were unsuccessful in substantiating the failure on the part of Germany to fulfill its duty to protect human life. However, the Higher Administrative Court held differently – which came as a (positive) surprise to many observers. The Higher Administrative Court concurred with the finding of the lower court in terms of the protective positive dimension of fundamental rights even in cases in which state action has an external dimension and concerns individuals who are not within the sphere of effective control of Germany (while the action possibly violating their rights stems from German territory). It also accepted that in such cases, the executive was to be granted a wide margin of appreciation in terms of how to fulfill its protective duties. Nevertheless, the Higher Administrative Court concluded that the German government's actions were – as it stands – insufficient. The German government was obliged to make sure that the drone strikes conducted by the US on Yemeni territory involving the US military base Ramstein complied with international law and that if this appeared not to be the case, the German government had a duty to take some form of action to ensure compliance with international law.

6. Constitutional Court of Bavaria, Decision of 14 March 2019, Vf. 3-VII-18: Tentative Constitutional Conformity of Religious Garment Ban in the Judiciary

For several decades, legal conflicts emerged from the expectation of non-Christian faiths to accomodate. Recently, as testament to their members' late societal advancement, the almost inevitable conflicts crossed the gates of public service. In order to ensure impartiality in judicial proceedings, the Bavarian State requires judges, prosecutors and legal trainees to refrain from wearing any religious symbol or garment in public when in official capacity.

The *actio popularis* (a recourse for individual claimants only available in Bavaria) argued, unsuccessfully, that this new statute provision not only violates freedom of religion but also discriminates against women as it mostly affects women of Muslim faith. The Länder Constitutional Court rather succinctly confirmed the statute's conformity with the Bavarian Constitution: the restriction of religious freedom is legitimate considering the weight of judicial neutrality and the negative freedom of the parties not to be exposed to religious symbols worn by state officials. At the heart of the Court's reasoning was its assumption that wearing religious symbols was per se sufficient to question the neutrality of state officials. At least for schoolteachers, the FCC requires a higher standard to cast neutrality in doubt – specific schools or school districts need to have experienced actual conflicts in order to justify prohibitions of religious symbols.[9] It remains to be seen whether this distinction between education and judicial proceedings will hold, as a case of a Bavarian legal trainee is pending before the FCC.

Concomitantly, the Bavarian Constitutional Court briskly distinguished the delicate matter of crucifixes in courtrooms as the latter supposedly merely constitute an administrative matter and are thus not connected to the impartiality of individual state officials. Finally, it rejected the claim of gender discrimination, again with a succinct reasoning, by referring to the creed-neutral conception of the ban. As no data exists with respect to gender-specific effects of the new law, the Court was confident to shrug away considerations of substantive equality.

7. Climate Change Litigation Reaches German Administrative Courts as well as the FCC

[9] See, foreshadowing, the decision of 22 May 2019, 1 BvQ 42/19 – provisional order to reinstate a Facebook account of a political party ahead of elections.
[10] Decision of 27 January 2015, 1 BvR 471, 1181/10.

The Administrative Court in Berlin (decision of 31 October 2019, VG 10 K 412.18) dismissed an application for a declaratory judgment brought by individual claimants as well as Greenpeace against the German government. The claimants argued that the government was obliged to implement measures ensuring the fulfillment of the goals set out in its climate change program 2020 – 40% reduction of greenhouse gas emissions until 2020 compared to 1990 – which was adopted by the Cabinet on 3 December 2014. The Court found that the claimants had no standing since they failed to substantiate that their fundamental rights – especially the right to property (Art. 14 BL) and right to life and physical integrity (Art. 2.2 1st sent. BL) – were infringed. The Cabinet decision entailing the climate change program 2020 constituted a non-binding instrument that could not be relied upon by the claimants. The individual claimants were, moreover, unsuccessful in substantiating that the German government failed to comply with its positive obligations stemming from fundamental rights by adopting manifestly impractical measures falling below the constitutionally required minimum. Furthermore, the Court found that Greenpeace had no standing within the proceeding at hand. It could not rely on Art. 3.3 of the Aarhus Convention to that respect.

Additionally, complaints were brought before the FCC by individual claimants and two associations (Solarenergie-Förderverein Deutschland e.V. (SFV), Bund für Umwelt und Naturschutz Deutschland (BUND)) in 2018. The claimants argued – partly similar to the arguments made in the previously mentioned case – that the German government failed to comply with its positive obligations to protect their life, physical integrity and property by implementing a policy which will not allow it to fulfill its climate protection goals 2020.

IV. LOOKING AHEAD

While the FCC is to decide high-profile cases on the ban on commercially assisted suicide, extraterritorial surveillance, the CETA agreement and cuts to party financing of extremist right-wing political parties, 2020 is also be characterized by a changing of the guard at the helm of the Court. President *Andreas Voßkuhle* was mostly heralded for his composed authority, internally uniting his Senate (avoiding dissenters), externally defending judicial independence and explaining the workings of the Court in public, culminating in a primetime TV appearance. Once even considered for the presidency of the Federal Republic, *Voßkuhle* has returned to his position as a law professor. His successor is be *Stephan Harbarth,* an attorney, and, up to his appointment as Vice-President in late 2018 a politician.[10] Although his professional background as an attorney makes him a rare figure at the Court, he is expected to mainly continue the trodden paths of his predecessor.

V. FURTHER READING

Matthias Hong, *Der Menschenwürdegehalt der Grundrechte – Abwägungsfeste Rechte – Todesstrafenverbot und Folterverbot* (Mohr Siebeck, 2019)

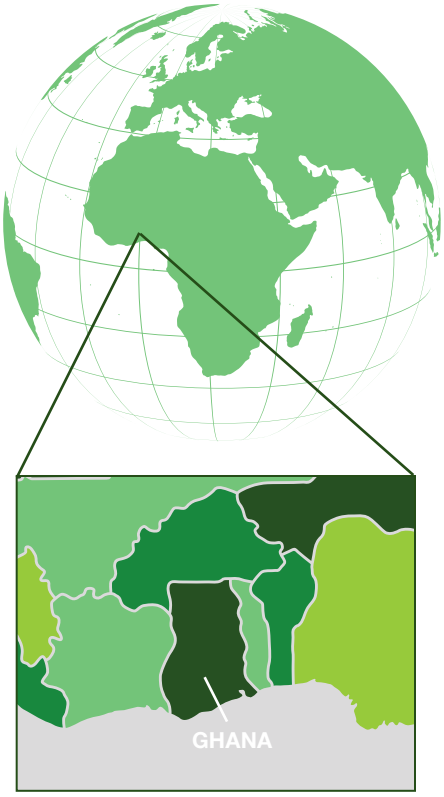
Christian Bumke, "Die Entwicklung der Grundrechtsdogmatik in der deutschen Staatsrechtslehre unter dem Grundgesetz" (2019) 144 Archiv des öffentlichen Rechts 1

Oliver Lepsius, "Kontextualisierung als Aufgabe der Rechtswissenschaft" (2019) Juristenzeitung 793

Antje von Ungern-Sternberg, "Parité-Gesetzgebung auf dem Prüfstand des Verfassungsrechts" (2019) Juristenzeitung 525

Donald P. Kommers – A Memorial Collection (2019) 20 *German Law Journal* 514 et seq.

[11] See a recent, non-unanimous conflict-of-interest decision by the FCC, 5 December 2019, 1 BvL 7/18, to *not* recuse *Harbarth* in a proceeding, challenging an act of Parliament, simply because he endorsed the law *politically*.



Ghana

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I. INTRODUCTION

2019 was a constitutionally eventful year. The Supreme Court composition was subject to important changes, as most of the long-serving judges retired and new faces took up their seats; a referendum was planned and aborted due to public pressure; and a constitutional provision that has been dormant since it first appeared in a Ghanaian Constitution fifty years ago has ripened into full force. Many controversies related to this provision can be expected to follow in the coming years. 2019 saw the enjoyment of some rights further entrenched and others unfortunately rolled back by Court decisions. But even if the constitutional journey continues by trial and error, we look forward to the day when the Court will have a chance to revisit those matters and, based on the lessons of our experience, correct the errors.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Supreme Court continued to see changes in its composition as many of the Fourth Republic's old guard attained the compulsory retirement age. Justice Sophia Akuffo retired in December from her position as Chief Justice. She was the second female Chief Justice in the country's history. During her tenure, Justice Akuffo prioritized improving the infrastructure of the Judicial Service. A number of new courts were commissioned, and dilapidated courts were shut down. She initiated the much-needed renovation of the official accommodation offered judges transferred out of their home regions. The E-Justice Project, which was initiated by her predecessor, Justice Wood, was finally fully implemented. It has upgraded all court filing processes from manual to electronic. Despite a few hiccups in the early days, it is anticipated that the E-Justice Project will significantly increase the efficiency of the justice system and thereby reduce the costs involved in prosecuting an action. Notable among Justice Akuffo's administrative achievements is the initiative to create a full and accurate inventory of all the landed property owned by the Service. Less flattering to her record, she leaves legal education in the turbulent state she inherited it; as its regulatory body, the General Legal Council, which she headed, appears to lack a clear strategy towards reforming legal training in light of Ghana's new realities.

Justices Mariam Owusu, Avril Lovelace-Johnson and Gertrude Torkornoo were elevated from the Court of Appeal to the Supreme Court. They replace Justices Akuffo, Adinyira and Akoto-Bamfo, who retired at various points in the year.

Article 266 of the 1992 Constitution provides that any freehold interest vested in a non-citizen became by operation of law a fifty-year lease beginning August 22, 1969, the reversionary interest then vesting in the Republic. The provision first appeared in the 1969 Constitution and so its reappearance in the 1992 Constitution was necessary to prevent chaos ensuing. Be that as it may, August 21, 2019, marked fifty years since all such freeholds were converted. The state has not issued any clear guidance what the next steps are for those affected – i.e., alien freeholders and citizens who purchased such an interest from them. Given the primacy of land access to the economy, it is easy to foresee a plethora of lawsuits and no small amount of confusion in the sector. It is hoped government will aver its mind on this thorny problem.

It will be recalled that we commented last year on how President Akufo-Addo appeared to make good on his campaign promise for

the District Chief Executive (DCE) to be elected and not appointed by him. However, in a strange and rather disappointing turn of events, the President announced a move to amend the Constitution to enable the DCE election to be contested on a partisan basis, and a referendum was scheduled for December 17, 2019. The announcement was welcomed with mixed feelings by the public, though both major political parties were enthusiastic about it. The almost non-existent engagement with the public on the exact question to be answered in the referendum turned the tide of public opinion forcefully against the proposed referendum. While some anti-amendment activists campaigned for a no vote, others campaigned for voters to stay home, skewing the constitutionally mandated voter turnout thresholds required to amend the Constitution. Eventually, the disaffection was so great that the President called off the referendum barely a week before its scheduled date. It is submitted respectfully that the referendum was in no way necessary to create democratically elected DCEs. It was only required for the President to initiate a convention whereby the districts voted their preferred candidate and he would defer to the electoral result in choosing his appointees. Amending the Constitution was hardly necessary and certainly undesirable. It would simply create a situation where competent members of the district who do not want to be affiliated with a party stand no chance of winning. It will also introduce the zero-sum tenor of national elections into provincial elections that should be about the small unit's needs. The failure of the amendment process was a welcomed outcome. This was the second referendum attempt in less than ten years to be defeated by public resistance. The first was under the Mahama government and was an ambitious overhaul of over fifty provisions of the Constitution. The referendum was so firmly opposed that it never took place. 2019's aborted referendum was much narrower and had the support of both political parties but met such public resistance that the risk of an embarrassing defeat was too great to be ignored. Perhaps Ghanaians are not dissatisfied with the 1992 Constitution, flaws notwithstanding.

Finally, it must be mentioned that the state has still not paid compensation for the large tract of land it compulsorily acquired in 2018, yet it has begun developing parts of it under the one-district, one-factory promise on which it won the elections. It is worrying that, notwithstanding Article 20's instruction that compensation must in such cases be 'prompt and adequate', nothing further appears to have been done on this issue. Out of the blue, the landowners who lived on the tract were almost immediately made homeless due to the acquisition. Over a year later, the state has not paid them their due. This is unacceptable. The state should be acting to protect and empower citizens, not impoverish and disregard them; otherwise there is no difference between a constitutional state and a military one.

III. CONSTITUTIONAL CASES

1. Martin Kpebu v AG: Detention without charge

In December, Justice Akuffo delivered her valedictory judgment. She held that the 48-hour period which a person can be detained without charge as per Article 14(3) of the 1992 Constitution was a 48-calendar-hour period. The unanimous decision ended a police practice of arresting persons on Friday or the eve of a public holiday and holding them until the next working day – sometimes 72 hours later.

2. Bomfeh v AG: Religious equality

In a very disappointing judgment, the Supreme Court held that because the power to allocate public land is vested in the President, President Akuffo-Addo's decision to allocate 6.5 hectares of public land for the construction of a National Cathedral was not incompatible with the religious equality guaranteed in the secular state created by the 1992 Constitution. With respect, it is hard to see how the cathedral benefits the scores of Ghanaians who are not Christian and have no use for it. While electoral decisions in a democracy are made by majority choice, it does not follow that the elected government must then pursue majority interests. Ghana may be a majority Christian country, but it is precisely to prevent majorities from expending collective resources on their interests to the exclusion of minorities that constitutional rights exist. The Court has done Ghana in general and its minorities in particular a great disservice by this decision.

3. Afoko v AG: Nolle prosequi as a discretionary power

In a 7-1 decision, the Supreme Court held that the AG's power to issue a *nolle prosequi* was not subject to Article 296 of the Constitution. This was yet another puzzling decision from the Court. Article 296 requires a person vested with discretionary power to publish guidelines on when and how that discretionary power will be used. It follows inescapably then that if a power is a discretionary power, it is subject to Article 296. The majority insisted that the filing of a *nolle prosequi* was an executive act, not a quasi-judicial one, and therefore did not fall within the purview of Article 296(c). With respect, that conclusion begs the question of whether it is or is not a discretionary power. Article 296(c) does not exclude any type of discretionary power from its application, so the type of discretionary power is irrelevant.

The majority relied on *Ransford France [2012]* 1 SCGLR 705 in coming to their decisions. It must be noted that when, in the February 2015 case of *Mensah v EC* (*unreported*), the Electoral Commission relied on *Ransford France* to disqualify a candidate without explanation, the Court (in a panel comprising four of the judges who sat on *Ransford France*) ruled that the scheduled election itself was unconstitutional, and based the decision on the absence of a constitutional instrument detailing how the EC planned to use its discretionary power to run the elections. Here, the Court was once again asserting that Article 296(c) was not applicable to all discretionary powers. Justice Pwamang deserves commendation for his lone but forceful dissent. His Lordship pointed out the point of Article 296(c) is to give certainty to all legal interaction with the state. The majority decision results in the exact opposite.

4. Theophilus Donkor v AG: Termination of Board appointments on assumption of office by new President

In a very welcome decision, the Supreme Court struck down Section 14 of the Presidential (Transition) Act 2012, (Act 845), which requires Chief Executives or Directors-General (howsoever described) of public boards or corporations to cease to hold office upon the assumption of office by a new President. The offensive section rendered all such offices vacant by operation of law and, during the time it took the President to find his own people to appoint, paralysed the institutions. It was a needless and purely rent-seeking section that created avenues for political appointments. The Attorney-General's reasoning that the section allowed a President to pursue his mandate with a team that believes in his policies is most unmeritorious. Followed to its logical conclusion, one would expect all staff of the civil service to be terminated in the same way as well.

5. Centre for Juvenile Justice v AG: Access to courts as a constitutional right

In this case, the Supreme Court struck down paragraphs 1 (9) and 2(8) of the First Schedule to the Revenue Administration Act 2016 (Act 915) as unconstitutional. These paragraphs required the possession of a TIN number in order to file a case before the courts. In a unanimous judgment, which happened also to be Justice Adinyira's valedictory judgment, the Court held that access to courts was a fundamental human right that did not depend on paying tax. The Court was undoubtedly right. The judicial review and human rights enforcement powers entrusted to the High Court and Supreme Court by Articles 2 and 130 would be easily defeated if the access to courts was not zealously protected. All an abusive executive would need to do is to issue executive instruments that thwarted court access. It also seems most unfair to the taxpaying citizen to be unable to pursue a debt or breach only because the other party in a transaction is less law abiding than she is.

IV. LOOKING AHEAD

In 2020, presidential and parliamentary elections will take place (the first elections to be held under the leadership of Ms. Jean Mensa as Electoral Commissioner). After a warm reception from the public on her appointment, Ms. Mensa's tenure got off to a rocky start. Her decision to compile a new voter's register was met with resistance that only grew in scope and audience as time progressed. She has suffered a dip in public confidence in her impartiality that we hope she can recover from before the elections.

President Akuffo-Addo will make his second appointment to the position of Chief Justice in the coming year. Justices Dotse and Anin Yeboah seem to the favourites for the slot. The Chief Justice is nominated by the President, and if so recommended by Parliament after vetting, is appointed by the President to serve until she/he attains the compulsory retirement age of 70.

V. FURTHER READING

Mensa-Bonsu, MAS, 'Interpreting article 266: reflections on *Verdose v Verdose-Kuranchie'* (2019), Vol 5 LUGLJ 142

Alengah C, 'Of *Stare Decisis*, the Constitution and the Superior Courts of Ghana: Making the Law Certain' (2019), Vol 5 LUGLJ 153

Nyarko MG, 'The Right to Property and Compulsory Land Acquisition in Ghana: A Human Rights Perspective' (2019), 27(1) AJICL 100

Greece

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I. INTRODUCTION

A constitutional revision marked 2019. Throughout the years of financial crisis, the long-awaited revision had triggered heated discussions that included issues ranging from the necessity of exercising constituent power and calls for radical reforms, even by circumventing the amending formula through the use of a constitutional referendum, to scholarly discussion about corrective interventions rendering the Constitution more functional. And yet the Constitution had remained formally unaltered for many years, at first because of a mandatory time lapse between revisions and then due to lack of consensus.

What followed is an anti-climax; that is, a modest intervention by way of few amendments that had matured enough to acquire the required consensus. This anti-climax is not necessarily a bad thing, especially following a severe crisis and deep political polarization. Still, due to the mandatory time lapse in between the initiation of revision processes, all formal change is now frozen for approximately another decade. The 2019 constitutional revision could be characterized as a lost opportunity to use the lessons from the crisis and make important constitutional reforms.

Constitutional jurisprudence is still in large part preoccupied with problems stemming from austerity measures. In the Greek context, constitutionality review is diffused and fiscal measures are challenged both as part of strategic litigation and by individuals claiming their rights. Judges became reluctant key players in economic matters with overreaching influence. The impact of judicial decisions on the state budget has become an acute and sensitive problem in the context of diffuse constitutional review.

Aside from this area of jurisprudence, dilemmas suggestive of the ongoing, yet subtle, culture wars in modern liberal democracies find their way to the courts. The interpretation of freedom of conscience and religion creates multiple constitutional issues in the context where Greek Orthodoxy is characterized by the Constitution as the prevailing religion of Greece.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A minimal yet useful constitutional revision marked 2019.[1] Throughout ten years of financial crisis, the Constitution remained formally unaltered undergoing informal constitutional change. Formal revision became procedurally possible in 2013 and yet, despite the strong calls for constitutional reforms, it only occurred in 2019, and no major reforms took place. The amending formula has two determining features: its ratio requires an exceptional degree of consensus expressed through the way the required majorities are laid down, and it provides for a five-year mandatory time lapse between the completion of a revision process and the initiation of a new one. An interesting feature of the 2019 revision was the absence of genuine citizen involvement. In March 2017, an electronic deliberation process was initiated. This process, which is not provided for by the Constitution, went rather unnoticed and

[1] See X. Contiades, 'A first assessment of the constitutional revision' (*Syntagma Watch* 25 November 2019) < https://www.syntagmawatch.gr/trending-issues/enas-protos-apologismos-tis-syntagmatikis-anatheorissis/ > accessed 29 January 2020.

citizens were not involved. Constitutional revision remained a game of inter-party consensus. The result, due to the degree of consensus necessary, was a minimal revision. This has blocked the possibility of introducing much debated proposed changes for another decade.

Nine – out of forty-nine proposals put forward – were approved by the Parliament: Article 21 on the protection of family, marriage, motherhood and youth where the clause that the State shall ensure a dignified standard of living for all citizens through a minimum guaranteed income system was added; Article 32 para 2 on the election of the President of the Republic; Article 54 para 4 on the vote of expatriates; Article 62 on limiting parliamentary immunity; Article 68 on the right of the parliamentary minorities to propose the establishment of investigative committees; Article 73 on popular legislative initiative; Article 86 on the statute of limitations with regard to ministerial immunity; Article 96 para 5 on Military Courts; and Article 101 on the election of members of independent authorities. Articles 112, 113, 114 par. 1, 2, 115 par. 1, 2, 3, 4; and 119 para 1 were abolished.

The most useful amendments made to the Constitution appear to be those that have a corrective function: the President's election is separated from the dissolution of Parliament; strict time limitations with regard to ministerial immunity are set; the MP's immunity from prosecution for criminal offenses is abolished (as the Parliament is placed under the obligation to grant permission for their prosecution if the relevant request by the public prosecutor's office concerns an offense not related to the performance of the MP's duties or political activity); and the election of the members of independent authorities now requires a three-fifths majority in the conference of Presidents instead of a four-fifths majority.

The most important among these amendments is the change in the way the President of the Republic is elected. This change was the result of consensus among almost all political parties. However, the choice that has been made, namely the possibility of a presidential election without a broader parliamentary consensus, could cast a shadow over the President's prestige in the exercise of his role as a regulator of the political system's function. In Greece, the President of the Republic's role is *prima facie* typical for the role of the head of State in parliamentary systems of government, i.e., the President's functions are mainly symbolic. Nonetheless, there is more to it since the Constitution provides that the President regulate the function of the political system (Art. 30 para 1) and he has the competence to dissolve Parliament (Art. 41 para 1).

The complexity of the system of presidential election before its amendment entailed the potential of crisis, as it allowed the presidential election to be manipulated in order to result in the dissolution of Parliament. In other words, the ratio of the provision, which was to ensure an augmented consensus for presidential election, could backfire, allowing the Parliament to be dissolved.[2] The amendment abolished the possibility that the presidential election could result in the dissolution of Parliament and early elections. More specifically, the Constitution provides that the President of the Republic is elected by Parliament for a term of five years. Re-election for a further term in office is permitted only once. Presidential election is conducted through vote by roll call in a special sitting called for this purpose by the Speaker at least one month before the expiration of the tenure of the incumbent President. The President of the Republic is elected by a two-thirds majority of the total number of members of Parliament. In case this majority is not achieved, the ballot is repeated after five days and if that second ballot also fails to produce the required majority, the ballot is repeated again after five days requiring a three-fifths majority of the total number of members of Parliament. Before the amendment, in case the third ballot also failed to produce the required majority, Parliament was dissolved and elections for a new Parliament were called. According to the revised provision, if the third ballot fails to produce the required majority, the vote is repeated after five days, requiring a majority of 151 out of 300 MPs and if this fails again, the President of the Republic is elected after five days by majority of the members present.

Amendments that correspond to narratives of citizen involvement and human dignity that were intensified during the financial crisis were also made: the introduction of citizen legislative initiative according to which citizens will be able to submit up to two legislative proposals (on issues not related to fiscal and foreign policy or defence) for discussion in Parliament if they gather a minimum of 500.000 signatures, and the guarantee of a minimum income for families to ensure human dignity in living conditions for all citizens. Time will show if these innovations will work in practice. The voting rights of Greek citizens abroad became more relevant during the years of the crisis since a significant number of citizens migrated. Long overdue legislation was thus passed to give life to remote voting by expatriates, a constitutional provision that had remained inactive for a long time. The much debated restrictions introduced, which were deemed proper by the majority, would be constitutional only in case a constitutional amendment were passed. It is noteworthy that the restrictions on the right to remote voting were enshrined in Article 54, although it would be more appropriate to include them in Article 51 par 3 and 4. This was not possible, however, since the latter was not under revision, so any change would have to wait for about ten years. This trick is expressive of the overall impact on constitutional choices of the five-year mandatory time lapse between revisions.

This mandatory time lapse combined with the strict procedural limits set out by the Greek formal amendment rule render what is not amended equally important to what is amended. When consensus is reached only

[2] See Contiades and Fotiadou, 'The Hellenic Republic', in L.F.M. Besselink, P.P.T. Bovend'Eert, H. Broeksteeg, R. de Lange and W. Voermans (eds), *Constitutional Law of the EU Member States* (Kluwer Law International, 2014) 703-771.

on a few articles, all other provisions are sheltered from change for almost a decade. Thus, much discussed crucial issues, such as the relationship between church and state and the constitutional dictate that higher education is public, will be frozen for a long time. It must be noted that this can also be the result of a conscious strategy: the previous government had stated that it deliberately avoided revision in order to preserve the provision on higher education. Another change that was not made, attracting a lot of attention, was the non-adoption of the proposed constitutional amendment adding to the prohibition of discrimination on the basis of nationality, race or language; religious or political beliefs; and gender, gender identity and sexual orientation. Although this prohibition is implied by the Constitution, enshrining it explicitly would enhance the protection of rights. Amnesty International expressed its disappointment, stressing that Greece is bound by international agreements to take action against discrimination.[3] This kind of criticism brings forth the theoretical discussion on the novel forms of constitutional imposition and the impact of global values and international agreements on how national constitutions change.

As in all constitutional revisions, success can only be evaluated over time. What is certain is that following a severe financial crisis during which the Constitution was central in political discussions, while narratives expressed the need for radical constitutional reforms even through the exercise of constituent power, the 2019 revision is indeed unimpressive. The future will show what careful corrective interventions signify; that is, whether this minimal revision is a lost opportunity or a sign of constitutional resilience.

III. CONSTITUTIONAL CASES

1. Council of State Decisions 1880 and 1888/2019: insurance contributions of self-employed persons and salaried employees

In Decisions 1880 and 1888/2019, the plenary session of the Council of State held on one hand that the integration of all existing social security funds into a new one, the Main Insurance Fund (EFKA), was constitutionally permissible despite the heterogeneity of the insured persons, and on the other that the application of uniform rules on contributions and benefits to both self-employed persons and salaried employees violates the principle of equality enshrined in Article 4 para 1 of the Constitution. The Court found unconstitutional the decisions of the Deputy Minister of Labour regarding the determination of the basis for calculating the insurance contributions of self-employed persons. According to the Court, applying uniform rules with regard to contributions and benefits to categories of insured persons with substantially different conditions of employment and income violates the constitutional principle of equality. According to the Court, dissimilar situations cannot be treated identically.

2. Council of State Decision 1891/2019: Main Insurance Fund

In Decision 1891/2019, the plenary session of the Council of State ruled in favor of the State funding the Main Insurance Fund, stating that the government would continue under the new legislative regime to have the obligation to cover the Fund's deficits. The Court also found constitutional the basis for recalculation of the main pensions, considering that the legislator sufficiently justified their choice. Nonetheless, the Court followed the rationale of previous case law and ruled that the recalculation of pensions was insufficiently justified due to the absence of a relevant actuarial study and was thus in violation of the constitutional principles of equality and proportionality. A very crucial point is that according to the Court, the effects of this decision will only be binding for the future. The Court thus attempts to contain the financial effect of the judgment since the budgetary cost of its implementation is immense in view of the system of diffuse constitutional review, which means that a great number of pensioners litigate their rights in lower courts across Greece.

3. Council of State Decisions 1749-1752/2019: Christian Orthodox indoctrination in schools

The Council of State in Decisions 1749-1752/2019 (Plenary Session) annulled the ministerial decisions of the Minister of Education, Research and Religions, which set out the curricula of the religion module in elementary and high schools. The Constitution recognizes Greek Orthodoxy as the 'prevailing religion'. This impacts the interpretation of Article 16 para 2 of the Constitution according to which education constitutes a basic mission for the State aimed at the moral, intellectual, professional and physical training of Greeks, the development of national and religious consciousness and the formation of students as free and responsible citizens. The Council of State found changes introduced to religious instruction in primary and middle schools unconstitutional because the curriculum included supplemental materials on the doctrines of various religions and encouraged interfaith dialogue. According to the Court, religious classes in Greek schools must be in the form of indoctrination in the Greek Orthodox faith, while students who cannot or wish not to participate due to reasons of religious conscience may be exempt from the lesson. This is a plausible interpretation of 'prevailing religion', which shows how important it would have been to include an interpretation of the term within the Constitution during the recent revision, an option which was not adopted. This does not mean that the Court had no alternative.

The alternative was expressed by the dissenting opinion expressed by many judges. Freedom of conscience and religion both in the Greek Constitution and in the European Convention on Human Rights allow, if not dictate, a different interpretation of the mission of the State to develop the religious consciousness of students. Still, the Court opted for the interpretation most in line with the views of the Greek Orthodox Church, which is quite problematic from the aspect of freedom of consciousness and religion. More specifically, with regard to the teach-

[3] See https://www.amnesty.gr/news/articles/article/22769/anatheorisi-toy-syntagmatos-gia-enan-kosmo-horis-diakriseis accessed 26 January 2020.

ing of the religious doctrine, the Court held that the aim of the modules is the development of Orthodox Christian consciousness and that this lesson is addressed exclusively to Orthodox Christian students. In addition, heterodox, non-religious or atheist students have the right to be fully exempt from the subject by submitting a written statement. This statement may invoke just reasons of religious conscience. The State must, if there is a sufficient number of pupils, schedule an alternative module to cover the 'free time'. In this case, however, the curricula at issue, as is apparent from their aims and content, did not seek to develop the religious consciousness of Orthodox students, since the primary and secondary education programs did not contain full teaching of the doctrines, moral values and traditions of the Orthodox Church distinct from other doctrines and religions, and the high school program did not offer such teaching. On the contrary, particular emphasis had been placed either on the presentation of elements in common with the teaching of other doctrines and religions (elementary-secondary school) or on the teaching of various ethical and social issues, which are either primarily subject to other subjects (elementary-secondary school) or are not connected to Orthodox Christian teaching (high school). Consequently, it was considered that the curricula in question violated Articles 16 para 2 and 13 para 1 of the Constitution, Article 2 of the First Additional Protocol to the ECHR and the principle of equality.

4. Council of State Decisions 1759-1760/2019: Recording religion on secondary education diplomas and certificates

All diplomas issued by Greek schools included the religious beliefs of the student. The Council of State (Plenary Session) found this practice in violation of religious freedom. According to the Court, Article 13 of the Constitution guarantees freedom of religion, subject only to the restrictions provided for by the Constitution, and includes freedom of religious conscience and freedom of expression of religious beliefs, and establishes religious equality. Freedom of religious conscience includes, *inter alia,* the right of the individual not to disclose, either directly or indirectly, their religion or their religious beliefs, while no State authority or body is permitted to request to know a person's religious beliefs or to impose the disclosure of such beliefs.

Consequently, recording religion in public documents, such as diplomas and certificates of studies in high school (or in identity cards issued by the police, as Decisions 2280-2286/2001of the Council of State in Plenary Session had ruled), which is in principle mandatory in the contested decisions, violates Article 13 of the Constitution. Recoding the religion in the above documents constitutes a violation of Article 13 of the Constitution, even if the student or their parents consent or request it, or if the relevant field exists on the document but may remain blank. The reason for that is that religious freedom includes the right of everyone to freely express their religion or religious beliefs in general, but does not include the right of individuals to express such beliefs when they so wish in public documents, such as high school certificates, which are proof of student attendance, performance and completion of their educational stage (and are displayed before every public authority or individual to certify the studies and knowledge of the holder throughout his life) and not evidence of irrelevant information, such as religious beliefs.

The opposite interpretation would result in the infringement of the religious freedom of those Greeks who would not wish to express their religious beliefs in this way and would be forced to disclose them indirectly publicly, which would differentiate them against their will from those who disclose their beliefs. This would also negate the religious neutrality of the State with regard to the exercise of religious freedom. More than that, recording religion in degrees and certificates provides grounds for discrimination, either positive or negative, and therefore entails the risk of violating religious equality.

IV. LOOKING AHEAD

As is always the case with formal constitutional change, amendments are tested in practice. Additions and changes to the Constitution will reveal their assets and possible unintended consequences through their application. In the realm of jurisprudence, developments are expected with regard to the complex relation between constitutionality review, fiscal policy and economic governance. As the constitutionality of fiscal measures stemming from the bailout agreements continues to be litigated before courts, the financial impact of jurisprudence on the state budget has become a crucial issue.

The question whether rulings finding pension cuts unconstitutional can set out time limits, so that they are applicable only in the future, is a complex issue with severe repercussions. What is at stake involves on one hand the very essence of constitutionality control and on the other the impact of judicial decisions on the state budget. Can a ruling of unconstitutionality take effect only for the future? The problem becomes more acute in light of the slow administration of justice and the equally slow reflexes of the competent authorities in abiding by court rulings, which multiply the financial cost of abiding by rulings of unconstitutionality. The diffuse system of judicial review is also relevant, since at the same moment the Council of State decides on a constitutionality issue, a great number of cases are pending before lower courts.

The Council of State (Decision 21/2019) accepted the Main Insurance Fund's petition for a pilot judgment procedure so that the issues raised by its decisions that impact a wide circle of persons can be clarified. This judgment will decide the future of litigation in lower courts. It is noteworthy that approximately 6.000 petitions are currently pending before the Administrative Court of First Instance in Athens alone, as pensioners seek retroactive payments citing Council of State rulings from 2015 that had found cuts unconstitutional.

V. FURTHER READING

X. Contiades and A. Fotiadou, 'Constitutional Resilience and Constitutional Failure in the Face of Crisis: The Greek Case', in Tom Ginsburg, Mark D Rosen, Georg Vanberg (Eds), *Constitutions in Times of Financial Crisis* (Cambridge University Press, 2019)

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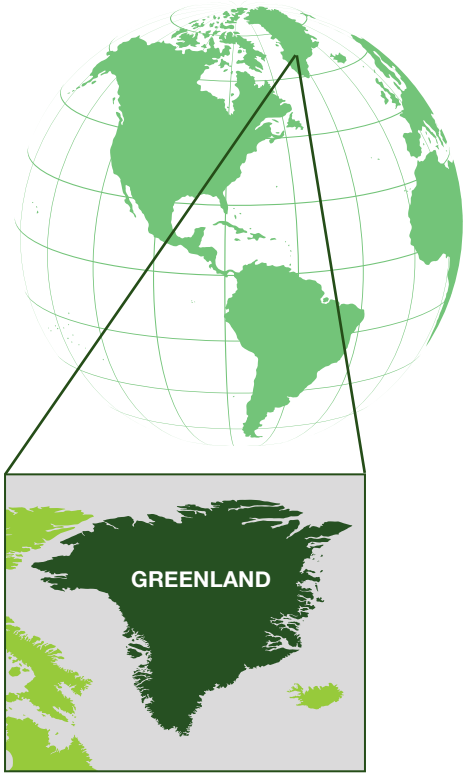

Greenland

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I. INTRODUCTION

Greenland is part of the Danish Realm together with the Faroe Islands. This review will introduce the Danish Constitutional framework of the Realm (*Rigsfællesskabet*), focusing on Greenland and the special home rule arrangement and Self-Government structure. This arrangement gives the people of Greenland far-reaching autonomy regarding their own affairs.

Greenland is a self-governing region within the Kingdom of Denmark. The Greenlandic Inuits are the indigenous peoples and largest ethnic group in Greenland with an entire population of only 55,992 (Jan. 2019)[1] 89.7 percent were born in Greenland, and 10.3 percent were born outside the region. The area of Greenland is 2,166,086 km2 (the largest island in the world). Of this area, 81 percent is covered with ice.

The legal foundation of Greenland is governed by the Danish Constitution of 1953, in which Article 1 states 'This Constitution applies to all parts of the Danish Realm' also including Greenland and thereby binding the Greenlandic and Danish authorities by the Danish Constitution and enabling the people of Greenland to invoke the rights conferred.[2]

Furthermore, Greenland was given parliamentary representation in Article 28 of the Danish Constitution. The Danish Parliament has 179 members, of which 2 are elected in Greenland and 2 in the Faroe Islands. The mentioned articles were incorporated into the Constitution in 1953, and the Constitution has not been amended since then.[3] Greenlandic autonomy is not based on the Constitution, but on legislation, originally the Home Rule Act form 1979[4] and now the current Self-Government Act from 2009,[5] both passed by the Danish Parliament with simple majority votes. Prior to the entry into force of the Self-Government Act, a guiding referendum was held in Greenland on 25 November 2008. Of the votes cast, 75.5 percent were for and 23.6 percent were against the introduction of self-government.

Having been a part of the European Community since 1973 through Denmark's membership, Greenland withdrew from the European Community in 1985 after a consultative referendum in 1982[6] in which the Greenlandic people voted to leave the Community. The new arrangement came

[1] See more Greenland in Figures 2019: pdf: http://www.stat.gl/publ/en/GF/2019/pdf/Greenland%20in%20Figures%202019.pdf

[2] See Commission (bet. 66/1953).

[3] See more about the Danish Constitution in Krunke and Thorarensen: '*The Nordic Constitutions – A Comparative and Contextual Study*', Concluding Thoughts.

[4] Act no. 577 of 29 November 1978 on Greenland Home Rule.

[5] Act no. 473 of 12 June 2009 on Greenland Self-Government.

[6] On 23 February 1982, voter participation was 74.9%. To the question whether Greenland should stay in the EC, 47% voted yes and 53% voted no.

into force on the 1 February 1985, stipulating the negotiated terms of Greenland's exit and the OCT-status (overseas countries and territories).[7] The main reason for leaving was disagreements about the Common Fisheries Policy (CFP). Therefore, Greenland obtained special fishery arrangements with the EU and was included as one of the so-called Overseas Countries and Territories enjoying association arrangements (special relations) with the EC/EU. The purpose of this association is 'to promote the economic and social development of the countries and territories and to establish close economic relations between the OCTs and the Union as a whole'. Consequently, the EU-Greenland relationship remains a comprehensive partnership.

The framework of the relationship between Denmark and Greenland relies on the division of competences according to the Self-Government Act, in which it is recognized that the people of Greenland are pursuant to international law with the right of self-determination. The Act is based on a wish to foster equality and mutual respect in the partnership between Denmark and Greenland.

Greenland has been provided with the competence to self-govern in a number of policy areas and could possibly transfer more policy areas. The Self-Government Act states that in the fields of responsibility taken over by Greenland, the Greenlandic authorities can exercise legislative and executive power. Furthermore, the courts of law established under the Self-Government authorities can exercise judicial power in Greenland in all fields of responsibility.[8] Accordingly, legislative power shall lie with Inatsisartut (the Greenlandic Parliament), the executive power with Naalakkersuisut (the Greenlandic Government), and the judicial power with the courts of law.

The Self-Government authorities may determine that part of the fields of responsibility that are contained in List I, para b and List II, Nos. 15, 25, and 27 in the Schedule to this Act shall be transferred to them.[9] This means that some areas can be taken over at sudden points in time set by the Self-Government authorities (List 1 of the Self-Government Act) while others can only be taken over at points in time set by the Self-Government authorities after negotiations with the Danish Government of the Realm (List 2 of the Act). Once a policy area is taken over, the Greenlandic Self-Government gets not only the legislative and executive competence but also the financial responsibility for the expenditure related to the attendance of the field.[10] Consequently, fields of responsibility that are taken over by the Greenland Self-Government authorities following Article 2-4 shall be financed by them, and there will be no increase of the Danish financial contribution to Greenland (*bloktilskud*). The Danish Government subsidy to the Self-Government authorities is fixed by law at DKK 3.8 billion annually,[11] but a parliamentary question from 2015 to the former Minister of Finance indicates the total subsidy is around DKK 500 million more if the areas that the Self-Government authorities can take over is included, making it 4.3 billion annually (2015).[12]

Certain fields that are listed in Schedule II of the Act (including the police; administration of justice, including the establishment of courts of law; aliens) require a higher degree of preparation, so the time of assumption of these fields is decided by the Self-Government authorities after negotiation with Danish authorities.[13]

The Self-Government Act contains a comprehensive set of rules and regulations governing foreign policy matters for Greenland. This area is of specific interest, and Chapter 4 of the Act is regulating it following the stipulation in the Danish Constitution on foreign policy as a governmental prerogative stated in Article 19. For important decisions in this field, the Government must have the consent of a simple majority of Parliament.[14] Thus, being part of the Danish Realm, the main responsibility for foreign affairs is on the Danish Government in conjunction with the Danish Parliament, and not in Greenland.

Yet, Self-Government Act Article 12 allows the Greenlandic authorities to 'negotiate and conclude international law agreements with foreign states and international organizations on behalf of the Kingdom of Denmark that relate exclusively to Greenland and fully cover areas taken over'. There is even a duty for the Danish Government to inform the Greenlandic Government before negotiating international agreements that are of particular importance to Greenland even if it is one Greenland cannot take over.[15] It can sometimes be difficult to draw the line between areas that have been transferred to Greenland and competences, which remain with the Danish authorities.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. A New Constitution

The most important constitutional development was the mandate to draft a proposal of a subregional constitution for Greenland. According to the Self-Government Act, 'a decision on Greenland's independence can be made by the Greenlandic people'.

An agreement between the Danish Government and Naalakkersuisut regarding

[7] See Treaty amending, with regard to Greenland, the Treaties establishing the European Communities: http://eurlex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:1985:029:FULL&from=EN and R. Leander Nielsen '35 years after the "Grøxit"-referendum: Why the EU still plays an important role for Greenlandic diplomacy': https://ecpr.eu/Filestore/PaperProposal/fc7f9236-e302-420f-9ae0-dddd0337bdfc.pdf
[8] See Article 1, Act no. 473 of 12 June 2009 on Greenland Self-Government.
[9] See the lists here: http://www.stm.dk/multimedia/GR_Self-Government_UK.doc
[10] Article 6.
[11] See more Greenland in Figures 2019.
[12] https://www.ft.dk/samling/20161/almdel/fiu/spm/396/svar/1415520/1771500.pdf
[13] http://www.stm.dk/_p_13090.html
[14] See the commentary on the Danish Constitution (2015) p. 55.
[15] Article 13.

the introduction of independence for Greenland is to be concluded with the consent of Inatsisartut and be endorsed by a referendum in Greenland. Furthermore, the agreement is to be concluded with the consent of the Folketing following Article 19 of the Danish Constitution. Independence for Greenland implies that Greenland assumes sovereignty over the Greenland territory.

At the end of March 2019, the first steps were taken in that direction, as the mandate of the Constitutional Commission was published.[16] The Constitutional Commission was unilaterally (not including Denmark) given a mandate to prepare a proposal for Greenland's Constitution in two stages: The first should be able to enter into force under the Danish constitutional framework. The second stage should only take effect when (or if) Greenland at some point will be independent. In addition, the Constitutional Commission was given a mandate to draft provisions that also allow Greenland to enter into intergovernmental cooperation, such as concluding a Free Association agreement with another state.

Due to the unilateral nature of the mandate, it is foreseen that the proposal for a subregional constitution will be critiqued by the Danish Government and claimed unconstitutional.[17] The main criticism has been that the proposal was on a collision course with the Danish Constitution as has been found by the Danish Ministry of Justice on a similar proposal for the Faroe Islands.[18]

2. Refugee Law

Another interesting development in 2019 was in the area of refugee law: the first refugee in Greenland arrived in April 2019. In 2001, Greenland had already signed 'Order 150 of 23 February 2001 on the entry into force of the Aliens Act in Greenland', which meant that asylum could be applied for in Greenland, but because the foreign policy area had not yet been taken over by the Self-Government, asylum cases in practice had to be dealt with in Denmark. A number of reservations in the administrative order meant that no one at that time had expected anyone to actually receive asylum in Greenland.[19]

3. Relations with the United States

In the fall of 2019, President Donald Trump presented the idea to acquire Greenland as a real estate purchase. The Greenlandic Foreign Affairs Ministry replied, 'We're open for business, not for sale', and the Danish Prime Minister found any discussion of a sale 'absurd'. The political position of a sale is different from a legal assessment, the question being whether it would be constitutional to sell a part of the realm within the constitutional framework. This would be possible if it were any other island in Denmark, but it could be argued that it would not be in accordance with International Law to sell Greenland without the consent of the Greenlandic people.[20]

Also related to the US, the Danish/Greenlandic relationship portrayed there was an interesting case of 'fake news' consisting of a letter allegedly send to a US governor, Tom Cotton, from the Greenlandic Foreign Affairs Ministry. In the letter, it appears that in the future, Greenland wanted to have the status of an organized alliance-free territory, and that the US was secretly supporting a fast-paced Greenland referendum on independence. The Greenlandic Foreign Affairs Minister, Ane Lone Bagger, explains that 'the cost of funding the event (a referendum) and the related activities has exceeded the planned level', and she is therefore asking for financial support from the US. The purpose of the counterfeit letter was clearly to pull Greenland and Denmark apart and create distrust between Denmark and the United States.

Yet, the relationship between the two (or three) countries has a long history and dates back to the North Atlantic Treaty between the Governments of the Kingdom of Denmark and the United States of America on the Defense of Greenland (1951),[21] which is still in force. The Treaty sets out the rules and agreements for the Government of the United States of America and the Government of the Kingdom of Denmark in order to promote stability and well-being in the North Atlantic Treaty area. The countries will unite their efforts for collective defense and for the preservation of peace and security and the development of their collective capacity to resist armed attack, and each will take such measures as necessary or appropriate to expeditiously carry out their respective and joint responsibilities in Greenland in accordance with NATO plans.

These two recent events can also be seen as examples of the growing political interest both regionally and internationally in the Arctic region. Greenland has been of strategic military importance ever since the Second World War. Negotiations between Denmark and the United States led to the Americans set up several air bases in Greenland. The largest base, Thule, was built in 1951 and played a crucial strategic role during the Cold War.[22] It is the US military's northernmost outpost, about 750 miles inside the Arctic Circle, and the radar and listening station employs 600 personnel and is still an important part of America's global defence system.

[16] https://naalakkersuisut.gl/da/Naalakkersuisut/Departementer/Finans/Selvstaendighed
[17] https://www.ft.dk/samling/20161/forespoergsel/f22/beh1-101/forhandling.htm
[18] Bárður Larsen and Kári á Rógvi, '*Det færøske forfatningsudkast i forfatningsretlig belysning – Kritiske bemærkninger til Justitsministeriets notat af 2. juni 2010 om forslag til en færøsk forfatning'* and the Ministry of Justice in responsum of 2 june 2010: https://www.ft.dk/samling/20091/almdel/f%C3%A6u/bilag/31/861094/index.htm
[19] Read the full story of the first Greenlandic refugee: https://www.weekendavisen.dk/2019-26/samfund/groenlands-foerste-flygtning
[20] See Ulfbeck, V., Møllmann, A. & Mortensen, B.O.G. (eds.), *Responsibilities and Liabilities for Commercial Activity in the Arctic: The Example of Greenland,* Routledge, 2016.
[21] See more: https://avalon.law.yale.edu/20th_century/den001.asp
[22] Auchet, M (2011), 'Greenland at the Crossroads: What Strategy for the Arctic?' *International Journal,* 66(4), 957-970.

III. Constitutional Cases

Thule Air Base has also played a significant role in a major constitutional case in a decision from the Danish Supreme Court on the legality of a decision regarding the forced movement of the inhabitants of Thule that was made and carried out in 1953.

The Danish Supreme Court delivered the first Danish decision on Inuit land claims in November 2003. The applicants included a number of individuals who had been forcibly removed from their Northern Greenland settlement in 1953 to make way for the establishment and extension of Thule Air Base. Their relocation was not subject to any formal Danish Government decision. The individuals received no financial compensation for the loss of territories. In 1999, the High Court ruled in favor of the applicants and granted them financial compensation. The discretionary compensation of DKK 0.5 million was upheld,[23] yet the land claims relating to the territories around Thule Air Base were dismissed. The judgment also stated that the Thule residents had no right to return to their old settlement because of the 1951 Danish Defense Agreement with the United States. In addition, the agreement to build a US military base at Thule that led to the forced relocation of Greenlandic families was upheld by the Danish Supreme Court in its 2003 decision.[24]

After the decision from the Danish Supreme Court, the Thule inhabitants tried to bring the case before the European Court of Human Rights in Strasbourg, but the complaint was rejected, since the European Convention on Human Rights was not applicable in Denmark when the forced relocation of the Inuits took place.[25]

In recent times, no major constitutional cases can be highlighted, but the judicial system of Greenland has undergone many reforms. Over the past 10 years, the reforms have been on centralizing and specializing. With the reform in 2013, the courts of Greenland that previously consisted of 18 district courts were limited to four, and the regional courts were only to decide criminal matters.[26] Civil cases were referred to the Court of Greenland in first instance with no exemption and in second instance to the High Court of Greenland. The district court judges are not legally trained, but lay judges with a special education and thorough knowledge of Greenlandic society. The Court of Greenland therefore rules in complicated cases in the first instance and handles supervision and education of district judges.

The judges in the Court of Greenland and the High Court of Greenland are law school educated. Rulings issued by the district courts and the Court of Greenland may be brought before the High Court of Greenland. As the Greenlandic court system is still a part of the Danish court system, rulings issued by the High Court of Greenland may, with the permission of the Appeals Permission Board in Denmark, be brought before the Supreme Court in Copenhagen.[27]

Going through the case law of the two Greenlandic instance courts in recent years, there are no constitutionally important cases. The cases handled have been primarily criminal in nature and reflect the social problems that exist in the region: violence, homicide and sexual assaults (including vast examples of assaults on minors). The civil cases consist of matrimonial and labor law cases.

Reviewing the case law of the Danish Supreme Court in search of constitutional cases, the same picture emerges except for the Thule case from November 2003. Consequently, there has not been recent case law supporting constitutional developments, but there have been rumors that the refugee case mentioned above could develop into one with constitutional dimensions. It goes to the heart of the division of competences between the two countries in terms of responsibility and financial support of the transferred policy area.

IV. LOOKING AHEAD

In the Self-Government Act, the people of Greenland are recognized as a people under international law with a right to self-determination.[28] Furthermore, the Act states that the Greenlandic language is the official language of Greenland.[29] The Act also recognizes the right of Greenland to become independent, and gives the competence to decide on this matter to the Greenlandic people. The work of the Constitutional Commission can be seen as the next step in becoming independent. If the Greenlandic people decide to become independent, the Danish Government will enter into negotiations with the Greenlandic Government and an agreement must then be accepted by the Greenlandic people in a referendum.[30] Independence would give full sovereignty over the Greenland territory.[31] The Danish Constitution does not have to be amended if an overseas territory such as Greenland becomes independent. Article

[23] See the case in the national weekly gazette (Ugeskrift for Retsvæsen) UfR..2004.382H. The primary claim for damages amounted to around DKK 235 million relating to the Thule Tribe's loss owing to the lost and reduced hunting and fishing opportunities as a result of the establishment of the base and the relocation of the population from the settlement.
[24] See more: 'Den danske højesterets dom om tvangsflytningen af Thules befolkning'.
[25] See Application no. 18584/04 by HINGITAQ 53 against Denmark.
[26] Danish Act. no 1388 of 23 December 2012.
[27] See more: http://www.domstol.dk/OM/OTHERLANGUAGES/ENGLISH/THEDANISHJUDICIALSYSTEM/Pages/TheDanishjudicialsystem.aspx
[28] Self-Government Act, Article 1.
[29] Self-Government Act, Article 20.
[30] Self-Government Act, Article 21.
[31] Ulfbeck, V., Møllmann, A. & Mortensen, B.O.G. (eds.), *Responsibilities and Liabilities for Commercial Activity in the Arctic: The Example of Greenland,* Routledge, 2016.

19 of the Constitution acknowledges the possibility of the Government concluding treaties diminishing the territory of the Realm, and such treaties only require the acceptance of Parliament to be ratified.[32]

Looking even more ahead, this could lead to major considerations if Greenland is to function as an independent country. Politically and financially, many problems can be foreseen. Bearing the size of the population in mind, limited personal income taxes and taxes on natural resources, fishing or other taxes would probably not be able to fill the gap from the missing subsidies from the Kingdom of Denmark, which today accrue for a substantial part of the total Greenlandic GDP.

V. FURTHER READING

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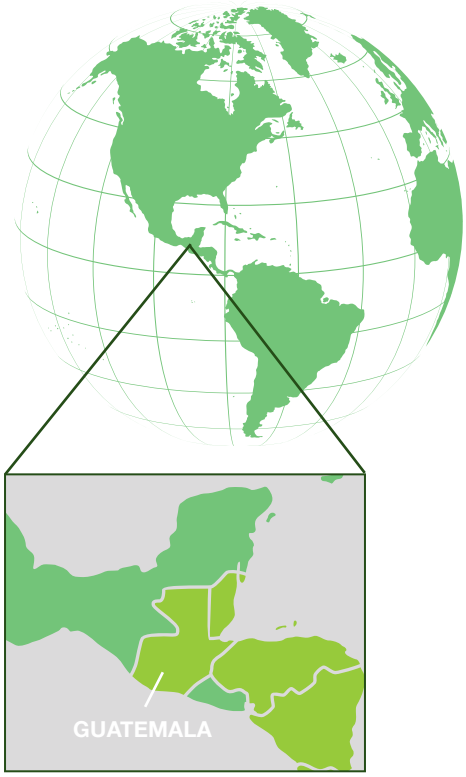
[32] Article 19 in the Danish Constitution, see Albæk Jensen, Denmark: The Position of Greenland and the Faroe Islands Within the Danish Realm, s. 178.



Guatemala

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I. INTRODUCTION

In many ways, 2019 continued the political backlash against constitutional institutions seen in 2018. As discussed in last year's report, 2018 was marked by Executive backlash against the International Commission Against Impunity in Guatemala, which ended its mandate in 2019, and the Constitutional Court in Guatemala. 2019 was not much different, and saw continued weakening of the role of the Constitutional Court not only by the Executive but also by new conservative groups. The Executive continued to disrespect the Constitutional Court's decisions, even signing an international agreement without the approval of Congress as required by the Constitution and directed by the Court. However, 2019 was also a year of change, as Guatemala held presidential and parliamentary elections and began the procedure to select new members of the Supreme Court and Court of Appeals. The Constitutional Court played a pivotal role in both the presidential election and the selection of new judges. However, in this, the Court faced public backlash, in particular from strong right-wing conservative groups. Part II of this report describes the three major events in Guatemala of constitutional relevance: first, the signing of the 'third safe country' agreement with the United States; second, the presidential election; and third, the selection of Supreme Court and Court of Appeals judges. The Constitutional Court played a central role in all of these events, and Part III discusses three of the most important cases decided by the Court in 2019. Part IV provides a view of how the future might look for Guatemala with a new presidency and Congress as well as a new judiciary.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The first major event of 2019 with constitutional significance was the signing of the 'third safe country' agreement (the Agreement) with the United States. This agreement sought to further the policy of the US government to halt the Central American migrant caravans, in which thousands of Central Americans fled their countries en masse, placing pressure on United States border officials and processes to allow them to stay.[1] This agreement facilitated the relocation of Central Americans, as well as asylum seekers and migrants of other nationalities, from the United States to Guatemala while their migration claims were being processed.[2] The constitutional relevance of this event is that it sparked a discussion on the Guatemalan Executive's use of powers without check as well as on the legitimacy of signing agreements under United States influence.[3]

[1] Associated Press, 'How does a Central American migrant caravan form?' *New York Post* (19 April 2019). https://nypost.com/2019/04/19/how-does-a-central-american-migrant-caravan-form/, last accessed 27 January 2019.

[2] Kirk Semple, 'The U.S. and Guatemala Reached an Asylum Deal: Here's What It Means', *New York Times* (New York, 28 July 2019) https://www.nytimes.com/2019/07/28/world/americas/guatemala-safe-third-asylum.html, last accessed 27 January 2020.

[3] Julian Borger, 'Trump plans to cut Central America aid, blaming countries for migrant caravans', *The Guardian* (London, 3 April 2019) https://www.theguardian.com/world/2019/apr/03/trump-to-sanction-central-american-nations-with-aid-cuts, last accessed 27 January 2020.

Concerned about the potential implications of this type of agreement for Guatemala, a group of former ministers of foreign relations and ambassadors of Guatemala brought a constitutional challenge against the signing of this agreement by the Guatemalan Executive. Their argument was that the content of the agreement must be at least disclosed to Congress prior to its signature. This caused backlash by United States and Guatemalan officials.[4] Despite an interim order issued by the Constitutional Court prohibiting it, the Guatemalan government proceeded to sign the agreement.[5] The Guatemalan government justified non-compliance with this interim order on the grounds that the agreement was for cooperation and therefore did not warrant the approval of Congress.[6] At the time of this writing in early 2020, the Constitutional Court has still not given a final judgment on the matter, and Guatemala has started to receive hundreds of asylum seekers and migrants relocated from the United States.

The second major event in Guatemala in 2019 was the presidential election.[7] It was particularly interesting because of the high involvement of the Constitutional Court in deciding on the validity of many frontrunners' eligibility to run for election.[8] As such, the decisions of the Constitutional Court had a direct effect in determining the outcome of the presidential race. The Constitutional Court did not allow the second and third runners-up to stand for election for reasons that are discussed in Part III of this report. This led to Alejandro Giammattei, who was in fourth place, to collect more votes from right-wing groups and win the election.[9] These judgments of the Constitutional Court began a wave of public backlash against it, particularly by right-wing groups, which continued to publicly attack the Constitutional Court for its alleged bias towards the left-wing frontrunner. The reputation of the Court deteriorated even further after the election. Moreover, several attempts to remove the judges of the Constitutional Court have been sought by Congress, the Executive and right-wing groups. Yet, these attempts have been rejected by the same Constitutional Court, granting protection to its own judges, causing even more backlash.[10]

The third event that had a major influence on the Guatemalan constitutional system was the selection of Supreme Court and Court of Appeals judges. Under the Guatemalan Constitution, Supreme Court and Court of Appeals judges serve for a term of five years from the day they take office.[11] Guatemala has an intricate system for selecting these judges, with many flaws.[12] This system involves the creation of 'postulation commissions' (*cómites de postulación*), which rank the people who wish to pursue judicial appointment. These commissions are composed of members elected by universities and the Professional Association of Lawyers of Guatemala – *Colegio de Abogados y Notario* – and follow a process established by statute. In addition, a new Judicial Council – the *Consejo de la Carrera Judicial* – was created to review the work of judges wishing to further their career and rise up within the judicial hierarchy.[13] These commissions each give Congress a list of people who are qualified for judicial appointment, from which Congress later selects. In 2019, problems arose because many steps in this selection process were omitted. For starters, the Council never reviewed the judges nor created a procedure to do so. This led the postulation commissions to start to review candidates even without the Council's review of judges. This in turn led to the filing of an injunction at the Constitutional Court challenging the selection process. The Constitutional Court resolved that the selection process should start over.

This judgment again sparked criticism of the Constitutional Court by some right-wing conservative groups. They argued that restarting the selection process would violate the constitutional term limits for judges. A group of constitutional litigants, called the *Centro para la Defensa de la Constitución* (Centre for the Defense of the Constitution), became vocal critics of the court's decisions, which they have labelled as activist, presenting publications on how the Court has violated its

[4] Vivian Salama and Juan Montes, 'Trump Wants to Punish Guatemala Over Failed "Safe Third Country" Deal', *The Wall Street Journal* (New York, 23 July 2019) https://www.wsj.com/articles/trump-says-he-will-punish-guatemala-for-not-reaching-safe-third-country-agreement-11563887818, last accessed 27 January 2020.

[5] Sonia Pérez, 'Guatemala court asked to block "safe 3rd country" with the US', *Associated Press* (11 July 2019) https://apnews.com/a62ad68f1acb44d28c056b-fada6e8b91, last accessed 15 January 2020.

[6] Lauren Carasik, 'Trump's Safe Third Country Agreement with Guatemala Is a Lie', *Foreign Press* (July 30, 2019) https://foreignpolicy.com/2019/07/30/trumps-safe-third-country-agreement-with-guatemala-is-a-lie/, last accessed 27 January 2020.

[7] Sofia Menchu, 'Unpopularity contest to decide Guatemalan presidential election', *Reuters* (7 August 2019) https://www.reuters.com/article/us-guatemala-election/unpopularity-contest-to-decide-guatemalan-presidential-election-idUSKCN1UX2DU, last accessed 27 January 2020.

[8] Lucas Perelló, 'In Guatemala, a presidential election in disarray', *Global Americans* (6 June 2019) https://theglobalamericans.org/2019/06/in-guatemala-a-presidential-election-in-disarray/, last accessed 25 January 2020.

[9] Sandra Cuffe, 'Guatemala elects right-wing president amid dismal turnout', *The Washington Post* (12 August 2019) https://www.washingtonpost.com/world/guatemala-awaits-presidential-election-results/2019/08/11/f8d70034-bc3a-11e9-a8b0-7ed8a0d5dc5d_story.html, last accessed 27 January 2020.

[10] Corte de Constitucionalidad de la República de Guatemala, *Expedientes Acumulados 162-2019 y 176-2019, Resolución de 23 de enero de 2019.*

[11] *Constitution of the Republic of Guatemala,* Article 215.

[12] The Americas, 'Buy any deans necessary. Letting academics pick magistrates has not worked in Guatemala', *The Economist.* (London, 25 July 2019). https://www.economist.com/the-americas/2019/07/25/letting-academics-pick-magistrates-has-not-worked-in-guatemala, last accessed 27 January 2020.

[13] Decreto Número 32-2016, reformado por el Decreto Número 17-2017, Article 4.

mandate and the Guatemalan Constitution.[14]

III. CONSTITUTIONAL CASES

In each of these three major events, the Constitutional Court played a pivotal role, issuing interim orders and judgments that determined Guatemalan political life.

1. Expedientes Acumulados 3829-2019, 3849-2019 y 3881-2019, Resolución de 14 de julio de 2019 (Third safe country case): Limits of executive power in foreign relations.

On 11 June 2019, a group of former Guatemalan ministers of foreign relations and ambassadors lodged a constitutional injunction against the President of Guatemala. This injunction was filed in order to prevent the Executive signing a 'third safe country agreement' with the United States. Guatemalan constitutional law allows the lodging of injunctions, called *amparos*, not only with the purpose of restoring the rights of individuals when violated by public authorities but also against the potential threat of their violation to avoid any action by public authorities.[15]

The applicants argued that the signing of the 'third safe country' agreement with the United States would violate the rights of local citizens as well as asylum seekers and the principle of social justice, which is the basis of the economic and social regime of the Guatemalan state.[16]

The President answered by asserting that the Constitution allowed him to sign such an agreement, and that individuals cannot obstruct the President in the fulfillment of his duties.[17] In essence, the President argued that as this was a matter of international affairs, individuals did not have standing to file an injunction of this kind. The President's counsel also argued that if the Constitutional Court were to grant the injunction, the Court would be acting outside the Constitution, because the Constitutional Court does not have jurisdiction over international affairs and can only rule over domestic matters.[18] The President's counsel argued that if such ruling were given, the President would not be obliged to abide by it, since the Court would be acting illegally. In addition to these legal arguments, the President's counsel argued that claims about the President's intention to sign any such agreement were mere 'conjectures' elaborated by local newspapers and without any solid evidence.[19]

In its ruling, the Constitutional Court emphasised that it was created by the Constitution in order to defend the constitutional order. The Court recalled that the *amparo* was created in order to defend individuals against any threat and that there is no exception for any act of public power.[20] The Court proceeded to analyse the different types of treaties and international agreements that exist in international law and their implications in domestic law.[21] In this analysis, the Court drew on the jurisprudence of the Colombian Constitutional Court, and particularly the rule that if treaties create new obligations on the state, they must be approved by Congress first.[22]

After reviewing comparative law, the Constitutional Court analysed the implications of 'third safe country' agreements. The Court's examination was informed by analyses of this type of treaty by the United Nations High Commissioner on Refugees, which determined that this type of international agreement does create new obligations for states, particularly on issues relating to the non-refoulement of asylum seekers and the standards of treatment owed to refugees in compliance with human rights standards.[23]

The Constitutional Court determined that, because a 'third safe country' agreement would create new obligations for the state beyond mere cooperation, it needed to be approved by Congress.[24] The Court noted that although the Guatemalan Constitution gives a high degree of autonomy to the Executive to coordinate foreign relations, any treaty that affects any domestic laws, imposes new restrictions on public power or burdens the state heavily must be approved by Congress. The Constitutional Court held that, in conformity with the Vienna Convention of the Law of Treaties of 1969 (which has been ratified by the Guatemalan state), in this case there was a specific restriction on the Guatemalan Executive to ratify such a treaty.[25] Finally, the Court delivered an interim order that the Executive not ratify a 'third safe country' agreement without the approval of Congress.[26]

[14] The Centre for the Defense of the Constitution published a document titled 'The Constitutional Court: limits, functions and the responsibility of its judges' criticizing publicly the Constitutional Court's judgments on a variety of topics. For a discussion of the paper, see: Carlos Arturo Villagrán Sandoval, 'Del funcionalismo al constructivismo en el análisis de jurisprudencia de la Corte de Constitucionalidad' (Boletín Jurídico No. 4 de la Universidad Rafael Landívar, December 2019).

[15] *Constitution of the Republic of Guatemala,* Article 265.

[16] *Expedientes Acumulados 3829-2019, 3849-2019 y 3881-2019,* page 3.

[17] Pages 3-4.

[18] Page 4.

[19] Ibid.

[20] Page 5.

[21] Pages 5-8.

[22] Page 7.

[23] Pages 8-10.

[24] Page 11.

[25] Page 12.

[26] Page 13-14.

Despite the order given by the Constitutional Court, on 26 July 2019, the Guatemalan Executive signed the 'third safe country' agreement with the United States. The Executive argued that this was not a 'third safe country' agreement but rather a cooperation agreement, and therefore it did not need Congress's approval. Interestingly, the terms of the agreement provided that it would only come into force after 'local constitutional procedures' were satisfied. On 10 August 2019, after reviewing the signed agreement, the Constitutional Court lifted the interim order and held that there was no longer a threat to rights. At the time of this writing, a decision on the merits of the case are still pending.

2. Expediente 1584-2019, Apelación de Sentencia de Amparo, 13 de mayo de 2019 (Zury Rios Case): Constitutional prohibitions on presidential candidacy

The Guatemalan Constitution enumerates a list of people who are prohibited to hold the Office of President. Article 186 establishes that leaders of a 'coup d'état, armed revolution or similar movement, who have altered the constitutional order, or those who as a consequence of such events have assumed the leadership of the government' cannot run for President. That same article establishes that 'relatives to the fourth degree of consanguinity and second of affinity of the President […] when the latter exercises the office of the President, and those of the persons referred to in the first paragraph of this Article' – meaning those who came into power via a coup – cannot run for the presidency either.

As mentioned in last's year report, the Constitutional Court has produced conflicting interpretations of this prohibition over the years, particularly in regard to former President and coup leader Efraín Ríos Mont.[27] This last election, Ríos's daughter, Zury, ran for election, notwithstanding the fourth degree of consanguinity prohibition. Ultimately, her eligibility to run for presidential office came before the Constitutional Court.

Zury Rios alleged that Article 186 violated her rights to run for the presidency, particularly those recognized at the Inter-American level by the American Convention on Human Rights.[28] She also argued that it violated the rights of the people to elect her as President. As such, she argued that the prohibition was unconstitutional under a human rights provision at both constitutional and international levels.[29] It is to be noted that the Guatemalan Constitution, in Article 46, establishes a 'general principle that within matters of human rights, the treaties and agreements approved and ratified by Guatemala have preeminence over the internal law'.

In reviewing the case, the Constitutional Court did not follow a strict legalist or originalist view of the prohibition, as it had done previously. Instead, it reviewed the constitutional prohibition under the human rights jurisprudence developed by it and other supranational jurisdictions, such as the Inter-American Court of Human Rights.[30] After reviewing the American Declaration of Rights and Duties of Man, which establishes that the rights of individuals can be limited, and a series of Inter-American judgments, the Court concluded that the right to be elected can be limited. Drawing expressly on the jurisprudence of the Inter-American Court of Human Rights, the Constitutional Court held that the right to be elected can be limited by 'historical, political, social and cultural necessities' which can 'vary from one society to the next'.[31] The Constitutional Court examined the historical circumstances leading to the first insertion of this provision in the Guatemalan Constitution of 1927, and its continuance in later constitutions.[32] After the examination of a series of constitutions and the violent history of Guatemala, the Court concluded that the prohibition was still a 'reasonable' response to the historical and social factors of Guatemalan society and politics.[33]

3. Expedientes Acumulados 4251-2019 y 4862-2019, Resolución de 16 de septiembre de 2019 (Judicial Selection Case): Judicial requirements and limits

On 16 September 2019, the Constitutional Court delivered an interim order to require the recommencement of the selection process of judges for the Supreme Court and Court of Appeals. The applicants of this case, a group of NGOs and individuals, filed an injunction against the Postulation Commission, which had commenced the judges' selection process a few weeks earlier. The applicants argued that the administrative procedure for the selection of judges for the Supreme Court and Court of Appeals was not correctly followed, therefore violating the principle of legality and compromising the judicial independence of the courts for the next judicial term.[34]

The selection process for Supreme Court and Court of Appeals judges is a complex one.[35] Because the term for judges of the Supreme Court and Court of Appeals is five years, judges wishing to advance in their career or get re-elected need to follow this process every five years. The selection process requires that the Judicial Council, an independent entity associated with the

[27] Carlos Arturo Villagrán Sandoval and Sara Larios, 'Guatemala' in Richard Albert et al, *2018 Global Review of Constitutional Law* (I.CONnect'Clough Center, 2019) 128.
[28] *Expediente 1584-2019,* page 3.
[29] Pages 4-6.
[30] Pages 24-26, 28.
[31] Page 29.
[32] Pages 30-36.
[33] Page 36.
[34] Pages 2-5.
[35] For a recent study of the Guatemalan process of judicial selection, including its challenges, see: José González et al, 'Obstaculos a la Carrera Judicial en Guatemala' (Impunity Watch, Policy Brief, October 2019).

Supreme Court, review the performance of judges during the term they hold office.[36] In the election process, the Council prepares a list of candidates who meet the requirements to apply for the judicial positions and who had the best performance during their time, and sends it to the Postulation Commission.[37] The Postulation Commission then opens the selection process to other applicants for these positions from outside the judiciary. The Postulation Commission prepares a list of the best qualified candidates, whether they are judges or people outside the judiciary, and sends it to Congress.[38] The Postulation Commission is comprised of the deans of the law schools in Guatemala and representatives of the Professional Association of Lawyers.[39] Congress elects persons from this list to become the next Supreme Court and Court of Appeals judges.

In its decision, the Constitutional Court emphasised the importance of judicial independence in a democratic state. In doing so, it reviewed a series of international instruments, such as the Universal Declaration of Human Rights, the Basic Principles on Judicial Independence and judgments of the Inter-American Court of Human Rights.[40] The Court stated that judicial independence is a pillar of the rule of law in Guatemala, and that individuals have the right to access the Court in conditions favourable for them. Therefore, the process for the selection of judges is of the utmost importance and must comply with international standards.[41]

The Constitutional Court then proceeded to detail the failures of the selection process. First, it found that the Judicial Council, the entity in charge of reviewing the work of judges in the performance of their duties, neglected to incorporate many judges who had the capacity to apply for the position of Supreme Court judge into a list that would be later sent to the Postulation Commission and Congress.[42] Second, the Constitutional Court found that the Judicial Council did not review the performance of any judge, either of the Supreme Court or Court of Appeals, during this period, nor did it develop the standards and procedures by which the judges would be reviewed.[43] Therefore, the list that the Judicial Council sent to the Postulation Commission did not follow the process established by law, thus compromising the entire selection process. As a result, the Court ordered that the entire selection process begin again to comply with the law and international standards, and ordered the Judicial Council to perform revisions of the judges, thus elaborating the procedures by which the judges would be reviewed.[44]

At the time of this writing, the selection process is still ongoing. However, this decision led right-wing groups to criticise the Court, stating that its order violated the Constitution because it requires that the current Supreme Court and Court of Appeals judges hold office beyond their five-year terms, as determined by the Constitution.

IV. LOOKING AHEAD

In 2020, a new Executive and Congress have taken office. While the judicial selection process is still ongoing, new judicial officers will join the higher courts in 2020.

The effects of significant constitutional events of 2019 can be expected to play out in 2020. A decision on the merits of the 'third safe country' agreement is still pending. However, as the Constitutional Court has done in other high-impact cases with international implications, such as the Jerusalem embassy transfer and the CICIG termination cases, it seems likely that the Court will avoid or defer making a decision on the merits. This has previously been done by the Court in order to avoid future backlash by strong conservative groups.

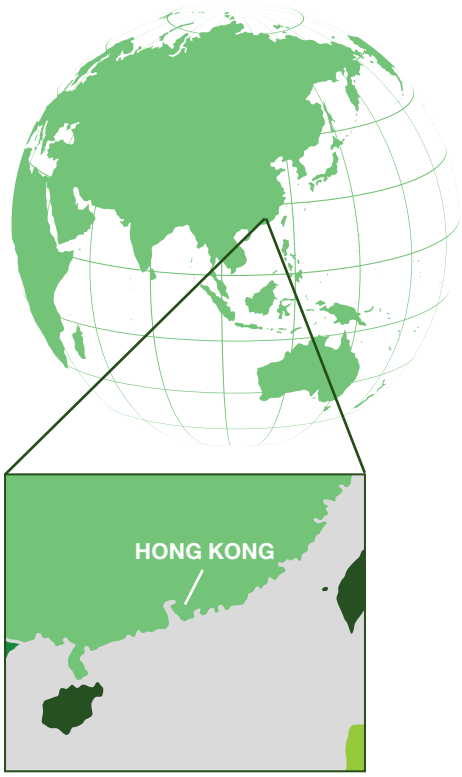
A new right-wing Executive government has taken office. In its first actions, it has declared emergency powers and a new initiative of laws targeting gangs (*maras*) with potential adverse impacts on human rights. Although the new President has taken steps to restore the international reputation of Guatemala after the CICIG was expelled by the previous government, tendencies for abusive use of power and corruption remain a major concern.

V. FURTHER READING

González, José, et al, Obstaculos a la Carrera Judicial en Guatemala (Impunity Watch, Policy Brief, October 2019).

Villagrán Sandoval, Carlos Arturo, 'Del funcionalismo al constructivismo en el análisis de jurisprudencia de la Corte de Constitucionalidad' (Boletín Jurídico No. 4 de la Universidad Rafael Landívar, December 2019).

[36] Decreto Número 32-2016, Article 6.
[37] Ibid.
[38] *Constitution of the Republic of Guatemala,* Article 215.
[39] Ibid.
[40] *Expedientes Acumulados 4251-2019 y 4862-2019,* pages 12-14.
[41] Page 14.
[42] Pages 14-16.
[43] Pages 17-26.
[44] Pages 27-29.



Hong Kong

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I. INTRODUCTION[1]

Hong Kong is a Special Administrative Region (SAR) of the People's Republic of China (PRC) governed under a Basic Law adopted by the National People's Congress of China (NPC) pursuant to the Chinese Constitution. The Basic Law provides for Hong Kong's separate systems, including the Chief Executive (who represents the SAR before the Central Government and heads both the SAR and its executive authorities), the executive authorities (which are vested with executive power), the legislature (which is vested with legislative power) and the judiciary (which is vested with independent judicial power including that of final adjudication). The Basic Law also provides for the Central Government being responsible for foreign affairs and defence, for the Standing Committee of the NPC (SCNPC) having the power to declare a state of emergency in Hong Kong, and for the SCNPC having the power to interpret the Basic Law. Whilst the NPC may amend the Basic Law, such amendments shall not contravene the PRC's established basic policies regarding Hong Kong recorded in the Sino-British Joint Declaration 1984. These basic policies express the PRC's approach for territorial reunification of "One Country, Two Systems". In 2019, civil unrest erupted in Hong Kong following the Government's rushed introduction and attempted passage of amendments to extradition and mutual criminal legal assistance laws. Misjudgments of public opinion by both the Hong Kong and the Chinese Governments have led to intensification, escalation and continuation of the protests, divisive and often violent clampdown by the police, the exposure of shortcomings of almost all institutions of accountability and a massive challenge for the judiciary. This report discusses developments in four areas: 1) the 2019 Protests; 2) the constitutional relationship between the PRC and Hong Kong; 3) Hong Kong's rule of law; and 4) the litigation of sexual minority rights.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS:

The anti-extradition law amendments movement in Hong Kong ("the 2019 Protests") began in June 2019. The chronology and the evolving narrative of the protests are relatively well documented by academics, news media and NGOs.[2] This report seeks instead to underline some of the causes and implications of the 2019 Protests that are related to the "One Country, Two Systems" model as well as the maintenance of the rule of law in Hong Kong.

The 2019 Protests arose from the Hong Kong Government's proposed legislative amendments to address a perceived gap in Hong Kong's criminal jurisdiction on homicide. The proposed amendments sought to remove the prohibition against rendition of fugitives to other parts of China (including Taiwan and Macao) in the extradition laws that had existed since the establishment of the Hong Kong SAR on 1 July 1997. The opposition to these facially technical

[1] The author thanks Cora Chan and Swati Jhaveri for their comments to the drafts of this report.

[2] See, for examples, Martin Purbrick, 'A Report of the 2019 Hong Kong Protests' (2019) 50(4) *Asian Affairs* 465; Johannes Chan, 'Ten Days that Shocked the World: The Rendition Proposal in Hong Kong' (2019) 49 *HKLJ* 431; *The New York Times* <www.nytimes.com/interactive/2019/world/asia/hong-kong-protests-arc.html>; and *Human Rights in China* <www.hrichina.org/en/2019-hong-kong-protests-timeline> accessed 6 February 2020.

amendments grew after the public became aware of their generality and implications. Opposition came from all sectors of the public, including the business sector and many residents with dealings on the Chinese mainland, who distrusted the Chinese legal and judicial authorities out of understanding their failings. The Hong Kong and Chinese Governments' underestimation of this deep-rooted suspicion of the Chinese criminal justice system led to the public protest of close to a million Hong Kong residents on 9 June 2019. The violent confrontation by the police against young protestors who surrounded the Legislative Council Complex on 12 June 2019 in a bid to stop the proceedings of the legislature marked the beginning of months of street battles, strikes and lynchings. After the formal withdrawal of the amendments in October 2019, police containment of protestors on two university campuses in November 2019 and the landslide successes in the District Council elections in November 2019 of candidates sympathetic to the protests, the intensity of the protests lessened significantly and disruptions to ordinary life in Hong Kong have diminished.

The 2019 Protests have fractured Hong Kong society into sides identified by political sympathies or visions, and produced a young and dangerous minority that have the knowhow and resolve to use destructive and lethal force to express their demands and anger. All institutions that had showcased Hong Kong's high world ranking in the rule of law were shaken. The excessive use of force by the police on numerous occasions have been well documented, but no police officer has yet been held accountable. The police oversight body in Hong Kong has proven to be unsuitable for conducting an independent and competent investigation into systemic and individual police misconduct,[3] and even became the subject of a legal challenge over whether it had the statutory authority to conduct a "thematic study" of the policing on key dates of the protests.[4] Although the Chief Executive, Mrs. Carrie Lam, announced that she would appoint in February 2020 an "independent review panel" on "social causes" of the protests, she excluded policing matters from the terms of such a "review" and ruled out the format of a commission of inquiry with coercive powers to summon witnesses and compel production of documents.

Both the Hong Kong Judiciary and the Department of Justice are being tested in their abilities to handle legal and prosecutorial matters arising out of the 2019 Protests. The arrests by the police of over 7,000 persons during the protests meant a lengthy and consuming process of numerous prosecutions in a divided society under the direction of Chinese President Xi Jinping to "jointly get things done in Hong Kong" in order to "safeguard the rule of law and oppose violence".[5] As the Chief Executive also rejected calls for collective non-prosecution, release with warning and amnesty of the arrestees, it is expected that the capacities, impartiality and independence of the Hong Kong courts will be seriously tested in the coming years. In the meantime, there have been signs of loss of faith in the administration of justice, including incidents of petrol bombing of court entrances and the vilification of named judges.[6]

Lawfare was applied by both the Government and the opposition during the 2019 Protests. While the Government and some public authorities had sought the assistance of civil courts to enforce the law by injunctions against unnamed persons inciting violence, destroying property, obstructing public transportation and doxxing police officers and their family members[7] (but with a patchy record of compliance and no prosecution of contempt thus far), opposition politicians judicially challenged the anti-masking law and the Chief Executive's emergency power to enact it (the first case in the next section of this report), and arrestees and persons who allegedly suffered police brutality lodged proceedings to require the disclosure of the identity of the police officers that committed the said acts, or to stop police from gathering evidence by allegedly unlawful means.[8] The first instance success of the opposition in challenging the anti-masking law led to a rebuke by the spokesman of the Legislative Affairs Commission of the SCNPC, suggesting that Hong Kong courts had no power to declare a Hong Kong legislation incompatible with the Basic Law, contrary to the understanding and practice of the Hong Kong courts since July 1997.[9]

Successful efforts to gain international recognition of the 2019 Protests affected

[3] Alvin Lum, 'Hong Kong police watchdog does not have powers and resources to cope with scale of protests, say Independent Police Complaints Council's expert advisers', *South China Morning Post* (Hong Kong, 10 November 2019). These international policing experts eventually 'stood aside' from rendering assistance in December 2019.

[4] *Lui Chi Hang Hendrick v. Independent Police Complaints Council* [2019] HKCFI 3120 (20 December 2019).

[5] As to arrest figures, see John Lee, 'LCQ4: Law enforcement procedures of Police' (8 January 2020) <www.info.gov.hk/gia/general/202001/08/P2020010800626.htm>. As to the directing statements of President Xi, see 'Speech by Luo Huining at the Spring Festival Reception' (15 January 2020) <www.locpg.gov.cn/js-dt/2020-01/15/c_1210440000.htm> accessed 6 February 2020

[6] See Geoffrey Ma, 'CJ's speech at Ceremonial Opening of the Legal Year 2020' (13 January 2020). <www.info.gov.hk/gia/general/202001/13/P2020011300622.htm> accessed 6 February 2020.

[7] See, for examples, *Secretary for Justice v. Persons Unlawfully and Wilfully Conducting Etc (2007/2019)* [2019] HKCFI 2777 and *Secretary for Justice v. Persons Unlawfully and Wilfully Conducting Etc (1957/2019)* [2019] HKCFI 2773.

[8] See *K v Commissioner of Police* [2019] HKCFI 3048 (17 December 2019); Ng Kang-chung, 'Hong Kong protests: High Court test for warrants that let police search phones', *South China Morning Post* (Hong Kong, 13 January 2020); Jasmine Siu, 'Hong Kong court suspends police search warrant to access medical records of teen who claims she was gang-raped by officers', *South China Morning Post* (Hong Kong, 28 November 2019).

[9] Tony Cheung, et al., '"No other authority has right to make judgments": China slams Hong Kong court's ruling on anti-mask law as unconstitutional', *South China Morning Post* (Hong Kong, 19 November 2019).

China's sovereign interests and policies on Hong Kong. The United States' Hong Kong Human Rights and Democracy Act[10] and Protect Hong Kong Act,[11] the report of the United Kingdom House of Commons Foreign Affairs Committee[12] and the initiatives by countries including Canada and the Netherlands to consider using Magnitsky Act type sanctions against Hong Kong officials violating human rights all contributed to China's concern that Hong Kong's situation would be used by its adversaries to restrain her rise. And on top of that, the successful re-election of Tsai Ing-wen as the President of Taiwan in a campaign that equated "One Country, Two Systems" with authoritarian rule, using the 2019 Protests as an example, alarmed the Chinese Communist Party, whose avowed mission has always been the reunification of Taiwan peacefully under the "One Country, Two Systems" model. In the depths of this quagmire, the rhetoric of the Party to Hong Kong has been to look to the Macao SAR as the "poster boy" for this governing model: Macao has been viewed favourably by Beijing in many respects, including addressing Chinese national security concerns and the material needs of the population.[13]

III. CONSTITUTIONAL CASES

1. Kwok Wing Hang v. Chief Executive of the HKSAR: Judicial Review of the Emergency Statutory Power that Made the Anti-masking Law

On 4 October 2019, the Chief Executive in Council invoked a power under the Emergency Regulations Ordinance (ERO) to enact an anti-masking law (i.e., the Prohibition on Facial Covering Regulation (PFCR)) on the ground that street violence had put Hong Kong "in a state of public danger" and the anti-masking law was needed to restore law, order and public peace. Twenty-four opposition members of the Legislative Council applied for judicial review against not only the PFCR but also the power in the ERO to make emergency regulations on the "public danger" ground. A division of the Court of First Instance of two (rather than the usual one) judges held on 18 November 2019 that not only the PFCR but also the Chief Executive's power in the ERO that made it were inconsistent with the Basic Law and declared the relevant provisions unconstitutional.[14] Both the said division of the Court of First Instance and the Court of Appeal refused to grant a temporary validity order or a temporary suspension of the declarations of unconstitutionality. The Court of Appeal heard the Chief Executive's appeal in January 2020 and has not handed down judgment at the time of finalization of this report.

The anti-masking law litigation readily qualified as the most controversial court case in 2019 not only because of the underlying circumstances of civil unrest, the Hong Kong Government's efforts to end violence and chaos and restore order following the instruction of the Central Authorities to all institutions of governance in Hong Kong (including the courts)[15] and the litigation itself being one lodged by the political opposition against the Government but also because of the Court's reasoning. In striking down the Chief Executive's emergency regulation-making power on the "public danger" ground, the Court held that such power is incompatible with the "constitutional order" established by the Basic Law, under which the legislative power is vested with the Legislative Council. In holding that the PFCR was a disproportionate measure, the Court stated that most of its prohibitions and the related enforcement power exceeded what was reasonably necessary to achieve the aims of deterrence of law-breaking and facilitation of law enforcement, and failed to strike a reasonable balance between the societal benefits sought to be promoted and the inroads made into the protected rights of freedom of expression, freedom of assembly, procession and demonstration, and the right to privacy.

The ERO is a piece of legislation previously in force in Hong Kong that had been endorsed by the colonial Hong Kong courts as *intra vires* on several occasions. The Court held that this law was incompatible with the Basic Law's scheme of not permitting the Hong Kong SAR's legislature to grant its primary law-making power to any other body (including the Chief Executive), except for an authorization of subordinate legislation. It is worth noting that in doing so, the Court enforced one of the Basic Law's features – namely, a particular aspect of the principle of separation of powers – as distinct from a specific provision's stipulation or a protected right stemming from one or more provisions. In addition, by holding the PFCR as disproportionate for not satisfying the third step of "necessity" and the fourth step of "proportionality *stricto sensu*", the Court brought rigor to the protection of fundamental rights in Hong Kong, bearing in mind that as our last year's report and other cases in this report have shown, the Hong Kong courts were principally concerned with the second step of "rational connection" and had mysteriously assumed that satisfaction of the third step inevitably led to satisfaction of the fourth step.

2. Comilang v. Director of Immigration and ZN v. Secretary for Justice: System Coherence over International Human Rights Law-based Protection of Immigrants

In two judgments handed down in 2019, the Hong Kong Court of Final Appeal (HKCFA) determined how judicial protection of fundamental rights should be administered under Hong Kong's constitutional framework under the Basic Law, particularly in relation to the International Covenant on

[10] Hong Kong Human Rights and Democracy Act 2019 (US Public Law 116-76).

[11] Protect Hong Kong Act 2019 (US Public Law 116-77).

[12] Foreign Affairs Committee, *China and the Rules-based International System* (HC 2018-19, 612).

[13] Natalie Wong, 'Citing Presiding Xi Jinping, Beijing's Hong Kong envoy Luo Huining says lack of national security laws allows "sabotage"', *South China Morning Post* (Hong Kong, 20 January 2020).

[14] *Kwok Wing Hang v. Chief Executive in Council* [2019] HKCFI 2820 (18 November 2019).

[15] Tony Cheung, 'No country would tolerate "violent and destructive acts" of Hong Kong's protesters, Chinese Vice-Premier Han Zheng says', *South China Morning Post* (Hong Kong, 6 November 2019).

Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In the *Comilang* case,[16] the (HKCFA) held that the Director of Immigration was not required by the Basic Law and the Hong Kong Bill of Rights (HKBOR) to take into account, when he makes a decision under immigration legislation on a person subject to immigration control, the enjoyment by that person (and/or that person's family members living in Hong Kong and/or the family consisting of that person and her family members living in Hong Kong) of fundamental rights guaranteed under the Basic Law, the HKBOR, the ICCPR, the ICESCR or the Convention on the Rights of the Child.

In the *ZN* case,[17] the HKCFA construed Article 4 of the HKBOR (which reproduces Article 8 of the ICCPR) as not prohibiting human trafficking generally or for the purposes of exploitation, servitude and forced or compulsory labour; and as imposing on the Hong Kong Government an investigative duty, though not an obligation to enact bespoke legislation to criminalize the activities prohibited by that article.

The *Comilang* case determined the structure and limits of human rights protection under the Basic Law. The ZN case determined the approach for interpreting substantive provisions protective of human rights. Three considerations ran through these cases. The first was the HKCFA's adherence to the "common law dualist principle" that an international treaty is not self-executing: unless and until its provisions are made part of Hong Kong domestic law by legislation, its provisions do not confer or impose any rights or obligations on individual citizens. The second was the HKCFA's construction of Article 39 of the Basic Law, which provides, *inter alia,* that the provisions of the ICCPR and the ICESCR as applied to Hong Kong shall remain in force and shall be implemented through the laws of the SAR – according to this provision, the HKBOR was given constitutional status. The third was the HKCFA's preference of "coherence" in the system of protection of fundamental rights under the Basic Law.

The consequences were that 1) an exception in the HKBOR reflective of the immigration legislation reservation was allowed to operate at the constitutional level to preclude reliance on *both* Basic Law rights and HKBOR rights by family members of the person subject to immigration control, thus depriving the family unit, i.e., the natural and fundamental group unit of society, of protection of fundamental rights; 2) the ICESCR, which has *no* reservation in respect to the cognate right of the family, was disengaged for the twin reasons of there being no Hong Kong legislation implementing it and the cognate right being basically subject to the immigration legislation exception in the HKBOR regardless; and 3) a declaration made by China not applying the Palermo Protocol to Hong Kong carried the effect that its provisions may not be used as an aid to construe Article 4 of the HKBOR, lest that would amount to a "backdoor application" of the protocol. The HKCFA's distancing from international human rights law was made explicit by its reluctance to agree and accept statements of the United Nations Human Rights Committee, the ICCPR's treaty body, on the ICCPR provision (reproduced in the HKBOR) being construed, claiming that General Comment statements do not have a clear indication of reasoning and that concluding observations regarding a periodic report have no binding status, are prescriptive in nature and do not provide any reasoned analysis.

3. Leung Chun Kwong v. Secretary for the Civil Service and MK v. Government of HKSAR: Same-sex Marriage – Foreign Recognition and Local Non-recognition

In the 2018 report, we covered the QT case, where the HKCFA applied the four-step proportionality analysis common to many jurisdictions having constitutional protection of human rights, and rejected the Government's justification of an immigration policy's limitation of "spouse" to a person of the opposite sex in a monogamous marriage in line with Hong Kong's marriage laws.[18] In the 2019 *Leung Chun Kwong* case, the Government sought to justify similar limitations on the meaning of "spouse" in civil service benefit regulations and tax legislation, arguing that the special status of marriage under Hong Kong's marriage laws should be promoted and maintained, and thus Mr. Leung's partner should not be regarded as his "spouse" under a same-sex marriage celebrated outside Hong Kong according to the laws of that jurisdiction. The HKCFA, again applying proportionality analysis, rejected the Government's case,[19] stating that the Government had failed to establish a rational connection between the legitimate aims of protection of the traditional family and the institution of marriage established under Hong Kong's marriage laws on the one hand, and on the other, the restrictions in question, which had the effect of disentitling same-sex married couples. The HKCFA added that the Government could not logically argue that people would be encouraged to enter into opposite-sex marriage in Hong Kong *because* a same-sex spouse is denied benefits.

Also in 2019, several applications were made to challenge the constitutionality of Hong Kong's marriage laws insofar as they define "marriage" in terms of a voluntary union for life of a man and a woman to the

[16] *Comilang v. Director of Immigration* [2019] HKCFA 10 (4 April 2019).
[17] *ZN v. Secretary for Justice* [2019] HKCFA 53 (10 January 2020).
[18] *Director of Immigration v. QT* [2018] HKCFA 28 (4 July 2018).
[19] *Leung Chun Kwong v Secretary for the Civil Service* [2019] HKCFA 19 (6 June 2019). The facts in this case are discussed in the 2018 report.

exclusion of all others and do not provide a legal framework for recognition of same-sex relationships. The Court of First Instance hearing *MK*, the first of these cases, dismissed the application by a skillful construction of the Basic Law and the HKBOR that enabled the Court to avoid undertaking the proportionality analysis of the Government's justification.[20] In particular, the Court agreed with the Government's submission that since the relevant provisions of the Basic Law and the HKBOR protective of marriage in fact specifically protect heterosexual monogamous marriage, they constituted a *lex specialis* that precluded other provisions of the Basic Law and the HKBOR, including the principle of equality, from operating to protect the right of marriage of same-sex couples. *MK*'s case is under appeal.

4. Chow Ting v. Teng Yu Yan Anne and Lau Wing Hong v Chan Yuen Man Amy: Candidate Disqualification without Natural Justice Invalidating Elections

Agnes Chow's challenge to the disqualification of her nomination in a Legislative Council by-election, noted in the 2018 report, was successful on the ground that the returning officer failed to afford her a reasonable opportunity to respond to the materials the officer proposed to rely on in decision-making. As a result, the Court of First Instance held that the disqualification was invalid, the by-election was voided and the person elected unseated.[21] This victory was overshadowed by the Court's acceptance of the reasoning of the coordinate court in *Chan Ho Tin*'s case, also noted in the 2018 report, regarding the legality of the role of the returning officer to scrutinize substantively a candidate's declaration that she intends to uphold the Basic Law and pledge allegiance to the Hong Kong SAR. While there was an appeal by the unseated members of the Legislative Council to the HKCFA, their arguments concerned only their unseating as the legal consequence of a successful election petition and did not touch upon the returning officer's substantive role,[22] and their appeals were in any event dismissed.[23]

IV. LOOKING AHEAD

2020 promises to be a year of change. The 2019 novel coronavirus outbreak in China has brought multiple challenges upon Hong Kong's presumably "separate systems". The Legislative Council elections scheduled in September 2020 will be a contest in which the opposition forces will seek to capture a simple majority of seats in Hong Kong's legislature, notwithstanding the structurally biased electoral system. Appeals of the first and third constitutional cases described above and of the "colocation case" described in the 2018 report will be heard by the Court of Appeal and/or the HKCFA. Last but not least, Carrie Lam, the Chief Executive (who is expected to stay in office under the tutelage of Luo Huining, the new Director of the Liaison Office of the Central People's Government in the Hong Kong SAR[24]), will have opportunities to fill up to three vacancies in the HKCFA, including that of the Chief Justice.

V. FURTHER READING

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Po Jen Yap, et al., 'Symposium: 20 Years of the Basic Law' (2019), 49 *HKLJ* 183

Johannes Chan, 'A Shrinking Space: A Dynamic Relationship Between the Judiciary in a Liberal Society of Hong Kong and a Socialist-Leninist Sovereign State' (2019), 72 *CLP* 85

Albert Chen, 'A Perfect Storm: Hong Kong-Mainland Rendition of Fugitive Offenders' (2019),49 *HKLJ* 419

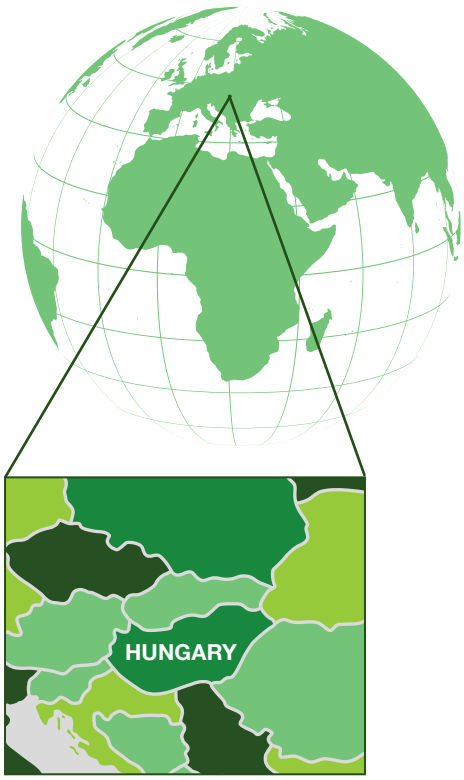
[20] *MK v. Government of HKSAR* [2019] HKCFI 2518 (18 October 2019).

[21] *Chow Ting v. Teng Yu Yan Anne* [2019] HKCFI 2135 (2 September 2019). See also the similar case of *Lau Wing Hong v. Chan Yuen Man* [2019] HKCFI 2287 (13 September 2019).

[22] For a critical assessment of the *Chow Ting* judgment, see Po Jen Yap and Jiang Zixin, 'Electoral Disqualification, Political Allegiance, and the Courts: A "Fruitless Debate"?' (2019) 49 HKLJ 825.

[23] *Au Nok Hin v. Teng Yu Yan Anne* [2019] HKCFA 50 (20 December 2019).

[24] Christian Shephard and Sue-lin Wong, 'Luo Huining: Beijing's enforcer in Hong Kong', *Financial Times* (London, 7 January 2020).



Hungary

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I. INTRODUCTION

After first taking power in the 2010 elections and subsequently winning a two-thirds majority in the Parliament in both 2014 and 2018, and after adopting the new Fundamental Law in 2011, the Fidesz KDNP Party coalition carried out further constitutional and legal changes that allowed it to control the autonomous state institutions as well as the non-governmental sphere. At the end of 2018, the majority of representatives in the EU Parliament voted to support a motion to open the door for the Article 7 TEU procedure against Hungary. It is worth mentioning that in January 2020, a new resolution adopted by the EU Parliament based on reports and statements by the Commission, the UN, OSCE and the Council of Europe indicated that Hungary's backsliding had progressed further since the initial triggering of Article 7(1). The findings of our review correlate with the findings of the EU. In Parts II and III, we examine steps taken by the Government in the construction of illiberal democracy and authoritarian rule. The Government majority's pressure on the independence of the judiciary through the introduction of new elements into the legal system raises major concern, similar to the elevated governmental influence on the fields of science, culture and education, e.g., through the reorganisation of the most important science network, the Hungarian Academy of Sciences (1825), by detaching its 15 large research institutions.

In 2019, constitutional adjudication did not have a role in restricting the two-thirds majority in Parliament to limit existing spheres of autonomy through legislative measures. A new amendment to the Constitution, the 8th since 2012, was adopted by the Parliament on 12 December to make it clear the establishment of the separate administrative court will be cancelled and therefore deleted from the Fundamental Law – under pressure from the EU and other international institutions dealing with the evaluation of the rule of law status of their member states.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most important change of constitutional relevance in 2019 was the amendment to several legal provisions in different acts related to courts and jurisprudence. As the provision for the independent and separate administrative court was deleted from the Fundamental Law, the independent and separate first instance administrative courts were also abolished in the act on the ordinary courts. Labor law cases start at the county-level courts (Törvényszék) at the first instance and the administrative cases start at dedicated county-level courts. After 31 March 2020, when the administrative and labor courts will cease to exist, all judges may continue their work at the county-level courts but the appointments of the heads of the separate courts terminate automatically. Another important change introduced by the act is that the incompatibility between the appointment for being a judge and a constitutional justice is annulled. An ordinary judge, therefore, can become a constitutional judge for the time of her mandate and then return to the general judiciary. Furthermore, a judge at the Constitutional

Court may request reintegration to the general judiciary outside of the ordinary procedure and formal and substantive requirements.

The most important change is that the decisions of the Kúria (Supreme Court) will be obligatory for all lower courts, which alters ordinary jurisprudence's task and competence fundamentally. The system introduces a quasi precedent law system that has not been present in Hungary either in ordinary or constitutional jurisprudence. The new provisions also changed the function of the so-called 'principle decisions' that had served as a guide to unify decision-making of lower courts.

Partly backing up the necessity of this change was the argument that the Fundamental Law does not apply properly in ordinary case law the way the Fundamental Law prescribes it in Article 28, which reads: 'In the course of the application of the law, courts shall interpret the text of 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 economic purposes which are in accordance with common sense and the public good.' Act CXXX of 2016 on the Civil Procedure prescribed that if a court would like to deviate from the published decision of the Kúria, it must explain its decision. Furthermore, it was possible to submit a complaint for the unification of the jurisprudence in a case to the Kúria that will decide it. If the Kúria does not accept the alteration of its decision, it annuls the decision of the lower court.

The independence of the judiciary was a heated topic in general in Hungary in 2019. The National Council of Judges asked for the removal of the head of the National Judicial Office, who was finally appointed to be a constitutional judge and left her office.

The municipal elections in October made a great change in the political landscape of Hungary because joint opposition forces gained new mandates and won the majority of votes in Budapest with the new mayor. The necessity of a complete constitutional revision of the Fundamental Law was introduced before the elections in 2019 by the Prime Minister, but after the elections it did not take place, and the possible drafts were not made public. After the relative success of the joint forces of the opposition parties in the country, the financial autonomy of the municipalities felt under further smaller restriction and, in December, the disciplinary rules in the Parliament were tightened with other smaller restrictions to the rules of procedures in Parliament.

Furthermore, on 2 July 2019, the Hungarian Parliament passed a law on the modification of particular laws necessary for the transformation of the institutional system and financing of the research, development and innovation system. Consequently, the Loránd Eötvös Research Network Secretariat was established and the 15 research centers of the Hungarian Academy of Sciences were separated from the Academia and integrated into this new institution. The main decision-making body of the Loránd Eötvös Research Network Secretariat is the Managing Body headed by a president, who is appointed by the Prime Minister. The Prime Minister appoints all members of the Managing Body. The new law obliges the Academy to provide the infrastructure (placement and necessary appliances) for the new institution without compensation, which was subject to a constitutional complaint submitted by the president of the Hungarian Academy of Sciences. According to the tempting summary of the employees of the research network: 'concerted attacks in the pro-government media accompanied the entire procedure.' A recurring line of attack, echoed by the Government, was the inefficiency of research centres to secure funds or produce innovation. The Academy attempted to question the connection between alleged inefficiencies and institutional settings and pointed out that Hungary, and the Academy especially, had been very successful in the region in securing third party (especially EU research) funding. The Government failed to provide any meaningful answer to this.

The forced reorganisation of the newest sphere of autonomy, science outside universities that already fall under several restrictions, led to the initiation by one-fourth of the members of Parliament of the abstract review procedure of Act LXVII of 2019 on the amendment of certain acts to transform the structure and financing of the research, development and innovation system. The case is focused on the freedom and autonomy of science and the right to property, and the Constitutional Court will probably decide on it in 2020.

In sum, the number of cases that challenged standards of liberal constitutionalism in Hungary increased in 2019, and in many cases, the Constitutional Court was in a position to take a stance in the debates over constitutionalism but did not.

III. CONSTITUTIONAL CASES

1. 22/2019. (VII. 5.) CC decision: Introduction of administrative courts

The Hungarian court system has been unified since the democratic transition in 1989-90, after which the transition courts with general jurisdiction have also handled administrative law cases. The new constitution-making process in 2011 kept this system, but the Government has started to prepare for the introduction of administrative courts. They have referred to historical traditions and international good practices, but background political motivations have been assumed. The plans were revived after several politically sensitive decisions by the courts that negatively affected the Government (e.g., in electoral or access to information cases).

Act CXXX on the administrative courts was adopted on 12 December 2018. It was criticized both in Hungary (mainly by legal scholars and civil society organisations) and abroad, including by the Venice Commission, the Commissioner for Human Rights of the Council of Europe, the UN Special Rapporteur on the independence of judges and lawyers, and the European Union.

In February, one-quarter of the Members of Parliament initiated a case at the Constitutional Court for the annulment of the Act.

They contended, on the one hand, a violation of the rule of law because the preparatory rules entered into force only one month after the promulgation of the Act and the Parliament left only one year to establish the whole new administrative court system. On the other hand, the petitioners claimed the violation of the separation of powers and judicial impartiality and independence. According to their position, the strong administrative power of the Minister of Justice was unconstitutional: she decides who can be a judge, as she selects the winner from the applicants to a judicial position; she appoints court leaders; and she decides budgetary questions.

As mentioned before, due to international political pressure, in May 2019, the Government finally decided to suspend the introduction of the administrative court system. This did not hinder the Constitutional Court in rejecting the petition challenging the constitutionality of the Act on the administrative courts in July 2019, finding the regulation constitutional. The Court found that judicial independence did not include complete administrative independence of the court system. As long as the administrative activity of the Minister of Justice did not exercise a direct influence on the adjudicating activity, it did not violate the judicial independence and separation of powers. Justice Stumpf, in his concurring opinion, pointed out that there was no legitimate reason for the hurried procedure and that the Court should have carried out a more detailed process, further elaborating their answers to the constitutional questions.

In October 2019, the Minister of Justice announced that the Government had decided to abandon the idea of a separate administrative court system, and in December, the Constitution was amended accordingly. (However, at the same time, other provisions were introduced, mentioned in Part II, that restricted the judicial independence in another way.)

2. 15/2019. (IV. 17.) CC decision: Opposition parties blocking the vote in the Parliament

In recent years, the freedom of speech of members of Parliament from opposition parties in Hungary has decreased significantly. In some of these cases (e.g., *Karácsony and others v. Hungary*), the European Court of Human Rights held that there was a violation of the freedom of speech of the MPs. These unfavourable cases did not hinder the willingness of the Government majority to restrict further members of Parliament, which, together with the restricted access to the Government-influenced public media, led to more radical steps by the opposition parties. One of the most critical situations occurred in December 2018, when the Parliament was deciding on the amendments of the Labour Code. The so-called 'slavery act,' which generated huge protests in Budapest, allowed employers to ask their workers to take on up to 400 hours' overtime per year. The vote was on the same day as the vote on the harshly criticized act on administrative courts (see point 1).

To prevent the two-thirds majority from voting, the opposition parties physically blocked the Speaker's podium in the chamber and blew whistles for more than two hours. However, the temporary obstruction did not stop the Government majority from adopting the acts. The opposition parties challenged the acts on formal grounds before the Constitutional Court. They claimed that their adoption was unconstitutional because guarantees of the parliamentary procedure were not kept: the Speaker of the House and the acting chair did not preside over the sitting of the Parliament from the podium; none of the parliamentary notaries in service at the time of the voting were members of the opposition parties; and the voting system was conducted in a cardless mode of operation.

The Constitutional Court rejected the arguments. According to the Court, the challenged conduct, which was not formally lawful, was not considered obstruction. It pointed out that it was the petitioners who blocked the way to the podium, so they could not base the unconstitutionality of the legislative process on their irregular behavior. Nevertheless, the provisions of the Standing Orders did not prohibit chairing the sitting from a place other than the Speaker's chair, provided that it otherwise complied with the rules of procedure. The podium is used for practical purposes. Concerning the notaries, the applicable provisions of the law did not exclude the way they were appointed. Finally, the applicable rules of procedure did not require carrying out machine voting in the operating mode with cards, and it was the responsibility of the MPs not to push the button of equipment that belongs to another MP. Therefore, none of the procedural irregularities violated the Constitution.

In this decision, the Constitutional Court focused on the merits instead of the review of the legislative process that, in the view of the Court, did not have constitutional relevance.

3. 3/2019. (III. 7.) CC decision: Criminal code on the facilitating of illegal immigration

Illegal immigration has been part of Government communication in recent years. The 7th Amendment to the Fundamental Law also inserted the prohibition of illegal immigration into the constitutional text. As an executive act for this provision, the Government submitted a legislative package called 'Stop Soros'. One of its elements was the amendment of the Criminal Code by establishing a crime of 'facilitating illegal immigration'. The provision banned individuals and organizations from providing any kind of assistance to undocumented immigrants. However, the legislation was drafted in such a vague way that, in theory, the Government could arrest someone who provided food to an undocumented migrant on the street or attended a political rally in favor of their rights. (Another element of the package introduced a 25 percent tax on non-governmental organisations deemed to be supporting or positively portraying migration.)

The regulation was criticized in Hungary by civil society organisations providing legal and material help to immigrants, and received criticism from international organisations, including the Venice Commission and the Office for Democratic Institutions and Human Rights (ODIHR), with both expressing serious concerns regarding this piece of legislation for its incompatibility with the freedoms of expression and association.

The civil society organization Amnesty In-

ternational challenged the regulation in a constitutional complaint procedure, stating that the provisions violate the clarity of criminal norms and the freedom of expression.

The Constitutional Court rejected the petition, holding that the regulation was clear and there was no proof that the terms in the provision were not interpretable in a constitutional way. The freedom of expression was not violated, as the provision did not prevent the individuals and organisations from expressing their views on migration and did not restrict public debate. According to the decision, with the appropriate judicial interpretation, the criminal offence of facilitating illegal immigration would not be considered realized if the aim of the activity were limited to the mitigation of the sufferings of those in need and the humanitarian treatment of such persons. To reinforce this, the Constitutional Court set up a constitutional requirement that the new statutory definition shall not apply to the altruistic conducts that perform the obligation of helping the vulnerable and the poor.

The decision does not seem to have convinced the European Commission, as it initiated an infringement procedure against Hungary, and the procedure is pending. After having examined Hungary's replies to a reasoned opinion, the Commission found that Hungary did not sufficiently address the concerns raised, particularly incompatibility with the EU's asylum law.

4. 19/2019 (VI. 18.) CC decision: Criminalization of homelessness

According to a new provision of the Fundamental Law, which was incorporated into the text by the 7th Amendment (2018), 'using public space as a habitual dwelling shall be prohibited'. As a consequence, the Act on Misdemeanors declared habitual dwelling a petty offence. According to these rules, habitual dwelling does not lead to sanction if the concerned person stops this activity following a warning from the police or accepts the social services provided to homeless people. However, if the police warn a person for the third time within 90 days, a misdemeanor proceeding must be started. In such a case, the person has to be detained and a court hearing has to take place within three days. The court can use warning, community service or confinement as a sanction.

Several misdemeanor proceedings were initiated against homeless people shortly after the new regulation entered in force. Some judges suspended court hearings and initiated norm control before the Constitutional Court, claiming a violation of human dignity, the requirement of equal treatment and the principle of the rule of law. *Amicus curiae* letters were also filed by NGOs and former justices of the Constitutional Court.

In its controversial and heavily criticized decision, the Court did not find the challenged piece of legislation unconstitutional, but it expressed constitutional requirements related to the application of the law in the ruling. According to this statement, in the case of a habitual dwelling, sanctions can be imposed only if the homeless person had a verifiable possibility to access the social services provided to homeless people. Moreover, imposing the sanction has to be in accordance with the purpose of the regulation, namely, the involvement of homeless people into the system of supportive (social) services. On human dignity and freedom of autonomy considerations, the Court emphasized that the individual can exercise her rights as a member of the community. According to the Court, the new sanctions included in the Act on Misdemeanors do not sanction people based on their special living conditions, rather the absence of their willingness to cooperate. In the Court's consideration, the new regulation is applicable in the case of all individuals who do not cooperate with the state organs; therefore, it is not discriminatory.

5. 2/2019. (III. 5.) CC decision: Abstract interpretation of the Fundamental Law and the right to asylum

This decision is also related to the 7th Amendment to the Fundamental Law (2018), in three aspects. First, the Amendment supplemented the 'European Union clause' by stating that the exercise of competences by the institutions of the European Union shall comply with the fundamental rights and freedoms prescribed in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure. Second, it prescribed that the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the state. Third, it implemented a new condition for granting asylum: those persons shall not be entitled to asylum who arrived in the territory of Hungary through any country where they were not persecuted or directly threatened with persecution.

The Government requested the abstract interpretation of certain provisions of the Fundamental Law – especially that of the new provision related to asylum – in light of the 7th Amendment. The motive behind this was the dispute between the Government and the European Commission on the compliance of the new Hungarian regulation on asylum (including the 7th Amendment) with EU Law.

On the request of the Government, the Constitutional Court examined the foundation of the applicability of EU Law in Hungary. The Court expressed that even EU Law is not part of the system of the sources of law in Hungary; its applicability is based on Article E) of the Fundamental Law (the 'EU clause'). Therefore, in the course of application of EU Law in Hungary, the related (new) limits prescribed in the Fundamental Law shall be taken into consideration. The Court also expressed the requirement that the interpretation of the Fundamental Law shall not be derogated by an interpretation of another organ – a statement addressed implicitly to EU institutions. Regarding the new provision of the Fundamental Law on the right to asylum (not granting asylum to those who arrived in the territory of Hungary through a country where they were not persecuted), the Constitutional Court reached a controversial conclusion. Consequently, the right to asylum does not function as a fundamental subjective right as it stems from relevant international treaties rather than being subject to regulation by statutes of the Hungarian state.

IV. LOOKING AHEAD

Predicting future development is easy but difficult at the same time. There are several politically sensitive cases pending; the Court has been postponing most of them for years (e.g., cases mentioned in the 'Looking Ahead' part of our 2017 and 2018 reports). Even if the Court issues decisions in these cases, it will most likely choose less confrontational ways (e.g., rejecting the petition but declaring a constitutional requirement or constitutional omission). There is no upcoming vacancy on the Court, but presently, all of the sitting judges have been elected by the same governmental majority. The changes in its power mentioned in Part II can even accelerate the process that we observed in the last decade: the Constitutional Court, instead of being a guardian of the system of the separation of powers and protector of fundamental rights, increasingly becomes an insignificant arbitrator of conflict between state institutions.

V. FURTHER READING

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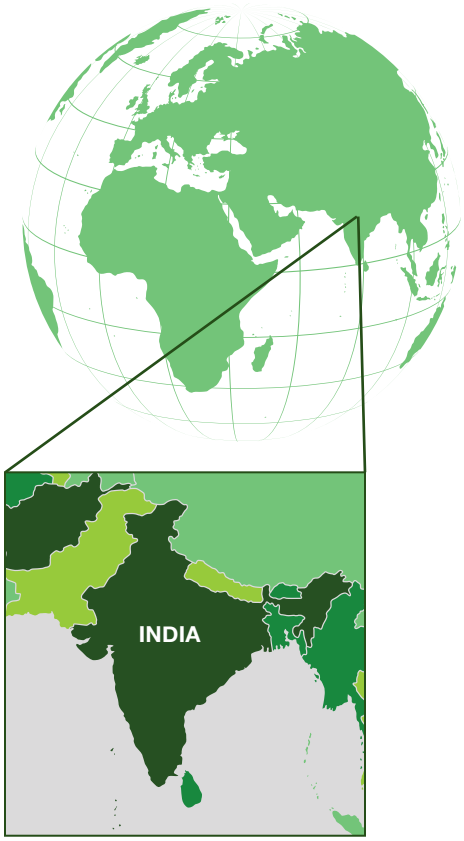

India

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I. INTRODUCTION

The Indian Constitution was amended for the 103rd time in 2019, a sign of the enduring and active political engagement around constitutional law and politics in India. However, 2019 was also significant for the immense constitutional changes that took place outside the written text of the Constitution. Attempts to bypass constitutional procedures resulted in a number of challenges, flooding the Indian Supreme Court's docket with tremendously important questions regarding democracy, accountability, and representation. Despite this, the Court's response was inconsistent, ruling rapidly on certain questions while dragging its feet on others. Following an emerging custom, Chief Justice Gogoi delivered a number of significant constitutional opinions in the weeks before his retirement in November, adding to the country's rich and sometimes confusing constitutional jurisprudence.

The control of the Supreme Court's docket rests almost entirely in the hands of its administrative head, the Chief Justice of India. Supreme Court judges do not have fixed terms, although they have a retirement age threshold, and the process of appointing a Chief Justice is neither transparent nor public. The resultant centralization of power in a single office that sees rapid turnover and no public scrutiny is part of why the Court's decision-making process continues to be inconsistent and opaque. This was acutely evident in 2019, when the Chief Justice heard and dismissed a sexual harassment complaint filed against himself by a Supreme Court staffer.[1] Concerns about the functioning of the Indian Supreme Court were coupled with massive public protests regarding constitutional changes to citizenship laws and the federal framework of India. A characteristic part of such protests was the public recitation of the Constitution's Preamble; 2019, consequently, was a year that saw challenges to the Constitution by the executive as well as affirmations of its significance by the public. This report briefly reviews significant constitutional developments and cases in India in 2019.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

India amended its Constitution in 2019 to extend affirmative action to economically disadvantaged persons. India has already instituted such affirmative action in government employment and for governmental educational institutions for historically disadvantaged castes and tribes, and the 103rd Constitutional Amendment allows a quota of 10% in government employment and educational institutes for 'economically weaker sections' of society.[2] Despite the significance of this change, the amendment bill was not circulated in public for comments as required by the Pre-Legislative Consultative Policy of this government,[3] and was introduced at the very last minute into the legislature's list of

[1] Niha Masih, 'A woman has accused India's top judge of sexual harassment, engulfing the Supreme Court in turmoil', *Washington Post* (2 May 2019) <https://www.washingtonpost.com/world/asia_pacific/a-woman-has-accused-indias-top-judge-of-sexual-harassment-engulfing-the-supreme-court-in-turmoil/2019/05/01/0ea2820e-6ab4-11e9-bbe7-1c798fb80536_story.html> (accessed 13 February 2020).

[2] The Constitution (103rd Amendment Act) 2019 [India] <http://egazette.nic.in/WriteReadData/2019/195175.pdf> (accessed 13 February 2020).

[3] Government of India, Ministry of Law and Justice, Legislative Department, 'Pre-Legislative Consultative Policy' (5 February 2014) <http://legislative.gov.in/documents/pre-legislative-consultation-policy> (accessed 13 February 2020).

business, violating its rules of procedure and catching many legislators by surprise.[4] The effective inability to oppose this legislation, by bucking parliamentary procedure, raisesd concerns about democratic accountability in India's Parliament. Pre-legislative consultation policies are not legally binding, but concerns about the manner of lawmaking have led to recent calls to amend legislative procedure to make them mandatory before bills are passed in Parliament.[5]

Concerns about democratic accountability were also raised when the Indian Government undertook a restructuring of India's federal structure by circumventing constitutional procedure. The highly-militarized state of Jammu and Kashmir in the north of India has been historically contested territory, with an ongoing record of border conflicts with Pakistan and China. Jammu and Kashmir's terms of accession to the Indian republic in 1947 guaranteed it semi-autonomy, an exceptional status under Article 370 of the Constitution. This allowed Jammu and Kashmir to have significantly more independence than other states in legislation and internal affairs,[6] suspended the application of some Constitutional provisions in the state, and allowed its citizens certain privileges that were not granted to non-permanent residents of Jammu and Kashmir.[7] Article 370(1)(d) of the Indian Constitution allowed the President to apply Constitutional provisions to Jammu and Kashmir by an order, passed in consultation with Jammu and Kashmir's constituent assembly. This constituent assembly was dissolved in 1956; consequently, in August 2019, the President of India, foregoing any consultation with the people of Kashmir, issued an order that applied all constitutional provisions to the state, effectively revoking its special status and allowing consultation with the state's legislative assembly and government instead.[8] This is despite the fact that the Supreme Court of India in 2017 held that the dissolution of the erstwhile Constituent Assembly did not deactivate the requirements of Article 370.[9] Moreover, the legislature and government of Jammu and Kashmir have been dissolved since 2018, with the state since being governed by a governor appointed by the federal government. As a consequence, the Government of India was able to divide the state of Jammu and Kashmir into two centrally-administered territories to be governed directly by the federal government, completely obviating all public consultation by consulting its own appointee instead.[10] Challenges to the reorganisation and removal of autonomy of Jammu and Kashmir were immediately filed at the Supreme Court of India and are currently being heard.[11]

Jammu and Kashmir has a high level of militarization and unrest, and in anticipation of protests against the removal of autonomy and reorganisation, the Government of India imposed a complete communications blockade in the state, preventing all phone and Internet communication and prohibiting public gatherings. It utilized, in part, a colonial-era legal provision to impose public restrictions.[12] A legal challenge to the indefinite blockade was filed in the Supreme Court, and while the Court refused to intervene directly pending the proceedings, it called upon the Government to make efforts to restore normalcy to Jammu and Kashmir as far as national security permitted.[13] The Supreme Court also heard challenges in 2019 to orders placing leaders of the political opposition under indefinite house arrest in Jammu and Kashmir. These leaders were detained under the Jammu and Kashmir Public Safety Act, 1978, which allows the Government to detain persons for up to two years without a trial.[14] A petition for *habeas corpus* concerning one such detained political leader was dismissed by the Supreme Court, which directed the petitioner to challenge the detention before a board constituted under the Public Safety Act instead.[15]

In addition to concerns about constitutional changes in the status of Jammu and Kashmir, India's citizenship laws have also been the subject of widespread public protest, following an amendment to the Citizenship Act, 1955.[16] This amendment allows the Indian Government to expedite citizenship

[4] Malavika Prasad, 'Parliament passes 10% quota for general category poor: Govt bulldozing amendment in both Houses undermines Constitution', *Firstpost* (10 January 2019) <https://www.firstpost.com/india/parliament-passes-10-quota-for-general-category-poor-govt-bulldozing-amendment-in-both-houses-is-betrayal-of-the-constitution-5867411.html> (accessed 13 February 2020).

[5] Arun PS and Sushmita Patel, 'Democratising Law-Making: The Tale of Pre-Legislative Consultative Policy', *Medianama* (15 August 2019) <https://www.medianama.com/2019/08/223-democratising-lawmaking-the-tale-of-pre-legislative-consultation-policy/> (accessed 13 February 2020).

[6] Constitution of India 1950, Art 370.

[7] Constitution of India 1950, Art 35A.

[8] Government of India, Ministry of Law and Justice, Legislative Department, 'The Constitution (Application to Jammu and Kashmir) Order 2019' (5 August 2019) <http://egazette.nic.in/WriteReadData/2019/210049.pdf> (accessed 13 February 2019).

[9] *State Bank of India v Santosh Gupta* (2017), 2 S.C.C. 538 paragraph 14, 15 (Supreme Court of India).

[10] Government of India, Ministry of Law and Justice, 'Jammu and Kashmir (Reorganisation) Act 2019' <http://egazette.nic.in/WriteReadData/2019/210407.pdf> (accessed 13 February 2020).

[11] Press Trust of India, 'Article 370: Question of referring issue to 7-judge bench to be considered at later stage, says Supreme Court', *Economic Times* <https://economictimes.indiatimes.com/news/politics-and-nation/article-370-question-of-referring-issue-to-7-judge-bench-to-be-considered-at-later-stage-says-supreme-court/articleshow/72494859.cms> (accessed 13 February 2020).

[12] Code of Criminal Procedure 1973, Section 144.

[13] Anuradha Bhasin v Union of India, W.P. (C), 1031 of 2019, Supreme Court of India, Order dated 16 September 2019 <https://main.sci.gov.in/supremecourt/2019/28817/28817_2019_1_304_16826_Order_16-Sep-2019.pdf> (accessed 13 February 2020).

[14] Jammu and Kashmir Public Safety Act 1978 <http://jkhome.nic.in/psa0001.pdf> (accessed 13 February 2020).

[15] Vaiko v Union of India, W.P. (Crl), 256 of 2019.

[16] The Citizenship (Amendment) Act, 2019 (12 December 2019, India) < http://egazette.nic.in/WriteReadData/2019/214646.pdf> (accessed 13 February 2019).

to undocumented migrants from six religious groups, notably excluding Muslims. The Preamble of the Indian Constitution affirms India's status as a 'secular' republic;[17] consequently, the introduction of a law that specifically discriminates on the basis of religion has been challenged with sixty petitions filed against it in the Supreme Court of India.[18] While some of these petitions have been filed by private individuals, they include a petition from the state of Kerala, which has invoked the Supreme Court's jurisdiction as an arbiter of federal disputes to argue that the Citizenship Amendment Act is unconstitutional and discriminatory.[19] These petitions are scheduled to be heard in 2020.[20] In addition to the changes to the Citizenship Act, the Indian Government has proposed the implementation of a National Register of Citizens (NRC), a database that is intended to constitute an official record of citizens of India, by re-examining the documentation of every citizen in the country.[21] A significant federal conflict has emerged as a result, with eleven state governments (representing 56% of the Indian population) refusing to implement the NRC, citing the potential disenfranchisement of undocumented minorities and groups disadvantaged for reasons of caste, gender, sexuality, and religion.[22] Legal opinions on whether the states can refuse to implement a federal law remain divided.[23]

The Indian Supreme Court in 2019 delivered a series of constitutionally significant judgments concerning freedom of information, religious rights, and political crises concerning the formation of state governments after elections.[24] However, the Court's rulings were all in the shadow of its response to a sexual harassment complaint against Chief Justice Ranjan Gogoi. The female staffer who raised the complaint was dismissed from service, after which the Chief Justice constituted and himself chaired a bench of three judges who considered and denied these allegations. The complainant was not present and was not heard during this process, and no judicial orders were passed; however, the Chief Justice publicly described the allegations as part of a conspiracy to destabilise the Court.[25] Following criticism of this process, the Chief Justice again constituted a bench of judges selected by himself, which directed an in-house committee to hear and reconsider the allegations against him and report them to his successor. The committee faced complaints regarding its procedure for hearing the challenge from the complainant and others; however, it eventually dismissed the allegations of sexual harassment as unfounded and refused to publish or disclose its findings.[26] After Chief Justice Gogoi's retirement, the complainant was reinstated to her position on the Supreme Court's staff with full back wages.[27] This incident, along with the summary dismissal of two court officials for tampering with a Supreme Court order in an ongoing case,[28] presented significant concerns regarding the Supreme Court's administrative functioning.

III. CONSTITUTIONAL CASES

1. M. Siddiq v Mahant Suresh Das and others[29] religious freedom, property

The Supreme Court brought to a close the decades-long conflict regarding the demolition of a 16th century mosque called the Babri Masjid in the city of Ayodhya by rioting members of Hindu groups in 1992. The mob that demolished the mosque claimed that it was built over a historic Hindu site, marking the birthplace of a deity. Under the Indian Constitution, religious groups have the right to manage, own, and administer their religious property;[30] consequently, this case presented a conflict of group religious rights as well as conflicting claims regarding the ownership and title of the contested site, further complicated by the fact that more than one Hindu religious organization raised claims to the property. Overruling a previous High Court order that held the property to be jointly owned by the parties to the suit, the

[17] Constitution of India 1950, Preamble and Article 14.

[18] Anindita Sanyal, 'Around 60 Petitions on Citizenship Law to Be Heard by Supreme Court Today', *NDTV* (18 December 2019) <https://www.ndtv.com/india-news/caa-citizenship-amendment-act-around-60-petitions-on-citizenship-law-to-be-heard-by-supreme-court-to-2150459> (accessed 13 February 2019).

[19] 'State of Kerala Files Suit in SC Against Union Govt Challenging Citizenship Amendment Act'. *LiveLaw* 13 January 2020 <https://www.livelaw.in/top-stories/breaking-state-of-kerala-files-suit-in-sc-against-union-govt-challenging-citizenship-amendment-act-151600 > (accessed 13 February 2020).

[20] *Indian Union of Muslim League and Others v Union of India,* W.P. (C), 1470 of 2019, Supreme Court of India, Order dated 18 December 2019 <https://main.sci.gov.in/supremecourt/2019/44931/44931_2019_1_38_19246_Order_18-Dec-2019.pdf> (accessed 13 February 2020).

[21] The Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules, 2003 <http://censusindia.gov.in/2011-Act&Rules/notifications/citizenship_rules2003.pdf> (accessed 13 February 2020).

[22] Samyak Pandey, '11 State Governments, Representing 56% of India, have now taken a no-NRC stance', *The Print* (24 December 2019) <https://theprint.in/india/11-state-govts-representing-56-of-india-have-now-taken-a-no-nrc-stance/340213/> (accessed 13 February 2020).

[23] Arpan Chaturvedi, 'Can States Refuse to Implement NPR and NRC?', *Bloomberg Quint* (31 December 2019) <https://www.bloombergquint.com/law-and-policy/can-states-refuse-to-implement-npr-and-nrc> (accessed 13 February 2020).

[24] See Part II below.

[25] Press Trust of India, 'Supreme Court holds special hearing on sexual harassment allegations of former SC employee against CJI', *Business Standard* (20 April 2019) <https://www.business-standard.com/article/pti-stories/sc-holds-special-hearing-on-sexual-harassment-allegations-of-former-sc-employee-against-cji-119042000215_1.html> (accessed 13 February 2020).

[26] Supreme Court of India, Notice dated 06.05.2019 <https://main.sci.gov.in/pdf/LU/notice_06052019.pdf> (accessed 13 February 2020).

[27] 'Supreme Court employee who complained against former CJI reinstated', *The Hindu* (23 January 2020) <https://www.thehindu.com/news/national/supreme-court-employee-who-complained-against-former-cji-reinstated/article30636638.ece> (accessed 13 February 2020).

[28] R. Balaji, 'Supreme Court sacks 2 of its own over change in order on Ambani', T*he Telegraph* (14 February 2019) <https://www.telegraphindia.com/india/supreme-court-sacks-2-of-its-own-over-change-in-order-on-ambani/cid/1684489> (accessed 13 February 2020).

[29] (2019) S.C.C. Online 1440 [Supreme Court of India].

[30] Constitution of India 1950, Art 26.

Supreme Court released a unanimous, but puzzling judgment regarding the property. Examining historical evidence, the Court found that neither Muslim nor Hindu groups could show title to the property, but that the decision could be made by examining possession.[31] Examining two different parts of the property, the Court found a 'preponderance of probabilities' suggested that Hindu groups had exclusive possession of one part of the property, while the Muslim groups failed to conclusively prove exclusive possession of another.[32] While the reason for applying two different standards of possession was not explained, the Court used this finding to grant the property as a whole to the Hindu groups, directing the federal government to constitute a trust to manage the property.[33] Although it also found that the demolition of the mosque was, in fact, illegal and a 'serious violation of the rule of law',[34] the Court did not direct any further action as a consequence of this finding, and instead directed the state government to grant the Muslim community an alternative plot of land to build a mosque, as it found that a 'wrong committed must be remedied'.[35] A number of petitions from both parties seeking a review of this judgment were subsequently dismissed.

2. Central Public Information Officer v Subhash Chandra Aggarwal:[36] right to information, accountability, judicial administration

A constitutional bench of five judges heard three appeals concerning the application of India's Right to Information Act, 2005 to the institution of the Supreme Court itself. The respondent, Mr. Aggarwal, had filed three applications to the Court's designated Public Information Officer (PIO) seeking details of correspondence from the Chief Justice concerning judicial appointments as well as information about the financial assets declared by Supreme Court judges. The PIO had rejected these applications on various grounds, arguing that the office of the Chief Justice was distinct from the Registry of the Supreme Court to claim that the information was unavailable to him. He also presented the claim that some of it was held by the Chief Justice in a fiduciary capacity and could not be disclosed. The respondent had preferred appeals to the Central Information Commission, arguing that the PIO had erred and that procedures under the Right to Information Act had not been followed. The appeals were allowed and were affirmed again by the Delhi High Court. The Supreme Court's PIO then appealed to the Supreme Court itself, which ruled in favour of the respondent. In a move towards greater transparency, the Supreme Court ruled that the PIO could not refuse to grant information available with the Chief Justice, as the office of the Chief Justice and the Registry of the Court were part of the same institution and could not be treated as separate entities.[37] Interpreting exceptions under the Right to Information Act, 2005, the Court emphasized the need to balance protections to individual privacy with the public interest in transparency, directing the PIO to disclose to the petitioner the details of assets declared by judges. These were found to not be held in a fiduciary capacity by the Chief Justice. The remaining two applications were redirected to the PIO, who was ordered to re-examine the availability of the information, issue notice to the appellant, and follow the procedures under the Right to Information Act, 2005.

3. Yashwant Sinha v. Central Bureau of Information:[38] right to information, accountability, freedom of the press

Petitions filed at the Supreme Court challenging an intergovernmental agreement with France to acquire fighter jets from Dassault were dismissed in 2018, with the Supreme Court finding no credence to allegations of corruption.[39] The petitioners filed for a review in 2019, claiming that the original judgment had been obtained by suppressing relevant material that the Court should have considered. The information that the petitioners were relying on were documents allegedly sourced from the Ministry of Defence and published in a national newspaper, *The Hindu*. The Government of India opposed this review, raising a preliminary objection that the Official Secrets Act, 1923 prohibited the disclosure of these documents, and that consequently they could not be relied upon by the petitioners. Although the review petitions were ultimately dismissed on merits in November,[40] the Supreme Court in a significant order had dismissed the preliminary objections regarding the disclosure of documents under the Official Secrets Act, 1923.[41] In this April order, the Court reiterated the constitutional protections and precedent concerning the freedom of the press, and found that the Official Secrets Act, 1923 did not absolutely prevent the publication or disclosure of information if it was in the public interest for the purpose of the Right to Information Act, 2005 or the laws concerning evidence produced in court. This was a significant step towards greater transparency, particularly with reference to government contracts.

[31] (2019) S.C.C. Online 1440 [Supreme Court of India], Paragraph 1027.

[32] (2019) S.C.C. Online 1440 [Supreme Court of India], paragraphs 1223.4, 1223.5, 1236.

[33] (2019) S.C.C. Online 1440 [Supreme Court of India], paragraph 1243.

[34] (2019) S.C.C. Online 1440 [Supreme Court of India], paragraph 1223.7.

[35] (2019) S.C.C. Online SC 1440 [Supreme Court of India], paragraph 1238.

[36] (2019) S.C.C. Online SC 1549 [Supreme Court of India].

[37] (2019) S.C.C. Online SC 1549 [Supreme Court of India] paragraph 14.

[38] (2019) 6 S.C.C. 1 [Supreme Court of India]; Judgment dated 14 November 2019 [Supreme Court of India] <https://main.sci.gov.in/supremecourt/2019/58/58_2019_1_1502_18275_Judgement_14-Nov-2019.pdf> (accessed 13 February 2020).

[39] *Manohar Lal Sharma v Narendra Damordas Modi* (2019), 3 S.C.C. 25 [Supreme Court of India].

[40] *Yashwant Sinha v Central Bureau of Investigation* (2019), S.C.C. Online SC 1460 [Supreme Court of India].

[41] *Yashwant Sinha v Central Bureau of Investigation* (2019), 6 S.C.C. 1 [Supreme Court of India].

4. Committee of Creditors of Essar Steel v Satish Kumar Gupta[42] and *Swiss Ribbons v. Union of India*:[43] insolvency, banking

The Supreme Court in two significant decisions ruled on the constitutionality of the newly-introduced Insolvency and Banking Code, 2016 (IBC), a statute that sought to resolve and update several conflicting financial regulations and laws. In *Swiss Ribbons v Union of India*, the Court upheld the constitutionality of the IBC, rejecting challenges to the Constitution of administrative authorities under the Code as well as claims that parts of the Code that classified creditors were 'manifestly arbitrary' and therefore violated the constitutional right to equality.[44] In doing so, the Court emphasized a high standard of judicial deference for economic legislation. Following this, in *Committee of Creditors of Essar Steel v Satish Kumar Gupta*, the Court heard challenges to a 2019 amendment to the IBC, which included a fixed time limit for the conclusion of insolvency proceedings. Despite its previous finding regarding judicial deference and the emphasis on making insolvency proceedings a time-bound process in *Swiss Ribbons*, the Court in *Essar Steel* invoked the doctrine of 'manifest arbitrariness' to reject this time limit, holding it to be discretionary instead of mandatory.[45] In these decisions, the Court also directed that administrative tribunals constituted under the IBC must maintain independence from governing ministries to avoid conflicts of interest in cases where the Government is a party to disputes, and provided specific orders regarding the sources of funding and administration of these tribunals.[46] While *Swiss Ribbons* and *Essar Steel* provide much clarity on the functioning of the IBC, the divergence on constitutional doctrine is an inevitable consequence of a poly-vocal Court that sits in multiple benches to rule on similar issues, often concurrently, and sometimes contradictorily.

5. Kantaru Rajeevaru v Indian Young Lawyers Association:[47] religious freedom, judicial review

In 2018, the Supreme Court resolved a dispute concerning access to the Sabarimala Temple, ruling that the rights of women to worship there took precedence over an exclusionary religious practice that linked menstruation to beliefs regarding impurity to prohibit women between the ages of 12 and 50 from entering the temple.[48] A review petition was filed against this judgment, along with some new petitions. The Court, by a majority of three to two judges, chose to hear the review petitions along with the new petitions, a puzzling approach that it first implemented in 2018 when hearing petitions and reviews against its judgment upholding criminal prohibitions against sexual intercourse for LGBTQ+ citizens.[49] This judgment appears to indicate that the Court did not consider itself to be bound by rules governing the hearing of review petitions, as the Court acknowledged that Order XL-VII in Part IV of the Supreme Court Rules, 2013 was not complied with in hearing these petitions. The resulting ambiguity in judicial procedure and the availability of reviews will, no doubt, have consequences for the finality attached to Supreme Court judgments, as indicated by two dissenting judges.[50] Substantively, the order did not overrule the previous judgment, but instead raised a number of related issues that *may* arise in future cases pending the Court, calling for them to be referred to a larger bench for consideration. The dissenting judges have pointed out that these questions anticipated by the Court are not presently being adjudicated, and therefore cannot be referred for decisions to a larger bench.[51] Regardless, the Court went on to refer these questions to a larger bench of nine judges, framing seven questions concerning the interpretation of constitutional protections to religious rights for individuals and groups.[52]

IV. LOOKING AHEAD

In 2020, the Supreme Court of India is expected to rule on a number of significant constitutional questions that were held over from 2019, including the legality of amendments to India's citizenship laws, which will allow the Government to discriminate on the grounds of religion, as well as the restructuring of the state of Jammu and Kashmir, which was done without public consultation. The validity of long-standing Internet prohibitions is pending before the Court, as well as petitioners concerning the detention of minors. The Court is also expected to hear a case challenging the Government's introduction of a scheme of electoral bonds, which reduce transparency in political funding. It has been pending before the Court since 2018 while the scheme continues to be implemented. The reference to a larger bench for a decision on principles of religious freedom under the Indian Constitution is also pending from 2019. A key concern will be whether the Court chooses to hear and ad-

[42] (2019) S.C.C. Online SC 1478 [Supreme Court of India].

[43] (2019) 4 S.C.C. 17 [Supreme Court of India].

[44] Constitution of India 1950, Art 14.

[45] See Dhruva Gandhi and Sahil Raveen, 'The Supreme Court's IBC Judgment and the Continuing Problems with "Manifest Arbitrariness"', *Indian Constitutional Law and Philosophy* (8 December 2019) < https://indconlawphil.wordpress.com/2019/12/08/guest-post-the-supreme-courts-ibc-judgment-and-the-continuing-problems-with-manifest-arbitrariness/> (accessed 13 February 2020).

[46] (2019) 4 S.C.C. 17 [Supreme Court of India], Paragraph 36.

[47] (2019) S.C.C. Online SC 1461 [Supreme Court of India].

[48] (2018) S.C.C. Online 1690.

[49] (2019) S.C.C. Online SC 1461 para 1.

[50] (2019) S.C.C. Online SC 1461, Para 14 (per Justice Nariman and Justice Chandrachud, dissenting).

[51] (2019) S.C.C. Online SC 1461, Para 11 (per Justice Nariman and Justice Chandrachud, dissenting).

[52] (2020) S.C.C. Online SC 158.

dress these concerns, or whether it will continue to hold one or several of these matters pending, effectively allowing Government action to remain unchecked.

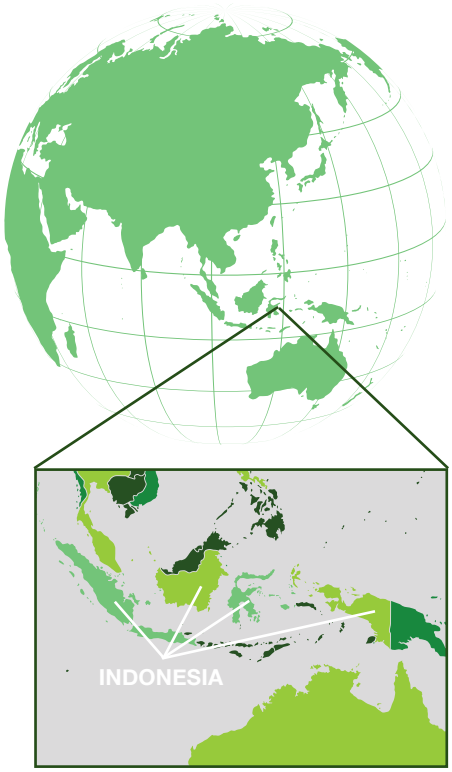
V. FURTHER READING

1. Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press, 2019)

2. Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (Harper Collins, 2019)

3. Rohit De, 'Between Midnight and Republic: Theory and Practice of India's Dominion Status' [2019], 17(4) *International Journal of Constitutional Law* 1213-1234, <https://doi.org/10.1093/icon/moz081>

4. Arvind Elangovan, *Norms and Politics: Sir Benegal Narsing Rau in the Making of the Indian Constitution 1935-50* (Oxford University Press, 2019)



Indonesia

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I. INTRODUCTION

This report offers an overview of the Indonesian Constitutional Court's case law in the term 2018/2019 (a term of the Constitutional Court begins in mid-August, and usually Court sessions continue until early August in the following year). The last term marked the full term under the leadership of Chief Justice Anwar Usman. Usman was sworn in as Chief Justice on April 2, 2018. The Chief Justice has a limited term of two and a half years, which means that Usman will be the Chief Justice until November 2020, and could be re-elected. He was appointed as an associate justice in 2011 and re-appointed in 2016, which means that his second five-year term will finish in April 2021. So if Usman gets re-elected as Chief Justice, he will never complete his second term because the term of his appointment does not match the term of his chief justiceship.

The last term also marked the departure of Associate Justice I Dewa Gede Palguna, who finished his second term in office on January 7, 2020. Justice Palguna was the last remaining justice from the first-generation Court. He was appointed in August 2003 and finished his first term in 2008. But President Joko Widodo re-appointed Palguna as an associate justice in January 2015. On January 7, 2020, President Jokowi appointed Daniel Yusmic, an academic from the medium-tier law school Atma Jaya Catholic University Jakarta, to succeed Justice Palguna. On the same day, Associate Justice Suhartoyo was re-appointed for his second term by the Supreme Court. The last term also marked the re-appointment of two associate justices by the House of Representatives (*Dewan Perwakilan Rakyat* – DPR), Aswanto, and Wahiduddin Adams.

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 six cases are examined, mostly centered on the judicial review of electoral laws.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Court's docket in the last term was filled with simultaneous general election disputes, especially presidential election disputes. On April 17, 2019, Indonesia held the first simultaneous election for the President and vice president, members of the Regional Representative Council (*Dewan Perwakilan Daerah* – DPD), members of the House of Representatives, and members of regional legislative bodies. It was reported that the Court received 334 cases on the general election dispute, which include 323 cases of a legislative election dispute, 10 cases of the dispute over the DPD election, and one presidential election dispute.

The highlight of the simultaneous general election disputes was the presidential election dispute, in which the losing presidential candidate, Prabowo Subianto, challenged the election result to the Court. On June 27, 2019, the Court rejected Subianto's petition to nullify the presidential election result. All nine justices rejected his petition in its entirety, and the Court reaffirmed the victory of incumbent President Joko "Jokowi" Widodo and his running mate, the chairman of the Indonesian Ulema Council (MUI), Maruf Amin, by 11% over the ticket of Prabowo Subianto and Sandiaga Uno.

The simultaneous general election, which took place on April 17, 2019, was the mandate of a Court decision in 2014.[1] But it turned out to be one of the most trying in Indonesia's history, with the death of more than 400 polling station workers. The Court immediately took heat as public anger was directed at the Court's decision. Most analysts and media blamed the Constitutional Court for holding the presidential and legislative elections simultaneously. As of the writing of this report, there have been two pending cases on the simultaneous general election. Several election monitoring groups are the petitioners in the first case,[2] and in the second case, an NGO called the League for Election and Democracy (*Perkumpulan Untuk Pemilu dan Demokrasi* - Perludem) has fielded a judicial review.[3] The petitioners have asked the Court to declare the simultaneous election unconstitutional. In other words, they want the Court to nullify its own decision, and they propose that the elections be held separately in 2024 as in past elections. Nobody knows how the Court will decide the case, but there has been a downward trend of support for the Court's decision, so there is a high probability it will nullify its own decision. As precedent, the Court nullified its rulings last term in *Pollster and Quick Count Results III* without any persuasive legal reasoning. The Court is not strictly bound to the principle *stare decisis* because Indonesia adheres to the civil law tradition; nonetheless, the it is still obliged to have a compelling reason to nullify its rulings.

But the main issue with the simultaneous general election was the logistical and technical issues surrounding it as opposed to its constitutionality. Before the general election on April 17, 2019, the chairman of the Election Commission opposed the use of electronic voting, reasoning that the nation was not ready for it. But he has recently become open to the idea at the 2020 simultaneous regional election.[4] Moreover, the then-Minister of Home Affairs, Tjahjyo Kumolo, also entertained the idea of having electronic voting.[5] Indeed, the work of polling station workers would have been made much more comfortable if Indonesia allowed electronic voting. Even without it, the Election Commission should have at least allowed polling station workers to use computers to file reports instead of having to file them manually.

The relocation of the capital was another crucial constitutional development last year. As one of his election pledges, President Jokowi announced a plan to relocate Indonesia's capital from Jakarta to a new place on the island of Kalimantan. Jokowi formally proposed the capital relocation in his speech in Parliament on August 16, 2019, to commemorate the 74th anniversary of Indonesia's independence. When he announced his plan, there was no formal legal basis for his decision. It was only after he delivered the speech that his administration began to prepare a bill. The Jokowi administration finished the bill in December 2019 and submitted it to the Parliament in January 2020. It was hoping that the Parliament would approve the bill by July 2020. While Jokowi has a compelling reason to relocate the capital due to chronic issues of flooding, traffic congestion, and pollution, as well as soaring property prices in the current capital, nobody seems to raise constitutional concern over the President's decision. First, there are several constitutional provisions related to the capital in the 1945 Constitution, and Jokowi and his team do not seem bothered by them. Second, Jakarta has been the capital of the republic since the struggle for independence, and arguably, it is part of the unwritten Constitution that Jakarta is the capital of the republic. Third, while the capital relocation bill is still in discussion, the administration has rolled out the plan to relocate the capital. In other words, the Jokowi administration is relocating the capital without any legal basis. It remains to be seen when the administration will formally pass a statute for relocation, and whether there is a possibility that the statute will be challenged to the Indonesian Constitutional Court.

Another constitutional development in Indonesia was the idea of a constitutional amendment. The ruling party PDI-P (Indonesian Democratic Party of Struggle) proposed a plan for a constitutional amendment. The PDI-P wanted to reinstate the People's Consultative Assembly (MPR) – which now acts as the joint session between the House of Representatives and Regional Representatives Council – as the highest governing body in the country. Under the New Order military regime's Constitution, the MPR was the highest governing body with the authority to elect the President, but its members were mostly picked up by General Soeharto when he was President. The PDI-P has denied that it has any intention of entrenching the status quo, but merely wants to restore the authority of the MPR to issue the defunct National State Planning Policy (*Garis – Garis Besar Haluan Negara* – GBHN), which was a centralized economic plan model under the New Order military regime. President Jokowi has indicated his opposition to reinstating the GBHN, and he also bluntly expressed his dismay at the amendment proposal because it might have a hidden agenda to restore the authority of the MPR to appoint the President. No timetable has been set for the constitutional amendment; nevertheless, the PDI-P and its coalition supporters have a clear majority in the People's Consultative Assembly, which means that they might not encounter any significant obstacle to passing the amendment. If the PDI-P and its coalition manage to roll back constitutional reform

[1] The Constitutional Court Decision No. 14/PUU-XI/2013 (hereinafter the *Simultaneous general election I* case).

[2] The Constitutional Court Decision No. 37/PUU-XVII/2019 (hereinafter the *Simultaneous general election II* case).

[3] The Constitutional Court Decision No. 55/PUU/ XVI/2019 (hereinafter the *Simultaneous general election III* case).

[4] "KPU Buka Peluang Penerapan E-Voting di Pilkada 2020 Serentak," (National Election Commission has opened the possibility to use electronic voting at the 2020 Simultaneous general election), Tribunnews.com, July 18, 2019, https://www.tribunnews.com/nasional/2019/07/08/kpu-buka-peluang-penerapan-e-voting-di-pilkada-2020-serentak

[5] "Indonesia Considers Electronic Voting After 550 Die of Exhaustion," Bloomberg.com, May 7, 2019, https://www.bloomberg.com/news/articles/2019-05-07/indonesia-mulls-electronic-voting-after-550-die-of-exhaustion

by passing the amendment, there will be a serious constitutional issue of whether the amendment itself is constitutional.

III. CONSTITUTIONAL CASES

1. The Voting Registration Transfer Case (Decision No. 19/PUU-XVII/2019)

This case involved the interpretation of Law no. 17 of 2017 on the general election, especially Article 210, which provides that if for some reason a voter may not be able to cast his vote at the polling station where he/she originally has registered, then the voter may transfer his voting registration to a different polling station at least 30 days before voting day. Moreover, the voter must show his electronic ID and proof he/she was registered in the original polling station. The claimants are a group of university students who argued that the 30-day requirement for voter registration transfer is inhumane, as the provision does not anticipate emergencies that prompt a voter to travel to a different region during the week or days before voting day. The claimants asked the Court to declare that the transfer of voter registration be allowed at least seven days before voting day.

The Court held that the procedure of voter registration is the domain of the Executive and Legislative branches. Thus, lawmakers have the authority to choose any system of voter registration. The Court further held that Indonesian elections are based on the state-initiated "passive" registration system, in which electors are automatically registered by national or local authorities. This system, if well administered, is more likely to ensure that all eligible voters are registered. Therefore, the transfer of voter registration is an exception, and the Court ruled that the lawmakers have provided sufficient time for voters to transfer their voting registration. The Court rejected the petition in its entirety.

2. The Vote Counting Time and Electronic ID Case (Decision No. 20/PUU-XVII/2019)

In this case, the petitioners challenged two provisions of Law Number 7 of 2017 on the general election: Article 383 (2), which states that vote counting must be conducted and completed on voting day; and Article 348 (9), which provides that the voters who are not registered may cast a vote by showing their electronic ID.

On account of the vote-counting time, the petitioners argued that the provision would potentially affect the validity of the general election as many polling stations would not be able to complete vote counting on voting day. The Court considered the consequence of holding a simultaneous election that would increase the volume of ballots, which eventually would require extra time to count them. It then held that the extension of the vote-counting time could only be done as long as the counting process was carried out continuously until no later than 12 (twelve) hours from the end of voting day at polling stations. The Court further held that the 12 extra hours of vote counting time was more than enough to resolve vote counting at polling stations.

Concerning the issue of electronic IDs, the petitioners argued that many citizens have no electronic ID, and therefore the provision would deprive them of their right to vote. The Court acknowledged that there had been an ongoing issue in the administration of national identity, especially concerning the computerized national register that contains necessary information about Indonesian citizens. Therefore, the Court acknowledged that not all voters have an electronic ID. Nevertheless, it reaffirmed the requirement to present an electronic ID as the minimum prerequisite for casting a vote at a polling station. The Court ruled that other types of IDs do not carry the same weight as electronic IDs, and so they could not be used as alternate IDs to cast a vote. Moreover, the use of non-electronic IDs had the potential to create fraud and manipulation.

The Court held that if a voter had not obtained an electronic ID by voting day, then he/she could use the certificate of registration of the electronic ID from the Bureau of Population Affairs, and such certificate could be used as a substitute for the electronic ID.

3. The Pollster and Quick Count Results III Case (Decision No. 24/PUU/XVII/2019)

This case was related to the prohibition of announcing the results of a pooling survey in the week before election day, which is known as the "cooling-off period" (*masa tenang*), and the announcement of quick count results before two hours after the closing of polling stations in the Western time zone of Indonesia. The Court already issued two previous decisions that invalidated the prohibition on the announcement of polling surveys during the cooling-off period, and stated that quick count results must not be announced at least two hours before the closing of polling stations in the Western time zone.[6] But lawmakers keep reinstating the prohibitions in new electoral laws, and the latest one was in Law No. 17 of 2017 on general elections.[7]

The claimants asked the Court to nullify the prohibitions and reaffirm its previous holdings. The Court addressed a question to itself on whether to reaffirm or nullify its previous holdings. It opined that its decisions must be understood in the context of the "living Constitution," which means that the Constitution must be interpreted in the light of evolving thoughts and opinions in society. The Court considered that the 2017 general election law was designed in the context of a simultaneous election, which was different from the previous two electoral laws. The Court further considered that the re-introduction of

[6] The Constitutional Court Decision No. 09/PUUVII/2009 (the *Pollster and Quick Count Results I* case) and the Constitutional Court Decision No. 24/PUU-XII/2014 (the *Pollster and Quick Count Results II* case).

[7] The Government initially included the provision in the Law No. 10/2008 on General Provision Law and later it re-enacted the provision in the Law No. 8 of 2012 on general election.

the prohibition for polling surveys and quick count results must be read under new circumstances, i.e., simultaneous election.

The Court held that the prohibition for the publication of polling results during the cooling-off period was related to the design of the electoral process in Indonesia, in which the cooling-off period was intended to restrict all campaign activities until election day. The Court explained that based on the empirical evidence, some pollsters were affiliated with political parties or presidential candidates. Therefore, if pollsters were allowed to announce their survey results during the cooling-off period, it would be contrary to the nature of the cooling-off period. In other words, the announcement of polling results during the cooling-off period was a manifestation of the campaign during the cooling-off period.

Concerning the prohibition to announce quick results in two hours after the closing of the polling stations, the Court held that such prohibition must not be read as an attempt to curtail the citizens' rights to obtain information. The Court held that the prohibition was intended only to delay the publication of quick count results for a more fundamental purpose – to protect electoral results. The Court explained that while the polling stations were closed in the Western time zone, people in the Central and Eastern time zones were still casting their votes. Therefore, the two hours' prohibition was intended to protect those voters from any outer influence in casting their votes. The Court opined that the immediate quick count results would potentially influence the voters to cast their vote based on "psychological motivation" to be with the winner. The Court rejected the claimants' petition in its entirety and nullified its holding.

4. The Supreme Court's Judicial Review Process Case (Decision No. 85/PUU/XVI/2018)

The background of this case is jurisdictional cohabitation between the Constitutional Court and the Supreme Court to conduct judicial review. The Constitution equipped the Constitutional Court to review the constitutionality of statutes, but the Supreme Court has the authority to review the constitutionality of any regulation below statutes in the hierarchy of norm, i.e., governmental regulation, presidential regulation, etc. The petitioners challenged the constitutionality of Law No. 3 of 2009 on the Supreme Court, which provided that the Supreme Court will conduct a judicial review within 14 days of the submission of a petition. The petitioners argued that the 14-day period was too short because it did not give sufficient time for petitioners to prepare arguments, and it also did not allow the government or lawmakers to present their arguments.

The Court held that it was in the authority of the lawmakers to assign a 14-day period for the Supreme Court to resolve the judicial review. If the petitioners expect the Supreme Court to conduct oral arguments by both parties and to present expert witnesses, then the Supreme Court will need extra time to conduct the judicial review. The Court opined that such a request should be addressed to the lawmakers instead of the Court. The Court held that it was the domain of lawmakers to change the law instead of the Court. The Court rejected the petition in its entirety.

5. The Pretrial Procedure II Case (Decision No. 66/PUU/XVI/2018)

This case involved the issue of pretrial proceeding under the Criminal Law procedure; the crux of the matter was the provision in the Criminal Procedure Law that stipulates that a judge must pass a judgment on a pretrial proceeding within a seven-day period (Article 82 § 1c). This case was related to the previous Court's decision on the pretrial proceeding in Decision No. 102/PUU-XIII/2015 (the *Pretrial Procedure I* case). In the *Pretrial Procedure I* case, the claimants challenged the constitutionality of Article 82 § 1d, which provided that in an event "a case has begun to be examined" in a district court, whereas the examination for pretrial review has not yet been completed, then the pretrial must be declared null and void. In the *Pretrial Procedure I* case, the Court held that the term "a case has begun to be examined" was unconstitutional and it must be interpreted that the pretrial was null and void when the first trial, which examines the merits of the case, started in the district court. In other words, the Court issued a new interpretation that the first trial, examining the merits of the case, will nullify the pretrial proceeding.

The claimants in the *Pretrial Procedure II* case argued that the seven-day period had posed a new problem for the interpretation of the Court's decision in the *Pretrial Procedure I* case. The claimants explained that there are many instances in which the prosecutor might ask the panel of judges to delay the pretrial proceeding for a certain period, and such strategy was intended to buy time until the first trial is started. Such delay would cause the pretrial proceeding to be declared null and void. The claimants asked the Court to declare that the district court must postpone the trial process until a judge renders a decision in the pretrial proceeding.

The Court opined that in an ideal world, there is no reason for a judge to delay a pretrial proceeding, and a district court judge should wait until the pretrial proceeding to be completed before starting the trial. But the Court considered that it is within the authority of the district court judges to delay the pretrial or when to start a trial. The Constitutional Court held that it was beyond its authority to address the subject matter because it involved a matter of implementation of law instead of the constitutionality of law. The Court rejected the claimants' petition entirely.

6. The Right to Obtain Recorded Information Case (Decision No. 94/PUU/XVI/2018)

The case involved an interpretation of Law No. 36 of 1999 on telecommunications. The law provides that "for the purposes of criminal prosecution, the telecommunications services operator may record the information transmitted and/or received by the telecommunication services operator and may provide the information," based upon a written request from the Attorney General, the Chief of National Police, and an investigator for certain criminal offenses. The claimant argued that the article did not respect the rights of criminal suspects or defendants when a piece of recorded information was obtained,

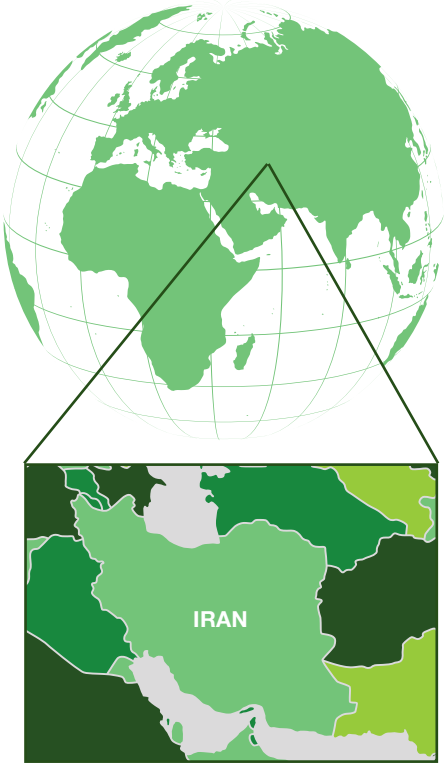
and therefore the provision was contrary to the principle of due process.

The Court held that the rights for the prosecutor and investigator to obtain a piece of recorded information must not be interpreted as a guarantee that the defendants will enjoy the same rights. The Court held that a defendant was not a law enforcer, and therefore had no burden of proof to show. Thus, the Court rejected the petition in its entirety.

IV. LOOKING AHEAD

When President Jokowi began his second term in office, his coalition held some 77 percent of the parliamentary seats. With a parliamentary majority, especially after his archrival Prabowo Subianto joined the coalition, President Jokowi has solidified his "uncontested presidency." As Jokowi has pushed many agendas to cement his legacy, the Constitutional Court hasn't shown any desire to play the critical role of balancing the power of the presidency. In past years, the Court has become non-intervening, and, under the chairmanship of Anwar Usman, it has retreated further from the interventionist approach of the first- and second-generation Courts.

Finally, at the end of April 2020, Associate Justice Manahan Sitompul will end his first five-year term. Justice Sitompul was appointed by the Supreme Court, and it remains to be seen whether the Supreme Court will re-appoint him for a second term or we will see a new constitutional court justice in spring 2020.



Iran

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I. INTRODUCTION

The year 2019 for Iranian jurisdiction, in a nutshell, was characterized by intense polarization, with a deterioration of recent critical developments within it. In 2019, the two fundamental characteristics of the Constitution, Islamic and Republican, representing Shia-Islamic thoughts and the democratic tendencies of the structure, got closer to breaking points.[1]

The most critical development was the regulation passed via the Supreme Council for Economic Coordination (SCEC), which is a partial legislation institution created by a religious head of state (Leader) decree in 2018. The regulations passed by the SCEC aggravated the weakening of the Islamic Consultative Assembly (ICA) in many ways. How these regulations were passed revealed a neglected democratic procedure laid out in the Constitution. They heated the arguments on the constitutionality of the SCEC on the one hand, and uncovered an established pattern of partial legislation on the other. This pattern shows the use of decree power in favor of partial legislation, which is gradually covering all legislation jurisdictions of the Parliament. The Parliament is also dismantling the authority of the people's representatives. This is in line with the authoritarianism of the Shia-Islamic thoughts of the Constitution.

The year also experienced new appointments among the members of the judicial review body, the Guardian Council (GC), which is the correspondent body for a constitutional court, though simultaneously has the most crucial role of being the electoral commission of the country.

For the first time in its history, the Leader announced the General Policies of the System of Legislation (GPSL), which frames an official and desirable Islamic Legislation Model of the current Shia school in power.

The latest developments in 2019 contained two long-awaited pieces of legislation that were eventually passed and one critical bill that was finally considered unconstitutional. The first law passed concerned the acquisition of Iranian nationality for children of Iranian women married to foreigners.[2] The second law passed featured new provisions for the first time. It introduced the death penalty as a punishment for acid spraying and also protects the victims of this crime. The bills considered unconstitutional were aimed at following the international recommendations of the Financial Action Task Force (FATF),[3] which is a global standard-setting body for Anti-Money Laundering and Combating the Financing of Terrorism. Since the bills are now unconstitutional, the FATF will put Iran under a high risk of being ranked on an international blacklist for investments.

[1] Iran (Islamic Republic of) 1979 (rev. 1989) < https://www.constituteproject.org/constitution/Iran_1989?lang=en> accessed 31 January 2019.

[2] The Law amending the Law on Citizenship of Children of Marriage of Iranian Women <http://rc.majlis.ir/fa/law/show/1322878> accessed 17 October 2019.

[3] It is an intergovernmental body established in 1989 by the Ministers of its member jurisdictions <https://www.fatf-gafi.org/> accessed 30 December 2019.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The emergence of the SCEC, along with its regulations on gas price, is the most critical development of the year 2019. This partial legislative institution was established in 2018; however, it had no significant regulations passed so far. In an unprecedented overnight announcement on November 15, 2019, the Government raised the gas price by 300% via unknown regulations passed by the SCEC. These regulations triggered a week of mobilizations and chaos in more than 100 Iranian cities.

For the past 41 years, gas prices in Iran have increased annually via the Parliament. Previously, the ICA passed all the regulations with a transparent due process. In those years, final acts were processed through a constitutional standard of legislation, openly deliberated and recorded. The deliberations were publicly accessed by radio and published in the Official Gazette (Articles 69 & 97). Additionally, there was previously a mandatory waiting period of 15 days from the time a nationwide law was published to when it could be enforced.

The SCEC's structure has been unclear, and it seems only to be involved with the nation's economic issues that revolve around the Joint Comprehensive Plan of Action.[4] The SCEC's structure, expiration, members, and powers are neither listed nor provided for in the Constitution, and the primary evidentiary acknowledgement is the Leader's reference to a group of officials presented in a public speech. Three other institutions similar to the SCEC have been established since 1979: the Supreme Cultural Revolution Council (SCRC) in 1984 and the Supreme Council of Cyberspace (SCC) in 2012, both established by the Leader's decree; and the Supreme Council for National Security (SCNC) created in 1989 via the 1989 amendment (Article 176). Unlike the SCRC and SCC, that only make their decisions public occasionally, the records, minutes, deliberation, discussions, and enactments of the SCNC are neither accessible nor public and have never expired. These legislative bodies have less than 20 members combined, all appointed by the Leader; three fixed members are the incumbent heads of the branches of power, and the speaker is always the head of the Government.

Although on one side, the Constitution does not acknowledge adopting decree-laws by the Leader, the two experienced Leaders tried altering the structure of the Parliament provided in Article 71. It states that the ICA can establish laws on all matters, within the limits of its competence, laid down in the Constitution. On the other side, the Constitution draws a disproportionate separation of powers, combined with a transcendental office, i.e., the powers of Government are vested in the three traditional branches, the legislature, the judiciary, and the executive. However, they are functioning under the supervision of the religious head of state, the Leader (Article 57). This distribution of power fully recognizes the absolute supremacy of the Leader, and consequently, any regulations passed through bodies like the SCEC are empirically considered above the enactments of the Parliament, since the GC declares the parliamentary enactments unconstitutional. In such cases, the GC interprets the jurisdiction of the Parliament limited to no conflicts with the administration of the Leader's decree. Therefore if a legislative act conflicted with the regulations of the SCEC and similar institutions, actions of the Parliament would be neither constitutional nor incompatible with Islam.[5]

Another development of the year 2019 was the announcement of the General Policies of the System of Legislation (GPSL) in September.[6] The office of the Leader, referring to paragraph 1 of Article 110, set a framework for the legislature and its actions after his consultation with the Nation's Exigency Council (NEC). All 17 paragraphs of the GPSL provided trans-branch frameworks for the legislative acts of the ICA, which limits its legislation jurisdiction and power. The Leader also decreed, "Policies should be communicated to the three powers, and they are required to schedule actions and report progress."

Primarily, the GPSL follows the supervision of the Leader on the three branches of power of Articles 57 and 110. However, in a closer look concerning the number of partial legislative institutions established and all the other decrees issued from the office of the Leader, which are suppressing the three branches of power, the conclusion of authoritarianism is inevitable. Moreover, in contrast to the philosophy of separation of powers, the supra-constitutional power that is experimentally emerging from the Shia-Islamic feature of the structure of the Constitution tends to be more unlimited.

This GPSL requires the ICA to evaluate and refine the existing laws in case of incongruity with religious criteria and with the Constitution, and to create the necessary mechanism for guaranteeing the application of absolute and general Islamic criteria to all laws and regulations. The judges in this matter are only half of the GC members, the appointed fuqaha (clergy scholars) via the Leader.

The GPSL sets the office of the Leader at the forefront of any legislation. Its invisible infrastructure targets classifying laws; resolving conflicts; harmonizing laws in line with Islamic criteria; formulating hierarchies, including general policies, statutes, regulations, bylaws, and guidelines; and setting a timeframe for law enforcement. It is expected that the heads of the three branches of power will report the progress of the laws, both macro and micro, to the head of state.

GPSL will now limit the scope of ICA performance and efficiency more than ever. The

[4] Kelsey Davenport, JCPOA at a Glance < https://www.armscontrol.org/factsheets/JCPOA-at-a-glance > accessed 25 November 2019.

[5] Multiple Legislative Authorities in the Islamic Republic of Iran < http://www.shora-rc.ir/Portal/file/?10949/GP920612-031.pdf > accessed 3 May 2019.

[6] <http://english.khamenei.ir/news/7071/Supreme-Leader-announces-General-Policies-of-the-System-of-Legislation> accessed 25 November 2019.

closing paragraphs of the GPSL determine the priorities of legislation by giving prominence to the unexecuted articles of the Constitution, strategic plans, the general policies of the Islamic Republic, the five-year Plan of Development, and the Leader's demands. In the last paragraph, the three branches of power are obliged to promote and institutionalize the culture of observing, obeying, and respecting the law and turning it into a public demand.

Altogether, the pattern of reproduction of partial legislative bodies and the GPSL are complementing phenomenon. Such a phenomenon might be seen as totalitarianism through a religious ideologic constitution. While it started gradually from the 1989 constitutional amendment, it is now moving faster towards possible founding moments.

III. CONSTITUTIONAL CASES

The structure of judicial review in Iranian jurisdiction is *a priori* monitoring; i.e., the Parliament cannot enact laws contrary to the principles of the Shia school of Islam or the Constitution. The GC, somewhat similar to a constitutional court, determines first whether acts of the Parliament are compatible with Islam; if a positive assessment, it reviews the constitutionality of the acts.

In comparison to the structure of a constitutional court, the GC does not follow any judicial procedure. Any acts passed by the ICA and with GC approval can be void only with a similar legislation process rather than a complaint to a constitutional court. Unlike a constitutional court, the GC is not a court that can nullify a law with a complaint, and it cannot order the modification of the law. Moreover, however rare, if the GC interprets that any law is against Islam or the Leader's decree, or even his taught thoughts, it declares that law void. The case of Sepanta Niknam, who is the first Zoroastrian to have served as a councilor in the city of Yazd, is an example of such an interpretation.

Furthermore, there is no direct individual access to the scrutiny of the GC. However, there is a similar constitutional body to the constitutional court, called the Court of Administrative Justice (CAJ), created under the supervision of the head of the judiciary. The CAJ can only investigate complaints concerning Government officials, organs, and their issued directives. It has no jurisdiction over laws.

In a strict sense, constitutional controversies in Iran are limited to the cases raised by the Parliament to the GC, and some additional matters under the jurisdiction of the GC. Among these, one could mention the supervisory responsibility for the elections of the Assembly of Experts for Leadership, the President of the Republic, the MPs, and the direct recourse to popular opinion and referenda.

1. Women's Rights, Motorcycle License

The CAJ delivered a crucial ruling in May, following a lawsuit brought before it by a female citizen. She filed a case to force traffic police to issue a motorcycle license to her, as all men and women should be equal before the laws. She complained that traffic police had refused to issue her one.[7] In the ruling, the CAJ mentioned driving for women has not been banned in any of the laws. The ruling was widely interpreted as a decision in favor of all women having the right to apply for a motorcycle license. However, the traffic police considered it a single decision in favor of the plaintiff and not extendable to the broader public. The police also appealed the ruling, confirming to enforce any final decision.

2. Significant Vacancies in Constitutional Bodies and Revealed Patterns

Many gradual essential changes happened in the high offices of the Constitution between 2018 and 2019. These variations reveal a model of formal changes rather than substantive ones. They happened mostly in the offices whose members are appointed by the Leader, e.g., the head of the judiciary and the cleric scholars (Faqih)[8] of the GC.

The following uncovers a pattern and some features of the closed cycle: The cycle of shifts happens only among the loyal people of the Leader. The alterations have no empirical requirements on the profession, efficiency, or the people's consent, and the age of the appointee. Only when one passes away will a new member join the cycle. The Head of the Judiciary is appointed from among those who served in the GC. After finishing the term in two periods of 5 years, they return to the GC to continue their service. There are no limits to renewing both offices with another term of office.

Second, GC cleric scholars, called fuqaha in the Constitution, are subject to almost no changes until they pass away; their office renews countlessly. The only personal requirements for both offices is that they shall be a mujtahid, who is a Muslim scholar with specific requirements such as a strong knowledge of the Quran, Sunna, and Arabic as well as a deep understanding of legal theory. This knowledge may allow the scholar to be considered fully qualified to practice ijtihad, the independent or original interpretation of problems not precisely covered by sources.[9] Most mujtahids are men well versed in judiciary affairs who possess prudence and administrative abilities.

The third and fourth features of the pattern are the age limitation and model of respon-

[7] Golnaz Esfandiari, In Iran, Court Rules in Favor of Female Motorcyclist, and It Gets Motors Running <https://www.rferl.org/a/in-iran-court-rules-in-favor-of-female-motorcyclist-and-it-gets-motors-running/30093722.html> accessed 14 September 2019.

[8] A Muslim theologian versed in the religious law of Islam.

[9] Encyclopaedia Britannica, Noah Tesch, Ijtihād, Islamic Law < https://www.britannica.com/topic/ijtihad > accessed 27 December 2019.

sibility before the people; GC faqih members have no age limitation and hold no direct press conferences, reporting only to the Leader annually.

Fifth, the Constitution limits a term of office to five years for judiciary and six years for the GC; however, both have no limits on reappointment. The revealed model also shows the judiciary office gets a new face after two continuous terms while GC members renew their office with no limits.

Following are samples of the closed cycle of shifts that happens only among the loyal people of the Leader. The former chairman of the NEC, AKA Expediency Discernment Council, and a member of the GC (faqih), Saied Mahmoud Hashemi Shahroudi, a Twelver Shia cleric, passed away in December 2019. Ayatollah Sadeq Amoli Larijani replaced his offices both in the GC and NEC. Larijani replaced him once before when, in 2009, he was appointed head of the judiciary. Both Larijani and Shahroudi have long served in the GC, which Larijani still does. He was replaced as the Head of the Judiciary by his vice chairman.

On March 7, Ayatollah Ali Khamenei appointed Ebrahim Raisi as the head of judiciary power. Born in 1960, Raisi attended the seminary. He was the vice president of the judiciary with a long duration of service on the bench and became a prosecutor in the early 1980s. He was also a member of the Assembly of Experts, and simultaneously became the first vice chairman of its Management Committee. Raisi participated as a presidential candidate in the 2017 elections and gained 38% of the votes, but lost to incumbent Hassan Rouhani, who got 57%.

Another faqih member of the GC passed away in February, and a new member took his place. Ayatollah Mohammad Momen (1938-2019), a Faqih and a very influential member of the GC, was replaced by Alireza Arafi (1959), a Shia cleric, chairman of Al-Mustafa International University, Qom Friday prayer leader, and head of Iran's Seminaries.

In summer 2019, when the previous members' office ended, three new jurists started their mandate in the GC. They are specialized in different areas of law, elected by the ICA from among the Muslim jurists nominated by the new head of the judicial power.[10]

3. Passing on the Maternal Nationality, Guardian Council Approved Granting Maternal Nationality

After ten years of debates and struggles, the law allowing Iranian women married to foreigners to pass on nationality to their offspring was finally approved by the GC. The GC once refused the bill for not considering enough security measures. Initially, the ICA involved the Ministry of Information for checking security measures. After the GC rejected the act, the ICA modified it by adding the approval of the Islamic Revolution Guards Corps Intelligence Organization (IRGCIO) to check whether the naturalization would create any security issues.

The law will mostly affect Iranian women married to Afghans, granting their children social rights. Some three million Afghans live in Iran, many of them married to Iranian women.

The ICA set provisions that nationality will not be granted automatically. It depends in each case on the approval of the IRGCIO and the Ministry of Information. In this regard, people born in Iran with Iranian parents can apply for citizenship when they are eighteen years old. Before, only the children of Iranian fathers could obtain nationality.

4. Death Penalty for Acid Sprayer, Protection for the Victims

Following the rise of cases of acid spraying crimes, the ICA passed a law that introduces harsher punishments for those crimes and protects victims of them. The law introduces the death penalty in cases subject to the specific provisions of the Islamic Penal Code: the crime committed is corruption on earth and is punishable by execution. Such laws seek to deter criminal acts; they may also increase the statistics of annual death penalties.

5. The Case of Compliance with Financial Action Task Force (FATF)

Iran has an ongoing case before the Financial Action Task Force (FATF), the global standard-setting body for Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT).[11] The case was filed in June 2016, when the FATF welcomed Iran's political commitment to address its strategic AML/CFT deficiencies and to seek technical assistance in the implementation of the Action Plan. Further, Iran established a related cash declaration regime in 2017 and amended its Counter-Terrorist Financing Act in 2018; in 2019, Iran also adopted amendments to its Anti-Money Laundering Act.

However, though the bills to ratify the Palermo and Terrorist Financing Conventions have passed the ICA, they have not been approved constitutionally by the GC and are not yet in force. Iran's compliance with FATF rules is vital to attract investors, especially after the United States re-imposed sanctions on the country.

According to the constitutional provisions, when the GC considers a provision unconstitutional or against Islamic criteria, but the ICA upholds the same provision, the issue is to be settled by the NEC.

The NEC was required to make a decision no earlier than three months and no later than one year from the transmission of the controversy. The term expired on October 1, 2019. If the NEC does not deliver any opinion by the required term, the GC decision is considered final, and bills are therefore struck down as unconstitutional.

[10] <https://www.shora-gc.ir/fa/members> accessed 27 August 2019.

[11] It is an intergovernmental body established in 1989 by the Ministers of its member jurisdictions <https://www.fatf-gafi.org/> accessed 30 December 2019.

Although FATF national supporters argue it could ease foreign trade with Europe and Asia, opponents say that passing FATF legislation could hamper Iran's support for its allies, such as Lebanon's Hezbollah.

If Iran does not enact the Palermo and Terrorist Financing Conventions in line with the FATF standards before February 2020, the FATF will fully lift the suspension of countermeasures, and call on its members, and urge all jurisdictions, to apply effective countermeasures in line with recommendation 191.

6. Non-Compete Vacancies, Disqualified Candidates, and the Open Case of Critiques

There are two highlights concerning the 2020 elections: First, the current Speaker of the Parliament, Ali Larijani, who has held the office since 2008, declared he is not running in the parliamentary election. Second, there has been a large number of disqualified candidates among both the registered candidates and current MPs.[12]

Candidates running for parliamentary, presidential, and the Assembly of Experts elections have to be declared qualified by the GC to be officially announced, per Article 99. With the lack of electoral laws and non-existence of a clear framework for people registering for candidacy, the GC declares most registered candidates disqualified. Additionally, the GC provides no public minutes or details about the procedure of its determining someone as qualified or not. Among the 476 men and women who sought candidacy to the presidency in 2009, the GC only approved four of them as qualified. It interprets its duty of "approbation supervision" as giving jurisdiction over the legality of elections and the competences of candidates. Such interpretation gives this constitutional body the ability to influence elections in favor of the head of the state. He appoints six members of the GC directly, and the other six members indirectly. In related decisions, the GC did not approve the qualification of a large number of registrations for nomination and also rejected the eligibility of over 70 of the current MPs (290). Most of them shared a liberal democratic political view. However, corruption accusations were pending on some of them.

Additionally, in some electoral regions for the Assembly of Experts, such as Qom, among 57 registrants for candidacy, 26 were declared disqualified while 21 received approval by the GC. However, after some candidates waived their electoral run, only two candidates were effectively on the ballot.[13] In another region, Shiraz, among 37 registered candidates, only one was declared qualified.

Consequently, the parliamentary election was founded on a pre-harmonized stream of candidates representing opponents of the current Government, the President, and his supporter parties. Most organized candidates with the support of major active parties based their campaigns on the impeachment of the President regarding the unsuccessful Iran Nuclear Deal, economic failures, and general inefficiency. Following the polarization between the Islamic and Republican features of the Constitution, the President as a republican symbol is under conflict with harmonized MPs that are prefigured by the GC's authority to examine registrants' qualification for candidacy. The GC plays a role in favor of the Leader, who is a significant symbol of the Islamic of the Constitution.

Upcoming elections face the pressure of a social media campaign to boycott them, protesting against inefficiencies of the whole system of Government. This campaign might result in a meager turnout. If this is the case, however, constitutional fractures will re-open, raising the fundamental question regarding future developments between the alternatives of constitutional amendment or revolution.

IV. LOOKING AHEAD

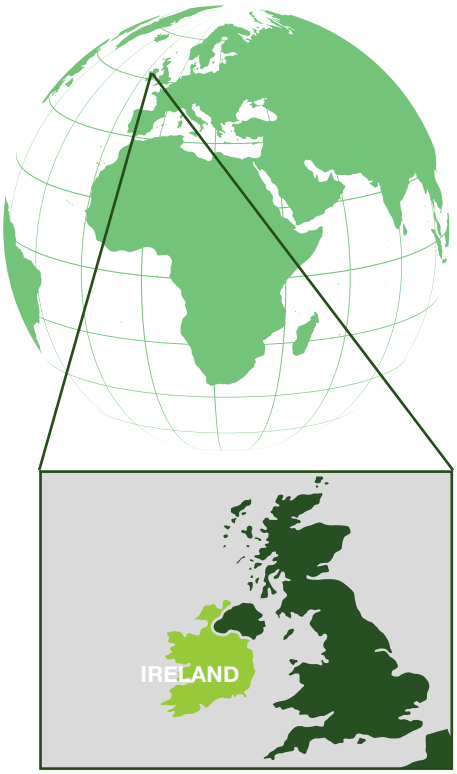
The year 2020 is heading toward breaking points. First, a parliamentary election risks a meager turnout. Second, a harmonized Parliament in favor of oppositions of the incumbent President that support the inefficiency of the Government. These developments should be read within the general picture of increasing deficiencies of the whole system of the state, raising more sequential demonstrations since 2017, demanding more rights, freedoms, and a democratic structure. A polarization is emerging between the theocratic (Islamic) and democratic (Republican) features of the Constitution. The hybrid character of the Constitution pushes political powers in opposite directions. On one hand, there is a desire for change in the direction of modern rights and freedoms, while on the other, there is conservative support for the Islamic theocratic heritage. This tension will likely lead to more conflict in the future, and possibly new founding moments.

V. FURTHER READING

Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (Harvard, 2019)

Richard Albert, Menaka Guruswamy, Nishchal Basnyat (eds), *Founding Moments in Constitutionalism* (Hart, 2019)

[12] The Electoral College Network, Iran, Islamic Republic of, Boundary Delimitation <http://aceproject.org/epic-en/CDCountry?country=IR> accessed 8 July 2019.
[13] < https://www.isna.ir/news/98110100879/> accessed 25 January 2019.



Ireland

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I. INTRODUCTION

After significant public controversy over constitutional questions in recent years, 2019 was a comparatively low-key year in domestic Irish constitutional law and politics. While there were several developments of potential long-term consequence – such as the much-trailed establishment of a Judicial Council – these generally did not attract a great deal of public attention. This was exemplified by the relative lack of comment (when compared with other recent referenda in recent years on Catholic-animated provisions of the text like marriage equality and abortion) for the constitutional referendum held in 2019 to amend Ireland's constitutional provisions on divorce. The measure passed comfortably with minimal controversy. This low-key approach was also evident in the Supreme Court's decisions this year.

While the Court dealt with a number of academically interesting and potentially contentious cases, these were generally resolved by reference to their specific facts as the Court largely eschewed any emphatic pronouncements on high-level principle. The long-awaited Kerins and O'Brien case, for example, provided useful guidance on the scope, extent and justiciability of parliamentary privilege at the level of broad principle – but held, at the same time, that those principles may be subject to a small but flexibly-defined exception where that is warranted by the countervailing constitutional commitment to defend and vindicate the rights of the individual.

Given the international attention devoted to recent experiments in Ireland, it is also worth noting that there was also further evidence of the Irish government's ongoing interest in civic deliberative fora with the announcement in June 2019 of a Citizens' Assembly on Gender Equality, to begin in early 2020. What these assemblies mean for constitutional politics and affected parties was also the subject of some discussion in the academic context with (anecdotal) evidence of a view amongst some domestic scholars that the picture is more complex than some prior accounts have allowed.

On the international level, a key issue of Irish concern was Brexit – although the precise implications for Ireland will not become clearer until 2020 and, perhaps, beyond.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most significant structural development in Irish constitutional law in 2019 was the enactment of the Judicial Council Act 2019. This establishes a Judicial Council in Ireland for the first time. The possibility of such a body was first discussed in the early 2000s when controversy involving a High and Supreme Court judge highlighted the absence under Irish law of a judicial code of conduct, or of any form of judicial sanction other than the removal of a judge from office.

Various proposals have been mooted since then, with the judiciary consistently calling for the introduction of some form of council in the last 10-15 years.

Discussions around a council acquired a political edge – and, from a judicial perspective, a more pressing urgency – in recent years as tensions emerged between the courts and the elected branches. This has been covered in previous reports but, in brief, the relationship between the branches were complicated post-2011 by the then-government's decision to

initiate a referendum permitting reductions in judicial salary. This took place despite the fact that the significant majority of judges had voluntarily foregone part of their pay in keeping with reductions applied to other civil servants; and fostered a sense amongst some observers that the government regarded the referendum as an exercise in performative 'radical' or 'anti-elite' action. Regardless of the truth of this, there was a clear sense on the part of many judges that the relationship was poor; that government commentary around this and other matters was detrimental to the courts; and that the judiciary was disadvantaged by the convention that they did not speak on such matters. This led to the establishment of an association of judges, and to continued calls for a Judicial Council.

These tensions more recently resurfaced when a reform of the judicial appointment system was proposed. In particular, regular attacks by an independent Minister in the government on the appointment system as (in his view) corrupt, coupled with a refusal by that Minister to allow vacancies to be filled over an extended period, again made judicial-political relations more difficult.

The Judicial Council Act 2019 formalises for the first time a number of relevant functions, including the provision for the continuing education of judges through the Judicial Studies Committee, the creation of a judicial code of conduct, and the introduction of mechanisms for dealing with complaints.

Reflecting current political and public debate around the perceived effects of judicial decision-making in the tort and criminal fields, the Council is also authorized to create guidelines for awards in personal injuries cases through the Personal Injuries Guidelines Committee and to develop Sentencing Guidelines through a Sentencing Guidelines Committee.

The functions of the Council are described in the legislation as including the promotion and maintenance of excellence in the exercise by judges of their judicial functions; high standards of conduct among judges, having regard to the principles of judicial conduct requiring judges to uphold and exemplify judicial independence, impartiality, integrity, propriety (including the appearance of propriety), competence and diligence and to ensure quality of treatment to all persons before the courts; the effective and efficient use of resources made available to judges for the purpose of the exercise of their functions; the continuing education of judges; and of ensuring respect for the independence of the judiciary as well as public confidence in the judiciary and the administration of justice.

The Judicial Council is also charged with establishing, maintaining and improving relations and communications with foreign judicial representative bodies and international bodies representing judges, and with assisting the provision of support to judges generally.

Several of these functions are committed to specific statutory committees.

For example, a Judicial Studies Committee is charged with facilitating the continuing training and education of judges with regard to their functions. A Personal Injuries Guidelines Committee is required to draft personal injuries guidelines, and also to draft amendments to those guidelines. The Sentencing Guidelines and Information Committee is required to prepare and submit to the Board draft sentencing guidelines. These guidelines may relate to sentencing generally or to sentences in respect of a particular offence, a particular category of offence or a particular category of offender, and may specify a range of sentences that it is appropriate for a court to consider before imposing sentence on an offender. In imposing a sentence, a court will be required by law to have regard to sentencing guidelines unless it is satisfied that to do so would be contrary to the interests of justice. If this is the case, the reasons must be stated by the court in its decision. This reflects an effort to balance the independence of the sentencing function of a trial court with the perceived need for consistency in criminal sentencing.

One of the most significant innovations is the establishment of a complaint and sanctioning mechanism for the judiciary. The Judicial Conduct Committee is given the task of considering complaints against individual judges. It is open to the Committee to seek to have the complaints resolved by informal means or to have them made subject to a more formal investigation. The Committee is mandated to take such action as it considers necessary for the purposes of safeguarding the administration of justice.

Where an investigation is required, complaints are referred to a panel of inquiry, which is to be appointed by the Judicial Conduct Committee. Upon completion of its investigation, the panel of inquiry must prepare and submit to the Judicial Conduct Committee a report in writing of the investigation, including the findings of the panel of inquiry in relation to the complaint, and the panel of inquiry's recommendations for reprimanding the judge concerned and any recommendations the panel of inquiry considers necessary for the purposes of safeguarding the administration of justice.

The Judicial Conduct Committee, after considering the report of the panel of inquiry and any submissions made by the complainant or the judge concerned, is then to make a determination of the complaint, including whether or not it has been substantiated, and where its determination requires the judge concerned to take any action, the Committee may require that judge to report to the Committee regarding his or her compliance with that requirement.

In terms of other developments, a constitutional amendment to facilitate the introduction of a more liberal divorce regime was passed by way of referendum in May 2019. Divorce had originally been prohibited by the 1937 Constitution. This was relaxed to some degree in 1995 when a referendum passed (by an extremely narrow majority) to allow divorce, subject to certain conditions. One of these was that the parties had been separated for at least 4 of the preceding 5 years. The referendum was held primarily to remove these restrictions and to allow the Oireachtas to legislate on the issue in the future. The amendment also allowed the Oireachtas to recognise foreign divorces. The referendum passed comfortably, with 82% voting in favour on a national turnout of just over 50%. As a liberalising measure on an area of social

policy, the referendum is broadly in keeping with the trend of recent Irish referenda on social issues, such as those on abortion or marriage equality. However, the referendum notably attracted much less public or media attention than those votes, probably reflecting expectations that it would pass easily.

Referenda were also originally proposed on the constitutional provision that 'mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'; and on permitting non-residents to vote in presidential elections. These had both been amongst the recommendations of the Convention on the Constitution in 2015. Despite this, however, the first proposal was sent back for further deliberation to the proposed Citizen Assembly on Gender Equality.

III. CONSTITUTIONAL CASES

1. P. v Judges of the Circuit Court: Remedies for breach of constitutional rights – Retrospectively

The proceedings related to the prosecution of a teacher for alleged sexual offences committed against a boy in the school at which he taught. It was alleged that he invited the complainant to his house on a number of occasions, gave him alcohol, showed him pornography and engaged in various sexual acts, including buggery and oral sex.

The legal issues arose in this instance because the offences were alleged to have occurred between 1978 and 1980 when the boy was between 15 and 17 years of age. The relevant offence at the time of the alleged incident was that of gross indecency. However, the prosecution of the accused of the same offence in 2019 raised a number of potential issues (aside from those of delay, which typically arise in a prosecution for offences of a historical character).

First, the offence had been abolished in the early 1990s. Secondly, and more fundamentally, the reason for the abolition was that the offence was one of universal application which had been introduced and applied in the 1880s to criminalise all forms of male homosexual conduct. This reflected not only a general liberalisation of social attitudes to homosexuality but also a specific legal and constitutional view that the offence represented a suspect interference with the constitutional rights of adult homosexual males. The argument made by the accused in this case, therefore, was that – notwithstanding that the offence had existed and applied at the time of the incidents – a prosecution for the offence in 2019 was unconstitutional.

The position was further complicated by the fact that the Irish Supreme Court had, by a 3-2 majority, upheld the constitutionality of the offence in the *Norris v AG* decision in 1983.

Yet, Irish law has also traditionally applied a doctrine under which unconstitutional acts are deemed to be void *ab initio*, i.e., as of the date of their enactment. It's curious how this could apply when an earlier Supreme Court finding the same act to be constitutional had never previously been considered.

This meant that the Supreme Court was faced with an unusual (and conceptually challenging) scenario in which a person disputed the constitutionality of his prosecution for an offence which was generally agreed would have been unconstitutional if still on the statute books – but which was not only lawful at the time of the alleged incidents but was subsequently found to be constitutional by the Supreme Court.

The Supreme Court judges approached the issue in several different ways.

O'Donnell J (delivering the decision of the 3-2 majority) held that the accused was precluded by the doctrine of *jus tertii* from challenging the prosecution on the basis of a general argument that an offence which applied to consenting adult partners was unconstitutional. In this instance, the claim was that prosecuting the accused's allegedly consensual relationship with a 16-year-old was unconstitutional. This, in his view, was not contrary to the Constitution, where that conduct was at all times – and still remained – contrary to the criminal law.

The minority held that it would be unconstitutional to allow the prosecution to continue. O'Malley J's view (with which Clarke CJ agreed) was that the offence of gross indecency as originally provided for was plainly unconstitutional when judged against contemporary constitutional values. Thus, any prosecution could only proceed in a constitutional manner if it was possible to read in a qualifying criterion – such as an age of consent – which would allow a distinction to be drawn between constitutional and unconstitutional prosecutions. In her view, this could not be done for the two reasons that it would stray beyond the judicial function and because it would be retrospectively suspect in any event to seek to apply an age of consent using today's standards when there had been variation in the attitudes to an age of consent over time.

Strikingly, however, all of the judgments delivered expressed a degree of disquiet over the void *ab initio* doctrine. This doctrine has given rise to periodic issues in recent years (see, for example, *A. v Governor of Arbor Hill*) but has largely remained intact as an accepted constitutional principle. This decision strongly suggests that this is unlikely to continue to be the case, and that the Supreme Court is moving towards a remedial approach which reflects the notion of the 'living constitution'.

2. Kerins v McGuinness [2019] IESC 11; and *O'Brien v RTE* [2019] IESC 12: Parliamentary privilege – Justiciability

These linked cases were heard sequentially by the Irish Supreme Court as, despite certain factual differences and variations in the claims made, they both centred on the question of the extent to which the courts can or should review the conduct of internal parliamentary procedures.

This had previously been considered in cases ranging from the treatment of parliamentary questions (held to be generally not reviewable in *O'Malley v Ceann Comhairle*) to the conduct of parliamentary inquiries into alleged wrongdoing by third parties (held in M*aguire v Ardagh* [2002] 1 I.R. 385 to be outside the Oireachtas's inherent constitutional powers).

Kerins v McGuinness involved a challenge by a non-parliamentarian to her treatment by the Oireachtas Public Accounts Committee (PAC). The applicant had been the subject of media commentary over her remuneration and expenses as CEO of a part-publicly funded charity. The applicant attended as requested but later challenged her treatment as unfair and unlawful.

In *O'Brien v. Clerk of Dáil Eireann*, the plaintiff was named under privilege by a TD (member of the Dáil) as the person who had obtained an injunction preventing his being identified in a scheduled television broadcast about the handling of loans by the state vehicle established during the 2008-2010 economic crisis to take over the bad debts of various Irish banks. Mr. O'Brien's complaint to the relevant parliamentary committee was dismissed. He sought to review this.

The proceedings raised the same fundamental preliminary question: was there, as the Court characterised it in Kerins, an 'absolute barrier' to judicial review?

Relevant to this were several articles of the Irish Constitution. These, in brief, privilege freedom of debate and private papers of members (15.10); reports, publications and 'utterances made in either House' (15.12); and prohibit members from being arrested or made 'amenable to any court' … 'in respect of any utterance in either House'.

In Kerins, the Court considered 'the sometimes difficult line between rights of the citizen and the privileges and immunities of the Oireachtas'. It began by observing that the courts had reviewed the legality of actions of the Houses or of their committees in previous cases. The question, therefore, was not whether there was an absolute barrier in all cases – but the more difficult one of where, if any, the limits to review lie.

In addressing this, the Court ultimately favoured a contextual – some might say pragmatic – approach. On the one hand, the articles indicate that 'there must be a significant area of privilege and immunity'. On the other, citizens are entitled to have their rights vindicated in their engagement with the Oireachtas. Key to the Court's decision was its assertion that the primary responsibility for vindicating the rights of citizens engaging with these aspects of the legislature's function was the Oireachtas itself. The significance of this was that it allowed the Court to approach the question not as a zero-sum choice between constitutional rights and parliamentary privilege but as a more familiar assessment of the constitutional separation of powers.

A second finding, which followed on from this, was that the separation of powers principle gave rise to a second distinct immunity from those specified in Article 15. This suggests a broader potential for matters to be covered by parliamentary privilege. However, in its reliance on a principle which the courts have ample experience of policing, any immunity here is arguably more clearly subject to potential judicial scrutiny.

How might this second immunity operate? The Kerins Court noted that the courts will exercise 'prudence' when asked to review an area that is primarily the responsibility of the other branches. Whether or not to intervene will depend on the circumstances of a given case. Here, given the PAC had already been found by the parliamentary authorities to have acted far outside its remit, there would be no breach of the separation of powers in a judicial declaration that it had acted unlawfully.

Applying this approach in O'Brien, by contrast, the Court concluded that the conduct about which the plaintiff complained fell squarely within the privileges and immunities conferred by Article 15. While his challenge was to the decision of the authorities not to sanction the TD, Mr. O'Brien was, in effect, inviting a court to pronounce on the legality or appropriateness of utterances made in the House. For the Court to determine if the parliamentary authorities had acted lawfully could, indirectly, affect freedom of debate in the House and make a TD amenable to court for their utterances. This would infringe both the text of Article 15 and the broader separation of powers principle identified in Kerins.

While the decisions provide some clarity to the law in this area in Ireland, the contextual nature of the approach means there remains uncertainty about when parliamentary matters may be judicially reviewed. The decisions clarify that there is no absolute barrier to judicial review. On the other hand, the judgments repeatedly emphasise the reluctance of the courts to intervene in such matters. It seems clear that, by highlighting the obligation on the Oireachtas as an institution to respect and vindicate rights, the courts expect (or hope) that this will obviate the necessity for them to be asked to intervene. Nonetheless, it is also clear that the Court (p)reserves its residual entitlement to intervene where it identifies a particularly serious threat to constitutional rights or principle, in which, at least, the Irish Court seems to share the instinct of its UK counterpart.

IV. LOOKING AHEAD

January 2020 will see the start of the Citizens' Assembly on Gender Equality, the latest in Ireland's series of deliberative fora. As a topic with a lower profile in political discourse at present, it will be interesting to see to what extent the Assembly and its eventual recommendations attract public and political engagement.

A general election must be held in the first half of 2020. This will take place against the backdrop of successful economic performance but also evidence of widespread public dissatisfaction with certain social issues, most notably the provision of housing at a time when housing supply is limited and rents – in particular – have escalated exponentially in recent years.

Finally, the question of what will occur at the end of the Brexit transition phase is likely to occupy much attention in the second half of 2020 given the serious political and government concerns in Ireland over what arrangements will apply to Northern Ireland; and what these will mean for economic performance, intra-island relations, the everyday lives of people on both sides of the border and, ultimately, the constitutional future of both jurisdictions.

V. FURTHER READING

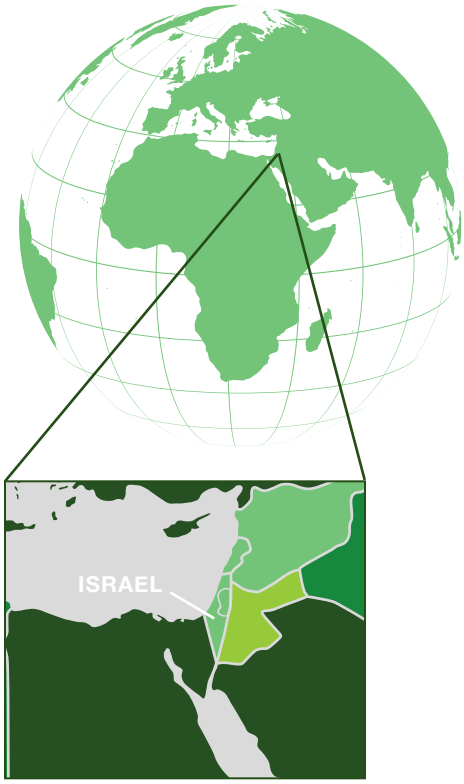
1. L. Black and P. Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform* (2019, Hart/Bloomsbury): A comprehensive collection of essays critiquing the intersection of law and gender in Ireland. Given the extent to which many of these issues were regulated at a constitutional level in Ireland, this contains a significant amount of material and discussion of the Constitution's text, caselaw and impact. The collection devotes a specific section to the symbolic and other effects of the Article 41. 2 provision on mothers, economic necessity and their "duties in the home".

2. T. Hickey, 'The republican core of the case for judicial review' (2019) *International Journal of Constitutional Law*, 17 (1): This article makes the case for judicial review based on the idea of freedom as non-domination. It is a democratic case for the institution, rooted in Philip Pettit's republican account of democracy as 'equally shared popular control'.

3. E. Daly, 'Translating popular sovereignty as unfettered constitutional amendability' (2019) *European Constitutional Law Review*, 15(4), 619-643: Looking in part to the Irish conception of referendums as 'sovereign' exercises, this articles presents an alternative account of sovereignty and constitutional (un)amendability.

4. M. Enright & A. O'Donoghue, 'The Northern/Irish feminist judgments project: experiments in feminist legal research', in L Cahillane & J Schweppe (eds), *Case Studies in Legal Research Methodologies: Reflections on Theory and Practice* (2019, Clarus Press): An overview of the project and methodologies of the Northern/Irish feminist judgments project, which covered many seminal cases in Irish constitutional law.

5. O. Doyle & T. Hickey, *Constitutional Law: Text, Cases and Materials* (Clarus Press, 2019): The second edition of this casebook of materials and commentary on Irish constitutional law.



Israel

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I. INTRODUCTION

The most important developments in constitutional law in 2019 were not to be found in the jurisprudence of the Israeli Supreme Court but rather in constitutional politics. The first was the political deadlock resulting in recurring general elections, and the second was the unprecedented criminal indictment of a sitting Prime Minister, Benjamin Netanyahu, who is being charged with bribery, fraud and breach of trust for various actions he took while in office. These two combined to generate a constitutional crisis in Israel.

In this report, we elaborate on these two constitutional developments as well as summarize the most important Supreme Court judgments of the previous year in the areas of emergency regulations, limitations on the right to be elected, non-discrimination in the private sphere and women's exclusion from the public sphere.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Israel faces an unprecedented constitutional crisis.[1] For over a year, it has been in the middle of a political and constitutional deadlock. On 2 March 2020, for the first time in Israel's history, the third parliamentary election in 12 months took place. This round of elections arrived after the previous two rounds (9 April 2019 and 17 September 2019) failed to successfully produce a sustainable government, as none of the leading candidates were able to form a coalition. Throughout this period, Benjamin Netanyahu has been and will remain a caretaker Prime Minister until the elections.

This political saga is even more complicated by the fact that again for the first time, a presiding Israeli Prime Minister has been indicted and is facing multiple criminal charges involving offenses directly related to his position. Notwithstanding the indictment, Prime Minister Netanyahu refused to resign and was running for reelection. He has also asked the Knesset to grant him parliamentary immunity, a request he later revoked.

These developments bring the Attorney General and Supreme Court to the center of the political crisis. The current situation raises many constitutional issues, and because this is a precedential scenario, it is unclear what Israeli constitutional law necessitates. Most importantly, different questions concern Netanyahu's ability (practically and legally) to serve as a Prime Minister under indictment (the Attorney General has already opined that Netanyahu can remain in office as caretaker Prime Minister until the elections). These questions are complicated against the backdrop of judicial impeachments of indicted ministers and mayors.

[1] See the thorough review of Elena Chachko, 'Netanyahu and the Anatomy of a Constitutional Crisis', *Lawfare* (January 17, 2020), https://www.lawfareblog.com/netanyahu-and-anatomy-constitutional-crisis

As Prof. Yoav Dotan elaborated in a recent academic article,[2] in the past three decades, the Israeli Supreme Court has ended the terms or prevented the appointment of ministers and other public officials based on 'good character' and 'public trust' principles. For example, in the *Eisenberg* case,[3] the Supreme Court held that Yossi Ginosar, a former senior member of the domestic security services who had been implicated in the cover-up and killing of two terrorists after their capture ("Bus 300 Affair" or "The Shin Beit Affair"), cannot be appointed as the general manager of Ministry of Housing due to his past, although he had been pardoned before trial by the President. And so, considerations of the rule of law and 'the principle of good character in public service' may lead to the legal result that appointing a person who committed severe offences to a top executive position can be struck down as unreasonable.

In the famous case of *Deri,*[4] the Supreme Court ruled that the Prime Minister's power to remove Cabinet ministers was discretionary, but there were circumstances which made the exercise of a discretionary power obligatory. Accordingly, the Court ordered Prime Minister Rabin to remove the then-Housing Minister Aryeh Deri from office after he was indicted for corruption:

'The offences attributed to Minister Deri are outstandingly serious, and failure to exercise power to remove him from office is unreasonable to an extreme extent.… The damage to confidence in the Government as a result of the failure to remove from office a person accused of the crime of corruption is far more serious than the damage to confidence as a result of failure to honour an undertaking which is prohibited by law. As already explained, we are not dealing here with the question of confidence as a moral norm, but with the provisions of law which deal with the reasonableness of failure to exercise power.… the Prime Minister is required by law to exercise his power under section 21A of the Basic Law: The Government to terminate the tenure of office of Minister Deri'.[5]

Thus, the expressed written law does not necessarily override the principle of good character and the importance of public trust. Dotan notes that, 'The Eisenberg and Deri cases were the earliest in a long series of cases in which the Court developed and applied the principle of good character in its supervision over appointments and removals of both politicians and high-ranking public officials'.[6]

In a more recent decision – the *Rochberger* case[7] – the Supreme Court removed from office three mayors of prominent cities less than one month before municipal elections after the Attorney General announced that he intended to indict them for corruption. This case is very important as city mayors are elected in direct personal elections. The Court could not prevent them from running for office in the upcoming elections despite the indictments against them. Nonetheless, as the authority to remove mayors from office for conduct unbecoming is one of discretion, which is subject to judicial review, the Court granted orders to immediately remove the mayors from their offices to preserve good character and the rule of law.

Thus, to conclude this point, the Israeli Supreme Court has already ruled that ministers who have been indicted cannot remain in office. One may argue that if that is the rule for ministers, it should all the more so apply to a Prime Minister. Thus, according to the existing legal principles of 'good character', 'rule of law' and 'public trust', it is plausible that the Supreme Court would rule that an indicted Prime Minister must step down. On the other hand, the above-mentioned decisions concerning the removal of ministers and mayors were decided based on administrative law's 'reasonable' principle that applies to the discretion of the Prime Minister as chief executive and city councils as administrative authorities. It is unclear whether the same applies to the Prime Minister himself (not the least because the removal of the Prime Minister means the resignation of the entire government). A judicial impeachment of a sitting Prime Minister would be unprecedented. This has never happened and was unnecessary; when previous Prime Ministers were faced with indictments they resigned. Basic Law: The Government demands the removal of the Prime Minister only after he is convicted, and the conviction becomes final, a process that may take years.

There is another set of challenges. If Netanyahu wins the upcoming elections, can the President even assign a Knesset Member under indictment the mandate to form a government? According to Basic Law: The Government, 'the President of the State shall, after consultation with representatives of party groups in the Knesset, assign the task of forming a Government to a Knesset Member who has notified him that he is prepared to accept the task'…. Typically, the mandate to form a government is given to whoever receives the most recommendations from Knesset Members. Can the President take the indictment into consideration? On the one hand, the President's exercise of discretion in granting the mandate to form a government may be subject to judicial review. On the other hand, it is also questionable whether the discretion of the President can even be challenged before the Court, considering that according to Basic Law: The President, 'The President of the State shall not be amenable

[2] Yoav Dotan, 'Impeachment by Judicial Review: Israel's Odd System of Checks and Balances', 19(2) *Theoretical Inquiries in Law* (2018), 705-744.

[3] HCJ 6163/92 *Eisenberg v. The Minister of Building and Housing* 47(2) PD 229 (1993).

[4] HCJ 3094/93 *The Movement for Quality in Government in Israel v. The State of Israel* 47(5) PD 404 (1993). See an English translation of the decision at https://supremedecisions.court.gov.il/Home/Download?path=EnglishVerdicts%5C93%5C940%5C030%5CZ01&fileName=93030940_Z01.txt&type=4

[5] Ibid., at para. 20-21 to the judgment of President Meir Shamgar.

[6] Dotan, supra n 2, at 722 and reference therein.

[7] HCJ 4921/13 OMETZ – *Citizens for Proper Government & Social Justice v. Rochberger* (Oct. 14, 2013), Israel Supreme Court Database; an English translation is available at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Ometz%20%E2%80%93%20Citizens%20for%20Proper%20Administration%20and%20Social%20Justice%20in%20Israel%20v.%20Rochberger.pdf

to any court or tribunal, and shall be immune from any legal act, in respect of anything connected with his functions or powers'. The High Court of Justice has thus far refrained from intervening in these questions.[8]

Judicial involvement in these questions puts the Court in a very difficult position. If it intervenes and disapproves Netanyahu's competence to serve as Prime Minister, this raises difficulties from a democratic point of view as it may thwart 'people's will' and provide the Attorney General great power of impeachment through indictments. But if it approves Netanyahu's competence, this would send a 'negative message' that corruption and breach of trust may be tolerated.

As these issues may arrive at the Supreme Court eventually, we do not include our opinion on these matters in this report. Updates on these events will be included in next year's report.

III. CONSTITUTIONAL CASES

1) HCJFH 10190/17 *Commander of IDF Forces in Judea and Samaria v. Allian* (9.9.2019): burial of terrorists' bodies for the purpose of negotiation

In an extended composition of nine Justices, it was ruled in a majority of 5-4 that the commander of the IDF in Judea and Samaria is permitted to order temporary burial of terrorists' bodies for negotiation, by virtue of Rule 133(3) of the Defense Regulations (Emergency) 1945.[9] In this Additional Hearing, the High Court of Justice reversed a previous ruling in this regard, which held that the military commander was not authorized to do so.[10] The majority opinion interpreted the authority conferred on the military commander in Rule 133(3) of the Defense Regulations and stated that this regulation is part of the internal law that is valid in the State of Israel and the region of Judea and Samaria, which is intended, among other things, to ensure the protection of the state's security.

It was held that protecting the security of the state also meant an ongoing and determined strive to return home IDF soldiers, fallen soldiers and Israeli civilians held by terrorist organizations. Because of this, the interpretative conclusion is that the military commander has the authority to order the temporary burial of terrorists' bodies for the purpose of negotiations with terrorist organizations. The Court held that the exercise of this authority entailed a degree of harm to the dignity of the dead terrorist and the dignity of his family, and that this authority must, therefore, be defined and exercised under the appropriate restrictions and balances as specified, *inter alia*, in the opinion of the Attorney General of 2004.

It was further held that international law does not explicitly prohibit the possession of bodies in the context of armed conflict and that contrary to the position expressed by the majority in the judgment under the Additional Hearing, international law does not enshrine an approach whereby legal difficulty exists in this practice. The minority justices held that Rule 133(3) of the Defense Regulations does not authorize the military commander to order the provisional burial of terrorists' bodies for negotiation purposes, and therefore, legislation is required for this purpose as provided in the judgment under the Additional Hearing. Justice D. Barak-Erez, in a minority opinion, held an 'interim position', according to which a distinction must be made in the context of Gaza terrorists whose bodies can, according to her, be held for negotiation purposes without specific legislation, as opposed to terrorists' bodies that were Judea and Samaria residents or residents and citizens of the State of Israel, in light of the different status – accordingly the different applicable law – of these areas.

2) EC1806/19 et al. *Lieberman v. Cassif* (18.7.2019): banning of political parties and candidates

An extended composition of nine Supreme Court Justices ruled on approval and appeals on Central Election Commission decisions on the disqualification of candidates and lists from the 21st Knesset elections.

The Court accepted the majority opinion in an appeal in the case of candidate Dr. Michael Ben Ari of the 'Otzma Yeudit' Party and ruled that he was barred from participating in the 21st Knesset elections for the grounds of disqualification provided for in Article 7A(A)(2) of Basic Law: The Knesset, in the matter of inciting racism.[11] The decision in Ben Ari's case was based on a very

[8] The Supreme Court has recently dismissed a case challenging Netanyahu's competence to receive the mandate to form a government after the next elections. It ruled that the case was merely theoretical and not ripe for adjudication because there was no certainty that Netanyahu would in fact get the mandate to form a government after the elections. With that said, the Supreme Court also noted that the relevant constitutional questions are justiciable, in principle, so they may come up in future litigation. See, e.g., Isabel Kershner, 'Israeli Supreme Court Removes an Obstacle for Netanyahu', *the New York Times* (January 2, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/netanyahu-indictment-court.html

[9] For a historical and theoretical background to the Israeli law of emergencies and an overview of the work of Israeli courts in this area, see Amichai Cohen, 'Emergency Law in Israel - Current Status' (February 25, 2019). Available at SSRN: https://ssrn.com/abstract=3359625 or http://dx.doi.org/10.2139/ssrn.3359625. On Israel's military governance of Judea and Samaria, see recently Maayan Geva, 'Military Lawyers Making Law: Israel's Governance of the West Bank and Gaza', 44(3) *Law and Social Inquiry* (2019), 704-725.

[10] HCJ 4466/16 *Mohammed Allian et al. v. The Commander of IDF Forces in the West Bank* (December 14, 2017). 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, 154.

[11] Section 7A of Basic Law: The Knesset gives the Central Elections Commission the power to ban the participation of any party or candidate in the elections if the goals or actions of the party or candidate, expressly or by implication, include negation of the existence of the State of Israel as a Jewish and democratic state; incitement to racism; or support for armed struggle by a hostile state or a terrorist organization against the State of Israel. See, e.g., Mazen Masri, 'The Limits of Electoral Politics: Section 7A of Basic Law: The Knesset', in Nadim N. Rouhana and Areej Sabbagh-Khoury (eds.), *The Palestinians in Israel: Readings in History, Politics and Society Vol II* (Arab Center for Applied Social Research, 2018), 130-138; Suzie Navot, 'Fighting Terrorism in the Political Arena: The Banning of Political Parties', 14(6) *Party Politics* (2008), 745-762.

long line of significant evidence, including racist and humiliating statements that lasted for about two years until very close to the 21st Knesset elections. It was ruled that Ben Ari attributed negative characteristics to the Arab public in Israel. His remarks and considerable exposure have earned him, among other things, social networks reflecting the racist political program he advocates and which he intends to implement as a Member of the Knesset. Majority justices found that the explanations given by Ben Ari were unconvincing, and they paled in the face of the ferocity of racist statements he repeatedly made in his voice and widely preached at rallies he attended and on social networks. It was emphasized that Ben Ari has neither apologized for most of his remarks nor showed any remorse. He tried to give his commentary in retrospect, but this was found to be unconvincing and as inconsistent with the natural context of what was said.

Justice Solberg delivered a minority opinion, according to which, considering Ben Ari's explanations and the importance of the constitutional right 'to elect and be elected' in our democratic system, he should not be prevented from participating in the Knesset elections.

In addition, the Court ruled not to prevent Adv. Itamar Ben Gvir, a candidate for 'Otzma Yeudit', and Dr. Ofer Cassif, from 'Hadsh-Thahal', from participating in the elections. It was held that the evidence presented to the Court was not at a high enough level of sufficiency to establish grounds for disqualification.

3) EA 5487/19 *Segal v. Ben Gvir;* EA 5506/19 *Otzma Yehudit v. Hareshima Hameshotefet* (25.8.2019): banning of political parties and candidates

The Court unanimously accepted the appeal regarding 'Otzma Yehudit' candidate Ben Zion Gopstein and accepted, in a majority opinion ruling, the appeal regarding 'Otzma Yeuhdit' candidate Baruch Marzel. The Court ruled that both were barred from participating in 22nd Knesset elections on the grounds of disqualification provided for in Article 7A(A)(2) of the Basic Law: The Knesset, in the matter of inciting racism. The Court unanimously rejected the appeal regarding 'Otzma Yehudit' candidate Adv. Itamar Ben Gvir as well as the appeals regarding the non-disqualification of the 'Otzma Yehudit' Party and the 'Hareshima Hameshotefet' to participate in the elections.

The decision to unanimously accept the appeal filed in the case of Gopstein and to prevent his participation in the elections was made based on numerous evidence that cast a clear, unambiguous and candid image showing that in his many statements and actions, Gopstein systematically incited racism against the Arab public. The Court ruled that Gopstein's statements revealed a new low point in racial discourse that we did not know before, and Gopstein even stated that he did not regret and did not show any remorse for any of it.

The appeals regarding Ben Gvir's candidacy, 'Otzma Yehudit', and the 'Hareshima Hameshotefet' were rejected because not enough evidence was found to substantiate the disqualification requested in their case according to the strict criteria set out in the case law.

4) LCA 10011/17 Mei-Tal *Engineering & Services Ltd. v. Salman* (19.8.2019): non-discrimination in housing sales

The principal question raised in the request for this appeal was whether the Prohibition of Discrimination Act on Products, Services and Entry into Entertainment Venues and Public Places (2000) (hereinafter: 'The Prohibition of Discrimination Act') also applies to an apartment sale.

Justice Mazuz ruled that the Prohibition of Discrimination Act applies to the sale of apartments by those whose business is supplying apartments. In his opinion, this determination is of the utmost public value and practical importance, given the need to send an unequivocal message of condemnation of discrimination and to provide effective legal tools to the victims of discrimination, through which they can claim their insult. Regarding the public value importance of this determination, Justice Mazuz emphasized the importance of the right to equality in Israeli law, the importance of the fight against discrimination and the importance of the Court's role in uprooting it. Regarding the practical importance of this determination, he stressed the need for the existence of an effective, simple, fast and inexpensive enforcement mechanism prescribed by law for the fight against discrimination. Justice Mazuz based his position on the interpretation of the language of the law and its objective and subjective purposes, leading to the conclusion that the Prohibition of Discrimination Act applies to the sale of residential apartments by anyone who is engaged in it.

Justice Stein held that the Discrimination Prohibition Act did not apply because, in the linguistic sense, a 'product' is a movable object while an apartment is real estate. In addition, the legislature made clear in explanatory notes to the act that it does not engage in real estate. However, Justice Stein considered that a contractor company, acting in a joint entrepreneurship with the state, cannot discriminate in selling apartments built on state land. The discrimination suffered by the respondents was thus an act of wrongdoing for which they were entitled to relief.

Justice Handel concurred with Justices Mazuz and Stein's conclusion that the appeal should be dismissed, but refrained from ruling in principle on the applicability of the Prohibition of Discrimination Act to an apartment sale. According to him, anyone contracting with the state must accept the duty of non-discrimination in light of the special status of public land.

5) CrimApp 5338/19 *Moshe Abutball Mayor of Beit Shemesh v. Nili Philip* (1.11.2018): women exclusion in the public sphere

In this case, the Court ruled that 'chastity signs', posted throughout the city of Beit Shemesh that contained abusive captions towards women were part of the harsh and

[12] On the general phenomenon, see, e.g., Michal L. Allon, 'Gender Segregation, Effacement, and Suppression: Trends in the Status of Women in Israel', 22(2) *DOMES - Digest of Middle East Studies* (2013), 276-291.

improper phenomenon of the exclusion of women from the public sphere.[12] The signs instructed women to dress according to certain dress codes and not to be found in certain places. They had the effect of expropriating many of the female sector's authority and making it private while exerting social pressure and compromising women's autonomy and security. Therefore, in such cases, it was obligatory upon the local authority to remove the signs and even to act under existing law against those responsible for placing them. It was further stipulated that the actions of the local authority should be given the proper weight for the grave violation of human rights caused by the placing of the signs – a wrongful phenomenon, which severely impaired human dignity.

IV. LOOKING AHEAD

There are big constitutional questions and controversies on the horizon, both in constitutional law and constitutional politics.

In terms of constitutional politics, the third round of elections was held on March 2, 2020. These elections brought to the fore the question of whether a Knesset Member who is indicted for criminal charges may receive the mandate to form a government.

As for constitutional law, on late 2020, an extended bench of 11 Justices of the Supreme Court will hear the various petitions submitted against the controversial Basic Law: Israel as the Nation-State of the Jewish People.[13] The petitions concerning this basic law are not only important on their merits but also for the more general question of whether the Supreme Court has the authority to review basic laws that carry a constitutional status and whether the doctrine of 'unconstitutional constitutional amendments' applies in Israel.[14]

V. FURTHER READING

Navot, Suzie and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel', *European Journal of Law Reform*, 21 (2019), 403

Roznai, Yaniv, 'Constitutional Paternalism: The Israeli Supreme Court as Guardian of the Knesset', 51(4) *Verfassung und Recht in Übersee* (2018-2019), 415-436

Sapir, Gideon and Daniel Statman, *State and Religion in Israel: A Philosophical-Legal Inquiry* (Cambridge University Press, 2019)

Stopler, Gila, 'Semi Liberal Constitutionalism', *Global Constitutionalism,* 8 (2019), 94-122

Weill, Rivka and Tally Kritzman, 'Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Entrants in Israel in a Comparative and International Context', *University of Pennsylvania Journal of International Law,* 41(1) (2019), 43

[13] We have elaborated on the enactment of this basic law in Justice Salim Joubran, Yaniv Roznai, Tal Habas and Yuval Geva, 'Israel', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *2018 Global Review of Constitutional Law* (I·CONnect-Clough Center, 2019), 163-166.

[14] See generally, Aharon Barak, 'Unconstitutional Constitutional Amendments', 44(1) *Israel Law Review* (2011) 321; Mazen Masri, 'Unamendability in Israel: A Critical Perspective', in Richard Albert and Bertil Emrah Oder (eds.), *An Unamendable Constitution? Unamendability in Constitutional Democracies* (Springer, 2018), 169.

Italy

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I. INTRODUCTION

In 2019, the Italian Constitutional Court (hereafter ICC) ruled in continuity with its most recent case law and strengthened its institutional role by coordinating its powers and competences both with other constitutional actors and with supranational institutions. The first dimension of this "institutional relationality" took center stage in 2019: the ICC engaged the legislator in an intense "dialogue" by using the full spectrum of its decisional powers. Some quintessential examples will be illustrated below (Section II). However, the Court remained firm in the exercise of its most traditional role of safeguarding fundamental rights, particularly those of the weakest part of the population (as illustrated in some of the cases reported below in Section III).

Similarly, the Court persevered in its engagement with public opinion, and further developed a dimension of "social relationality." This occurred through numerous events promoted by the ICC. Among these, the ICC continued its "journey" in public schools and prisons. This journey began in 2018; in 2019, the Court organized ten "stops" in ten different prisons, where judges of the Court met detained persons and discussed with them the impact of the Constitution on their condition.[1] This journey eventually resulted in a documentary, which was produced and broadcast on national television.

Finally, yet importantly, Professor Marta Cartabia (coordinator of this group of authors since the very first report in 2015,[2] strong supporter of the *Global Review of Constitutional Law* since its inception and co-president of the I·CONS Italian Chapter) was elected President of the Constitutional Court of Italy last December. She is the first woman to be elected President of the Court since 1956, when it was first operative. Her election is a significant symptom of transformation not only of the Court but of Italian society if one only recalls that Professor Cartabia was, when appointed judge of the Constitutional Court in 2011, the third woman to be named as such.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Major developments in the year 2019 may be divided into two macro-categories, where both a vertical relational approach and horizontal one emerge. As for the former, characterizing the ICC's openness toward supranational law and case law, the main developments emerged through numerous decisions reported in Section III of this report (e.g., judgment Nos. 24, 112 and 117 of 2019). As for the horizontal dimension, the ICC engaged the legislator in an intense dialogue in 2019. At least two streams of its case law in this category are worthy of attention. First, the ICC tackled the issue of legislative omissions in the field of end-of-life choices. Second, the ICC clarified its role as an arbiter when the respect of parliamentary pro-

[1] https://www.cortecostituzionale.it/jsp/consulta/vic/vic_home.do

[2] http://www.iconnectblog.com/2016/03/developments-in-italian-constitutional-law-the-year-2015-in-review/

cedures was contested by means of conflicts of attributions promoted by political actors.

As for the first stream, with its judgment No. 242 of 2019, the ICC made clear that assisted suicide is not punishable under specific conditions. The judgment came one year after the ICC had stayed its proceedings, waiting for the Italian Parliament to legislate on the matter[3] – which it did not do. The constitutional question was raised by the highly controversial case of Fabiano Antoniani, known as DJ Fabo, who was left in severe and irreversible conditions after a car accident in 2014. He needed artificial support for nutrition and respiration and suffered from terrible pain and frequent convulsions and muscle spasms. At one point, he decided to opt for assisted suicide. The politician Marco Cappato, a member of the radical party, drove him to Switzerland where, unlike in Italy, assisted suicide was legal under certain conditions. After the assisted suicide was carried out, Cappato turned himself in to the police in Italy. His self-reporting was aimed at opening a case for strategic litigation, with the objective of challenging the constitutionality of the criminal implication of his helping carry out the assisted suicide.

Cappato's plan of strategic litigation succeeded, as he was charged with a punishable crime under Article 580 of the criminal code ("Helping someone to commit suicide, or to convince someone to commit suicide, is punishable with a sentence between 5 and 12 years") before a court in Milan submitted a question of constitutionality to the ICC. This provision was challenged on the ground of its constitutionality by the ordinary judge, who argued that this criminal regime violated the right to self-determination contained in Art. 2 and Art. 13 of the Italian Constitution. With an unprecedented decision resembling the German *Unvereinbarkeitserklärung*, the ICC decided in October 2018 to stay the proceedings for one year, waiting for the Parliament to provide a comprehensive regulation on the matter – which it did not. After the year expired, the ICC took over the case again and struck down the contested legislation as partly unconstitutional. With a detailed and complex reasoning, the Court made clear that – while assistance to suicide is legitimately punished in general – criminal indictment should be withheld when the assisted persons are in very specific conditions, i.e.: suffering from an irreversible pathology; under intolerable physical or psychological suffering; kept alive only through artificial life-support; and capable of making free and informed decisions, including on access to palliative care, which must always be an effectively available alternative. However, the Court did not abandon its relational approach; in fact, it considered a new comprehensive intervention by the Parliament as indispensable, and also tried to extract conditions for the non-punishment of assisted suicide from the existing legislation. What emerged from the second category of landmark constitutional developments that occurred in 2019 was that the ICC, in engaging the legislator in an intense dialogue, saved wide margins of autonomy not only as far as the content of political choices is concerned, but also when disputes arise in respect to parliamentary procedures. The category consists of three decisions issued within the framework of constitutional conflicts of attributions.[4]

In the first case,[5] both a parliamentary group and a certain number of individual Senators objected to the use of a procedural mechanism in the Senate whereby the government, at the last minute, rewrote the entire draft annual budget law through a block amendment associated with the request of confidence vote (which prevented further amendments and forced Senators to immediately vote for, or against, the government amendment). For the first time in its case law, the ICC recognized standing to individual MPs, at least theoretically, albeit only in relation to their specific and individual constitutional attributions; in this case, the right to the time necessary to understand a legislative proposal (amendment) before it is voted. The Court insisted on the specific circumstances enabling MPs to raise conflicts in two decisions adopted later in the year[6] by confirming in principle the possibility of individual MPs referring a conflict to the Court.

However, coming back to the conflict on draft budgetary legislation, the ICC recognized that the Parliament enjoys a very broad margin of appreciation in the application of its own rules. Therefore, the Court's power of review is limited to cases in which violations are evidently identifiable already within a summary consideration. The Court held that, on the facts, this exacting test was not met in this case, although it reserved the right to review particularly manifest violations of the rights of MPs in the future. However, the opening of the Court has not yet found any concrete applications. On the contrary, as mentioned before, the Court further circumscribed the concrete circumstances under which single MPs could successfully refer a conflict on procedural violations, such as the ones disputed in this case.

III. CONSTITUTIONAL CASES

1. Judgment No. 20 of 2019 – Fundamental rights and multilevel protection

In this case, the Court considered a question of constitutionality involving the balancing of two possibly conflicting rights: the right of citizens and the press to access possibly significant data and the right to privacy. In particular, the referral order questioned the constitutionality of a law that imposed a duty to publish a wide spectrum of fiscal data concerning managers working for public administrations, irrespective of their position.

[3] See our 2018 report: Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2018 Global Review of Constitutional Law,* 2019, p 168

[4] For an analysis of this context, see Vittoria Barsotti and others, *Italian Constitutional Justice in Global Context* (OUP USA 2016) 49.

[5] Corte costituzionale, ordinanza 10 gennaio – 8 febbraio 2019, n. 17.

[6] Corte costituzionale, ordinanza 4 dicembre – 18 dicembre 2019, n. 274; Corte costituzionale, ordinanza 4 dicembre – 18 dicembre 2019, n. 275.

The duty was imposed also on their spouses and relatives up to the second degree.
The case is highly significant, as the Court confirmed and fine-tuned its recent case law on the order of priority when questions of compatibility arise both with the Constitution and the Charter of Fundamental Rights of the European Union (CFR). The ICC specified that its ruling would be based on internal constitutional provisions and European law if applicable, according to whichever system is most appropriate to the specific case. It also stressed the importance of its constitutional interpretation of the fundamental rights guaranteed by the CFR, which allow it to be interpreted in harmony with national constitutional traditions. Ordinary courts may still refer preliminary questions to the Court of Justice of the European Union (CJEU), but they must also take into account that a constitutional referral is the main way, provided for in the Italian Constitution, to strike down a law infringing on fundamental rights. Therefore, it is entirely correct to refer questions to the ICC first, and eventually later to the CJEU.

As for the merits of the case at hand, the Court applied a proportionality test. It found the aim of the provision – namely granting widespread public oversight on the use of public funds and carrying out of public functions – legitimate in principle. However, the Court found that the concrete balancing adopted by the contested legislation put disproportionate burdens on one side, where it imposed the duty to publish an extremely wide range of data on all public managers without distinction. The Court found that the indiscriminate application of duties to publish such an extensive quantity of data was inherently unreasonable. The balancing was unreasonable first because the duty generated an enormous quantity of data that private citizens did not have the tools to navigate. Therefore, the duty lowered the protection of one right without increasing the protection of another. Second, the contested legislation was unreasonable because it invited curious digging into the private lives of managers and their families, and failed to meet the requirement of resorting to the least restrictive option. Finally, the ICC found that the indiscriminate imposition of the contested duties to all public managers was unconstitutional.

2. Judgment No. 24 of 2019 – Vertical relationality: ECtHR De Tommaso follow-up

This case dealt with numerous referral orders concerning the application of certain personal preventive measures of seizure and confiscation. The decision is worthy of attention, as it refers to an important stream of case law of the European Court of Human Rights[7] and reflects once again the "vertical" dimension of the Constitutional Court's relational approach. The contested preventive measures applied to "any person who may be presumed, on the basis of factual findings, to be habitually involved in unlawful dealings," and "any person who, owing to his or her conduct and lifestyle, may be presumed, on the basis of factual findings, to earn a living, either in full or in part, from the proceeds of unlawful activities." The Court denied that the measures had the nature of sanctions only for the fact that they were being imposed upon indications that suggest prior involvement in criminal activity. However, the it struck down the contested measures as unconstitutional only insofar as they applied to persons "who may be presumed, on the basis of factual findings, to be habitually involved in unlawful dealings." In the view of the Court, this wording was inherently imprecise, in particular as for the conditions of "unlawful dealings" and "habitually"), and also in view of the relevant ECtHR case law.

3. Judgment No. 40 of 2019 – Proportionality in criminal sanctions

In this case, the Court struck down a legislative provision in the matter of criminalization of drug offenses that provided a minimum punishment of eight rather than six years in cases of serious offenses. In fact, the contested legislation distinguished between minor and serious offenses, with the latter carrying a minimum sentence of eight years, exactly two times the maximum sentence for the former (four years). In this case, the ICC revisited its numerous decisions in the same field, and recalled the many occasions in which it warned the legislator to take relevant action, similar to the cases reported in Section II of this report.
First, the ICC reaffirmed its authority to strike down unconstitutional criminal provisions – including sentences – if they are patently unreasonable and disproportionate. Secondly, it was also confirmed that, when such a provision is struck down, the ensuing void may be filled by the ICC itself extending a different provision if it already exists in the overall legal system and concerns analogous situations. In the view of the Court, after a close examination of pre-existing legislation, the six-year minimum recommended by the referral order was consistent with the overall legislative scheme. However, the Court made also clear that the legislator remains free to alter the six-year provision resulting from the Court's decision.

In this case, the ICC embraced its traditional role of counter-majoritarian guardian by insisting on the seriousness of the fundamental rights involved. The ICC noted that disproportionate punishments undermine the constitutionally mandated rehabilitative purpose of criminal punishment. Moreover, as many cases fall into a grey area on the borderline between serious and minor offenses, the very wide gap between the minimum punishment for serious and the maximum punishment for minor offenses inherently led to potentially unreasonable consequences.

4. Judgment No. 99 of 2019 – Lack of alternatives to imprisonment for mentally ill inmates is unconstitutional

In this case, the Court struck down part of the 1975 law regulating the penitentiary system, as long as the contested provisions did not provide for the application of specific

[7] *de Tommaso v. Italy*, 205 Eur. Ct. H.R (2017).

[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.

measures allowing for house arrest in the event of serious mental illness, when this condition supervened during enforcement of the sentence. The absence of any alternative to imprisonment for those who develop serious mental illness rather than a physical one while in detention resulted from successive, but partly incoherent, legislative reforms that abolished first civic and then forensic psychiatric hospitals. The abolition removed any alternative to imprisonment in the cases at hand and, according to the Constitutional Court, created a lack of effective protection of the fundamental right to health. When combined with the inevitable suffering arising from deprivation of liberty, this lack of alternatives could result in an additional and inhumane punishment liable to further damage the health of the detainee, in violation of the ECHR. The Court struck down the contested provisions as unconstitutional and accepted the remedy identified in the referral order of the Court of Cassation, namely the application of the alternative measure of house arrest. However, the Constitutional Court made clear that courts are responsible to assess on a case-by-case basis whether a detainee suffering from supervening serious mental illness can serve his or her sentence in prison or needs to be treated in secure accommodation elsewhere.

5. Judgment No. 112 of 2019 – Vertical relationality in the matter of proportionality of sanctions

In this case, the Court struck down various pieces of legislation providing for the mandatory confiscation not only of the gains deriving from insider trading but also of the means and assets used in order to realize the gains. Although the sanction was administrative in nature, the Court recalled how certain guarantees, traditionally applied only to criminal sanctions, apply also to administrative ones. In particular, the ICC argued that the automatic confiscation of the means used to realize the gains was disproportionate, holding that the contested sanctions did not comply with the constitutional requirements of proportionality of sanctions. Considering that the legislation already provided elsewhere for fines, which were moreover already severe, the additional penalty of automatic confiscation of the means used to realize the gains resulted in excessive punishment and was thus unconstitutional, and incompatible with both the ECHR and the Charter of Fundamental Rights of the European Union.

6. Order no. 117 of 2019 Vertical relationality: fundamental rights in between the Italian Constitution, the ECHR and the CFEU (with a new reference for preliminary ruling from the ICC to the CJEU)

In this case, the Court submitted a new referral order to the CJEU. This is not unprecedented,[8] although this is the first time the ICC questioned the CJEU not only on the interpretation but also on the validity of a European provision. The case concerned the applicability of the right to silence in proceedings that, although formally administrative, entail the imposition of sanctions of a substantially punitive nature. The referring Court of Cassation was of the view that the legislation could violate both constitutional and supranational parameters, as the legislation in question punished with extremely severe sanctions those who refuse to answer questions from a competent administrative authority if it might reveal their liability for wrongdoing, punishable by administrative sanctions. The ICC recalled its latest stream of case law concerning the concurrence of domestic constitutional remedies and supranational remedies when the violation of fundamental rights was at stake,[9] and eventually decided to submit a reference for a preliminary ruling. This decision was connected with the circumstance that the contested legislation stemmed from obligations incumbent on Italy under, initially, Directive 2003/6/EC and, subsequently, Regulation (EU) No. 596/2014. However, the wording of the relevant European obligations was ambiguous. Therefore, the ICC asked the CJEU for an interpretation (and possible validity) of these obligations in light of Articles 47 and 48 of the CFEU. The proceedings before the Court were stayed pending the outcome of the request for a preliminary ruling.

7. Judgment No. 221 of 2019 – Ban for female same-sex couples to access medically assisted procreation is not unconstitutional

In this case, the ICC was called once again to scrutinize the 2004 legislation providing for strict regulation of access to medically assisted reproduction (MAR), after the same ICC declared parts of this law unconstitutional in 2014 and 2015. This time, the Court upheld the contested pieces of legislation concerning the ban for same-sex female couples to access MAR. In fact, the contested legislation allows MAR only for different-sex couples (provided the partners are living, of potentially fertile age and married or cohabiting). The exclusion of female same-sex couples was challenged by two referring courts on the basis of both constitutional and international grounds. On both grounds, the Court held that the questions were unfounded. Stressing the plurality of constitutional interests involved, the Court held that the task of identifying a reasonable balance – taking into consideration the leanings of society at a specific point in history – belongs, as a matter of priority, to the legislator, in its role of interpreter of the national collectivity. In this line of reasoning, the ICC relied also on ECtHR case law, which held in a similar case that states have a wide margin of appreciation in areas where there is no general consensus at the European level, and also that states may legitimately limit the use of MAR procedures to the therapeutic purpose of curing infertility. This was the main (legitimate) rationale of the contested legislation. This circumstance distinguished this case from the case law evoked by the referring judges concerning two cases in which the ICC declared part of the same legislation unconstitutional, where the contested legislation excluded from MAR couples affected by pathologies causing infertility or sterility. On the contrary, in this case infertility was not caused by any pathologies. The Court re-

[8] The ICC submitted three references for preliminary rulings in the past: see Corte costituzionale, ordinanza 15 aprile 2008, n. 103; ordinanza 18 luglio 2013 n. 207; and ordinanza 26 gennaio 2017, n. 24.

[9] Corte costituzionale, sentenza 14 dicembre 2017, n. 269; sentenza 21 febbraio 2019, n. 20; sentenza 21 marzo 2109, n. 63.

fused to assign a constitutional value to the desire to have children with one's partner. It distinguished from the cases allowing recognition of adoptions by homosexual individuals of the minor biological children of their partners, and those allowing recognition of parenthood by same-sex couples achieved by MAR procedures obtained abroad, as in those cases the overarching interest to protect was the one of the children to have a family. On the contrary, this case concerned the interest of a couple to have children.

8. Judgment No. 237 of 2019 – Recognition of "foreign" parenthood of same-sex couples

This case concerned a different scenario if compared with the one originating the decision above; in fact, a referral order questioned the constitutionality of a body of provisions that purportedly prevented a civil registry official from specifying two women, married under the law of a foreign state, as the parents of a child born as a result of MAR. Here as before, the ICC reaffirmed that the law in Italy excluding same-sex couples from MAR fell within the legislator's margin of discretion. However, the Court did not decide on the merits of the referral order, as it considered it inadmissible because it was not clear what the precise contested provision was. In fact, the referral order contested a body of provisions without specifying with enough clarity what was the subject of the question of constitutionality.

9. Judgment No. 253 of 2019 – Absolute preclusion of bonus treatments for mafia inmates is unconstitutional

In this case, the Court struck down part of the 1975 law regulating the penitentiary system as unconstitutional, insofar as the contested provisions precluded inmates serving a life sentence convicted of certain mafia-related crimes from eligibility for bonus periods of short release if they did not cooperate with judicial authorities. The Constitutional Court focused on the part of the provision that established the following absolute presumption: non-cooperation with judicial authorities automatically meant that non-cooperative inmates maintained some links with organized crime and were therefore ineligible for bonus periods of short release under the penitentiary system. In the view of the Court, the absolute presumption violated Articles 3 (principle of equality) and 27(3) (principle of rehabilitation of offenders) of the Constitution for three distinct but related reasons. First, the absolute presumption penalizes uncooperative inmates with the aim of serving investigative needs. However, investigative needs are unrelated to the crime committed by the uncooperative inmates, and this circumstance makes the contested provision irrational. Second, the contested preclusion erases any possible evaluation of the uncooperative inmate's progress and moreover serves as a disincentive for him or her to make any progress. This combination violates the principle of rehabilitation of offenders. Last, the fact that the presumption still applies even though there are grounds for rebutting it based on the actual circumstances of the case makes it unreasonable. Therefore, the Court held the challenged provision to be unconstitutional insofar as it did not provide that inmates convicted of the mafia-related crimes specified in the article may be granted bonus periods of short release, even in the absence of cooperation with judicial authorities, when information had been acquired that ruled out both current links with organized crime, terrorism or subversion and the danger of the restoration of such links.

IV. LOOKING AHEAD

At the beginning of 2020, the Court approved some additional rules of procedure that allow the addition of experts and, notably, a peculiar type of *amicus curiae*. Now NGOs and public institutions may send a written opinion to the Court when a constitutional question impacts on general or public interests they are concerned with. They do not become formally parts of the proceedings, and their opinions will be admitted only if they are effectively helpful, considering the case and its complexity. Nonetheless, if used wisely, this new tool could have a significant impact on constitutional justice, particularly when the issues to be debated are not merely legal (e.g., require scientific, economic or statistical knowledge and expertise).

As usual, several relevant questions await decisions: e.g. (in January), on another referendum on the electoral law for the Parliament, and the rebuilding of a highway bridge (whose collapse killed 43 people), from which the corporation formerly responsible for it has been excluded through a special legal provision.

Three judges, including President Cartabia, shall end their mandates in 2020. Therefore, one-fifth of the Court will be renewed (even more, if one considers the appointment of Judge Stefano Petitti occurred last year on December 10, 2019), with one judge to be appointed by the President of the Republic, one by the Court of Cassation and one by the Court of Auditors.

V. FURTHER READING

Armin von Bogdandy and Davide Paris, 'Building Judicial Authority: A Comparison between the Italian Constitutional Court and the German Federal Constitutional Court', in Vittoria Barsotti and others (eds.), *Dialogues on Constitutional Justice: Comparative Reflections on the "Italian Style"* (Oxford University Press, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3313641&download=yes> accessed 8 February 2019

Giacomo Delledonne, '"A Goal That Applies to the European Parliament No Differently from How It Applies to National Parliaments": The Italian Constitutional Court Vindicates the 4% Threshold for European Elections: Italian Constitutional Court, Judgment of 25 October 2018 No. 239/2018' (2019), 15 *European Constitutional Law Review* 376

Daniele Gallo, 'Challenging EU Constitutional Law: The Italian Constitutional Court's New Stance on Direct Effect and the Preliminary Reference Procedure' (2019), 25 *European Law Journal* 434

Giuseppe Martinico and Giorgio Repetto, 'Fundamental Rights and Constitutional Duels in Europe: An Italian Perspective on Case 269/2017 of the Italian Constitutional Court and Its Aftermath' (2019), 15 *European Constitutional Law Review* 731

Kazakhstan

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I. INTRODUCTION

The year 2019 was key for Kazakhstan in terms of major political and legal developments directly related to the country's constitutional system. Because of changes in the State's highest political leadership and its subsequent practices and reactions, it may be said that 2019 was a testing time for the constitutional institutions established since the adoption of the 1995 Constitution.

The first half of the year was marked by Kazakhstan's first President, Nursultan Nazarbayev, announcing his resignation in March after 29 years in office. The interim post was filled by the Senate Chairman, Kasym-Jomart Tokayev, in accordance with the Constitution. Shortly thereafter, Tokayev announced early presidential elections and subsequently won in summer 2019. The elections were accompanied, for the first time in Kazakhstan, by massive protests in the capital.

This report describes the most significant constitutional developments in the country as well as the work carried out by the Constitutional Council of Kazakhstan in 2019. It highlights the reaction of the Council to the changes in the State's leadership, qualifying (partially) them from a constitutional legal point of view, and provides an overview of its normative resolutions and other decisions dealing with issues of constitutional significance. The report proposes, *inter alia*, that it would be more appropriate to refer to Kazakhstan's constitutional system as one of "flexible" constitutional control rather than true constitutional justice due to some of its determinative elements. The following years will show ever clearly whether this system can still live up to the progressive expectations of the authors of the 1995 Constitution, or not.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

While there were no major amendments introduced to the Constitution in 2019 (which have been quite frequent over the last 24 years, reaching a total of 72 by 2017) – except for one renaming the capital of Kazakhstan from Astana to Nur-Sultan – other instances occurred where specific provisions of the highest law of Kazakhstan were invoked. In short, they included requests from the Head of State addressed to the Constitutional Council on the official interpretation of parts of concrete articles of the Constitution dealing with the presidency (two instances; see next section for thematic overview), and an all-new possibility for human rights organizations, scientific and other institutions as well as citizens specializing in issues addressed before the Council to send their conclusions and opinions to the Council (see next section). Additionally, a new Constitutional Law was adopted introducing technical changes and additions to two other constitutional laws dealing with elections and an exclusive economic zone in the capital, Nur-Sultan.

The major events within the purview of this report as briefly noted in the introduction were the transfer of power by the first President of Kazakhstan and the presidential elections of June 2019. After serving for almost thirty years as President of the Republic of Kazakhstan, Nazarbayev announced on 19 March 2019 that he was stepping down as Head of State and signed a decree to this effect ending his powers effective 20 March. Kassym-Jomart Tokayev, the Senate Speak-

er, took over as the acting President for the remainder of Nazarbayev's term. Despite the ex-President's stepping down, he remains the Chairman of the Security Council, the leader of the Nur Otan political party, which dominates the Parliament, and continues holding his legal title as "Leader of the Nation". His resignation did not signal any immediate major policy shifts for the country. The former President's control of Kazakhstan's Security Council (the lifelong right to head it had been found to be constitutional by the Constitutional Council back in 2018[1]), which sets guidelines for foreign and security policies, ensured that he remained essentially in power as the main decision-maker.

These developments were followed by the announcement of early presidential elections made by the interim President (in accordance with Art. 41, para. 3, of the Constitution), citing the need to eliminate a period of uncertainty and potential political instability before the initially scheduled elections in 2020. Prior to that, Tokayev who had been replaced in his previous post as the Senate's Chairman by Dariga Nazarbayeva (the first daughter of the ex-President), questioned the Constitutional Council about the interpretation of the constitutional requirement for presidential candidates to have been residing in Kazakhstan for the last fifteen years in order to be eligible for election. Upon receiving the Council's positive affirmation that this requirement includes the time served outside of the country as a representative of diplomatic service to Kazakhstan (Tokayev had previously worked as Under Secretary-General, Director-General of the United Nations Office for two years in 2011-2013), he proceeded to register as a candidate, nominated on behalf of the leading Nur Otan Party. Tokayev subsequently won the elections against six other candidates with 71% of the popular vote and became the second President of Kazakhstan on 9 June 2019.

His first step as interim President was to rename the capital city of Kazakhstan after his predecessor, with the Parliament approving the renaming of Astana to Nur-Sultan the same day. It was done, again, after the required positive conclusion by the Constitutional Council that the corresponding law on amending the Constitution with the change in the capital name was constitutional.[2] These changes stood out because of their swiftness (all in a matter of three days), with the Minister of Justice highlighting that despite its speedy nature, the legal and constitutional procedure in this case had been followed in strict accordance with the acting legislation.[3]

The speed that has been accompanying the changes in the content and form of the constitutional law of Kazakhstan since 1998 continues to amaze observers. It reaffirms the constant major problem that has been characteristic of the constitutional system and practice of the country for years: the design of the Constitutional Council. Conceived as a quasi-judicial body based on the French model, it appears to be merely a political instrument often used for a legal formalization of constitutional deviations, and sometimes even for replacing the constitutional norms *per se* by its normative resolutions.[4] This undermines the stability of the constitutional framework, the central core of which, the Constitution itself, being viewed as a progressive legal and political act, at least in a big part of its major aspects (human rights and freedoms above all, principle of separation of powers, a true separation of the institutions of investigation, court and prosecution, etc.). As the events of 2019 demonstrated, this recurring problem continued to contribute to the persistent disinclination of both lawyers and non-lawyers in the country to view the Constitution as nothing more than a symbolic document easily subject to political manipulation. They reaffirmed that the existing constitutional system in Kazakhstan represents a system of non-rigid constitutional control rather than a truly independent framework with its own autonomous self-sufficient mechanism of constitutional justice.

III. CONSTITUTIONAL CASES

It would be difficult to refer to the below instances of decision-making activity of the Constitutional Council as cases *ad litteram* given the fact that in Kazakhstan there is no judicial mechanism, in the strict meaning of the word, directly vested with the power to hear and decide constitutional disputes, and especially considering the absence of any possibility for ordinary individuals and citizens to directly petition the Council.[5] However, these instances illustrate concrete situations significant from the point of view of constitutional law that marked the year 2019; they have shown once again how important it is that developments in the political system be checked against their constitution-

[1] Normative Resolution #4 of the Constitutional Council of the Republic of Kazakhstan "On checking the Law of the Republic of Kazakhstan 'On the Security Council of the Republic of Kazakhstan' and the Law of the Republic of Kazakhstan 'On Amending and Adding to Some Legislative Acts of the Republic of Kazakhstan on the Activities of the Security Council of the Republic of Kazakhstan' on their conformity with the Constitution of the Republic of Kazakhstan", 28 June 2018.

[2] A later development in 2019 was that President Tokayev granted Nazarbayev broader powers regarding personnel matters. According to his decree signed on 9 October 2019, the Head of State will coordinate with the Chairman of the Security Council the appointment of all ministers, except for the Heads of the Ministry of Foreign Affairs, Ministry of Internal Affairs and the Ministry of Defense of the Republic of Kazakhstan. Also, from now on he will have to coordinate with Nazarbayev the appointment of Akims (Governors) of regions, cities of republican significance and the capital.

[3] See Weekly Newspaper *Наша Версия [Our Version],* "Минюст Казахстана признал законным переименование Астаны в Нурсултан" ["The Ministry of Justice of Kazakhstan Recognized the Renaming of Astana to Nursultan as Legal"], issue #3, 27 January 2020, available at https://versia.ru/minyust-kazaxstana-priznal-zakonnym-pereimenovanie-astany-v-nursultan

[4] See Arman Shaykenov, "С правом переписки: краткая история изменений казахстанской конституции" ["With the Right to Re-Draft: A Brief History of Amendments to the Kazakhstani Constitution"], published online 10 December 2018, available at https://expertonline.kz/a15790/

[5] In accordance with Article 20 of the Constitutional Law of the Republic of Kazakhstan, "On Constitutional Council" of 1995, only the following actors may initiate constitutional proceedings: President, Chairman of the Senate and Chairman of the Majilis (Lower Chamber) of the Parliament, a group of parliamentarian deputies (constituting no less than one-fifth of the total number of deputies of the whole Parliament), Prime-Minister, courts as well as state bodies and officials whose acts are being subjected to constitutional scrutiny.

ality by an appropriate body of constitutional supervision and in a proper manner. They further demonstrate whether or not the State body mandated to ensure the supremacy of the Constitution throughout the whole territory of the country has performed its task at such a key time. In fact, no petition questioning the constitutionality of the results of the presidential elections was filed in 2019 by any institution or body authorized to do so by law in the name of any of the presidential candidates who lost the elections.

1. Normative Resolution #1 of 15 February 2019: Grounds for President's early termination of office

In this decision, the Constitutional Council was acting upon the official request of the ex-President Nursultan Nazarbayev, who had asked whether the list of grounds for early termination of presidential powers established in Article 42, para. 3 of the Constitution was exhaustive. This provision states that "the powers of the President of the Republic are terminated from the moment the newly elected President of the Republic takes office, as well as in the event of early dismissal or removal of the President from office or his demise. All former Presidents of the Republic, except for those dismissed from office, have the title of the ex-President of the Republic of Kazakhstan." After considering the various aspects of the status of the President as per the Constitution, the Council briefly analyzed each of the early termination grounds existing in the constitutional law and concluded that the current enumeration of those grounds does not represent a full list. In particular, it does not explicitly provide for and at the same time does not prohibit the early termination of the Head of State's powers on the basis of his personal will, for example in the form of resignation due to personal or other reasons. The Council considered that the right of the Head of State to prematurely terminate his powers on personal grounds (i.e., the right to resign) is an integral element of the presidential form of government and the constitutional status of the President of Kazakhstan. Freedom of expression is inherent in the President of the Republic, both as a person and as a citizen of Kazakhstan. Hence, the current list was not exhaustive and the President was fully entitled to terminate his office early out of his own volition, which was thus a self-sufficient basis for such termination. The Council therefore essentially endorsed the planned move of the ex-President to step down.

2. Conclusion #2 of 20 March 2019: Constitutionality of renaming the capital

This decision of the Constitutional Council came as a result of the first open request of Kassym-Jomart Tokayev addressed to the constitutional body in his capacity as interim President. It had to deal with the first proposed legislative project of Tokayev under such capacity, namely, the Law "On Introducing Amendments to the Constitution of Kazakhstan", and its constitutionality. The Law set forth a new edition of Art. 2, para. 3 of the Constitution in the following way: "The law shall determine the administrative-territorial division of the Republic and the status of its capital. The capital of Kazakhstan is the city of Nur-Sultan." The previous formulation of this provision had featured "Astana" instead of "Nur-Sultan". The Council highlighted that the historical mission of Nursultan Nazarbayev as the Founder of the new independent State of Kazakhstan was constitutionally justified. It did so by noting that amendments and additions to the Constitution of the Republic are submitted, according to Art. 91, para. 3 of the Constitution, either to a republican referendum or to the Parliament of the Republic. The Council agreed that compliance with constitutional requirements was achieved, and since no referendum on the matter was called for, the choice for procedure was clearly the second option.

To reach this conclusion, the Council referred to its own previous normative resolution in 2017, referring to another amendment where it stressed that the "list of specially protected constitutional values was expanded". That list now apparently included the "fundamental principles of the Republic established by the Founder of independent Kazakhstan". According to the Council, the Founder ("Elbasy", or "The Leader of the Nation") ensured Kazakhstan's unity, protection of the Constitution, human and civil rights and freedoms, and, thanks to his constitutional status and personal qualities, he had made a decisive contribution to the formation and development of sovereign Kazakhstan. The amendments to the Constitution of the Republic of Kazakhstan regarding the renaming of the capital of the Republic from "Astana" to "Nur-Sultan" are thus associated with the recognition of the historical role and perpetuation of the merits of the First President of the Republic of Kazakhstan to the people of Kazakhstan. They do not affect the independence of the State, the territorial integrity of the Republic and its form of government as well as the fundamental principles of the Republic, laid down by Elbasy, and do not contradict the requirements of Art. 91, para. 3 of the Constitution. Therefore, the proposed Law "On Introducing Amendments to the Constitution of Kazakhstan" was recognized by the Council as constitutional. The Council did not address the question of what possible repercussions or consequences the capital's renaming could or would entail from, e.g., a financial perspective, or what public opinion would be on the matter.

3. Normative Resolution #3 of 11 April 2019: Amendments to the regulations of the Constitutional Council

A seemingly rather technical document,[6] Resolution #3 was more than just a formality; it introduced a novelty in Kazakhstani constitutional law that may signify a potentially effective opportunity for interested actors to positively contribute to the normative outcomes of the workings of the system of constitutional control in the future. It is especially so that for the time being, there is no other way for civil society to affect directly or to have access to these processes given the existing procedural regulation of the Coun-

[6] It was issued in the form of a normative resolution, a type of legal act that is an integral part of acting law of the Republic of Kazakhstan, according to Art. 32 of the Constitutional Law "On Constitutional Council".

cil. The novelty is that for the first time, the Council provided a possibility for human rights organizations, scientific and other institutions as well as citizens specializing in issues addressed before the Council to send their conclusions and opinions to it. Conclusions that are based on legal analysis of the issue, deal with the matter of relevance for the Council and facilitate a proper consideration of the request that initiated the constitutional proceedings may be included in the materials of the proceedings and published using the online resource of the Constitutional Council. It is unfortunately not clear who was the author of the initial petition for this particular decision of the Council; that is not indicated in the text. The need for speedy procedures in the constitutional practice of the country has again been illustrated by this decision; another provision establishes that "due to a particular importance and urgency of the appeal (petition), the Constitutional Council may decide to consider it in an expedited manner."

4. Annual Address of 20 June 2019: Status of constitutional legality in Kazakhstan

This particular decision of the Constitutional Council had as its basis a specific provision in the Constitution that obliges the Parliament to hear annual addresses of the Council about the state of constitutional legality in the country.[7] It is important because it not only showed examples of constitutional work carried out in the country, at least for a part of the reported period, but also indicated some serious shortcomings in this work related to the absence of a follow-up of the Council's previous decisions on the side of State bodies. Also, it includes several suggestions by the Council on key issues of law and practice (e.g., criminal law and procedure) albeit formulated rather generally. In the address, the Council noted that the period that had passed since the announcement of the previous annual address to the Parliament (including the first half of 2019) was marked by historical events significant for Kazakhstani statehood and constitutional identity. According to the Council, there was a smooth process of transferring supreme power in Kazakhstan. It recounted the main events of constitutional significance that are dealt with in this report (presidential stepdown and elections, renaming the capital) and proceeded to state that all these events took place in strict accordance with the requirements of the Constitution and the Constitutional Law of the Republic of Kazakhstan "On Elections in the Republic of Kazakhstan".

Thus, according to the Council, the continuity and commitment of society and the State to the course of faithfully following the letter and the spirit of the Constitution declared by the Elbasy at the dawn of independence were reaffirmed. Moreover, it noted that the transfer of power took place in a calm, non-conflict context, which is a powerful factor in ensuring internal stability and strengthening the international image of Kazakhstan.

As noted by the Council, over the reported period, the country continued to work on the consistent promotion of constitutionalism, improving the effectiveness of the provisions and norms of the Constitution in the field of State building, guaranteeing the rights and freedoms of man and citizen. After explaining its normative interpretative work (see cases above), the Council discussed the work in the beginning of 2019 directed at following up and implementing its previous decisions (normative resolutions), such as, for example, introducing a new article into the Law "On Executive Proceedings and the Status of Bailiffs", which now regulates in detail the order of using the forced delivery of a person to the interrogating officer, investigator, prosecutor or the court in case of failure to appear upon their call without good reason.

The Council reported on the legislative and interpretative work carried out during the years prior to 2019, upon which it proposed measures to improve the existing legislation in the country in several substantive areas. First, it noted that an analysis of the criminal procedural law shows that it lacks rules obligating criminal prosecution authorities to assist the victim in criminal cases of private prosecution to clarify the circumstances of the criminal offense in the absence of information about the prosecuted person. Furthermore, the Constitutional Council believed that the establishment of the procedure in which the initiation of criminal cases of private prosecution and criminal prosecution of them is assigned to the victims themselves does not exempt the State (represented by its authorized bodies) from fulfilling its constitutional duties to ensure adequate protection of the rights and freedoms of citizens, including judicial protection, as well as the rule of law and order in the country. In addition, the constitutional provision on the inviolability of personal dignity obliges the State to establish legal guarantees for the protection of this intangible good, not only during a person's life but also after their death. In this regard, in order to properly protect the constitutional rights and freedoms of crime victims, it is advisable to amend the Criminal Procedural Code accordingly. Regrettably, it did not propose any concrete wordings or formulations to the law.

Similar general suggestions were made as to the necessity of taking additional legislative measures in order to protect the institutions of motherhood and childhood as well as to pay serious attention to the modernization of the unified system of State patronage of the institution of marriage and family, motherhood, fatherhood and childhood. Importantly, the Council highlighted that it was necessary to make wider use of the possibilities for courts to access the Constitutional Council. There is no clear mechanism for notifying the courts about the Council's admission of requests made by other courts. Recently, the dynamics of such requests could not be called positive. The reasons to blame for this would be not only a low level of judicial activity but also (some unclear) organizational problems.

[7] Art. 63, para. 6 of the Constitution of the Republic of Kazakhstan. In accordance with Art. 32, para. 3 Constitutional Law "On Constitutional Council", addresses of the Council represent one of the three forms of its decisions that it uses in its work.

IV. LOOKING AHEAD

It appears logical to suggest that the next big question would be whether the main constitutional body of the country "gains confidence", despite all the peculiarities in its legal setup, in exercising its authority to provide proper control for ensuring constitutional legality, especially when it comes to the highest political actors. This will be particularly relevant in light of a potential need for constitutional review of possible new acts by the President in 2020[8] and beyond. Another challenge exists in ensuring that the Council's earlier decisions that weren't implemented by the responsible state bodies in 2019 are complied with and their recommendations followed.

V. FURTHER READING

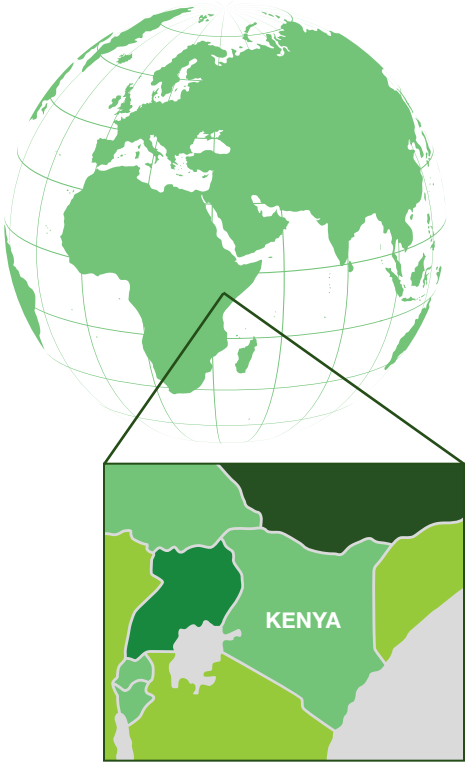
Tatyana Au, et al., "Constitutional Basis and International Standards of the Electoral Process in the Republic of Kazakhstan" (2019), 8 Konstitucionnoe i municipal'noe pravo 70 [Constitutional and Municipal Law, in Russian]

Ayan Toleubekov, "The Main Stages and Specific Features of Establishment and Development of Parliamentarism in Kazakhstan" (2019), 3 Konstitucionnoe i municipal'noe pravo 76 [Constitutional and Municipal Law, in Russian]

A.M. Zaretskiy, "Constitutional and Legal Status of the Parliaments of Kazakhstan, Uzbekistan and Tajikistan (Comparative Aspect)" (2019), 38 (1) *Eurasian Advocacy* 112

M.Kh. Zholdakhmet, R.V. Shagieva, "Foundations of the Constitutional System as a Category of Constitutional Law (On the Example of the Republic of Kazakhstan)" (2019), 40 (3) *Eurasian Advocacy* 71

[8] 2020 will mark an important milestone in the evolution of Kazakhstan's constitutional law: the 25th anniversary of the adoption of the current Constitution. Given the possibility of further political developments in the country coming from its new leadership – however real or formal – the next year might turn out to be more than a purely symbolic period of time.



Kenya

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I. INTRODUCTION

Constitutional change was the dominant theme of constitutional discussion in 2019. While some proposals focused on saving resources, and some on providing more resources to the devolved governments, most debate concerned possible changes in the entire system of government (from presidential to parliamentary or semi-presidential) and whether this change would facilitate national unity and peaceful elections.

Cases worth analysis were few. This paper focuses on some interesting applications of human rights provisions and on the criminal justice system – some offering improvement, others disappointing. Bringing that system into conformity with the Constitution is a matter of some urgency, but the cases are bringing improvements at the margins. Expansion of economic, social and cultural rights remained disappointingly limited. The problem of corruption, and efforts to control it, remained at centre-stage with many arrests, but no prominent convictions. This "fight" yielded associated crises in terms of executive-judiciary relations, and in individual counties where senior officers were under investigation. True leadership and vision in advancing constitutionalism were still sadly lacking.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The main constitutional focus was on proposals for constitutional change. One of these reached a resolution: an effort by a political party to use the popular initiative procedure for amendment. The Thirdway Alliance introduced the Punguza Mizigo (Relieve the Burden) proposals, focused on reducing the number of public offices as well as trying to expedite the corruption-related findings of the Auditor General through the courts. The Independent Electoral and Boundaries Commission examined the signatures and pronounced that there were more than the one million threshold required to start the process. However, the initiative failed at the next hurdle of getting 24 legislatures out of the 47 counties to approve it. Only one approved the proposal. It was clearly a political affair; in fact, the only county to approve it was the home of the Deputy President. Otherwise, the alliance of President Uhuru Kenyatta and Raila Odinga (see below) opposed it, and counties fell in line.[1]

However, in our opinion, the initiative was largely misguided. First, we are not convinced that "a constitutional amendment" (Article 277) covers such a large slew of amendments. Many proposals were poorly thought through, notably to reduce MPs to two for each county (so that Lamu, for example, with 69,793 registered voters in 2017, would have the same number of MPs as Nairobi (2,251,921 registered voters). Providing that the Auditor-General's reports must be automatically adopted, and lead to prosecutions, would give too much power to this office and detract from the role of the Director of Public Prosecutions. Providing that all corruption trials must end in 30 days was simply unrealistic. Minimum funding to counties would have been raised from at least 15 percent of national revenue to at least 35

[1] The bill can be downloaded from the Party website at https://thirdwayalliance.com/download/8_3_PUNGUZA_MIZIGO_Amendment_Bill_2019_2.pdf

percent. There was no suggestion to transfer any of the hefty national budget items to the counties, such as the police, courts, education, airports, universities or major roads.

The "UhuRaila" alliance alternative was the "BBI", the year's catchphrase: Building Bridges Initiative. This emerged from the handshake between the two outlined in the 2018 Global Review piece. A presidential task force was assigned to respond to nine issues outlined by the two handshakers. These included violent elections, a non-inclusive system of government, ethnic antagonism, the viability of the system of devolution based in 47 counties and corruption.

The task force reported in October 2019.[2] It made a large number of proposals, very many amounting to little more than saying we should follow the law and Constitution. Nine or ten would require amendment to the Constitution (of which a few need a referendum). Almost all attention was focused on the system of government – particularly because this was the way Odinga had painted the endeavour. However, the task force did not propose a true parliamentary system, but would have added a Prime Minister (similar to the Tanzanian or Ugandan model, but required to have the support of the parliamentary majority) to the President, plus a couple of deputy PMs. The second-place candidate in the presidential election would be *ex officio* in Parliament and Leader of the Opposition. The task force described this as a "autochthonous, home-grown executive structure that responds to our political realities, sought by Kenyans [and] broad-based and inclusive". They also wanted the counties to get 35-50 percent of the national revenue. They hinted, but did not recommend, an Odinga favourite: an intermediate level of government to legislate and coordinate regional law and policy.

The extension of term limits – for the President and governors – was also proposed. And both Punguza Mizigo and BBI favoured more development resources at the lowest elected level of government: the wards from which county assembly members come.

The tension between the judiciary and other branches of government continued. The President simply failed to perform the routine function of appointing 41 judges to superior courts. His excuses were that negative National Intelligence Service reports (an explanation greeted with incredulity on the part of those familiar with the judiciary), possible corruption and ethnic balance issues.[3] An earlier case had held that the President was obliged to appoint judges chosen by the Judicial Service Commission.[4] A new challenge to the President's reluctance is in court. Lack of person-power meant that regionally based Court of Appeal benches had to be withdrawn into Nairobi. Budgetary cuts have also been a challenge to the judiciary. The Treasury eventually restored the budget after what one report called a "passionate rant" by the Chief Justice.[5]

The "war on corruption" waged by the President, police and Director of Public Prosecution continued with many arrests but few convictions. The right to bail under the Constitution (Article 49(1)(h)) continued to create tensions between the judiciary and prosecution, but eventually magistrates, upheld by the High Court, began to include as a condition of bail for senior accused the prohibition on attending their offices. This was welcomed, but towards the end of the year, a peculiar crisis occurred when the Governor of Nairobi was arrested and charged with corruption (one of three to be charged). He had no deputy governor (his running mate having resigned early, citing an inability to work with the governor). Queries remained: What exactly was the governor prevented from doing? Who could stand in for him? The county assembly speaker could step in but only if the governor position was actually vacant (Article 182(4)). Could the governor nominate a new deputy, according to law, for approval by the County Assembly, despite the bail conditions? By year-end, these were unresolved, but court decisions were awaited.

III. CONSTITUTIONAL CASES

A) Human Rights

1. Federation of Women Lawyers (FIDA) v Attorney-General – 2019 eKLR Right to life; abortion; High Court[6]

The assumed facts were that the second petitioner, a girl of 14 at the time, had been compelled to have sexual relations, became pregnant and, unable to procure a legal abortion, resorted to other means, with serious consequences to her health – and indeed her death before the case concluded. Her claim was based on the withdrawal of guidelines for safe abortion by the Ministry of Health, despite the Constitution (Article 26) saying that abortion is forbidden "unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law". The action succeeded, based on violations of constitutional rights to the highest attainable standard of health, non-discrimination, information, to benefit from scientific progress and consumer rights, constituted by withdrawal of the guidelines. The Court indicated that pregnancy resulting from rape and defilement (intercourse with an underage person) could be terminated if the necessary opinion of a medical professional existed.

Formally, the Court said that the Constitution means what it says (including that abortion is

[2] It can be downloaded from https://d2s5ggbxczybtf.cloudfront.net/bbireport.pdf

[3] See for examples https://www.pd.co.ke/news/national/why-uhuru-has-yet-to-appoint-41-new-judges-7539/

[4] *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR http://kenyalaw.org/caselaw/cases/view/122387/ (a five-judge High Court bench including two of the three judges hinted by the President to be the subjects of NIS reports).

[5] See https://www.kenyans.co.ke/news/46107-uhuru-forced-backdown-fight-maraga

[6] Muchelule, Mumbi Ngugi, Odunga, Achode and Mativo JJ. http://kenyalaw.org/caselaw/cases/view/175490/

generally forbidden). However, its assertion that it was sometimes possible, including in cases of rape, and that there ought to be guidelines on when and how it was possible, was considered important.

2. EG & 7 others v Attorney General – Decriminalisation of homosexual activity; privacy; discrimination; High Court[7]

This was the other big "moral" issue of the year, but the result was very different. The petition was for a ruling against the criminalisation of male homosexual activity: "having carnal knowledge of any person against the order of nature". The challenge was mounted in terms of the right to health and of freedom from discrimination, vagueness of the Penal Code provision and breach of other rights such as to privacy.

All were rejected. The provisions did not discriminate against gay men (a finding that ignores the prohibition on indirect discrimination). The core of the Court's reasoning on other rights was Article 45 on the importance and protection of the family and that "every adult has a right to marry a person of the opposite sex, based on the free consent of the parties". To decriminalise gay sex would be the thin end of the wedge was essentially the Court's assumption, especially because the Marriage Act recognises long-term heterosexual cohabitation as equivalent to marriage. Other rights like privacy had to be read in the light of this provision that encapsulated Kenyan social values (deemed hostile to gay sex).

3. Non-Governmental Organizations Co-Ordination Board v EG & 5 Others – [2019] eKLR Right of association; discrimination; sexual orientation; Court of Appeal[8]

The Court of Appeal upheld the High Court decision that an organisation ought to be able to register, and do so using a name indicating its objectives. Justice Nambuye dissented on the ground that to fall into one of the categories of beneficiaries of the non-discrimination provision of the Constitution (Article 27) implied in the use of the word "including", a group must not be based on illegality (like sex against the order of nature) and must show that it is "vulnerable". Justice Musinga, like the Court in the decriminalisation case (case 2 here), rested a good deal of his argument on Article 45's protection of the family.

Justice Waki said that "the time has come for the peoples' representatives in Parliament, the Executive, County Assemblies, Religious Organizations, the media and the general populace, to engage in honest and open discussions over these human beings [LGBTI community]".

4. CKC & Another (Suing through their mother and next friend JWN) v ANC – [2019] eKLR Equality; Islamic law; inapplicability of equality to cases in Kadhi court; unmarried parents; succession; Court of Appeal[9]

The case involved "whether the appellants, children born of a Muslim father and a non-Muslim mother who were not formally married, can inherit the estate of their deceased father". The Kadhi Court and High Court had assumed that the property of a Muslim devolved on death according to the Shari'a, and that the non-Muslim children of the deceased had no right under Shari'a to inherit from their Muslim father. This involved discrimination on the grounds of illegitimacy and religion, but the right to equality does not apply "to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to … inheritance" (Article 24(4)). The Court of Appeal, however, held that this did not apply because the sons were not Muslim. It emphasised the centrality of human rights to the Constitution, and its obligation to interpret the Constitution in the way that most favours rights. The dispute therefore should have been dealt with in the High Court and under the Law of Succession Act. Many issues remain to be sorted out; suppose for example a deceased Muslim has both Muslim and non-Muslim offspring. Might not equality mean the Shari'a basis of succession should apply to all? Suppose some offspring were female?

5. British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health – [2019] eKLR Tobacco control regulations; participation; restriction on industry contact with government officials; what is "tax"? Supreme Court[10]

The Supreme Court upheld lower courts in rejecting the challenge to tobacco control regulations. It elaborated on the nature of public participation, an important value of the Constitution that almost achieves the status of a right, before proceeding to hold that participation in this case had been adequate. Provisions that limit tobacco industry interaction with public officials are not unconstitutional because they satisfy Article 24 on limitation of rights (including rejecting the submission that it was inappropriate to consider the health effects of tobacco). Similarly, provisions about revealing manufacturing information are a justified limit on rights of privacy. A curious aspect of the decision is the finding that a requirement to make payments (called "solatium") into a fund for research, public information and campaigns was not a "tax" because it was not national revenue. This seems unnecessary (because the parent act provided for the fund). It also raises the possibility of evasion of constitutional rules on approval of taxes, and limits on the taxing power of counties in the devolved system of government.

[7] Aburili, Mwita, Mativo JJ; http://kenyalaw.org/caselaw/cases/view/173946/

[8] Waki, Koome, and Makhandia Justices of Appeal, Nambuye and Musinga, JJA dissenting.

[9] Karanja, Musinga and M'Inoti JJ.

[10] Maraga CJ; Mwilu Deputy CJ, Ojwang, Wanjala and Njoki, Supreme Court Justices, http://kenyalaw.org/caselaw/cases/view/185959/

6. Orange Democratic Movement Party (ODM) v Independent Electoral and Boundaries Commission – [2019] eKLR Access to information vis-à-vis privacy; High Court[11]

This involved the balance between access to information and privacy rights. The information was the names and identity card or passport numbers of voters. The petitioner had asked for this information to be made public, online, for a by-election. The High Court held that to deny the information was a violation of the right of access to information (Article 35), the state had failed to establish that this was justified and the infringement of privacy was justified by the need for free and fair elections.

7. J W M (alias P) v Board of Management [Particulars Withheld] High School – [2019] eKLR Rights to religion and education; school uniform rules; High Court[12]

The petitioner was excluded from school because she wore dreadlocks. Her claim was that she did this as a religious observance being a Rastafarian. Satisfied that this was a genuine religious choice, the Court held that her rights to freedom of religion and to education had been violated. It said that "Where genuinely held religious beliefs clash with school rules, both sides must strike a balance between religion and education for the good of the learner and the institution. School rules must appreciate genuinely held religious beliefs and should not be applied as though they are superior to the text of the Constitution". There have been other cases about tension between school rules and religious conviction. The school in this case did not seem to have made a strong case about the reason for the uniformity of hair styles.

B) Humanising (or not) the Criminal Justice System

8. Aloise Onyango Odhiambo v Attorney General – [2019] eKLR Prisoners' rights; forced labour; High Court[13]

The petitioners were serving life sentences (some commuted from death) and challenged various aspects of their situation. There are few Kenyan cases on prisoners' rights, but this one is disappointing, perhaps because the petitioners represented themselves. Thus, though the Court held that the petitioners were entitled to amenities like soap on the basis of the constitutional guarantee of respect for dignity, it could not order that they be supplied in the absence of any budgetary allocation. Again, the Court held that not every prisoner was entitled to participate in work (and these had not shown that they were in the category of those who were entitled), and that prison work did not amount to forced labour (perhaps not "labour" at all but rehabilitation). The case was a missed opportunity to deliberate on the conditions of prisoners.

9. Sammy Musembi Mbugua v Attorney General – [2019] eKLR Prisoners' rights; equality; eligibility for remission; High Court[14]

The petitioners had been convicted of robbery with violence and ultimately sentenced to fixed terms. Under the Prisons Act, prisoners undergoing such sentences were not entitled to remission. This was held to be discriminatory and declared unconstitutional. A disappointing aspect of this case is the Court's acceptance that life prisoners are not entitled to remission (because it is not possible to calculate one-third of their sentence).[15] This leaves them alone without the possibility of remission – in other words, assumed to be incapable of rehabilitation despite the fact that the need for prisons to be places of rehabilitation was featured in the Supreme Court's decision in 2017 on the unconstitutionality of the mandatory death penalty.

A number of cases have dealt with the questions of detaining people at the pleasure of the President, notably persons found unfit to plead "guilty but insane" or child offenders. These provisions have been held unconstitutional, but the position remains a bit confused. In 2019, the courts decided the following case.

10. Republic v E N W – [2019] eKLR "Guilty but insane", appropriate sentence; High Court[16]

The judge disagreed with a previous case holding unconsititutional a provision that a person found guilty but insane was to be detained at the President's pleasure. However, she imposed a fixed term of imprisonment (assuming the case would then go on to the President for application of the 'perogative' of mercy). Neither case produces a just result for those who in other jurisdictions would be held "Not guilty on the ground of insanity". Fortunately, in late 2019 a Task Force was established to consider mental illness including the legal framework.

C) Frame of Government

The procedures and spirit of the 2010 Constitution have by no means been internalized by the government. A good deal of litigation is directed towards ensuring that the Constitution is both understood and implemented.

[11] Justice J A Makau, http://kenyalaw.org/caselaw/cases/view/184474

[12] Justice Chacha Mwita, http://kenyalaw.org/caselaw/cases/view/180467/

[13] Justice Mwita, http://kenyalaw.org/caselaw/cases/view/184839/

[14] Justice Odunga, http://kenyalaw.org/caselaw/cases/view/180115/

[15] The Court is clear that the declaration of unconstitutionality relates only to the fixed term; thus the KenyaLaw website errs when it says "Paragraph 46(1)(ii) declared Unconstitutional" because that applies to life sentences also (note to s. 46), http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2090

[16] Justice Lesiit, http://kenyalaw.org/caselaw/cases/view/179034/

11. National Gender and Equality Commission v Majority Leader, County Assembly of Nakuru – [2019] eKLR List members of county assemblies; discrimination; nature of constituencies; High Court[17]

The legislative bodies include both members elected for single-member geographical districts (constituencies, counties or wards – at county level) and others drawn from party lists to represent special groups. There are four in each county assembly drawn from persons with a disability, youth or a marginalized group, plus enough to ensure that overall no more than two-thirds of the assembly are of the same gender. The role of these members (often misleadingly called "nominated") is generally considered unclear, and they, especially the women, are frequently referred to in a derogatory fashion.

A Nakuru assembly resolution had the effect of excluding women list members from the position of chair or deputy of assembly committees (reducing the women-held leadership roles in committees from 35 percent to 10 percent). The High Court held that this was discriminatory, despite the language of the resolution being gender-neutral (Article 27(4) on indirect discrimination would have been sufficient to resolve this). It rejected the submission that other remedies should have been exhausted (since the petitioner Commission could not have gone to the Political Parties Dispute Resolution Tribunal yet was an eminently appropriate petitioner). It also rejected a submission that its assumption of jurisdiction would trespass on the "venerated principle of Separation of Powers": while showing due deference, it could intervene if the decision of another branch of government violated a "rationality test".

The national Salaries and Remuneration Commission ordered that list members in all legislatures were not to get mileage allowances because they did not have constituencies. The Court again found for the petitioner: "Nominated MCAs represent special interests, especially vulnerable, minority and historically marginalized groups such as women, the youth, Persons with Disabilities and racial minorities. These populations tend to be dispersed throughout the various counties."

12. Law Society of Kenya v Attorney General – [2019] eKLR Legislative process; miscellaneous amendment statutes; independence of legal profession; Court of Appeal[18]

The petitioner/appellant sought to have legislation making various changes to law affecting the legal profession declared unconstitutional. The changes had been made by a Statute Law (Miscellaneous Amendments) Act (long title: "An Act of Parliament to make minor amendments to Statute Law"). The Court of Appeal agreed that the particular changes were not minor, and there had not been adequate public participation (required by Constitution Article 118(b)) – or at least the judge had erred in holding that it was for the petitioner to establish the lack of participation. Lack of public participation is a common feature of legislating by Miscellaneous Amendments Act. The court also seems to have concurred with the appellant that the substance of some of the amendments was objectionable as reducing the independence of the profession.

13. Katiba Institute v Attorney General & 3 Others; Kenya National Commission on Human Rights (Interested Party) – [2019] eKLR Failure to constitute accountability body required by Constitution as read with statute; High Court[19]

The petition complained that the government and the National Intelligence Service had failed to set up a Complaints Board as required by statute. The High Court accepted that establishing the Board was something to be done in accordance with Constitution Article 239(5): "The national security organs are subordinate to civilian authority". It ordered the relevant bodies to establish the Board, which must comply with constitutional principles. Interestingly, after the case had been started, those authorities had begun the process of creating the Board, but the judges commented sardonically that "my deduction is that [certain letters] are merely but a thin veneer put up by the Respondents, after being compelled no less, in an attempt to put on a show that there is indeed an ongoing process for constituting the Board. This Court is not convinced in the least". The respondents were given 180 days from mid-December 2019. Unusually for a public interest case, costs were awarded against the respondents.

IV. LOOKING AHEAD

Constitutional developments in 2020 promise to be in continuity with 2019. The Building Bridges Initiative will absorb a good deal of time and money on the part of the government. It may well lead to the recommendation of a full-fledged parliamentary system or a semi-presidential one. Its architects envisage a people's initiative and perhaps referendum. That will almost certainly be challenged on the basis of the objections aired in Section II above.

The relations between the judiciary and executive and legislature are unlikely to improve a great deal. The activities of the judiciary will continue to be hampered as long as the President declines to appoint and promote judges. At the beginning of the year, a member of the Supreme Court will retire and, as the Deputy Chief Justice will be embroiled in a criminal case, the Court may find it hard to ensure a quorum.

As the 2022 elections draw closer, the worst type of politics will undoubtedly dominate. Concern about constitutionalism will be absent.

[17] Justice Joel Ngugi, http://kenyalaw.org/caselaw/cases/view/178745/

[18] Justices of Appeal Waki, Musinga and Kiage, http://kenyalaw.org/caselaw/cases/view/181561/

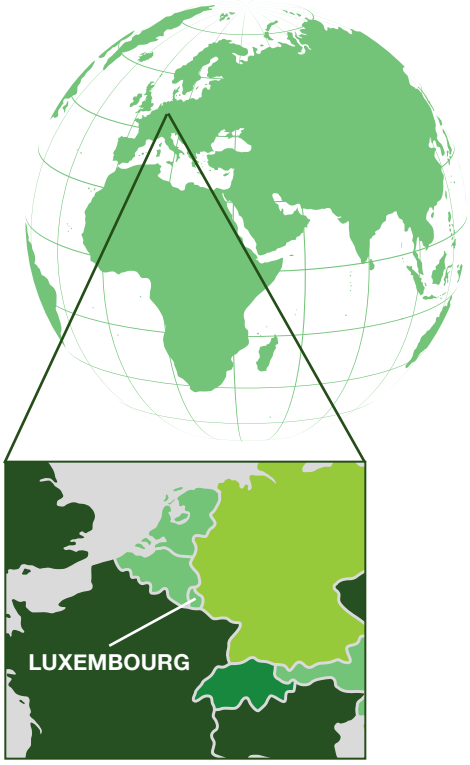
[19] http://kenyalaw.org/caselaw/cases/view/186822/ (Justice Nyakundi).

V. FURTHER READING

Dominic Burbidge, *An Experiment in Devolution: National Unity and the Deconstruction of the Kenyan State*, Strathmore Press, 2019

Andra Le Roux-Kemp, 'The Enforceability of Health Rights in Kenya: An African Constitutional Evaluation' (2019), 27 *Afr J Int'l & Comp L* 126

Cecil Yongo, 'Constitutional Interpretation of Rights and Court Powers in Kenya: Towards a More Nuanced Understanding' (2019), 27 *Afr J Int'l & Comp L* 203



Luxembourg

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I. INTRODUCTION

Just as in past years, the dominant issue in Luxembourg was the questions of whether and how the Constitution, one of the oldest constitutional documents in Europe still in force, should be subject to an in-depth and complete overhaul in order to modernize its language and to adapt its text to political reality and international standards, in particular the standards of protection of human rights. While this long-lasting discussion came to an end in 2019 in a somewhat unexpected manner we shall discuss below, the transition of the constitutional text into a "living instrument" will certainly continue to occupy all institutions, notably the Parliament,[1] the Government and the Council of State[2] in the coming years.

Furthermore, the year 2019 was marked by some significant decisions of the Constitutional Court. Generally speaking, these decisions reflected the intention of the constitutional judges not only to determine more actively the interpretation and understanding of the constitutional text but also to shape the interactions between constitutional law and other fields of law, in particular administrative and international law.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Even though much work and commitment has been invested in the general constitutional amendment procedure over the past years, the reasons for its end are numerous. It is worth recalling that since 2005, the Parliament, and in particular its Constitutional Review Commission (CRC), has worked on the project to generally amend the Constitution in order to adapt it to the needs of a modern democracy. On 21 April 2009, the CRC introduced a revision proposal[3] that has been amended six times by the same CRC and served as a basis for three governments' position statements, issued respectively in 2011, 2015 and 2018. The Council of State delivered no less than four opinions on this subject (June 2012, March and December 2017, March 2018). Its fifth opinion is expected to be adopted in the beginning of 2020, on explicit request of the Parliament. This opinion will probably be the last and closing "preparatory document" of this enormous project. Moreover, the Venice Commission of the Council of Europe provided its legal advice twice, in October 2012 and March 2019, to help Luxembourg bring its Constitution into line with European

[1] The Parliament in Luxembourg is the Chamber of Deputies (*Chambre des députés*), as the Luxembourg parliamentary system is unicameral.

[2] According to Article 83bis of the Constitution, the Council of State is called to give its opinion on all proposed legislative acts (including constitutional amendment acts) and regulatory acts. The Council of State examines in particular the compatibility of the proposed acts with sources of higher law such as International and European Law, the Constitution as well as general principles of law.

[3] *Proposition de révision portant modification et nouvel ordonnancement de la Constitution* of April 21, 2009, renamed in 2015 *Proposition de révision portant instauration d'une nouvelle Constitution*, doc. parl. no. 6030. For further details, see Jörg Gerkrath, 'Some Remarks on the Pending Constitutional Change in the Grand Duchy of Luxembourg', *European Public Law*, 19 (2003) 449.

standards in the fields of democracy, human rights and the rule of law.[4]

In June 2018, the CRC adopted a "final" report taking into account numerous official opinions and position statements, as well as propositions made in the context of a remarkable citizen's participation initiative, which led to a public parliamentary discussion in 2016. This report was also the result of a consensus between the major political parties. An information campaign was meant to be launched in autumn 2019, to be followed by a binding referendum. However, just before the summer break 2019, the conservative Christian Social Party (CSV), which had obtained a relative majority in 2018 but had to remain in the opposition because of the continuation of the coalition government between liberals, socialists and the green party, expressed its reluctance with respect to the final report and its disagreement on several points. Besides, the question whether to submit the new Constitution to a referendum remains controversial.[5] As no constitutional amendment can be passed without votes from the CSV, the CRC decided to suspend the information campaign and to put an end to the ambitious project of a general overhaul of the current Constitution.

The CRC nevertheless reiterated, on the same day, its willingness to continue the revision of the constitutional text over the coming years. Some 30 points have been identified on which a large cross-party consensus exists. The focus will be first on the courts and the judiciary in general. This approach is in line with two proposals of legislative acts (*lois*) that were initiated in 2018 and 2019, respectively.

The proposal of 2018[6] followed up on a suggestion to create a "National Council of Judiciary" (CNJ) previously made by the Ministry of Justice in 2011 in the context of the general amendment procedure.[7] The Ministry considered, in fact, that there was no need to wait for a constitutional amendment, as the CNJ-Act would not be contrary to the current Constitution. The newly created CNJ would be responsible for ensuring independence of judicial authorities as well as proper administration of the judiciary.

The proposal of 2019 seemed to be an immediate reaction to the failure of the general constitutional amendment procedure. In March, the Parliament proposed to amend Article 95ter of the Constitution relative to the Constitutional Court.[8] The purpose of this proposal was twofold. First, it aimed at introducing the possibility of substitute judges sitting when necessary. In fact, as the Court is currently composed of nine judges who are, at the same time, judges of the highest courts in Luxembourg (double mandate), it is sometimes difficult to set up a body of decision in a particular case. Due to the principle of impartiality, no judge should indeed sit twice in the same case.

Secondly, the proposal aimed at strengthening the effects of the rulings of the Constitutional Court. At present, these effects are limited to the dispute that gave rise to the preliminary procedure. As other courts are entitled to refrain from introducing a question in similar cases, the rulings of the constitutional judge enjoy relative authority. Legislative Acts that the Court declared non-compatible with the Constitution do, however, remain in force. Parliament has full discretion whether to withdraw or to amend those acts. It hardly comes as a surprise that several acts that have been declared inconsistent with the Constitution are still in force. This is considered unacceptable, and the constitutional amendment proposal intends to give general and absolute effect to the rulings of the Court. In order to mitigate judgments that would entail excessively severe consequences, the Court shall have the competence to defer the absolute effect of its ruling for a maximum of twelve months. In July, the proposal was split: the first part regarding substitute judges was adopted in December 2019;[9] the second part, concerning the effects of the Court's judgments, is expected to be adopted in 2020.

III. CONSTITUTIONAL CASES

The *Cour Constitutionnelle*[10] rendered 8 judgments (*arrêts*) in 2019 compared to 11 in 2018 and 4 in 2017. The low number of verdicts resulted from its very limited competence. The only way to bring a case before it is for ordinary courts and tribunals to submit a preliminary question on the constitutionality of a legal norm. The vast majority of cases concerned respecting the principle of equality laid down in Article 10bis of the Constitution. Hence, 5 out of the 8 cases decided by the Court in 2019 concerned this principle alone or in conjunction with another constitutional provision.

Two cases were declared inadmissible (143/19 and 151/19), either because the referring judge modified the wording of the preliminary questions without giving the parties a chance to discuss this (151/19), or the submitted question was considered by the Constitutional Court to be "irrelevant" (143/19). One case was stayed because the Court decided to ask a preliminary question

[4] The 'preparatory documents' are all available at www.chd.lu (doc. parl. no. 6030).

[5] See Carola Sauer Rappe, 'Luxembourg', *I Connect Report* 2017 (2018) 183.

[6] *Projet de loi portant organisation du Conseil suprême de la justice* of June 22, 2018, doc. parl. no. 7323.

[7] See *Prise de position du Gouvernement*, doc. parl. no. 6030/5, 44, and the pre-law proposal of the Ministry of Justice, *Dossier de presse* of February 27, 2013, available at www.mj.public.lu/actualites/2013/02/Cour_supreme/Dossier_de_presse_reforme_Justice.pdf

[8] *Proposition de révision de l'article 95ter de la Constitution*, February 27, 2019, doc. parl. no. 7414.

[9] *Loi* (Act) of 6 December 2019 *portant révision de l'article 95ter de la Constitution*, Mémorial A 831, December 10, 2019.

[10] The Constitutional Court of Luxembourg was established in 1997 by the *Loi* (Act) of 27 July 1997 *portant organisation de la Cour Constitutionnelle*, Memorial A 58, August 13, 1997 1724.

of the Court of Justice of the European Union (146/19). In the five remaining cases, the Court concluded that the referred legal norms were not conforming to the Constitution.

1. Judgment from May 28, 2019 in case 146/19

A question was brought to the Constitutional Court by the *tribunal administratif* in a procedure regarding the exchange of information on request in tax matters. The referring tribunal explicitly asked whether "the principles of the rule of law and the principle of legality emerge from the constitutional provisions" and more particularly from Article 95 of the Constitution, which states that "The courts and tribunals shall apply general and local by-laws and regulations only to the extent that they are in conformity with the law". If so, the tribunal further asked whether Article 6(1) of the *Loi* (Act of Parliament) of 25 November 2014, laying down the procedure applicable to the exchange of information on request in tax matters, is consistent with the principle of the rule of law and the principle of legality insofar as it enshrines a legal prohibition to introduce an action for judicial review of a foreign request for exchange of information, or of the decision of a correlative injunction emanating from the Luxembourg authorities.

As Article 8(1) of the founding Act of the Constitutional Court of 27 July 1997 states clearly that the referring judge "shall indicate precisely the legislative and constitutional provisions" to which the preliminary question relates, the wording of the submitted question raised an issue of admissibility, considering that neither the principle of the rule of law nor the principle of legality is laid down as such in the Constitution.
Abandoning its more timid stance from earlier judgments,[11] the Court found this time that "it is immaterial whether the national court refrains from designating the article of the Constitution which is liable to be infringed by a legal rule, provided that it clearly indicates the legal rule contained in one or more provisions of the Constitution". Thus it declared the question admissible.

Furthermore the Court ruled that the fundamental principle of the rule of law is inherent in Articles 1 and 51(1) of the Constitution, according to which "the Grand Duchy of Luxembourg is a democratic State (…) placed under the rule of parliamentary democracy" and that the principle of legality and Article 95 of the Constitution constitute an emanation of the fundamental principle of the rule of law in which they participate.[12] This finding, suitable in the result, still raises some questions regarding the line of argumentation. Though the principles of democracy and the rule of law must coexist in a liberal democracy, it is indeed not fully convincing to deduce the second from the first.[13]

Once the question for a preliminary ruling being declared was admissible, the Court had to consider it from the point of view of the right to access to a judge and the principle of an effective remedy deriving therefrom. Mentioning explicitly "Articles 6 and 13 of the ECHR concerning access to the courts and effective remedies, corresponding to those of Article 47 of the Charter of Fundamental Rights", the Court reminded that the question referred by the *tribunal administratif* "bears definite similarities" with a preliminary ruling question referred to the Court of Justice of the European Union by the Administrative Court (*Cour administrative*),[14] and decided to stay the proceedings until the Court of Justice delivered its ruling.

Thus, even though case 146/19 is not yet finally settled, it is testimony to a "new era" of constitutional case law in Luxembourg. If confirmed by future judgments, this era is characterised by two main elements: the willingness of the Court to construe the Constitution more actively in a comprehensive manner, and its openness to "supranational" sources of constitutional law and principles.

2. Judgment from July 5, 2019 in case 147/19

The judgment in case 147/19 is a typical illustration of the way the Court deals with questions raised under the principle of equality enshrined in Article 10*bis* of the Constitution providing that "Luxembourgers are equal before the law". The Court holds indeed in its stable case law that, at a first stage, "the implementation of the constitutional rule of equality presupposes that the categories of persons between whom discrimination is alleged are in comparable situations with regard to the legal provision under criticism". In this case, the two situations are those of an adopted person whose author, the spouse of the adopter, is deceased, and that of an adopted person whose author is still alive.

In this case, the Court found that the aim sought by paragraph 4 of Article 359 of the Civil Code is to maintain the filiation link existing between the spouse of the adopter and the adopted person and, therefore, to allow the latter to keep the name he or she holds of his or her biological parent, and considered that this link is not affected by the death of the latter. Thus the Court decided that both situations are comparable.

In a second stage, the Court regularly reminded "that the legislator may, without violating the constitutional principle of

[11] See notably the judgments in case 2/98 of November 13, 1998, and in case 37/06 of November 17, 2006, where the Court declared that "it is not empowered to substitute any other constitutional rule for that specified by the referring court".

[12] Cp. Judgment 57/10 of October 1, 2010, where the Constitutional Court had already recognized the general principle of separation of powers, which isn't explicitly mentioned in the Constitution either.

[13] Cp. Luc Heuschling, 'Pourquoi la Cour constitutionnelle devrait s'intéresser à l'histoire, ou audaces apparentes et réelles de l'arrêt no 146 (2019) relatif à « l'État de droit »' [2019] JTL 97 and Patrick Kinsch, Observations' [2019] JTL 111.

[14] Judgment of March 14, 2019, No 41487C.

equality, subject certain categories of persons to different legal regimes, provided that the difference instituted results from objective disparities and is rationally justified, adequate and proportionate to its purpose". This wording has been retained by the *Chambre des deputés* (Parliament) for a future amendment of Article 10*bis*.

As a result, the Court finally considered that by granting, according to the interpretation of the referring court, the adopted person, who is the child of the adopter's living spouse, the right to keep his or her name without providing for the same right for the adopted person whose author is deceased, the provision under consideration "creates a difference in treatment between adopted persons to the detriment of the latter".

As this difference in treatment does not result from an objective disparity and is not rationally justified, adequate or proportionate to its aim, the Court held consequently in relation to the preliminary question referred that Article 359(4) of the Civil Code does not comply with Article 10*bis*(1) of the Constitution.

3. Judgment from July 5, 2019 in case 148/19

Case 148/19 raised, once again, the question of the division of competences between the legislator and the executive power adopting grand-ducal regulations, this time in the medical profession field.[15] Article 11, paragraph 6, subparagraph 1 of the Constitution provides indeed: "Freedom of trade and industry, the exercise of the liberal profession and agricultural work shall be guaranteed, subject to such restrictions as may be established by a *Loi* (Legislative Act)".

Article 32, paragraph 3 of the Constitution provides furthermore: "In matters reserved to the law by the Constitution, the Grand Duke may make regulations and orders only by virtue of a specific legal provision which lays down the purpose of the implementing measures and, where appropriate, the conditions to which they are subject". Thus, the respective domains of the law (legislative act) and the regulation are clearly delimited.

Article 19 of the *Loi* of 29 April 1983, at stage in the present case, provides that a Grand-Ducal regulation "shall lay down a list of equipment and apparatus which may not be held or used by doctors and dentists for the needs of their medical practice, as well as a list of equipment and apparatus which may only be held or used by specialist doctors for the needs of their specialties".

The request for the acquisition of magnetic resonance imaging (MRI) equipment emanating from a medical radiologist had been refused authorisation by a decision of the Minister of Health on 27 December 2017 based on the Grand-Ducal regulation of 17 June 1993, which sets out the list of equipment and appliances that cannot be acquired by doctors and dentists for the needs of their medical practice.

Considering that in accordance with Article 11, paragraph 6, subparagraph 1 of the Constitution, restrictions on the exercise of the liberal profession of doctor "are a matter reserved for the law" and that the establishment of a list of equipment and appliances which may not be acquired by doctors and dentists for the needs of their medical practice constitutes such a restriction, the Court held consequently that, in relation to the preliminary question referred, Article 19 of the *Loi* of 29 April 1983 was not in conformity with Articles 11(6) and 32(3) of the Constitution.

In addition to that finding, the Court also underlined the requirement to respect the supplementary condition for a *Loi* to be in conformity with Article 32, paragraph 3 of the Constitution. As in a previous judgment from 2018,[16] the Court required indeed that the *Loi* give an "indication as to the purpose of the implementing regulation".

4. Judgment from November 15, 2019 in case 150/19

The preliminary question in this case was raised by the *tribunal administratif* in a judgment of 5 April 2019. On 28 July 2017, X, a teacher, had lodged a request before that tribunal seeking the annulment of a decision of the Minister for National Education, Children and Youth of 2 May 2017 refusing to recalculate his salary following the annulment by the *tribunal administratif* of a Grand-Ducal Regulation of 25 August 2015. The main point at issue before the tribunal administratif concerned the effects and scope of the aforementioned judicial decision to annul the Grand-Ducal Regulation of 25 August 2015. In this context, the tribunal referred the following question to the Constitutional Court for a preliminary ruling: "Are the provisions of Article 7, paragraph (3) of the amended Loi (Act) of 7 November 1996 on the organization of the administrative courts, which, in its second sentence, provides that 'annulment is absolute from the day on which it has the force of *res judicata*', in conformity with Article 95 of the Constitution?".

Article 95 of the Constitution states indeed that "The courts and tribunals shall apply general and local by-laws (*arrêtés*) and regulations only to the extent that they are in conformity with the *lois* (legislative Acts) (…)". Consequently, the Constitution Court construed Article 95 of the Constitution as calling "on the courts, without distinction in time, to refrain from applying such by-laws and regulations that are contrary to *lois*".

Coming to the second sentence of Article 7(3) of the amended Act of 7 November 1996 on the organisation of administrative courts, which provides that the final annulment of an administrative act of a regulatory nature by the administrative courts "is absolute in nature and has *erga omnes* effects for the future", the Court underlined that, "in so providing, the legislature has opted for an *ex*

[15] Cp. Paul Schmit, 'Le pouvoir réglementaire du Grand-Duc dans le miroir de la Cour constitutionnelle. Sommes-nous à l'abri de surprises?' [2019] RLDP 63.

[16] Cp. Judgment 141/18 of December 7, 2018, in the field of the definition of tasks of secondary education teachers.

nunc effect of decisions to annul a regulatory administrative act, implicitly but necessarily excluding the retroactive nature of the *erga omnes* effects of the annulment". According to this interpretation, the modulation in time of the effects of the annulment of an administrative act of a regulatory nature implied, according to the Court, "that such an act, although deemed unlawful, continues to be applicable from the date of its coming into effect until the date on which its annulment has become final and that the courts are therefore bound to apply it for the period prior to its annulment despite its recognised contravention of the *loi*".

Such a general and unconditional limitation in time of the effects of the annulment of an administrative act of a regulatory nature thus runs counter to the prohibition laid down in Article 95 of the Constitution, since neither that article nor any other constitutional provision provides for the possibility of derogating from it. The Court finally rejected the argument based on the infringement of legal certainty raised by the Government. According to its judgment, such an infringement resulting necessarily from the retroactive effect of the annulment of an administrative act of a regulatory nature cannot be used as a basis for derogation from the prohibition laid down in Article 95 of the Constitution. The Court therefore held that, in relation to the question referred for a preliminary ruling, the second sentence of Article 7(3) of the Law of 7 November 1996 was not in conformity with Article 95 of the Constitution "in that it limits, generally and unconditionally in time, the effects of the definitive annulment of an administrative act of a regulatory nature".

IV. LOOKING AHEAD

The upcoming constitutional revisions are likely to have a major impact on the functioning of the Constitutional Court in at least two respects (as mentioned above in Section II). One is the introduction of a system allowing for substitute judges to be called to sit in the Court when regular members are not available. The other one concerns the legal effects of the Court's judgments. If the revision passes, provisions declared unconstitutional will cease to have legal effects on the day following the publication of the judgment (or later if decided otherwise by the Court, but in any case no more than twelve months after the publication of the judgment). This should ultimately impact the nature of the control performed by the Constitutional Court.

In addition, the Constitutional Court is expected to deliver a preliminary ruling on a question referred to it by the Administrative Court.[17] This should allow the Constitutional Court to follow up on its 2019 case law on the rule of law and the principle of legality. The case concerns a dispute over the implementation of certain provisions of Luxembourgish tax legislation which have retroactive effects. The Administrative Court has questioned the constitutionality of the retroactive effects in light of the rule of law and the principle of legality, and it has asked the Constitutional Court to clarify whether the principles of legal certainty, protection of legitimate expectations and non-retroactivity of the law have constitutional value.[18]

V. FURTHER READING

Fatima Chaouche, Jörg Gerkrath, Janine Silga, Julia Sinnig, Catherine Warin (dir.), *Droit luxembourgeois et européen de l'asile,* Pasicrisie luxembourgeoise, Luxembourg, 2019, 410

Collectif, 'Constitution' in [2019] Forum für Politik, Gesellschaft und Kultur, no. 399, Luxembourg, 70

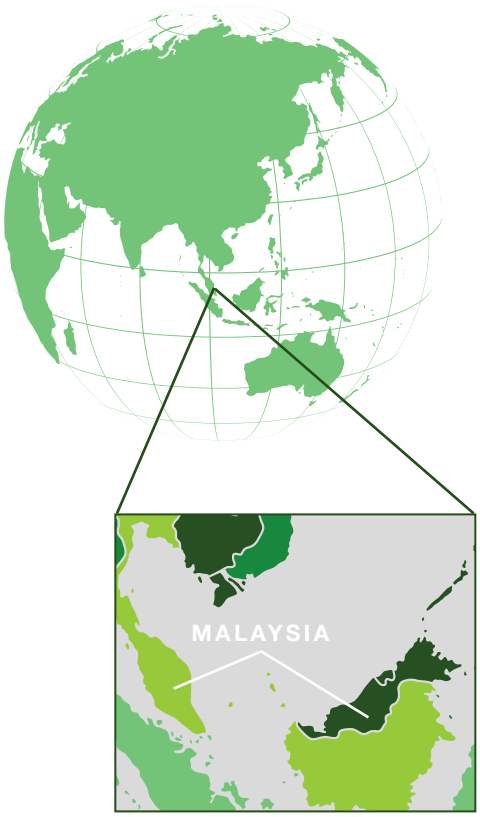
Carola Sauer, *Contrôle juridictionnel des lois au Luxembourg*, Larcier, Brussels, 2019, 432

Paul Schmit, 'L'art de s'esquiver. Regard critique sur les amendements proposés au projet de nouvelle Constitution à la suite de l'avis de la Commission de Venise' [2019] RLDP 93

Fatima Chaouche, *Legitimate expectations in Luxembourg tax law. The case of administrative circulars and tax rulings,* Larcier, Brussels, 2019, 552

[17] The Administrative Court is Luxembourg's supreme administrative court, i.e., it rules on appeals against judgments of the *tribunal administratif*.

[18] Administrative Court, November 26, 2019, no. 42582C.



Malaysia

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I. INTRODUCTION

Following landmark general elections in 2018, when a new political coalition came into power to form the federal government for the first time since Malaysia's independence, 2019 was the critical year in which their capacity to govern and bring about key constitutional reform was tested. The new *Pakatan Harapan* (Pact of Hope) coalition government saw many of its lofty reform promises scuttled by pressure from vested interest groups which, at times, inflamed ethnoreligious sentiments to block changes that would consolidate democracy in the country. Only one constitutional amendment, and precious few legislative initiatives, successfully materialized over the year.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Elusiveness of Constitutional Amendment

The difficulty of securing constitutional reform in a situation where the ruling coalition does not command the requisite two-thirds parliamentary majority to effect such amendments was highlighted on two occasions. In March, the government attempted to amend Article 1(2) of the Federal Constitution to 'restore the constitutional position' of Sabah and Sarawak, Malaysia's two states on the island of Borneo. Historically and ethnically distinct from the rest of the country, these states have considerable grievances – openly acknowledged as legitimate by the present ruling coalition – stemming from underdevelopment and neglect since helping to form Malaysia in 1963.

In truth, it was always arguable whether the government's proposed amendment, which sought merely to place Sabah and Sarawak in a separate category within the constitutional provision enumerating the States of the Federation, would have amounted to anything more than window-dressing in the face of the very real concerns currently facing these two states. However, in the hyper-charged atmosphere of contemporary Malaysian politics, even this token measure swiftly escalated into a test of the ruling coalition's ability to stamp its mark on the country's constitutional architecture. In an event unprecedented in Malaysian history, the proposed amendment failed at the first hurdle when it could not muster the required two-thirds majority support in the Lower House of Parliament. Ironically, an independent bloc of lawmakers from Sarawak joined with the federal opposition to block the bill, highlighting the inability of the present government to secure constitutional amendments without bipartisan support.

In July, the federal government mounted another effort, this time to reduce the constitutional age of eligibility to vote in parliamentary and state-level elections from 21 years to 18. This was in fulfillment of a specific promise that the now-ruling coalition had made in its electoral manifesto, but this time, the government was able to entice support from opposition parties by acquiescing to their demand for automatic registration of voters upon reaching the age of 18. With

both the ruling and opposition coalitions fancying their chances of appealing to younger voters, the Constitution was successfully amended, with cross-party support providing near unanimity in Malaysia's bicameral Parliament. This was the first successful constitutional amendment in Malaysia since 2008, from which time no single party or coalition commanded the necessary two-thirds majority in both Houses of Parliament.

These episodes demonstrate the realization of the constitutional design of a rigid Constitution in a country where political parties no longer have supermajorities and therefore need bipartisan support to amend the Constitution. The ability of any government to make fundamental changes to the constitutional system thus depends very much on its ability to build consensus. One persistent challenge for reformers in Malaysia has always been whether they can overcome ethnic and religious divisions to build consensus on the requirements of good constitutional governance and the protection of individual rights.

Malaysia Backtracked on Ratification of Rome Statute

Soon after resuming the post of Prime Minister, Dr Mahathir Mohamad made a landmark speech to the UN General Assembly in which he pledged that the new government would 'ratify all remaining core UN instruments related to the protection of human rights'.[1] Accordingly, Malaysia attempted to ratify the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) in 2018, but pressure from right-wing groups ostensibly intent on preserving the dominance of Malaysia's ethnic Malay majority rapidly frustrated this plan.[2]

In March, Malaysia signed the Instrument of Accession to the Rome Statute of the International Criminal Court (ICC), joining the majority of the international community in acknowledging the ICC's jurisdiction to punish genocide, crimes against humanity, crimes of aggression, and war crimes. Soon afterwards, however, the crown prince of the southern state of Johor (Malaysia has nine royal houses, each with their State within the federation) tweeted that this accession could threaten the sovereignty of the Malay Rulers, the status of Malays (the majority ethnic group in Malaysia), and the position of Islam (the constitutional 'religion of the Federation').[3] Public disquiet built up rapidly, fanned by the political opposition and aggravated by a perception that Malaysia's hereditary monarchs (who, despite being notionally constitutional monarchs, retain significant influence over national affairs in practice) had not been properly consulted prior to the accession. Whether or not such fears had any basis in reality, concerns were expressed that accession would allow the ICC, a foreign court, to potentially acquire criminal jurisdiction over the Malay monarchs in the future by virtue of their (largely ceremonial) positions of command within the armed forces.

The escalating pressure soon became too much, and barely a month after the accession, the government was forced to announce its withdrawal from the Rome Statute publicly. Ministers within the federal government cited fears of a 'deep state' and even a *coup d'etat* as justifying the decision to withdraw, a worrying revelation in a country that has never experienced a coup or a military junta in its modern history.[4]

This episode clearly illustrated the formidable forces that can be quite easily stirred up to frustrate any reform initiatives perceived as threatening the current balance of power in Malaysia. The powerful nexus between the so-called '3Rs' of Malaysian politics – royalty, race, and religion – was amply leveraged by the political opposition, who cast the issue of accession as threatening the sovereignty of the Malay Rulers, and quickly linked it to the Rulers' position as 'protectors' of the Malay community and heads of the Islamic faith. In truth, it was always doubtful whether accession to the Rome Statute had any such implications at all;[5] yet factual discourse took a backseat as ethnocentric identity politics carried the day. The elected government's climb-down will have only emboldened anti-reform elements to use the same stratagem in future political and constitutional contestations.

Greater Diversity on Apex Court

In a landmark development, in May, Tengku Maimun Tuan Mat became the first woman to be appointed Chief Justice of the Federal Court. Previously, the position – which heads Malaysia's apex court – was held by Richard Malanjum, the first indigenous non-Muslim to hold the position, from July 2018 to April 2019.

Subsequently, history was made again in November when Rohana Yusof became the first woman President of the Court of Appeal, Malaysia's second-highest court. With the elevation of another three lady justices to the Federal Court in December, Malaysia's apex court – which also includes the Chief

[1] [Speech text] Dr Mahathir at 73rd UN General Assembly (*New Straits Times*, 29 September 2018) <https://www.nst.com.my/news/nation/2018/09/415941/speech-text-dr-mahathir-73rd-un-general-assembly> accessed 7 February 2020.

[2] See Andrew Harding et al., 'Malaysia', in Richard Albert et al. (eds.), *I·CONnect-Clough Center 2018 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy, 18 October 2019) <https://ssrn.com/abstract=3471638> accessed 7 February 2020.

[3] Ahmad Farhan, 'Rome Statute: Was Malaysia Hasty?' (The ASEAN Post, 9 April 2019) <https://theaseanpost.com/article/rome-statute-was-malaysia-hasty> accessed 7 February 2020.

[4] See e.g., 'Malaysia withdrew from Rome Statute for fear of coup d'etat: Minister' (Channel News Asia, 8 April 2019) <https://www.channelnewsasia.com/news/asia/malaysia-withdraws-rome-statute-for-fear-of-a-coup-d-etat-11423324> accessed 7 February 2020; Zurairi AR, 'Foreign minister: Withdrawal of Rome Statute due to risk of "coup d'etat" triggered by "deep state"' (Malay Mail Online, 7 April 2019) <https://www.malaymail.com/news/malaysia/2019/04/07/foreign-minister-withdrawal-of-rome-statute-due-to-risk-of-coup-detat-trigg/1740575> accessed 7 February 2020.

[5] See e.g., Shad Saleem Faruqi, 'Treaty on ICC No Threat to Royals' (*The Star*, 28 March 2019) <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2019/03/28/treaty-on-icc-no-threat-to-royals/> accessed 7 February 2020.

Justice and the President of the Court of Appeal – now has a record number of six female judges, or just below half of the Court's 13-person strength.

These developments are the latest outcome of a trend towards greater diversity in the composition of Malaysia's judiciary since the advent of the Judicial Appointments Commission in 2009. It signals a commitment to presenting a changed image across the branches of government in the context of a judiciary that frequently grapples with issues of considerable importance to women and ethnic minorities.

III. CONSTITUTIONAL CASES

1. TR Sandah & Ors v Director of Forest, Sarawak & Anor:[6] Native customary rights and the spirit of the Malaysia Agreement 1963

An attempt to revisit a controversial apex court decision regarding the extent of native customary rights enjoyed by indigenous tribes over land in Malaysia's sprawling state of Sarawak raised issues of tremendous importance going to the spirit of the Malaysia Agreement, the instrument by which the contemporary federation was created in 1963.

In 2016, the Federal Court had delivered a controversial judgment restricting the extent to which the Iban, a native community of Sarawak, could claim native customary rights (NCR) over uncultivated forest land.[7] The natives who lost that case now attempted to invoke the inherent jurisdiction of the Federal Court to review the decision on several grounds, chiefly that there had been coram failure because one of the five judges on the panel had retired by the time of judgment, two judges delivered the majority judgment, one dissented, and the fifth judge agreed briefly with the majority based on separate reasons that were later shown to be manifestly unsustainable. In the present case, a fresh panel of the Federal Court, by a 2-1 majority, declined to review the earlier decision, citing the need to maintain the finality of litigation and preferring to focus on the outcome ordered by the majority in the earlier case rather than the reasoning for it.

Of considerable constitutional significance, however, was the challenge to the earlier judgment based on the fact that the Federal Court panel therein did not contain a judge with 'Borneo judicial experience', contrary to paragraph 26(4) of the Inter-Governmental Committee Report of 1962 read with Article VIII of the Malaysia Agreement 1963. The principle emanating from paragraph 26(4) – that 'normally at least one of the Judges of the Supreme Court should be a Judge with Bornean judicial experience when the Court is hearing a case arising in a Borneo State' – was never expressly incorporated into either the Federal Constitution or into legislation. This was (and remains) contrary to Article VIII, which commits the Governments of Malaya, North Borneo, and Sarawak to 'take such legislative, executive or other action as may be required to implement' the relevant principle.

While the two majority judges in the present case rejected this argument based on the positivist stance that what is not expressly legislated is not law, the dissenting judge (the Chief Judge of Sabah and Sarawak, David Wong) held that the provisions of the Courts of Judicature Act 1964 (CJA), which stipulate the composition of the Federal Court, must be interpreted in conformity with Malaysia's obligations under international law – in this case, the obligation to give effect to the provisions of the Malaysia Agreement, which has the status of an international treaty. The learned judge held that the Agreement, as a 'pre-constitutional document' comparable to the Federalist Papers in the United States, could be taken into account in interpreting the obligations of the judiciary under the current Federal Constitution. He also highlighted the 'quasi-constitutional' status of the CJA, which expressly prevails over any written law it may conflict with except for the Federal Constitution. On the main point in dispute, the dissenting judge also held that there had been manifest coram failure and that the earlier judgment should be set aside.

TR Sandah is significant for several reasons. First, it highlights the problematic structure of Malaysia's judiciary insofar as parity among the founding regions of the federation is concerned. Although Malaysia has two separate High Courts in Malaya (West Malaysia) and the Borneo States, as well as separate Bar associations for the two, at the appellate level there is a single Court of Appeal and a Federal Court for the entire country. As *TR Sandah* highlighted, judges from Sabah and Sarawak are underrepresented on the panels of these top courts, even in cases emanating from these states, whose laws differ extensively from those of West Malaysia. Second, this case drew further attention to the uncertain status of the 1963 Malaysia Agreement, in particular its unfulfilled promises, which impacts negatively on Sabah and Sarawak. As the Agreement does not technically have the force of law according to *TR Sandah*, it cannot be legally enforced despite its fundamental role in establishing the present federation. Third, it is disheartening that a case on NCR in Borneo was first decided – against the native community – by a panel of Federal Court judges without Borneo judicial experience (i.e., by West Malaysian judges), and then affirmed by a majority of West Malaysian judges, with the Chief Judge of Sabah and Sarawak dissenting. In light of this case, a fundamental reconsideration of how cases from the Borneo states are decided before the appellate courts in Malaysia may soon be necessary.

2. Tony Pua Kiam Wee v Government of Malaysia:[8] Liability of the Prime Minister for misfeasance in public office

As the corruption cases linked to the international scandal surrounding govern-

[6] [2019] 6 MLJ 141 (Federal Court).

[7] *Director of Forest, Sarawak v TR Sandah Ak Tabau & Ors,* [2017] 2 MLJ 281 (Federal Court).

[8] [2019] 12 MLJ 1 (Federal Court).

ment-linked investment company 1Malaysia Development Berhad (1MDB) continued to unfold before the criminal courts, the civil courts achieved a landmark in terms of establishing the legal accountability of government by ruling that a Prime Minister can be held liable in the tort of misfeasance in public office.

The Federal Court so held in allowing an appeal by a Member of Parliament who sued former Prime Minister Najib Razak for that tort, which was originally developed by the English courts on the idea that based on the rule of law, administrative power may be exercised only for the public good and not for ulterior and improper purposes.[9] The allegations against Najib Razak were that he abused his powers and positions for personal gain and that he provided wrong and misleading replies to questions in Parliament about the matter.

Earlier, the High Court and the Court of Appeal had interpreted the constitutional and legal framework, particularly Article 132(3)(a) of the Federal Constitution and Section 3 of the Interpretation Acts 1948 and 1967, to reach the astonishing conclusion that a Prime Minister is not a 'public officer', and cannot, therefore, be liable for misfeasance in public office. This painted a dystopian scenario whereby ordinary bureaucrats could theoretically be held liable in tort whereas the ministers (and the Prime Minister), who directed them in the first place, could not.

The Federal Court ably corrected the situation by pointing out that these interpretative provisions applied to written law; in particular, statutes enacted in and for post-independence Malaysia, and they could not be superimposed on a common law tort emanating from England without due regard for the principles and purposes underlying that tort. As the entire point of the tort was to hold public officials who exercise public power accountable for any abuse of that power, it was congruent with common sense that the Prime Minister, who holds the most powerful office in the constitutional framework, could also be liable for it.

While this decision did not find the former Prime Minister liable – it determined only the preliminary point of whether he was a 'public officer' – it is a welcome step in terms of securing the legal accountability of government. By enabling private law to march in step with public law in securing governmental accountability, this decision fortifies the rule of law in Malaysia.

3. JRI Resources v Kuwait Finance House (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners):[10] Non-reviewable power of the *Syariah* Advisory Council

Islamic banking continues to be a significant part of Malaysia's services sector, but its operation raises fundamental questions of constitutional importance as to how a religiously guided concept can be operationalized through essentially secular regulatory and judicial systems. This interaction adds to the ongoing discourse around the nature of the Malaysian state and the true position of Islam within the constitutional framework.

At issue in *JRI Resources* was the power and competence of Malaysia's secular commercial courts to rule on principles of Islamic banking, which are founded in the tenets of Islam. The Central Bank of Malaysia Act 2009 provides for a *Syariah* Advisory Council (SAC), to which reference must be made if any disputed *Syariah* matter within Islamic banking arises in proceedings before the courts. Furthermore, the ruling of the SAC is expressed to be not only final but also binding on the court hearing the dispute. This scheme raised concerns as to whether Parliament could, by statute, direct the High Court to accept the ruling of an executive body (the SAC) as binding, and whether this infringes 'the judicial power of the Federation', constitutionally vested in the judicial branch, as well as the separation of powers housed generally within the Federal Constitution.

A full bench of nine justices was convened, under a new policy instituted by former Chief Justice Richard Malanjum whereby cases raising constitutional issues of fundamental importance before the Federal Court would be heard and decided by a full bench. By a 7-2 majority, the Federal Court affirmed the constitutionality of this arrangement, holding that the SAC's role was merely to 'ascertain' the Islamic law applicable to disputes before the courts and that it was constitutional for Parliament to legislate on this matter since this was within the list of legislative competences prescribed by the Federal Constitution. Furthermore, the majority held that the SAC's role was merely to determine the relevant points of *Syariah*, or Islamic law, applicable to the case and not to decide the outcome of the dispute, which would be a transgression into the judicial power of the courts.

The then-Chief Justice and the Chief Judge of Sabah and Sarawak dissented, highlighting that the interpretation of *Syariah* given by the SAC could often be (and indeed was, in the present case) determinative of the entire dispute and therefore the adjudicatory power of the courts had been reassigned to the SAC. The statutory scheme elevated the level of SAC rulings beyond that of expert evidence, which a court can independently evaluate and weigh as between the parties. Instead, the Court is now statutorily compelled to accept the SAC's ruling as that of the Court itself, and this infringed the constitutional principle that judicial power shall be vested solely in the judicial branch.

JRI Resources raises interesting issues at the confluence of constitutionalism, commercial imperatives, and religiously inspired law. Undoubtedly, allowing non-religiously trained judges in a secular-based judicial system to accept or reject scholarly rulings on Islamic banking could lead to inconsistent

[9] *Jones v Swansea City Council* [1990], 1 WLR 54, 85F (Court of Appeal, England); see also T*hree Rivers District Council and Others v Governor and Company of the Bank of England*, (No 3) [2003] 2 AC 1 (House of Lords).

[10] [2019] 3 MLJ 561 (Federal Court).

interpretation of the law and undermine this burgeoning sector of the economy. Nevertheless, it is a valid question whether removing the determination of issues forming the entire substratum of the dispute to a separate body without the safeguards of judicial independence and then compelling the courts to accept this body's rulings as binding is compatible with the separation of powers which is integral to constitutionalism.

4. Other developments in the courts

Malaysia's apex court has conclusively declined to pronounce on the constitutionality of the controversial appointment of the then-Chief Justice and President of the Court of Appeal in 2017. In finally dismissing an application by the current Prime Minister (after having denied similar applications by the Malaysian Bar Council and several political parties), the Federal Court reiterated that the constitutional questions posed to it had become 'academic' since the two senior judges in question had since resigned their posts following the change of government in 2018.[11]

As the temperature of ethnocentric politics increased, a lawyer affiliated with right-wing nationalist organizations challenged the constitutional status of government-aided 'vernacular primary schools', which use Mandarin or Tamil (instead of Malay, the national language) as their main medium of instruction and are popular among Malaysian parents, especially those from ethnic minorities. In *Mohd Khairul Azam bin Abdul Aziz v Minister of Education & Anor*,[12] the Federal Court dismissed the action on essentially technical grounds, holding that Parliament undoubtedly had the power under the Federal Constitution to provide for the sustenance of such 'vernacular schools', albeit that the complainant could challenge the current scheme as being inconsistent with the national language provisions of the Federal Constitution by way of ordinary proceedings in the future, should he wish to do so.

IV. LOOKING AHEAD

There are important insights that can be drawn from the stalled constitutional reform in Malaysia. Phenomenal electoral wins are not so easily translated into democratic consolidation, even with a reform-minded government. Entrenched interests and bureaucratic culture can coalesce to resist constitutional changes. In the meantime, a restless public may turn on the new government when it fails to deliver on its promises to deliver economic prosperity and good governance, which appears to be the case in Malaysia as the ruling coalition lost four by-elections across the country in 2019. There may be greater political instability as state-level elections are due in Sarawak, Malaysia's largest, resource-rich state, by September 2021 at the latest. It is possible, if not likely, that these elections will be called ahead of schedule if opportune circumstances manifest (Malaysia has no equivalent of the UK's Fixed Term Parliaments Act). The Election Commission has been allocated funds to conduct this election in its budget for 2020, intensifying speculation around an early poll. If this takes place, it will be an important mid-term referendum on the new federal government's performance (a regional bloc of independents currently governs Sarawak).

The increasing politicization of race and religion, and the predilection of certain elements to harp on these issues for political mileage, bodes ill for Malaysia. The current government appears trapped between a reluctance to crack down hard on hate speech (which would undermine its reformist credentials) and a hemorrhaging of support as extremists on all sides play up dangerous sentiments to shore up political power at its expense. Too many parties within and outside the government appear to have no compunction about using ethnocentric identity politics to achieve their narrow aims, even at the risk of further fragmenting the nation. One may, therefore, see the struggle for constitutional change in Malaysia as one over the very identity of the nation.

V. FURTHER READING

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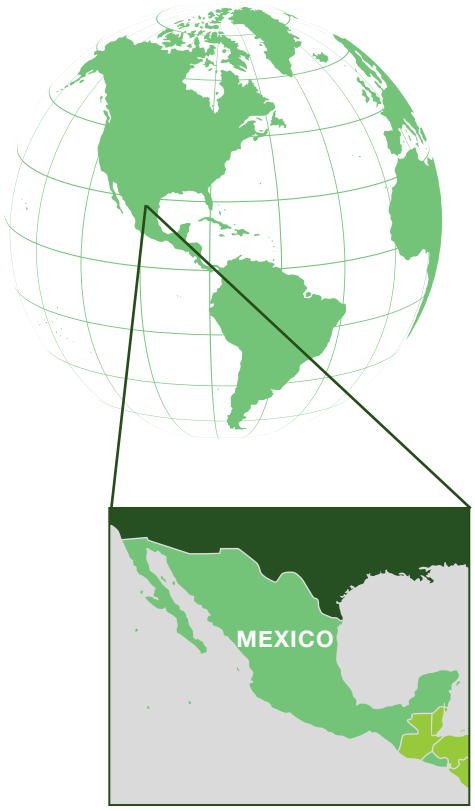
Tan Sri James Foong, *The Malaysian Judiciary – A Record* (3rd edn., LexisNexis, 2019)

[11] See e.g., Bernama, 'Federal Court dismisses Dr Mahathir's leave to appeal' (New Straits Times, 1 July 2019) <https://www.nst.com.my/news/crime-courts/2019/07/500600/federal-court-dismisses-dr-mahathirs-leave-appeal> accessed 7 February 2020.

[12] [2019] MLJU 1300 (Federal Court).



Mexico

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I. INTRODUCTION

2019 was the first full year of Andrés Manuel López Obrador's government (which began on December 1, 2018). It was characterized by a number of constitutional and legislative reforms he implemented in order to carry out what he defined as the "Fourth Transformation" (better known as "4T", in reference to its name in Spanish *Cuarta Transformación*). This expression refers to the vision the President has about his government as a new "revolutionary" – but peaceful – moment of change, supposedly placed at the same level of importance as three other key moments in Mexican history: the Independence (meaning the armed movement that gained the country's freedom from 300 years of Spanish domination, which took place between 1810 and 1821); the Reformation (consisting of the conflict between liberals and conservatives from 1858 to 1861, leading to the approval of the "Laws of Reformation", of which the establishment of a separation between Church and State stands out); and the Revolution (that is, the armed conflict against the regime of Porfirio Díaz between 1910 and 1917, which led to the promulgation of the 1917 Constitution that continues to govern Mexico). Like these historical events, President López Obrador expects his government to bring a profound change to the country based on the principles of universality, progress, and well-being.

This report describes a few constitutional reforms implemented in 2019, and shows how some of the above-mentioned legislative reforms have been interpreted by the judicial branch in the first year of the new government.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

One of the most discussed and controversial constitutional reforms approved in 2019 was the one introducing the National Guard, a civil police institution composed of members of the Federal, Military, and Naval Police that will be responsible for guaranteeing public security. It was published in the *Official Gazette of the Federation* on March 26, 2019, and amends, adds, and repeals various provisions of Articles 10, 16, 21, 31, 35, 36, 73, 76, 78, and 89 of the Mexican Constitution.

The constitutional reform was integrated by a legislative package that entered into force in May 2019: three new laws (the National Guard Law, the National Law on the Use of Force, and the National Law of the Detention Registry) and a law reforming the General Law of the National Public Security System. According to the constitutional reform, the National Guard is a police institution civil in nature and the training and performance of its members will be governed by a police doctrine founded on service to society, discipline, respect for human rights and the rule of law, and superior leadership as well as on gender perspective.

However, according to the Second Transitory Provision, the National Guard will be constituted of elements of the Federal Police, the

Military Police, and the Naval Police. The purpose of the National Guard is to reduce the high crime rates in the country, and its functions (as established in Article 9 of the National Guard Law) can be summarized as follows: to safeguard the integrity of citizens; to guarantee, maintain, and restore public order and social peace; to prevent the commission of crimes throughout the country's territory, and to conduct the necessary investigations for that purpose; to perform verification tasks for the prevention of administrative infractions; to receive complaints, verify their veracity, and inform the Public Ministry; to perform intelligence operations through covert and simulated user operations on the Internet; to intervene personal telecommunications with the authorization of a judge; to conduct, under the direction of the Public Ministry, the investigation of crimes; to execute arrest warrants and detain persons under the provisions of Article 16 of the Mexican Constitution; to provide assistance to victims and witnesses of crimes; and to collaborate with other federal authorities in monitoring, verification, and inspection functions and in joint operations.

The reform has been heavily criticized by the political opposition and human rights organizations due to the serious violations of human rights against the Mexican population that occurred during different military operations across the country when the military and police forces were responsible for public security.

A few weeks before the approval of this constitutional reform was debated in Parliament, the Inter-American Court of Human Rights issued its decision in the *Alvarado Espinoza and others vs. Mexico* case (November 28, 2018). This is a paradigmatic ruling against the Mexican Army, since the Court held that the Mexican State was responsible for the forced disappearance of civilians by military forces in the context of the so-called "war against the *Narco*". The Court's judgment addressed the negative effects originated by the participation of military personnel in public security functions, underlining the high degree of impunity for acts of the Mexican military forces and emphasizing the need to demilitarize the strategies to combat organized crime and to adapt the internal constitutional framework in order to allow a state approach that defends the security of its citizens in accordance with international standards.

Another very important pillar of the "Fourth Transformation" government was the constitutional reform on popular consultation and the revocation of mandate, published in the Official Gazette of the Federation on December 20, 2019. The reform amends Articles 35, 36, 41, 73, 81, 83, 99, 116, and 122 of the Mexican Constitution. With respect to popular consultations, the reform recognized the right of citizens to vote in popular consultations on issues of national and regional importance. Issues concerning human rights, the permanence and continuity of the positions of popularly elected public servants, electoral matters, the financial system, income, expenditure, and budget as well as infrastructure works in progress, national security and organization, and operation and discipline of the armed forces may not be subject to popular consultation. The popular consultation must be requested by at least 2 percent of the citizens registered in the nominal list of voters, equivalent to 1.8 million persons.

The part of the reform that establishes the revocation of mandate provides citizens with a legal instrument for deciding whether, at the end of the first half of their mandate, the President of the Republic, or a governor, or a mayor may or may not remain in office. Contrary to the original proposal, neither the President of the Republic nor Congress can request such revocation, which is a right that only citizens can enforce through the National Electoral Institute. With this constitutional reform, the President of the Republic may be removed by means of free, direct, and secret voting in a revocation consultation, provided that at least 40 percent of the voters registered in the nominal list participate. The revocation may be requested only once during a government's mandate, and the request needs to have the signatures of 3 percent of the citizens registered at that moment in the nominal list (that is, around 2.7 million voters currently). In addition, the results may only be challenged before the Superior Chamber of the Electoral Court of the Judicial Power of the Federation. According to a transitional provision, a consultation to revoke the mandate of President López would only be possible until March 2022, cancelling any possibility of pairing it with the midterm federal elections as originally proposed by the President.

Finally, the constitutional reform including the principle of gender equality in public office (published in the *Official Gazette of the Federation* on June 6, 2019) must be mentioned. On one hand, this reform has been widely welcomed for what it represents in the context of gender struggle, but on the other hand, it has been strongly criticized for its omissions and inadequacies.

III. CONSTITUTIONAL CASES

1. Declaratoria General de Inconstitucionalidad 6/2017: The first decision on a "new" process

The Supreme Court issued its very first decision in a new procedure, the so-called "General Declaration of Unconstitutionality". It is a new constitutional control procedure introduced by the 2011 constitutional amendment to the Mexican *Amparo* procedure. Even though it had been in force for eight years, no substantive decision was issued until February 2019. The procedure allows the Supreme Court to repeal with *erga omnes* effects a normative provision that has been declared unconstitutional through the *Amparo* (a procedure which only may render *inter partes* effects).

The Second Chamber of the Supreme Court (specialized in administrative and labor law) declared in a series of *Amparos en Revisión* the unconstitutionality of Article 298-B, fraction IV of the Federal Law on Telecommunications and Broadcasting. The regulation provided a high fine which did not respect the constitutional principle of proportionality of taxes. The main discussion in the Supreme Court was whether or not the previous unconstitutionality analyzed in *Amparo* could be analyzed again in the general declaration of unconstitutionality or if the procedure constituted only a formal verification of the requirements, thereby negating

reopening a substantive debate. The Court concluded that the discussion of the case was not a mere formality and, therefore, justices may vote against the declaration even if the formal requirements had been met.

2. Amparo directo en revisión 1182/2018: The right to effective legal assistance

An individual was convicted of kidnapping. Through the *Amparo* procedure, he claimed that his lawyer had not provided effective legal assistance because he had withdrawn relevant evidence to prove his innocence. The Circuit Court dismissed the allegations, stating that Supreme Court case law was clear regarding the fact that the right of defense only implied that it should be provided by a licensed attorney. Taking this into consideration, it was not permissible for federal courts to assess the defensive strategy adopted by the lawyer.

In a relevant decision, the Supreme Court changed its consolidated case law. It observed that the European Court of Human Rights and the Inter-American Court of Human Rights (among other courts and tribunals) had stated that the right to defense should not be understood as a mere formality but as an effective right. In view of the above-mentioned considerations, the right to an effective defense implies that, regardless of the private or public nature of the attorney, federal courts should analyze the effectiveness of the defense under the following elements: a) that the deficiencies of the defense are not attributable to the will of the accused; b) that the defense strategy is not responsible for the mistakes of the defense; and c) that the deficiencies had a substantive impact on the resolution.

3. Amparo en revisión 1368/2015: Unconstitutionality of the interdiction figure

An individual obtained the judicial declaration of interdiction of her two minor children. The civil judge granted the interdiction petition and appointed members of the family as tutors and curators. After the mother passed away, one of the children filed successive petitions demanding judicial recognition of his capability to make decisions, which were successively denied. Afterwards, the person filed an *Amparo*, claiming the unconstitutionality of the articles that regulated the interdiction procedure.

The Supreme Court granted the *Amparo* to the applicant. The ruling stated that the state of interdiction was not compatible with the rights granted by the Convention on the Rights of Persons with Disabilities. That is, the interdiction state fosters stereotypes as it conceives the persons as objects of care and thus not subject to rights. Far from achieving inclusion, the appealed regulation deprives the rights of persons with disabilities of autonomy. The decision was relevant as it modified the previous Court's position on the *Amparo en Revisión* 159/2013, where the Supreme Court upheld the constitutionality of the provision (although conditioning its constitutionality to a problematic interpretation in conformity with the Constitution that materially added normative content to the article).

4. Acciones de inconstitucionalidad 105/2018 and 108/2018: Unconstitutionality of the Federal Salaries Act

In 2009, under Felipe Calderon's presidency, the Mexican Constitution was amended to establish that no federal officer shall have a salary higher than that of the President. Andrés Manuel López Obrador became President in the 2018 election by a landslide, employing an "Austerity" proposal. López Obrador constantly argued that the salaries of concrete federal officers, judges, and other federal employees were simply too high and unacceptable in view of the general state of poverty in Mexico. López Obrador's majority passed a bill (*Ley Federal de Remuneraciones*) which enforced the constitutional provision by setting a base to federal salaries and by adding to the Federal Criminal Codes crimes regarding the authorization or even receipt of payments which contravene legal provisions. This was to be the first great constitutional assessment of López Obrador's policy. The action of unconstitutionality was controversial from the very beginning as Justice Pérez Dayán, being in charge of the procedural aspects of the actions, decided unprecedentedly to "suspend" the application of the law until the emission of the ruling.

Given the fact that the Mexican Constitution requires a qualified 8/11 vote majority to decree the unconstitutionality of laws, the Supreme Court, in a very tight decision, failed to invalidate the full act. Seven justices considered the law to be unconstitutional *in toto*, but the argumentation had to be dismissed by lack of a majority. Instead, a bare eight-vote majority managed to declare the unconstitutionality of several parts of Articles 5 and 6 of the act, which constituted key provisions. The Supreme Court stated that the act allowed the discretional establishment of salaries. It also declared the unconstitutionality of the new regulated crimes because they were broadly configured and did not describe precisely the criminalized conducts. It must be noted that Justice González Alcántara (nominated by López Obrador and confirmed by his senatorial majority) formed part of the majority that invalidated the relevant portions of the act.

5. Amparo en revision 805/2018: Legislative omissions

A civil association filed an *Amparo* suit arguing that there was an omission by the federal Congress and President to fulfill the obligations of the International Convention on the Elimination of All Forms of Discrimination. The plaintiffs argued that Article 4 of the convention forced Mexico to criminalize hate speech on racial grounds. A district judge initially granted the *Amparo*, and the authorities appealed the decision before the Supreme Court.

The Supreme Court denied the appeal and thus confirmed the initial ruling. In an extensive analysis, it was stated that the obligations derived from the International Convention on the Elimination of all Forms of Discrimination were not fulfilled by the national legal framework and confirmed the obligation of the federal Congress to legislate. This criterion is important as it again confirms the shift in doctrine by the Supreme Court that made possible civil associations to question legislative omissions initiated in the *Amparo en Revisión* 1359/2015.

6. Contradicción de tesis 318/2018: Labor protection for pregnant women

The Supreme Court solved a contradiction of criteria between circuit courts. The legal question to consider was whether or not a signed statement was enough to prove that a pregnant woman had freely and spontaneously resigned from her job in procedures regarding unjustified dismissal.

The Supreme Court stated that given the "primacy of reality" principle derived from Article 17 of the Constitution, certain situations permit the inference that it is more probable that the pregnant woman was a victim of an unjustified dismissal rather than a resignation by free will. Furthermore, it stated that even though Mexico had not ratified the Maternity Protection Convention (Convention 183 from the International Labor Organization), it was binding to Mexico as an international standard of protection of working women. Under such conditions, the proof standard is higher for the employer to prove that there was a free will resignation. That proof standard cannot be fulfilled solely by the signed resignation of the woman, which per se falls under a situation of vulnerability.

7. Amparo directo en revisión 4865/2018: Swastika cross tattoo

The First Chamber of the Supreme Court ruled that a swastika cross tattoo in an employee's skin (below the ear) is a form of hate speech and that it consequently cannot be part of the freedom of expression protected by the Constitution. After an employee was hired by a company to work as a billing boss, many working colleagues complained about his tattoo since they self-claimed to be Jews and the owner of the company was also part of the Jewish community.

The tattoo's bearer was first told to erase or to hide the swastika cross. He did not follow this advice and was fired. The employee argued that he was fired based on an illegitimate reason and that he was thus discriminated against by the company. He sued the company and claimed for moral damages.

The Court decided that the exhibition of such a tattoo is not protected under any comprehension of the freedom of expression. A swastika cross in a democratic context has a negative meaning for human rights, equality, security, and human dignity. It, therefore, represents a form of racist and antisemitic hate speech not allowed by the Constitution. Furthermore, it was intended that the swastika cross tattoo be tolerated by a Jewish working community and labor management in a private environment. The Supreme Court concluded that the dismissal was not illegal since there was no constitutional obligation of tolerating the tattoo. Consequently, there was no right to compensation for alleged moral damages.

8. Amparo en revisión 331/2019: Unconstitutionality of the mother's preference in child custody

The Civil Code for the Federal District (Mexico City) provided that in a divorce lawsuit context, the provisional custody for children under 12 years of age must be automatically granted to the mother. The First Chamber of the Supreme Court declared that rule unconstitutional.

It is first relevant to note that this new precedent overruled the one that considered it possible to embrace an interpretation in conformity with the Constitution. The First Chamber stated that it was impossible to maintain the precedent because the legal rule discriminates based on gender, which is a constitutional special clause of non-discrimination.

The decision based its conclusion on two fundamental reasons. The first is that the Civil Code affects the principle of the best interest of the child. Judges must have the option to decide which parent is in the best position to satisfy the needs and care of the child. The second argument is that the said rule was based on a traditional stereotype of gender. The legal presumption that the mother will always have a better role as custodian does not allow the elimination of traditional conceptions of the female role in a family framework.

9. Amparo directo 6/2018: Recognition of indigenous special jurisdiction

An indigenous community located in the state of Oaxaca (San Cristóbal Suchixtlahuaca, Coixtlahuaca) filed a lawsuit against the public ministry and a local criminal judge for interfering in an indigenous dispute. For the first time in its constitutional case law, the First Chamber of the Supreme Court recognized a special jurisdiction in matters of indigenous peoples. The case was related to damages caused by cattle in prohibited areas of the community property.

The indigenous jurisdiction prevailed over the ordinary criminal jurisdiction for judging behaviors carried out in the indigenous community. The Chamber stated that it is possible to identify this jurisdiction when the facts take place within an indigenous territory and when indigenous authorities have applied traditional customs and cultural habits, especially when they are not contrary to human rights enshrined in the Constitution or International Human Rights Law.

In this case, the indigenous authorities condemned an individual based on its customs and traditions. Such jurisdiction was accepted by the accused from the beginning of the trial. Later, when he learned that the judgment was against him, he sought the state's criminal authority to revoke the decision. That claim was not granted by the Court. Instead, it ordered that the final decision was the one established in the indigenous judgment. The Court added that this decision was in line with a historical debt of the Mexican state to the indigenous people on their long way to achieving true autonomy and self-government, both protected by the Mexican Constitution and international human rights treaties.

10. Amparo en revision 353/2019: Refugee status in Mexican territory

In this case, the Second Chamber of the Supreme Court analyzed the constitutionality of the 30-day legal period in which foreigners must prove their refugee status before

Mexican authorities. Article 11 of the Mexican Constitution establishes that every person has the right to seek and obtain asylum. It also provides that refugee status must be determined by international treaties and consider the exceptions and norms derived from Mexican legislation.

The Chamber first concluded that the deadline in which every foreign person must prove their refugee condition fulfills the proportionality principle requirements: the provision is suitable, it is necessary for a democratic society, and it is not disproportionate in front of the purposes of the legal measure. The legal provision is reasonable when a foreigner does not have a material impossibility to probe his/her status.

Second, the Court stated that there could be exceptions to this rule. It may be possible to demand an official refugee declaration even when there is a situation that makes it physically impossible, namely, extraordinary causes not attributable to his/her person. However, in this respect, conclusive proof is not required but only minimal evidence that reveals the special condition of the asylum candidate.

11. Amparo en revisión 57/2019: Therapeutic use of cannabis in children with epilepsy

A doctor prescribed cannabidiol oil (CBD) for a child with epilepsy associated with West syndrome. Due to the nature of his epilepsy, the child generated tolerance to the substance. Then, it was recommended to replace it with a preparation with tetrahydrocannabinol (THC) to improve his health.

On June 20, 2017, amendments to the General Health Law entered into force. One of these legal provisions ordered the Ministry of Health to harmonize its regulations to said legal mandate within 180 days of its publication. The Ministry did not obey the legal mandate. The child's legal lawyer sued the Ministry of Health for its lack of action. A federal judge rejected the claim because he considered the omission to issue legislation was not reviewable by the federal judiciary. The child's attorney appealed the decision before the Supreme Court.

The Second Chamber of the Supreme Court granted the *Amparo*, considering that the lack of compliance by the Ministry of Health represented a regulatory omission that affected the fundamental rights of people, especially in this case, the right of children to access better levels of public health services. The Chamber concluded that the principle of the best interest of the child, concerning the right to health, does not only imply respecting his right to a fair trial or medical service but also guarantees a specific economic resource and the implementation of public policies to improve health services and, therefore, the well-being and integral development of children.

IV. LOOKING AHEAD

2020 may be a decisive year for the Supreme Court, in which it celebrates its 25-year anniversary as a Constitutional Court. After Chief Justice Arturo Zaldívar jointly presented with President López Obrador a plan to amend the legal and constitutional framework of the judicial branch, the next years will tell the future of the federal judiciary. Among the proposals, it is relevant to mention a restriction of the ordinary-legal jurisdiction of the Supreme Court in order to strengthen its role as a Constitutional Court. Also relevant is the proposal on the opening of judicial charges to members of civil society without judicial record.

The independence of the Supreme Court will also be an important question. President López Obrador has already proposed three of the eleven justices of the Court, all approved by the Senate (Justices González Alcántara, Esquivel Mossa, and Ríos-Farjat). It is highly expected that the Court will analyze the constitutionality of key reforms and public policies carried out by the recently elected Government. *Inter alia*, it is worth mentioning the public salary measures, popular referendums related to new public infrastructure, the performance of the above-mentioned National Guard, state laws passed by *Morena* (the President's political party), and restrictions of social security benefits allegedly necessary to address the corruption problem in Mexico.

V. FURTHER READING

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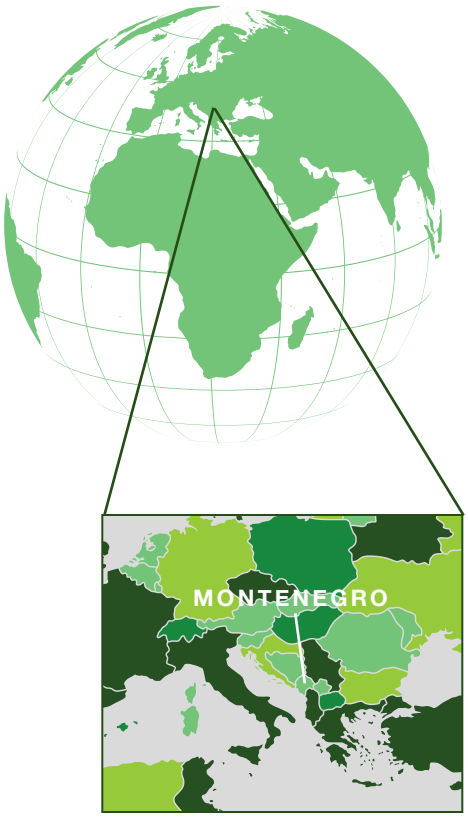
Luis Efrén Ríos Vega and Irene Spigno (eds.), *Estudios de casos líderes nacionales. Vol. XI. Cuestiones actuales de los derechos familiares y de la niñez en la jurisprudencia de la Suprema Corte de Justicia de la Nación de México* (Tirant lo Blanch, 2019)



Montenegro

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I. INTRODUCTION

In 2019, Montenegro kept on its path to EU membership. Compared to other states in the region, Montenegro is considered to be a leader in the accession negotiations process, with 32 negotiation Chapters opened and 3 provisionally closed.[1] This smallest Balkan State is a member of the UN, NATO, WTO, OSCE, CoE, and the CEFTA. Although membership negotiations have been an ongoing process since June 2012, the country is still slow in achieving full compliance with EU standards. Namely, according to the Progress Reports the European Commission publishes each year, Montenegro has achieved limited progress or is moderately prepared to become an EU member state. Media freedom, judicial reform, the fight against corruption and organized crime, clientelism, and transparency remain major challenges. According to the latest Economist White Paper, Montenegro is a hybrid regime democracy.[2] As one party has been dominating the political arena for three decades, electoral reforms are nowhere in sight. Most of the opposition parties are boycotting Parliament. The overall public distrust in the authorities after the "Envelope" affair[3] brought thousands of protesters onto the streets asking for the resignation of the government and President Đukanović. At the same time, the State Prosecutor's office did not meet the expectations of protestors, taking a long time to act upon the evidence presented in the media and creating what we can perceive as a judicial charade. As a result, overall distrust in the authorities remained, implying that state capacity to deal with deeply rooted corruption is weak. Amid such circumstances, the end of 2019 marked the passing of the controversial Law on Religious Freedoms, which was adopted by Parliament in the middle of the night, resulting in 18 members of Parliament being detained or arrested.[4]

According to the Constitution (Art. 11(6)), the Constitutional Court is the guardian and protector of constitutionality and legality and is usually regarded as the highest court in the judicial system. In reality, and according to the Constitution, that role belongs to the Supreme Court. This creates a power imbalance, which I will address later below.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Between WWII and October 2007, Montenegro adopted five Constitutions. The Constitutional Court in Montenegro was established in 1963. Its Constitutional legal framework relied on the heritage of Yugoslavian law. Though, originally, Yugoslavian states have been influenced by Austrian codification and the scholarship of Hans Kelsen, Montene-

[1] 'Montenegro Progress Report' (European Commission, 2019) <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-montenegro-report.pdf>

[2] 'Global Democracy Has Another Bad Year', *The Economist* <https://www.economist.com/graphic-detail/2020/01/22/global-democracy-has-another-bad-year?fbclid=IwAR12dLvEwtm-yPe8qALCDP3P6o-Tu_g6IMtAMIWRY-ZKHoZky4s2t1QzhUqk> accessed 30 January 2020.

[3] '"Envelope" Affair Raises Suspicion over Montenegrin Party Funds' (*Balkan Insight*, 25 January 2019) <https://balkaninsight.com/2019/01/25/envelope-affair-raises-suspicion-over-montenegrin-party-funds-01-24-2019/> accessed 30 January 2020.

[4] 'Montenegrin Parliament Adopts Religion Law Amid Furious Protests' (*Balkan Insight*, 27 December 2019) <https://balkaninsight.com/2019/12/27/montenegrin-parliament-adopts-religion-law-amid-furious-protests/> accessed 30 January 2020.

gro's Constitutions operated throughout the period of the socialist self-management system, ideology of the Communist party, and unitary power system that influenced the development of its constitutional legal framework. Constitutional complaints found their roots in the 1963 Constitution as the right to "initiative for the review for the protection of rights and freedoms". However, the 1974 Constitution does not recognize such a competence for the Constitutional Court. This institute was brought back with the Constitution of Republic of Yugoslavia in 1992 and remained there until the new Constitution of the independent state was adopted. In that period, the Constitution provided a comprehensive list of human rights and freedoms protected in a market economy. With the renewal of independence, the new Constitution was adopted. In its preamble, Montenegro commits to European and Euro-Atlantic integration. Since then, the national legal system has been influenced by the harmonization process with the *acquis communautaire*. The new Constitution establishes the Constitutional Court as a judicial authority separated from other authorities. Its main purpose is the protection of constitutionality and legality, constitutional order, and safeguarding human rights and freedoms. For the first time, the direct protection of human rights was established.

As a result of the EU accession process, the need to provide for an effective system of checks and balances, and the requirement to reform the judiciary, Constitutional Amendments I to XVI were adopted in 2013. The election and appointment of judges is conferred to the Judicial Council. Since then there have been no major Constitutional changes, but major constitutional controversies.

Article 39(2) of the Law on Constitutional Court determines that the Court shall decide in each case no later than 18 months from the date proceedings were initiated. Apart from providing a time limit, the Law in question does not give an answer to what happens when the eighteen-month deadline expires, or when proceedings take too long.[5] In September 2018, the Supreme Court, the highest regular court in the country, ascribed to itself the competence to protect the constitutionally guaranteed right to a trial within a reasonable time, including in cases of constitutional complaints. The party in the decision filed a suit for just satisfaction due to the long duration of the court proceeding, which is an ordinary competence of the Supreme Court. However, it claimed that the Court failed to make a decision within the eighteen-month deadline. The Supreme Court established that the Constitutional Court violated the right to a trial within a reasonable time and ordered the Government of Montenegro to compensate the claimant.[6] Their reasoning was also based on the fact that two constitutional complaint proceedings had lasted five years, nine months, and twenty-two days, compared to the two proceedings before the Supreme Court, which lasted only one month and twenty-six days. This created a conflict between judicial authorities. The Constitutional Court refused to transfer any case files to the Supreme Court in its proceedings in the aftermath of the Decision from September 2018. Essentially, this led the Supreme Court to declare it will no longer have the competence to decide in cases where a party claims the Constitutional Court has exceeded the deadline to adopt a decision.

Analysis[7] shows that there is a tendency in the Supreme Court to decline the reasons for the revision given by the Constitutional Court, which the Supreme Court should do pursuant to Article 77(2) of the Law on Courts. When the Constitutional Court repeals an individual act and remands a case back to the authority, the latter 'shall respect the legal reasoning of the Constitutional Court stated in the decision and shall decide in the repeated proceedings within a reasonable time'. A study suggests the meaning of this provision is problematic in theory and practice. The Supreme Court generally comes to the same conclusion as it did in the repealed decision. In addition, not only does it not accept the argumentation and reasoning of the Constitutional Court, it provides for new explanations and adds them to the original decision. The issue in question is related to the understanding of what the word 'respect' in Article 77(2) refers to. Does it mean that in the revision procedure it must decide in accordance with the reasons of the Constitutional Court? Or that it should take these reasons into account but does not have to make a new decision based on them?

As if trust in Montenegro's judiciary is not shaky enough, just before finalizing this report, the Constitutional Court did something that sparked major controversy. At the general session of the Court, a new presiding judge was elected, as the mandate of the current President of the Court is expiring. According to the Constitution, judges elect the President of the Court amongst themselves every three years.[8] One can be elected president only once. According to the latest decision, the new presiding judge is Desanka Lopicic, who was previously a president of the Court. According to a press release, the judges could not agree on a new president. But the Law and the Rulebook do not recognize such action. According to the procedure defined in Articles 13 and 22 of the Law and Article 12 of the Rulebook, the session for the appointment of the president is chaired by the oldest judge. If none of the judges get a majority of the vote, the duties of the president shall be conferred to the deputy president. Where the Court does not have a deputy president to assume the office, then the office of President of the Court shall be exercised by the oldest judge. The Decision published on the Court's website is all but legal. Namely, in its attempt to provide sound legal reasoning, the Court creatively found

[5] Bosa Nenadic, 'Analiza Rada Ustavnog Suda Crne Gore Usmjerena Na Pravnu Sigurnost i Pravo Na Konacnu Odluku' (Council of Europe, 2019) 27.

[6] *Tpz 26/2018* [2018] Supreme Court of Montenegro Tpz.br.26/2018 1.

[7] Mihajlo Dika and Ivana Martinovic, 'Analiza uticaja odluka Ustavnog suda Crne Gore na aistem redovnih sudova sa posebnim osvrtom na odnos Ustavnog i Vrhovnog suda Crne Gore' (Council of Europe, 2018) 49-54.

[8] Amendments I to XVI to the Constitution of Montenegro, 2013 s XVI.

that Article 22 of the Law is not applicable, as it refers to the expiration of the office of the president but not to its mandate. Linguistically that might be the correct reading, but it is obvious what the intention of the legislator was: to make sure that the office of the president will never be vacant. Thus, legislators adopted the solution in which the oldest judge will assume the office by the power of Law. Furthermore, in paragraph 10, the judges decided to introduce the function of presiding judge based on the practice of the Court (this has never happened before) and comparative case law. This creative manner of interpretation of Montenegro's legal framework raises a classic question for the future: who will guard the guardians?

III. CONSTITUTIONAL CASES

The 2007 Constitution confers new responsibilities upon the Constitutional Court. The biggest development concerns the Court's role in the protection of human rights and freedoms by introducing constitutional complaints. Upon exhausting all legal remedies before the regular courts, the final instance to adjudicate on matters of constitutional and human rights, as well as any other right provided for by international treaty that Montenegro is party to, is the Constitutional Court. This subsequently increased the number of cases before it. Today, almost 90 percent of all cases are constitutional complaints. According to the report for 2018 (the 2019 report was not published at the time of the submission of this report), the Court recorded 120% more cases than the year before,[9] with constitutional complaints cases overshadowing the rest. The most dominant are those on the right to fair trial (Article 32 of the Constitution and Article 6 of the ECHR), which amount to 75 percent, followed by the right to liberty and security (Articles 29 and 30 of the Constitution and Article 5 of the ECHR). The number of cases in 2018 increased to 2,291 (2017: 1,039) and the Court resolved 1,203. The number of cases pending at the end of 2018 was 2,492. This too supports my claim that the Court lacks the capacity to deal with the increasing number of cases.

1. U-I br. 2/19 – Constitutionality and legality of the Law on Constitutional Court

According to Article 39(2) of the Law on Constitutional Court, the 'Court shall decide in each case no later than 18 months of the date of initiating the proceeding before the court, unless otherwise provided'. Motions for the assessment of conformity with this provision were put on the agenda of the Court early in January 2019; however, the judge rapporteur withdrew it. It was peculiar that there were many motions pending before the Court, yet this one appeared without delay. On July 18, 2019, at the general session of the Court, the Decision which annuls the stated provision was adopted. Based on their interpretation of Article 32 of the Constitution and Article 13 of the ECHR, the judges decided that the deadline given by the Law was not effective and contrary to its purpose. It is wrong to assume that the Court will provide for decisions of good quality. Rather they are pushed to fulfill quantitative goals. Their judicial reasoning seems fair, and it was backed up by the jurisprudence of the European Court of Human Rights (ECtHR). But their analysis was flawed in its method, as the Court failed to compare the facts of their own reality with the relevant facts of the cases used to support their claim. I believe analogical reasoning would have provided a better understanding of their motivations. The comparable jurisdictions in many of the cases in question were the German or Italian Constitutional Courts, and even the French Conseil Constitutionnel. For example, the Court quotes the ECtHR and its *Süßmann* judgment in which the ECtHR considered the length of a proceeding before the German Constitutional Court. In its decision, the ECtHR found that the period of three years, four months, and three weeks was reasonable considering the complexity of the case.[10] And yet there are several hundreds of cases pending before the Court for more than three years. Recall that Montenegro is a unitary state with a rather simple judicial hierarchy compared to the massive judicial authority of the states listed above. We can agree that not all these cases are the same and that many have important implications for society; thus, responsibility in adjudication differs and might demand more time. The deadline of eighteen months was not respected in many cases, and while that fact could have been used as inspiration to amend the Law with a new provision based on precise statistical data from the Court itself, it was solely based on its own work and merits. The Constitutional Court has approached the issue differently. The Court is displeased that such a provision is given in the form of an imperative legal norm,[11] and one could understand the judges being offended by its patronizing tone. It seems to me that they failed to comprehend that 'the legal rules are simply formulae describing uniformities of judicial decision'.[12]

If we allow for the proceedings not to have any deadlines, and with the backlog of the Court as it is, the citizens will ultimately be left to hope for a miracle. The most appropriate course would have been for the Court to amend this provision by breaking down the list of different motions and activities it has within its competence with new provisional deadlines applicable to themselves. And finally, the Constitutional Court has almost the same number of cases as the Supreme Court with only seven judges compared to the Supreme Court's nineteen. In addition, it is heavily understaffed, and new, skilled people would be a game changer for the Court.

2. U-I br. 34/18, U-III br.1970/18 i U-III br. 1987/18 – Constitutionality and legality of Criminal Procedure Code

Proceedings before regular courts were ini-

[9] 'Annual Report of the Constitutional Court for 2018'.

[10] *Süßmann v Germany* [1996] European Court of Human Rights 20024/92 [62].

[11] *Ukidanje zakonskog roka* (n 10) para 7.2.1.4.1.

[12] Felix S Cohen, 'Transcendental Nonsense and the Functionalist Approach' (1935), 35 *Columbia Law Review* 809, 848.

tiated against two members of Parliament in 2018 without prior lifting of their immunity as guaranteed by the Constitution (Article 86). One of them was detained. The other avoided arrest by staying in the Parliament building. Earlier that year, both MPs refused to disclose certain information while testifying before the Court. By doing so, the Higher Court in Podgorica and Court of Appeal sentenced them to prison. According to their claim, they did not refuse to testify but did refuse to disclose certain information, such as the identity of the national security agent who provided information on an alleged bribe by the Chief Special Prosecutor.

However, the Constitutional Court did not decide on the merits of the constitutional complaint filed by the MPs or the constitutionality of the provision on which the detention was based. Instead, in line with Article 55 of the Law on Constitutional Court, it initiated constitutional review of Article 119 (2) of the Criminal Procedure Code. By doing so, the Court temporarily suspended detention orders pending their final decision. This was a rather creative maneuver to avoid political implications and scrutiny. Having taken this path in September 2019, the Court declared that the provision was unconstitutional as it was not compatible with the constitutional principle of the rule of law. This rather vague reading was backed up by the jurisprudence of the ECtHR.

Why is this case important? First, ECtHR jurisprudence does not negate the right of each country to establish procedural rules in criminal justice. Some states do not have provisions like the one in question; others like Croatia do. This provision is not unconstitutional, but the manner in which it was applied is. The MPs did not refuse to testify but refused to disclose the identity of a source. In that respect, there is a provision in the same law (Article 108) referring to the right not to disclose the professional secrets of journalists, doctors, or lawyers. The Court could have been creative and applied the same logic to the MPs. As to the reason they did not disclose the information, the MPs stated they there suspicious of the impartiality of the Higher Court as well as the Office of the Special Prosecutor. Second, the issue of the imprisonment of MPs before their immunity was lifted was not answered. The decision in question is just a cosmetic one, and the Court did not have the courage or capacity to decide on the constitutional complaints. It thus avoided confronting the regular judiciary.

3. U-III br. 1874/19 Constitutional complaint – Prohibition of extradition of a Turkish citizen

Turkish citizen Harun Ayvaz filed a timely and admissible constitutional complaint against the decision of the Higher Court, later confirmed by the Court of Appeal, to extradite him to Turkey. His claim was that, given the Turkish state's crusade against members of the alleged terrorist organization Gulen, his rights under Articles 3, 6, 8, and 13 of the ECHR would be violated.

A three-member panel of the Constitutional Court noticed that the Higher Court judge held that the general conditions for extradition had not been met, and in accordance with international standards and human rights jurisprudence, Mr. Ayvaz should remain in Montenegro. Subsequent Court proceedings held differently.

The Court established that there were clear indications that the life of the applicant would be in danger. It also took into consideration the accounts of different international and non-state human rights organization reports on the various violations of the rights of detainees accused of being part of the Gulen organization. In the almost twenty-five-page-long decision, the Court elaborated on its understanding of the relevant ECHR jurisprudence, applied the findings of reports and resolutions of the relevant EU authorities, and applied them *ad literam*, concluding that there was a valid and legitimate concern about the life of the applicant should he be extradited to Turkey under the circumstances. Namely, those in which Turkish security forces were involved in torture as well as serious, massive, and systematic human rights violations.

This decision is historic and very important for Montenegrin constitutional heritage, as it is the first decision in which the Court annuls an extradition decision pursuant to Article 3 of the ECHR. In addition, by doing, so the Court respected the international principle of non-refoulement.

4. U-III br. 245/17, 254/17, 265/17, 268/17 i 287/17 – Constitutional complaints for violation of a right to a trial within a reasonable time

Four men, members of an organized criminal group, were sentenced to thirty years in prison for the murder of a senior police official in 2005 and the bombing of a hotel complex. In their complaints, they claimed that the regular courts violated their right to a trial within a reasonable time, as the final verdict of the Supreme Court was issued in 2016. In its fifty-page decision, the Court overturned this verdict, finding that the case was remanded to the court of first instance three times for retrial, which resulted in a delay. According to the Court, this kind of behavior is what the ECtHR, in its jurisprudence, refers to as 'unjustified activity by the courts'. In addition, the Court found the overall delay was unjustified, as the Supreme Court took eleven months to reach a decision and was not taking any additional or new procedural activities or adducing new evidence, but rather forming its judgment based on the proceedings before the lower courts.

This prompted the Court to evaluate the complaints and take into consideration that the delay was mostly the courts' fault, that there were frequent revocations of judgments, multiple changes of the judge in charge, and that there was unjustified delay in the preparation of expert witness findings. The Court did not find that the complainants or their defense team contributed to the delay of the proceedings. In addition, during this entire time, they remained in detention, meaning that the courts are obliged to act with extreme urgency. The Court established that such a long delay was excessive and it derogated from the complainants' right to a trial within a reasonable time as one of the elements of a right to a fair trial under the Constitution and ECHR. This decision is important for two reasons: first, it is again a test for the Supreme Court to see if it will take this decision into consideration in new

proceedings; and second, a few months prior to this decision, the ECtHR found that Montenegro had violated Article 3 of the ECHR due to the conditions in which an applicant was detained and to violations of his freedom of personality for lack of justification of his five-year, five-month detention.[13]

IV. LOOKING AHEAD

Besides a possible lack of public trust, as they just appointed a presiding judge illegally that could increase questions about the Court's independence from the Executive branch, the reluctance or even defiance of the Supreme Court to adjudicate on the basis of the legal reasoning of the Constitutional Court will remain an issue in 2020. This year will be challenging as we are waiting for several important decisions from the Court: on the constitutionality and legality of the Law on electronic communication[14] as well as the constitutionality of the newly adopted Law on religious freedoms;[15] challenges to the legal principle adopted by the Supreme Court, according to which regular courts are not to adjudicate in cases where the Parliament makes appointments to state council bodies;[16] and the constitutionality of the latest amendments to the Law on state symbols and statehood day.

V. FURTHER READING

'Annual Report of the Constitutional Court for 2018'

Cohen FS, 'Transcendental Nonsense and the Functionalist Approach' (1935), 35 *Columbia Law Review* 809

Dika M and Martinovic I, 'Analiza uticaja odluka Ustavnog suda Crne Gore na sistem redovnih sudova sa posebnim osvrtom na odnos Ustavnog i Vrhovnog suda Crne Gore' (Council of Europe, 2018)

Đuković M, 'Pseudo-Legal Justice' (*Verfassungsblog*, 27 August 2019) <https://verfassungsblog.de/pseudo-legal-justice/> accessed 1 February 2020

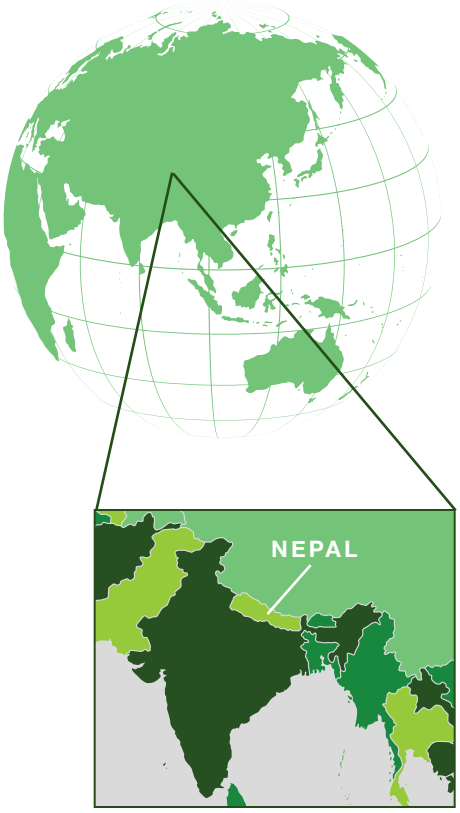
Nenadic B, 'Analiza rada Ustavnog Suda Crne Gore usmjerena na pravnu sigurnost i pravo na koncacnu odluku' (Council of Europe 2019)

[13] *Bigovic v Montenegro* [2019] European Court of Human Rights 48343/16.

[14] During the last elections for Parliament, the Agency for Telecommunications disabled for several hours Internet communication on "whatsapp" and "viber" as citizens were sharing information that certain parties (including the ruling one) were buying off votes.

[14] Many see this law as a way of nationalization of Church property.

[15] Mirko Đuković, 'Pseudo-Legal Justice' (*Verfassungsblog*, 27 August 2019) <https://verfassungsblog.de/pseudo-legal-justice/> accessed 1 February 2020.



Nepal

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I. INTRODUCTION

The implementation and operationalisation of the 2015 Constitution continued to be the primary focus of constitutional law in Nepal in 2019. The new Constitution was adopted by the country's Constituent Assembly in 2015 after a protracted decade of Constitution-making, which was put into motion by the 2006 peace settlement that brought the Maoist insurgency to an end. After two and a half centuries of highly centralised rule, which perpetuated the exclusion of large segments of Nepali society, the new Constitution promises a more equal and inclusive naya (new) Nepal. The federal restructuring of the state is central to this vision: devolving political power from elite-captured Kathmandu institutions to facilitate balanced development, a greater appreciation for religious and ethnic diversity, and an increase in peoples' participation in governance, especially of historically marginalised groups.

While the transition to federalism remains a significant constitutional challenge and a matter of enormous political contestation, devolution appears to be conferring new forms of legitimacy on government. Moreover, in 2019, the post-conflict transitional justice process, which lingers as a critical yet unfulfilled constitutional concern, continued to languish. As the year progressed, concerns emerged regarding the federal government's attempts to stymie criticism and constrain civic engagement. Further, after years of inactivity, the Constitutional Bench restarted hearing cases. However, the system of constitutional adjudication continues to function poorly.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Federalism

Political disruption and manoeuvring characterised the period between the promulgation of the Constitution in September 2015 and elections in 2017. In 2016, unsuccessful attempts, including the January 2016 amendment to the Constitution, to appease the Madhes-based parties, which had walked out of the Constituent Assembly and turned to street protest in the final months of Constitution-making, engulfed political and constitutional discourse; little to no focus was given to structurally implementing the new Constitution. 2017 was a year of elections. From May to December, in five phases, more than 35,000 representatives were elected to public office across the three tiers of government. 2018 was thus the first year of establishment: at the subnational level the primary focus was forming new governance institutions – under the heavy direction (often unwelcome by the local and provincial elected representatives) of the federal government; at the federal level, the Parliament began the considerable task of bringing the country's legal frameworks into conformity with the new Constitution.

The gradual institutionalisation of the new federal structure continued throughout 2019 with many of the same transitional challenges facing the federation. Of these, the most critical was the continuing failure of the federal government to deploy a coherent transition management plan to guide the dynamic period of federal transformation and ensure the delivery of critical public goods and services at the subnational level. This has resulted from and is compounded by the strong resistance within federal institutions to devolve power as well as the highly centralised nature of major political parties. Without administrative structures and mechanisms to implement public service processes and programs, including functions within

their exclusive jurisdiction, provinces have had to struggle to avoid becoming bottlenecks. In many instances, under the express direction of the federal ministries to await federal framework legislation to be promulgated – which in many key policy domains, such as policing, has yet to occur – provincial legislatures have been unable to enact the legislation critical for provincial and municipal government. To date, the general ineffectiveness in transitioning governmental responsibility for the delivery of critical public goods and services has weakened the foundations for federalism in Nepal.[1]

Identity, inclusion, and conflict

The historical marginalisation of significant segments of Nepali society – across many axes (ethnic, caste, language, geography, etc.) – has resulted in stark inequalities and driven civil conflict, most notably the Maoist insurgency (1996-2006). Addressing identity-based grievances is a stated concern of the ongoing democratic federal transition.

Even though it was approved by 90% of members within the Constituent Assembly, political unrest accompanied the promulgation of the 2015 Constitution. Protests among large sections of the Madhesi, Tharu, and Janajati communities, both leading up to and after the adoption of the new Constitution, resulted in violent clashes with security forces and at least 50 deaths. The issues that gave rise to the unrest remain relevant: in 2019, the Madhes-based parties continued to seek to work through the parliamentary process to address grievances, continuing to demand constitutional amendments regarding the recognition of all ethnic languages; the guarantee of indiscriminate and gender-neutral naturalised citizenship; the representation of provinces in the National Assembly (the second chamber of the federal Parliament) based on population; and the redrawing of federal subunit boundaries. However, by and large, their concerns remained under-discussed in national political discourse and the Pahad-Madhes (hill-plains) political fault line remains fragile. In particular, the relationship between the federal government and government in Province Two, which encompasses much of the eastern Tarai/Madhes and is the only province to have a party in government different from the ruling Nepal Communist Party (NCP) at the centre, has been tense, and the two have come into conflict on numerous occasions. Notwithstanding these concerns, early observations indicate that the devolution of administrative and political power and increased inclusion of marginalised and underrepresented groups in the new subnational political spaces have conferred new forms of legitimacy on government, in particular local government.[2]

In 2019, the splinter Maoist group led by Netra Bikram Chand ('Biplab'), which challenges the validity of the new constitutional order and seeks to 'complete the revolution' that it considers was abandoned when the Maoists joined democratic politics in 2006, continued to pursue political violence, including a series of bomb blasts in Kathmandu. While the group retains credibility among small segments of society, especially in the traditional Maoist strongholds, its present influence on constitutional politics remains peripheral. More positively, in March, secessionist leader CK Raut, another prominent voice contesting the Constitution, signed an agreement with the government in which he agreed to give up his demands for an independent Madhes and pledged to continue to advance his political agenda within the bounds of the Constitution.

Transitional Justice

After more than a decade since the end of the Maoist conflict, the transitional justice process has made little progress. While more than 63,000 cases have been registered with the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP), neither commission has concluded even one investigation. In February 2019, both commissions had their tenure extended, and after remaining idle for ten months without commissioners, an agreement was reached in January 2020 between the NCP and Nepali Congress on the appointment of new leadership to the commissions.

Lawyers and activists remain concerned that the transitional justice process has been designed to ensure that powerful perpetrators of human rights violations remain immune from prosecution. Indeed, despite being struck down by the Supreme Court in 2015, the provisions in the Truth and Reconciliation Commission Act 2014, which leave open the possibility of amnesty for human rights violators, remain unamended; other provisions ordered by the Court to be integrated into the act have yet to be incorporated. Moreover, the delays mean that individuals implicated in war-era human rights violations continue to be able to obtain high constitutional office without being subjected to the transitional justice process and its attendant consequences. Significant progress in transitional justice in the near future seems unlikely.[3]

[1] For further discussion of the federal transition, see Democracy Resource Center Nepal, 'Functioning of Local and Provincial Governments in Nepal' (DRCN Periodic Report no 4, April 2019); 'Formation and Functioning of Provincial Institutions in the Federal Structure' (DRCN Periodic Report no 5, August 2019) <www.democracyresource.org/reports/> accessed 20 January 2020.

[2] For further discussion of identity and inclusion, see Janak Rai, 'Deepening Federalism: Post-Federal Analysis on Marginalised Communities in Nepal's Tarai Region' (International Alert and Saferworld, June 2019) <www.international-alert.org/publications/deepening-federalism-post-federal-analysis-marginalised-tarai-nepal> accessed 29 January 2020.

[3] For further discussion on transitional justice, see Tika R Pradhan, 'Sapkota Becomes Speaker Amid Concerns from Conflict Victims and Rights Watchdogs', *The Kathmandu Post* (Kathmandu, 26 January 2019) <https://kathmandupost.com/1/2020/01/26/agni-sapkota-becomes-new-speaker-amid-concerns-by-rights-defenders-conflict-victims-and-global-rights-watchdogs> accessed 29 January 2020; Renee Jeffery, 'Nepal's Truth and Reconciliation Commission Limps On' (*The Interpreter*, 12 February 2019) <https://www.lowyinstitute.org/the-interpreter/nepal-truth-and-reconciliation-commission-limps> accessed 29 January 2020.

Shrinking political space

In 2019, concerns emerged regarding the federal government's attempts to stymie criticism and constrain civic engagement. Indeed, the general environment became increasingly hostile for journalists and those critical of the NCP. Several bills tabled in the federal Parliament (yet to be enacted as of January 2020) have the potential to curtail free expression and undermine the independence of the National Human Rights Commission. Vaguely worded language in the Information Technology Management Bill, for example, would criminalise social media posts that are deemed to contain 'improper' content. Given the increasing utilisation of imprecise provisions in existing laws to detain and fine journalists and other prominent individuals, fears that the new provisions will be used to restrict freedom of expression seem well founded. In an encouraging sign for free speech, however, the content of bills, and the lack of public consultation throughout the legislative process, have been met with strong criticism and opposition from civil society groups and the media.

There are also concerns regarding moves to restrict the NGO sector. The federal Cabinet, for example, has authorised the Ministry of Home Affairs to draft new laws to regulate social organisations, and the new National Integrity Policy seeks to prevent INGOs from sending reports to their international headquarters without first receiving the federal government's permission.[4]

III. CONSTITUTIONAL CASES

The 2015 Constitution establishes a Constitutional Bench within the Supreme Court of Nepal, which is tasked with interpreting the Constitution and adjudicating intergovernmental disputes (Article 137). While the Bench was formally constituted in 2015, internal politics have prevented it from properly functioning, and throughout much of 2016 to 2018 it remained virtually inactive. Indeed, the post-2015 era has been a turbulent period for the judiciary. In 2017, the federal Parliament unsuccessfully attempted to impeach Chief Justice Sushila Karki, and the rejection of Deepak Raj Joshee's nomination for the position of Chief Justice by the Parliamentary Hearing Committee in August 2018 led to a five-month period in which the Court was without a leader. Controversy regarding judicial nominations and impeachments continued in 2019.

However, the appointment of Cholendra Rana as Chief Justice in January 2019 – the fifth person to head the judicial branch in less than four years – and the enlargement in August of the pool of judges from which the Constitutional Bench can be constituted meant that in the second half of 2019, the Bench restarted hearing constitutional disputes. Nonetheless, delays continue and legacy cases relating to the 2007 Interim Constitution consume much of the Bench's attention. There is general agreement among legal experts for the need to reform the system of constitutional adjudication and perhaps even disband the Constitutional Bench entirely. While the cases were few in number in 2019, the Court did engage several matters of constitutional import, as discussed below.[5]

1. Advocates for the Nation v Office of the Prime Minister and Council of Ministers:[6]
Secularism

Hinduism's position within the state – until 2006, Nepal was constitutionally a Hindu kingdom – and its relationship to different visions of nationalism have long been the subject of political and legal contestation. For many minority ethnic and religious communities, secularism has been associated with their emancipation from historical marginalisation.

The 2015 Constitution confirms the Nepali state as 'secular,' defining this secularism as meaning 'religious, cultural freedoms, including protection of religion, culture handed down from the time immemorial' (Article 4). While Article 26 protects the freedom to profess, practice, and protect religion according to personal conviction, this right does not extend to certain conduct, including that which seeks to, 'convert another person from one religion to another'; this conduct 'shall be punishable by law' (Article 26(3)).

In *Advocates for the Nation*, through public interest litigation, the petitioners challenged the constitutional validity of Article 158 of the Criminal (Code) Act 2017 (the Code), which criminalises proselytization and states, among other things, that 'no person shall convert anyone from one religion to another or make an attempt to or abet such conversion of people' (Article 158(1)). Violation of the article is punishable by imprisonment for up to five years and a fine up to 50,000 Nepali Rupees (Article 158(3)).

The petitioners appealed to the fundamental rights enumerated in the Constitution, including to freedom of religion, as well as international law, arguing that not only does the Code restrict an individual's ability to express and practice their religion, values, and beliefs, but Article 158 is based on a false definition of religious preaching, which presumes that preaching and conversion are necessarily coercive and nefarious activities. The result of the law, they argued, is serious harm to the religious beliefs and feelings and autonomy of both individuals and communities.

In a rather plain application of the constitutional text, the Court held that Article 158 of the Code was promulgated to enact the laws of punishment described in Article 26(3) of the Constitution. In the Court's opinion, 'religious secularism and freedom mean that every individual and community can follow

[4] For further discussion, see Bhrikuti Rai, 'Curtailing Civil Liberties in Nepal, One Legislation at a Time', *The Kathmandu Post* (Kathmandu, 30 December 2019) <https://kathmandupost.com/national/2019/12/30/curtailing-civil-liberties-in-nepal-one-legislation-at-a-time> accessed 29 January 2020.

[5] A copy of the Nepali text of all of the judgements discussed in this section as well as simple English translations can be found at <https://tinyurl.com/NepalSC2019>. The authors thank Shreya Paudel for her assistance with the translations.

[6] Writ No: 075-WC-0063 (date of ruling: 12 July 2019).

and practice norms as per their belief. They do not imply freedom to convert another individual from their religion or interfere with another religion [and its beliefs, practices, and activities].' The Court concluded that the petitioners had been unable to substantiate how Article 158 curtailed constitutional freedoms.

In the judgement, the Court did not engage in any conceptual, historical, or comparative analysis to elucidate what secularism means in Nepal. Thus, the judgement provides only limited clarity on the tension between the freedom to choose a religion and the constraint on propagating religion, which is apparent in the Constitution's framing of secularism and freedom of religion. Significantly, the Court did not engage the definitional question raised regarding the propagation of religion. The petitioners had, in the alternative, requested that the Court order the Government of Nepal to convene a multi-religious team of experts to develop standards to identify the conditions under which Article 158 applies. However, as the Court felt that the petitioners had been unable to substantiate how Article 158 impinges on an individual's religious autonomy and freedom, it found it unnecessary to address this request. It thus remains unclear when the practice and preaching of religious values and beliefs will be considered acts of coercive religious conversion – and thus illegal – and when such activities may be engaged in lawfully.[7]

2. Advocate Lokendra Bahadur Oli v Provincial Assembly of Province Two:[8] **Local Elected Officials' Salaries**

The local facilities case is the first case in which the Constitutional Bench invalidated laws enacted by the provincial governments. Six of the seven provinces (all but Province One), which have the constitutional mandate to establish the legal frameworks in which local governments operate, enacted legislation (collectively referred to here as the 'Facilities Acts') to provide 'facilities' – both monetary and non-monetary – to local elected office bearers.

The petitioner challenged the six Facilities Acts, arguing that the legislation had no constitutional basis and should thus be declared void. While the Constitution stipulates that both remuneration and facilities should be provided to members of the federal Parliament (Article 108) and the speaker and deputy speaker within the provinces (Article 196), the provisions relating to local units (Article 220(8) and Article 227) only refer to facilities and do not mention remuneration. The petitioner claimed that the benefits provided to local representatives by the Facilities Acts, which comprised a monthly stipend, in fact constituted remuneration and were thus unconstitutional.

The Court concluded that the Facilities Acts did provide remuneration to the elected officials – the mere fact that the Acts called the payments facilities did not mean that they were so. In considering the constitutionality of the legislation, the Court was of the view that the Constitution's text demonstrated the clear intent of the drafters to provide only facilities and not remuneration to local office-bearers. Construing Articles 220(8) and 227 broadly to enable local representatives to receive remuneration, it held, would constitute a 'fraud on Constitution.' The Court thus concluded that the Facilities Acts were inconsistent with the Constitution and declared them void from the date of the judgement.

If the Court continues to construe express omissions in the Constitution's text as express prohibitions, then the Constitution's ability to adapt to changing circumstances and forces unseen by its drafters in the future will be highly limited. Moreover, the practical effect of the judgement is that around 30,000 local officials, who are often engaged full time in their elected roles, are now unremunerated. While the judgement led to calls for a constitutional amendment, it seems more likely that the six affected provinces will enact laws modelled off Province One's unchallenged legislative scheme. This provides local representatives generous meeting allowances and other job-related benefits, which equal the remuneration given to elected officials in the other six provinces and which in effect function as remuneration. The judgement is thus likely to encourage the creation of artificial expenditure by elected officials to generate their salaries.

3. Ministry of Industry, Tourism, and the Environment, Province Two v Office of the Prime Minister and Council of Ministers:[9] **Federal Division of Powers**

The Sagarnath Forestry Development Project (SFDP) case, brought by the government of Province Two against the federal government, is the first case in which a province has challenged federal government action and in which the Constitutional Bench has been asked to consider the federal division of power.

Province Two claims that SFDP, a plantation project located within the province, is under its jurisdiction. Through a federal Cabinet decision in June, which Province Two challenged as *ultra vires*, the federal government purported to dissolve the SFDP's management committee and merge the project with the Timber Corporation of Nepal Ltd, a wholly-owned entity of the federal government.

Schedule 6 states that the 'use of forests and waters and management of environment within the province' is under the exclusive jurisdiction of provincial governments and legislatures. Province Two thus argued that, as SFDP was a national forest project, it alone had exclusive power to make decisions

[7] For further discussion of freedom of religion, see: International Commission of Jurists, *Challenges to Freedom of Religion or Belief in Nepal: A Briefing Paper* (July 2018) <www.icj.org/wp-content/uploads/2018/08/Nepal-Freedom-of-religion-brief-Advocacy-Analysis-brief-2018-ENG.pdf> accessed 29 January 2020.

[8] Writ No: 076-WC-0002 (date of ruling: 18 October 2019).

[9] Writ No: 076-WC-0001 (date of ruling: 11 December 2019).

regarding its governance. In reply, the federal government argued that in the absence of provincial laws – the Province Two legislature had yet to enact any forest-related laws – it retained authority to regulate with regard to matters that the Constitution delineated as exclusive to the provinces.

In August, the Constitutional Bench issued a temporary stay order, which was continued in December, to prevent the federal government from implementing the Cabinet resolutions regarding SFDP. While the Constitutional Bench has yet to deliver its final judgement, the interim order indicates the Bench's intent to support the exclusive jurisdiction of the provinces. The way in which the Bench goes about engaging the issues in its forthcoming judgement will be important for establishing the trajectory of the Court's division of powers jurisprudence.

4. Advocate Pravin Subedi v Office of the Prime Minister and Council of Ministers:[10]
Freedom of Expression

This case is another in which the Supreme Court has yet to deliver its final judgement. Nonetheless, through the interim order issued in July, the Court indicated its intent to support freedom of expression, which given many commentator's wider pessimism regarding the curtailment of political rights, may be increasingly important.

The petitioners challenged an order of the Kathmandu District Court, following a petition made by Nepal Police, to ban the popular online game PlayerUnknown's Battlegrounds (PUBG). The ban was publicly justified on the grounds that it was addictive and hampering the studies and mental health of young people.

The petitioners contended that the ban was contrary to the constitutional protection of free expression (Article 17(2)(a)) and constituted an unreasonable curtailment of citizens' rights to access the Internet. In addition, they argued that upholding the ban would invite further government restriction on the Internet in the future.

In short order, the Court observed that considering freedom of expression, press freedom, and other fundamental rights guaranteed by the Constitution, restrictive bans must be 'just, fair, and reasonable' and that government authority must be wielded in ways that are 'rational and wise.' In this case, the Court found that the Kathmandu District Court ruling did not clearly state the rationality for the ban, and therefore it should not be put into effect.

IV. LOOKING AHEAD

The institutionalisation of the new constitutional order will remain the principal focus of the coming year. Significant pieces of legislation remain to be put in place at all three tiers of the federation – both framework and sectoral laws. The legislative process will continue to be heavily driven by Kathmandu, which is likely to generate conflict between the federal and subnational governments. While speculation regarding constitutional amendment continues, if/when and on what terms this will occur remain uncertain.

Relationships between the country's 761 governments will become increasingly important, especially as provincial and local governments become more firmly established. The ways in which the political parties continue to go about moulding themselves to (or resisting) the new polycentric federation will have a significant impact on intergovernmental relations and will thus be important to watch.

Moreover, the constitutional institutions designed to support and supervise intergovernmental relations – the Inter-Provincial Council, the National Natural Resource and Fiscal Commission, and the Constitutional Bench – will likely play an increasingly salient role in the federation. With its caseload only expected to increase, 2020 could see the Constitutional Bench decide many important constitutional questions of foundational importance to the federation (the forthcoming judgement on the Sagarnath Forestry Development Project is one such anticipated judgement). However, if the Bench continues to function poorly, momentum to reform to the system of constitutional adjudication is likely to gather.

V. FURTHER READING

Democracy Resource Center Nepal, 'Formation and Functioning of Provincial Institutions in the Federal Structure' (DRCN Periodic Report no 5, August 2019) <www.democracyresource.org/reports/formation-and-functioning-of-provincial-institutions-aug-2019/> accessed 20 January 2020

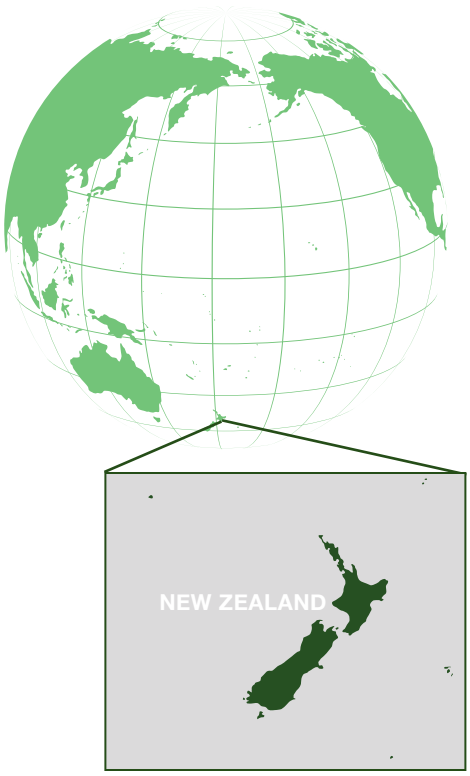
'Chapter 2: State and Human Rights', in Informal Sector Service Center (INSEC), *Nepal Human Rights Year Book 2020* (forthcoming), expected to be available from 19 February 2020 at <www.insec.org.np/hr-yearbook/>

Mahendra Lawoti, 'Constitution and Conflict: Mono-Ethnic Federalism in a Poly-Ethnic Nepal', in Vivek Sachdeva, Queeny Pradhan, and Anu Venugopalan (eds.) *Identities in South Asia: Conflicts and Assertions* (Routledge, 2019)

Mara Malagodi, 'Godot Has Arrived! – Federal Restructuring in Nepal', in George Anderson, Sujit Choudhry (eds.), Territory and Power in Constitutional Transitions (OUP, 2019)

Niti Foundation, 'An Essential Balance: Federalism, Rule of Law, and the Judiciary in Nepal' (Niti Brief, 2019) <http://nitifoundation.org/an-essential-balance-federalism-rule-of-law-and-the-judiciary-in-nepal/> accessed 20 January 2020

[10] Writ No: 075-WC-1047 (date of ruling: 19 April 2019). Note: this case was heard by a regular bench of the Supreme Court and not the Constitutional Bench.



New Zealand

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I. INTRODUCTION

The most important event in New Zealand in 2019 took place on March 15, when a gun attack on two mosques by a lone far-right extremist murdered 51 people and injured another 49. This terrorist incident was the first to take place in New Zealand since operatives from the French intelligence services sank a Greenpeace vessel, the *Rainbow Warrior*, in Auckland Harbour in 1985. The mosque attacks having disabused the country of its assumption that "terrorism represents more of a latent threat than a lived reality",[1] legislative steps were quickly taken to address the danger posed by both readily available military-style weapons and individuals who may have participated in terrorist entities overseas. In addition, the government has announced a range of reviews of New Zealand's law on "hate speech" regulation and general terrorism-related laws.

The other area in which some notable constitutional activity took place was in relation to the country's electoral laws. As one of the last remaining bastions of parliamentary sovereignty, without a written higher law constitution or judicial power to invalidate legislation, New Zealand's electoral processes play a foundational role in establishing the legitimacy of governing authority. In 2019, the country's Parliament passed legislation to enable the voters to directly decide two socially controversial matters: whether to permit medically assisted dying, and whether to legalise the personal use of cannabis. In addition, a number of changes to electoral laws were made by the governing coalition against the wishes of the current minority parties.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The March terrorist attack had a profound effect on a New Zealand society unused to political violence, especially on this scale. It also focused attention on the ready availability in New Zealand of military-style semi-automatic weapons as well as raised questions about the sufficiency of current laws relating to terrorist activity and "hate speech". The day after the shootings, the Prime Minister announced that "our gun laws will change",[2] with legislation to prohibit ownership of most forms of semi-automatic firearms and related parts introduced into Parliament two weeks later. Following a severely truncated legislative process, the Arms (Prohibited Firearms, Magazines, and Parts) Amendment Act 2019 was enacted into law on 11 April, less than a month after the events that prompted it.

This legislation's rapid passage into law demonstrates the ongoing importance of parliamentary supremacy in New Zealand's constitutional arrangements and limited mechanisms for challenging that institution's decisions, particularly on an issue that attracts widespread political consensus. The parliamentary vote on the amending Act was a near-unanimous 119-1, with representatives across the political spectrum agreeing on the

[1] Andrew Geddis and Elana Geddis, "Addressing terrorism in New Zealand's low threat environment", in Ian Cram (ed.), *Extremism, Free Speech and Counter-Terrorism Law and Policy* (Routledge, Oxford, 2019) 190, 190.

[2] Damien Cave and Matt Stevens, "New Zealand's Gun Laws Draw Scrutiny After Mosque Shootings", *New York Times* (15 March 2019) https://www.nytimes.com/2019/03/15/world/asia/new-zealand-gun-laws.html

measure's necessity. And a post-enactment attempt to have the legislation reviewed by the High Court on both substantive and procedural grounds was summarily dismissed, with the Court ruling that even considering the merits of the case would breach comity.[3] On the question of what sort of weaponry citizens ought to be permitted to possess, the judiciary had no interest in questioning the unified decision of the country's elected representatives.

However, there has been less political agreement on other responses to the Christchurch attacks. In mid-October, the government introduced into Parliament the Terrorism Suppression (Control Orders) Bill, designed to create a system of civil control orders for individuals returning to New Zealand after involvement with terrorist organisations overseas. Despite this legislation imposing potentially severe restrictions on individuals' liberty, it also was expedited through the House; the public only was given three working days in which to make submissions to the parliamentary committee considering it. And although the opposition voted against the Bill's enactment, they did so on the basis that it did not contain stringent enough controls.

Future responses to the Christchurch attacks also look likely to provoke significant political disagreements. In April, the Minister of Justice announced a review by government officials of how New Zealand regulates "hate speech", which has yet to be reported. However, opposition parties already have indicated that they see little need to change the country's law in a way that may further constrain freedom of expression. And a Royal Commission of Inquiry into the Christchurch attacks is due to report its conclusions in April of 2020. The government has indicated that this report may form the basis for amending New Zealand's Terrorism Suppression Act 2002, which has been criticised by the country's Solicitor General for being "unnecessarily complex, incoherent and … almost impossible to apply …".[4]

The other notable constitutional developments in 2019 took place in the field of electoral law. Electoral law-making by elected representatives is a fraught activity in all places. In New Zealand, however, it perhaps is even more fraught given the foundational role the "democratic mandate" plays in its constitutional arrangements. Absent a written, higher-law constitution and with Parliament retaining sovereign status over the nation's laws, the periodic distribution of public power on the basis of election results is perhaps the key constraint on political actors. The rules that govern the election process, and how those rules are decided, thus become extremely important matters.

The first issue of note was a spate of especially severe partisan wrangling over two electoral amendment bills. Although claims of a "convention" that electoral law reform in New Zealand should occur in a non-partisan fashion are overblown,[5] the usual processes of law-making in this area were not followed. An Electoral (Amendment) Bill that, *inter alia*, would make it easier to register to vote and cast early votes was introduced into Parliament before its Justice Committee had concluded its standard inquiry into the 2017 general election and made recommendations for reforms. And in November, the Electoral Amendment Act 2019, which lowered the amount that foreign donors may give to political parties and candidates, was introduced, debated, and enacted into law in but a single day. Opposition parties criticised the legislative process used for both measures.

The second issue of note in this area was the decision to allow the general public to decide two matters directly at the 2020 general election. When enacting the End of Life Choice Act 2019, which will permit terminally ill individuals to obtain their doctor's assistance to end their lives, members of Parliament chose to make its coming into force conditional on a majority referendum vote at the next election. And the government also has chosen to ask the public directly whether personal possession of cannabis, along with regulated forms of supply, should be legalised. These referendum votes on "moral" issues are the first since New Zealand abandoned regular votes on the issue of liquor licensing in the 1980s.

III. CONSTITUTIONAL CASES

1. Kim v Minister of Justice [2019] NZCA 209: Extradition to the PRC

The New Zealand Court of Appeal's judgment in *Kim v Minister of Justice*[6] in June 2019 was significant for three key reasons. First, because of its impact: in quashing a decision to extradite a Korean citizen and New Zealand permanent resident to the People's Republic of China (PRC) to face a charge of murder, the Court of Appeal may have prevented the extradition of *anyone* to PRC in the future. Secondly, because of its timing: in June 2019, matters involving the PRC and extradition were gaining particular currency. Not only was the judgment delivered just as the turmoil in Hong Kong was beginning to unfold – protests in response to a proposal that would allow extradition of its residents to mainland PRC – but a month after the Court's decision, a Swedish court also refused extradition of a PRC national on similar grounds to the New Zealand Court of Appeal.[7] Finally, and far less newsworthy, the decision marked a milestone in New Zealand administrative law: full acceptance and application by the Court of Appeal of variable standards of review.

[3] *The Kiwi Party Inc v Attorney-General* [2019] NZHC 1163.

[4] Andrew Geddis and Elana Geddis, "Addressing terrorism in New Zealand's low threat environment", in Ian Cram (ed.), *Extremism, Free Speech and Counter-Terrorism Law and Policy* (Routledge, Oxford, 2019) 190, 195.

[5] Henry Cooke, "Nick Smith dips his toes in very dangerous waters with electoral law spat", *stuff.co.nz* (23 June, 2019) <https://www.stuff.co.nz/national/politics/113646931/fights-about-electoral-law-are-a-very-dangerous-game>

[6] *Kim v Minister of Justice* [2019] NZCA 209.

[7] Reuters, "Sweden rejects China's request to extradite former official" (9 July 2019) <https://www.reuters.com/article/us-sweden-extradition-china/sweden-rejects-chinas-request-to-extradite-former-official-idUSKCN1U40RI>

At the heart of the case was the desire by the PRC to try Kyung Yup Kim in a Shanghai court for murder. It has been seeking his extradition from New Zealand since 2012.[8] The Minister of Justice first agreed to surrender Mr Kim to the PRC in 2015, but Mr Kim successfully challenged that decision in the High Court on the basis that the Minister had failed to properly assure herself that his rights would be respected by the PRC as required by s 30 of the Extradition Act 1999 (NZ).[9] Subsequently, the Minister sought additional advice on those matters identified by the Court from a professor of law in Hong Kong, information from the New Zealand Minister of Foreign Affairs and his officials, and confirmation from Chinese officials about when New Zealand officials would have access to recordings of police questioning Mr Kim. After reconsidering the matter in light of all this new material, the Minister once again concluded that Mr Kim could receive a fair trial in the PRC consistent with New Zealand's human rights obligations and agreed to his surrender.

Mr Kim's challenge to the Minister's second decision was rejected by the High Court,[10] but in 2019 was unanimously accepted by the Court of Appeal. Remarkably, the Court of Appeal held that the Minister's decision remained flawed in spite of the further information received because problems with the PRC's criminal justice system were so deeply rooted as to be inimical to basic principles of justice. The impact of that reasoning may well make it impossible for any Minister to ever be satisfied that a person will receive a fair trial in that country. And if that is the case, no reasonable Minister can exercise his or her discretion under the Extradition Act 1999 to agree to surrender a person for extradition to the PRC. Needless to say, the decision represented quite a damning analysis of the PRC's criminal procedure practices and legal system with ramifications beyond the judicial sphere.

In addition to the political and diplomatic impact of the Court of Appeal's decision, Kim also represents the first Court of Appeal decision to unequivocally accept and apply variable intensity of review in administrative law proceedings. Unfortunately, it declined to go further and engage in the sort of abstract analysis that would have provided (much needed) guidance to lower courts as to how to determine and apply such variable standards of review. It thus provided a tantalising but ultimately frustrating suggestion of a significant development in the judicial approach to reviewing ministerial decisions, and many questions about variable intensity or standards of review remain unanswered in this jurisdiction. At the very least, however, the Court of Appeal's decision in Kim had important ramifications for New Zealand's diplomatic relationship with the PRC (which is now New Zealand's largest trading partner). This is perhaps why the Crown chose to appeal the decision to the Supreme Court, which granted leave to appeal on 20 September 2019.[11] It will be difficult for that Court to shirk providing direct analysis about extradition to the PRC and variable standards of review, and so is a decision public lawyers in New Zealand await with bated breath.

2. Arps v New Zealand Police [2019] NZCA 592: Punishment of hate crimes

As noted, the impacts of the Christchurch terror attack continue to reverberate both in New Zealand and globally. The alleged attacker is in custody presently awaiting trial for multiple charges of murder and attempted murder as well as New Zealand's first charge of "engaging in a terrorist act" under s 6A of Terrorism Suppression Act 2002. The original trial date was set for 4 May 2020, but on 12 September 2019 it was shifted to 2 June 2020 so as to avoid coinciding with the Islamic holy month of Ramadan. A Royal Commission of Inquiry into the attack was commenced on 10 April 2019, and it will present its findings on 30 April 2020.

Adjacent to these major developments, the Court of Appeal's decision in Arps was also significant. The case centred on the actions of Philip Arps, who distributed to approximately 30 of his associates video footage showing the alleged attacker's livestream of the attack. That livestream caused significant controversy globally, and eventually caused Facebook – which hosted the livestream video – to review its livestreaming policy and practices.[12] Mr Arps also arranged for modifications to the video footage to include an image of rifle "crosshairs" and a "kill-count". He was charged with two counts of supplying or distributing objectionable material contrary to s 124(1) of the Films, Videos, and Publications Classification Act 1999, plead guilty to both charges, and was sentenced to 21 months' imprisonment on 18 June 2019.[13] An appeal to the High Court against that sentence was dismissed on 21 August 2019.[14]

In a further appeal to the Court of Appeal, Mr Arps argued that his sentence was manifestly excessive on the grounds that (amongst other things) the courts below erred by failing to take into account s 14 of the New Zealand Bill of Rights Act 1990 (NZBORA), which affirms the right of everyone in New Zealand "to freedom of expression, including the freedom to seek, receive, and impart in-

[8] For a full discussion of the background to the case, see M Douglas, "The Extradition Relationship Between New Zealand and China: *Kim v Minister of Justice*", [2017] *N.Z. Crim. L Rev.* 123.

[9] *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425.

[10] *Kim v Minister of Justice* [2017] NZHC 2109, [2017] 3 NZLR 823.

[11] *Minister of Justice v Kim* [2019] NZSC 100.

[12] Julia Carrie Wong, "Facebook finally responds to New Zealand on Christchurch attack", The Guardian, 29 March 2019 < https://www.theguardian.com/us-news/2019/mar/29/facebook-new-zealand-christchurch-attack-response>

[13] *R v Arps* [2019] NZDC 11547.

[14] *Arps v Police* [2019] NZHC 2113.

formation and opinions of any kind in any form". When deciding to imprison Mr Arps, the sentencing judge had invoked s 9(1)(h) of the Sentencing Act 2002, which identifies motivation from hate as an aggravating factor. Mr Arps argued that as he was engaging in protected speech when he was distributing the footage, this factor ought not to have been considered as it conflicted with s 14 of the NZBORA. This rather interesting submission was necessary because perhaps the core argument – the interaction between hate speech, freedom of expression, and censorship legislation and, thus, whether his actions ought to have been considered criminal in nature – was not at issue: Mr Arps's guilty plea meant the appeal was based purely on sentence.[15]

The Court of Appeal accepted that Mr Arps was engaging in protected speech:[16]

> While right thinking members of society regard Mr Arps's opinions as being utterly repugnant, they are nevertheless opinions that fall within the wide ambit of s 14 of the NZBORA precisely because they are "opinions of any kind". We are therefore satisfied Mr Arps was imparting information and his opinion when he distributed the video footage. His case therefore engages s 14 of the NZBORA.

However, the Court went on to hold that although s 9(1)(h) of the Sentencing Act may have limited Mr Arps's freedom of expression under s 14 of the NZBORA, it constituted a justified limitation of that right. In reaching this conclusion, the Court of Appeal engaged in perhaps the most straightforward and clear application of the *Hansen* framework to date.[17] *Hansen* assists a court in navigating the notoriously complex operative provisions in the NZBORA when confronted by primary legislation that conflicts with an NZBORA protected right. Following that framework, the Court held that s 9(1)(h) of the Sentencing Act served a sufficiently important purpose,[18] was rationally connected to that purpose,[19] did not infringe s 14 of the NZBORA more than necessary,[20] and was overall a proportionate response from Parliament in seeking to achieve that purpose.[21] Therefore, as s 9(1)(h) of the Sentencing Act is a justified limitation under s 5 of the NZBORA, invoking it was not inconsistent with Mr Arps's freedom of expression as guaranteed by s 14 of the NZBORA.

There will be many more developments to come from the tragic and distressing Christchurch terror attack. Arps represents a subsidiary, but interesting development on the hate speech that followed the attack and demonstrated a nimbleness on the part of the Court of Appeal to deal with the complex interaction between that speech and the speaker's freedom of expression.

3. The Stage 2 Report on the National Freshwater and Geothermal Resources Claims (Wai 2358): Indigenous rights to water

The third "case" for discussion is not a court judgment. Rather, it is a report by the Waitangi Tribunal, which is a standing commission of inquiry established under the Treaty of Waitangi Act 1974. This Tribunal may make recommendations on claims brought by New Zealand's indigenous Māori relating to legislation, policies, actions, or omissions of the New Zealand government that are alleged to breach the promises made in the Treaty of Waitangi, a compact signed in 1840 between the chiefs of various Māori "tribes" and the British Crown. While the Tribunal's reports and recommendations have no binding legal force, they are considered to be a highly influential form of "soft law" given the Tribunal's standing and the societal importance of the subject matter in question.

The Stage 2 Report on the National Freshwater and Geothermal Resources Claims responds to claims by Māori that current legal regulation of New Zealand's freshwater and geothermal resources fails to honour the Treaty's guarantee of "te tino rangatiratanga" (the exercise of chieftainship) over lands, villages, and "taonga katoa" (all treasured things). The Tribunal's broad finding was:[22]

> ... that [current laws] are not consistent with Treaty principles, including the principle of equity. Māori have been prejudiced by the ongoing omission to recognise their proprietary rights, barriers that have prevented their participation in the first-in, first-served allocation system, and the lack of partnership in allocation decision-making. Economic opportunities have been foreclosed by the barriers to their access to water.

In addition to recommendations that the government enact amending legislation to remedy existing inequities, the Tribunal also noted that merely changing the legal status accorded to Māori interests in water was insufficient. Rather;[23]

> The Crown's guarantees to Māori in the Treaty, including the guarantee of tino rangatiratanga, require the use of partnership mechanisms for the joint gov-

[15] *Arps v New Zealand Police* [2019] NZCA 592 at [38].

[16] *Arps v New Zealand Police* [2019] NZCA 592 at [41].

[17] R v Hansen [2007] NZSC 7; [2007] 3 NZLR 1 at [104].

[18] *Arps v New Zealand Police* [2019] NZCA 592 at [48]. The Court held that "[t]he purpose of s 9(1)(h) of the Sentencing Act is to require courts sentencing a defendant to treat as an aggravating factor of the offending that it was wholly or in part motivated by the defendant's hostility towards the victim because of, amongst other factors, the victim's religion."

[19] *Arps v New Zealand Police* [2019] NZCA 592 at [49].

[20] *Arps v New Zealand Police* [2019] NZCA 592 at [50].

[21] *Arps v New Zealand Police* [2019] NZCA 592 at [51].

[22] *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358), 115.

[23] *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims* (Wai 2358), 101.

ernance and management of freshwater taonga.

Under this model, most often, the approach to the management of water bodies would require a co-governance/co-management partnership between Māori and the relevant local government authority. This is referred to as "the Treaty standard for freshwater management". It would only be in some instances that this "standard" will need to be departed from, where Māori interests in a water body are so pressing that they require Māori governance of that taonga.

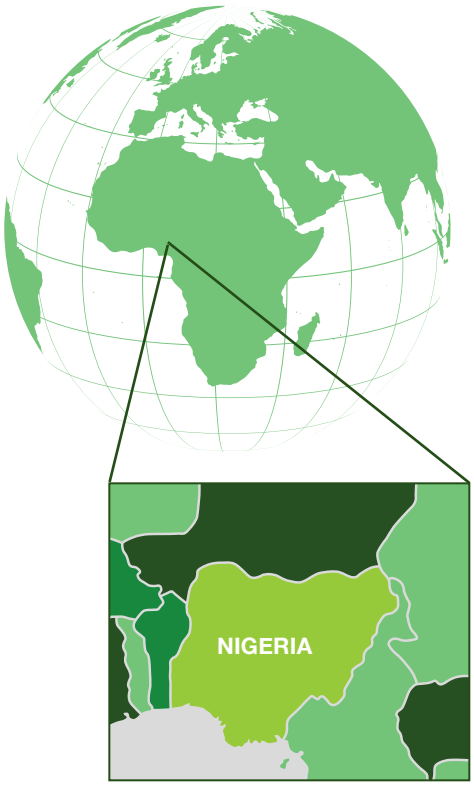
The importance of the Tribunal's report is that it provides a rallying point for Māori claims in future water management policy-making processes. As demands on this resource increasingly comes to outstrip supply, the government faces intense pressure to create a new allocation mechanism that balances multiple competing interests. And unless Māori aspirations can be satisfied within this mechanism, there is every chance that a case will be brought before the courts seeking a declaration that customary property rights in this resource have never been extinguished. The Waitangi Tribunal already has indicated its view that:

> Māori had rights and interests in their water bodies for which the closest English equivalent in 1840 was legal ownership. Those rights were then confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that the Treaty bargain provided for some sharing of the waters with incoming settlers. The nature and extent of the proprietary right was the exclusive right of [tribes] to control access to and use of the water while it was in their rohe [traditional areas].

The prospect of a binding High Court ruling that such ownership rights to an essential resource continue to exist in New Zealand's common law would create a major rule of law problem for the New Zealand government when it comes to allocating that resource. As such, negotiating a settlement of Māori claims outside of the judicial process is very much in its interests, with the Tribunal's report forming a key part of such negotiations.

IV. LOOKING AHEAD

A general parliamentary election must be held before November 21, 2020, which in New Zealand's Westminster constitutional arrangements also will decide the makeup of the country's executive government. At that election, the voters will directly decide whether to legalise aid in dying and personal cannabis possession. Before the vote takes place, however, the government will have to consider the report of the Royal Commission on the Christchurch attacks and decide what legislative response it merits. Decisions also will have to be made on a model for water use and allocation, with the Waitangi Tribunal's report potentially being central to this process. And the Supreme Court's decision in Ministry of Justice v Kim may have very important ramifications for New Zealand's relationship with China, its extradition laws generally, and the shape of administrative law for years to come.



Nigeria

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I. INTRODUCTION

Election was the most defining event in the year under review. Unfortunately, pre- and post-election violence and threat of violence, intimidation of election observer groups, and allegations of extensive electoral malfeasance cast a shadow of doubt on the credibility of the entire process and its outcome. Without understating the culpability of the other political actors, the ferocious pursuit of victory at all cost by the ruling All Progressives Congress (APC) at the presidential polls and at governorship polls in many states were clear pointers to electoral authoritarianism.[1] Local and international observer groups, the independent press, and civil society groups scored the elections below democratic standards. While freedom of choice devoid of intimidation and inducements is essential to democratic elections, the 2019 general elections witnessed several forms of electoral fraud, including blatant vote buying.[2] Judicial refusal of redress by "technical" interpretations of electoral rules effectively gave legal protection to electoral authoritarianism. The entire process from the electoral code to voting were actively manipulated. The absence of electronic transmission of election results and the relegation of the smart card reader (SCR) machine to a mere accreditation device effectively excluded use of technology to curb fraud. A wholly manual process allowed for the manipulation of the elections.

Judicial independence is a strong mechanism for consolidating democracy. Since independence, Nigeria has suffered from a less than independent judiciary due to authoritarian regimes.[3] Given this, judicial autonomy is a paramount factor in measuring Nigeria's democracy. In 2019, Judicial independence was undermined by acts of intimidation by the Executive, including, prominently, the dismissal of the Chief Justice of Nigeria and routine disobedience of Court orders.

The National Assembly also has been considerably weakened through external interference in the selection of its leadership, thus constraining its capacity to contain executive abuse. These developments point to the relegation of mechanisms of vertical (election) and horizontal (check/balance) accountability. The new challenge posed by weak accountability mechanisms is not just how to curtail the "growing gap between electoral and liberal democracy"[4] but how to halt a total reversal of democracy.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Electoral Legitimacy

One of the three milestones in the consolidation of democracy is transparent election.[5] Election provides the opportunity for vertical accountability of incumbents to the electorates. More than anything else, the

[1] Morse explains that "in electoral authoritarian regimes incumbents hold elections that do not live up to democratic standards of freedom and fairness and therefore facilitate repeated incumbent victory": Yonathan L. Morse, "The Era of Electoral Authoritarianism," *World Politics* 64(1) (2012) 161-198, 162.

[2] See A. Steve Amaramiro, et. al., "An Appraisal of Electoral Malpractice and Violence as an Albatross in Nigeria's Democratic Consolidation", *Beijing Law Review* 10 (2019) 77-97.

[3] See K. Post, The New States of West Africa (Penguin Books, 1968), 94-99; B. O. Nwabueze, *Presidentialism in Commonwealth Africa* (C. Hurst & Co., 1974) 255-297.

[4] Larry Diamond, *Developing Democracy: Toward Consolidation* (John Hopkins University Press, 1999) 10.

elections of 2019 were a defining moment in the country's democratic practice. The general elections were held on 23 February (presidential and National Assembly), 9 March (governorship and state legislature), and 23 March for supplementary polls in areas where elections were declared inconclusive. President Mohammadu Buhari of the APC won the presidential election with 15,191,847 votes, representing 55.6 percent of the total valid votes. His closest challenger, former Vice President Atiku Abubakar of the People's Democratic Party (PDP) had 11,262,978 votes (41.2 percent of the total). Buhari received the constitutional minimum votes of 25 percent in 32 states, well over the 24-state and Federal Capital Territory (FCT) constitutional threshold. The APC had majority votes in 19 states compared to the PDP's 17 states and the FCT. Mr. Atiku filed a petition at the presidential election tribunal (a special five-member panel of the Court of Appeal) challenging the validity of the election results and claimed to have won the election based on parallel collated results allegedly from the electronically transmitted results of the polls. The election tribunal and the Supreme Court dismissed his claim partly on the ground that the existence of the alleged electronically transmitted results was not established nor indeed the existence of an Independent National Electoral Commission (INEC) server that may have stored the said data.

However, voting and result collation were fraught with irregularities. For instance, there were high incidences of cancellation of polling unit votes with only general explanations and, according to EU Observer Mission reports, the results announced by state returning officers during the collation of presidential results showed a discrepancy of an additional 1.66 million registered voters above the total figures published by the INEC on 14 January 2019.[6] The INEC attributed this to arithmetic errors during lower-level collation, but this does not appear entirely satisfactory. Political violence was rife, with more than a dozen deaths reported. There were also local newspaper reports of the use of military personnel to intimidate voters and opposition supporters in the oil-rich states of Rivers and Bayelsa.[7] In the former, conflict between unidentified security agencies and armed thugs led to delayed and eventual suspension of result collation. In Benue (north-central), a PDP-controlled state, independent reports had it that four polling officials were kidnapped on their way to collation centers. In some other states, opposition party agents and independent observers were barred from collation centers. Foreign observers (IRI/NDI) noted issues at collation centers in Adamawa, Benue, Lagos, Nasarawa, and in Rivers, where INEC officials abandoned a collation center due to threats and rumours of violence.[8] The ease with which these attacks happened, sometimes involving uniformed men, suggests that relevant authorities were complicit. This lends credence to electoral authoritarianism.

On 16 November 2019, off-cycle governorship elections were held in two states: Kogi in the north-central and Bayelsa. The pattern of brazen voter inducement/intimidation, violence (pre- and election day), and manipulations already established at the general elections was repeated, sometimes involving security personnel and armed thugs.[9] Election officials were attacked and abducted[10] just as voters were chased out of voting centres with tear gas fired from police helicopters ostensibly to "stop those fighting and snatching ballot boxes."[11] The ruling APC won both states, breaching for the first time the firewall of the Niger Delta stronghold of the PDP. The Bayelsa and Kogi elections were perhaps the most violent elections since the return to democracy in 1999.[12]

On the whole, the 2019 elections failed to meet the minimum standards expected of a democracy.

Weakened Legislature

One of the marks of an effective legislature is an independent leadership selection process. With a majority (62 of 109 senators) short of two-thirds after the 9 February polls, the ruling party dictated that the legislators-elect should occupy the leadership positions of the two chambers of the National Assembly. The

[5] Robert A. Dahl (ed.), *Political Oppositions in Western Democracies* (Yale University Press, 1966) xi.

[6] European Union Election Observation Mission, *Nigeria 2019 Final Report,* 38: <https://eeas.europa.eu/sites/eeas/files/nigeria_2019_eu_eom_final_report-web.pdf> accessed 24/1/2019. See also IRI/NDI, *Nigeria International Election Observation Mission Final Report:* <https://www.iri.org/sites/default/files/nigeria_election_report_updated.pdf> accessed 24/1/2020. However, one observer group that undertook parallel vote tabulation (PVT), YIAGA AFRICA, reported that, based on reports from 1,491 polling units, which are 98.4 percent of sampled polling units, "For both APC and PDP the official results fall within the PVT estimated ranges": <https://www.vanguardngr.com/2019/02/yiaha-africa-verifies-election-results/> accessed 30/01/2020.

[7] Emmanuel Obe, "How Nigerian Army overran Rivers State," March 25, 2019: <https://tell.ng/how-nigerian-army-overran-rivers-state/> accessed 27/1/2020; "Elections 2019: Armed men in military uniform kill government house photographer, PDP Ward Chairman in Bayelsa," February 23, 2019: <http://pointblanknews.com/pbn/exclusive/elections-2019armed-men-in-military-uniform-kill-govt-house-photographer-pdp-ward-chairman-in-bayelsa/> accessed 27/1/2020.

[8] European Union & IRI/NDI (n. 6).

[9] See "Sporadic violence greets Bayelsa, Kogi governorship elections," November 16, 2019: <https://punchng.com/sporadic-violence-greets-bayelsa-kogi-gov-elections/> accessed 25/1/2020; "Violence, intimidation, vote buying mar Bayelsa, Kogi Polls," November 17, 2019: <https://www.thisdaylive.com/index.php/2019/11/17/violence-intimidation-vote-buying-mar-bayelsa-kogi-polls/> accessed 25/1/2020.

[10] See Friday Olokor, "30 missing ad hoc staff safe – INEC," November 17, 2019: <https://punchng.com/kogi-election-missing-30-ad-hoc-staff-safe-inec/> accessed 25/1/2020.

[11] Muideen Olaniyi, "Helicopter dropping teargas in Kogi was for preventive purpose – Police IGP," November 19, 2019: <https://www.dailytrust.com.ng/helicopter-dropping-teargas-in-kogi-was-for-preventive-purpose-police-ig.html> accessed 25/1/2020.

[12] See "Bayelsa, Kogi: Election as warfare," November 28, 2019: <https://tribuneonlineng.com/bayelsa-kogi-election-as-warfare/> accessed 25/1/2020.

leadership vote confirmed those nominees as leaders. The new legislative leadership ratified all executive appointments previously turned down by the 8th Senate (2015-2019) with very little or no consideration. Senate President Ahmed Lawan stated that every single approval requested by the President would be given expeditious consideration.[13] For the first time in the sixteen years of the current democratic experiment, ministerial nominees were pampered through a sham screening exercise.[14] Horizontal accountability was weakened with the apparent "conquest" of the judiciary and the legislature by the executive just as vertical accountability was weakened as a result of the poor electoral processes.

III. CONSTITUTIONAL CASES

1. Atiku Ababukar v Mohammadu Buhari: Electoral Legitimacy

After the declaration of incumbent President Buhari as the winner of the 23 February election, Atiku Abubakar filed a petition before the Presidential Election Tribunal on 18 March 2019 challenging the results declared by the INEC. Mr. Atiku mainly alleged manipulation of result sheets, over-voting, wrongful recording of results, and intimidation of voters in 11 "focal states" in the northeast and northwest sections of the country. In its ruling on 11 September 2019, the tribunal dismissed all allegations on the ground that they were criminal in nature and required proof beyond reasonable doubt. Attempts to rely on the SCR to prove non-accreditation of voters and subsequent over-voting were rejected on the authority of an earlier Supreme Court's decision that the use of the SCR has no statutory backing outside INEC guidelines.[15] The opinion that the SCR remains unusable until it is provided for in the Electoral Act is self-rebutting because other guidelines of the INEC have been upheld or not queried; for instance, the consistent controversial declaration of elections as inconclusive because the margin of victory was less than the number of registered voters in areas where elections weren't held for reasons ranging from logistic failures to security challenges, or where elections were cancelled.[16] The Electoral Act (Amendment) Bill vetoed by the President four times had mandated electronic documentation using the SCR. Non-incorporation of the SCR into the electoral law made the INEC adopt its use as a verification and confirmation mechanism of the manual process to enhance credibility.[17] During its voter education, the INEC explained that the SCR was capable of transmitting results from the voting point to an e-collation officer at its headquarters in Abuja (which suggests the existence of a server). However, it announced before the election that there would be no electronic transmission of results. Under the circumstances, the tribunal held that the petitioner was unable to establish the electronic transmission of the election results. It upheld the declaration by the INEC of the winner of the election.[18] A further appeal by Atiku to the Supreme Court on 24 September was dismissed on 30 October, 2019.

While the apex court was reclusive in the governorship and presidential elections, it voided party candidate selection processes that violated the INEC's guidelines. The INEC had rejected the APC candidates in Rivers for the governorship position and in Zamfara for state/federal legislative seats, including the governorship position. The Supreme Court upheld the decision of the INEC on the two states,[19] and for the latter state ordered the replacement of the APC governor and legislators (already winners at the general elections) with candidates of the PDP (runners-up) as duly elected.[20]

Earlier in the year, the Supreme Court ruled in favour of the APC and its candidates in the southwest states of Ekiti and Osun in the 2018 elections, which were widely reported to be below international standards.[21] While the INEC declared the APC candidate in Osun the winner, the election tribunal upturned the declaration by nullifying the supplementary elections and announced the candidate of the PDP as duly elected. However, the Court of Appeal and the Supreme Court in split decisions reversed the tribunal decision nullifying the supplementary election and further ruled the entire tribunal decision incompetent because Justice Peter Obiora, who read the lead judgment, was not at the tribunal hearing on 6 February 2019 when a major argument on non-compliance with the electoral law was made.[22] Two justices of the apex court, Akaas and Galinje, opined in their dissents that the illegality of the supplementary polls was an overriding

[13] Seun Opejobi, "We will honour all Buhari's request(s) – Senate President, Ahmed Lawan," November 22, 2019: <https://dailypost.ng/2019/11/22/we-will-honour-all-buharis-request-senate-president-ahmed-lawan/> accessed 26/1/2020.

[14] See Tonnie Iredia, "Ministerial Screening: Meaning and Purpose," August 4, 2019: <https://www.vanguardngr.com/2019/08/ministerial-screening-meaning-and-purpose/> accessed 27/1/2020.

[15] *Wike v Peterside* (2016) 7 NWLR (pt. 1512) 452, 522, 574.

[16] S. Ukhuegbe and G. O. Arishe, "Nigeria" (2018) *Global Review of Constitutional Law* 214-218 at 215-216.

[17] Independent National Electoral Commission, *Regulations and Guidelines for the Conduct of Elections*, para. 10.

[18] See "Buhari vs Atiku: Tribunal Ruling on 2019 Election": <https://punchng.com/live-updates-buhari-vs-atiku-tribunal-ruling-on-2019-election/> accessed 25/01/2019.

[19] Ade Adesomoju, "Supreme Court upholds disqualification of APC candidates in Rivers," February 13, 2019: <https://punchng.com/supreme-court-upholds-disqualification-of-apc-candidates-in-rivers/> accessed 26/1/2020.

[20] Ade Adesomoju, "Supreme Court nullifies APC candidates' elections, declares PDP winner of Zamfara polls," May 24, 2019.

[21] See "Fayemi duly won Ekiti governorship polls, Supreme Court rules," May 24, 2019: <https://www.pmnewsnigeria.com/2019/05/24/fayemi-duly-won-ekiti-governorship-poll-supreme-court-rules/> accessed 25/1/2020.

[22] Evelyn Okakwu, "Supreme Court affirms Gboyega Oyetola's election as Osun governor," July 5, 2019: <https://www.premiumtimesng.com/news/headlines/338994-breaking-supreme-court-affirms-gboyega-oyetolas-election-as-osun-governor.html> accessed 25/1/2020.

consideration. Akaas held that: "The INEC is supposed to be an umpire, not a partisan group. For the INEC to have pronounced the election inconclusive showed that it had something up its sleeves. And it achieved that through the rerun."[23] On the absence of Justice Obiora on 6 February, Justice Galinje, while admitting that such absence should result in the nullification of judgment, drew attention to the lack of proof of the judge's absence, saying "the only way to affirm that was by producing the original court records."[24] The discontent expressed in the minority decisions are important wake-up calls to the INEC and the judiciary to look beyond technicality in dispensing justice.

It is in fact worrisome that the presidential election verdicts at both courts were without dissent or even a condemnation of the widely reported incidences of violence and other electoral misconduct.[25] The continuous validation of faulty elections is a sharp departure from the pattern established by the Court of Appeal and affirmed by the Supreme Court in a line of cases.[26]

2. Hon. Justice Walter Onnoghen v FRN: Judicial Independence

The independence of the judiciary is not only relevant to consolidation but also a key indicator of democracy. Given long years of military authoritarian rule, the autonomy of the judiciary is central to Nigeria's democracy. Authoritarianism is bad for the judiciary because of the possibility of curtailment should the "leader become displeased."[27] Judicial independence means that judges be the "authors of their own opinions"[28] and their decisions enforced in practice.[29] Judicial independence in this sense connotes *judicial power.*[30]

The United Nations' *Basic Principles on Judicial Independence* and the *International Bar Association (IBA) Minimum Standards of Judicial Independence* postulate key indicators of judicial independence, one of which is guaranteed term of office with regulations on appointment, discipline, and removal from office. There is a clear endorsement of this principle in Nigeria's constitution in order to protect judges from undue influence and retribution.[31]

On 14 January 2019, the Chief Justice of Nigeria (CJN), Walter Onnoghen, was charged in the Code Conduct Tribunal (CCT) for incomplete assets declaration in 2016. The Court of Appeal (Abuja) gave an interim order to halt the CJN's trial at the CCT but subsequently reversed itself.[32] Simultaneously, the National Judicial Council was investigating the same allegations against the CJN following the Attorney General's petition.[33] On 23 January 2019, an *ex parte* order was issued by the CCT for the suspension of the CJN and called for the most senior justice at the Supreme Court to replace him in an acting capacity.[34] In the first place, the second arm of the *ex parte* order was superfluous because by the tenor of the constitution, the most senior justice acts whenever there is a vacancy.[35] The intriguing aspect of the suspension order was that it was granted the day after the CCT had adjourned the hearing to 28 January 2019,[36] apparently to await the Court of Appeal ruling (24 January) on an

[23] Dennis Erezi, "Supreme Court Justices accuse INEC of rigging Osun governorship election," July 5, 2019: <https://guardian.ng/news/supreme-court-justices-accuse-inec-of-rigging-osun-governorship-election/> accessed 25/1/2019.

[24] Ibid.

[25] Contra *Buhari v INEC* (2008) 19 NWLR (pt. 1120) 246, where President Yar'Adua won at the apex court on a split 4-3 decision.

[26] See *Buhari v Obasanjo* (2005) 2 NWLR (pt. 910) 241, 487-488, 60; *Buhari v INEC* (2008) 19 NWLR (pt. 1120) 246, 359, 427-428.

[27] P. H. Solomon, "Courts and Judges in Authoritarian Regimes" (2007) 60(1) *World Politics Review* 122-145.

[28] L. A. Kornhauser, "Is Judicial Independence a Useful Concept?" in S. B. Burbank and Barry Friedman (eds.), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications Inc, 2002) 42-55.

[29] J. Ríos-Figueroa and J. K. Staton, "Unpacking the Rule of Law: A Review of Judicial Independence Measures," April 26, 2009, 14: <http://people.bu.edu/jgerring/Conference/MeasuringDemocracy/documents/RiosStaton2009.pdf> accessed 12/10/2018.

[30] See I. C. Pats-Acholonu, "Nigeria: Disobedience of Court Orders, Form of Intimidation," *All Africa* (17 April 2006): <https://allafrica.com/stories/200604180578.html> accessed 14/10/2018; E. Okakwu, "Special Report: How Buhari's Administration serially disobeys Court Orders," *Premium Times* (11 June, 2017): <https://www.premiumtimesng.com/news/headlines/233665-special-report-how-buhari-administration-serially-disobeys-court-orders.html> accessed 14/10/2018; G. Obike, "Ministry orders dredgers to disregard Appeal Court's Ruling," *The Nation* (August 8, 2017): <http://thenationonlineng.net/ministry-orders-dredgers-disregard-appeal-courts-ruling/> accessed 14/10/2018.

[31] Ss. 291(1)(2); 292(1).

[32] Evelyn Okakwu, "Code of Conduct sets date for Continuation of Onnoghen's Trial," January 31, 2019: < https://www.premiumtimesng.com/news/top-news/309122-code-of-conduct-tribunal-sets-date-for-continuation-of-onnoghens-trial.html> accessed 07/02/2019.

[33] David Iriekpen and Alex Enumah, "NJC gives Onnoghen, Muhammad Seven Days to Respond to Petitions," January 30, 2019: < https://www.thisdaylive.com/index.php/2019/01/30/njc-gives-onnoghen-muhammad-seven-days-to-respond-to-petitions/> accessed 07/02/2019.

[34] Wale Odunsi, "CJN Onnoghen: See the full CCT Order Buhari acted on," January 25, 2019: <http://dailypost.ng/2019/01/25/cjn-onnoghen-see-full-cct-order-buhari-acted/> accessed 08/02/2019.

[35] S. 231(4).

[36] Kamarudeen Ogundele, "CCT Rejects Court Orders Stopping Onnoghen's Trial," January 23, 2019: <https://punchng.com/cct-rejects-court-orders-stopping-onnoghens-trial/> accessed 08/02/2019.

application for stay of proceedings. Indeed, on 24 January, the Court of Appeal gave an interim order halting the continuation of the trial.[37] The order was of little effect, however, because Onnoghen was suspended from office a day earlier. It is also worrisome that an order *ex parte* was granted without putting the CJN on notice, even though he had counsel on record. These happenings, together with the expression of dissatisfaction on the leadership of Justice Onnoghen by President Buhari[38] during the swearing-in of Justice Tanko Mohammad as acting CJN, lend credence to the allegation that the suspension order was contrived through the agency of the chairman of the CCT. The political interference, presumably from the executive branch, in the trial of the CJN is a serious threat to the independence of the judiciary. The NJC later found Onnoghen culpable, after which he tendered his resignation. Tanko Mohammad has since assumed a substantive role following formal appointment. Just like the CCT, the NJC's decision may not have been independent of external influence.

3. Dasuki v FRN & Sowore v FRN: Respect for Judicial Orders

Where there is no real assurance of compliance with court orders by the political branches, judicial reticence may set in. Sambo Dasuki was held in detention from 2015 despite meeting bail conditions set by the courts.[39] Omoyele Sowore, presidential candidate of the African Action Congress (AAC) in the 2019 election and online news publisher, was arrested on 3 August by the Department of State Services (DSS) ahead of a planned nationwide protest tagged "Revolution Now" and charged with treason. Two court orders for Sowore's release on bail were initially ignored by the detaining authority. However, under a threat of contempt of court, the DSS released Mr. Sowore on 5 December, only to re-arrest him illegally on 6 December within the premises of the court.[40] Due to much protest from civil society and the general public as well as international pressure, he was released 24 December 2019 along with Mr. Dasuki.[41] The agency's recalcitrance after judicial release on bail clearly breaches judicial independence.

IV. LOOKING AHEAD

An interesting case to watch for is the quest by the PDP to have the Supreme Court reverse its 14 January 2020 post-election ruling that replaced the sitting governor of Imo State, Emeka Ihedioha of the PDP, who was declared winner in February 2019 by the INEC, with Hope Uzodinma of the APC.[42] There are sixteen justices at the Supreme Court at the moment, five short of the constitutional maximum. In January 2019, Justice Awani Abba-Aji, formerly one of the senior Justices of the Court of Appeal, was appointed to the Supreme Court. This appointment puts the number of female justices of the Supreme Court at four, or a quarter of the bench. Four other Court of Appeal justices were recommended to President Buhari by the National Judicial Council in October 2019 for appointment into the apex court, but no action has been taken.[43]

There are two anticipated mandatory retirements (by age) at the Supreme Court in 2020: Justices Amiru Sanusi and Paul Galinje. Similarly, the first female president of the Court of Appeal, Zainab Adamu Bulkachuwa, will retire mandatorily on 6 March 2020 at seventy. According to the established practice, it is expected that her successor will be the most senior member of the Court.

V. FURTHER READING

Gabriel O. Arishe and Bright E. Enorenseeghe, "Fixing Boundary against Encroachment: How judicial independence can be entrenched in Nigeria" (2020) *Obafemi Awolowo University Law J*

Gabriel O. Arishe, *Developing Effective Legislature* (Paclerd Press, 2017)

[37] Halimah Yahaya, "Appeal Court Stops CCT from Proceeding with Onnoghen's Trial," January 24, 2019: <https://www.premiumtimesng.com/news/headlines/307638-breaking-appeal-court-stops-cct-from-proceeding-with-onnoghens-trial.html> accessed 08/02/2019.

[38] According to President Buhari: "It is no secret that this government is dissatisfied with the alarming rate in which the Supreme Court of Nigeria under the oversight of Justice Walter Onnoghen has serially set free persons accused of the most dire acts of corruption, often on mere technicalities, and after quite a number of them have been convicted by the trial and appellate courts": Leon Usigbe, "Based on CCT Order, Buhari Suspends Onnoghen as CJN," January 25, 2019: <https://www.tribuneonlineng.com/186549/> accessed 08/02/2019.

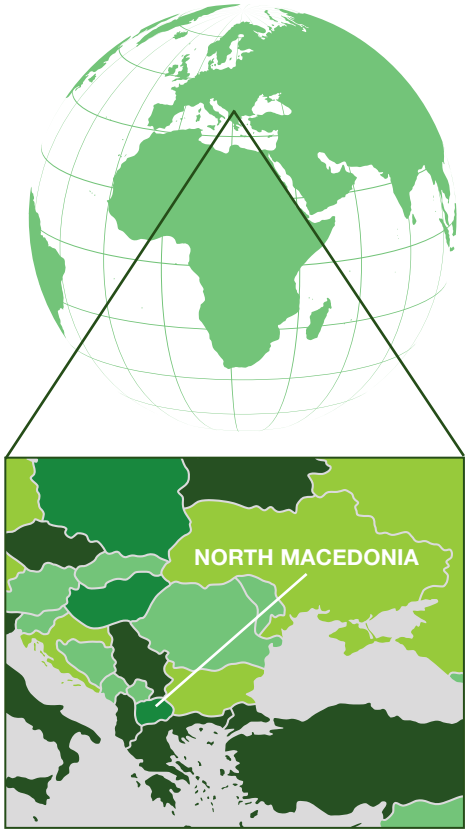
[39] See S. Ukhuegbe and G. O. Arishe, "Nigeria: The State of Liberal Democracy" (2017) *Global Review of Constitutional Law* 204-208 at 207, where the continued detention of Sambo Dasuki and Sheikh Elzakzaky were reviewed.

[40] Ade Adesomoju, "Drama as DSS operatives storm Abuja court to rearrest Sowore," December 6, 2019: <https://punchng.com/drama-as-dss-operatives-storm-abuja-court-to-rearrest-sowore/> accessed 26/1/2020.

[41] Dennis Erezi, "DSS releases Omoyele Sowore," December 24, 2019: <https://guardian.ng/news/dss-releases-omoyele-sowore/> accessed 26/1/2020; Azimazi John Momoh, et al., "Why Buhari made u-turn, released Dasuki, Sowore," December 25, 2019: <https://guardian.ng/news/why-buhari-made-u-turn-released-dasuki-sowore/> accessed 26/1/2020.

[42] Chuks Okocha, "Ihedioha: PDP files request for case review to Supreme Court this week," January 26, 2020: <https://www.thisdaylive.com/index.php/2020/01/26/ihedioha-pdp-files-request-for-case-review-to-scourt-this-week/> accessed 26/1/2020.

[43] Alex Enumah, "NJC recommends appointment of four new justices of the Supreme Court, probes eight judges," October 25, 2019: <https://www.thisdaylive.com/index.php/2019/10/25/njc-recommends-appointment-of-four-new-supreme-court-justices-probes-eight-judges/> accessed 26/1/2020.



North Macedonia

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I. INTRODUCTION

The year 2019 was marked by polarization along party lines and the country's historic name change to the Republic of North Macedonia. In 2019, the government also continued its attempts to combat high-level corruption arising from controversies occurring in 2015. In that year, Zoran Zaev, of the Social Democratic Union of Macedonia (SDSM), accused then-Prime Minister Nikola Gruevski, of the nationalist Internal Macedonian Revolutionary Organization-Democratic Party for Macedonian National Unity (VMRO-DPMNE),[1] of wiretapping thousands of people including politicians and journalists. At that time, protests erupted in the country and Gruevski resigned. President Ivanov, under an interim government, provided amnesty to top officials involved in the wiretapping scandal.[2] After this, a new government was slow in forming.[3] Ultimately, Zaev formed a government coalition, supported by a coalition of Albanian parties, in May 2017.

As a result of the wiretapping scandal, a Special Prosecutor's Office was created to combat high-level corruption. However, in 2019, the government chose to close this office due to the indictment of its top prosecutor. The closing of the Special Prosecutor's Office was controversial, as there were other options to continue its legal mandate. The Special Prosecutor's pending cases were transferred to the Basic Prosecutor's Office for Corruption and Organized Crime.

Also in 2019, the country passed new laws providing additional language rights for the Albanian minority and several judicial reforms. North Macedonia's Constitutional Court heard few cases on the merits, but did not resolve important cases arising from the 2017 storming of Parliament, wiretapping and urban planning.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

On January 12, 2019, constitutional amendments, requiring two-thirds support in Parliament, changed the name of the state to the Republic of North Macedonia.[4] The name change was aimed at overriding Greece's twenty-seven years of objections to Macedonians' aspirations of becoming a NATO member state and obtaining a date to start negotiations for EU membership. The start date for the country's EU membership negotiations was stymied by France's President Emanuel Macron in November 2019 and cut short the government of Prime Minister Zoran Zaev, who had supported the name change. As a result, early elections will be held in April 2020.

[1] In 2018, Gruevski was sentenced to two years in prison for receiving a reward for unlawful influence pursuant to Article 359(2) of the Criminal Code, but fled to Hungary where he received asylum.

[2] Ivanov provided amnesty to two former prime ministers as well as the current Prime Minister, Zoran Zaev, the former Minister of Interior, the former Director of the Secret Police and three prosecutors from the Special Prosecutor's Office in 2016.

[3] After Gruevski resigned, VMRO-DPMNE had the most seats held by a single party in Parliament, and for this reason, Ivanov provided this political group with the mandate to govern. However, it was unable to gather the needed majority to elect a government.

[4] *Official Gazette* no. 6/19.

Continued controversies arising from the 2015 wiretapping scandals and their resolution resulted in further institutional changes and constitutional law decisions (reviewed below) in 2019. By way of background, in 2015, publicly released wiretapped conversations of high state officials raised suspicions about high-level government corruption and abuse of official positions. Due to the wiretapping revelations, the major political parties agreed to adopt the Law on the Special Prosecutor's Office to fight high-level corruption among politicians, judges, civil servants and businessmen.[5] The first named Special Prosecutor was Katica Janeva, whose position was equal to that of the State Public Prosecutor.[6]

The above law regulating special prosecution contains a five-year sunset clause. Its Article 22 stipulates that the indictments must be submitted within eighteen months from the day the cases and materials are remitted to the Special Prosecutor. On January 30, 2019, the Supreme Court issued a general legal opinion stating that after the expiration of the eighteenth-month deadline, which occurred on June 30, 2017, the Special Prosecutor no longer had jurisdiction to submit indictments, conduct investigations or undertake pre-investigative measures.[7] This opinion raised public concerns that a number of perpetrators of high-level corruption and abuse of official position might escape justice.

At the time of creating the Special Prosecutor's Office, prosecutors raised concerns that this autonomous office was in contravention of the Constitution.[8] The Constitution envisages a single organisation – the Prosecutor's Office. According to the former Minister of Justice, although the constitutionality of the law was challenged four years ago, the Constitutional Court has not yet examined the initiative.[9] The constitutionality of the special prosecutor, however, may be a moot issue because in 2019, the Basic Public Prosecutor for Prosecution of Organized Crime and Corruption indicted Special Prosecutor Janeva for illegal trading in influence and abuse of official position. Following the indictment, high-level corruption cases under her jurisdiction were transferred to the Public Prosecutor's Office, leaving the Special Prosecutor's Office with nothing to do. Some of the prosecutors from this office were transferred and some have remained without pay. To date, the government is still working on the viability of a Special Prosecutor's Office, but it remains uncertain, due in part to the country's delayed starting talks for EU membership.

In 2019, the Parliament passed several important amendments and laws aimed at strengthening courts and fortifying minority rights. Reforms related to the Law on Courts and the Law on Judicial Council of North Macedonia were adopted in 2019.

Amendments to the Law on Courts and to the Law on Judicial Council, approved in 2019, "improved the system of appointment and promotion and introduced qualitative criteria in the professional evaluation of judges, in line with the Venice Commission's recommendations."[10] The Venice Commission provided commentary on the Law on Judicial Council over many years and in general approved this newest version. It provides for a more transparent manner for electing the President and Deputy of the Judicial Council, and procedures for disciplining judges and appeals. The Venice Commission noted, however, that supermajority voting rules within the Council may make it hard for this collegial body to reach decisions and suggested some changes to the process for promoting judges and screening disciplinary complaints.[11]

The Law on the Use of Languages came into force in 2019 and replaced the Language Law of 2008. The new law implies that Albanian is one of the official languages of North Macedonia. This piece of legislation was seen as essential by Albanian parties to fulfill the country's obligations under the Ohrid Framework Agreement, which ended the country's civil conflict in 2001, and due to the fact that more than 20% of the country's citizens are Albanian according to the 2002 census.[12] The new law requires that Albanian be used in all official documents and communications by national and local governments. The initiative to examine the constitutionality of this law has been pending before the Constitutional Court. Meanwhile, the Venice Commission of the Council of Europe provided its opinion about it.[13] While not examining the issues of constitutionality pending before the Consti-

[5] Law on the Public Prosecutor's Office for Prosecution of Criminal Offenses in Connection with and Discovered in the Course of Illegal Wiretapping, Official Gazette 159/15.

[6] Ibid.

[7] Akademika, 'Supreme Court: After the expiration of 18-month deadline, Special Prosecution is no longer authorised prosecutor for [undertaking] pre-investigative and investigative measures (Skopje, 30 January 2019) <https://akademik.mk/vrhoven-sud-po-istekot-na-rokot-od-18-mesetsi-sjo-ne-e-ovlasten-tuzhitel-za-predistrazhni-i-istrazhni-dejstvija/>

[8] Pravdiko, 'Prosecutors against Katica Janeva: The Special Prosecution is Unconstitutional', (Skopje, 14 October 2015) < https://www.pravdiko.mk/obvinitelstva-ta-kontra-katitsa-janeva-spetsijalnoto-obvinitelstvo-e-neustavno>

[9] Mihajlo Manevski, 'Dilapidated Constitutional Court', Republika on line (Skopje, 11 December 2019) <https://republika.mk/kolumni/urnisan-ustaven-sud>

[10] Venice Commission (2019). 'Commission Staff Working Document, North Macedonia 2019 Report'. Accompanying the document 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2019', Communication on EU Enlargement Policy, Brussels, 29.5.2019 SWD (2019).

[11] Venice Commission (2019). 'North Macedonia Opinion on the Draft Law on the Judicial Council', adopted by the Venice Commission at its 118th Plenary Session (Venice, 15-16 March 2019).

[12] Attempts to organize a new census for 2011 were abruptly terminated.

[13] Venice Commission, 'Opinion on the Law on the Use of Languages', CDL-AD(2019)03, Adopted by the Venice Commission at its 121st Plenary Session (Venice, 6-7 December 2019).

tutional Court, the Venice Commission, *inter alia*, criticised this law for its ambiguity, highlighting the lack of an explicit constitutional basis for the use of non-majority languages in court proceedings and warning about difficulties in the law's implementation that may affect the right to a fair trial. The Venice Commission was also critical of the country's failure to allow for a broad and comprehensive public debate with all linguistic groups.[14]

III. CONSTITUTIONAL COURT CASES

The Constitutional Court has competence, *inter alia*, to examine the initiatives for constitutionality and legality of laws and secondary legislation, and to hear requests for protection of freedom of expression, association and belief, and protection from discrimination. Citizens, associations and political actors may refer cases to the Court. Decisions on the constitutionality and legality of pieces of legislation have *erga omnes* effects, while decisions on requests for protection of certain rights have *inter partes* effects.

In 2019, the Constitutional Court reviewed 122 decisions, but 90% of these were found inadmissible. Of the remaining 12 decisions, the Court found a constitutional violation in 9 of them.[15] While the effectiveness of the Constitutional Court cannot be measured solely on the number of cases heard on the merits, the high number of inadmissible cases may indicate a need for increasing it. This part summarizes six of the most important decisions issued by the North Macedonian Constitutional Court in 2019.

1. Decision U no. 100/2019: Amnesty for 2017 Parliament Storming

On 27 April 2017, protestors stormed the Parliament in an attempt to prevent the election of the parliamentary speaker Talat Xhaferi from the Albanian Party DUI. The reason behind this was to stop the adoption and publication of the Law on the Use of Languages, substantially expanding the use of Albanian at the national and local level.[16] Due to the inaction of the police, several members of Parliament (MPs) were injured. In 2018, the Parliament passed the Amnesty Law, which granted amnesty to those involved in the attack. Among those amnestied were MPs from the opposition who later voted for the Constitutional amendments to change the name of the State.

The law stipulated exceptions under which amnesty would not be granted. The former Minister of Internal Affairs and Director of Public Safety, who was convicted of terrorist endangerment of the constitutional order and security of the country and sentenced to 18 years of imprisonment, was not granted amnesty on the bases of the exceptions stipulated in the law. He complained to the Constitutional Court that the impugned Amnesty Law was discriminatory, infringed upon his constitutional rights and freedoms and violated the rule of law. The Constitutional Court declared his Request to Examine the Constitutionality of the Law on Amnesty inadmissible, *inter alia,* on the ground that it had been the Parliament's prerogative to decide who will be amnestied and under what conditions. The impugned Amnesty Law had precisely determined the scope and the limits of the amnesty. Had the Constitutional Court decided otherwise and nullified the impugned law, the investigative and criminal proceedings against all amnestied persons would have continued.

2. Decision U no. 57/2019: Lawyers of the Accused for the Parliament Storming Fined for Contempt of Court

Thirty-three persons were accused of the Terrorist Endangering of the Constitutional Order and Security of the Country in relation to the 2017 parliamentary storming. In the course of the trial, when a protected witness had to be cross-interrogated, the lawyers of the accused protested, complaining that they did not have adequate working conditions. The court fined the lawyers 1000 euro each for contempt of court. On appeal it was reduced to 500 euros.

Two of the fined lawyers complained to the Constitutional Court that the fines interfered with their constitutional freedom of expression. Relying on a decision of the European Court of Human Rights, the Constitutional Court found a violation of the lawyers' freedom of expression. In particular, it held that although the interference with their freedom of expression was according to the law and for a legitimate aim – to conduct a criminal trial within a reasonable time – it was disproportionate and not necessary in a democratic society. In a dissenting opinion, two judges stated that no one had the right to complain about a constitutional violation when the very reason for the complaint came from one's illegal activities, or a failure to observe the law. It remains to be seen whether this decision creates some type of precedent for attorneys fined for contempt of court in the course of court proceedings, allowing them to successfully make claims for violations of their freedom of expression. Alternatively, it may remain a single decision in the context of a complex criminal case, which symbolizes social polarization along party lines and the difficulties of democracy *a la Macedoine*.

3. Decisions U nos. 115/2018 and 96/2018: Referendum relating to the Change of the Name of the State

The Constitutional Court rejected two initiatives on the examination of the constitutionality and legality of a number of secondary legislative acts adopted by the State Electoral Commission (SEC). The impugned secondary legislation regulated the public referendum, called in relation to changing the name of the State in order to ease the way towards Euro-Atlantic integration.

[14] Ibid, pp. 10, 11, 16, 17, 20-25.

[15] Constitutional Court, 'Decisions' (Skopje, 2019) <ustavensud.mk>

[16] The Law on Use of Languages was never signed by former President Ivanov as a precondition for its publication in the *Official Gazette*. The Law was published upon the approval of parliamentary speaker Xhaferi.

The applicant complained that the secondary legislation was not published in the *Official Gazette*, which was one of the requirements for it to enter into force. The Constitutional Court established that the impugned secondary legislation was published on the SEC's website. Further, the initiative was submitted late in the sense that it had been lodged with the Constitutional Court 25 days after the referendum had taken place and after the publication of the results indicating that the referendum to change the name had failed.

The Constitutional Court failed clearly to explain why it considered that the impugned secondary legislation (on a very controversial topic) could enter into force without being promulgated in the *Official Gazette*. It did not provide any legal basis in this regard. It also failed to examine when the impugned secondary legislation was placed on the SEC site in order to offer more arguments in support of its reasoning that publication on the website was sufficient. Such a decision may, hypothetically speaking, offer an excuse for other state bodies seeking to avoid posting secondary legislation in the *Official Gazette*, and instead allow them to post it on its website any time they choose. Such a practice would be incompatible with the principle of public access to legislation and democratic law-making.

4. Decision U no. 83/2018: Challenge to the Wiretapping Law[17]

The applicant challenged the constitutionality of Article 17 of the Wiretapping Law of 2018 and complained about a violation of the right to privacy guaranteed by the Constitution and Article 8 of the European Convention on Human Rights. He complained that Article 17 enabled the procurement and use of special technology. These technologies enable secret police to covertly listen to the telephone conversations of persons within a specific radius. Use of such wiretapping technology, claimed the complainant, allowed the wiretapping of an indeterminate number of persons for an indefinite time period. In particular, for the use of classical wiretapping technology, the secret police had to request a telecommunication service provider to enable the wiretapping based on a court warrant, which would specify the exact person and the duration of the wiretapping. The use of the new technology made this needless, making wiretapping much easier and a court warrant practically unnecessary. The complainant alleged that such technology had already been procured, which posed a risk to individuals' right to privacy.

The Constitutional Court rejected the initiative to examine the constitutionality of Article 17 of the above law. It held that the Law on Wiretapping, when read in its entirety, was based on the Constitution, relevant international instruments and required a court warrant for wiretapping. The use of special wiretapping/surveillance equipment did not infringe upon the Constitution. The relevant laws specified that only a suspect of a serious crime, named in the court warrant, could be wiretapped. The suspect's conversations unrelated to the criminal offense for which the wiretapping was ordered were inadmissible in the criminal procedure.

The decision not to examine the potential broad violations of the right to privacy on the merits indicates that the Constitutional Court was uneasy with examining this matter involving the powers of the secret police. It used the international instruments guaranteeing the right to privacy and the need to fight against organized crime to justify its decision. The Court failed to seize this opportunity to contribute to a greater protection of the constitutional right to privacy, especially following a public release of the conversations, secretly recorded without a court warrant. Even more, the country is plagued with the continuous release of secretly recorded conversations on YouTube about various alleged corruption scandals in the country. The source of these recordings, apparently obtained without a warrant, are unknown, The Constitutional Court connected the examination of the above initiative solely with the admissibility of evidence in the criminal procedure while failing to examine the possible violations of individuals' right to privacy on a broader scale. According to the Constitution, individuals who are not suspected of serious criminal offenses have the right to speak on the phone without their conversations being listened to and recorded by unauthorized and unknown persons, which opens up a possibility for their abuse.

5. Decision U no. 80/2019-1: Abrogation of 2015 Decision on the Detailed Urban Plan of the Municipality of Karpos

The constitutionality and legality of the decision in 2015 on the Detailed Urban Plan of the Municipality of Karpos, a part of Skopje, was challenged as being incompatible with the constitutional protection of the rule of law, regional planning and protection of the environment. The impugned decision was also alleged incompatible with the legal requirement to make public a justified decision for not carrying out an environmental impact assessment of the detailed urban plan.

The Constitutional Court found that the requirement to make public the impugned decision was not observed by the municipality, which infringed upon the right to appeal it, and violated the government's fundamental obligation to uphold the rule of law. Although the decision was declared unconstitutional, the Constitutional Court did not nullify it and it had already taken effect prior to the Court's findings. The Court's decision seems to be in contravention to the Constitution and the stipulated legal procedure depriving citizens of their constitutional right to a legal remedy. Taking into consideration the high level of pollution in Skopje, it seems that the Constitutional Court did little to protect the citizens from the arbitrariness of the municipal decision on an important health matter involving the city's pollution.

6. Request to examine the Law on Presidential Pardon

A request to examine the constitutionality of Article 11-a of the Law on Presidential Pardon was lodged with the Constitutional Court. This article represents the legal basis for the

[17] Official Gazette no. 71/2018.

President's retracted pardons in 2016, mentioned in the introduction.[18] The Constitutional Court declared the initiative admissible and adjourned to await an authentic interpretation of this article by the Parliament.[19] Should the Constitutional Court nullify the article, presidential pardons will become valid again, meaning that top former officials may escape criminal liability for alleged cases of corruption and abuse of power. Such a ruling would undoubtedly shrink what is left of public confidence in the country's institutions and the rule of law.

IV. LOOKING AHEAD

Looking ahead, North Macedonia should expect a Constitutional Court decision regarding the Law on the Use of Languages, early elections in 2020 and the adoption of a new Law on Public Prosecution. The latter draft law is in a deadlock despite the push from the EU countries for its final adoption and implementation in order to end the endemic impunity for cases of high-level corruption and abuse of position.

There is also a debate about introducing a process for citizens to file a constitutional complaint before the Constitutional Court for protection of all fundamental rights set out in the Constitution. However, when looking at the small percentage of cases that the Constitutional Court finds admissible, delays in the examination of important cases and the impact of its decisions, one cannot escape the impression that the Constitutional Court will first have to undergo a comprehensive reform before being able to effectively and adequately protect citizens' constitutional civil and political rights.

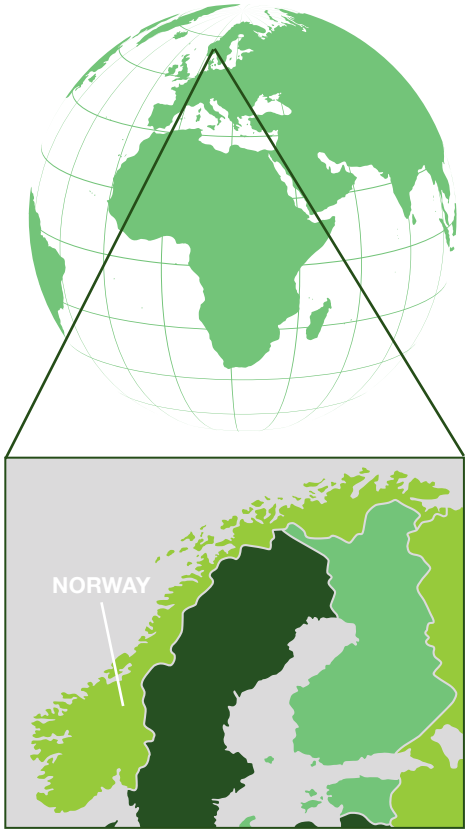
V. FURTHER READING

OSCE, *First Interim Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO)* (Report, OSCE Mission to Skopje, 2018)

OSCE, *Second Interim Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO)* (Report, OSCE Mission to Skopje, 2019)

[18] Amending and supplementing the Law on Pardon, *Official Gazette* no. 99/16.

[19] Constitutional Court, Announcement (Skopje, 2 December 2019) <http://ustavensud.mk/?p=18462>



Norway

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I. INTRODUCTION

2019 was a turbulent year for the Norwegian legal system: a social welfare scandal shook the country, and an unprecedented number of cases concerning Norwegian child welfare services were decided and pending before the European Court of Human Rights. Additionally, the Parliamentary Oversight Committee on Intelligence and Security Services issued a special report to Parliament where it disclosed that the Police Security Service had collected considerable amounts of information about airline passengers in an unlawful manner for years.[1]

With reverberations still palpable in 2020, the question arises: how will cases like these affect Norwegians' traditionally very high trust in public authorities? An annual survey by the Norwegian Courts Administration showed that the number of people with "very high confidence" in the courts decreased from 37% in 2018 to 27%.[2] Still, the level of general confidence is high, and considerably higher than the average within the OECD.[3] The effects of 2019's turbulence should not be overly concerning, as the Norwegian legal system is in general highly well functioning.[4] There is, however, reason to follow closely the general level of trust in the coming years of handling these challenges.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The case legally defining Norway in 2019 was what has become known as "the NAV scandal".[5] It is relevant to this review as it illustrates how the higher ranked EU norms function constitutionally in defining the scope of permitted national practice. In October, the Norwegian Labour and Welfare Administration (NAV) announced it had administered some social benefits cases contrary to EEA law dating back at least to 2012. In brief, NAV refused to grant sick pay, work assessment allowance, and attendance allowance to persons travelling abroad. At least 75 persons receiving such benefits while staying abroad were wrongfully convicted of fraud, and probably thousands were either denied benefits they were entitled to or had to refund allegedly ill-gotten money.

The NAV's practice was based on the Social Security Act, which explicitly requires recipients of such social benefits to stay in

[1] Dokument 7:2 (2019-2020).

[2] See <https://www.domstol.no/nyheter/fortsatt-stor-tiltro-til-domstolene-men-lavere-enn-i-2018/> accessed 16 January 2020.

[3] OECD, 'Government at a Glance 2019. Country Fact Sheet: Norway', available at <https://www.oecd.org/gov/gov-at-a-glance-2019-norway.pdf> accessed 16 January 2020.

[4] For instance, Norway ranks number two on the 2019 Rule of Law Index. See World Justice Project, *Rule of Law Index 2019*, available at <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf> accessed 16 January 2020.

[5] For an analysis of the case, see Hans Petter Graver, 'The Impossibility of Upholding the Rule of Law When You Don't Know the Rules of the Law', Verfassungsblog, 14 November 2019, available at <https://verfassungsblog.de/the-impossibility-of-upholding-the-rule-of-law-when-you-dont-know-the-rules-of-the-law/> accessed 12 January 2020.

Norway.[6] According to Regulation (EC) No 883/2004 on the coordination of social security systems, however, insured persons "residing or staying" in an EEA state are entitled to cash benefits in accordance with national legislation. This EU regulation is part of EEA law,[7] incorporated into Norwegian law in 2012 with a primacy clause.[8] According to a memorandum from 2018, the NAV held that "staying" does not cover short-term travels, such as vacations. In its new assessment from 2019, it made a volte-face on this interpretation.

The gravity of the case is indisputable: people – often in a disadvantaged position – have been punished without law in breach of fundamental constitutional and human rights. Further, people have suffered the hardship of not receiving their entitled benefits or having to refund money. What is less clear is the share of responsibility attributable to different actors – and what lessons are to be drawn. The scrutiny process is ongoing due to the complexity of the case, and the space here only allows for a few brief considerations below.

The question of the quality of the legislative process goes to both Parliament and the Government, the latter having the main responsibility for drafting proposals. When the legislator does not amend material provisions to reflect binding international norms but implements them by stowing them away in a regulation adding a supremacy clause as a "safeguard", the task of ensuring compliance is delegated *in toto* to law-appliers. Thus, the NAV case triggers a general question over appropriate techniques of implementing international law. A second question relates to how the NAV and Ministry of Labour and Social Affairs have handled the case. Since June 2017, the Social Insurance Court has quashed several cases on the ground that the NAV has not considered EEA directives, and the NAV did not appeal any of these to obtain legal clarity. It is certainly questionable whether relevant authorities have acted with the sufficient promptness required by the rule of law to prevent the scandal.[9] Third, as has already been evident from public debate, the spotlight is on the legal community as a whole: how could it be that neither prosecutors, attorneys, nor legal academics sensed that something might be wrong – that not even the ordinary courts acquitted those prosecuted for fraud (*"iura novit curia"!*)? One commentator has pointed to an alleged hostility among Norwegian politicians and lawyers towards EEA law.[10] The overarching challenges are probably more complex, involving not the least a general lack of knowledge about and a perception of EU law and methodology as something of a "foreign" and complicated oddity with many Norwegian lawyers.

The other high-profile 2019 issue concerns the Norwegian child welfare services. In 2019, the European Court of Human Rights (ECtHR) decided four child welfare cases against Norway and found a violation in all of them. The Grand Chamber decided one.[11] Moreover, the Court communicated 25 new applications to the Government. Adding three more cases communicated in previous years and three judgements from 2017 and 2018, the total number of child welfare cases over a few years is 35. In a Norwegian context, this influx is unprecedented and truly remarkable. To give a bigger picture, the Court has issued 52 judgements involving Norway in total.

The child welfare cases concern different issues and are often tied very closely to the factual circumstances. Two main structural challenges have nevertheless stood out thus far. First, it seems the Norwegian system has not adopted to a sufficient degree the approach that, in the language of the ECtHR, "a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parents and the child".[12] In some of the cases, the authorities seem to have abandoned a "reunification mindset" at an early stage of the proceedings without providing sufficient grounds for this, something that has, for instance, resulted in very limited contact rights.[13] Second, whereas the Court has accepted the (formal) procedural framework of the decision-making process in several cases,[14] it has now increasingly turned its focus to the (actual) quality of those process-

[6] Lov-1997-02-28-19, Articles 8-9, 9-4 and 11-3.

[7] Norway is not a member of the European Union but is closely associated through the European Economic Agreement (EEA). In practice, a considerable amount of EU Directives and Regulations are incorporated into Norwegian law and given precedence, cf. the EEA Act (Lov-1992-11-27-109).

[8] Regulation on the Incorporation of the Social Security Regulations of the EEA Agreement (FOR-2012-06-22-585).

[9] For instance, the Director of Public Prosecutions was only briefed in October 2019. News reports have shown that a person was sentenced for fraud as late as September 2019.

[10] See Carl Baudenbacher (former President of the EFTA Court), '"Room for Manoeuvre" is the Real Reason for Norway's EEA Scandal', *Verfassungsblog*, 21 November 2019, available at <https://verfassungsblog.de/room-for-manoeuvre-is-the-real-reason-for-norways-eea-scandal/> accessed 12 January 2020. The analysis is convincingly rejected by Halvard Haukeland Fredriksen, 'The Rule of Law in a European Economic Area with National "Room for Manoeuvre"', *Verfassungsblog*, 29 November 2019, available at <https://verfassungsblog.de/the-rule-of-law-in-a-european-economic-area-with-national-room-for-manoeuvre/> accessed 12 January 2020.

[11] *Strand Lobben and Others v Norway*, App no 37283/13 (10 September 2019). The other cases are: *K.O. and V.M. v Norway*, App no 64808/16 (19 November 2019); *Abdi Ibrahim v Norway,* App no 15379/16 (17 December 2019); and *A.S. v Norway,* App no 60371/15 (17 December 2019).

[12] See, e.g., *Strand Lobben and Others*, para. 208.

[13] See in particular *K.O. and V.M.*, para. 68-69, and A.S., para. 62-63.

[14] See, e.g., *K.O. and V.M.*, para. 62; *Jansen v Norway*, App no 2822/16 (6 September 2018), para. 99; and *Mohamed Hasan v Norway*, App no 27496/15 (26 April 2018), para. 152.

es.[15] The cases serve as an important reminder that national authorities and courts must base their decisions on a broad, in-depth, and genuine consideration of the facts of the case, especially when authorizing extremely intrusive measures.

The Supreme Court will decide three child welfare cases in the Grand Chamber in February 2020. We expect them to provide further guidance to lower instances – as well as the legislative branch currently working on a new Children's Welfare Act – on how to implement the guidelines from Strasbourg.

As to legislative developments in 2019, Parliament codified the principle of the independence of the prosecution authority in the Criminal Procedure Code – a principle thitherto but a customary rule. Also, a legislative commission proposed an Act on Special Measures in Extraordinary Crises.[16] This proposal authorizes the Government to issue temporary regulations that complements, supplements, or derogates from ordinary legislation when extraordinary crises – e.g., serious natural disasters or terrorist attacks – occur in times of peace. The proposal does not mandate derogations from the Constitution or human rights, and it includes several material and procedural safeguards, but has still been criticized.[17]

III. CONSTITUTIONAL CASES

1. HR-2019-1226-A: Retention of a DNA Profile

In June, the Supreme Court considered whether a decision to retain the DNA profile of a person convicted of tax fraud was a disproportionate interference with his private life under Article 8 of the ECHR.[18] Under Norwegian law, the main criterion for registration of DNA profiles of convicted persons in the police register is the gravity of the crime committed. The nature of the crime – whether drug offences, violence, sexual assault, etc. – is irrelevant. This gave rise to the most interesting aspect of the case, to wit: given that DNA evidence plays a limited role in the investigation of tax fraud cases, was the retention in this specific case proportionate?

The Court broadly assessed a number of relevant principles from an extensive analysis of case law from the ECtHR. These principles, pertaining, *inter alia*, to the scope of the competence to retain DNA, the gravity of the crime, safeguards against abuse, the right of removal and removal routines, the storage of the profiles, the access to the data and confidentiality, the intensity of the interference, and so on, were then applied to the facts of the case in a scrupulous manner.

As to the question of how the nature of the crime affects the proportionality assessment, a majority of four judges interpreted the ECtHR's case law to hold that the nature of the crime might be a relevant factor, but that "nothing suggests that the 'DNA relevance' of the offence alone should be decisive".[19] In the application of this principle, the majority acknowledged the limited "DNA relevance" in tax fraud cases, but considered this as one amongst several considerations. Moreover, the majority referred to statistics indicating that persons convicted of economic crime are more likely to commit new offences – including "DNA relevant crimes" – than previously unpunished persons.

One judge dissented, expressing doubts as to whether the retention was sufficiently relevant and necessary for its purpose. This judge also emphasized the function creep resulting from a Supreme Court order from 2018, where the Appeals Selection Committee ruled that one could obtain DNA profiles from the police register in civil cases concerning clarification of paternity.[20]

An application of the case is lodged with the ECtHR. If admitted, the Court's approach will be interesting to follow. The Supreme Court rather meticulously assessed principles emanating from Strasbourg and referred to considerations of proportionality undertaken in the legislative process – two elements that will normally trigger subsidiarity considerations at the ECtHR.[21] The margin of appreciation is, however, limited in cases like this,[22] and the crux of the matter is a principled legal issue that the ECtHR has not dealt with before. This latter point could possibly prompt reflections as to whether Norway should ratify Protocol No. 16 to the Convention. This protocol, which entered into force in 2018, establishes a system where the highest courts and tribunals of member states may request advisory opinions from Strasbourg before deciding a case. With this tool, the Court would have had the opportunity to clarify the principled question before deciding the case.[23]

2. The *Fosen* Case: Norway and the EFTA Court

[15] See in particular A.S., para. 62 ff., *K.O. and V.M.*, para. 69-70 and *Strand Lobben and Others*, para. 220 and 222-225.

[16] NOU 2019: 13.

[17] Both the Norwegian Bar Association and the International Commission of Jurists (ICJ) Norway have raised concerns over its implications for the protection of the rule of law.

[18] The judgement is available in English translation at the Supreme Court's website: <https://www.domstol.no/en/Enkelt-domstol/supremecourt/translated-rulings/rulings-2019/retention-of-dna-profile/> accessed 18 January 2020.

[19] Para. 70.

[20] HR-2018-2241-U, discussed by the dissenting judge in para. 122 f. (cfr. para. 101-102 for the majority's considerations).

[21] See, e.g., Robert Spano, 'The Future of the European Court of Human Rights – Subsidiarity, Process-Based Review and the Rule of Law' (2018), 18 Human Rights Law Review 473, 487 ff. DOI: <https://www.doi.org/10.1093/hrlr/ngy015>

[22] As noted by the Supreme Court itself, see para. 59.

[23] It is not clear why Norway has not done this. The question of ratification has been under consideration in the Department of Justice since 2018.

In EEA matters, however, a system with advisory opinions *is* in place – Norwegian courts may request the EFTA Court to give an advisory opinion in cases involving the EEA Agreement.[24] The system differs from the one established within the EU in that there is no obligation for the Supreme Court to bring such matters before the EFTA Court and the latter's opinions are not binding.[25] At least historically, the Supreme Court has been reluctant to ask the EFTA Court for advisory opinions, leading to what some scholars have coined a "troubled relationship" between the courts.[26] In 2019, the relationship developed in a peculiar manner with the *Fosen* case.[27]

The case concerned a company that claimed damages following the cancellation of a tender procedure. In 2016, the Court of Appeal asked the EFTA Court for an advisory opinion on the liability conditions under the relevant EU legislation on public procurement.[28] The EFTA Court stated in 2017, that "[a] simple breach of public procurement law is in itself sufficient to trigger […] liability…".[29] This interpretation surprised several commentators who argued that it was wrong. The case was appealed to the Supreme Court, who in 2018 asked for a new opinion, seeking "clarification and amplification, or possibly a reconsideration" from the EFTA Court. In 2019, the latter – now, it should be noted, with a new composition and a new president – reversed its position and held that the minimum standard for liability must be a "sufficiently serious breach" of the public procurement law.[30]

This case is illustrative of the diverging views on the appropriate relationship between Norwegian courts and the EFTA Court. Carl Baudenbacher, ex-president of the EFTA Court and a staunch critic of Norway in many instances, alleged that the composition of the EFTA Court in *Fosen II* was "manipulated" and that the opinion was even invalid.[31] A Norwegian law professor who launched the idea of a second referral from the Supreme Court argued, on the other hand, that it would be more constructive and fair to ask the Luxembourg court to clarify its views instead of just disregarding it, as did the Court of Appeal.[32]

3. HR-2019-2038-A: Children's Right to Privacy

May parents' social media posting of sensitive personal information concerning their children constitute a punishable violation of the latter's privacy? The question was raised before the Supreme Court in a case decided on 5 November. A mother was prosecuted for breach of privacy under Article 267 of the Penal Code for having posted videos and pictures of her seven-year-old daughter in vulnerable situations, as well as intimate information about her, in an open Facebook group. Child welfare services had placed the daughter in foster care, and her mother struggled to have her back home.

The Court clarified, first, that a potential consent from the child to publishing information of this kind would be legally irrelevant. It pointed to the young age of the girl and more generally – thus applicable for more mature children – the need to protect children from parental pressure and forced situations. Second, the Court held that it did not fall within the scope of parental responsibility to consent on behalf of the child – which would render children without protection from their parents in situations like this.

The Court balanced the mother's right to freedom of expression and the child's right to privacy as protected by the Constitution and the ECHR. It noted certain parallels with the ECtHR's judgement in *Krone Verlag GmbH v Austria*,[33] which concerned the dissemination in the press of intimate details about a young boy, but distinguished the case at hand, as the publishing was not linked to a matter of public concern. Hence, the mother's freedom of speech could not override the child's interest in not having private and sensitive information made public.

This case demonstrates how incautious exposure of children on social media may compromise their privacy. There are compelling reasons why society should protect children from such exposure. However, parents who have their children taken into public care are often in a situation of extreme despair. Their struggle to reunite with their children might be legitimate regardless of whether the child welfare services' decision is well founded or not. The Court acknowledged this, but pointed out that the mother could have carried out her struggle without exposing private and sensitive information about her young daughter.[34]

[24] Article 34 of the EFTA Surveillance and Court Agreement.

[25] Compare Article 267 of the Treaty on the Functioning of the European Union (TFEU). See, however, for a different view, Carl Baudenbacher, 'The EFTA Court: Structure and Tasks' in Baudenbacher (ed.), *The Handbook of EEA Law* (Springer, 2016) 156-162.

[26] Halvard Haukeland Fredriksen and Christian Franklin, 'On Pragmatism and Principles: The EEA Agreement 20 years on' (2015), 52 *Common Market Law Review* 629, 671 f. As noted by the authors, the trend seems to have turned at least somewhat in recent years.

[27] HR-2019-1801-A.

[28] Article 2 (1) (c) of the Remedy Directive (Directive 89/665/EEC), cfr. also Directive 2004/18/EC.

[29] Case E-16/16, para. 82.

[30] Case E-7/18, para. 20.

[31] Carl Baudenbacher, 'Fosen and NAV – "room for manoeuvre"', *Anbud365* 13 November 2019, available at <https://www.anbud365.no/internasjonalt/eu/fosen-and-nav-room-for-manoeuvre/>. Prior to the Supreme Court's decision to ask for a new opinion, Baudenbacher also claimed that such a referral 'would be the end of the rule of law', cfr. Kjetil Kolsrud, 'Baudenbacher langer ut mot norsk professor', Rett24 30 May 2018, available at >https://rett24.no/articles/baudenbacher-langer-ut-mot-norsk-professor>. Both links accessed 15 January 2020.

[32] Professor Halvard Haukeland Fredriksen, see Kolsrud (2018) (n31).

[33] App no 33497/07 (17 January 2012).

[34] Para. 31.

4. The *Tidal* Case: Digital Enforcement Jurisdiction

Another "digital case" from 2019 was the *Tidal* case, decided 28 March.[35] The disputed issue was whether Norwegian police officers searching the data terminals of a Norwegian company – Tidal Music AS – could download digital material that was stored on servers in other countries. Tidal claimed that such search and seizure violated the principle of exclusive territorial enforcement jurisdiction under international law. It is illustrative of the practical relevance of the case that the material included emails on a Google account stored in "the cloud".

The Court noted that no treaty regulates the issue and found – based on a brief review of case law from other countries and international reports – no relevant international customary law.[36] Given this legal *terra incognita*, the Court formulated the following question: "Is the relevant search an interference with another state's exclusive enforcement jurisdiction in a way that violates the sovereignty of that state?" It then added that "[t]he ultimate assessment must be specific and adjusted to the situation calling for the relevant measure".[37]

The Court concluded that the search and seizure did not violate the sovereignty of other states. Its main argument was that the coercive measures were directed against a Norwegian company with an office in Norway. The police had not intruded into the servers but used access credentials handed over by the company based on a court decision. Moreover, the search only involved access to information that the company itself had stored, and the data would remain unchanged on the server abroad.[38]

IV. LOOKING AHEAD

In 2020, the NAV scandal follow-up will proceed, and an independent investigation committee is supposed to deliver its report in June. The controversies over child welfare services will also continue. Most likely, more cases will be decided in Strasbourg, and the outcome of the Supreme Court Grand Chamber assessment of the three child welfare cases in February will hopefully clarify what adjustments administrative and adjudicative bodies need to undertake.

We also expect important reports in 2020: the Election Act Commission, appointed to draft a new Election Act, is to deliver its report by the end of May. A few months later, the second report of the Court Commission on the organization and independence of the courts will be published. The Legal Aid Commission will also deliver its report on a reform of the legal aid scheme in spring 2020.

V. FURTHER READING

Gunnar Grendstad, William R. Shaffer, Jørn Øyrehagen Sunde, and Eric N. Waltenburg, *Proactive and Powerful: Law Clerks and the Institutionalization of the Norwegian Supreme Court* (Eleven International Publishing, 2019)

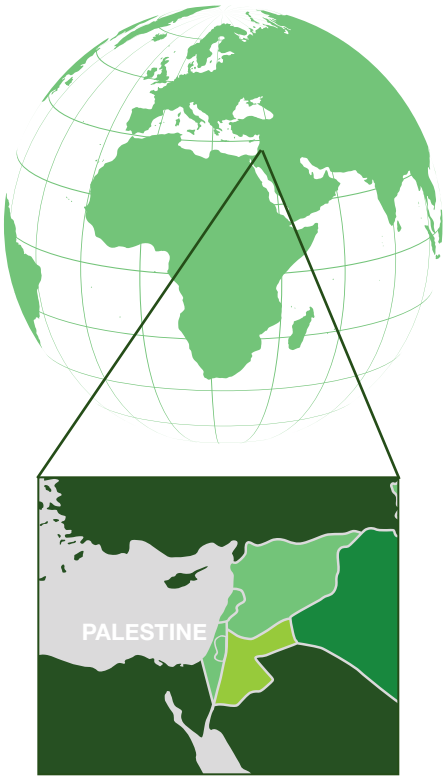
Malcolm Langford and Beate Kathrine Berge, 'Norway's Constitution in a Comparative Perspective' (2019), Vol. 6 No. 3 *Oslo Law Review* 198. DOI: https://doi.org/10.18261/ISSN.2387-3299-2019-03-02

[35] HR-2019-610-A. The judgement is available in English translation at the Supreme Court's website: <https://www.domstol.no/en/Enkelt-domstol/supremecourt/translated-rulings/rulings-2019/search-at-tidal-music-as/> accessed 18 January 2020.

[36] The Supreme Court referred to a 2012 Supreme Court judgement from Denmark, a Swedish Official Report from 2017, case law reviews by expert groups of the Council of Europe from 2012 and 2016 and by a working group under the EU Commission from 2018 as well as the 'Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations' from 2017, para. 49-56.

[37] Para 61-62.

[38] The decision was criticized in a law journal editorial for being contrary to the principle of sovereignty under international law, see Jon Petter Rui, 'Høyesterett i «skyen»' (2019), No. 5 *Lov og Rett* 261. DOI: https://doi.org/10.18261/issn.1504-3061-2019-05-01. This view has been countered by Jørgen S. Skjold, 'Suverenitet, jurisdiksjon og beslag i informasjon på server i utlandet' (2019), No. 10 *Lov og Rett* 617. DOI: https://doi.org/10.18261/issn.1504-3061-2019-10-03



Palestine

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INTRODUCTION

This review briefly introduces Palestinian constitutional changes that occurred in 2019, building on last year's review of 2018. It refracts significant developments through a liberal and democratizing lens and draws on Supreme Constitutional Court (SCC) rulings to provide new insight into key constitutional developments.

These developments are mainly connected to the SCC ruling of 22 December 2018, which was previously discussed in the 2018 Palestine report.[1] In applying it, the Palestinian President announced the dissolution of the Palestinian Legislative Council (PLC) and refrained from calling for new elections. This ruling is perhaps the SCC's most controversial and significant to date because it resulted in the dissolution of one of the pillars of Palestinian democracy (albeit one that had not functioned for more than a decade). A further note of controversy is elicited by the fact that dissolution and the actions that should immediately follow it are not directly referenced in the 2003 Basic Law (BL).

The President is still using Article 43 to issue decrees that have the power of laws.[2] Thus, this report will tackle the statutory developments relying on the constitutional gap the President uses to do so, especially after the formation of the 18th government in 2019. Then the report will move towards the changes within the judiciary after Decree Laws 16/2019 and 17/2019 that respectively made clear intervention within judiciary independence by creating a Transitional High Judicial Council.

2019 also witnessed an active move towards advancing the discussion forward regarding the 2016 Palestinian Constitution – the latest effort to create a constitution for the State of Palestine. Within this constitutional dialogue, the need for elections and the process for them will be introduced. In addition, a discussion over the status of international treaties will also be analyzed. Finally, the decision made by the SCC relating to the two decree laws of 2019 will be addressed to test if the Court's position was indeed helpful in securing separation of powers or whether it undermined this principle further.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Statutory Developments

Since 2007, Palestine has been ruled by decree. The amended BL means that the

[1] Y Khamis and A Khalil, 'Palestine', in R Albert, D Landau, P Faraguna and S Drugda (eds.), *2018 Global Review of Constitutional Law, I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College*, 2019, 224-228.

[2] Article 43 of the Basic Law states: '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.'

President can, in instances of necessity and subject to the meeting of other conditions, issue decrees that have the force of laws. The absence of a functioning PLC has reinforced the emergence of different governing entities in the West Bank and Gaza Strip.

Major statutory amendments that were introduced in 2019 in the form of decree laws will now be discussed. It should be first recognized that the President does not use decree laws as a substitute for the PLC's *law making* power only; it is actually a substitute for the chamber's oversight role, as shown by the fact that the President issues decree laws that bestow confidence on the government he formed! Decree Law 12/2019 was most recently used to express confidence in the government of Mohammad Shtayeh, the current Prime Minister. In normal circumstances, this would instead be provided by the sitting PLC. The existing form of governance, in contrast, is sustained by the *absence* of the PLC and presidential continuity.

Decree Law 7/2019 is the second amendment to Law 3/2006, which established the Supreme Constitutional Court (SCC). Decree Law 19/2017, which concerns the duration of a judge's mandate, was the first amendment made to SCC law. Under the original law, he/she would remain in office until reaching the pensionable age of 70. The amendment then instituted a six-year non-renewable commission. From 2017 onwards, three new judges were/will be added to the Court's assembly on a biannual basis (2017, 2019 and 2021). In 2022, the mandate of the first group of judges, who have been in office since 2016, will expire. The other appointed judges will then continue with their work, which is mainly focused on the constitutional review of laws and bylaws.

The limitation of the mandate of SCC judges can be considered a positive step towards the development of an independent judiciary because it produces judges who are less dependent on the executive. The SCC first appointed judges and then proceeded to create the Court's General Assembly, which nominates future judges through a majority vote. After the outcome of this vote is confirmed, the president of the Court will then submit the names to the President for his/her approval. Although the Court is inevitably subject to the influence of the executive (not least in its very establishment), there are certain procedures in SCC law that permit independence, and they need to be nurtured and cultivated. The President also issued Decree Laws 16/2019 and 17/2019, which directly affected the judiciary. Decree Law 16/2019 reduced judges' pension age from 70 to 60, which meant that many judges (mainly from the high court) were no longer eligible for their roles. Decree Law 17/2019 dissolved the High Judicial Council (HJC), and nominated nine judges to the new transitional HJC (THJC), which had a one-year mandate that could only be extended by six months. Both of these laws were controversial because they were argued to further enhance executive control over the judiciary rather than reform the justice system. The SCC reviewed both decrees before abolishing Decree Law 16/2019 and maintaining 17/2019. In 2019, decree laws were also used to ratify treaties. This trend was first observed in the preceding year, when laws of this kind were mostly used to ratify bilateral treaties and treaties related to the Arab League. Examples included the Arab Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (Decree Law 5/2019) and a temporary commercial agreement with the UK and Northern Ireland (Decree Law 6/2016).

The BL does not refer to the place of international treaties in the Palestinian constitutional system, nor does it suggest how treaties should be ratified. The SCC attempted to address this gap in constitutional law by issuing two rulings in 2017 and 2018. This meant that the entry of treaties into force became more complex – treaties are required to be published in the Palestine *Official Gazette* and go through the same processes required for the 'making' of any law. Associated complications have prevented core human rights from being ratified and humanitarian treaties from becoming published in the *Official Gazette*, with the consequence that their enforcement in the Palestinian legal system remains open to question.

Few decree law amendments have helped to clarify Palestinian human rights obligations. Decree Law 21/2019, for example, establishes 18 as the minimum marriage age for all religious denominations in Palestine, although it does permit some exceptions. It refers to all personal status laws that apply to Muslims (e.g., Law 61/1976, which applies in the West Bank; and Family Law 1954, order 303, which applies in the Gaza Strip) that will be enforced by Sharia courts. It also refers to Christian personal status laws that apply to all recognized Christian denominations, which will be enforced by Christian religious courts.

Decree Law 22/2019, which enables a single 'guardian' woman to open a bank account on behalf of a minor, is a further example of change. Palestinian law was previously discriminatory in this regard as it only recognized the right of single male 'guardians' to do this. Palestine also now honors obligations that were established by the agreement between the PLO and the Holy See. Decree Law 10/2019, for example, establishes that 'found' orphan babies can be registered as Christian if the parent leaves certain signs that indicate his/her wishes (see Article 13). Although it was previously theoretically possible that a 'lost' baby could be registered as Christian, the convolutions of the registration process made this very unlikely. All baby orphans that were previously found were therefore designated as Muslim, irrespective of surrounding signs.

The President suspended Social Security (Decree) Law 19/2016 by issuing Decree Law 4/2019. The suspended decree law relates to a fundamental economic right that is entrenched in the BL, and its passage caused popular unrest as thousands descended on the streets to protest against it. Organized sit-ins and other forms of passive resistance threatened to push the whole political and legal system to the point of collapse.

B. Constitutional Developments

The previous report described how, in December 2018, the SCC officially authorized the dissolution of the PLC and invited the President to call legislative elections within six months. Fatah/PA and Hamas nego-

tiations that followed the dissolution of the council also entertained the possibility that presidential elections might be held. It was agreed that the legislative election could precede presidential elections, although it was understood that this would be within a timeframe established by the same presidential decree. Both Hamas and Fatah made it clear that their support for elections would depend on the meeting of certain key conditions.[3]

At the time of this writing, no 'election' decree has been issued. East Jerusalem is one of the main outstanding obstacles – on 10 December 2019, President Abbas informed the Israeli government of his wish to hold elections and requested that Palestinian East Jerusalemites be permitted to participate, as they had in 1996 and 2005/6.[4]

Israel's reluctance in this regard creates a clear problem for Fatah and Hamas. If the elections went ahead without East Jerusalemite participation, it could be construed as a de facto renunciation of the Palestinian claim to this part of the city.[5] Mr. Abbas's reluctance to push this question has called his commitment into question,[6] although his reticence was perhaps welcomed by an international community that is reluctant to pressurize Israel on this and other points.

The debate over the implementation of the international Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) also highlights a number of important issues. On 1 April 2014, the State of Palestine acceded to CEDAW without expressing any reservations. The subsequent publication of Decree Law 21/2019, which established an age limit for marriage (18 years of age), gave rise to heated debates. During a public event in Hebron, the National Liberation 'party' (a fundamentalist Salafi group) and some tribal family representatives voiced their objections to the decree and called on the National Authority to act in accordance with Sharia.

The decree law was consistent with international human rights treaties, and here it is instructive to recall the SCC ruling in Case 4/2017. The Court observed:

> International conventions take precedence and acquire superior force to domestic legislation, especially after it is ratified and published; and it has to go through the formal procedures of any domestic law that applies to individuals and authorities, being attentive to the contours of national, religious and cultural identity of the Palestinian Arab people.[7]

This ruling affected the implementation of CEDAW by clarifying that ratification alone would not impose a binding obligation on the domestic legal system. Such an obligation would only exist after publication in the *Official Gazette.* The ruling also suggests that courts will not be obliged to apply provisions that contradict Sharia, and which are therefore contrary to Palestinian religious identity, even after publication.

The State of Palestine, in acting in accordance with its obligations, submitted its official report to the Committee on the Elimination of Discrimination against Women on 10 March 2017. The report, which was prepared by a government committee after consultation with civil society institutions, focused on the administrative, judicial and legislative implications of CEDAW provisions, and also situated CEDAW in the wider context of Israel's continued violations of international law. The report was accompanied by various shadow reports which were prepared by eight human rights and civil society organizations, who worked both individually and collectively.[8] These shadow reports recognize the need to enforce CEDAW provisions in the domestic legal system, and place particular emphasis on publication in the *Official Gazette*.[9] The official report was submitted to the CEDAW committee on 11 July 2018; in its concluding observations (which were published on 25 July 2018), the committee expressed its concern that 'the Convention has not been published in the *Official Gazette* in order to make it applicable in the State party'.

The BL, which was intended to be replaced by the 'Constitution of the State of Palestine' (Article 115), does not provide clear answers to most of the constitutional issues and ambiguities that were raised. Although efforts to draft a constitution preceded the United Nations General Assembly's (UNGA) 2012 recognition of Palestine as a non-member state, UNGA recognition gave a renewed impetus to Palestinian constitutional endeavors, as was shown when the Palestinian National Council (PNC), the legislative arm of the Palestine Liberation Organization (PLO), ap-

[3] S Ramahi, 'Are Palestinian elections going to be held?', *Middle East Monitor,* December 2019. Accessed January 24, 2020. https://www.memopublishers.com/images/uploads/documents/201912_Are_Palestinian_elections_likely_to_held.pdf

[4] RA Jalal, 'Abbas mulls option of postponing Palestinian elections', *Al-monitor,* January 15, 2020. Accessed January 24, 2020. https://www.al-monitor.com/pulse/originals/2020/01/palestinian-elections-cancel-abbas-israel-request-jerusalem.html#ixzz6C9fIlOVJ

[5] RA Jalal, 'Abbas mulls option of postponing Palestinian elections', *Al-monitor*, January 15, 2020. Accessed January 24, 2020. https://www.al-monitor.com/pulse/originals/2020/01/palestinian-elections-cancel-abbas-israel-request-jerusalem.html#ixzz6C9fIlOVJ

[6] B White, 'Are Palestinian elections on the horizon?', *Al Jazeera News*, December 15, 2019. Accessed January 24, 2020. https://www.aljazeera.com/news/2019/12/palestinian-elections-horizon-191211182354352.html

[7] In this decision, 'domestic legislation' refers to ordinary legislation. Constitutional Interpretation 5/2017 of 12 March 2018 clarifies the status of international conventions in domestic legislation by observing they are inferior to the (PLO) Declaration of Independence and the Basic Law and superior to various pieces of ordinary domestic legislation.

[8] The reports are available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1171&Lang=en

[9] See, for example, the shadow report by Al-Haq: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/PSE/INT_CEDAW_NGO_PSE_31670_E.pdf

pointed a new 'Constitutional Committee'.[10] The latest draft Constitution was completed in 2016 and it has since been circulated to a limited circle of civil society organizations with the aim of promoting targeted sectoral discussions with human rights, women's and youth organizations.

In 2019, women's organizations sought to mobilize popular energies behind an entirely 'new' constitution by enhancing women's political participation. They ultimately agreed that a 'quota' of women's leadership was necessary in order to achieve proper political representation and have sought to achieve this by influencing the future drafting of the 2016 Constitution. The increased participation of women has produced the ratification of engendered articles and growing pressure on the SCC to incorporate a gender-sensitive interpretative method into its rulings. At the time of the writing, however, the Constitution is still in the process of development.[11]

III. CONSTITUTIONAL CASES

On 27 July 2019, appellants (16 judges) submitted a direct complaint to the SCC that claimed Decree Laws 16/2019 and 17/2019 (published in issue No. 20 of the *Official Gazette*, 16 July 2019) were unconstitutional and should be retracted. The SCC subsequently declared 16/2019 to be unconstitutional on formal and substantive grounds – in the first respect, it observed that the BL (Article 100) establishes a mandatory obligation to consult with the HJC on amendments affecting the judiciary (this did not take place); in the second, it cited Articles 97, 98 and 99 of the BL, which uphold the independence of the judiciary and individual judges. The Court observed that Article 3 of Decree Law 16/2019, which holds that a judge's service should be terminated when he/she reaches the age of sixty, is tantamount to dismissal from the judicial function, and noted that this contradicts the provisions of Article 99/2 of the 2003 BL and its amendments. Article 15 of this document also clearly establishes that punishment should be personal, and that such general forced retirement would amount to a collective punishment.

The rights to a fair trial and defense are also are enshrined in Article 14 of the BL and are also core principles in international human rights law. While the Court observed that the protection of the judiciary does not mean individual members cannot be punished or dismissed, it noted any such measure should be subject to Judiciary Law 1/2002, which protects members of the judiciary from the unwarranted interference of the executive and the legislative. The Court also referred to Article 43 of the BL, which concerns the President's use of legislative powers. Its ruling suggested that it held the view that unusual legislative powers should only be used in the circumstances listed in the BL. One way to interpret this is to consider the SCC attempting to indirectly limit the President's use/s of decree law.

This claim would have been considerably strengthened if the Court had upheld the appellant's claims vis-à-vis Decree Law 17/2019. The importance of this debate is further underlined by the fact that the THJC, in accordance with its mandate, is now working on a new law that will substantially affect the Judicial Authority Law. However, the Court actually ruled it is constitutional. In doing so, it observed that the judicial council is an administrative institution that does not interfere in the judiciary's work. The Court cited Articles 39 and 41 of Judicial Authority Law 1/2002, which clearly support this interpretation of the council's function. On this basis, the Court claimed that its decision did not conflict with the principle of judicial independence. The executive's nomination of the THJC did not therefore overstep boundaries that are essential to the rule of law.

The decree could, nonetheless, under a different interpretation, have been viewed as violating judicial independence. This claim could conceivably have been upheld in procedural (the formation of the THJC) and objective (the functioning of the TJHC) terms. Both are addressed in Articles 97, 98, 99 and 100 of the BL, which clearly establish that the judiciary must remain independent of the executive.

The question of if Decree Law 17/2019 undermines the BL can be primarily grasped by referring to the BL's Article 2,[12] which enables the THJC to prepare legislation that could affect laws relating to the judiciary. This problem arises because the THJC has been created by the executive and will presumably rely on it to ensure its continued existence. This brings the independence of the judiciary from the executive into clear question and suggests an overreach of executive influence.

Article 2 (paragraph 3) also refers to the THJC's right to make recommendations to the President on the delegation, early retirement and dismissal of judges. It cites the Judicial Authority Law but fails to acknowledge that it does not actually contain an early retirement option. This suggests that Decree Law 17/2019 is not only concerned with establishing an administrative body that governs the judiciary but also seeks to amend the Judicial Authority Law. For example, the stipulation that an individual can be removed (if the THJC is of the view that might harm the prestige and status of the judiciary or negatively affect public trust in the judiciary) is clearly an amendment to the law that directly affects the independence of the judiciary. On this basis, we believe the Court should have declared the decree law to be unconstitutional.

[10] The Constitutional Committee is made up of a small group of elected relevant experts who are responsible for amending and drafting the Constitution, and a larger general committee tasked with ratifying the Constitution.

[11] S Alsarghali, 'Palestine and the State of Exception: A Forced Marriage?', in "States of Exception or Exceptional States: Law, Politics and Giorgio Agamben in the Middle East" (Simon Mabon, Sanaa Alsarghali and Adel Rushaid, eds) (I.B. Tauris, London 2020).

[12] See paragraph four in particular.

The SCC decisions on the two decree laws were supposed to reinstate all judges who had been forced into 'early' retirement (60 rather than 70) and maintain the THJC and its powers. The SCC publicly announced its decision on 15 September 2019. On the same day, two presidential decrees were issued on the recommendation of the THJC. They announced the early retirement of 19 judges, 11 of whom were the appellants who originally contested the constitutionality of the two decree laws.

IV. LOOKING AHEAD

The controversial nature of the SCC's rulings becomes fully apparent when the Court's interventions are considered in the wider context of the current crisis and unprecedented conflict and polarization within the Palestinian political system. While the establishment and continuation of the THJC could conceivably be justified with reference to the shortcomings of its predecessor, revisions to the age, qualification and quality of judges need to be considered more broadly, not least because they have serious implications for the enjoyment of human rights and fundamental freedoms in Palestine. The PLC's dissolution and the lack of pressure in support of elections has increased the system's dependence on the executive and the President in particular.

While Palestine is currently experiencing a 'double' transition to statehood and democracy, both outcomes are, however, currently obstructed by the Israeli occupation and the vicissitudes and uncertainties of internal Palestinian politics. In a number of respects, Palestine has entered a state of exception, and the concentration of presidential powers makes it difficult to see when it will end. The (re)establishment of a legislative body does, however, logically precede a government that is held to account and a Palestinian democracy that achieves its full potential.

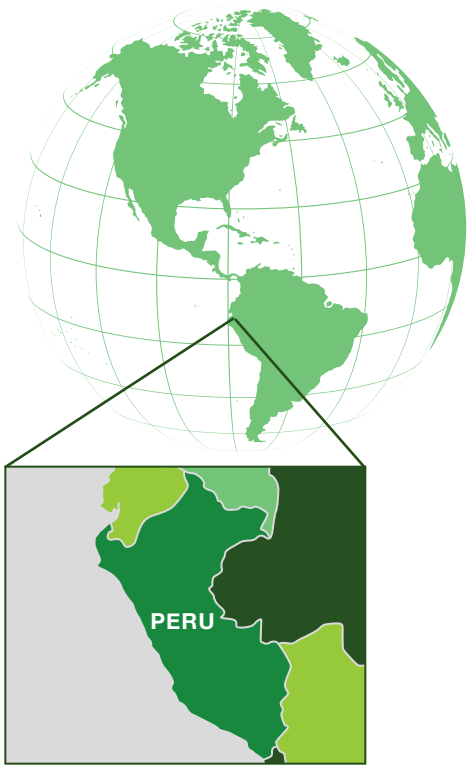
V. FURTHER READING

S Alsarghali, 'An (Un) Constitutional Hangover: An Analysis of the Current Palestinian Basic Law in Light of Palestine's Constitutional Heritage, *U. Ill. L. Rev.,* 2017, 497

S Alsarghali, 'Interpreting Palestine's Basic Law: A Question of History and Gender Sensitivity,' in F Biagi, J Frosini & J Mazzone (eds.), *Uses of History in Constitutional Adjudication: Comparative Perspectives*, Brill, forthcoming

A Khalil, 'Courting Economic and Social Rights in Palestine: Justiciability, Enforceability and the Role of the Supreme Constitutional Court', *Journal Sharia and Law*, College of Law, U.A.E. University, 2019

Y Khamis and A Khalil, 'Palestine', in R Albert, D Landau, P Faraguna and S Drugda (eds.), *2018 Global Review of Constitutional Law, I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College*, 2019, 224-228



Peru

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I. INTRODUCTION

2019 was characterized by the aftermath of the corruption scandals that shook Peru in 2018. It was also a crucial year in the ongoing fight between the executive and the legislative state power. This fight culminated in the closure of the Parliament through President Vizcarra and was brought before the Constitutional Court. The Constitutional Court itself was in the spotlight as well because the appointment of its new members did not go smoothly. A major achievement in returning to normality in the judiciary was the installation of the new Junta Nacional de Justicia (National Board of Justice), which worked on the second attempt.

It is important to note that the tough political conflict between the Parliament and the President was canalized by constitutional rules. Therefore, despite political difficulties, 2019 can also be seen as a good year for democracy. The dissolution of Congress proved that it was possible to solve a severe political crisis by constitutional means (without going back to the proven remedy for solving political crises in the past, the *coup d´état*).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2019 was a troubled year for Peru. Politics were still dominated by the Odebrecht corruption scandal (former President Alan García committed suicide; after the dissolution of Congress, some members of Parliament left the country because Odebrecht announced he would reveal the names of allegedly corrupt parliamentarians) and also by the aftermath of the "White Collars of Callao" and "Case of the Audios CNM" corruption scandals that had shaken the judiciary, undermining the trust of citizens in judicial power.

Following the crisis of the judiciary, the Consejo Nacional de Magistratura, the institution that decides on the selection of judges, which was already suspended in 2018, was formally dissolved in 2019. This was the result of reforms of the Peruvian Constitution proposed by President Martin Vizcarra in July 2018, which were approved with the referendum in December 2018. In February 2019, the organic law Ley No 30916 - Ley Orgánica de la Junta Nacional de Justicia was enacted. Since the first call for members of the Junta Nacional de Justicia failed because there were not enough competent people applying, on 30 December 2019, members of the board were finally elected. The process of selection was criticized due to the unequal treatment of one of the candidates. Meanwhile, a substitute member was sworn in. Among other functions of the new Junta Nacional de Justicia are the appointment of judges and public prosecutors and their evaluation.

Various constitutional questions were raised by the closure of Congress. As in 2018, problems arose out of a proposed vote of confidence. In June 2019, President Vizcarra

proposed to change the Constitution again and implement, among others, the following changes: reform parliamentary immunity, promote citizen participation in the internal decision-making of parties (internal democracy), new rules on the registration of parties (less signatures than before), rules for party financing and the limitation of the right to run for a public office if a person has been convicted of an intentional crime if a prison sentence of more than four years is foreseen. The president of the Cabinet announced that if members of Parliament refused to accept the reforms, he would call for another vote of confidence. Since this would be the second motion of confidence, the President would have – if it was denied – the option to dissolute Congress (based on Article 134 of the Constitution). Nothing happened, but in his speech to the nation on Independence Day (July 28), President Martin Vizcarra announced new constitutional reforms (early elections in 2020 instead of 2021, among others).

Then, a few weeks later, in September, the president of the Cabinet wanted to introduce an amendment to the law to the Constitutional Court regarding the selection of justices to the Court. Although a motion of confidence has priority over other matters, the majority bloc in Congress refused to discuss the motion. Yet, the Prime Minister managed to attend the debate (after an attempt to prevent him from entering the building) and proposed the motion of confidence.

At the same time, the majority bloc in Congress wanted to elect six new justices (out of seven members) to the Constitutional Court. Whereas the election of judges would have been scheduled after the discussion on the motion of confidence, the majority bloc in Parliament refused to discuss it and – in violation of the relevant provisions – proceeded to the election of the Constitutional Court. Whereas one candidate, the cousin of the president of Congress, managed to obtain the necessary votes to be elected, the second candidate did not. Further votes were not held.

Following this, President Vizcarra closed Congress based on Article 134 of the Peruvian Constitution, according to which Congress can be dissolved after two votes of confidence have been denied. The President argued that since members of Parliament refused to discuss the motion of no confidence and proceeded to the election of the new judges, confidence had been refused. People welcomed the closure of Congress, which has very low rates of approval – an alarming sign for democracy.

New elections were announced for January 2020. Although President Vizcarra had the backing of the police and military forces, the former president of the Congress ordered that President Vizcarra should be dismissed. Moreover, he sent a letter to the Organization of the American States (OAS) for support. But the OAS welcomed new elections and recommended approaching the Constitutional Court for settlement of the conflict.

On the question of linking constitutional amendments to the question of confidence, the Venice Commission issued an opinion (Opinion No. 964/2019, CDL-AD(2019)022) after a visit to Peru. It tried not to take sides in the conflict between the executive and the legislative power but pointed out that the recently implemented changes to electoral laws would be difficult to apply quickly. It further pointed out the importance of transparent elections, in line with international standards and best practices (Venice Commission, p. 6). Similarly to the OAS, the Venice Commission emphasized that "[s]ince the Constitution does not include any express limitations on the power for the executive to introduce a question of confidence or to use it in a ministerial initiative, neither as concerns the frequency of exercising this power nor the subject matter to which it is linked, the issue of whether a constitutional amendment introduced in Congress by the executive could be linked to a question of confidence can only be clarified by a decision of the Constitutional Tribunal of Peru." (p. 10).

In that light, the importance of the selection of judges to the Constitutional Court cannot be overstated. Moreover, the events of 2019 again show the problematic situation of a President with very little backing in Parliament, created by the Peruvian Constitution. Yet this situation also involves other considerations, such as how certain politicians act – the leader of the majority party, Keiko Fujimori, was only recently released from preventive detention.

(Note: Keiko Fujimori was placed into pretrial detention on January 28, 2020; see below.)

III. CONSTITUTIONAL CASES

1. Pedro Carlos Olaechea Álvarez-Calderón vs Executive Power (Expediente 0006-2019-CC/TC Auto 1): Conflict of competences

This case deals with the question of whether the Constitutional Court was competent to decide on the constitutionality of the dissolution of Congress with Supreme Decree 165-2019-PCM. The case was brought to the Court by Pedro Carlos Olaechea Álvarez-Calderón, former president of the Congress, and the Constitutional Court had to decide first whether Olaechea had the legitimation to bring the case to the Court since the relevant norms required the plenum of Congress to back such a demand. The Court decided that the principle of *pro actione* (as laid down in Article III of the Preliminary Title of the Code of Constitutional Procedure) had to be applied, adapting the formal requirements in order to guarantee the primacy of the Constitution.

At the core of the decision lies the question of whether the executive branch is competent to put forward motions of confidence with regard to competences which are exclusive of Congress. Such competences reflect the approval of constitutional reforms (Art. 206, Peruvian Constitution) and the selection and election of judges of the Constitutional Court (Art. 201, Peruvian Constitution). Furthermore, the questions arose whether a motion of confidence can be decided in a tacit or factual manner, and the way the motion has to be debated (with regard to the possibility of self-regulation of Congress).

The Constitutional Court accepted that there was a conflict of competence since one constitutional organ had allegedly interfered with the competence sphere of another con-

stitutional organ. It laid down that it was for the development of the democratic system that the Constitutional Court had to decide on the matter and that the controversy on the dissolution of Congress was one of the most important and urgent constitutional conflicts mentioned in Art. 202, para. 3 of the Peruvian Constitution. Therefore, the Constitutional Court accepted the *demanda competencial*. However, the Court also pointed out that accepting the claim did not mean to anticipate a decision. It was only in January 2020 that the Constitutional Court decided the matter. Together with solving the conflict of competences, Olaechea had also requested a provisional measure to nullify the closing of Congress, which was refused by the Constitutional Court. It ruled that there had not been enough evidence that the closure of Congress was an unconstitutional decision of the President.

Some authors argue that the decision of the Constitutional Court (to deny the provisional measure and to accept deciding on the conflict of competences) was ambiguous since both cases relied on a July 25th decision on the plenary of Congress. On that day, Congress adopted an agreement that allowed the president of the Congress to call on the Constitutional Court regarding the scope of a motion of confidence. The ambiguity is seen in the fact that on the one hand, Olaechea as the president of Congress is (according to the Constitutional Court) able to file a complaint regarding a conflict of competences based on the decision of July 25th; on the other hand, that same decision, according to the Constitutional Court, does not allow Olaechea to bring the provisional measure to the Court because it seems that the authorization of the decision targets a different topic. According to the Court, this ambiguity was solved by the application of the mentioned principle of *pro actione.*

Note: The competence conflict was decided on January 14, 2020, and will be covered in next year's report.

2. Keiko Sofia Fujimori Higuchi (Sachie Marcela Fujimori Higuchi in her representation) vs The Second Criminal Specialized Chamber of the Superior Court of Lima (Expediente 02534-2019-PHC/TC)

On October 31, 2018, Keiko Fujimori was placed into pretrial detention due to an investigation of asset laundering (in aggravating circumstances). On January 3, 2019, that decision was confirmed by an ordinary justice. On March 8, 2019, Sachie Fujimori Higuchi (her sister) filed a writ of *habeas corpus* on her behalf before the Constitutional Court, which had to analyze the following points:

A. To declare admissible or not the proceedings, taking into consideration a pending ruling in a similar matter before the ordinary courts (*recurso de casacion*). The Constitutional Court considered that in principle, applications like this should be dismissed; nonetheless, it considered that they could be admitted exceptionally when the issue had been decided by the ordinary courts and had turned final (*firmeza sobrevenida*), and the proceeding before the Constitutional Court was still open. In that line, the tribunal pointed out that on September 12, 2019, the Supreme Court of Justice had answered the request of cassation filed by Keiko Fujimori and, therefore, it considered itself competent to decide the case.

B. Considerations on the right to personal liberty and pretrial detentions as an *ultima ratio*. The Constitutional Court stressed the fact that all judges must protect the right of individuals to be presumed innocent by issuing reasoned and proportional judgments that connect the theory of the case with the evidence provided by the public prosecutors.

C. The delay of the ordinary justice to process Keiko Fujimori's request of an appeal. The Constitutional Court considered that the delay led to a breach of her fundamental rights. It ordered that in the future, the judge of the first instance should apply measures guaranteeing the fundamental rights of defendants. Moreover, the Court decided to inform the Internal Control Body of the Judiciary (*Control Interno de la Magistratura*) about these conclusions so they could proceed with the necessary investigations.

D. On the right of defense (specifically, regarding the time to prepare the defense and provide evidence). The Constitutional Court considered that the judge of the first instance had not given Keiko Fujimori's defense reasonable time to analyze the indictment made by the public prosecutor. It stressed that the right to prepare a defense and evidence could be impaired by violations of due process of law or when the time given to that effect was extremely short. As before, the Court decided to notify the Internal Control Body of the Judiciary about its conclusions.

E. On the impairment of the right to obtain a reasoned judgment. In a lengthy consideration, the Constitutional Court stressed the fact that the evidence of the case did not show a strong link between Keiko Fujimori and a criminal organization (as alleged by the Prosecutor's Office). According to the Constitutional Court, due diligence required contrasting the evidence of the case with new cases in order to obtain certainty or plausibility of the existence of a criminal organization. The Court noted that the evidence did not link Keiko Fujimori to grave suspicions of the commitment of the alleged crime. According to the Court, the judge of the first instance based his decision on mere presumptions that made him determine the existence of those grave suspicions. The Court also examined the declaration of other witnesses. It concluded that the judge's motivation lacked an inner reasoned argumentation because after admitting those declarations in their entirety, he then proceeded to discard sections

of them insofar as they could lead him to different conclusions.

In regards to that same right, but considering the decision of the judge of the second instance, the Court concluded that the argumentation of the judge of the second instance was unconstitutional. In the Court's view, the way the second instance's judge deduced that Keiko Fujimori knew about the origin of the money could only lead to the conclusion that pretrial detention could be imposed without a minimal verification of the defendant's participation in the alleged crime. This situation led to a violation of the right to be presumed innocent. As a result, the Court declared the right to obtain a reasoned judgment infringed. Moreover, the Court considered that the judge also infringed that right by supporting grave suspicions in facts that had not been correctly assessed; namely, the fact that Fujimori knew about the circulation of money coming from Brazil and the fact that her political party (Fuerza Popular 2011) was financed illegally. Moreover, the fact that she was part of a criminal organization and that she was aware of the illicit origin of the assets, among other points.

The Court also questioned the cassation decision adopted by the Supreme Court that reduced the pretrial detention of Fujimori from 36 to 18 months. The Constitutional Court recalled that the Supreme Court was convinced that Fujimori was at no risk of absconding but that she could hinder the process of collecting further evidence. According to the Constitutional Court, the Prosecutor's Office had collected abundant evidence during Fujimori's detention and therefore there was no reason for not releasing her at that moment. It also considered that the cassation lacked a congruent reasoning, insofar as it did not include a ruling over all the points presented by the plaintiff.

Some of the judges of the Constitutional Court issued their individual opinions. They each pointed out that the judgment went too far and invaded the exclusive competences of the judiciary, specifically by assessing and evaluating criminal evidence and by assessing and evaluating the facts of the criminal case. Alleged political pressure, requests of the judiciary directed at the Constitutional Court to clarify its judgment and new proceedings against Keiko Fujimori in order to remand her in pretrial detention are the background and the outcome of this controversial judgment.

Note: On January 28, 2020, pursuant a court order, Keiko Fujimori was placed again into pretrial detention for a period of 15 months. This will be covered in next year's report.

3. Constitutional complaint of Erick Américo Iriarte Ahón against the resolution of page 71 of 24 August 2016, issued by the Superior Court of Justice of Lima (Primera Civil), (Expediente N 00442-2017-PA/TC): Twitter account of a (former) president of the Cabinet and right to access public information

The case was referred to the Constitutional Court in 2019, but its roots lie further back.

This case dates back to 2015, when a citizen was blocked from following the personal Twitter account of former president of the Cabinet Cateriano Bellido, arguing (among others) his right to access public information was violated. Whereas the First Civil Division of the Superior Court of Justice of Lima did not deem it necessary to proceed with the claim (since Cateriano Bellido is not the president of the Cabinet any more), the Constitutional Court decided the case. One of the claimant's arguments was that the right of access to public information was violated. The Constitutional Court could not find a violation regarding this. It argued that a personal Twitter account is not an official way of transmitting public information (the Cabinet has its own Twitter account), and just because a citizen holds public office does not take away his right to block someone from his Twitter account.

IV. LOOKING AHEAD

2020 is a promising year for Peru: First, the Constitutional Court already decided on the conflict of competences regarding the dissolution of Congress. Second, parliamentary elections, which can be considered clean and democratic, were held at the end of January. Therefore, restoration of the political equilibrium and the reestablishment of democratic control between state powers seems to be within reach.

V. FURTHER READING

César Landa Arroyo, 'Is the Dissolution of the Peruvian Congress a Constitutional Measure?' (IACL-AIDC Blog, 15 October 2019), <https://blog-iacl-aidc.org/2019-posts/2019/10/15/is-the-dissolution-of-peruvian-congress-a-constitutional-measure>

For further developments, see César Landa Arroyo, <https://www.enfoquederecho.com/author/landa/>

Maria Bertel, 'Democratization through Decentralization. Why Electoral Laws Matter' (2019), 52 *World Comparative Law* 7.

[4] Ley que regula el gasto de publicidad del estado peruano, Ley Nº 30793.

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I. INTRODUCTION

The year 2019 was exceedingly important in the Polish political calendar due to the European and parliamentary elections that constituted the hope that the democratic opposition would gain an advantage over the ruling Law and Justice party (PiS). Nevertheless, PiS still enjoyed strong popularity. The results of the first chamber (Sejm) parliamentary elections allowed PiS to remain in power. A new situation, however, was created in the Senate, where opposition parties, together with non-allied senators, were able to secure the majority. The weaker position of Poland's second chamber in fulfilling the legislative function does not let PiS opponents block controversial bills, but may slow down the unprecedented legislative hurry, which was characteristic of the previous parliamentary term of office. The Senate also participates in many appointment decisions, including, *inter alia,* the Ombudsman and the President of the Supreme Chamber of Control. It is believed that debates and various events announced by the newly elected speaker, Professor Tomasz Grodzki, may contribute to wider public awareness of potential threats contained in proposed legislative solutions.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Last year was marked by unprecedented measures leading to the destruction of judicial independence on the one hand, by applying legal provisions introduced to the legal system in 2017-2018, and on the other hand by using previously existing provisions concerning the disciplinary accountability of judges in an abusive manner. Also, throughout the year, disciplinary prosecutors appointed by the Minister of Justice launched dozens of investigations concerning adjudication decisions. This kind of political action aimed at intimidating judges was possible only due to the capture of the institution of disciplinary prosecutors. Before the reform, it was the independent National Council of the Judiciary (NCJ) that appointed the general disciplinary prosecutor and its deputies. Under the new rules, the Minister of Justice has also been empowered to indicate who from among the courts of appeal judges should play the role of disciplinary judges at the first instance, while the disciplinary courts' presidents are now appointed by the head of the new Disciplinary Chamber (DC) of the Supreme Court (SC).

From the beginning, this institutional structure seemed to be well thought out in order to tame judges who dared to contest the 'reform'. The most spectacular actions violating the constitutional principle of judicial independence included various disciplinary charges slapped against judges[1] for their critical statements about the current policies regarding the administration of justice, the composition of the new NCJ,[2] and the status of the DC. In some cases, judges were held accountable for the content of their judicial decisions.[3] A widely commented example of judge intimidation consisted of launching disciplinary proceedings against Justice Paweł Juszczyszyn from Olsztyn, who demanded that the Chancellery of the Sejm hand over the list of signatures of those giving their support to candidates of the new NCJ. The list of signatures remained secret despite the ruling of the Supreme Administrative Court (SAC), which ordered to disclose them. Apart from this accusation of committing a disciplinary offence, Juszczyszyn, only several hours after making his decision, was called off from his secondment to a court of a higher instance. The initiative of Justice Juszczyszyn was a follow-up of the judgement of the CJEU in joined cases C–585/18, C–624/18, and C–625/18[4] concerning the controversies around the status of the DC. This chamber is comprised of judges whose legal status can be questioned as they undergo the nominating procedure conducted by the newly elected NCJ. On 19 November 2019, the CJEU ruled that the Polish SC, as the referring court in these cases, should assess whether the DC was in fact independent. In its judgement, the CJEU set out criteria for this assessment, also quoting its previous case law.

In December 2019, a new bill was submitted to the Parliament from the initiative of the ruling party that was supposed to intensify disciplinary sanctions against judges. The new law was an attempt to block the implementation of the above-mentioned CJEU judgement. The law was widely criticized by the democratic opposition, judges, and representatives of other legal professions as well as by constitutional law scholars. A deep concern was also expressed by Věra Jourová, the European Commission's Vice-President. She turned to the Polish President, Prime Minister, and Parliament to suspend work on this bill until further consultations were conducted. Her effort did not bring about any results, and public protests against the bill were ignored. Then, at the end of 2019, the statute was passed by the Sejm and put forward to the Senate. According to this new law, a judge could be held accountable not only, as previously, for obvious and gross violation of the provisions of law and for breach of the authority of the judicial offices but also for acts or omissions that may prevent or significantly impede the functioning of the justice system; actions questioning the status of a judge, including the effectiveness of their appointment, as well as for actions questioning 'constitutional empowerment' of a constitutional organ of the state; and actions for any public activities 'incompatible with the principles of the independence of courts and judges'. Only in the last moment, a provision on the accountability for not applying a law due to its non-conformity with the Constitution and with an international agreement was abandoned. Despite its removal, the new law continues to contradict the fundamental values of the European Union's (EU) legal order by violating judicial independence. The new law's direct aim remains the same: to eliminate the possibility of implementing CJEU judgement so the state of affairs created by PiS will solidify.

Two of the most constitutionally important events of 2019 were the European and parliamentary elections. As mentioned above, PiS was able to win both of these elections. As a result, an interesting issue arose involving a relatively high number of filled electoral complaints (279) directed at the new Extraordinary Control and Public Affairs Chamber of the SC. To some extent, the complaints were politically motivated. PiS representatives declared their dissatisfaction with the electoral results to the Senate, suggesting the need for a repeated vote count. This approach seemed to challenge the basic aim of the institution of the electoral protest. The SC declined to count the votes again, took into account only summited documents, and eventually rejected all objections. Finally, on 23 December 2019, the SC proclaimed the election results valid.

Many controversies were caused by an electoral complaint concerning the Senate elections in one of the electoral districts where PiS registered a new candidate to the Senate – Marek Komorowski – in place of the deceased Kornel Morawiecki (father of the Prime Minister, Mateusz Morawiecki). There were legal doubts related to the way by which a date for announcing a new candidate was determined. On the basis of Article 265a of the Electoral Code, an announcement of a candidate's death shall be made not later than 15 days prior to the election date. In this case, the 15th day prior to the election date fell on a Saturday; however, Morawiecki died on Monday, or in other words, on the 13th day prior to the elections. Nevertheless, the State

[1] Rule of Law, 'Judges under fire: 43 judges already targeted by disciplinary officer and prosecutors' (10 January 2020) <https://ruleoflaw.pl/judges-under-fire-43-judges-already-targeted-by-disciplinary-officer-and-prosecutors/> accessed 31.01.2020.

[2] Judicial members of the NCJ were previously elected by bodies of judicial self-government, but currently the first chamber of Parliament (the Sejm) elects them from amongst candidates supported by either 25 judges or 2000 citizens, who must confirm each candidature by their signature. The new method of being elected to the NCJ is perceived by the majority of academia as an apparent constitutional infringement of Article 187 (1) of the Polish Constitution. However, the politically captured CT ruled on 25 March 2019 that the new procedure is in conformity with the Constitution (see 'Constitutional Cases').

[3] Justice Alina Czubieniak was reprimanded for her ruling revoking a previous decision on pre-trial detention of a man with intellectual disabilities who allegedly harassed a 9-year-old girl, but was deprived of the right to legal aid at the prosecutor's hearing. Eventually, the disciplinary proceeding was launched only because the DC ruled she was guilty, although they decided not to impose any punishing means.

[4] InfoCuria 'Judgement of the Court (Grand Chamber)' (19 November 2019) <http://curia.europa.eu/juris/document/document.jsf?docid=220770&text=&dir=&doclang=EN&part=1&occ=first&mode=DOC&pageIndex=0&cid=611315> accessed 31.01.2020.

Electoral Commission (SEC) accepted a new candidate, taking into account Article 9 § 2 of the Electoral Code, which provides that 'if the end of the time limit for performing an activity stated in this code falls on Saturday or on a public holiday, the time limit expires on the first business day after that day'. According to a number of analysts, this kind of interpretation was oversimplified and incorrect. In order to conclude that the end of the time limit for performing an activity falls on a Saturday or a public holiday, as referred to in the above-mentioned provision, the time limit should be 'opened'. This is because this provision introduces an extension of the limit. Therefore, in the discussed case, the death of a candidate should have initiated this time limit. This argument was accepted neither by the SEC nor by the SC, which considered the complaint.

The year 2019 was also significant because the reformed composition of the SEC entered into force.[5] The reform abolished the judicial character of the commission, which was widely criticised by constitutional scholars as well as by the Venice Commission. Presently, the SEC is composed of nine members: seven appointed by the Sejm; one is a judge of the Constitutional Tribunal (CT) appointed by the president of the CT; and one is a judge of the SAC appointed by the president of the SAC.[6] On 20 December 2019, the Sejm elected seven new members of the SEC, three appointed by PiS, two by the Civic Coalition, one by the Left, and one by the PSL-Kukiz'15.

III. CONSTITUTIONAL CASES

1. Judgement of the Constitutional Tribunal of 25 March 2019 (K 12/18) – Election of judges to the NCJ by the Sejm (OTK ZU A/2019, item 17)'

The CT ruled that the election of judges to the NCJ by the Sejm (on the grounds of the 8 December 2017 amendment to the Act on the NCJ) is in conformity with the Constitution. At the same time, the CT decided that Article 44, para. 1a of the Act on the NCJ is inconsistent with Article 184 of the Constitution. This statutory provision regulated a right of appeal to the SAC against the NCJ's resolutions in individual cases concerning an appointment of SC judges. This provision constituted an exception to the general rule that the NCJ's resolutions can be questioned before the SC.

Such a controversial decision by the CT was justified rather abruptly and superficially. The CT applied a strict textual interpretation of Article 187, para. 1 (2) of the Constitution by emphasising its wording, according to which 15 judges are 'chosen from amongst judges', but not necessarily *by* judges. In this way, the CT ignored the practice of electing this group of NCJ members by bodies of the judicial self-government that was established at the very beginning of the NCJ's existence (1989). The CT's juxtaposition of the said provision with Article 187, para. 1 (1) and (3) of the Constitution – both strictly specifying who nominates the respective members – does not justify the conclusion about legislative freedom in this respect. Taking into account the constitutional function of the NCJ (i.e., safeguarding the independence of the courts and judges), the election of 23 out of 25 members of this State body by the political organ raises reasonable doubts. Unfortunately, the CT ignored these doubts, notwithstanding very few vague remarks, such as the one stating that the constitutional requirements regarding courts and tribunals are not applicable to the NCJ since this organ is not included in the Constitution as an organ of judicial power.

In regards to the SAC's appeals against the NCJ's resolutions, the CT reasoned that the criteria of assigning cases in the administrative courts were not fulfilled in this case, and that issues regarding the same category should not be considered by courts of different types. However, in the aftermath of the CT's ruling, the Parliament amended the Act on the NCJ, excluding any appeals in this regard to any sort of court, trying at the same time to force *ex lege* discontinuation of the appeal proceedings already in progress before the SAC.[7] This meant that candidates to the SC whose candidatures had not been included in the NCJ's motions submitted to the President became deprived of their constitutional right to a trial.

Regardless of the poor quality of reasoning given by the CT, the discussed judgement provides a striking example of how the ruling party uses the captured CT as a tool to achieve political goals. One cannot forget the fact that the judgement was decided with the participation of Justyn Piskorski (who was even the judge rapporteur in this case), a person illegally elected to the CT in 2017 following the death of one of the three so-called 'double-judges' unduly elected for the vacancies already filled by the Sejm for the precedent term of office.[8]

2. Judgement of the Supreme Administrative Court of 28 June 2019 – Disclosure of the lists of the NCJ candidates' supporters (I OSK 4282/18)

In this case, the SAC dismissed the cassation appeal through which the head of the Chancellery of the Sejm challenged the previous judgement of the Voivodship Administrative Court (VAC) in Warsaw. Thus, the SAC finally acknowledged that the lists of the NCJ candidates' supporters amongst judges (see note 2) should be disclosed. Therefore, the constitutional right to obtain public information found judicial protection, despite the huge efforts of the ruling party to conceal these lists from the public. During the course of the NCJ election proceedings, a citizen applied for the disclosure of the lists of the

[5] Article 157 § 2 amended by Article 5 (59) (a) of the Act of 11 January 2018 ('Journal of Laws of 2018', item 130), which amended this Act as of 12 November 2019.

[6] Before the amendment, the SEC was composed solely of judges (i.e., 3 judges of the CT, 3 judges of the SC and 3 judges of the SAC).

[7] See the 26 April 2019 amendment to the Act on the NCJ and to the Act – the Law on the System of Administrative Courts.

[8] About the illegal election of the 3 judges in 2015, see T.T. Koncewicz, M. Zubik, M. Konopacka, K. Staśkiewicz, 'Developments in Polish Constitutional Law', in R. Albert, D. Landau, P. Faraguna, S. Drugda (eds.), *The I·CONnect-Clough Center 2016 Global Review of Constitutional Law* (Clough Center 2017) 166.

candidates' supporters. The head of the Sejm's Chancellery refused to disclose the lists, claiming that Article 11c of the Act on the NCJ – a provision passed by the Sejm in order to make the lists non-transparent – does not allow it. According to this provision, the Marshal (Speaker) of the Sejm shall immediately hand in the candidates' applications to deputies and make them public 'except for attachments'. These 'attachments' included the lists of supporters. The Chancellery of the Sejm argued that the above-mentioned provision excluded the disclosure of the lists and constituted an exception in the rules established in the Act on Access to Public Information. The VAC overruled the decision of the Head of the Chancellery of the Sejm, stating that only lists of ordinary citizens are not subject to access (due to the protection of privacy), while the names of judges who supported candidates should be accessible. Later, the SAC adjudicated that Article 11c does not provide for different rules and a diverse mode of access to public information in comparison to the universal legal standard. The only significance thereof involves the specific duties of the Marshal (Speaker) of the Sejm in the election proceedings regarding the NCJ's composition. Hence, Article 11c pertains to another kind of proceeding than the one on the access to public information.

Following the SAC's ruling, the president of the Personal Data Protection Office issued an interim order preventing the Sejm's Chancellery from disclosing the judges' personal data included on the lists of support. Taking into account this approach, the Chancellery decided not to subordinate to the judicial decision, although after the SAC ruling, the VAC judgement became final. The abandonment of the lists' disclosure proves the lack of transparency in the 2018 NCJ elections, and is widely perceived as an attempt to hide ties of its members to the Ministry of Justice. On the other hand, the disregarding of the Court's final decision by an administrative body provides an example of a flagrant display of the Polish rule of law crisis.

3. Judgement of the Supreme Court of 5 December 2019 – Status of the NCJ and the Disciplinary Chamber (DC) of the SC (III PO 7/18)

The SC ruled that the newly established DC of the SC – the crucial component of the so-called judiciary reform forced through Parliament – does not fulfill both the constitutional and the EU law standard of the right to a fair trial.

The legal background of this case involved two statutes: the Act amending the Act on the NCJ and the new Act on the SC. The first one established the election of 15 judges to the NCJ by the Sejm (instead of being elected by judges). The Act on the SC, in turn, *inter alia,* reorganised the division of the SC (including the creation of the DC) and reduced the age of SC judges' retirement from 70 to 65 years – this is also the case for SAC judges.[9] A judge who reached the age of 65 years had to retire unless they declared the will of further incumbency and received the President of the Republic's assent. The President of the Republic was entitled to seek an opinion of the NCJ in this respect. The above-mentioned changes applied also to the incumbents of the SC/SAC seats of that time. The requirement to apply for a consent of the executive organ regarding the possibility of further incumbency of judges raised serious doubts in terms of the conformity of such regulations with the principles of the separation of powers, irremovability, and the independence of judges.

On 1 January 2019, the 21 November 2018 amendment to the Act on the SC entered into force. It enabled the retired SC and SAC judges, who had been appointed before the 2017 Act on the SC came into force, to return to their duties. The decisive role in amending the 2017 Act on the SC was played by the preliminary order of the CJEU vice-president in October 2018, issued with regard to treaty infringement proceedings initiated by the European Commission. The vice-president's order obliged Poland to cancel the legal effects of the 2017 Act regarding retirement pursuant to the new rules by the judges appointed before this Act entered into force. In the judgement of 5 December 2019, the SC took into account the already discussed CJEU judgement of 19 November 2019. Although the CJEU did not answer the questions submitted in case no. C–585/18 (unlike in the remaining two joint cases), the SC pointed out the universally binding character of the CJEU's interpretation of EU law. Notwithstanding the applicant's return to duties, because of his legal interest, the SC did not discontinue the proceedings. It ruled that the DC is not a court in light of Article 47 of the Charter of Fundamental Rights of the EU, Article 6 of the European Convention on Human Rights, and Article 45 of the Polish Constitution. The Labour and Social Insurance Chamber (which had the jurisdiction in this matter before the creation of the DC) refused to put forward the applicant's appeal to the DC and decided to rule on the appeal by itself, striking down the NCJ's resolution.

According to the SC, the lack of NCJ independence from the legislative and executive powers may be demonstrated by, *inter alia,* the shortening of the constitutional term of office of the former NCJ members and entrusting the Sejm with the competence to elect NCJ judicial members. It must be emphasized that presently 23 out of 25 members of the NCJ are nominated by the legislative and executive powers. Many reasonable doubts were also caused by the circumstances of the 2018 election proceedings; for example, keeping the candidates' supporter lists secret and the fact that amongst the elected members of the NCJ are judges seconded to the Ministry of Justice.

The assessment of the NCJ provided by the SC was based on the aggregation of the above-mentioned and further circumstances. Taken separately, none of these played a decisive role. A similar method has been used in order to assess the status of the DC. As far as the status of the latter is concerned, the SC argued, *inter alia,* that this chamber

[9] According to Article 49 of the Act of 25 July 2002 – the Law on the System of Administrative Courts – in matters not regulated within this Act, provisions regarding the SC shall apply as appropriate.

was created from scratch, and has an adjudicative monopoly in some category of cases concerning SC judges. The SC also argued that the DC is composed exclusively of judges appointed on the motion of the new – not independent – NCJ.

IV. LOOKING AHEAD

The criticism concerning the many measures adopted in violation of the rule of law is consistently ignored by the ruling party, which still counts on huge electoral support. This means that one cannot be very optimistic that the political and legal situation in Poland will significantly change in the near future. The organs and institutions constitutionally aimed at securing the legal and political checks and balances lose their inherent role in this respect. The capture of the CT became evident, even for an unacquainted observer, since two active PiS politicians, famous for their unrefined attacks against the opposition, were elected to the CT in the fall of 2019. Anyone who might think that the state approaches the direction of so-called political constitutionalism at the expense of legal constitutionalism is deeply mistaken. Parliamentary organs are treated not as forums for exchanging opinions and wide public debate but as a rubber stamp of political decisions made by parallel political factors with PiS's leader at the forefront. Perhaps the CJEU's expected 2020 rulings regarding the new disciplinary regime for Polish judges, issued as a result of the European Commission's infringement procedure, may force the government to ease its position a bit. In this regard, at the beginning of 2020, the European Commission decided to request that the CJEU issue interim measures that may contribute to abolishing or reforming the controversial DC of the SC. As Wojciech Sadurski rightly argues 'while no PiS politician actively wants Poland to exit the EU, they have even less appetite for a system in which EU law takes priority and allows European institutions to call out democratic defects in a member state'.[10] This may raise legitimate concerns as to the further functioning of Poland in the EU's structures.

V. FURTHER READING

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Wojciech Brzozowski, 'Can the Constitutional Court Accelerate Democratic Backsliding? Lessons from the Polish Experience', in: M. Belov (ed.), *The Role of Courts in Contemporary Legal Orders* (Eleven International Publishing, 2019)

Tomasz Tadeusz Koncewicz, 'From Constitutional to Political Justice: The Tragic Trajectories of the Polish Constitutional Court', *VerfBlog,* (27 February 2019) <https://verfassungsblog.de/from-constitutional-to-political-justice-the-tragic-trajectories-of-the-polish-constitutional-court/> accessed 31.01.2020

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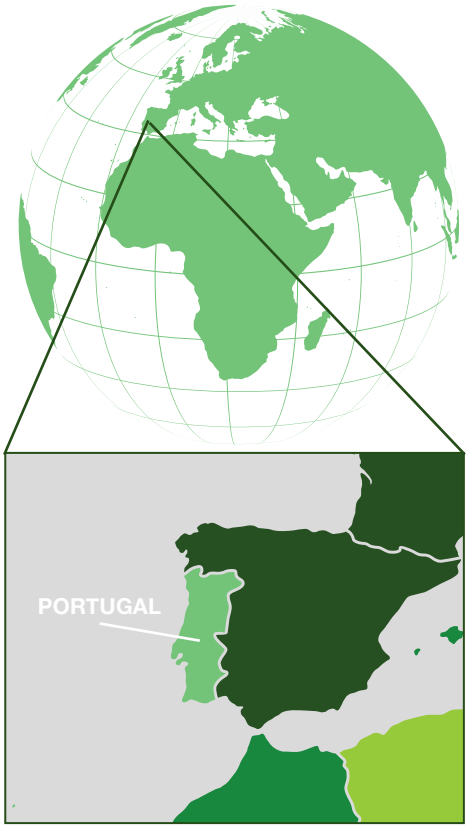
[10] W. Sadurski, 'Poland's autocratic government is at it again', *Politico* (16 January 2020) <www.politico.eu/article/poland-autocratic-government-pis-power-grab/> accessed 31.01.2020



Portugal

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I. INTRODUCTION

2019 was a year marked by political change and social contestation. On the political quadrant, we saw the end of the highly publicized *geringonça* (contraption), due to the lack of consensus between the Socialist Party and its previous left-wing allies. We now have a minority socialist Government that will have to seek the support of other parties when necessary. The Portuguese Parliament also became more fragmented in the 2019 legislative elections, with the election of Parliament members by parties that, until then, had not achieved representation (in particular, a radical right-wing party was able, for the first time in our democracy, to elect one member of Parliament).

The social field was also very active, with the summoning of several strikes in different professional sectors. Strikes by the drivers of dangerous goods transport vehicles were particularly felt, which led the Government to invoke administrative emergency powers. But discontent was also very acute among health professionals, teachers, and even policemen. And since the Government did not correspond to their demands, this scenario is likely to repeat itself in the next year.

For its part, constitutional jurisprudence focused, once again, on the matter of family rights (revisiting its landmark decision on surrogacy, but also its previous rulings on paternity proceedings), while reaffirming the rights to citizenship and personality development, as well as to privacy and the protection of communications.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. European elections and low turnout rate

In the 2019 European elections, the turnout rate increased in 20 of the 28 EU states.[1] By contrast, the turnout rate in Portugal was very disappointing, scoring merely 31.40% and leaving the remaining 68.60% to abstention.[2] The centre-left Socialists (PS) won the 2019 European Parliamentary (EP) elections with 33.4%. This result was quite surprising and marked the first time that a sitting Government won a European election.

Notwithstanding the new measures that were introduced to boost voting in Portugal (such as advanced voting, pilot experiences with electronic voting, or postal voting abroad), abstention rates in the Portuguese 2019 EP elections hit record levels.[3] Further studies

[1] http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20190523STO52402/elections-2019-highest-turnout-in-20-years

[2] See https://election-results.eu/

[3] Catarina Santos Botelho, 'European Elections: The Silence of the Lambs and the Dangerous Political Resignation – The Portuguese Perspective', in *DCU Brexit Institute Blog*, 03/06/2019, available at: http://dcubrexitinstitute.eu/2019/06/european-elections-the-silence-of-the-lambs-and-the-dangerous-political-resignation-in-portugal/

are being held to try to understand the reasons behind abstention rates and to put forward possible solutions to overcome endogenous and exogenous electoral problems.[4]

2. Legislative elections

In the 2015 legislative elections, the colligation PàF (Portugal à Frente) – which gathered the center-right party PSD (Social Democratic Party) and the conservative CDS-PP (Popular Party) – won by 39%. However, as the colligation PàF was not able to pass its governmental program by the Parliament, it was dismissed just twenty-eight days after its nomination, making it the shortest Government ever in the Portuguese constitutional democracy.[5]

Aiming at stability, the President of the Republic then nominated a Government drawing on the Socialist Party (which was the second most voted party) after the other left-wing parties – the coalition of the Communist Portuguese Party (PCP) and the Greens ('Os Verdes'), and the Left Bloc (BE) – clarified that they would provide parliamentary support.

This arrangement was regarded abroad with some curiosity. Would it last? Would it be repeated with the same partners or with new ones? Or would the socialists secure an absolute majority in the following elections and govern without allies?

This unprecedented arrangement, that many believed would fade away soon at the first political impasse, surprisingly lasted through the four-year parliamentary term. It became known, not without a pejorative connotation, as 'contraption' (*geringonça*). This contraption was not a coalition, but instead a post-electoral alliance that was even written and made public. Naturally, the agreement benefited both parties: the communists-greens and the Left Bloc would support the minority socialist Government while at the same time ensuring the implementation of some of their political initiatives. During the legislature, the Government was able to sustain the delicate balance between complying to eurozone budget commitments and partially reversing austerity measures.

Four years later, and as some predicted, 'the likelihood of a potential *geringonça* 2.0' highly depended on the electoral result for the PS.[6] And, in fact, the political landscape changed in the 2019 legislative elections, which resulted in political fragmentation. The communists and the Green Party 'Os Verdes', as well as the PSD and the CDS-PP, lost a considerable number of votes. In turn, the People, Animals and Nature Party (PAN) had an excellent result and two new right-wing parties (the radical right 'CHEGA' and the liberal 'Iniciativa Liberal') entered the Portuguese Parliament as well as the new left-wing party 'LIVRE'.

Immediately after the elections, the Prime Minister (PM), António Costa (of the Socialist Party), considered renewing the *geringonça* with one or more parties. However, after meetings with the other left-wing parties represented in the Parliament, the PS decided that it would govern as a minority Government and seek support from the other parties when necessary.[7]

3. Social contestation

During 2019, social contestation against the Government, through strikes and demonstrations, was intensified. Several professional sectors contested governmental policies:

a. *Drivers of dangerous goods transport vehicles* complained about low wages and poor working conditions. Their several strikes impacted public transportation, airports, factories, and petrol stations.[8] The PM, António Costa, argued that these strikes jeopardized essential social needs and, therefore, invoked emergency powers.

b. *Doctors, joined by nurses,* protested during a two-day national strike that gathered a high level of support amongst health professionals of the public health system. Apart from salary revindications, doctors argued for a stronger National Health Service (SNS), suggesting measures such as ensuring a family physician for every citizen, decreasing waiting lists, offering longer appointments, and so on. As far as nurses were concerned, they demanded better working conditions, the recognition of the health sector's dignity for the benefit of patients and health professionals, an earlier retirement age, and career progression.[9]

c. *Teachers* reinforced the strikes that were held in 2018. They argued for retroactive pay raises (going back almost a decade), less working hours per week, and the protection of the profession's dignity.[10]

[4] See João Cancela and Marta Vicente, Portugal Talks – Abstenção e participação eleitoral em *Portugal: diagnóstico e hipóteses de reforma* (Portugal Talks 2019), available at: https://www.pttalks.pt/wp-content/uploads/2019/11/Estudo_Portugal-Talks_Abstenção-e-Participação-Eleitoral-em-Portugal_2019-1.pdf

[5] Catarina Santos Botelho, 'Portugal: The State of Liberal Democracy', in Richard Albert, David Landau, Pietro Faraguna & Simon Drugda (eds.), *2017 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2018, pp. 230-234.

[6] Celso Gomes, 'Portuguese Election: What comes after the Geringonça?', available at: https://europeelects.eu/2019/10/05/portuguese-election-what-comes-after-the-geringonca/

[7] José Santana Pereira, 'Goodbye "Geringonça"? The 2019 Legislative Elections in Portugal', available at: https://www.enainstitute.org/en/publication/jose-santana-pereira-goodbye-geringonca-the-2019-legislative-elections-in-portugal/

[8] http://www.marsecreview.com/2019/05/fuel-tanker-drivers-threaten-new-strike-in-portugal/

[9] https://www.theportugalnews.com/news/first-of-doctors-strikes-sees-three-quarters-walking-out/50170

[10] https://www.theportugalnews.com/news/teachers-threaten-strike-in-october/51161

d. Members of the *Public Security Police* (PSP) and the *Republican National Guard* (GNR) manifested outside the Parliament and demanded better working conditions and higher salaries.[11]

As a global answer to these revindications, the Government stressed the need for financial responsibility and sustainability as well as maintenance of the country's credibility abroad.

III. CONSTITUTIONAL CASES

1. Ruling 465/19: Medically assisted procreation (surrogacy)

Under an anticipatory review of constitutionality, the Portuguese Constitutional Court (PCC) analyzed Article 2 of Bill no. 383/XIII, which intended to introduce changes to Act no. 32/2006 (the diploma that regulates medically assisted procreation).

This provision reintroduced Article 8 § 8 of that same Act, which had been previously subjected to constitutional review and declared unconstitutional. Therefore, the present judgement revisited the reasoning behind that first decision (Judgement 225/2018).

Article 8 § 8 (in articulation with Article 14 § 5 of Act no. 32/2006) allowed surrogates to revoke their consent, but merely until the beginning of the medically assisted procreation treatments. In Judgement 225/2018, the PCC stated that such a rule was incompatible with the fundamental rights to personality development and to reproductive self-determination.

To substantiate this decision, the PCC stressed that these procedures are only admissible, with respect to these rights, because the surrogate has given her consent. In fact, the highly personal nature of the obligations stemming from this contract demands that they should only be complied with voluntarily. And such volition must be ensured in all phases: the contract's conclusion, the implementation of medically assisted pregnancy techniques, the pregnancy, the birth, and the child's relinquishing to the beneficiaries.

Therefore, one must ensure that the consent is truly informed, encompassing this process's full extent, which can be put into question since the consent was given even before the pregnancy itself. In fact, during surrogacy, the woman's body, as well as her psychological and emotional well-being, undergo several changes. Pregnancy is a complex, dynamic, and unique process, during which there is the creation of a bond between the pregnant woman and the fetus. The possibility to revoke consent is the only insurance that each of these phases is truly voluntary and, therefore, still an expression of the surrogate's right to personality development.

This means that the surrogate must be allowed to deviate from this contract because she has decided either to terminate the pregnancy (in accordance with the law), or to pursue her own parenting project. To try to enforce this contract against her will would entail the surrogate's instrumentalisation, encroaching her self-determination and dignity. These considerations are equally valid if the surrogate is no longer willing to give the child up. However, in this case, the decision must rest on the child's superior interest, which demands a case-by-case analysis.

In the present judgement, the PCC concluded by stating that Article 2 of Bill no. 383/XIII intended to reintroduce the exact same solution that had been previously censured, without there being any supervening circumstances that would justify the reopening of this debate. Therefore, it considered this article to be equally unconstitutional for breaching the fundamental rights to personality development and to raise a family.

2. Ruling 464/19: Meta-data

The PCC analyzed the constitutional compliance of Articles 3 and 4 of Act no. 4/2017 (which regulates the special procedure to access telecommunications and Internet data by information officers of the Portuguese Internal Intelligence Service and the Portuguese External Intelligence Service) by means of a subsequent abstract review of constitutionality.

Article 3 allowed the access to baseline data and equipment location data in order to gather necessary information to safeguard national defense and homeland security, and to prevent acts of sabotage, espionage, terrorism, proliferation of weapons of mass destruction, and highly organized criminality. Article 4 allowed the access to traffic data; to provide the necessary information to prevent acts of espionage and terrorism.

In both cases, such access was dependent on the previous authorization of one of the criminal sections of the Portuguese Supreme Court to ensure an appraisal between the relevance of the request and the safeguard of fundamental rights (Article 5 of Act no. 4/2017).

In this judgement, the PCC promoted an interjurisdictional dialogue, considering EU law and the jurisprudence of the EUCJ as well as the ECHR and the jurisprudence of the ECtHR. To this effect, the PCC considered that, in abstract, a restriction to fundamental rights on this matter would be admissible according to both Article 15 § 1 of Directive 2002/58/EC[12] and Article 8 of the ECHR, assuming a few conditions were met.

[11] https://www.telesurenglish.net/news/Portugal-Police-Demand-Better-Working-Conditions-Higher-Wages-20191121-0006.html

[12] It should be noted that on Judgement *Tele2* (joined Cases C-203/15 and C-698/15), the EUCJ stated that the directive should be interpreted as precluding 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 (point 2 of the ruling). Furthermore, when no longer liable to jeopardize the investigations, the persons affected should be notified of these procedures, to enable them to exercise their right to a legal remedy (par. 121).

The PCC also differentiated between the data concerning intersubjective communication and the data that does not relate to any communication but only identifies the subjects (their name, address, phone number) and the equipment location data as well as the traffic data that only involves the communication between the subjects and a machine, such as website consultation.

The applicants only called upon the infringement of Article 34 § 4 of the Portuguese Constitution, which enshrines the fundamental right to inviolability of one's home and to privacy of correspondence. However, the PCC, under Article 51 § 1 of the Law of the Constitutional Court, which allows the Court to consider other provisions, decided to also take into account Articles 26 § 1 and 35 §§ 1, 3, and 4 of the Portuguese Constitution. In fact, baseline data, which does not concern communications *per se,* according to the PCC's jurisprudence, is not encompassed by the right to confidentiality of communications, but instead, by the right to privacy (Article 26) and to informative self-determination (Article 35).

Taking that into account, and regarding Article 4, the PCC made a distinction between data that concerns intersubjective communication and data that does not. Concerning the first category, the Court stated that such an access is unconstitutional. In fact, the Portuguese Constitution only allows for restrictions on the contents of Article 34 within criminal procedures. And since that is not the case, where information officers are concerned, the Portuguese legislator did not respect the constitutional choice.

Still on Article 4 but considering now the data that does not involve an intersubjective communication, the PCC found that this norm did not state objective criteria for the selection of the citizens affected by these measures. In fact, a mere suspicion of involvement, in any way, in the preparation or execution of terrorist attacks or serious crimes would allow the state to target a large number of people without them being aware, and therefore, without allowing them to subsequently ask for the destruction of those materials and the accountability of those involved in such an access.[13]

In sum, the PCC declared the unconstitutionality, with general binding effects, of Article 4 due to the violation of Article 34 § 4 of the Portuguese Constitution concerning the access to traffic data that involves intersubjective communication, and also due to the violation of Articles 26 § 1, 35 §§ 1 and 4, and 18 § 2 of the Portuguese Constitution regarding the access to traffic data that does not involve intersubjective communication.
In turn, the PCC considered that the choices enshrined in Article 3 were both adequate and necessary due to the inexistence of less harmful means to achieve the same results. However, this did not apply to the part that mentioned the usage of this data to safeguard national security and homeland security due to the lack of determinability of these concepts. For this reason, Article 3 was declared unconstitutional, with general binding effect, on the part it bestowed on information officers access to baseline data and equipment location data to gather the necessary information for the safeguard of national defense and homeland security due to the breach of Articles 26 § 1 and 35 §§ 1 and 4, as well as Article 18 § 2 of the Portuguese Constitution. This ruling does not apply to the part of Article 3 that allows access to this data in order to provide the necessary information to prevent acts of sabotage, espionage, terrorism, proliferation of weapons of mass destruction, and highly organized criminality.

3. Ruling 497/2019: Portuguese Citizenship

This judgement was issued under a constitutional review applied to a concrete case. It concerned Article 6 § 1, d) of Act no. 37/81, the Nationality Law (version of 2015), according to which, in case of naturalization, the applicant cannot have been convicted of a crime punishable by a penalty of up to three or more years of imprisonment. The applicant in question had been given a one-year suspended sentence for robbery, which is punishable by up to eight years of imprisonment.

Meanwhile, this rule was modified in a way that would allow the applicant to obtain Portuguese citizenship. But since the citizenship acquisition takes effect from the moment it is bestowed onwards, the PCC deemed it necessary to analyze this matter.

The PCC emphasized that the right to citizenship has a fundamental nature (it is enshrined in Article 26 § 1 of the Portuguese Constitution) comprised of not only the right to retain it, but also the right to acquire it when legal conditions are met. Therefore, these requirements must be adequate, necessary, and proportional, ensuring the assessment of the applicant's bond to the Portuguese community. The imposition of criteria unrelated to this evaluation shall be considered disproportional.

In this case, the applicant came from a Portuguese-speaking country, had been living in Portugal since he was a minor, and had completed here at least one cycle of education. He was convicted to a very light sentence, and the court even determined that this conviction should not be transcribed to his criminal record.

The PCC also noted that suspended sentences are limited to reduced penalties (related to petty and average criminality) and they can only be bestowed when the offender's life circumstances and behavior (before and after the crime), as well as the events surrounding the crime, make it possible to conclude that the mere reproach and threat of imprisonment are sufficient. The requirements to prevent the sentence's transcription to the offender's criminal record are even narrower.
Hence, Article 6 § 1, d), by imposing a condition merely based on abstract penalties, prevents the consideration of factors that objectively reflect the offender's bond to the Portuguese community. Therefore, there is a breach of Articles 26 § 1 and 18 § 2 of the Portuguese Constitution, since this is not a necessary imposition, as the access to Portuguese citizenship could lie on less burdensome requirements.

[13] The PCC considered, furthermore, that the demand for a clearer and more precise regime is in line with the requirements established in the EUCJ and ECtHR's jurisprudence.

By thwarting the weighting of circumstances that allowed for a lighter sentence, the provision at hand also infringes Article 30 § 4 of the Portuguese Constitution, according to which no conviction shall entail, as a necessary effect, the loss of any civil, professional, or political rights.

4. Ruling 394/19: Dismissal of paternity proceedings

Articles 1873 and 1817 § 1 of the Civil Code rule that a claim for the establishment of paternity may be brought at any time until the child reaches the age of majority.[14] However, the right to seek paternity recognition by judicial decision lapses ten years after the person has attained the age of majority.[15]

Last year, and in dissonance with previous constitutional jurisprudence, 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 protection of the interests pertaining to the investigating party should not be limited, and that, even if it were allowed, such a restriction was not justified due to the lack of proportionality among the various conflicting interests.[16]

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'.[17]

Recently, on Ruling 394/19, the Plenary of the PCC ruled that the imposition of a ten-year limit, present in Articles 1873 and 1817 § 1 of the Civil Code, was not unconstitutional.[18] The Court held that 'the constitutional problem raised by the legal expiry periods for the exercise of the right of action does not lie in the possibility of its existence but in the restrictive intensity of its effects. It is accepted, therefore, that the state, through the legislator, can establish expiry periods for the exercise of the right of action in general, which means setting (temporal) limits to effective judicial protection'.[19]

In his dissenting opinion, Manuel da Costa Andrade, the president of the PCC, sustained that 'from the point of view of the values and interests at stake, the filing of the paternity investigation action always arrives at the right time and in good time. Never too soon, never too late. (…) It is thus clear that personal identity, a very personal value of eminent dignity that pontificates in the teleological horizon of the right to the recognition of paternity, does not see its axiological density and weight progressively faded and reduced over time'.

IV. LOOKING AHEAD

In September and October 2020, there will be elections in the autonomous regions of Azores and Madeira. In 2020, the Parliament will debate the following issues: (a) legalization of euthanasia; (b) legalization of cannabis; (c) legalization of prostitution; (d) prohibition of bullfighting; (e) policies to increase fertility rates; (f) policies to attract citizens to rural land in the desertified areas of Portugal; (g) measures to improve the fight against corruption; and (h) legislation on shared parenting (shared physical custody) after separation and divorce.

V. FURTHER READING

Benedita Menezes Queiroz, 'The Impact of EURODAC in EU Migration Law: The Era of Crimmigration?' (2019), III (1) *Market and Competition Law Review* 157

Catarina Santos Botelho, 'Constitutional narcissism on the couch of psychoanalysis: Constitutional unamendability in Portugal and Spain' (2019), 21 (3) EJLR 346

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 Giuseppe Franco Ferrari (ed.), *Judicial Cosmopolitanism – The Use of Foreign Law in Contemporary Constitutional System*s (Brill/Nijhoff, 2019)

Gonçalo Almeida Ribeiro, *The Decline of Private Law – A Philosophical History of Liberal Legalism* (Hart Publishing, 2019)

João Cancela and Marta Vicente, *Portugal Talks – Abstenção e participação eleitoral em Portugal: diagnóstico e hipóteses de reforma* (Portugal Talks, 2019)

[14] Act no. 14/2009, of 1 April 2009, which amended the text of Article 1817 § 1 to its current version.

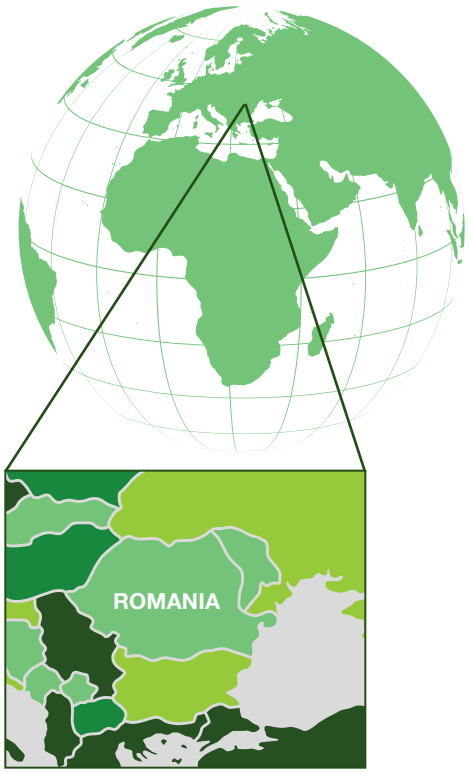
[15] Article 1817 § 3 of the Civil Code adds a supplementary three-year period, in addition to the general ten-year time limit, within which paternity proceedings can be filed.

[16] Ruling 488/2018, of 4 October 2018 < http://www.tribunalconstitucional.pt/tc/acordaos/20180488.html > accessed January 2020. See Catarina Santos Botelho, 'Portugal', in Richard Albert, David Landau, Pietro Faraguna & Simon Drugda (eds.), *2018 Global Review of Constitutional Law*, I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2019, pp. 243-247, pp. 246-247.

[17] < http://www.tribunalconstitucional.pt/tc/en/tclaw.html > accessed January 2020.

[18] Ruling no. 394/19, of 3 March 2019 < http://www.tribunalconstitucional.pt/tc/acordaos/20190394.html > accessed January 2020.

[19] Par. 2.2.3.



Romania

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I. INTRODUCTION

Some of the constitutional developments of 2019 continued the trends started in the previous two years. However, there were also new issues, especially in electoral matters and on constitutional amendment initiatives. The involvement of the Constitutional Court in political and judicial matters was also more obvious, whereas the number of fundamental rights-based constitutional decisions decreased.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In Romania, 2019 was an electoral year important for three reasons.

First, the elections for the European Parliament, held in May 2019, brought old habits and new developments into the Romanian political and constitutional landscape. A novelty was that a referendum was convened simultaneously with the elections by the President of Romania in accordance with Article 90 of the Constitution (see below). Also, as a consequence of the difficulties that occurred during voting outside the country in November 2014, the authorities claimed that the number of polling stations was increased and similar obstacles would be avoided. However, this was not the case. Due to the high turnout, including abroad, the number of polling stations proved to be insufficient as did the newly introduced system of voting (each voter had to be first checked in an electronic device to avoid multiple votes, but this process was slowed down by the insufficient number of devices). As a consequence, as before, thousands of voters were prevented from exercising their fundamental right.

Second, the *consultative referendum* organised on the same day as the European elections, also known as "the referendum for the judiciary", had two questions: "Do you agree with the prohibition of amnesty and pardon for corruption offences?" and "Do you agree with the prohibition of the adoption of Emergency Government Ordinances in the field of criminal offences, criminal penalties and judicial organisation and with the extension of the right to challenge Government Ordinances at the Constitutional Court?". The referendum was declared valid by meeting the legal turnout requirement of over 30% of the total number of registered voters. Both questions were answered "yes" with an overwhelming percentage of over 80% of the voters. As a result, two constitutional amendment initiatives were drafted (see below for the decisions of the Constitutional Court) and are now in the parliamentary procedure.

Third, in November 2019, presidential elections took place. Following major changes in electoral legislation (including the introduction of vote by mail and the extension of voting to three days for voters abroad), there were no more incidents related to the exercise of the right to vote. Acting President Klaus Iohannis was re-elected with a comfortable majority.

This strong endorsement of pro-European and progressive values highlighted the existing gap between an electorate that has become accustomed to require action, results and efficiency from its political representation and some of the political forces over-represented in national and local public authorities.

Against this political background, the coalition supporting the Government split on August 26, and the Prime Minister had to submit a new reshuffle of the Government. This time, however, the reshuffle could no longer be considered a mere negotiation between the two heads of the executive power (PM and President, with the President limited to the role of rubber-stamping suggestions coming from the PM) but, according to the Constitution (Article 85), it had to be endorsed by Parliament. In an attempt to avoid parliamentary scrutiny, being well aware of the fact that in at least one of the Houses the Government no longer enjoyed support from the parliamentary majority, the PM decided to make a bold move and challenged the President before the Constitutional Court for not appointing *ad interim* ministers and refusing to provide legal reasons for his inaction (according to the precedent established in Decision no. 875/2018). In its Decision no. 504/2019, the Constitutional Court ruled that the President was obliged to appoint the *ad interim* ministers suggested by the PM as he had no discretionary powers in that respect, but the PM was also obliged to submit the new list of ministers for Parliament's approval because a change in the political composition of Government had occurred. In a separate opinion, two judges found that the criteria for the identification of a legal conflict of a constitutional nature were not met in this specific case as the apparent blockage claimed by the PM could easily be solved if the parliamentary procedure for the reshuffle of a Government with a new political composition had been followed from the beginning.

However, none of the above happened because soon after, on October 10, the Government was dismissed through a vote of no-confidence. A month later (on November 4), a minority Government was invested by Parliament. With fragile and contextual support in Parliament, the new Government was reduced to governing via emergency ordinances and the special legislative procedure of engaging its responsibility on various reforms. Most of the measures thus adopted were contested in front of the Constitutional Court and some of the emergency ordinances were invalidated up front by Parliament. The outcomes of these developments will only be seen in 2020.

III. OTHER CONSTITUTIONAL CASES

1. Legal Effects of Constitutional Court's Decisions

For a few years now, the Constitutional Court has given decisions that resemble a scalpel cut: either they tend to interfere with the tiny details of the judicial cases that bring the constitutionality issues in front of the Constitutional Court, generally contradicting the interpretation given by ordinary courts to the relevant laws, or they are meant for a specific purpose and, in order to achieve its target, the jurisdiction feels the need to be very explicit as to the required legal effect of its own decisions.

Falling into the first category are Decision no. 874/2018, published in January 2019, and Decision no. 220/2019. Both cases brought before the Constitutional Court dealt with issues where the judicial system took a different view from the Constitutional Court with regard to specific legal provisions. In both situations, the procedural details may look insignificant and the cases at hand may seem pernicious, but the impact of the decisions adopted by the Constitutional Court is huge because, on the one hand, the Court expands its jurisdiction and interferes with specific cases ongoing before ordinary courts, changing their outcome, and on the other hand, the final result is the retroactivity of relevant laws. In both situations, the Constitutional Court acted rather as a court of cassation without being established as such by the Constitution.

Thus, ordinary courts took the view that the new Civil Procedure Code said that cases that had not been finally ruled upon should follow the previous civil procedure, while the Constitutional Court considered that new civil procedural rules should be applied immediately, including to cases which were ongoing when the new code came into force. Because the apex court issued a general interpretation of the new Code that merely reproduced the relevant legal provision, saying that the new rules would only apply to cases started under the new Code, the Constitutional Court decided that not only was the provision of the Code unconstitutional but also the interpretation provided by the supreme court of the land (Decision no. 874/2018). Everything would be fine if the interpretation provided by the Constitutional Court was not, in fact, retroactive and if the Constitutional Court and not the High Court of Cassation and Justice (HCCJ) had the jurisdiction to unify the case law of regular courts. But on both counts, the legal and constitutional answer is negative.

Similarly, in Decision no. 220/2019, the Constitutional Court observed that some provisions of the new Criminal Procedure Code had been invalidated in its previous Decision no. 540/2016. But instead of declaring that any attempt to validate those provisions should be void as a consequence of its previous decision, the Court resorted to expanding retroactively the effects of its Decision no. 540/2016 to final Court decisions pronounced 30 days before their publication in the *Official Gazette,* because 30 days is the time limit for the revision of such Court decisions. The dissident opinion signed by one judge pointed to this retroactive application of Decision no. 540/2016, but to no effect.

The second category of decisions can again be divided into two subcategories: decisions dealing with laws that approve delegated legislation and decisions dealing with the effects of previous decisions that have invalidated laws.

The case law of the Constitutional Court with regard to the total invalidation of laws for extrinsic, i.e., formal/procedural, reasons has been constant over time. A law which has been found entirely unconstitutional in an *a priori* control for the infringement of procedural requirements ceases to exist as a legal act and Parliament is obliged to start a new legislative process from the beginning, starting with a new legislative initiative. This constant case law applies to all types

of laws, including those approving emergency ordinances issued by Government, and it has been validated also in Decision no. 214/2019, where the Court ruled that "Parliament has to cease any legislative process in this matter and, in case it will initiate a new legislative process, it has to comply with those provided by this decision". However, in Decision no. 412/2019, the Court gave a different solution without justifying this reversal of jurisprudence. Namely, only in this case did the Constitutional Court rule so that the delegated legislation (emergency ordinance) would survive, although the law meant to approve it was wholly invalidated in an *a priori* control for extrinsic reasons. To this end, the Court declared that, in the specific case of laws approving delegated legislation, their total invalidation for extrinsic reasons requires the resumption of the legislative procedure only from the parliamentary phase and not from the stage of the initiative because, in this case, the initiative is precisely the delegated legislation. While the reasoning of the Court may be seducing, it would have been also convincing if it were duly motivated, particularly against a constant case law ruling to the contrary. Two judges noticed this reversal of jurisprudence in a separate opinion.

Finally, in order to achieve specific targets, the Constitutional Court modulates the effects of its own decisions in a manner which obliges the legislator to adopt specific laws, practically as drafted by the Court. A telling example is Decision no. 466/2019, which concerns the new Criminal Code. Thus, in Decision nos. 405/2016 and 368/2017, the Constitutional Court invalidated some provisions of the new Criminal Code. The legislator had attempted to adopt revised versions of the concerned provisions, but they were found unconstitutional in 2018. This offered the Court the opportunity to elaborate on the effects of its own decisions in the following terms: "if in the case of a re-examination of a law required by the President of Romania the Parliament retains its full margin of appreciation, in the case of a re-examination of a law imposed by an invalidation ruled by the Constitutional Court the margin of appreciation of the Parliament is limited, because the legislator is obliged to re-analyse the normative substance of the law exclusively in order to make it compliant with the decision of the Court. […] Abandoning the legislative procedure is not an option available because it equates with the infringement of the constitutional obligation of Parliament to comply with the requirements of a previous decision of the Constitutional Court". In other words, in this specific situation, the legislator should no longer follow the established case law, according to which a total invalidation of a law for extrinsic reasons has to put an end to the ongoing legislative process and may open the possibility of a fresh start, but the legislator necessarily has to adopt new legislation as instructed by the Constitutional Court. Such a modulation of the effects of decisions risks transforming the Constitutional Court from a negative into a positive legislator.

2. Quality of the Law

One of the major trends of the constitutional case law in 2019 was the Court's focus on the quality of the law from a formal point of view ("external" or "extrinsic" unconstitutionality). All components of the legislative procedure were examined, and the Court often decided the unconstitutionality only on grounds of violating these rules.

In Decision no. 145/2019, the Court declared a law unconstitutional in its entirety on grounds of infringement of procedural rules. Thus, the law changing some public order and safety legislation was adopted without the advisory opinion of the Supreme Council of National Defence, which the Court considered as a compulsory step according to the law. Thus, the Constitutional Court argued that an essential element of the legislative procedure in the field of national security was missing and so the law was unconstitutional as a whole. Moreover, the Court found another unconstitutionality ground, as the delay for silent adoption of the law had been exceeded, in breach of Article 75(2) of the Constitution. The absence of the assessment of the economic and social impact of the law and of the advisory opinion of the Economic and Social Council, compulsory according to the law, were also reasons of unconstitutionality in Decision no. 139/2019, in which the Court invoked the breach of the principle of legality (Article 1(3) of the Constitution).

In the more controversial Decision no. 137/2019, in the context of judicial review, the Court assessed the role of the European supervision mechanism established by the European Commission (Cooperation and Verification Mechanism – hereinafter CVM) in 2006. The object of the decision was the law approving the Emergency Governmental Ordinance (EGO), which made operational the new – and controversial[1] – Special Section for Investigating Magistrates from the General Prosecutor's Office. The authors of the unconstitutionality complaint argued that by approving the ordinance, the law was not taking into account the 2018 CVM Report, the Venice Commission advisory opinion and the Ad-hoc Report on Romania of the GRECO and thus was in breach of several articles of the Constitution especially related to the rule of law principle (Articles 1(4) and (5)) and Romania's obligations as an EU member state (Article 148(2)). The Constitutional Court argued that the European law act that created the CVM – Decision 2006/928/CE – does not provide concrete obligations for Romania (except for the one that required the creation of an integrity agency), but only draws guidelines with a wide, general character and with a mainly political value. Therefore, said the Court, such an act has no constitutional relevance for Romania and neither have the reports issued by the European Commission as part of the CVM. Consequently, the Court did not consider that the law was in breach of any constitutional provision.

[1] Our Reports on 2017 and 2018 (http://www.iconnectblog.com/2019/10/now-available-the-2018-global-review-of-constitutional-law, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3215613).

3. Decisions on Constitutional Amendment Initiatives

2019 was the year when three constitutional amendment initiatives reached the table of the Constitutional Court for initial review. According to the Constitution (Article 146 (a)), the review of constitutional amendment by the Constitutional Court initiatives is mandatory.

The first one was a popular initiative, which was exercised according to Article 150(1) of the Constitution (by over 500.000 voters, belonging to at least half of the counties, and in each county must be recorded at least 20.000 signatures). The initiative was the result of the anti-corruption campaign of some of the opposition parties and aimed to prohibit persons that were convicted by final decisions to be eligible for public office. Thus, the constitutional text on the "right to be elected" (or, more properly put, the right to run for elected public offices) would change as follows: "There cannot be elected in the local administration organs, in the Chamber of Deputies, in the Senate and in the office of the President of Romania, citizens convicted of intentional crimes to freedom depriving penalties, until the occurrence of a situation that removes the consequences of the conviction". By its Decision no. 222/2019, the Constitutional Court assessed, on the one hand, the formal conditions of the initiative (number of signatures and their geographical distribution) and, on the other hand, the conformity with the substantive limits of the amendment, set forth by Article 152 of the Constitution. Thus, more specifically, the Court had to rule if the initiative was a proportionate and justified limitation to the right to run for office as a fundamental political right. The Court stated that the proposed change was a legitimate one, as it aimed to enhance "the morality, integrity and honesty that must be proven by any person who seeks access to public offices". The proportionality comes from the fact that the prohibition was not intended to be a permanent one but to last only until one of the situations that remove the consequences of the conviction occurs. In its decision, the Court referred to the standards of the European Court of Human Rights in the field of electoral rights and to the Venice Commission's Code of Good Practices on Elections as well as to some of the other European states' legislation.

The second and third constitutional amendment initiatives were introduced almost simultaneously by the parliamentary political parties as a result of the referendum convened by the President and organised on 26 May 2019 (see point II.2. of this report). They included the proposal that made the object of the popular initiative (regarding the convicted persons' access to public offices) and additional amendments that originated in the text of the questions asked at the referendum. Thus, for instance, the first parliamentary initiatives proposed to limit the power of the President to grant pardons by removing from the potential beneficiaries the persons convicted for corruption offences. The Constitutional Court ruled that such a proposal would infringe the limits of constitutional amendment prescribed by the Constitution, because "its effects affect the principle of equality, a guarantee of fundamental rights and, indirectly, the human dignity as a source of fundamental rights and freedoms". In the Court's view (Decision no. 465/2019), the removal of the power of the President to grant pardons to persons convicted for corruption would place those persons in a position of inferiority, "without a reasonable and objective justification" and would amount to discrimination, violating thus the rights-based limit of constitutional amendment prescribed by Article 152(2) of the Constitution. The same arguments were used by the Court when rejecting the amendment from the third proposal, to prohibit collective amnesty or pardon of persons convicted for corruption (Decision no. 464/2019).

Another amendment proposed by these parliamentary initiatives regarded the scope and the constitutionality review of Government Ordinances. These acts of delegated legislation, especially the Emergency Government Ordinances (EGO) have become very frequent in the last decade, and their excessive use has been criticised by the CVM reports, especially in sensitive fields such as the judiciary and criminal law. As regards the scope of the amendment – to prohibit the adoption of EGOs in the fields of criminal law and of judicial organisation – the Constitutional Court considered that there was no breach of the constitutional amendment limits. Nevertheless, the same initiatives aimed at introducing a direct form of constitutional review of the Government Ordinances, "at the request of the President, of a number of 50 deputies and 25 senators, of the High Court of Cassation and Justice and of the Ombudsman". In this case, although the Court did not have, in principle, any objection to such a change and stated that it did not breach the limits of the constitutional amendment, it made some remarks regarding the wording of the proposed text. Thus, the Court emphasized that, especially given the urgent nature of EGOs, the review should be expressly qualified as an *a posteriori* one, i.e., to be exercised after the ordinances have entered into force.

Following the decisions of the Constitutional Court, all three constitutional amendment initiatives are currently at the Parliament to follow the procedure established by the Constitution.

4. Legal Paradigms

Continuing the trend started in 2018, when it arbitrarily expanded its jurisdiction from normative acts and legal conflicts of constitutional nature to legal paradigms, in 2019 the Constitutional Court ruled upon two most interesting cases dealing directly with the organisation and functioning of the judicial system in ways and manners which not only affected the efficiency of the fight against corruption but also challenged the core function of the judicial system of imparting justice to citizens.

In the first one (Decision no. 26/2019), the Court discovered a legal conflict of constitutional nature between the Public Ministry (General Prosecutor) and Parliament, upon notification from the President of the House of Deputies in the "legal paradigm" that made possible for courts and prosecutors to be bound not only by laws but also by other legal documents such as the two secret protocols of cooperation concluded between an intelligence service and the Public Ministry with regard to the standard procedure to be followed in case a judicial mandate for the

interception of communication needed to be implemented with support from that intelligence service. Based on a "seeming resemblance" of such a protocol with an administrative act, the Court inferred that the said intelligence service had been granted the power to interfere with judicial cases and the Public Ministry had overstepped the legislative powers of Parliament. In two dissident opinions, one, and respectively two other judges found that the criteria for the identification of a legal conflict of constitutional nature were not met in this specific case, while in a concurring opinion, one judge considered that the two protocols examined by the Court were different in nature as they were based on different acts issued by the Supreme Council for National Defence.

In the second one (Decision no. 417/2019), upon notification from the same President of the House of Deputies, the Court discovered a legal conflict of constitutional nature between Parliament and the High Court of Cassation and Justice (HCCJ) in the "legal paradigm" that consisted in the fact that between 2003 and 2019, the HCCJ considered that all judges who ruled upon criminal cases at the level of the HCCJ were specialised *ope legis* to judge corruption cases. Indeed, Law no. 78/2000 for the prevention, discovery and sanctioning of corruption offences requires that corruption cases be dealt with by panels of judges "specialised in ruling upon corruption". Numerous revisions of this law as well as the general law on judicial organisation, and intensive training of both incoming and sitting magistrates in the substantive matter of corruption offences made possible the interpretation made by all courts in Romania, not just the supreme court of the land, that all judges that have been specialised in criminal cases and who can sit in panels judging criminal cases are *ope legis* specialised in corruption cases as well. Despite this factual reality, the Constitutional Court not only found a new "legal paradigm" that it considered unconstitutional without mentioning a reason but it also detailed the legal effects that its own decision should trigger, namely that all final court decisions that have been ruled between 2003 and 2019 by panels which were not specialised should be considered null and void; as a consequence, such cases should be reopened and legal situations that had been considered settled now had to be put to final trial again. Just as in 2018 with Decision no. 685/2018 dealing with the "legal paradigm" of the five-judge panels at the HCCJ, Decision no. 417/2019 severely affected the principle of *res judicata.* This decision was adopted with a majority of five judges; the four others signed dissident opinions. Two judges signed a dissident opinion explaining why judges specialised in criminal cases can be considered specialised in corruption cases as well. Two other judges signed a dissident opinion explaining why legal paradigms are not part and parcel of the jurisdiction of the Constitutional Court and the situation addressed in this decision does not fulfill the criteria established in the case law of the Constitutional Court of Romania for the identification of a legal conflict of constitutional nature.

5. Highlights of the Rights-based Review

In 2019, rights-based review was not as rich as before. The Constitutional Court seemed more preoccupied to correct extrinsic unconstitutionality and to rule on conflicts between authorities.

Among the most frequently invoked right in the Court's case law in general is the right to a fair trial. Decision no. 87/2019 concerned an article of the Code of Criminal Procedure regarding the absolute nullity of procedural acts for absence of legal counsel. Thus, Article 90 c) of the Code of Criminal Procedure set forth that legal counsel is compulsory during the preliminary chamber procedure (i.e., when the judge decides on provisional measures, including pre-trial detention) and during trial only in cases where the law provides life imprisonment or a prison sentence of more than five years. In the absence of such legal counsel, the nullity of procedural acts can be invoked (even when the parties are present, but without legal assistance). Article 91(1) of the Code of Criminal Procedure provides that in these cases and when the accused did not choose his/her own lawyer, the court must ensure the presence of an *ex officio* counsel.

The Constitutional Court noticed that the institution of a delay in which to invoke the nullity of procedural acts on the grounds of absence of legal counsel is depriving the right to defence of its effectiveness because the law also creates an imperative obligation of legal assistance. Therefore, the fact that the nullity can only be invoked within a certain delay "would mean that the right to defence has no actual substance". As a consequence, the dispositions of the Code that provided that delay (Articles 281(4)(a) and (1)(f)) were declared unconstitutional for infringing the right to a fair trial.

The right of property of legal persons was the subject of Decision no. 382/2019. The Court reminded that the right of property is not an absolute one, but that its restrictions cannot have as a consequence the suppression of the right itself. The provision of a law that automatically transferred the property of goods that remained in the patrimony of a legal person, after its radiation from the commercial records, within the private property of the state, was declared unconstitutional for creating an imbalance between the interests at stake.

In the field of social and economic rights, the Court analysed the provisions of the law on national education regarding public transport of pupils, according to which the children who are not schooled in their home commune/town have the right to reimbursement of their travel expenses only if they are in possession of a travel subscription. However, such travel subscriptions/cards are not available in all cases; therefore, the imposition of such a condition would amount to discrimination and is therefore unconstitutional (Decision no. 657/2019).

In the same field of social and economic rights, the Court decided that the restriction of the right of military employees to a leave of absence to care for an ill child, in the sense that this right is granted only for a shorter period than other employees, amounts to a violation of the constitutional right to health care of the child and to a discrimination. The Court also invoked the dispositions of Article 20 of the Constitution, Articles 4 and 24 of the International Convention on the Rights

of the Child and Article 14 of the European Convention on Human Rights (Decision no. 323/2019).

IV. LOOKING AHEAD

Almost all major decisions adopted by the Government that were voted towards the end of 2019 have been contested in front of the Constitutional Court, and some of them have already been invalidated based on formal grounds.

2020 will be an important electoral year. First, local elections are expected in the spring. Secondly, following the installation of the minority Government in November 2019, the lack of support for its policies by the Social Democratic Party-dominated Parliament led to the idea of organizing early general elections (normally due in November 2020). The early elections procedure provided by the Constitution is a cumbersome one, involving the dismissal of the Government, the rejection of two new Governments by Parliament in a delay of 60 days and the dissolution of the Parliament by the President. It remains to be seen if all the conditions for this procedure, which has never been used before, will be met in the first part of 2020.

V. FURTHER READING

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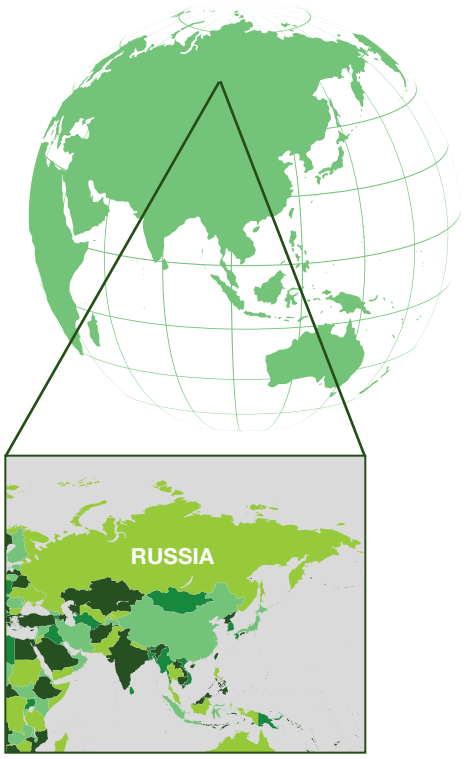

Russia

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I. INTRODUCTION

During 2019, as in previous years, Russia was the center of attention in the international media for alleged interference in a number of important elections, including those of the European Parliament. These international geo-political speculations were intertwined with the narrative concerning the so-called 'illiberal democracies', amongst which Russia is counted by some observers. The interest in these issues is linked to the global development of populism, which has found inspiration in some of President Putin's speeches (including the interview published in the *Financial Times* on 28 June 2019 in which he openly challenged the continuing validity of liberal ideas) and in those of the main architect of Russia's 'sovereign democracy' doctrine, Vladislav Surkov. In an interview with *Nezavisimaya Gazeta* on 11 February 2019, Surkov legitimized Putin's continuity in power as justified on the grounds of the 'deep' characteristics of the Russian people. At the same time, he acknowledged the attraction of 'Putinism' outside Russia.

Russian relations with European organizations experienced both light and dark moments in 2019. While participation of the Russian delegation in the Parliamentary Assembly of the Council of Europe was reinstated by the Resolution of 26 June 2019, relations with the European Union were somewhat more controversial. Two Resolutions of the European Parliament (one on 12 March 2019 – 'On the state of EU-Russia political relations' and the other on 19 September 2019 – 'On the importance of European memory for the future of Europe', of which the latter equates Nazism with Stalinism) – have provoked in Russia an acute resentment of Western 'disinformation'. It is claimed that European institutions have misrepresented a series of historical events considered by Russians as central to their sense of national identity; e.g., the victory over Nazi fascism during the 'great patriotic war' (see in particular the reaction of the speakers of the federal Parliament in their meeting with President Putin on 24 December 2019).

The trends in constitutional jurisprudence in 2019 did not differ greatly from previous years, although there were some attempts to mitigate the restrictions on the freedoms of assembly, political participation and the media. However, the Constitutional Court remained deferential towards authority, continuing a trend of consistent subordination that dates back to the entry into force of the current Constitution. This subordination was further reinforced by legislative reforms that have systematically reduced the autonomy of judges over the years. The Russian CC has never been an independent actor and does not deal with politically sensitive issues. However, it plays a significant role in the protection of social and economic rights, which are quite fragile in the current political context.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

During 2019, three legislative packages restricting the freedom of the Internet were adopted. They penalise defamation of the authorities and the nation, target fake-news

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sources and, lastly, introduce the so-called 'sovereign Internet'. In the first two packages (Acts of 18 March 2019), there was a modification of the federal Act 'On Information, on Information Technologies and on Information Protection' and of the Code on administrative offenses. In the third legislative package (Acts of 1 May 2019) the Act 'On Communications' was modified along with the Act 'On information ...'. The prevailing logic of the three legislative packages is clear; the Kremlin intends to increase its control of the web particularly in the light of significant upcoming electoral events (the Duma in 2021 and the Russian presidency in 2024).

With regard to the first package, the changes equate the dissemination of content that 'insults the state, society or authorities' with acts of minor vandalism, thus extending the concept of a 'public place' to include the virtual space of the web. With regard to the second package, 'misinformation' is considered a sort of abuse of free speech; therefore, those who disseminate as true false information that is of public interest and which could have serious consequences for individual health or social stability are punished. In both cases, the state communications watchdog *Roskomnadzor* (Federal Communications Supervision Service, introduced in 2008) will play an important role. At its request, Internet Service Providers have a legal obligation to block websites where prohibited information was published. The criteria for establishing whether the information or declarations are forbidden are vague, thus relying on the discretion of the prosecutor in establishing the adequacy, accuracy and thus legality of online content.

The power of the *Roskomnadzor* and of other public bodies is even greater in the third package, which reforms the way in which the current global Internet access web infrastructure and electronic communication services work. The overall aim is to build an autonomous national web network (RU.NET). Internet providers will be obliged to install devices to filter traffic, and the *Roskomnadzor* will have unparalleled powers, including exclusive control of the 'off switch' to deploy as it sees fit. The official justification for these measures is to avoid interruptions of network services by foreign servers and/or cyber attacks originating mainly from the USA (thus providing for the progressive disconnection of service providers in Russia from foreign servers and their reconnection to a new national domain system).

The Russian doctrine of constitutional law is almost entirely silent on concerns that preoccupy international legal doctrine, such as restrictions on the freedoms of association, assembly and manifestation of thought (Internet censorship being the most recent example). The main constitutional law journals continue to focus on the issues of 'constitutional values' and 'constitutional culture', topics that seem to echo similar debates occurring in various European countries. In Russia, a conservative reading of constitutional values predominates and sits well with the persistent anti-globalist and anti-liberal rhetoric. However, there are some progressive ideas under discussion, such as those that touch upon election regulations. There is a widespread belief in the need to adopt a single election code to replace the conglomeration of rules that regulate far too minutely every single aspect of the registration of candidates, parties and associations. The excessive detail and the continuous modification of the electoral legislation (a phenomenon noticed since the beginning of the post-communist period) are a sign of a precise political intent: on the one hand, to control elections and parties as much as possible (in this sense, for example, the experiment with electronic voting for the Moscow Duma), and on the other, to continually change the rules to find the most effective combinations to achieve the desired result. This is how one might read the recent proposals to strengthen the uninominal quota to elect the Duma in order to remedy discontent and apathy caused by the pro-Kremlin party, United Russia. Another approach saw it presenting its representatives as independent candidates in the September 2019 Moscow Duma elections. Both from the start and during the election campaign for the holding of these elections, the most heated public protests occurred in response to the failure to register a set of opposition candidates. The mechanisms of presentation of candidates at each level are overly complex to the point of arousing criticism by international election monitoring bodies.

The protests for 'fair elections', which ramped up in the summer of 2019 on the initiative of the candidates of the 'non-systemic' opposition who had been refused registration mainly for formal reasons such as the collection of signatures in their support (since legislation exempts from the collection of signatures only the candidates of parties already represented in the legislative bodies), were added in the last year to other types of protests (for pension reform, for corruption, for environmental reasons, etc.). These have also been treated by the police with extreme harshness. Although these protests are a cause for concern for the authorities, they are unlikely to lead to systemic political changes and only a few cosmetic and opportunistic changes are expected.

December 2019 saw a further change to the media law that now requires individuals to declare funding received from abroad. This change brings the regulations in line with the same requirement established in previous years for NGOs. In particular, such an amendment designates individuals who communicate with foreign media outlets as foreign agents. The amendment allows Russian authorities to investigate citizens for any information they spread to international media outlets. This provision is also part of the trend that considers street demonstrations and protests no longer an internal product of the extra-parliamentary 'liberal' opposition but instead a reflection of external interference by the West. Such is the perceived interference that a special parliamentary commission of inquiry was established.

III. CONSTITUTIONAL CASES

In 2019, the Constitutional Court issued a total of 3374 decisions: 41 judgments and 3333 ordinances. The cases concerned political rights (freedom of peaceful assembly and freedom of the media), social rights (employment, pensions, including military pensions) and economic rights. The majority of the applications were launched by citizens.

Other applicants included courts of general jurisdiction and arbitration courts, commercial entities and a municipality. Applicants mostly challenged federal laws (especially the provisions of the federal codified statutes: the Tax Code, the Labor Code, the Civil Code, etc.). Only in a handful of cases did the Court scrutinize the laws of subnational units. In eighteen judgements, the disputed provisions were declared completely or partially unconstitutional.

1. Review of the constitutionality of Article 19.1 of the Act on Mass Media

In January 2019, the Constitutional Court reviewed the constitutionality of Article 19.1 of the Act on Mass Media ('The Mass Media Act'). This article, adopted as an amendment to the Mass Media Act in 2014, provides that those Russian citizens who hold a citizenship of another country cannot own more than 20 percent of shares in Russian mass media companies. As a result of this amendment, Mr. Finkelstein, a Russian citizen who held a citizenship of the Netherlands, forfeited the right to participate in the management of radio station Chance LLC, in which he owned 49 percent of shares. Specifically, he could not contest the unilateral decision of the second shareholder to take over the radio's broadcasting license. After a series of appeals, the matter came before the Constitutional Court. The Court recognized that, although by operation of law, Mr. Finkelstein's shareholding in the company was reduced to 20 percent, he did not entirely forfeit his right to participate in the management of the company and avail of any other remedies and legal protections provided under applicable laws. The failure to acknowledge the rights attached to Mr. Finkelstein's reduced share in the company is in violation of several articles of the Constitution, namely Articles 19.1 (equal protection under laws), 34.1, 35.1, 35.2 (property rights and protection of private property), 55.3 (limitations on constitutional rights and freedoms) and 62.2 (citizenship).

However, the Constitutional Court, by limiting its decision to the issue of rights and legal protections of shareholders, failed to address the concerns of those who opposed the law due to its negative impacts on the independence of the media. In this regard, in a separate opinion attached to the judgment, Justice Konstantin Aranovsky offers useful guidance regarding the broader implications of the Mass Media Act amendments for constitutional rights and freedoms. Particularly, Justice Aranovsky argued that the amendments to the Act were unconstitutional because they imposed unreasonable limitations on the freedom of expression and information under Article 29 of the Constitution. Further, he pointed out that any constitutional rights, freedoms and guarantees can be limited only to the extent necessary to protect the fundamental foundations of the constitutional system: morality, health, rights and legitimate interests of persons and purposes of national defense and security (the constitutional doctrine refers to this list contained in Article 55.3 of the Constitution as 'constitutional values'). However, the evidence provided by the government failed to demonstrate an immediate, potential or existing threat to the constitutional values. In other words, the contested article of the Mass Media Act limited access to information without any reasonable justification.

2. Review of the constitutionality of some provisions of the Act on Public Assemblies, Rallies, Demonstrations, Marches and Pickets

The Act on Public Assemblies, Rallies, Demonstrations, Marches and Pickets ('The Act on Public Assemblies') was adopted in 2004 to regulate the exercise of the constitutional right to peaceful assembly. According to Article 5.4.5 of this Act, organizers of public events − assemblies, rallies, demonstrations, marches and pickets − must ensure public order and safety during these events. To comply with public safety requirements, organizers must cooperate with local law enforcement authorities and local government. Article 7 of the Act on Public Assemblies requires that an organizer of a public event notify local authorities about it and explain how he or she intends to ensure public safety. In August 2018, Mr. Teterin notified the Irkutsk city administration that he intended to hold a small public rally and that the city police and emergency services would be responsible for public safety during the event. Shortly after the notice was filed, city authorities informed Mr. Teterin that he had failed to comply with the requirements of the Act on Public Assemblies because references to local law enforcement and ambulance services were insufficient to meet public safety requirements.

The Constitutional Court found that this decision of the Irkutsk city authorities violated several articles of the Constitution. Particularly, the Court held that local authorities could not limit the constitutional right to peaceful assembly by placing upon organizers of public events an obligation to ensure public order and safety. Moreover, the Court held that if the local authorities were not satisfied with the public safety information contained in the notice, they were required to cooperate with the organizers to meet the safety requirements.

3. Review of the constitutionality of some provisions of the Act of the Komi Republic on Holding Public Events in the Komi Republic

In 2012, the legislator of the Komi Republic (a federal subject located in the western part of Russia) adopted an Act that regulates the exercise of the constitutional right to peaceful assembly. It prohibits holding public assemblies in the central square of the Republic's capital and also within a 50-meter radius of entrances to all state and municipal buildings of the Republic.

In the summer of 2017, Ms. Tereshonkova and Ms. Sedova notified local authorities that they intended to hold assemblies in two locations that fell under the ambit of the Act. Local authorities, referring to the legal prohibitions, refused to give their consent to the events. The applicants unsuccessfully contested these decisions in the lower courts. In November 2019, the Constitutional Court declared the aforementioned provisions of the Act of the Republic of Komi unconstitutional. First, it held that a general prohibition against the freedom of assembly in one of the central squares violated Section 11 (2) of the European Convention on Human Rights and Article 31 of the Constitution, which guar-

antee the right to peaceful assembly. The Court further acknowledged that the law of the Komi Republic placed unreasonable limitations on the constitutional rights and freedoms of citizens. As was mentioned above, Article 55.3 of the Constitution provides that constitutional rights and freedoms can be limited only to the extent that it is necessary to protect the foundations of the constitutional system: morality, health, rights and legitimate interests of other persons and to defend the country and ensure its national security. The Constitutional Court also noted that the legislator of the Komi Republic did not have jurisdiction to adopt laws that ban public assembly within a 50-meter radius of entrances to all state and municipal buildings of the Republic. This is because under Articles 72.1 (b) and 76.2 of the Constitution, the federal legislator has preemptive jurisdiction to adopt a list of locations where it is unsafe to hold a public assembly, and spaces near state and municipal buildings were not on the list.

4. Review of the constitutionality of some provisions of the Act on Countering Terrorism and of the Act on the Monetary Allowance and the Provision of Separate Payments to Military Personnel

In 2013, Mr. Ponkratov was deployed in a counterterrorist operation in the Chechen Republic and sustained serious injuries that led to a disability. He then received a disability allowance under the Act on Countering Terrorism and, following a rehabilitation period, resumed military service.

In 2017, the military medical board declared that, due to the disability, Mr. Ponkratov was not eligible for military service and he was fired from the Russian armed forces. Following the decision of the board, he applied for additional disability benefits, this time under the Act on the Monetary Allowance and the Provision of Separate Payments to Military Personnel ('The Monetary Allowance Act'). This Act provides for a disability payment for military veterans. However, the military commission and the lower courts concluded that Mr. Ponkratov's claim for disability benefits could not be satisfied due to the fact that he had already received analogous disability payments under the Act on Countering Terrorism.

In a rather concise decision, the Constitutional Court criticized the lower courts for failing to correctly interpret the purpose of the Act on Countering Terrorism. Particularly, the Court pointed out that by adopting this Act, the legislator, among other things, acknowledged that military personnel deployed in counterterrorism operations enjoyed a special legal status and that they were eligible for additional social benefits. Therefore, the payments under the Act on Countering Terrorism did not substitute for the payments under the Monetary Allowance Act. The Court concluded that the contested administrative and judicial decisions were unconstitutional because they deprived Mr. Ponkratov of his right to equal protection under laws under Article 19 of the Constitution.

IV. LOOKING AHEAD

Since the 2018 presidential elections, there has been intense speculation about the Kremlin's plans for how it will transition power from Putin to Putin when his current term ends in 2024. During the year-end press conference of 19 December 2019, President Putin did not exclude changes to the organizational part of the Constitution as he has done in the past. This opens up speculation about constitutional amendments. The options discussed are essentially two: to allow further mandates to the same President or to strengthen the role of the Prime Minister and the parliamentary majority. This second option was advocated by the Duma speaker Volodin in an interview with *Parlamentskaya Gazeta* of 17 July 2019. But this second scenario has already occurred, with the Constitution unchanged in the period 2004-2008. In Russia, the real problem does not lie with constitutional provisions but with the political feasibility of the different scenarios and with Putin's own agenda, which he has not yet made public. The 'system' has its own strict internal logic and it is certainly not modification of the constitutional rules that will prevent alternation or continuity in power. Any change of mechanism occurs as a matter of practice following the adjustment of relations between rival power groups. The system still remains monolithic and self-referential, and is impervious to the ritual street protests in the run-up to elections that have been observed on several occasions in recent years.

V. FURTHER READING

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Serbia

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I. INTRODUCTION

The most important step in the procedure for the adoption of constitutional amendments undertaken during 2019 was the decision in June of the Committee on Constitutional and Legislative Issues of the National Assembly (NA) to accept the Government's proposition (initiative) for constitutional changes. However, due to the forthcoming parliamentary elections in spring 2020, it is upon the new legislature to continue and, most likely, finish the procedure. Given that the NA is not formally tied by the content of the proposed amendments, it remains to be seen what the new constitutional provisions would bring regarding some of the key issues, like, for example, the composition of the High Judicial Council, the conditions for the first appointment of judges, or the relations of the three branches of power.

When it comes to the conditions under which the spring 2020 parliamentary elections will be held, there was a long process of negotiations between the ruling party and the opposition in summer 2019. In spite of the fact that some modifications in various areas of national legislation were adopted (more reliable and transparent registry of voters, constitution and functioning of electoral committees, and misuse of public resources in electoral campaign), a significant number of opposition political parties announced that they would boycott the elections.

The overwhelming majority of all judgements adopted by the Constitutional Court of Serbia (CCS) over the last year concerned constitutional complaints, while other decisions mainly treated the issues of constitutionality and/or legality of laws and other general acts. Within the group of constitutional complaints, numerous decisions were taken regarding the violation of the right to a trial within a reasonable time. The CCS also examined the constitutionality of the Law on Chambers of Commerce and constitutionality and legality of an act adopted by the National Council for Higher Education.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As was the case both in 2017[1] and 2018,[2] the ongoing procedure for the adoption of constitutional amendments represented the quintessence of national constitutional developments, at least during the first half of the year. In June 2019, the Committee on Constitutional and Legislative Issues of the National Assembly accepted the Government's proposition (initiative) for the adoption of constitutional changes[3] that was submitted on November 30, 2018. However, the entire procedure was then stopped, given that a clear political decision undoubtedly indicated that the new legislature resulting from the spring 2020 parliamentary elections would finally adopt the constitutional changes. In spite of the fact that there is no

[1] See 2017 *Global Review of Constitutional Law*, I-CONnect-Clough Center 2018, Report on Serbia, p. 240-243.

[2] See 2018 *Global Review of Constitutional Law*, I-CONnect-Clough Center 2019, Report on Serbia, p. 258-262.

[3] The term 'constitutional changes' is used because the Serbian Constitution does not mention the term 'amendment,' 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.

constitutional, legal, and/or jurisdictional provision (or decision) demanding that the procedure for the adoption of constitutional changes has to be completed by the subsequent (and not the actual) legislature, the Minister of Justice declared in August 2019 that, 'taking into consideration the time lapse and the complexity of the procedure',[4] it is expected that the new legislature would be in the position to complete the process. In any case, the next procedural step[5] should be the decision of the NA's plenary, necessitating a two-thirds majority, regarding the adoption of the initiative for constitutional changes. The NA is not formally tied by the content of the proposed amendments given that – once it adopts the initiative for constitutional changes (Art. 203-3 of the Constitution) – it is formally entitled to autonomously elaborate the act comprising constitutional amendments (Art. 203-5).

It remains to be seen whether the new legislature will follow the major elements of the Government initiative adopted by the Committee on Constitutional and Legislative Issues in June 2019. As was the case during all of 2018, the following three issues are still giving rise to major concerns: 1) 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.[6]

Given that, in the first months of 2019, several opposition parties represented in the NA started boycotting parliamentary sessions, and taking into consideration the approaching spring 2020 parliamentary elections, a complex and multi-phased process of negotiations between the ruling party and the opposition began in summer 2019. The main topic of these negotiations was improvement of the overall institutional and procedural framework for free and democratic parliamentary elections. Even if it was clear from the beginning that these negotiations – predominantly held under the auspices of different EU representatives, including the rapporteur of the European Parliament for Serbia – weren't expected to bring any *stricto sensu* constitutional changes, some modifications in various areas of national legislation were adopted; for example, those related to more reliable and transparent registry of voters, the constitution and functioning of electoral committees, and misuse of public resources in electoral campaign. However, these initial results were seriously compromised by at least two factors: 1) numerous opposition political parties left the negotiations in their early stage, claiming that they did not bring any significant changes; and 2) the substantial lack of media freedom keeps compromising the achieved results.

According to the latest findings of *Reporters Without Borders,* the ranking of Serbia in the 2019 World Press Freedom Index was downgraded (from 76 to 90), given that the country 'has become a place where practicing journalism is neither safe nor supported by the state',[7] while 'the number of attacks on media is on the rise, including death threats, and inflammatory rhetoric targeting journalists is increasingly coming from governing officials'.[8] In this context, even some undeniably positive steps taken in the direction of improving the election-related regulatory framework could not be expected to have their full effect. The legitimacy of the new spring 2020 legislature – and, consequently, the quality and political sustainability of forthcoming constitutional changes – critically depends on the overall conditions under which the spring elections will be held. In conclusion, one can only reiterate the assessment given in our reports for years 2017 and 2018 – the path before the initiated constitutional changes in Serbia is still long and unpredictable.

III. CONSTITUTIONAL CASES

In 2019, the Constitutional Court of Serbia (CCS) adopted 427 various decisions,[9] out of which the overwhelming majority (416) concerned constitutional complaints, while other decisions treated the issues of constitutionality and/or legality of laws and general acts adopted by the National Assembly (5); the constitutionality or legality of other general acts (5); and one that concerned the conflict of competences in one correctional matter. Within the group of constitutional complaints, numerous decisions were taken regarding the violation of the right to a trial within a reasonable time (Art. 32 of the Constitution); other CCS decisions treated violations of other rights, including the right to property (Art. 58 of the Constitution) and the right to freedom and security (Art. 27 of the Constitution). When it comes to the issues of constitutionality of laws, in one of its most interesting decisions, the CCS examined two provisions of the Law on Chambers of Commerce. Finally, within the group of CCS decisions on constitutionality or legality of other general acts, two out of five rulings concerned various legal acts of cities and municipalities and another two treated the issue of collective agreements on work-related matters. In another of its rulings, the CCS examined the legality of one general act of the National Council for Higher Education. In this chapter, we will analyse the CCS's decisions regarding 1) two constitutional complaints, 2) constitutionality of the Law on Chambers of Commerce, and 3) constitutionality and legality of an act adopted by the National Council for Higher Education.

[4] See <http://rs.n1info.com/Vesti/a508600/Kuburovic-Naredni-saziv-Skupstine-da-zavrsi-proces-izmena-Ustava-Srbije.html>, accessed 10 January 2020.

[5] 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 the 2/3 majority, potentially followed by a 4) referendum (obligatory or not, depending on the provision to be modified); and 5) proclamation of the act on constitutional changes.

[6] See *2018 Global Review of Constitutional Law,* I-CONnect-Clough Center 2019, Report on Serbia, p. 259.

[7] See <https://rsf.org/en/serbia>, accessed 13 January 2020.

[8] Ibid.

[9] All the data in this chapter is based on the publicly accessible base of jurisprudence of the Constitutional Court of Serbia, published on its website; see <http://www.ustavni.sud.rs/page/jurisprudence/35/>, accessed 11 January 2020.

1. Case Už-185/2015 – Constitutional complaint for violation of the right to freedom and security and other rights related to criminal procedure: Judicial review

The CCS's decision in this case is interesting not only for its complex subject matter but also because of the important references the CCS has made to the jurisprudence of the European Court of Human Rights (ECHR). In spite of the fact that the CCS finally found that the plaintiff's constitutional rights – including the right to freedom and security – were not violated, it is worth examining the main circumstances and basic elements of the CCS's reasoning.

On 8 January 2015, B.J. from Novi Sad filed a constitutional complaint before the CCS, claiming that decisions of the High Court and Court of Appeal of Novi Sad (of 4 and 26 November 2014, respectively) violated his following constitutional rights: right to freedom and security (Art. 27-1 of the Constitution), rights related to decisions on detention (Art. 30-1) and its limited duration (Art. 31-2), right to a fair trial (Art. 32-1), and right to presumption of innocence (Art. 34-3). Given its fundamental importance for the protection of individual rights in the course of criminal proceedings, we will first focus on the issue of presumption of innocence; then, the emphasis of this review will be on the right to freedom and the related right to the limited duration of detention.

According to the plaintiff, the presumption of innocence was violated because the High Court of Novi Sad in its ruling claimed that 'the criminal offence in this matter, for which there is a reasonable doubt that it was committed by B.J., was perpetrated by him', while, according to the plaintiff, the Court should have used the formulation claiming that 'the criminal offence was committed,' given that his responsibility was not duly established in the procedure before the lower court, while the higher instance reiterated the same formulation. The CCS found that the High Court of Novi Sad had not violated the plaintiff's right to presumption of innocence because in its decision it clearly and undoubtedly indicated that there was a reasonable doubt that the plaintiff had committed the criminal offence, and not that this affirmation was certain. Given that the decision in question was related to the prolongation of detention, the CCS found that the High Court did not overstep the boundaries of a reasonable doubt, 'in which the decision making in matters of detention can exclusively operate', and that, consequently, the plaintiff was not declared guilty before the decision in this criminal matter was final.

Concerning the right to freedom and the related right to the limited duration of detention, the plaintiff affirmed that the detention and its prolongation were unlawful, given that a reasonable doubt that the criminal offence was perpetrated by him was not duly established. At this point, the CCS specified that, according to national legal provisions, the court can determine (and prolong) the detention only if two conditions are cumulatively fulfilled: 1) there is a reasonable doubt that the person in question perpetrated a criminal offence; and 2) the detention is necessary in the course of criminal proceedings. Furthermore, the second element should be duly motivated by the court with clear specification of the reasons for which the detention is necessary for an undisturbed course of criminal proceedings. In this respect, the CCS invoked several judgements of the ECHR, in which it established that an arbitrary detention exists when there is no adequate motivation given by the competent courts that clearly indicate the reasons for which the detention was necessary (ECHR judgements in cases *Kurt v. Turkey*[10] and *Bazorkina v. Russi*[11]). The CCS found that, in this matter, all these conditions were met. Finally, concerning the duration of the detention, the CCS established that, in line with its stable case law, the constitutional right (Art. 31-2) is not violated if the competent court in its decision presented relevant and sufficient reasons that justified the duration of the detention and gave particular motivation for urgency in the course of criminal proceedings (ECHR judgements in cases *Lavents v. Latvia*[12] and *Buzadji v. Moldova*[13]).

Case Už-5342/2016 – Constitutional complaint for violation of the right to property: Judicial review

The specificity of the CCS's judgement in this case lies in the fact that – even if it is clear that the main constitutional right of the plaintiff, which the Court examined, was the right to property – there was a profound interconnection between the right to property and the right to a trial within a reasonable time. Therefore, the constitutional basis of the CCS's reasoning in this case was Art. 58 of the Constitution, guaranteeing a 'peaceful tenure of a person's own property and other property rights acquired by the law' (para. 1), while the 'right of property may be revoked or restricted only in public interest established by the law and with compensation which cannot be less than market value' (para. 2). However, the Constitution also guarantees that 'everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within a reasonable time, which shall pronounce judgement on their rights and obligations' (Art. 32, para. 1).

In spite of the fact that the main *ratio constitutionalis* of this provision is to guarantee individual rights in the course of criminal proceedings, the same constitutional right is also fully applicable in civil matters. Namely, the plaintiff S.M., who was employed by the company S. Ltd. from the city of Čačak, was entitled to receive from his former employer financial compensation for

[10] Case 69481/01 of 27 July 2006.

[11] Case 24276/94 of 25 May 1998.

[12] Case 58442/00 of 28 November 2002.

[13] Case 23755/07 of 5 July 2016.

unlawfully reduced salary according to the judgement of a competent Municipal Court on 31 March 2008. After several years and all necessary legal steps having been taken by the plaintiff, the adjudged financial compensation still had not been paid after more than eight years. The plaintiff then initiated, before the High Court of Čačak, the procedure for the protection of his right to a trial within a reasonable time.

In its judgement of 20 May 2016, this Court established that the plaintiff's right was violated. Given that the violation of his right to a trial within a reasonable time was due to the non-execution, by competent national judicial authorities, of an effective judgement, the CCS found that this also represented a violation of the plaintiff's right to property. Moreover, 'taking into consideration the case law of international institutions for the protection of human rights' (para. 4 of the judgement), the CCS also found that the plaintiff had the right to damage compensation. However, it refused – by invoking its own case law in similar matters (judgement of 8 May 2013 in case Už-633/2011) – the plaintiff's demand for the compensation of costs of the procedure before the CCS itself.

3. Case IUz-249/2016 – Constitutionality of the Law on Chambers of Commerce

In spite of a relatively limited number of CCS judgements in this area (5) in 2019, the examination of constitutionality and/or legality of laws and general acts adopted by the National Assembly represents an important aspect of its jurisprudence. In one of its most important cases, the CCS examined the constitutionality and compliance with ratified international treaties of Articles 10 and 33 of the Law on Chambers of Commerce (LCC), adopted in 2005 (*Official Journal* No. 112/2015). The procedure before the CCS was initiated by various associations and other legal entities (examination of the constitutionality) and by a group of Members of Parliament (examination of the compliance with ratified international treaties).

Regarding Art. 10 of the LCC (to which was dedicated practically the entire reasoning of both claimants and the CCS), the claimants argued that it was non-compliant with three constitutional provisions: 1) the principle of direct implementation of guaranteed rights (Art. 18 of the Constitution); 2) the freedom of association (Art. 55 of the Constitution and Art. 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms); and 3) freedom of entrepreneurship (Art. 83 of the Constitution). The main issue was the provision of Art. 10, para. 1, which obliges all business entities operating in Serbia to become (as of 1 January 2017) members of the Serbian Chamber of Commerce (SCC). According to the claimants, the SCC cannot be considered an association of public law given that, if it were the case, the introduction of the principle of compulsory membership would compromise business entities' negative right to freedom of association (right not to be a member), thus violating the constitutionally guaranteed freedom of association as well as freedom of entrepreneurship.

The claimants were also pleading that the ECHR, in its stable case law, found that in spite of the fact that Art. 11 of the European Convention for the Protection of Human Rights does not mention *expressis verbis* the protection of the negative right to freedom of association, it should be interpreted in the sense that this right should also be guaranteed. Moreover, it was also argued by the claimants that the chambers of commerce cannot be considered associations of public law, 'given that they are established in order to protect private interests of their members, and not the public interest', as it was, according to the claimants, established in the jurisprudence of the ECHR (e.g., cases *Sigurdur A. Sigurjónsson v. Iceland, Gustafsson v. Sweden, and Chassagnou v. France*).

In its long and complex reasoning, the CCS affirmed that it is beyond contention that all chambers of commerce are interest-based, professional, and non-profit business associations. As for the SCC, the Court sustained that it enjoys certain entrusted public authorities and has delegated public powers, like certain other legal entities such as bar associations and associations of notaries. Therefore, the competence of the SCC is not only to coordinate and represent the interests of its members but also to enhance business-related activities. Consequently, the CCS concluded that the provisions of the LCC, and in particular its Art. 10, were constitutional and in accordance with relevant ratified international treaties.

4. Case IUo-134/2018 – Constitutionality and legality of an act adopted by the National Council for Higher Education

An important aspect of the CCS's activity is examination of the constitutionality and legality of general acts other than laws adopted by the NA, including the decisions with an *erga omnes* effect of various national and local administrative and expert entities. The National Council for Higher Education (NCHE) has 21 members, elected by the NA, and its main competence is to ensure the development of higher education and to improve its quality. In November 2017, the NCHE, acting according to its prerogatives, adopted the specific criteria for contractual engagement of university professors older than 65 years. Article 3, para. 3 of this act specified that this specific criteria should also cover the period before the person in question acquired the academic status of full university professor.

The claimant argued that this provision was contrary to Art. 93, para. 3 of the Law on Higher Education (LHE), which specifies that the examination and evaluation of the scientific results of university professors can be performed only by taking into consideration the results achieved after the moment when the full professorship has been acquired. It was also argued by the claimant that, consequently, this provision of the specific criteria is contrary to Art. 195, para. 1 of the Constitution, which provides that the 'general acts of organisations with delegated public powers, political parties, trade unions, and civic associations and collective agreements must be in compliance with the Law'. Therefore, the NCHE is competent to adopt specific criteria for contractual engagement of university professors older than 65 years, but only within the limits of general provisions set by the LHE.

In this case, the the CCS found that the NCHE exceeded its prerogatives, given that it had not limited its decision to further elaboration of specific criteria, but effectively modified the provision of Art. 93, para. 3 of the LHE. By doing so, the NCHE acted not as an authority competent for further elaboration of legal acts within the boundaries thereof but practically exercised the capacity of a legislator by modifying the provision of the LHE. Therefore, the CCS found that the provision of Art. 3, para. 3 of the specific criteria for contractual engagement of university professors older than 65 years is contrary to the relevant provision of the LHE, and thus unconstitutional.

IV. LOOKING AHEAD

In spite of the fact that the entire procedure for the adoption of constitutional amendments already lasts for more than two years, the new composition of the NA resulting from the 2020 spring parliamentary elections would, probably, undertake steps towards their final adoption. It remains to be seen whether the conditions under which the 2020 parliamentary elections will be held will show some effective improvement of the overall institutional and procedural framework for the free and democratic competition of political parties. When it comes to further reforms of the judiciary in the context of the EU membership negotiation process (Chapter 23 of the EU acquis), very limited progress in 2019 leaves important room for improvement in the future. Constitutional complaints will certainly continue to represent the majority of cases before the Constitutional Court, with many of them most probably concerning the violation of the right to a trial within a reasonable time and the right to property.

V. FURTHER READING

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Singapore

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I. INTRODUCTION

The year 2019 saw a flurry of important constitutional cases, alongside two significant legislative developments with constitutional implications. The Court of Appeal handed down its judgment on whether there is a constitutional requirement to call for a by-election in the case of a single vacancy in a Group Representation Constituency. This is a case that implicated foundational issues of legal hierarchy in Singapore. The judicial power and constitutional requirements of the principle of separation of powers remained another crucial area of constitutional discourse. It was, however, freedom of speech and assembly that took center stage in 2019 within and outside the courts. Aside from two constitutional cases touching upon the scope of Article 14 of the Singapore Constitution guaranteeing freedom of speech, association, and assembly, constitutional debate around the Protection from Online Falsehoods and Manipulation Act 2019 (POFMA), Singapore's anti-fake news law, also revolved around free speech concerns. Interestingly, however, amendments to the Maintenance of Religious Harmony Act (MRHA), legislation that had previously been criticized for its impact on religious freedom and freedom of speech, have largely been accepted by religious groups, which were most affected by these changes. One possible reason for this is that there was widespread consultation among these groups before the amendments were introduced. Accordingly, as we observed generally last year, the Singapore government's increasing reliance on public consultations could serve "not only as a 'crowdsourcing' of ideas but also to play a legitimating role in the final legislative product."

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Protection from Online Falsehoods and Manipulation Act 2019

In 2019, Singapore became one of several countries in the world that passed a law aimed at countering fake news. POFMA empowers the Government to deal swiftly with online falsehoods by providing a range of remedies targeting the communication of "false statements of fact" (FSOF), and the making or altering of bots or the provision of services for that purpose.[1] An FSOF is defined as a false or misleading statement that a reasonable person would consider to be a representation of fact.[2]

Under POFMA, any Minister may issue a range of directions, including Correction Directions and Stop Communication Directions, if satisfied that an act communicating

[1] No. 18 of 2019. See ss 7-9.

[2] Ibid s 2(2).

a false statement of fact has been committed and that it is in the public interest to do so.[3] A Correction Direction requires the party who communicated the falsehood to put up a notice admitting as such, and/or a correction to the falsehood and where the correction may be found. A Stop Communication Direction requires the party to take necessary steps to ensure that the falsehood communicated is no longer available on, or through, the Internet to end-users in Singapore. These may include the removal of the falsehood from an online location by a specified time and stopping the publication, sharing, or posting of the falsehood in Singapore. In addition, POFMA enables Ministers to require Internet intermediaries (such as Google and Facebook) and providers of mass media services to communicate correction notices to all its end-users, or to disable end-user access to the relevant statement.[4]

POFMA provides remedies for parties issued a Direction. There is an initial expedited appeal to the relevant Minister, and subsequently, the possibility of an expedited appeal to the court if the Minister rejects the appeal. The Minister must decide on an appeal no later than two working days after the appeal is received, and the court must fix a hearing within six days if the appellant requests an expedited hearing.

The enactment of POFMA garnered significant domestic and international attention, including from the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.[5] Opposition Members of Parliament argued that there was a risk that POFMA would be used against political dissidents and opposition members.[6] Academics were also concerned that it might affect their academic freedom.[7] Despite assurances from the Government, a group of academics issued a press statement urging it to include an exemption for academic work in the law.[8] The Government took this criticism into consideration, assuring that the law only targets false statements of fact and not opinions and fair criticism.[9] It also clarified that POFMA is carefully calibrated in that it leaves the original content untouched except in the case of a Stop Communication Direction. In addition, POFMA provides more extensive and expeditious judicial oversight through an internal appeal process. In comparison, the courts' usual oversight over other executive action is through judicial review only.

Notably, Singapore is by no means the only country that has anti-fake news laws; France, Germany, and Russia have also passed tough new laws against fake news or hate speech.[10] As countries around the world grapple with the proliferation of fake news, a difficult balance will have to be struck between freedom of speech and the need to protect the integrity of a democratic system and the public interests of the people in the democratic state.

B. Maintenance of Religious Harmony (Amendment) Act 2019

Another major legislative amendment with constitutional implications concerned the MRHA. The MRHA serves to restrain religious speech that has the impact of threatening religious harmony, defined as causing feelings of enmity, hatred, ill-will, or hostility between different religious groups; carrying out activities to promote a political cause, or a cause of any political party while, or under the guise of, propagating or practising any religious belief; carrying out subversive activities under the guise of propagating or practising any religious belief; and/or exciting disaffection against the President or the Government while, or under the guise of, propagating or practising any religious belief. The MRHA had previously been criticized for its expansive reach.[11] However, no restraining order has ever been issued under the MRHA since it came into operation in 1990. The MRHA's primary effect was in setting out the terms for discourse in Singapore.

The MRHA was amended for the first time in 2019. The main purposes of the amendment were to address the use of the Internet and social media to spread hate and mobilise mobs against religious groups, and to regulate perceived foreign interference in domestic affairs globally. The significant amendments are, first, a restraining order

[3] Ibid ss 4, 10(1) and 20(1).

[4] Ibid Part IV.

[5] See David Kaye, "Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression" (24 April 2019) <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL_SGP_3_2019.pdf> accessed 9 February 2020.

[6] Bhavan Jaipragas, "Singapore's opposition calls fake-news bill a 'Damocles sword' hanging over the public" (*South China Morning Post*, 7 May 2019) <https://www.scmp.com/week-asia/politics/article/3009263/singapores-opposition-calls-fake-news-bill-damocles-sword> accessed 9 February 2020.

[7] See Ellie Bothwell, "Singapore 'fake news' law 'threatens academic freedom worldwide'" (*Times Higher Education*, 23 April 2019) <https://www.timeshighereducation.com/news/singapore-fake-news-law-threatens-academic-freedom-worldwide> accessed 9 February 2020.

[8] See Fabian Koh, "Academics reject MOE's assurances on fake news Bill, want assurances reflected in the legislation" (*The Straits Times*, 13 April 2019) <https://www.straitstimes.com/singapore/academics-reject-moes-assurances-on-fake-news-bill-want-assurances-reflected-in-the?cx_testId=0&cx_testVariant=cx_2&cx_artPos=0#cxrecs_s> accessed 9 February 2020.

[9] Ong Ye Kung (Minister for Education), speech during the Second Reading of the Protection from Online Falsehoods and Manipulation Bill, *Singapore Parliamentary Debates, Official Report* (8 May 2019), vol 94.

[10] See Fathin Ungku, "Factbox: 'Fake News' laws around the world" (Reuters, 2 April 2019) <https://www.reuters.com/article/us-singapore-politics-fakenews-factbox/factbox-fake-news-laws-around-the-world-idUSKCN1RE0XN > accessed 9 February 2020.

[11] Jothie Rajah, "Policing Religion: Discursive Excursions into Singapore's Maintenance of Religious Harmony Act", in Penelope Nicholson and Sarah Biddulph (eds.), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Brill, 2008).

takes effect immediately rather than after 14 days post-amendment. Second, the amended MRHA requires the governing bodies and top leadership of religious organizations be comprised mostly of Singapore citizens or permanent residents. Third, the amended MRHA introduces a new disclosure requirement, whereby religious organisations have to declare one-time donations of $10,000 and above from foreign sources as well as affiliations with any foreign individual or organisation that is in a position to exert control over them. Lastly, the amendments introduce a community remedial initiative (CRI), which enables a person who has allegedly committed an offence under the MRHA to voluntarily undertake remedial action with the offended religious group. These measures may include issuing a public or private apology or participating in activities that promote religious harmony. They are aimed at resolving communal tensions and repair disrupted ties between religious communities using non-penal methods.[12] Consistent with the objectives of restoration and rehabilitation, a person may not be prosecuted for an alleged offence when a CRI in respect of that offence is in force.

Criticism of the amendments was fairly muted, as they refine the MRHA to respond to new technological and geopolitical developments, and are justifiable. Furthermore, the formalization of the CRI ensures that the MHRA prioritises reconciliation over criminal sanctions. The amendments also reflect the power of consultation – religious organizations in Singapore were largely supportive of the new measures because they were closely consulted before the changes were introduced. The Government also promised assistance to smaller religious organizations to help them meet the new reporting requirements.

III. CONSTITUTIONAL CASES

1. Nagaenthran a/l K Dharmalingam v Public Prosecutor: Judicial Power and Justiciability

The separation of powers is a foundational principle of Singaporean constitutional law and has been recognized in Singapore as being part of the Constitution's basic structure.[13] Within this, ensuring the integrity of judicial power, enshrined in Article 93 of the Constitution, has become a key focal point for constitutional argumentation in Singapore.[14] The case of *Nagaenthran a/l K Dharmalingam v Attorney-General*, an appeal from a High Court decision summarized in last year's *Global Review,*[15] concerned the issue of when, if at all, legislation can oust the court's power to review executive action without violating the Constitution.

The challenge was brought by an offender who had been convicted of a capital offence of drug trafficking under the Misuse of Drugs Act (MDA).[16] A person convicted of such a charge could escape the death penalty if he was merely a drug courier and was certified by the Public Prosecutor (PP) to have "substantively assisted" the Central Narcotics Bureau in disrupting drug trafficking activities in or outside Singapore.[17] In this case, the PP had declined to grant the appellant a certificate of substantive assistance. The appellant unsuccessfully sought leave from the High Court to challenge the PP's decision. Before the Court of Appeal, he contended that leave should be granted because the PP's decision was made: (a) without taking into account relevant considerations; and (b) in the absence of a precedent fact.

The anterior question for the Court was whether section 33B(4) of the MDA ousted the supervisory jurisdiction of the courts over the PP's non-certification decision except on the grounds of bad faith, malice, and unconstitutionality.[18] Section 33B(4) reads:

> 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.

The Court first drew a distinction between clauses that oust or exclude the court's jurisdiction or authority to act in a matter and clauses that immunise parties from suit or liability.[19] The latter were exceptional preclusions, commonly enacted to protect persons carrying out public functions. In the Court's judgment, section 33B(4) of the MDA was not an ouster clause; rather, it immunised the PP, when acting under s 33B of the MDA, from suit save on the stated grounds.[20] Two concerns dominated its reasoning in this re-

[12] Sun Xueling (Senior Parliamentary Secretary to the Minister for Home Affairs), speech during the Second Reading of the Maintenance of Religious Harmony (Amendment) Bill, *Singapore Parliamentary Debates*, Official Report (7 October 2019), vol 94.

[13] *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129, [69] (Court of Appeal); note, however, that the Court of Appeal declined to conclude whether the basic structure doctrine formed part of Singapore law and, even if it did, what its extent or effect would be: at [71]-[72].

[14] See Jaclyn L. Neo, "Autonomy, Deference and Control: Judicial Doctrine of Separation of Powers in Singapore" (2018) 5 JICL 461, generally.

[15] *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 (High Court). Jaclyn L Neo [et al.], "Singapore", in Richard Albert [et al.] (eds.), *2018 Global Review of Constitutional Law* (I-CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2019) 263, 266-267.

[16] Cap 185, 2008 Rev Ed. See MDA s 33B(2)(b). Under the MDA, the death penalty is a prescribed punishment only where the quantity of drugs trafficked exceeds a prescribed threshold.

[17] Ibid s 33B(2).

[18] The former two grounds are expressly provided in MDA s 33B(4). The ground of constitutionality is premised on *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222, [35] (Court of Appeal).

[19] [2019] 2 SLR 216 [47] (Court of Appeal).

[20] Ibid [51].

gard: respect for the separation of powers and the judiciary's institutional competence.[21]

The upshot of the Court's interpretation of section 33B(4) was that the judicial review of the PP's non-certification decision on the usual grounds such as illegality, irrationality, and procedural impropriety was not excluded.[22] The Court provided a glimpse into the reasoning it might have employed had section 33B(4) truly purported to oust the court's power to review the legality of the PP's non-certification. A clause ousting judicial review, the Court observed, would be constitutionally suspect for being in violation of Article 93 of the Constitution as well as the principle of the separation of powers.[23] Such review was directed at the legality and propriety of decision-making and the upholding of the rule of law, which were matters that the judiciary was well placed to adjudicate on.[24] Thus, the Court held that a review of the merits of the PP's non-certification decision was neither within judicial competence nor suitable for judicial inquiry.[25] By preventing an aggrieved offender from forcing the court to determine an issue that it was not inherently capable of determining, the conferral by section 33B(4) of immunity from suit augmented the conventional legality-merits distinction in Singaporean administrative law.

2. Wong Souk Yee v. Attorney-General: Group Representation Constituencies

The Court of Appeal judgment in *Wong Souk Yee v Attorney-General*[26] had important implications for constitutional interpretation and the right to vote in Singapore. Also an appeal from a decision summarized in last year's *Global Review,*[27] the case came about when a Member of Parliament (MP) in a Group Representation Constituency (GRC) resigned. Under Singapore's system of parliamentary representation, electoral districts are either Single Member Constituencies (SMCs), where one candidate is elected an MP, or GRCs, where voters cast their ballots for a team of candidates, at least one of whom must be from an ethnic minority community. The initial rationale for introducing GRCs was to ensure minority representation in Parliament.

The key issue was whether the Government must call a by-election in order to fill a single vacancy in the GRC. Under section 24(2A) of the Parliamentary Elections Act,[28] there is no requirement for a by-election. It states:

> In respect of any group representation constituency, no writ shall be issued […] for an election to fill any vacancy unless all the Members for that constituency have vacated their seats in Parliament.

The applicant, a resident of Marsiling–Yew Tee who had stood for election in the constituency at the 2015 general election, argued before the High Court that this provision was inconsistent with Article 49(1) of the Constitution. Article 49(1) states:

> Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

The applicant also argued that a requirement for a by-election when a single member of a GRC vacates her seat was the necessary implication of a citizen's constitutional right to vote. The High Court dismissed both these arguments.

The Court of Appeal upheld the High Court's decision, though it disagreed with its reasoning. The Court reconciled Article 49(1) with section 24(2A) by essentially narrowing the scope of the constitutional provision. The Court noted that when Article 49(1) was enacted in 1965, GRCs did not exist. Thus, how the Article applied to GRCs was unclear. Indeed, both parties agreed that there must have been a legislative oversight when drafting the constitutional amendments which implemented the GRC scheme. As such, reference to extraneous materials was deemed necessary to ascertain the true meaning of Article 49(1).[29] Parliamentary debates showed that the intention was not to call a by-election unless all the seats in a GRC had been vacated, as per section 24(2A) of the PEA.

While the High Court had sought to apply either a rectifying or updating construction to Article 49(1), the Court of Appeal expressed doubt about whether it was proper to apply these approaches towards statutory construction to constitutional provisions as the latter "are designed to be more deeply entrenched and are generally regarded as fundamental in nature".[30] A rectifying construction was ruled out because it could not be said with sufficient certainty what additional words the drafter would have inserted into the Article, while an updating construction also could not be adopted as it was not clear that Parlia-

[21] Ibid [66]-[67].

[22] Ibid [51].

[23] Ibid [71]-[74].

[24] Ibid.

[25] Ibid [58]-[59], [64]-[66].

[26] [2019] 1 SLR 1223 (Court of Appeal).

[27] *Wong Souk Yee v Attorney-General* [2018] SGHC 80 (High Court). See Neo [et al.], "Singapore" (n 14) 263, 265-266.

[28] Cap 218, 2011 Rev Ed.

[29] *Wong Souk Yee* (n 25) [28]-[48]. See the Interpretation Act (Cap 1, 2002 Rev Ed), s 9A(2)(b)(i): "[I]n the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material […] to ascertain the meaning of the provision when […] the provision is ambiguous or obscure".

[30] Ibid [64].

ment had intended to make such substantial changes to the Article.[31] Without specifying the applicable rule of construction for Article 49(1), the Court upheld the interpretation of Article 49(1) that was in line with the parliamentary intention behind the PEA, namely that Article 49(1) only referred to SMCs. The Court was concerned that it should not adopt an interpretation that would require additional words to be read into the Article, which might be seen as too adventurous.

The case strikes at the core of a critical constitutional debate in Singapore involving the proper role of the courts in adjudicating the constitutionality of legislative acts. While the Court of Appeal affirmed the supremacy of the Constitution, it was concerned that it would not be seen as engaging in "judicial legislation" and "overstepping [its] constitutional role".[32] On the right to representation, the Court was careful to say that even if such a right was implied in the Constitution's basic structure, it would not mandate a particular form of representation as "fundamental and essential" to the Westminster model of government and thus immutable. In other words, there was nothing in principle preventing Parliament from allowing a GRC to be represented by fewer than its full complement of MPs if some of them had vacated their seats.[33]

3. Li Shengwu v Attorney-General: Scandalizing Contempt of Court

While recent decisions have illuminated the scope and effect of Article 93 of the Constitution within Singapore's domestic constitutional system, *Li Shengwu v Attorney-General*[34] was the first decision to have explored its potential international effects. There, committal proceedings were instituted against the applicant for his alleged act of scandalizing the judiciary, and committal papers were served on him in the United States. The applicant challenged the court's jurisdiction to allow such service, a matter which the Court of Appeal acknowledged had never before been subject to considered judicial scrutiny.[35]

The Court's inquiry into its international jurisdiction involved two elements: its "subject-matter jurisdiction" over the matter, and its personal jurisdiction over the alleged contemnor. Personal jurisdiction could be established through the ordinary civil process, under Order 11, rule 1 of the Rules of Court. However, the Court did not appear to establish its "subject-matter jurisdiction" by appealing to its international criminal or civil jurisdiction under the Supreme Court of Judicature Act.[36] Indeed, the Court held that had its international criminal jurisdiction been invoked, service out could only be achieved with foreign assistance, which had not been sought.[37] Moreover, by bifurcating its jurisdictional inquiry as it did, the Court clearly did not apply its ordinary test for international civil jurisdiction.[38]

Instead, the source of the Court's "subject-matter jurisdiction" to allow service out for contempt of court was its "inherent jurisdiction", flowing from the "judicial power" under Article 93 of the Constitution.[39] Thus, after *Li Shengwu,* it appears that Singapore's courts have "subject-matter jurisdiction" to allow proceedings to be served out of the jurisdiction as long as the underlying cause of action is "inherent" to the judicial power under Article 93. It remains unclear whether, besides contempt of court proceedings, other such proceedings exist.

4. Wham Kwok Han Jolovan v Public Prosecutor: Freedom of Assembly

In *Wham Kwok Han Jolovan v Public Prosecutor,*[40] the High Court considered the consistency of section 16 of Singapore's Public Order Act (POA) with a citizen's right of assembly under Article 14(2)(b) of the Constitution. Section 7 of the POA grants the Commissioner of Police discretion to issue or refuse a permit to organize a public assembly while section 16 makes it a criminal offence to organize a public assembly without such a permit. The applicant was prosecuted under section 16, and argued, *inter alia*, that the section contravened his right of assembly. This was because section 16 imposes criminal liability even if the executive decision which forms an element of the offence (here, the Commissioner's decision to refuse a permit under section 7) was unlawful under established administrative law principles.[41]

The Court rejected the applicant's argument on two grounds. First, it opined that where an accused was denied a section 7 permit but went ahead to hold the public assembly anyway, he would be engaging in "vigilante conduct" which "cannot be condoned". [42] Second, the Court held that the applicant's submission relied on a "wholly speculative

[31] Ibid [66]-[69].

[32] Ibid [75].

[33] Ibid [76]-[78].

[34] [2019] 1 SLR 1081 (Court of Appeal).

[35] Ibid [124].

[36] Cap 322, 2007 Rev Ed.

[37] *Li Shengwu* (n 33) [92]-[93].

[38] *Cf Burgundy Global Exploration Corp v Transocean Offshore International Ventures* [2014] 3 SLR 381, [88] (Court of Appeal), where, in the context of civil proceedings, the Court of Appeal held that doctrine of "subject-matter jurisdiction" was merely the interpretative "presumption against extra-territoriality" applicable to statutory provisions conferring personal jurisdiction, not a separate and additional requirement that applicants seeking leave to effect service out must fulfill.

[39] *Li Shengwu* (n 33) [99] and [109].

[40] [2019] SGHC 251 (High Court).

[41] Ibid [26].

[42] Ibid [25].

and unsubstantiated" assumption that the Commissioner "may act in bad faith", which could not support a finding of unconstitutionality, especially given the "established principle that acts of high officials of state should be accorded a presumption of legality or regularity".[43]

The decision in *Jolovan Wham* is the first to have invoked the presumption of regularity, applicable to exercises of executive decision-making powers, in response to a challenge to the constitutionality of legislation. One may question whether the Court should have invoked the presumption of constitutionality, applicable to legislation passed by Parliament, instead.[44] Moreover, to the extent that the Court's decision on the constitutionality of section 16 of the POA rested on a need to deter "vigilante conduct", it is somewhat circular. Since Article 4 of Singapore's Constitution states that any statutory provision "which is inconsistent with [the] Constitution shall […] be void", conduct contravening section 16 can only meaningfully be called "vigilante conduct" if that provision is in fact constitutional. If the constitutionality of section 16 of the POA is ever canvassed before the Court of Appeal, clarifications on these matters would be welcome.

5. Aljunied-Hougang Town Council v Lim Swee Lian Sylvia: Town Councils

Although the case of *Aljunied-Hougang Town Council v Lim Swee Lian Sylvia*[45] did not directly raise constitutional questions, it has significant constitutional implications insofar as it determines the role and responsibilities of parliamentarians in managing Town Councils. Under Singapore's Town Councils Act,[46] elected MPs are also appointed to Town Councils having governance over, and estate management duties in relation to, the constituencies they represent in Parliament. The intertwining of parliamentary duties with Town Council management is a significant innovation in Singapore.[47]

The High Court held that town councilors, while an office created by statute, owe fiduciary obligations to the Town Council, a body corporate.[48] Their position vis-à-vis the Town Council was one of trust and confidence, not dissimilar to that of company directors. Thus, town councilors must manage the estate and serve the interests of their Town Council with single-minded loyalty and for proper purposes.[49] However, the Court also noted that town councilors did not owe fiduciary duties to the residents within a Town Council's constituency, since, under Singapore's system of government, citizens hold their elected MPs to account primarily through the ballot box.[50] Nevertheless, it emphasized that the fiduciary duties town councilors owe to Town Councils were "entirely distinct from the political relationship between town councilors and their constituents".[51]

On the facts, the Court found the various defendants liable for an assortment of breaches of fiduciary duties (of good faith and non-conflict of interest) and duties of skill and care by, *inter alia,* waiving procurement tenders without adequate reason and making payments to conflicted parties.[52] The Court further held that the statutory defence of good faith only shielded town councilors from liability to third parties for acts done in their capacity as town councilors and not from liability to the Town Council itself.[53] The case is novel for the deployment of private law to safeguard and enforce the proper and good faith management of public resources. The fact that the defendants were opposition MPs unfortunately colored the proceedings and made it a more political case than the facts would have shown.[54]

IV. LOOKING AHEAD

The year 2020 looks set to be a year of significant constitutional and political significance for Singapore. The High Court is set to issue its judgment on three constitutional challenges heard in 2019 on the constitutionality of section 377A of the Penal Code, which criminalizes male homosexual intercourse. Of relevance here is the publication of an article by former Chief Justice Chan Sek Keong, forwarding various arguments against the constitutionality of section 377A, which parties relied on heavily in court. Moreover, the Government's use of POFMA and the judiciary's role in overseeing the legality thereof will be of key interest, especially since an opposition party has sought to appeal a Correction Direction issued against it.[55] All this will likely take place against the backdrop of general elections, which the rul-

[43] Ibid [27]-[29].

[44] See Public Prosecutor v Taw Cheng Kong [1998] 2 SLR(R) 489 [60]-[61] and [77]-[79] (Court of Appeal).

[45] [2019] SGHC 241 (High Court).

[46] Cap 392A, 2000 Rev Ed.

[47] Ibid ss 8-9.

[48] *Sylvia Lim* (n 44) [175] [191] [212] [216] [218] [223] and [225].

[49] Ibid [218].

[50] Ibid [189] and [219].

[51] Ibid [219].

[52] See Ibid [634] for a summary of liabilities.

[53] Ibid [494]-[498].

[54] See, e.g., the discussion in "FactCheck: Were the posts by 'Fabrications About the PAP' regarding the AHTC and PRPTC lawsuits against members of the Workers' Party correct?" (Black Dot Research, 17 October 2019) <https://blackdotresearch.sg/factcheck-were-the-posts-by-fabrications-about-the-pap-regarding-the-ahtc-and-prptc-lawsuits-against-members-of-the-workers-party-correct/> accessed 9 February 2020.

[55] See Janice Lim, "SDP files first High Court appeal to challenge manpower minister's POFMA action" (TODAY, 8 January 2020) <https://www.todayonline.com/singapore/sdp-files-first-high-court-appeal-challenge-manpower-ministers-pofma-action> accessed 9 February 2020.

ing People's Action Party intends to hold in 2020, and which will likely see leadership renewal for the party and Singapore.[56]

V. FURTHER READING

Kevin YL Tan & Bui Ngoc Son (eds.), *Constitutional Foundings in Southeast Asia* (Hart Publishing, 2019)

Jaclyn Neo and Andrea Ong, "Making the Singapore Constitution: Amendments as Constitution-Making", 14(1) *Journal of Comparative Law* 72 (2019)

Jaclyn L Neo & Ngoc Son Bui (eds.), *Pluralist Constitutions in Southeast Asia* (Hart Publishing, 2019)

Chan Sek Keong, "Equal Justice under the Constitution and Section 377A of the Penal Code: The Roads Not Taken" (2019), 31 *SAcLJ* 773

Marcus Teo, "Service out for Scandalising Contempt: An International Constitutional Jurisdiction?" (2019), *SJLS* 477

[56] See generally Royston Sim, "Next GE will decide if Singapore can sustain a good, stable Govt: PM Lee Hsien Loong" (*The Straits Times*, 10 November 2019) <https://www.straitstimes.com/politics/pap-convention-next-ge-will-decide-if-singapore-can-sustain-a-good-stable-government-says> accessed 9 February 2019.

Slovakia

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I. INTRODUCTION

Two important developments took place in Slovak constitutional law in the year 2019, which marked a watershed for the young democracy. First, the composition of the Constitutional Court changed dramatically. Nine out of thirteen judges of the Court were appointed in 2019 for a twelve-year term of office. The Parliament used for the first time live-streamed selection hearings to choose candidates for the positions on the Court. Second, the outgoing Court judges invalidated a constitutional amendment in a historic ruling that identified an implicit unamendable core of the Constitution. The decision established a great new power for the Court to review *ex-post* constitutional amendments. When used, the Constitutional Court will weigh in on central questions of social organisation, morality, and politics, which had been until now reserved exclusively for the Constitution-maker. But even if avoided as a bad precedent, the case will surely affect constitutional thinking of Slovak lawyers, and the perceived limits of the power of the amending actors.

The Parliament, in its capacity as the Constitution-maker, adopted four amendments to it in 2019. The Slovak Constitution is poly-textual, which means that it is not fully contained in one master-text document.[1] The amending actors adopted one direct amendment to the Constitution, adding the retirement age cap[2] and a provision on the minimum wage to the master-text document.[3] The amending actors also adopted three amendments to the Constitutional Act on the Protection of the Public Interest in the Exercise of the Functions of Public Officials. These amendments are called "indirect" because they modify a stand-alone act of constitutional force.

In another development, a presidential election took place in March 2019 that saw Zuzana Čaputová win the electoral contest. Čaputová became the first female President in the history of the Slovak Republic. She is also a lawyer and has been previously active in the third sector, working for NGOs on legal reforms. The office of the President has gained in prominence over the past couple of years, with the holder actively shaping constitutional politics. It will be interesting to see how Čaputová will conduct herself in office, and whether the trend of more active presidents continues.

In this report, we primarily examine the decision of the Constitutional Court on the material core as the single most important constitutional development of the year. We also review three other salient court cases decided last year in the third section, and conclude with a prediction on what lies ahead.

[1] Constitution of the Slovak Republic, Act No. 460/1992 Coll.

[2] Šimon Drugda, "Slovakia Amends the Constitution to Cap the Retirement Age" (*I·CONnect*, 16 May 2019) <http://www.iconnectblog.com/2019/05/slovakia-amends-the-constitution-to-cap-the-retirement-age> accessed 5 February 2019.

[3] Constitutional Act No. 375/2004 Coll., amended by Act Nos. 66/2019, 232/2019, and 469/2019 Coll.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

On January 30, 2019, the Constitutional Court, for the first time in the history of the Republic, invalidated a direct amendment to the Constitution because it breached its material core. Constitutional amendments have until now been considered outside of the Court's power of judicial review. However, this time the Court found that the Constitution contains an implicit material core, with the basis in Article 1(1), which declares that the Republic "is a sovereign, democratic state governed by the rule of law." The core cannot be changed through the ordinary amendment process, and if an amendment violates a core provision, it will be struck down.[4]

The case, PL. ÚS 21/2014, concerned a constitutional amendment on judicial background checks. The Parliament introduced the vetting of judges and candidates for judicial office in the middle of 2014. The Slovak judiciary regularly scores the lowest among court systems of all EU member states in its perceived independence, so politicians presented the reform as an effort to restore the confidence of the public in judges. The amendment was supposed to enhance judicial independence, but as the Constitutional Court found later, the vetting had the opposite effect.

Article 141a(5b) of the Constitution vested the Judicial Council with the authority to decide whether a candidate for a judicial appointment meets requirements that will "guarantee that she will exercise the judicial office independently." The change primarily concerned judicial candidates. To become judges, candidates in an open call for recruitment were selected based on their proficiency in law, and they also had to pass a background check. The background check had two components. Candidates first had to consent to the processing of their data, and they had to declare their assets, liabilities, addictions, prior criminal convictions, and mental health. The National Security Authority then verified their declarations and prepared material for the decision of the Judicial Council. Candidates had the right to comment on their files, and also to appeal to the Constitutional Court in the event of an unfavourable decision of the Judicial Council.

The most contentious part of the reform was the applicability of the vetting procedure to sitting lower court judges. Article 154d(1) of the Constitution, a transitional provision, retroactively extended the scheme to judges appointed before the amendment coming into force in 2014. Before the case went any further, however, the Court suspended the effect of the transitional provisions. As a result, for the last five years, candidates for judicial appointment were the only ones that had to be vetted.

The Court established its power to review the constitutional amendment on the guardianship provision of the Constitution. It asserted that its "power to protect the Constitution of the Slovak Republic extends across the whole sphere of constitutionality and is unconditional."

The power of judicial review of constitutional acts structurally replicated the procedure for the review of legislation under Article 125. Reviewing challenged provisions one by one, the Court found that the vetting of judges had been adopted in breach of the principle of judicial independence, which is a corollary to the rule of law, and was also retroactive. The direct amendment from 2014, already being part of the Constitution itself by 2019, was therefore found unconstitutional. After the Court invalidated the amendment, the amending actors had six months to redraft the act in accordance with the judgment but failed to do so. The amendment, therefore, lapsed. The amending actors could challenge the Court over the controversial decision but instead seemed to have accepted the outcome of the case.

III. CONSTITUTIONAL CASES

The following section examines three salient constitutional cases from the year 2019 that concern hate speech, speech rights of MPs, and the distribution of their mandates after the election to the European Parliament. As before, we focus on cases of judicial review of legislation under Article 125 of the Constitution and leave out most constitutional complaints and electoral disputes. Statistics on the decision-making activity of the Court are currently missing, as the practice of their publication has been discontinued. But because the Court was incomplete for most the year, it is reasonable to expect that the number of resolved cases significantly decreased and that there is a considerable backlog.

1. Hates Speech and Protected Groups under Criminal Law

In another landmark judgment (PL. ÚS 5/2017), the Court reviewed Criminal Code restrictions on speech crimes, which had been introduced to the law in 2016 to push back against the rising tide of extremism in civil society.[5] The decision of the Constitutional Court concerned two provisions of the Criminal Code that extended the definition of protected groups and added protection of political conviction.

First, the Court reviewed a provision that criminalised hate speech towards "another group of individuals" without distinction. Article 421(1) of the Criminal Code proscribes the establishment, support, and promotion of a movement aimed at suppressing fundamental rights and freedoms of others. Anyone who promotes an existing or historical movement or ideology that advocates for

[4] Simon Durgda, "Slovak Constitutional Court Strikes Down a Constitutional Amendment—But the Amendment Remains Valid" (*I·CONnect*, 25 April 2019) <http://www.iconnectblog.com/2019/04/slovak-constitutional-court-strikes-down-a-constitutional-amendment-but-the-amendment-remains-valid/#_ftnref4> accessed 5 February 2020.

[5] Criminal Code, Act No 300/2005 Coll.

suppression of fundamental rights of protected groups in society is criminally liable for up to five years of imprisonment. Traditionally protected groups in Slovakia have been racial, ethnic, national, or religious minorities. After the change, the protection against hate speech was extended to other groups of the population irrespective of their characteristics. The offence also covers the use and display of altered flags, badges, uniforms, or watchwords that imitate existing or historical movements and ideologies aimed at suppressing fundamental rights of different groups in society. Second, the change to the Criminal Code also modified the criminal offence of incitement to national, racial, and ethnic hatred under Article 424. The provision stipulates that anyone who publicly incites violence or hatred against an individual or group because of their actual or presumed affiliation with any race, nation, nationality, ethnic group, "actual or presumed" origin, skin colour, sexual orientation, religion, or because they are free confession or publicly inciting suppression of their rights and freedoms can be criminally punished by imprisonment for up to three years.[6] The amended Article 424 also added "political conviction" as a protected group characteristic.

The Court found both amendments to the Criminal Code unconstitutional. After a broad analysis, invoking the philosophy of hate speech, various conceptions of battling against it, and assessing different international documents, the Court applied the test of proportionality to the legislation. First, it considered the inclusion of an open category of "another group" in Article 421 of the Criminal Code. The legislation did not pass the subtest of legality, although the Court noted that the interpretation of the term "another group" in conformity with the Constitution could be possible. The reasons were the following: For the sake of certainty, the Court decided not to leave the open category to be tested and interpreted by general courts, and in the downstream application of the rule by the prosecutorial office. Second, if lawmakers seek to protect individuals or groups under the threat of criminal sanction to others, they must identify the protected group by a characteristic that will ensure consistency in the application of the rule. Third, unlike in the comparative constitutional law, the challenged legislation did not require a trigger of the breach of public order or violence for application of the norm, so it had to be interpreted narrowly. Finally, the Court noted that the open category was a rational design element because it could have been extended to groups the legislator is not yet able to identify over time. However, a cautious approach against open categories in criminal law was required. Taken together, the clause did not withstand the subtest of legality.

The Court used similar arguments in the review and invalidation of Article 424 of the Criminal Code, adding that the enhanced protection of political conviction against incitement to hatred could have a chilling effect on political discussion. The Court advised state institutions against overly relying on criminal law and expressed its readiness to clarify and update the standing elements of hate speech crimes and protected groups in individual constitutional complaints.

Several MPs in the current parliamentary term have been charged, and one expelled, for criminal speech against a minority ethnic. Most prominently, MP Milan Mazurek from the far-right party Kotleba lost his seat after being found guilty of anti-Roma hate speech by the Supreme Court. Mazurek was convicted for remarks during a public radio broadcast in 2016.[7] The law stipulates that an MP automatically loses a seat in the Parliament for being convicted of a deliberate crime.

Mazurek received only a 10,000 EUR fine for the racist speech, however, which if paid will not prevent him from running for office again.[8] With a stronger presence of far-right parties in the Slovak body politic, speech crimes are bound to become litigated more often.

2. Speech Rights of Members of Parliament

Free speech was at the heart of another important decision of the Constitutional Court (PL. ÚS 6/2017). A group of MPs challenged several provisions of Standing Orders of the Parliament that in their opinion limited freedom of expression of MPs and free competition of political forces. Namely, the amended rules from 2017 introduced variable time limits for speaking at the session;[9] prohibited the use of video, audio, or other visual aids during the speech (including posters, leaflets, banners, etc.); and privileged certain public office holders by allotting them more time to speak (the President, members of the Government, Speaker of the Parliament, etc.). Finally, the Speaker was given the new power to expel an MP who disrupts the orderly course of a session. The case received wide attention by the media and observers because it concerned the question of balance of power between the in- and out-groups in the Parliament as well as effective control of the executive, which traditionally commands a parliamentary majority.

The Court has always applied deference towards the Parliament in establishing the rules for conduct of its business and had previously stressed that the Parliament enjoys wide autonomy on internal matters. However, this time the Court noted that the substantive rule of law requires even the Parliament to follow

[6] The offender may face up to six years of imprisonment if the offence of incitement to hatred was committed with a special motive (pursuant to Article 140 of the Criminal Code), by a public official, a member of an extremist group, or in a state of emergency or war.

[7] Max Steuer, "Democratic (Dis)Armament: Slovakia's Legal Battle against Extreme Speech" (*Verfassungsblog* 17, December 2019) <https://verfassungsblog.de/democratic-disarmament/> accessed 5 February 2020.

[8] "Far-right MP Mazurek found guilty. He will lose his seat" (*Slovak Spectator,* 3 September 2019) <https://spectator.sme.sk/c/22203605/far-right-mp-mazurek-found-guilty-he-will-lose-his-seat.html> accessed 5 February 2020.

[9] The allotted time was 30, 20, and 10 minutes depending on the specific situation and type of speech.

the Constitution because the quality participation of MPs in the legislative process and protection of parliamentary minority is paramount. In reviewing the Standing Orders, the Court also relied on comparative constitutional law that has dealt with the allotment of time for speaking at parliamentary sessions in several jurisdictions in Europe. The Court took special notice of the practice in Germany, France, and the Czech Republic. To review the ban on visual aids for presentation in the Parliament, the Court also examined similar rules in the UK, France, Finland, Belgium, and Denmark.

When analysing the time limit for a speech in the Parliament, the Court surprisingly denied MPs the protection of general freedom of expression under Article 26 of the Constitution and instead held that the situation should be assessed under Article 78, which stipulates the right of an MP to exercise her function. The application of the test of proportionality in this case also exhibited weaknesses and inconsistent reasoning, but the Court concluded that time limits for intervention in parliamentary debates do not infringe on the freedom of speech of MPs. Moving on to the prohibition of visual aids, the Court took into account the decision of the ECtHR in *Karácsony and Others v. Hungary,*[10] but read the case quite narrowly. According to the Court, the use of presentations, leaflets, or posters during a speech at a parliamentary session is not an essential element of MPs' speech rights. The regulation limits the form but not the substance of the speech. Hence, the limitation does not touch the core of the right of MPs to participate in the discussion. Finally, in reviewing the power of the Speaker to expel an MP disrupting the course of a session, the Court emphasised the existence of various procedural safeguards against the expulsion, including a challenge of the expulsion order, the requirement that all of Parliament decides on the expulsion, and the right to full participation of the affected MP in disciplinary proceedings. The Court dismissed the challenge and upheld the constitutionality of Standing Orders of the Parliament.

3. Ghost Members of European Parliament

Although this report is about Slovak constitutional law, this section examines a prominent case that resulted from an external development, namely the withdrawal of the United Kingdom from the European Union. A case that became colloquially known as the "Lexmann controversy" (PL. ÚS 15/2019) concerned the allocation of seats in the European Parliament (EP) after the election held in Slovakia in 2019. The case is named after an elected candidate to the EP, Miriam Lexmann, who became a "member-in-waiting" because her parliamentary status was conditioned on Brexit. Lexmann was one of a cadre of MEPs-in-waiting across Europe, "taking no salary or expenses, standing by for the UK to leave the EU, so that they may take up seats after their British counterparts."[11]

The European Council adopted a decision on June 2018 that set out the composition of the EP for the 2019-2024 parliamentary term, already taking into account the UK's expected withdrawal from the EU.[12] The resolution stipulated that the UK seats in the EP would be redistributed among underrepresented member states. The EP would reduce in size from 751 to 705, and 27 out of the 74 seats of the UK were due to be redistributed. This rearrangement resulted in an increase in the number of MEPs from 13 to 14 for Slovakia. The fourteenth seat, however, would become available only once the UK effectively withdrew from the Union.

The national distribution of MEP seats is a matter for domestic regulation of every member state. The Electoral Code of the Slovak Republic governs the procedure for readjustment of MEP seats in Article 220a:

> If the United Kingdom of Great Britain and Northern Ireland is a Member State of the European Union at the start of the 2019-2024 parliamentary term, the elected [Slovak] member of the European Parliament from the political party that achieved the lowest residual number of votes after a division shall not take office until the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU. If several parties have an equal number of residual votes after the division, the elected candidate of the political party or coalition that received fewer votes shall not take office. If the number of valid votes of those candidates is equal, the decision will be made by drawing lots.[13]

After the EP election in 2019, the distribution of EP mandates in the Slovak Republic caused certain numerical difficulties, since all 14 seats were not allocated in the first round of division. The pertinent provision of "the lowest residue after a division" from §220a could have been interpreted in various ways. The State Electoral Commission applied a very controversial method of interpretation by which the 14th (i.e., conditional) mandate was allocated to a candidate who received more votes than the candidate who ended up in 13th (i.e., unconditional) position.

The State Electoral Commission did not take into consideration the final residue of votes after several rounds of division, but quite astonishingly, the residue of votes (only) after the first round of division. Ultimately, this "mechanical" and quite absurd interpretation ultimately resulted in the candidate with fewer total votes achieving a higher residue (after the first round of division) and, consequently, the unconditional MEP seat. The

[10] Nos. 42461/13 and 44357/13.

[11] Daniel Boffey, "Ghost MEPs stuck with no pay as they wait for UK to give up seats" (*The Guardian*, 6 August 2019) <theguardian.com/world/2019/aug/06/ghost-meps-stuck-no-pay-wait-uk-give-up-seats-brexit> accessed 6 February 2020.

[12] European Council Decision no. 2018/937, 28 June 2018 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32018D0937> accessed 6 February 2020.

[13] Act No. 180/2014 Coll. on the Conditions of the Exercise of Voting Rights.

Commission interpreted this provision in contrast to any reasonable application of the Electoral Code as well as against the basic constitutional principles governing the right to vote (mainly the principle of equality).

The judge rapporteur suggested that the case be accepted for further deliberations. In these types of electoral cases, the Court must convene in a plenary session, in which it is constitutionally obliged to decide with a full majority of judges (i.e., with at least seven supporting the decision). Since at that time only seven judges were appointed to the Court, the procedural decision to accept the case for further deliberation had to be unanimous. The plenum was unable to reach that conclusion. Thus, the case was dismissed on procedural grounds. The verdict was condemned by the dissenting opinion of the chief judge for the Court's procedurally awkward position that avoided adopting the decision on the merits.

Since then, all 13 judges have been appointed to the Court, and the case has been refiled and is currently being reargued. According to case law of the Court, a procedural ruling does not create an obstacle of *res iudicata*. Consequently, procedurally dismissed cases like this can be relitigated.

IV. LOOKING AHEAD

After a turbulent half-decade, the Constitutional Court sits again in full composition. The earliest upcoming vacancy on the Court, barring the unforeseen resignation of a judge, will not occur until 2026. That gives the Court time to stabilise and resolve the backlog in cases caused by staff shortage. Political actors, on the other hand, will have time to think if the appointment mechanism for constitutional judges needs updating, as the latest effort to change the system failed in 2018.[14]

It will be interesting to see if the "fourth generation" of CC judges follows up on the jurisprudence of its predecessors, specifically the decision on constitutional unamendability. The decision of the Constitutional Court invalidating parts of the Constitution was delivered during the selection hearings for the next judges of the Court, and although some candidates agreed in principle that there is judicial power to protect the core of the Constitution in extreme cases, most disagreed with the application in the specific case of background checks for lower court judges. We will have to see, therefore, if the momentous new power of the Constitutional Court will be used again in the next term or fall into desuetude, with the precedent becoming lapsed.

The new Court will be tested by the upcoming general election, which is scheduled for February 28, 2020. The Constitutional Court has an important role in electoral disputes, which is a seasonal agenda that surges every time local or national elections take place. Related to the parliamentary election in 2020, the Constitutional Court will have to decide meritoriously on the new electoral law, which extended the silence period against the publication of opinion polls before an election. The Court suspended the effects of the law in the interim so that the prohibition would not affect the parliamentary election, but the issue has still not been resolved determinatively.[15]

The presence of far-right parties in the Parliament is, and will likely continue to be, a stress test for Slovak democracy.[16] Old politicians have not been able to counter the rise of the far-right in the body politic despite the rhetoric of "acting as a dam" against the rising tide of extremism in society. At the time of the publication of this report, it seems that the People's Party Our Slovakia will make gains in the general election, and with the larger number of MPs in the Parliament, will bring a bigger appetite to influence outcomes.[17] Over the parliamentary term, People's Party Our Slovakia successfully exploited Standing Orders of the Parliament to initiate disruptive proposals and blame failure on the "establishment." It effectively used legislative and Constitution-making power to attract media coverage.

V. FURTHER READING

Šimon Drugda, "Changes to Selection and Appointment of Constitutional Court Judges in Slovakia" (2019) 102 *Právny Obzor*

Max Steuer, "The Guardians and the Watchdogs: The framing of politics, partisanship and qualification by selected newspapers during the 2018–2019 Slovak Constitutional Court appointment process" (2019) 102 *Právny Obzor*

Max Steuer, "Constitutional Court of the Slovak Republic" (2019), *Max Planck Encyclopedia of Comparative Constitutional Law*

[14] Šimon Drugda, "Changes to Selection and Appointment of Constitutional Court Judges in Slovakia" (2019), 102 *Právny Obzor,* pp18-19.

[15] Šimon Drugda, "50-day Silence Period on Publication of Opinion Polls before Election in Slovakia" (*I·CONnect*, 20 December 2019) <http://www.iconnectblog.com/2019/12/50-day-silence-period-on-publication-of-opinion-polls-before-election-in-slovakia> accessed 5 February 2020.

[16] Šimon Drugda, "Behaviour of the Far-Right in the Slovak Parliament: Constitutional Amendment as a PR Tool" (*Bridge*, 4 December 2020) <https://bridgenetwork.eu/2019/12/04/behaviour-of-the-far-right-in-the-slovak-parliament-constitutional-amendment-as-a-pr-tool/> accessed 6 February 2020.

[17] "The far-right ĽSNS in the game to win 2020 elections" (*Slovak Spectator*, 16 January 2020) <https://spectator.sme.sk/c/22304085/the-far-right-lsns-in-the-game-to-win-2020-elections.html> accessed 5 February 2020.

Slovenia

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I. INTRODUCTION

In 2019, the Constitutional Court rendered several precedential and important decisions in which it bolstered the protection of human rights and fundamental freedoms. In so doing, it contributed to strengthening the overall constitutional order. While the Constitutional Court continues to be the most reliable rule of law institution in Slovenia, its stature in 2019 was diminished due to its growing ineffectiveness and intra-institutional professional as well as personal disputes among judges, which have brought it a lot of negative press.

In response to the Constitutional Court's 2018 decision in which electoral legislation was declared unconstitutional, the National Assembly initiated the laborious process of adopting a new law. Simultaneously, the Government proposed to the National Assembly to initiate the procedure for amending the Constitution by placing the right to Slovenian sign language into the constitutional framework.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Slovenian Constitution is often depicted as a rigid one, as it requires a two-thirds absolute Parliament majority to pass a constitutional amendment. Accordingly, the Constitution has so far been amended several times, namely in 1997, 2000, 2003, 2004, 2006, 2013, and 2016. By the last amendment in 2016, a new human right (the right to drinking water) was inserted in the Constitution. At least two new constitutional amendments could be added in the future.

The first, less problematic one concerns the placement of Slovenian sign language into the constitutional framework.[1] This constitutional change is welcome as it would increase the importance of sign language and facilitate the integration of the deaf community into Slovenian society.

The second possible constitutional amendment is politically sensitive as it refers to elections to the National Assembly following a Constitutional Court decision on the unconstitutionality of the legislative provisions determining the size of electoral districts. By Decision No. U-I-32/15 of 8 November 2018, the Constitutional Court reviewed the conformity of the National Assembly Elections Act and the Act Establishing Constituencies for the Election of Deputies to the National Assembly to the Constitution.[2]

The fifth paragraph of Article 80 of the Constitution determines three fundamental elements of the electoral system: deputies are elected (1) according to the principle of proportional representation (2) with a four-percent threshold required for election to the

[1] See the governmental proposal *Predlog za začetek postopka za dopolnitev II. poglavja Ustave Republike Slovenije z osnutkom Ustavnega zakona o dopolnitvi II. poglavja Ustave Republike Slovenije* (UZ62a), EVA 2019-2611-0009 [2019].

[2] See Decision of the Slovenian Constitutional Court No. U-I-32/15 [2018], *Official Gazette* RS 82/18.

National Assembly, and (3) with due consideration that voters have a decisive influence on the allocation of seats to the candidates.[3] The Constitutional Court assessed that the electoral system guarantees voters decisive influence on the allocation of seats to candidates.[4] However, it also established that 26 years after the adoption of the electoral legislation, the areas of the electoral districts are unconstitutional as they no longer correspond to the criteria determined by Article 20 of the National Assembly Elections Act (i.e., an equal number of inhabitants, geographical completeness, and the highest possible integrity of municipalities).[5] The number of constituents differs greatly from one electoral district to another. Namely, the difference in the size of the biggest electoral district to the smallest electoral district has a ratio of 1:3.73.[6] In the present situation, votes of those who cast their ballots in smaller districts thus count more than those cast in larger districts. Furthermore, the territories of the electoral districts are not harmonised with the borders of the new municipalities and no longer fulfill the requirement of geographical completeness.[7] The Constitutional Court imposed on the legislature a two-year time limit to eliminate the established unconstitutionality.

The political parties and the constitutional experts debated on possible solutions. Broadly speaking, there are two proposals, neither currently with sufficient support. Whereas one proposes changing electoral districts, the other seeks to abolish them. The electoral legislation should be changed before the next parliamentary elections, which are due in 2022.

III. CONSTITUTIONAL CASES

Cases contained in this report have been included for their particular importance in complying with the following criteria: 1) a decision of the Constitutional Court entails the resolution of an important constitutional issue and 2) a decision directs courts and other state authorities or puts a limit on their power. It is worth adding that only important parts of these decisions are mentioned and referred for further reading.

1. Decision No. Up-619/17 of 14 February 2019: Right to Respect for Home

In this decision, the Constitutional Court decided on a complainant's right whose lease for a non-profit rented property was cancelled. The important constitutional question considered by the Constitutional Court was whether the decision of cancelling the non-profit rent agreement inadmissibly interfered with the complainant's right to respect for home.

The Constitutional Court already established that such right is protected under the right to inviolability of dwellings referred to in the first paragraph of Article 36 of the Constitution (also Article 8 of the ECHR).[8] This constitutional and conventional right does not entail that an individual has a right to be provided with home. However, as the Constitutional Court clarified, the right to respect for home guarantees judicial control of the proportionality of the measure entailing an interference with the right to respect for home prior to the loss of home. The Constitutional Court also took into account the principle of social state referred to in Article 2 of the Constitution that the loss of home is the most severe form of interference with the right to respect for home. The Constitutional Court, having looked into all the circumstances of the case, decided that the Higher Court did not carefully assess the proportionality of the interference with the complainant's right to respect for home and, as such, it inadmissibly interfered with this right. The Constitutional Court abrogated the judgment of the Higher Court and remanded the case thereto for new adjudication.

2. Decision No. U-I-477/18, Up-93/18 of 23 May 2019: Right to Personal Liberty of Persons Suffering from a Mental Disorder

In case No. U-I-477/18, Up-93/18, the Constitutional Court decided on a constitutional complaint against a judicial decision by which a person was committed to a secure ward of a social care institution without his consent.[9] The committed person alleged, *inter alia,* a violation of the right determined by Article 19 of the Constitution because he was placed in an institution that was overcrowded. The Constitutional Court extended the review to the Mental Health Act.

Within the framework of the review of the constitutionality of that Act, it first answered the question of whether the existing statutory regulation of commitment to a secure ward of a social care institution is consistent with the safeguards determined by the second paragraph of Article 19 of the Constitution, under which personal liberty may be limited.[10] It stressed that, when regulating by law a measure that entails an interference with the personal liberty of persons suffering from a mental disorder, the legislature must refer to its protective objective but also strive

[3] Ibid [27].

[4] Ibid [33].

[5] Ibid [56].

[6] Ibid.

[7] Ibid.

[8] Decision of the Slovenian Constitutional Court No. U-I-64/14 [2017], *Official Gazette* RS 66/17. In this decision, the Constitutional Court decided on the constitutionality of several provisions of the Construction Act.

[9] Decision of the Slovenian Constitutional Court No. U-I-477/18, Up-93/18 [2019], *Official Gazette* RS 44/19.

[10] Ibid [13].

towards the realisation of the therapeutic objective of the measure.[11] The determination of the conditions for the execution of the measure directed towards attaining both the protective and therapeutic objectives concurrently entails a safeguard ensuring that the duration of the measure is limited to the period strictly necessary for the committed person's health condition to improve and for preventing his or her condition from deteriorating.[12] A statutory regulation that does not satisfy the mentioned requirements is inconsistent with the second paragraph of Article 19 of the Constitution.

When reviewing the conformity of the statutory regulation with the first paragraph of Article 19 of the Constitution, the Constitutional Court proceeded from the constitutional requirement that only the judicial branch of power has the right to order deprivation of liberty that is longer than only momentary.[13] The reviewed statutory regulation enables courts to merely weigh the necessity of the measure from the viewpoint of ensuring the attainment of the protective objective, which is to be attained by excluding the person concerned from the environment. However, it excludes the possibility of the courts assessing the appropriateness of the concrete institution charged with executing the measure from the viewpoint of ensuring security within the secure ward and the attainment of the therapeutic objective of the measure. A regulation that excludes such assessment by the court when ordering a measure involving the deprivation of liberty is not an appropriate measure for achieving a constitutionally admissible objective and is thus inconsistent with the right determined by the first paragraph of Article 19 of the Constitution.[14]

3. Partial Decisions No. U-I-152/17, both dated 4 July 2019: Right to Protection of Personal Data

Two cases worth mentioning stem from a request lodged by the Human Rights Ombudsman arguing that various provisions of the Police Tasks and Powers Act were unconstitutional.[15] The Constitutional Court already adopted two partial decisions; one aspect of this regulation is still under consideration.

Two new means for the performance of police tasks introduced by the challenged regulation that were under the review of constitutionality were the use of drones and the optical recognition of licence plates (the established abbreviation for automatic number plate recognition is ANPR). In both cases, the Constitutional Court reviewed the challenged regulation from the perspective of the human right to protection of personal data. The Constitutional Court stressed that the Constitution-framers specifically protected one aspect of one's privacy, namely information privacy. This privacy has a special place in the Constitution and is important within the overall protection of an individual's privacy.

Regarding the use of drones in law enforcement action, the Constitutional Court decided that the challenged regulation was not inconsistent with the right to protection of personal data determined in Article 38 of the Constitution. This decision was based on the fact that the Human Rights Ombudsman did not substantiate his allegations.

The case of ANPR had a different outcome. The Constitutional Court first explained that this technical means functions in general in such a manner that the optical unit takes a photograph of the licence plate, the software then recognises the licence plate number, and these data are subsequently compared (cross-checked) with other personal data databases.[16] If the data match, the system notifies the police officer, and on such grounds the police officer may stop the driver and the vehicle and carry out a more detailed check. Licence plate data that produce no matches are further retained.[17] In accordance with the established constitutional case law, any processing of personal data entails an interference with the constitutional right to protection of personal data which requires that the processing of personal data be subject to statutory regulation. This requirement signifies that there must exist a statutory basis for every single action taken in relation to personal data.[18] The Constitutional Court decided that the challenged provision did not fulfill this requirement. As it established, the challenged provision failed to determine that the collected licence plate data can be further processed by automatic comparison with other personal data databases. For this reason alone, the challenged regulation was therefore inconsistent with the Constitution, so the Constitutional Court abrogated it.

4. Decision No. Up-135/19, U-I-37/19 of 5 June 2019: The Right to a Public Hearing in an Electoral Dispute Regarding Local Elections

The complainant claimed there were irregularities relating to the financing of the election of the members of the City Council of the Municipality of Ljubljana that took place in 2018.[19] Since the Administrative Court decided with finality on questions of law and fact and rejected the motion to carry out a main hearing, the complainant lodged a constitutional complaint.

[11] Ibid [18].

[12] Ibid.

[13] Ibid [29].

[14] Ibid [31].

[15] See Partial Decision of the Slovenian Constitutional Court No. U-I-152/17 (ANPR) [2019], *Official Gazette* RS 46/19; Partial Decision of the Slovenian Constitutional Court No. U-I-152/17 (DRONES) [2019], *Official Gazette* RS 48/19.

[16] Partial Decision of the Slovenian Constitutional Court No. U-I-152/17 (ANPR) [2019] [14].

[17] Ibid.

[18] Ibid [32].

[19] Decision of the Slovenian Constitutional Court No. Up-135/19, U-I-37/19 [2019] *Official Gazette* RS 45/19.

The Constitutional Court stressed that the right to a main hearing is a human right ensured by Article 22 of the Constitution.[20] It held that whenever it is necessary to correctly establish the relevant facts by taking into account all the circumstances of the concrete case, the court at issue must hold a main hearing.[21] A public main hearing on the electoral dispute initiated after the day of voting is of special importance as these disputes have to be carried out transparently to establish trust in the credibility of the election results.[22] The Constitutional Court did not concur with the Administrative Court that in the electoral dispute proceedings only the questions of law were at issue.[23] Moreover, it stated that ensuring the public nature of a judicial decision taken in such a dispute does not substitute for the right to a public hearing.[24] Furthermore, the principles of effectiveness and procedural economy cannot qualify as a prevailing reason for the Administrative Court not to hold a public hearing in electoral disputes.[25] Since the Administrative Court failed to carry out a public hearing, the Constitutional Court abrogated the challenged judgment in the part referring to the assessment of whether the allegations in the appeal were well founded, and in this part remanded the case to the Administrative Court for new adjudication.

5. Decision No. Up-672/16 of 13 March 2019: Right of Aliens to Social Security

By Decision No. Up-672/16, the Constitutional Court decided on the constitutional complaint of a foreign citizen who challenged the courts' decisions finding that the Pension and Disability Insurance Institute correctly stopped disability allowance because the complainant was erased from the register of unemployed persons due to the expiry of his work permit. The Constitutional Court stressed that the protection of the right to social security under the first paragraph of Article 50 of the Constitution is reserved to citizens of the Republic of Slovenia.[26] However, this does not mean the Constitution doesn't at all guarantee foreign citizens the right to social security. Such a narrowing constitutional interpretation could in certain circumstances lead to a denial of human dignity.[27] The Constitutional Court already took the position that the right to a pension was also protected by the right to private property referred to in Article 33 of the Constitution, which, on the other hand, applied also to all aliens.[28]

6. Decision No. U-I-59/17 of 18 September 2019: Amended Aliens Act in Light of the Mass Migration and Refugee Flows

Much awaited in the domestic as well as foreign milieu was a decision of the Constitutional Court on the constitutionality of certain provisions of the Aliens Act.[29] The Slovenian Government (Ministry of the Interior) proposed amendments to the Aliens Act in 2016. Changes, adopted by the legislature, were driven by fear of mass migration and refugee flow and possible border closures. However, the legislative amendments encountered criticism in Slovenia and abroad.[30] The request of the constitutionality of the challenged provisions regulating the specific legal regime for the treatment of persons expressing their intention to file an application for international protection in the light of the changed migration situation was lodged by the Human Rights Ombudsman.

The Constitutional Court reviewed the amendments from the view of their consistency with the principle of *non-refoulement,* which prohibits the direct and indirect return of individuals to a country in which they may face treatment that violates the right to the prohibition of torture.[31] This principle has its constitutional protection in Article 18. The removal of individuals who claim that they need protection from a country without assessing the existence of substantial reasons that justify the conclusion that there exists a real risk of inhumane treatment is consistent with the principle of *non-refoulement* only if the third country is safe. That is when individuals enjoy effective protection against a violation of this principle. Based on the Constitutional Court's established case law, the case law of the European Court of Human Rights, and the Court of Justice of the European Union, the Constitutional Court established that the contested legislative provisions are unconstitutional as they interfere with the right determined by Article 18 of the Constitution.[32] As this is an absolute right,

[20] Ibid [22].

[21] Ibid.

[22] Ibid [23].

[23] Ibid [42].

[24] Ibid [44].

[25] Ibid.

[26] Decision of the Slovenian Constitutional Court No. Up-672/16 [2019], *Official Gazette* RS 32/19 [8].

[27] Ibid.

[28] Ibid.

[29] Decision of the Slovenian Constitutional Court No. U-I-59/17 [2019], *Official Gazette* RS 62/19.

[30] See, for example, Council of Europe, "Mission to Slovenia to discuss amendments to the Aliens Act" (*Council of Europe Newsletter on Migration and Refugees*, February 2017) <https://www.coe.int/en/web/portal/-/mission-to-slovenia-to-discuss-amendments-to-the-aliens-act> accessed 24 January 2020; Saša Zagorc, Neža Kogovšek Šalamon, "Slovenia: Amendments to the Aliens Act Enable the State to Activate Closure of the Border for Asylum Seekers" (*EU Migration Law Blog*, 30 March 2017) <https://eumigrationlawblog.eu/slovenia-amendments-to-the-aliens-act-enable-the-state-to-activate-closure-of-the-border-for-asylum-seekers/> accessed 24 January 2020.

[31] Decision No. U-I-59/17 [26] [30].

[32] Ibid [61].

interferences with such right are inadmissible. The Constitutional Court thus abrogated the contested provisions.[33]

There is another aspect of this decision worth mentioning. When the Constitutional Court reviews the constitutionality of a law falling within the scope of European Union law, it must also consider not only the case law of the Court of Justice of the European Union but also the Charter of Fundamental Rights of the European Union. Namely, the Charter became legally binding with the entry into force of the Treaty of Lisbon (the first paragraph of Article 6 of the Treaty on the European Union).[34] The Constitutional Court has not yet dealt with a case in which it would have had to apply the Charter as a direct (formal) criterion for its assessment. The importance of this decision lies in the Constitutional Court's explanation when and how it will apply the Charter.[35]

IV. LOOKING AHEAD

Slovenia is currently ruled by a very fragile coalition with minority support in the Parliament. Snap elections, therefore, certainly cannot be ruled out. These could also be spurred by a decision of the Constitutional Court, in front of which several much awaited and important decisions are due. The constitutionality of a highly debated supplementary budget for 2019 was challenged before the Constitutional Court. Although the Fiscal Council issued a negative opinion on it due to excessive expenditure and a lack of reform measures, the legislature adopted the budget and its constitutionality is now under review.

There is a request lodged by the Judicial Council and a petition to initiate the review procedure by the Office of the State Prosecutor that question the constitutionality of the Parliamentary Inquiries Act, and the fact that this Act does not prevent ordering what they consider to be an unlawful parliamentary inquiry. These applications are related to a specific recent situation. However, it is worth remembering that the Constitutional Court back in 2011, by Decision No. U-I-50/11,[36] found that the Parliamentary Inquiries Act and the Rules of Procedure on Parliamentary Inquiries were inconsistent with the Constitution as they failed to regulate a procedural mechanism that would ensure that motions to present evidence that are manifestly intended to delay proceedings, to mob the participants, or which are malicious or entirely irrelevant to the subject of the parliamentary inquiry are dismissed promptly, objectively, predictably, reliably, and with the main objective of ensuring the integrity of the legal order. As a result of this legal gap, the effective nature of the parliamentary inquiry, which is required by Article 93 of the Constitution, was diminished in an unconstitutional manner. The time limit determined for remedying the established unconstitutionality already expired in 2012, and the legislature has not yet responded appropriately thereto.

V. FURTHER READING

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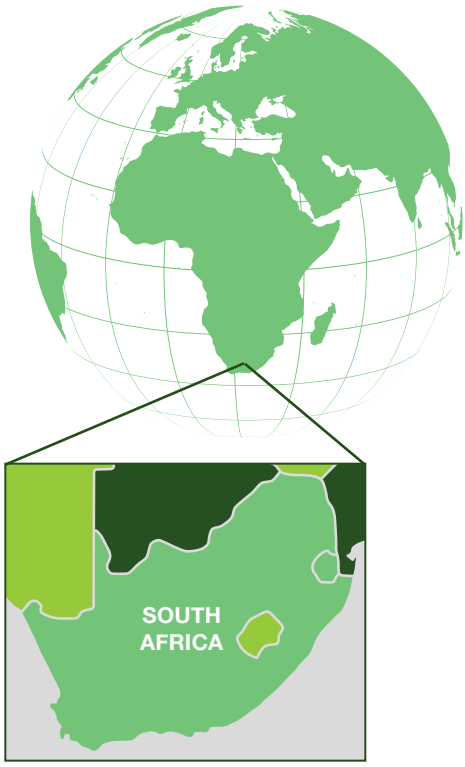
[33] Ibid [62].

[34] Consolidated Version of the Treaty on European Union [2016] OJ C 202/1.

[35] Ibid [22]-[25]. For details, see, Katarina Vatovec, »Evropeizacija ustavnosodne presoje prek Listine Evropske unije o temeljnih pravicah [Europeanization of the constitutional court's case law through the Charter of Fundamental Rights of the European Union]« (2019) Dignitas 83/84, 27.

[36] Decision of the Slovenian Constitutional Court No. U-I-50/11 of 23 June 2011 [2011], *Official Gazette* RS 55/11.



South Africa

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I. INTRODUCTION

As the devastation of the economy, constitutional institutions, and the foundations of constitutionalism that characterized the Zuma era continues to come to light in investigations by the "Zondo Commission" amongst others, Zuma's successor, President Ramaphosa struggles to establish control over the ANC and the government. In the general elections in May, Ramaphosa's organization lost some ground, but retained a significant parliamentary majority amidst a growing trend of apathy within the electorate.

In this context, and against the background of creeping socialism in the form of relentless centralization of state control over society, 2019 saw an interesting, if sometimes disconcerting set of judicial interventions. The most visible failures were related to the state-owned power utility ESKOM, which has been teetering precariously on the brink of collapse due to demonstrated technical and managerial incompetence and corruption, and government's refusal, on ideological grounds, to allow private electricity generation.

In the Zuma era, manipulation of a commission of enquiry's 2015 report on fraud and corruption attending the government's arms procurement process, which was launched in the late 1990s and known as the Strategic Defence Procurement Package, became public knowledge when the flawed findings were reviewed judicially and set aside. Zuma's prosecution based on his conduct in this regard is still pending.

Much litigation also surrounded the work of the incumbent Public Protector, appointed by parliamentary majority under circumstances that gave rise from the outset to well-founded suspicions of a lack of objectivity, so much so that it's possible she may be removed by Parliament before completing her term of office.

Other cases reported here relate to the trend in government and judicial policies demonstrating opposition to the constitutional acknowledgment of cultural and linguistic diversity, and unlawful government interception of private and professional communications.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Since the late 1990s, a range of laws and policies have been adopted with the clear intention of centralizing government control over all public and many previously private instruments of authority in the process of what the ANC government describes as a "national democratic revolution". This process involves, *inter alia,* affirmative action based on racial classification; "cadre deployment" of ANC supporters to all public institutions; the nationalization (euphemistically termed "public trusteeship" and "custodianship") of water, mineral, petroleum, and fishery resources; "Black Economic Empowerment" aimed at transferring, by force of law, the ownership of a maximum amount of business interests to "Black" owners; the rolling out of a system of social grants rendering around one-third of the total population to be clients dependent on the state for their basic survival; state control over the legal professions; and proposals still in the process of development concerning a constitutional amendment to allow for expropriation of property without compensation (EWC), the virtual nationalisation of all health services, and increased state control over education and sport.

This trend may justifiably be described as creeping socialism, which is clearly inconsistent with the prescripts of the Constitution: section 1 of the Constitution, for instance, elevates non-racialism, multi-party democratic government that ensures accountability, the rule of law, and responsiveness and openness to foundational constitutional values; section 6 requires the state to elevate the status and advance the use of indigenous languages and to ensure parity of esteem of all official languages; section 14 affords everyone the privacy of their communications; section 22 purports to protect every citizen's freedom of trade, occupation, and profession; section 25(1) prohibits arbitrary deprivation of property; and section 29(2) guarantee's everyone's right to receive education in the official language of their choice. None of these rights are immune from limitation, but in terms of sections 36 and 39 of the Bill of Rights, limitations and the interpretation of the rights are determined by the question of whether they conform to the standards of an open and democratic society based on human dignity, equality, and freedom. It is becoming increasingly doubtful whether the escalating trend of creeping socialism can be justified as conforming to the requirements of the rule of law and of the open and democratic society envisaged by the Constitution.

Background to the proposed amendment of section 25 of the Constitution to allow for EWC was given in last year's report. In the meantime, a new Parliament was constituted following general elections in May. A parliamentary ad hoc EWC committee published a draft bill on 3 December for public comment, with 31 January 2020 as the deadline.

The explanatory memorandum accompanying the draft provides the following context: "The purpose of the Constitution Eighteenth Amendment Bill, 2019 ("the Bill") is to amend section 25 of the Constitution so as to provide that the right to property may be limited in such a way that where land is expropriated for land reform, the amount of compensation payable may be nil. Further to clarify that such limitation is 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". The preamble of the draft reiterates the notion of empowerment towards productive participation in agriculture.

The proposed amendment is silent on mechanisms designed to ensure productivity of expropriated land allocated to new owners, presumably on the assumption that the existing land reform system makes adequate provision therefor. The current system of land allocation, which has been in operation for a number of years, unfortunately has a disastrous record of administrative incompetence, corruption, and inadequate state support for maintaining or developing productive land that has been reallocated.[1]

The draft amendment of section 25 essentially takes the form of two additions: first, by adding the possibility of a court determining that no compensation needs to be awarded "where land and any improvements thereon are expropriated for the purposes of land reform"; and second that parliamentary legislation must "set out specific circumstances where a court may determine that the amount of compensation is nil". If these amendments were adopted, the implication would be that the fundamental right not to be deprived of property would be rendered subject to further extra-constitutional legislation. Such limiting legislation would, in terms of section 36(1), which provides: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose".

The ad hoc committee proposed that the procedure to be followed for the adoption of the constitutional amendment be determined by section 74(2) of the Constitution. That would entail support for the amending bill by two-thirds of the members of the National Assembly and of six of the nine provincial delegations to the National Council of Provinces. Furthermore, the committee expressed the opinion that the bill should also be referred to the National House of Traditional Leaders (which does not form part of the national legislature) "since it contains provisions pertaining to customary law or customs of traditional communities". Whatever the position the traditional leaders may take on the matter, it would not be binding on Parliament.

III. CONSTITUTIONAL CASES

1. Corruption Watch v The Arms Procurement Commission 2019 JDR 1491 (GP): Review of commission report on fraud and corruption

It is well known that the global arms industry is associated with corruption involving spectacular amounts of money covertly expended for various reasons, including to influence government decision-making on the acquisition of arms and military hardware.[2] Since its inception in 1997, an extensive government arms procurement process named the Strategic Defence Procurement Package has been immersed in controversy involving its rationale, need, effects, and intended offsets, but more specifically due to indications that its decision-makers, which included later (now former) President Jacob Zuma, were improperly and corruptly influenced in the award of procurement contracts. Under political

[1] The complexities attending land reform were illustrated, for instance, by Professor Ben Cousins of the Institute for Poverty, Land and Agrarian Studies in a public lecture in October 2019 – accessible online at <https://www.plaas.org.za/land-reform-accumulation-and-social-reproduction-public-lecture-by-prof-ben-cousins/> accessed 14 January 2020.

[2] See, e.g., Francois Venter, 'Arms deals, bribery and political interference: how (im)potent the (rule of) law?' (2008) 125(4), *SALJ* 633.

pressure in 2011, Zuma (then President) appointed a commission of enquiry to investigate the allegations. At the end of 2015, the Commission delivered its report, finding no evidence of wrongdoing, undue influence on government functionaries, fraud, or corruption. The Commission rejected the evidence brought before it as "wild allegations and baseless hearsay".

Two NGOs brought an application before the High Court in Pretoria to review and set aside the findings of the Commission, essentially due to fundamental procedural defects in the manner in which it conducted the inquiry under the guidance of its chairperson, Judge Willie Seriti. In the absence of precedent regarding the jurisdiction of a court to undertake a review of the report of a commission of enquiry, a comparative investigation was undertaken, finding that it did have such jurisdiction if it found irregularities regarding the legality and objectivity of the proceedings.

The applicants argued that "the Commission failed to gather relevant material, to properly consider and investigate matters raised in this regard, failed to admit evidence which was highly material to its inquiry and which was in its possession, failed to seek and allow information or material evidence from key witnesses and failed to test the evidence of witnesses who appeared before it by putting questions to them with the required open and enquiring mind" (summarized in para 18 of the judgment).

The Court found (para 53) that "it is clear that the Commission failed to enquire fully and comprehensively into the issues which it was required to investigate on the basis of its terms of reference" and that (para 66) the chairperson of the Commission "adopted the position that the evidence given by what were referred to as non-critical witnesses were 'known facts' and evidence given by critical witnesses ... were merely theories", and in conclusion (para 70) "where the uncontested evidence reveals to manifest a set of errors of law, a clear failure to test evidence of key witnesses and a refusal to take account of documentary evidence which contained the most serious allegations which were relevant to its inquiry, the principle of legality dictates only one conclusion, that the findings of such a commission must be set aside".

In 2005, Zuma associate Schabir Shaik was convicted of two counts of corruption and one of fraud on the evidence of him making numerous payments totaling a substantial amount of money to or on behalf of Zuma in connection with the Strategic Defence Procurement Package. Zuma was subsequently also charged with corruption, fraud, and money laundering, although the matter has been delayed substantially due to a range of legal maneuvers, including indecision by the National Prosecuting Authority, various appeals, and applications for an order to permanently stay prosecution. In November 2019, the High Court in Pietermaritzburg rejected Zuma's most recent application for a permanent stay of prosecution.

2. Democratic Alliance v The Public Protector 2019 JDR 1582 (GP): A failing constitutional institution

The Public Protector (PP) is an institution created by Chapter 9 of the Constitution to support democracy. During the term of the previous incumbent, the Office of the PP flourished as a stalwart of constitutional integrity and produced various influential reports exposing public wrongdoing and abuse of power. The appointment of the present incumbent (Busisiwe Mkwebane) was strongly opposed by the official parliamentary opposition, expressing concerns about her political objectivity and proficiency. Unfortunately, these misgivings have proven to be well founded. Various reports produced under her guidance have been challenged successfully on review before the courts, in some cases producing unusually strongly worded judicial denouncements of Mkwebane. During the year, attempts to remove her from office through the required parliamentary processes have consequently gained momentum.

One instance of judicial intervention was an application launched in the High Court in Pretoria by the official opposition and an NGO to review the legality of a report of the PP on alleged provincial maladministration of an agricultural project in the Free State in which Ace Magashule, former premier of the province and now Secretary General of the ANC (known to be aligned with Zuma) and the notorious Gupta family were involved.[3]

The Court stated (para 20) that the "PP is charged with rooting out improper conduct in Government for the public benefit. The institution of the PP was ultimately created to serve the people, and to protect their interests against those in power, who might be tempted to abuse it for nefarious purposes".

Mkwebane expressly chose not to investigate core issues, such as who actually benefited from the project besides the intended beneficiaries, the roles of leading politicians (including Zuma and Magashule) in the failed project, and why disciplinary action was not taken when irregularities were discovered by the National Treasury. The Court found (para 47) that the PP's "decision to limit the scope of her investigation so dramatically was irrational as it side-stepped all the crucial aspects regarding the complaints and led to a failure on her part to execute her constitutional duty".

The Court commented as follows on the PP's view that compliance with relevant requirements for concluding public-private partnerships did not need to be investigated: "On what basis she could justifiably come to such a conclusion is unclear. It points either to ineptitude or gross negligence in the execution of her duties" (par 60). Regarding the PP's failure to make findings on irregular expenditure, the Court stated (para 75): "One may justifiably ask whether this was done for some ulterior purpose. Unfortunately no explanation was given by the PP". The Court reached a clear conclusion regarding the PP's investigation (para 84): "The failure of the PP to execute her constitutional duties in investigating and compiling a credible

[3] See *2017 I-CONnect-Clough Center Global Review of Constitutional Law*, 262.

and comprehensive report points either to a blatant disregard to comply with her constitutional duties and obligations or a concerning lack of understanding of those duties and obligations". Regarding the PP's failure to investigate the reasons why the intended beneficiaries did not benefit from the project, the Court commented (para 91): "It is an absolute disgrace that some as yet unidentified people benefited while the poor and the marginalized were yet again robbed of an opportunity to better their circumstances."

The outcome of the case was that the PP's report was reviewed, set aside, and declared unlawful, unconstitutional, and invalid. But this was not the end of the matter. The Court postponed the handing down of a costs order because the PP had appealed a punitive costs order in a previous case to the Constitutional Court, which delivered its judgment on this issue in July. Subsequently, the Gauteng High Court ordered the office of the PP to bear 85% of the costs of the applicants and ordered her to pay the balance of their costs in her personal capacity.

3. Gelyke Kanse v Chairperson of the Senate of the University of Stellenbosch 2019 (12) BCLR 1479 (CC): Emasculation of language rights

The South African citizenry has a pronounced diversity in its cultural and linguistic composition, which is expressly recognized, *inter alia,* in the preamble of the Constitution, where the belief is expressed "that South Africa belongs to all who live in it, united in our diversity" and in section 6, which proclaims eleven languages to be official languages and demands the protection and promotion of all those languages plus various others, including the Khoi, Nama, and San languages. However, since 1994, the government has done little to comply with these constitutional demands and has in fact done much to emasculate the role in education of indigenous languages, especially Afrikaans.

None of the five universities that taught primarily in Afrikaans until two decades ago have withstood the political pressure to cease doing so in favour of teaching only, or primarily, in English. When the University of Stellenbosch officially committed itself in 2016 to teach essentially in English only, a group of Afrikaans-speaking students and others involved in the university challenged the constitutionality of the new policy on the basis of section 29(2) of the Constitution, which guarantees everyone "the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable."

The High Court in Cape Town determined that the new language policy did not contravene the provisions of the Constitution if a "context-sensitive analysis" of "reasonable practicability" was made after assessing its fairness and feasibility, and specifically considering "the need to remedy the results of past discriminatory laws and practices". On appeal, the Constitutional Court confirmed these findings in the culmination of a series of judgments in which it was made abundantly clear that it preferred transformation towards cultural uniformity before diversity, despite paying lip service to the sentiment of accommodating diversity found in the Constitution.

Thus, for instance, the Court stated (para 48): "Afrikaans has been recognised in this Court as 'one of the cultural treasures of South African national life'. The flood tide of English risks jeopardizing the precious value of our entire indigenous linguistic heritage. Gelyke Kanse is entitled to invoke that risk. This is because the march of history both in South Africa and globally seems relentlessly hostile to minority languages, including Afrikaans, which is the mother tongue of some seven million on a planet inhabited by seven billion people". This, it was found, should not be considered the problem of either the university or the Court because it "... is not the university's burden, as little is the fact that Afrikaans has all but vanished at other tertiary institutions, barring only one other. And the dilemmas the global march of English poses is not the question before the Court."

4. Amabhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services [2019] 4 All SA 343 (GP): Privacy and media freedom

In terms of the Regulation of Interception of Communications and Provision of Communication Related Information Act 2002 (RICA), telecommunication service providers must obtain core identification data from every customer before making their services available (typically for mobile phones). The interception of communications is prohibited, subject to a range of exceptions related to serious crime and espionage, including the routing of signals by a service provider to an "interception centre" established and maintained by the state for real-time surveillance and the examination of a person's communications history. This arrangement concerns various constitutionally protected rights, including the rights to privacy, freedom of expression (including media freedom), the right of access to a court, and to a fair trial.

Various abuses of the facilities provided for in RICA came to light, including irregular spying on a public prosecutor and journalists, triggering an application to the High Court in Pretoria to investigate the constitutionality of the Act, based on the argument that the limitations on the fundamental rights that RICA allows exceed the constitutional requirement that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.

The relevant law was extensively analyzed by the Court to support a detailed set of orders. First, the Court declared seven specific provisions of RICA to be inconsistent with the Constitution and therefore invalid insofar as no procedure is provided for to notify a person whose communications are intercepted. In order to allow Parliament to rectify the legislation, the declaration of invalidity was suspended for two years, but the Court created additional provisions deemed to be part of the Act until Parliament may replace it. The effect of these "read-in" provisions is that subjects of surveillance have to be informed thereof 90 days after the expiry of the permitted interception of their communications.

The second order concerned the absence of an appointment mechanism for judges designated to deal with applications by officials to be given admission to a person's communications, which rendered RICA unconstitutional. Again, Parliament was given two years to rectify the law, but a statutory definition of "designated judge" in the statute was fashioned by the Court to be deemed part of the Act in the meantime.

The third order declared invalid the ex parte nature of the procedure by which access to a person's communications may be obtained, suspended until Parliament cures the defect.

The fourth order similarly invalidated the provisions of RICA dealing with or failing to prescribe proper procedures to be followed when state officials are examining, copying, sharing, sorting through, using, destroying, or storing the data obtained from interceptions.

Order five read-in an additional section (pending parliamentary intervention) to deal with circumstances where a subject of surveillance is either a practicing lawyer or a journalist. The additional provision requires the applicant to draw the designated judge's attention to the fact that the subject is a journalist or practicing legal practitioner, and furthermore requires the judge to be satisfied that it would be necessary and appropriate to allow the surveillance of the journalist or lawyer concerned.

Lastly, the Court declared the bulk surveillance activities and foreign signals interception undertaken by the National Communications Centre to be unlawful and invalid.

The remarkable *legislative* activity of the judiciary (reading-in) seen in this judgment is founded upon the interpretation by the Constitutional Court of section 172 of the Constitution in various previous judgments. At first sight, the jurisdiction to create new legislative provisions judicially does appear to offend the principle of separation of powers. However, Parliament is not precluded thereby from intervening by amending or rescinding the "judicial legislation", and an order concerning the constitutional invalidity by a High Court, as in this case, has in terms of section 172(2)(a) of the Constitution "no force unless it is confirmed by the Constitutional Court". The Amabhungane matter has been placed on the roll of the Constitutional Court for February 2020.

IV. LOOKING AHEAD

It can be expected that if the amendment of section 25 of the Constitution allowing expropriation without compensation is passed in the form currently proposed, the constitutionality of the effective seizure of property of primarily white owners will be contested before the courts – and that the outcome of such a challenge will be determined by the eventual ideological stance of the Constitutional Court regarding the balance between constitutionalism and punitive transformation.

The courts may have to consider an argument that an amendment of this nature would require a parliamentary majority of 75% in terms of section 74(1)(a) because it effects the foundational values of non-racialism and the rule of law entrenched in section 1 of the Constitution. The ANC alone does not command a two-thirds majority in the National Assembly, but it's possible – though unlikely – that it would be able to garner sufficient support from minority parties to make up the shortfall.

Beyond the issue of expropriation, reactions to the continuing revelations of corruption in public life and government responses thereto – either increased socialist centralization or a return to the foundational values of the Constitution – will determine the social and economic stability of the country.

V. FURTHER READING

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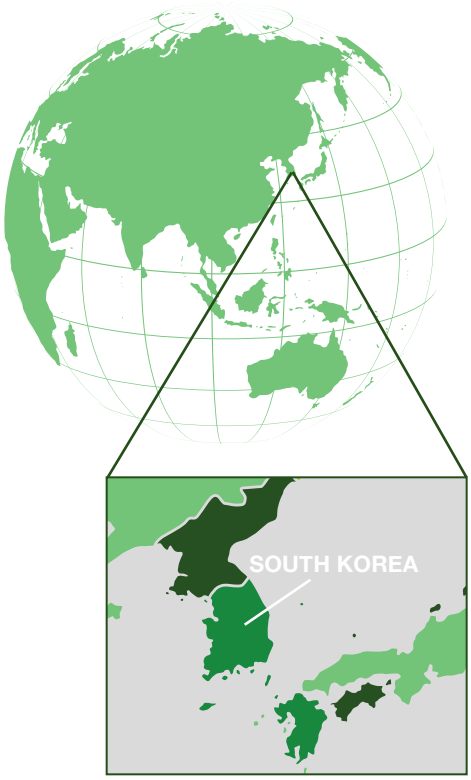
Firoz Cachalia, 'Precautionary Constitutionalism, Representative Democracy and Political Corruption' (2019), 9(1) *Constitutional Court Review* 45

Nkanyiso Sibanda, 'Amending section 25 of the South African Constitution to allow for expropriation of land without compensation: some theoretical considerations of the social-obligation norm of ownership' (2019), 35(2) *SAJHR* 129

Francois Venter, 'Judicial Defence of Constitutionalism in the Assessment of South Africa's International Obligations' (2019), 22 *PER / PELJ* 2019(22) <https://journals.assaf.org.za/index.php/per/article/view/6253> accessed 14 January 2020



South Korea

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I. INTRODUCTION

2019 was the third year of the liberal Jae-in Moon administration, and people were expecting secured human rights, which were limited during the past conservative administration. As a matter of fact, in 2018, the Constitutional Court ruled Article 5 (1) of the Military Service Act, which did not provide alternative service for conscientious objectors, was nonconforming to the Constitution. A year later, the Court ruled that the abortion ban in the Criminal Act was nonconforming to the Constitution.

However, in the same year, the Moon administration confused Korean society when it sent back to the North two North Korean fishermen seeking asylum, in a continued show of affinity towards North Korea. Because of the conciliatory attitude by the South Korean government, people suspected an illegal transfer of goods from South Korea to North Korea, which led the Japanese government to exclude South Korea from the "white list," the group of its trusted trading partners. The South Koreans regarded Japan's decision as political retaliation against the Supreme Court's decision in October 2018 regarding wartime laborers. Due to these circumstances, the relationship between Japan and Korea is worsening each year.

Also, in domestic politics, President Moon appointed Kuk Cho, a professor of criminal law at Seoul National University and former Senior Presidential Secretary for Civil Affairs, as the Minister of Justice. However, Cho and his family have aroused numerous suspicions of corruption, which seems no different from the previous conservative administration. This disappointed the Korean people, which led to a decreased approval rating for the Moon administration.

This report focuses on the most notable rulings by the Constitutional Court and discusses the Moon administration's political achievements in 2019.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most prominent constitutional event in Korea in 2019 was the decision of nonconformity to the Constitution of the abortion ban. According to Articles 269 and 270 of the Criminal Act, abortion was prohibited and punishable for anyone who received or performed an abortion. However, this section of the report focuses on other important issues.

1. Kuk Cho Scandal

One of the biggest incidences that severely impacted Korean society was the appointment of Kuk Cho as the Minister of Justice, notwithstanding the numerous scandals pending on him.

Article 12 (3) of the Constitution established that prosecutors can request warrants of arrest, detention, seizure, or search, which gives them enormous power. In order not to be involved in corruption trials by prosecutors, President Moon tried to alter and reduce their power.[1] So he appointed Kuk Cho as the Minister of Justice in August 2019 to begin this curtailed power.

[1] The National Assembly passed the prosecution reform bill to establish an anti-corruption agency in December. (See Jung-a Song, 'South Korea passes bill to set up anti-corruption agency,' *Financial Times* (30 December 2019) <https://www.ft.com/content/11b3f736-2aec-11ea-bc77-65e4aa615551> accessed 1 February 2020.

However, the confirmation hearing at the National Assembly made note of Cho's suspicious actions, which involved his daughter's inappropriate university admission, a fabricated testimonial for his daughter from the university that Cho's wife was affiliated with, and opaque investments by his relatives.

While the presidential system in the United States requires the President to receive confirmation by the Senate to appoint Cabinet members, Article 94 of the Korean Constitution does not require the President to obtain recognition by the legislative branch in order to appoint ministers. Currently, the President appoints ministers after a confirmation hearing held at the National Assembly. However, the confirmation hearing decision cannot bind the President, so Moon successfully appointed Cho to follow Kyung-wha Kang, who has been the Foreign Minister since 2017.

Since the Moon administration accused the previous conservative administrations of injustice with the phrase jeokpye cheongsan, meaning "eradication of deep-rooted evils," Cho's numerous scandals deeply disappointed the Korean people. In response, students at Seoul National University, where Cho worked as a professor of criminal law, and students at Korea University, where Cho's daughter graduated from, held demonstrations to protest against Cho's appointment. Also, demonstrations were frequently held demanding Cho's resignation as Minister of Justice. As a result, he resigned as Minister only a month after his appointment and returned as a professor to Seoul National University.

As a result of the numerous scandals, Cho's wife was arrested under suspicion of fabricating a testimonial in order to easily allow her daughter to attend graduate school, and Cho's younger brother was arrested for bribery at the school operated by his relatives.[2] The Moon administration's support rate plummeted to 39%, the lowest since the beginning of his administration.[3]

2. Sending North Korean Fishermen Back to the North

In 2019, human rights of North Koreans were ignored, as the current Moon administration took a conciliatory attitude toward the North Korean government.

According to Article 3 of the Constitution, "the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands." Therefore, South Korea regards the northern part of the Korean peninsula as belonging to the Republic of Korea and the North Koreans as the nationals of the Republic of Korea. Although South Korea previously accepted residents who escaped from the North, under Article 3 of the Constitution, the Moon administration sent two North Korean fishermen back to North Korea, even after they demanded asylum.

The South Korean government insisted that the two North Korean fishermen killed sixteen colleagues while heading to the South, and thus they could not be protected under Article 9 (1) of the North Korean Refugees Protection and Settlement Support Act. The government decided to send them back to the North; they were reportedly brought to Panmunjeom and extradited to the North, where they supposedly fainted with disappointment.

These behaviors by the government were strongly criticized by South Korean scholars of constitutional law. For instance, Young-soo Chang insisted that the government ignored the spirit of the Constitution because it did not thoroughly investigate if the two North Korean fishermen actually murdered their colleagues, and then sent them back to the North and potentially caused their deaths despite the Constitution regarding North Korean residents as South Korean nationals.[4]

Also, the international NGO Human Rights Watch (HRW) accused the Korean government of sending back the two North Koreans[5] despite the fact that South Korea joined the "Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment." Since the Moon administration's attitude toward North Korea appears too conciliatory, international and domestic communities have questioned if its actions were appropriate.

III. CONSTITUTIONAL CASES

1. The Decision of Unconstitutionality on Not Giving Permission to Meet Suspect for "The Attorney Willing to be the Counsel" (2015 Hun-Ma 1204, February 28, 2019)

A suspect was arrested and detained at night and requested to have assistance of counsel. However, Article 58 (1) of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates stated that the meeting time was limited under Article 9 of the State Public Officials Service Regulations to 9 AM to 6 PM on weekdays. Therefore, the suspect, who was arrested at night, was not permitted to have assistance of counsel and was interrogated.

In these circumstances, the attorney, who was willing to be the suspect's counsel, became the plaintiff and insisted that not permitting

[2] Jung-hwan Kim and Jung-goo Lee, 'Kuk Cho's Brother is Arrested. Court Recognized the Necessity to Arrest from the Additional Suspicions,' *Chosun Ilbo* (1 November 2019) <http://news.chosun.com/site/data/html_dir/2019/11/01/2019110100269.html> (in Korean) accessed 16 December 2019.

[3] Mi-na Kim, '[New analysis] Unclear how Cho Kuk's resignation affects Moon's approval ratings,' *Hankyoreh* (21 October 2019) <http://www.hani.co.kr/arti/english_edition/e_national/914015.html> accessed 17 December 2019. According to the article, another survey shows 45.5% approval.

[4] Gi-chol Kim, 'I am Worried about the President and the Government Who Threaten the Spirit of the Constitution,' *Chosun Ilbo* (11 December 2019) <https://news.chosun.com/site/data/html_dir/2019/12/11/2012121100179.html> (in Korean) accessed 21 December 2019.

[6] 'South Korea Deports Two from North to Likely Abuse,' *Human Rights Watch* (12 November 2019) <https://www.hrw.org/news/2019/11/12/south-korea-deports-two-north-likely-abuse> accessed 21 December 2019.

the suspect to meet the attorney violated the right to prompt assistance of counsel, secured by Article 12 (4) of the Constitution, and filed a constitutional complaint.

In this case, the plaintiff was not the suspect but "the attorney who was willing to be the counsel." Although the Constitution secures suspects' right to prompt assistance of counsel, the central point was whether or not the attorney's right to meet the suspect can be regarded as a fundamental right secured by the Constitution.

The Constitutional Court argued that suspects and defendants would not have enough opportunity to have assistance from counsel if attorneys are not secured to meet suspects. Therefore, the Court decided that the right of "attorneys who are willing to meet suspects" was a fundamental right secured by the Constitution and ruled that Article 58 (1) of the Enforcement Decree of the Administration and Treatment of Correctional Institution Inmates was unconstitutional.

2. Decision of Nonconformity to the Constitution[6] in Abortion Ban (2017 Hun-Ba 127, April 11, 2019)

The Criminal Act in Korea prohibits abortion in Articles 269 and 270. The former prohibits women from receiving abortions, and the latter bans physicians from performing abortions. The Constitutional Court had decided previously in 2012 regarding the plaintiff, a midwife who assisted in the practice of abortion on a woman who was six weeks pregnant. However, the Court upheld contested provisions by giving priority to the right of the fetus's life over the female's right to self-determination.

Despite the ruling of the Constitutional Court in 2012, there were many women who wanted abortions. In order to stop illegal abortions, the Ministry of Health and Welfare toughened punishments for physicians who performed them. In these circumstances, the discussion of legalizing abortion arose again. In April 2019, the Constitutional Court ruled that the abortion ban by the Criminal Act as nonconforming to the Constitution. In this case, three justices insisted that it was simply unconstitutional, while four justices insisted on nonconforming to the Constitution. Therefore, seven out of nine justices voted against the abortion ban, and the decision of nonconformity to the Constitution was adopted.

In Korea, legal abortion can be limited by Article 14 of the Mother and Child Health Act in such cases as pregnancy harming the woman's health or the woman being the victim of rape. However, there were still many women eager to abort, thus physicians were helping them illegally.

In this case, the plaintiff was the physician who performed the abortion and was indicted for the violation of Articles 269 (1) and 270 (1) of the Criminal Act. The physician insisted that Article 269 (1) violates women's right to self-determination, right to health, and right to maternal protection. The plaintiff also insisted that the Article violated equal rights, because it is only forcing women to endure unwanted pregnancy and birth.

Subsequently, the plaintiff insisted that Article 270 (1) violates the physician's equal rights and right of occupation because it punishes only with imprisonment, whereas Article 269 (2), which is consent to an abortion by a non-physician and considered to be more risky, includes punishment with a fine. The four justices of the Constitutional Court pointed out that a fetus can live by itself after around 22 weeks of gestation, thus women have time for self-determination on whether to keep the pregnancy or interrupt it until that point. However, since the current situation does not provide enough time for this, women must abort by unsafe procedures.

Also, the justices considered that the current Mother and Children Health Act does not allow women to abort for economic and social reasons (e.g., if they study or work, if the couple does not plan to marry, and if minors become pregnant). Therefore, the current Criminal Act punishes women who abort for economic and social reasons, and thus the Article violates the principle of proportionality.

The Constitutional Court recognized that abortion by physician in Article 270 (1) is an accomplice with women's self-abortion, thus abortion by physician must be unconstitutional if women's self-abortion became unconstitutional. However, since it is necessary for the legislative branch to define the precise time limit to practice abortion legally, and what kind of social and economic reason can be acceptable for a legal abortion, the Constitutional Court ruled the Criminal Act as nonconforming to the Constitution instead of the decision of regular unconstitutionality.

3. The Decision of Constitutionality on the Medical Service Act (2014 Hun-Ba 212, 2014 Hun-Ga 15, 2015 Hun-Ma 561, 2016 Hun-Ba 21 [consolidated], August 29, 2019)

According to Article 33 (8) of the Medical Service Act, a physician is prohibited from establishing or operating multiple medical institutions. The Act provides for a sanction of up to five years' imprisonment or up to a fifty million won fine for physicians responsible for violating the regulation. Therefore, the physicians who established and operated multiple medical institutions were prosecuted under these Articles of the Medical Service Act.

The physicians became the plaintiff in this case and claimed that the Articles of the Medical Service Act violated the freedom of occupation and right to property. Also, the plaintiff insisted that the previous Medical Service Act before the amendment only prohibited physicians to "establish," thus adding "operation" violates the principal of clarity, which is derived from "no punishment without law."

[6] The publication of the Constitutional Court of Korea translated this form of decision into English as "nonconformity to the Constitution" (See Constitutional Court of Korea [ed.], *Thirty Years of the Constitutional Court of Korea* [Constitutional Court of Korea, 2018] p. 152). However, the website of the Constitutional Court uses the term "unconformable." (See Constitutional Court of Korea <http://english.ccourt.go.kr/cckhome/eng/decisions/casesearch/caseSearch.do> accessed 26 January 2020). I have unified the term to "nonconformity."

The Constitutional Court ruled that the purpose of the Act was to regulate excessive pursuit of profit and to maintain medical quality by concentrating on working responsibly at only one medical institution. Also, the Court argued that it is possible to predict that the word "operate" means "management," thus the Act does not violate the principal of clarity deriving from "no punishment without law."

4. Disclosure of Identity of the Sexual Offender for the Children and Juveniles (2017 Hun-Ma 399, November 28, 2019)

In November 2019, the Constitutional Court rejected a constitutional complaint on Article 42 (1) of the Act on the Protection of Children and Juveniles against Sexual Abuse. The plaintiff committed an indecent act toward children and youth, which is prohibited in Article 7 (3) of the Act on the Protection of Children and Youth against Sex Offenses, and was sentenced to pay a five million won fine and attend a medical program for sexual offenders.

According to Article 42 (1) of the Act on Special Cases Concerning the Punishment, etc., of Sexual Crimes, the criminal must register his/her personal information if the verdict is confirmed. Also, the convicted person must submit personal information to the head of the local police office and must submit corrected information when the information changes (Articles 43 (1) and (2)). Article 43(2) requires the convicted person to report to the head of the local police office and inform them of the country where he/she goes, along with the length of stay, when he/she goes abroad for more than six months. The personal information of the convicted person is registered by the Minister of Justice (Article 44 (1)), where it is retained and managed by the Minister for a certain period (Article 45 (1)). The Act decrees that the head of the local police office periodically visits the convicted person to verify the truthfulness of any changes to the registered information (Article 45 (7)). Article 46 (1) enables the Minister of Justice to distribute the registered information to public prosecutors or the heads of various levels of police offices.

The plaintiff filed a constitutional complaint to the Constitutional Court claiming that the articles of the Act on Special Cases Concerning the Punishment, etc., of Sexual Crimes violates his right of self-determination regarding his personal information. However, the Court argued that the public interest of preventing sexual crimes is much bigger than his right of personal information, thus the plaintiff's complaint was not accepted.

5. Dismissal of the "Comfort-Women" Agreement between Japan and Korea (2016 Hun-Ma 253, December 27, 2019)

In 2015, the Japanese and Korean governments reached the "Comfort-Women" Agreement. According to the Agreement, Prime Minister Abe expressed his most sincere apologies, the Japanese government paid funds to establish a foundation to support former "Comfort Women," and the matter was resolved finally and irreversibly. However, former "comfort women" and their descendants became the plaintiff, and they insisted that the Agreement in 2015 violated their human worth and dignity, and filed a constitutional complaint.

On December 27, the Court pointed out that the Agreement was not even documented or recognized by the National Assembly, unlike other documented treaties. Subsequently, the Court described the Agreement as "general and declarative" because it did not include any concrete plan or procedures to settle the matter. Therefore, the Court argued that the Agreement does not have binding force and does not violate the plaintiffs' rights.[7] Also, the Court argued that the eligibility of the plaintiff, who died after filing the constitutional complaint, had expired with the plaintiff's death.

Since the Constitutional Court dismissed the complaint, the Court did not mention if the Agreement in 2015 is constitutional or not. However, there will be strong opposition from the Japanese government because the Court mentioned that concrete rights and obligations do not arise from the Agreement.

Regarding the wartime issue under Japanese rule, on the same day as the dismissal of the "Comfort-Women" Agreement, the Constitutional Court dismissed the claim against Japan by the Koreans abandoned in Sakhalin. The Court described that the Korean government offered to negotiate with the Japanese government several times, so the Korean government is fulfilling its legal duty, although the result has been insufficient.[8]

6. Decision of Nonconformity to the Constitution on Prohibiting Establishment of Support Group for Governor of Area-Wide Unit of Local Government (2018 Hun-Ma 301, 2018 Hun-Ma 430 [consolidated], December 27, 2019)

In Korea, support groups are established for the President and National Assembly members. However, Article 6 of the Political Funds Act does not include governors or congressional members of local municipalities. In these circumstances, Jae-myung Lee, the governor of Gyeonggi-Do, filed a constitutional complaint because he was not allowed to establish his support group at the local election held on June 13, 2018. The ruling consolidated multiple filings. Other plaintiffs included the candidate for the governor of Gwangju City, the candidates for the ward assembly in Gwangju, and the residents who tried to establish support groups.

The Constitutional Court compared the 2016 national election and the 2018 local election, and pointed out that the elections of the

[7] I introduced the different mindsets on international and domestic law between Japan and South Korea and mentioned that the binding force of the "Comfort Women" Agreement would be weak in the *Global Review* in 2017. (Leo Mizushima, "South Korea – Developments in South Korean Constitutional Law," Richard Albert, David Landau, Pietro Faraguna, and Simon Drugda (eds.), *2017 Global Review of Constitutional Law* (I-CONnect-Clough Center 2018) p. 269).

[8] 2012 Hun-Ma 939, December 27, 2019.

governors of area-wide units of local government spent a larger amount of election expenses than the national election. Thus, it was necessary to secure the election funds specifically for the candidates belonging to the new party or independent candidates. Also, the Court considered that the support group does not inhibit the integrity of the governors of area-wide units of local government, so it made a decision of nonconformity to the constitution.

However, on the other hand, the candidates of the ward assembly were not allowed to establish their support groups. The Constitutional Court pointed out that it is not necessary to secure a larger amount of election expenses, and the quality and quantity of the political activities of the ward assembly members are lower than that of the President and National Assembly. The Court also mentioned that members of the ward assembly have frequent opportunities to contact local residents. Thus, it is necessary to regulate funds by establishing support groups in order to maintain political integrity.

IV. LOOKING AHEAD

1. Amending Public Official Election Act and National Election in 2020

On December 27, 2019, the National Assembly passed a reformed bill of the Public Official Election Act. According to the revised act, the voting age was lowered from 19 to 18 years old. The amended act adopted "semi-interlocking proportional representation," which is advantageous for small parties at proportional representation. The Liberal Korea Party, the current largest opposition party, was strongly against the bill, but the ruling Democratic Party successfully passed it with the cooperation of small parties such as the Bareun Mirae Party, the Party for Democracy and Peace, the Justice Party, and the preparatory group to form the New Alternative Party.

A national election is scheduled in 2020, and the new electoral system will be adopted. Thus, the upcoming election ensures that the two-party system can be maintained, or small parties can increase their representation at the proportional representation election.

2. Worsening Japan-Korea Relations

Since the beginning of the Moon administration, the relationship between Japan and Korea has been gradually worsening. Due to South Korea's current conciliatory attitude toward North Korea, Japan suspected a security problem in the export control system in South Korea and announced that it expunged South Korea from the list of countries that have preferential trade with Japan.

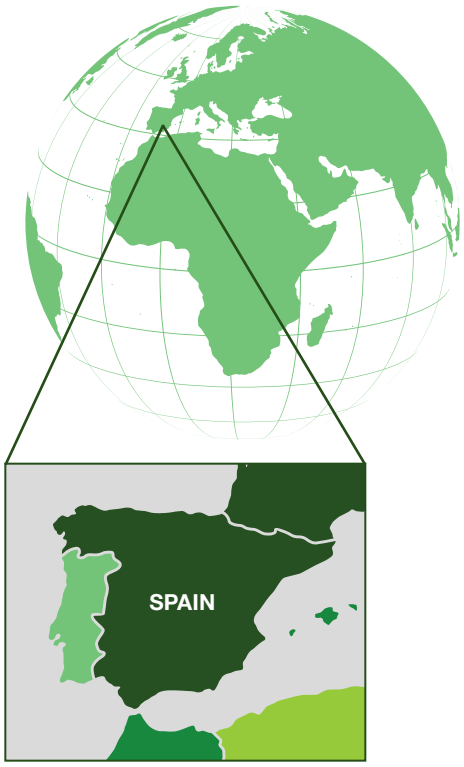
In these circumstances, Korea faces difficulty importing materials for manufacturing semiconductors. Thus, the Korean government demanded that Japan withdraw the toughened rule and accused Japan of taking "retaliatory action" after the Supreme Court ruling on wartime laborers in 2018. Subsequently, the Korean government announced that it would terminate the General Security of Military Information Agreement (GSOMIA) between Japan and Korea in August. On November 22, the Korean government finally decided not to terminate the GSOMIA, but the controversy is still unsettled within the Japan, South Korea, and United States alliance.

Despite the deterioration of the relationship between Japan and Korea, some Korean scholars are expressing deep concern with the current excessive antipathy toward Japan and published a book titled *Ban-il Jongjok Jueui* (Anti-Japan Tribalism). It discusses the past Japan-Korea relationship objectively and became a bestseller in Korea. Korean society is increasingly paying attention to different points of view, not limited to a perspective expressing strong antipathy toward Japan. 2020 must be the year for both countries to maintain continuous discussion until reaching a mutual understanding and strengthening their bond as neighboring countries.

V. FURTHER READING

Constitutional Court of Korea (ed.), *Thirty Years of the Constitutional Court of Korea* (Constitutional Court of Korea, 2018)

Lee, Young-hoon et al., *Ban-il Jongjok Jueui (Anti-Japan Tribalism)* (Miraesa, 2019) (in Korean)



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I. INTRODUCTION

The case law of the Spanish Constitutional Court in 2019 was once again marked by various elements related to the independence process in Catalonia. Four main themes are identifiable in this respect: a) the attempted investiture of an absent candidate as president of the Generalitat, b) Catalan parliamentary resolutions defining its position with respect to the institutions of the state, c) the pre-trial detention of the pro-independence leaders, and d) the reach and limits of Art. 155 CE. Some of these themes have ruptured the unanimity that the Constitutional Court justices had previously displayed in judgments related to the pro-independence process. Beyond the Catalan question, there have been many varied topics on which the CC has had to rule, from the evidential validity of the Falciani list, to the civil register rights of transsexual minors, to the exhumation of Franco.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Procedures of state coercion (Judgments 89 & 90/2019)

In the period that interests us, the judgments that particularly stand out are those responding to appeals of unconstitutionality raised against the agreement in the plenary session of the Senate on 27 October 2017, which approved the measures the government wanted to take with respect to the Generalitat de Cataluña [Government of Catalonia] under Article 155 of the Constitution (Judgments 89 & 90/2019). With these judgments, the Court, with the unanimous agreement of all of the justices, endorsed the application of this coercive mechanism.

Art. 155 CE states in its first paragraph that "If a Self-governing Community does not fulfill the obligations imposed upon it by the Constitution or other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government, after having lodged a complaint with the President of the Self-governing Community and failed to receive satisfaction therefore, may, following approval granted by the overall majority of the Senate, take all measures necessary to compel the Community to meet said obligations, or to protect the above-mentioned general interest". Its second paragraph states that "With a view to implementing the measures provided for in the foregoing paragraph, the Government may issue instructions to all the authorities of the Self-governing Communities".

This (October 2017) was the first application of this singular, extraordinary instrument of control of the autonomous communities (inspired by Art. 37 of the Bonn Basic Law) since the Constitution was approved in 1978. It was a consequence of the referendum on

Catalan independence held that same October and the subsequent declaration of independence (although only for a few moments, as it was immediately suspended) by the president of the Generalitat de Cataluña. It is worth remembering that while almost twenty years previously the national government had sent a demand to the president of a different autonomous community under the threat of applying the aforementioned Art. 155 CE (the Canary Islands in 1989, in connection to a tariff issue arising from the then-European Community), subsequent negotiations led to agreements between the national government and the autonomic government which made it unnecessary to continue the Art. 155 CE process or resort to the Senate to approve any measures.

Judgments 89 and 90/2019 rejected the appeals (the first raised by more than fifty members of Congress from the parliamentary group Unidos Podemos-En Comú Podem-En Marea, and the second by the Catalan Parliament) against the plenary agreement of the Senate, understanding that the application of Art. 155 CE in this specific case was in line with the Constitution. The appeal of unconstitutionality was the appropriate process route for an agreement with the force of law. This is different from regulations or implementing acts which lack this force, and which led to the partial non-admission of the appeal in the second of the judgments.

The main measures adopted included the removal of the government of Catalonia and the automatic calling of elections for the regional assembly, along with taking over running the Catalan administration for a limited, although indeterminate time (*dies certus an incertus quando*), with a new Catalan government taking over following the elections. It is important to note that only on a very specific point was one aspect of the appeal approved, related to a collateral issue to the intervention itself, and referring to official publications and the validity of the content therein for certain matters, which were declared unconstitutional for reasons of legal certainty.

In these judgments, the Constitutional Court endorsed both the measures taken by the government and the procedures the government and the Senate followed, as guarantors of the integral organization of the state, for the approval of this extraordinary instrument of direct coercion that has no other objective than redirecting autonomy to its own constitutional, statutory, and legal framework. It is an instrument for re-establishing constitutional order and the normal institutional function of the autonomous community so ordered, which as the Court itself highlighted, "in some way could give rise to the indefinite suspension of autonomy, and not least to the institutional suppression of that autonomous community as a territorial, political public entity".

2. The Faciani list and illegally obtained evidence (Judgment 97/2019)

Judgment 97/2019 responded to the appeal for *amparo* raised by an individual who had been found guilty of various tax-related crimes and sentenced to fines and imprisonment in a process that began with his name being found on the so-called "Falciani list".

The data about Spanish taxpayers in this list was given to Spanish authorities by the French tax office in 2010 (they did the same for other countries affected by the fraud) after it was found in a search that was carried out in compliance with applicable French law. It gave rise to various cases in our country. This included the case brought by the special anti-corruption prosecutor against the appellant in this judgment, who was found guilty in the Madrid Provincial Court in April 2016, with the sentence being confirmed in the Supreme Court in February 2017, before being appealed to the Constitutional Court.

The petitioner alleged the violation of the fundamental rights to effective legal protection, to a fair trial, and to the presumption of innocence (Arts. 24.1 and 2 CE). The Court, following a thorough examination of constitutional case law on illegal evidence, unanimously rejected the appeal.

The underlying question in this complex case, which had multiple elements and aspects at stake, is whether illegally obtained evidence can be used. Remember, the data in the list (which listed thousands of accounts suspected of tax evasion with the account holders and the amounts held in each) were obtained illegally by H. Falciani in Switzerland between 2006 and 2008 while he was working in a bank subsidiary, for which he was convicted in *abstentia* of economic espionage in 2015. It was after he fled to France that the French authorities obtained the list following a legally sound search. As the Court highlighted, the minor nature of the violation of the petitioner's financial privacy (only the account data and the amount held), which would be protected by the procedures in place in the country where it happened, does not alter the canon of constitutionality to apply nor does it require extending the needs of substantive protection of rights to the area of criminal procedure.

In its judgment, the Court made a very detailed summary of its doctrine on illegal evidence, recalling its three guiding principles: 1) "the procedural non-admission of evidence obtained by violating a substantive fundamental right does not constitute a requirement that derives from the content of the affected fundamental right", 2) "the expectation of exclusion of illegal evidence comes from the preferential position of fundamental rights in the legal system, it is strictly procedural and must be approached from the perspective of guaranteeing a fair process –Art. 24.2 CE–", and 3) "the violation of procedural guarantees in Art. 24.2 CE must be determined in relation to the illegally obtained evidence, following a careful evaluation to ensure balance and equality to the parties, that is, the integrity of the process in question as a fair, equitable process".

III. CONSTITUTIONAL CASES

1. Investiture of the president of the government in the Parliament of Catalonia

Judgment 19/2019 was issued in response to the appeal raised by the national government, challenging the resolution of the speaker of the Catalan Parliament proposing Carles Puigdemont as a candidate for the president of the Catalan government [Gobierno de la Generalitat de Cataluña]. The Spanish gov-

ernment based their appeal on the fact that Puigdemont, by fleeing from justice and having a judicial order against him ordering his capture and imprisonment, was not going to personally attend the investiture session. He would not be able to present his government's legislative program, nor participate in the debate in Parliament. The Constitutional Court declared the Catalan Parliament resolution proposing Puigdemont as a candidate for the presidency of the Catalan government void, as the physical presence of the candidate in Parliament is a necessary requirement in the parliamentary system of government described in the Constitution.

Judgment 52/2019, related to judgments 19/2019 and 45/2019, responded to a request for protection of fundamental rights [*amparo* request] brought by the parliamentary group *Socialistes i Units per Avançar* against the Catalan Parliament decision to indefinitely defer the investiture of Carles Puigdemont as president of the Catalan government. The Catalan Parliament alleged that the conditions were not right to ensure the exercise of Puigdemont's political rights, as he was a fugitive in Belgium. The parliamentarians who raised the request believed that this violated their right to exercise their representative functions, as the delay in the investiture blocked the formation of a government in Catalonia, the legislative function of Parliament, and the powers of the members of Parliament. The Constitutional Court judgment did not resolve the matter, as the situation resolved itself with other candidates subsequently being proposed for the presidency of the Generalitat. In fact, when the Court gave its judgment, Catalonia already had a president.

Judgment 96/2019 responded to an *amparo* request brought by socialist members of the Catalan Parliament against the parliamentary decision to use emergency procedures for the modification of Law 13/2008 to allow the investiture of the president of the Generalitat *in abstentia.* The Constitutional Court, applying case law from judgment 45/2019, ruled that this had not infringed the petitioning members' rights to exercise their representative functions.

2. Decisions of the Catalan Parliament and its relationship with the Spanish state

Judgments 41/2019 and 42/2019 responded to *amparo* requests brought by the Ciudadanos parliamentary group in the Catalan Parliament against the legislative processing of two laws: the foundational law of the republic and the law about the self-determination referendum. The Catalan Parliament had decided to eliminate all of the legally required legislative steps in order for the laws to be voted on in Parliament without the necessary parliamentary debate. The Constitutional Court ruled that the parliamentary procedures required by the legislative process aimed at ensuring the participation of minorities and all citizens through their representatives. Because of that, omitting these procedures was a violation of the fundamental right to exercise the representative role of the petitioners.

Judgment 98/2019 responded to an appeal brought by the Spanish government against various sections of Resolution 92/XII passed by the Catalan Parliament. This resolution included various statements rejecting and condemning the position exhibited by King Felipe VI about the events of 1 October 2017 in Catalonia, and reaffirmed the commitment to republican values in favor of the abolition of the Monarchy. The Constitutional Court ruled the resolution unconstitutional, considering the fact that the resolution was beyond the competencies of the Parliament of an autonomous community and contradicted the constitutional position of the King, which recognizes his status as "inviolable" and "not subject to responsibility".

Judgment 111/2019 was very similar, responding to an appeal raised by the Spanish government against the Catalan Parliament's decision to create an investigative parliamentary commission on the Monarchy. The objective of the commission was, among other things "to investigate irregular or criminal activities of people linked to the Spanish royal family (…)". The Constitutional Court, applying the case law of Judgment 98/2019, ruled that the Catalan Parliament's decision was contrary to the constitutional position of the King.

During the final quarter of 2019, the Constitutional Court passed various orders to ensure compliance with the above judgments in the face of Catalan parliamentary agreements that have reiterated the right to self-determination, the objective of independence, and the condemnation of the King.

3. Imprisonment of pro-independence leaders

Judgment 62/2019 was in response to the *amparo* request brought by Jordi Cuixart (one of those tried and sentenced in October 2019 for acts related to the independence process in Catalonia). He contested the Supreme Court orders for him to be tried for the crime of rebellion and ordering him to be remanded in custody due to him being a flight risk, carrying the risk of continued offending, and for obstruction of justice. The petitioner claimed violation of his rights to personal liberty, to a safe legal process, and to effective legal protection, claiming that provisional imprisonment was against the Constitution. The Constitutional Court ruled that provisional imprisonment complied with the Constitution, as it is justified by risks of reoffending and the accused fleeing justice, and the acts for which he was being held are not protected by the rights of assembly, demonstration, or freedom of expression.

Ruling 75/2019 was in response to an *amparo* request brought by Jordi Sánchez (another of those sentenced in 2019 for actions related to the Catalan independence process) against a punishment imposed by the disciplinary commission of the prison he was being held in as a result of a telephone call he made from there which was recorded to be distributed as part of an electoral campaign. The petitioner alleged the violation of the right to participate in public acts, access to public office, and sanctioning legitimacy. The Constitutional Court rejected the *amparo* request as it was raised outside of the time limits set by law.

4. Gender equality

Judgment 2/2019 was issued in response to an *amparo* request brought by a parent against the decision of a local administration

to not give him the same-length paternity leave as the law sets out for maternity leave. The petitioner claimed that this was a violation of the principle of equality. The Constitutional Court ruled, referring to its precedent Judgment 111/2018, that this was not a violation of the principle of equality because the difference in treatment had an objective, reasonable justification. The longer duration of maternity leave aims at contributing to the mother's best possible physical recovery.

Judgment 91/2019 was in response to an appeal raised against the social security law, which included a "part-time coefficient" for the calculation of part-time workers' pensions. The Constitutional Court ruled that the law was unconstitutional because it violated the right to equality and constituted indirect sex discrimination. Referring to the right to equality, the Constitutional Court noted that the law did not have an objective, reasonable justification, as the part-time coefficient meant a reduction in the base salary of part-time workers, in view of the reduction in effective time worked, which was already less than full-time workers. Referring to gender equality, the law produced implicit discrimination against women, as they make up the majority of the part-time workforce.

Judgment 99/2019 was in response to a question of unconstitutionality raised about the law regulating modification of registry information about individuals' sex. The Constitutional Court ruled that, in contrast to the law in question, minors with sufficient maturity who are in a stable transsexual situation could request their sex to be changed in the civil registry.

Judgment 118/2019 was in response to a question of unconstitutionality raised against an article of the law regulating the status of workers that allows for contracts of work to be terminated due to justified absences when they reach a certain number of working days. The Constitutional Court ruled that the disputed law did not violate workers' rights to health, but rather maintained a balance between the right to health and the protection of business interests. There were three dissenting votes who claimed that the sentence elevated the interests of business over the rights of workers. One of the dissenting opinions stated that the disputed law would be indirect sex discrimination as it is women who have to take more sick and personal days due to their family responsibilities.

5. Guarantees in the criminal process

Judgments 10/2019, 15/2019, 23/2019, and 80/2019 were in response to *amparo* requests against various law court rulings which declared themselves not competent to judge certain crimes committed outside Spanish territory by non-Spanish nationals. The petitioners claimed that these legal rulings had violated the right to effective legal protection. They claimed that this law should be interpreted in accordance with the principle of universal criminal justice recognized in international law. The Constitutional Court, referring also to its Judgment 140/2018, found that neither the case law of the International Criminal Court nor the European Court of Human Rights grounded an absolute principle of universal criminal justice, but rather thought that this principle could be subject to the requirements set by national states. Therefore, limiting the efficacy of the principle of universal criminal justice did not violate the right to effective legal protection.

Judgment 97/2019 responded to an *amparo* request due to supposed violation of the right to a safe trial and the presumption of innocence. The petitioner had been found guilty by the Supreme Court of tax fraud, with the so-called "Falciani list" as the main evidence. This is a list of tax evaders obtained and published by a computer engineer working for a Swiss bank. The Supreme Court ruled that the "Falciani list" was valid evidence to support a conviction, having been correctly included in the legal process. The Constitutional Court ruled that the Supreme Court judgment did not violate the right to a safe legal process or the right to the presumption of innocence, as they had carried out a correct assessment of all the interests at stake.

6. Historic rights and the Constitution

Judgment 158/2019 was in response to an appeal of unconstitutionality raised by the Popular Party congressional group against the Aragón Parliament law 8/2018 on updating historical rights in Aragón. The Constitutional Court declared the unconstitutionality of the articles of the law in which historical rights were invoked as authentic bases for self-government and the power of the autonomous community of Aragón.

7. Exhumation of the dictator Francisco Franco

Order 119/2019 announced the rejection of the *amparo* request brought by Francisco Franco's granddaughter against the government's decision to exhume the remains of the dictator from the "Valley of the Fallen", owned by the state. The government's decision was backed by law 52/2007, which recognized the rights and established measures for those who had suffered persecution or violence during the Civil War and the dictatorship. The Constitutional Court considered that the government's decision to exhume did not violate the principle of equality, or the rights to personal and family privacy, the right to religious liberty, or the right to effective legal protection.

IV. LOOKING AHEAD TO 2019

2020 began with the investiture of a coalition government between the PSOE and Unidas Podemos, presided over by Pedro Sánchez, who in the investiture debate repeatedly indicated his desire to de-judicialize the political conflict in Catalonia. It remains to be seen what the repercussions of similar announcements are for the Constitutional Court, particularly the effects on all of those constitutional processes in which there is recognition of the government's active legitimacy. In any case, we expect the Court to still rule on numerous questions with a background in the secessionist process. It will be interesting to see whether the justices maintain the divisions of STC 155/2019 or whether they return to their previous unanimity. In addition, it is quite plausible that the Constitutional Court will be called upon to rationalize the powers of majorities and minorities in Parliament, given the fragmentation in Congress. An increase in litigiousness is certain.

V. FURTHER READING

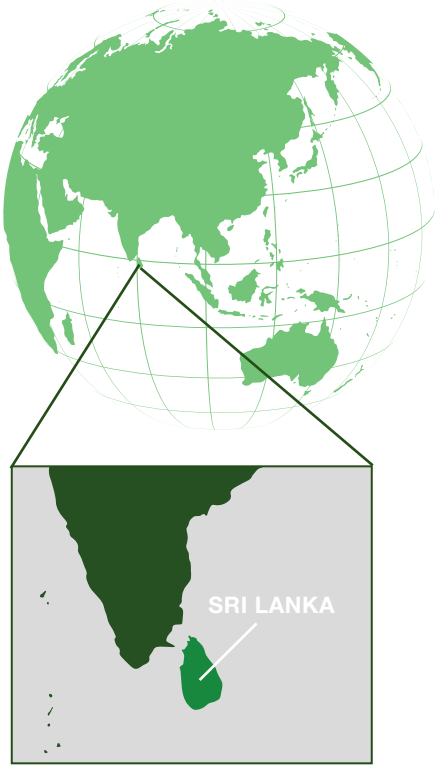
Pulido Quecedo, Manuel, Laurenz Itoiz, Miguel Ángel, 'Interdicción de la arbitrariedad en el procedimiento legislativo y derechos de la minoría: (comentario a las SSTC 14/2019 y 41/2019, de 27 de marzo)' [2019] Revista General de Derecho Constitucional, 30

Paloma Martínez Santa María, 'Las investiduras no presenciales: comentario a la sentencia del Tribunal Constitucional 19/2019, de 12 de febrero' [2019] Revista de las Cortes Generales, 107

Yolanda Sánchez-Urán Azaña, Francisca Moreno Romero, 'Sistema de cálculo de la pensión de jubilación de los trabajadores a tiempo parcial, principio de igualdad y no discriminación por razón de sexo' [2019] Revista de jurisprudencia laboral, 4

Fernando Castillo López, 'Nulidad de la Resolución del Parlamento de Cataluña que desconoce la configuración constitucional de la Corona: comentario a la Sentencia del Tribunal Constitucional 98/2019, de 17 de julio' [2019] Revista de las Cortes Generales, 107

José Luis Monereo Pérez, 'Sobre la constitucionalidad del despido objetivo fundamentado en la causa d) del artículo 52 del Estatuto de los Trabajadores: STC núm. 118/2019, de 16 de octubre' [2019] Revista de jurisprudencia laboral, 7



Sri Lanka

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I. INTRODUCTION

The 2019 presidential election ended the life of the government of national unity elected in 2015 to reform the Constitution and strengthen democracy and good governance. After some early successes, the reform process had been in terminal decline for a while. But the government's poor record in other areas such as the economy, and especially its lapses in relation to national security as revealed by the Easter Sunday terror attack, sealed its fate. With the country turning to strong leadership, the newly elected President Gotabhaya Rajapaksa offered an alternative vision of majoritarian nationalism, economic populism, and soft authoritarianism. He has been clear about his opposition to the Nineteenth Amendment to the Constitution enacted in 2015, the most significant curtailment of presidential power since the 1978 Constitution was established. It is very likely that he will win a legislative majority in the parliamentary elections due in 2020, and it is then also possible that he would benefit from post-election political realignments to secure a two-thirds majority for constitutional change. While the precise content of forthcoming changes is yet to be seen, it is expected that there will be a recentralisation of power in the presidency, a process that has already begun informally. It seems likely therefore that the 2019 presidential election has set a democratic regression in motion in Sri Lanka for the foreseeable future.

The superior courts delivered important judgments in a number of cases relating to the right to life, the rights of the child, and the system of government in the devolved Provincial Councils, which are discussed in this report. Politically, the most significant in terms of the change of regime in 2019 was the decision of the Court of Appeal dismissing a challenge to the citizenship status of Gotabhaya Rajapaksa, which cleared a major legal obstacle in his path to the presidency.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major constitutional crisis of October-December 2018 had ended with what seemed like a demonstration of institutional resilience against an attempt at democratic backsliding and executive self-aggrandisement (see 2018 report). The performance of constitutional restraints, Parliament, and the courts, and the spontaneous public mobilisation in defence of constitutional government, seemed good portents for deepening democratisation. However, 2019 showed why such an assessment was over-sanguine. The favourable outcome of the crisis provided no impetus whatsoever for a kick-start of the stalled constitutional reform process, or for ensuring the legal or political accountability of the President for precipitating the crisis. Preoccupied with strategic and tactical manoeuvring in an election year, the political elite abandoned both reform and accountability.

One of the worst terror attacks in Sri Lankan history occurred on 21st April, the first since the end of the war a decade ago in 2009, and the first with avowedly Islamist motives. On Easter Sunday, terrorists of an ISIS-inspired local organisation, the National Thowheeth Jama'ath (NTJ), launched coordinated suicide bomb attacks in churches and hotels across the country. The eventual death toll was over 250 killed and many more injured.

The attacks caused maximum immediate impact by targeting religious observances and tourism, post-war Sri Lanka's best performing economic sector. It also had extraordinary constitutional implications by revealing serious weaknesses of institutional structures and political culture.

An astonishing picture of incompetence and negligence emerged in the aftermath of the attack. The intelligence services and police appeared to have been working at cross purposes, even though the perpetrators, their violent ideology and intentions, and their organisational networks had been known to the authorities for years previously. There had been many indications of impending attacks, including through specific intelligence sharing from foreign and neighbouring governments. The ultimate cause of the dysfunction, however, was rooted in the political dynamics that had led to the constitutional crisis in 2018 and the changes to internal procedures that resulted from it.

The breakdown in the cohabitation relationship between the President and the Prime Minister had led to the President's attempted unconstitutional power-grab in October 2018. At this time, the President had monopolised control over the National Security Council (NSC), the key coordinating institution for anti-terrorism measures. The President, *ex officio* the Commander-in-Chief, was also the Minister of Defence and the Minister of Law and Order. The military, police, and intelligence services all came within his purview. On Easter Sunday morning when the attack took place, the President was overseas on a private visit, without having appointed acting ministers to any of the relevant ministries, or indeed an Officer Administering the Government. It also emerged that the Prime Minister, the junior defence minister, and the Inspector General of Police had all been excluded from NSC meetings since October. None of them, however, had seen fit to object to this unusual situation until the attacks took place. The Permanent Secretary to the Ministry of Defence and the Chief of the State Intelligence Service, serving in the period before the attacks, publicly attested to the erratic nature of NSC meetings and its functioning according to presidential whims rather than any institutionalised procedures.

A state of emergency was declared on 23rd April, and a harsh set of emergency regulations promulgated the following day. The scope of offences and penalties, the extraordinary powers adversely affecting personal liberty and property, the potential for the imposition of undue and illegitimate restrictions on the freedoms of expression and assembly, the granting of police powers to the military, and the absence of effective oversight mechanisms all gave serious cause for concern.

In May, a Select Committee of Parliament was appointed to investigate the attacks and the institutional failures that led to them. In October, its report strongly criticised the intelligence services and the President for multiple failures and negligent acts as well as the Prime Minister for omissions. It suggested that the failures were such as to lead to the impression that certain elements within the intelligence apparatus colluded in allowing the attacks to go ahead so as to create panic and help in changing the government in the presidential election due later in 2019. It also recommended institutional reform of the intelligence sector, in particular putting the NSC on a statutory footing, and introducing an independent National Security Advisor.

There was a significant rise in Islamophobia, including increasingly virulent rhetoric by Sinhala-Buddhist nationalists, as well as orchestrated attacks by vigilante groups on Muslim civilians and their property. The record of the authorities in this regard was mixed at best, with evidence of police collusion with mobs on some occasions, although localised violence was generally contained without further escalation. The advent of Islamist terrorism, coupled with the political vacuum created by a dysfunctional government, gave a new lease on life to the politicised Buddhist clergy to engage in anti-minority nationalist activism. Moreover, the public failures of the civilian political authorities and the police emboldened the armed forces and the intelligence services, still at wartime strength and unreformed for a post-war peacetime role, to suggest a more active role for themselves in governance in the name of combating the threat of international terrorism.

All of these developments pointed to a change of government in the next presidential election, which duly occurred on 16th November. The reform government elected in 2015 had not delivered on its promise of a new Constitution, and even the significant achievements it managed to attain were never presented as such due to poor communications. The economy never got off the ground, the reform coalition's public bickering discredited the very idea of constitutional reformism, and after the Easter Sunday crisis, the public mood drifted increasingly in the direction of a presidential strongman who could create order out of political chaos and deliver development out of economic stasis. The new President, Gotabhaya Rajapaksa, offers this populist authoritarian solution. After an expected consolidation of a legislative majority in the parliamentary elections due after March 2020, he may well undertake a rollback of the democratising constitutional reforms of the past five years.

III. CONSTITUTIONAL CASES

1. Rathnayake v. Abeykoon (SC FR 577/2010) [17 December 2019]: Right to Life Implied by the Constitution and International Law

This was a case of torture and death of a suspect in police custody. The suspect, alleged by the police to have connections to organised crime, had been arrested and interrogated without regard to applicable provisions of criminal law and police standing orders in the course of a murder investigation. Several days after the suspect was taken into custody, on 18 September 2010, the police alleged that the suspect suffered accidental death when a police firearm was discharged during a scuffle with a police officer. The widow of the deceased filed a petition in the Supreme Court alleging the violation of the deceased's fundamental rights to freedom from torture (Art. 11) and freedom from arbitrary arrest and detention (Art. 13(1)). The petition averred that the deceased had been arrested

on false charges without any credible material and without reasons being given for the arrest; that the deceased has been detained in custody without adherence to procedure established by law and without justification; that the deceased had been subject to torture and cruel, inhuman, and degrading treatment by being assaulted whilst in custody; that the deceased was killed by the police whilst he was in their custody; and that the police then fabricated a version of events to justify the killing and escape liability.

This was not a difficult case for the Supreme Court in establishing the violation of the deceased's fundamental rights on the facts. The illegal actions of the police had been undertaken in an extraordinarily transparent manner, perhaps on the belief that the deceased's alleged underworld connections would dissuade his relatives from pursuing justice in the courts. What was noteworthy as a matter of constitutional law was that this decision was a reaffirmation of a previous precedent in which the Supreme Court had held that an implied fundamental right to life was recognised by the Constitution even though that right is not expressed in the text. In *Silva v. Iddamalgoda* [2003] 2 SLR 6, 76-77, the Court had observed that Art. 13(4), read with Art 11., "recognises a right not to deprive life whether by way of punishment or otherwise, and by necessary implication, recognises a right to life." Even though Art. 13 (4) was not pled in the present petition, the Court extended the principle that no person shall be punished with death or imprisonment except by order of a competent court to the circumstances of the case. Adopting a normative approach, the Court relied on the guarantee of human dignity in the preamble in interpreting the positive rights under Arts. 11 and 13. It also deployed a reference to international law in the Directive Principles of State Policy to establish that Sri Lanka's international obligations under the UDHR and the ICCPR required the recognition of a right to life. For the violation of this right of a deceased person, punitive compensation was awarded to the widow payable by the state as well as personally by the respondent police officers.

2. Landage v. Bogahawatte (SC FR 677/2012) [12 June 2019]: Rights of the Child; Judicial Use of International Law; and Judicial Policy Making

In this case, the violation of a minor's fundamental rights was the subject of the petition to the Supreme Court by her legal next friend, her mother. Acting on the false complaint of a third party, and despite consistent denials by the minor, the police attempted through harassment and intimidation to extract an admission that she had been subjected to sexual abuse by a local politician. The subjection of an innocent girl to this illegal and unconscionable treatment seems to have been part of some elaborate political scheme to have the local politician implicated in a sexual abuse scandal in which police officers apparently colluded with no regard to their legal functions and duties. In the process, her fundamental rights relating to freedom from torture, arbitrary arrest, and judicial supervision of detention were all found on the facts to have been breached by the actions of the police (Arts. 11, 13(1) and 13(2)). The distressing and bizarre facts of the case aside, judgment is noteworthy for three reasons.

First, it contains an important exposition of children's rights in Sri Lanka, as derived from international and domestic law and other non-statutory standards. In particular, it is held in Art. 11 that a higher standard of care that must be exercised in the criminal justice system when children's rights are implicated demanded a lower burden a proof in establishing a violation of a child's fundamental rights against torture and other cruel, inhuman, or degrading treatment. In the words of the judgment, "…what amounts to a 'high degree of maltreatment' [i.e., the standard established in previous cases in relation to Art. 11 rights] in relation to an adult does not always resonate with the mental constitution of a minor. Therefore, when a minor complains of degrading treatment, the Court as the upper guardian must not be quick to dismiss the claims for failing to meet the same high threshold of maltreatment. Instead, it must carefully consider the impact the alleged treatment may have had on the mentality and the growth of the child." [p.18].

Second, the Court's use of authority was expansive. It relied on international treaties, domestic statutes, and its own case law (distinguishing long lines of authority where required, as above) as well as statements of international soft law (e.g., UN Rules for the Protection of Juveniles Deprived of their Liberty, GA Res. 45/113, 14th December 1990) and domestic non-statutory standards (e.g., The Charter on the Rights of the Child). The Court, it would seem, was concerned to make a complete judicial restatement in this area of child rights law, and so took care to mention every source from which those rights derived. In particular, its deployment of the Sri Lankan Charter on the Rights of the Child provides judicial recognition and imprimatur to what is otherwise a purely declaratory and legally unenforceable document.

Finally, in the most unique aspect of the judgment, the Court took the highly unusual step of ordering the Inspector General of Police to lay down guidelines for law enforcement authorities, and set out 20 principles to be followed in the framing of such guidelines. This was not a relief prayed for, but the Court noted that abuses of power in law enforcement were endemic and only a fragment of such cases reached it by way of judicial proceedings. Guidelines reflecting the requirements of Sri Lankan law, international instruments, and global best practice were necessary to clarify the applicable standards and the rights of those affected. The Court seemed to suggest that, once promulgated, it would enforce those guidelines in addition to the law. There is no doubt the Court was responding to a serious systemic defect of Sri Lankan law enforcement, with real and persistent consequences for individual liberty. The principles set out by the Court are a useful distillation of a large body of law emanating from multiple sources, and some will welcome this (limited) judicial activism. Others may see in it an instance of judicial overreach, with the Court trying to emulate its Indian counterpart in giving prescriptive directives to the executive for the making of policy. The more serious question, however, is the efficacy of the strategy, given that the cause of the problem is not the shortage of written guidance in law.

3. Deniswaran v. Wigneswaran (CA (Writ) 285/2017) [19 October 2019]: Power to Dismiss a Provincial Minister

The petitioner in this case was a member of the Board of Ministers of the Northern Provincial Council who sought writs of *certiorari* from the Court of Appeal to first quash his dismissal from ministerial office by the Chief Minister of the Northern Province, and second, to quash the appointment of replacements to portfolios previously held by him by the Governor of the Northern Province on the advice of the Chief Minister.

The Thirteenth Amendment to the Constitution (1987) establishes a system of devolution by which legislative and executive powers are devolved to Sri Lanka's nine provinces. In each province, devolved legislative power is exercised by the elected Provincial Council, and executive power is exercised by the Governor and a Board of Ministers headed by the Chief Minister. The Governor is appointed by the President of Sri Lanka, and the Chief Minister and other Ministers are drawn from the Provincial Council. The manner in which executive power is shared and exercised by the Governor and the Chief Minister and the Board of Ministers is set out in Arts. 154C and 154F, read with Arts. 154B(2) and 4(b). In terms of these provisions, there are two ways in which executive power is exercised at the provincial level: directly by the Governor, where he is specifically required to do so by or under the Constitution; and more generally by the Governor on the advice of the Chief Minister and Board of Ministers. The legal issues implicated in this case fall within the second category. In terms of Art. 154F(5), the Governor appoints Ministers on the advice of the Chief Minister, and although that provision does not expressly provide for dismissal, s.14(f) of the Interpretation Ordinance is clear that any person who has the power to appoint also has the power to dismiss. Therefore, the dismissal of provincial ministers is an act that is formally done by the Governor, but it can only be done on the substantive advice of the Chief Minister.

In this case, it appears that this constitutional framework was not understood by either the Chief Minister or the Governor, or indeed by the Court of Appeal. The Chief Minister erred in law when he purported to directly dismiss the petitioner from ministerial office. The correct way was to advise the Governor to formally dismiss the petitioner. The Governor erred in law when he acceded to the Chief Minister's advice to appoint two other Provincial Councillors to fill the vacancies created by the petitioner's dismissal, thereby going over the five-member limit on the Board of Ministers imposed by Art. 154F(1). The Court of Appeal was therefore right to quash both those acts, but it overreached when it declared that, "There cannot be a scintilla of doubt that…it is the Governor who has the power to appoint Ministers, *of course on the advice of the Chief Minister"* (emphasis added), and that "there is no room for a different interpretation." [pp.5-6]. This interpretation is patently inconsistent with both the clear words of Art. 154F(5) as well as the underlying scheme of provincial executive power. It denudes the Chief Minister of his constitutional role in the dismissal of Ministers, and in purporting to vest this power exclusively in the Governor, it negates a crucial democratic safeguard within the system of devolution. The Constitution limits the Governor's formal power over the appointment (and by implication the dismissal) of Ministers by the requirement of responsible advice from the Chief Minister. The Chief Minister in turn is able to tender that advice by virtue of commanding the confidence of the Provincial Council. If, as the Court of Appeal holds, the Governor, who is appointed by the President and mainly responsible only to the President, enjoys both the formal and substantive power in this regard, then the whole framework of democratic accountability within the Provincial Councils is undermined. It is to be hoped that the Supreme Court will on appeal correct this serious interpretational error by the Court of Appeal.

4. Viyangoda and Thenuwara v. Rathnayake (CA (WRT) 425/2019) [15 October 2019]: Citizenship Status of a Presidential Candidate; Executive Powers of the President; Constitutional Interpretation

The present case arose by way of an application for writs of *certiorari* to the Court of Appeal. The petitioners' main prayer was to have the certificate of dual citizenship granted to Gotabhaya Rajapaksa on 21 November 2015 by his brother, then-President Mahinda Rajapaksa, acting as the Minister in charge of citizenship, declared a nullity by the court. It would then follow that he would not fulfill the requirement of Sri Lankan citizenship for the purpose of nomination as a candidate in the 2019 presidential election. The factual basis for this argument was that on the date at which the certificate was issued, President Rajapaksa had not fulfilled the constitutional requirements that would have enabled him to exercise the ministerial power of authorisation under the Citizenship Act. These mandatory requirements, under Arts. 44(1) and (2) of the Constitution (as they were at the time), were that he had to have first appointed the Prime Minister and the Cabinet of Ministers, and assigned subjects and functions to them, before he could as President assign to himself any ministerial role and exercise any statutory power of a Minister. Put another way, there was no restriction on the President to immediately exercise any power by or under the Constitution as the President (e.g., emergency powers), but he could only exercise the powers given to a Minister under any Act of Parliament once the Cabinet had been appointed and subjects assigned. Since these steps had not been taken prior to the issuance of the certificate, the certificate and everything that flowed from it were null and void.

The Court rejected this argument on two related grounds. The first was a prudential objection to the highly formalist and rigid proceduralism of the petitioner's argument with regard to the constitutional framework of government formation after an election in which a new President had been elected. It observed that political negotiations in as-

sembling legislative coalitions, for example, could result in some legitimate delay in the appointment of Ministers, and it could not have been intended that numerous statutory powers vested in Ministers would be held in limbo during this period. Secondly, the Court noted that if such restrictions were indeed intended, then the framers would have placed express time limits on government formation. Affirming a consistent line of cases, the Court also rejected the respondents' argument that a "plenary" executive power vested in the President (which validated his actions upon election notwithstanding any procedural limitations). But it did agree with the respondents that the President was, under the Constitution, the "repository" of executive power, and as such, he could exercise statutory powers of Ministers before he had appointed any Ministers or assigned functions to them.

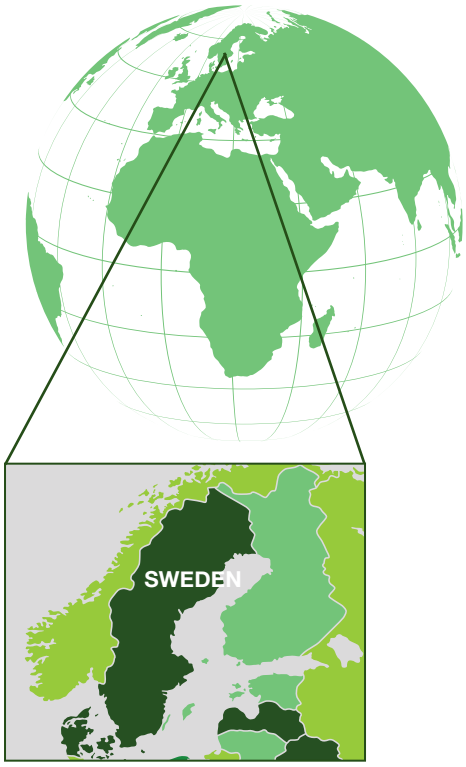
While this was on the whole an interpretation that supported a presidential rather than a semi-presidential view of the Constitution, the precedential value of the decision is limited by the fact that provisions in issue have now been removed by the Nineteenth Amendment. Its lasting significance, therefore, could be the political one of having paved the way for Gotabhaya Rajapaksa to become President.

IV. LOOKING AHEAD

With the political opposition in complete disarray and civil society demoralised and stifled, it is expected that President Rajapaksa will win a majority in the parliamentary elections coming after March 2020, and that this may enable a two-thirds majority to be put together with further party realignments. This will in turn empower him to change the Constitution. No details have been revealed, but it can be predicted with a high degree of certainty that this would involve recentralisation of power in the presidency and the weakening of checks and balances. The democratic regression to come could prove a high price to pay for the squandering of the opportunity for reform that was provided by the regime change of 2015.

V. FURTHER READING

Asanga Welikala (ed.), 'Special Issue on Constitutional Reforms in Sri Lanka' [2019], *The Round Table* 108(6): 605-719



Sweden

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I. INTRODUCTION

Three main constitutional law questions dominated the Swedish constitutional law debate in 2019. First, the relationship between the Council on Legislation and the Government,[1] second the criminalization of joining and supporting terrorist organizations and the outlawing of racist organizations, and third, whether the independence of the judiciary needs to be enhanced and its constitutional protection strengthened. The relationship between the Council on Legislation, which exercises abstract constitutional review *a priori*, and the Government continued to be tense throughout 2019. This trend culminated in the Government retracting a draft bill that would criminalize joining and supporting terrorist organizations after the Council reached the conclusion that the draft partly violated the freedom of association as protected by the Swedish Constitution. The scope of the constitutional protection of freedom of association was debated in Sweden for yet another reason. In 2019, the Government appointed a Commission of Inquiry with the task of investigating whether racist organizations could and should be criminalized. The background is the increasing visibility of Nazis on the streets of Sweden and the threat they pose to other individuals and democracy as a whole.[2] The independence of the judiciary has been debated for several years already. However, as a result of the dismantling of the rule of law and judicial independence in Poland and Hungary, concrete measures of how to secure judicial independence in Sweden are increasingly being debated. Thus far, this debate has not generated any changes to the Constitution. However, in early 2020, a Commission of Inquiry into this matter was appointed.[3] In addition, the UN Convention on the Rights of the Child (UNCRC) was implemented as Swedish law as of 1 January 2020.

II. CONSTITUTIONAL DEVELOPMENTS

The relationship between the Council on Legislation and the Government is still tense, and potentially increasingly so. In several opinions, the Council has heavily criticized draft bills put forward by the Government. There is an obvious tension between the political ambitions of the Government and the *a priori* abstract assessment made by the Council on Legislation. The latter has to take into account, for example, the draft bill's constitutionality, the manner in which it relates to the legal system in general, and whether it is likely to achieve the stated end. A statement of opinion is not binding on the legislature. However, should the Council find a draft bill to be unconstitutional, it is highly unlikely that the Government will put that draft to the legislature for a vote.

Early in 2019, the Government presented a draft bill to the Council on Legislation that would criminalize joining and supporting terrorist organizations. The Council assessed the constitutionality of the draft bill and concluded that if adopted by the legislature (*riksdagen*) it would infringe the Constitution, in particular the freedom of association (see the Instrument of Government (IG) Ch.

[1] See the *2018 Global Review* on Sweden.
[2] Dir 2019:39.
[3] Dir 2020:11.

2, Sect. 1, p. 5).[4] The Government retracted the draft, referring to the assessment of the Council. At the end of summer 2019, the Government presented a new, more narrowly tailored draft law that was later passed by the legislature. The new law criminalizes supporting terrorist organizations through, for example, the handling of weapons, providing communications and transport means, or making property such as housing or land available to terrorist organizations. The legal background is that the Swedish anti-terror laws are many and fragmented. As a result, their efficiency and degree of legal certainty have been questioned. Still, there are important gaps in the law compared to other states' anti-terror laws, especially as regards the joining of a terrorist organization (EU states in particular).

In July 2019, a Commission of Inquiry was appointed and tasked with investigating the legal preconditions for and ramifications of criminalizing racist organizations. The background is the increasing number of violent acts of racist organizations taking place in Sweden and the threat they pose to a democratic and open society as well as to individuals. Freedom of association is a fundamental right that enjoys strong protection in Swedish constitutional law. It can only be restricted in a few cases, explicitly mentioned in the Constitution under IF 2:24, Sect. 2. Racist organizations can in principle be prohibited under the Constitution. Still, important and difficult questions remain as to the definition of what constitutes a racist organization and whether the banning of such organizations would be in congruence with the Swedish tradition of content-neutral restrictions on fundamental rights, especially freedom of expression and association, whether it can be deemed proportional and necessary in a democratic society, and last but not least, whether criminalization is likely to bring the expected results, in this case to abolish racism and the violent actions that come with it.

III. CONSTITUTIONAL CASES

1. NJA 2019 s. 72 (the Flag): Applicability of the Freedom of the Press Act

In the town of Eskilstuna, on a public space, two persons raised a flag depicting the Nazi swastika. One of them was apprehended by the police and was subsequently charged with the offence of incitement to racial hatred (*hets mot folkgrupp*). The Supreme Court determined that, since the flag had been produced using screen printing, the case was to be tried under the constitutional Freedom of the Press Act – which is normally applicable to messages disseminated via printed newspapers or books. The Court emphasized that the Freedom of the Press Act applies to any "publication" produced using a printing technique, i.e., the applicability of the Act is not limited to traditional publications but extends even to printed fabric.

2. NJA 2019 s. 577 (the Laser Pointer III): The Principle of Legality

The Swedish criminalization of possession of laser pointers on public spaces has generated three Supreme Court judgments. The two previous cases concerned the standard of negligence required for criminal responsibility (NJA 2011 s. 725, the Laser Pointer I), and the requirement that a technical standard, referred to in a criminal statute, must be made available to the public for free (NJA 2017 s. 157, the Laser Pointer II). The third part of this Laser Pointer trilogy related to the requirement that, under the principle of legality, a technical standard referred to in a criminal statute must be available in the Swedish language. Since the technical standard at issue, which determined whether a laser pointer fell under the scope of criminalization, was available only in English, the principle of legality led to the accused being acquitted.

3. HFD 2019 ref. 1: Access to Information under the Freedom of the Press Act

Under the Freedom of the Press Act, individuals have a right to access public documents (that are not confidential) in their original form, unless significant obstacles exist. Regardless of any such obstacles, the Freedom of the Press Act gives individuals an absolute right to request and receive a copy of public documents for a fee determined by statute. In the case at hand, an individual had requested to access documents from the Swedish National Archives. The documents dated back to the 15th and 16th centuries, and some were severely infested by mold and fire damaged. Hence, the documents were extremely fragile and could, according to the Swedish National Archives, not be handled without inflicting loss of information. The Supreme Administrative Court concluded that under these circumstances, there existed significant obstacles that hindered access to the documents in the original. Furthermore, the Court held that, despite the absolute nature of the right to access copies of public documents under the Freedom of the Press Act, the right to access public documents presupposed that it was possible to provide access without destroying the relevant documents. Hence, the request to access the documents was denied.

4. HFD 2019 ref. 24: Access to Information under the Freedom of the Press Act

As mentioned under the previous case, the Freedom of the Press Act gives individuals the right to access public documents, provided that the documents are not confidential. Under the Act, a document is "public" if it is in the possession of an authority, and the document (i) has been created by the authority and is finalized, or (ii) has been received by the authority from an external source. In the case at hand, an individual had been denied a request to access public (but confidential) documents relating to a police investigation, and appealed the Police Authorities' denial to the Administrative Court of Appeals. When the Administrative Court of Appeals obtained the files in question from the Police Authority, the plaintiff requested to access the documents in order to determine the merits of the appeal. The

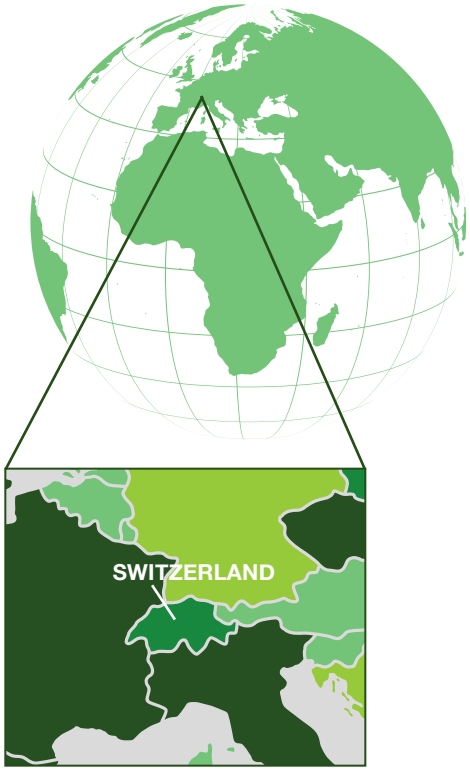
[4] Council on Legislation, Statement of Opinion from March 20, 2019.

Court of Appeals denied the request for access, holding that the Court had not "received" the documents in the meaning of the Freedom of the Press Act and hence, that the documents possessed by the Court were not "public". The Supreme Administrative Court held that the documents in question had in fact become public when received by the Administrative Court of Appeals, arguing that a public document cannot lose its character of being public when sent from one authority (the Police Authority) to another (the Administrative Court of Appeals). However, the Supreme Administrative Court also held that the public documents in question should not be viewed as being part of the Administrative Court of Appeal's case file. This is significant, since the parties to a case have a far-reaching right to access the Court's case file, even if it contains confidential information. The Supreme Court of Appeals argued that any other determination would have rendered the process of appealing a denial of access to public documents meaningless, since it would in fact give the appellant access to the confidential information sought simply by initiating an appeal.

IV. LOOKING AHEAD

It is clear that the constitutional debate in Sweden is heavily influenced by the political and constitutional illiberal trend globally. Several important Commissions of Inquiry into important constitutional matters have been formed. In addition to the two inquiries mentioned above, an inquiry is currently assessing the possibility of claiming damages for violations of constitutional rights.[5] The Supreme Court is developing important case law on this matter and the questions assigned to the inquiry are whether the right to damages should be regulated by law. Since this is the case concerning violations of rights protected by the ECHR (*skadeståndslagen* (1972:207) Ch. 3 § 4), there are strong arguments to be made in favor of such a law. In addition, rights of the Samí people are increasingly on the political and legal agenda. As natural resources are being exploited to an increasing extent in the northern parts of Sweden, in combination with climate changes, the circumstances under which the Samí people can exercise their traditional way of life, including herding reindeer, are increasingly restrained.

[5] Dir 2018:92.



Switzerland

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I. INTRODUCTION: FOREIGN POLICY AND DIRECT DEMOCRACY

The Swiss Federal Constitution of 18 April 1999 (Swiss Fed. Const.)[1] is a 'popular constitution'.[2] Formally, it ranks amongst the most rigid given the considerable hurdles amendments must clear.[3] Not only are constitutional amendments subject to a referendum but require a double majority of both the voters nationwide and the 26 constituent states (Cantons) to be approved.[4] The result of the popular vote in each Canton determines its respective vote.[5] Constitutional amendments are nevertheless frequent. Swiss citizens are usually called upon four times a year to vote on two to four referenda regarding constitutional amendments, international treaties, or federal statutes. In 2019, however, the voters and the Cantons *failed to approve any constitutional amendment.* On 10 February 2019, they rejected a popular initiative against urban sprawl aimed at mitigating the deprivation of cultivated land by barring the Cantons from creating new residential zones.[6] Federal Parliament had met some of the demands by amending the Federal Statute on Spatial Planning in 2012.

In small and open economies like Switzerland, referenda on international treaties may, in both political and legal terms, rise to the same importance as referenda on far-reaching constitutional amendments. This is supported by empirical evidence according to which voter turnout tends to be significantly higher in referenda on *foreign policy* than on domestic issues.[7] Unlike all of its neighbours, Switzerland is neither a member of the European Union (EU) nor the European Economy Area. The country is nonetheless closely linked with the EU by a densely knit network of bilateral treaties allowing, among other things, for free movement of persons.[8] Coupling the EU's dynamic *acquis communautaire*, including secondary legislation and decisions by the European Court of Justice, with static treaties under international law, however, creates inevitable tensions. Such friction resurfaced with regard to the EU's 'Schengen Agreement', which largely abolished internal border checks within the European 'Schengen Area',[9] of which Swit-

[1] Swiss Federal Constitution, 18 April 1999, Classified Compilation of Swiss Federal Law (SR) No. 101; official titles are in German, French, and Italian. Available at: https://www.admin.ch/opc/en/classified-compilation/19995395/index.html (non-official English translation).

[2] Johannes Reich, 'Switzerland: The State of Liberal Democracy', in Richard Albert et al. (eds), *2017 Global Review of Constitutional Law* (I•CONnect & Clough Center 2018) 280, 280.

[3] Astrid Lorenz, 'How to Measure Constitutional Rigidity' 2005 (17), *Journal of Theoretical Politics* 339, 359.

[4] Swiss Fed. Const. (note 1), article 140 section 1a.

[5] Swiss Fed. Const. (note 1), article 142 section 3.

[6] 'Popular Initiative Against Urban Sprawl'. Vote of 10 February 2019. Available at: https://www.bk.admin.ch/ch/f/pore/va/20190210/index.html.

[7] For empirical evidence see, e.g., Lionel Marquis and Pascal Sciarini 'Opinion formation in foreign policy: the Swiss experience' (1999) 18 Electoral Studies 453, 458.

[8] 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. Available in French at: https://www.admin.ch/opc/fr/classified-compilation/19994648/index.html.

zerland has been part since 2008 based on its 'Schengen Association Agreement'.[10] The latter committed Switzerland to adopt the 'Schengen *acquis*'[11], and a failure to comply would lead to the termination of the treaty by default.[12] Each national referendum launched against the adoption of the developing Schengen *acquis* therefore amounts to a flirtation with terminating Switzerland's membership of the 'Schengen Area' altogether. This would not only lead to reintroduced checks at the Swiss border but put Switzerland's participation with the EU's 'Dublin Regime', determining which country bears the responsibility to examine an application for asylum, in jeopardy.[13]

In January 2019, a referendum was launched against adopting a further development of the Schengen *acquis* on control of the acquisition and possession of weapons. In Switzerland, where the Constitution provides for general conscription for all male Swiss citizen of full age,[14] individual ownership of a firearm and full membership of the citizenry have been emblematically linked for centuries. The Federal Constitution of 1874, in force until 1999, even stated, that the 'firearm shall … remain in the hands of the serviceman' off duty.[15] Despite these persistent yet slowly fading traditions, the voters *rejected* the referendum against the adoption of the Schengen *acquis* and thus *allowed* for continued membership of Switzerland in the Schengen Area.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS: GENERAL ELECTION OF THE SWISS FEDERAL PARLIAMENT

1. Bicameral Swiss Federal Parliament: Constitutional Framework

On 20 October 2019, Swiss voters were called upon to elect the Federal Parliament. When the first Swiss Federal Constitution of 12 September 1848 was drafted, transforming the former confederacy into a federal state, the 'United States Congress served as a blueprint for Switzerland's bicameral parliamentary system'.[16] The bicameral Swiss Federal Parliament consists of the *National Council* and the *Council of States,* the former resembling the United States House of Representatives, the latter emulating the United States Senate. Both houses, the National Council and the Council of States, which taken together are called *Federal Assembly,*[17] are, unlike the chambers of the U.S. Congress, equal and have identical powers.[18] The *National Council* consists of 200 representatives of the People.[19] They are elected directly by the voters according to a system of proportional representation for a term of four years.[20] Proportional representation is, however, severely distorted by the fact that each of the 26 Cantons forms a constituency (electoral district).[21] The seats of each Canton are allocated according to their permanent resident population.[22] The authority to adjust the allocation of seats based on the most recent census is delegated to the federal executive branch (Federal Council).[23] Voters domiciled in the Canton of Zurich, for instance, were therefore entitled to elect 35 representatives in 2019, whereas the voters residing in one of the six smallest Cantons could each elect a sole representative only.[24] The *Council of States,* in turn, consists of 46 members.[25] Each Canton elects two representatives, bar those six Cantons that emerged from partition of a single Canton into two between the Late Middle Ages and the 19th century. These Cantons each elect one representative to the Council of States

[9] See 'Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders' [14 June 1985], O J L 239, 22/09/2000, 13-18.

[10] See 'Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis' [26 October 2004], O J L 53, 27/02/2008, 52-79. Available in French at: https://www.admin.ch/opc/fr/classified-compilation/20042363/index.html.

[11] See M Oesch, *Switzerland and the European Union* (Nomos & Dike, 2018) 42-3, 103-10.

[12] See 'Schengen Association Agreement' (note 10), article 7 section 4.

[13] 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. Available in French at: https://www.admin.ch/opc/fr/classified-compilation/19994648/index.html.

[14] Swiss Fed. Const. (note 1), article 59 section 1.

[15] Swiss Federal Constitution, 29 May 1874, in force until 31 December 1999, article 18 section 3.

[16] Johannes Reich 'The Americanization of Swiss Legal Culture [Book Review]' (2018), 66 *American Journal of Comparative Law* 723, 725.

[17] Swiss Fed. Const. (note 1), article 148.

[18] Swiss Fed. Const. (note 1), article 148 section 2.

[19] Swiss Fed. Const. (note 1), article 149 section 1.

[20] Swiss Fed. Const. (note 1), article 149 section 2.

[21] See Swiss Fed. Const. (note 1), article 149 section 3.

[22] Federal Act on Political Rights, 17 December 1976, article 16 section 2; SR (see note 1) 161.1; official titles are in German, French, and Italian. Available at: https://www.admin.ch/opc/en/classified-compilation/19760323/index.html (unofficial English translation).

[23] See Federal Act on Political Rights (note 22), article 16 section 2 and Decree on Political Rights, 24 May 1974, article 6a; SR (see note 1) 161.1; official titles are in German, French, and Italian. Available at: https://www.admin.ch/opc/de/classified-compilation/19780105/index.html.

[24] Decree on the Allocation of Seats regarding the General Election of the National Council, 30 August 2017; official titles are in German, French, and Italian. Available at: https://www.admin.ch/opc/fr/official-compilation/2017/4259.pdf.

[25] Swiss Fed. Const. (note 1), article 150 section 1.

only.[26] It is for the Cantons to determine the rules governing the elections regarding the Council of States.[27] All of the Cantons elect their representatives directly by the people for a term of four years, all but two Cantons by majority voting.[28]

2. Climate Change: Environmental and Political Impacts

Global warming has had a profound and visible impact on the Swiss landscape already: Alpine glaciers have lost around 60 percent of their volume since 1850, the number of days with snowfall has halved since 1970 at altitudes below 800 metres above sea level, heatwaves have doubled in both frequency and intensity since 1901, and near-surface air temperature has increased by 1.5 °C over the last 150 years, which is considerably more than the global average of 0.9 °C.[29] Within a period being shorter than today's life expectancy at birth, average temperatures are estimated to rise up by a further 4 to 7 °C during the summer season.[30] Such dramatic climatic changes are most likely to have profound societal and economic consequences even for Switzerland, being a highly developed and land-locked country. They thus call for decisive political action.[31]

Climate change consequentially was featured among the issues dominating the election campaigns. The Swiss Green Party (GPS) increased its share of the national vote by 6.1 percent, gaining 17 additional seats in the *National Council*[32] – the most significant increase of any party since proportional representation had been introduced by a popular initiative in 1918. The *Green Liberal Party* (GLP) increased its share of the vote by 3.2 percent and secured nine additional seats. All of the remaining parties stagnated or suffered defeats: The right-wing *Swiss People's Party* (SVP) lost 12 mandates, albeit holding on to its position achieved in 1999 as the most influential political group in Parliament by a large margin, while the *Social Democratic Party's* (SP) share of the national vote dropped to 16.8 percent – the lowest since the party came into being in the late 19th century. Both the centre-right *Democratic Liberal Party* (FDP) and the moderate-conservative *Christian Democratic Party* (CVP) stagnated at historically low levels with 29 and 25 seats, respectively. Both of them, nevertheless, continue in their roles as the dominating forces in the *Council of States*[33] as a result of majority voting in all but two Cantons, holding 12 (FDP; – 1) and 13 (CVP; +/– 0) of the 46 seats, respectively. The GPS jumped from one to five mandates while the SP holds nine (– 3) and the SVP six (+ 1) seats.

3. Composition of the Federal Executive Branch – Still 'a Kind of Magic'?

The *Federal Council,* the executive branch of the federal government, forms a *singularity* in a comparative perspective: It consists of *seven* members with *equal rights and powers* and is elected by the National Council and the Council of States in a joint meeting ('United Federal Assembly') for a term of *four years* after each general election of the National Council.[34] The right of 50,000 citizens eligible to vote to launch a referendum against any federal statute decided by Parliament provides for incentives to strive for a broad consensus at an early stage of legislative proceedings even before the draft bill is put on the agenda of Parliament. As the Federal Council usually conducts preliminary legislative proceedings,[35] at least four different political parties have been represented in the Federal Council continuously since the so-called '*magic formula*', a political convention according to which all five parties with the largest share of the national vote hold at least one seat in the Federal Council, has taken root in 1959 to enhance the possibility to reach a broad political consensus.[36] According to this 'epitome of Swiss consociationalism',[37] the GPS would have qualified for a seat in the Federal Council. The unprecedented gains of the GPS in the general election failed to alter the composition of the Federal Council, however, as Parliament *reelected all of the incumbent Federal Councilors.* The Federal Council thus furthermore consists of two members of the SVP, the FDP, and the SP and one member of the CVP; four of the members have German, two French, and one Italian as their native language.[38]

III. CONSTITUTIONAL CASES:

[26] See Swiss Fed. Const. (note 1), article 150 section 2

[27] See Swiss Fed. Const. (note 1), article 150 section 3.

[28] See, inter alia, W Haller, *The Swiss Constitution in a Comparative Context* (2nd ed, Dike, 2016) 130-2.

[29] National Centre for Climate Services [NCCS], *Climate Scenarios for Switzerland* (2018), 18 (available at: https://www.nccs.admin.ch/dam/nccs/en/dokumente/website/klima/CH2018_broschure.pdf.download.pdf/CH2018_broschure.pdf).

[30] NCCS (note 29) 6-13.

[31] See Johannes Reich, 'Abwendung der Klimakatastrophe durch Gerichte?' (2019), 120 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 413 (available at: https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html).

[32] Federal Statistical Office FSO, *Élections fédérales* 2019 (FSO, 2019) 9-12, 16 (https://www.bfs.admin.ch/bfsstatic/dam/assets/10907688/master).

[33] Federal Statistical Office, 'Élections au Conseil des États' (https://www.bfs.admin.ch/bfs/fr/home/statistiques/politique/elections/conseil-etats.html).

[34] Swiss Fed. Const. (note 1), article 175 sections 1-3 and article 177 section 1.

[35] Government and Administration Organisation Act, 21 March 1997, article 7; SR (see note 1) 172.010; official titles are in German, French, and Italian. Available at: https://www.admin.ch/opc/en/classified-compilation/19970118/index.html (unofficial English translation).

[36] Johannes Reich, 'An Interactional Model of Direct Democracy – Lessons from the Swiss Experience' (2008), 12-4, 17-8 (https://ssrn.com/abstract=1154019).

[37] Adrian Vatter, 'Switzerland on the Road from a Consociational to a Centrifugal Democracy?' (2016), 22 *Swiss Political Science Review* 59, 71.

[38] On the legal relevance of multilingualism in Switzerland, see Johannes Reich, 'Auslegung mehrsprachigen Rechts unter den Bedingungen der Polyglossie in der Schweiz' in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung – Sprache –Rechtsdogmatik* (Nomos, 2019) 145-173.

JUDICIALIZATION OF POLITICS, ISLAMIC HEADSCARVES, AND HOMESCHOOLING

1. First-ever Judicial Nullification of a Federal Ballot – a Judicialization of Politics?

The Federal Constitution guarantees each citizen the right 'to form an opinion and to give genuine expression to his or her will' in particular with regard to their political rights (elections and ballots).[39] The Federal Court, Switzerland's supreme court, thus consistently held that no result of a ballot shall be approved failing to reflect 'the genuine and undistorted will of the voters'.[40] Accordingly, the Court has regularly nullified such ballots at the levels of the Cantons and the municipalities in which public authorities had interfered by means of unbalanced information or distorting propaganda. Pursuant to an explicit constitutional provision, however, *acts of both the Federal Assembly and the Federal Council* remain *outside of the scope of judicial review.*[41]

In the run-up to each federal ballot, ballot papers are mailed to voters together with an *official information booklet.* All information contained therein must comply with 'the principles of completeness, objectivity, transparency, and proportionality'.[42] The official information booklet is an 'act of the Federal Council', as it is responsible for providing for the respective 'short' and 'objective explanation'[43] of the referenda and popular initiatives to be decided upon at the ballot box.

In a decision of 2011,[44] the Federal Court held that despite the official information booklet's character as 'an act of the Federal Council', the Court would still scrutinize the 'general state of information prevailing at the time of a popular vote'.[45] As the Federal Council's official information booklet plays a crucial role in the decision-making process,[46] this effectively amounted to a *circumvention* of the constitutional restrictions on judicial review.

Drawing on the aforementioned case law, the Federal Court, on 10 April 2019,[47] *nullified* a federal ballot for the first time in Switzerland's history. The Court's judgment annulled the federal ballot of 28 February 2016 on a popular initiative seeking to abolish what is commonly referred to as 'the penalty on marriage'. The term describes the phenomenon according to which the tax due for married couples and homosexual couples living in a registered partnership is determined based on the *total* income and wealth of *both* individuals involved. Due to *progressive* tax rates, the tax levied on individuals joint in marriage or registered partnership tend to be higher than the tax imposed on two single persons in the same situation, provided both individuals gain income. In its official information booklet, the Federal Council estimated that 80,000 couples would be affected by the 'penalty on marriage', only to correct this figure to 454,000 two years later. The Federal Court not only deemed the previous estimate to be 'grossly misleading' but assumed that it significantly impacted the 'general state of information prevailing at the time of a popular vote'. It *nullified* the ballot as a consequence.

Whereas the Federal Court, with its decision of 10 April 2019, *strengthened the integrity of the process of direct democracy at the federal level,* both the lack of manageable standards to assess the 'general state of information prevailing at the time of a popular vote' and the circumvention of the constitutional limits imposed on judicial review with regard to 'acts of the Federal Council' amount to a *constitutionally unwarranted judicialization of federal politics.*

2. Prohibition of 'Visible Religious Symbols' in Court Hearings

Whereas the Islamic headscarf has featured frequently in the case law of Switzerland's highest court, all previous decisions have so far related to *public schools.* In 1997, the Court held a prohibition for *teachers* at public schools to wear Islamic headscarves to be *constitutional* both in view of the constitutional commitment of Geneva, the Canton in question, to a strict separation of religion and state (*laïcité*) and the teachers' role representing the state and thus being bound to remain neutral on religious matters.[48] In 2015, the Court ruled that banning 'headgear' in general and headscarves in particular for *students* would *unconstitutionally* infringe on their freedom of religion.[49]

On 11 March 2019, the Federal Court held a mere ordinance issued by the Council of Justice of the Canton of Basel-City committing all court officials (judges and clerks) to

[39] Swiss Fed. Const. (note 1), article 34.

[40] See, e.g., Swiss Federal Court, BGer., decision BGE 140 I 394 section 8.2 (26 September 2014). Available at: www.bger.ch.

[41] Swiss Fed. Const. (note 1), article 189 section 4.

[42] Federal Act on Political Rights (note 22), article 10a section 2.

[43] Federal Act on Political Rights (note 22), article 11 section 1.

[44] Swiss Federal Court, BGer., decision BGE 138 I 61 (20 December 2011). Available at: www.bger.ch.

[45] See Swiss Federal Court, BGE 145 I 207 (10 April 2019) at section 1.5 (*'…l'état d'information global prévalant au moment d'une votation populaire…'*). Available at: www.bger.ch.

[46] See Alexander H Trechsel and Pascal Sciarini, 'Direct democracy in Switzerland: Do elites matter?' (1998), 33 *European Journal of Political Research* 99, 113-5 and, for a contextual assessment, Hanspeter Kriesi, *Direct democratic choice: The Swiss experience* (Lexington, 2005) 230-9.

[47] BGE 145 I 207 (note 45).

[48] Swiss Federal Court, BGer., decision BGE 123 I 296 (12 November 1997). Available at: www.bger.ch.

[49] Swiss Federal Court, BGer., decision BGE 142 I 49 (11 December 2015). Available at: www.bger.ch; for a critical assessment see Johannes Reich, 'BGE 142 I 49' (2016), 117 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 369 (available at: https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html); see also Swiss Federal Court, BGer., decision 1C_76/2018 (20 August 2019). Available at: www.bger.ch.

abstain from 'wearing visible religious symbols' during both public pronouncements of judgments and court hearings with the parties or the public being present to be *constitutional*.[50] The Court found that the prohibition would pursue a legitimate public interest by seeking to prevent parties from being given the impression that court officials would be 'guided by their religious convictions in their decision-making process'. The Court furthermore stated that the regulation would not severely restrict the freedom of religion of court officials as it would only apply to circumstances being strictly limited both in time and subject matter, leaving 'the everyday life' of court officials mostly unaffected. Against this backdrop, the prohibition would, according to the Court, not only be proportionate but rest on a *sufficient legal basis*. This is *unconvincing* as firmly held and religiously rooted beliefs tend to form part of an individual's self-conception. An obligation to visually disassociate oneself from one's religious convictions when appearing in public even in one's professional life thus amounts to a *severe* restriction of freedom of religion, asking for a proper legal basis.

3. No constitutional right to home-school

'Home-schooling' – to teach one's child school subjects at home – remains a rare phenomenon in Switzerland. In 2012, around 500 children were home-schooled, representing 0.055 percent of all children at compulsory school age.[51] Even though these numbers may have risen considerably in the meantime, they are most likely to have lingered well below the threshold of 1 percent. School education is a subject matter to be regulated by the Cantons rather than the Federation.[52] As a result, 26 different regulations apply to home-schooling across Switzerland.[53] Despite such varying standards, every child has a *constitutional right to adequate primary education being free of charge*.[54] Primary 'education' (not to be confused with 'schooling') is *mandatory* for all children living in Switzerland on constitutional grounds.[55] The Cantons are, at the same time, under a constitutional obligation to provide for schools allowing for such adequate primary education free of charge.[56] Children furthermore have a constitutional right to 'special protection of their integrity and to the encouragement of their development' (*best interest of the child*).[57]

In its first leading case on the subject, the Federal Court held on 22 August 2019,[58] that the right to respect for one's private and family life enshrined in both the Federal Constitution and European Convention on Human Rights (ECHR) would *not grant an individual right to home-school*. Regulations enacted by the Cantons severely restricting or even prohibiting home-schooling are thus, according to the Court, in line with both the Federal Constitution and the ECHR as long as the schools of the respective Cantons provide for adequate primary education free of charge. Notably, the Court made no mention of the constitutional clause protecting the best interest of the child. It thus turned a blind eye to the possibility that home-schooling might, as an exception and for a limited time only, indeed be in a child's best interest.[59]

IV. LOOKING AHEAD: POPULAR INITIATIVES AS 'SOCIETAL SEISMOGRAPHS'

Popular initiatives, which require only 100,000 signatures of Swiss citizens to be launched,[60] often amount to 'societal seismographs', putting issues on the political agenda that have been neglected by the political elites. The popular initiative 'for more affordable housing', to be decided on 9 February 2020, sheds light on high rents in some Swiss cities, whereas the popular initiative 'for moderate immigration' to be decided on 17 May 2020 amounts to yet another flirtation with Switzerland turning its back on the EU altogether. The initiative seeks to end the free movement of people within EU countries. Continually e*valuating the inevitable trade-offs* between self-governance, democracy, and economic integration will, therefore, remain a defining feature of Switzerland's direct democracy in the year to come.

V. FURTHER READING

Oliver Diggelmann, Maya Hertig Randall, Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz – Droit constitutionnel suisse* (three volumes, Schulthess, 2020)

[50] Swiss Federal Court, BGer., decision 2C_546/2018 (11 March 2019). Available at: www.bger.ch.

[51] Johannes Reich, '"Homeschooling" zwischen elterlichem Erziehungsrecht, staatlicher Schulpflicht und Kindeswohl' (2012), 113 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 567, 568, 607-9 (available at: https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html).

[52] Swiss Fed. Const. (note 1), article 19.

[53] For an overview of these regulations, see Reich (note 51) 607-9.

[54] Swiss Fed. Const. (note 1), article 19.

[55] See Swiss Fed. Const. (note 1), article 62 section 2.

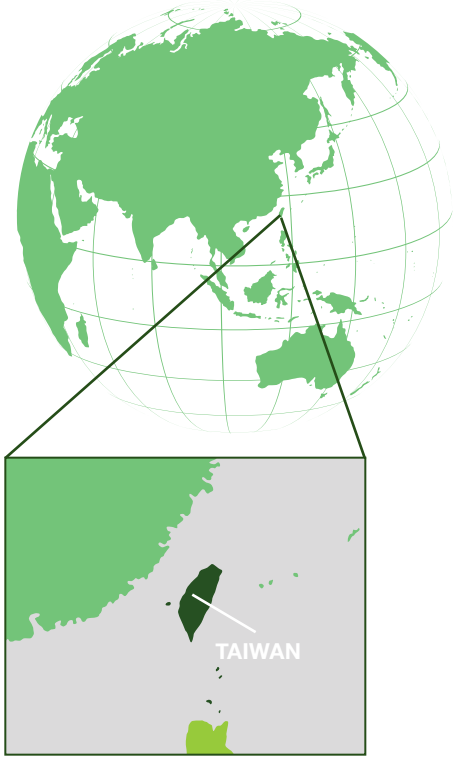
[56] See Swiss Fed. Const. (note 1), article 62 section 2.

[57] Swiss Fed. Const. (note 1), article 11 section 1; for a detailed analysis see Johannes Reich, '"Schutz der Kinder und Jugendlichen" als rechtsnormatives und expressives Verfassungsrecht' (2012), 131(I) Zeitschrift für Schweizerisches Recht 363 (available at: https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html).

[58] Swiss Federal Court, BGer., decision 2C_1005/2018 (22 August 2019). Available at: www.bger.ch.

[59] See Reich (note 51) 605.

[60] Swiss Fed. Const. (note 1), article 139 section 1.



Taiwan

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I. INTRODUCTION

2019 was a year of uncertainty in Taiwan's constitutional development. Although there was no election – which historically has been the impetus for landmark changes in Taiwanese constitutional law and politics – in 2019, the constitutional landscape was nonetheless shaped in the shadow of elections. On the one hand, as reported last year, the local elections of 2018 not only shook the ruling Democratic Progressive Party (DPP) to the core but also portended a tectonic constitutional change with a cluster of controversial citizen-initiated referenda under the 2017 Referendum (Amendment) Act. On the other hand, the presidential and general elections scheduled for 11 January 2020 undoubtedly bore greatly in the minds of constitutional players of all political persuasions. Both the preceding and the upcoming elections set the tone of Taiwan's constitutional development in 2019.

Against this backdrop, the development in 2019 was reactive in character, with the legislative arena as the main constitutional theater. As will be further discussed, in reaction to the constitutionally controversial and politically divisive referenda aimed at curtailing the Taiwan Constitutional Court's (TCC) historic *Same-Sex Marriage Case,* the government introduced legislation both to implement the TCC's ruling on marriage equality and to amend the Referendum Act again to minimize the impact of referendum politics on elections in the future. To propaganda and other forms of interference imputed to China, Taiwan's undeclared enemy, which had been blamed for the DPP's election defeat in 2018, the DPP government reacted with a series of legislative moves to tighten up national security measures to avoid repeating the same misfortune in the elections to come.

Paralleling the reactive moves on the legislative front were the seeming constitutional routines as manifested in the president's judicial appointments in the anticipation of scheduled retirements from the TCC and the TCC's decisions. Routine as they seem to be, both non-statutory constitutional developments, whether they played out in the judicial forum or not, were of long-term significance in Taiwan's constitutional development in their own right. The constitutional story of Taiwan in 2019 starts with the statutory and non-statutory constitutional acts playing out in the legislative arena.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Statutory Enactment and Amendment

The major statutory changes of constitutional significance include the implementation of the TCC's *Same-Sex Marriage Case*, reactive reform on the conduct of referenda, and reaction to the interference from external hostile forces, which are discussed in order.

a. Legalization of Same-Sex Marriage

As has been reported previously, in the 2017 *Same-Sex Marriage Case* – formally styled as Interpretation No. 748 in the official case report – the TCC issued a suspended remedial order along with a declaration of unconstitutionality as to the current statutory provisions governing the marriage institution in the Civil Code. Should the Legislative Yuan fail to legislate same-sex marriage

during the two-year remedial grace period, the TCC further decreed that the current Civil Code would then be extended to same-sex couples who wish to enter into marriage. It was also reported last year that to push back against the TCC's declaration of equal protection of freedom of marriage in respect of same-sex couples in the *Same-Sex Marriage Case,* conservative and religious groups initiated two proposals under the Referendum Act as amended in 2017. Specifically, the voters were asked to answer, *inter alia,* the following two questions in the referenda in December 2018: "Do you agree that the marriage provisions in the Civil Code should be applicable only insofar as the relationship between a man and a woman is concerned?" (Referendum Initiative No. 10) and "Do you agree to legislate some form of union, other than that as referred to in the marriage provisions in the Civil Code, to protect the rights of same-sex couples who live together permanently?" (Referendum Initiative No. 12).

With both questions answered in the affirmative, there was little hope that the marriage institution as provided for in the Civil Code would be directly applicable to same-sex couples. Read together, the results of the two referendum initiatives were interpreted as preventing the provision for freedom of marriage and the corresponding rights in respect to same-sex couples through the formal amendment of the Civil Code and mandating that the prospective legally protected relationship of same-sex couples be designated as something other than marriage. This was the line drawn on the subsequent legislative bill concerning marriage equality that was to be enacted in 2019 as ordered in the *Same-Sex Marriage Case.*

It was no surprise that the results of these two controversial referendum initiatives as interpreted above were disappointing to LGBTQ+ activists and advocates for civil rights and liberties in general. Moreover, the exclusion of the marriage designation from the legally protected relationship of same-sex couples raised concerns about the equal protection of freedom of marriage as mandated in the *Same-Sex Marriage Case* being unconstitutionally weakened. Despite such constitutional concerns, the DPP had neither the political capital nor the political appetite for opening a new front on the battle for marriage equality beyond the scope delimited by the TCC after its dismal election performance in December 2018. As the two anti-same-sex marriage referendum initiatives were seen as instrumental in the mobilization of opposition forces in the 2018 local elections, the DPP was not prepared to be continuously entangled in the issue of same-sex marriage with the 2020 presidential and general elections in sight.

In reaction to the referendum results, civil rights advocacy groups and the DPP government eventually agreed on the ostensibly bland statutory title "A Bill for the Implementation of J.Y. Interpretation No. 748," which was enacted into law on May 24, 2019. The most salient characteristic of "the Act for the Implementation of J.Y. Interpretation No. 748" (the Act)[1] is not what is included but rather what is absent. The Act makes no mention of "marriage (婚姻)" whatsoever. As regards its legislative purpose, it only states, "[t]he Act is enacted to implement the J.Y. Interpretation No. 748" (Article 1) without specifying what Interpretation No. 748 is about or what it requires. To define the legally protected relationship of same-sex couples, Article 2 provides, "[t]wo persons of the same sex may form a permanent joint relationship of intimate and exclusive nature for the purpose of living a common life." Notably, to avoid the implicit downgrading of the legally defined relationship same-sex couples enter into under the Act vis-à-vis marriage as provided for under the Civil Code, the Act does not refer to such relationship as "union" or "civil union," either, as they had been considered inferior to marriage. Rather, it only provides for "such relationships as referred to in Article 2."

Despite the absence of references to marriage or civil union, virtually all the rights available to heterosexual married couples under the Civil Code are replicated in the Act or apply, *mutatis mutandis,* to same-sex couples accordingly, except that same-sex couples are only allowed to adopt children genetically related to one of them. Thus, in terms of substance, the Act does satisfy the TCC's requirement for marriage equality in the *Same-Sex Marriage Case*. Moreover, same-sex couples who enter into the relationship as provided for under the Act are allowed to register themselves as spouses for the purpose of matrimony registration (結婚登記) as heterosexual married couples do under the household registration system, although their relationship is not legally designated as marriage (婚姻).

b. Amendment to the Referendum Act

After the Referendum Act was amended to reduce procedural thresholds to initiate a referendum and make it binding in December 2017, ten referenda were held alongside the local elections in December 2018. The conduct of referenda under the 2018 Referendum (Amendment) Act received severe criticism for several reasons. On the one hand, it was blamed for causing a disruptive delay in voting with the local elections and the referenda held in parallel. Also, it was criticized for failing to make contingency plans for issues arising from the coordination of the local elections and the unprecedented ten parallel referendum initiatives. On the other hand, as suggested above, with the expanded referendum agenda put on the ballots, divisive issues such as the anti-same-sex marriage initiatives came to fore in the political debate and were adopted by political forces as a rallying cry for their political base. The 2018 Referendum (Amendment) Act was not only held responsible for contributing to the DPP's electoral misfortune in December 2018 and curtailing the Same-Sex Marriage Case but also questioned for opening the door for malevolent populists.

In reaction, the DPP-controlled Legislative Yuan pushed a package of amendments

[1] To be faithful to the spirit of the Act as expressed in its Chinese version, the following English translation of the provisions of the Act is our own. The official English translation is available at <https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008>.

to the Referendum Act in June 2019. The key components of the 2019 Referendum (Amendment) Act concern a change in the timeframe of conducting referendum initiatives. On the one hand, the Central Election Commission is given sixty days, instead of thirty days, to verify the identity of the signees of the referendum initiative (Article 10, paragraph 3). On the other hand, it is required that the referendum initiative and the relevant arrangements (including the government position paper in respect thereof) be gazetted no less than ninety days, instead of twenty-eight days, before voting day (Article 17, paragraph 1). By extending the timeframe, it is hoped that populist passion will cool down and give way to deliberative reasoning. Yet, the structural transformation in the timeframe is caused by the stipulation, "[t]he referendum day is formally scheduled to be held on the fourth Saturday of August, once every two years starting from [2021]" (Article 23, paragraph 1). As a result, no referendum will be held alongside ordinary elections in the foreseeable future as the latter take place in either December (local elections) or January (presidential and general elections) unless the Legislative Yuan is dissolved or a special presidential election is required when both the office of the president and that of the vice-president become vacant. The decoupling of referendums from ordinary elections marks a point of departure in the development of referenda in Taiwan.

The above changes on the timeframe are controversial. Supporters have rallied around the amendment on the grounds that issues to be put on referendum ballots require reflection and deliberation before a choice is made. The extended timeframe and the decoupling of referenda from ordinary elections help the public to focus on the substance of the referendum initiatives without succumbing to emotion and ideology agitated by election campaigns. In contrast, critics raise concerns over the disempowering effect of the above changes. As reported last year, referendums had long been held as the means of manifesting Taiwanese sovereignty without holding an independence plebiscite or formally changing the state title. And, mass participation was regarded as the key to the success of referenda. Democratic forces, including the DPP, had insisted on holding referendums alongside ordinary elections to increase voter turnout until the DPP's electoral defeat in December 2018. Thus, the DPP's eagerness to push through the 2019 Referendum (Amendment) Act in the name of deliberative democracy was considered disingenuous, betraying its stance on the sovereignty significance of referendums. In sum, the game-changing role expected of the 2018 Referendum (Amendment) Act in Taiwanese constitutional law and politics turned out to be transitory and was deserted in the 2019 amendment.

c. Passage of the Anti-Infiltration Act

Partly in correspondence to the growing concern over the increasingly assertive China under President Xi and partly in reaction to the election results in 2018, the DPP government and its parliamentarians pushed through a series of legislative bills to strengthen Taiwan's national security vis-à-vis the interference and infiltration from China. It is noteworthy that these statutory enactments and amendments were pitched as part of the global defense of constitutional democracy against anti-constitutionalist forces such as populism and totalitarian ideologies. The legislative initiative to strengthen national security culminated in the passage of the Anti-Infiltration Act on December 31, 2019, just less than two weeks before the scheduled presidential and general elections, despite strong objection from opposition parties.

As a complement to existing statutory regulations, the Anti-Infiltration Act mainly focuses on activities such as interference, lobbying, disruption of social order, spreading disinformation, and illegal political donations by "external hostile forces" – a euphemism for China – and provides increased penalties and longer custodial sentences. Although the objective of the new Act is obvious and the DDP government has defended it as a necessary measure to curb Chinese influence in Taiwan's democracy and sovereignty, it still causes concerns about infringement of human rights because of its overbreadth and vagueness in the text.

2. Non-Statutory Development in the Legislative Yuan: New Judicial Appointments

Another development in the Legislative Yuan was the confirmation of President Tsai Ing-wen's nominees for the four scheduled retirements from the TCC in June 2019. Half of the nominees were female, making the female justices in the TCC four in total out of fifteen. With the four new appointments, eleven in total out of the fifteen Justices were appointed by President Tsai. As reported last year, the voting threshold for constitutional interpretation will be substantially lowered with the removal of the requirement of a supermajority in the Constitutional Court Procedure Act when it comes into effect in 2022 as scheduled. Whether a majority of justices appointed by the same president under the lowered voting threshold after 2022 will change the dynamics of constitutional interpretation remains to be seen. The four new appointees took office on October 1, 2019.

III. CONSTITUTIONAL CASES

In 2019, the TCC received 627 new petitions for either constitutional interpretations (603 petitions, about 96.2%) or uniform interpretation of laws and regulations (24 petitions, about 3.8%). Among these 627 new petitions, 563 (about 89.8%) were filed by the people, 61 by the courts, and only 3 by other governmental agencies. Out of the 627 new petitions and 637 pending petitions, the TCC dismissed 601 and rendered 14 Interpretations (Nos. 774 to 787), including 29 combined cases.[2] About 95.5% of the dismissed cases (574 out of 601) were brought by the people. Of the 14 Interpretations, only one (No. 787) was a uniform interpretation. Among the other 13 constitutional interpre-

[2] As of the end of 2019, there were a total of 619 pending petitions. For statistics of the TCC's new and decided cases in 2019, see Statistics of New and Terminated Cases of the TCC (in Mandarin), available at <https://www.judicial.gov.tw/tw/lp-1920-1.html>.

tations, only one (No. 780) upheld the constitutionality of the challenged laws in its entirety. The remaining 12 Interpretations declared the challenged laws unconstitutional, either in their entirety or in part. In terms of decision outcome, the TCC has become more active in striking down unconstitutional laws, following its own path since Taiwan's democratization began in the late 1980s.

Of the 13 constitutional interpretations, the TCC touched upon issues involving various subjects. They included pension reform, criminal justice, right to judicial remedy, and separation of prescribing and dispensing medicines, all of which will be discussed below.

1. Interpretation Nos. 781, 782, and 783: Pension Reform

Pension reform was one of the top priorities on the platform list during Tsai's presidential campaign in 2016. Immediately after her inauguration, she established an ad hoc commission to formulate the details of pension reform. In August 2016, two legislative bills governing the pension scheme of civil servants and public school teachers, respectively, were passed by the Legislative Yuan. In June 2018, the third bill governing the pension scheme of military personnel was also adopted by the legislature. These three new laws entered into force beginning on July 1, 2018. They lowered the ceiling amount for monthly pension payments and accordingly reduced the amount of monthly payments by a schedule of two (for civil servants and teachers) or ten (for the military) years. But the new laws also installed a new floor amount for each category of retirees to ensure their standard of living. For those incumbents, the new legislations extended the age and service length eligible for their retirement in the future, and increased the rate of their monthly premium contributions in order to increase the cash inflow of the Pension Funds and to delay projected bankruptcy dates of the Pensions Funds. To afford job opportunities for potential teachers of younger generations, the new laws would suspend the monthly pension payments of retirees if they were hired as full-time teachers or administrative staff by any private school and receive a salary beyond the amount of statutory base salary.

Tens of thousands of retirees were affected by these three new laws. A significant portion of them filed administrative litigations against the decisions to cut their individual payments. But none of these complaints reached the TCC, as they are required to exhaust ordinary remedies first. The opposition parties soon filed three petitions to the TCC challenging the constitutionality of the three laws. The TCC held oral arguments on June 24 and 25, half a day for each case, and rendered three decisions, Interpretation No. 781 on military personnel, Interpretation No. 782 on civil servants, and Interpretation No. 783 on public school teachers, all on August 23. Judging from the complexity of constitutional issues involved and the magnitude of social impact, these three interpretations undoubtedly stood out as the representative decisions of the TCC in 2019.

In all of the three interpretations, the TCC upheld nearly all provisions of the three laws except two. The first provision found unconstitutional was the suspension of monthly pension payments for being employed by private schools as provided for in all three laws. The TCC held that the classification between private and public schools was over-inclusive and the classification between private schools and other private organizations (e.g., corporations and associations) was under-inclusive. By applying the standard of intermediate scrutiny, the TCC declared that such suspension violated the equal protection of law and shall be null and void immediately after the publication of the respective interpretation.

The second provision found unconstitutional concerned fixing the amount of monthly pension payment as determined at the time of retirement. In the case of a significant rise in inflation, the retirees would suffer unpredictable loss in the real value of their pension payments. The TCC thus mandated that the authorities concerned amend the respective legislation as appropriate to provide timely adjustments in the amount of monthly pension payments in the future.

Taken together, these three interpretations on pension reform indicated the majority of the TCC did adopt a more lenient standard of review for adjudicating the constitutionality of the three laws. Under this standard, the TCC recognized most of the purposes or interests (e.g., sustainable operation of the respective pension funds, generational justice, and protection of the reliable expectation of those incumbents) asserted by the government were either legitimate or even important. On the review of means, the TCC also found most means (e.g., lowering the ceiling amount for monthly pension payments, progressive reduction in the amount of monthly payments within two or ten years, installment of the floor amount for each category of retirees, and extension of the retirement age and service length eligible for the incumbents' retirement in the future) bore a rational relationship to the respective legitimate governmental purpose.

2. Interpretation Nos. 775 and 777: Criminal Justice

The TCC rendered two Interpretations touching upon the issues of criminal law. In Interpretation No. 775, it declared unconstitutional Article 47 of the Criminal Code, imposing a mandatory increase of up to one-half of the principal punishment (e.g., imprisonment). This was the first Interpretation that found the provision of the Criminal Code unconstitutional, though the TCC has already declared unconstitutional several provisions of special criminal statutes or regulations, e.g., the "Act for Eliminating Hoodlums" (Interpretation 636) and "Disciplinary Measures for the Prevention of Repeat Offenses by Communist Espionage Criminals during the Period of National Mobilization for the Suppression of the Communist Rebellion" (Interpretation No. 567). In Interpretation No. 775, the TCC held the increased punishment for recidivists did not violate the double-jeopardy principle, as the increased punishment only applied to repeated criminal offenses instead of the original offense, and the legislature may take into account such repetition of criminal offenses in determining the range of punishment. However, the TCC held such increased punishment might produce evident excessive harshness as ap-

plied to non-serious violations, and therefore violated the principle of proportionality.

The other Interpretation on criminal law issues was No. 777. This one declared another provision (Article 185-4) of the Criminal Code partly unconstitutional. Article 185-4 provides that any person who flees after the motor vehicle he or she was driving has caused an accident resulting in death or injury of another shall be sentenced to imprisonment for not less than one year but less than seven years. The TCC held that the term "has caused an accident" was void for vagueness, as the average person would not be able to understand whether this provision also included accidents that were not caused as a result of the driver's intention or negligence. This Interpretation further found that the sentencing range of between one and seven years' imprisonment was also unconstitutional in part, because the judges were not allowed to convert the imprisonment sentence into a fine in a case of non-serious violation. Such minimal sentence of one-year imprisonment might produce evident excessive harshness, and therefore violated the principle of proportionality.

3. Interpretation Nos. 774, 784, and 785: Right to Judicial Remedy

In 2019, the TCC rendered three Interpretations on the right to judicial remedy. Interpretation No. 774 expanded the application of Interpretation No. 156 of 1979 to the parties suffering damages as a result of any specific modification in an urban plan, even if such parties' property is located outside of the urban plan in dispute. In Interpretation Nos. 784 and 785, the TCC finally broke the spell of special power relationships (*besonderem Gewaltverhältnis*) by allowing school students of any level and civil servants, respectively, to bring administrative litigations against a school or the government. Interpretation No. 784 explicitly overturned Interpretation No. 382 of 1995, which allowed students to bring administrative litigations against their schools only in cases of an expulsion or similar action that would alter a student's status as a student. In Interpretation No. 785, the TCC also cleared civil servants' access to judicial remedies for any infringement of their rights or interests. However, the TCC adopted a different approach in Interpretation No. 785 to reach a similar conclusion. Without expressly overturning its previous interpretations on similar issues, e.g., Interpretation Nos. 243 of 1989, 298 of 1992, and 323 of 1993, the TCC held that any civil servant should be granted the right to bring an administrative litigation against any government action infringing upon his or her rights, since the Administrative Litigation Act (amended in October 1998 and entered into force in July 2000) has in fact allowed such litigation. If the said reasoning of Interpretation No. 785 is sustainable, then the approach taken in Interpretation No. 784 would be wrong, or unnecessary, in overturning the previous Interpretation. In the view of Interpretation No. 785, Interpretation No. 382 should have become obsolete and lost its legal effect after the enactment of the Administrative Litigation Act in July 2000.

4. Interpretation No. 778: Separation of Prescribing and Dispensing Medicines

Interpretation No. 778 was a rare decision on the issue of dispensing separation. Taiwan's health care system is considered one of the best in the world. It provides universal, affordable, efficient, and good-quality health care service to all Taiwanese and eligible foreigners. Since the introduction of the Western medical system in the early 1900s, physicians in Taiwan have been allowed to dispense and sell medicines to their patients without the assistance of pharmacists. Beginning in 1997, two years after the establishment of the current health care system, the government started to implement a policy of dispensing separation, city (county) by city (county). Not surprisingly, this policy has been resisted by physicians. An obstetrician, after being fined for dispensing medicines to her patient, brought a petition to the TCC and challenged the authorizing provision of the Pharmaceutical Affairs Act and its implementation regulations. In this interpretation, the TCC held the law itself is constitutional, but found the emergency exception clause provided by the Implementation regulations unconstitutional for adding new restrictions on the physicians beyond the authorization of the said Act.

IV. LOOKING AHEAD

2019 may have been election-free, but it was cast in the shadow of elections. Apart from the elections in Taiwan, the district elections in Hong Kong and the general democratic movement in reaction to the aborted extradition bill also played a role in Taiwan's changing constitutional landscape. The election campaign leading to the 2020 presidential and general elections was influenced by Hong Kong's civil resistance vis-à-vis Beijing. Undoubtedly, the result of the 2020 elections will be shaped by what happened in 2019 in Taiwan and Hong Kong, with wide implications for Taiwan's constitutional landscape in 2020. Looking ahead, another development outside electoral politics is worth noting. The Transitional Justice Commission is expected to publish a comprehensive report on transitional justice in 2020 unless its mandate is renewed.

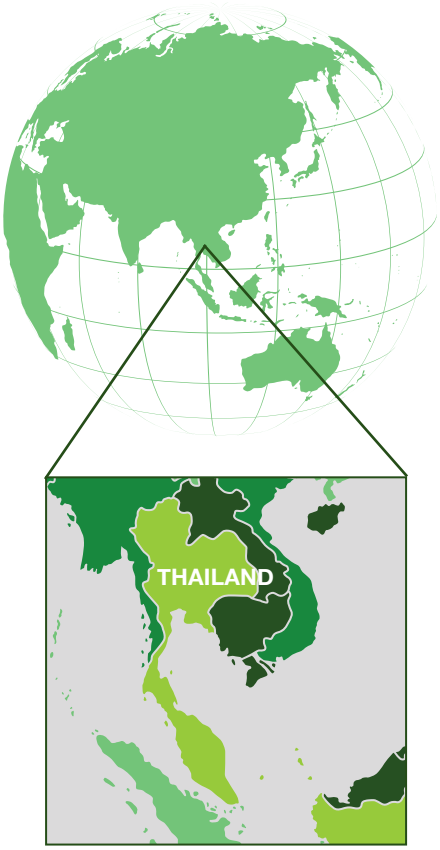
V. FURTHER READING

Jerome A. Cohen, William P. Alford and Chang-fa Lo (eds.), *Taiwan and International Human Rights: A Story of Transformation* (Springer, 2019)

Chao-ju Chen, 'Migrating Marriage Equality Without Feminism: *Obergefell v. Hodges* and the Legalization of Same-Sex Marriage in Taiwan' (2019), 52 *Cornell International Law Journal* 101

Ming-Sung Kuo, 'Between Choice and Tradition: Rethinking Remedial Grace Periods and Unconstitutionality Management in a Comparative Light' (2019), 36 *UCLA Pacific Basin Law Journal* 157

Ming-Sung Kuo and Hui-Wen Chen, '"Four Interpretations (Barely) Make One Footnote": Pension Trio, Same-Sex Marriage, and the Casting of the TCC's Reform Jurisprudence in Justice Stone,' *Int'l J. Const. L. Blog,* 27 August, 2019 <http://www.iconnectblog.com/2019/08/four-interpretations-barely-make-one-footnote-pension-trio-same-sex-marriage-and-the-casting-of-the-tccs-reform-jurisprudence-in-justice-stone/>



Thailand

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I. INTRODUCTION

The first half of 2019 witnessed a time of transition. After five years in power and following the coup it staged on 22 May 2014, the National Council of Peace and Order (NCPO) allowed the first general election to be held since 2014, and it proved to be one of the most eventful in modern history. Experts agreed that the election was by no means a return to democracy. Indeed, it marked the junta's attempt to transform the regime from one of a traditional military dictatorship to a competitive authoritarian system. The junta employed every possible tactic to give itself an edge. The 2017 Constitution was prepared by the junta, which also appointed its sympathizers in all the key positions. Furthermore, the election was rife with accusations of fraud, with the Election Commission (EC) refusing to take any action. The election result itself was inconclusive, yet the EC intervened in favour of the junta. In sum, a combination of unfair rulings and biased umpiring brought the NCPO electoral victory at the price of democratic backsliding. The second half of 2019 saw the NCPO make several attempts to consolidate its power by invoking several constitutional provisions to dismantle the opposition. Most notably, the Future Forward Party, which positioned itself as being very anti-coup, faced a number of frivolous lawsuits that could in the near future eventually lead to its dissolution. Meanwhile, the NCPO government repeatedly showed blatant disregard towards the constitutional mandate and acted with impunity. The Constitutional Court's reluctance in reviewing the case against the government starkly contrasted with its eagerness to scrutinize the government's foes. This discrepancy has long been a characteristic of Thailand's decade-long political crisis. Under the continuation of this repressive regime, civil rights continue to suffer. Security forces continue to suppress political activities while assaults on activists were reported. At the same time, pressure to amend the present Constitution is growing.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Democracy continues to decline, adhering to the trend that began since the 2014 coup d'etat. The 24 March 2019 election was the first under the 2017 Constitution after several delays. However, the election did not restore democracy as claimed by drafters of the 2017 Constitution. The NCPO leader simply used the election as a ritual to transform himself from that of a traditional military dictator to an elected autocrat.[1] This whitewashing was possible because the NCPO had total control over preparation for the election. It closely monitored the drafting of the Constitution, making sure that the rules would work in its favour. Furthermore, it appointed sympathizers into key institutions that oversaw the election, including the Election Commission (EC) and the Constitutional Court.[2]

The election fell somewhere in the middle of the ideological cleavage between the pro- and

[1] Khemthong Tonsakulrungruang, 'Constitutionalizing Autocracy: A General Election Under Thailand's 20th Constitution', *International Journal of Constitutional Law Blog* (16 March 2019) at <http://www.iconnectblog.com/2019/03/constitutionalizing-autocracy-a-general-election-under-thailands-20th-constitution/> accessed 29 January 2020.

[2] 'สี่ปี คสช. ใช้มาตรา44 + สนช. เข้ายึดองค์กรอิสระได้เบ็ดเสร็จตามใจ' [Four years under the NCPO, Section 44 and NLA have absolute control over independent agencies], iLAW (15 November 2018) at <https://ilaw.or.th/node/4808> accessed 29 January 2020.

anti-dictatorship camps.[3] The NCPO set up a proxy party, the Phalang Pracha Rath Party (PPRP), to compete with the anti-junta front, co-led by Pheu Thai (PT) and the Future Forward Party (FFP). Although Prime Minister Prayuth was not a member, PPRP showed strong support for him, with his own ministers running the party.[4] The name Phalang Pracha Rath itself is the name of the NCPO's main economic policy that copied Thaksin's populist style.

The 2017 Constitution adopted a mixed-member apportionment electoral system whose main beneficiaries are small-sized parties, such as the PPRP. A single ballot determines both 350 constituency and 150 party list MPs.[5] Total seats are determined by the overall votes that the party receives. Seats are first given to candidates who win in constituencies. The remaining quota is then allocated to party list candidates. Thus, the more seats a party wins in a constituency system, the fewer seats it will get in a party list system. However, smaller parties may not win in any constituency but still be allocated party list MPs.[6]

In addition to the electoral design, the EC proved unfit to uphold a free and fair election. The NCPO and PPRP engaged in cheating and violations of election law, with no consequences. While other parties were still under a ban, under the pretext of economic relief, the NCPO toured the country handing out cash and other benefits as well as promising more goodies if the PPRP was elected.[7] The PPRP organized a fund-raising gala dinner where several business entities and government agencies donated hundreds of millions of Thai Baht, clearly breaching donation rules.[8] The NCPO even postponed the election by a month to have additional time to channel more cash into the PPRP's bases. The EC ruled out any wrongdoing in these cases and many others, its inertia contrasting with its enthusiasm in hounding the PPRP's rivals.

Election day was rife with complaints, partly due to the EC's incompetence. Overseas ballots arrived late and the EC discarded them entirely.[9] Undertrained staff mis-instructed voters, resulting in wasted ballots.[10] Tallying was so full of errors that the EC ordered it to stop in the middle of the night, triggering speculation of fraud.[11] In some constituencies, the EC ordered up to five recounts, all with differing winners.[12] But poor performance was also due to the EC's prejudice. While the EC withheld election results for over a month, the main issue was the method used to calculate party list MPs. The law here was ambiguous, so the EC enjoyed vast discretion. Finally, the EC arbitrarily adopted a calculation most generous to smaller parties, assigning them one MP each even though their votes did not amount to one full MP. The EC deducted these MP seats from the major parties. Such absurd calculations upended the pro-democratic coalition, which lost several MPs to small single-MP parties who, as expected, joined the PPRP coalition.[13] Finally, the Constitutional Court refused to rule on the constitutionality of the EC's interpretation.[14]

Another player helping the NCPO complete its transition was the Senate. A special provision in the Constitution dictates that, for the first five years, the 250-strong Senate be appointed by the NCPO, with six seats reserved for armed forces commanders.[15] This first Senate is allowed to vote on prime minister selection jointly with the Lower House. Unsurprisingly, the NCPO filled the Senate with friends and colleagues, the majority of whom were army generals.[16] Of the 500 votes in favor of Prayuth as the PM in the joint session, 249 were from the cronyistic Senate, and only 251 were from the Lower House.[17]

In sum, experts agreed that Thailand was devolving into an illiberal democracy, referred to as a Thai-style democracy.[18] The term was used in the 1970s as an alternative to liberal

[3] Duncan McCargo, 'Southeast Asia's Troubling Elections: Democratic Demolition in Thailand' (2019), 30 *Journal of Democracy* 119, 124-125.

[4] Siripan Nogsuan Swasdee, 'Electoral Integrity and the Repercussions of Institutional Manipulations: The 2019 General Election in Thailand' (2019), *Asian Journal of Comparative Politics,* 5-6.

[5] 2017 Constitution, sec. 85-86.

[6] See Siripan, *Electoral Integrity,* 3-4, 7-10.

[7] Jacob I. Ricks, 'Thailand's 2019 Vote: The General's Election' (2019), 92 *Pacific Affairs* 443, 450. Asian Network for Free Elections, *The 2019 Thai General Election: A Missed Opportunity for Democracy* (ANFREL, 2019) 77-75.

[8] 'Activist Wants Palang Pracharath Donations Probed', *Bangkok Post* (19 January 2019) at <https://www.bangkokpost.com/thailand/politics/1614138/activist-wants-palang-pracharath-donations-probed> accessed 29 January 2020.

[9] '1,500 ballots from New Zealand invalidated after late arrival', *Bangkok Post* (24 March 2019) at <https://www.bangkokpost.com/thailand/politics/1650428/1-500-ballots-from-new-zealand-invalidated-after-late-arrival> accessed 29 January 2020; see ANFREL, 86.

[10] ANFREL, 81, 84.

[11] Siripan, *Electoral Integrity,* 11.

[12] ANFREL, 56.

[13] Ricks, *Thailand's 2019 Vote,* 448.

[14] Const Ct Decision 6/2562 (2019): Const Ct Order 16/2562 (2019).

[15] 2017 Constitution, sec. 269.

[16] Ricks, Thailand's 2019 Vote, 449.

[17] 'Prayuth officially chosen as Prime Minister of Thailand', *Prachatai* (6 June 2019) at <https://prachatai.com/english/node/8081 https://prachatai.com/english/node/8081> accessed 29 January 2020.

[18] In addition to McCargo and Ricks cited above, see, for example, Pravit Rojanaphruk, 'Thailand's Democratic Dictatorship', DW (6 June 2019) at <https://www.dw.com/en/opinion-thailands-democratic-dictatorship/a-49082008> accessed 29 January 2020.

democracy. Thai-style democracy offered a regime with regular, but only ritualistic, elections where the army, the Senate, or the judiciary tightly controlled, manipulated, or even intervened in politics through the claim of protecting national interest.[19] Developments in the second half of 2019 provided further credence to such observation.

The Prayuth government showed little regard to the Constitution. Prayuth was actually ineligible as PM because of his position in the NCPO. In further disregard, he appointed a former drug trafficker who had been jailed in Australia as a Cabinet member.[20] He also deliberately avoided swearing his allegiance to the Constitution during the inauguration ceremony. Regardless of the controversies, the Constitutional Court endorsed the legality of his actions.[21]

There is little change under the Prayuth administration. Human rights have suffered as usual.[22] Political activists were murdered and assailed.[23] Security forces intimidate any political gathering, including climate change protests.[24] They virtually enjoy absolute impunity.

The conservatives' next goal is to consolidate its power further by eradicating the opposition. The main target is the FFP, which they have charged with several lawsuits. The FFP was a rising star, modelled after several left-leaning parties in Europe, therefore making it the biggest threat to the right-wing nationalists.[25] In what is described as 'lawfare', the PPRP, the EC, and their supporters filed several frivolous lawsuits, mostly accusing the FFP of violating electoral law and being disloyal to Thainess.[26]

This is the beginning of another episode of crisis. The 2017 Constitution did not tackle any underlying problems; instead, it fueled them: an unaccountable judiciary and watchdog agencies, presence of the army, a crony Senate, the exaggerated problem of corruption as a pretext for authoritarianism, and a weak, fractious House that hinders effective public administration.

III. CONSTITUTIONAL CASES

The Constitutional Court remains one of the most significant allies of the NCPO. It consistently ruled in favor of the pro-junta camp while punishing its rivals. Inevitably, the Constitutional Court faces accusations of bias, which render its decisions unreliable for pro-democratic Thais. However, there is no accountability mechanism to be enforced upon the judiciary, leaving many greatly frustrated. Worse, the judiciary began to silence its critics with a new law authorizing the Constitutional Court to punish those who made unfavorable comments.[27] One academic has been summoned so far. A few cases below have been picked as the highlights of the Court's 2019 case law.

(1) Constitutional Court Decision 3/2562: Political Party Ban

According to the 2017 Constitution, a political party must nominate in advance up to three PM candidates.[28] Candidates may or may not be their MPs, a provision that allows Prayuth to run as a PM candidate without becoming a member of the PPRP. Shortly prior to election day, Thai Raksa Chat (TRC), another proxy party of Thaksin Shinawatra, nominated Princess Ubolratana.

The eldest daughter of the late King Bhumibol, Ubolratana relinquished her title decades ago to marry an American. Although she has never been given her title back, she still enjoys royal perks such as a motorcade, attendance at royal functions, and being addressed as Her Royal Highness. It appeared that Thaksin was about to exploit the ambiguity of her status to combine the sacredness of the royal family with his strong popular political network. The amalgamation would have silenced his critics while gaining him an avalanche of support.[29] Meanwhile, some observers of Thai politics dreaded that the deal could have brought about the collapse of the constitutional monarchy, establishing a neo-absolute monarchy.

The campaign was short-lived as the conservatives were furious after learning that the palace may have been making a deal with their enemy.[30] A few hours later, King Vajiralongkorn, Ubolratana's brother, issued a

[19] See Kevin Hewison and Kengkij Kitirianglarp, 'Thai-Style Democracy: The Royalist Struggle for Thailand's Politics', in S. Ivarsson and L. Isager (eds.), *Saying the Unsayable: Monarchy and Democracy in Thailand* (Nordic Institute of Asian Studies Press, 2010).

[20] Michael Ruffles and Michael Evans, 'From Sinister to Minister: Politician's drug trafficking jail time revealed', *The Sydney Morning Herald* (9 September 2019) at < https://www.smh.com.au/national/from-sinister-to-minister-politician-s-drug-trafficking-jail-time-revealed-20190906-p52opz.html> accessed 29 January 2020.

[21] Const. Ct. Decision 11/2562 (2019).

[22] See Freedom House's Freedom in the World 2019 report for Thailand at https://freedomhouse.org/report/freedom-world/2019/thailand.

[23] 'ผู้ลี้ภัยทางการเมือง: คนเห็นต่าง หรือพวกหนักแผ่นดิน' [Political Refugees: Dissenters or Worthless Humans], *BBC Thai* (2019) at <https://www.bbc.com/thai/extra/Y0IB3TQXys/thai_exiles> accessed 29 January 2020; Thammachart Kri-aksorn, 'Fallout from assault against Sirawith; no police protection unless activism ends', *Prachatai* (10 July 2019) at <https://prachatai.com/english/node/8131> accessed 29 January 2020.

[24] 'Police Order Bangkok Climate Protest to Disperse', Khaosod English (29 November 2019) at <http://www.khaosodenglish.com/politics/2019/11/29/police-order-bangkok-climate-protest-to-disperse/> accessed 29 January 2020.

[25] McCargo, *Democratic Demolition,* 127.

[26] Piyabutr Saengkanokkul [From Warfare to Lawfare], *Facebook Official Fanpage* (4 November 2019) at <https://www.facebook.com/PiyabutrOfficial/photos/a.2260340760916461/2529105320706669/?type=3&theater> accessed 29 January 2020.

[27] Khemthong Tonsakulrungruang, 'The Thai Constitutional Court's War on Freedom of Expression', *New Mandala* (14 November 2019) at <https://www.newmandala.org/the-thai-constitutional-courts-war-on-freedom-of-expression/> accessed 29 January 2020.

[28] 2017 Constitution, sec. 160.

[29] McCargo, *Democratic Demolition in Thailand,* 128-129.

[30] Id., 129.

proclamation condemning the deal and forbidding his sister from such activity.[31] The TRC promptly withdrew her nomination but the EC asked the Constitutional Court to ban the TRC.

The Constitutional Court found that the TRC's nomination could potentially be hostile to Thailand's democratic regime with the king as the head of the state, an offence under Section 92 of the Political Party Organic Act B.E. 2560 (2017). It referred to the first Constitution of 1932, which prohibited senior royal members from being involved in politics. The clause was later removed, but the Court insisted it had become a convention, and a fundamental principle of Thailand's constitutional monarchy. Nomination would attract criticism, and eventually hatred of the royal family. Ubolratana is still a member of that family, despite her stepping down. Thus, the Constitutional Court dissolved the TRC.

The Constitutional Court also revoked the political rights of TRC executives for ten years. The law was not explicit about the political ban or the length of it. In the 2007 Constitution, a party executive could get banned for up to five years.[32] In the 2017 Constitution, a party executive is only barred from taking an executive position in another party for ten years.[33] The Court carefully reviewed the case, admitting that the TRC had acted out of negligence and shown remorse for the mistake. Still, it imposed the ten-year ban, a measure which could be seen as arbitrary.

It is debatable whether the TRC's nomination amounted to an act 'potentially hostile to the democratic regime with the king as the head of the state' as prescribed by the law. Moreover, does a potentially hostile act deserve a ban even if the damage did not materialize? It is also doubtful whether the Constitutional Court has the authority to impose a ban so severe without an explicit mandate from a written law. Many believe that the dissolution was simply to get rid of the TRC, enabling an easier victory for the PPRP in the upcoming election. Political party dissolution has only been invoked since the 2006 coup, which was backed by royalist conservatives.[34] The measure is regarded as a tool to thwart or weaken democratic movements.

Ironically, while the Constitutional Court insisted that the decision would help uphold the status of the royal family to be politically *super partes,* other circumstances suggested that it actually confirmed the role of the monarchy in politics, as mentioned above: the palace announcement, the EC's prompt response, and the harsh punishment for TRC's daring deal.

(2) Constitutional Court Order 36/2562: Failure to Complete a Constitutional Procedure

The Cabinet's inauguration was prescribed by the Constitution, including taking an oath before the king or his representatives.[35] However, this supposedly simple procedure was problematic when Prayuth disobeyed the protocol. In front of the king, he pledged that he would serve with honesty, for the interest of the country and its people, forever. He omitted the last part of the oath about upholding and following the Constitution while adding forever into his oath.[36] It appeared that the mistake was deliberate, as his script was prepared as such. There was an uproar about what his intention was, but the PM refused to provide any explanation, insisting that the inauguration was complete.[37] The opposition tried to have a censure debate on the issue.[38] However, the king appeared supportive of the PM's actions, granting the Cabinet an audience and a printed speech giving them support.[39]

There is no channel to directly challenge the legality of the inauguration so a complaint was lodged to the Ombudsman stating that failure to properly take the oath posed a risk that any subsequent act of the Cabinet was void, therefore jeopardizing a claimant's rights as a citizen.

The Constitutional Court rejected the case, reasoning that an oath was a political issue, or an act of government, which was not subject to judicial review. This decision is problematic for two reasons. First, an act of government consists of a purely political act when a Cabinet acts in a capacity as the executive branch. Generally accepted examples of an act of government include a decision to dissolve the House, a declaration of war, and a decision to enter into a treaty. Taking an oath is not one of them.

Another reason for rejection was that, at the end of the decision, the Constitutional Court elaborated further that the king had already accepted the oath. The issue was thus beyond scrutiny by anybody. Although the Constitutional Court did not make an explicit statement, it was implying that the Constitution was not the supreme law of the land and that it could be exempted under particular circumstances. Is it possible that there is another body more supreme than the Constitution since it could rule on an exception?

The oath-taking case was also a reminder, and perhaps a harbinger, of what may happen in the coming year.[40] When the supremacy of the Constitution is undermined, even the most simplistic task may be ignored. No drafter has foreseen such a problem, so there is no channel to review or redress it.

[31] Id.

[32] 2007 Constitution, sec. 237.

[33] Organic Act on Political Party B.E. 2560 (2017), sec. 94 para 2.

[34] See Khemthong Tonsakulrungruang, 'Thailand: An Abuse of Judicial Review', in Po Jen Yap (ed.), *Judicial Review of Elections in Asia* (Routledge, 2016).

[35] 2017 Constitution, sec. 161.

[36] Thammachart Kri-aksorn, 'Oath Error: recapping case that shakes government', *Prachatai* (13 September 2019) at <https://prachatai.com/english/node/8212> accessed 29 January 2020.

[37, 38, 39] Id.

[40] Nidhi Ewosriwong, 'หน้าใหม่ของประวัติศาสตร์ไทย' [New Episode of Thai History], Prachatai (29 September 2019) at <https://prachatai.com/journal/2019/09/84547> accessed 29 January 2020; Kasian Tejapira, 'ระบบนิรนาม' [The Regime with No Name], Matichon Online Newspaper (22 September 2019) at <https://www.matichonweekly.com/column/article_249336> accessed 29 January 2020.

(3) Constitutional Court Decision 14/2562: Conflict of Interest

Since 2007, Thai Constitutions have prohibited an owner or shareholder of a media business to take public office. This ban was proposed on the assumption that Thaksin Shinawatra, whose background was a telecommunications tycoon, misused his business to influence the public. The law was intended to guarantee the rights of Thais to have access to impartial, honest, and professional media, but it had never been invoked. Moreover, in reality, many newspapers and TV stations clearly had ties with either left- or right-wing political groups. The quality of Thai journalism has remained questionable.

During the campaign period, one FFP candidate was accused of running a media business. In reality, the candidate owned a printing shop but his memorandum of association (MOA) contained an objective of running a media business. A MOA is a document stating the details and nature of one's business entity given to an owner once he registers his business with the Ministry of Commerce. A widespread practice, even encouraged by the registrar itself, is for a company to register as many objectives as possible for the sake of flexibility. The standard MOA as provided by the registrar contains a wide range of objectives including operating as both a massage parlor and private hospital. However, the Supreme Court strictly followed a document-based approach and disqualified him.[41] The case sets a very awkward standard for other politicians whose companies have also used the same standard MOA form. However, the only real victim of the media share law was the FFP leader, Thanathorn Juangroongrueangkit.

Thanathorn was accused of holding shares in V-Luck Media. The defunct company used to publish a lifestyle magazine but was now no longer in business. Thanathorn argued that he had already transferred the shares to his mother prior to registering for an election, but the EC, whose evidence was supplied by right-wing media, decided to pursue a case against him. The Constitutional Court then issued Thanathorn a temporary suspension so he could not attend a joint session to vote for PM, where he would surely have voted against Prayuth.[42]

Thanathorn tried to argue that the company was already out of business, but the Constitutional Court adopted a document-based approach here too. As V-Luck was not officially dissolved, there was always the chance that it could return to the media business.

The main issue was when did Thanathorn transfer shares to his mother? Did he miss the deadline set by the EC? As the norm, in a private company such as V-Luck, the transfer is made when both parties sign a private share transfer instrument, so there is no way outsiders will know the exact date. Later, the change in share-holding is then registered with the Department of Business Development. However, the registration is required only once or twice a year, so it does not reflect the actual transaction.

Although the Constitutional Court found no evidence suggesting otherwise, it dismissed Thanathorn's evidence of share transfer based solely on doubt; that the paperwork was too neat and too unreal; that Thanathorn left a cheque longer than normal business practice; and that the business plan looked unrealistic. The judges seemed to be asserting their personal preference in Thanathorn's case even though none had any business background. The Constitutional Court disqualified Thanathorn as an MP.

Thanathorn's case was compared to a previous case, that of Don Pramudwinai, a Foreign Minister in Prayuth's Cabinet. His wife was also accused of owning shares, an offence that could have disqualified her husband due to conflict of interest. Don claimed that the transfer took place some time ago but his wife's staff member was slow to prepare the relevant documents and register the transfer. Many people suspected that the document was only forged after the case emerged. However, the Constitutional Court was willing to give her the benefit of the doubt.[43]

IV. LOOKING AHEAD

As the government continues to consolidate its dominance, the Constitutional Court remains a crucial partner in subordinating the opposition. There are several more lawsuits, on campaign finance and treason, currently filed against the FFP. Five of the nine Constitutional Court judges were due to retire last October but the Senate has been unusually slow in recruiting successors. The current panel, some members of which have been serving for more than a decade, is known for its hostility towards elected politicians. The delay is possibly intentional.

In response to the government's harassment, citizens have begun to exercise their constitutional rights to public assembly and political expression[44] More anti-government mass gatherings are set to be held in the coming months. It remains to be seen how faithful the government will honor civil rights. The movement to amend the current Constitution is brewing.[45] The number of Thais demanding a new electoral system that could produce a fairer outcome in the next election is growing.

[40] Nidhi Ewosriwong, 'หน้าใหม่ของประวัติศาสตร์ไทย' [New Episode of Thai History], Prachatai (29 September 2019) at <https://prachatai.com/journal/2019/09/84547> accessed 29 January 2020; Kasian Tejapira, 'ระบบนิรนาม' [The Regime with No Name], Matichon Online Newspaper (22 September 2019) at <https://www.matichonweekly.com/column/article_249336> accessed 29 January 2020.

[41] 'Abuse of media share law a growing concern', Bangkok Post (27 April 2019) at <https://www.bangkokpost.com/thailand/politics/1668132/media-share-minefield> accessed 29 January 2020.

[42] 'Court suspends Thanathorn from MP', Bangkok Post (23 May 2019) at <https://www.bangkokpost.com/thailand/politics/1682696/court-suspends-thanathorn-from-mp> accessed 29 January 2020.

[43] Const Ct Decision 5/2561 (2018).

[44] Caleb Quinley, 'Thousands of Thanathorn backers rally against Thai establishment', *Al Jazeera* (14 December 2019) at <https://www.aljazeera.com/news/2019/12/thousands-thanathorn-backers-rally-thai-establishment-191214134451210.html> accessed 29 January 2020.

[45] Khemthong Tonsakulrungruang, 'Undoing Authoritarianism: Thailand's Campaign to Amend the 2017 Constitution', *International Journal of Constitutional Law Blog* (8 January 2020) at http://www.iconnectblog.com/2020/01/undoing-authoritarianism:-thailand's-campaign-to-amend-the-2017-constitution/> accessed 29 January 2020.

The Netherlands

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I. INTRODUCTION

The Netherlands is a parliamentary democracy and constitutional monarchy. The king, as head of state, operates under the full political responsibility of the ministers. Proportional representation is used for electing both houses of Parliament, the provincial councils, and municipal councils. The Netherlands is one of four countries in a quasi-confederal structure called the Kingdom of the Netherlands. It consists of the 'European' Netherlands, and the Caribbean islands of Aruba, Curaçao, and Saint Maarten. Three smaller islands, Bonaire, Saint Eustatius, and Saba, are overseas public bodies within the decentralized organization of the European Netherlands. Distinctively, Article 120 of the Dutch Constitution forbids the constitutional review of Acts of Parliament by the judiciary. At the same time, Articles 93 and 94 of the Constitution acknowledge the direct applicability of international law that is binding on all persons, granting it precedence over national law. Consequently, fundamental rights protection is mainly based on the European Convention on Human Rights (ECHR).

This report first addresses three major constitutional developments in part II, namely the response of the government to the recommendations of the State Commission to strengthen the parliamentary system, evolutions with regard to militant democracy as a response to criminal activities of outlaw motorcycle gangs, and the establishment of a temporary parliamentary committee on the digital future. Part III discusses court cases with a constitutional impact that are relevant to an international audience: the judgment of the Supreme Court (i.e., the Court of Cassation) on 20 December 2019 in the *Urgenda* case on climate change, and the judgment of the Central Appeals Tribunal on 15 May 2019, in which the Tribunal adopted the judicial framework to review automated decision-making as developed by the Council of State in 2017 and 2018. We conclude the report in part IV with some upcoming events.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. State Commission

In June 2019, the government announced that it was preparing legislative proposals aimed at strengthening parliamentary democracy.[1] The announcement was a response to an extensive report (384 pages) published in December 2018[2] by a 'State Commission': an advisory body established by Royal Decree in 2017 to assess the 'future-readiness' of the parliamen-

[1] https://www.rijksoverheid.nl/actueel/nieuws/2019/06/26/minister-ollongren-komt-met-maatregelen-voor-vernieuwing-van-de-democratie.

[2] https://www.staatscommissieparlementairstelsel.nl/actueel/nieuws/2019/07/18/download-the-english-translation-of-the-final-report-of-the-state-commission.

tary system. Besides assessing the powers and activities of the House of Representatives and the Senate, the State Commission also covered other aspects of representative democracy as well as the rule of law and formulated 83 recommendations for strengthening both. In its response, the government announced the implementation of 11 of the Commission's recommendations, including electoral system reform, the adoption of a Political Parties Act, a new election method for the Senate, and a revision of the formal constitutional amendment procedure.

The reform of the electoral system aims to improve the representation of the people. According to the current system, voters can only cast a vote for a specific person on an electoral list. These lists are compiled by political parties and typically headed by party leaders. The Commission suggested a new electoral system in which citizens *either* vote for a specific candidate on an electoral list (preferential vote) *or* vote for the electoral list as a whole (party vote). As a result, preferential votes will carry more weight than the case is now. The government endorsed this suggestion, believing that under the new system voters will identify themselves more with their representatives because it will be easier for their preferred candidate to obtain a seat in Parliament. Not only should this strengthen the citizens' feeling that their votes actually matter but it should also foster the representation of as many political opinions in Parliament as possible.

The proposed adoption of the Political Parties Act aims to bring together the rules on political parties. Political parties play a crucial role in Dutch democracy but are not mentioned in the Constitution. They are, however, subjected to different regulations; for example, to the Civil Code (political parties are associations and therefore qualify as private legal entities) and to the Political Parties Funding Act. The Political Parties Act would probably comprise new rules on prohibiting political parties; transparency rules relating to income and expenditure on behalf of election campaigns of political parties and individual candidates, including the already existing rules laid down in the Political Parties Funding Act; rules on digital election campaigns of political parties; the maximum limit for gifts to political parties and individual candidates; and amend the rule currently laid down in the Elections Act (Art. G1(1)) that political parties must be an association.

The proposed new election method for the Senate aims to 'depoliticize' it. The Parliament consists of the House of Representatives and the Senate. The House of Representatives counts 150 members that are elected directly by national citizens, whereas the Senate counts 75 members who are elected by provincial councils. These elections take place every four years and, as a consequence, the term for all members of Parliament (thus of both Houses) is four years. As a result, the Senate may obtain a more recent mandate than the House of Representatives during a government period, which could cause friction between the two Houses and between the government and the Senate. The government has therefore proposed that members of the Senate be elected for six years instead of four, and that half of the seats be contested every three years. As a result, changes in the political party landscape during a government period would only have an indirect and delayed effect on the composition of the Senate. An additional argument in favour of this election method is that the elections for the provincial councils might no longer be captured by national opposition parties campaigning against the national government but instead revolve around actual provincial matters.

Lastly, the government wants to change the constitutional amendment procedure. The Dutch Constitution is rather rigid. A constitutional amendment needs to be adopted by an ordinary majority in both Houses in the first reading and a two-thirds majority in both Houses in the second reading. The latter takes place *after* the members of the House of Representatives have been newly elected. The government wants to change the amendment procedure in the second reading. It is not for the explicit aim to make constitutional amendment easier, but to avoid the possibility under the current procedure that 26 out of 75 senators block a constitutional amendment, even if a two-thirds majority of the directly elected House of Representatives supports the amendment. The government therefore wants both Houses to convene in a joint session when voting on the constitutional amendment in the second reading. A constitutional amendment would still require a two-thirds majority in its favour of votes cast in both Houses sitting together.

Next to these envisaged changes, the government is still considering seven of the other recommendations that the State Commission proposed in December 2018. It concerns, *inter alia,* the introduction of a binding referendum, the lifting of the ban on constitutional review of legislation by the judiciary, lowering the voting age to 16 years, and the power for the Senate to 'send back' a legislative bill to the House of Representatives if the Senate feels the House of Representatives should reconsider the bill.

2. Militant democracy

In recent years, outlaw motorcycle gangs (OMGs) have served as major vehicles for organized crime in the Netherlands. Members of Hells Angels, Satudarah, Bandidos, No Surrender, and other gangs have been involved in the production and trafficking of cannabis, hard drugs, synthetic drugs, and weapons as well as human trafficking, related violence, and other criminal activities. These crimes are regarded as 'subversive' because the criminal activities of these organizations not only penetrate the licit economy but also undermine public trust in authorities and the rule of law in general since administrative and judicial authorities – until recently – have been incapable of effectively combating them.

Mayors in particular faced difficulties due to these problems. According to the Municipal Act, mayors have a general responsibility for safeguarding public order and safety within their municipality. They are usually the first to be confronted with the activities of criminal organizations, and with the need to react. Mayors have used various administrative powers to combat OMGs, such as refusing permits, orders to close down buildings when evidence of drug trafficking is found, and temporary orders limiting the freedom of movement of specific groups of people. Nevertheless, mayors have no truly effective powers to dismantle criminal organizations

on a national level, which is why many of them have joined in an urgent call for national action and more effective legal instruments to tackle the issue.

Until 2017, however, courts were reluctant to dissolve and prohibit organizations, valuing the freedom of association over the need for repressive measures. Although Article 2:20 of the Civil Code provides courts with an instrument to dissolve and prohibit a legal person whose activities or statutory goals violate public order, associations were rarely dissolved and prohibited. Most prominent examples are the dissolution and prohibition of a racist political party by the District Court in Amsterdam in 1998, and of an association called *Martijn,* which aimed to promote the social acceptance of sexual relations between adults and children, by the Supreme Court in 2014 (ECLI:NL:HR:2014:948).

The reluctance of courts to restrict the freedom of OMGs is demonstrated by the failed attempt to dissolve and prohibit the Dutch chapter of the Hells Angels in 2009. The Supreme Court decided that the criminal actions of individual members of Hells Angels could not be attributed to the association as a whole (ECLI:NL:HR:2009:BI1124). The Court also argued that the dissolution and prohibition would be disproportionate and would therefore constitute an unlawful interference with the freedom of association, as protected under Article 8 of the Constitution and Article 11 ECHR.

Worried by the lack of effective instruments to combat OMGs, several MPs drafted a bill in November 2018 (Parliamentary Documents No. 35 079) that would grant the Minister of Interior Affairs the power to prohibit and dissolve criminal organizations. This would enable a faster response to criminal activities of criminal organizations, subject to *ex post* judicial review. However, the Council of State, Advisory Division, vehemently criticized the bill in April 2019. The Council questioned the necessity of the proposed instrument and contested that it would be a swifter method to stop criminal activities, as the minister would have to prepare a case with sufficient diligence for it to successfully pass judicial scrutiny. The bill is still awaiting parliamentary debate.

Subsequently, in 2019, a government bill was drafted to sharpen Article 2:20 of the Civil Code. It specifies which activities or statutory goals violate public order, and therefore warrant a court decision to dissolve and prohibit an organization. Furthermore, it aims to regulate some of the consequences of a prohibition in order to prevent individual members from simply moving their activities to a new organization. The bill (Parliamentary Documents No. 35 366) was introduced in Parliament on 18 December 2019 and will probably be debated in 2020.

Nonetheless, the question should be posed whether new legislation is necessary. In the past two years, district courts have become more active in order to protect constitutional democracy from subversive crime. They have adopted a new interpretation of Article 2:20 of the Civil Code and ruled in cases against OMGs from 2017 to 2019 that organizations that 'stimulate and uphold a culture that promotes and glorifies criminal activities and violence' may be dissolved and prohibited. This new interpretation has led to the actual dissolution and prohibition of various OMGs, such as Bandidos in 2017 (ECLI:NL:RBMNE:2017:6241), and Satudarah and Catervarius in 2018 (ECLI:NL:RBDHA:2018:7183 and ECLI:NL:RBMNE:2018:113, respectively). In 2019, courts moreover dissolved and prohibited the Dutch chapters of Hells Angels and No Surrender (ECLI:NL:RBMNE:2019:2302 and ECLI:NL:RBNNE:2019:2445, respectively). Although some of these cases are still pending appeal, the fact that district courts have become more militant towards OMGs in order to protect constitutional democracy from subversive crime is indeed a striking development.

3. Parliamentary grip on digitization

On 2 July 2019, the House of Representatives established a temporary parliamentary committee on the digital future in order to get a better grip on fast-growing developments in digitization, such as the use of algorithms and AI, in many sectors of the economy, society, and government functioning. The House of Representatives seeks to create frameworks, stimulate developments, and determine boundaries in this regard. Most importantly, Parliament aims to reflect on its own internal organization in order to effectively deal with digital evolutions in society.

The committee mainly inquires how Parliament can better use its right to be informed to enhance access to information in the field of digitization in order to get control of positive and negative digital evolutions given its duties to check government and co-legislate. In order to answer this main question, three sub-questions have been formulated. The first is which digitization issues require the House's attention and why. The second is which lessons can be learned from the current practice of the House and from other countries, and which methods or assessment frameworks can be adopted. The third addresses which instruments, contents, and organizational and institutional arrangements for the House are necessary to get a better grip on digitization. The committee aims to present its report and recommendations in April 2020.

III. CONSTITUTIONAL CASES

1. Urgenda: climate change

On 20 December 2019, the Supreme Court delivered its judgment in the *Urgenda* case on climate change (ECLI:NL:HR:2019:2006). The matter originated in the District Court of The Hague, judgment of 24 June 2015 (ECLI:NL:RBDHA:2015:7145), after it was appealed before the Court of Appeal of The Hague, judgment of 9 October 2018 (ECLI:NL:GHDHA:2018:2591). The Supreme Court rejected the state's arguments, thereby confirming the judgment of the Court of Appeal, which again confirmed the judgment of the District Court. *Urgenda* and its claim will be addressed first, after which the judicial route of this private law case starting in the District Court will be summarised.

[3] See https://www.houseofrepresentatives.nl/members_of_parliament/committees/tcdt.

The plaintiff, Urgenda, is a Dutch foundation established in 2008, the name being a contraction of 'urgent' and 'agenda'. The foundation originated from the Dutch Institute for Transitions (Drift) at Erasmus University Rotterdam. Urgenda's stated aim is to achieve a fast transition to a sustainable society. It brought the case on its own behalf, and on behalf of 886 individuals in whose interests it acted. Urgenda lodged 10 claims against the state in the District Court, the most important for present purposes being that the state would act unlawfully should it fail to reduce or have reduced the annual emission of greenhouse gasses in the Netherlands by 40%, or at least by 25%, by the end of 2020 when compared to emissions in 1990 (the base year). The state only pursued a policy of achieving a reduction of at least 20% in the context of its European Union membership, while previously the country pursued a reduction of at least 30%.

The judgment of the District Court ordered the state to limit the annual emission of greenhouse gasses in the Netherlands by at least 25% by the end of 2020 when compared to the base year. The figures in Urgenda's claim were taken from the recommendation made in the Fourth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC) in 2007 for so-called Annex I parties (of which the Netherlands is one). The IPCC is an intergovernmental organisation of the United Nations entrusted with assessing science related to climate change. The recommendation was made in order to prevent a global temperature rise of 2 degrees Celsius when compared to the period before industrialisation. By 2050, a reduction of 80% to 95% was advised.

The District Court held that the Netherlands' UN/international (and EU) climate commitments resulted in duties between states, and not in commitments, which are legally enforceable before a national court. Instead, the District Court relied on private law. The state had to achieve a reduction of at least 25% to avoid acting unlawfully based on the Civil Code provision on tort law (Article 6:162). By not achieving the lower end of the recommendation in the fourth IPCC report, the state would violate its duty of care to prevent dangerous climate change. In arriving at this conclusion, the District Court used constitutional, international, and EU law sources indirectly as interpretative aids to apply open-ended national (private) law standards and concepts including 'social proprietary', 'reasonableness', and the 'general interest'. This meant international law had a so-called 'reflex effect' in national law.

The Court of Appeal confirmed the District Court's order, albeit for different reasons. The Court of Appeal allowed the order based on Article 2 (the right to life) and Article 8 (the right to respect for private and family life) ECHR. These rights were recognised as subjective and enforceable according to Articles 93 and 94 of the Constitution. The Court of Appeal emphasised the state's positive obligations under these rights in environmental cases, finding they would be violated if the state did not pursue a reduction of at least 25%.

The Supreme Court – which only considers legal and not factual questions – agreed with the Court of Appeal. The Supreme Court noted that climate change posed a 'real and immediate risk', warranting positive action from the state to protect Articles 2 and 8 ECHR. This action was also required by Article 13 ECHR, enjoining the state to provide an effective national remedy in protecting ECHR rights. The Supreme Court held that no legal questions arose which warranted an advisory opinion from the European Court of Human Rights based on Protocol 16 ECHR. Moreover, questions related to judges stepping into the political domain, thereby raising separation of powers issues, could not prevent the order, as courts are duty bound to keep the state to its legal obligations. Important in this regard is that the order only legally requires the state to achieve the 25% reduction, leaving the way in which this is achieved (for instance through specific measures and legislation) to the state's discretion.

2. Judicial review of algorithmic or automated decision-making

On 17 May 2017 (ECLI:NL:RVS:2017:1259) and 18 July 2018 (ECLI:NL:HR:2018:1316), the Council of State, Administrative Jurisdiction (one of the four highest administrative courts), ruled on the programme for assessment of nitrogen deposition that used the AERIUS software system. AERIUS enables algorithmic-driven, partially automated decision-making regarding activities that emit nitrogen. In the landmark judgment of 17 May 2017, the Council of State developed, for the first time, a specific judicial framework to review automated decision-making, adopting transparency and readability requirements for (partially) automated decision-making. In order to guarantee equality of arms between parties, the Council of State ruled that in this case the ministers and state secretary are obliged 'to make the choices, the used data and assumptions public, fully, in a timely manner and on their own initiative so that these choices, data and assumptions are accessible to third parties in a suitable manner', implicitly based on the duties of due diligence and reason-giving. According to the Council, this complete, timely, and adequate availability of data must enable parties to assess the choices made and the data and assumptions used and to have them assessed or if necessary challenged, so that effective legal protection against decisions based on these choices, data, and assumptions is possible. As a result, the judge would be able to check the legality of these decisions.

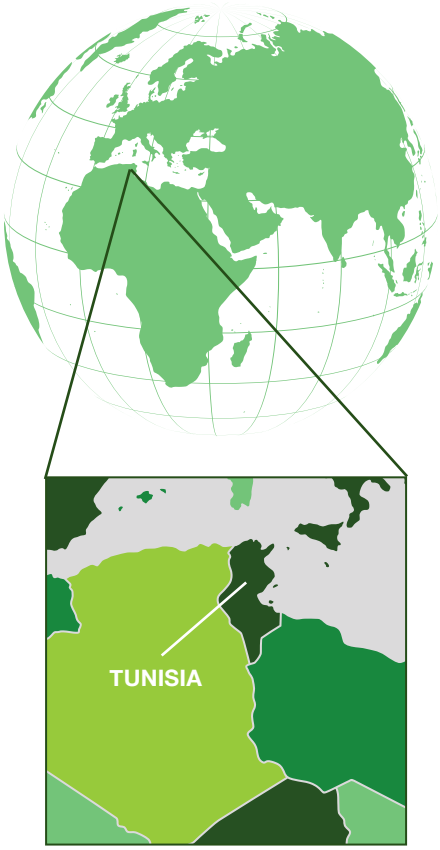
In its ruling of 18 July 2018, the Council of State refined this framework of judicial review by making a distinction between custom input data and standard input data. The government must make custom input data, i.e., individual data, entered by the users themselves, on its own initiative available on paper or otherwise observable as data relating to the case pursuant to Article 8:42 of the General Administrative Law Act. This is necessary for interested parties to determine whether they want to initiate an administrative appeal or judicial appeal, and to be able to contest the accuracy of the data used, calculations made, and the assumptions, choices, and decisions based on them. The obligation to make data available on its own initiative does not automatically apply to the standard input data, which are independent of the specific case.

Following the landmark judgment of the Council of State of 17 May 2017, the Supreme Court conformed its case law to this review framework in its judgment of 17

August 2018 (ECLI:NL:HR:2018:1316). Finally, on 15 May 2019, the Central Appeals Tribunal also explicitly adopted the Council of State's framework to review automated decision-making. One can situate these judgments within a broader debate on the use of algorithms in society and in particular on the use of algorithms to support or automate decision-making of administrative authorities, leading to ensuing complexity and the dangers of a so-called 'black box'. This might clash with general principles of good administration, such as the duty of reason-giving and due diligence, which could ultimately also hamper effective judicial review. In order to break the latter's vicious circle, the Council of State has started to develop a review framework based on transparency and readability requirements. In the near future, it will be up to Parliament to enact specific legislation on algorithmic decision-making or, in the absence thereof, administrative authorities will have to operationalize the general principles of good administration themselves in order to meet the established transparency and readability requirements, which will require a 'by design' approach. As a result, software developers, government lawyers, and policy-makers will have to work together already in the very early stages of software development to turn the 'black box' into a 'glass box' that meets the case law requirements adopted by the highest administrative courts in the Netherlands.

IV. LOOKING AHEAD

In 2020, the government will introduce measures to strengthen parliamentary democracy and articulate its vision on the relationship between forms of direct democracy and representative democracy. A constitutional amendment initiated by an MP to introduce a binding referendum awaits parliamentary debate as well as a proposal to criminalise sexual street harassment, which would restrict the freedom of expression. In the *SyRI* case, the Court will reach a verdict on whether the recourse to data-driven surveillance techniques for welfare fraud detection by the government complies with human rights and privacy protection standards. After the preliminary ruling of the Court of Justice of the European Union in March 2019 (ECLI:EU:C:2019:189), the Council of State will reach a final verdict in *Tjebbes e.a.* on the question of whether the minister lawfully refused passport renewal of Dutch citizens possessing a second nationality of a non-EU country since the refusal resulted in the loss of EU citizenship.



Tunisia

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I. INTRODUCTION

Elections shaped the 2019 constitutional agenda in Tunisia. We can qualify 2019 as the year of the constitutional revolution, and like any revolution, it witnessed ups and downs: from a failure to create some of the needed institutions for democracy, to a youth electoral contestation over policy and decision-making results, to a radical change that shook both political figures and parties in Tunisia. The government initiated a proposal to change the electoral law, and the draft was approved by the Parliament and the Temporary Authority for the Control of the Constitutionality of Draft Laws. The interim president at the time unconstitutionally aborted the attempt to change the electoral law.

After the death of the president in power, Tunisia managed to show the world that a democratic and peaceful power transition was possible in an Arab country. The Parliament declared the position of the president open and the electoral management body set the presidential elections in motion. In September, the country held its second democratic, free and transparent elections under the Constitution of 2014.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In May 2019, a proposal to change the election law was made by the government's bloc in the Tunisian National Assembly. Several political parties, figures and civil society organizations objected to the proposed amendments, as they considered them unconstitutional and harmful to political diversity in the Assembly since they set an electoral threshold of 3%, which damaged the small parties. Several candidates, including Olfa Terras Rambourg, Abir Moussi and Nabil Karoui, considered the amendments a violation of their constitutional right of candidacy.[1] Subsequently, on June 18, 2019, the government bloc formed a consensus with the Islamist party Ennahda, and they passed the law with a majority of 128 votes. By June 24, 51 deputies challenged the constitutionality of the amendments before the Temporary Authority for the Control of the Constitutionality of Draft Laws. The Temporary Authority ruled in favour of the amendments in one of its more controversial rulings since its creation.[2]

The disputed judgment brought back the debate over the Tunisian Constitutional Court, as the Tunisian Constitution, in Article 118, grants Tunisia a constitutional court, mandated mainly to oversee the constitutionality of its laws. The creation of this independent constitutional body was to take place within one year of the 2014 elections.

The Parliament has failed to elect the needed members of the Court since the elections of 2014,[3] except electing Judge Raoudha Wersighni in 2018.

[1] Digital Tunisia: [online] Available from: https://ar.tunisienumerique.com [Accessed 1 Jan 2020]

[2] الشروق: الهيئة الوقتية لمراقبة دستورية مشاريع القوانين تقبل شكلا وترفض أصلا الطعن المقدم بشأن القانون المتعلق بالانتخابات والاستفتاء. AlChourouk [online] Available from: http://www.alchourouk.com/article/ [Accessed 30 Jan 2020]

[3] أنباء تونس Kapitalis: إنتخاب أعضاء المحكمة الدستورية: عدم تحصل أي من المرشحين على العدد المطلوب من الأصوات. Kapitalis , [online] Available from: http://www.kapitalis.com/anbaa-tounes/2019/07/10/ [Accessed 30 Jan 2020]

On June 27, 2019, then-President Beji Caid Essebsi had a severe health crisis,[4] and according to Article 84 of the Constitution, the competent body to declare a void in the President's position is the Constitutional Court. Its absence led the country into the unknown, as the President's deteriorating health condition and resulting political vacuum came with two terrorist attacks in the capital, Tunis. A week later, President Essebsi left the hospital and signed a decree calling voters to the polls for 2019 elections.[5]

The deteriorating health of the acting president at the time pressured the National Assembly to speed up the elections of Constitutional Court members; thus, on July 10, 2019, the chairman of the Tunisian Parliament[6] called for a plenary session to choose four members of the Court. As stipulated in paragraph 2 of Article 118, the Parliament shall appoint 4 among the 12 members of the Court. The Parliament failed again, as none of the candidates managed to receive the required number of votes stipulated in Article 11 of the organic law N° 50-2015 of December 2015 related to the Constitutional Court. The article specifies that the four Court members need to be elected by a two-thirds majority, which corresponds to 145 votes.

Two weeks after the plenary parliamentary session, on July 25, the President passed away without the Constitutional Court in place, which would have been the competent body to acknowledge the permanent vacancy and notify the Assembly's speaker so he could take the oath as interim president. The country was facing a constitutional void and an unknown fate due to the negligence of its ruling elites. From a political angle, the irresponsible and unreasonable lack of consensus between the political blocs in the Parliament made it difficult to appoint any of the existing candidates. From a technical angle, the impossibility of meeting the candidacy criteria set by the organic law of the Constitutional Court limited the range of persons who qualified.

To avoid any form of political tension, and to keep the power transition with the Constitution, the Temporary Authority for the Control of the Constitutionality of Draft Laws acted as the constitutional court despite being constitutionally incompetent. It acknowledged the vacuum and directed the head of the Assembly of the Representatives of the People – the speaker of the Assembly – to take the oath and address the people as the interim president.[7] In its 63rd year, the Republic of Tunisia was hailed as the only successful post-Arab uprising country to make a democratic and very smooth power transition in exceptional constitutional conditions.

The Electoral Commission announced that the presidential election would be pushed up, and the date was fixed at September 15 in compliance with the deadlines set by the Constitution.[8]

Tunisia held its third set of elections as a democratic state since 2011. According to the supreme Independent High Authority on Elections, Tunisia's election-governing body, September's presidential election witnessed an increase in voter numbers by a half-million from previous local elections. The number of candidates reached 97, among them 11 women. The Authority retained 26 candidates for the first round, among them two women. This election also witnessed the candidacy of the first openly gay candidate in a Muslim country, but it was rejected because of the non-conformity of his 'popular support' form.[9]

On October 6, the parliamentary election took place. Only 41% of the registered voters voted, 8% lower than the first round of the presidential election.[10] As no candidate won a majority in the presidential election, a runoff was held on October 19 between the two top candidates, Kais Said and Nabil Karoui. The conservative constitutional lawyer Kais Said won with 73% of the vote.

To sum up, we can consider 2019 the year of democratic consolidation, and that democratic rule is on the rise in Tunisia despite all the earthquakes that the constitutional framework has witnessed.

III. CONSTITUTIONAL CASES

The Tunisian Constitution of 2014 established the most advanced constitutional framework in the region. It contains the first limitation clause in the Middle East and North Africa (MENA). The Constitution had been in force for six years, but unfortunately, as mentioned above, one of the key institutions to protect, implement and interpret it is still missing.

[4] BBC News, Tunisia President Beji Caid Essebsi has 'severe health crisis' [online], available from: https://www.bbc.com/news/world-africa-48790068 [Accessed 30 Jan 2020].

[5] Tunisia Africa Press Agency: Caid Essebsi says decree calling voters to polls signed, TAP [online], available from: https://www.tap.info.tn/en/Portal-Politics/11614704-caid-essebsi-says [Accessed 31 Jan 2020].

[6] الحقيقة أون لاين: البرلمان يُنتخب اليوم بقية أعضاء المحكمة الدستورية Truths online, [online] Available from: https://www.hakaekonline.com/article/106613 [Accessed 30 Jan 2020]

[7] AlChourouk [online] Available from:http://www.alchourouk.com/article/ [Accessed 31 Jan 2020]

[8] Middle East Online, Tunisian Parliament speaker sworn in as interim president [online], available from: https://middle-east-online.com/en/tunisian-parliament-speaker-sworn-interim-president [Accessed 31 Jan 2020].

[9] According to Article 74 of the Tunisian Constitution, each candidate must have the support of 10 members of the Assembly of the Representatives of the People or heads of the elected local authority councils, or 10,000 registered voters from 10 different electoral circumscriptions. The application form of Mr. Mounir Baatour contained the names of 30,000 citizens declaring their support for his candidacy. However, the Electoral Commission was unable to verify the legitimacy of support as voters' signatures were missing.

[10] Mosaïque, L'ISIE annonce le taux de participation aux législatives, Mosaïque FM [online], available from: https://www.mosaiquefm.net/fr/legislatives/618704/l-isie-annonce-le-taux-de-participation-aux-legislatives [Accessed 31 Jan 2020].

We must acknowledge the Temporary Authority for the Control of the Constitutionality of Draft Laws and the Administrative Tribunal, which declared itself a constitutional judge in the absence of the Constitutional Court.

The most important event in 2019 was the attempt by both judges to apply the proportionality principle, which had been incorporated in Article 49 of the Constitution, in their decisions.

1. Al-sharfi v. The Elections Commission: Right to candidacy

In this case, following a miscommunication between the officer in charge receiving the candidacy files of the lists to check their conformity and seriousness before adding them to the electoral lists, as specified in the Electoral Commission Decision N° 16-2014 of August 1, 2014, related to the rules and conditions of candidacy of legislative elections. The officer was unable to verify the existence of the candidate Anas Kadoussi in the commission headquarters due to its overcrowding. This resulted in the unacceptance of the candidacy of the Social Democratic Union list in Tunis II circumscription.

The list, represented by its head, sued the local election commission. Decision N° 2019-2023 of the Administrative Tribunal confirmed the commission decision. An appeal was submitted by the list to review the court decision and they presented a statement from the head of the commission confirming the signature and existence of Anas Kadoussi on registration day and within the deadlines.

The court ruled that the decision of the commission was an unreasonable limitation to the right to candidacy of the list, and that the commission's failure to include the name of the candidate in the electoral list compromised the essence of the list's right. It ordered the modification of the electoral lists to include the Social Democratic Union list in Tunis II circumscription.

2. Decision N° 04-2019 of 8 July 2018: Decision of Temporary Authority for the Control of the Constitutionality of Draft Laws on the amendments of the Elections Law

On June 18, 2019, the government's bloc in the Parliament and their allies managed to pass a law to change the Elections Law five months before the elections.

This law raised much concern in Tunisian political, legal and civil society. Fifty-one deputies in the Tunisian Parliament signed a demand to challenge the constitutionality of the amendments before the Temporary Authority for the Control of the Constitutionality of Draft Laws, contesting several articles within this law. The first instituted an electoral threshold of 3%, which is considered by the deputies as harmful to political diversity in the Assembly, damaging small parties and institutionalizing the big parties' control over the political scene in Tunisia.

The second article of the draft set some exclusionary criteria and conditions, as the proposal made it mandatory for every candidate to present a clean criminal record certificate. Also, Article 20a ordered the Electoral Commission to refuse the candidacy in legislative and presidential elections of anyone who had enjoyed any activity or publicity prohibited for political parties. This article was considered an attempt to exclude Olfa Terras Rambourg and especially Nabil Karoui, the second candidate in the runoff of the presidential election.[11]

Article 42 of the proposal was considered an unreasonable limitation to the liberty of expression and a violation of Section 49 of the Tunisian Constitution, as it states:

> The independent high authority for elections rejects the candidacies of all those who prove explicitly and repeatedly an expression of speech that:
>
> Does not respect the democratic system, the principles of the Constitution and the peaceful alternation in the exercise of power and threatens the republican system and pillars of the rule of law.[12]

Despite all the contestations and the petition signed by national and international civil society in Tunisia, the Temporary Authority for the Control of the Constitutionality of Draft Laws accepted the demand of Parliament members. Still, it ruled in favour of the proposal in one of its most controversial decisions. According to Temporary Authority members, the crucial political context of the country forced them to approve the draft law despite all the concerns raised. The government explained these amendments as an attempt to fight money laundering, as several political actors, including Nabil Karoui and Olfa Terras Rambourg, have used a legal loophole to get foreign financing for their political ambitions through forming associations. In Tunisia, it is prohibited for political parties to obtain external funding. Regardless of the political context, the Temporary Authority was convinced that these activities were a violation of the equality principle. Also, the conditions of the clean criminal record and the income report were considered reasonable and proportional with the government's objectives of combatting tax evasion and money laundering.

IV. LOOKING AHEAD

Given the political context, it is essential for Tunisia as a newly established democracy to complete its institutional framework – the Constitutional Court; an independent constitutional commission, such as a human rights commission; a good-governance commission; and others. It is also essential to review the Tunisian legal framework to assure its conformity to the new democratic standards set by the 2014 Constitution. Accordingly, it is crucial to build the capacity of the state's institutions to help them adapt to the new re-

[11] Middle East Online, Tunisia: Dispute over amendment of election law months before elections [online], available from: https://www.middleeastmonitor.com/20190614-tunisia-dispute-over-amendment-of-election-law-months-before-elections/

[12] Article 19, Tunisia: Latest amendments to Electoral Law are unconstitutional and violate the right to freedom of expression [online], available from: https://www.article19.org/resources/tunisia-latest-amendments-to-electoral-law-represent-are-unconstitutional-and-violate-the-right-to-freedom-of-expression/

ality of the country, which will help to create a modern, democratic and free society.

V. FURTHER READING

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Human Rights Watch, Tunisia: New Parliament's Rights Priorities: Establishing Constitutional Court Should Top Agenda [online], available from: https://www.hrw.org/news/2019/11/13/tunisia-new-parliaments-rights-priorities [Accessed 31 Jan 2020]

Aljazeera, Tunisia's Sustainable Democratization: Between New and Anti-Politics in the 2019 Presidential Election [online], available from: https://studies.aljazeera.net/en/reports/2019/10/tunisias-sustainable-democratization-anti-politics-2019-presidential-election-191021120857585.html [Accessed 31 Jan 2020]

Sharan Grewal, Tunisia needs a constitutional court, Brookings [online], available from: https://www.brookings.edu/blog/order-from-chaos/2018/11/20/tunisia-needs-a-constitutional-court/ [Accessed 31 Jan 2020]

Lilia Blaise, Tunisia's Democracy Is Tested, and Pulls Through, After a President's Death, *New York Times* [online], available from: https://www.nytimes.com/2019/07/26/world/africa/tunisia-president-death-democracy.html [Accessed 31 Jan 2020]

Turkey

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I. INTRODUCTION

A wise man once said: 'Just when you think things cannot get any worse, they will.' The year 2019 was such a dramatic year for Turkey. The agenda was as loaded as ever. In early 2019, the stinging defeat of the ruling Justice and Development Party (AKP) in the municipal elections made international headlines. The main opposition Republican People's Party (CHP) managed to record a resounding victory by winning mayoral elections in the country's three largest cities – Istanbul, Ankara, and Izmir. The AKP and the right-wing Nationalist Movement Party (MHP) lodged an extraordinary appeal with the Turkish Supreme Board of Elections seeking the cancellation of the Istanbul polls due to alleged irregularities. In a rather controversial decision, the Turkish electoral board decided to annul and renew the metropolitan election in Istanbul that saw the CHP's candidate Ekrem Imamoğlu winning the mayoral position. In June 2019, the AKP suffered another blow as Imamoğlu massively increased his majority. In the aftermath of the March 2019 elections, the arrests and arbitrary dismissals of democratically elected mayors affiliated with the Kurdish movement continued apace. Since last year's elections, more than 30 elected mayors of the pro-Kurdish People's Democratic Party (HDP) were removed (under the usual terrorism pretext) and replaced with government-appointed trustees. Moreover, Turkey's military 'Peace Spring' operation in Syria also attracted a lot of international attention.

Most importantly, the full entry-into-force of Turkey's new presidential system in July 2018 and its over one-year implementation received the most attention and shaped much of the constitutional agenda of the country in 2019. This chapter first zooms in on the implementation of Turkey's new presidential system, as it was the most important constitutional development in 2019. It then reports on the cases of the Turkish Constitutional Court (TCC) during that year under three categories, and finally looks ahead to several important issues that will arise next year, including possible vacancies in the TCC and interesting pending cases.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As noted above, much of the constitutional debates in 2019 concerned the implementation of Turkey's new presidential system. One of its most notable features is the power of the President to issue decrees. While the constitutional amendments made clear that such decrees can only be issued on executive matters outside the areas that remain the prerogative of the Parliament, in practice, they regulated a broad range of social and economic policy issues, including restructuring public administration, making key public appointments, introducing major economic policies, establishing new agencies and offices, and merging ministries and other institutions. Moreover, a closer examination of presidential decrees reveals that they serve as a means of shortening legislative procedure. Since the presidential system took force on 9 July 2018, the Parliament has reportedly passed 53 pieces of legislation whereas the President has issued 55 executive decrees.[1] When contrasted with the number of pieces of legislation approved by

[1] 'Son 29 yılın en işlevsiz Meclisi,' *BirGün*, 21 January 2020 <birgun.net/haber/son-29-yilin-en-islevsiz-meclis-i-284795>. See also, Kemal Gözler, 'Cumhurbaşkanlığı Hükûmet Sisteminin Uygulamadaki Değeri – Bir Buçuk Yıllık Bir Bilanço' <anayasa.gen.tr/cbhs-bilanco.htm> accessed 23 January 2020.

the Parliament in 2017 (314) and 2018 (120), it reveals a drastic decrease (89%).[2] This data alone clearly shows that the new system has significantly curtailed the Parliament's legislative functions.

Furthermore, under the new system, the drafting of legislative proposals, originally done by ministers, lies now with members of Parliament. Throughout the year 2019, several opposition members directed severe criticisms at the ruling majority (AKP and its *de facto* coalition with the MHP) due to their repeated attempts to ignore many proposed legislations. The lack of necessary resources or expertise on the part of Parliament to do this complex task also remains a persistent issue.

As regards the Parliament's oversight functions, there has been further regression. At the most fundamental level, presidential decrees remain exempt from parliamentary control. Moreover, traditional oversight mechanisms such as the vote of confidence and the possibility to put oral questions to the executive are no longer possible. The only living instrument – the right to submit written questions – can only be addressed to the Vice-President and ministers, and such questions are seldom answered in practice. If three-fifths of its members agree, the Turkish Parliament may launch a parliamentary investigation into alleged criminal actions by the President, Vice-President, and ministers related to their functions, but in reality, this is almost impossible. So it is clear that the President's accountability is limited mainly to elections, and that the Parliament is largely unable to exercise such a role.

The executive also increased its grip over the judicial branch through controversial appointments. President Erdoğan's last overtly political appointments to the TCC in 2019 are in point: the newly appointed members, Judge Yıldız Seferinoğlu and Judge Selahaddin Menteş, both previously served as Deputy Minister of Justice. Ultimately, then, it could be concluded that the presidential system perpetuated executive dominance and eradicated the key checks and balances required to safeguard against such excessive concentration of power, and thus facilitated the process of 'constitutional capture'[3] and pushed the country toward the brink of the 'constitutional autocracy' abyss.

III. CONSTITUTIONAL CASES

Under these circumstances, the TCC struggled to give consistent decisions. While some decisions in very controversial cases were favourable to defending human rights, its general trajectory is quite worrying. The TCC's decisions rendered in 2019 fell into three main categories. The first category concerned pre-trial detention and prosecution of journalists and civil society leaders.[4] While all applications raised similar issues, the Court did find violations in only four of them.[5] In the remaining applications, it found no violation of any rights.[6] Juxtaposing the European Court of Human Rights (ECtHR) findings in some of the applicants' cases with what the TCC found in their applications reveals a stark contrast. For the sake of brevity, only three cases will be elaborated below. The second category concerned several constitutionality review decisions of the TCC in which it legally validated problematic provisions originally adopted by emergency decrees. These decisions should be read as a confirmation of the blank check given to the Government for an institutionalized state of emergency. The third category concerned decisions in which the TCC upheld rights and freedoms by providing convincing and plausible reasoning – probably at the expense of political pressure.

A) Detention Cases

1) İlker Deniz Yücel

Deniz Yücel, a German-Turkish journalist for *Die Welt,* was detained in February 2017 on charges of disseminating propaganda and inciting hatred or hostility in support of a terrorist group. He was held without a formal indictment for over a year, and was released in February 2018. In its decision of May 2019, the TCC found that the charges Yücel was facing were based on nothing more than a journalistic activity – an interview he conducted with Cemil Bayık, one of the leaders of the Kurdistan Workers' Party (PKK). Highlighting that 'persecuting or punishing a journalist for things an interview partner says would greatly hamper the media's ability to discuss relevant topics publicly,' the Court found a violation of the right to liberty and freedom of expression.

2) Ahmet Hüsrev Altan

Ahmet Altan, a prominent novelist and journalist, was detained on 10 September 2016 as part of an operation against the Gülenists' media network along with fellow journalists, including Nazlı Ilıcak, and his brother, Mehmet Altan, a professor of economics, for allegedly giving subliminal messages the night before the failed coup of 15 July 2016. They were charged with attempting to overthrow the Government and abrogating constitutional order through the use of violence based merely on their newspaper columns

[2] 'Cumhurbaşkanlığı Hükümet Sistemi,' BBC News, 28 Haziran 2019 <bbc.com/turkce/haberler-turkiye-48788902> accessed 23 January 2020.

[3] See Jan-Werner Müller, 'Rising to the Challenge of Constitutional Capture: Protecting the rule of law within EU member states,' *Eurozine,* 21 March 2014 <eurozine.com/rising-to-the-challenge-of-constitutional-capture/> accessed 23 January 2020.

[4] For a critique of these decisions, see Turkey Human Rights Litigation Support Project, 'Commentary on the May 2019 Judgments Adopted by the Turkish Constitutional Court,' 2 August 2019. <turkeylitigationsupport.com/blog/2019/8/2/commentary-on-the-may-2019-judgments-adopted-by-the-turkish-constitutional-court-on-the-detention-of-journalists-and-a-civil-society-leader> accessed 23 January 2020.

[5] TCC, Individual Applications of Ahmet Kadri Gürsel (App. No. 2016/50978), Murat Aksoy (App. No. 2016/30112), Ali Bulaç (App. No. 2017/6592), and İlker Deniz Yücel (App. No. 2017/16589).

[6] TCC, Individual Applications of Ahmet Altan (App. No. 2016/23668), Nazlı Ilıcak (App. No. 2016/24616), Murat Sabuncu (App. No. 2016/50969), Akın Atalay (App. No. 2016/50970), Önder Çelik and others (App. No. 2016/50971), Ahmet Şık (App. No. 2017/5375), and Osman Kavala (App. No. 2018/1073).

and comments given to media outlets that had been dissolved by the Turkish Government's emergency decrees. On 16 February 2018, they were sentenced to life in prison. Though an Istanbul Regional Court of Justice upheld this conviction in October 2018, the Turkish Supreme Court of Appeals on 5 July 2019 cleared the Altan brothers' charges due to the lack of sufficient and credible evidence, thus overturning the life sentences. In the meantime, the Altan brothers lodged separate individual applications with the TCC in November 2016. Despite the nearly identical circumstances of their cases, the TCC handed down opposite rulings. On 11 January 2018, in the case of Mehmet Altan, the TCC recognized that his right to liberty and freedom of expression were violated. On 3 May 2019, the TCC ruled there was no violation in the case of Ahmet Altan.

3) Osman Kavala

Osman Kavala, a businessman and prominent civil society activist, was arrested on 18 October 2017 on suspicion of attempting to overthrow the Government and the constitutional order through force and violence – charges linked to the Gezi Park events and to the 15 July 2016 attempted coup, respectively. In justifying Kavala's pre-trial detention on 1 November 2017, the Turkish magistrate court found that there existed concrete evidence indicating that he had led, organised, and financially supported the Gezi Park events. Regarding the charge concerning the 15 July attempted coup, the magistrate alleged that Kavala had been in contact with *H.J.B.* (Professor Henri J. Barkey, allegedly one of the instigators of the attempted coup) based on reports from base transceiver stations that their mobiles emitted signals from the same station. On 28 June 2019, the TCC ruled, by ten votes to five, that there existed factual evidence giving rise to a strong suspicion that Kavala had committed the alleged offence during the Gezi Park events, and that his detention was thus neither arbitrary nor unjustified.

B) Constitutionality Review Decisions

1) 14-day Unsupervised Detention Period

On 22 July 2016, the first post-coup emergency decree, Decree No. 667, was issued, authorising detention without access to a judge for up to 30 days 'due to the difficulty of collecting evidence or a higher number of suspects.'[7] Another decree, No. 684 of 23 January 2017, reduced it to seven days, with the possibility of an extension a further seven days (14 days in total), the time during which a suspect had to be brought before a competent judicial authority.[8] Following their approval by the Turkish Parliament on 29 October 2016 and 8 March 2018, respectively,[9] two separate appeals were lodged with the TCC seeking annulment of these two provisions (among many others) on the ground that they violated the Turkish Constitution. On 24–25 July 2019, the TCC rejected these appeals and held the relevant provisions specifically permitting pre-trial detention for up to 14 days to be constitutionally valid,[10] even though it substantially exceeds the outer limit the ECtHR has held to be justifiable in times of derogation under Article 15 of the ECHR.[11]

2) 'Security Investigation/Archive Check' Requirement for Public Employment

On 29 October 2016, Decree No. 676 introduced one of the most controversial measures of Turkey's post-coup emergency rule. Article 74 of that Decree amended Turkish Law No. 657 on Public Servants and stipulated that applicants for public sector employment must undergo 'a security investigation and archive check' before being appointed.[12] Stringent security and background checks enabling a detailed assessment of every record on an applicant held by security and intelligence services ranging from traffic fines to detention records are already necessary for those to be recruited in some confidential units of state, such as military, police, and intelligence. That amendment, however, extended the scope of security investigations for *all* fields of public employment and even further to include an assessment of moral character, political views, and affiliations based on some generic terms, such as 'cooperation with,' and 'loyalty to the state.' In 2018, an appeal challenging its constitutionality was lodged before the TCC. On 24 July 2019, the TCC ruled that the 'security investigation/archive check' requirement for public employment was contrary to Article 13 ('fundamental rights may only be restricted by law'), Article 20 ('right to privacy'), and guarantees that public servants should enjoy under Article 129 of the Turkish Constitution.[13] While a wide swath of Turkish society praised the ruling, one cannot interpret this decision as bringing the discussion on the 'security investigation/archive check' requirement to an end. Some of the TCC findings could indeed leave the door open

[7] See Decree on Measures to be Taken Under State Emergency, No. 667, 22 July 2016.

[8] Decree on Specific Regulations Under the State of Emergency, No. 684, 23 January 2017.

[9] See Law No. 6749 published in the *Official Gazette* on 29 October 2016 and Law No. 7074 published in the *Official Gazette* on 8 March 2018. Whether they have become ordinary pieces of legislation is questionable.

[10] TCC Constitutionality Review, Plenary Assembly, Docket No. 2016/205, Decision No. 2019/63, 24 July 2019 at paras. 78–79 and TCC Constitutionality Review, Plenary Assembly, Docket No. 2018/92, Decision No. 2019/67, 25 July 2019 at paras. 48–73.

[11] In exceptional circumstances, e.g., under a state of emergency, the ECtHR has acknowledged that a longer period of detention may be justified. However, even under such circumstances, the ECtHR, in *Aksoy v. Turkey* (App. No. 21987/93, Merits, 18 December 1996 at paras. 70–78) held that holding a suspect for fourteen days, and in *Nuray Sen v. Turkey* (App. No. 41478/98, Merits, 17 June 2003 at para. 28) for eleven days, without judicial intervention, was not a proportionate derogation from Article 5 ECHR.

[12] See Article 74 of Decree Law on Specific Regulations Under the State of Emergency, No. 676, 23 January 2017. The decree was approved by the Turkish Parliament on 8 March 2018 and became Law No. 7070.

[13] TCC Constitutionality Review, Plenary Assembly, Docket No. 2018/73, Decision No. 2019/65, 24 July 2019 at paras. 161–173.

for another version of the security check. Specifically, the TCC highlighted that such a provision stipulating security investigations for public employment falls within the margin of appreciation of the legislative branch provided that it is introduced by a normal piece of legislation that possesses guidance as to how these investigations would be carried out within the limits of the constitutional right to privacy. Against this backdrop, it came as no surprise that the ruling majority (AKP and MHP) are working on new draft legislation as reported by the Turkish media in January 2020.[14]

3. 'Immunity' Decision

Decree No. 667 introduced another problematic provision of Turkey's two-year-long emergency rule and absolved Government officials of any responsibility for actions taken in the context of the decrees. Notwithstanding the potential for abuse, Article 9 of that decree granted full immunity from legal, administrative, financial, and criminal liabilities to Government officials who could otherwise be subjected to criminal investigation and prosecution.[15] This effectively prevented accountability for all abuses that might have been perpetrated during that time.[16] In a constitutionality review decision, the TCC ruled that this provision aimed at protecting state agents in fulfilling their legally mandated duties in the fight against a terrorist organization (FETO) which posed a grave threat to the survival and security of the nation through its clandestine infiltration of state mechanisms.[17]

C) Favourable Decisions

1. Ayşe Çelik

Ayşe Çelik, a teacher, joined a national-scale live TV show by phone and made some comments during a period of conflict between the Turkish army and the PKK, stating that in southeast Turkey, 'unborn children, mothers and people are being killed' and that the media must 'not keep silent.' She was prosecuted, convicted and sentenced to one year and three months' imprisonment for the broad-reaching and ill-defined crime of 'disseminating propaganda' in favor of a terrorist organization. The case had attracted broad attention, and Ms Çelik, who also gave birth to a child during the domestic proceedings, became a symbol of the peace demanders. On 9 May 2019, the TCC ruled that her imprisonment constituted a violation of freedom of expression, requesting both a retrial and an end to the violation. The TCC highlighted that mere expression of thoughts in parallel to a terrorist organisation's ideology or social or political goals could not be considered as terrorist propaganda unless they involve statements encouraging recourse to violence.

2. Erdal Karadaş

Erdal Karadaş, a dismissed teacher sacked after the coup attempt in 2016 and a member of a left-wing trade union, joined protests in the western province of Aydın by distributing fliers and promoting petitions. He received an administrative fine for taking part in protests. On 28 May 2019, the TCC ruled that his freedom of assembly had been violated and that it was natural for people who lost their jobs during the emergency rule to voice their objections. The Court pointed out that banning peaceful meetings and demonstrations on arbitrary grounds was unlawful.

3. Zübeyde Füsun Üstel and Others – Academics for Peace

In a very important decision, the TCC ruled that a group of Turkish academics (publicly known as 'Academics for Peace') had their freedom of expression violated for signing a peace petition condemning state violence against the Kurds. The declaration signed by the applicants contained statements charging the state with 'massacring,' 'slaughtering,' and 'torturing' people. Soon after that, criminal investigations were launched, and some of them were dismissed from their jobs through emergency decrees. In most of the cases, the Turkish courts issued custodial sentences, but allowed the academics to serve them on parole. In its ruling, the TCC emphasized that, although the petition was written in accusatory and severe language and it was even unilateral, contradictory, and subjective, it did not necessarily mean that it incited violence. The Court highlighted that such interferences impose a severe restriction on the public's right to be informed of a different perspective on the particularly significant events taking place in the country. In a rather unusual manner, the majority of the Court also noted that they do not agree with the statements in the declaration.

4. The Wikimedia Foundation

After refusing to remove pages that contain references of the Turkish Government's alleged ties with Syrian militants, on 29 April 2017, the Information and Communication Technologies Authority blocked access to

[14] 'Kamuda çalışanlara "Güvenlik soruşturması" mı geliyor?' Deutsche Welle, 21 January 2020 <dw.com/tr/kamuda-çalışanlara-güvenlik-soruşturması-mı-geliyor/a-52068253> accessed 23 January 2020.

[15] See Article 9 of Decree No. 667. Article 37 of Decree No. 668 of 27 July 2016 and its subsequent amendment (Article 121 of Decree No. 696, 27 December 2017) extended this immunity to civilians, thus raising concerns of pro-state vigilantism.

[16] See Article 6 (1 (e)) of Decree No. 667. Beginning in the early days after the attempted coup, some disturbing images have fueled allegations of torture and ill treatment of detainees in Turkey that were widely reported by the media and international organisations. See, i.e., Human Rights Watch 'A Blank Check – Turkey's Post-Coup Suspension of Safeguards Against Torture,' 24 October 2016, <hrw.org/report/2016/10/24/blank-check/turkeys-post-coup-suspension-safeguards-against-torture> accessed 23 January 2020.

[17] TCC Constitutionality Review, Plenary Assembly, Docket No. 2016/205, Decision No. 2019/63, 24 July 2019 at paras. 130–137.

Wikipedia in Turkey. Following the ban, Wikipedia had applied to the TCC after several unsuccessful applications lodged before magistrate courts. On 26 December 2019, the TCC ruled by ten votes to six in favour of the world's largest internet encyclopaedia, holding that there was not enough reason for the prevention of access to the site, and that such an interference was not necessary for a democratic society and led to a violation of the right to freedom of expression. The dissenting judges argued that the content of the entry violated national security and the Wikimedia Foundation should instead be held accountable for not cooperating with Turkish authorities. Following the publication of the TCC's reasoned judgment, the ban was eventually lifted on 16 January 2020.

5. Sırrı Süreyya Önder

Süreyya Önder was a member of the Turkish Parliament who played an active role during a long-standing democratic initiative process in Turkey. He delivered a speech during the Newroz celebrations in 2013 in which he allegedly called the head of the PKK, Abdullah Öcalan, as the leader of the Kurdish people and referred to the southeast of Turkey as 'Kurdistan.' After the collapse of peace talks in June 2015, his parliamentarian immunity, along with many other MPs, was lifted through an amendment made to the Turkish Constitution that bypassed normal procedures. Önder was sentenced to three years and six months' imprisonment for disseminating terrorist propaganda in 2018. The TCC held that the impugned speech was delivered within the context of increasing and improving the possibility of ceasing violent acts in the country and called for the continuation of the policies initiated to resolve protracted problems through non-violent methods. It eventually ruled his speech did not incite violence and found his freedom of expression was violated.

IV. LOOKING AHEAD

The year 2020 will be challenging. A number of constitutionality review appeals concerning the controversial provisions originally adopted by the post-coup emergency decrees are already on the TCC's agenda for January 2020. Moreover, the ECtHR is expected to hand down judgments in several applications arising out of alleged post-coup human rights violations, such as *Selçuk Altun v. Turkey and 545 Other Applications,* concerning the provisional detention of dismissed judges and prosecutors – all of whose individual applications were declared inadmissible by the TCC – and the Grand Chamber's ruling in the case of Selahattin Demirtaş, the previous co-chair of the HDP. Another important issue is the upcoming vacancies in the TCC: between 2020 and 2023, five members are expected to retire. On top of the five appointments President Erdoğan made to the TCC since he became President in 2014 (under the abolished parliamentary system), he will have had a direct or indirect influence in 10 out of the 15 members by 2023.[18] Turning back to the quote that opened this chapter, in 2019, the Turkish people had hard times. Whether the year 2020 will bring harder times or a beacon of hope for the entire nation to change its course, we'll have to wait and see.

V. FURTHER READING

Emre Turkut, '*Osman Kavala v. Turkey:* unravelling the Matryoshka dolls,' *Strasbourg Observers,* 12 December 2019 <strasbourgobservers.com/2019/12/12/osman-kavala-v-turkey-unravelling-the-matryoshka-dolls/>

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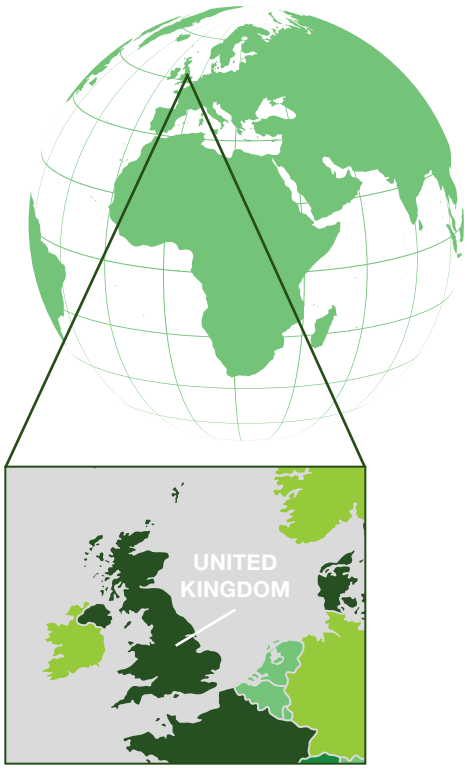
Human Rights Foundation, 'The Collapse of the Rule of Law and Human Rights in Turkey: the Ineffectiveness of Domestic Remedies and the Failure of the ECtHR's Response,' April 2019 <hrf.org/wp-content/uploads/2019/06/Turkey-ECtHR-Report_April-2019.pdf>

Turkey Human Rights Litigation Support Project, 'Access to Justice in Turkey? A Review of the State of Inquiry Commission,' October 2019 <www.turkeylitigationsupport.com/blog/2019/10/15/access-to-justice-in-turkey-a-review-of-the-state-of-emergency-inquiry-commissionnbsp>

[18] See Cem Tecimer, 'Recognizing Court-Packing: Perception and Reality in the Case of the Turkish Constitutional Court,' *Verfassunsgsblog,* 11 September 2019 <verfassungsblog.de/recognizing-court-packing/> accessed 23 January 2020.



United Kingdom

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I. INTRODUCTION

Our 2018 report ended by emphasizing the impossibility of predicting the United Kingdom's immediate constitutional future. If 2019 brought significant clarity with the achievement of a Brexit deal by year's end, it was not easily achieved, as the UK Constitution weathered its stormiest period in recent decades. Two developments will long stand out in collective constitutional memories: the government's failed attempt to prorogue Parliament in September 2019; and the landslide victory of the Conservative Party in the December general election – widely described as the most important in a generation – handing Prime Minister Boris Johnson a mandate to shape not only the Brexit process but also a supportive legislature able to reshape the wider political and constitutional landscape. This report focuses on the constitutional tensions generated by the Brexit process in Parliament and two key Supreme Court judgments: finding the prorogation of Parliament unlawful; and ruling on the attempted ouster of the High Court's jurisdiction to review decisions of a tribunal established to supervise security and intelligence services.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Building on analysis in the 2018 report, this section focuses on the challenges Brexit posed for the Westminster Parliament in 2019. As in 2018, Brexit dominated Parliament in 2019 but saw the dramatic battle between the Government and the House of Commons intensify. Boris Johnson's appointment as the new Prime Minister in July 2019 led to a more direct conflict with the Commons. The deterioration of relations between the executive and legislatures ended up in the courts (as detailed below). In *Miller (No. 2),* discussed in the next section, the Supreme Court may have re-asserted Parliament's supremacy over the executive, but in political terms, the Government ended 2019 firmly in control. In the long term, the political effect of the parliamentary dramas of 2019 may end up being more significant than the constitutional effect of the Supreme Court's ruling. The Conservative Party secured a significant majority in the House of Commons at the general election on 12 December 2019, winning 365 of the 650 seats, based on a message of 'get Brexit done'. A core part of this message was based on the idea that both Parliament and the courts were blocking the 'will of the people'. The success of this message is likely to see further challenges to the value of checks and balances in 2020.

A Failed Brexit Deal under Prime Minister May's Government

In January 2019, Theresa May's Government was trying desperately to secure the support of a majority of MPs for the Withdrawal Agreement, an international treaty negotiated with the EU. The Government only managed to secure the support of under one-third of the total 650 MPs for the deal during the first meaningful vote on 15 January 2019. While subsequent attempts to negotiate (including legislative concessions on workers' rights and environmental standards) with the official opposition, the

Labour Party, persuaded some additional Labour and Conservative MPs to support the deal, the Government could not convince the Labour leadership to endorse it. In the UK's majoritarian political culture, the Labour Party sensed there was little to be gained from helping the Government get the deal approved in the House of Commons.

The Government's efforts were also hindered by unavoidable constitutional realities. It could not offer cast-iron guarantees on the nature of the UK's long-term relationship with the EU because Article 50 dictated that the future relationship would only be negotiated once the UK had formally withdrawn. Further, parliamentary sovereignty meant that the Government could not entrench any commitments in law. The first few months in 2019 highlighted the difficulty of a parliamentary system based on majoritarian principles adapting to the need to build a cross-party consensus to deliver the constitutional changes needed to deliver Brexit. The second meaningful vote on the original deal (12 March 2019) saw 242 MPs vote for the deal. The third and final meaningful vote (29 March 2019) achieved only 286 MPs' support. By that point, the Government's credibility, even though it formally retained the confidence of the House, was severely weakened.

Much of the parliamentary drama of 2019 was generated by MPs' efforts to stop the UK leaving the EU without an agreement, commonly known as a 'no-deal Brexit'. The Government had long maintained that the House of Commons faced a simple choice between the deal that had been negotiated or leaving the EU without a deal on 29 March 2019. This was based on the strict legalism of both the UK Government's and the EU's positions: that under Article 50, the UK would leave 'automatically' two years after the notification was given (29 March 2017) unless either a deal was in place or an extension was requested and agreed to by the European Council; the UK Government's position since 2017 that no such request would be made even if the deal was rejected; and that the Withdrawal Agreement, once finalised, could not be changed.

The battle to stop a no-deal Brexit saw MPs and the Speaker of the House of Commons take unprecedented steps to pass legislation requiring the Government to seek an extension from the EU. The first of these Acts of Parliament, known as the 'Cooper-Letwin Bill' was passed on 8 April 2019. Before this legislation was in force, Theresa May's Government sought a second extension (the first had been granted until 12 April 2019), which was granted and shifted exit day to 31 October 2019. By rejecting both no deal and the Withdrawal Agreement, the Government was left with little room to manoeuvre and Theresa May announced her resignation on 24 May 2019.

A New Prime Minister, Prorogation, and Parliamentary Drama

Boris Johnson formally became Prime Minister on 24 July 2019. A core part of his appeal to the Conservative Party was that he would renegotiate the Withdrawal Agreement and get it approved by a majority in the Commons. If the EU refused his Government's demands to change the deal, or if the Commons did not approve the amended deal, then the UK would leave without a deal on 31 October 2019. This determination was reinforced by the speculation, and then confirmation, that the Government would 'prorogue' Parliament to prevent a repeat of the Cooper-Letwin Bill being passed (prorogation is discussed in the next section). In reality, the proposed prorogation provoked MPs to act quickly and the Benn Act, mandating the Government to seek an extension by Saturday 19 October 2019, was enacted on 9 September 2019.

To pass both the Cooper-Letwin Bill and the Benn Act, MPs secured time on the floor of the House of Commons by suspending the procedural rule, Standing Order No. 14, which gives the Government control of the House of Commons' agenda. Legislating in this way was extremely controversial, being perceived by some as subverting the relationship between the Government and the House of Commons. The impasse was in part a product of the fact that a majority of MPs were determined to take steps to stop a no-deal and had rejected the Government's main policy goal – passing the Brexit deal – but were not prepared to install an alternative Government. The Fixed-term Parliaments Act 2011 was blamed for contributing to this impasse by enshrining a statutory requirement that the House of Commons approve an early general election. In the run-up to 31 October, MPs were reluctant to agree to an election, fearing that the resulting dissolution would enable the Government to leave the EU without a deal.

The Government planned to avoid seeking an extension by obtaining House of Commons approval of the Withdrawal Agreement before 19 October 2019. The Government defied the expectations of many experts by securing changes to the Withdrawal Agreement at the European Council summit on 17-18 October 2019. Eurosceptic Conservative MPs had objected to the arrangements in the Northern Ireland Protocol in the original Withdrawal Agreement negotiated by Theresa May. On 29 January 2019, a majority of MPs voted to change the Protocol, and Boris Johnson's Government made changing the Protocol his priority. To secure approval for the amended Withdrawal Agreement, the Commons sat on a Saturday for the first time since the Falklands War in 1982. The Commons declined to approve the deal on Saturday 19 October, instead voting to approve an amendment by Conservative Party backbencher Oliver Letwin, fearing that approving the deal in principle but without enacting the legislation needed to ensure its ratification would mean the UK could still leave the EU without a deal on 31 October 2019. As a result, the legal obligation to secure an extension was triggered and the EU granted an extension until 31 January 2020. The terms of the extension meant that the UK could still leave on 31 October if Parliament could pass the necessary legislation beforehand. The Government asked the Commons to approve the European Union (Withdrawal Agreement) Bill, which would implement the Withdrawal Agreement into domestic law, on 22 October 2019. A majority of MPs, 329 to 299, approved the bill. However, the House of Commons rejected its programme motion, which sought to see the bill pass through the Commons in three days. A number of MPs that supported the deal felt that it

was not appropriate to pass such a significant constitutional bill so quickly, especially as it was certain there would be intense discussion over possible concessions. In response to the MPs' refusal to agree on the timetable for the bill, the Government sought to trigger a general election on 12 December. On Monday 28 October 2019, a majority of MPs, 299 to 70, voted in favour of an early election, but this did not meet the two-thirds of MPs required by the Fixed-term Parliaments Act 2011. The next day, the Labour Party changed its position and agreed to approve an election through an Act of Parliament, which enabled its date to be set by law for 12 December 2019.

A Brexit Deal, Newly Empowered Executive, and Constitutional Change

The general election on 12 December returned the House of Commons to a more conventional majority Conservative Government. This change of dynamic meant that the legislative concessions that were promised in the earlier European Union (Withdrawal Agreement) Bill vanished. The bill sailed through Parliament in under a month and was enacted on 23 January 2020, enabling the UK to leave the EU with a deal on 31 January 2020.

In terms of constitutionalism, there is a range of different narratives that can be extracted from 2019. The House of Commons showed that it could act as an effective check on executive power by stopping a no-deal Brexit and that it could influence the substance of a treaty. At the same time, the actions of MPs in delaying Brexit led to vociferous criticisms of Parliament from politicians, which appeared to gain traction with the public. Further, the inability to approve the Brexit deal before the election meant that many of the concessions designed to form a cross-party consensus – for example, by giving Parliament a bigger role in supervising the next stage of the Brexit negotiations – were lost. The Government's current majority promises more stability but this does not mean that the constitutional challenges presented by Brexit will be any less significant.

III. CONSTITUTIONAL CASES

This section discusses two key judgments of the Supreme Court: finding the prorogation of Parliament unlawful; and ruling on the ouster of the High Court's jurisdiction to review decisions of a tribunal established to supervise the conduct of key security and intelligence services.

1. R (on the application of Miller) v. The Prime Minister; Cherry and others v. Advocate General for Scotland: Legality of Prorogation of Parliament

Also known as *Miller (No. 2)* or *Cherry/Miller,* the petitioners included Joanna Cherry MP and Gina Miller, the same petitioner as in the *Miller (No. 1)*[1] case in 2017, seeking an answer to the question of whether Prime Minister Boris Johnson's advice to the Queen to prorogue Parliament for five weeks in September 2019 was unlawful. Prorogation refers to the ending of a session of Parliament, which also brings an end to any bills that have not become law in addition to any parliamentary debates or scrutiny. It is an unlegislated prerogative power exercised by the Queen upon the advice of the Prime Minister. At the point Parliament was prorogued, there were eight weeks left until the UK's (revised) scheduled departure from the EU on 31 October 2019. For any outcome other than a no-deal Brexit, wherein the UK would depart without any agreement on the future of trade or movement between the UK and EU, it was necessary for Parliament to legislate for it, which was not possible while Parliament was prorogued.

Legal action was launched in all three jurisdictions that constitute the UK (England and Wales, Scotland, and Northern Ireland) seeking a judicial review of the Government's advice to the Queen, and a ruling that such advice was unlawful. As the matter concerned the use of prerogative power, Government lawyers argued that it was not justiciable, making a strong objection to the Court's involvement in political matters: simply, 'if Parliament had a problem with it, it is for Parliament to sort it out'. If the Court were to find it a justiciable matter, the Government would argue that the prorogation was a normal exercise of an ordinary power to, among other matters, allow sufficient time for a new legislative agenda.

The English High Court found that the Prime Minister's advice was not justiciable, obviating any need to determine its lawfulness.[2] Less than four days later, the Scottish Court of Session found that the issue was justiciable and the advice was 'unlawful and is thus null and of no effect'.[3] The Northern Irish High Court declined to give judgment on the question of prorogation.

The English High Court rejected consideration of the Prime Minister's advice to the Queen as it considered there to be no appropriate or judicial or legal standards against which the legality of the executive decision could be assessed. The Court acknowledged, though did not examine, the variety of political reasons both allowed and given for prorogation. It also conjectured that it would be impossible for a court to find the length of time to be excessive or to assess 'by any measurable standard how much time is required to hold the Government to account'. [57] Scotland's highest court, the Scottish Inner Court of Session, was dismissive of a wide discretion and deference to the executive, finding that the courts have jurisdiction to decide 'whether any power, under the prerogative or otherwise, has been legally exercised'. [103] The Court rejected the position that there could be no legal standard against which to measure the Prime Minister's advice. While acknowledging that power used for legitimate political purposes could not be

[1] *R (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5. Discussed in our 2018 report.

[2] *R (Gina Miller) v. The Prime Minister* [2019] EWHC 2381.

[3] *Joanna Cherry & ors v. Advocate General of Scotland* [2019] CSIH 49.

challenged, the Court found that the 'purpose was to stymie parliamentary scrutiny of the executive, which was a central pillar of the good governance principle enshrined in the constitution; this followed from the principles of democracy and the rule of law'. [51]

Hearings in the UK Supreme Court took place within a week of the Scottish judgment, with the Court sitting as a full bench of 11 judges under the presidency of Baroness Hale. The expediency necessitated by circumstances was unprecedented. On 24 September 2019, two weeks following the prorogation of Parliament, the Supreme Court handed down its unanimous judgment, ruling that such prorogation was 'unlawful, null, and of no effect'. [69] On the question of justiciability, the Court recalled its centuries-old supervisory jurisdiction over the lawfulness of Government acts and ruled the exercise of the prerogative power to be justiciable. [44] The fact that ministers had political accountability to Parliament did not negate legal accountability to the courts. In determining the limits on the exercise of executive power, the Court relied on the two fundamental principles of parliamentary sovereignty and parliamentary accountability. Parliamentary sovereignty was interpreted to mean not just Acts of Parliament but the *actions* of Parliament. The Court held that the exercise of the power to prorogue without reasonable justification to frustrate or prevent Parliament from carrying out its constitutional functions as a legislature and as the body responsible for the supervision of the executive was unlawful. No reason had been submitted in evidence by the Government for such a long prorogation, which by the degree of its detrimental constitutional effect was found to be unlawful. As the advice was held unlawful and outside the powers of the Prime Minister to give, it was quashed. The Court also quashed the Order in Council, otherwise simply understood as the exercise of the Queen's power, as having no effect – a 'blank piece of paper' [69]. Parliament returned the following day, continuing the previous session.

The *Cherry/Miller* case follows *Wightman*[4] and the seminal 2017 *Miller (No. 1)* decision as again deliberating on the fundamental principles of the rule of law, parliamentary sovereignty, and the separation of powers in the UK. While all cases have emphasised the sovereignty of Parliament and the limits of executive and delegated powers, *Cherry/Miller* provided a sharp rebuke to the notion that any unlegislated power could be unlimited or immune from judicial scrutiny, particularly when parliamentary scrutiny had been removed by its very exercise. The Government's negative response included the Leader of the House of Commons, Jacob Rees-Moog, calling it a 'constitutional coup'. Following the December elections, Boris Johnson mooted the possibility of wide-scale judicial reforms, including the possibility of executive control over the appointment of judges to the UK Supreme Court.

2. R (on the application of Privacy International) v. Investigatory Powers Tribunal and others[5]

The Investigatory Powers Tribunal (IPT) is a specialist tribunal established under the Regulation of Investigatory Powers Act 2000 (RIPA) with supervisory jurisdiction to examine inter alia the conduct of the Security Service, the Secret Intelligence Service, and the Government Communications Headquarters. Under Section 67(8) RIPA, except where otherwise provided for by the relevant Secretary of State, decisions of the IPT were excluded from appeal or oversight of any court. This section was essentially an ouster clause: removing the jurisdiction of the High Court to judicially review decisions of the IPT. The applicants, Privacy International, sought a review of this clause on two issues: first, whether Section 67(8) 'ousts' the supervisory jurisdiction of the High Court to quash judgments for error of law and in effect immunises the IPT from legal challenge; and second, if so, in accordance with what principles could Parliament by statute ever 'oust' such jurisdiction to quash the decision of an inferior court or tribunal of limited statutory jurisdiction.

By a majority of 4 to 3, the Supreme Court held that Section 67(8) RIPA does not oust the High Court's jurisdiction. Following the ratio of *Anisminic,*[6] a decision vitiated by an error of law could not be a determination beyond the remit of the courts: only a legally valid determination could therefore be referenced within Section 67(8). This was grounded on a common law presumption that the legislative drafters did not intend to oust the jurisdiction of the High Court, and so could only apply such exemption to legally invalid determinations: judicial review may only be excluded with the most 'clear and explicit words', which, in section 67(8) RIPA, may be both 'determination' and *'purported determination'*.

The majority concluded there was no need to consider the second issue based on the determination that RIPA had not ousted the jurisdiction of the High Court, but nevertheless commented that it was for the courts, not the legislature, to determine the proper limits and scope set by the rule of law to the power to exclude review. Agreeing with the majority, Lord Lloyd-Jones added in obiter that

> consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. It should remain a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question. [144]

Essentially, a necessary consequence of parliamentary sovereignty is the rule of law, as understood to mean an authoritative and independent judicial body providing oversight (and limits) to the exercise of legislative power: 'it is ultimately for the courts, not the legislature, to determine the limits set by the rule of law to the power to exclude review'.

[4] Case C-621/18 *Wightman and others v. Secretary of State for Exiting the European Union* (judgment of 10 December 2018) ECLI:EU:C:2018:999.

[5] [2019] UKSC 22.

[6] *Anisminic v. Foreign Compensation Commission* [1969] 2 AC 14.

[131] In a system premised on parliamentary sovereignty, or *unlimited* legislative authority, this raises significant questions.

In dissent, Lord Sumption concluded that the effect of the section was to exclude the High Court's jurisdiction, which followed from a plain reading of the text. On the key question of the tribunal having the power to determine the limits of its own jurisdiction by the fact of its immunity from the review, he accepted that Parliament's intention was not consistent with the capacity of the courts to enforce such limits. [210] Lord Sumption, however, found that the rule of law was sufficiently met by the judicial character of the IPT, which consequently required no right of appeal.

In practical terms, s.67(8) has already been repealed, though its legacy continues. In critical comment, Mike Gordon writes that this judgment may have 'reached an intolerable level of artificiality in the interpretation of legislative language, and, from a rule of law perspective, the regrettable position where only an elite understanding of legal doctrine will provide the necessary context to comprehend the meaning of statute law'.[7] The majority's interpretation of the drafters' use of the term 'determination' to exclude errors of law (and so allow for judicial review in the High Court) could be more readily identified as a 'disguised prohibition' on such ouster by the courts.[8] In an otherwise turbulent year for the constitutional foundations of the UK, *Privacy International* does not sit as a counterpoint to *Cherry/Miller* but in parallel to it: both deliberations considered the meaning of parliamentary sovereignty, and both recognised the rule of law not only as a constitutional principle in theory but also in practice.

IV. LOOKING AHEAD

Compared to the miasma of uncertainty noted at the end of our 2018 report, this report – finalised in February 2020 – faces a somewhat clearer vista: the Government has a significant majority; the UK withdrew from the EU on 31 January 2020; and Northern Ireland's Government was restored in January 2020. However, fundamental questions abound. The details of the UK's future relationship with the EU remain to be hammered out. The Conservative Party election manifesto has promised a wide-ranging review of the UK Constitution, covering everything from the courts, to the relationship of state powers, to the royal prerogative power. We see renewed calls for a second referendum on Scottish independence, and intensifying discussion of a potential unification of the island of Ireland. A reinvigorated spirit of experimentation – embodied in the proliferation of citizens' assemblies across the UK, discussing everything from the constitutional future of Scotland to climate change – reflects dissatisfaction with the existing model of representative democracy.

V. FURTHER READING

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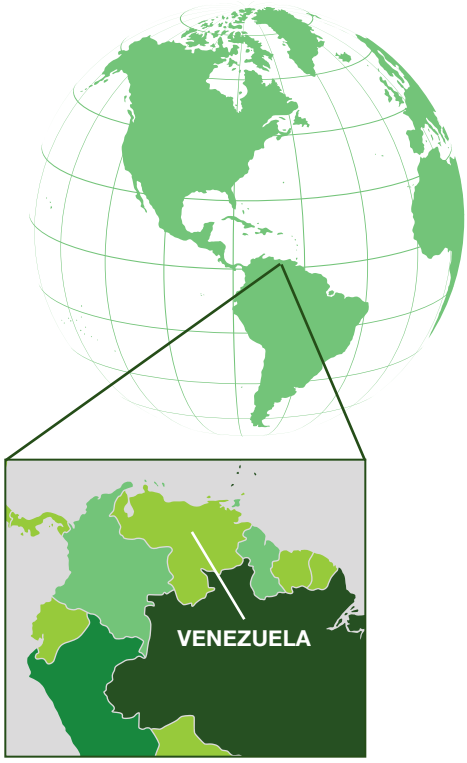

Venezuela

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I. INTRODUCTION

2019 was a crucial year for Venezuela and its ongoing social, economic and humanitarian crisis. Against this backdrop, the country experienced a sharper turn towards authoritarian rule and the emergence of a major constitutional standoff between the government and the opposition that, at the time of this writing, has no end in sight.

The main reason for the crisis was Nicolás Maduro's insistence in keeping power for a second term following the May 2018 presidential election, deemed unconstitutional and fraudulent by most of the opposition and a large number of countries worldwide. In January 2019, the President of the Parliament (National Assembly), Juan Guaidó, assumed the interim presidency of the country based on Article 233 of the Venezuelan 1999 Constitution with the goal of ending Maduro's unconstitutional claim to power, installing a transitional government and holding free elections. In the following weeks, over 50 countries recognized Guaidó as Interim President, including the United States, a large number of neighboring countries and several European governments. However, Maduro – who had been the constitutional President of the country since April 2013 – has retained *de facto* control over the executive branch, counting with the support of his party (the United Socialist Party of Venezuela, PSUV) the armed forces and several countries, particularly authoritarian regimes like China, Cuba, Iran, Russia and Turkey.

Thus, throughout the year 2019, Venezuela had Maduro as a *de facto* President with internal control of the country while more than 50 countries recognized Guaidó instead. Hence, while the Interim President was focused on foreign policy with little local effects in Venezuela, Nicolás Maduro failed to make his decisions recognized in many key countries that recognized Guaidó as Interim President, and his government faced a variety of pressures at the international level, including economic sanctions enacted by the US, the European Union and several countries.

The National Assembly and Interim President Guaidó passed several acts to achieve a political transition. The Statute to Govern a Transition to Democracy and to Re-establish the Full Force and Effect of the Constitution of the Bolivarian Republic of Venezuela was the main piece of legislation enacted to organize and implement this process. However, the legislature's authority was challenged by Maduro's regime and its authorities in *de facto* control of the rest of the government, including the Supreme Court and the Attorney General's Office. The most concerning aspect was that an unconstitutional 'National Constituent Assembly' remained installed (since August 2017). This institution claims

to have wide official prerogatives based on its interpretation of constituent power, including legislative functions. However, the National Constituent Assembly failed to comply with its supposed role of writing a new constitution, serving instead as a key authoritarian institution.

This report offers a survey of these developments, particularly the constitutional dimension of the crisis, and briefly discusses the decisions issued by the Venezuelan Supreme Tribunal in the past year – especially the Constitutional Chamber – as part of the country's turn towards autocracy.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The interim presidency of the President of the National Assembly

In 2017, amid growing confrontations between the opposition and the government, and the regime's refusal to allow a recall referendum to be attempted against the President (in the terms established in the 1999 Constitution and applicable legislation), Maduro proceeded to convene a National Constituent Assembly that would exercise full prerogatives as exclusive 'constituent power'. This body was meant to make decisions outside of the existing constitutional framework and abide with all existing authorities, including the opposition-controlled National Assembly (the legislature). The creation of the National Constituent Assembly was denounced by the political opposition, several governments and many scholars as fraudulent and unconstitutional, among other reasons, due to its lack of fulfillment with the imperatives established in the 1999 Constitution for its creation and the openly fraudulent election of its delegates in August 2017.

The following year, in May 2018, despite persistent social and economic troubles, an unfolding humanitarian crisis, very high levels of unpopularity and mass migration, Maduro's regime held a fraudulent presidential election where he was declared the winner. This election was unconstitutionally called by the National Constituent Assembly and organized under illegal and unfair conditions, including (i) the illegalization of most opposition political parties so no major opposition leader could run, (ii) electoral corruption and government abuse during the campaign and (iii) the requirement of a government-issued ID – the 'fatherland's card' or *carnet de la patria* that would be checked next to voting booths across the country, among other major unconstitutional and illegal activities. The opposition filed several claims against the election, but the Supreme Tribunal rejected them. In response, the Parliament declared the presidential election as 'non-existent'. A large part of the international community – including many governments, scholars and organizations – also decided not to recognize this election and pointed out the country's lack of electoral integrity.

According to Articles 230 and 231 of the Venezuelan Constitution, the presidential term begins on January 10. Thus, on January 10, 2019, a new presidential term began without a legitimately elected President since the 2018 presidential election was electoral fraud. However, Maduro decided to bypass the National Assembly – the constitutional authority that swears in an elected President – and wanted to take the oath for a second term before the Supreme Tribunal. The Parliament considered this a usurpation of power and on January 15, 2019, based on Articles 233 and 333 of the Constitution, issued a statement declaring its president – Juan Guaidó – as Venezuela's Interim President (chief executive) until the usurpation ceases and free and transparent elections are called and held. In this respect, Article 233 of the Constitution establishes that, in the absence of a President on the first day of the presidential term, the President of the National Assembly must assume the presidency of the republic as an Interim President.

Guaidó assumed the interim presidency on January 23, 2019, and over the past year has led an effort to ensure a transition back to democracy. Maduro's regime has denounced the opposition's efforts, and has sought to keep power at all costs, at odds with the 1999 Constitution and at a significant cost to it and the nation as a whole. A year later, the standoff persists without a clear end in sight – Guaidó remains President of the National Assembly and exercises prerogatives as Interim President that are recognized by external actors and the legislature while the rest of the government and the state as a whole remain under Maduro's de facto control.

2. The Statute for the Transition and other acts of the National Assembly

To guide a political transition and the country's return to democratic rule and constitutional normalcy, the National Assembly enacted the Statute to Govern a Transition to Democracy to Re-establish the Full Force and Effect of the Constitution of the Bolivarian Republic of Venezuela. Accordingly, Article 2 of the statute states: 'For the purposes of this Statute, a transition is understood as the democratization and reinstitutionalization itinerary that includes the following stages: the liberation of the autocratic regime that oppresses Venezuela, the formation of a provisional Government of national unity and holding free elections'. In addition, a deep humanitarian crisis was identified as a problem that should be solved during this transitional period. According to the statute, the President of the National Assembly is the Interim President of the Republic until Maduro's usurpation of power ceases and free and fair elections take place. The opposition majority of the National Assembly re-elected Guaidó as President of the Parliament this past January 2020, so he continues holding office as interim chief executive.

Within the aforementioned statute, the role of Interim President is crucial and includes a range of important prerogatives. For instance, it gives Guaidó the power to designate several authorities to restore democracy, including members of the board of public companies (such as the Venezuelan oil company PDVSA and its American subsidiary CITGO) and a special attorney general to defend the interests of the Bolivarian Republic of Venezuela in court (especially US courts). Throughout 2019, Interim President Guaidó decreed several acts to restore democracy; designate ambassadors in 36 countries and two multilateral organizations (OAS and Lima Group); and to protect and recover assets outside of the country via negotiations

or litigation (several US courts have also recognized Guaidó as Interim President).

The statute also outlined important prerogatives for the National Assembly during the transition period. During this time, the National Assembly will control the particular actions of the Interim President in matters of protection of assets and interests of the republic and appoint heads of diplomatic missions, corruption and money laundering, among others. Additionally, besides the Statute to Govern a Transition, the National Assembly also passed the Law of Guarantees for Public Sector Officials and Workers and Social Sectors Participating in the Restoration of Democracy, and the Law for the Re-entry of Venezuela to the Inter-American Treaty of Reciprocal Assistance.

Thus, in 2019, the National Assembly focused its efforts towards the political route designed in the Statute to Govern a Transition. In particular, the National Assembly: (i) reversed the decision to withdraw Venezuela from the OAS; (ii) ratified again the American Convention on Human Rights; (iii) approved the re-entry of Venezuela into the Inter-American Treaty of Reciprocal Assistance; (iv) defended the historical position of Venezuela in the dispute over the Esequibo territory with Guyana; and (v) with the support of the Lima Group, the European Union and the European Parliament for the restoration of Venezuelan democracy, defended the permanence of Venezuela in the MERCOSUR Parliament (PARLASUR). The National Assembly also presented and passed a plan of public policies called 'Plan País' that a new government could implement to face the complex humanitarian emergency in Venezuela.

Also in 2019, national deputies of Maduro's party, the Socialist United Party of Venezuela (PSUV), returned to sessions of the National Assembly. They had decided not to attend the sessions back in April 2017 after the Supreme Tribunal of Justice declared the National Assembly in 'contempt'. With the participation of the PSUV, the National Assembly also installed the preliminary commission for the appointment of the Electoral Nominations Committee, and eventually proceeded with the renewal of the Electoral Power authorities according to the 1999 Constitution. It is still unclear when (and if) this process will take place, but it certainly is one of the most important developments of the past year.

Finally, in December 2019, the Parliament approved the inclusion of the electronic vote in its debate rules book. This would allow national deputies to vote in the sessions of the National Assembly even if they were outside the country. This was an important development, since a large number of deputies are in exile, detained or otherwise unable to attend sessions due to government prosecution.

3. The National Constituent Assembly in 2019

On the other hand, Maduro's government was reluctant to negotiate or otherwise facilitate an electoral transition in Venezuela. Different attempts to broker an agreement between Maduro and his ruling elite and the opposition floundered – as was the case of the goodwill efforts of the Norwegian government last year. In the meantime, Maduro sought to consolidate his rule in Venezuela via executive decisions and the active collaboration of all state institutions under his control, and a range of pro-government informal actors that enhance the regime's ability to control (and repress) the population, enhance governance and preserve power (such as pro-government armed groups known as *colectivos*).

Given that the Maduro regime lacks the support of the opposition-controlled National Assembly, it resorted to governing with the active assistance of two key institutions: the National Constituent Assembly and the Venezuelan Supreme Tribunal of Justice (TSJ), especially its Constitutional Chamber. The National Constituent Assembly, convened and elected in 2017, remained active during 2019. As we mentioned above, its creation was the breakpoint of the already-weak Venezuelan rule of law. Its installation was clearly against the Constitution – as it was directly called by the President instead of the Venezuelan people – and the election of its members was unconstitutional and illegal. The National Constituent Assembly was installed not only to write a new constitution but also to concentrate powers. It was formed exclusively by *Chavistas* representatives and, as has been pointed out in recent work, its vast powers help to position it as an open threat against the opposition and as a key governance mechanism vis-à-vis the rest of the regime.

After more than two years, the National Constituent Assembly has not produced a single debate or released a working paper regarding the new constitution that it should be producing. From a political perspective, in 2019, the importance of the National Constituent Assembly was relatively marginal – as most major decisions seemed to lie elsewhere in the Maduro regime, with the *de facto* President himself as the main decision-maker (in a nominal and/or real sense). However, the National Constituent Assembly still fulfills the role of 'last trench' of the regime, making decisions that still have an important influence in the country's constitutional trajectory in these volatile times. For example, during the last year, the National Constituent Assembly issued several decisions to lift the constitutional immunity of several deputies of the National Assembly, openly usurping a prerogative of that body. More recently, it also threatened by playing an important role in organizing and convoking the next legislative elections in Venezuela.

III. THE VENEZUELAN SUPREME TRIBUNAL: CONSTITUTIONAL CASES

The Venezuelan Supreme Tribunal continued to be a bulwark of authoritarianism, this time playing a key role in protecting the Maduro regime, legitimizing repression against the opposition and, most importantly, continuing to issue decisions against the opposition-controlled National Assembly. Although its role was not as significant as in previous years (as we mentioned above, the core of the Maduro regime's actions lie in the executive branch), the Tribunal continued to offer the regime reliable support during the crisis. In addition to rulings, the support manifested itself in the open actions of several justices – especially Chief Justice Maikel Moreno – on behalf of the regime.

Since its creation by the 1999 Venezuelan Constitution, the Constitutional Chamber of the Supreme Tribunal of Justice has tended to support the regime's interests and, over time, fulfilled a very important role in the demise of democracy and the emergence of autocratic rule in Venezuela. As has already been pointed out in a range of scholarly works in the past few years, the Supreme Tribunal's Constitutional Chamber has used, misused and abused its power in many matters: allowing a constitutional reform that helped the President to further extend his powers in 2007; abolishing presidential term limits in 2008; overruling the legislative body and giving its power to the President in 2016; refusing to curb any possible electoral fraud, particularly in presidential elections (2013, 2017, 2018); allowing the President to declare a state of economic and social emergency for more than four years and reducing human rights guarantees during Maduro's time in office (2014–2019); and finally, allowing the President to convoke himself a constituent assembly in 2017 that concentrated the power in only one branch, consolidating a dictatorship (Urosa: 2019).

The Constitutional Chamber's role assisting in the regime's authoritarian governance continued during 2019. In January 2019, a few days after the Parliament declared Guaidó the Interim President of the Republic until fair elections could take place, the Constitutional Chamber overruled the legislative body and stated that Maduro was the legitimate President (Hernández: 2019). The Constitutional Chamber also overruled every legislative act of Interim President Guaidó in 2019: the Statute to Govern a Transition (Decision 06/2019); the appointment of board members for the state oil company Petróleos de Venezuela SA and its US refining arm Citgo (Decisions 39/2019 and 74/2019); the appointment of the Special Attorney General of the Republic (Decision 75/2019); the selection of the directors of the Central Bank of Venezuela (Decision 247/2019); the reinsertion of Venezuela in the Inter-American Treaty of Reciprocal Assistance (Decision 248/2019); and the reform of the National Assembly's debate rules book (Decision 517/2019). Thus, Venezuela's Constitutional Chamber is a clear example that non-independent constitutional courts are very dangerous not only because they evade applying their constitutional review power but also because they can actively pave the way for the advance of authoritarianism (Urosa: 2019).

IV. LOOKING AHEAD

As we mentioned above, Venezuela should be considered (and analyzed as) an authoritarian regime given its lack of separation of powers, complete disrespect of checks and balances and overall autocratic governance logic. Maduro, as *de facto* President, keeps control over the judicial branch, the electoral branch, the citizens branch and the National Constituent Assembly. There is no independent judicial review system or impartial electoral arbitrator but there is an overall lack of transparent and rule-abiding government as the 1999 Constitution orders. The Supreme Tribunal of Justice – particularly its Constitutional Chamber – and the National Constituent Assembly remain as instances of control of the political opposition and as political instruments in charge of supporting the decisions of Maduro's authoritarian regime.

On January 5, 2020, Juan Guaidó was re-elected as the President of the National Assembly and was confirmed as the Interim President of the Republic. Earlier that day, several national deputies decided to convoke an inauguration session and elected Congressman Luis Parra as President of the National Assembly without fulfilling the requirements established in the Constitution and the Parliament's debate rules book. Parra has been recognized as the President of the National Assembly by Nicolás Maduro. However, it is expected that Guaidó will take other decisions to try to restore democracy through a political transition driven by the National Assembly.

On the other hand, according to the Constitution, in 2020 new members of the National Assembly must be elected. The National Electoral Council will likely convoke the election of the deputies to the National Assembly. It is difficult to know if the political opposition will participate in a parliamentary election. Finally, it seems that the National Constituent Assembly will continue to function during 2020. As we pointed out above, this is a major obstacle for the return to institutional normalcy based on the 1999 Constitution.

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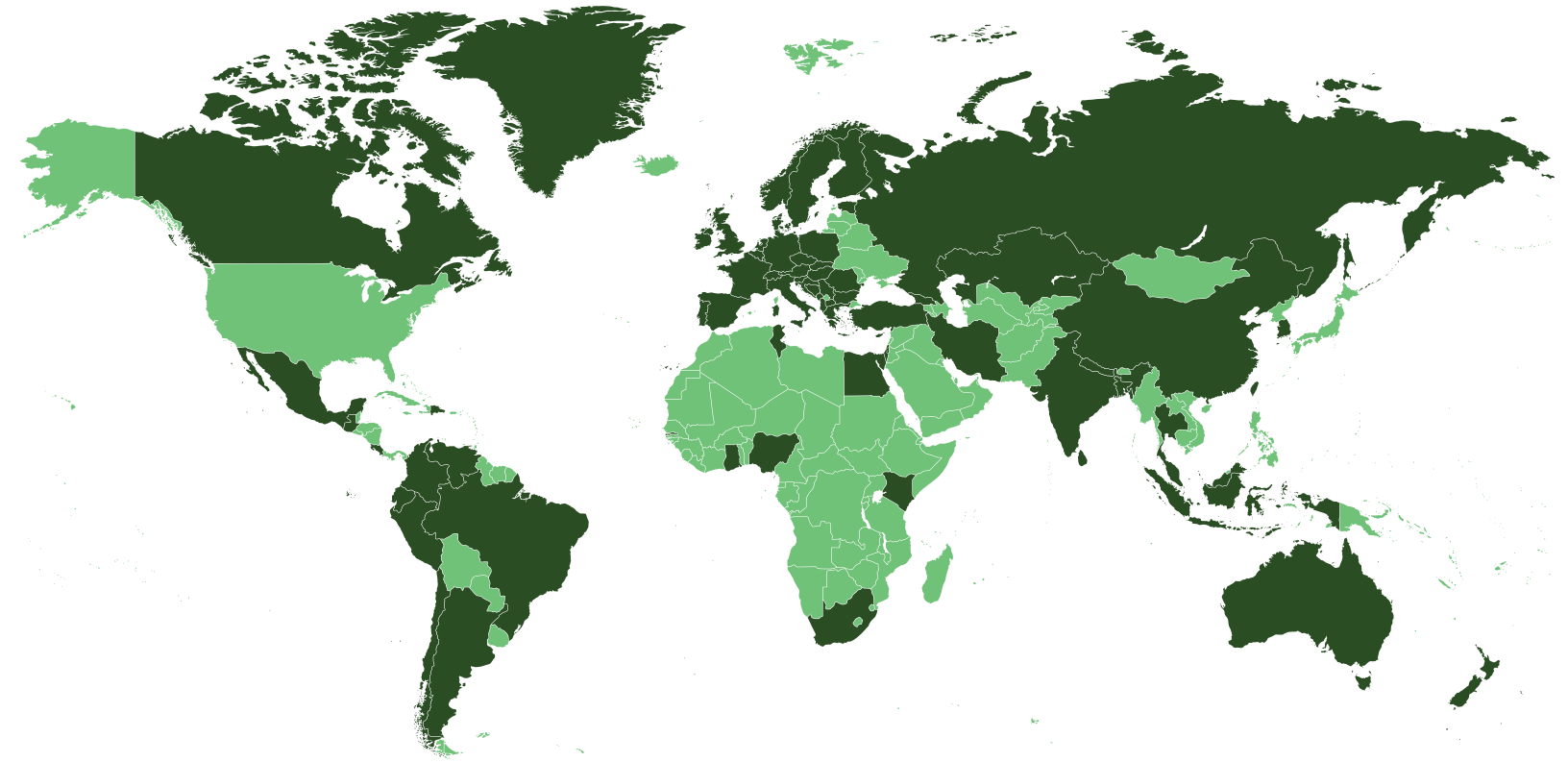
SUMMARY



Albania

2019 was characterized by a constitutional conflict between the President and Parliament leading up to the impeachment of the head of state. Because the opposition boycotted the local election, only a single candidate ran in most municipalities, winning by default. The implementation of justice reform slowly progressed throughout the year, affecting the renewal of justice institutions.

Argentina

In an election year, the Supreme Court was not at the forefront of public discussion. However, a handful of important and politically charged decisions timidly evinced the emergence of a majority inclined to check the government and protect some rights. Political change and economic turbulence may alter this.

Australia

Religious freedom dominated public consciousness in 2019 as the government consulted on and developed a Religious Discrimination Bill to be introduced to Parliament in February 2020. If passed, the Bill will protect against religious discrimination (and discrimination against atheists and agnostics) and establish a Freedom of Religion Commissioner.

Austria

In 2019, the Federal Government's breakdown after the "Ibiza scandal" ended a phase of bold legislative reforms that also induced the Constitutional Court to examine several and repeal part of them. The Federal Constitution proved to be a highly stabilizing factor during the breakdown phase and following political events.

Bangladesh

The Awami League commenced its third consecutive term. The BNP, the real opposition to the ruling party, joined the current parliament with just six seats after five years. The larger Supreme Court mostly showed reluctance on civil rights. But its activism in compensation and gender-based violence cases attracted appreciation.

Belgium

Elections were held and resulted in an arduous formation process of the federal government. Moreover, an attempt to amend Article 7bis of the Constitution in order to adopt a "Special Climate Act" was unsuccessful, yet the provision was again included in the list of articles that can be amended.

Bosnia and Herzegovina

The distribution of mandates after the elections in 2018 proved to be a contentious issue in Bosnia and Herzegovina. Despite the decisions of the Constitutional Court, political stakeholders held that impugnable constitutional provisions were still in effect. This put enormous pressure on the Election Commission of the country.

Brazil

Brazil under President Bolsonaro, a populist with an explicit authoritarian mindset, is certainly a threatening scenario for democracy. Interestingly enough, Brazil's democracy, up to this point, has shown some resilience and its institutions have provided a reasonable degree of horizontal accountability.

Bulgaria

For Bulgaria, 2019 was marked by rising tensions among the highest echelons of state power, particularly between the President and the government. Against this background, the most significant constitutional developments concerned the controversial appointment of a new chief prosecutor and a long-overdue reform aimed at ending the impunity of this office.

Canada

In June, the legislature of the province of Québec made a rare use of the Canadian Charter's 'notwithstanding clause' in passing an act to prohibit public sector employees 'in a position of authority' from wearing religious symbols at work. Four lawsuits challenging the constitutionality of the act ensued.

Cape Verde

The year 2019 was especially marked by an increase of constitutional complaints lodged with the Constitutional Court, and subsequently to the continuous development of case law in the field of protection of accused persons in the criminal framework and in other proceedings that led to the application of sanctions.

Chile

The constitutional reform of December 24, which was the result of a bipartisan agreement that tried to offer a political way out of a crisis, established the steps of a Constitution-making process that, if successful, will generate a total constitutional replacement.

Colombia

The core 2019 constitutional developments concerned matters on limitations to freedoms, gender equality, and non-discrimination between nationals and non-nationals; the protection of the environment; and the relationships between constitutional law, on the one hand, and international investment law and inter-American human rights law on the other.

Costa Rica

Politicians' growing dissatisfaction with the Constitutional Court's exercise of its review powers engendered a backlash in Congress that resulted in significant delays in the election of new magistrates and a highly contentious debate over the fairness of the procedures used to elect them to the country's apex court.

Croatia

2019 was marked by important decisions of the Constitutional Court on the protection of the freedom of thought and expression. The Court underlined that protecting freedom of expression not only relates to non-offensive information and/or ideas but also 'to those which are offensive, shocking or disturbing'. This has implications for democratic dissent.

Cyprus

2019 was marked by a significant amendment of the Cypriot Constitution. It introduced the notion of 'non-taken parliamentary seats' in an attempt to fill the 56th seat that remained vacant following the 2016 parliamentary elections due to the impasse created by the non-affirmation of one of the elected candidates.

Czech Republic

In 2019, the Senate prepared a constitutional charge against President Zeman, claiming serious breaches of the Constitution. However, it was rejected by the Chamber of Deputies, mostly thanks to the votes of PM

Babiš's party, ANO. Also, the investigation of PM Babiš's conflicts of interest continued on national and European levels.

Denmark

The new government strengthened the state but was accused of arrogating judicial power to its own hand through a new law aimed at revoking citizenship, while a large majority of MPs agreed to adopt an ambitious climate law, expected to influence Danish politics for a decade.

Dominican Republic

Through several decisions on political party and electoral laws in 2019, the Constitutional Court made key decisions regulating both the internal organization of political parties and the political competition between them. The Court is now firmly placed at the center stage of Dominican politics.

Ecuador

The transitory Council for Public Participation and Social Control dissolved and appointed several public officials, and also gave birth to a new Constitutional Court. While there have been crucial steps made towards a stronger constitutional democracy, the fruits of this transition are still to be seen after a much-anticipated period of consolidation.

Egypt

The most significant development in Egypt's constitutional status in 2019 was the constitutional amendments adopted in late April. Those amendments widened the scope and level of the executive branch's power vis-à-vis other authorities, and gave the military a new constitutional duty of protecting the Constitution and democratic pillars of the country.

Estonia

2019 was marked by elections to the Estonian Parliament. They had a decisive effect on the claims the Supreme Court had to deal with and brought the so-called far right into government. This led to a tense relationship between the government and the president and raised several constitutional issues.

Finland

The proposed legislation on civil and military intelligence and on the oversight of intelligence gathering, the implementation of which Section 10 of the Constitution of Finland on the secrecy of confidential communications had been amended, was approved by the Parliament and entered into force on 1 June 2019.

France

In a period of intense social protest and claims for a renewal of democratic participation, the Constitutional Council ruled for the first time on a joint Parliament- and citizen-initiated referendum. It also reviewed major bills relating to the right to protest and a major reform of the judicial system.

Gambia

2019 saw The Gambia move from setting up key institutions such as the Constitutional Review Commission (CRC); Truth, Reconciliation, and Reparations Commission (TRRC); and National Human Rights Commission (NHRC) to actualising the key transitional justice standards required to restore the rule of law and democracy to the country.

Georgia

This report provides a brief introduction to the constitutional system of Georgia, constitutional amendments, civil protest, local elections, media, and main challenges facing the judiciary. It also provides an overview of landmark judgments of the Constitutional Court in 2019 and developments expected in 2020, including court vacancies, court cases, and other related events.

Germany

The federal Constitutional Court recalibrated its stance towards the European Union, also ruling for the first time on the digital right to be forgotten. In short, the Court promoted the EU Charter of Fundamental Rights to the constitutional standard of review when EU law is applicable.

Ghana

The most important development in 2019 emerged from the decision of the Supreme Court to uphold state resource expenditures on one particular religion if they benefit society as a whole. As a legally secular, culturally multi-religious society, Ghana can ill afford religious disaffection. Religious equality was guaranteed in the 1992 Constitution to prevent that.

Greece

A toothless yet useful constitutional revision marked 2019. The Constitution had remained formally unaltered throughout a crisis, first because of a mandatory time lapse between revisions and then due to a lack of consensus. Nine out of forty-nine proposed amendments were made. All formal change is now frozen for many years.

Greenland

The most important constitutional development was the unilateral decision to draft a subregional constitution for Greenland in two stages: the first, to enter into force under the Danish constitutional framework; the second to take effect only when (or if) Greenland becomes independent.

Guatemala

2019 was a year marked by the intervention of the Constitutional Court in the election and selection of the traditional powers of the state: Executive, Congress and the Judiciary. However, this came at a cost. The year was also marked by strong backlash against the Constitutional Court.

Hong Kong

Misjudgment of public opinion by the Hong Kong and Chinese Governments contributed to the mass civil unrest in 2019. The state's hardline approach against the protestors prompted further violence. The Hong Kong judiciary's independence and credibility were tested as disputes related to the movement found their way to the courts.

Hungary

Government influence on courts increased in 2019. Although amending actors abandoned the idea of establishing a separate administrative court system through the 8th Amendment to the Fundamental Law, new statutory provisions constrained judicial power to interpret legal and constitutional rules. Institutional tensions in the entire judicial system increased.

India

In 2019, the Indian state of Jammu and Kashmir lost its constitutional status as a semi-autonomous region and was brought under complete federal control. The absence of public consultation contributed to widespread protests at the annulment of the historical guarantee granted at its accession to the Indian union.

Indonesia

In 2014, the Court issued a decision on the simultaneous general election. But the Court has come under fire after around 400 polling station workers died in the 2019 election. In this term, the Court has to decide on whether to nullify its decision or re-affirm the simultaneous election.

Iran

The gas price hike regulations in November 2019 via the Supreme Council for Economic Coordination (SCEC) put the Constitution on edge. They opened several fractures between the latent conflicts in the Constitution, making constitutional dysfunctions more clearly and dramatically visible.

Ireland

2019 saw the passage of legislation to establish a Judicial Council. This had been discussed for over two decades, with the senior judiciary becoming increasingly vocal on the issue in recent years. The Council will have responsibility for judicial conduct, disciplinary matters, training and representation.

Israel

The most important developments in Israeli constitutional law in 2019 were the political deadlock resulting in recurring general elections and the unprecedented criminal indictment of a sitting Prime Minister, Benjamin Netanyahu, for bribery, fraud and breach of trust. These two combined to generate a constitutional crisis in Israel.

Italy

In 2019, the Italian Constitutional Court ruled in continuity with its most recent case law and strengthened its institutional role by coordinating the exercise of its powers and competences with both other constitutional actors and supranational institutions.

Kazakhstan

2019 was marked by the surprising voluntary resignation of the country's first President, Nazarbayev, in the spring, and the transfer of the presidential office to Tokayev, former Senate Speaker, in the summer. The Constitutional Council of Kazakhstan upheld these developments.

Kenya

The most important constitutional development was something that has not happened – yet. Namely, a debate about whether to make major shifts, and whether by a referendum, in the system of government, with the purpose of creating one that is more inclusive (especially of ethnic groups).

Luxembourg

The dominant theme in Luxembourg remained the questions of whether and how the Constitution should be rewritten. This long-lasting discussion came to a sudden end in November 2019. The transformation of the Constitution into a "living instrument," however, continues to occupy all institutions, notably the strengthened Constitutional Court.

Malaysia

Securing meaningful reform in the post-transition era remained the main challenge in Malaysia, given the formidable vested interests against it. Abortive attempts by the new government to amend the Federal Constitution and to ratify several international conventions emphasized the areas in which reform is needed, as well as the challenges ahead.

Mexico

The National Guard (a civil police institution composed of members of the Federal, Military, and Naval Police responsible for guaranteeing public security) was introduced in the Constitution. The Constitution was also amended to introduce the revocation of the mandate as a popular consultation mechanism that will be applied to the President.

Montenegro

The year was not marked by major constitutional developments but controversies and challenges to the autonomy and consistency of the judicial authorities and their commitment to the rule of law, particularly the power imbalance between the Constitutional Court and the Supreme Court.

Nepal

The implementation and operationalisation of the 2015 Constitution remained the primary constitutional focus. Federalisation persisted as a significant challenge. While the ineffective transfer of governmental

responsibility to subnational governments spurred intergovernmental conflict and weakened the foundations for federalism, devolution appears to be conferring new forms of legitimacy on government.

New Zealand

In response to the March 15 gun attack on two mosques by a lone far-right extremist, which murdered 51 people and injured another 49, New Zealand had to reconsider a swathe of laws relating to gun ownership and terrorist activity.

Nigeria

Nigeria's democratic trajectory seemed to veer off course in 2019. Pre- and post-election violence and the threat of violence and electoral manipulation marred the 2019 general elections. Also, horizontal accountability mechanisms appeared to weaken during the period. A course correction will be required in the coming years.

North Macedonia

Combatting impunity in high-level corruption cases remained a challenge in 2019 as citizens still awaited the prosecution and punishment of high-level officials involved in wire-tapping scandals from 2015. Fighting corruption is a precondition for the country's EU integration, especially after its historic name change this year.

Norway

Following unlawful administration of social welfare benefits, citizens were wrongfully convicted. The secret police unlawfully collected airline passenger data. Central cases concerned retention of DNA profiles, the Norway-EFTA Court relationship, and children's right to privacy in social media. In the ECtHR, cases about the Norwegian child welfare system dominated.

Palestine

Palestinian President Mahmoud Abbas dissolved the Palestinian Legislative Council but did not call for new elections as per the SCC ruling on the matter. He also replaced the sitting High Judicial Council with a temporary one. This concentration of powers makes it harder to counteract his power/s and ensure accountability in government.

Peru

In 2019, Peru managed to overcome a tough fight between the legislative and the executive, which culminated in the closure of Congress, by constitutional means. Since Peru has a history of overcoming political crises by coup d´états, this cannot be overstated.

Poland

In 2019, the rule of law further deteriorated in Poland, including the undermining of the judiciary's independence. This was possible by applying legal measures that were introduced in previous years. In December, the first chamber of Parliament passed a law allowing the extensive punishment of judges.

Portugal

2019 was a year marked by elections and, subsequently, parliamentary fragmentation, governmental change, and social contestation (with the summoning of several strikes and manifestations by dissatisfied professional sectors). The Constitutional Court dealt with issues such as surrogacy, citizenship, data protection, and paternity proceedings, revisiting some of its previous jurisprudence.

Romania

The most important development of 2019, besides the Constitutional Court's involvement in the political and judicial spheres, was a significant shift in the options of the electorate, manifested in the outcome of three major popular consultations. This led to an unexpected but rather conjunctural change of parliamentary majority and to the change of Government.

Russia

The Constitutional Court continued a trend of consistent political subordination that dates back to the entry into force of the current Constitution. It has never been an independent actor and does not deal with politically sensitive issues. However, it plays a significant role in the protection of social and economic rights.

Serbia

In June 2019, the Committee on Constitutional and Legislative Issues of the National Assembly accepted the Government's initiative for constitutional changes. However, due to the forthcoming parliamentary elections in spring 2020, it is upon the new legislature to continue and, most likely, finish the procedure.

Singapore

Besides the usual constitutional issues, it was the enactment of the Protection from Online Falsehoods and Manipulation Act that had the strongest constitutional impact in 2019, and beyond. By regulating online falsehoods, the law attempts to balance freedom of speech against the integrity of democracy and other public interests.

Slovakia

In a historic ruling, the Slovak Constitutional Court held that the Constitution contains an implicit material core that cannot be changed through the ordinary amendment process. If an amendment violates a core provision, it will be struck down. The Court's composition changed dramatically in 2019, possibly having implications for the endurance of this ruling.

Slovenia

In 2019, the Constitutional Court rendered several precedential and important decisions, strengthening the protection of

human rights and fundamental freedoms. While the Court continues to be regarded as the most reliable rule-of-law institution in Slovenia, its stature was diminished in 2019, in particular due to its growing ineffectiveness.

South Africa

The proposed amendment of section 25 of the Constitution, intended to allow the government to seize property without compensation, continued to be an ongoing project reflecting accelerated creeping socialism and a concomitant decline of constitutionalism amidst ongoing revelations of corruption and attempts to remedy its consequences. Meanwhile, lively constitutional litigation continued.

South Korea

The South Korean Constitutional Court decided on the nonconformity to the Constitution of the abortion ban; the Moon administration was criticized for returning two North Korean fishermen demanding asylum to the North; and the scandal surrounding Kuk Cho, the former Minister of Justice, deeply disappointed the Korean people.

Spain

Judgment 89/2019 reviewed the constitutionality of the process of activation and application of the instrument of state coercion on autonomous communities in case of serious non-compliance with the constitutional system. The article was applied for the first time by the government following the events in Catalonia in autumn 2017.

Sri Lanka

The 2019 presidential election ended the government elected in 2015 to strengthen democracy and good governance through constitutional reform. With the country turning to strong leadership, the new President, Gotabhaya Rajapaksa, offered an alternative vision of nationalist authoritarianism. A period of democratic regression has followed.

Sweden

Three constitutional issues dominated the Swedish constitutional law debate in 2019: the relationship between the Council on Legislation and the Government, the criminalization of joining and supporting terrorist organizations and the outlawing of racist organizations, and lastly, the constitutional enhancement of the independence of the judiciary.

Switzerland

The Green Party won the general election to the Federal Parliament but failed to get a seat in the executive branch. The Federal Court nullified a federal ballot for the first time in history and held that a prohibition barring court officials from wearing 'visible religious symbols' in court hearings was constitutional.

Taiwan

Taiwan's constitutional development in 2019 was reactive in character, with the legislative arena as the main theater. In reaction to the disappointing referenda on the legalization of same-sex marriage in 2018, laws were passed reworking the relationship between referendums and elections while finally realizing marriage equality in law, but without a name.

Thailand

For the first time in Thailand's history, the military junta successfully became a democratically elected government, regardless of the democratic quality of the Constitution. The regime remains as repressive as ever. However, this arrangement provided a flimsy disguise, posing a challenge to those wishing to question the regime's legitimacy.

The Netherlands

The government responded to the State Commission's recommendations to strengthen the parliamentary system. Also, a temporary parliamentary committee on the digital future was established; the Supreme Court delivered the *Urgenda* climate change judgment; and there were evolutions regarding militant democracy as a response to criminal activities of outlaw motorcycle gangs.

Tunisia

Eight years after its revolution, Tunisia made a milestone step toward the creation of sustainable democracy despite political challenges. The North African resource-poor country managed to complete its third set of elections and, despite imperfections, was hailed as the only democracy in the region.

Turkey

A comprehensive implementation of the new presidential system in Turkey perpetuated executive dominance, eradicated key checks and balances, and pushed the country toward the brink of becoming a constitutional autocracy. Under these worrying circumstances, the Turkish Constitutional Court struggled to give consistent judgments.

United Kingdom

In 2019, the battle between the Government and the House of Commons concerning Brexit intensified. In September 2019, two weeks after the prorogation of Parliament, the Supreme Court unanimously ruled the prorogation 'unlawful, null, and of no effect', reaffirming the need for judicial and parliamentary scrutiny of government acts.

Venezuela

In 2019, Venezuela experienced a major constitutional standoff. Following the fraudulent May 2018 presidential election, President Juan Guaidó of the opposition-led legislature acted as Interim President to achieve a democratic transition via elections, yet Nicolás Maduro clung to power supported by the Supreme Tribunal and National Constituent Assembly.

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