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Editors

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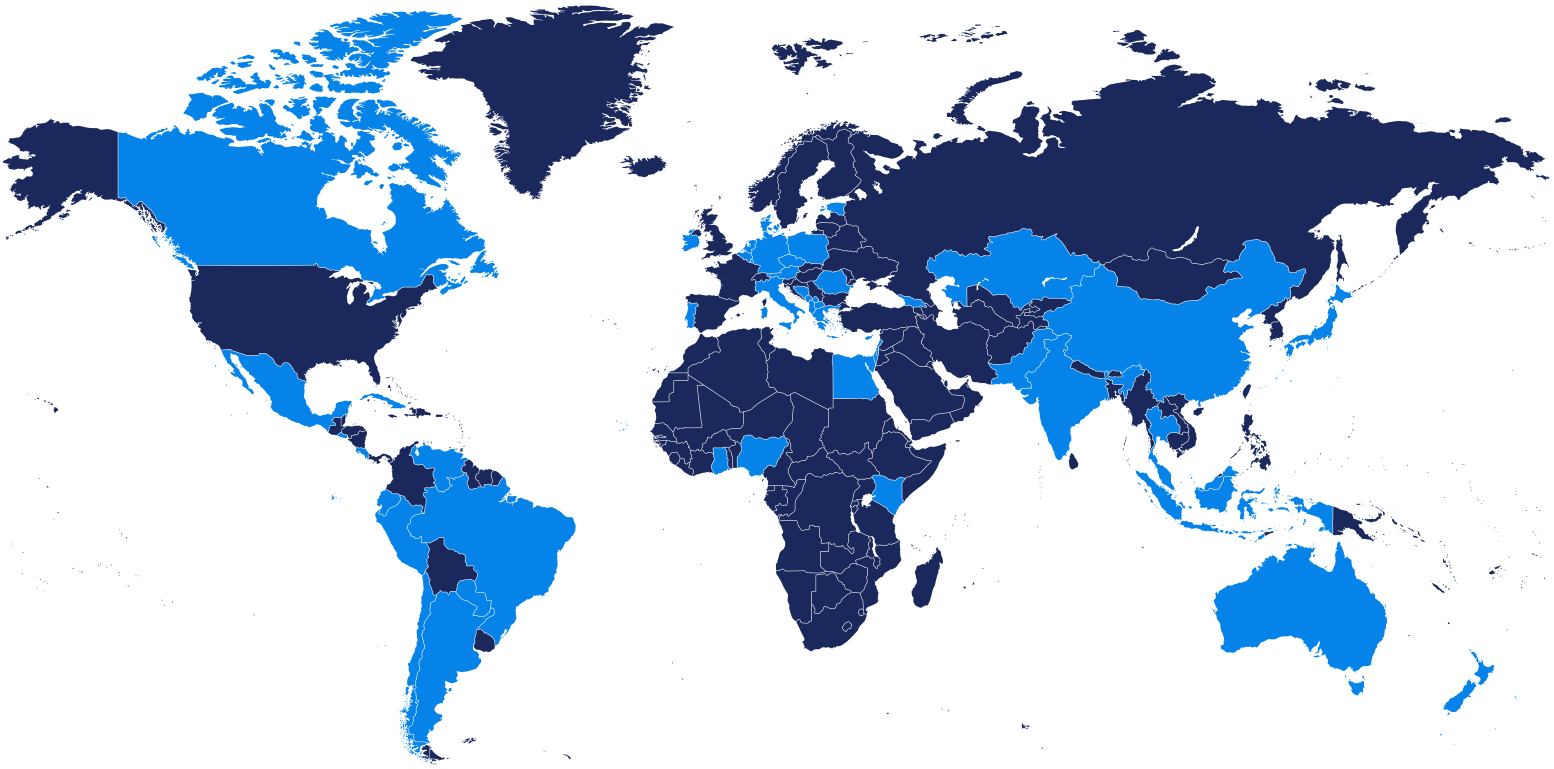

INTRODUCTION

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

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

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

CELEBRATING FIVE YEARS 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

When we launched the *I·CONnect-Clough Center Global Review of Constitutional Law* five years ago, we had no idea it would grow into what it has become today. The Global Review is frequently cited in books and articles, it is often assigned in law school classes, and it has been read by thousands of persons around the world. We routinely receive inquiries during the year from scholars who wish to join our team as authors, and we receive many more inquiries from persons asking when the next edition will be published. This, for us, is evidence of the need for this annual publication.

In this fifth edition of the Global Review, we feature dozens of reports on constitutional law developments around the world in the year 2020. Our goal in this anniversary edition is the same as it has been with earlier editions: to offer readers systemic knowledge about jurisdiction-specific constitutional law that has previously been limited mainly to local networks rather than a broader readership. The Global Review seeks to increase the base of knowledge upon which scholars and judges can draw 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.

We thank our wonderful contributors—judges and scholars—for preparing their superb jurisdictional reports that illuminate for our readers the state of constitutional law in every region of the world.

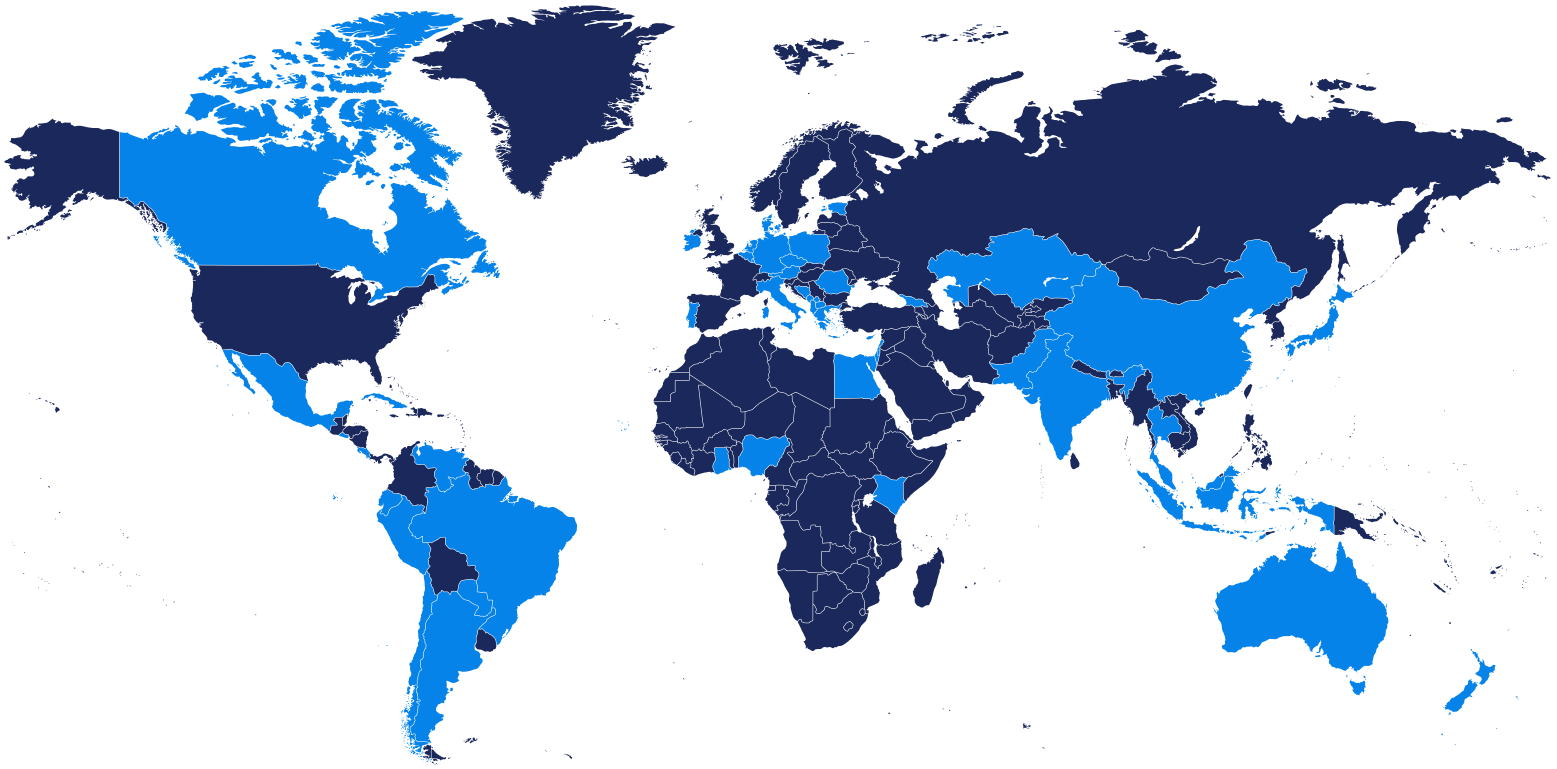
We thank to Gaurie Pandey at the Center for Centers at Boston College for her exceptional work in designing this magnificent resource. And we thank Trish Do at the University of Texas at Austin for her excellent assistance.

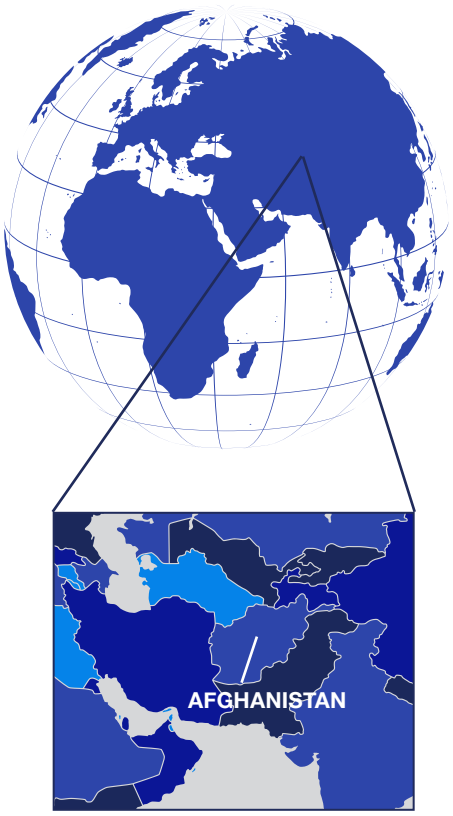
We are grateful to our fellow constitutionalist Vlad Perju, Director of the Clough Center for the Study of Constitutional Democracy and Professor of Law at Boston College. When we brought him our idea five years ago to create this partnership between I·CONnect and the Clough Center, he responded with enthusiasm and with invigorating ideas about how we might make this publication greater than the sum of its parts. And here we are today, thanks to his vision and generosity. The Global Review would not have become a reality without him.

We invite interested authors 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.

Happy reading!

COUNTRY REPORTS





Afghanistan

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I. INTRODUCTION

Afghanistan provides an excellent opportunity to witness how constitutionalism plays out in conflict-ridden societies. In a year where COVID-19 wrecked even the most developed nations, Afghanistan was no outlier. Yet, Afghanistan went through political developments that perhaps overshadowed the pandemic as far as domestic happenings go. 2020 was a watershed year for Afghanistan. It saw talks with the Taliban reaching their highest point. This resulted in a peace deal with the United States of America (US). Additionally, for the first time, the Taliban engaged in discussions with the Afghan Government. These events took place in the backdrop of an extremely contentious 2019 presidential election, which spilled over into 2020 and also saw the Afghanistan Supreme Court stepping in.

II. THE CONSTITUTIONAL SYSTEM

Understanding modern-day constitutionalism in Afghanistan requires, at the bare minimum, a bird's eye view of the 2004 Constitution, the constitutional system it created, and the politics surrounding the two of them. Consequently, this section will provide a brief overview of the aforesaid in order to lay down a framework for discussions that follow.

1. The 2004 Constitution

The 2004 Constitution of Afghanistan is the country's sixth constitution since 1923. While several provisions of the 1964 Constitution are carried forward or, in Ozan Varol's words, "stick," the 2004 Constitution owes its prime origin to the December 2001 Bonn Conference. Here, a group of Afghan elites assembled in Bonn, Germany, under the United Nations auspices with a view of ending a twenty-three-year long period of conflict in the country. The Bonn Conference laid down an agreement aimed at state-building in Afghanistan. Among other things, it mandated that Afghanistan was to draft a new constitution and convey a Constitutional Loya Jirga (CLJ) – the Afghan variant of a constituent assembly – to adopt the constitution. On January 2, 2004, the CLJ approved the "Constitution of the Islamic Republic of Afghanistan."

It was hoped that this comparatively liberal constitution would help put Afghanistan on the path to democratization. The 2004 Constitution was a first step for Afghanistan in recognizing Afghanistan's ethnic and religious diversity. It also embedded wide-ranging rights and recognitions for the same. As far as the structural provisions of the 2004 Constitution were concerned, it created a presidential system. Furthermore, the Constitution adopted a unitary model of governance, which concentrated most of the power in the Central Government. These choices were made to aid state-building in Afghanistan. In 2004 Afghanistan, all governance institutions were destroyed. Most of the country beyond the capital city of Kabul was under the command of regional militias and warlords. With respect to the judicial system, Afghanistan retained the Supreme Court from its 1964 Constitution. However, it expanded the Supreme Court's abilities by giving it the power of judicial review – something it did not exercise under the 1964

Constitution. Additionally, the Constitution created another body, the Independent Commission for Overseeing the Implementation of the Constitution (ICOIC), which would supervise the Constitution's implementation.

This seemingly well drafted Constitution was laden with issues right from the start. The 2004 Constitution was not a product of consensus. Efficient manoeuvring by the international community and the Transitional Government led by Hamid Karzai (the Pashtun power bloc's leader) ensured that warlords and Islamists could only exercise minimal influence at the CLJ. Ethnic tensions in the CLJ were not accounted for but were resolved with coercive backroom dialogues. The Constitution's adoption took place without any balloting. Delegates at the CLJ were simply asked to stand if they approved the Constitution. In the absence of a formal recording of votes, opposition voices were massively muffled.[1] The 2004 Constitution exemplified to a great degree the vision of the international community and the Karzai power bloc. As Noah Feldman mentions, the 2004 Constitution was a textbook example of a modern-day "imposed constitution."

Moreover, the above-mentioned are just the start of the Constitution's problems. In a deeply divided country with several ethnic cleavages, militarised groups, and where the Central Government controlled less than thirty percent of the territory, a unitary presidential system was a recipe for disaster. While Afghanistan has made significant headway in establishing state institutions, not a lot has changed on the peace front. The bulk of the country is still under the command of regional warlords and militias. These warlords and militias make their earnings from the countries flourishing illegal narcotics production, which accounts for more than half the country's GDP. The major variation since the Bonn years has been the fluctuation in the militias' and the local warlords' territorial control. The Taliban, which was on the cusp of oblivion and collapse, has re-emerged on the landscape, more invigorated than ever. Both the current Ghani Government and the US now recognize the Taliban as a legitimate participant in Afghanistan's future.

2. The Supreme Court and the ICIOC

As mentioned earlier, the 2004 Constitution retained the decentralized Supreme Court and created an independent commission, the ICIOC. This is only one half of the story. The original plan was to create a new centralized constitutional court. There was no ICIOC on the cards. A constitutional court was a demand of the non-Pashtun factions at the CLJ who feared they would lose the presidency to Karzai and his Pashtun successors. They saw a constitutional court as political insurance against presidential excess. A new constitutional court was also considered a good way to overhaul the existing legal system with the Supreme Court at the epicenter. Traditionally, the Supreme Court's control lay with the ulemas, who were trained in Islamic jurisprudence and who were accused of being a corrupt and self-perpetuating clan.[2] Karzai and his power bloc opposed the constitutional court out of apprehensions that it might trump the political system and act as a check on the president's office.[3] Ultimately, Karzai was able to exercise influence and remove the constitutional court from the Constitution's draft. Nevertheless, as a bargain, the ICIOC was added to the Constitution via Article 157. The Constitution was silent about the role the ICIOC was to play.

Article 121 of the Constitution provides for the Supreme Court and lays down its powers. According to Article 121, the Supreme Court can only receive judicial review requests from the government (and its constituent institutions) and the lower courts. As far as judicial appointments are concerned, Afghanistan has an appointment mechanism similar to the one in the US. However, appointments have taken the shape of an implicit *quid pro quo* system, where the President has appointed "aides or subservient judges" rather than qualified and independent judges.[4] The Supreme Court has, in pretty much all key disputes, taken the side of the President. This issue gets more complicated because right from day one, the Executive has often been at odds with the Legislature.

The conflict between the Executive and the Legislature reached its peak when the Parliament in 2007 impeached the then Foreign Minister and member of the Executive cabinet Dr. Rangin Dadfar Spanta. President Karzai referred the impeachment to the Supreme Court, which naturally ruled in his favour and held the impeachment unconstitutional. The Parliament rejected the Supreme Court's ruling, stating that the Supreme Court did not have jurisdiction to resolve disputes between the Executive and the Legislature. As a result, a crisis ensued over how to resolve such disputes. While the latter's full details are beyond this report's scope,[5] the Spanta affair ultimately resulted in the Parliament giving wings to the ICOIC and passing a law that gave the ICOIC the power to interpret the Constitution. At present, there are two bodies, the Supreme Court and the ICIOC, which exercise judicial review and interpret the Constitution. The Executive treats the Supreme Court as the body to interpret the Constitution and exercise judicial review while the Legislature looks to the ICOIC.[6] This has led to severe political skirmishes every time a disagreement emerged between the Legislature and the Executive.

On the other hand, when it comes to other

[1] J. Alexander Thier, 'The Making of a Constitution in Afghanistan' (2007) 51 N.Y. L. Rev. 557, 571.

[2,3] Barnett Rubin, 'Crafting A Constitution for Afghanistan' (2004) 15(3) J. Dem. 5, 18.

[4] Sayed Ziafatullah Saeedi, 'How Afghanistan's Judiciary Lost Its Independence' (*The Diplomat*, 5th June 2019) <https://thediplomat.com/2019/06/how-afghanistans-judiciary-lost-its-independence/> accessed 1st March 2021.

[5] See e.g., Shoaib Timory, 'Judicial Review and Constitutional Interpretation in Afghanistan' (2019) 42 Loy. L.A. Int'l & Comp. L. Rev. 223; See also Shamshad Pasarlay, 'Restraining Judicial Power: The Fragmented System' (2018) 26(2) Mich. State Int'l. L. Rev 245.

[6] Shamshad Pasarlay, 'Back to the Future: Why and How Afghanistan is Moving Towards a Constitutional Court?' (IACL-IADC Blog, 7th March 2020) <https://blog-iacl-aidc.org/2020-posts/2020/4/7/back-to-the-future-why-and-how-afghanistan-is-moving-towards-a-constitutional-court> accessed 1st March 2021.

not as political, constitutional decisions, the Supreme Court ultra-conservative judges have been eroding the liberal promises of the 2004 Constitution. Among other controversial verdicts, the Supreme Court has banned cable television and women singing on state-owned channels; ruled that a child bride could not get divorced from her abusive husband despite child marriage being prohibited; upheld the death penalty of two journalists for blasphemy who reported that Islamic practices in Afghanistan were reactionary; and decreed that the penalty for homosexuality is death despite there being no law requiring it. Karzai and his successor Ashraf Ghani have tolerated the Supreme Court's decisions because it has supported the President's office - *quid pro quo* again.

Another problem with the judicial system has been its corruption and lack of transparency (which plagues other government branches but are amplified in the judiciary's case). Per Transparency International, the judiciary is the most corrupt and non-transparent public institution in Afghanistan. Neither the Supreme Court nor the ICOIC publish their decisions or provide many details regarding their functioning. The only time they do is when they intentionally want to publicize it or when the Government clarifies in the official gazette that a specific legal change has been made because of a judicial decision. The way the bulk of the populace is made aware of either institution's decisions is through the means described above or through the media. These problems have been aggravated in the last two years, and the Supreme Court has been dubbed the "most closed government institution." As of this report's writing, both the Supreme Court's and the ICOIC's website have no information regarding the issues under consideration or any opinions that they have rendered.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The Presidential Election 2019-2020

Presidential elections have been one of the most controversial political events in this deeply divided country – especially considering the power the President wields. Afghanistan's latest presidential elections were initially slated to be held in April 2019. They were first delayed till July 2019 and then again to September 2019. The reasons cited for these delays was that the Election Board was trying to iron out problems with the voting process (particularly the use of technology in all phases). These delays raised the constitutional question of who is to run the Government in the interim. The presidential term was to get over on May 22, 2019. Article 61 of the Constitution states that new elections are to be held between 30 to 60 days before the end of a presidential term. The Constitution, however, does not provide any answers for what happens in case of delays. President Ghani was keen to hold on to power for the interim period, but his rivals were calling for him to step down. For the interim period, they demanded that a transitional caretaker government be constituted. This demand becomes more relevant considering that a candidate needs more than 50 percent votes to be elected in Afghanistan. In the absence of a 50 percent majority, a runoff election is conducted. Further, any delay in announcing the results could lead to an even more extended interim period.

The opposition's pressure resulted in the President's legal department requesting the Supreme Court to review Article 61 of the Constitution and provide its legal opinion on the governance arrangements in the case at hand. The Supreme Court issued a ruling on April 20, 2019, extending the President and Vice-Presidents' terms until a new president is elected. The Supreme Court cited a similar ruling of the Supreme Court in 2009 as the principal basis of its decision. Commentators state that this time the situation was different because of the opposition's demands for a transitional caretaker government. Even here, the ICOIC came into the picture. Abdullah Shafayi, a member of the ICOIC, created controversy by mentioning to the press that President Ghani had rarely referred constitutional issues to the ICOIC ever since he had opposed its members' decision to dismiss the chairman of the Commission in 2017.

This was not the end of the story. The elections were eventually held on September 28 with an excessively low voter turnout of 1,6 million out of the registered 9,7 million voters. The final vote tally was to be announced on November 7. Election results were repeatedly delayed amid accusations of fraud and technical problems with counting ballots. The Election Commission tried to launch a ballot recount in November, but Abdullah Abdullah (the other potential contender besides Ghani) halted any attempt to do so. He stated that his observers would not participate in any recount and stop attempts to carry out one. Thousands of his supporters rallied against what they said were 300,000 (almost 1/5 of the total votes cast) fake ballots. Abdullah agreed in December to allow a ballot recount in provinces where his supporters had stopped the process.

After several delays, Ashraf Ghani was declared the winner on February 18, 2020. Abdullah rejected the results, and both Ghani and Abdullah conducted separate inauguration ceremonies and moved to set up parallel governments. On March 23, 2020, the US announced that it would reduce aid to Afghanistan by one billion dollars due to the political stalemate. The US had further stated that if Ghani and Abdullah did not resolve their problems, it might reduce more aid. The election saga finally ended on May 17, 2020, when Ghani and Abdullah signed a power-sharing deal in which Ghani would remain president and Abdullah would lead the peace talks with the Taliban when they start.

2. The Taliban Peace Talks

While important occurrences for the future of Afghanistan and the world, the Taliban peace talks initially do not come across as "constitutional developments." But perhaps nothing implicates constitutionalism and its future in Afghanistan more than these talks. The present Taliban peace talks can be traced back to 2018 when Ghani announced that he was ready to negotiate with the Taliban and recognize them as a legitimate political party. At that time, the Taliban refused to engage with Ghani's Government, which it believed was a US puppet. In the interim, the Taliban began discussions with the US Government (as well as some other stakeholders like Rus-

sia). At first, in July 2018, US diplomats met secretly with Taliban leaders in Qatar. Over the next two years, as many as ten formal rounds of peace talks were held between US officials and Taliban leaders. Discussions in the middle had even broken down. During this whole period, the Taliban continued to not deal directly with the Ghani Government.

Finally, in February 2020, the US government and the Taliban signed an agreement in Qatar titled "The Agreement for Bringing Peace to Afghanistan." The key provisions of this agreement included: (1) withdrawal of all US troops from Afghanistan. This would take the form of an initial reduction of forces from 13,000 to 8,600 by July 2020, followed by a full withdrawal within 14 months if the Taliban abided by its part of the deal, (2) closing five US military bases within 135 days, (3) ending economic sanctions on the Taliban within six months, (4) that the Taliban would disallow the al-Qaeda from operating in areas under Taliban control, (5) that the Taliban would pledge not to attack US forces, and (5) that the Taliban would agree to peace talks with the Afghan Government.

The resulting intra-Afghan negotiations between the Afghan Government and the Taliban were originally scheduled to begin on March 10, 2020, in Norway. These talks did not resume on time over a discord regarding a prisoner swap deal in which, before the start of the talks, the Afghan Government would release 5,000 Taliban prisoners in exchange for 1,000 government soldiers held by the Taliban. This was a condition in the absence of which the Taliban refused to either reduce violence or come to the table. The delay was aggravated because of the Ghani-Abdullah power struggle and uncertainty over who would negotiate on behalf of the Afghan Government. Once the Ghani and Abdullah power-sharing deal was finalized (and after much back and forth by both sides), the first round of peace talks was held between the Afghan Government and the Taliban in Qatar on September 12, 2020.

The intra-Afghan talks continue to date – at a very slow pace and with disagreements over the smallest issues. There have been numerous impasses, violence has not reduced (if anything, it has only increased), and at the time of writing of the report, there have been calls for Ghani to step down as President. Proponents of this suggestion (including the Taliban) propose that an interim government handle affairs while the peace talks are ongoing. Ghani, on his part, has firmly rejected the possibility of this option. It is to be seen how the election of Joe Biden as the US President impacts the intra-Afghan discussions and the US deal with the Taliban. The Taliban talks with both the US Government and the Afghan Government raise some critical issues that would be vital to the future of Afghanistan's constitutionalism. Firstly, the Taliban rejects the current 2004 Constitution and calls it invalid, imported from the west and an obstacle to peace. The Taliban has demanded a new Islamic Constitution but stated that they would be open to an "Inclusive Islamic Constitution" this time. Flowing from that demand is the Taliban claim that they want Afghanistan to be under Islamic Law. The Taliban has also floated proposals for the judicial system to be headed by the Iranian style Council of Guardian's with sweeping powers, including those to remove officials who work in ways that contradict Islamic principles.[7]

IV. CONSTITUTIONAL CASES

As was mentioned earlier, the Supreme Court and the ICOIC do not publish their decisions unless they want to (and it serves to some end). Furthermore, at this moment, the respective websites do not contain any information coupled with the relevant official gazette's not having referenced in 2020 (and early 2021) a single case that involves Constitutional Law, it is tough to say definitively what the Supreme Court or the ICOIC have been up to. Ambitious requests for information from the relevant institutions and ministries were unanswered. In the absence of actual judgements, there remains uncertainty over whether specific cases implicated constitutional issues and, if yes, then in what way. Moreover, as Afghanistan's own neighbours, Pakistan and India demonstrate that glimpses of significant constitutionalism can be seen in the most unexpected of places. Without actual judgements, it is not easy to know where to look. Nonetheless, based on media reports and discussions with lawyers, academics, and journalists, the following are major cases from 2020 that might have constitutional aspects.

1. Acquittal Decision of Zaman Ahmadi (Freedom of Expression)[8]

In 2012, Zaman Ahmadi wrote an article on the destruction of the Bamiyan Buddha Statutes and submitted it for consideration to a local magazine. Later, the editors of the publication invited Ahmadi to their office. However, once Ahmadi went there, the police was waiting to arrest him. During his trial, prosecutors claimed that Ahmadi had committed blasphemy in his article and insulted Islam. A lower court convicted him of blasphemy and sentenced him to 20 years of imprisonment. All appeals were rejected as courts considered his case sensitive. Legal experts stated that his conviction violated Article 34 of the 2004 Constitution, which states that the freedom of expression is inviolable. After seven years, in December 2019, the Supreme Court reversed the 20-year jail sentence for Ahmadi. While reversing the decision, the Supreme Court weirdly held that a lower court must review the Supreme Court's reversal decision. In March 2020, the Supreme Court ordered his release. Again, due to the lack of a formal record, there is no information as to what led to the March 2020 decision of the Supreme Court and if a lower

[7] Shamshad Pasarlay, 'Back to the Future: Why and How Afghanistan is Moving Towards a Constitutional Court?' (IACL-IADC Blog, 7th March 2020) <https://blog-iacl-aidc.org/2020-posts/2020/4/7/back-to-the-future-why-and-how-afghanistan-is-moving-towards-a-constitutional-court> accessed 1st March 2021.

[8] Zahra Rahimi, 'Ahmadi Released After 8 Years' (TOI News, 12th March 2021) <https://tolonews.com/afghanistan/ahmadi-released-after-8-years> accessed 1st March 2021; See also 'Zaman Ahmadi is behind bar on charges of expressing his mind' (Kabul Now, 28th August 2019) <https://kabulnow.af/2019/08/zaman-ahmadi-is-behind-bar-on-charges-of-expressing-his-mind/> accessed 1st March 2021.

court reviewed the Supreme Court reversal. Back when Ahmadi was still imprisoned, the Supreme Court's spokesperson had refused to provide journalists with information regarding his case or its status.

2. Transfer of Funds From Central Bank to the Ministry of Finance Case (Separation of Powers)[9]

Early in the year, approximately 194 million dollars (15 Billion Afghanis) were transferred from the State-owned Central Bank to the Ministry of Finance (an executive branch institution). This transfer was authorized by the Vice President of the Bank and the Supreme Court's Chief Justice. The legal basis of this transfer or the details of the authorization are not precisely known. Legal experts have opined that irrespective of these unknowns, this transfer is unconstitutional and would require the Parliament's approval. Likewise, this issue raised controversy with several Parliamentarians who believed that only the Parliament could have approved such an intra-governmental fund transfer.

3. Rejection of Abdul Wahidi Appeal (Powers of Ministers and Corruption)[10]

Abdul Wahidi was the former Minister of Communication from 2015 until he was suspended in 2017 on accusations of embezzlement in his current position and misusing his authority when he was the Deputy Finance Minister in 2015. A trial court sentenced Wahidi to three years in prison on charges of corruption and misuse of authority in July 2018. The Appeals Court overruled this decision in July 2019 and acquitted him. The Supreme Court, in February 2020, reversed his acquittal and remanded the case back to the trial courts. Wahidi has stated to local newspapers that the Supreme Court decision was "a political plot…when the game is not working in the political ground, conspiracies are started through which the ball is thrown in the court of the judicial institutions." The President's Office and the Supreme Court both did not comment on Wahidi's remarks or about the case. Considering the nature of the case (and the fact that a large share of the Supreme Court's docket is allegedly comprised of corruption issues), this case might have thrown up several constitutional issues regarding minister's authorities and immunities under the Constitution.

V. LOOKING AHEAD

For constitutional law and politics, 2021 will undoubtedly be an exceedingly challenging year. The intra-Afghan peace talks will be the topic occupying the lion's share of the limelight. These talks and their outcomes will be vital for what lies ahead for Afghanistan's constitutionalism. If history is any evidence, the road ahead is very long. It will not be many years before Afghanistan sees a new Constitution – that is, if at all. For the time being, the 2004 Constitution is here to stay and run the country. As far as the judiciary is concerned, one can only hope that it can reform itself from within. This could certainly start with judicial institutions being more transparent. Though considering two female Supreme Court judges and one lower court judge were in the past few month's victims of targeted assassinations, judicial institutions would be hesitant to provide details of their working. Nevertheless, there will be a considerable onus on the Supreme Court and the ICOIC to prove its independence, though it seems highly unlikely that they will. Until then, all we can do is wish that 2021 is finally the year that puts Afghanistan on the road to peace for good.

[9] Zabihullah Jahanmal, 'Lawyers Critical of Money Transfer from Central Bank to MoF' (TOI News, 6th January 2020) <https://tolonews.com/business/lawyers-critical-money-transfer-central-bank-mof> accessed 1st March 2021.

[10] Tamim Hamid, 'Ex-Minister Wahidi Says His Case Has Been Politicized' (TOI News, 10th February 2020) <https://tolonews.com/afghanistan/ex-minister-wahidi-says-his-case-has-been-politicized> accessed 1st March 2021.

Albania

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I. INTRODUCTION (300)

The year 2020 was characterized not only by a political polarization as the year before but also by the effects of the pandemic. The parliamentary life was still affected by a prolonged boycott from the opposition coalition, which then relinquished *en bloc* their parliamentary mandates in February 2019.[1] Meanwhile the difficulties of the pandemic have slowed down the process of vetting judges and prosecutors and also the renewal of high courts.

In parallel to the above, the impeachment process against the President of Republic initiated by the governing majority in 2019 was closed without any concrete political or legal result which was not quite a surprise since the investigation committee has been inactive for months.

This report will focus on constitutional development during 2020 which includes constitutional reform on elections, the ongoing results of vetting process and the establishment or renewal of justice institutions (re)designed by the constitutional reform approved in 2016.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constitutional reform on elections

The political environment remained polarized throughout 2020. The opposition parties relinquish their parliamentary mandate *en bloc*. Institutional continuity was still ensured through gradual filling of vacant parliamentary seats. The Assembly had 122 out of 140 members. More than half of the relinquished parliamentary mandates have been reassigned by the Central Election Commission ('CEC') from the list of respective political parties of the opposition. As a consequence, the quorum for the full functionality of Parliament is maintained.

Despite that, the opposition has never accepted/acknowledged the new members of the parliament as part of the "opposition" and has excluded them as party members. The constitutionality of replacing the "old" MPs with "new" ones from the lists raised a question of a democratic representation of the people, which is still unresolved since the Constitutional Court has no quorum to decide on the merit of a case.

2020 was an electoral reform year, which in addition to amendments to the Electoral Code brought amendments to the Constitution[2] of Albania as well. This reform was the result of a consensus among political parties on the eve of the Parliamentary Elections, to be held on April 25, 2021. In general, throughout the democratic transition in Albania, the period before the election year has been a period of electoral reforms. The system of allocation of mandates provided by the 1998 Constitution was a mixed system based on a combination of the proportional system with the majority system. The constitutional reform of 2008 altered this system,

[1] See Richard Albert, David Landau, Pietro Faraguna and Simon Drugda, "Albania Country Report", I·CONnect-Clough Center 2019 Global Review of Constitutional Law, (2020).

[2] Constitutional amendments approved by Law No. nr.115/2020.

sanctioning the regional proportional system with multi-name constituencies in accordance with one of the administrative units of the territorial division of the Republic of Albania.[3]

The Constitutional amendment of 2020 presented some changes, which were focused mainly on these questions. (i) Regulations on the competition between the candidates in the proportional system, based on "open lists" instead of "closed lists" as it was foreseen prior to the amendment by the Electoral Code.[4] As a result, the voters will exercise their right to vote more effectively expressing their preference for specific candidates, in addition to voting for the political party and its list as a whole.

(ii) Abolishment of the pre-election coalitions of political parties and the possibility to run as such during election, thus allowing only political parties and voters to nominate candidates. The proponents to this provision claimed that it would affect the competition between political parties, as pre-election coalitions were used as a mechanism to reach the electoral threshold of entering in the parliament. As a result, it could excessively limit the ability of small political parties to represent their voters in parliament.

(iii) The amendment linked the electoral threshold with the possibility to profit from the distribution of mandates after election. The amendment gave the threshold a considerable weight in relation to the mandate's allocation system. Logically all three aspects are related to one-another and its result depend on their further implementation and harmonization by the Electoral Code.[5]

(iv) The amendment imposed a gender balance on the constitutional level. In the past there was a gender quota, which has been subsequently improved, increasing the number of women in parliament considerably. One of the reasons in including the gender balance in the constitution was the new formula of election based on open lists, which could negatively affect female representation.[6]

The 2020 amendments were proposed by a group of MPs to the Assembly on 15 June and adopted on 30 July, the whole procedure lasted only 45 days. Although the report of the Parliamentary Commission clearly presents the entire consultation process and its results which slightly defers from that initially proposed by the group of MPs,[7] it seems to have been a rather hasty procedure, which was also criticized by the Venice Commission and the OSCE/ODIHR in their opinion on the 2020 Electoral Reform.[8]

In addition, the parliamentary activity during 2020 has undergone some restrictions due to measures taken in order to prevent the spread of COVID-19 pandemic, which have impacted not only the public but also institutional activity. There were restrictive measures undertaken however there was no need to amend the Constitution on that regard. As of March 2020, the government reacted swiftly to the COVID-19 pandemic and took stringent measures, managing the crisis with limited human and financial loss. It issued a series of decrees subsequently endorsed by the Parliament. The State of Emergency for Natural Disaster was extended repeatedly. The authorities notified a derogation from the obligations under certain articles of the Convention for the Protection of Human and Fundamental Freedoms.

Meanwhile, the implementation of 2016 Justice Reform[9] went slowly forward in 2020. Its focus was particularly to fill the vacancies of the Constitutional Court and Supreme Court, in order to become operational after almost three years since its inactivity because of the vetting process.

Failed impeachment of the President of Republic

As presented in the 2019 Global Review (Albanian report), the Parliament initiated an impeachment procedure on the President that was finalized in late July 2020. The ad hoc inquiry committee of the Parliament concluded that while the President had overstepped his Constitutional power, the violations did not justify his impeachment. The actions of the President of the Republic which caused the initiation of impeachment procedure were mostly related with: (i) issuing several decrees on the date of local elections without any consultation with political parties; (ii) refusing 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; and (iii) the appointment of a Constitutional Court judge in a manner not in accordance with the Constitution.[10] The investigation committee decid-

[3] Constitutional amendments approved Law No. 9904, of 21.4.2008.

[4] Article 64 of the Constitution as amended in 2020.

[5] For more information, please refer to: "Report of the Parliamentary Committee on Legal, Public Administration and Human Rights Affairs", available at: https://www.parlament.al/Files/ProjektLigje/20200716145313Raport%20per%20ndryshimet%20Kushtetuese-16-7-2020.pdf, (2020).

[6] For more details see: Aurela Anastasi and Arta Vorpsi, "Albania Report", The 2020 International Review of Constitutional Reform, (forthcoming 2021).

[7] See: Report of the Assembly Laws Committee, cited.

[8] *"The Venice Commission and ODIHR regret that the procedure for the adoption of the amendments to the Constitution as well as of Law No. 118 was extremely hasty. A wide consultation among the political stakeholders and non-governmental organizations, providing adequate timeframe, should have taken place before the amendment of such fundamental texts"* see: Venice Commission CDL-AD(2020)036, Joint Opinion on the Amendments to the Constitution of 30 July 2020 and to the Electoral Code of 5 October 2020, para. 11.

[9] See Albert et al, note 1.

[10] Art. 90, para 2, 3 of Constitution.

ed to seek an *amicus curiae* from Council of Europe's Venice Commission, which stated that even the President needs a specific legal basis to postpone elections.[11]

Although the parliamentary committee worked for more than a year, the result was only a recommendation to approve a special law on the competences of the President of Republic, which could have been reached in a simple way of legislative activities, without the need to aggravate the political situation more than usual.

The (re)establishment of the Supreme Court

In the beginning of 2020, the High Judicial Council ('HJC') nominated 3 new judges of the Supreme Court, who came from the academia (non-magistrate judges). As of today there are no other new judges working at the Court, which has a backlog of more than 36.000 cases. The renewal process of the Supreme Court has been linked with the vetting process which take a considerable amount of time till the final decision (see the 2019 report).

The controversial renewal process of the Constitutional Court

As reported before, because of the vetting process of all judges and prosecutors in Albania, the Constitutional Court has not been able to carry out hearing of any case in full composition since Spring 2018. From January 2019 to November 2019, the court had only one judge. In November 2019, 3 new judges were elected. During 2020 the responsible institution for the selection and ranking of the candidates did not succeed until the last weeks of December to fill the vacancies, when 3 other judges were nominated. Despite the result, there is still concern about the constitutionality of these nominations considering that there was no competition and no list with at least 3 candidates, as the constitution and the organic law on the Constitutional Court requires.

The Justice Appointment Council evaluated and proposed only one candidate for each vacancy and sent them to the President and the parliament for final approval, which at the end is a mandatory confirmation, not a selection. There are also doubts on the qualification criteria of some candidates who challenged the decisions of the Council before the court repeatedly. The process of nomination was elaborated in details in the report of 2019. Meanwhile there are still 3 judges of the Constitutional Court who should be selected by the Supreme Court, which is currently impossible since the latter is not fully functional. There should be at least 12 judges at the Supreme Court to select the candidates for the Constitutional Court. In actuality there are 7 judges (the mandate of one of them has been expired in 2017) instead of 9.

The inability of the Constitutional Court to issue rulings due to lack of quorum led to legal uncertainty during the reporting period and exacerbated a number of constitutional disagreements between the government and the President of the Republic.

III. CONSTITUTIONAL CASES

As mentioned above, the Constitutional Court has not been in position to decide on merits of cases since Spring 2018 because of the lack of quorum. The situation did not change during 2020. It means that cases raised in 2019 are still pending before the Court.

IV. LOOKING AHEAD

From a political point of view the most important matter is the ongoing electoral reform which requires the readiness and willingness for collaboration between the political parties. Currently, the opposition is divided in two large groups: one represented in parliament (called 'parliamentary opposition') and the other taking actions 'outside' the parliament. It remains unclear if the electoral reform is successful. The next election, scheduled for April 25th, 2021 will be a testing moment.

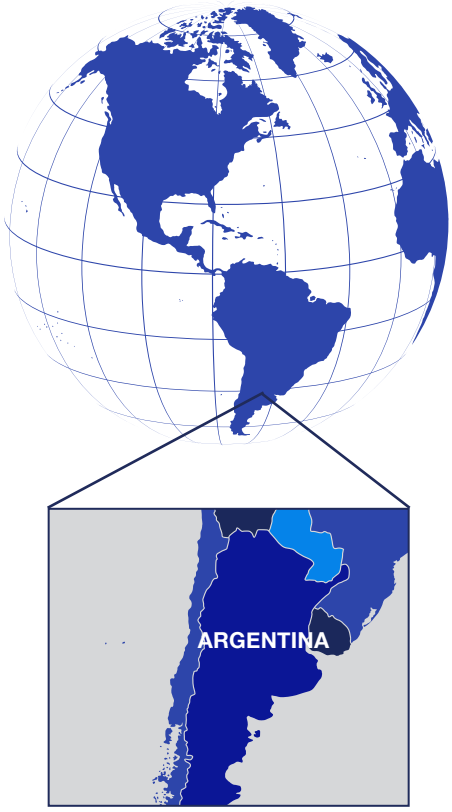
Another issue as important as electoral reform is justice reform. The establishing or renewal of the justice institutions is taking a considerable amount of time, which has led to a complex situation affecting human rights of individuals seeking for justice. The full functioning of the Constitutional Court and the Supreme Court is crucial for a democracy. There are pending cases waiting to be adjudicated. This affects the rights of the citizens to have justice within a reasonable time. There are already cases before the ECtHR against Albania claiming domestic remedies are not effective because both high courts have not been functioning for almost 2 years. There is hope that in 2021 steps forward will be made to reach the full composition of both high courts to decides complaints in merits.

V. FURTHER READING

Aurela Anastasi and Arta Vorpsi, "Albania Report", 2020 International Review of Constitutional Reform, (2021).

Gjergi Erebara, "Venice Commission Queries Albanian Move to Impeach President", Balkan Insight at: https://balkaninsight.com/2019/10/11/venice-commission-queries-albanian-move-to-impeach-president, (2019).

[11] See Albert et al, note 1.



Argentina

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I. INTRODUCTION

The most important development of 2020 peaked with the year's last breath. On December 30, Congress passed a statute decriminalizing abortion, culminating an extraordinary process of women's mobilization. Other than this, the Supreme Court found itself pressed by opposing forces to settle politically intractable questions. The outcome was bad constitutional law—the kind only a country perpetually in crisis can produce. We devote most of this report to the existing dispute between the two main political factions regarding the legitimacy of judicial inquiries into previous administrations. The controversy has put extra strain on a flawed and manipulated judiciary.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year ended on an extremely high note, crowned as it was by Congress' enactment, on December 30, of a statute legalizing abortion during the first fourteen weeks of a pregnancy.[1] The legislative debate was as intense as in 2018 but shorter. This time, the law had the explicit support of the President, who used his power of legislative initiative to send the bill himself. This unequivocal political endorsement may partially explain why the Senate flipped in just two years. (The 2018 bill cleared the House but was narrowly defeated in the Senate.) But the indefatigable women's movement is the main reason that the law saw the light, a necessary step to end clandestine abortions and give women a voice regarding their body and choices. Its awe-inspiring achievement deserved a first mention.

As everywhere else around the globe, 2020 was defined by the Covid-19 pandemic. By March, Argentina had gone into a strict lockdown established by an executive order with the support of all provinces' governors. The decision restricted the constitutionally protected freedom of movement under public health grounds. The initial measure was to last eleven days[2] but it was eventually renewed seven times.[3] On July, the President issued a more comprehensive regulation of the emergency measures, including a set of criteria to manage rights' restrictions and the stringency of social distancing measures.[4] Perhaps predictably, Congress was slow to react. It spent weeks discussing changes to its procedures to allow for virtual sessions, including an unusual legal action by Vice President Cristina Fernández de Kirchner who, as the Senate's President, asked the Supreme Court to clarify whether virtual sessions would be deemed valid.[5] The Court ducked the question by saying that there was no actual "case or controversy". While we cannot describe in detail the complex and somewhat flimsy legal architecture of the emergency measures, which otherwise seem intelligible to us substantively, the nation's reaction followed the familiar pattern

[1] Ley 27.610 [statute], published 15 January 2021.

[2] Decreto 297/2020 [executive order], 20 March 2020.

[3] Decretos 325/20, 355/20, 408/20, 459/20 y 493/20, 520/20 and 576/20 [executive orders].

[4] Decreto 605/2020, 18 July 2020 [executive order].

[5] Fernández de Kirchner, "Cristina en carácter de Presidenta del Honorable Senado de la Nación", CSJ 000353/2020/CS001, (2020).

of concentration of power on the executive at the federal and provincial levels and fairly weak legislative and judicial oversight.

One dominant and vehement dispute during the year concerned the open judicial inquiries into the previous Kirchnerist administrations (2003-2015). For the Peronist-Kirchnerist coalition that in 2019 placed President Alberto Fernández and former President and current Vice President Cristina Fernández de Kirchner in office (no relation between them), a set of ongoing indictments on corruption charges are nothing but "lawfare," the politically motivated use of the judiciary as a witch hunt of the opposition. For *Juntos por el Cambio*, the coalition that governed from 2015 to 2019, the inquiries are both sound and under attack by an administration that features some its members—including the Vice President herself—among those being investigated.

This dispute presents a challenging issue from a constitutional standpoint, one with potential long-lasting effects. (And, as we shall note, the most important case of the year is closely tied with it.) The controversy builds upon the country's traditionally murky relationship between politics and the judiciary and is a thorn in the side of President A. Fernandez's judicial politics. On March 1, the President inaugurated the legislative year by announcing in Congress an ambitious judicial reform agenda that, among other things, would dilute the power of the twelve federal judges based in Buenos Aires City in charge of handling corruption cases. For the President, it was imperative to stop both the "fabrication of indictments" and "arbitrary pre-trial detentions" and to prevent judges' discretion from overriding legal rules. He also linked his judicial agenda to the much-needed reform of the nation's intelligence agency. The latter's improper connections with the judiciary (which space constraints prevent us from expounding) constitutes an inadmissible institutional trait in a democracy to which all administrations have contributed to since the 1990s.

The President established a commission of experts to study ways to "strengthen" the judiciary, including analyzing how the Supreme Court could be made more effective. The commission came into existence in July and was populated by eleven mostly prestigious jurists including—significantly—Mr. Carlos Beraldi, one of the attorneys representing Vice President C. Fernández. (Critical media unkindly called this commission the "Beraldi Commission.") After three months, the commission issued a useful but inconclusive report that reads like a seriatim opinion since its members failed to agree on a shared proposal.

In parallel, President Fernández sent to Congress a draft bill aimed at restructuring the federal judiciary, creating dozens of new courts to achieve among other things the previously mentioned diluting effect. The bill was swiftly discussed and approved in the Senate, but it faced more obstacles in the House. As of February 2021, there were not clear signs that it was moving forward, although political pressure against the judiciary was fast simmering. The lagging judicial reform agenda was seemingly a source of dispute within the ruling coalition. In August, Vice President Fernández stated that this judicial reform was not the (arguably more aggressive) one the country needed. In October, she said that there were "officials who do not work"[6] (*funcionarios y funcionarias que no funcionan*), a criticism that observers considered was leveled at the Minister of Justice, allegedly one of the President's trusted advisors. And, in December, she accused the Court of "directing" and "coordinating" the "lawfare" efforts targeted at her, her family, and some members of her former administration. According to the Vice President, these efforts were part of a media and judicial conspiracy to "hunt and imprison members of the opposition" that had started when former President Macri reached the presidency in 2015, though some of the investigations had initiated before this date. This accusation underscores the seriousness of the political controversy and the tough spot in which the President–a part-time law lecturer who has said to be committed to judicial independence–finds himself in as the minority partner in a ruling coalition that demands from him a belligerent condemnation of the judiciary.

What to make of these attacks? The credibility of the federal judges in charge of corruption cases is fantastically low. Political pressure of these and other judges is a sad reality and part of a flirting game judges themselves often play eagerly in exchange for favors. While there are few doubts that the Macri administration was keen on aggressively pushing those prosecutions–which does not mean that some of them were weightless–it looks like the current administration focused on a still picture instead of a slow-evolving movie, since the previous is part of a trend that is not the product of a single administration. The selective prosecution of politicians once they lose power is rather common and has often been supported by the incoming administration.

The judiciary in the country is generally inefficient, corporativist, conservative, and weakly transparent, so some type of reform is indeed much needed. Nevertheless, the reform should not be in the direction of enhanced political control and aim instead for improvements in efficiency, accountability, and independence from all powerful actors–the administration, the opposition, and, not least, any economic interests. Achieving this is a hard task that demands both strong political will and a plural consensus.

III. CONSTITUTIONAL CASES

Bertuzzi and *Bruglia:* Transferring Judges

The most politically fraught decision of the year found a Court largely split in the way noted in previous reports. The case concerned the transfer of criminal law judges, including those intervening in corruption cases. In 1994, a constitutional amendment established the *Consejo de la Magistratura*, a body that compiles a list of candidates based

[6] 'Cristina Kirchner cuestionó al Gabinete de Alberto: "Hay funcionarios y funcionarias que no funcionan"' (*iProfesional*, 26 October 2020) <https://www.iprofesional.com/politica/326323-cristina-kirchner-hay-funcionarios-que-no-funcionan> accessed 11 February 2021.

on exams and other qualifications to fill each vacancy (other than Supreme Court vacancies) in the federal and national judiciaries.[7] From this list, the country's President selects one candidate and sends it to the Senate for confirmation. Although undoubtedly superior to the more politicized system it replaced of appointment and confirmation, the new system, in operation since 1998, preserved some problems and aggravated others.

One of these is the long time it takes to fill vacancies, around three and a half years from the opening of a selection procedure to a Senate confirmation.[8] To minimize the impact of delays, both the council and the country's president have engaged in the otherwise long-standing practice of transferring judges who are already confirmed for, and sitting in, a given court to another one, including in cases where a new court is established anew. One of the obvious dangers of the practice is that it allows for political maneuvering, not to rid of a judge perceived as 'hostile' since she must consent to the transfer, but to sit a 'friendlier' judge in a court. If these transfers are made permanent, they risk violating the constitutional appointment system since they circumvent the staggered participation of council, President, and Senate. Were delays due to objective constraints, transfers would be a bad solution to a product of circumstance. But a risk exists that there is endogeneity to the problem. When there is political alignment of both a majority at the council and the country's president, delays may be exacerbated to allow for a transfer instead of proceeding with a normal appointment.

In 2020, the Court said that the time had come to minimize if not end this system. Given the above, one would be very hard-pressed to dispute this conclusion. We join others who have expressed that "the best transfer system is one that does not exist"[9] or something to that effect. The problem is the rationale of this hotly political case. During President Macri's tenure (2015-2019), five national courts were transformed into federal ones, which many commentators rightly saw as setting a friendlier ground for the federal prosecution of outgoing President C. Fernández and related politicians. This is nothing much new–as noted, most administrations have regrettably messed with the judiciary. In an administrative decision (*Acordada*) from 2018, the Court by majority halted this move. Yet, responding to a consultation from the Macri administration, it refined its previous decision. It clearly underscored the exceptionality of, and the risks involved in, transfers but said that what was forbidden by the Constitution was the transfer of a national judge to a federal court or vice versa. A new appointment was not needed in the transfer of a judge serving in a national court to another *national* court and, similarly, of a judge serving in a *federal* court to another federal court if the hierarchy of both courts were analogous. The administration followed through, transferring several federal judges to vacant federal courts.

Things changed under the new administration of President A. Fernández and Vice President C. Fernández de Kirchner as the council (with a changed composition) retraced its steps. In July 2020, it declared that the standing of ten judges, including two who would have to decide appeals in cases involving Ms. C. Fernández in her previous capacity as President, was irregular since they had sidestepped the Constitution's appointment system. (The council also adopted a more stringent transfer system that still did not comply with the Constitution.) Those two judges brought a writ of *amparo* against the council decision which a first instance judge dismissed in August. In September, a Senate controlled by the administration's party predictably failed to confirm the transfers, which prompted the President to sign an order ending them.

That same month, the Court by unanimity invoked the seriousness of the institutional matters involved to hear the case before the appeals court (the "superior court") intervened, as it had done in a series of mostly infamous cases in previous decades. Although the seriousness of the matters was beyond dispute, the case was ripe for an arguably speedy decision by an appeals court, so the Court could have waited. The Court's willingness to hear the case caused an uproar in the administration and its followers, who heavily criticized the tribunal while bracing for the impact of what they saw as a sure decision siding with plaintiffs. Yet, when the Court announced a decision a month later, it was to dismiss the case. The same three justices who had penned the administrative decision seemingly consenting to the transfers signed the majority opinion (Justices Lorenzetti, Rosatti, and Maqueda; Justice Highton concurred, and Justice Rosenkrantz dissented), ruling that the judges' situation was irregular while declaring lawful their official performance thus far to satisfy legal certainty. It also struck down the transfer system in place and exhorted the council to speed up regular procedures. While the administration was doubtless pleasantly surprised by it, the decision did not completely mollify it since it ordered that a new procedure be opened to fill the vacancies of the two courts where the judges had sat by guaranteeing their participation if they so wished. The decision did not pleasantly surprise anybody else. When a court seeks to satisfy everyone, it risks satisfying no one.

The majority opinion is long, but its core is simple. Citing the study referenced above, the Court highlighted the delays involved in appointments. But it said that the Constitution establishes a single system for appointments of federal lower judges (the staggered participation of council, President, and Senate), and emphasized that transfers that do not comply with that system jeopardize judges' independence and the right to an impartial judge. Now, the key question was how the Court tried to square its conclusion in this case with

[7] National courts are non-federal courts under federal control in Buenos Aires City, the country's capital district.

[8] UNJCP, "Programa de Estudios Sobre Poder Judicial: Laboratorio de Estudios Sobre Administración Del Poder Judicial", 74, (2019).

[9] Gustavo Arballo, "El Único Reglamento de Traslados Permanentes Constitucionalmente Admisible Es El Que No Existe", Saber Derecho accessed from http://www.saberderecho.com/2020/10/el-unico-reglamento-de-traslados.html, (2020).

its 2018 administrative decision, and, in our view, it failed to do so satisfactorily. The Court's majority said that the 2018 decision had been exclusively referred to the question it had been asked concerning the legality of *transitory* transfers. When it said that a new confirmation procedure was not necessary, it was answering that it was not necessary *for those transfers.* The procedure was obviously necessary for *permanent* transfers, since concluding otherwise would mean equating transfers with regular appointments, thus creating a new appointment system.

Hard as we tried, we could not find in that previous decision any trace of that distinction. The majority said that plaintiffs' interpretation of the 2018 decision was unreasonable because it was tantamount to arguing that the Court had in practice amended the Constitution. Although we agree that this outcome was unreasonable, it was the one that most clearly stemmed from that decision and that the Court had accepted as part of a long-standing practice. The Court now distanced itself dramatically from that decision by negating that it had made it in the first place. Dissenting, Justice Rosenkrantz remarked among other things that the practice of transfers had been accepted for decades and that the Court in 2018 had not introduced any difference between temporary and permanent transfers.[10] Yet Rosenkrantz avoided criticizing the transfer system itself.

Assuming we are correct in saying that the Court in 2018 did not attempt to distinguish between a transitory transfer and a permanent one, how can the new decision be made sense of? One possibility is that the Court now genuinely realized that it had erred on constitutional grounds. True, such transfers were routine, but it was time to end them since they had become too pervasive and politically motivated. Also, the Senate's rejection of specific transfers in September could signal that the acquiescence by the political class upon which transfers were based had ceased to exist. While the Court should have banned transfers when it wrote about the issue in 2018, it would have been preferable that it openly acknowledged the mistake rather than equivocating the issue. The other possible reading of the new decision is that the Court simply realized that upholding the 2018 criterion would invite backlash in an already rarified environment. Perhaps the 2017-2018 saga concerning prison terms for those involved in massive human rights violations about which we informed in our 2018-2019 reports was fresh, and the Court wanted to shield itself this time. While we appreciate the general outcome—the extant transfer system is indefensible—we do not welcome the Court's reasoning. It is time for the Court to put an end to what the scholar A. Binder has labeled its "elusive and labyrinthine rhetoric."[11]

Pando: Upholding free speech

In *Pando*,[12] the Court had to decide whether a photomontage of pro-military activist María Cecilia Pando was off limits. Four of the five justices (Justice Highton did not participate) decided against the plaintiff and ratified its rather protective freedom of expression case-law. The case involved the satirical *Barcelona* magazine, which mocked a protest in which Pando participated, with several activists chaining themselves up at the gates of the Ministry of Defense to oppose prosecutions for past human rights abuses. Pando is the leader of a group that defends prosecuted officials and denies that those abuses ever took place; she is also the wife of a former military officer. The magazine photoshopped Pando's head on a scantily dressed female body that was bonded in S&M fashion. The Court rightly framed the publication as part of the right to critique others and said that what matters in those cases is to determine whether the critique was unjustifiably insulting. It did not consider that it was. We agree with the outcome and wonder whether the Court would also deem acceptable a similarly harsh critique against more popular or sympathetic plaintiffs.

Lee: Emergency powers under Covid-19

The full implementation of lockdown measures established by the national government rested on the provinces.[13] Nowhere was the lockdown stricter than in the northern Formosa province, ruled since 1995 by the heavy hand of Governor G. Insfrán. The governor's handling of the lockdown was the target of serious criticism. One of the measures he implemented was to close the province's borders in April and establish a system of "orderly return" for citizens caught outside it. Stranded citizens would have to ask for permission to return and, if receiving it, would have to isolate for two weeks in government-run centers. According to the information given by the provincial government to the Court, the program had received over 13,000 requests by October 31st, of which around 6000 had been granted and nearly 7500 were pending authorization. (The province had 1455 beds available for the quarantine in government quarters and those willing to pay for hotels adapted for that purposes were able to do so.[14])

Although a full decision on the merits has not been announced yet, a unanimous Supreme Court preliminary found that the statute implementing the measures excessively limited the right to move freely within the country. Now, the justices reached that (arguably sensible) conclusion by saying that statutes can be struck down if, as in the case, they were "unreasonable–when the means do not match the ends pursued–or when they entail a clear iniquity".[15] As an adjudication tool,

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

[11] Alberto Binder, "El Arte de Agravar La Institucionalidad", Pagina12, retrieved from: https://www.pagina12.com.ar/303615-el-arte-de-agravar-la-institucionalidad, (2020).

[12] *Pando de Mercado, María Cecilia c Gente Grossa SRL s/ daños y perjuicios,* CIV63667/2012/CS1 [22 December 2020].

[13] Decreto 605/2020 [executive order], sections 21-22.

[14,15] CSJN, *Lee, Carlos Roberto y otro c/ Consejo de Atención Integral de la Emergencia Covid-19 Provincia de Formosa,* FRE002774/2020/CS001 (19 November 2020).

this has a ring of rational-basis review but exceeds it. Yet it also does not appear to be a European-style proportionality analysis or a U.S.-inspired categorical review. The Court should be more careful than it is in its articulation of a method to analyze rights limitations and balance rights and interests. Indeed, the case provided (and, since a merits decision is pending, it still provides) an excellent opportunity to develop a more structured proportionality approach, which the Court has hinted at in the recent past but never developed seriously. The Court relied on a vague finding of *unreasonableness*, aided for that purpose by the fact that the program was not "limited in time", but without considering its effectiveness, weighting the state interests and rights at stake, and/or analyzing less restrictive alternatives.

Ademus and *Ministerio de Trabajo:* Unions

In Ademus, the Court had to decide whether the law that assigns the right to collective bargaining to the "most representative" union in the relevant sector was constitutional. Partly addressing the International Labour Organization's (ILO) criticism of the domestic law of unions, a series of Court decisions in the recent past had found that the law unconstitutionally limited union pluralism in various respects, although the Court had not openly decided yet on the issue of collective bargaining. A set of unions that were not the "most representative" now claimed that the statute unduly restricted their power to sit with management in collective bargaining, a power exclusively reserved to those most representative unions. The Court considered the preference legitimate and within what the ILO experts themselves found acceptable,[16] thus failing to expand its previous case law. Justice Rosatti dissented. He viewed the limitation as violating the constitutional mandate to guarantee democratic, free, and non-bureaucratic unions.

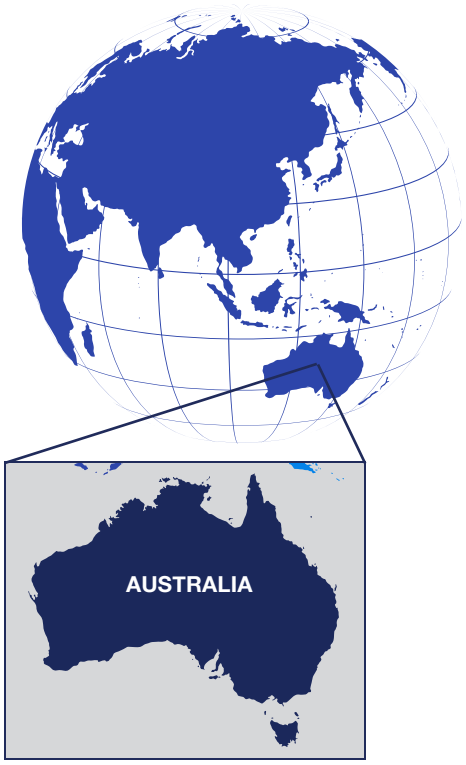
In *Ministerio de Trabajo,* the Court ratified the line of a case we discussed in our 2017 report, according to which the state is entitled to restrict the right to join or form a union of members of the security forces. The case presented a slightly new scenario, as those seeking unionization were now police officers and prison guards. A majority found that the Entre Ríos province had implicitly restricted the right by including as a "serious offense" in the statutes regulating the conduct of both police officers and prison guards the making of "collective demands", since a union is nothing but an organization to fight for "collective interests".[17] Like in the 2017 case, Justices Rosatti and Maqueda dissented, the latter sensibly insisting that such a limitation must be explicit. A ban to join a union should not be construed from a rule whose goal was to maintain internal discipline.

This decision came weeks after a demonstration by police officers of the Buenos Aires Province forced the hand of the governor to provide a (otherwise) necessary salary raise. The protest included utterly objectionable actions such as the envelopment of the Presidential residency with patrol cars.

IV. LOOKING AHEAD

It will be key to critically follow the political crisis concerning the judiciary. By the time the reader sets her eyes on these pages, she will already have a type of information we currently lack. Any transformation of the judiciary should not aggravate current predicaments but instead address them.

[16] CSJN, "ADEMUS y otros c. Municipalidad de la Ciudad de Salta", FSA648/2015/CS1 (2020).
[17] CSJN, "Ministerio de Trabajo, Empleo y Seguridad Social c/ Asociación Profesional Policial y Penitenciaria de Entre Ríos", CNT044551/2015/CS001, (2020).



Australia

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I. INTRODUCTION

In 2020, Australian Constitutionalism was hit with the unique challenges posed by the COVID-19 pandemic. The pandemic, as was the case with numerous other liberal democracies, tested Australian express and implied constitutional civil and political liberties.

The Australian response to the pandemic has left citizens stranded outside Australia, in addition to students and temporary visa holders being unable to leave the country due to rigid rules against re-entry. The pandemic further posed questions about Australian federalism and the movement of citizens across state borders during times of crisis. As such, COVID-19 has exposed Australian federalism's capacity to act as a restrictive tool that can limit the movement of citizens across state borders.

Despite the significant challenges posed by 2020, progress was made by the High Court of Australia in taking a step towards recognising the rights of indigenous Australians to autonomy. While the Court stopped short of recognising indigenous sovereignty, the Court did recognise an indigenous connection to the land and an indigenous sense of belonging in Australia.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. COVID-19

COVID-19 generated several important judicial decisions in 2020 in response to state government border closures and lockdown measures. For its part, the state of Victoria enacted one of the longest and most rights-restrictive lockdowns of any liberal democracy globally. In locking Victoria down in three separate instances, Victorian Premier Daniel Andrews instituted a range of measures after declaring a State of Emergency, including the closure of all non-essential businesses, places of worship, and the imposition of an 8pm-5am curfew for all Victorians. Furthermore, Victorians were subjected to a 5km limitation on movement and for a major part of the initial lockdown, restricted single Victorians from visiting any other person.

The economic ramifications of the 112 days lockdown were particularly pronounced, leading to legal challenges to the COVID-19 measures. For example, the Supreme Court of Victoria in *Loielo v Giles* examined the curfew imposed on Victoria under the Public Health and Wellbeing Act 2008. The case was brought by a small business owner on the basis that the curfew had a detrimental effect on her business,[1] and impinged on her rights to liberty and movement under the *Victorian Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter)*.

In the Supreme Court of Victoria, Judge Ginnane began his analysis by noting that the curfew constituted a "major restriction" on the human rights of Victorians.[2] In assessing the impact of the curfew on the right to liberty, the Court found that "the human right of liberty … does not apply to the Curfew's impact on [the plaintiff], but … the human right of freedom of movement does".[3]

[1] *Loielo v Giles* [2020] VSC 722, 4.
[2] Ibid, ¶2.

Turning to the question of the plaintiff's right to freedom of movement, the Court had to determine, under the first part of section 38(1) of the *Victorian Charter,* whether the limitations imposed were proportionate.[4] The Court characterised the right to health as "being ultimately concerned with the right to life," a "pre-requisite for the enjoyment of all other human rights."[5] Relying on evidence to the efficacy of the restrictions, and keeping in mind that Victoria was in a state of emergency,[6] Judge Ginnane concluded that there were no other reasonable means to curb the spread of the pandemic and thus held the curfew to be proportional.[7]

In assessing the second portion of section 38(1) of the Charter, which requires a decision-maker to be mindful of the possible impacts of the policy on human rights,[8] the Court concluded that the defendants "approach was that the sooner that the spread of the virus was substantially reduced, the sooner people would be able to resume their normal lives."[9] In doing so, the Court held that the plaintiff's Charter claim had not been established.

The Victorian COVID-19 lockdown measures were further challenged in the Australian High Court. In *Gerner v The State of Victoria,* it was submitted that a right to freedom of movement is implied under the Constitution.[10] In examining whether an implied right to freedom of movement exists under the Constitution, the High Court noted that such a right would constitute a "limitation on legislative or executive power rather than a personal right, effectively limiting the capacity for the state to make laws…to restrict freedom of movement."[11]

The plaintiff had asserted that such a limitation springs from the fact that federation produced "one people, one nation, where there had been several peoples and several colonies."[12] The Court rejected this approach on several grounds. First, it acknowledged that "the notion that a freedom of communication or movement is a freestanding implication of the *Constitution*… is contrary to the settled course of authority in this Court."[13] Second, the Court noted that the question to be asked when determining what the Constitution implies is not "what is required by federation" but rather, what "the terms and structure of the Constitution prohibit, authorise or require."[14] According to the Court, "federation is not a 'one size fits all' proposition; the kind of federation that is created depends on the *text and structure* of its constitutive instrument."[15] Third, the Court noted that "States as members of the federation established by the Constitution are expressly preserved by s106 of the Constitution."[16] Accordingly, the Court found that the plaintiff's assertion that state powers are "necessarily limited" by freedom of movement "draws no support in the text or structure of the Constitution."[17] The Court noted that "Section 51(ix) of the *Constitution* confers on the Commonwealth Parliament an express power to make laws with respect to 'quarantine'."[18] It further observed that "by virtue of s 106 of the Constitution the concurrent legislative power of the States with respect to the same subject matter was expressly preserved'.[19]

Having dismissed the plaintiff's assertion that a right to freedom of movement is implied under the Australian Constitution, the Court moved on to assess the plaintiff's claims under section 92 of the Constitution. In this regard, the plaintiff submitted that freedom of movement is implicit in section 92 on the basis that "intrastate movement is a necessary incident of the freedom of interstate intercourse it guarantees."[20] In assessing the plaintiff's assertion, the Court held that accepting such an assertion "would be to accept an implied restriction on legislative power that is wider in its operation than the express terms" of the Constitution.[21] The claims were therefore dismissed.

Finally, in a blow to political rights, the New South Wales Supreme Court refused to authorise a Black Lives Matter protest, on the basis that it would "increase transmission" of COVID-19. Judge Fagan acknowledged

[3] Ibid, ¶221.
[4] Ibid, ¶224.
[5] Ibid, ¶239, citing Blackstone and the UNHRC Gen. Comment 36.
[6] Ibid, ¶249.
[7] Ibid, ¶253.
[8] Ibid, ¶255.
[9] Ibid, ¶260.
[10] *Gerner v The State of Victoria* [2020] HCA 48, ¶7.
[11] Ibid ¶10
[12] Ibid ¶11.
[13] Ibid.
[14] Ibid ¶12-13.
[15] Ibid ¶14 (emphasis added).
[16] Ibid ¶15.
[17] Ibid.
[18] Ibid ¶16.
[19] Ibid ¶15-6.
[20] Ibid ¶28.
[21] Ibid ¶28.

the importance of the right to protest and the focus on indigenous Australian concerns but described arguments supporting the protest as "futile," concluding that to allow it to proceed would be an "unreasonable proposition" in light of COVID-19 restrictions.[22]

2. Religious Discrimination Bill

The Australian Government is currently considering the controversial Religious Discrimination Bill 2019. The Bill aims to eliminate discrimination against persons based on "religious belief," which is defined as "(a) holding a religious belief; or (b) engaging in lawful religious activity; (c) not holding a religious belief; or (d) not engaging in, or refusing to engage in, lawful religious activity." On the face of it, this Bill gives much-needed protection to religious citizens who do not benefit from robust Constitutional guarantees of freedom of religion. While the Australian Constitution protects freedom of religion of citizens, the High Court of Australia has narrowed the scope of protection given by section 116 (the Freedom of Religion Clause of the Constitution) to only apply to Federal policy.[23] The restrictive interpretation of section 116 has resulted in religious liberty, and relatedly discrimination cases, being challenging to litigate under the Australian Constitution. In light of this, the legislation is a welcomed move because it gives effect to the constitutionally guaranteed religious liberties of citizens. However, independent of the added level of protection, the Religious Discrimination Bill may be viewed as too comprehensive in that it enables the discrimination of other minorities by religious citizens.[24]

The Bill is particularly controversial for a clause that attempts to prevent discrimination based on statements of belief, defined as "(a) the statement [which]: (i) is of a religious belief held by a person ; (ii) is made, in good faith, by written or spoken words by the first person; (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs, or teachings of that religion." In protecting statements of beliefs, the Bill can be criticised on several levels.

Importantly, the Bill is criticised for overriding protections given to other heads of discrimination. Section 41 of the Act states that "(1) A statement of belief does not: (a) constitute discrimination for the purposes of any anti-discrimination law." Additionally, section 41 of the Bill has a limited set of exceptions arising when the regulation of "a statement of belief" is legal. The section notes that a statement of belief can be regulated when (a) "it is malicious," or (b) where it "would, or is likely to, harass, vilify or incite hatred or violence against another person or group." The Bill, therefore, provides that a religious statement made in good faith does not constitute discrimination under another head of Australian discrimination law. Second, the Bill establishes a high threshold in determining when statements of belief can be regulated. The Bill makes it clear that regulation can only occur in circumstances where a malicious statement is not made in good faith and is likely to incite hatred or violence against a person. This is similar to the high threshold that is used to regulate free speech in the United States and therefore has proved to be extremely controversial.

3. Kerr's Palace Letters

The dismissal of the Whitlam government by the Governor-General in 1975 remains a controversial political event that is deeply related to Australian constitutional identity.[25] Despite being analysed thoroughly, the event remained shrouded in mystery and never fully impacted Australian constitutional identity in the way that some predicted.[26] However, the event remains relevant in the long-standing debates about Australian republicanism and the movement away from the dominion status held by Australia which continues to vest sovereignty with the British Crown.

By way of background, the dismissal of the Whitlam government occurred against the backdrop of a three-week constitutional crisis. Prime Minister Gough Whitlam was elected in December 1972 and subsequently in May of 1974. The leader of the opposition, Malcolm Fraser, refused to provide the support needed for supply bills to fund essential government activity unless Whitlam called a double disillusion election in May of 1976. Whitlam refused to do so and called a half-senate election as an attempt to politically compromise.

Soon after the half-senate election was called, Sir John Kerr, then Governor-General of Australia, on conversing with the Palace, unilaterally dismissed the government. The dismissal occurred without consulting with the Prime Minister, as was customary under the Australian Constitution. On dismissing the Whitlam government, the Governor-General appointed Malcolm Frazer as the Australian Prime Minister on the condition that he called a snap election in December 1976.

The correspondence between the Queen and the Governor-General (hereinafter referred to as the Palace Letters) have long sparked scholarly interest. For years, there were com-

[22] *Commissioner of Police v Bassi* [2020] NSWSC 710.

[23] For a detailed account of Australian Secularism, see generally Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 Federal Law Review 139.

[24] Liam Elphick and Alice Taylor, 'Religious Discrimination Bill is a Mess That Risks Priviledging People of Faith Above All Others', (The Conversation, 30 August 2019). <https://theconversation.com/religious-discrimination-bill-is-a-mess-that-risks-privileging-people-of-faith-above-all-others-122631> accessed 9 March 2021.

[25] For a general account of Australian Constitutional identity and values, see generally, Adrienne Stone & Elisa Arconi, 'Small Brown Bird: Values, Aspirations and the Australian Constitution' (2016) 16 International Journal of Constitutional Law 60.

[26] Jenny Hocking, The Dismissal Dossier:; Jenny Hocking, 'The Palace Letters are Every Bit the Bombshell They Promised to be' (*Sydney Morning Herald* 14 July 2020) <https://www.smh.com.au/national/the-palace-letters-are-every-bit-the-bombshell-they-promised-to-be-20200713-p55bpx.html> accessed 9 March 2021.

peting theories of what the correspondence could entail and the political and constitutional ramifications of the correspondence.[27] The Palace Letters collectively refer to 211 copies of correspondence between Sir John Kerr and the Queen's personal secretary between the years 1974 and 1977. The letters were deposited in the National Archives by the secretary of Sir John Kerr with instructions to keep them as a personal record not to be publicly accessible till the year 2037 (when the Queens' copies were due to be made public). In the year 1991, the Queen brought the date forward to 2027 with the added caveat that the files would be publicly available subject to a Royal Veto.

In 2001, Professor Hocking attempted to access the letters under section 31 of the Archives Act. Section 31 provides that any "Commonwealth" record within the care of archives must be made publicly available within an "open access period." The Palace Letters were to be made publicly accessible 31 years after they were created. The National Archives rejected Hocking's request for the records because they claimed the Palace Letters were "personal records" and not "Commonwealth records." The National Archives argued that they were not subject to the public access provisions of the *Archives Act.* Hocking challenged this decision in 2016 and has since been embroiled in a prolonged legal battle with the National Archives, resulting in an appeal to the High Court of Australia.

In a 6:1 decision, the majority of the High Court ruled in favour of Hocking. The Court found that the letters were "Commonwealth record," not "personal records," and therefore held that the Palace Letters were subject to public access provisions under section 31 of the *Archives Act.*[28]

While declining to determine the question of the ownership of the letters, the Court held that the existence of ownership rights of a private citizen would not have an impact on the categorisation of records.[29] As such, even if Sir John Kerr was the true owner of the letters, that fact alone would not be sufficient to impact the deposited correspondence as a Commonwealth record.[30] Accordingly, the majority concluded that by holding and subsequently depositing the letters with the National Archives, the official secretary of the Governor-General's actions were enough to conclude that the lawful power to control the physical custody of the documents vested with him. This informed the Court's holding that the Palace Letters were properly characterised, at the time of deposit, as "official establishment of the Governor-General."[31] In light of the proper characterisation of the documents, the Court concluded that the documents were Commonwealth documents and not personal documents.

Although the Bill has proved controversial and has continued to be debated since early 2020, there is little suggestion that the Bill will not pass. This Bill is thus likely to undermine some of the progress made by Australia in the protection of minorities against discrimination.

The constitutional implications of this case cannot be understated. While the claim itself did not relate to a constitutional matter, the political significance of the dismissal of the Whitlam government and the constitutional crisis are important to note. The dismissal of the government and the subsequent treatment of Sir John Kerr indicates that this particular instance is critical to the public opinion regarding the potential for Australia to move towards a republic. Currently, Australia is a dominion territory of the Crown with independence. However, the releasing of the Palace Letters into the public domain could result in a renewed impetus towards Australian Republicanism.

III. CONSTITUTIONAL CASES

1. Love v. Commonwealth [2020] HCA 3.

The status of Aboriginal Australians and Torres Strait Islanders in Australia's legal and political system has been a point of ongoing debate.[32] The case of *Love v. Commonwealth (Love)*[33] adds an authoritative voice to this debate. The central issue in this case was whether Aboriginal Australians and Torres Straits Islanders could be deported as "aliens" under the ambit of section 51 (xix) of the Australian Constitution.

The case of Love was brought by two plaintiffs, each of whom were born outside Australia and hold citizenship in their respective country of birth. In the case of Love, in Papua New Guinea and the case of Thoms, New Zealand. Both applicants have an Australian citizen as a parent and have held valid Australian visas. Both plaintiffs were convicted of criminal offences and therefore deported under the *Migration Act of 1958.* The plaintiffs challenged their deportation on the grounds that they "were non-citizens and non-aliens" and therefore could not "possibly answer the description of alien under the Alien Powers act of section 51 (xix)." To make this argument, the plaintiffs asserted that Aboriginal Australians and Torres Strait Islanders have a "spiritual and cultural connection to the land of Australia" and therefore, have a sense of belonging to the land.

[27] For a succinct summary of competing accounts see generally, Will Partlett, 'A constitutional Historiographt of the Palace Papers', (*AUSPUBLAW-blog,* 12 August 2020). <https://auspublaw.org/2020/08/the-constitutional-historiography-of-the-palace-letters/> accessed 9 March 2021.

[28] For a detailed account of the case see generally, Maria Nawaz, 'Palace Letters are a Commonwealth Record: A Victory for Democratic Transparency' (*AUSPUBLAW-blog,* 10 June 2020). <https://auspublaw.org/2020/06/palace-letters-are-commonwealth-records-a-victory-for-democratic-transparency/> accessed 9 March 2021.

[29] *Hocking v. Director General of the National Archives of Australia* [2020] HCA 19 ¶120.

[30] Ibid.

[31] Ibid ¶118.

[32] Michelle Foster and Kirsty Gover, 'Determining Membership: Aboriginality and Liniage in the Australian High Court' (2020) 31 PLR 105.

[33] (2020) ALJR 198; [2020] HCA 3.

In a 4:3 decision, the Australian High Court ruled in favour of the plaintiffs. While the plurality of judgments in the majority disagreed on several issues, three of the judges in the majority agreed that the word "alien" meant a person who belonged to a foreign place. Additionally, they agreed that Aboriginal Australians and Torres Strait Islanders "cannot be said to belong to another place"[34] even if they were born in another country due to their deep metaphysical, cultural, and spiritual connection to the land of Australia.[35] Judge Edelman summarised this position by holding that "an Aboriginal child whose genealogy and identity includes a spiritual connection forged over tens of thousands of years between person and Australian land, or 'mother nature'."[36]

Judge Nettle differed from the other judges in the majority by finding that the common law "must be taken always to have comprehended the unique obligation of protection owed by the Crown to those societies and to each member in his or her capacity."[37] Additionally, Judge Nettle observed that "[u]nderlying the Crown's unique obligation of protection to Australian Aboriginal societies and their members as such is the undoubted historical connection between Aboriginal societies and the territory of Australia which they occupied at the time of the Crown's acquisition of sovereignty."[38] Judge Nettle stops short of noting that there is a fiduciary obligation imposed on the Crown and therefore, the Federal Government, towards Aboriginal communities.[39] However, he notes that the common law imposes special obligations on the government to recognise the connection Aboriginal Australians have with the land.

In making this decision, two important issues remained unresolved. First, the justices did not conclusively clarify the law around who is an Aboriginal person.[40] As noted by Michelle Foster and Kirsty Gover, "two tests were in play in the judgements, one is directed at identifying indigenous persons as being members of the 'Aboriginal Race' (…) and the other identifying members of 'indigenous people'."[41] While both are based on a three-part test which assesses "biological dissent, community recognition and self-identification,[42] only the latter requires that recognition of a person's membership (not Aboriginality) be given 'by the elders or other persons enjoying traditional authority'"[43] within indigenous communities. All the judges in the majority agreed that the narrow test which was directed at identifying "indigenous people" applied. However, they expressed disagreement on whether the recognition by elders needed to reflect "traditional laws and customs." This disagreement casts doubt on what test for Aboriginality will be adopted in future cases and the issue remains unresolved in this case.

A second issue that remains unresolved is that of indigenous sovereignty. None of the justices moved towards recognising indigenous sovereignty adverse to the Crown.[44] Lawyers and activists hoped that the case of *Love* would be a landmark case which went one step further in the recognition of indigenous sovereignty. The minority criticised the majority justices by stating that they came "perilously close" to "recognising indigenous sovereignty by allowing members of an indigenous society to determine 'the question of whether they are non-aliens'."[45]

However, as noted by Shireen Morris, the minority justices "overstate the implications of the majority decision, which only impacts a very small group of Indigenous noncitizens (…)."[46] The majority held that it was impermissible to recognise Indigenous sovereignty "adverse to the Crown." Nevertheless, two justices in the majority, Judges Nettle and Gordon, emphasise that the consequences of sovereignty are justiciable and "properly fall to be determined by the common law."[47] Accordingly, they reached the conclusion that the recognition of some Aboriginal Australians as falling outside the constitutional category of "Aliens" does not amount to the common law impermissibly recognising indigenous sovereignty.[48] It is clear from this reasoning that the majority did not take any steps to recognise Indigenous sovereignty and relied on the common law to determine Indigenous rights.

2. Hamzy v. Commissioner of Corrective Services and the State of New South Wales [2020] NSWSC 414

This case was brought by a prison inmate. Under the relevant New South Wales (NSW) regulations, EHRR inmates are required to communicate solely "in English in person, on the phone and in writing with [their] vis-

[34] Ibid ¶74.
[35] Ibid.
[36] Ibid. ¶466.
[37] Ibid ¶272.
[38] Ibid ¶276.
[39] Ibid; Shireen Morris, 'Love and Thoms: Implications for Indegenous Recognition' Federal Law Review (Fortcoming 2021) <https://research-management.mq.edu.au/ws/portalfiles/portal/138553653/Accepted_author_manuscript.pdf > Last Accessed 9/03/2021.
[40] Foster & Gover (n 32) 109.
[41] Ibid 109.
[42] Ibid.
[43] Ibid 109.
[44] Ibid.
[45] *Love v. Commonwealth* (n 29) ¶125.
[46] Morris (n 39) 18.
[47] Foster & Gover (n 32) 112.
[48] Ibid 112.

itors," including with legal representatives. The plaintiff submitted that this requirement was unlawful under sections 9(1) and 10(1) of the *Racial Discrimination Act 1975* (Cth) (RDA), preventing racial discrimination and providing for equality before the law, given that he was unable to speak in his native language of Arabic. It was further argued that the NSW regulations were inoperative to the extent of their inconsistency with the Commonwealth *RDA,* by virtue of section 109 of the Australian Constitution.

The judgement is an example of Australian judicial engagement with international law and decisions of foreign jurisdictions. Judge Bellew of the NSW Supreme Court considered this issue by first examining whether the plaintiff's rights under the RDA were protected under international law. In doing so, Judge Bellew distinguished between the right to freedom of expression and "linguistic freedom."[49] In his view, the right to freedom of expression may encompass the protection of a particular language "although this right cannot be equated with a 'right *to* language'."[50]

It then became necessary for Judge Bellew to consider whether prison constitutes "public life." Here, the decisions of the European Commission and the UNHRC influenced the determination.[51] Drawing on this comparative set of jurisdictions, Judge Bellew concluded that communications which are public in nature do not give rise to a right to use a language of one's choice.[52] Because Judge Bellew considered a correctional centre to be a "public facility operated by the state," Judge Bellew held that the plaintiff had "no right to speak and express himself in Arabic in all circumstances."[53]

The plaintiff further alleged that relevant provisions of the NSW Criminal Regulations were constitutionally invalid as they infringe the right to communicate privately and confidentially with, and access, legal representation, as well as a fair hearing under Chapter II and III of the Australian Constitution. In this regard, the NSW Criminal Regulations allowed calls made by an EHRR inmate to his lawyer to be monitored by corrective services "briefly and randomly" to determine that English was being spoken.[54] In balancing the interests of the state with that for the plaintiff, Judge Bellew noted the importance of legal professional privilege, whilst also recognising that the "practice of 'dropping in' to calls reflects the striking of an appropriate balance between the right of an inmate to maintain the confidentiality and privilege of communications with a legal representative, and the necessity for the defendant to effectively manage, and to monitor inmates housed in, a correctional facility."[55] Judge Bellew therefore concluded that monitoring calls under the NSW Criminal Regulations "does not allow the officer in question to become privy to the substance of what is being discussed."[56] Further, he was "satisfied that the monitoring process" did not breach the plaintiff's "access to confidential communications with his legal practitioners to any extent greater than that which is required for its stated purposes, or to an extent greater than the legislation allows."[57]

IV. LOOKING AHEAD

Aside from continuing legal developments expected around COVID-19, the Australian High Court will decide *Zhang v The Commissioner of Police and Ors.* The case concerns search warrants obtained by the Australian Federal Police under the *National Security Legislation Amendment (Espionage and Foreign Interference)* Act 2018 ("Foreign Interference Laws"), following investigations to determine whether John Zhang, a staffer to Labour Member of Parliament (MP) Moselmane, along with other unnamed persons, used a private social media chat group with the MP to "advance the interests and policy goals of the Chinese government in Australia."[58]

According to High Court submissions, Zhang and unnamed others allegedly "concealed from or failed to disclose to [the MP] that they were working for or in collaboration with the Chinese state."[59] Zhang has denied any wrongdoing and submitted that the search warrants issued were invalid because they "misstate the substance of the law" and are insufficiently precise in identifying the offences to which they relate.[60] In this regard, Zhang relies on the High Court's quashing of the warrant used to raid the home of News Corp journalist Annika Smethhurst in 2020.[61] In *Smethurst,* a joint decision by Kiefel CJ, Judges Bell and Keane found that the terms of a warrant issued to enable the AFP to seek the source of leaked classified material on an expansion of powers to spy on Australians, failed in its requirement to state the particular offence to which it related, and in fact,

[49] *Hamzy v Commissioner of Corrective Services and the State of NSW* [2020] NSW SC 414 ¶147,99.
[50] Ibid ¶146 (emphasis added).
[51] *Fryske Nasjonale Partij v Netherlands; Guesdon v France;* Ibid. ¶145-151.
[52] Ibid ¶145-151.
[53] Ibid ¶145-151.
[54] Ibid ¶105.
[55] Ibid ¶67.
[56] Ibid ¶109.
[57] Ibid ¶115.
[58] *Zhang v The Commissioner of Police and Ors* s129/2020 (Joint Annotate Submissions of the First Defendant and the Attorney General of the Commonwealth (intervening) ¶30.
[59] Ibid.
[60] Ibid.

"succeeded in misstating it."[62] Accordingly, the search warrant in *Smethurst* was held to be invalid based on the need to avoid "general warrants" that confer a "free-ranging power of search."[63]

Zhang also raises interesting questions regarding the scope of the constitutionally implied freedom of political communication with respect to Australia's foreign interference laws. Zhang, an Australian citizen, asserts that two provisions of the foreign interference laws are invalid because they "impermissibly burden the implied freedom of political communication" under the Australian Constitution.[64] Moreover, Zhang argues that the purpose of the foreign interference laws is "incompatible with the maintenance of constitutionally prescribed system of representative and responsible government in a pluralistic democracy" because it "prevents communication within the Australian Political System of advancing policy positions favourable to foreign actors."[65]

The NSW and South Australian Governments have made their own intervener submissions to the case. According to submissions for the NSW Government, simply because "law may have the effect of preventing certain political communication does not mean that its overall purpose is not legitimate."[66] The submissions argue that policy positions favourable to foreign actors may be legally advanced under the foreign interference laws when it is not done so covertly, deceptively or in an otherwise illegitimate manner, and so long as "the connection to the foreign principal is disclosed to the target."[67] In addition, the NSW Government argues that the purpose of the foreign interference laws is to protect Australian sovereignty and reduce the risk of foreign interference within the Australian democratic process, in light of the "growing global trend in foreign interference, including the current unprecedented level of espionage and foreign interference activity against Australia's interests."[68] In this sense, the NSW Government noted that the Foreign Interference Laws "do not require proof of any specific malevolent intent, or the identification of a specific harmful effect resulting from the conduct because they reflect ASIO's position that foreign interference 'is harmful in and of itself'."[69]

V. FURTHER READING

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Will Partlett, Crown-Presidentialism', International Journal of Constitutional Law (Forthcoming 2020).

[61] *Smethurst v Commissioner* [2020] HCA 14.
[62] Ibid ¶43. The remaining justices (Gageler, nettle, Gordon and Edelman JJ) agreed with the plurality to the High Court.
[63] Ibid ¶22.
[64] Zhang (n 58) ¶2.
[65] Ibid ¶45.
[66] Ibid ¶30.
[67] Ibid ¶26.
[68] Ibid ¶21.
[69] Ibid ¶22.

Austria

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I. INTRODUCTION

2020 was expected to be the great jubilee year of the Austrian Federal Constitutional Act (Bundes-Verfassungsgesetz, B-VG) that had been enacted 100 years ago. The B-VG thus belongs to a group of a rather few constitutions across the globe that have been continuously in force for such a long time. Nobody, however, had expected the celebrations to be overshadowed by a pandemic.

The B-VG does not regulate a formal declaration of an emergency. Neither was the majority of those constitutional provisions that relate to emergencies - such as "emergency decrees" by the Federal President, the Land Government or Land Governor,[1] the moving of the seats of supreme state bodies[2] or Art 15 ECHR (which has constitutional rank in Austria) - applied. Still, the Federal Constitution underwent some minor COVID-19 amendments. As a rule, however, COVID-19 measures were based on the limitation clauses inherent in most fundamental rights. Many of these measures lacked a proper legal basis or justification and were thus held to be unconstitutional by the Austrian Constitutional Court. The Court also decided on a number of other important issues, such as the illegality of assisted suicide, the headscarf ban in primary schools, referendums at local level or the access of parliamentary investigative committees to certain documents.

At the beginning of 2020, moreover, a new coalition Federal Government consisting of the conservative People's Party and the Greens was appointed. It replaced the first "expert government" that had led Austria during the governmental crisis of 2019. While the new Federal Government does not command a constitutional majority in the National Council, it was nevertheless mainly responsible to tackle the corona crisis since health issues are a federal competence.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Austrian Federal Constitution is both flexible and fragmented which means that federal constitutional law normally - when compared to an ordinary law-making procedure - requires just a qualified majority in the National Council and that it is possible to create federal constitutional law outside the B-VG, eg as single constitutional provisions within ordinary laws. In 2020, the Federal Constitution received several amendments and additions, though of minor substantive relevance. A major constitutional reform had already been enacted in 2019, part of which entered into force on 1 January 2020.[3] This part concerned the allocation of powers in the Austrian federal system, namely Art 12 B-VG which enumerates powers for which the federation holds the power to enact framework laws, while the component Länder enact implementing laws and execute them. Most of these enumerated powers were either transferred into the exclusive power of the federation (Art 10 B-VG) or into another shared power (Art 11 B-VG) under which the federation enacts laws while the Länder executes them. Some powers were, however, just omitted from Art 12 B-VG which means that they now silently fall into the residuary com-

[1] Art 18 para 3-5, Art 97 para 3-4, Art 102 para 5 B-VG.
[2] Art 5 para 2, Art 25 para 2 B-VG.
[3] BGBl I 2019/14.

petence of the Länder (Art 15 para 1 B-VG). As a result, just a tiny list of powers remained in Art 12 B-VG. In 2020, moreover, a piecemeal competence, regarding oil-fired boilers, was transferred to the federation.[4] Some constitutional provisions containing an exclusive federal power were added to the Cogeneration Act[5] as well as to the Green Electricity Act.[6] Some other constitutional provisions were enacted that mostly related to the pandemic in as much as they contained specific procedural provisions, eg with regard to the administrative courts and the supreme Administrative Court.[7] Even the B-VG itself was amended due to COVID-19: the Federal Government was enabled to pass circular resolutions and to take decisions in online meetings (Art 69 para 3 B-VG).[8] A similar provision, "in case of extraordinary circumstances", was adopted with regard to the local councils (Art 117 para 3 B-VG).[9] Both provisions will only be applicable for a limited time.

Some other constitutional amendments are mentioned vaguely in the new Federal Government's coalition programme of January 2020.[10] Since the coalition parties do not command a two-third majority in the National Council and their political agendas are highly divergent, the envisaged amendments do not concern any crucial constitutional reform. One issue is the establishment of a constitutional right to information which, however, has not been entrenched yet. Another contested issue is the possibility of a precautionary detention that had already been discussed with regard to crime-committing asylum seekers by the former right-wing government and was revived in the context of the Islamist terrorist attack that happened in Vienna on 2 November 2020.

The Federal Council which is a notoriously "weak" federal second chamber that hardly ever uses its (limited) veto powers vetoed some COVID-19 bills of the National Council but was overruled by the National Council in all cases. The veto was not rooted in the defense of federalism, though, but in the political refusal of the measures envisaged by the respective bills. While the Federal Government commands a majority in the National Council, the opposition parties command a (tiny) majority in the Federal Council. Their majority decreased with the regional elections that took place in the Länder Styria and Vienna this year and in which both the Conservative People's Party and the Greens were successful. Since the newly elected Land parliaments elect the Federal Council's members for the respective Land in accordance with the political composition of the respective Land parliament, majorities in the Federal Council may change after regional elections.

On the whole, the Federal Constitution received most attention with regard to the COVID-19 measures which clearly outshone the constitutional centennial. The Federal Government mainly coped with the crisis by enacting governmental decrees (mostly, by the Federal Health Minister) that at least claimed to be based on COVID-19 enabling legislation. While the first of these laws, enacted in mid-March 2020, had even received unanimous consent in both houses of Parliament and was approved, signed and published even on the same day, criticism increased with the continued enactment of similar laws afterwards: it focused on the legislative fast-track procedures, the absence of a previous constitutional evaluation or an examination by the respective parliamentary committees. The Federal Chancellor's statement that it was the Constitutional Court's responsibility to repeal unconstitutional measures after their enactment earned him many critical remarks in as much as the Austrian Constitutional Court does not exercise ex ante review and is not entitled to grant interim injunctions in case of direct appeals. In practice, the Court needs some months to decide from an ex post perspective. Still, the lawmaker is itself bound to observe the Federal Constitution and should thus carefully consider its limits from an ex ante perspective. Although the crisis came unexpected and required the quick enactment of measures that could not but interfere with numerous fundamental rights, this did not suspend the validity of the Federal Constitution, as the Constitutional Court stressed when it declared several measures unconstitutional. The number of decrees and their sometimes daily or weekly amendment has made the Austrian COVID-19 law an extremely confusing field. Moreover, a number of future measures, such as compulsory digital tracing, compulsory testing or compulsory vaccination have been discussed intensely. It does not seem improbable that at least some of these instruments will be introduced in 2021 on a pseudo-voluntary basis: many people fear that if they refuse, they will not be allowed to go shopping, dine at a restaurant, take part in cultural events or travel anymore.

III. CONSTITUTIONAL CASES

Also, the Austrian Constitutional Court, forerunner of specialized constitutional courts across the globe,[11] celebrated its hundredth birthday in 2020. Moreover, a new President (Christoph Grabenwarter) and Vice-President (Verena Madner) were appointed after the former President had become Federal Chancellor and thus headed the short-term expert government of 2019.

[4] BGBl I 2020/6.

[5] As amended by BGBl I 2020/24.

[6] As amended by BGBl I 2020/24.

[7] BGBl I 2020/16.

[8] BGBl I 2020/16.

[9] BGBl I 2020/24.

[10] See Bundeskanzleramt Österreich, 'Aus Verantwortung für Österreich. Regierungsprogramm 2020-2024' (2020) <www.bundeskanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf> accessed 7 January 2021.

[11] See IACL-AIDC Blog, "100th Anniversary of the Austrian Constitutional Court", https://blog-iacl-aidc.org/100th-anniversary-of-the-austrian-constitutional-court, (2020).

In 2020, the Constitutional Court dealt with numerous cases relating to COVID-19 measures and asylum issues. It repealed several restrictions pertaining to the work of a parliamentary investigative committee,[12] but refused appeals based on a "climate right",[13] as well as appeals against the plastic bag ban[14] or certain provisions relating to religious holidays.[15] It proved itself as a strong-form review court that did not shy away from declaring numerous legal acts unconstitutional. But there were also important single-issue decisions of great social impact that have encountered criticism not just by politicians.

1. 14 July 2020, V 363/2020-25; 14 July 2020, V 411/2020-17; 14 July 2020, G 202/2020-20, V 408/2020-20, G 212/2020-15, V 414/2020-15, G 213/2020-15, V 415/2020-15; VfGH 1 October 2020, G 271/2020-16, V 463-467/2020-16; 1 October 2020, V 428/2020-10; 1 October 2020, V 405/2020-14; 1 October 2020, G 272/2020-11, G 273/2020-12, G 275/2020-11, V 468/2020-11, V 469/2020-12, V 471-472/2020-11, V 473/2020-12, V 475/2020-11; 1 October 2020, V 392/2020-12; 26 November 2020, E 3417/2020-8; 26 November 2020, E 3544/2020; 26 November 2020, E 3412/2020-10; 10 December 2020, V 436/2020-15: selected COVID-19 cases

As the number of COVID-19 decisions was very high in 2020, only a selection of cases can be dealt with here. Many appeals of persons that claimed to be directly violated in their rights were not admitted for formal reasons. However, in most of the admitted cases a violation was found. Mostly, these cases related to regulations enacted by the Federal Health Minister which interfered with a number of fundamental rights such as equality, freedom of movement, freedom of gainful acquisition, property and others. In these cases, the Court applied more or less the same reasoning. Firstly, it was stressed that the Federal Constitution was as valid during the pandemic as any other time. In particular, this concerned the validity of the legality principle and fundamental rights. While the legality principle could be applied in a "differentiated way" so that laws might be less precise during a crisis requiring great flexibility and quick adaptation of measures, the regulations based on delegating laws needed to compensate this by being precise and well-reasoned. They also needed to be evaluated and adapted continuously according to the current situation. When COVID-19 regulations interfered with fundamental rights they needed to be based on a law (that itself had to be reasonable and proportional) and needed to be properly explained in an attached document.

In many cases, however, the Federal Health Minister had enacted the regulations without any evidence why the restrictive measures were suitable and necessary. The Constitutional Court thus declared many of these measures unconstitutional because they lacked a proper explanation and/or a legal basis: this included, eg, the requirement to wear masks in closed rooms in public places,[16] the prohibition of events with more than 10 persons,[17] the ban to enter restaurants,[18] the requirement of a certain distance between tables,[19] the segregation of school classes and the requirement to wear masks at school.[20] A legal basis had particularly been lacking with regard to the prohibition to leave one's private home generally (with some piecemeal exceptions), since the law had only empowered the regulation to prohibit the entry to "certain" public places.[21] An unjustified discrimination was found in the unequal lockdown treatment of carwash facilities attached to petrol stations on the one hand and "mere" carwash facilities on the other hand;[22] as well as between hardware stores and garden centers on the one hand and other large stores on the other.[23] The Court, however, refused various claims for financial compensation during lockdowns.[24]

In most cases, moreover, the Constitutional Court declared the unconstitutionality of provisions that had already entered out of force since they had only been applicable for a few weeks or were amended afterwards. Their expiry did not induce the Court to declare the respective cases inadmissible. Even though the judges did not need more than a few months to deal with a very large number of appeals and surely did their best to decide as quickly as possible, the decisions were mostly not quick enough to repeal provisions in force but could only declare their unconstitutionality after their expiry. In order to extend the general effect of the respective judgments, the Constitutional Court also declared that the expired provisions could - not just with regard to the individual appellant's case - not be applied retroactively anymore. Still, the Court has no power to enact preliminary injunctions in direct appeal cases. Nor is the Court entitled to exercise ex ante

[12] VfGH 2 December 2020, UA 3/2020; 3 March 2020, UA 1/2020.
[13] VfGH 30 September 2020, G 144-145/2020-13, V 332/2020-13.
[14] VfGH 17 June 2020, G 227/2019-13.
[15] VfGH 10 March 2020, G 228-233/2019-12.
[16] VfGH 1 October 2020, G 271/2020-16, V 463-467/2020-16.
[17] VfGH 1 October 2020, V 428/2020-10.
[18] VfGH 1 October 2020, V 405/2020-14.
[19] VfGH 1 October 2020, G 272/2020-11, G 273/2020-12, G 275/2020-11, V 468/2020-11, V 469/2020-12, V 471-472/2020-11, V 473/2020-12, V 475/2020-11.
[20] VfGH 10 December 2020, V 436/2020-15.
[21] VfGH 14 July 2020, V 363/2020-25.
[22] VfGH 1 October 2020, V 392/2020-12.
[23] VfGH 14 July 2020, V 411/2020-17.
[24] VfGH 14 July 2020, G 202/2020-20, V 408/2020-20, G 212/2020-15, V 414/2020-15, G 213/2020-15, V 415/2020-15; 26 November 2020, E 3417/2020-8; 26 November 2020, E 3544/2020; 26 November 2020, E 3412/2020-10.

scrutiny before a law or regulation is enacted, which could have been a very helpful instrument despite the problem that the judges would have had to pre-assess the rationality and proportionality of measures.

At the end of 2020, new lockdowns were imposed due to increasing infection numbers. Since some laws were adapted and explanatory memorandums attached to the new decrees in accordance with the Court's criticism, it is unclear what the Court will do exactly if the formal requirements, such as a formal legal basis or explanatory document, are kept. In this case, the Court, depending on the respective right, will need to go a step further and apply the substantive reasonability and proportionality tests. Whether the Court will declare measures to be unreasonable, unsuitable and unnecessary - which are in fact questions closely linked to extra-legal, such as infectiological knowledge - remains to be seen.

2. VfGH 6 October 2020, G 166-168/2020-15, V 340/2020-15: "Popular legislation" at local level

The Constitutional Court also repealed several provisions of the Referendums Act and the Local Government Act of the Land Vorarlberg that permitted "popular legislation" at local level. "Popular legislation" is an instrument consisting of two plebiscites: if a citizens' initiative is supported to a certain qualified extent a binding referendum on the same issue will have to be organized. If the referendum supports the initiative, it will have to be implemented even against the will of parliament. "Popular legislation" had already been declared unconstitutional by the Court at the federal and Land level since the democratic principle of the Federal Constitution had to be understood as representative in nature, while it allowed for direct democracy only marginally.[25] It had been controversial whether this case law could be applied to the local level as well, since the Austrian municipalities, technically speaking, have no "legislative" competences.

However, the Court applied the same understanding of democracy to the local level as well: accordingly, it undermined the overall principle of representative democracy, if local regulations, based on a citizens' initiative and subsequent approval in a referendum, had to be passed by the elected local council even against its will. The federal constitutional provision on direct democracy at local level (Art 117 para 8 B-VG) was not to be understood as a radical shift towards municipal direct democracy, but in accordance with the overall constitutional principle of representative democracy. However, the Constitutional Court abstained from repealing a provision of the Vorarlberg Land Constitution that could be understood in the same direction and rather interpreted it consistently with the federal constitutional principle of representative democracy. This decision underlines the Court's support of representative democracy which means that a strong degree of direct democracy is not even admitted at local level.

3. VfGH 11 December 2020, G 4/2020-27: Headwear ban in primary schools

In this case, the Austrian Constitutional Court repealed Sec 43a of the Federal School Education Act as unconstitutional. This provision, enacted only in 2019,[26] had prohibited all (6 to 10 year old) pupils in primary schools from wearing head-covering clothes of a religious or ideological nature. The provision had explicitly stressed that all pupils should be guaranteed the best possible development and that it aimed at the social integration of children in accordance with local traditions and manners, the protection of constitutional values and education principles as well as the equality between men and women. It had also provided that in case of a violation of the headwear ban the legal guardians of the respective child would be invited to discuss the ban and the reasons for violating it with the education authority. If the legal guardians did not follow this invitation or if the ban was violated even after such a talk, a fine could be imposed. Several Muslim parents and some of their daughters had directly lodged an individual complaint against that provision before the Austrian Constitutional Court in which they had, inter alia, claimed a violation of the Austrian equality principle as well as of freedom of religion under Art 9 ECHR in conjunction with Art 14 StGG. In turn, the Federal Government argued that no violation had taken place, since there was no general rule in Islam that small girls at that age had to wear a headscarf at all. Moreover, even though the wording of the provision targeted all sexes and all kinds of headwear, only the Muslim headscarf - differently from the Jewish kippah or Sikh patka - was based on a sexualised notion that women should not show certain parts of their bodies in public. Small girls should, however, be protected from early sexualisation, in particular with a view to end the segregation between the sexes and the social exclusion of girls as well as to promote the parity of men and women.

According to the Constitutional Court, the provision, despite its general wording, actually targeted only Muslim girls in primary schools and thus violated the Austrian equality principle (Art 7 B-VG and Art 2 StGG) in conjunction with religious freedom (Art 14 para 2 StGG and Art 9 para 1 ECHR). The Court, however, refused to inquire more accurately whether a headscarf for girls at that age was indeed a religious requirement. Neither did the Court deal with the argument regarding early sexualisation nor did it compare the Muslim headscarf to other kinds of religious headwear apart from stating that it might be comparable to it "in one or other way". The fact that girls might be forced to wear the headscarf was indirectly admitted by the Court in as much as girls might not be sent to state schools anymore if they were not allowed to wear the headscarf. The Court vaguely alluded to social conflicts at schools where Muslim girls might be bullied into wearing the headscarf but recommended the lawmaker to find more suitable instruments to cope with such problems that should not address the girls themselves.

[25] VfSlg 16.241/2001.
[26] BGBl I 2019/54.

4. VfGH 11 December 2020, G 139/2019-71: Ban on Assisted Suicide

In this decision, the Court repealed part of Sec 78 of the Austrian Criminal Code which had prohibited assisted suicide. Even though there is no written individual "right of autonomy" including a right to shape one's life as well as the right to die with human dignity in the Austrian constitutional order, the Court derived such a right from the right to a private life, right to life and the equality principle. According to the Court, the prohibition of assisted suicide interfered with this "right of autonomy". Since the Austrian legal system already allowed persons to deny life-sustaining medical measures in advance or to apply risky palliative measures to fatally ill persons there could be no reason to prohibit assisted suicide if third persons were willing to assist a person wanting to die. The Court admitted that there might be economic and social pressure on persons to commit suicide, so that the lawmaker should find a suitable instrument to avoid this danger while at the same time granting the said right of autonomy. The Court thus deferred the effect of the repeal in order for the lawmaker to enact a substitute provision by the end of 2021. The judgment was severely criticized by most political parties, but also by religious and medical communities. As in the headscarf ban case, the Court's reasoning is thin and covers just a couple of pages while much more space is given to the parties' statements.

Even the European Court of Human Rights had, with regard to the relevant Articles 2 and 8 ECHR, not gone as far as the Austrian Constitutional Court which rather follows, although without explicit reference, a similar decision of the German Constitutional Court[27] earlier this year. First, the comparison between the said permitted measures and assisted suicide is ill-founded since the existing provisions are limited to a medical background. They do not allow to actively kill a person even if palliative treatment might bear such a risk. Moreover, there is a considerable danger that ill, handicapped or elderly people will be prompted to commit suicide or will actually be killed under the pretext of an assisted suicide. As the concrete case shows (a Swiss euthanasia company financed one of the parties), the decision will also benefit those who make euthanasia their enterprise. It will be difficult for the lawmaker to find a new provision that serves both aims. This is not the first case in recent years in which the Constitutional Court dealt with a matter of great social impact in a rather ideological way, leaving the lawmaker a legal situation very difficult to resolve. Even though one may guess that the decision was not taken unanimously, this was not made transparent due to the absence of the possibility of a separate vote in Austria.

IV. LOOKING AHEAD

2021 will be no outstanding constitutional year in terms of jubilees, national elections or large constitutional reforms. However, the constitution will be seriously put to the test by the question of how much interference with fundamental rights is tolerable in times of a pandemic. This will not only require the Constitutional Court to give judgment on many contested measures enacted in late 2020, but also with regard to possible compulsory testing and vaccination. In particular, this will concern indirectly "compulsory" measures that do not formally require persons to submit to such treatments, but put them under continued restrictions as long as they do not submit. In the present political situation, the Constitutional Court is more or less the only institution from which effective relief against these measures can be sought. The constitutional judges will bear an enormous responsibility and need to rely on careful reasoning more than ever.

V. FURTHER READING

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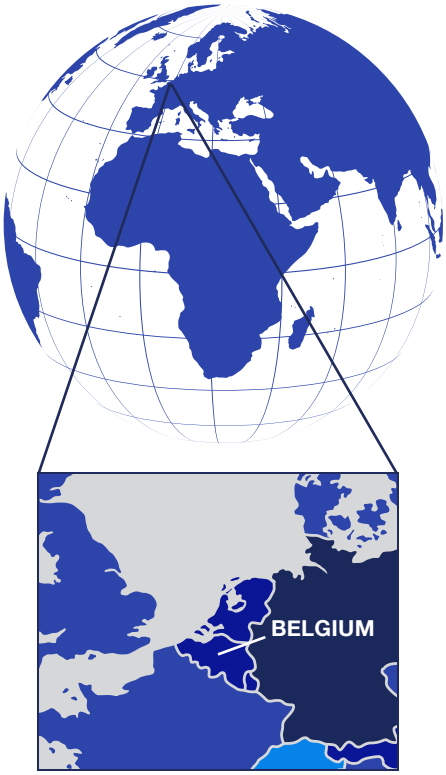
[27] BVerfG, Judgement of the Second Senate 26 February 2020 - 2 BvR 2347/15, 2 BvR 651/16, 2 BvR 1261/16, 2 BvR 1593/16, 2 BvR 2354/16, 2 BvR 2527/16 -.



Belgium

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I. INTRODUCTION

The COVID-19 pandemic dominated the Belgian political and legal agenda in 2020. Two main developments are elaborated below. Firstly, we address how the pandemic accelerated the formation of a new federal government after a temporary minority government was granted special powers. Secondly, we discuss the decision by the federal government to combat the crisis mainly through ministerial decrees, which was criticized by constitutional scholars. Next, the article gives an overview of the main cases of the Belgian Constitutional Court of the past year with regard to the rule of law, access to justice, the freedoms of trade unions, criminal law, the environment and sustainability, the freedom of religion and the right to abortion. Finally, the overview looks ahead to a number of interesting pending cases, as well as to the proposed adoption of a so-called 'pandemic act' and the preparation of the seventh reform of the Belgian State.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

After the federal elections on May 26, 2019, an arduous process to establish a federal government started. The corresponding number of seats in the Chamber of Representatives (52 of the 150 seats) of the caretaker minority government of Prime Minister Charles Michel (later on replaced by Sophie Wilmès) decreased to 38 seats. In the middle of a still ongoing government formation, the Covid-19 virus was confirmed to have spread to Belgium on February 4, 2020. After an unsuccessful attempt to establish an 'emergency government' including the Flemish nationalists (N-VA) and Francophone socialists (PS), the members of the Wilmès II minority government (Francophone and Flemish liberals and Flemish Christian-Democrats) took the oath on 17 March 2020. In Belgium, it is a constitutional custom that the government asks a vote of confidence of parliament. Consequently, on March 19 2020, Wilmès II ultimately gained the support of a large majority in the Chamber of Representatives as a government with full powers tasked to take all necessary measures to effectively combat the pandemic, yet under the promise

[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/

to renew confidence of parliament after six months.

The fight against the pandemic gave rise to a number of important constitutional issues.[1] On March 30, 2020, two 'special power' acts were published in the Belgian Official Gazette. In these acts, parliament temporarily attributed part of its legislative powers to the minority government in order to fight the COVID-19 crisis more effectively. The special power Royal Decrees taken in application of such acts may repeal, supplement, change or replace applicable legal provisions, even with regard to matters that the Constitution explicitly reserves to the legislator. These decrees must be ratified by parliament within one year of their entry into force. In an urgent advice, the Legislative Section of the Council of State reconfirmed the constitutional principles and limitations applicable in the context of the special powers doctrine, which had not been put to use for many years.[2]

There is no legal provision explicitly attributing crisis management to the federal or to the subnational level of government. It can be argued that it is a residual federal police power, although it is likely to have substantial impact on subnational policy domains.[3] On March 12, 2020, the National Security Council announced a federal phase of crisis management, based on the Royal Decree of January 31, 2003 establishing the emergency plan for crisis events and situations requiring coordination or management at national level. Inevitably, the pandemic gave rise to discussions regarding the distribution of power between the federal and federated levels and required intense coordination between them. For instance, no less than eight ministers and one secretary of state each have substantial powers regarding health policy.

After almost 500 days of government formation negotiations, a new government was established on October 1, 2020 by a coalition of Francophone and Flemish liberals, socialists, and ecologists, as well as the Flemish Christian-Democrats, led by Flemish liberal Prime Minister Alexander De Croo. The new government decided to primarily combat the pandemic through the Consultation Committee. It is the main mechanism for consultation, cooperation and coordination between the federal government, the communities and the regions.

Overall, during the crisis, the federal government decided to combat the pandemic through ministerial decrees. Constitutional scholars criticized this approach.[4] The government mostly relied on the Civil Security Act of 2007 as the necessary legal basis for the corona measures, which grants powers to the Minister of the Interior to take protectionary measures. This Act, however, was designed for interventions in case of acute and temporary emergencies, such as fires, explosions or the release of radioactive materials. Nonetheless, the general assembly of the Administrative Litigation Section of the Council of State (judgments n° 248.818 and 248.819 of October 20, 2020) dismissed two claims for suspension against the curfew and closure of catering establishments, stating that the protection of civil security in the meaning of the 2007 Act can also include catastrophes like infections with a living virus. In response to growing criticism, at the beginning of 2021 Minister of the Interior Annelies Verlinden nevertheless announced to submit a draft Pandemic Act in parliament.

Several crisis measures, such as the curfew, the ban on certain assemblies and the obligation to wear face masks have led to discussions of proportionality in view of fundamental rights and freedoms. Overall, the case law of the Council of State on the crisis measures demonstrates substantial deference towards the ministerial powers. This changed somewhat in a later phase of the pandemic, when the Council of State for example ordered (judgment n° 249.177 of December 8, 2020) that the Belgian state should at least provisionally amend the prohibition of the collective practice of worship.

III. CONSTITUTIONAL CASES

In 2020, the Constitutional Court delivered 169 judgments and handled 209 cases in total. Regarding the nature of the complaints, conflicts of competencies between the federated entities and the federal state represent only 9% of the judgments in 2020. The majority of cases concern infringements of fundamental rights. In 2020, the principle of equality and non-discrimination was still the most invoked principle before the Court (52%), followed by review of compliance with the right to private and family life (8%), jurisdictional warranties (7%), the socioeconomic rights (7%), guarantees in taxation matters (7%), principles of legality in criminal matters (3%), property rights (3%), personal freedom and legality of criminal charges (2%), freedom of religion and freedom to hold opinions (2%), rights of the child (2%), freedom and equality in education (2%), and freedom of association (2%).

References were made to the jurisprudence of the ECtHR in 49 cases. Moreover, the jurisprudence of the CJEU is also regularly reflected in the judgments of the Constitutional Court, with references to this case law in 22 cases. References to other sources of international law can be found in 35 cases. The Constitutional Court also made a reference to the jurisprudence of the International Court of Justice.

[1] See, e.g., T. Moonen, "Questions of Constitutional Law in the Belgian Fight Against Covid-19", J.M. Serna de la Garza (ed.), Covid-19 and Constitutional Law, UNAM/IACL, (2020), 123-130.

[2] Council of State, Legislative Section, 25 March 2020, no. 67.142/AV.

[3] P. Popelier, "The impact of the Covid-19 crisis on the federal dynamics in Belgium", UACES Territorial Politics Blog, (5 May 2020), https://uacesterrpol.wordpress.com/2020/05/05/the-impact-of-the-covid-19-crisis-on-the-federal-dynamics-in-belgium/.

[4] See, e.g., P. Popelier, "COVID-19 legislation in Belgium at the crossroads of a political and a health crisis", The Theory and Practice of Legislation, (2020/8), 138-141.

Last year, the Court referred two cases for preliminary ruling to the CJEU.

1. Rule of law

In a democratic state governed by the rule of law, it is of fundamental importance that courts and tribunals command the trust of the public and the parties in a trial. To this end, a Federal Act passed on March 23, 2019 introduced stricter rules on recruiting substitute judges and how the substitute judge system works, in line with recommendations of the Council of Europe's Group of States against Corruption (GRECO) and the High Council of Justice. In two previous judgments, the Constitutional Court had already held that occasionally holding judicial office while practicing law could be justified subject to sufficient procedural safeguards to rule out any legitimate fear of partiality. This practice was also designed to ensure the swift and fair administration of justice (see judgments nos. 146/2012 and 53/2017). In line with that case law, the Court held in its judgment n° 7/2020 that the new, stricter system for the appointment of substitutes judges did not violate the right to an independent and impartial judge. It noted, however, that having the same person perform the functions of both judge and barrister, even occasionally, should be avoided as much as possible.

In judgment n° 154/2020 the Court also found that the possibility for a lawyer to be appointed, not as a substitute, but as a lay judge in a business court was surrounded by sufficient safeguards regarding independence and impartiality in a Federal Act of May 5, 2019.

Another aspect of the rule of law was at issue in the case concerning the Federal Squatting Act of October 18, 2017. One of the measures authorized the public prosecutor, upon request by the owner of property unlawfully occupied by another person, to order the squatter to vacate the property within eight days of the court order being displayed on the said property. The Court held however that a coercive measure could only be executed with the authorization and under the supervision of an independent and impartial judge and that it was therefore not, in principle, for a prosecutor to order a measure infringing an individual right or freedom. The Court therefore decided in its judgment n° 39/2020 to annul the legislative provision which authorized the public prosecutor to order a squatter unlawfully occupying a property to vacate said property.

2. Access to justice

In order to increase the budget available to compensate attorneys tasked with *pro bono* representation, the federal legislator in 2017 created a specific budget fund. In civil and certain administrative courts, each claimant was required to advance a fee of 20 euros. Upon final verdict, the courts would settle those fees in their cost orders. Parties who benefited *pro bono* assistance themselves were exempted.

The Constitutional Court was asked to review that approach in light of the right of access to justice. In its judgment n° 22/2020, the Court found that providing adequate funding for the *pro bono* system constituted a legitimate purpose to justify an additional fee on litigants. The Court also concluded that the projected fee did not unreasonably increase the costs, although it warned that the legislature in deciding on such matters should take into account the cumulative effect of other financial burdens placed on litigants. This echoed earlier problems in the area of access to justice, including tax increases and the compensation of attorney fees by the losing party. Since the fee of 20 euros was required per claimant, the Court however found that, to that extent, it could lead to an unreasonable burden upon a losing party.

Notably, in its judgment n° 118/2020, the Court accepted the retroactive application of another law amending the *pro bono* system. This was necessary to cover the validity of decisions granting access to *pro bono* assistance during the period of retroactivity. Those had been based on government regulations lacking a sufficient legal basis.

3. Trade union freedoms

The Act of November 29, 2017 inserted a new Chapter called 'Continuity of service in rail passenger transport in the event of a strike' in the Act of July 23, 1926 (concerning the National Railway Company of Belgium (SNCB) and its employees). The petitioners (the trade unions) submitted an action for annulment of the Act of November 29, 2017 since it provides for a minimum service, with regard to which the International Labor Organization (ILO) has laid down specific conditions. On May 14, 2020, the Constitutional Court (n° 67/2020) partially rejected the action for annulment. The Court held that this law did not include a minimum service (since, for example, it did not ensure a minimum service level in the event of strikes, but a reduced level of transport service based on the availability of railway staff) and that it did not violate the right to strike. In general, the Court based its reasoning on the voluntary character of the work (only the railway staff who agrees to come to work has to provide the service). In doing so, the Court reaffirmed the growing importance of the rights (to move and to travel freely) of passengers. The Court did not find a violation of the so-called 'standstill principle' which prohibits measures that would result in a substantial decline of the rights ensured by the right to social security. However, the Constitutional Court did acknowledge that imposing a disciplinary sanction on railway staff who did not notify (in due time) their intention to not take part in the strike was unlawful.

4. Criminal law

The so-called *pentiti* program – *pentiti* being the Italian name for "criminals turned informers" – was introduced by the Federal Act of July 22, 2018. This program enables persons under criminal investigation or those convicted to provide information on serious offences and organized crime in exchange for a reduced sentence or discharge. The fact that the public prosecutor may determine – within the limits of the legislation at issue – individual cases in which he makes a commitment, does not authorize him to disregard the principle of equality and non-discrimination or to decide arbitrarily which persons are eligible for the *pentiti* program. The prohibition of arbitrariness falls within the safeguards of the rule of law. For this rea-

son, it is the task of the investigating or trial court having jurisdiction to verify whether the use of the *pentiti* program is necessary for the establishment of the truth and whether the equal treatment of all persons involved in the investigation has been ensured. In its judgment n° 16/2020, the Court dismissed the application. However, several of the law's provisions have to be interpreted in accordance with the Constitution. Therefore, certain considerations of the Court are to be taken into account in the interpretation of the law. This is to ensure, in all events, effective judicial review and the right to adversarial proceedings in the *pentiti* program.

In 2020, the Constitutional Court also decided on a self-incrimination issue. The code of criminal procedure required anyone with specific knowledge, including suspects, to cooperate with a criminal investigation by providing *information* about the functioning or access to computer system. A duty of cooperation was also imposed on all persons suitable to handle the system or operate it. This duty of *cooperation* was not applicable to suspects, however, so as to not force them to incriminate themselves. The Court was asked whether a suspect could be required to provide information if he could not be required to cooperate. In a short judgment n° 28/2020, the Court found a relevant distinction between requiring providing information existing independent from the suspect's will and requiring to actively participate in the collection of evidence of a criminal offence. It concluded there was no violation.

5. Environment and sustainability

By Federal Act of March 30, 2018, a "cash-for-cars" system had been introduced. Employers could grant a mobility allowance, consisting of a free-to-spend amount the employee receives from his employer in exchange for giving up his company car. Company cars have become overtime a very popular means to increase employees' income in a tax friendly way. That allowance was determined according to the catalog value of the returned vehicle, was exempt from social security contributions and was treated very favorably from a tax point of view. The Act was challenged by a broad coalition of trade unions and environmental organizations. The Court accepted the objections of the petitioners who essentially alleged that the contested law, while having a sustainable development objective, violated the principle of equality and non-discrimination in tax matters and with regard to financing social security. An unjustified difference in treatment had been introduced between employees who did not receive the mobility allowance and whose salary was entirely subject to the tax and social security contributions and employees who were free to spend the financial compensation received enjoying tax and social privileges, without real guaranties on environmentally friendly mobility behavior. The Court annulled the system by judgment n° 11/2020 but upheld the effects of the quashed provisions until December 31, 2020.

Following the preliminary ruling of the CJEU of July 29, 2019[5] the Court annulled by its judgment n° 34/2020 the Federal Act of June 28, 2015 on the phasing out of nuclear energy. The CJEU held that Directive 2011/92/EU must be interpreted as meaning that the restarting of industrial production of electricity for a period of almost 10 years at a nuclear power station that had previously been shut down, and deferral by 10 years, of the date initially set by the legislature for deactivating and ceasing industrial production of electricity at an active power station, is subject to an environmental impact assessment prior to the adoption of those measures and a proper assessment according Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora. As the CJEU allowed the Constitutional Court to maintain the effects of the contested measures, adopted in breach of EU law, if such maintenance were justified by overriding considerations relating to the need to avoid a genuine and serious threat of rupture of the electricity supply, "which cannot be remedied by any other means or alternatives, particularly in the context of the internal market". For as long as is strictly necessary to remedy the breach, the Court decided to allow the legislator a period ending on December 31, 2022 to remedy the violation.

In its judgment n° 162/2020 relating to the Brussels Capital Region Ordinance concerning the introduction of smart electricity meters, the Court found with regard to the right to a healthy environment (art. 23 of the Constitution), that, unlike the Walloon Decree (judgment n° 144/2020), the contested Ordinance did not provide alternative solutions for those who declare to be "electro-sensitive". The possible exposure to electromagnetic radiation, for the persons who thereby run a health risk, should be considered as a considerable decline in the level of protection of their right to a healthy environment. There is no reasonable justification for that significant deterioration, since electromagnetic radiation can be easily avoided by means of cabling. Since the Ordinance did not provide for an adequate regulation for electro-sensitive persons, the provision that did not allow to refuse the installation of a smart meter or to request its removal has been annulled. Electro-sensitive persons can therefore, in attendance of the introduction of such a provision, refuse the installation of a smart meter or request its removal.

6. Freedom of religion

Article 3 of the Decree of the French Community adopted on March 31, 1994 'defining the neutrality of education in the French Community' offered the possibility for a total ban of the wearing of political, philosophical or religious symbols in order to create a "completely neutral educational environment", if it is explicitly provided for in the internal regulations of a school (in this case: a school of higher education in Brussels, where the students concerned are aged 18 and over), and approved by the school's governing body (in this case: the Brussels city council). On June 4, 2020, the Constitutional Court (n° 81/2020), following a preliminary referral, ruled that by adopting article 3 of the Decree (which, as mentioned above,

[5] Case C 411/17, "Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen", ECLI:EU:C:2019:622.

comprises the possibility for a total ban, approved by the school's governing body), the French Community did not act contrary to the obligation to respect neutrality in public education. In general, the Court concluded that such a ban is not mandatory to ensure neutrality. In addition, the Court considered that a total ban does not violate the freedom of religion guaranteed by the Constitution.

7. Right to abortion

Legal abortion has been recognized in Belgium since 1990, when a conditional exception to the criminal offence of abortion was adopted for the voluntary termination of pregnancy until 12 weeks following conception, or in cases of serious danger to the woman's health or an extremely serious ailment with the fetus. In 2018, the federal legislature decided to principally decriminalize voluntary abortion when certain conditions were met. These conditions were generally similar to the ones set in 1990. Nevertheless, the new law introduced an obligation for a medical professional to immediately refer the woman concerned to another physician or medical center when they would object to performing an abortion. Moreover, the law also prohibited the (attempt of) physical hindrance to women in their access to abortion and abolished abortion advertising restrictions. In its judgment n° 122/2020, the Constitutional Court upheld the entire new law. While the Court recognized that several instruments of international law oblige states to protect the life of unborn children, it held that, in any case, the legislature may treat born and unborn children differently under the Belgian Constitution. In doing so, the Court avoided settling the difficult question of whether a fetus enjoys the right to life. The Court considered that the freedom of conscience of objecting medical professionals was not endangered by requiring them to immediately refer women to another physician and to provide them with the necessary information to proceed with their intent to terminate the pregnancy. It noted that the legislature legitimately acted to respect the right of women to abortion in a safe medical environment. According to the Court, there was also no sufficient reason to believe that lifting the ban on publicity for abortion would have a direct effect on the right to life of the unborn child, even if such a right was recognized.

IV. LOOKING AHEAD

On January 1, 2021 248 cases were pending before the Constitutional Court. Some of these cases are of interest to an international audience. The Court has yet to decide some cases in which a preliminary ruling of the CJEU has been asked. That is the case with the demand for annulment of the Federal Act regulating the collection and retention of data in the electronic communications sector,[6] the question whether the Unstunned Slaughter Ban introduced in the Flemish and Walloon Region is compatible with freedom of religion, the separation of church and State and freedom of labour and enterprise[7] or whether the processing of passenger information is compatible with the Constitution and primary EU Law.[8]

The renewal of the composition of the Constitutional Court is going ahead. As reported in our 2019 review, Judge Jean-Paul Snappe from the Francophone group of former MPs retired in November 2019. The candidate proposed at first by the Francophone Green Party (Ecolo) did twice fail to obtain the necessary two-third majority of votes in the Senate. Another candidate was proposed by that group to fill in the vacancy. Thierry Detienne, a master in Roman philology and former regional minister, secured sufficient votes in the Senate and has been appointed judge to the Constitutional Court by Royal Decree of July 12, 2020. President André Alen retired from the Court on September 25, 2020, since the mandatory retirement age is seventy. Luc Lavrysen has been elected by his peers to replace Alen as Dutch-speaking president. Danny Pieters, a former speaker of the Senate and full professor of social security law at the KU Leuven, was nominated by the Chamber of Representatives on proposal of the Flemish Nationalist Party (N-VA) and appointed judge to the Constitutional Court by Royal Decree of January 13, 2021. In 2021, there will be two vacancies, due to the retirement of Judge Trees Merckx-Van Goey in June and of the Francophone President François Daoût in September.

Early 2021, Belgium remained on the brink of a third wave in the COVID-19 pandemic. As explained, for almost a year, the government had imposed various measures limiting personal freedom through ministerial decrees. Several government ministers now agree that an act of parliament is preferable, although they immediately went on to disagree about whether this new act would be applicable to the on-going pandemic as well. At the time of writing, no bill to this end had been submitted in parliament.

Unrelated to COVID-19, the government also announced that it would make use of the coming year 2021 to consult citizens through a 'dialogue platform' on their views concerning the future of the federal structure of the state. The governmental coalition has agreed that by 2024, a new state reform should be prepared. The pandemic has put that debate on hold, but there is little doubt that it will return sooner or later.

[6] CJEU Grand Chamber, Joined Cases C-511/18, C-512/18 and C-520/18, "La Quadrature du Net and Others", ECLI:EU:C:2020:791, (October 6, 2020).
[7] CJEU Grand Chamber, Case C-336/19, "Centraal Israëlitisch Consistorie van België and Others", ECLI:EU:C:2020:1031, (December 17, 2020).
[8] Request for a preliminary ruling from the Constitutional Court (Belgium), Ligue des droits humains v Conseil des ministers, Case C-817/19, (October 31, 2019).

Bosnia and Herzegovina

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I. INTRODUCTION

In 2020, the department of civil protection and the crisis staff of the Ministries of Health – the state bodies in charge of the management of the crisis caused by the novel coronavirus – found themselves under intense scrutiny. In 2020, these bodies adopted decisions that established different measures to curb the spread of the virus (obligatory mask-wearing, curfews, lockdowns, etc.). However, the decisions and measures have been challenged before the Constitutional Court of Bosnia and Herzegovina.

2020 was also the year of the local elections in Bosnia and Herzegovina. Funding the elections depends to a large extent on the budget of Bosnia and Herzegovina. However, due to the inability of the Parliamentary Assembly of Bosnia and Herzegovina to adopt the budget, the elections have been postponed for the first time since the independence of the country. This has proved to be controversial and has resulted in cases being brought before the Constitutional Court.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

On March 11, 2020, the World Health Organization (WHO) declared that COVID-19 caused by SARS-CoV-2 was a pandemic. The WHO prompted governments to protect public health without disrupting economic and social affairs. Respecting human rights was mentioned as a priority.[1] However, balancing measures minimizing the impact of the novel coronavirus while continuing economic flows and social interaction proved to be especially challenging in Bosnia and Herzegovina. At the very beginning of the pandemic, the country did very well in keeping the number of infections low, thanks to a strict lockdown and measures imposed by the government bodies in charge of the COVID-19 crisis (the department of civil protection and the crisis staff of the Ministries of Health). It soon became apparent that the economy (and the budget) of Bosnia and Herzegovina relies especially on the tertiary industry, in particular traditional hospitality industries (such as hotels, resorts, restaurants, and coffee shops) and personal services (hair and nail salons). This lead to the widespread dissatisfaction of the population on two interrelated fronts: (1) the owners of establishments were not sufficiently compensated or subsidized while being closed; and (2) as a consequence, many decided to lay off their workers. The unemployment rate, which is already one of the highest in the region, raised and the working force pressured for the opening of the country. This led to cases before the Constitutional Court of Bosnia and Herzegovina.

When citizens started challenging the decisions on lockdowns, obligatory mask-wearing, curfews, etc. imposed in Bosnia and Herzegovina, one of the issues that arose has been linked to using the possibility of derogation of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Conven-

[1] WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (accessed: 9/3/2021).

tion") in accordance with Article 15 of that convention.[2] The Constitutional Court established that Bosnia and Herzegovina had not informed the Secretary-General of the Council of Europe that it was availing itself of the right to derogate the European Convention according to Article 15.[3]

Even though this is a possibility and not an obligation, the Constitution of Bosnia and Herzegovina states that the European Convention shall have priority over all other laws which makes the situation intricate.[4] Based on this fact, the Constitutional Court decided that it would discuss the measures only in the light of a possibility of restricting human rights that the European Convention normally provides for.[5] The Constitutional Court made it clear on the obligations of Bosnia and Herzegovina concerning the European Convention. Measures that were introduced were not *a priori* prohibited. There are positive obligations to pursue the protection of the health of the people which require that member states demonstrate active care and timely reaction. Not introducing measures could be considered a violation of the positive obligations of Bosnia and Herzegovina. At the same time, measures restricting human rights, such as the prohibition of assembly, isolation, prohibition of leaving one's own home, etc., have to be lawful, pursue a legitimate aim, and have to be "necessary in a democratic society," i.e., there has to be proportionality between the measures undertaken and the aim sought to be achieved. This stance of the Constitutional Court is visible from the constitutional cases below.

Another issue was linked to the fact that the decisions which established the measures were not made by the competent bodies, such as parliaments and/or governments. The decisions were made by the Headquarters of the Federal Department of Civil Protection, the Crisis Staff of the Ministry of Health of the Sarajevo Canton, and the Crisis Staff of the Ministry of Health of the Federation of B&H. Importantly, the Constitutional Court held that the decisions were unconstitutional. However, the measures remained in force until the competent bodies have remedied procedural shortcomings. In other words, although it was established that the decisions violated human rights and freedoms, the measures, such as obligatory mask-wearing and the curfew, remained in force. This brought a lot of confusion among the population about whether they should continue to obey the decisions and until when.

Amid the pandemic, Bosnia and Herzegovina faced the problems of organizing local elections. For the first time since the independence, the elections in Bosnia and Herzegovina were postponed. Initially, the elections were scheduled for October 4, 2020 but were postponed for November 15. The reason was not the pandemic, but rather the inability of the ruling parties and the opposition to agree on the budget of Bosnia and Herzegovina.

According to the Election Law, the local elections are financed through the budget of Bosnia and Herzegovina and the budgets of local communities.[6] Relevant international actors in Bosnia and Herzegovina, such as the Office of the High Representative (OHR) and the Organization for the Security and Cooperation in Europe (OSCE), expressed their concern with the situation but only mildly pressured the leaders of the ruling parties and the opposition to reach an agreement. The non-adoption of the budget of Bosnia and Herzegovina prevented the Central Election Commission from initiating the public procurement procedures.

Based on this, the Central Election Commission decided to postpone the elections. However, the issue with postponing the elections is that the Election Law of Bosnia and Herzegovina does not provide for the postponement of elections in their entirety. The law only stipulates that elections may be postponed if it is not possible to hold elections at a particular polling station or constituency on the day of the regular elections. Also, the postponed elections should be held within seven days, and no later than thirty days from the day that is designated to vote in regular elections. Finally, the elections were scheduled for November 15 which is more than thirty days after the day that is designated to vote in regular elections (October 4). This initiated wide public and political discussions and triggered cases before the Constitutional Court of Bosnia and Herzegovina.

III. CONSTITUTIONAL CASES

1. AP 1217/20 and AP 1247/20: Impact of the pandemic on the protection of human rights

This case challenged the constitutionality of the Order of the Headquarters of the Federal Department of Civil Protection of March 20, 2020 and the Order of the Headquarters of the Federal Department of Civil Protection of March 27, 2020 based on the Decision to Declare the State of Disaster caused by the Emergence of Coronavirus (COVID-19) in the Federation of B&H. The Decision ordered "for all FB&H ministries, administrations and administrative organizations, legal entities and other institutions to make themselves available to the FB&H Civil Protection Headquarters" while the FB&H Civil Protection Headquarters ordered "to undertake […] all activities regarding the coordination and management of people protection and rescue actions in an endangered area." Based on this, the Headquarters adopted a set of measures such as an obligation of self-isolation, isolation, ban on crossing the state border, restriction of working hours, ban on work for certain businesses, curfew,

[2] Article 15 of the European Convention allows the member states to derogate from the European Convention in times of emergency. This a possibility and not an obligation.

[3] Case AP-1217/20 before the Constitutional Court of Bosnia and Herzegovina.

[4] Article II.2. of the Constitution of Bosnia and Herzegovina.

[5] Case AP-1217/20 before the Constitutional Court of Bosnia and Herzegovina.

[6] Article 1.2a of the Election Law of Bosnia and Herzegovina.

etc. One of the measures was the prohibition of movement for those under the age of 18 and above 65.

The appellants (two citizens) requested the repeal of the Orders. One appellant alleged that the Orders "have been in violation of her human rights and freedoms, and that she has been treated in a discriminatory manner on the ground of her age," "which is the reason why she has sustained irreparable damage on a daily basis" as the Orders put her in a "life-threatening situation and imposed unreasonable restrictions" preventing her from going to "bank, pharmacy, doctor or from providing necessities" or from "taking her dog for a walk." This reduced the appellant's freedom to what is called "house arrest" in criminal law. The appellant also argued that Article 5 of the European Convention safeguards the liberty and security of person while Article 2 of Protocol No. 4 to the European Convention secures the freedom of movement to all person lawfully within the territory of a State of the Council of Europe. The appellant further contended that restrictions on the exercise of those rights may be imposed only in accordance with the law if they are necessary in a democratic society.
Another appellant alleged that the confinement imposed on their underaged child prevented them from "providing care and protection for their child" and that this renders their everyday life and life of their child "more difficult." The appellant added that "as a parent, they are not able to ensure the life to their child following the child's best interests" while, at that point, "the World Health Organization has not made any recommendation to suggest that the persons under the age of 18 are dangerous persons transmitting the virus." The appellant also argued referring to the Constitution of Bosnia and Herzegovina, the European Convention, and the International Covenant on Civil and Political Rights that their "right to the liberty and security of person, right to freedom of movement and residence, right to non-discrimination, right to dignity, right to liberty of a person, right to an effective and efficient legal remedy" have been violated.

The Constitutional Court held that it has to take into account the balance between the needs and protection of society as a whole and the rights of individuals and adds that this is directly conditioned by a fair balance between the measures taken and the aim sought to be achieved. According to the Court, in this particular case, it is especially conditioned by the duration of their application and the regular review of their necessity. Based on this, the Court considered that the Orders do not fulfill the requirement of "proportionality" under Article 2 of Protocol No. 4 to the European Convention, because they do not indicate the basis for the assessment of the Federal Civil Protection Headquarters that the groups concerned have a higher risk of contracting or transmitting COVID-19 infection. Also, because no consideration was given to the introduction of milder measures, the measures were not strictly limited in time, nor was there an obligation to review them regularly to ensure that they last only as long as necessary. In other words, the Constitutional Court concluded that the appellants' rights have been violated for the lack of proportionality or fair balance between measures and public interest. However, the Constitutional Court could not quash the Orders as unfounded given the current situation and the fact that there was certainly a great public interest in imposing certain restrictions, especially because negative consequences could have arisen if the competent authorities would not have had the opportunity to review and adopt appropriate the measures.

2. 2. AP-3683/20, AP-4072/20, AP-4076/20, and AP-4109/20: Mandatory face masks and a curfew

This case challenged the constitutionality of the Order of the Crisis Staff of the Ministry of Health of the Sarajevo Canton of October 12, 2020 and the Order of the Crisis Staff of the Ministry of Health of the Federation of B&H of November 9. The Orders imposed mandatory face masks in open and closed spaces for all and a curfew in the FB&H from 23:00 to 5:00.

The appellants (a group of citizens) requested to quash the challenged Orders. Referring to the case law of ordinary courts in France and Germany, the appellants argued that wearing mandatory face masks is not proportional to the aim sought to be achieved. Some of the appellants stated they had a physical disorder, obstruction, which made their breathing difficult even in ordinary circumstances. Thus, that circumstance made mask-wearing an excessive burden. Also, according to the appellants, the mandatory wearing of masks leads to skin infections and development of micro-organisms in a humid and warm atmosphere of both respiratory cavities. Finally, the appellants argued that, in a situation where no study conducted by experts existed, the obligation to wear a face mask constituted inhuman and degrading treatment. The appellants also referred to the WHO that stated that there was currently no evidence that mask-wearing (whether medical or other types) by healthy persons in the wider community setting could prevent them from infection with respiratory viruses, including COVID-19. The appellants further argued that the Orders violated the freedom of movement. Moreover, the appellants mentioned that it was not clear why the time limit was set specifically from 23:00 to 5:00 and that not a single research mentions that COVID-19 spreads more quickly at a certain time of the day or night or "that the virus attacks only at night." The appellants contended that they like to socialize late at night, that they like to take a walk at 4:00, or walk their dog at midnight, etc. The restricted movement discriminated the appellants as citizens of FB&H compared to the RS and BD where no restrictions were imposed.

The Constitutional Court emphasized that, during emergencies, the competent public authorities have a broad margin of appreciation to select measures and apply the law. Even though the measures were issued based on the input from the Ministries of Health, the Court states that the measures interfering with fundamental human rights have to be proportionate to the aim sought to achieved and appropriate in protecting the values of a democratic society. Another issue that the

Court emphasized was that the usual practice in democratic systems is for a legislative body in such situations to transfer in advance its competences to the executive authority, or to approve subsequently such conduct on the part of the executive authority. According to the Court, it comes as a necessity to shift an emphasis from the conventional relationship "legislator-citizen" to the relationship "legislator- executive authority" to be able to assess whether the executive authority abuses its powers or not, as it is contrary to the rule of law for the executive to apply the discretionary right to include unrestrained powers. The Court emphasized that the challenged measures were not delivered at the outset of the pandemic, for since then a sufficient period of time elapsed during which it was necessary to consolidate all segments of the public authority. However, the measures were brought by the crisis staff of the Ministries of Health, without the participation of the highest executive authority and the legislative authority. This resulted in the imposition of measures that seriously interfered with the fundamental human rights in FB&H (the obligation to wear face masks in the Canton Sarajevo and restriction of movement in FB&H). Finally, the Constitutional Court deemed that the (in) action of the Parliament of the FB&H is contrary to the ensuring of the compliance with guarantees comprised in the right to "private life" and the right to "freedom of movement" given that the interference with the constitutional rights does not satisfy the principle comprised in the democratic necessity test. However, the Constitutional Court could not invalidate the Orders as unfounded given the public interest in the introduction of necessary measures for the protection of the population from the pandemic.

3. U-5/20: Postponing the 2020 local elections

This case challenged the constitutionality of the Decision on Postponing the 2020 Local Elections issued by the Central Election Commission of Bosnia and Herzegovina. The decision postponed the local elections from October 4 to November 15, 2020. The reason for this decision was the fact that the competent bodies did not provide the necessary funds for the elections to take place.

The appellants (the Alliance of Independent Social Democrats Caucus) filed a request that the Constitutional Court of Bosnia and Herzegovina establish the unconstitutionality of the challenged decision and render the decision ineffective. The appellants provided several reasons: (1) the rule of law is exercised at free and direct elections and it also includes a limited term of office of elected representatives. The mandate of the members of representative bodies elected in the regular elections is four years and shall commence on the day when the results of the election have been published in the Official Gazette of BiH. By postponing the local elections, the mandate of the elected representative would exceed four years; (2) according to the Election Law, the decision on postponing the elections shall be issued by the Central Election Commission of BiH based on the facts indicating that it is not possible to conduct the elections in accordance with the Election Law. In this case, there has been no constitutional nor legal ground for rendering the challenged decision on postponing elections in their entirety; (3) according to the Election Law, postponed elections shall be held if voting could not take place, which is also not the case; and (4) according to the Election Law, elections shall be held within seven days, and no later than thirty days from the day set for voting. In this case, there would be an unlawful violation of the deadline, since the elections were originally scheduled for October 4, 2020, and, by the challenged decision, the elections were postponed for November 15, 2020, which would have exceeded the deadline of thirty days.

The Constitutional Court raised several issues: (1) according to the Constitution of Bosnia and Herzegovina, "disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity." The caucus of a political party is not authorized to initiate a dispute before the Court. However, since the request was signed by a quarter of representatives of the National Assembly of the Republic of Srpska, the Court considered that the request was admissible as it was under the Constitution; (2) the Constitutional Court considered that the decision under review to determine its constitutionality and legality was a legal act of lower legal rank than the law. Because the Constitution of Bosnia and Herzegovina stipulates that the Constitutional Court has jurisdiction to decide any dispute arising under the Constitution, which includes but is not limited to whether any provision of the constitution or law of an entity is in accordance with the Constitution, the Constitutional Court examined whether it was competent to review the constitutionality of such an act in the present case. The Court studied its case law and concluded that whenever it is possible, it must interpret its jurisdiction in such a way as to allow the widest possibility for the elimination of the consequences of violations of human rights and freedoms. The Court emphasized that this particular case was about the review of the legality of an act for which there is judicial protection before ordinary courts. The Constitutional Court reasoned that it could only review the constitutionality of a measure if the conditions already stated in its case-law have been met, but that the legality of a general act (as a bylaw) could not be reviewed in the proceedings before the Constitutional Court. Hence, the Constitutional Court considered that this matter fell within the jurisdiction of an ordinary court. In fact, the Court found no reason to depart from its case law to declare itself competent to review the constitutionality of the challenged decision as it constituted a legal act of lower legal rank than the law.

IV. LOOKING AHEAD

In 2020, the Constitutional Court continued to hear numerous cases where it ruled on: (1) a violation of the right to a fair trial concerning the adoption of a decision within a reasonable time limit; and (2) a violation of the right to effective legal remedies. It is expect-

ed that in 2021 the Court will continue to be overburdened with cases that require its consideration of whether 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 law of Bosnia and Herzegovina was applied in either an arbitrary or discriminatory manner.

There is also an ongoing appellation, AP-1140/19, on the lack of adequate investigation in the case of the murder of David Dragičević. The controversial murder of the student, which happened in March of 2018, triggered country-wide protests over alleged corruption and the concealment of evidence by the District Prosecutor's Office and the police. The appeal has been submitted in March of 2019 but the case is still pending before the Constitutional Court.

V. FURTHER READING

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I. INTRODUCTION

In 2020, Brazilian constitutional law was shaped by the (mis)management of the COVID-19 crisis and by a series of attempted assaults on the country's institutions and democratic system.

Brazil has one of the worst coronavirus outbreaks, hitting the world's second-highest COVID-19 death toll in 2020. This bleak scenario has been attributed by experts and the press, at least in part, to inconsistent and ineffective national COVID-19 policies as well to the Executive's nonscientific and dismissive approach to the pandemic. The federal government mismanagement of the public health crisis and its failure to coordinate the responses of subnational governments triggered a political crisis with states and municipalities, which were forced to take the lead in the fight against the virus.

In this context, the Supreme Court stepped up as an arbiter of disputes between the branches of government and the validity of emergency restrictions and efforts to fight against COVID-19. An interactive board on the court's website – the "Panel of COVID-19 cases" – keeps track of the enormous flow of litigation arising from the pandemic. In 2020, the court received more than 6,500 cases and handed down approximately 8,000 decisions on the matter. As this report reveals, unsurprisingly, most of the Court's high-profile rulings were related to the new coronavirus crisis.

Alongside the health emergency crisis, Brazil is going through a democratic crisis. According to Supreme Court Justice Edson Fachin, symptoms of democratic backsliding identified throughout the year 2020 have included: the growing presence of military personnel in senior government positions; calls for the closure of Congress and the Supreme Court; a campaign to discredit the country's voting system, including the President's unsubstantiated allegations of electoral rigging and fraud; increased harassment of press freedom; the sheer expansion of access to firearms; and indications of abandoning anticorruption fights.[1]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In our review of the 2019 Global Review of Constitutional Law, we pointed out the challenges of a country that had recently elected Jair Bolsonaro as President, a far-right populist whose illiberal agenda would certainly prompt a more active role by the Supreme Court. Brazil had just come out of a very polarized and atypical presidential election, in which social media and fake news dominated and whose outcome was highly unexpected. The traditional polarization in the presidential

[1] Saiba quais são os sete sintomas de corrupção da democracia apontados pelo ministro Fachin, Folha S. Paulo (2021), <https://www1.folha.uol.com.br/poder/2021/02/saiba-quais-sao-os-sete-sintomas-de-corrupcao-da-democracia-apontados-pelo-ministro-fachin.shtml>.

elections between the center-right Brazilian Social Democracy Party (PSDB) and center-left Worker's Party (PT) that had prevailed since Fernando Henrique Cardoso's election in 1994, was wiped off the map with the emergence of the far-right candidate Jair Bolsonaro. Traditional politics looked also quite impaired, with the striking rise of newcomers to Congress, many of whom coming from Bolsonaro's until then inexpressive Social Liberal Party (PSL).

Though looking like a new political moment, Brazil woke up in 2019 with the sentiment of a country that receded to its past, where the specters of the civil-military dictatorship (1964-1985) reappeared in presidential discourses and distinct governmental measures aimed at disrupting the rule of law and some key achievements in individual and social rights. It was the typical scenario where supreme courts are usually called upon, but the Brazilian constitutional design added an unexpected layer of protection to such circumstances. Congress, with its highly fragmented party system, paradoxically behaved as a shield to block or slow some such measures.[2] In a political system where presidents need to build strong coalitions to govern, an anti-systemic rhetoric does not fit well. As we pointed out in our review, the incapacity of the government to do politics led to a "rising countermovement towards strengthening legislative authority," which "resulted in a set of government's proposals being rejected in Congress or – what might even be politically less costly – deliberately not even brought to discussion."[3] The Supreme Court did decide some relevant cases, but 2019 was the year of Congress.

In 2020, a rearrangement of political forces began to take shape, but not without President Bolsonaro first revealing that, if not duly constrained, radicalization is on the radar. It was the COVID-19 year, and Bolsonaro joined the group of world leaders who betted their chips on denying and downplaying the crisis that was rapidly devastating lives and economies worldwide. Challenged by such a global phenomenon of epic proportions, Bolsonaro would basically step in the United States President Trump's shoes, adopting the strategy of "[inoculating] truth from a pandemic."[4] The playbook was weirdly similar: attacks on scientific knowledge and freedom of press, spread of misinformation, disregard of the seriousness of the disease and its effects, among others.

Brazil became one of the democratic nations whose handling of the crisis was nothing short of calamitous: over 250.000 lives were lost (according to numbers of February 2021, just behind the United States), and it only did not get worse because Brazil features a universal health care system (SUS) and is a federal country, where governors and mayors have also some say in how to tackle the crisis. They rely nonetheless on the coordination by the federal government in matters of such a magnitude, which was not provided. The Supreme Court had to be called upon to decide unanimously that states and municipalities have concurrent authority to combat COVID-19[5] which, nonetheless, was strategically and falsely used by President Bolsonaro himself to justify why he was not more directly involved in tackling the crisis. Since then, Bolsonaro largely spread the distorted news that he was "prohibited" by the Supreme Court to "interfere in actions to combat COVID in states and municipalities."[7]

The attacks on the most basic principles of governance would also be reflected on continuous attacks on institutions, more explicitly during the first semester of 2020. They were all synchronized in a series of events where President Bolsonaro incited his supporters to protest against the Supreme Court, Congress, and the press, many of which with explicit references to the civil-military dictatorship (1964-1985) or calling for a military intervention. There were some relevant reactions in both Congress and the Supreme Court, and calls for impeachment intensified,[8] though Bolsonaro's popularity swung little throughout the year.[9]

In March 2020, the Supreme Court opened an investigation to examine the spread of fake news and potential crimes against the Court Justices and their relatives, which targeted various supporters of President Bolsonaro, among them some businessmen accused of providing financial backing to such practices.[10] In April 2020, the Supreme Court accepted the opening of an investigation of potential interference in the Federal Police by President Bolsonaro.[11] Such an investigation followed the dismissal of Sergio Moro – the

[2] See 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/

[3] Barroso, L.R., Benvindo, J.Z. & Osorio, A. (2019) Brazil. In *I· CONnect-Clough Center 2019 Global Review of Constitutional Law,* (Eds, Albert, R. et al.) pp. 41-45.

[4] Andrea Scoseria Katz, Lies in the Time of Corona: Attempts to Inoculate Truth from a Pandemic, Int'l J. Const. L. Blog, Apr. 29, 2020, at: http://www.iconnectblog.com/2020/04/lies-in-the-time-of-corona-attempts-to-inoculate-truth-from-a-pandemic/

[5] STF, ADI 6341

[6] *Bolsonaro tenta imputar ao STF omissão do governo federal para agir na epidemia* (Consultor Jurídico, Jan. 21, 2021), https://www.conjur.com.br/2021-jan-15/bolsonaro-tenta-imputar-stf-omissao-governo-epidemia.

[7] See *Bolsonaro volta a apoiar ato antidemocrático contra o STF e o Congresso, em Brasília* (G1, May 3, 2020), https://g1.globo.com/fantastico/noticia/2020/05/03/bolsonaro-volta-a-apoiar-ato-antidemocratico-contra-o-stf-e-o-congresso-em-brasilia.ghtml; Matheus Teixeira, 4 pontos sobre o discurso de Bolsonaro em ato a favor de 'intervenção militar' (BBC Brasil, Apr. 20, 2020), https://www.bbc.com/portuguese/brasil-52353804.

[8] Danielle Brant, Renato Machado, *Veja quais são os 68 pedidos de impeachment contra Bolsonaro*(Folha de S. Paulo, Feb. 6, 2021), https://www1.folha.uol.com.br/poder/2021/02/veja-quais-sao-os-68-pedidos-de-impeachment-contra-bolsonaro.shtml.

[9] Daniel Marcelino, Fernando Mello, *Avaliação do governo Bolsonaro: confira a retrospectiva mês a mês em* 2020 (JOTA, Dec. 18, 2020), https://www.jota.info/dados/aprovacao-dos-presidentes/avaliacao-do-governo-bolsonaro-2020-18122020.

[10] STF, INQ 4.781, Rapporteur: Min. Alexandre de Moraes.

[11] STF, INQ 4831-DF.

former judge presiding over the "Operation Car Wash"[12] – from his position as Minister of Justice. He left office accusing President Bolsonaro of planning to interfere in the Federal Police and of committing malversation and false representation.[13] Justice Celso de Mello, who was presiding over the case, left the Court (he retired in October 2020) pointing out his deep concerns about the future: "in such delicate moment of our institutional history… when high authorities of the Republic, by ignoring that no power is unlimited and absolute, dangerous experiments of co-optation of republican institutions are taking place, whose enterprise can only be legitimate when the degree of institutional autonomy that the Constitution assure us is preserved."[14]

As reactions increased and the risk of an impeachment became more real,[15] President Bolsonaro's most explicit authoritarian impulses receded and a new strategy was adopted: co-optation. Against his electoral discourse, he would attempt to build a coalition with the so-called "Centrão," a group of congressmen from distinct parties largely associated with patronage, pork-barrel politics, and corruption. Though such a coalition has historically proven very shaky, by providing some benefits to this group amid the municipal elections at the end of 2020, the political landscape seemed to have calmed down. Political strategies of all sorts dominated the second semester, but Bolsonaro's liberal reforms could not advance further in Congress despite the new coalition. His agenda, largely inspired by the typical right-wing agenda on abortion, guns, and cultural wars, was also mostly blocked by Congress. The municipal elections revealed an interesting outcome: the *"Centrão"* was the big winner, and most of the politicians connected with Bolsonaro's radical agenda lost, what suggested that Bolsonaro's influence may be waning. This configuration would lead to a relevant prospect in the political realm: as *"Centrão"* becomes stronger, the relationship with Bolsonaro will become costlier still.

2020 ended with the bleak scenario of a dire health crisis and a central government delivering an erratic and inefficient policy to combat COVID-19. As the next session will show, the Supreme Court was constantly called upon to help provide a response to the health crisis by a series of decisions that: 1) empowered state and municipalities to fight COVID-19;[16] 2) determined the daily publication by the federal government of epidemiologic data related to COVID-19;[17] 3) defined the responsibility of public agents in combatting COVID-19;[18] 4) ordered the federal government to adopt measures aimed at protecting the indigenous people from COVID-19;[19] and 5) established that the Union, the states, and the municipalities have the authority to impose mandatory COVID-19 vaccinations.[20]

The Supreme Court has been a key player in the absence of federal coordination to tackle the crisis. It was also a key player in defining the future of the relationship between the *"Centrão"* and Bolsonaro's government, which will likely change the landscape of President Bolsonaro's next two years in power. In December 2020, the Court blocked the attempt of reelection of both the Speaker of the House, Rodrigo Maia, and the President of the Senate, Davi Alcolumbre.[21] Congress, which was until then a central player in blocking some of Bolsonaro's most authoritarian impulses, would have new leaders. The political realm would become more turbulent still.

III. CONSTITUTIONAL CASES

In this section, we highlight the most important constitutional law cases decided by the STF in 2020.

1. Concurrent powers of the Federal government, states, and municipalities to legislate and adopt measures to respond to COVID-19: ADI 6341 MC-Ref, injunction granted on 03/24/2020, confirmed by the Court on 04/15/2020

The Plenary of the Supreme Court unanimously held that the Federal government, states, and municipalities hold concurrent powers to legislate and adopt measures in the fight against the COVID-19 pandemic, including quarantine and mobility restrictions. The case was prompted by the adoption of Provisional Measure 926/2020,[22] aimed at containing the spread of the new coronavirus, which provided, inter alia, that the President would regulate the functioning of essential public services during the pandemic. In practice, the legal act was enacted to limit the autonomy and the normative powers of state and local governments, which took the lead in the coronavirus crisis. Criticizing the federal government's inaction and failure to coordinate

[12] The Operation CarWash was a massive corruption investigation that implicated bigwigs in the political realm and CEOs of some of the Brazilian biggest companies. For more, see Jonathan Watts, *Operation CarWash: Is this the biggest corruption scandal in history?*(The Guardian, Jun. 1, 2017), https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history.

[13] Maurício Fefro, *Sergio Moro sai e acusa Bolsonaro de crime de responsabilidade* (Poder 350, Apr. 24, 2020), https://www.poder360.com.br/governo/sergio-moro-deixa-o-governo-bolsonaro/.

[14] Ricardo Britto, *STF estará à altura dos que ensaiam cooptação de instituições, diz Celso de Mello em discurso de despedida* (Reuters, Oct. 7, 2020), https://www.reuters.com/article/politica-celso-mello-despedida-idBRKBN26S3KO-OBRDN

[15] Edson Sardinha, Flávia Said e Lauriberto Pompeu, *Pressão por impeachment cresce: Maia já tem quase 30 pedidos sobre a mesa* (Congresso em Foco, Apr. 24, 2020), https://congressoemfoco.uol.com.br/governo/pressao-por-impeachment-cresce-maia-ja-tem-quase-30-pedidos-sobre-a-mesa/.

[16] STF, ADI 6.347.

[17] STF, ADPF 690.

[18] STF, ADI 6421, ADI 6422, ADI 6424, ADI 6425, ADI 6427, ADI 6428.

[19] STF, ADPF 709.

[20] STF, ADI 6586, ADI 6587.

[21] STF, ADI 6524.

[22] Provisional measures are temporary executive decrees with force of law which are submitted to Congress for appreciation.

Brazil's COVID-19 response, the Supreme Court found that the provisional measure of the President, although valid, could not impinge on the autonomy of states and municipalities to act in matters of public health.

2. Sharing of telecommunications data with government to produce COVID-19 statistics: ADI 6387, 6388, 6389, 6390 and 6393 MC-Ref, injunction granted on 04/24/2020, confirmed by the Court on 05/07/2020

The Supreme Court struck down Provisional Measure 954/2020 that required telecommunications companies to share users' personal data with the Brazilian Institute of Geography and Statistics (IBGE) to support the production of statistics during the COVID-19 public health emergency. The ruling found that the executive order was overly broad and failed to specify the purposes of data collection. In this landmark case, for the first time, the Court recognized data protection as an autonomous fundamental right.

3. Liability of public agents in the fight against COVID-19: ADI 6421, 6422, 6424, 6425, 6427 and 6431, decided 05/21/2020

This case challenged the constitutionality of the Provisional Measure 966/2020 that limited the civil and administrative liability of public agents for actions or omissions in the handling of the COVID-19 crisis to cases of willful misconduct or gross error. The majority of the Court held that the standard of gross error should be read as requiring public agents' COVID-19-related decisions to adhere to technical and scientific criteria established by recognized national and/or international organizations.

4. Suspension of police operations in Rio de Janeiro's favelas during COVID-19: ADPF 635 MC, injunction granted on 06/05/2020, confirmed by the Court on 08/05/2020 and extended on 08/18/2020

In an ongoing legal challenge against police violence in Rio de Janeiro, the STF confirmed an injunction order that limited police operations in the state's shantytowns *(favelas)* during the COVID-19 pandemic to exceptional circumstances duly justified in writing. The Court also established protocols for any police raid, including a ban on the use of helicopters as a shooting platform, limitations for operations near schools and healthcare facilities, and rules to allow for proper investigation of police and military officers suspected of committing crimes.

The legal action was filed in November 2019, arguing that the public security policy adopted by the Rio de Janeiro government is unconstitutional, as it exposes *favela* residents to various violations of their fundamental rights. Among other structural and systemic problems, the claimants underscored the high rate of police lethality, police raids near schools and hospitals, along with several cases of child homicide, and the structural racism revealed by the fact that most victims are black. In the context of the pandemic, in which residents of these communities were forced to stay at home, the situation was aggravated, with reports of several police operations that repeated the patterns of rights violations and even hindered the delivery of humanitarian assistance.

5. Public disclosure of COVID-19 epidemiological data: ADPF 690 MC-Ref, injunction granted on 06/09/2020, confirmed by the Court on 11/23/2020

In early June 2020, the Ministry of Health began to suppress and/or omit COVID-19 epidemiological data, which had been publicized in a standardized format since the beginning of the pandemic. The Court unanimously confirmed an injunction order determining that the Ministry of Health resume the disclosure of daily and cumulative numbers of COVID-19 cases and deaths, according to the previously adopted methodology, in order to guarantee the transparency and publicity of information.

6. STF's inquiry into fake news and other threats targeting the court and its members: ADPF 572, decided 06/18/2020

The Supreme Court decided, by 10 votes to 1, to move forward with an inquiry into fake news, smear campaigns, and other threats targeting the court, its Justices, and their family members. The criminal investigation was opened *ex officio* by STF's Chief Justice in 2019. Although initially viewed by some specialists as a potential violation of the accusatorial system and the principle of natural justice, the probe has increasingly gained legitimacy as a relevant instrument for the protection of Brazil's constitutional order and democracy in view of escalating attacks on the court, including calls for its closure. In May 2020, the court had ordered police raids against President Bolsonaro's allies citing evidence of an organized crime network dedicated to spreading fake news and attacks on authorities and institutions, fueling an institutional crisis between branches. Due to free speech concerns, the Court underlined in its ruling that journalistic articles, posts, and other messages on the internet were excluded from the scope of the inquiry provided that they were not part of schemes for the mass dissemination of disinformation on social networks.

7. Protection of indigenous people from COVID-19: ADPF 709 MC-Ref, injunction granted on 07/08/2020, confirmed by the Court on 08/05/2020

In a unanimous ruling, the Court requested the federal government to adopt adequate measures aimed at protecting Brazil's indigenous people from the COVID-19 infection. Considering (i) that indigenous people are particularly vulnerable to infectious diseases, (ii) the evidence of the accelerated spread of COVID-19 within indigenous communities, and (iii) the insufficiency of the actions adopted by the Federal government to contain the virus among these groups, the Court required the Federal government to formulate, within 30 days, a "COVID-19 Response Plan for Brazilian Indigenous Peoples," with the participation of indigenous communities, to be submitted for the Court's approval. In relation to indigenous peoples in voluntary isolation and initial contact, the Court also determined the creation of a situation room for the management of COVID-19-related actions, with representatives of indigenous communities. Unprecedently, the decision recognized legal standing to file direct claims before the Supreme Court to associations that advocate for minority groups.

While the government adopted several actions to guarantee the life and health of indigenous peoples in compliance with the ruling, by December 2020, there was still no COVID-19 Response Plan for Indigenous people approved by the Court. Three versions of the plan were rejected by the Justice rapporteur, who found that they were overly vague.

8. Prohibition on the production and sharing of intelligence reports against critics of the government: ADPF 722 MC, decided 08/20/2020

The Plenary of the Supreme Federal Court, by a majority of 11 votes to one, prohibited the Ministry of Justice from taking any action aimed at producing or sharing information about the personal life, political choices, and civic practices of citizens and public servants identified as members of the anti-fascist political movement, of university professors, or of any other individuals who exercise their free speech rights.

News articles had revealed that the Ministry of Justice produced and distributed among public agencies a dossier about a group of 579 civil servants and three university professors identified as members of the "anti-fascism movement," who were critical of President Bolsonaro. The Court found that the gathering of information to map the political opinions of a certain group or to identify opponents of the government constitutes a misuse of intelligence activities, violates freedom of expression, and endangers democracy.

9. Immediate effect of proportional allocation of public funds to black candidates: ADPF 738 MC-Ref, injunction granted on 09/10/2020, confirmed by the Court on 10/05/2020

The campaign financing regulations faced sweeping changes in the 2020 election as a result of the Supreme Court ruling that ordered the immediate effect of the Superior Electoral Court's decision that public funds and free TV and radio airtime should be allocated in proportion to the number of black women and black men running for office. While the electoral court had ruled that the decision would only take effect in the 2022 presidential elections, the STF found that the constitutional principle according to which modifications of electoral law adopted within one year of an election shall not apply has not been violated and does not take precedence over affirmative action to increase black political participation.

10. State's authority to impose mandatory COVID-19 vaccinations: ADI 6586 and 6587, and ARE 1267879, decided 12/17/2020

The Supreme Court reviewed three cases related to compulsory vaccination. The Plenary of the STF ruled, by a 10 to 1 vote, that the State can impose by law mandatory COVID-19 vaccinations. According to the decision, while the State cannot compel its citizens to be vaccinated, it can impose restrictive measures provided by law on those who refuse immunization, including fines and a ban from certain public activities and spaces. In addition, regarding the authority of subnational units in the matter, the Court held that states, the Federal District, and municipalities may also carry out local vaccination campaigns. In a case that discussed more broadly whether parents have the right to refuse to vaccinate their underage children on religious or philosophical grounds, the STF ruled that mandatory vaccination does not constitute a violation of the freedom of religion of parents or guardians.

11. Reelection of the Speakers of the House and the Senate: ADI 6524, decided 12/18/2020

In a 6 to 5 split, the Supreme Court blocked the possibility of reelection of the Presidents of the House, Rodrigo Maia, and the Senate, Davi Alcolumbre. The Court found that the text of the Constitution explicitly prohibits the re-election of the Speakers of both houses of Congress during the same legislative term. The minority opinion had argued that this provision should be read against the backdrop of constitutional amendment nr. 16/1997, which introduced the possibility of President's re-election for a subsequent term, and thus interpreted as allowing the presidents of both houses to serve two consecutive terms, in order to maintain the system of checks and balances.

IV. LOOKING AHEAD

After the Supreme Court's decision prohibiting the re-election of the leaders of both Houses of Congress,[23] the coalition with *"Centrão"* helped elect as Speaker of the House Representative Arthur Lira, who was supported by President Bolsonaro. This may help advance Bolsonaro's agenda. Despite that, the stability of such a political configuration may not last long if political and budget gains are not shared with the coalition and the economic and health crises weaken Bolsonaro's political clout, as recent polls suggest.[24] The arrival of former President Lula da Silva, a very strong contender, as a potential candidate for President in the 2022 elections will certainly impact the whole political landscape and the prospects of Bolsonaro's reelection. With a Congress more aligned with the Federal government, 2021 will possibly require the Supreme Court to play a more active role. Additionally, with Justice Marco Aurélio de Mello's retirement in July 2021, President Bolsonaro will have the opportunity to nominate a second Justice for the Court. The first was Justice Kassio Marques, who took office after Justice Celso de Mello's retirement in October 2020.

V. FURTHER READING

Fernando Luiz Abrucio et al., 'Combating COVID-19 under Bolsonaro's federalism: a case of intergovernmental incoordination' (2020) *54 Revista de Administração Pública* 4, 663, 677.

[23] STF, ADI 6524.

[24] *Avaliação positiva do governo Bolsonaro cai para 33%, aponta pesquisa* (IstoÉ, Feb. 22, 2021) https://istoe.com.br/avaliacao-positiva-do-governo-bolsonaro-cai-para-33-aponta-pesquisa/

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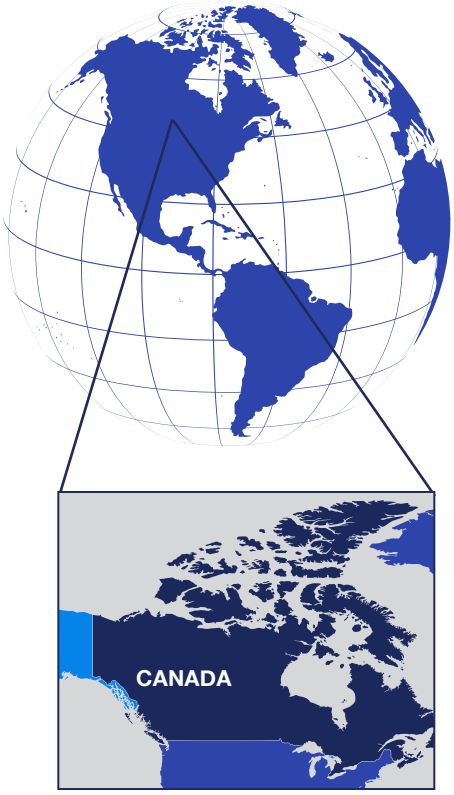

Canada

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I. INTRODUCTION

In March 2020, Canada entered the pandemic with the only national minority government under a Westminster parliamentary system. As the government is heading past the average length of a federal minority government, which is less than two years, it appears that the pandemic has afforded the country an unusual degree of political stability under these circumstances and is helping the government go on with its business largely unconcerned by the threat of a non-confidence vote. A different sort of 'business as usual' could also be observed at the Supreme Court. There, the heightened divisiveness between the justices in recent years[1] seems to have continued in the notable constitutional cases of 2020, three of which are discussed in this report. *9147-0732 Québec inc* examined the applicability to corporations of the guarantee against cruel and unusual punishment and unfolded into an unexpected lengthy debate on the judicial use of international and comparative legal sources. In *Re Genetic Non-Discrimination Act,* the Court grappled with the important issue of the scope of federal legislative authority over criminal law, but, unfortunately, it did not come to a majority decision. Probably the most constitutionally significant case of the year was *G,* in which the Court sought to restate the principles governing the use of remedies in the face of unconstitutional laws.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

National Minority Government During the Pandemic

Canadian governmental affairs during the pandemic have been characterized at all levels by a large-scale use of executive orders and unprecedented restrictions on individual liberties. Provincial governments have prohibited and, in some parts of the country, continue to prohibit interprovincial and intra-provincial travel. Since March 2020, the Canadian and US governments have agreed to close their shared land border to all non-essential travel. On January 9, 2021, the government of the province of Québec imposed the first general province-wide curfew in the country's history. Lawsuits challenging the constitutionality of government restrictions have met with limited success in the courts but are expected to continue.

During the summer of 2020, the federal government was hit by a political scandal for selecting a charity with ties to the Prime Minister and his family in order to administer a C$912-million federal student financial assistance programme. Allegations of conflicts of interest prompted the Ethics Commissioner to launch a third inquiry concerning the Prime Minister. Three parliamentary com-

[1] See H-R Zhou, "The 2019 I·CONnect-Clough Center Global Review of Constitutional Law", 'Canada', in R Albert et al (eds), (2020) 51, 52.

mittees also decided to conduct their own investigations. The Ethics Commissioner later extended his inquiry to the Finance Minister, who resigned in August. The next day, Prime Minister Trudeau sought and obtained from the Governor General the prorogation of Parliament, thereby suspending the work of all parliamentary committees. When Parliament reconvened in October, the House approved the Throne Speech, thus allowing the government to survive its first vote of confidence without much suspense.

By then, the Governor General herself was also in troubled waters after allegations of workplace harassment and abuse surfaced. Following an independent review finding her responsible of a toxic work environment, the Governor General submitted her resignation in January 2021. Pursuant to His Majesty's Letters Patent 1947, the Chief Justice of the Supreme Court of Canada was vested with the powers and authorities of the Governor General as the Administrator of the Government of Canada until the appointment of a new Governor General. Under normal circumstances, including such times under a minority government, the role of the Governor General as the Queen's representative in Canada remains purely formal and ceremonial. Almost all of the Governor General's effective powers and authorities are regulated by convention. They retain only a few and relatively vague reserve powers that can be exercised at their discretion in some circumstances when the government has lost the confidence of the House.

So far, the federal Liberal government has survived all confidence votes in the House, owing largely to the prevailing reluctance to force a national election campaign in the middle of the pandemic. However, the recent successes of all incumbent provincial governments at their general elections, including two minority governments that won a majority mandate, may change the status quo in Ottawa. The weakness of the opposition parties could also weigh in the balance. In particular, the current Opposition Leader has assumed office only in August 2020 after his predecessor was pushed to resign following his party's defeat at the 2019 general election. As the mass vaccination campaign gets underway, one can expect the Liberal Party to be on the lookout for the next opportunity to return to the campaign trail in the hope to regain a majority mandate.

III. CONSTITUTIONAL CASES

1. Québec (AG) v 9147-0732 Québec inc: Judicial use of international and foreign law and whether a corporation can suffer cruel and unusual punishment

While bills of rights are assumed to protect individual rights and freedoms, courts in Canada have on occasion extended the scope of some parts of the Canadian Charter of Rights and Freedoms 1982 to corporations, such as protection against unreasonable search or seizure (s 8)[2] and the right to be tried within a reasonable time (s 11*b*)).[3] In *9147-0732 Québec,* the Supreme Court was asked for the first time whether a corporation had a right not to be subjected to cruel and unusual punishment under s 12 of the Charter. In that case, the respondent corporation challenged the mandatory minimum fine of C$30,843 that it received for having carried out construction work without holding a valid license. The Court summarily held that, because s 12 referred to human pain and suffering and was anchored in the notion of human dignity, it did not apply to a corporation, notwithstanding the fact that human beings were behind its legal existence and that, in many cases, they would ultimately suffer the consequences of punishments imposed on the corporation.

While the finding of the inapplicability of s. 12 to corporations should have settled the case, the justices were drawn into an extensive tangential debate on constitutional interpretation, especially the appropriate role of international and foreign law. In her judgment, Abella J (Karakatsanis and Martin JJ concurring) cited a wide range of international rights instruments and foreign national laws in further support of the Court's unanimous conclusion that the prohibition against cruel and unusual punishment excludes corporations. Abella J's use of international and comparative law drew firm condemnation from the majority justices of the Court who viewed her 'indiscriminate' use of international and comparative sources as 'a marked and worrisome departure' from established Supreme Court practice, prompting them to set out a 'coherent and consistent methodology' for considering non-domestic sources.

For the majority justices, distinctions must be made between binding and non-binding international instruments, on the one hand, and pre-Charter and post-Charter instruments, on the other hand. Binding international instruments should carry more persuasive weight than non-binding instruments because they trigger the presumption of conformity with the Charter, according to which the latter provides a 'protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified' (para 31). By contrast, a court choosing to rely upon non-binding international instruments adopted after 1982 'should explain *why* it is doing so, and *how* they are being used (that is, what weight is being assigned to them)' (para 40). However, such explanation is less necessary for non-binding pre-Charter international instruments and certain foreign national instruments of historic importance as they 'can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed' (para 41). The drafters of the Charter drew on them 'because they were the best models of rights protection, not because Canada had ratified them' (id). Finally, the majority justices opined that 'particular caution' should be exercised when referring to foreign national sources, 'as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the Canadian *Charter'* (para 43).

[2] *Hunter v Southam Inc,* [1984] 2 SCR 145.
[3] *R v CIP Inc,* [1992] 1 SCR 843.

In the end, the most prudent (and perhaps wisest) way to dispose of the appeal came from Kasirer J who simply adhered to the Court's view that the guarantee against cruel and unusual punishment does not apply to corporations, without needing to engage in the debate on the judicial use of international and comparative legal sources. Nonetheless, one could still suggest that that debate had the merits of bringing the Court to reaffirm the persuasiveness of international and comparative law and its rejection of 'pure' or 'new' textualism pursuant to which constitutional interpretation 'is strictly restricted to the text of the Constitution' (para 12).

2. Reference re Genetic Non-Discrimination Act: What Is a Criminal Law?

Criminal law is arguably the widest head of legislative power assigned to Parliament under s 91(27) of the 1867 Constitution. Since at least the end of the Second World War, it has been defined in the case law as composed of three essential elements: a prohibition, a penalty and a valid criminal law purpose. Much of the debate would revolve around the meaning of the third substantive element of the definition. Read too narrowly, and Parliament cannot properly exercise its authority to determine which conducts present the degree of danger that amounts to a crime. Read too widely, and virtually any human activity within exclusive provincial jurisdiction could end up falling under federal purview. Over the decades, the Supreme Court was closely divided between two main camps. Under the last iteration of the broader approach, a criminal law must respond to a reasonable apprehension of a risk of harm. By contrast, proponents of a narrower approach argue that the harm must be 'real', that there must be a sufficient connection between the apprehended harm and the evil in question.

The constitutional challenge to the federal Genetic Non-Discrimination Act 2017 arose in unusual circumstances. It originated from as a private member's bill introduced in the Senate, which was eventually approved in the Commons in a free vote despite the opinion of the Minister of Justice and the Justice Department that the bill, if enacted, would be unconstitutional. The Act, a succinct 11 articles, prohibits anyone from requiring a genetic test or disclosing or using the results of a genetic test without consent as a condition of providing goods or services or otherwise entering into a contractual relationship. When the matter of the constitutionality of the Act reached the courts, the Attorney General of Canada took the rare step of siding with the provincial Attorney Generals who challenged Parliament's Act, prompting one justice to note somewhat wryly the 'unusual congruence of views'.

At the Supreme Court level, five justices ultimately agreed in separate sets of judgments that the Act was a valid exercise of the federal power under s 91(27). Karakatsanis J (Abella and Martin JJ concurring) adopted the broader approach to s 91(27). For her, the 'pith and substance' of the Act was to protect people's control over their personal information disclosed by genetic tests and to prevent genetic discrimination based on that information. More specifically, the conduct prohibited by the Act could lead to abuse of a person's genetic information and stigmatization of some people because of their genetic characteristics, and therefore threatened individual autonomy and personal privacy. The prohibited conduct also posed a risk to public health to the extent that some people will forego beneficial testing for fear of genetic discrimination. Since these matters were traditional interests of criminal law, Karakatsanis J concluded that the impugned Act was a valid exercise of Parliament's jurisdiction over criminal law.

Kasirer J's dissenting judgment represented the view of the plurality of the Court owing to the split majority reasons. For him, the pith and substance of the Act was to regulate contracts and the provision of services by prohibiting certain genetic tests with a view to promoting public health. Applying the narrow approach to s 91(27), Kasirer J found that the impugned Act did not seek to suppress or prevent genetic discrimination and its purported threat to public health, individual autonomy and personal privacy. On the contrary, the Act encouraged Canadians to undergo genetic testing as beneficial to public health. Therefore, Kasirer J concluded that the Act was ultra vires Parliament's criminal law power. In a separate judgment, Moldaver J (Côté J concurring) found that the impugned Act was a valid exercise of Parliament's criminal law power under either a broad or a narrow approach. Indeed, the Act is directed at suppressing a real threat to health, as many Canadians were choosing to forego genetic testing and thereby suffering preventable disease because of the fear that their genetic test results could be used against them.

The deep division among the justices makes it difficult to work out any valuable principle from their extensive discussion. The most one can venture to suggest is that a broad view of what constitutes a criminal law somehow continues to prevail, although a significant amount of uncertainty surrounds its critical substantive element. More generally, the debate on the limits of Parliament's power under s 91(27) is illustrative of the longstanding tensions between the more centralized and the more decentralized conceptions of the Canadian federation. While the Genetic Non-Discrimination Act may not have provided the best basis to revisit the issue, this reference case represents a missed opportunity for the Supreme Court to contribute some certainty to this important area of the division of powers.

3. Ontario (AG) v G: Rights to equality and suspension of declaration of invalidity

In 2000, the legislature of the province of Ontario enacted Christopher's Law ('Act'), named in memory of an 11-year-old boy who was abducted, raped and murdered in 1988 by a 45-year-old repeated psychopathic sex offender three months after his conditional release from jail. The Act created a sex offender registry based on the American model, a recommendation of the 1993 report of the coroner's inquest into Christopher's death.

Under the Act, persons who are convicted or found not criminally responsible on the account of mental disorder ('NCRMD') of a sex offence must report to a police station to have their personal information added to the province's sex offender registry and then updated therein regularly for at least

ten years. They are also subject to random police checks and their names remain on the registry even after their death. Offenders who are granted a discharge are exempted from having to register or are removed from the registry and relieved of the reporting obligations. However, those who are found NCRMD and receive a discharge can never be removed from the registry and relieved of the reporting obligations.

In 2002, the respondent was found NCRMD of two counts of sexual assault on his wife. The assaults occurred as a result of a manic episode caused by a bipolar disorder. A year later, the respondent received an absolute discharge of the offences. Since the day he was placed on the sex offender registry, the respondent complied with all of his reporting obligations. During that time, the respondent had not engaged in any criminal activity and had been in full remission after completing treatment for his condition. However, because he was found NCRMD, he was not eligible to have his name removed from the registry and be relieved of the reporting obligations. In 2017, the respondent decided to challenge the Act as a violation of his rights to equality on the basis of mental disability under s 15 of the Charter.

The Supreme Court unanimously upheld the appeal court's suspended declaration of invalidity of the Act insofar as it applied to those found NCRMD of sexual offences but had been absolutely discharged. The Court found that the impugned law created a distinction based on s 15's enumerated grounds of mental disability. That law stereotyped persons with mental illness as inherently dangerous and put them in a worse position than those found guilty. It also perpetuated the historical and enduring disadvantage of people suffering from mental illnesses. While the justices generally agreed that the Act violated the s 15 rights of individuals with mental disability, they were divided on the proper approach to constitutional remedies.

Section 52(1) of the 1982 Constitution states that: 'any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.' As such, the language of s 52(1) allows courts a fair amount of flexibility in crafting appropriate remedies. However, the applicable principles had become somewhat muddled over time with the mounting number of laws held unconstitutional. In G, the Supreme Court attempted to restore some structure to the application of constitutional remedies.

Karakatsanis J delivered the majority judgment. She interpreted the case law as requiring courts to exercise 'principled discretion' in determining the proper constitutional remedies. If the government wanted to obtain a delay from the immediate effects of a declaration of invalidity, it had to demonstrate the existence of an overriding compelling public interest to temporally keep an unconstitutional law on the books. In respect of the Act's violation of s 15, Karakatsanis J recognized that 'the need to safeguard *Charter* rights and ensure constitutional compliance of all legislation weigh heavily in favour of an immediately effective declaration' (para 171). However, allowing now the removal from the registry of those found NCRMD of sexual offences and absolutely discharged poses a risk to public safety as this group is at a statistically higher risk of committing crimes than the general population. Moreover, granting an immediate declaration of invalidity could hinder the legislature's ability to consider new policies regarding the registry and appropriate amendments to the Act in response to the present judgment. Karakatsanis J concluded that the evaluation of the weight of the remedial principles as applied to the Act justified a 12-month suspension of the declaration of invalidity.

Rowe J disagreed with the majority's balancing approach, which, in his view, lacked analytic structure and provided no meaningful guidance. He supported reaffirming an earlier precedent pursuant to which a suspension should be granted in certain instances of underinclusive laws or where an immediate declaration of invalidity would pose a potential danger to the public or would otherwise threaten the rule of law. In a partly dissenting judgment, Côté and Brown JJ would have restricted even further the use of suspensions only to protect the rule of law and public safety. An immediate declaration of invalidity of the Act would mean that persons found NCRMD would be removed from the registry irrespective of their risk of reoffending. Therefore, Brown and Côté JJ agreed with the majority justices that a suspension was warranted in this particular case to protect public safety and the rule of law.

Suspending a declaration of invalidity entails that the claimant who has successfully brought a constitutional challenge to the courts would be left after the judgment in the same position as if the challenge had not taken place, thus raising the question whether the claimant should receive an individual exemption from the suspension. In Karakatsanis J's view, the claimant who has 'braved the storm of constitutional litigation' and obtained a judgment that will benefit society at large, has done the public interest a service (para 142). Individual remedies can help incentivize claimants to bring cases that carry substantial societal benefits. Brown and Côté JJ rejected Karakatsanis J's reasoning, arguing that granting an exemption to the claimant only is unfair to others who are in the same situation, some of whom may well be unable to participate in court proceedings. Nevertheless, Karakatsanis J stated that, 'when the effect of a declaration is suspended, an individual remedy for the claimant will often be appropriate and just', and that 'there must be a compelling reason to deny the claimant an immediate effective remedy' (paras 147, 149). In the case of the respondent, Karakatsanis J upheld the Court of Appeal's decision to exempt him from the suspension, considering his spotless record and the absence of indication of risk to public safety. Brown and Côté JJ would have denied the exemption and Rowe J declined to weigh in on the issue since the suspension had expired by the time the case was decided.

G is a serious attempt to overhaul the criteria for suspending declarations of invalidity. In doing so, the majority of the Supreme Court signified its continued embrace of a Dworkinian approach to constitutional adjudication. However, one can appreciate Rowe J and the dissenting justices' scepticism on whether the majority's reasons will

provide sufficient guidance to courts asked to grant suspended declarations of invalidity. In respect of individual exemptions, both the majority and dissenting justices raised legitimate policy considerations. Here, the majority's 'compelling reason' standard signals a clear shift from the Court's long-standing official position[4] in that it recognizes 'ancillary' constitutional exemptions as part of the courts' toolbox of remedies for unconstitutional laws.

IV. LOOKING AHEAD

Without a doubt, the most anticipated decision of 2021 will be in the Supreme Court reference case on the constitutionality of the federal 'carbon tax', where the Court is expected to revisit its four decade-old precedent on the federal power to make laws for the peace, order and good government of Canada under s 91 of the 1867 Constitution.[5] Another pending case that initially garnered much public attention is the constitutional challenge of a law passed in the middle of the 2018 municipal election campaign by the newly elected Conservative government of Ontario that unilaterally reduced the number of Toronto City wards and councilors by half.[6] 2021 will also mark the mandatory retirement of Abella J, whom many consider as the most left-leaning judge currently sitting on the Supreme Court. As was the case for the two previous Supreme Court appointments made by the current Liberal government, an independent advisory committee chaired by a former prime minister was set up and is tasked to recommend suitable candidates to the Prime Minister.

V. FURTHER READING

R Alford, *Seven Absolute Rights: Recovering the Foundations of Canada's Rule of Law* (McGill-Queens' University Press 2020)

F Chevrette, H Marx and H-R Zhou, *Constitutional Law: Fundamental Principles – Notes and Cases* (Thémis 2021), transl. *Droit constitutionnel: principes fondamentaux – notes et jurisprudence* (2nd rev'd edn by H-R Zhou, Thémis 2021)

A Gagnon and J Poirier (eds), *Canadian Federalism and Its Future: Actors and Institutions* (McGill-Queen's University Press 2020), transl. *L'avenir du fédéralisme canadien : acteurs et institutions* (Presses de l'Université Laval 2020)

N Karazivan and J Leclair (eds), *The Political and Constitutional Legacy of Pierre Elliott Trudeau* (LexisNexis 2020), transl. *L'héritage politique et constitutionnel de Pierre Elliott Trudeau* (LexisNexis 2020)

C Mathen and M Plaxton, *The Tenth Justice* (UBC Press 2020)

[4] See F Chevrette, H Marx and H-R Zhou, "Constitutional Law: Fundamental Principles – Notes and Cases" (Thémis 2021), 752-60.

[5] "Saskatchewan (AG) v Canada (AG) (SCC 38663)", "Ontario (AG) v Canada (AG) (SCC 38781)", "British Columbia (AG) v Alberta (AG) (SCC 39116)", appeal heard 22-23 September 2020.

[6] "City of Toronto v Ontario (AG)", hearing scheduled 16 March 2021 (SCC 38921).

Cape Verde

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I. INTRODUCTION

This report aims at presenting the political, legislative, jurisprudential, and doctrinal evolution of Cape Verde's (CV) Constitutional Law in 2020. Despite some controversial measures issued by the Executive intended to control the pandemic, the state of the liberal democracy remained stable, at least according to major international indices[1] and perceptions on the ground. Thus, no major constitutional changes or political frictions were noticeable. Furthermore, the legislative agenda led to the approval of relevant acts and the Constitutional Court of Cape Verde (CCCV) delivered important and long-awaited opinions and increased the number of decisions as compared to 2019. Relevant scholarship on CV political and constitutional matters was also published.[2] The conclusion is that there was no substantive change to the constitutional system.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The COVID-19 pandemic set the pace of the political year from March to December. A month before the first case was diagnosed in CV, some initial measures were adopted by the Cabinet: (i) transfer of funds to support a special plan of emergency,[3] (ii) limits on flights coming from Italy,[4] (iii) the approval of a contingency plan to prevent and control the pandemic,[5] and, more controversially, (iv) the imposition by resolution of restrictive measures prohibiting public events[6] as well as (v) the amplification of the list of flight bans,[7] which was especially onerous for a country that largely depends on tourism. After a small number of imported cases were diagnosed in the Archipelago, the President of the Republic (PR), following the required consultation to the Executive and a parliamentary authorization,[8] declared a national state of emer-

[1] CV is classified as free by the Freedom of the World 2020 Report (FH 2020), 16; as a flawed democracy by the Democracy Index 2020 (Economist 2020), and as an Electoral Democracy by the *Autocratization Becomes Viral. Democracy Report 2020* (V-Dem 2021), 31.

[2] See Antero Tavares, *Casamento entre Pessoas do Mesmo Sexo e Constituição Cabo-Verdiana* (Authors Edition); José Pina Delgado, 'Relações entre a Carta e a Constituição de Cabo Verde' in Paulo Pinto Albuquerque (ed), *Comentário à Carta Africana dos Direitos Humanos e dos Povos e do Protocolo Adicional* (UCE); Benfeito Ramos, "O recurso de amparo em Cabo Verde: Será o Tribunal Constitucional uma super-instância de revisão das decisões judiciais?" and José Pina Delgado, 'O mecanismo de incorporação de normas convencionais internacionais no ordenamento jurídico cabo-verdiano' in: Mário Monte *et al.* (eds), *Estudos em Homenagem ao Professor Doutor Wladimir Brito* (Almedina); Leão de Pina, *Cultura Política, Valores Cívicos e Cidadania Democrática em Cabo Verde: entre Adesão Formal e Embaraço Cultural* (Editora ISCJS) and its Preface written by José Pina Delgado, 'Prefácio: O Sangue da Democracia'; Mário Silva, *Código Eleitoral Anotado* (3rd edn., LPC); see also papers written by Geraldo Almeida, Jorge Miranda, and Yara Miranda included in Lígia Fonseca et al. (eds), *Liberdade Sempre* (LPC).

[3] Council of Ministers Resolution [CMR] 34/2020, OJ I-S, n 22, 25/02/2020, 545-550.

[4] CMR 35/2020, OJ, I-S, n 23, 27/02/2020, 552.

[5] CMR 46/2020, OJ, I-S, n 30, 13/03/2020, 822-842.

[6] CMR 47/2020, OJ, I-S, n 30, 13/03/2020, 842.

[7] CMR 48/2020, OJ, I-S, n 31, Sup., 17/03/2020, 2-3.

[8] National Assembly Resolution (NAR) 109/IX/2020, OJ, I-S, n 38, 28/03/2020,1012-1014.

[9] Presidential-Decree [PD] 06/2020, OJ, I-S, n. 38, 28/03/2020, 1010-1012, later regulated by Law-Decree 36/2020, OJ, I-S, n 38, Sup., 28/03/2020, 2-7.

gency on March 28,[9] the milder mechanism of constitutional exception set forth in the Constitution (Articles 270–271). This state of emergency was subsequently extended in some of the islands and lifted on others.[10] Thus, public policies and the legislative agenda were largely driven by pandemic propagation control. Both led to the imposition of major restrictive measures during and after the period of exception through: (i) emergency decrees, (ii) the Parliamentary Act on Exceptional and Temporary Measures to Respond to the Situation of Epidemiology Provoked by the Coronavirus Sars-Co-2 and of COVID-19,[11] and (iii) the Act to Impose the Outdoor Use of Facial Masks.[12] The Cabinet kept using executive resolutions based on the "state of calamity" set out in the Civil Protection Act to approve broad measures that had an impact on personal rights.[13] Economic, sanitary, and social measures for the mitigation of the effects of the pandemic on the population were adopted as well, such as: (i) Family and Income Protection,[14] (ii) Protection of Families, Companies, Charities, and Social Economy Entities,[15] (iii) Fiscal Incentives to the Production and Importation of Health Equipment,[16] (iv) Extraordinary Insurance for Health Workers,[17] and (v) Employment Protection.[18]

Another issue in the public agenda of 2020 was the arrest of Mr. Saab, a Colombian-Venezuelan national, which was followed by a request for extradition from the United States of America (US) where he is being prosecuted for allegedly conducting an illegal bribery scheme and for money laundering.[19] After his detention, Mr. Saab's presented his legal defense. On top of that. the Venezuelan Government asserted that Mr. Saab enjoys personal inviolability and immunities from criminal jurisdiction in CV because he was traveling to Iran on a special mission directly mandated by Mr. Maduro[20] and that, in consequence, the detention violated his constitutional rights. Afterwards, Venezuela also alleged that he was a diplomat because he had been appointed Alternate Ambassador of Venezuela in the African Union (AU) in the last days of December, of which CV is a member.[21] The matter was further complicated by the intervention of the Economic Community of West African States (ECOWAS) Court of Justice that granted a provisional measure requested by Mr. Saab and ordered CV authorities to put him on house arrest.[22] Yet, the Attorney-General (AG) declared that the country could not be compelled to comply with a treaty that it didn't even sign much less ratify.[23] This reasoning was also adopted by a Court of Appeal that had denied his release on many occasions for other circumstances as well.[24] The Supreme Court (SC) also dismissed many habeas corpus requests on behalf of Mr. Saab.[25] Pursuing this further, the CCCV alleged the absence of the exhaustion of ordinary remedies and rejected intervening in the case. Thus, in the last days of 2020, he was still held in pretrial detention and the final decision on his extradition is still pending.

Finally, municipal elections were held on October 25, which led to the victory of the ruling party, MPD, in most of the municipalities (14 of 22). However, it was a bitter one because there was a major and unforeseen upset in the capital city of Praia with the surprising victory by the main opposition party —PAICV.

Other important political development was a cabinet reshuffle[26] in January, which resulted in the appointments of (i) Mr. Figueiredo Soares, the former majority whip and a law professor, as the new Minister of Regional Integration[27] to replace Mr. Herbert, who died the year before,[28] (ii) Mr. Veiga as Minister of Maritime Economy, and (iii) Mr.

[10] PD 07/2020, OJ, I-S, n 48, 17/04/2020, 1124-1126; PD 08/02020, OJ, I-S, n 55, 02/05/2020, 1292-1294; PD 09/2020, OJ, I-S, n 60, 14/05/2020, 1322-1324.

[11] Law 83/IX/2020, OJ, I-S, n 44, 04/04/2020, 1086-1091.

[12] Law 102/IX/2020, OJ, I-S, n 122, 29/10/2020, 2812-2813.

[13] CMR 76/2020, OJ, I-S, n 65, 29/05/2020, 1408-1409; CMR 85/2020, OJ, I-S, n 71, 18/06/2020, 1502-1515; CMR 92/2020, OJ, I-S, n 68, 04/07/2020, 1598-1600.

[14] CMR 58/2020, OJ, I-S, n 39, 30/03/2020, 1016-1018.

[15] Law-Decree 38/2020, OJ, I-S, n 40, 31/03/2020, 1022-1026.

[16] Law 88/IX/2020, OJ, I-S, n 57, 07/05/2020, 1303-1305.

[17] CMR 79/2020, OJ, I-S, n 66, 03/06/2020, 1424-1425.

[18] Law 97/IX/2020, OJ, I-S, n 86, Sup., 23/07/2020, 2-4.

[19] See https://www.justice.gov/opa/pr/two-colombian-businessmen-charged-money-laundering-connection-venezuela-bribery-scheme, which gives access to the indictment.

[20] See Joshua Goodman, 'Venezuela Demands Release of Business Man Connected to Maduro', available at https://apnews.com/article/6b-20d5164e76243138e211d4eb45da79.

[21] See https://www.premiumtimesng.com/news/headlines/433703-venezuela-appoints-businessman-detained-in-cabo-verde-as-ambassador-to-african-union.html.

[22] http://prod.courtecowas.org/2020/12/03/ecowas-court-orders-republic-of-cape-verde-to-place-detained-venezuelan-under-permanent-home-arrest-home-detention/.

[23] https://expressodasilhas.cv/pais/2020/12/19/cabo-verde-ao-ratificou-protocolo-sobre-direitos-humanos-da-cedeao-pgr/72635.

[24] https://noticiasdonorte.publ.cv/110472/trb-indefere-pedido-da-defesa-de-saab-a-competencia-para-determinar-a-soltura-ou-substituicao-das-medidas-cautelares-e-dos-tribunais-nacionais/.

[25] https://thevenezuelanjournal.com/supreme-court-rejects-second-habeas-corpus-request-to-free-alex-saab-p1155-170.htm.

[26] PD 01/2020, OJ, I-S, n 4, 09/01/2020, 48.

[27] https://inforpress.cv/rui-figueiredo-promete-passos-significativos-para-uma-efectiva-integracao-regional.

[28] *GRCL* 2019, 57.

Santos as Minister of Tourism and Transportation, portfolios that were previously held by the all-powerful Minister of Economy, Mr. Gonçalves, who left the cabinet.[29] In November, Ms. Rosabal resigned as Minister of Education, Family, and Social Inclusion —formally for personal reasons but in practice contested by grassroots supporters of the ruling party for keeping opposition activists in important positions in her department's structure—. The Secretary of State of Higher Education, Mr. Cruz, was elevated to Minister of Education whereas the other portfolios that she held went to Mr. Freire, the Minister of the Presidency of the Council of Ministers, Parliamentary Affairs, and Sports.[30]

The relationship between the Speaker of Parliament and the opposition political parties turned sour again,[31] with the former accusing the latter of bias in conducting parliamentary business.[32] Furthermore, the Cabinet and the President that propose and choose, respectively, ambassadors were accused by the opposition of nominating political personalities to ambassadorships instead of selecting career diplomats.[33] In addition, at the end of the year, the recently reelected mayor of the third most populated municipality of the country, S. Catarina, was shot at home and died of the inflicted wounds with contradictory statements on whether it was a suicide or a murder.[34]

Parliament finally elected a new Ombudsman, Mr. Delgado, to replace the one whose term had expired in 2018.[35] But, unfortunately, none of the other vacant positions – substitute justices of the CCCV, members of the Judicial Council, and of the Public Prosecutors Council – were fulfilled in 2020. The legislative agenda was mainly directed at pandemic control measures, but even so, many statutes relevant to constitutional law were enacted as well. This was the case of (i) the Creation of the Order of Freedom Act,[36] (ii) the Service Members Act,[37] (iii) an Act to Grant a State Pension to Victims of Torture and Ill-Treatment under the regime of the so called I Republic,[38] and another statute to create (iv) the Corruption Prevention Council.[39] Important legislation was also approved in the field of social rights, namely, the Social Inclusion Income Act.[40]

At the international level, the Cabinet approved the ratification of the Agreements of Promotion and Reciprocal Protection of Investment with Hungary[41] and Equatorial Guinea,[42] as well as an Economic and Technical Agreement with Hungary.[43] Parliament authorized the ratification of many other treaties, such as (i) the one that created the African Free Trade Area and its Protocols on Trade and Services and Dispute Settlement[44], (ii) the AU Convention on Cyber Security and Personal Data Protection,[45] (iii) the Convention for the Suppression of Unlawful Seizure of Aircraft and its Beijing Protocol,[46] (iv) the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions,[47] and (v) the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure.[48] Related to foreign affairs legislation, it is important to mention the enactment of the Diplomats Statute.[49]

As for judicial politics, an MP was accused of undermining the independence of courts by requesting that inquiries be launched against SC Judges accused of mismanagement of justice by an attorney-at-law. This led to an unprecedented public position adopted by almost all the judges of the SC in a press conference threatening to boycott public acts.[50] Later, the ceremony of the inauguration of the 2020–2021 judicial term was cancelled.[51] Additionally, it is relevant to highlight that two

[29] https://inforpress.cv/government-reshuffle-jose-goncalves-leaves-for-personal-reasons-and-is-replaced-by-carlos-santos-and-paulo-veiga/
[30] PD 16/2020, OJ, I-S, n 134, 08/12/2020, 1986-1987.
[31] *GRCL 2018,* 48.
[32] https://anacao.cv/2020/06/25/jorge-santos-sem-confianca-politica-do-paicv/
[38] *Inforpress,* 5/12/2019, <https://www.inforpress.cv/en/arc-considers-2020-budget-insufficient-to-meet-needs-in-an-election-year/>
[34] https://expressodasilhas.cv/pais/2020/12/24/morreu-beto-alves/72699
[35] https://expressodasilhas.cv/pais/2020/11/17/jose-carlos-delgado-empossado-como-novo-provedor-de-justica/72192
[36] Law 70/IX/2020, OJ, I-S, n 9, 22/01/2020, 216-218.
[37] Legislative-Decree 1/2020, OJ, I-S, n 12, 31/01/2020, 254-294.
[38] NAR 20/2020, OJ, I-S, N. 12, Sup., 31/01/2020, 2-4.
[39] Law 77/IX/2020, OJ, I-S, n 35, 23/03/2020, 926-928.
[40] Law-Decree 41/2020, OJ, I-S, n 42, 02/04/2020, 1070-1073.
[41] Decree 2/2020, OJ, I-S, n 21, 24/02/2020, 494-513.
[42] Decree 3/2020, OJ, I-S, n 27, 06/03/2020, 682-688.
[43] Decree 4/2020, OJ, I-S, n 31, 17/03/2020, 877-881.
[44] NAR 151/IX/2020, OJ, I-S, n 22, 25/02/2020, 518-545.
[45] NAR 153/IX/2020, OJ, I-S, n 31, 17/03/2020, 844-858.
[46] NAR 154/IX/2020, OJ, I-S, n 31, 17/03/2020, 858-870.
[47] NAR 156/IX/2020, OJ, I-S, n 36, 26/03/2020, 1019-1034.
[48] NAR 158/IX/2020, OJ, I-S, n 36, 26/03/2020, 1034-1041.
[49] Law-Decree 35/2020, OJ, I-S, n 36, 26/03/2020, 1042-1063.
[50] https://santiagomagazine.cv/sociedade/efeito-mircea-delgado-stj-boicota-presenca-em-atos-oficiais-enquanto-se-mantiver-hostilidade-institucional.
[51] https://anacao.cv/2020/12/10/polemica-no-sector-da-justica-abertura-do-ano-judicial-esta-comprometida/.

female judges of the SC retired, namely the Judge-President Coronel and Associate Judge Boal, leaving two seats vacant.[52]

III. CONSTITUTIONAL CASES

2020 was particularly productive for the CCCV due to the number of decisions it delivered, which increased from fifty-three to sixty-five. Yet more than half of the decisions — thirty-eight — were rulings (R): (i) on the admissibility of constitutional complaints (or *amparo*), which often were coupled with adoption of provisional measures requests (R-1/2020; R-2/2020; R-3/2020; R-4/2020; R-5/2020; R-6/2020; R-7/2020; R-9/2020; R-11/2020; R-21/2020; R-22/2020; R-25/2020; R-26/2020; R-28/2020; R-32/2020; R-33/2020; R-46/2020; R-49/2020; R-50/2020; R-51/2020; R-54/2020; R-56/2020; R-57/2020; R-58/2020; R-59/2020; R-61/2020; R-62/2020; R-63/2020), all written by C.J. Semedo which, with rare exceptions (R-18/2020, A.J. Lima dissenting), gathered the unanimous support of the Court; (ii) to allow plaintiffs to correct their *amparo* petitions (R-8/2020; R-14/2020; R-16/2020; R-17/2020; R-23/2020; R-24/2020, all written by C.J. Semedo); (iii) on request of clarification or to argue nullity of non-admissibility rulings (R-47/2020; R-48/2020, written by C.J. Semedo); and (iv) on complaints directed against a decision of ordinary courts not granting leave to submit a request to control the constitutionality of a norm to the CCCV (R-12/2020, written by A.J. Lima).

Constitutional complaints decided on the merits were mostly repetitive cases or minor questions related to the interpretation of criminal procedural safeguards set forth in the Constitution that did not bring any noticeable change in the CCCV case law. These constitutional complaints were decided following previous understandings adopted by the justices (Judgement (J) J-13/2020; J-5/2020; J-19/2020; J-20/2020; J-27/2020; J-60/2020, all written by A.J. Pina-Delgado, and J-17/2020 written by A.J. Lima).

The other decisions concerned electoral matters raised by political organizations that contested the above-mentioned municipal elections. Most of the appeals had the goal of quashing district court decisions on the admissibility of electoral lists or individual candidates. The CCCV followed its traditional approach, favorable to political participation rights, to review the fulfillment of electoral requirements intended to challenge municipal elections, reversing or confirming decisions on that matter (J-34/2020, written by A.J. Lima; J-35/2020, written by A.J. Pina-Delgado; J-36/2020, written by A.J. Lima; J-37/2020, written by C.J. Semedo; J-38/2020, written by A.J. Pina-Delgado; J-39/2020, written by C.J. Semedo; J-40/2020, written by A.J. Pina-Delgado; J-41/2020, written by A.J. Pina-Delgado). It is also important to report that by choosing to decide some of the judgements on other grounds (J-34/2020 and J-39/2020), the CCCV declined to rule on the constitutionality of the Gender Parity Act, despite the controversy raised by this statute.[53] Other appeals in this domain related to (i) the possibility of local electoral bodies correcting elector lists after publication (J-43/2020, written by A.J. Lima); (ii) the principle of equity in the distribution of vote clerks and workers between the contestant organizations (J-44/2020, written by C.J. Semedo); (iii) the existence of an obligation of the Red Cross of CV to grant its facilities to establish poll stations (J-45/2020, written by A.J. Pina-Delgado); (iv) the nullity of a decision of the National Electoral Commission (NEC) for not presenting reasons for not approving a candidate financial report (J-29/2020, written by A.J. Lima); (v) and the possibility of NEC hiring external staff to assist electoral officials in voting sites (J-31/2020, written by A.J. Lima). It is also noteworthy to mention an extraordinary claim by an independent candidate that the CCCV should interpret electoral law in a sense that would guarantee the greatest possible representation to all social groups in the municipality, if necessary by applying a method of conversion of votes in mandates not prescribed by law. Despite not being decided on the merits, the arguments were unsurprisingly criticized as totally groundless (J-55/2020, written by A.J. Pina-Delgado). There were also two decisions related to the system of election of the Chairperson of Municipal Assemblies (J-52/2020; J-53/2020, both written by A.J. Lima) in which the CCCV decided that, according to municipal legislation, if the party with the most votes could not command a majority of deputies and minority parties managed to reunite sufficient support, the latter could elect the Chairperson and all other Board Members of the organ.

Major decisions

1. Advice 1/2020 (Referral by the PR on the constitutionality of the law-decree that approves the framework of the Contract of Concession of the Right to Organize and Operate National Lottery): preventive review of constitutionality[54]

The PR submitted a referral to the CCCV to review the constitutionality of a law-decree that approved the framework of the Contract of Concession of the Right to Organize and Operate National Lottery before its promulgation on the grounds of a possible violation of the principle of healthy competition between economic operators, the principle of public interest, the democratic principle, and the transparency principle. This was because the legislator established the possibility of the Executive to directly choose one operator to organize and operate the national lottery. The CCCV, in a unanimous opinion written by A.J. Lima, recognized that the law-decree would restrict competition but, nonetheless, considered that the underlying constitutional principles were not absolute. As such, they should be balanced with other public goals (namely, safeguarding trust and quality of the service) and in the framework of the CV tradition, A.J. Lima reasoned that the decision should take into consideration mainly social goals, especially in this case as the lottery was promoted for a long time

[52] https://csmj.cv/index.php/noticias/216-conselheira-fatima-coronel-despede-se-da-magistratura-e-deixa-stj-por-aposentacao.

[53] *GRCL* 2019, 58.

[54] OJ, I-S, n 14, 04.02.2020, 347-357.

by a special non-profit humanitarian entity, the Red Cross. The rest of the claims were dismissed without much inquiry, leading to a pronouncement that the rules were "not unconstitutional."

2. Advice 2/2020 (Referral by the PR on the constitutionality of the Enabling Act to Approve the Drug Trafficking Criminalization Act Reform Act): preventive review of constitutionality[55]

The PR understood that a Parliament-approved enabling act intended to delegate powers to the Executive to modify the Drug Trafficking Criminalization Act was possibly unconstitutional. This was because, according to his interpretation, the Constitution requires that the content of the delegated act shall be previously defined. A.J. Pina-Delgado wrote the opinion for the CCCV and A.J. Lima concurred. Despite declaring the act unconstitutional because it lacked sufficient indications, it reiterated a previous opinion (Advice 02/2018, written by A.J. Pina-Delgado for a unanimous Court)[56] in which it stressed its understanding that Article 182, paragraph 1, only mentions "the object, the scope, and the duration of the authorization" and that it was not possible to attest to the emergence of any constitutional convention that required that the content of the legislation shall be defined by the enabling act as well. Thus, the rule only supported the reading that an enabling act shall integrate general legislative indications but not the broad definition of the content of the act as was claimed by the PR, a thesis also adopted by A.J. Lima's concurrence.

3. J-10/2020 (Referral by MPs on the constitutionality of rules of the CV-US Status of Forces Agreement of 2018): successive review of constitutionality[57]

The CV-US SOFA Referral led to the long-expected and most important decision of the CCCV in 2020. The Court had to deal with important constitutional questions. First, whether Article III, paragraph 2, would violate (i) the principle of equality as far as it authorizes the US to exercise criminal jurisdiction over its personnel during their stay in CV territory; (ii) the principle of national sovereignty; (iii) the principle of popular sovereignty; (iv) the immunities of criminal jurisdiction of the PR, MPs, and members of the Cabinet; and (v) safeguards against the extradition of CV nationals and of any person in cases of application of a life imprisonment or death sentence. Second, the court had to address the constitutional question of whether Article XII, paragraph 2 —which establishes that any claim on damages and losses caused by US personnel would be resolved by the United States in accordance with US laws and regulations— would be in violation of the right of access to justice and to effective judicial protection. Finally, the court had to decide if Article IV, paragraph 2, as far as it would authorize US forces to freely move around the country and to use means of transportation and storage sites in cases of mutually agreed temporary operations, would amount to a violation of the constitutional clause that prohibits the installation of foreign military bases in the national territory.

The opinion of the Court, written by A.J. Lima, considered that those clauses were not incompatible with the Constitution in most aspects. However, it found that Article III, paragraph 1, when interpreted as recognizing the power of US Forces to judge its members on CV soil, was incompatible with the principle of national sovereignty. Notwithstanding, a major question was left unanswered for procedural reasons: whether SOFA's Article III, paragraph 1, violated certain constitutional clauses —namely, the principle of equality— by rendering the immunities regime set out in the Vienna Convention on Diplomatic Relations applicable to US administrative and technical personnel and recognizing, in consequence, full criminal immunities to US personnel.

A.J. Pina-Delgado's concurrence departed from the reading of the prohibition of the installation of foreign military bases in CV territory established by Article XI, paragraph 4, which was promoted by the Court's opinion. He rejected the idea that the rule was grounded on the principle of peace, proposing instead the reasoning that it was related to national sovereignty and a safeguard of national independence. He also advanced a different reading of the clause because, in his opinion, its strictness was substantially softened by a 2010 constitutional amendment to the foreign policy regime set forth in the Constitution in the sense that CV shall participate in the international fight against terrorism. He further clarified the reasons that led him to vote for the unconstitutionality of Article III, paragraph 2, underlining that the problem of this provision was that it was so broad that it would allow the assumption of real judicial powers and not merely military disciplinary powers by US Forces in CV territory. Finally, he questioned the arguments put forward by the respondent according to which criminal immunities of foreign forces were based on international customary law and vehemently denied that they could be considered jus cogens under international law.

4. J-30/2020 (PAICV v. NEC): electoral appeal[58]

The main opposition party appealed a deliberation by the NEC that prohibited the distribution of some electoral propaganda materials by contestant organizations, namely t-shirts and face masks. The petition raised questions of statutory interpretation of a clause in the Electoral Code that forbids the distribution of ornaments and props that have a special utility for the elector as well as constitutional issues related to the freedom of political speech. The CCCV, in an unanimous opinion written by A.J. Pina-Delgado, stressed that the NEC has no legitimacy to interpret the language of a rule that limits a right in such a

[55] OJ, I-S, n 25, 03.03.2020, 633-657.
[56] OJ, I-S, n 44, 02.07.2019, 1141-1156.
[57] OJ, I-S, n 86, 23.07.2020, 1731-1782.
[58] OJ, I-S, n 139, 23.12.2020, 2182-2198.

way —as to establish implicit restrictions on the freedom of political speech — because that would amount to law-making, which is the competence of Parliament and not of an administrative body. It also added that, even if such a restriction were enacted by the National Assembly, it would be unconstitutional. According to the CCCV, a restriction on the freedom of political speech in electoral periods, which results from forbidding the distribution of t-shirts and face masks with contestant organizations symbols, colors, and moto, thereby hindering their prospects of publicizing their message and of promoting the scenic effect of the standardization of the supporters' attire, would be constitutionally intolerable.

IV. LOOKING AHEAD

In 2021, parliamentary polls are expected in the first semester and presidential elections in the second. It is anticipated that bills to reform the Criminal Code, the Criminal Procedure Code, and the Civil Procedure Code will be discussed and arguably passed into law. With respect to political and legislative developments, it may be the year that Parliament fills vacant positions for substitute judges of the CCCV and councilors of the Judicial Council and of the Public Prosecutors Council. Two SC Justices and, subsequently, Court of Appeals Judges will certainly be appointed by the Judicial Council after a public examination of candidates. It is also likely that the Alex Saab case will be resolved, both regionally and domestically, with the probable decision on extradition delivered by the Barlavento Court of Appeals in the first months of the year. If appeals are filed, a possible intervention of the SC and of the CCCV is expected. A clash between national courts and the ECOWAS Court of Justice will be likely if this court delivers a decision on the merits favorable to Mr. Saab. Finally, the CCCV may decide important cases, namely, a second challenge to the CV-US SOFA and a referral related to age discrimination in access to public office.

Chile

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I. INTRODUCTION

2020 was an important year for Chilean Constitution Law for at least two reasons. The first reason is the constitution-making process.[1] In the October plebiscite, 78.3% of the Chilean voters supported the demand for a new Constitution, and 79% decided that an elected Constitutional Convention is going to draft the new Constitution while rejecting the option of having a mixed assembly composed by sitting legislators and elected citizens.[2] Citizens were supposed to elect the members of the Convention in April 2021.[3] A relevant fact regarding the constitution-making process is the approval of reserved seats for indigenous peoples.[4]

The second reason that made 2020 an important year for Chilean Constitution Law is related to the measures taken by the government regarding the pandemic, including the existence of an emergency regime—*estado de catástrofe*—and the actions the government and the Congress advanced to alleviate the economic problems and help the people during the crisis. Among those measures, in July, legislators approved a reform that included a transitory clause to the Constitution allowing individuals to take up to 10% of their retirement fund savings from their accounts.[5] This measure created a deep political controversy. When legislators tried to approve a second reform following the same procedure, the President challenged the bill's constitutionality to the Chilean Constitutional Court (*Tribunal Constitucional de Chile*) (hereinafter, CC). As we will explain in the next section, the CC released a landmark decision endorsing the unconstitutional constitutional amendment doctrine, even citing Yaniv Roznai's prominent book.[6] It was the first time that the CC has ever promoted this doctrine.[7]

[1] We explained the main features of this process in our previous report: Iván Aróstica, Sergio Verdugo and Nicolás Enteiche, 'Chile' in Richard Albert and others (eds), *2019 Global Review of Constitutional Law* (I·CONnect-Clough Center 2020). The literature on the process is quickly growing. See, for example, Samuel Tschorne, 'Las claves conceptuales del debate constitucional chileno: poder constituyente, legitimidad de la Constitución y cambio constitucional' [2020] Estudios Públicos 81; Sergio Verdugo and Marcela Prieto, 'The Dual Aversion of Chile's Constitution Making Process: Between Bolivarian Constitutionalism and the Pinochet Constitution' (2021) 19 International Journal of Constitutional Law. Also, see the contributions of the ICONnect symposium on the Chilean process in http://www.iconnectblog.com/2020/10/introduction-symposium-on-chiles-constitution-making-process/ (accessed on April 4, 2021), and of the IberICONnect symposium in https://www.ibericonnect.blog/2020/11/introduccion-al-simposio-plebiscito-constitucional-en-chile/ (accessed on April 4, 2021).

[2] See the results at the *Servicio Electoral de Chile* website: http://www.servelelecciones.cl/ (accessed on April 4, 2021).

[3] However, legislators postponed the election to May due to the number of people infected by the Covid-19 pandemic in late March of 2021.

[4] See Law 21,298, which added the temporary clauses numbers 43, 44, 45, 46, 47 to the Chilean Constitution.

[5] See Law 21,248, which added the temporary provison 39 to the Chilean Constitution.

[6] See STC 9797, at 21. The book is Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017).

[7] On the idea of an unconstitutional constitutional reform in Chile, see, for example, José Manuel Díaz de Valdés, 'Algunas preguntas pendientes acerca del control de constitucionalidad de los proyectos de reforma constitucional' [2007] Sentencias Destacadas 2006 145; Sergio Verdugo, 'The Role of the Chilean Constitutional Court in Times of Change' in Richard Albert, Carlos Bernal and Juliano Zaiden Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019).

The following section will engage with the CC and focus on that case. Section III will summarize the majority votes of four selected rulings after giving a brief overview of the CC's docket. As we need to be brief, we will ignore concurrent opinions and judicial dissents. Although this report only engages with the CC's jurisprudence, the reader should be aware that other relevant constitutional developments were advanced by the Electoral Court (*Tribunal Calificador de Elecciones*) and the Supreme Court (*Corte Suprema*).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The CC has continued to be in the midst of controversies, though for different reasons than previous years. As we have reported previously, the political controversies associated with the CC were typically related to the way the CC was using its ex-ante judicial review powers against legislative bills that were politically sensitive.[8] Though, some of the controversies of 2020 have a different nature. A scandal arose when the new Chief Justice, María Luisa Brahm, gave an interview to the press. During the interview, the Chief Justice speculated, without any clear indication of the facts, that the CC had a significant delay in releasing decisions, including human rights cases, and suggested that the delay was possibly due to other judges' actions that, according to her, were on the "verge of corruption."[9] This allegation triggered an investigation that is still pending—though no charges have been made. Also, accusations against the Chief Justice's alleged abusive labor behavior against her subordinates. To clarify the situation, an internal investigation was initiated. This inquiry is conducted by the last judge that was appointed to the CC, judge Rodrigo Pica—a judge appointed by the Supreme Court on March 4, 2020.[10] These events have revealed fragmentation within the CC and have deepened its reputational problems. We have previously reported on the attempts to modify or replace the CC and the likelihood that the constitution-making process will seek to consolidate these attempts.[11] It is plausible to think that these new controversies put additional pressure on modifying the CC.

In this context, President Piñera brought a politically salient case connecting to Congress's economic measures to alleviate the consequences of the Covid-19 pandemic. The CC was called to solve whether the second constitutional amendment adding a transitory rule to the Constitution to allow individuals to take another part of their retirement fund savings (up to 10%) violated the Constitution (hereinafter, the "10% reform"). In Chile, the pension system is financed mainly from mandatory savings that each employer is supposed to provide to private-run financial companies called *Administradoras de Fondos de Pensiones* (AFP), who manage and invest the individual savings of the employees. Each individual has an account with their savings, and they are not allowed to use them before retiring. Nevertheless, the strategy of enabling individuals to use these funds was widely supported by public opinion and a majority of legislators.

The Constitution prevented legislators from advancing the 10% reform following the regular legislative procedure. According to the Chilean Constitution, legislative changes to the social security system can only be initiated by the President.[12] Thus, to avoid the practical veto power that this rule gives to the President, legislators decided to regulate the retirement of parts of the retirement funds via constitutional amendment, arguing that the exclusive initiative rule should not prevent them from reforming the Constitution. It could be argued that amending the Constitution should be more demanding than approving ordinary pieces of legislation. After all, constitutional amendments require legislative supermajorities, while simple majority rule is the requirement for passing most statutory legislation. (Regarding legislation on social security, the Constitution mandates that statutes need to be passed by a majority of legislators—not only legislators present at the moment of the voting.[13]). However, the bill got the support of the required legislative supermajority but not of the president, which explains how the regular legislative procedure was, in this case, more rigid than the constitutional amendment process.

The CC decided President Piñera's petition with a tied vote, i.e., five judges voted in favor and five judges voted against it.[14] The CC's rules of procedure state that the Chief Justice's vote will be the casting vote (*voto dirimente*) when there is a tie in this type of case.[15] As Chief Justice Brahm voted in favor of the bill's unconstitutionality, the CC's ruling rejected the 10% reform.

The case's doctrinal points are many, and we are only going to summarize some of them. The President's legal argument had both procedural and substantive reasons.

The procedural reason alleged that the reform had to be passed by a legislative majority of 2/3rds, and not 3/5ths. The supermajority requirement for amending the

[8] See, for example, 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).

[9] See https://www.latercera.com/la-tercera-domingo/noticia/maria-luisa-brahm-presidenta-del-tc-antes-de-que-yo-llegara-habia-causas-detenidas-en-el-tc-por-mucho-tiempo-al-limite-de-la-corrupcion/WCLGYHFHTVF7FF2GSNDT36TB3Y/ (accessed on April 4, 2021).

[10] Judge Rodrigo Pica replaced judge Domingo Hernández, who retired in January of 2020. Before serving as a judge, Rodrigo Pica was the Secreary of the CC.[6] See https://www.bbc.com/mundo/noticias-america-latina-50190029 [accessed 1/31/2020].

[11] See, for example, Iván Aróstica, Sergio Verdugo and Nicolás Enteiche, '2018 Global Review of Constitutional Law: Chile' (2019) 17 International Journal of Constitutional Law 661, 663–664.

[12] See Article 65, number 6, of the Chilean Constitution.

[13] Article 19, number 18 of the Chilean Constitution.

[14] STC 9797.

[15] Article 8, par. g., Law 17,997.

Chilean Constitution depends on the Chapter of the Constitution that is modified, though there is no explicit rule regarding the transitory clauses.[16] Chapter III, recognizing fundamental rights and, among others, the right to social security,[17] can only be modified with a 2/3rd legislative majority. At the same time, Chapter V, including the legislative procedure's rules and the President's exclusive initiate,[18] needs 3/5ths of Congress to be modified. As the 10% reform included a transitory provision connected to Chapter III, the President alleged that the corresponding 2/3rd legislative majority should have approved it. On the other hand, as there is no explicit rule defining the required supermajority for approving transitory provisions, it could be argued that only 3/5ths of the votes of the congressmen in office were required, as 3/5ths is the general rule according to Article 127 of the Constitution. The CC accepted the President's argument.[19]

However, the most important constitutional issues behind the conflict are whether the Constitution has a set of essential principles or an identity that constitutional amenders cannot modify. The CC declared the bill's unconstitutionality by first arguing that the Court has the authority to decide formal and substantive claims against constitutional amendments. The sovereignty of the constituent power is limited by fundamental rights and the separation of powers.[20] Specifically, the CC pointed out that constitutional amenders should not contradict certain parts of the Chilean Constitution: the *bases de la institucionalidad*, fundamental rights, and the main features of the Chilean democracy.[21] The CC used cited some landmark works from national and international scholars,[22] referred to the substitution doctrine that the Colombian Constitutional Court has used to challenge constitutional amendments, and mentioned the Hungarian Constitutional Court's doctrine regarding the use of transitory rules in the Constitution.[23] After building the doctrine, the CC argued that the 10% reform is connected to the social security system,[24] that constitutional amenders cannot establish a transitory clause to alter the primary use of the pensions' savings,[25] and that Congress should not violate the presidential exclusive legislative initiative even in exceptional circumstances.[26] Among other arguments, the CC concludes that the amendment is an "aggravated case of illegitimacy" as it tried to add a transitory disposition modifying the "constitutional essence" without formally changing permanent clauses.[27]

III. CONSTITUTIONAL CASES

According to the CC's statistics, 2020 had 1,934 new cases, and 1509 of those cases were petitions of inapplicabilities.[28] Though 1,659 cases ended in 2020, the CC released 1230 final rulings.[29] In the inapplicability cases, the petitioners ask the CC to declare that a specific legal provision should not be used because of the unconstitutionality of a possible application of the provision within the particular case. A problem that the CC faces is a substantive delay in the review of inapplicability petitions. The time between the dates the petitions are presented and the dates the hearings take place (*vista de la causa*) can be much longer than half a year.[30]

In 2020, the CC released 836 decisions that accepted at least a part of an inapplicability petition.[31] Among them, 570 rulings relate to judges' limitations to substitute a criminal penalty by lower sanctions.[32] In general, those decisions removed the limitations so that judges can replace a criminal sanction that imprisoned or restricts the defendant's liberty, with lower punishments such as imposing a specific obligation to serve the community and authorization to leave prison during the daytime, or conditional pardons. Also, 110 decisions challenged a Labor Code clause stating that the Code's rules will also be applicable to state employees unless they are subject to special regulations.[33] Another group of 51 judicial decisions challenged a legal provision that prevents impaired drivers from substituting their criminal punish-

[16] See Article 127 of the Chilean Constitution.

[17] Article 19, number 18 of the Chilean Constitution.

[18] See Article 65 of the Chilean Constitution.

[19] STC 9797 at part 30.

[20] STC 9797 at part 1.

[21] JSee STC 9797, at parts. 6, 7, 9, 10, 11, 12, 21, 24, 32 and 33.

[22] Some of the non-Chilean scholars cited are Yaniv Roznai, Rosalind Dixon and David Landau, Otto Bachof, Lucio Pegoraro, Ángelo Rinella and Yaniv Roznai. See STC 9797, at parts 10 and 12.

[23] STC 9797, at part 11.

[24] STC 9797, at part 19.

[25] STC 9797, at part 26.

[26] STC 9797, at parts 22-23.

[27] STC 9797 at part 30.

[28] See https://www.tribunalconstitucional.cl/estadisticas/estadisticas-ano-2020 (accessed on April 4, 2021).

[29] See https://www.tribunalconstitucional.cl/estadisticas/estadisticas-ano-2020/asuntos-terminados-2020 (accessed on April 4, 2021).

[30] See https://www.tribunalconstitucional.cl/roles-de-asunto-en-estado-de-tabla (accessed on January 28, 2021). As of January 28, 2021, there are 186 pending cases. The oldest is case No. 9097, filed on August 10, 2020. The *vista de la causa* was held on March 4, 2021.

[31] https://www.tribunalconstitucional.cl/estadisticas/estadisticas-ano-2020/asuntos-terminados-2020 (accessed on April 4, 2021).

[32] Article 1, par. 2, Law 18,216.

[33] Article 1, par. 3, Labor Code. Similar cases have been reported in previous years: Aróstica, Verdugo and Enteiche, '2018 Global Review of Constitutional Law' (n 11) 56; Aróstica, Verdugo and Enteiche, 'Chile' (n 1) 65.

ment for a lower sanction and subjecting them to full sanctions for at least a year.[34]

These groups of decisions are not new in the jurisprudence of the CC, and our previous reports have already explained cases involving the same provisions that the CC continues to challenge. Thus, the remainder of this section focuses on four unrelated cases. The first two rulings relate to administrative law cases engaging with the agencies' power to impose sanctions on private parties, such as fines or closures. These decisions consolidate a jurisprudential trend that requires legislators to use criminal law due process principles, such as proportionality, to design administrative law procedures that may end with a punishment against a private party.[35] If the legislator fails with this task, regulations may be unconstitutional. The following two rulings concern cases of freedom of speech.

1. Case of the Sanitary Fines (STC 8823)

The case involved the death of an employee of *"Blue Shell S.A.,"* a mussel production company that operates in Dalcahue, Chiloé, an island located in southern Chile. The employee died in an accident, and the regional health-related agency (*SEREMI de Salud*) prepared an inspection report. The authority imposed a fine on the company based on the facts reported by the agency. The plaintiffs challenged the constitutionality of the legal provisions establishing the procedure that led to the fine, arguing that they violated the right to due process, legality principle, and the principle of typicality. This last principle comes from Criminal Law, and it requires that the legal provision describe all the elements of the illegal behavior.[36] All these principles are included in Article 19, number 3, of the Constitution. The CC claimed that that constitutional provision was supposed to apply to the case and, therefore, the legal provisions contradicting them should be declared inapplicable.[37] For making its argument, the CC cited several precedents, particularly from 2018 onward, and tried to consolidate the doctrine requiring that the principles of "criminal order" should apply to the sanctions carried out by an administrative agency, in this case. The CC added that proportionality implies that the legislator must incorporate specific elements that ensure that the final sanction will be appropriate to the infraction committed (c. 25 and 26).[38] This is the first judicial decision that declares the inapplicability of sanctioning rules within the regulated area, expanding the previous precedents.

2. Case of the Foreigners' Statute (STC 7587)

"Blanco y Negro S.A," a company that manages "Colo-Colo," the most popular soccer club in Chile, was fined by the Department of Foreigners and Immigration, which depends on the Ministry of Interior and Public Security. Among other arguments, the applicant questioned the constitutionality of Article 74, final paragraph, and article 79, first paragraph of the Decree-Law 1,094, allow fines to be imposed "solely based on the background that justifies them, and whenever possible, the affected party must be heard." The applicant also questioned the final paragraph of that provision, which requires the party to deposit a particular amount of money before filing a judicial action against the administrative decision. As in the previous case, the CC accepted the inapplicability petition.[39] The CC also claimed that the legal provisions infringed articles the equal protection clause and the due process of law. Concerning Article 79, the CC also added that the due process clause includes the right to complain against Administration's acts. An economic requirement for appealing the agency's decision violated this right.

3. Case of Parliamentary Removal (STC 8123)

A group of right-wing legislators filed a petition to the CC asking the CC to declare the removal of Hugo Gutiérrez, a legislator from the Communist Party, on the ground that Mr. Gutiérrez had allegedly incited the "alteration of the public order" by threatening the police, participating in protests that ended up with violent outcomes such and by tweeting multiple alleged incitations. Although Article 60 of the Chilean Constitution establishes the possibility of removing a legislator on the ground that he or she has incited the public order's alteration, the CC had previously used a restrictive interpretation of the Constitution.[40] In this new case, the CC showed awareness of the importance of deciding a case like this, which could end in removing an elected legislator,[41] and explicitly endorsed a restrictive reading of the Constitution.[42] It stated that the incitation should be "objectively severe" and that there should be a causal link between the acts of the legislator and the alteration of the public order.[43] It added that the case also involved freedom of speech and the liberty to criticize the government, which estimates essential for a democratic society.[44]

[34] Article 196 ter, par. 1, final part, de la Ley de Tránsito. Similar cases have been reported in previous years: Aróstica, Verdugo and Enteiche, 'Developments in Chilean Constitutional Law' (n 8) 50.

[35] We have reported parts of this trend in previous reports. See, for example, Aróstica, Verdugo and Enteiche, 'Chile' (n 1) 66. The rulings we are about to explain, consolidate a line of jurisprudence that began in 2010 (STC 1518), expanding the precedents to diverse areas of administrative law.

[36] The CC used it in STC 8823, part 24.

[37] See STC 8823

[38] STC 8823, parts 25-26.

[39] STC 7587.

[40] See, for example, STC 970.

[41] See STC 8123, part. 2.

[42] See STC 8123, part. 4.

[43] See STC 8123, part. 11.

[44] See STC 8123, part. 38.

4. Case on the Punishment against Human Rights Violations Deniers (STC 9529)

A group of legislators presented a bill aimed at punishing the crime to incite violence. Among the types of behaviors that the bill tried to punish, the legislators included justifying, approving, or denying human rights violations committed during the Pinochet regime between 1973 and 1990. That part of the bill was subject to a constitutional challenge on procedural and freedom of speech grounds. In a divided ruling, the CC accepted the petition and declared that that part of the bill violated the constitutional guarantee of freedom of speech because, among other things, that clause only allows the punishment of behaviors and not ideas, unless those ideas suppose a direct incitement to violence.[45] For the CC, defend or disseminate political ideas should not be punished.[46] The CC had also declared that the bill was unconstitutional on procedural grounds, as Congress did not achieve the constitutionally required legislative majority.[47] Article 19, number 12, para 1, of the Chilean Constitution requires that a majority of Congress should establish the crimes and abuses concerning speech. (This majority requirement is a more stringent requirement than the one used for regular statutes, which only mandates the majority of legislators attending the session in which the vote is held.[48])

IV. LOOKING AHEAD

2021 will be marked by the work of the Constitutional Convention and a number of elections that will renew an important part of the country's elected officials, including the President, a large part of the Congress, majors, governors, and members of the local council. Beyond the contingency and the pressures to reform the CC, we expect the CC to continue to exercise its powers within the current constitutional framework. Inapplicability cases will probably be the major part of the CC's docket, though the CC may also receive politically salient cases concerning legislative or constitutional amendments bills.

V. FURTHER READING

Symposium on Chile's Constitution-Making Process: http://www.iconnectblog.com/2020/10/introduction-symposium-on-chiles-constitution-making-process/ (accessed on April 4, 2021)

Symposio Plebiscito Constitucional en Chile: https://www.ibericonnect.blog/2020/11/introduccion-al-simposio-plebiscito-constitucional-en-chile/ (accessed on April 4, 2021)

Dixon R and Verdugo S, 'Social Rights and Constitutional Reform in Chile: Towards Hybrid Legislative and Judicial Enforcement' [2020] forthcoming (on file with author)

Tschorne S, 'Las claves conceptuales del debate constitucional chileno: poder constituyente, legitimidad de la Constitución y cambio constitucional' [2020] Estudios Públicos 81

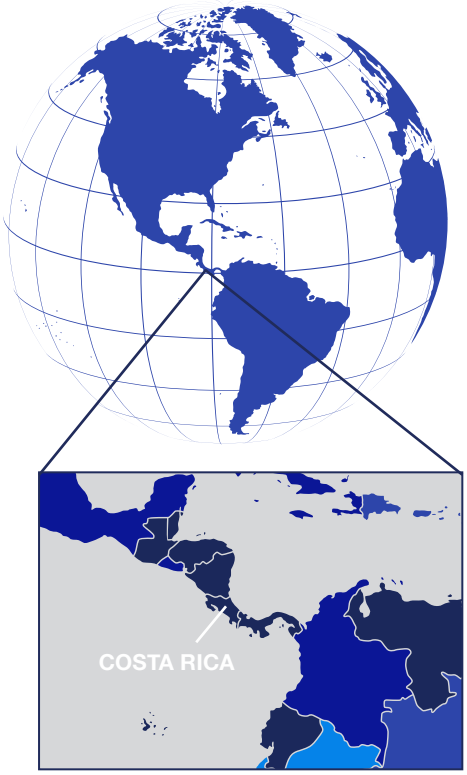
Verdugo S and Prieto M, "The Dual Aversion of Chile's Constitution Making Process: Between Bolivarian Constitutionalism and the Pinochet Constitution" (2021) 19 International Journal of Constitutional Law

[45] The CC even cited the European Court on Human Rights to make this point. See STC 9529, part 51, final para.

[46] STC 9529, part. 49.

[47] STC 9529, part. 14.

[48] See Article 66 of the Chilean Constitution.



Costa Rica

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I. INTRODUCTION

The global COVID-19 pandemic and the state's response to it dominated the social, political, economic and legal landscape of Costa Rica in 2020. The government's measures to combat the pandemic included mandatory travel restrictions, shuttering of mass public events, and curbs on business activities. These salutary actions, while successful in comparison with most other countries in the world, generated a significant political and litigative backlash from people harmed by the measures that raised important constitutional questions concerning the appropriate role of the state in combating the pandemic. Many of these challenges were filed directly with the Constitutional Chamber of the Supreme Court, commonly referred to as the *Sala Cuarta.* In March 2020, the president declared a state of "National Emergency,"[1] which authorized the mobilization of all necessary public resources and agencies to coordinate their response to the rapidly spreading Covid-19 crisis.

The pandemic also affected the operations of the Sala Cuarta and the administration of the criminal justice system initially resulting in a significant backlog of criminal cases that were ultimately resolved using video conferencing to link judicial personnel with defendants or plaintiffs during their criminal hearings and trials. Another important constitutional event in 2020 was the signing of a constitutional guarantee for all people living in Costa Rica to access to clean potable water, perhaps one of the most significant constitutional amendments in the last 70 years.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS IN 2020

On June 5, 2020, after more than two decades of congressional discussion, debate, and judicial review President Carlos Alvarado signed a constitutional amendment to guarantee all people in Costa Rica a constitutional right to access water for human consumption. As a result of the amendment to Constitutional Article 50, the Constitution now states that, "Every person has the basic and inalienable human right of access to drinking water, as an essential necessity for life. Water is a good of the nation, it is essential to protect such a human right. Its use, protection, sustainability, conservation and exploitation will be governed by the provisions of the law that will be created for these purposes and the supply of drinking water for consumption by individuals and populations will have top priority." The choice of Article 50 as the home of the amendment deliberately ties the right to water to existing environmental rights that guarantees "the right to a healthy and ecologically balanced environment."

[1] http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=90991&nValor3=120051&strTipM=TC

Amending the Constitution is a slow, deliberative process that is designed to prevent capricious amendments or amendments that impinge on the rights of minorities.[2] The process contains a rigid set of legislative procedures and detailed steps that Congress must follow that are significantly more onerous than those used to approve ordinary legislation.[3] Before Congress finally passes a constitutional amendment, it must be reviewed by the Constitutional Chamber of the Supreme Court to assess the constitutionality of the legislative process. In the case of the water rights amendment, the Constitutional Chamber's first review found Congress had diverged from the required Legislative Procedural Rules[4] that mandate two congressional debates before a Special Commission can draft the final version of the amendment. It is that version of the amendment that is subject to a simple majority vote of Congress before being sent to the Executive branch for comments. But the Constitutional Chamber found that the Special Commission drafted the proposal after the first debate rather than after the second debate that constituted a clear breach by the Legislative Assembly of its own procedural rules.[5] The Court's decision required Congress to rewind the amendment process to the last valid stage of procedure.[6] In a second mandatory advisory opinion[7] the Constitutional Chamber found no remaining procedural issues, which allowed the amendment could advance through the rest of the amendment process in Congress.

The Constitutional Chamber accepted the importance of the content of the Constitutional provision specifically guaranteeing the human right to water and found it consistent with Article 48, a provision that accepts international human rights instruments as direct and enforceable rights in Costa Rican jurisprudence. Housing the human right to water in article 50, replicates the long standing international developments on the right to water found in different declarations, treaties and resolutions.[8] With the adoption of the constitutional amendment, the legislators formally elevated the legal protections that the Constitutional Chamber had already recognized in the legal order and the institutional networks that were designed to provide access to water as an essential element to service life and the human being. Furthermore, the Constitutional amendment recognized the strategic importance of water by associating it to a good or property of the Nation, therefore suitable to be in private hands only through concessions and permits in accordance with preexisting laws and those enacted in the future.[9]

Other significant constitutional developments in 2020 include a potential resolution to the ongoing problem of electing magistrates in a timely manner to replace retiring magistrates on the Constitutional Chamber. The Constitutional Chamber is composed of seven magistrates who are elected to eight-year terms by a 2/3rds super-majority of the Legislative Assembly and automatically re-elected unless a 2/3rd majority of deputies vote not to renew them. No magistrate has been denied reelection, thus in practice justices enjoy life tenure. In 2020 Justice Fernando Cruz Castro was reelected as a Justice on the Constitutional Chamber with 29 votes against reappointment and 25 in favor, since this fell short of the required 2/3rds votes of Congress, he was duly reelected.[10] Despite a requirement for the Legislative Assembly to elect replacement justices within thirty calendar days of a vacancy being reported,[11] some vacancies have remained open for over two years as was the case when Justice Ernesto Jinesta Lobo, who retired in 2018, was replaced by Justice Anamari Garro Vargas in 2020. Justice Garro Vargas, a long serving alternate Justice on the Constitutional Chamber, was elected to her first term as a full justice on the Constitutional Chamber with 44 votes in Congress.[12] The Constitutional Chamber currently has its full complement of seven full justices. The only remaining vacancies in the Constitutional Chamber are two alternative *(suplente)* justices.

III. CONSTITUTIONAL CASES

Immediately after the first confirmed Covid-19 case in Costa Rica was made public, the Ministry of Health and other relevant agencies began to implement a strategy to deal with the pandemic. Physical distancing and hygiene protocols were discussed and publicized through government events and press conferences. The uncertain impact and potential scale of the pandemic guided many of the government's decisions and put pressure on public services including health facilities and water services. The Costa Rican Social Security agency, for example,

[2] The Sala IV held unconstitutional a TSE-approved referendum to ban Same Sex Marriage (Decision # 2010-11349, June 29, 2010).

[3] Article 195 of the Constitution.

[4] Decision #2019-25241 of December 18, 2019.

[5] Article 210.4 and 5 of the Legislative Procedural Rules.

[6] Article 101 of the Law of the Constitutional Chamber. http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm.

[7] Decision #20-003982, February 2020.

[8] Some of these international legal instruments cited in the decision include the Dublin Statement on Water and Sustainable Development, the Rio Declaration on Environment and Development, Copenhagen Declaration on Social Development, the Declaration of Water Council, Additional Protocol to the American Convention on Human rights in the area of Economic, Social and Cultural Rights "Protocol of San Salvador", and ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169) and the United Nations Declarations E/C.12/2002/11 and 70/169/ of December 2015.

[9] Transitory Provision Article 50.-XX Current laws, concessions and use permits, legally granted under law, as well as the rights derived therefrom, shall remain in force, if a new law regulating the use, exploitation and conservation of water does not take effect.

[10] In 2012, Justice Cruz became the first Constitutional Chamber justice to be denied reelection by a vote of 38 deputies in Congress. After an appeal, the vote was dismissed because of a technicality.

[11] Constitution Article 163

[12] https://salaconstitucional.poder-judicial.go.cr/index.php/magistrados

took steps to implement and prepare hospital facilities ahead of any potential flood of patients by reallocating resources and redirecting services. As the number of infected people increased, personal protective equipment (PPE) and specialized garments quickly began to runout and as restrictions on travel took effect Costa Rica's tourism industry and other key sectors of the economy suffered significantly. Unemployment reached historic levels and added to the social discontent that ultimately sparked protests across the country. All but one of the following cases are directly related to constitutional issues brought about by the pandemic.

1. Water, health, and hygiene[13]

Every year between December and March, Costa Rica undergoes a dry season[14] the impact of which is regularly felt in the most populated regions of the country through short-term water shortages. In 2020 the end of the dry season and the water shortages coincided with the start of the COVID-19 pandemic, which impeded people's ability to follow government recommendations of frequent handwashing to combat the spread of the disease. The Instituto Costarricense de Acueductos y Alcantarillado (AyA), as one of the main public institutions in charge of water distribution and sewage management, was incapable of meeting the demand for potable water. The AyA argued that it had the capacity to process and deliver larger volumes of water, but the Dry season prevented it from increasing water distribution. Instead, the AyA implemented water rationing that reduced household water access in heavily populated urban areas to a few hours each day. Although these shortages were a normal occurrence, in 2020 it coincided with the pandemic that required increased levels of water to maintain proper hygiene presented a constitutional question.

In previous decisions on similar cases, the Constitutional Chamber generally accepted the AyA's defense that water supply issues were caused by very low rain fall rather than institutional neglect or failure in its water provision services. These court decisions generally included an admonishment to the AyA to make systemic changes to improve water distribution to houses.[15] The watchdog institution for public services (ARESEP), though, revealed a bigger, structural problem: almost 50% of the water entering the water system could not be accounted for. Elderly citizens and the Ombudsman filed independent writs of amparo at the Constitutional Chamber that ultimately were resolved in a series of decisions.[16] In decision N° 2020-7754 of April 24, 2020, the Constitutional Chamber revisited its previous water provision jurisprudence and took into consideration the lack of investment in the water distributing infrastructure and the resulting water loss. Due to the prolonged shortages and the health crisis caused by Covid-19, the Court ordered the AyA to immediately provide relief to the affected communities in a manner that ensures basic needs are met and comports with the health authority's preventive guidelines and to develop plans for additional water production sources. The Court changed posture on the water provision issues was motivated by the urgency of the Covid-19 crisis that required immediate attention to improve the supply and delivery of potable water.

2. The right to protest and freedom of expression.

The Constitutional Chamber struck a balance between the health restrictions imposed by the state and the fundamental rights of the people to protest. The Court held that the nature of the health restrictions and prohibitions imposed on businesses and other commercial activities could not support the restrictions on the right to protest and freedom of expression.[17] The Constitutional Chamber held that the different health measures taken by the Ministry of Health to protect the citizens against the contagion were legitimate, but these restrictions could not support the arrest of a woman who organized and participated in the protest. The Court held that protesting suspension of commerce and business, sporting events, parks, mass gatherings, etc., is a constitutionally protected, legitimate action. The Court relied on a previous case on legitimate social protests, freedom of expression and the right to peaceful assembly as well as international cases and legislation.[18] The court noted that no such protest restrictions were possible on public streets and much less in a walk-out-event *(caminata)* in Playa Tamarindo (a popular beach area). The Court noted that the protest was peaceful, socially distanced, and widespread use of Ministry of Health-recommended facemasks. The court concluded that local health authorities, police, and the public prosecutor's office overreached their legitimate powers by arresting the woman.

In another case, the Constitutional Chamber held that there are limitations to people's constitutional right to protest. The Court held that massive protests and roadblocks are not supported by the Constitutional rights or the democratic system if their goal was to impede people's freedom of movement indefinitely.[19] On September 30th, 2020, the *Rescate Nacional* (National Rescue) movement sought to close all major and minor roads in different regions of the country to bring the country's hard-hit economy to a complete halt. In previous decisions, the Constitutional Chamber held that protests were legal and possible so long as alternative roads remained open and that the pro-

[13] Decision #2020-07754, April 24, 2020; Decision #2020- 08455, May, 2020; Decision #20-08750, May 12, 2020; Decision 2020-09207, May 22, 2020.

[14] https://www.imn.ac.cr/documents/10179/31165/clima-regiones-climat.pdf/cb3b55c3-f358-495a-b66c-90e677e35f57

[15] Decision #2017-006082, April 28, 2017; Decision #2019-007183, April 26, 2019; Decision #2017-009023, June 16, 2017.

[16] Decisions #2020-8455 of May 8, 2020; #20-8750 and others.

[17] Decision #2020-14944 of August 7, 2020

[18] Decision #2019-015221of August 14, 2019 cited in Decision #2020-14944

[19] Decision #20-19711of October 13, 2020

testers did not impede people's transit. The Constitutional Chamber relied on a previous decision in which it analyzed international Courts' decisions.[20] It recognized the importance of protests and the citizens right to be directly involved in a democracy but argued that protestors could not impinge on the constitutional rights of other people as this would be an overreach of the right of expression and to assemble peacefully. The Court held that "Repeated recourse to road blockade as a means of exerting political pressure has led to a deformation of the true nature of demonstrations, originally conceived as an exercise of freedom of expression and peaceful assembly."[21] The protesters' intent was to specifically paralyze and hinder the vital infrastructure of the country, such as the ports, borders, and roads. These actions, the court held, could not be deemed a legitimate exercise of the freedom of expression and assembly as its ends are not to communicate an opinion or a message, but to harm public order until their demands were met. This was an illegitimate aim and was deemed by the Constitutional Chamber to fall under the scope of *Éva Molnár vs. Hungry* case of the European Court of Human Rights: protests can be lawfully limited and public authorities can intervene in a timely fashion to avoid abuses. In this case, the plaintiff was deprived from traveling to his destination and forced to stay overnight before being allowed to continue his journey. The Constitutional Chamber deemed the police force's limited response to the protesters unconstitutional and held that it was illegitimate for the police to allow protesters to decide if and/or when vehicles would be allowed past their barricade; they should have intervened to protect the rights of the citizens affected by the protests.

3. Restrictions on private vehicles

Because the Constitution does not allow curfews, state authorities implemented a so-called "health vehicle restriction" to curb the movement of people to limit the spread of the highly contagious COVID-19. Some citizens, though, complained that banning personal vehicles from the roads two days each week was an impingement of their freedom of movement and filed complaints at the Constitutional Chamber. In response to the constitutional complaints[22] the Constitutional Chamber held that Article 95 of the Ley de Tránsito y Seguridad Vial gave the Executive branch of government the necessary authority to impose vehicular restrictions to promote the public, regional, or national interest. The law established that this discretionary exercise of authority be clearly publicize and signpost which areas would be affected and when. Therefore, the Constitutional Chamber's decision found that these restrictions on vehicular movement to address the emergency health situation caused by the covid-19 pandemic are a valid, constitutional exercise of the executive authority in the public interest.

4. Protective equipment and other measures for health workers

As the pandemic took hold in Costa Rica, heath workers claimed that they were not provided with the necessary garments and equipment to protect themselves against infection from Covid-19. In response to a *writ of amparo* filed by a Health Workers' Union (Sindicato de Médicos Especialistas), the Constitutional Chamber held[23] that the CCSS should put in place all measures necessary to provide health workers with the essential protective equipment. Similarly, related to these claims, the Constitutional Chamber also reviewed other allegations from medical professionals and specialists concerned with a CCSS requirement that medical professionals adhere to the pre-Covid-19 protocol of in-person patient-doctor consultation.[24] The plaintiff argued that requiring in-person consultations put both the medical personnel and patients at risk of infection from Covid-19. The Constitutional Chamber agreed to review the case based on the health risks at stake, but before the case was heard the CCSS implemented a series of corrective measures and suspended in-person consultations. Instead, videoconferencing and telephone follow-up calls with patients would be acceptable replacements of the face-to-face consultations. Other minor and ambulatory surgeries, except for emergency and other urgent interventions, were suspended for the duration of the Covid-19 crisis in Costa Rica.

5. Virtual hearings for prisoners awaiting sentencing

Proceedings against defendants were disrupted by the government's physical and social distancing measures[25] and resulted in some hearings being suspended and the creation of a significant sentencing backlog. According to Article 328 of the Criminal Procedure Code[26] the defendant has a right to be physically present in the courtroom during their hearing. As a result of the ongoing Covid-19 pandemic, the penitentiary and judicial system were unable to immediately adjust to the new pandemic reality and to coordinate hearings to meet the demands of the law. The Constitutional Chamber held that Judicial and penitentiary authorities were bound by the defendant's rights to a legal course of action but argued that physical attendance by

[20] Decision #19-15221 of August 14, 2019 cited in Decision #20-19711 of October 13, 2020

[21] Decision #20-19711 of October 13, 2020

[22] Decision #2020-006601, March 31, 2020

[23] Decision #2020-010180, June 5, 2020.

[24] Decision #2020-8488, May 8, 2020.

[25] Decision # 2020-20872, October 30, 2020.

[26] Ley No. 7594, April 10, 1996.

the defendants could be replaced by technical solutions including video conferencing. The Court required the criminal system to adapt the Covid-19 protocols and to implement measures that could drive the legal process while protecting the overarching constitutional and procedural rights and guarantees of defendants awaiting trial. Authorities were compelled to arrange and provide protocols that dealt with massive, related diseases in prisons such as Covid-19,[27] as well as medical care within the penitentiary system. By validating the use of communication technologies, the court held that in exceptional times the physical presence of the detainee in hearings was not necessary for the material defense. Prior to the pandemic the Supreme Court of Justice, the Superior Council of the Judiciary, and the Criminal Affairs Commission adopted some protocols and guidelines to use video conferencing in criminal proceedings. In response to the Constitutional Chamber demand that the Executive branch of government produce protocols on October 9, 2020 the Ministry of Health in conjunction with the Ministry of Justice and Peace jointly prepared a Protocol for the holding of judicial hearings in isolated areas of the prisons during the continuation of the Covid-19 national state of emergency. Installing video conference rooms within the prisons allowed the hearings to take place. The unanimous decision of the Constitutional Chamber forced penitentiary authorities to oversee and implement these protocols.

6. Luxury Pensions

In a constitutional case unrelated to the Covid-19 pandemic, the Constitutional Chamber decided 42 actions of unconstitutionality regarding several laws that were collectively labeled "pensiones de lujo" (luxury pensions) in October 2020. The cases, filed by former deputies, their spouses, and other high ranking government officials who were granted special pensions under a Government regime that was funded by the national budget, were combined and decided in a single court decision. Because the pension system lacks its own formal fund, politicians who wanted to end these special pensions argued that the pensions created a substantial burden on scarce state resources. Although some of the pension systems had been reformed and some of their generous conditions removed, other pensions retained their generous benefits. While the Court's vote was made public, the arguments and reasoning of the individual Constitutional Chamber justices' decision has not yet been released to the public. As a result, the analysis here is drawn from dispositive portion of the decision that was made public at the time the decision was announced.

The challenged legislation, Laws No. 9380 and No. 9383, enacted several measures designed to reduce the overall public deficit to which, it was argued, the luxury pensions are a contributing cause. The Justices were divided in their decision with a majority holding that the State could take no more than 50 percent of the gross sum of the pensions through taxation. Another law, No. 9381, was considered constitutional as it stripped away the special pensions bestowed on the children of congress people and other politicians. After the enactment of the law, the goal of removing income from pensioners under 65 years old was held to be constitutional. Finally, the dispositive portion of the Constitutional Chamber's holding reveals that the chamber considers Law No. 9388, which amends and unifies the system to adjust public servants' pensions in line with the cost of living, to be constitutional.

IV. LOOKING AHEAD

In the coming year two justices will reach the end of their eight-year terms, Justices Luis Fernando Salazar Alvarado and Nancy Hernández López. Congress will vote on the retention of Justice Salazar's tenure on December 3, 2021 while Justice Hernandez recently announced her intentions to seek a position at the Inter-American Court of Human Rights, if she is successful Congress will be required to fill her vacated position within 30 days. If she is unsuccessful in seeking a position on the InterAmerican court, her reelection vote will be on December 2, 2021. In 2021, there will likely be many more cases resolved concerning "pensiones de lujo" as well as the full decisions from the cases decided in 2020.

The Legislative Assembly is also working on legislation designed to put order on the public sector remuneration through a global salary system that would likely ease the country's public spending problems. This legislation seems to find traction in the economic dislocation caused by the Covid-19 economic crisis and the recent agreement with the International Monetary Fund, but it will likely result in challenges being filed at the Constitutional Chamber in 2021 by public sector unions.

V. FURTHER READING

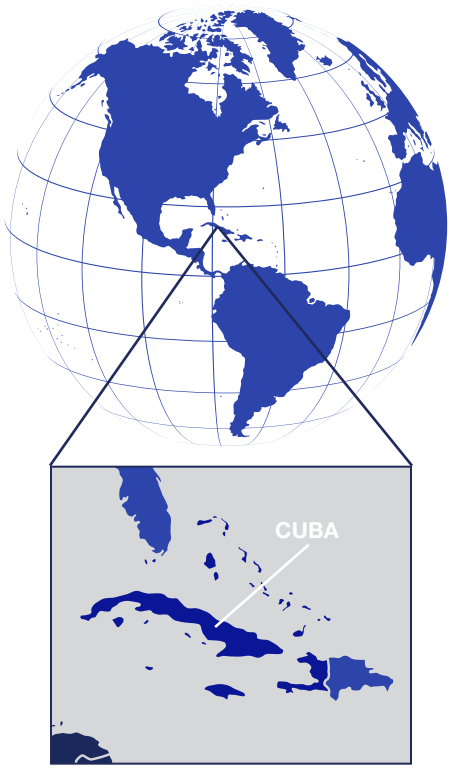
Revista de la Sala Constitucional Corte Suprema de Justicia. Available at: https://revistasalacons.poder-judicial.go.cr

Bruce Wilson, M. & Olman Rodriguez, 'Costa Rican Constitutions' in Conrado Huebner Mendes, Roberto Gargarella (eds) *Oxford Handbook of Constitutional Law in Latin America* (OUP 2021)

Enrique Ulate Chacón, Haideer Miranda Bonilla, 'El Juez Constitucional como comparatista' (2020) 2 *Revista de Derecho Constitucional Comparado* <https://cr.ijeditores.com/pop.php?option=articulo&Hash=0f4c226b16e9e7a6f8171fcde3dd43a8> accessed 2 April 2021

Programa Estado de la Nación *Tercer informe estado de la justicia* (PEN 2020) <https://estadonacion.or.cr/wp-content/uploads/2020/06/PEN_Estado_Justicia-2020-Completo.pdf>

[27] Decision 2020-17756, September 18, 2020. But before Covid-19 the penitentiary system had to deal with an outbreak of mumps Decision #2019-20584, October 23, 2019.



Cuba

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I. INTRODUCTION

Cuba was impacted in 2020 by the influence of COVID-19, which had serious consequences for their constitutional and legal sphere, among other issues. A year earlier, in February 2019, a new Constitution was adopted in Cuba,[1] which introduced significant reforms on many levels if compared with the previous constitutional text of 1976, partially amended in 1978, 1992, and 2002.[2]

Since the new Constitution entered into force, a legislative process began intended to adopt an array of legal norms and provisions aimed at complementing it. To conduct this process in an orderly manner, the National Assembly of People's Power (NAPP), namely the supreme body of state power,[3] approved a legislative schedule in its plenary session of December 2019. In the time remaining in 2019, important legal norms and provisions in the constitutional sphere were passed, all of which had a significant imprint in 2020. For example, the cases of the acts on the organization and operation of the NAPP and the Municipal Assemblies of People's Power and popular councils.

This broad normative creation process is based on the fact that the Cuban Constitution was considered a minimum standard, that is, that it would only contain the most general aspects of the different matters regulated in it. This criterion does not correspond with the most advanced contemporary legal doctrine being that it was surpassed in the second half of the 20th century by the development of concepts such as the rule of law, human rights, or constitutional axiology.[4] This normative creation process depended on a drafting commission made up of experts in various subjects, government officials, deputies to the NAPP, the highest representatives of social and mass organizations legitimized by the state as representatives of the different sectors of civil society, amid others. That said, the drafting commission followed a procedure that was similar in nature to that used in the definition and enlargement of the contents established in the previous Constitution. At the head of this commission was Raúl Castro Ruz in his capacity as First Secretary of the Communist Party of Cuba.[5]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The four most important aspects in terms of Constitutional Law are, first, those related to the elections that were held in January 2020 for the designation of provincial governors; second, the non-declaration of the state of emergency or other exceptional framework

[1] All the articles of Cuban Constitution cited in this report can be checked in: <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2019-ex5_0.pdf> accessed 19 January 2021.

[2] See Martha Prieto, 'La Constitución cubana de 2019: nuevos contenidos y necesidades' [2020] <http://scielo.sld.cu/scielo.php?script=sci_arttext&pid=S0253-92762020000100003&lng=es&nrm=iso> accessed January 19 2021.

[3] Article 102 of Cuban Constitution.

[4] See M. García Canales, 'Principios Constitucionales y Principios Generales' [1989] Revista de Estudios Políticos 64.

[5] See Oscar Figueredo and Dianet Doimeadios, 'Preside Raúl Castro Ruz Comisión de la ANPP para Reforma Constitucional' (*Cubadebate*, 2 June 2018) <http://www.cubadebate.cu/noticias/2018/06/02/preside-raul-castro-ruz-comision-de-la-anpp-para-reforma-constitucional/> accessed January 19 2021.

to confront COVID- 19, a disease that arrived in Cuba in March 2019; third, the adoption of laws and decree-laws that complement the Constitution of 2019; and, fourth, the modification in December 2020 of the legislative schedule approved the year before, which had an effect on the protection of several fundamental rights. As for the decree-laws that complement the Constitution of 2019, it is appropriate to highlight that they have been approved by the Council of State. The Council of State is the body that represents the NAPP between each of its sessions being that the national legislative body members are not political professionals nor are those who make up the Municipal Assemblies of People's Power.[6]

The Election of Provincial Governors and Vice Governors

This electoral exercise was novel and is consistent with the state structure that was established at the local level with the entry into force of the new Constitution in 2019. The election of the governors and vice-governors of each of the fifteen provinces of the country was a process implemented by the Municipal Assemblies of People's Power, located within the boundaries of each province. These bodies were constituted in electoral colleges, in compliance with the provisions of article 240 of the Electoral Act.[7] According to this article, the delegates to the Municipal Assemblies of the People's Power meet by their own right, constituted in electoral colleges on a fixed date and in the place that is agreed, with the aim of electing the provincial governor and vice-governor through free, equal, direct, and secret vote. The voters are not expected to intervene in the process to elect the highest government figures in each province.

The results show a large participation of municipal delegates as well as that the majority of the candidates for governors and vice governors received more than 95% of the votes when they were elected.[8] One should point out here that it is the responsibility of the President of the Republic to propose the municipal delegates candidates to the Municipal Assemblies of the People's Power of each province along with the candidates for the election of the provincial governor and vice governor.[9] This ensures that they are candidates that the head of state can rely on. Furthermore, it is important to emphasize that, in the particular case of this election, there was a marked interest in promoting gender equity between governors and vice governors.

COVID-19 and its Juridical Effects

It should be noted that no exceptional framework of those included in the Constitution or in the corresponding regulations was formally declared with the aim of facing the COVID-19 pandemic. However, several state bodies were put into operation since they must respond when one of the exceptional scenarios provided for in the legal system arises. In practice, this generated a hybrid situation whereby state organs that operate under normal circumstances and state bodies provided for specific circumstances functioned at the same time.

Thus, at the municipal and provincial levels, the Defense Councils were brought into play. Defense Councils are structures legally conceived to face national catastrophes or other phenomena that affect national security and are meant to become the highest organs of state and political power. In accordance with article 28 of the National Defense Act of 1994, the provincial, municipal, and defense zones Defense Councils are created and developed in peacetime to lead the way in their respective territories in the conditions of a state of war, during a war, a general mobilization, or a state of emergency, based on a general defense plan as well as the role and duties that correspond to the military councils of the armies.[10] Article 28 refers to the catalog of exceptional situations provided for in the Constitution of 1976. However, the political and legal practice has been characterized by their operation without the formal declaration of any of the exceptional situations provided for in the Constitution and in the National Defense Act. The classic example in this regard is the implementation of Defense Councils at all levels, including the National Defense Council (NDC) to mitigate the effects of hurricanes.[11]

This practice was followed to confront the COVID-19 pandemic, with the exception of the NDC that was not put into operation and of the higher organs of state power which continued to function, that is, the NAPP, the Council of State, and the Council of Ministers. Another interesting aspect that is not specifically provided for in the National Defense Act, but that is part of the political practice in Cuba since 1994, is that the provincial and municipal Defense Councils that began to operate to confront the COVID-19 pandemic were not administered by the provincial governors and municipal mayors, but by the main authorities of the communist party in those territories. This order of things may be valued as positive if a review of the current legislation on exceptional situations is conducted.

In accordance with article 10 of the National Defense Act, a set of rights may be regulated in a differentiated way while exceptional circumstances last. These are the right to work, freedom of speech and the press, the rights to assemble, the right to demonstrate and associate, the inviolability of the home and of correspondence, and the detention regime of people. However, the National Defense Act

[6] Article 115 of Cuban Constitution.

[7] See Electoral Act of Republic of Cuba, Act No. 127/2019, <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2019-o60.pdf> accessed 19 January 2021.

[8] See Parlamento cubano, Resultados de las elecciones de gobernadores y vicegobernadores provinciales, <http://www.parlamentocubano.gob.cu/index.php/resultados-de-las-elecciones-de-gobernadores-y-vicegobernadores-provinciales/> accessed 19 January 2021.

[9] Article 242.1 Electoral Act.

[10] See National Defense Act, Act No. 75/1994, <http://www.parlamentocubano.gob.cu/index.php/documento/ley-de-la-defensa-nacional/> accessed 19 January 2021.

[11] See Radio Cubana, 'Se activan Consejos de Defensa en Cuba para enfrentar a "Irma"' (*Radio Cubana*, 5 September 2017) <http://www.radiocubana.cu/noticias-de-la-radio-cubana/68-noticias-nacionales/19294-se-activan-consejos-de-defensa-ante-amenaza-del-huracan-irma> accessed 19 January 2021.

does not say how different their regulation may be, that is, it does not define how their exercise would be modified or which of the guarantees for their protection would be suspended. This circumstance creates a situation of uncertainty in violation of the principle of legal certainty. From our point of view, this scenario makes the permanence of the hybrid status mentioned above preferable to the formal declaration of a state of emergency or another exceptional situation. The validity of a legal regime of peacetime for the regulation of fundamental rights is superior to one that restricts them without such limitations being well defined, based on the principles of proportionality, necessity, and rationality.[12] To what has been said so far, it should be added that the National Defense Act was adopted after the constitutional reform of 1992 and that its catalog of exceptional situations is narrower than those established in the Constitution of 2019. In this sense, the Constitution of 2019 mentions the state of war or duration of a war, general mobilization, and state of emergency but, unlike the Natural Defense Act, it also includes a disaster situation.[13]

Compliance with the Legislative Schedule

In another vein, during 2020, four laws were passed in Cuba. These were the Foreign Service Act; the Act on the Organization and Operation of the Council of Ministers; the Act for the Recall of those elected to the Organs of People's Power; and the Act on the President and Vice President of the Republic. Of the sixteen decree-laws planned for 2020, eleven were passed, as well as fourteen others that, although not included in the legislative schedule, were put into effect by the Council of State.[14]

Regarding the content of some of these laws, it is important to highlight two different aspects. The first is that the Act for the Recall of those elected to the Organs of People's Power was not implemented for the empowerment of voters. Voters only intervene directly in the recall of the delegates to the municipal assemblies, but not in that of the rest of the elected representatives.[15] In terms of recall of elected officials from office, this situation constitutes an obstacle in the exercise of the right to political participation of citizens (as set out in article 204 of the Constitution).

On the other hand, in the Act of the President and the Vice President of the Republic, broad powers are granted to the President as he or she is allowed to issue presidential decrees that are divided into two large groups: those in the general interest and those that are not in the general interest. The main difference between the two is that the acts in the general interest are published in the official gazette while those that are not in the general interest are not. Furthermore, the acts that are not in the general interest can be notified only to their recipients.[16] This could eventually imply a violation of the rule of due transparency that all state organs, their directors, and officials must comply with, as established in article 101, subsection h), of the Constitution.

Changes in the Legislative Schedule

At the end of 2020, the legislative schedule was modified in the sense that the dates of adoption of several laws and decree-laws were changed.[17] In some matters, these changes meant postponing the adoption of normative provisions that constitute formal guarantees of constitutional rights. For example, of the thirty-three pending laws on the schedule, it was decided to approve twenty-five in the 2021-2022 period, including several decree-laws. These include the Act on Protection of Personal Data and the Act on the Claim of Constitutional Rights before the Courts. However, the Act on Transparency and Access to Information will not be passed until October 2022, so there will not be a formal guarantee for this right until then. For the next legislature of the NAPP and its Council of State, which begins in 2023, ten laws that were originally planned to be adopted in this legislature that ends in 2022 remain. Among them, it is worth mentioning the laws of migration, foreigners, citizenship, rights to demonstrate and assemble, as well as the law of defense and national security.

Regarding the Act on the Claim of Constitutional Rights before the Courts, it should be noted that it is concerning that, until the beginning of 2021, its content has not been made public. As previously stated, the Cuban Constitution has been conceived as a minimum standard and, thus, the legal provisions passed to complement it are crucial in the determination and scope of constitutional rights. As established in article 92 of the Constitution, the State guarantees, in accordance with the law, that people are able to access the judicial system in order to obtain effective protection of their rights and legitimate interests. In a context where the Constitution has not been conceived as the legal norm that contains the minimum and maximum standards to determine the scope of state power, the expression "in accordance with the law" could eventually mean that the Act on the Claim of Constitutional Rights before the Courts excludes from judicial protection some rights enshrined in the Constitution. If this situation arose, it would also violate the principles of equality, non-discrimination, and interdependence of constitutional rights, set out in article 41 of the Constitution.

These changes to the legislative schedule, that the Cuban authorities have justified

[12] See Martin Borowski, 'La restricción de los derechos fundamentales' [2000] 59 Revista Española de Derecho Constitucional.

[13] Articles 222 and 223 of Cuban Constitution.

[14] See Oscar Figueredo, 'Asamblea Nacional aprueba nuevo cronograma legislativo (+ Infografías)' (*Cubadebate*, 17 December 2020) <http://www.cubadebate.cu/noticias/2020/12/17/asamblea-nacional-aprueba-nuevo-cronograma-legislativo-infografias/> accessed 19 January 2021.

[15] See Act of Recall of those Elected to the Organs of People's Power, Act No. 135/2020, <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-o88.pdf> accessed 19 January 2021.

[16] See Act of the President and Vice President of the Republic of Cuba, Act No. 136/2020, <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-o89.pdf> accessed 19 January 2021.

[17] See Agreement Number IX-76 of the NAPP <https://www.gacetaoficial.gob.cu/sites/default/files/goc-2021-o3.pdf> accessed 19 January 2021.

based on the complex epidemiological situation that existed in Cuba in 2020 in account of the COVID-19 pandemic, raise several questions about their real commitment to follow that schedule. A phenomenon that manifested itself for many years in the Cuban political and legal-constitutional practice, during the validity of the Constitution of 1976, was that of unconstitutionality by omission. In this Constitution of 1976, the regulation of various constitutional rights was delegated to special legal provisions that were never passed during the 43 years of its validity (1976-2019).[18]

III. CONSTITUTIONAL CASES

The first aspect to point out is that Cuba lacks constitutional jurisdiction. In consequence, there are no special legal actions and procedures for the defense of constitutional rights, such as the amparo procedure or the action of unconstitutionality,[19] although habeas corpus (article 96) and habeas data (article 97) are recognized in the Constitution of 2019. Another concerning point is the non-existence of a concentrated judicial tribunal that administers justice on constitutional grounds as well as the absence of extended judicial practice on the application of the Constitution, as a norm for the solution of cases before the courts. This phenomenon, which is long-standing and has been mentioned several times by the national scholarship, implies the insufficient direct applicability of the constitutional text by Cuban judges which, in turn, has led to the almost null interpretation of its contents.[20]

Constitutional control in Cuba is political in nature and is exercised by the NAPP, in accordance with the provisions of subsection e) of article 108 of the Constitution. This continues to be, in our opinion, one of the main debts of the constitutional design of the Cuban state with a view to its democratization, together with the preponderant role granted to the Communist Party of Cuba. The Cuban Communist Party is recognized as the only organization of its kind in the country and the leading political force superior of society and the state, as provided for in article 5 of the Constitution. In practice, this means that, since the Constitution of 1976 was adopted, the conduct of the NAPP has never been subject to the control of any state bodies. In addition, the NAPP has the constitutional power to interpret the Constitution and the laws (article 108 subsection b)), but has not defined the content and scope of the aforementioned article 5.

The case of Homoparental Adoption

Despite this entire situation, an important case in which the Constitution was directly applied was decided in 2020. It was a dictum issued by the Ministry of Justice for the recognition of the right of a Cuban homosexual couple to adopt a minor, sustaining his reasoning in article 7 of the Constitution. In the Constitution, the Supremacy Clause of the Constitution is recognized, by stating that the Constitution is the supreme legal norm of the State. Everyone is obliged to comply with it. The provisions and acts of the organs of the State, their directors, officials, and employees, as well as the acts of the organizations, entities, and individuals shall be compatible with what the Constitution provides.

In addition, this dictum is based on article 81 of the Constitution, by virtue of which everyone has the right to found a family. The State recognizes and protects families, whatever their form of organization is, as a fundamental cell of society and creates the conditions to guarantee that the achievement of their ends is fully favored. They are constituted by legal or factual ties, of an affective nature, and are based on the equal rights, duties, and opportunities of their members. The legal protection of the various types of families is regulated by law. Equally important, a step forward in the determination of the content of the Constitution of 2019 with respect to the previous constitutional text, was the recognition of sexual orientation and gender identity as a suspicious or specially protected category, that is, as criteria which discrimination is prohibited, as provided for in article 41 of the Constitution.

IV. LOOKING AHEAD

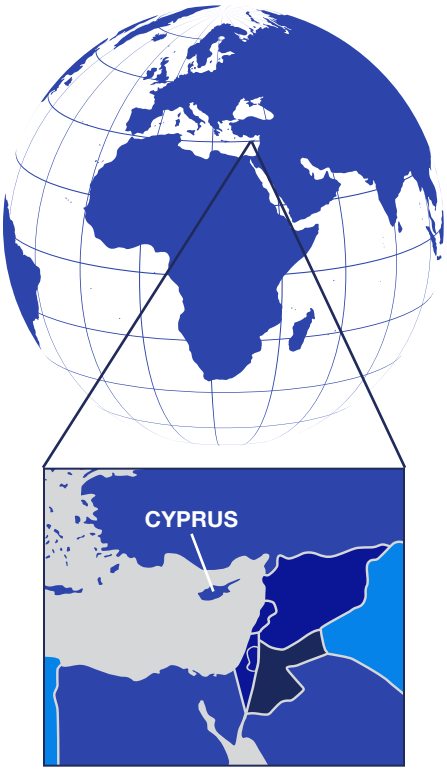
In the immediate future, it should be expected that several laws and other regulations focused on the legislative development of constitutional provisions are passed. It has been determined that between 2021 and the following year, around twenty-five laws (ten in 2021 and fifteen in 2022), and twenty-nine decree-laws by the Council of State (eighteen in 2021 and eleven in 2022) must be approved by the NAPP.

Another important challenge is to make the consideration and application of constitutional theory a common practice in the courts, which will not only depend on the legislative development complementary to the Constitution, but also on the establishment and subsequent strengthening of a legal culture and practice in this regard. The latter is valued as fundamental, considering that article 1 of the current Constitution declares Cuba as a socialist state of law. Similarly, it will be important that the regulations to be passed conform to the best international standards and practices.

[18] See Raudiel Peña, 'Los mecanismos de control constitucional: un análisis desde y para Cuba con especial referencia a la inconstitucionalidad por omisión' [2017] 4 (1) Revista de Investigações Constitucionais.

[19] See Amanda Prieto, 'Garantías judiciales y propuestas para la defensa de los derechos constitucionales: Cuba, 2019' [2020] <http://scielo.sld.cu/scielo.php?script=sci_arttext&pid=S0253-92762020000100223> accessed 19 January 2021.

[20] See Martha Prieto, En pos de la aplicabilidad directa de la constitución cubana de 1976 (un breve comentario) [2020] <https://www.revistaius.com/index.php/ius/article/view/256/358> accessed 19 January 2021.



Cyprus

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I. INTRODUCTION

2020 was marked by some major constitutional developments in Cyprus. Most importantly, the Supreme Court settled two constitutional matters that had been pending for years in the Cypriot legal order with regard to "non-taken" parliamentary seats and to the constitutionality of pay cuts and reforms imposed as austerity measures on the salaries and pensions of employees and pensioners of the public and wider public sector. Of great significance was also the introduction by the Supreme Court for the first time of the basic structure doctrine in the Cypriot constitutional context and the subsequent expansion of the judiciary's competence to review the substance of constitutional amendments. Moreover, the House of Representatives adopted the fifteenth amendment to the Constitution relating to administrative court procedures for granting and withdrawing international protection. Finally, special reference should be made to the COVID-19 pandemic and its effects on Constitutional Law. In the case of Cyprus, the measures adopted for containing and preventing the spread of the virus raise significant concerns for the rule of law.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As already noted, the year 2020 has had five major constitutional developments that are worth mentioning. First, the Supreme Court expanded the scope of its jurisdiction as regards constitutional amendments. More specifically, the Supreme Court had traditionally limited its jurisdiction to review constitutional amendments on procedural grounds but did not enter into the examination of the substance of laws that introduced constitutional amendments. With its landmark ruling in Electoral Petition 1/2019,[1] the Court introduced the doctrines of "basic structure" and "unconstitutional constitutional amendments" for the first time in Cypriot Constitutional Law and labelled them as theories with wide-ranging application in different instances.[2] In this sense, the Supreme Court expanded the scope of its jurisdiction in relation to constitutional amendments and may now exercise a substantive review of constitutional amendments.

Second, on the same decision in Electoral Petition 1/2019, the Supreme Court put an end to the constitutional saga relating to the fifty-sixth "non-taken" parliamentary seat that existed since 2016 and which had already been the subject matter of three previous judicial decisions (see below). Despite certain gaps in its findings, the Supreme Court indirectly upheld the twelfth constitutional amendment and the inclusion of provisions on the notion of "renounced or non-taken seats."[3] Third, the Supreme Court issued another highly anticipated decision on the constitutionality of pay cuts and reforms imposed on the salaries and pensions of employees and pensioners of the public and wider public sector, as a result of the financial crisis that hit Cyprus in 2012-2013. In particular, in Republic v. Av-

[1] *Electoral Petition 1/2019, Michaelides et al. v. Chief Returns Officer et al.,* Decision of 29 October 2020.

[2] See below, Section III, for an analysis of the case.

[3] See Law concerning the Twelfth Amendment of the Constitution of Cyprus (Law 128(I)/2019).

gousti,[4] analysed below, the Supreme Court approached the right to property, as guaranteed under article 23 of the Constitution, in an unconventional and improvised manner, that has attracted much criticism.

A fourth important development in 2020 was the implementation by the House of Representatives of the fifteenth amendment of the Constitution of Cyprus through Law 135(I)/2020.[5] The amendment aimed at improving the regulation of asylum issues, tackling the increased irregular migration faced by Cyprus, minimizing the abuse of the asylum procedures, and addressing the need for expeditious determination of the status of asylum seekers for securing the effectiveness of asylum management mechanisms, in accordance with international and EU obligations.[6] Therefore, with Law 135(I)/2020, the House of Representatives amended article 146(3) of the Constitution and provided for the adoption of enabling legislation for setting a different deadline for filing appeals before the International Protection Administrative Court.[7] As a result, asylum seekers have 30 days to lodge an appeal against decisions, acts, or omissions of the Asylum Service and the Refugee Reviewing Authority, instead of the 75 days deadline for challenging the validity of any administrative decision, act, or omission of the executive or administrative authorities.[8] The deadline for filing appeals is even stricter (set to 15 days) in relation to specific administrative decisions (for example, a decision to reject the application of an asylum seeker as manifestly ill-founded).[9]

The fifth development in the constitutional field relates to the COVID-19 response policy that was adopted by the Cypriot government. As this report notes below,[10] the measures adopted for controlling and preventing the spread of the virus on the island are based on ministerial decrees, enabled by outdated colonial legislation. These measures raise grave concerns as regards the fundamental principle of the rule of law[11] and have failed to receive the appropriate judicial and legislative scrutiny.

III. CONSTITUTIONAL CASES

1. Republic v. Avgousti et al.: The Final Settlement of the Constitutionality of Austerity Measures and their Effect on the Right to Property

The 2018 and 2019 reports examined a series of decisions delivered by the Administrative Court assessing the constitutionality of pay cuts and reforms introduced as austerity measures to the salaries, pensions, and allowances of employees and pensioners of the public and wider public sector.[12] In those cases, the Administrative Court affirmed that salaries, pensions, and allowances are constitutionally protected as they fall within the definition of "property" of article 23 of the Constitution, safeguarding the right to property. The Administrative Court then found that the challenged laws imposing restrictions on salaries, pensions, and allowances were unconstitutional, as the limitations imposed on the right to property were based on the grounds of public interest, which is not permissible under article 23(3) of the Constitution. The Republic filed appeals against these decisions of the Administrative Court. On April 10, 2020, the Supreme Court issued its decision on these appeals and overturned the findings of the Administrative Court.

The majority of the Supreme Court in Republic v. Avgousti *et al.*[13] focused on the scope of the right to property. It held that, while salaries and pensions do fall under the protection of article 23, "the right to property does not extend to a salary of a certain amount." "[C]onsequently, the differentiation, under certain conditions, of the amount of the salary under critical economic conditions is not excluded, provided that the decent living of the employee is not endangered." Concerning the appeals under review, the Supreme Court ruled that the reductions and pay cuts introduced to the salaries and pensions did not affect the core of the right over salaries and pensions and that they did not endanger the decent standard of living of the applicants. For these reasons, the Supreme Court overturned the

[4] *Republic v. Avgousti et al.,* Appeals Nos 177/18, et al., (10 April 2020).

[5] Law concerning the Fifteenth Amendment of the Constitution of Cyprus (Law 135(I)/2020).

[6] See preamble of Law 135(I)/2020, and therein references to Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, recitals 18 and 20 and article 46(4).

[7] The International Protection Administrative Court has exclusive jurisdiction to adjudicate on first instance on any recourse made to it by an asylum seeker under article 146 of the Constitution (as amended with the Law concerning the Eighth Constitutional Amendment (Law 130(I)/2015)) against a decision, an act or omission relating to the provisions of the Refugee Law.

[8] See article 12A(1), Law 73(I)/2018, as amended with Law regulating the establishment and operation of the Administrative Court for International Protection (Amending No. 2) (Law 141(I)/2020).

[9] See article 12A(2), Law 73(I)/2018, as amended.

[10] See below, Section III.

[11] For an analysis of the rule of law as a fundamental principle of the Cypriot constitutional law, see Constantinos Kombos, *Cypriot Constitutional Law* (Nomiki Vivliothiki, 2021) 198-203 (in Greek).

[12] See *Christodoulidou et al. v. the Republic et al.,* Joined Cases 441/2014 et al., (12 November 2018) and *Avgousti et al. v. the Republic et al.,* Joined Cases 898/2013 et al., (27 November 2018), analysed in Constantinos Kombos, 'Cyprus' in Richard Albert and others (eds) *2018 Global Review of Constitutional Law* (The I·CONnect-Clough Center 2018) 75-76; and Nicolaidi et al. v. Republic, Joint Cases Nos 98/2013 et al., (29 March 2019), *Koundourou et al. v. Republic,* Joint Cases Nos 611/2012 et al., (29 March 2019), *Filippou et al. v. Republic,* Joint Cases Nos 1713/2011 et al., (29 March 2019). Constantinos Kombos, 'Cyprus' in Richard Albert and others (eds) *2019 Global Review of Constitutional Law* (The I·CONnect-Clough Center 2019) 84-86. See also previous decisions on the same matter in *Charalambous v. Minister of Finance,* Joint Cases 1480/2011, et al., (11 June 2014) and *Koutsellini-Ioannidou v. the Republic,* Joint Cases 740/2011 (7 October 2014).

[13] *Republic v. Avgousti et al.,* Appeals Nos 177/18, et al. (10 April 2020).

decisions of the Administrative Court and concluded that the reductions in salaries and pensions of employees of the public and wider public sector are constitutional.

The Court's reasoning gives rise to certain ambiguities. First, the Supreme Court construed the concept of salary as being protected under the right to property and excluded the amount of the salary from the scope of the said right. At the same time, the Court explained that the decisive criterion in the assessment of the legality of a limitation of the right to salary is whether the limitation affects the core of the right. Consequently, there arises an inconsistency in the Court's reasoning. How can the particular amount of a salary fall outside the scope of the right to property as a matter of principle, and yet the Court still examine whether such limitation affects the core of the right to property? Second, the use of the core of the right to property as a yardstick for examining whether the limitation of the amount of a particular salary falls outside the scope of article 23 of the Constitution (for example, the right to property), creates confusion in terms of the proportionality test for limitations in accordance with article 23(3).

Following this atypical reasoning, the Court enabled the restriction of the right to property on grounds that are not explicitly provided for in article 23(3) of the Constitution. The Court did so in violation of its own obligations under article 33 of the Constitution, that prohibits the limitation or restriction of the rights and liberties guaranteed under the Constitution on grounds other than those provided therein, and that requires the strict interpretation such limitations or restrictions. Moreover, the Court's reasoning further breached the judiciary's obligation under article 35 of the Constitution to secure, within the limits of its competence, the efficient application of human rights and circumvented its own traditional approach on human rights interventions, as established in its case law.[14] In any case, and despite certain critical gaps and inconsistencies, this decision of the Supreme Court saved the State from compensating employees and pensioners with what is estimated to have been a billion euros.

2. Electoral Petition 1/2019: The End of a Constitutional Saga

As noted in the 2018 and 2019 reports, the parliamentary elections of 2016 and the withdrawal of an elected candidate after the confirmation of her election by the Chief Returning Officer (CRO), but before her public affirmation and commencement of the term of office, gave rise to the notion of "non-taken" parliamentary seats. This is a notion that is unknown to the Cypriot Constitution. There were legislative attempts to regulate this novel constitutional matter by opting for the declaration of the runner-up of the same political party as a representative. However, all such measures had been struck down by the Supreme Court as unconstitutional, since no legal basis existed and the principle of popular sovereignty requires free general elections or by-elections.[15] As a result, the House of Representatives proceeded with the twelfth amendment of the Constitution as a last resort, introducing in the text of the Constitution the notion of "renounced or non-taken seats." These are defined as parliamentary seats of elected candidates who, before the CRO announces the outcome of the elections, die or refuse to exercise their right to give the necessary affirmation or, following the CRO's announcement and prior to their affirmation by virtue of Article 69, decline or fail to assume their duties.[16] In order to respond to the specific non-taken seat, the legislature gave retroactive effect to the amendment. In accordance with these provisions, and other enabling legislation,[17] the CRO declared as representative the runner-up from the same political party and, thus, as the person who refused to take the seat.

In Electoral Petition 1/2019, the applicant (who was also a candidate in the 2016 parliamentary elections) challenged the declaration of the runner-up as a representative. It should be noted that the application did not request the Supreme Court to declare unconstitutional the amendment to the Constitution. The Supreme Court reiterated its findings from its previous decisions on the matter and found that the declaration of the runner-up violated the principles of popular sovereignty and separation of powers. It held that, "with these amendments," the election of the runner-up "took place on the basis of specific legislation and not by free general election or a by-election by the people, that is the expression of popular sovereignty, which falls within those fundamental human rights which could not, *being regarded as covered by the basic structure of the Constitution,* be deprived of in a legislative manner. It is also clear that the separation of powers is being circumvented because the House of Representatives has, once again, impermissibly chosen to resolve the issue in this way despite the Supreme Court's final judgments to the contrary."[18]

This was the first time that the Supreme Court had endorsed the basic structure doctrine,

[14] According to the traditional approach of the Supreme Court, the courts have a duty to observe the constitutionally provided tenants of human rights and to hold any unconstitutional intervention to such human rights as *ab initio* impermissible. Additionally, the Cypriot courts have acknowledged that they do not have a discretion in assessing the reasons for the unconstitutional intervention and the actual impact that they may have; see *Police v. Georghiades* (1983) 2 CLR 33, Police v. Shiamishis (2011) 2 CLR 308.

[15] The attempts and relevant case law have been analyzed in the 2018 and 2019 reports; see *Electoral Petition 2/2016, Andreas Michaelides et al.* v. *Chief Returns Officer et al.,* 31 May 2017, and *Electoral Petition 1/2017, Andreas Michaelides et al. v. Chief Returns Officer et al.,* 30 April 2018, analyzed in Constantinos Kombos, 'Cyprus', in Richard Albert and others (eds), *2018 Global Review of Constitutional Law* (The I·CONnect-Clough Center 2018) 74-75. See also *Referral 4/2018, President v. House of Representatives,* 19 March 2019, analyzed in Constantinos Kombos, 'Cyprus' in Richard Albert and others (eds) *2019 Global Review of Constitutional Law* (The I·CONnect-Clough Center 2019) 82-83.[16] Law concerning the Fourteenth Amendment of the Constitution (Law 161(I)/2019).

[16] See Article 71 Constitution, as amended.

[17] See the Law on the Election of Members of the House of Representatives (Amending) of 2019 (Law 131(I)/2019).

[18] Translation by the author (emphasis added).

which in the Cypriot context includes, as stated in the decision, the exercise of electoral rights and popular sovereignty. No further elaboration of the broader possible content of the basic structure doctrine was undertaken by the Supreme Court. Overall, the Court's reference to the basic structure doctrine was unconvincing and lacked any proper justification. In particular, the Court mentioned that the theory of basic structure doctrine has been developed in other constitutional courts, primarily by the Indian Supreme Court in Kesavananda Bharati v. State of Kerala,[19] and noted that "the right of the constitutional drafter to amend a provision of the Constitution as an expression of the Parliament's representative capacity of the people, is *limited by the fact that it cannot interfere with fundamental structures of the Constitution."*[20] The Court further noted that, despite being criticized as the product of judicial activism, such judicial interference "is required and necessitated when amendments are used as a means for undermining from the inside the principle of democracy."

The Court concluded that, in the application under examination, the declaration of the runner-up candidate as a representative was null and void, being "the product of unconstitutional and unlawful procedure made under the provisions of the Twelfth Amendment of the Constitution Law of 2019 and the Election of Members of the House of Representatives (Amendment) Law 131(I)/2019."[21] At this point, the question that arises is whether the Court invalidated the twelfth amendment of the Constitution. The Court did not take a clear stance on this issue. However, it may be presumed that the Court did not invalidate the constitutional amendment. In fact, the Court exercised substantive review of the constitutional amendment in a fragmented manner, and only annulled the act that derived from it, that is to say, the CRO's declaration of the runner-up as a representative. The absence of a formal declaration of invalidity of the constitutional amendment relating to retroactivity suggests that the Court did not proceed to an annulment. Nevertheless, the constitutional amendment was introduced for the purpose of resolving the specific issue after the rulings of the Court. Thus its *raison d'être* cannot logically be disassociated from the act that derived from it.

In conclusion, Electoral Petition 1/2019 is a landmark decision in that it introduced the basic structure doctrine to the Cypriot legal order, albeit in an overall unconvincing, unjustified, and improvising manner, which may be explicitly applied in the future to invalidate constitutional amendments on substantive grounds.

3. Patsalidi v. the Republic: (Lack of) Judicial Scrutiny on the COVID-19 measures

In March 2020, the first cases of COVID-19 infections were confirmed in Cyprus, requiring the Cypriot government to adopt effective responses to contain the spread of the virus. In the absence of any relevant legislation and with the deliberate decision not to introduce appropriate legislation, the executive employed the provisions of the colonial Quarantine Law enacted in 1932 by the British.[22] The Quarantine Law remained in force after Cyprus gained its independence in 1960, as per article 188 of the Cypriot Constitution, subject to compliance with constitutional provisions and until the legislature introduced a new law. The colonial legislation concentrates all relevant competences on the executive by empowering him to declare any infectious or contagious disease as dangerous and to adopt regulations and/or decrees imposing a wide range of restrictive measures.[23] The House of Representatives' inactivity to implement a contemporary and appropriate legislation as well as the lack of substantial legislative scrutiny on the measures adopted, enabled the executive, and the Minister of Health in particular, to interfere in an unprecedented manner with the constitutionally-entrenched human rights of the population through ministerial decrees.

It is important to point out that the ministerial decrees are administrative regulatory acts or orders in the form of secondary legislation that set general and impersonal rules of legislative nature. The validity of such decrees depends on the primary legislation which explicitly authorizes the enactment of secondary legislation. Their constitutionality may be challenged incidentally by filing a recourse before the Administrative Court against a decision, an act, or omission of the administration by a person whose legitimate interest is adversely and directly affected by such decision, act, or omission.[24] Therefore, the nature of the regulatory act must have an individual impact on the person in a manner that is similar to that of an administrative act. Alternatively, if a person is prosecuted for acts or omissions in violation of the decrees, s/he may raise the issue of constitutionality in order to invalidate the decrees.

The issue of whether limitations of constitutionally envisaged human rights by virtue of secondary legislation are lawful was raised in the first years following the entry into force of the Constitution. In the 1962 Hondrou decision, the then Supreme Constitutional Court reasoned that only the House of Representatives could restrict or limit the fundamental rights and liberties by relevant legislation, but that "there was nothing in the Constitution […] to prevent the House, *once a law had been enacted restricting or limiting such rights,* from delegating its power to other organs in the Republic, for the purpose of making subsidiary legislation prescribing

[19] *Kesavananda Bharati v. State of Kerala,* AIR 1973 SC1461. The Court further made selective references to the case law of the Czech Constitutional Court (2009/09/10 - Pl. ÚS 27/09: Constitutional Act on Shortening the Term of Office of the Chamber of Deputies), and of the Ukrainian Constitutional Court (Opinion of June 17, 2010, No. 2-v/2010).

[20] Emphasis added.

[21] Translation by the author.

[22] The Quarantine Law (Cap. 260).

[23] See articles 3, 6 and 6A of the Quarantine Law.

[24] See article 146 of the Constitution and Law concerning the General Principles of Administrative Law (Law 158(I)/1999).

the form and manner of carrying into effect and applying the particular restriction or limitation, within the extent and provisions of the law so enacted."[25] In other words, the restriction of human rights can only occur by primary legislation enacted by the legislature, whereas secondary legislation may solely regulate in more detail the application of the restrictions set forth by the legislature.[26] Here, the Quarantine Law cannot be construed as enacting restrictions or limitations of human rights and can, thus, call into question the legality of the decrees.

Notwithstanding that circumstance, from March 2020 and until the end of 2020, the executive issued 62 decrees imposing measures to contain and prevent the spread of the virus, based on the 1932 Quarantine Law.[27] The initial measures adopted were of high severity. Once the epidemiological situation and risk assessment allowed so, the measures were gradually relaxed from May 2020, but stricter measures were once again imposed in October 2020 due to the rapid increase in COVID-19 cases. The measures imposed through ministerial decrees included: national or local lockdowns; curfews (prohibition of any movement during specific hours); prohibition of movement in or out of "hotspot" districts (with exceptions); prohibition of unnecessary movements; exceptional movement after obtaining relevant permission via text message or special forms (limited to three or two instances per day and for specified categories of movement); prohibition of access to public places (for example, parks or playgrounds); suspension of operation of public markets, bazaars, etc.; prohibition of attendance to places of religious worship; suspension of operations of all retailers (with exceptions); mandatory use of masks; closure of schools; restrictions on entering the territory of Cyprus; and even ban on assemblies of more than two persons whether in private or public spaces.

Many of the measures implemented by the executive were (and continue to be) the source of significant concerns as regards the rule of law and its components. These measures undermine the principle of legality, as their weak legal basis (an outdated colonial legislation that authorizes the adoption of measures through secondary legislation) disregards post-colonial realities in Cyprus resulting from the fundamental principle of the supremacy of the Constitution.

Moreover, the executive's repeated failure to provide any sufficient justification of the measures hampers the assessment of their necessity and proportionality. Additionally, the large number of promulgated decrees altering, readjusting, or clarifying the COVID-19 measures, raise issues of uncertainty and lack of clarity and precision. Finally, the lack of proportionality and the blanket application of many of the measures adopted hinder the enjoyment of constitutionally entrenched rights, including the right to liberty and freedom of movement (articles 11 and 13), the right to respect for private life (article 15), the freedom of religion (article 18), the right to practice a profession or to carry out business (article 25), and the freedom of assembly (article 21). The affected constitutional provisions are not absolute and may be limited on the grounds of public health. However, the requirements of necessity, suitability, and proportionality of the measures limiting those rights do not seem to be complied with. Similarly, certain measures adopted reveal issues of unequal treatment and selectiveness by the government without any valid justification for differentiations introduced as regards specific categories of activities and professions.

Unfortunately, the constitutionality of the measures to halt the pandemic has not been successfully challenged before Cypriot courts. With the exception of a number of criminal cases challenging the fines imposed on individuals for the alleged violation of relevant decrees,[28] there has only been one decision where the constitutionality of COVID-19 measures was challenged. That is the decision in Patsalidi v. the Republic.[29]

The case arose before the Administrative Court, in the context of interim proceedings, and challenged a travel ban imposed by the government on March 16, 2020.[30] A Cypriot student of a university in the United Kingdom claimed that the travel ban infringed the absolute right enshrined in article 14 of the Constitution that "[n]o citizen shall be banished or excluded from the Republic under any circumstances." She further argued that the prohibition from entry to Cyprus on the part of the Cypriot authorities, which forced her to stay in the United Kingdom, endangered her safety and life in violation of articles 7 and 9 of the Constitution. Consequently, she called on the Administrative Court to request a judicial order that suspended the decree imposing travel restrictions to Cyprus for being *ultra vires* to the enabling legislation, that is, the Quarantine Law.

The Administrative Court dismissed her claim on procedural and standing grounds.[31] What is important in this decision is the *obiter* finding of the administrative judge of first instance that measures adopted on the grounds of public health fall within the scope of governmental acts *(acte de gouvernement)* and are, therefore, excluded from judicial review. This finding was based on the Court's

[25] *Police v. Hondrou* (1962) 3 RSCC 82 (emphasis added).

[26] See also, *Spyrou et al. v. Republic* (1973) 3 CLR 627.

[27] Most of the decrees adopted are available in English, on the Press and Information Office website, at https://www.pio.gov.cy/coronavirus/eng.

[28] See for instance, *Antoniou v. Police,* Criminal Appeal 74/2020, 31 July 2020, ECLI:CY:AD:2020:B281; *In re Aristide et al.,* Civil Petition 96/2020, 11 August 2020, ECLI:CY:AD:2020:D284; *Nicosia Police Director v. Singh Thapa, et al.,* Case no. 9088/2020, 2 June 2020, ECLI:CY:EDLEF:2020:B103; *Famagusta Police Director v. Antoniou, Case* No. 1797/2020, 12 May 2020, ECLI:CY:EDAMM:2020:B34.

[29] *Patsalidi v. the Republic,* Case 301/2020 (April 16, 2020), ECLI:CY:DD:2020:188.

[30] See Decree 101/2020.

[31] See relevant analysis: Constantinos Kombos, 'Covid-19 and the Cypriot Example: A Constitutional Paradox', (*UK Const. L. Blog* 7 May 2020), https://ukconstitutionallaw.org/2020/05/07/constantinos-kombos-covid-19-and-the-cypriot-example-a-constitutional-paradox/. Accessed 12 March 2021.

acceptance that the executive possesses certain expertise and a better appreciation of the severity of the pandemic. The Court further noted that a different approach would have turned the judiciary into a decisive regulator of public health policies, and would have inadmissibly engaged the judicial system in purely political assessments.

In conclusion, the executive's omnipotence in deciding and implementing the measures that it deems necessary, the legislature's idleness in overseeing the implemented measures and providing certain safeguards for human rights and the rule of law, in combination with the judiciary's reluctance to scrutinize the measures, create an upsetting and troublesome situation that endangers the rule of law, destabilises human rights protection, and casts doubt as to the principles of legality and legal certainty.

IV. LOOKING AHEAD

The year 2020 has undoubtedly been an irregular year that has left some mixed feelings in terms of the development of Cypriot constitutional law. As for the long-awaited reform of the Cypriot administration of justice that has been underway for years, not much progress has been made. The proposed reform includes the creation of new courts and procedures with the enactment of relevant constitutional amendments and enabling legislation. However, at the beginning of 2021, during the discussions of the proposed reforms before the *ad hoc* parliamentary committee mandated with the task of drafting the new legislative framework, the Cypriot judges voiced their opposition regarding specific provisions of the draft proposals, such as the issue of identifying the competent court for the adjudication of cases that are pending before the Supreme Court and the participation of non-judges in the composition of the council with disciplinary powers as regards judges. It is hoped that this stalemate will not cause any further delays in the realization of the reforms of the judicial system.

Czech Republic

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I. INTRODUCTION

Year 2020 was an extraordinary year for Czech constitutionalism. The 100th anniversary of the first Czechoslovak Constitutional Charter was celebrated. However, we have experienced significant infringements of principles of democracy and rule of law. Similar to the rest of the world, the most relevant developments in the area of Constitutional Law in 2020 in the Czech Republic (CR) were related to the coronavirus pandemic. CR was affected by the first wave later than other European countries and responded to it firmly, with a very strict, but effective lockdown. Nonetheless, we paid dearly for such bold success. The excellent response to the first wave brought the impression that the coronavirus pandemic was a piece of cake. After the end of the first wave, the main unifying theme of the Czech response to the pandemic was chaos and unpreparedness. This circumstance turned CR into one of the leading countries in numbers of infections and deaths later in 2020 and in early 2021, even with its excellent system of health care. From a constitutional point of view, CR disregarded basic principles of the rule of law.

The events related to the pandemic overshadowed some long-term issues, such as conflict of interests of the Prime Minister (PM) Andrej Babiš, which was officially confirmed by the EU in 2020,[1] and his continuing criminal investigation for misuse of EU funds. Another long-standing constitutional problem - the disrespect of *Prezident* Miloš Zeman to basic principles of the Czech Constitution - has developed a new angle in 2020. The Czech president, described as "our man in Prague" by journalists close to the Kremlin, used a lot of his influence to persuade PM Babiš to import and vaccinate Czech population with Sputnik V and Sinopharm vaccines, not registered by EMA.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

This year began with the death of Jaroslav Kubera, chairman of the Czech Senate. His successor Miloš Vystrčil was re-elected again in the Senate election in the fall of 2020. Miloš Vystrčil decided to follow the steps of Mr. Kubera and together with the Czech delegation visited Taiwan.[2]

In the beginning of March 2020, the CR was hit by the first wave of coronavirus pandemic, which brought extensive use of the State of Emergency (SoE). Before 2020, SoE was usually used for responding to natural catastrophes like floods, so it was declared mostly for short time periods and only for certain parts of the territory. Also, limitations on human rights were relatively narrow, both in scope and extent. The relationship between the legal regulation of crisis management, protection of public health, and SoE were not sufficiently explored. For the first time, the SoE and extraordinary measures

[1] Ian Willoughby, 'Final draft of Brussels audit finds Babiš in conflict of interest' (*Czech Radio*, 30 November 2020) <https://english.radio.cz/final-draft-brussels-audit-finds-babis-conflict-interest-8701603> accessed 27 February 2021.

[2] More information can be found on the website <https://www.roc-taiwan.org/cz_cs/post/4225.html>.

were challenged in courts, so the question of applicability of different legal remedies had to be answered (for details, see the case law section).

In relation to measures adopted to deal with the pandemic, the Executive branch repeatedly and frequently violated some key principles of the democratic rule of law. The adopted measures were not sufficiently justified and substantiated. In that sense, the measures were not linked to clearly defined legitimate aims and the scope of restrictions on fundamental rights was not proportionate to these aims. Furthermore, the measures were not clear, transparent, or predictable: the concrete instructions have varied from day to day, some were adopted just hours before they came into force, their content was not clear even to experts, and their enforcement significantly differed. In February 2021, the government even bypassed the approval of the Chamber of Deputies (CHoD) with prolongation of the SoE.[3] Last, but not least, the actions of the government did not respect the applicable competence framework: the measures were adopted by inappropriate officials being that the competences are fragmented among a group of actors (the prime minister, ministers, chief medical officer, regional hygienic stations, or regional governors); even worse, some of the measures adopted had no legal basis in the current legislation.

However, there were also positive trends. Courts, presented with claims challenging such obvious disregard for the constitutional principles, repeatedly stepped in and repealed some of the measures or at least declared which constitutional principles must be observed in the future. Also, legal experts were regularly analyzing the situation and to some surprise, the government seemed to respect at least some of their advice. The political accountability of top officials became more significant. For example, the Minister of Health resigned after being spotted attending a secret meeting in a restaurant during lockdown and leaving without a face mask.[4] Several other officials resigned because of breaking the applicable anti-pandemic measures by, for instance, attending illegal parties.

At the beginning of the year, the new Public Defender of Rights[5] (the Ombudsman) was elected by the CHoD. The newly elected Ombudsman, Stanislav Křeček, originally deputy of the former Ombudswoman, Anna Šabatová, attracted a lot of attention to his person due to his controversial opinions about the rights of the minorities. The tension around his election escalated when the Minister of Health accepted measures forbidding the presence of the father during childbirth, which were supposed to be examined by the Ombudsman and his office. Mr. Křeček said that there is nothing to examine because in "extraordinary times, extraordinary measures are happening" and that the presence of the father during childbirth is not a right, but just a fashionable affair. He demonstrated disrespect to the constitutional order and questioned the principle of proportionality so strongly, that a group of more than 300 academics, judges, lawyers, and law students signed an open letter kindly pointing out that he should protect the rights of all and not misinterpret the fundamental rights and to spread his personal opinions.

The independence of the main Czech public service broadcaster, the Czech Television (CT), keeps being challenged. The supervisory authority of CT, the CT Council,[6] has 15 members elected and removed by the CHoD so that important regional, political, social, and cultural currents of opinion are represented. In November 2020, the CT Council dismissed its advisory board, the Supervisory Commission. Disagreeing with the move, the president and vice president of the CT Council promptly resigned.[7] The CT Council strictly refused any claims of illegal actions and instead appointed the new advisory board. However, its newly elected members are very politicized and linked to extremists that seek to control public media. The independence of the CT is at stake. Above all other reasons why it is important to have an independent media, public media is the center of attention due to the coming election of the CHoD in 2021.

Looking ahead, the election of the CHoD is scheduled for October 2021. Departing from previous practice, the President set the dates for the election 9 months ahead which starts the electoral campaign (in the past, the campaign usually lasted from 4 to 6 months). Reacting to creation of two coalitions among opposition parties, the President implicitly supported the current PM Babiš by stating that, for him, the winner of the election is the party with the biggest number of deputies, not a coalition of parties. Both coalitions of opposition parties have high chances to win the election. The election will be also strongly affected by a decision of the Constitutional Court (CC), which was announced in February 2021. The CC announced it has annulled aspects of electoral law favoring bigger political parties, including the distribution of seats and thresholds of voter support that coalitions must achieve to enter Parliament.[8] However, the new legislation is only to be adopted.

[3] Tom McEnchroe, 'Czech government manages to extend state of emergency after joint request from regional governors' (*Czech Radio,* 15 February 2021) <https://english.radio.cz/czech-government-manages-extend-state-emergency-after-joint-request-regional-8709434> accessed 25 February 2021.

[4] Robert Tait, 'Czech health minister set to lose job after breaching his own Covid rules' (*The Guardian,* 23 October 2020) <https://www.theguardian.com/world/2020/oct/23/czech-republic-health-minister-roman-prymula-resigns-breaching-own-covid-rules> accessed 20 February 2021.

[5] More information can be found on the website <https://www.ochrance.cz/en/>.

[6] More information can be found on the website <https://www.ceskatelevize.cz/english/the-czech-television-council/>.

[7] Tim Gosling, 'In the middle of pandemic, Czech Television risks repeat crisis' (*International Press Institute,* 8 December 2020) <https://ipi.media/in-the-middle-of-pandemic-czech-television-risks-repeat-crisis/> accessed 24 February 2021.

[8] Brian Kenety, 'Constitutional Court repeals electoral law clauses favouring big parties, hamstringing coalitions' (*Czech Radio,* 3 February 2021) <https://english.radio.cz/constitutional-court-repeals-electoral-law-clauses-favouring-big-parties-8707327> accessed 28 February 2021.

III. CONSTITUTIONAL CASES

1. Decision of the Municipal Court in Prague, Case No. 14 A 41/2020: review of extraordinary anti-pandemic measures

This decision of the Municipal Court in Prague (MC) was one of the first to review the emergency measures. Its key element was that the court accepted the possibility to challenge the extraordinary measures through administrative courts in the proceedings on legality of measures of general nature *(Opatření obecné povahy, Allgemeinverfügung)*. Furthermore, the fact that extraordinary measures have been challenged by legal means, reviewed by a court, and annulled for their illegality must be considered a fundamental victory of the rule of law.

In examining the legality of the contested measures, the MC started off with a premise that the declaration of a state of emergency does not automatically mean a restriction of fundamental rights and freedoms. On the contrary, the exercise of certain rights (typically freedom of expression) is worthy of maximum protection even in times of emergency, as it can be a means of protection against the abuse of an emergency by the executive. Other rights may then be limited to the extent necessary and proportionate in order to achieve the objective pursued, i.e., to eliminate the causes or consequences of the emergency. Even in an exceptional situation, restrictions on fundamental rights may be adopted only on the basis of law, for the purpose of constitutionally protected values, and only to the extent necessary (14 A 41/2020, para. 129).

Probably the most fundamental part of the reasoning of the judgment of the MC should be compulsory reading for all law students, because it very succinctly captures the essence of the need to uphold the principles of democracy and rule of law even in exceptional circumstances. The court acknowledged that, for the government and the executive power in general, the situation at hand was exceptional, including the legal point of view, as they had never faced such a danger to public health in the past. In the absence of any relevant case law, the executive power could have been convinced of the correctness of their action.

"The court does not dispute that the adopted measures seemed to be effective in dealing with the threat. However, efficiency is not a measure of legality. There is a complex legal regulation for emergency situations, including the Constitutional Act No. 110/1998 Coll., on security of the Czech Republic. Nothing came to light in the proceedings that would prevent the government from proceeding under this legislation. This legislation, which allows, under exceptional circumstances, to drastically limit citizens' rights and impose extraordinary obligations on them, should therefore be fully complied with. The state of emergency differs from chaos precisely in that the state institutions continue to operate, which adopt extraordinary measures in order to restore the normal situation, and which operate within the framework set by law. Although the legislation becomes less relevant than individual measures of the executive bodies, it cannot be argued that the laws will cease to apply for good. On the contrary, it is necessary to adhere to their strict observance, as they provide constitutional guarantees and clear boundaries in which the executive must operate." (*ibid.*, para. 161).

2. Decision of the Czech Constitutional Court, Case No. Pl. ÚS 8/20: review of declaration of State of Emergency

This decision of the CC is the pilot case, which formed the basis for subsequent case-law. It is in stark contrast to the emphasis on judicial review of the observance of the principles of the democracy and rule of law, applied by the MC: the CC, for reasons difficult to understand, rejected the possibility of reviewing the government's declaration of a state of emergency (although not entirely - see below). The dissenting opinions of seven judges are attached to the decision, but only three judges disagreed with the majority opinion; four concurring opinions concerned certain parts of the reasoning of the majority opinion.

The majority argument was based on the lack of jurisdiction of the CC, considering the declaration of a state of emergency by the government to be primarily an "act of government." Such an act has a normative effect, but in principle is not subject to the control of the CC and can be "reviewed" primarily by a democratically elected political ("non-judicial") body, i.e., the CHoD. Since there is no legal regulation of special procedural rules allowing this type of review, the traditional constitutional review of proportionality cannot be applied to a political decision that declares a state of emergency. In accordance with this decision, the government bears political responsibility before the CHoD (Article 68, para. 1 of the Constitution), which can apply its review function based on Article 5, para. 4 of the Constitutional Act No. 110/1998 Coll. regarding security in the Czech Republic and, thus, invalidate the SoE (Pl. ÚS 8/20, para. 26).

This line of reasoning is not entirely persuasive. First, the existence of political accountability does not preclude the possibility of judicial review: the CHoD primarily makes decisions based on political criteria, not legal assessment. Even if we agree with the CC that the review of political aspects of acts of governance (for example, whether there were sufficiently serious reasons for the application of the SoE) should be restrained, this does not mean that the CC should not review the legal aspects of the measure, such as the competence to issue it, compliance with prescribed procedures and with the legal conditions, proper justification, etc.

This decision also significantly limited the access of individuals to request constitutional review of a SoE and subsequent extraordinary measures. The CC views the declaration of a SoE as a specific kind of legislation which cannot be challenged by constitutional complaint (Pl. ÚS 8/20, para. 46). With regard to extraordinary measures, the CC confirmed the view of the MC (see above) that these are measures of general nature that can be reviewed by administrative courts. This procedural instrument was not used by the complainant in the case Pl. ÚS 8/20 which, according to the CC, would have meant that

the complaint was inadmissible. However, since this case involved a significant public interest, the applicant could have resorted to one of the exceptions set forth in such rule pursuant to Article 75, para. 2b of Act No. 182/1993 Coll., as amended. Besides negative consequences of such an approach for the access to justice and the protection of fundamental rights, the CC avoided substantive assessment of many relevant challenges to extraordinary measures contained in the constitutional complaint.

3. Decision of the Czech Constitutional Court, Case No. Pl. ÚS 6/20: recognition a foreign decision of the adoption by registered same-sex partners

A step back (or rather staying in place) is the decision of the CC in the matter of cross-border recognition of an adoption made by registered same-sex partners. Czech law does not allow same-sex couples to adopt a child together. In the case at hand, the main actors were registered partners who live in the United States, one of them a Czech citizen, and who adopted two children. The partners applied to the district court for recognition of the adoption because they were afraid of legal risks and complications when they travelled to the CR. The district court denied their application because one of the conditions for recognition, namely, that the adoption should be permissible under Czech law (§ 63, para. 1 of the Private International Law Act), was not met. The partners appealed to the regional court, which asked the CC to repeal this provision as unconstitutional due to a contradiction with the best interest of the children. This allegedly violates Article 3 of the Convention on the Rights of the Child as well as Article 10, para. 2 and Article 36, para. 1 of the Charter of Fundamental Rights and Freedoms (CFRF), since it does not allow the court to provide protection for the family life of adoptive parents who have a legitimate interest in resolving the legal status of their family and its members.

The CC stated that the condition in the questioned provision is nothing more than a typical manifestation of the sovereignty of CR in the form of non-recognition of the primacy of foreign law over Czech law. The decision of a foreign state does not have any special status that would grant them the same effect as if it was a decision of Czech authorities. Such a significant restriction of the legislator itself in favor of a foreign legislator would have to be explicitly and unambiguously set in the Constitution. The CC also stated that a negative decision on the adoption does not violate the right to family life because the law clearly prefers adoption within marital relationship. According to CC, the only relevant consequence of the contested regulation is that in certain cases, a "legal" status based on national law of another state is not recognized. The CC is aware that the European Court of Human Rights (ECHR) also considers relevant in some cases whether *de facto* family life has been legally recognized. Nevertheless, the ECHR has not yet found that the non-recognition of a foreign decision on joint adoption by registered partners is contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms. Anyhow, the CC made a statement in one of its previous constitutional cases that the national legislature is better destined to change institutions that affect the family, marriage, or relationships between adults and children and there is no intention to change this position now, without intending the development of ECHR case law.

4. Decision of the Czech Constitutional Court, Case No. III. ÚS 2300/18: freedom of speech and name protection

In this case, Tomio Okamura, leader of political party SPD (in English, it could be translated as Freedom and Direct Democracy), turned to the CC because of a possible violation of Article 10, para. 1 and Article 36, para. 1 of the CFRF, invoking protection of his personality and asking for a restriction of the freedom of speech. Czech magazine Reflex, known for often publishing political satire, published more than 10 articles about Tomio Okamura. In these articles, he is often called "Pitomio" (compound of Tomio and stupid) and painted like a clown. One article used a photography of his girlfriend downloaded from Okamura's Facebook page and another referred to the bankruptcy of his company (a travel agency for plush toys). Mr. Okamura demanded compensation for non-pecuniary damages, an apology published on the website of the magazine, and a ban for using the nickname "Pitomio" and the clown pictures.

The CC stated that the courts did not sufficiently distinguish between statement of facts and value judgments, or so-called hybrid statements, which is essential for balancing the rights under Article 10, para. 1 (right to privacy) and Article 17 (freedom of speech) of the CFRF. According to established case law, the presumption of permitted criticism protects only the evaluative judgment, not the factual statement which, in so far as it served as the basis for criticism, must, on the contrary, be proved by the critic himself. The case was remanded to the lower court for it to re-decide on it. In the end, the court only decided that the magazine Reflex must publish the apology. Using the nickname "Pitomio" is still allowed, which is regrettable for Mr. Okamura because that was the main reason why he turned to the CC.

5. Decision of the Czech Constitutional Court, Case No. Pl. ÚS 4/17 and Pl. ÚS 38/17: the Conflict of Interest Act

As we mentioned in the 2019 review, CR is dealing with a conflict of interest of the PM Babiš. In June, the European Parliament (EP) adopted a resolution and insisted that a conflict of interest at the highest level of government of a member state, if confirmed, cannot be tolerated and must be resolved by the person.[9] At the end of the 2020, the European Commission (EC) review has confirmed that the PM breached domestic and

[9] European Parliament resolution of 19 June 2020 on the reopening of the investigation against the Prime Minister of the Czech Republic on the misuse of EU funds and potential conflicts of interest (2019/2987(RSP)), available at <https://www.europarl.europa.eu/doceo/document/TA-9-2020-0164_EN.html>.

EU legislation and remains convinced that the PM still controls Agrofert Group, despite placing it into trust funds. CR is now in the three-month period during which it must inform how the recommendations of the EC are put into practice.

But let us take a step back and look on two constitutional decisions focusing on Act No. 159/2006 Coll. on conflict of interest. This act is often called "*lex* Babiš." The PM often makes a statement that this act is pointed against him as an effort to get him out of the political scene. Two challenges of certain provisions in this act were brought to the CC in 2017 and decided in 2020.

In the first case (Pl. ÚS 4/17), the CC denied the argument advanced by the President requesting the invalidation of specific provisions focusing on restrictions imposed on public officials. The CC first rejected that the Conflict of Interest Act is aimed at specific persons and pointed out that regulations must always be measured by all persons who fall into a certain category of public officials. According to the CC, the contested provisions fulfil the duty of a democratic state governed by the rule of law not only to create conditions for public officials to perform their function properly, but also to prevent them from using the power thus entrusted to them to promote their own (personal) interests to the detriment of public interest and, thus, public confidence. The CC stated that the legal regulation under review does not prevent anyone from running for public office due to a possible conflict of interests based on property or the operation of a certain activity. On the contrary, it stipulates that anyone can run for public office and provides that any incompatibility or conflict of interest will be resolved only if s/he wins public office. Our constitutional order thus requires that candidates for public office make decisions, not that the state change its nature by adapting to the personal situation and private interests of the candidates and ceasing to represent the public interest and the common good for all, as required by the Constitution.

In the second case (Pl. ÚS 38/17), the CC reviewed the claims of a group of Senators and invalidated some provisions that focused on admission of data in the register of notifications. The CC stated that it is clear that the challenged legislation interferes with the right to privacy in the form of the right of informational self-determination, as every public official falling under the Conflict of Interest Law regime must provide property data under threat of sanction, income, and liabilities, which constitutes data of a private nature. Another question, however, was whether this intervention is constitutionally acceptable or not. The CC resorted to the principle of proportionality and came to the conclusion that the method of obtaining data from the register of notifications available is not necessary to achieve the legitimate aim pursued, thus violating the right to privacy, namely, the right to informational self-determination (Article 3 of the CFRF).

IV. LOOKING AHEAD

As we mentioned earlier, 2021 will bring us the election of the CHoD together with a new electoral law because of the decision of the CC in the beginning of 2021. Politicians must now reach an agreement on the new election principle in a short time. The activity of the courts in assessing the validity of anti-crisis measures can be expected. We are especially looking forward to the decision of the CC, which should evaluate the extension of the state of emergency that, according to experts, was extended unconstitutionally. Continuing from earlier years, we expect development in the PM's conflict of interests. And, to finish on a positive note, we expect to have a newly elected judge to the EHRC.

V. FURTHER READING

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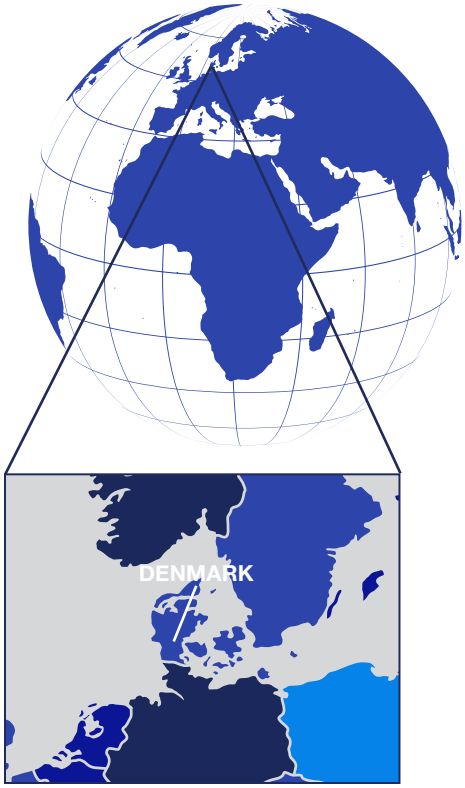

Denmark

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I. INTRODUCTION

The year 2020 is a strong contender for being the most interesting year in Danish constitutional law during the last 100 years. Due to the Covid-19 epidemic, the Danish Parliament gave the government unprecedented powers to implement strict restrictions and limit citizens' freedoms. Restrictions at this level of intrusiveness have never before been used in Denmark, but they are similar to restrictions implemented in many other countries during 2020. However, in Denmark the restrictions culminated in the most likely permanent shutdown of an entire world-leading industry. Without any clear legal basis, the government commanded the culling of all mink in Denmark, causing the world's largest mink fur industry to collapse. The lack of clear legal mandate for this decision has led to significant criticism, and investigation into a possible breach of the constitution is ongoing. Further, proposed changes to the Danish law on epidemics led to major discussions on how to involve the Parliament more in decisions taken during times of crisis.

If the Covid-19 situation was not enough, 2020 also culminated in the decision to initiate an impeachment trial against a former minister. This is only the second Danish impeachment trial during the last 100 years.

Finally, the Danish Defense Intelligence Service was accused of illegally spying on Danish citizens' by obtaining information and handing it over to intelligence services in other countries, as well as of deliberately misleading the agency in charge of monitoring the intelligence service. These are very serious accusations, but the case is complicated by the need to keep information secret due to national security, meaning that detailed investigations into these claims are unlikely to be made public.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Summary of restrictions during Covid-19 crisis

As many other countries, Denmark limited freedoms during 2020 to hinder the spread of Covid-19. The first major lockdown happened in March 2020. Denmark was one of the first countries in Europe to close their borders to all neighboring countries. Within Denmark, most public employees were told to work from home, and schools and universities were transformed to online teaching. Shortly thereafter, malls, restaurants, and many other businesses were ordered to close down their physical premises for customers. Even religious organizations were prohibited from having religious gatherings, except for funerals, marriage ceremonies, and baptisms, which had to be carried out with strict limits to the number of attendees.

A specific constitutional question was raised in regards to the courts. During the initial lockdown, the Danish courts were closed down (except for critically important court cases). It has since been discussed who gave this order as well as who had the authority to order Danish courts to close. Internal correspondence between the Danish Court Administration and the courts has given the impression that the government ordered the courts to close and that the courts did so without protesting. Clearly, the government being able to close down courts is a funda-

mental challenge to democracy, even if this specific situation was due to a health emergency. Both the government and the Danish Court Administration have since claimed that the government did not order the closure of the courts and that the courts could simply have said no. However, the communication sent to the courts gives the impression of an order. The entire process has been strongly criticized by legal experts, noting that although the decision to close down the courts was probably the right decision under the circumstances, the decision should have been made by the courts themselves and both the government and the courts should have acted differently to avoid any confusion about the separation of powers. Since then, the courts have established their own crisis unit, which provides recommendation to the courts on how to act in regards to lockdowns, but it has now been made clear that ultimately the individual courts and judges decide the local processes.

For private citizens, one of the most intrusive restrictions has been the prohibition of public gatherings of more than 10 people. This restriction was eased over the summer but was implemented again in October and was still in place at the end of 2020. In fact, on 5 January 2021, it was reduced to only five people, showing that the restrictions in 2021 are lining up to be more severe than the restrictions in 2020. Facemasks is another intrusive restriction that has been implemented. The first requirement to wear facemasks in public transportation was implemented in August. Since then, it has also become a requirement to wear masks indoor in publicly available places including shops.

Many of the restrictions during the lockdown were eased over the summer. However, gradually they have almost all been reimplemented. The latest major lockdown took place in December 2020, meaning that at the end of the year almost all parts of the Danish society were closed, excluding only supermarkets, pharmacies, and other essential services. Religious gatherings were regulated in regards to the number of people in attendance, but at the end of the year, they were not fully prohibited as they had been for a time in the spring. The government has implemented compensation schemes in an attempt to cover many of the expenses that the lockdown has had for private companies.

Some of the very intrusive restrictions seen in other countries during 2020, such as limitations concerning how often people could leave their homes, how far away they could travel from their homes, or general curfews have not been implemented in Denmark. In private homes, the limitations on gatherings have also only been a (strongly emphasized) recommendation. Thus, while a large part of the Danish population has worked from home for many months, and while many businesses and public institutions have been closed for long periods, the personal freedom to travel around the country has not been challenged. The one notable exception happened in November 2020, in which citizens of seven municipalities in Northern Jutland were told not to leave their municipalities. This was done to prevent the spread of the mutation detailed further below. While there was no punishment for leaving the municipality, public transportation was shut down, effectively stopping many people from leaving. This is the most significant limitation of private citizens' freedom of movement that has taken place in Denmark during 2020.

B. Mink Mutation and constitutional breach

A very specific situation of constitutional importance took place in early November. Before 2020, Denmark had the largest production of mink fur in the world with around 1100 mink farms housing more than 15 million mink each year. During 2020, there were examples of Covid-19 spreading to these mink. In accordance with existing Danish legislation, the Danish government could in such cases demand mink on the infected farm and nearby farms to be culled.

However, on 4 November 2020 the government announced that such local efforts were inadequate. Danish health authorities had discovered a new mutation of Covid-19, which originated from virus transferring from humans to mink and back to humans. The Danish authorities feared that this mutation was resistant to the new Covid-19 vaccines that were under development. Thus, the government considered the spread of this mutation a threat to not only Denmark but also the whole world's efforts at combatting the virus. For this reason, the government had decided that all mink in Denmark were to be culled, effectively destroying the entire industry. In doing so, the government may have breached the Constitution.

One week after this announcement, the public discovered that the government did not have statutory authority to order this culling. Even worse, while the government might not have been aware of this lack of authorization when they first announced the decision to cull all mink, public officials had continued to carry out the decision even after realizing the lack of legal basis. Severe criticism has been directed at the Danish police, who informed mink farmers directly that they had to cull their mink, despite the police apparently being aware that there was no statutory authority. The Danish Defense was also involved in the process.

The government had further promised each farmer an economic bonus if they culled all their mink within 10 days. This meant that many mink had already been killed when it became publicly known that the culling was not authorized. The government was also not authorized to promise such a bonus, but continued to promise this payout even after it was publicly known that there was no legal basis for these actions.

Not surprisingly, the decision to destroy an entire Danish industry without having any authorization has led to severe criticism. One minister has resigned. The Prime Minister was involved in making the decision, and the criticism of her, the rest of the government, and the public officials involved in the process has continued. Eventually, the Parliament agreed to create a legal basis for the continued culling, although this does not in itself relieve the government of responsibility for actions carried out before this legal basis was in place. In January 2021, a large majority of the Parliament approved a compensation to the mink farmers, who may end up receiving almost 19 billion DKK (2.5 billion euro) in total.

The Parliament has also decided to investigate the process leading up to the decision further, especially the extent to which politicians, including the Prime Minister, may have a responsibility for the illegal actions. In relation to this, an entirely new type of commission has been created. As opposed to other commissions of inquiry known in Denmark, this commission will refer directly to the Parliament instead of to the Ministry of Law, and the commission is meant to carry out their investigation faster than usual commissions, delivering its report within one year.

C. Noteworthy legislative changes due to Covid-19

While restrictions can greatly limit personal freedom, they are time-limited and only implemented during an emergency. The legislative changes that have taken place during Covid-19 can have far greater importance, as they more permanently influence the legal rights of private citizens or change the distribution of power between government and the Parliament.

Some of the most significant legislation implemented during the Covid-19 pandemic was adopted within the first month of the Danish lockdown.

Within criminal law, a new legislation adopted in April 2020 has meant that a person convicted of crimes that have a relation to the Covid-19 pandemic will receive twice the punishment they would otherwise have received. For economic crimes to do with fraudulently taking advantage of the compensation schemes, the punishment will be quadrupled. In early 2021, these provisions led to people involved in violent protests against the Covid-19 restrictions receiving twice the punishment they would otherwise have received. This has been criticized for creating a link between criticism of the government and double punishment.

In March 2020, the Parliament approved that the authority to implement far-reaching restrictions during an epidemic was moved from local epidemic commissions to the Minister of Health. This was a significant centralization of power. The new law also gave the Minister significant new powers to implement restrictions that the local epidemic commissions had not had before. These new powers were used to implement the restrictions mentioned above, many of which would not have been possible under the earlier legislation, e.g. the prohibitions against entering privately owned shops, fitness centers etc. The new law also allowed the Minister to authorize private actors to carry out tasks on behalf of the government, including use of force (although not use of weapons). It is clear from both this law and the changes to the criminal law that the government anticipated that the restrictions could lead to unrest.

Only two weeks after the Minister of Health had significantly had his powers extended, the Parliament approved delegating further power to him. While the earlier law had allowed for prohibiting large gatherings (which the government had used to forbid gatherings of 10 people), the new law allowed for prohibiting gatherings of three people or more. This was also the law that made it possible for the government to prohibit access to buildings owned by religious organizations.

All three laws mentioned above contained a time-limitation, which means that they had to be reconsidered on 1 March 2021.

Partly due to this time-limitation, part of the year 2020 was used on discussing what the content should be of a new law on epidemics. As seen, the government had found the old laws inadequate and had requested a significant increase in power from the Parliament. However, while the Parliament was very accommodating towards the government's requests in the beginning of the epidemic, they became more skeptical over the year.

The government eventually suggested a new permanent law on epidemics, which would generally have made the powers they received in March 2020 permanent and made it possible after Covid-19 to implement similar restrictions whenever the government assessed a new disease to warrant similar measures.

The government was not able to get this proposal approved in the Parliament. Instead, at the end of 2020, another proposal was approved. This proposal means that when implementing new restrictions the government will now have to consult a special committee in the Parliament, which can veto new restrictions. Thus, while the government in 2020 could implement highly intrusive restrictions without having to consult the Parliament, the Parliament has now regained some control and power over the process. As we enter 2021, the dynamic between Parliament and government is therefore expected to be quite different in the continued efforts to handle the pandemic.

D. The Danish Defense Intelligence Service spying on Danish citizens

In August of 2020, the head of the Danish Defense Intelligence Service (DDIS) and two other leaders in DDIS were suspended following severe criticism from the agency tasked with monitoring the intelligence services in Denmark. The monitoring agency said that DDIS had withheld information and misled them. Further, the agency said that the leadership of DDIS had omitted investigating indications of espionage. Finally, the agency also found that DDIS had initiated operational activities in violation of Danish law, including obtaining and passing on a significant amount of information about Danish citizens. The monitoring agency only became aware of this due to whistleblowers handing over information to the agency.

Due to national security, much information in the case is kept secret. Danish newspapers have revealed that the case allegedly has to do with a deeply confidential agreement between DDIS and the US National Security Agency (NSA), which has allowed NSA to access data from Danish internet cables. However, it is still unknown to the public exactly what DDIS is accused of having done.

In the end of 2020, the government and the Parliament initiated an investigation of these claims through a commission. For this purpose, a special law was made to make it possible for this investigation to remain highly confidential, making it uncertain whether the public will ever receive thorough information about these claims.

E. Impeachment trial against Inger Støjberg

Inger Støjberg was the Danish Minister for Immigration and Integration from 2015 to 2019. During this time, a decision was made to separate married asylum seekers from their spouses when one of the spouses was below 18 years of age. This decision has been considered illegal by the Danish Ombudsman, since The European Convention of Human Rights requires a concrete assessment in each case before separating family members. The commission investigating this decision gave their first report in December 2020, which implicated Støjberg in the responsibility for the decision and concluded that she had lied to the Parliament.

In January 2021, a majority of the Danish Parliament supported initiating an impeachment trial against her, which will take place in the autumn of 2021. Impeachment trials are highly unusual in Denmark. The last Danish impeachment trial took place in 1995 and no other impeachment trials has taken place since 1910.

III. CONSTITUTIONAL CASES

1. Western High Court, 7 February 2020: Refusal to grant citizenship was indirect discrimination based on disability

A man with Turkish background had been refused Danish citizenship. He was approved for a "flex job", which is a Danish concept under which an employer receives partial wage subsidy when hiring workers with a reduced working capacity. During a short unemployment period, the man received "ledighedsydelse", a special form of unemployment benefit for people approved for flex jobs. His application for citizenship was rejected due to him having received this unemployment benefit. Had he not had a disability, and therefore not been approved for flex job, he would have received a different type of unemployment benefit which did not preclude citizenship. For this reason, the court found that the refusal was indirect discrimination based on disability.

2. Eastern High Court, 11 September 2020: Man deprived of legal capacity could not retain voting rights

The case concerned a man who had been assessed to have cognitive impairment following an accident nine years earlier. He had been placed in a time-limited legal guardianship and the case concerned whether this should be prolonged. The man wanted the guardianship to end, while the guardian, an attorney, requested that the guardianship be prolonged and extended to include all personal and financial matters as well as deprivation of legal capacity with the exception of the right to vote. The city court approved the request from the guardian and the case was appealed to the high court. On its own initiative, the high court informed the parties that it was not possible under Danish law to be deprived of all legal capacity except the right to vote. As described in my constitutional review of 2018, Denmark recently changed the law to allow people who are only partially deprived of legal capacity to retain their voting rights. However, the law does not allow people fully deprived of legal capacity to have voting rights, as this would go against art. 29 of the Danish Constitution. The high court found that it was not possible to deprive a person of legal capacity with the only exception being the voting rights. Instead, the deprivation of legal capacity had to be limited in other ways before the voting rights could be retained. The court encouraged the parties to discuss together whether another limitation of the deprivation could be made. The parties were not able to reach an agreement on this and the high court eventually deprived the man of his full legal capacity including his right to vote, and extended the deprivation for another three years.

3. Supreme Court, 16 November 2020: Supreme Court tells Parliament to reconsider the law on adoption in light of human right concerns

A Danish couple had used a surrogate mother in Ukraine to give birth to two children, which were the biological children of the Danish man. Danish authorities recognized the man as the father of the children but refused to let the Danish woman adopt the children due to a complete ban in Danish law on allowing adoption if one party in the process has received payment, which the Ukrainian surrogate mother had. The Danish Supreme Court found that the Danish law on adoption did not allow for a concrete assessment of whether it was in the interest of the children to let the woman adopt them. However, case law concerning art. 8 of the European Convention of Human Rights requires such an assessment to be made. For this reason, the Supreme Court found that the Danish legislative power had to reconsider the law on adoption. In the meantime, the Supreme Court carried out the concrete assessment. The court was split on the final decision, with a majority of four out of seven judges finding that the children's interest in being recognized as the Danish woman's children did not outweigh the more general interest in assuring that children are not sold and that vulnerable women are not exploited. For this reason, the majority found that currently there was no breach of the Convention and therefore upheld the decision not to let the woman adopt.

4. Western High Court, 2 December 2020: Compensation for daily searches of a remand prisoner

A man was charged with the crime of having travelled to Syria and joined ISIS. For this reason, he was remanded in custody while awaiting trial. The authorities found that there was a high risk of him having illegal communication with the outside world. They therefore searched him and his cell daily. During a period of 11 months his body was searched a total of 301 times and his cell was searched 318 times. Nothing was found in any of these searches. The court found that Danish law did not allow for routine searches of the cell, although it did not consider these searches a breach of the European Convention of Human Rights or the Danish Constitution. Similarly, the court found that Danish law did not allow for routine searches of his body and further found these routine searches to be a breach of art. 3 of the European Convention of Human Rights.

IV. LOOKING AHEAD

One of the most significant constitutional events of 2021 will be the impeachment trial against Inger Støjberg, which will become a significant part of Danish constitutional history regardless of the result. The trial will last from September until end of November, with the ruling being made at some point after that.

Several court cases mentioned in last year's review are expected to reach a decision during 2021. One of these deals with the constitutionality of the Danish state's attempt to ban an organization accused of being a criminal gang. This case has now reached the Supreme Court. Another case deals with the constitutionality of a Danish law that allows the government to administratively revoke citizenship. Finally, a third case has to do with the fact that the Danish state requires telephone companies to retain detailed information about their users' conduct, which the European Court of Justice (ECJ) has declared a breach of fundamental rights in several cases against other EU Member States. Denmark is planning to change these rules during 2021, however a court case regarding whether the Danish government has reacted too late to the case law from ECJ is also expected to reach a decision in 2021.

During 2021, the Grand Chamber of ECHR will decide in a case concerning Danish rules that prevent certain refugees from applying for family reunification during the first three years of their stay in Denmark.

A number of commissions of inquiry are still ongoing. Both the Tibet Commission and the Tax Commission, described in earlier reviews, are expected to deliver reports during 2021. The commission looking into the actions of the Danish Defense Intelligence Service is supposed to conclude towards the end of 2021, while the commission looking into the decision on mink will likely deliver its results in 2022.

In November 2021, Denmark will have local elections. This will be the first interesting glance at how the Covid-19 crisis has changed the power balance between political parties. During 2021, Denmark will also have its Universal Periodic Review at the UN Human Rights Council.

While 2020 has been one of the most interesting years in Danish constitutional law for many years, the many events already expected in 2021, together with the still ongoing restrictions due to Covid-19, may make 2021 an even more interesting year.

V. FURTHER READING

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Ecuador

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I. INTRODUCTION

As is the case in the rest of the world, the year 2020 in Ecuador was defined by the impact of the COVID-19 pandemic. The country's economic, political, and social instability intensified the pandemic's devastating consequences.

It has been a challenging year for Ecuador's Constitutional Democracy, given COVID-19 volatile context and the Government's political branches experiencing historically low public approval levels. Against this backdrop, 2020 also saw the conclusion of one of the country's most important and historical trials: the corruption case against former president Rafael Correa, his Vice-President, and many other high-ranked officials of his Government.

This complex year also resulted in some of Ecuador's institutions gaining wider legitimacy, particularly the Constitutional Court. In the second year of its current formation, the Court played a role of utmost importance by setting limits to the Executive and Legislative branches and fully assuming its constitutional role as a political and jurisdictional player.

In the following paragraphs, these developments are presented across two main sections. The first section briefly describes the most important political events of the year and the challenges that the COVID-19 pandemic presented on Ecuador's constitutional system. It details the limits imposed by the Court on the exceptional faculties activated by President Lenin Moreno to curtail the health crisis. The most important constitutional cases that arose from the pandemic are also described.

The second section is dedicated to the most important advances in the Constitutional Court's jurisprudence, focusing on the rights of indigenous peoples, human mobility, freedom of expression, judicial independence, and women's rights. Through its caselaw, the Court shows that it is starting to consolidate as a robust and more legitimate institution.

The report concludes by detailing the country and the Constitutional Court's foremost challenges for 2021. Presidential and congressional elections are set to be held in February of next year. This means that the country's future will be marked by political and social uncertainty, threatening the advances achieved towards the country's institutionalization.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

It was a challenging year for Ecuador's still maturing institutions. The country faced one of the most severe socio-political crises of its history, made worse by a weakened Executive in constant confrontation with a divided National Assembly. The most important Legislative development of 2020 was the "Organic Law of Humanitarian Support," a comprehensive legislation designed to curve some of the pandemic effects in the country's economy and social fabric.

At the end of 2019, the National Court of Justice's entire formation went through a performance evaluation from the body in charge of its supervision, the Judiciary Council. This process, which was often fraught with criticism from scholars and public intellectuals, resulted in the early termination of the terms of twenty-three judges. They were replaced by temporary judges nominated from lower levels of the judiciary, raising concerns about their temporal nature and possible lack of independence. In the second half of 2020, the Judiciary Council initiated a process to

designate the judges that would replace the twenty-three temporal judges. This process culminated in early 2021 with the seating of a new National Court of Justice.

As we reported last year, the prosecution of corruption has served as the yardstick against which high State officials were held accountable. This phenomenon intensified in 2020 with the developments in the trial known as "Bribes 2012-2016," which tested the judiciary's independence and impartiality in the face of mounting political and social pressure. On April 7, the National Court of Justice handed out a significant ruling sentencing former President Rafael Correa, the former Vice President, several former high-ranking officials, and various individuals and private companies on corruption charges.

The National Court of Justice found that the former President's political party had constructed a bribery scheme to finance election campaigns. In exchange for public contracts, companies had paid more than $8 million in illegal campaign contributions. Most of the accused were sentenced to eight years in prison and were ordered to pay more than $14 million in reparations. The verdict was confirmed in appeal and cassation, and the final constitutional remedy was denied at the beginning of 2021.

The verdict is one of the most important in the country's history, as it constitutes a milestone in the fight against widespread corruption in Ecuador. However, both the Attorney General Office and the National Court of Justice have received strong criticisms regarding possible due process irregularities. Issues regarding the politicization of the proceedings have also been raised since a conviction against Former President Correa excludes him from running in the 2021 presidential elections.

Nonetheless, the biggest and most unexpected challenge for Ecuador's constitutional system in 2020 was the COVID-19 pandemic. The Constitutional Court found itself in a challenging position, as it had to find an adequate balance between an ever-expanding set of executive powers and the protection of human rights. Due to repetitive historical abuses, Ecuador's current Constitution, enacted in 2008, assigns the Constitutional Court an active role in controlling the rigid material and temporal limits imposed on the President's attribution to declare a state of emergency.

In an effort to combat the pandemic, throughout 2020, the Government declared eight states of emergency. The first one was issued on March 17. Six days later, the President declared Guayaquil, Ecuador's second most populated city, an emergency zone. Both declarations suspended the rights to freedom of movement and association, imposed curfew restrictions, and activated emergency powers such as the deployment of the armed forces.

Acknowledging the severity of the emergency, the Court ruled on the constitutionality of both declarations in Judgments 1-20-EE/20 and 1-20-EE/20A. Moreover, it decided that the protection of fundamental rights required the imposition of specific obligations to State officials. The ruling also established parameters for protecting the rights of homeless persons, people in human mobility, hospitalized patients, among others.

Once the time limit imposed by the Constitution expired, the Government renovated the state of emergency. In Judgment 2-20-EE/20, the Court confirmed the renovation. Still, the Court warned the Government that, given the pandemic's long-term nature and the Constitution's strict temporal limits, it had to progressively implement mechanisms to face the pandemic by ordinary means.

Up to this point, the President's actions were characterized by the absence of technical and legal arguments to justify the measures, entering into tension with constitutional restrictions that inhibit the use of extraordinary means in a permanent manner.
On June 16, the Government declared a new 90-days state of emergency. In a 5-4 ruling, the Court decided that it was necessary to accept the extension due to the magnitude of the health crisis. However, it notified the President that it would not accept a new declaration based on the impact of the COVID-19 pandemic.

Finally, on December 22, the Executive declared a new state of emergency, based on the same facts, disregarding the Court's warning. This situation proved to be enough to flip the Court's majority. In Judgment 7-20-EE/20, the Justices declared the Presidential Decree's unconstitutionality and, once again, ordered the Government to adopt long-term measures through ordinary means to tackle the health crisis.

To guarantee compliance with the Court's decisions, the Constitutional Court used the "supervision side" of its jurisdiction to require the Government to provide detailed information related to the enforcement of its judgments. The Court published reports with the information obtained through this process, which allowed greater transparency regarding the President's actions. This, in turn, allowed relevant civil society actors to question the technical viability of those actions.

The Executive's measures to address the COVID-19 pandemic also translated into the submission of several cases to the Constitutional Court. Due to the worldwide economic contraction, the Ecuadorian State's revenues decreased dramatically and, by so, the Government's investment in social services, especially education and health. Several plaintiffs objected to the constitutionality of these budgetary cuts, which created new challenges to the Court as it was required to review decisions of a political nature.

In case 9-20-IA/20, Ecuadorian public professors challenged the constitutionality of reducing high education expenditure and implementing guidelines regarding the allocation of resources to universities. The Court determined that the budgetary limits im-

[1] For example, the NGO *Observatorio de Derechos y Justicia* published a report detailing a series of due process irregularities in the case. https://odjec.org/2020/06/21/informe-de-alcance-y-ampliacion-caso-de-teodoro-calle-posibles-violaciones-a-las-garantias-del-debido-proceso-en-los-casos-sobre-delitos-de-corrupcion/.

posed hampered the ability of public universities to provide adequate services. Hence, it declared the unconstitutionality of the measures, highlighting that these actions affected the autonomy of high education institutions.

On Judgement 10-20-IA/20, the Court ruled that the termination of an International Baccalaureate program in public schools violated the right to legal certainty of enrolled students and, in consequence, their right to education. The Tribunal found that the measures had no legitimate justification and did not consider their impact on students.

These decisions showed the commitment of the Court to upholding the right to education, despite the precarious conditions created by the COVID-19 pandemic. They also show some of the difficulties that arose from using constitutional justice as a way to challenge budgetary decisions made by political bodies of the system.

Finally, on Judgment 2-20-IA/20, the Tribunal reaffirmed that the right to an effective remedy for human rights violations could not be suspended amidst the pandemic. Furthermore, in Judgment 8-20-IA/20, it declared that the operational consequences that the COVID-19 restrictions had on the judiciary could not suspend the temporary limits of preventive detention for suspected persons.

As the previous paragraphs show, Ecuador's constitutional development in 2020 was significantly marked by the COVID-19 pandemic. Through the constitutional revision of declarations of state of emergency and several rulings related to the pandemic, the Constitutional Court showed that it could play a fundamental role in governance crises. The Court acted as a counterweight to the expansion of executive powers and for the first time in the country's history, the Court declared the unconstitutionality of a declaration of state of emergency for violating the limits set out in Ecuador's Constitution.

Given the widespread displeasure with the economic policies adopted to deal with the crises, several people and institutions turned to the Constitutional Court to challenge those measures. This forced the Court to analyze processes that would traditionally be understood as political decisions exempted from jurisdictional control. Consequently, the Court had to develop proactive and creative methods to protect constitutional rights without interfering with the constitutional roles assigned to other branches of government.

III. CONSTITUTIONAL CASES

One of the Constitutional Court's primary goals in 2020 was to legitimize itself through its jurisprudence and reinforce its image as a democratic and trustful institution. Despite the unfavorable conditions experienced throughout the year, the Court doubled its productivity, compared with 2019 statistics. Between January 16, 2020, and January 31, 2021, the Court issued 856 rulings, compared to 383 judgments in 2019.

Even though the core of the Court's 2020 decisions centered on the challenges of the COVID-19 pandemic, the Tribunal also focused on developing constitutional rights, reinforcing Ecuador's democracy, and protecting its institutions. The following section contains a brief explanation of the most prominent constitutional law cases, apart from those relating to the health emergency.

1. Indigenous Peoples' Rights

Throughout 2020, the Constitutional Court emitted three landmark decisions regarding the rights of indigenous peoples. Two of them related to the right to be consulted before adopting legislative or administrative measures that may affect their rights. The last one referred to the rights of indigenous peoples to practice their traditional systems of justice.

In Judgments 20-12-IN/20 and 3-15-IA/20, the Tribunal reaffirmed the importance of the right of indigenous communities to be consulted to obtain their free, prior, and informed consent before adopting and implementing resolutions that may affect their collective rights. Previous jurisprudence had limited this right to measures adopted by the National Assembly. Through these decisions, the Constitutional Court expanded its application to every normative or administrative decision that can affect the collective rights of indigenous communities.

In case 20-12-IN/20, the Court ruled the unconstitutionality of a ministerial agreement that declared an area as a protected forest. It found that the determination of protected areas pursues legitimate objectives, such as safeguarding the environment. However, it also affects and limits the activities of the ancestral communities in those areas.

Hence, the Tribunal found that the Ministry of the Environment had failed to obtain the consent of the indigenous communities affected by the decision and declared its unconstitutionality. The Constitutional Court considered that the pre-legislative consultation constitutes an adequate mechanism to harmonize legitimate environmental purposes with its consequences on the traditional practices of indigenous peoples.

On the other hand, in the ruling of case 3-15-IA/20, the Constitutional Court reviewed the decision that settled a border dispute between two districts, Calvas and Sozoranga, which divided the ancestral territory of the indigenous Chinchanga community. Based on the principle of interculturality, the Constitutional Court concluded that, when defining territorial limits that may affect indigenous territories, the State must consider the impact this boundary may have on their traditional cultural practices and consult to the potentially affected communities.

Finally, case 134-13-EP/20 referred to the jurisdictional conflicts that arise from the constitutional recognition of the traditional systems of justice of indigenous peoples. Ecuador's Judicial Code establishes that when an indigenous authority requires the ordinary system to decline its jurisdiction, a parallel process to resolve this issue must begin. The Court analyzed the conditions under which the ordinary justice system must decline its jurisdiction in favor of traditional systems of indigenous justice.

Reaffirming the constitutional principles of plurinationality and interculturality, the Constitutional Court determined that all ancestral justice systems must be recognized

on an equal basis by the State. To ensure complete autonomy and independence of the traditional systems, the Court ruled that, when the existence of a previous process in an indigenous justice system is proved, the State must decline its jurisdiction. Through this ruling, the Tribunal reaffirmed its exclusive jurisdiction to review a decision from an indigenous system of justice.

2. Human Mobility

Regarding human mobility, the Constitutional Court developed standards to guarantee due process for revoking Ecuadorian nationality and during procedures for a person to be granted asylum. The Tribunal also declared a series of human rights violations resulting from a case in which Ecuadorian authorities carried out a collective expulsion of migrants.

In ruling 335-13-JP/20, the Court affirmed that, during all procedures that could impact the right to a nationality, the affected person must be notified since the beginning of the process. The legal notification of such proceedings is a necessary component of due process because the rest of the defendant's guarantees depend on the person's knowledge of the existence of the process.

The Court also established that, even though the State has the discretionary power to regulate the right to nationality and determine the grounds to revoke it, this power cannot be exercised arbitrarily under any circumstances. On the contrary, the Tribunal ruled that these procedures require respect for the most rigorous guarantees. Before the immigration authority makes any decision, it must verify if the revocation does not render the person stateless (*de facto* or *de jure*).

Additionally, the Constitutional Court held that the widespread use of immigration detention and summary deportations represents a way to criminalize migration and reinforce harmful stereotypes. The Tribunal highlighted that human mobility had been an inherent characteristic of human beings throughout history. It ordered the State to refrain from implementing migration policies and practices that reinforce negative stereotypes about migrants.

Furthermore, in case 897-11-JP/20, the Court required the State to respect and guarantee due process in all procedures where people's migratory condition is decided, especially if it involves an individual in need of international protection.

The Constitutional Court held that the State must ensure clear communication between the interviewer and the asylum seeker. Therefore, a qualified and trained interpreter must be provided when their native language is not the same as that of the host country. The Tribunal ruled that this requirement is essential to obtain detailed information on the applicant's reasons for claiming persecution which, in turn, leads to a more objective decision-making process.

Finally, in case 639-19-JP/20, a critical pronouncement was made regarding the prohibition of collective expulsions against migrants. The Court held that, during the interception of people in border areas, immigration authorities must ensure an individualized review of each case.

The Tribunal held that the practice of Ecuador's State agents of forcing foreigners who enter irregularly to leave the territory immediately violated the prohibition against collective expulsions. Therefore, the Court called the State's attention, ordering to guarantee the right to migrate and the right to freedom of movement since, in the Ecuadorian constitutional system, migration is not a crime and cannot be treated as such.

3. Freedom of expression during electoral periods

Concerning case 1651-12-EP/20, the Court studied the sanctions imposed to a media outlet for the publication of an opinion editorial related to a 2011 referendum promoted by former President Rafael Correa. The electoral authority considered that the editorial piece constituted "electoral propaganda."

The Tribunal determined that a publication that criticizes specific questions of a referendum is a speech of public interest and, as such, is specially protected by the right to freedom of expression; thus, the electoral sanction imposed to the outlet constituted an arbitrary interference to the freedom of expression. With this decision, the Constitutional Court reaffirmed the essential role that media and freedom of expression play during electoral periods.

4. Judicial independence

Concerning judicial independence, in case 3-19-CN/20, the Constitutional Court studied the constitutionality of a norm related to the Judicial Code, which allowed an administrative body to remove judges, prosecutors, and public defenders who acted with *"malice," "manifest negligence," or "inexcusable error."*

This process had considerable political and jurisdictional implications. In previous decades, this article of the Code had been used by different State powers to interfere in the judicial system and weaken the independence of judges. The Court established that only a higher judicial body could declare these infractions' existence. It set standards of due process for sanctionative procedures conducted by the administrative body charged with regulating the judiciary.

5. Women's rights

The Constitutional Court also made relevant pronouncements regarding women's reproductive rights. In one case, it detailed the guarantees enjoyed by pregnant and breastfeeding women in the workplace. In another, it determined that a woman's pregnancy condition cannot constitute a justification to discriminate against them.

In judgment 3-19-JP/20, the Tribunal analyzed the situation of several pregnant and breastfeeding women and women on maternity leave who worked in the public sector and were discriminated against by the State. The Constitutional Court determined that determined that women are currently at a disadvantage compared to men in terms of the enjoyment and exercise of the right to work. The Tribunal pointed out that this situation is exacerbated when a woman is pregnant or receiving postnatal care. Those conditions have historically put women on a state of inequality and serious vulnerability. Without technical

nor constitutional justification, these have been used as a discriminatory category, which despite socially and legally accepted must be abolished and eradicated.

The Constitutional Court held that inside Ecuador's patriarchal society, the domestic workload has fallen on women, making it necessary to promote men's family care responsibilities. It also stressed that as part of the State co-responsibility, if the working relationship of a pregnant or a breastfeeding woman is terminated unilaterally, she has the right to special compensation.

The Tribunal ordered the State to allocate the necessary resources to promote and protect sexual and reproductive rights, including maternal health programs, childbirth, postnatal and breastfeeding care, and to develop measures that equitably shared the caring obligations between mother and father.

Finally, in ruling 1894-10-JP/20, the Tribunal reviewed a case regarding a female pregnant cadet's separation from a military school. The Tribunal affirmed that military disciplinary regulations were discriminatory since they established a penalty for a woman who is pregnant and not for a man whose partner is pregnant. Although it recognized that a military career entails a physical effort different from other professions, the Tribunal held that the condition of being *"pregnant," "not having children,"* or being *"single"* could not be a distinction that motivates the separation of a woman from any educational institution.

Based on these considerations, the Court concluded that the State violated the rights to non-discrimination and education for prohibiting the continuance of a woman in military training due to her pregnancy. This decision constitutes a step towards closing the historical gap between men and women since it recognizes the urgent necessity of combating sexist prejudices prevalent in Ecuadorian society.

IV. LOOKING AHEAD

Ecuador's 2019 report highlighted the importance of the new appointments to the Constitutional Court, as its Justices are regarded as more transparent and independent than its predecessors. The performance of the Tribunal during 2020 reaffirmed this assessment, as it acted as an independent counterbalance to the Executive power during the COVID-19 pandemic and issued several relevant rulings that protected and developed the rights established in Ecuador's Constitution.

Next year will be marked by the February presidential elections, as the two main contestants represent radically different futures for the country. On the one hand, the candidate Andrés Arauz embodies the return of Rafael Correa's autocratic style of Government. On the other, the candidate Guillermo Lasso denotes a rightward shift to a more market-oriented view and the end of fourteen years of the current ruling party.

Regardless of who ends up at the helm, the new Government will face a huge responsibility to acquire and distribute enough COVID-19 vaccines for the entire population. This will prove particularly difficult since Ecuador's financial and economic situation continues to be critical. Ecuador's fiscal problems also mean that, throughout 2021, the assistance of the International Monetary Fund and other International Organizations will continue to be indispensable. This entails a potential socio-political conflict because the financial aid is conditioned upon compliance with possible controversial measures, such as cuts in public spending and downsize the public sector.

In Ecuador's 2019 report, it was pointed out that one of the main objectives of the Constitutional Court was to pursue wider recognition and obedience of its decisions while maintaining its independence and impartiality. Its current formation will face its third and final year, as a partial renovation is due in 2022.

Although it is still early to assess its impact, after the enormous challenges of 2020, there can undoubtedly be hope that the Constitutional Court, for the first time, is starting to consolidate its independence and impartiality, protecting fundamental rights and safeguarding the Constitution's supremacy. However, the Tribunal has been strongly criticized; overall, its work has helped spawn a constitutional dialogue between the different State' powers and civil society and renewed interest in the promises of the 2008 Ecuadorian Constitution.

Given the presidential election in 2021, a new government's formation will prove a new challenge to the Court's independence and, depending on who wins the election, probably its very existence. A win by presidential candidate Andrés Arauz could represent a push for a new Constitution (it would be the 23rd in the country's history) and the disarticulation of the institutions that arose from the transitory Council for Public Participation and Social Control. Thus, it can be expected that, in the next year, the Tribunal will try to have as much impact as possible through its jurisprudence.

V. FURTHER READING

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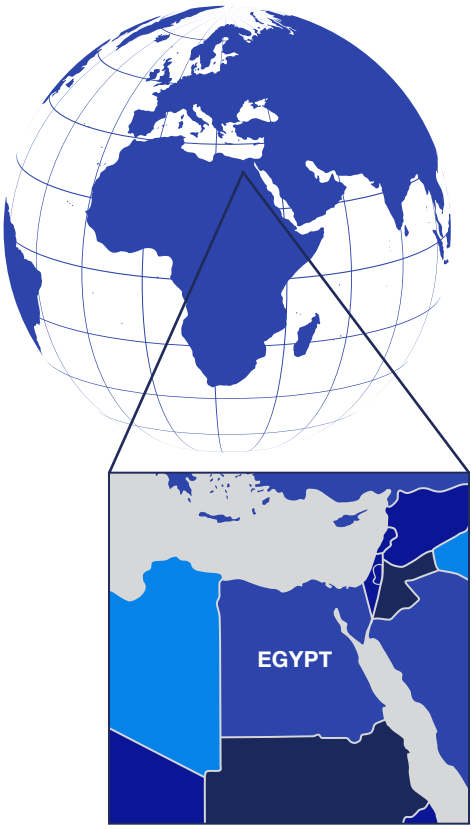

Egypt

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I. INTRODUCTION

In 2020, Egypt introduced new laws while amending others. These laws regulate parliamentary elections, emergency status and the Senate. Emergency status was declared twice and extended twice. New Supreme Constitutional Court (SCC) appointments were witnessed appointing the second female SCC judge in Egyptian history. On another note, two rulings of the SCC touch on matters of religion and gender equality. In 2021, the Municipalities Law and the battle for women in the State Council are still ongoing.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Three significant constitutional developments stand out in Egypt in 2020: Parliamentary Elections, Emergency Status, and the Supreme Constitutional Court appointments.

First, both the Senate and a new Representatives House were elected. These elections were precedented by amending and issuing of relevant laws. Upon Parliamentary suggestion and approval, and National Election Authority (NAE) approval, President El Sisi issued Law number 140 of the year 2020, amending some provisions of the Political Rights Practice Law number 45 of the year 2014, the Representatives House Law number 46 of the year 2014, and the National Authority of Elections Law number 198 of the year 2017.[1] Moreover, the President also issued the Law of Electoral Constituencies of the Representatives House number 174 of 2020.[2]

The most remarkable amendments include the following points. First, the reduction of the legal periods given to the NEA to look into: (1) complaints to the elections process within 24 hours instead of 48 hours, and (2) complaints into the elections and referenda results within one day instead of three days. Second, the reduction of the legal period given to the Administrative Justice Court to consider the appeal requests against the NEA's acceptance or rejection of the candidates' applications to 3 days instead of 5. Third, banning Parliament members who were deprived of their membership before, due to lost trust or integrity or breach of their membership duties, from running for parliamentary elections unless the reason for losing the membership has been remedied. Fourth, endowing the Head of the Senate the powers of the Head of the Representatives House in periods when the latter is not in session, and in case both houses are not in session, the powers of both heads of the houses are endowed to the Prime Minister. Fifth, expanding parliamentary immunity to include the Representatives House members who work in different types of public sector entities, even if the member's violation is irrelevant to his/her public position or his/her parlia-

[1] Law number 140 of year 2020, The Official Gazette, Volume 26 (repeated k), PP. 3-11, July 1, 2020, https://drive.google.com/file/d/1SBsFIbAO-pXnXBOgECW-m7VksH08_PU_/view?fbclid=IwAR0N3qx4F5621YXe_r7i1EXAtkz3OiiNM7BIbCnLbcQhcp2kEt1bYk-zHug

[2] Law number 174 of year 2020, The Official Gazette, Volume 36 (continued), PP. 2-23, September 3, 2020, https://drive.google.com/file/d/1WYIz6yU9BDO6IyZtIsGqcceu-wgquAG5/view?fbclid=IwAR2ATzIJ_0s2_IY-6Q0DuGUX1vqYI7yTmbdXRBmh5n2Qb5DyWIkRMVPot-1o

mentary office, and even if the violation is against public funds. Sixth, it is not allowed for anyone to have membership in both Houses simultaneously. Seventh, regarding the Representatives House's formation, the numbers of members were increased from 540 to 568; half of these seats are allocated for closed lists candidates (increased by 164 seats), and the other half to individual candidates. The closed lists seats were allocated four electoral constituencies around the Republic; women, the disabled, Christians, the youth, Egyptians abroad, workers, and farmers all have quotas in these lists. Also, at least 25% of the Representatives House members have to be women, and the President has the right to appoint up to 5% of the House members. Finally, both political parties and independent candidates have the right to run for both the closed lists and individual seats.

In the same volume of the Official Gazette, the Senate Law number 141 of the year 2020 was issued by the President after the earlier suggestion and approval of the Parliament and the NEA.[3] The Senate is restored upon the 2019 constitutional amendments and is similar to El Shura Council, the upper chamber of the Egyptian Parliament until the 2014 constitution abolished it. According to articles 248 and 249 of the amended 2014 constitution, the Senate has only advisory powers in terms of suggesting and studying bills, constitutional amendments, and "whatever tools to consolidate democracy, support national unity, social peace, the basic values of society, supreme values, rights, freedoms and public duties, and deepen and expand the democratic system." Moreover, according to article 253 of the same constitution, the Senate has no powers over the executive.[4]

Among the most significant provisions of the new Senate Law are the following. First, the Senate is to be formed from 300 members; 1/3 of them will be appointed by the President, while 2/3 are to be elected. Second, at least 10% of the seats have to be allocated to women. Third, half of the elected seats will be from closed lists, and the other half from individual candidates. Both independent and party candidates are eligible to run under both systems. Fourth, the Senate's term is five years starting from its first assembly, and a new Senate has to be elected 60 days before the end of the last term. Fifth, the Senate candidates have to be at least 35 years old and hold at least a university degree or equivalent. Sixth, all assets of the abolished Shura Council are to be transferred to the new Senate.

The first round of Senate elections was held from August 9 to August 12 2020,[5] while the second round took place from September 6 to September 9, 2020.[6] The NEA declared that voter turnout was 23%[7], the majority came from the political party "Mostaqbal Watan," which is associated with the regime.[8]

Unlike the Senate's elections, the Representatives House elections were held on two stages. The first took place from October 21 to October 25, 2020; and the second round for this stage took place from November 21 to November 24, 2020.[9] The first round of the second stage was held from November 4 to November 8, 2020; and the second round was held from December 5 to December 8, 2020.[10] The first stage's voter turnout rate was 28.06%,[11] while it reached 29.50% in the second stage.[12] Among 13 political parties, "Mostakbal Watan" obtained the majority with 316 seats, 55.7%, of the House and increase from 53 seats, 9%, in the last House.[13]

There was widespread criticism of the electoral process. The closed lists electoral constituencies' massive size, which divided the country only into four constituencies, raised concerns around the role of political money in the elections. With this geographical limit, the candidates' popularity will play a

[3] Law number 141 of year 2020, The Official Gazette, Volume 26 (repeated k), PP. 12-14, (July 1, 2020), https://drive.google.com/file/d/15rpSaipHPTWdmd3M-sAUPce2XKrimPOYn/view?fbclid=IwAR3iFX9izmkUPnsloaYKxW-yNqLV_R-S90dxULOTZPuQs95Hwy2bfLPm5M0

[4] The 2014 Egyptian Constitution, https://constituteproject.org/constitution/Egypt_2019?lang=ar

[5] "The National Authority of Elections Decision number 22 of year 2020 Inviting Voters for the Senate Elections", The Official Gazette, Volume 27 (following), PP. 3-4, July 4, 2020, https://www.facebook.com/Legislations/photos/pcb.3108736435862236/3108735632528983/

[6] Ahmed El Masry, رئيس الهيئة الوطنية: انتهاء اليوم الثاني للترشح في انتخابات الشيوخ و323 مرشح اجمالي تقدموا بأوراقهم اليوم وامس ["The Head of the National Authority: The Second Day for Candidacy in the Senate Election Has Ended and 323 Candidates Have Applied Yesterday and Today"] (*The Parliament Gate* بوابة البرلمان, 2020) <https://www.parlgate.com/53362?fbclid=IwAR0N3qx4F5621YXe_r7i1EXAtkz3OiiNM7BIbCnLbcQhcp2kEt1bYk-zHug> accessed 2 March 2021.

[7] The National Authority of Elections, 'نتيجة انتخابات مجلس الشيوخ [The Senate's Elections Results]' (2020) <https://drive.google.com/file/d/1Xuex5HM68Wcv-S64iRjHpyLn2-3NRBSK-/view?fbclid=IwAR3W-ky7dy1BqU22lmcAPqv5w29WWfGZasAOXwgxQvI0Y__ulMaZYLPLsNg> accessed (March 2, 2021).

[8] The National Authority of Elections Decision number 50 of year 2020 Declaring the Senate Elections Results, The Official Gazette, Volume 33 (repeated w), PP. 1-14, (August 19, 2020), https://drive.google.com/file/d/12RDxwpjd1ayEx-6SGA9CBxmnEWPSc4Df/view?fbclid=IwAR3xluH5OteWw1r_AQeRf9yLR6kQdpJ90xM-COTlzUHOJ1b4JYlVhRtQO6Bk

[9] The National Authority of Elections Decision number 53 of year 2020 regarding the Time Plan of the Representatives House Elections, P. 2, (September 10, 2020), https://www.elections.eg/images/pdfs/decrees/nea-decree-53_2020.pdf

[10] The National Authority of Elections Decision number 53 of year 2020 regarding the Time Plan of the Representatives House Elections, P. 3, *September 10, 2020), https://www.elections.eg/images/pdfs/decrees/nea-decree-53_2020.pdf

[11] Ibrahim Kassem and others, 'الهيئة الوطنية للانتخابات: نسبة المشاركة بالمرحلة الأولى لانتخابات النواب 28.06 % [The National Authority of Elections: The Participation Rate in the First Stage of the Representatives House Elections Is 28.06%]' (اليوم السابع *Youm 7,* 2020) <https://www.youm7.com/story/2020/11/1/الهيئة-الوطنية-للانتخابات-نسبة-المشاركة-بالمرحلة-الأولى-لانتخابات-النواب-28-06/5047252> accessed March 3, 2021.

[12] Ibrahim Kassem, Mohamed Abdul Azim and Mahmoud El Soudy, 'الهيئة الوطنية: 29.50% نسبة المشاركة في المرحلة الثانية لانتخابات النواب [The National Authority: 29.50% Is the Participation Rate in the Second Stage of the Representatives House Elections]' (*Youm 7* اليوم السابع, 2020) <https://www.youm7.com/story/2020/11/15/الهيئة-الوطنية-نسبة-المشاركة-في-المرحلة-الثانية-لانتخابات-النواب-29-50/5068517> accessed March 3, 2021.

[13] Amr Hashem Rabee, 'تشكيل مجلس النواب الجديد [Formation of the New House of Representatives]' (بوابة الشروق *El Shorouk Gate,* 2020) <https://www.shorouknews.com/columns/view.aspx?cdate=17122020&id=d97380c9-82f8-4b7c-82d7-db9bf117afce> accessed March 3, 2021.

minor role compared to the funds they have for campaigns.[14] Moreover, before the elections, the NEA Head threatened whoever abstains from voting in the Senate's election with fines under the law.[15] Even though the elections were held under the first year of the COVID-19 spread, media, experts, and even religious figures threatened boycotts of the elections and those who incite others to boycott with legal and religious sanctions.[16] Additionally, incidents of vote buying were reported by the media.[17] Furthermore, there have been rumors that the number of seats allocated to each party depends on the amount of funds it donates to the state authorities.[18]

Civil society organizations and opposing candidates accused the authorities of manipulating the election results[19] and arranging a monopoly for the "Mostakbal Watan" party.[20] Both the NEA and the state-supported parties, on the contrary, praised the election process.[21]

The second major constitutional development concerns the emergency law and status. The emergency status was declared twice, in April[22] and October,[23] and extended twice, in January[24] and July[25] 2020, by President El Sisi and with Parliamentary approval. These actions are a continuation of the emergency norm in Egypt in the last few years.[26] What is novel in 2020 is that the Emergency Law number 162 of 1985 was amended on May 6 after the viral spread of the COVID-19 virus in Egypt.[27] The Emergency Law was amended by Law number 22 of the year 2020 issued by the President. The amendments to articles 4 and 7 gave new competencies to the military members to: 1) directly enforce the President's orders, or whoever shall have his/her powers, without the need of Justice Ministry approval, and 2) enjoy legal title as law enforcement officers. Moreover, the Military Prosecution now has the jurisdiction to undertake the primary investigations in any

[14] Ahmed Fawzy, 'تعديلات قانون مجلس النواب تسبب صدمة في البرلمان وتعصف آمال النواب الحاليين في البقاء' [The House of Representatives Law Amendments Cause a Shock in the Parliament and Destroy the Current Representatives Hopes in Staying]' (*The Parliament Gate* بوابة البرلمان, 2020) <https://www.parlgate.com/51074?fbclid=IwAR3LPran0-BOSqjxNBwkYJoe0-WOGnok9OTjNiJD0NC3oPffC3q__LLDEWY> accessed 2 March 2021.

[15] Omneya El Iraqi, 'وفقاً للقانون.. الوطنية للانتخابات: من يتخلف عن المشاركة في انتخابات الشيوخ ستطبق عليه الغرامة' [According to the Law.. The National Authority of Elections: Whoever Abstains from Voting in the Senate's Election Will Be Fined]' (*The Parliament Gate* بوابة البرلمان, 2020) <https://www.parlgate.com/54941?fbclid=IwAR2d9YY7OCSEmDqQqUtDlEGxiuiPWNsZOV1vjNYP-VR2hCx3LkDlukj4TwY> accessed 2 March 2021.

[16] Omneya El Iraqi, 'مارثون انتخابات مجلس الشيوخ 2020 .. تعرف على عقوبة عرقلة سير الانتخابات والتحريض على المقاطعة' [The 2020 Senate Elections Marathon .. Get to Know the Sanctions for Obstacling the Elections and Inciting Boycotting]' (*The Parliament Gate* بوابة البرلمان, 2020) <https://www.parlgate.com/54948?fbclid=IwAR3Ph5O6waM-tAixqQhybYJZnMLovjLM91ugT3UScgiYiCoZQ431uncL4MM> accessed 2 March 2021.

[17] Omneya El Iraqi, 'بالفيديو.. مسلسل الرشاوي عرض مستمر بالشيوخ: ٥٠ جنيه قبل التصويت والباقي بعده' [In Video.. The Bribes Series Is on Continued Display in the Senate's: 50 Pounds before Voting and the Rest to Be Paid After]' (*The Parliament Gate* بوابة البرلمان, 2020) <https://www.parlgate.com/55011> accessed 2 March 2021.

[18] Mohamed Saad, 'هل يتكرر سيناريو مجلس الشيوخ في الانتخابات البرلمانية وتأخذ الأحزاب نفس النسب في القوائم ؟' [Will the Scenario of the Senate Be Repeated in the Parliamentary Elections and Same Parties Get the Same Percentage in the Lists?]' (The Parliament Gate بوابة البرلمان, 2020) <https://www.parlgate.com/56534?fbclid=IwAR15RPhvHCmfZCJg_Kd-Vl3wswTdDwObJ4OKb4zudWFYcVgzOyF2TlsnviU> accessed 3 March 2021.

[19] El Mawkef El Masry الموقف المصري, '**بالمحاضر الرسمية : نتائج الانتخابات العمرانية الحقيقية الموقعة من القضاة**' [** With Official Audits: The True Results of El Omraneya Elections Results Signed by the Judges**]' (الموقف المصري *Facebook Page,* 2020) <https://www.facebook.com/almawkef.almasry/posts/2955654094534468> accessed 3 March 2021; 'الحملة الشعبية لدعم أحمد الطنطاوي ٢٠٢٠' [The Popular Campaign to Support Ahmed El Tantawi 2020]' (الحملة الشعبية لدعم أحمد الطنطاوي ٢٠٢٠ *FaceBook Page,* 2020) <https://www.facebook.com/ahmed.altantawy2020/posts/149145336948270> accessed 3 March 2021.

[20] Mada Masr, 'The Cost of Playing Monopoly: How the Nation's Future Party Has Caused Rifts among Parties in House Elections' (*Mada Masr,* 2020) <https://www.madamasr.com/en/2020/10/01/feature/politics/the-cost-of-playing-monopoly-how-the-nations-future-party-has-caused-rifts-among-parties-in-house-elections/> accessed 3 March 2021.

[21] Ahmed Al Sharqawy, 'تنسيقية شباب الأحزاب : لا مخالفات تذكر في انتخابات الشيوخ' ["Tanseqeyet Shabab Al Ahzab": No Remarkable Violations in the Senate's Elections"]' (*The Parliament Gate* بوابة البرلمان, 2020) <https://www.parlgate.com/56712?fbclid=IwAR3k-ydh4byuP4pLcK-v0B6p440MaSo1sQWoNF-bAc84eKSQRNYCWZatQBHE> accessed 3 March 2021.

[22] The President of the Arab Republic of Egypt Decree Number 168 of year 2020 Declaring the Emergency Status, The Official Gazette, Volume 17 (repeated), P. 3, April 28, 2020, https://www.youm7.com/story/2020/4/28/%D8%A7%D9%84%D8%B1%D8%A6%D9%8A%D8%B3-%D8%A7%D9%84%D8%B3%D9%8A%D8%B3%D9%89-%D9%8A%D8%B9%D9%84%D9%86-%D8%AD%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%B7%D9%88%D8%A7%D8%B1%D8%A6-%D9%81%D9%89-%D8%A7%D9%84%D8%A8%D9%84%D8%A7%D8%AF-%D8%A8%D8%AF%D8%A7%D9%8A%D8%A9-%D9%85%D9%86-%D8%A7%D9%84%D9%8A%D9%88%D9%85/4747025?fbclid=IwAR0qKQLNlqPYNxF9_xPMcgDhU37GI7tl5HDivzaAeXvOloNumJ2SR-JaWvMM

[23] The President of the Arab Republic of Egypt Decree Number 596 of year 2020 Declaring the Emergency Status, The Official Gazette, Volume 43 (repeated), P. 3, October 26, 2020, https://www.youm7.com/story/2020/10/26/%D8%A3-%D8%B4-%D8%A3-%D9%82%D8%B1%D8%A7%D8%B1-%D8%AC%D9%85%D9%87%D9%88%D8%B1%D9%89-%D8%A8%D8%A5%D8%B9%D9%84%D8%A7%D9%86-%D8%AD%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%B7%D9%88%D8%A7%D8%B1%D8%A6-%D9%81%D9%89-%D8%A7%D9%84%D8%A8%D9%84%D8%A7%D8%AF/5037722

[24] The President of the Arab Republic of Egypt Decree Number 20 of year 2020 Extending the Emergency Status, The Official Gazette, Volume 3 (repeated c), PP. 3-4, January 19, 2020, https://www.youm7.com/story/2020/1/19/%D8%A7%D9%84%D8%B3%D9%8A%D8%B3%D9%89-%D9%8A%D9%82%D8%B1%D8%B1-%D9%85%D8%AF-%D8%AD%D8%A7%D9%84%D8%A9-%D8%A7%D9%84%D8%B7%D9%88%D8%A7%D8%B1%D8%A6-%D9%84%D9%85%D8%AF%D8%A9-%D8%AB%D9%84%D8%A7%D8%AB%D8%A9-%D8%B4%D9%87%D9%88%D8%B1-%D8%AA%D8%A8%D8%AF%D8%A3-%D9%85%D9%86/4594529

[25] The President of the Arab Republic of Egypt Decree Number 391 of year 2020 Extending the Emergency Status, The Official Gazette, Volume 29 (repeated h), PP. 3-4, July 21, 2020, https://www.facebook.com/Legislations/posts/3165910876811458

[26] Eman Muhammad Rashwan, 'Egypt Under COVID-19: Normalizing Emergency — IACL-IADC Blog' (*IACL-IADC Blog,* 2020) <https://blog-iacl-aidc.org/2020-posts/2020/7/14/egypt-under-covid-19-normalizing-emergency> accessed 1 March 2021.

[27] Ahmed El Masry, 'الجريدة الرسمية تنشر قرار منح القوات المسلحة الضبطية القضائية حالات الطوارئ' [The Official Gazette Publishes the Decree Endowing The Armed Forces with the Legal Title of Law Enforcement Officers under Emergency Status]' (*The Parliament Gate* بوابة البرلمان, 2020) <https://www.parlgate.com/49086> accessed 1 March 2021.

violation of the Emergency Law. This part of the amendments gives broader powers to the military, although not related to COVID-19. The other parts of the amendments create new powers for the President. Seven newly added sub-articles to article 3 of the Emergency Law legalize the Prime Minister's procedures taken to combat the COVID-19 spread, which involved restricting, forbidding, or regulating nearly all services and activities by the state and private sector. These procedures now fall under the permanent powers of the President under emergency status.

The third major constitutional event was the appointment of the second female judge in the history of the Supreme Constitutional Court (SCC). Justice Fatma Al Razzaz was appointed as a Vice President of the court, in addition to other two judges, by Presidential Act number 695 of the year 2020. She is currently the sole female judge among 14 judges on the SCC bar. The presidential Act was delivered around three months after the SCC's general assembly decision of the appointments. The appointments are considered to be the first application of the 2019 constitutional amendments that included changes to the SCC's judges' selection process.[28]

III. CONSTITUTIONAL CASES

1. Hany Shokry Naeem Faheem v. the President of the Republic and others: Religion-based equality regarding admissible evidence of adultery crime.

According to Egyptian Criminal Law,[29] the crime of adultery only exists when one, at least, of the perpetrators is married; the married partner is the principal, the other is the accomplice. The criminal proceedings are restricted to the victim's complaint, who is the spouse of the principal perpetrator.

It is heavily mentioned in Egyptian criminal law jurisprudence that the act of sexual intercourse per se is not the criminalized act in the crime of adultery; instead, it is the jeopardizing of the matrimonial trust. Subsequently, the criminal proceedings are not taken against the two partners in the same manner. This difference is reflected in two main points; the first is that the proceedings are taken initially against the principal married partner, and the indictment of the accomplice is an ancillary process. The second point is the list of admissible evidence against each of the partners. Article 267 of the Criminal Code stated a limited list of admissible evidence against the accomplice. The article reads: "the evidence to be accepted and be a plea against the one convicted with adultery shall be the actual arrest of the man in the act, or his confession, or the existence of correspondence or other written paper from him, or his presence in the house of a Muslim in the place appropriated for the women's partition in his household."

The criminal proceedings of adultery were initiated against the plaintiff as an accomplice at the fourth defendant's complaint, the husband of the principal accused. Both the victim and the principal individual being indicted are Muslim spouses; the accomplice is a non-Muslim partner who was caught in the act of adultery with the principal individual being indicted in the bedroom of the house of the victim. Criminal proceedings were then initiated upon the victim's complaint, and the case was registered under the number 4171 for the year 2008 before the Sixth of October II Misdemeanors Court. The plaintiff argued the constitutionality of the said article as it states an irrebuttable presumption against the accomplice in the crime of adultery, thus contradicts the constitutional principles of freedom of litigation and the presumption of innocence. Accordingly, the court approved the seriousness of the plea of constitutionality and authorized the victim to file the lawsuit.

The case was delivered to the Supreme Court and was recorded under no. 248 of the judicial year 30. On which the court delivered judgment on 2 July 2020.[30]

The court renounced the state's defense of *res judicata*.[31] The plaintiff argued the unconstitutionality of the said article[32] as violating the principles of the presumption of innocence, and the individual nature of the punishment, and on the basis of restraining the criminal court in establishing its doctrine, and the violation to the right to a fair trial. The court renounced these arguments and held that the admissible evidence list stated by article 276 is not irrebuttable presumptions; instead, they form a procedural limitation to the public prosecution's authority of prosecuting the accomplice if none of this list existed.

The court, though, continued examining the constitutionality of the said article on different bases, namely the infraction of articles no. (4, 53, 97, 98) of the constitution. The court elaborated the stipulation of equality between citizens in the concessive constitutions, which prohibited discrimination based on religion or faith, and Article 2 of the Universal Declaration of Human Rights to which Egypt is a party.

The court also reviewed the historical circumstances of said articles and concluded the inappropriateness of this article to the contemporary reality. It deduced that the crime shall be astonishingly hard to be proven if the victim is non-Muslim and all other admissible evidence do not exist, which violates the rights of non-Muslim citizens of preserving their honor and matrimonial bonds.

It was clear and obvious in the court's view that the Constitution in article 10 obliges the state to defend Egyptian families no matter

[28] ShoroukNews, 'بينهم عميدة حقوق حلوان.. تعيين ثلاثة أعضاء جدد بالمحكمة الدستورية العليا [The Appointment of Three New Members at the Supreme Constitutional Court.. One of Them Is the Dean of Helwan Law]' (*Shorouk News,* 2020) <https://www.shorouknews.com/news/view.aspx?cdate=20122020&id=4e7f03d0-b40f-4a3d-9cff-3d9929973315&fbclid=IwAR2rgtig4Lfu25whp_1piisWSY6bmAnfPhHZUuGXTTzNbmlCdwPLiCNgCxY> accessed 1 March 2021.

[29] Articles 273 – 277 of the Egyptian Penal Code, the law no. 58 of the year 1937 and its modifications.

[30] The Official Gazette vol. 24 (bis), on Jul. 14, 2020.

[31] The court dismissed cases no. 34/10, and 226/26 on different basis.

[32] On basis of breaching articles no. 4, 53, 54, and 95 – 98.

what religion they follow; therefore, putting a piece of additional admissible evidence in the list to defend only Muslim families is a grave violation to the constitution.

2. Sayeda I. Ah. Al-Samman v. the President of the Republic and others: Gender equality

More than once, the constitutionality of articles no. 274 and 277 of the Penal Code was disputed before the Supreme Constitutional Court, as they discriminate between the male and the female victims in the crime of adultery. While the crime exists for a female perpetrator once she has sexual intercourse with another male than her husband, the crime does not exist for a male perpetrator except when committed in the marital house. The prescribed penalty also differs on a gender basis, it is six months imprisonment in the case of the male adulterer and two years in the case of the female adulterer, and in all cases, the accomplice shall also be punished with the same penalty.

The Supreme Constitutional Court used to dismiss all cases concerning this matter. The common factor between those cases is the claimant's status, which is the wife of a principal perpetrator in a crime of adultery when the crime is committed outside the house of the male adulterer. The female perpetrator's spouse renounces the complaint after initiating the proceedings, which will terminate the proceedings against both perpetrators. The female victim will not be able to resume the lawsuit as the material element of the crime does not exist because the crime was not committed in the marital house.

The court used to dismiss the case based on lack of standing as a victim in the criminal proceedings, as it considered the spouse of the principal perpetrator, being him/her a husband or a wife, as a civil claimant in the criminal proceedings, and limited his/her legal status to that. Hence, it renounces his/her interest in repealing the said articles.

The criminal proceedings were initiated against the sixth defendant, the principal perpetrator, and the seventh defendant's wife on the latter's complaint against her and the fifth defendant, the husband of the plaintiff. According to this scenario, the sixth defendant was the principal female perpetrator, and the seventh defendant was the male accomplice as the crime was committed in the marital House of the female partner. The crime was registered Al-Basateen Misdemeanour case no. 36686/2000.

The plaintiff filed a sub-lawsuit of compensation as a civil claimant and demanded 2001 L.E. as a civil compensation. During the proceedings, the sixth defendant renounced his complaint against his wife. Subsequently, the court was forced to terminate the proceedings if it was not for the plaintiff's defense of unconstitutionality, which was approved severe by the court, and the plaintiff was authorized by the court to file the constitutional lawsuit.

This constitutional lawsuit was, hence, filed before the court and was registered under the no. 318 for the year 23, on which the court rendered its award on 4 July 2020. The court did not break its previous conduct line and renounced the case based on lack of legal status. However, it is to be mentioned that all cases against the said articles were filed by the wife victim upon the misdemeanor court's authorization in question, unlike the most recent lawsuit filed by the Court of South Benha, the second appealed misdemeanor circuit in the appealed misdemeanor no. 7604 of the year 2020 on 16 December 2020.

In this lawsuit, the Supreme Court will be obliged for the first time to examine and assess the unconstitutionality of the said articles on a subjective constitutional basis regardless of the legal status of the plaintiffs.

IV. LOOKING AHEAD

Egypt's parliamentary agenda is expected to witness the passing of the Municipalities Act. The previous Parliament did not pass the Act, seeing it as a grave violation of the constitution.[33] If adopted, the Act shall supposedly call for a Local Council's election in 2021 following article 180 of the constitution.

In an ongoing breach of article 11 of the constitution, the Supreme Administrative Court in 2020 dismissed all cases demanding women's appointment in State Council, same with the Cassation Court in regard to Public Prosecution's appointments. The judicial battle shall continue in 2021.

V. FURTHER READING

'The Penalties of Filming Trials amid Privacy Protection and wasting the principle of publilcity - عقوبات منع تصوير الجلسات بين حماية خصوصية المتهم، وإهدار مبدأ العلانية' *Masr360* (17 December 2020)

'A New Amendment to the Law Expropriating Land by the Government' Egypt Watch (19 January 2020)

George Sadek, 'Egypt: Country's First Law on Protection of Personal Data Enters into Force' [2020] Library of Congress

Eman Muhammad Rashwan, 'Egypt Under COVID-19: Normalizing Emergency,' IACL-AIDC Blog

[33] Article 242.

El Salvador

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I. INTRODUCTION

Similar to other countries, El Salvador faced the dangerous disease of COVID-19, which caused important constitutional challenges: *(i)* how to deal with President Nayib Bukele's decisions to ban anyone from entering the country, including Salvadoran citizens?; *(ii)* how to respond to the limitations on the exercise of freedom of movement for breaching the mandatory quarantine at designated places (home, hotel, or other accommodation)?; *(iii)* how to solve the tensions between President Bukele and the Legislative Assembly where the government refuses to dialogue to reach a common agreement on how to face the pandemic?; *(iv)* how to deal with the institutional crisis between the Constitutional Chamber *(Sala de lo Constitucional)* of the Supreme Court of Justice and the government being that President Bukele does not want to comply with the constitutional decisions that he does not sympathize with?

These are the issues that will be discussed in the present report. However, since this is the first report about El Salvador in the *Global Review,* it is necessary to provide some background information about Salvadoran constitutional law to show its development.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

El Salvador registers several relevant moments in the evolution of its constitutional law: *(i)* the *habeas corpus (exhibición de la persona)*[1] was first established in the Constitution of 1841 (article 83); *(ii)* the *amparo*[2] was regulated for the first time in the Constitution of 1886 (article 37); *(iii)* the Constitution of 1939 incorporated, as mechanisms of constitutional control, the judicial power of inapplicability *(inaplicabilidad)*[3] and the figure of controversies (controversias) between the Legislative power and the Executive branch over the law-making process[4] (articles 128 and 82, respectively); *(iv)* in the Constitution of 1950, the process of unconstitutionality *(inconstitucionalidad)*[5] was introduced and the Supreme Court of Justice was established as the only competent court to declare the unconstitutionality of laws (article 96); *(v)* in 1959, the Amparos Chamber *(Sala de Amparos)* was created as a specialized division of the Supreme Court of Justice to decide on *amparo* lawsuits; moreover, this Chamber substantiated the unconstitutionality processes and prepared the draft sentences for the Court, which had the power to decide on

[1] The *Habeas Corpus* protects the personal freedom of individuals from constraint by government authorities or other individuals.

[2] The *Amparo* protects the fundamental rights of people, except personal freedom (protected by *Habeas Corpus*).

[3] According to this mechanism, the courts in their judgments should declare the inapplicability of any law or order from the authorities that is contrary to the Constitution (a diffuse system of constitutional review).

[4] This mechanism occurs when the President of the Republic considers that a bill is unconstitutional and returns it to the Legislative Assembly, which ratifies it with two-thirds of the elected Deputies –qualified majority (56/84)–; thus, in this case, the President of the Republic shall present it to the *Sala de lo Constitucional* to decide, after hearing the arguments of both sides, whether it is or is not constitutional.

[5] Through this procedure, a citizen can file a direct action before the *Sala de lo Constitucional* to challenge the constitutionality of any infra-constitutional normative product.

this process;[6] *(vi)* the Constitutional Procedural Law *(Ley de Procedimientos Constitucionales)* was created in 1960 to regulate constitutional procedure in a single legal body; *(vii)* in the 1983 Constitution –still in force –,[7] the *Sala de lo Constitucional* was created to take cognizance of and decide on constitutional procedures; the Constitution also prescribes that the *Sala* has the power to decide on the process of suspension or loss of citizenship rights *(suspensión o pérdida de los derechos de ciudadanía)*, and the corresponding rehabilitation; and, finally *(viii)* in 2006, the legislature reformed the Constitutional Procedural Law and incorporated the procedure of inapplicability —this procedure establishes the obligation of the courts to refer to the *Sala* the decisions in which they declare that a law, provision, or act is unconstitutional (article 77-E). The objective of this mechanism is to give the *Sala* the authority to determine with general effect *–erga omnes–* the constitutionality or not of the invalidated legal provision (article 77-F) being that the effect of the ruling of an ordinary court is only between the parties –inter partes– (article 77-D)—.

The *Sala de lo Constitucional* is a constitutional, jurisdictional, independent, permanent, and specialized organ, established within the Judicial system –specifically, in the Supreme Court of Justice[8]–. Its members are impartial literate Justices *(magistrados)*, appointed only and exclusively by the Legislative Assembly.[9] The *Sala de lo Constitucional* is empowered, among other functions, to: (i) give full existence to the Constitutional State of Law; (ii) ensure the validity of the distribution of powers established by the Constitution; (iii) guarantee the protection of constitutional rights; and (iv) to preserve the defense of the Constitution in all circumstances.[10]

Now, even though the Sala de lo Constitucional has competence to decide on the process of suspension or loss of citizenship rights since the promulgation of the Constitution of 1983, it has never exercised this attribution until 2020. Furthermore, there was not an established procedure to process the suspension or loss of citizenship neither in the Constitution nor in the Constitutional Procedural Law. In consequence, and since lawsuits for the loss of citizenship rights are filed against citizens, the Sala considered that the absence of a legally established procedure was not an impediment for it to exercise the control of constitutionality because judges and courts have an inexcusable duty to resolve all the cases they hear. Therefore, based on the consideration that it has a capacity for procedural innovation called "procedural autonomy,"[11] the *Sala de lo Constitucional* created the procedure of loss of citizenship rights. Procedural autonomy enables the *Sala de lo Constitucional* to fill existing gaps and accommodate legal procedures through the direct application of the Constitution to guarantee an adequate and real protection of each right or constitutional provision. This means that the procedure of loss of citizenship rights was created by jurisprudence, almost 37 years after the creation of the *Sala de lo Constitucional.*[12] Nevertheless, the Sala did not say anything about the procedure for the suspension of citizenship rights but, due to their similarity, it is believed that it would be the same.

In any case, 2020 was a challenging year for the *Sala* due to the COVID-19 pandemic and several political situations, as will be described in the cases explained in the next section.

III. CONSTITUTIONAL CASES

1. Amparo 167-2020: Salvadorans citizens stranded outside of El Salvador.

The *Sala de lo Constitucional* accepted a case in which the plaintiffs challenged the decision of President Nayib Bukele to close the international airport from March 17 to prevent the spread of COVID-19 disease.[13] This meant that Salvadoran citizens who were outside the country were stranded, despite the fact that the Constitution establishes that no Salvadoran can be prohibited

[6] Articles 4 and 51 of the Organic Law of the Judicial Power *(Ley Orgánica del Poder Judicial)* of 1953, as a consequence of the reform of 1959. This law was derogated by the Organic Judicial Law of 1984.
This means that El Salvador had two courts with competence to take cognizance of and decide the constitutional processes: the *Sala de Amparos* and the Supreme Court of Justice –in plenary session–.

[7] The Constitution was passed by the Constituent Assembly on 15 December 1983, published on 16 December 1983 in the Official Gazette and came in to force on 20 December 1983 (37 years of validity). For that reason, the Salvadoran Constitution, like the first Constitution of the independent Republic of Croatia (approved on 22 December 1990), could also be called the "Christmas Constitution".

[8] The Supreme Court of Justice is formed by 15 *magistrados* elected by the Legislative Assembly for 9 years and it is divided into 4 Chambers: *(i)* Civil (3); *(ii)* Criminal (3); *(iii)* Contentious-Administrative (4); and *(iv)* Constitutional (5). Article 174 prescribes that the jurisdiction of the Sala de lo Constitucional includes all the constitutional processes already mentioned: *Habeas Corpus, Amparo,* Unconstitutionality, Controversies in the law-making process and, finally, the suspension –the cases of article 74 ordinals 2nd and 4th– or loss –the cases of article 75 ordinals 1st, 3rd, 4th and 5th– of citizenship rights. Constitutional jurisprudence has also established that the determination of whether or not a law is of public order corresponds to the Sala (e.g., *Inconstitucionalidad 78-2014 [September 19, 2014*]). The above-stated implies that judicial review in El Salvador is a mixed model: despite the constitutional review power of the *Sala* (a concentrated system), all ordinary courts have, according to article 185, the power to declare the inapplicability of a law, provision or act that they consider unconstitutional (a diffuse system).

[9] *Inconstitucionalidad 16-2011 (April 27, 2011*).

[10] *Inconstitucionalidad 19-2012 (June 25, 2012).*

[11] It implies that the *Sala* has the capacity to design its own procedural channel and avoid failing to resolve a specific case, when it is not possible to use self-integration or hetero-integration to fill a procedural gap.

[12] *Pérdida de derechos de ciudadanía 1-2020 (October 5, 2020).*

[13] Previously, the entry of passengers from the following countries was prohibited: *(i)* China (January 31); *(ii)* South Korea and Italy (February 25); *(iii)* Iran (February 28); *(iv)* France and Germany (March 7); and *(v)* Spain (March 9). On March 15, the entry of foreigners to the national territory was prohibited.

from entering the territory of the Republic (article 5). Therefore, the plaintiffs requested a preventive measure that they be allowed to enter the country.

The *Sala* considered in its decision that, although there was an alleged violation of the plaintiffs' freedom of movement, granting a preventive measure under the circumstances requested could produce a considerable damage to the public or general interests. It concluded that the public health of the majority of Salvadorans who were in the country should prevail over a considerably smaller number of nationals who were abroad at the time and wanted to enter the territory of the El Salvador. Nevertheless, the *Sala* adopted a different preventive measure: the President of the Republic —within the competent authorities— should urgently elaborate a plan for the gradual repatriation of Salvadorans who were abroad unable to return to the country, despite the fact that they had purchased a plane ticket prior to the airport closure. In spite of this, it was clarified that the President of the Republic —again, within the competent authorities— had the responsibility to inform, evaluate, and enforce preventive health measures to which Salvadorans would be subjected to once they entered the country, such as quarantine in designated places —home, hotel, containment center, etc.— or those that the health authorities deemed appropriate.

As a result of the Repatriation Plan ordered by the *Sala,* during the following months thousands of stranded Salvadoran citizens were able to enter the country. Furthermore, on September 19, the international airport was reopened. According to the new regulations implemented, passengers arriving at the airport must present a Polymerase Chain Reaction (PCR) test negative for COVID-19 in order to enter the territory, which must be certified by a laboratory and must have been made no more than 72 hours prior to the flight.[14] In view of this, the *Sala* extended the preventive measure adopted to suspend the application of the requirement of a negative PCR test to Salvadorans and foreigners with permanent residence in the country. The *Sala* reasoned that a negative PCR test implied a restriction to their fundamental right to enter the national territory.

To find a way around this decision, President Bukele transferred to the airlines the responsibility of requiring proof of negative PCR test for COVID-19 to all their passengers in order to be able to land at the airport, otherwise it would be closed again.[15] However, the Sala ruled that this transference of responsibility constituted a fraudulent way to evade the compliance of the ordered preventive measure. In consequence, it warned the Attorney General's Office (Fiscalía General de la República) of the possible commission of crimes during this process such as disobedience, arbitrary conduct, coercion, breach of duties or others.

On December 20, President Bukele announced the prohibition of entry into the country of any person who had been in the United Kingdom or South Africa, and the Sala reiterated to the corresponding authorities that they should refrain from preventing the entry into the national territory of Salvadorans coming from those or other countries.

At the end of 2020, a final judgment in this case remained pending.

2. Habeas corpus 148-2020: Detentions for breach of home quarantine

In this case, three women were apprehended by police officers, apparently without grounds, and taken to prison.

By way of background, it is important to highlight that the Legislative Assembly had issued the *"Ley de Restricción Temporal de Derechos Constitucionales Concretos para Atender la Pandemia COVID-19,"* which provided the limitation of some rights, like the freedom of movement. On the other hand, the Ministry of Health issued some extraordinary measures, according to which all the inhabitants, excluding exceptional cases, had to maintain a compulsory home quarantine.

Considering all the above, the *Sala* established that the population was obliged to comply with the provisions of the authorities aimed at preventing or controlling the spread of COVID-19. Thus, it reasoned that irresponsible conducts that jeopardize the effectiveness of that legitimate objective of the government may be addressed vigorously, even with intense limitations of rights, but only within the framework of the Constitution.

Now then, the *Sala* ruled: *(i)* that the measure consisting in the compulsory transportation of a person to pandemic containment centers indicated by the Ministry of Health, applied for not observing a general quarantine and without objectively establishing that the person intervened could be a source of contagion, constituted a deprivation of liberty; *(ii)* that the impact that forced internment for health purposes has on the rights of individuals requires that its application may only be decided by formal law; however, the law under review did not regulate such internment; *(iii)* that any person subjected to forced confinement for sanitary purposes for breach of a general quarantine must have the opportunity to know with certainty the specific, precise, and reasonable circumstances in which they could be confined; *(iv)* that the application of a non-home quarantine must be duly documented, among other reasons, to ensure that the interested parties have access to information on the location and the conditions of the person interned; and *(v)* that forced quarantine may only be applied or ordered when adequate places for such regime are effectively available (in no case may prison quarters or other police facilities be used), and, in addition, the subjected persons may not be presented to the media without their consent.

At the end of 2020, the final judgment in this case also remained pending.

[14] On September 21, the land borders were reopened and a negative PCR test was also required for those entering the country.
[15] In addition, according to the government, the General Direction of Migration and Alien Affairs *(Dirección General de Migración y Extranjería)* would impose a fine of USD $6,000 for each passenger who does not comply with the requirement in the terms mentioned above.

3. Inconstitucionalidad 6-2020/7-2020/10-2020/11-2020: Right to insurrection, Constitutional purposes of the Armed Forces (Fuerza Armada [FA]) and the National Civil Police (Policía Nacional Civil [PNC]) and "the peace"

In this case, it was alleged that the Executive branch was trying to impose his agenda to the Legislative Assembly and force its deputies to vote in a certain way (approving a loan to finance a security plan) and that, if they did not do it within a week, the Executive would exercise the right to insurrection. To reinforce this, on February 9, President Bukele entered the Legislative Palace accompanied by the FA and the *Unidad de Mantenimiento del Orden* (a PNC team similar to SWAT), apparently with the purpose of intimidating the legislators.

In its final judgment, the *Sala* considered that the main purpose of the right to insurrection is to legitimize the struggle against the attempts of the President in office to perpetuate himself in power, especially when force —military or police— is used in an arbitrary, illegal, and/or unconstitutional manner; it also serves to justify the belligerent struggle against those who seek to assume the power of any state organ by antidemocratic or unconstitutional methods and/or against serious violations of fundamental rights.

It also determined that the FA and the PNC, which are the institutions that concentrate the public force, are constitutionally obliged to respect the constitutional order and the fundamental rights of the people. Even though they are part of the Executive branch, they do not owe absolute obedience to it. Since the FA is in charge of defending the sovereignty of the State and the integrity of the territory, and the PNC is responsible for protecting the rights of individuals and for maintaining public order and peace, these institutions must not be used or allow themselves to be used for debates, propaganda, participation, or partisan political purposes, nor may they be instrumentalized to coerce organs of the state (in their functions or in the facilities where they perform them).

Finally, the *Sala* ruled that peace can be understood as a value, a principle, and a right. In its valuative dimension, peace, as a form of common good, involves the recognition that the state of affairs of what is usually called "peace" is valuable and should be pursued. This implies the absence of war, conflict, intolerance, discrimination, hatred or a spirit of rejection of others —in short, peace is a state of complete harmony, without conflict or confrontation—. As a principle, peace requires that the actions or omissions of individuals and the state be oriented towards the optimization of its content —suppression of unjustified conflicts or confrontations, eradication of intolerance, discrimination, phobias or aversion to social sectors, non-initiation or cessation of unfounded wars, etc.—, as something preceptive and obligatory. And the right to peace allows to demand the absence of structural violence and the ending of any state conduct towards its consummation or to the stigmatization of social groups, especially when it is motivated by the mere displeasure they generate in those who exercise power. In its legal dimension, the right to peace legitimizes citizens to demand actions aimed at eliminating violence, intolerance, hatred, and aversive or phobic behaviors.

4. Controversia 8-2020: abuse of the presidential veto and institutional dialogue.

This case was originated by the veto issued by the President of the Republic against a decree of the Legislative Assembly[16] for the alleged violation of the organic separation of powers.

In its final judgment, the *Sala* considered that the President should resort to a veto for substantive reasons to object a bill for its own content, and that it should be used in defense of the Constitution or in defense of political opportunity considerations. However, the use of the veto tends to be distorted in the practice of presidential systems to make way for blockades and immobilism as forms of political pressure to impose the particular vision of the President in office.

For this reason, the *Sala* ruled that the veto for unconstitutionality is part of the powers of the President of the Republic. However, the democratic rules and the constitutional engineering cannot be altered for any state organ's convenience; quite the contrary, it is the conduct of any public power that must be adapted to them. Therefore, if the real reasons for disagreement are merely political, not constitutional, this must be stated in the veto. Otherwise, it is an abuse of law from the constitutional point of view due the exercise of a veto without a discernible purpose or a serious and legitimate considerable objective. In addition, it was pointed out that the "misuse" of the presidential veto leads to a lack of legal validity of the institutional result produced. Consequently, the desired state of affairs is not generated and two related consequences may occur: the deviation of power and the tendency to hyper-presidentialism.

Finally, the *Sala,* on the one hand, appealed to the Legislative and Executive branches to immediately coordinate efforts and establish an institutional dialogue to seek consensus and alternatives for action that the country requires during the pandemic. On the other hand, it reiterated the need for these organs to be attentive to the problems that the pandemic generates –social, health, political, labor, economic, social, etc.–. By doing so, the Legislative and Executive powers would acknowledge how these issues become more complex, more acute or weaker, or are transformed and, based on the principle of collaboration between fundamental and constitutional organs, they would be able to manage them in a technical, concerted, and comprehensive manner. The main goal of this process would be to obtain the greatest welfare of the inhabi-

[16] In the law-making process, after the approval of the bill by the Legislative Assembly, the Executive Branch intervenes through the President of the Republic, who may adopt three types of acts –interorganic control–: sanction, make observations or veto.

tants. In this regard, it should be noted that the *Sala* previously[17] urged the Legislative Assembly to discuss the proposed laws and other norms necessary to confront the COVID-19 pandemic, especially those that would serve to protect the life and health of the people; and it also urged the President of the Republic to comply with the obligation to ensure social harmony, preserve peace and internal tranquility, and the security of the human person as a member of society. Thus, both organs had to comply with their constitutional obligations, reaching the necessary consensus for the creation of a normative framework that would guarantee the fundamental rights of the Salvadorans during the pandemic.

IV. LOOKING AHEAD

2021 is an electoral year: legislative (also municipal) elections will take place in February of 2021, with an immediate impact on the Legislative Assembly which, according to the results, could become a strong ally of the government's agenda and, thus, deteriorate the system of checks and balances.
In that sense, President Bukele entrusted the Vice President of the Republic to coordinate the study and proposal of amendments to the Constitution. Thus, depending on the election results, the Legislative Assembly may be more willing to approve it.

Furthermore, in 2021, Chief Justice *(Magistrado Presidente)* of the Sala de lo Constitucional and the Supreme Court of Justice ends his term of 9 years (as well as 4 other *Magistrados* of the remaining Chambers). This implies that the Legislative Assembly will have to appoint new *Magistrados* and, again, according to the results of the legislative elections, there is a risk that those who support President Bukele's government will be appointed, causing more damage to the system of checks and balances.

Finally, 2020 was a difficult year for El Salvador due to the COVID-19 pandemic. Nevertheless, the pandemic does not imply that the Constitution lost its strength and sense of obligation. Therefore, those who have sworn to defend the Constitution must ensure its fulfillment and the *Sala de lo Constitucional* also must accomplish its functions: give full existence to the Constitutional State of Law; ensure the validity of the distribution of powers established by the Constitution; guarantee the protection of constitutional rights; and preserve the defense of the Constitution in all circumstances.

V. FURTHER READING

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Alessandra Cantizano, 'El hábeas corpus en época de pandemia. Innovaciones jurisprudenciales producto del COVID-19 en El Salvador' (2020) 22 Ley, Derecho, Jurisprudencia 41.

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[17] *Inconstitucionalidad 63-2020 (May 22, 2020).*

Estonia

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I. INTRODUCTION

The distribution of power brought about by the 2019 Estonian parliamentary elections proved to be a decisive factor in the constitutional discussion also in 2020.[1] The participation of the conservative-populist EKRE party in the governing coalition and the fact that the party that had won most of the votes in the 2019 elections ended up remaining in the opposition,[2] set the scene for a tense political atmosphere that overlapped with the COVID-19 pandemic in 2020.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

2020 did not give rise to any constitutional amendments.[3] However, two topics dominated the constitutional debate and influenced its practice. The first issue was related to the COVID-19 pandemic whereas the second concerned a referendum on the institution of marriage.

1. Constitutional issues in the context of the COVID-19 pandemic

On February 27, 2020, the first case of COVID-19 was registered in Estonia and the government decided to put up a scientific committee to coordinate further action with the help of expert guidance.[4]

The Health Department (HD) subsequently issued various communications, including instructions to maintain self-isolation for individuals who were awaiting the result of their COVID-19 test or had already tested positive. The extent to which the instructions could be considered legally binding was questioned from various viewpoints.[5] In particular, it was questioned if the HD had competence to issue restrictions on the freedom of movement inherent in the instruction to self-isolate.[6]

On March 12, the government declared a state of emergency for the first time since the enactment of the Constitution of Estonia in 1992 (CE). The CE provides that the government may, *inter alia,* declare an emergency situation "to prevent the spread of an infectious disease,"[7] which allows for exceptions concerning the freedom of movement and the prohibition of forced labour. Based on individual decisions of the government, universities and schools were closed and moved to online learning and

[1] Paloma Krõõt Tupay, Linell Raud, Katariina Kuum, '2019 Global Review of Constitutional Law - Country report Estonia' (2020) I·CONnect-Clough Center Global Review of Constitutional Law 2020.

[2] ibid.

[3] Due to the complicated procedure of constitutional amendment foreseen in the Constitution of Estonia (CE), formal amendments to the CE are rare. Since its adoption in 1992, the current constitution has been in total amended only five times.

[4] A verbatim report from the 27 February 2020 session of the Government of Estonia. <https://www.valitsus.ee/et/uudised/valitsuse-pressikonverentsi-stenogramm-27-veebruar-2020> accessed 05 March 2021.

[5] Risto Käbi, 'Trahv pesemata käte eest?' *(Blog of Triniti law firm*, 25.03.2020) <https://triniti.ee/trahv-pesemata-kate-eest> accessed 05 March 2021.

[6] *See also:* Paloma Krõõt Tupay, 'Riigivõimu otsused koroonaviiruse ohjeldamiseks: kas garantiikiri Eesti riigi püsimiseks või demokraatia lõpp' (2020) Juridica 2020/3.

[7] CE § 87 p 8. English translations of Estonian legal acts are available at <https://www.riigiteataja.ee/en/> accessed 05 March 2021.

public life, including events, museums, and sports facilities, was shut down.[8]

On March, 20, the government of Estonia informed the Secretary General of the Council of Europe (CoE) and the Secretary General of the United Nations (UN) of possible derogations from certain obligations concerning fundamental rights and freedoms under Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and under Article 4 of the International Covenant on Civil and Political Rights.[9] The opposition strongly criticized these derogations and warned that the government could use this opportunity to disproportionately restrict other civil liberties as well.[10] When the government ended the state of emergency on May, 18, it informed the CoE and the UN.[11]

Upon ending the emergency situation, measures were eased. However, various limitations continued to apply and were now founded on legislative amendments elaborated during the state of emergency. While the government was generally not accused of evidently disproportionate restrictions during the state of emergency, the legal amendments drew criticism from many sides. The president of Estonia, who has the constitutional duty of promulgating parliamentary laws and who also has the right to veto their content, proclaimed the amendment but noted that the amendments had been "a good example of bad legislation, [b]oth in form and content."[12] She went on to say that although the amendment granted the executive branch, especially the HD, extensive powers to combat the pandemic, it did so at the expense of the powers of the parliament and also the government. This would allow political responsibility to be shifted to official institutions.[13] For example, the broad wording of the amended law, which does not explicitly mention the requirement to wear masks, has subsequently led to questions about whether the HD has the authority to impose a general mask-wearing requirement.[14] Although a few lawsuits have been filed to challenge the restrictions imposed by the government to combat the COVID-19 pandemic, no notable court rulings have been issued to date in this regard.

2. Plans to hold a referendum on whether marriage should remain a union between a woman and a man exclusively

The second constitutional issue that assumed great importance in Estonia in 2020 was that of the referendum that asked voters if the institution of marriage should remain a union between a man and a woman. As already indicated in the 2019 review, one of the priorities of the far-right coalition party EKRE had been to write this issue into the coalition agreement.[15] However, the question of the "how" of the referendum proved to be difficult.

On the one hand, the current Family Act's § 1 already defines marriage as a union between a man and a woman. On the other hand, it was clear that the absolute 3/5 majority needed to change the CE by referendum would not be achieved in parliament.[16] But the CE also gives the Estonian parliament (Riigikogu) the right to put "other affairs of state" to a referendum.[17]

Nonetheless, this regulation had never been the basis of a referendum before. The only referendum held so far on the basis of the CE concerned Estonia's accession to the EU and the related constitutional amendment in 2003. Therefore, many questions — in particular of procedural nature— arose. Among others, it was questioned what legal effect a vote "on other affairs of state" could have. According to one view, its outcome should be considered binding on the legislature since, according to the CE, the people have the supreme power.[18] According to another view, the people should not be able to decide on issues on which the legislature had already decided, in this case the regulation on the institution of marriage

[8] *See also:* Mark Klamberg, *International Human Rights Law and States of Emergency. In: D. Rogers (ed.), Human Rights in War, International Human Rights* (Springer 2021). <https://doi.org/10.1007/978-981-15-5202-1_6-1> accessed 05 March 2021.

[9] Estonian Ministry of Foreign Affairs, 'The obligations of the Ministry of Foreign Affairs to inform international organisations of emergency situation measures' - <https://vm.ee/en/obligations-ministry-foreign-affairs-inform-international-organisations-emergency-situation-measures> accessed 05 March 2021.

[10] ERR News, 'Foreign Minister: No 'era of silence' over ECHR Article 15 triggering' (31 March 2020) <https://news.err.ee/1070831/foreign-minister-no-era-of-silence-over-echr-article-15-triggering> accessed 05 March 2021.

[11] ERR News, 'Estonia formally notifies Council of Europe of emergency situation end' (16 May 2020) <https://news.err.ee/1090719/estonia-formally-notifies-council-of-europe-of-emergency-situation-end> accessed 05 March 2021.

[12] ERR News, 'President proclaims second cluster law despite concerns' (4 May 2020) <https://news.err.ee/1085316/president-proclaims-second-cluster-law-despite-concerns> accessed 05 March 2021.

[13] Press release of the President of Estonia, 'President Kaljulaid kuulutas välja hädaolukorra seaduse muutmise: see on hea näide halvast seadusloomest'(15 May 2020). <https://www.president.ee/et/meediakajastus/pressiteated/15983-president-kaljulaid-kuulutas-vaelja-haedaolukorra-seaduse-muutmise-see-on-hea-naeide-halvast-seadusloomest/index.html> accessed 05 March 2021.

[14] ERR News, 'Legal expert: Fining for not wearing a mask has no legal grounds' (24 November 2020) <https://news.err.ee/1162714/legal-expert-fining-for-not-wearing-a-mask-has-no-legal-grounds> accessed 05 March 2021; ERR News, 'Justice chancellor: Appeal to administrative courts on face-mask order' (26 November 2020) <https://news.err.ee/1164601/justice-chancellor-appeal-to-administrative-courts-on-face-mask-order> accessed 05 March 2021.

[15] *See* Krõõt Tupay, Raud, and Kuum (n 1).

[16] *See* CE § 164.

[17] *See* CE § 105.

[18] ERR News, 'Justice chancellor: Supreme Court may have last say on marriage referendum' (12 January 2021) < https://news.err.ee/1608070969/justice-chancellor-supreme-court-may-have-last-say-on-marriage-referendum> accessed 05 March 2021.

in the Family Act.[19] In addition, the opposition attempted to obstruct parliamentary negotiations by submitting over 9,000 proposed amendments.[20] The coalition, in turn, tried to circumvent this obstruction with measures whose legitimacy was in doubt.[21] Just a day before the Riigikogu was expected to vote on holding the contested referendum, on January 12. 2021, the Public Prosecutor's Office announced it suspected that high-ranking members of the governing coalition and the prime minister's party were involved in serious corruption.[22] As the prime minister resigned the next day, the decision to hold the referendum was not adopted by parliament and the legal questions raised beforehand remained unanswered.

III. CONSTITUTIONAL CASES

In Estonia, Constitutional Review is carried out by the Constitutional Review Chamber (CRC) of the Supreme Court of Estonia (SC) or by the SC *en banc*.[23] In 2020, the SC handled 11 different constitutional cases in total.[24]

1. Issues of social protection

The almost 30 years since Estonia regained its independence are marked by an increase in economic power, in social prosperity, and in the average age of the population. This again is accompanied by increased challenges and demands on the Estonian welfare state.[25]

1.1 RKPJKo October 20, 2020 5-20-3/43: The reform of the Estonian pensions system.

The Estonian pensions system consists of three pillars.[26] Its first pillar is paid out of the social tax calculated from the total employment income received during a person's lifetime. The second pillar is based on preliminary financing – every working person pays 2% of their gross salary to the pensions fund. The state adds to this another 4% from the employee's social tax. Making personal savings under the third pillar is voluntary.[27]

On January 29, the Riigikogu adopted the Amending Act to the Funded Pensions Act.[28] The amendment would make the pension system's second pillar voluntary and give people the right to withdraw their money from it. Until then, the second pillar had been mandatory for everyone born in 1983 or later. In total, more that 70% of adults had joined the second pillar.[29]

The government's explanatory memorandum stated that the aim of the reform was to give payers more personal freedom and, thus, to increase people's awareness of the various options for pension provision.[30] Critics say that the only goal of the reform was to give voters a quick buck. This, in turn, would come at the expense of future generations.[31]

A major point of contention was whether the reform was merely a political issue or also one of legal nature. When the Chancellor of Justice (CoJ)[32] questioned the constitutionality of the reform, which had not yet passed parliament, she was criticized by the government for interfering in day-to-day politics.[33]

The reform was adopted by parliament and sent to the president for promulgation, who made use of her right to veto.[34] As the majority of parliament did not agree with the president's criticism, it passed the law without changes for a second time. As a result, the president requested the SC to annul the law.[35]

According to the president, the amendment

[19] ERR News, 'Uno Lõhmus: rahvahääletus kui põhiseaduslik probleem' (04 January 2021) <https://www.err.ee/1227385/uno-lohmus-rahvahaaletus-kui-pohiseaduslik-probleem> accessed 05 March 2021.

[20] The Baltic Times, 'Parlt committee to continue reviewing amendments to draft marriage referendum' (06 January 2021) <https://www.baltictimes.com/parlt_committee_to_continue_reviewing_amendments_to_draft_marriage_referendum/> accessed 05 March 2021 ERR News, 'Riigikogu leaders don't see violations in marriage bill proceedings' (12 January 2021) < https://news.err.ee/1608070441/riigikogu-leaders-don-t-see-violations-in-marriage-bill-proceedings> accessed 05 March 2021.

[21] ERR News, 'Riigikogu leaders don't see violations in marriage bill proceedings' (12 January 2021) < https://news.err.ee/1608070441/riigikogu-leaders-don-t-see-violations-in-marriage-bill-proceedings> accessed 05 March 2021.

[22] Estonian World, 'Estonia's prime minister Jüri Ratas resigns, Kaja Kallas asked to form the government' (13 January 2021) < .https://estonianworld.com/security/a-political-crisis-in-estonia-prime-minister-juri-ratas-resigns/> accessed 05 March 2021.

[23] See Krõõt Tupay, Linell Raud, Katariina Kuum (n 1).

[24] The Supreme Court of Estonia <https://www.riigikohus.ee/en/supreme-court-estonia> accessed 05 March 2021.

[25] This topic was also of central importance in 2019. See Krõõt Tupay, Linell Raud, Katariina Kuum (n 1). [26] ibid.

[26,27] Pensionikeskus, 'Estonian pension system overview' <https://www.pensionikeskus.ee/en/pension-system/estonian-pension-system-overview/> accessed 05 March 2021.

[28] Funded Pensions Act, <https://www.riigiteataja.ee/en/eli/520012021001/consolide>.

[29] Estonian Ministry of Finance, Statistics on state old-age pensions, compulsory funded pensions and voluntary funded pensions. (31.12.2018) <https://www.pensionikeskus.ee/files/dokumendid/kogumispensioni_statistika_012019.pdf> accessed 05 March 2021.

[30] Explenatory Notes to the Funded Pensions Act, pages 81-82, 87, <https://www.rahandusministeerium.ee/sites/default/files/kops_jt_seaduste_muutmise_sk_002.pdf> accessed 05 March 2021.

[31] Finance Estonia, 'Rahvusvaheline valuutafond soovitab pensionireformiga mitte kiirustada' <http://financeestonia.ee/news/rahvusvaheline-valuutafond-soovitab-pensionireformiga-mitte-kiirustada/> accessed 05 March 2021.

[32] For more information regarding the Institution of the Chancellor of Justice, see <https://www.oiguskantsler.ee/en> accessed 06 March 2021. The institution is also explained in Estonia's 2019 country report, see ref 1.

[33] For more details, see: ERR News, 'Ministers: We took justice chancellor pension reform comments on board' (27 January 2021) <https://news.err.ee/1028628/ministers-we-took-justice-chancellor-pension-reform-comments-on-board> accessed 06 March 2021.

[34] Press release of the President of Estonia (n 1).

would create a situation where future retirees would live in poverty and next generations would face an excessive tax burden to meet the state's obligation to support them. In addition, the president pointed out that the reform disproportionately infringed the right to property of those who decided to stay in the second pillar,[36] as the state retroactively created the risk that the value of the units of the second pillar would become significantly more dependent on the behaviour of the other unit-holders and the volatileness of financial markets.[37]

The SC found that the challenged reform interfered with the fundamental right to property and equality of those deciding to stay in the second pillar, but it did not consider that interference to be disproportionate.[38] However, the court emphasized that the law could prove to be unconstitutional in the event of a change in the actual circumstances or in a specific case, namely, if the risks associated with the reform were to materialize. It expressly confirmed that the right of re-examination of the constitutionality of the reform would remain open.[39]

7 out of the 19 Supreme Court judges disagreed with the final judgement. They pointed out that, even if the act increased people's freedom, it must be reasoned why that compensates for the reduction in their level of social protection. Concerning the fundamental right to state aid in old age, the abolition of substantive guarantees cannot be justified by the purely theoretical possibility of replacing these funds by other means in the future.[40]

1.2 RKPJKo May 5, 2020 5-20-1/15: The extent of subsistence benefits.

In the case at hand, a person applied for a subsistence benefit which, according to the Estonian Social Welfare Act,[41] shall be calculated on the basis of the net income of a person from which certain costs, i.e., housing costs, shall be deducted. After deductions, the claimant's income was 11 euros and 5 cents higher than the maximum monthly income level of 150 euros,[42] above which the right to a subsistence benefit was excluded.

If the plaintiff had been able to write off costs for prescription drugs, his income would have remained below 150 euros. Therefore, the court was called upon to examine whether the exclusion of such deductions was constitutional.

The claimant had been provided with several subsidies for the purchase of prescription drugs and food. He had also been offered support services that he had refused to use. In addition to the support measures offered by public authorities, the claimant was also eligible to receive food aid provided by the Estonian Food Bank and by the EU, which he had also partially refused.

The SC found that, given the extent and variety of assistance the applicant had been provided with, it could not be concluded that he suffered from deprivation. Although the SC could not find the exclusion of deductions to be unconstitutional in this specific case, it emphasized that, under other circumstances, it could declare its unconstitutionality. According to the court, prescription medicines and other emergencies are likely to lead to scenarios where there is an increased need for assistance.

2. Municipal autonomy versus the state' s regulatory authority

According to CE § 154, "[a]ll local issues shall be decided and organised by municipalities, which shall act independently on the basis of laws." While the CE mentions the issue of municipal autonomy only in general terms, its more detailed elaboration is delegated to the legislature.

Already in 2009, the SC ruled that the legislator had not regulated the separation of responsibilities between the state and the municipalities precisely.[43] The legislator, however, has done little to change this situation. This led to tensions between the municipalities and the state, disputing the allocation of responsibility in frequent court cases.

2.1 . PSJKo May 26, 2020 5-20-2/11: A municipality's right to planning autonomy.

In this case, the municipality argued that the state had interfered with its planning autonomy by way of a legal reform. The reform granted anyone who had obtained a mining right at the state level permission to use the relevant cadastral unit(s) without need of any additional coordination at municipal level.

The SC stated that according to CE § 5 "[t]he natural wealth and resources of Estonia are national riches which must be used sustainably." Therefore, the SC argued, the interference with the municipality's autonomy was justified by an overriding national interest. Furthermore, the municipality has a right to express its opposition in the mining permit procedure and can appeal to the court if it believes that the permit violates its rights. In the court's view, this precludes a breach of the rights of the municipality.

[35] For more details regarding the legal procedure, see CE § 107.

[36] RKPJKo 5-20-3/43 20 October 2020, point 7.1.2.

[37] ibid point 7.3.1.

[38] ibid point 71.

[39] ibid point 143.

[40] Dissenting opinion by Peeter Jerofejev, Kai Kullerkupp, Kaupo Paal, Nele Parrest, Ivo Pilving, Kalev Saare and Juhan Sarv in case RKPJKo 5-20-3/43 20 October 2020 <https://www.riigikohus.ee/et/lahendid?asjaNr=5-20-3/46>

[41] Article 133 of the Social Welfare Act <https://www.riigiteataja.ee/en/eli/ee/504042016001/consolide/current>.

[42] Estonian Ministry of Social Affairs, 'Subsistence benefit.' <https://www.sm.ee/en/subsistence-benefit-0> accessed 06 March 2021.

[43] PSJKo 30 September 2009 3-4-1-9-09 on mining permits.

2.2 PSJKo April 17, 2020 5-19-45/9: A municipal council member's right to employment.

In the present case, the CRC, at the request of the CoJ, declared unconstitutional a section of the Local Government Organisation Act according to which the mandate of a municipal council member terminates prematurely if they are employed by an administrative agency of the same municipality.

The CoJ argued that such a restriction unjustifiably infringed both a person's constitutional right to be elected to a representative body (or their passive suffrage) as well as their freedom of choice of profession. Even if the contested provision lessened the risk of corruption, this risk was not prevalent enough in the case of employees that are not considered municipal officials and, thus, have minimal impact on the decision-making process.

The CRC agreed with the CoJ and found that a temporary suspension of the mandate of a municipal council member would be a more proportionate measure than its termination.

3. The open question of an individual constitutional complaint

As an extraordinary legal remedy, the individual constitutional complaint (IndCC) gives a person the right to demand directly from the highest court the protection of their fundamental rights against the state, provided that such protection is not secured by any other legal remedy.[44]

Estonian procedural law does not explicitly provide for the institute of IndCC, and its possible codification in the law has been the subject of controversial debate for years.[45] The main argument against the codification of the IndCC is the administrative burden it would place on the SC. Advocates for the remedy argue that such a risk could easily be minimised through appropriate legal process conditions.[46]

In accordance with the CE, legal recourse must be available to any person whose rights or freedoms have been restricted. However, the SC has recognized in its legal practice the possibility of an IndCC. In one case so far, where a prison inmate sought to lessen his prison sentence due to a legal reform setting out a lesser maximum sentence for the crime he had committed, the SC has pronounced an IndCC successful.[47]

Since 2003, almost 200 IndCCs[48] have been submitted to the SC, but none have succeeded. In all cases, the SC found that the claims were inadmissible. In 2021, three individual constitutional complaints submitted to the SC were also dismissed on procedural grounds.

3.1 PKJKm May 12, 2020 5-20-4/2: A prisoner's right to phone communication.

In the case at hand, an inmate at the Tartu prison found the restrictions to prisoners' phone communications to be unconstitutional because they are set out in a regulation of the Minister of Justice and lack of a delegation of statutory powers. Even though the SC found a possible infringement of rights questionable, it dismissed the complaint on procedural grounds and argued that the question was competence of the administrative court.

3.2 PKJKm December 14, 2020 5-20-8/2 and PKJKm December 22, 2020 5-20-9/2: Denial of the right of action in individual claims against procedural norms of the SC.

In case 5-20-8/2, the claimant had contested the constitutionality of a provision in the Code of Civil Procedure that establishes that, with good reason, the SC may make a judgment on refusal to satisfy an appeal in cassation only in the form of a conclusion (i.e., a judgement that lacks the descriptive part and statement of reasons). The claimant argued that the right to a justified court decision is a fundamental right arising from both the CE and the ECHR. As the provision concerns decisions made by the SC, there was no other efficient legal remedy available to contest its constitutionality. The SC denied the claimants right of action, as it found that the SC is obliged to examine the constitutionality of each norm it applies. Hence, the constitutionality of every decision of the SC is assured.

Similarly, the claimant in case 5-20-9/2 contested the constitutionality of a provision of civil procedure that gives the SC the right to dismiss an appeal in cassation without justification. The SC dismissed the complaint.

4. RKPJKo December 2, 2020 5-20-6/11: Constitutional review of the time limit provision for application for extraordinary aids conditioned by COVID-19.

On April 30, the Minister of Culture issued a regulation to provide emergency assistance to the culture and sports sector that had suffered significant losses due to the closures associated with the COVID-19 pandemic. The regulation stated that, to justify their request, applicants from the theatre sector may submit repertoire statistics for the year 2018 or 2019 by May 1, that is, within one day. Hereupon, one Estonian theatre's application for assistance was rejected for the reason that it had not submitted repertoire statistics by May 1, while other theatres had done so on a

[44] Rait Maruste, 'Mis oli, on ja võiks olla põhiseaduslikkuse kohtulikus järelevalves' (2020) Juridica 2020/6.

[45] Madis Ernits et al., The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law. National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law. (T.M.C. Asser Press 2019) <https://link.springer.com/chapter/10.1007/978-94-6265-273-6_19> accessed 05 March 2021.

[46] Maruste (n 44).

[47] RKÜK 17 March 2003 3-1-3-10-02 (also known as the Brusilov case).

[48] Supreme Court of Estonia, Procedural Statistics <https://www.riigikohus.ee/et/riigikohus/statistika?fbclid=IwAR3ctYKAfWIRLUfA-d1-HIzl8y1hDETDcxGpkx-CaSYtvhvR5MbTWRPIcZ2U> accessed 06 March 2021.

voluntary basis. The theatre filed a complaint against this decision.

The SC found that emergency assistance could not be conditioned to the presentation of statistics, the submission of which was voluntary. In fact, the theatre could not foresee that it could be deprived of the right to assistance by not providing statistics. In conclusion, the SC declared unconstitutional the unequal treatment caused by the refusal of emergency assistance to the claimant.

IV. LOOKING AHEAD

In the first days of 2021, the government changed and many issues disappeared from the agenda from one day to the next. With the exclusion of the populist conservative EKRE party from government, the referendum on the institute of marriage also vanished. Nevertheless, 2021 shows that matters of high importance, such as the right to sue or the legal status of municipalities, require an answer regardless of the political orientation of the ruling parties. Thus, it is to be expected that in 2021, despite the omnipresent task of resolving the COVID-19 crisis, the issues of social protection of the people and the fundamental questions of the structure of the state will continue to occupy the SC.

V. FURTHER READING

Ivo Pilving, Monika Mikiver, 'A Kratt as an Administrative Body: Algorithmic Decisions and Principles of Administrative Law' (2020) Juridica International 29/2020.

Georgia

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I. INTRODUCTION

This report provides a brief introduction to the Georgian constitutional system including constitutional amendments, parliamentary elections, Adjara supreme council elections, boycotting elections and calling snap elections, covid-19 pandemic regulations, appointment of judges in the Supreme Court and the Constitutional Court, appointment of the General Prosecutor and an Independent Inspector in the Common Courts System and main challenges of the judiciary. It provides an overview of landmark judgments of the Georgian Constitutional Court in 2020. The final section examines developments expected in 2021 related to local elections, court vacancies, Constitutional Court cases and other related issues.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constitutional Amendments

After long-term multi-party and international talks through the mediation of foreign diplomats, the Georgian Dream and opposition parties reached an agreement on 8 March 2020. According to this agreement, 120 deputies will be elected by a proportional system and 30 by a majoritarian system in 2020, with a 1% electoral threshold. A party with less than 40% of the vote cannot form a parliamentary majority. The parties signed a memorandum of understanding and released a joint statement. It was determined that the political party and not the party blocs have the right to participate in the next parliamentary elections, and it was also determined that in case of one or more snap parliamentary elections by 2024, the elections will be held according to the amended rules, and the last elections will be held on October 26, 2024.[1]

2020 Parliamentary Election

On October 31, 2020, parliamentary elections were held in Georgia. The citizens of Georgia elected a 150-member parliament by a mixed (120 proportional/30 majoritarian) electoral system. According to the election results, the Georgian Dream, which won the parliamentary elections for the third time, won 90 seats (61 by proportional and 30 by majoritarian system) in the 150-member legislature. Opposition parties boycotted parliament and refused to enter the legislature. The opposition claimed that the October 31, 2020 parliamentary elections were held under conditions of violence and intimidation of voters, coordinated pressure from the State Security Service and the criminal groups, large-scale bribery, use of administrative resources and violence against the will of the electorate. This was accompanied by manipulation of election protocols and a "carousel", which significantly distorted the election results.[2]

Boycotting elections and calling snap elections

On December 11, 2020, the President of Georgia opened the first session of the Parlia-

[1] Constitutional Law and Constitutional Amendment of June 29, 2020, <https://matsne.gov.ge/ka/document/view/4904761?publication=0>

[2] "Opposition parties participating in the elections signed a joint statement that", (nterpressnews, (2020) https://www.interpressnews.ge/ka/article/627356-archevnebshi-monacile-opoziciurma-partiebma-ertobliv-gancxadebas-moaceres-xeli-rom-ec-parlamentshi-ar-shevlen/>, accessed April 04, 2021

ment. The spring session of the Parliament of Georgia opened on February 2, 2020, which discussed the issue of termination of the powers of 51 members of parliament elected from the opposition, but has not made a decision and the opposition formally remains in parliament.[3] Only three deputies of the "Patriots Alliance" and two other members of parliament, signed a memorandum with the Georgian Dream on changes to the election law entered parliament.[4] Although the Georgian Dream has a majority in parliament, the parliament will not be able to make decisions that require 100 or 113 votes. Following the election, various international organizations called on opposition parties to end their boycott and enter parliament, but opposition still demanded a snap election. Following the boycott, the Georgian Dream introduced a bill that would suspend state funding for parties in a parliamentary boycott, an amendment to abolish a free time in media, reducing salaries of deputies for absenteeism.[5]

Elections of the Supreme Council of the Autonomous Republic of Adjara

In parallel with the parliamentary elections in Georgia, on October 31, 2020, elections of the Supreme Council of the Autonomous Republic of Adjara was held. Adjara is the only region in Georgia that has a regional parliament. It consists of 21 members and, like the parliamentary elections in Georgia, is elected by a mixed electoral system (18 proportional, 3 majoritarian) under a 5% electoral threshold. According to the election results, only two political parties - Georgian Dream and UNM - have crossed the threshold. They received 45.86% and 33.95% of the vote, Georgian Dream also won in three single-member majoritarian constituencies and gained a majority in the Supreme Council. Like the parliament, the the United National Movement bloc boycotted and refused 6 seats in the Supreme Council, although one member of the Republican Party from block entered in the Council.[6]

Appointment of Supreme Court judges

On March 17, 2020 Nino Kadagidze was elected chairman of the Supreme Court by the parliament of Georgia. She was a judge since 2002 in different common courts and in December 2019 he was elected a judge of the Supreme Court for life. On 17 March 2020, she was elected as the chairman of the Supreme Court for a ten-year term by the parliament. At the same time, the former General Prosecutor has become the deputy chairman of the Supreme Court and chairman of the Criminal Cassation Chamber. Giorgi Mikautadze became the Second Deputy Chairman of the Court and the Chairman of the Chamber of Civil Cases in October 2020, after the termination of Mzia Todua due to her retirement. The appointment of new members to the Supreme Court of Georgia will take place after the legislative changes, which are currently under consideration and concern the procedure for selecting candidates.

The appointment of a judge of the Constitutional Court

In 2020, the Supreme Court of Georgia appointed two judges to the Constitutional Court of Georgia. In December 2019, the term of office of a judge elected by the Supreme Court of Georgia expired. The last date for appointment of a new judge was on November 24, however the Supreme Court violated the law and a new judge was appointed to the constitutional Court only on April 3, 2020, during a state of emergency.[7] On May 29 the second judge of the Constitutional Court Vasil Roinishvili, the only candidate for the post, was appointed by the Plenum of the Supreme Court. Roinishvili's rushed appointment has been strongly criticized.[8] In June 2020, the term of office of the Chairman of the Constitutional Court expired and the Plenum of the Court elected Judge Merab Turava as the new Chairman of the Constitutional Court for a term of 5 years. As was said by experts, the appointment of a judge during the state of emergency was expeditiously linked to the Constitutional Court case on rules for the election of judges of the Supreme Court. After the appointment of Kikilashvili, its composition was changed.[9] On July 30, 2020 the Constitutional Court rejected this constitutional claim. In this case, 4 judges of the Constitutional Court dissented.

Appointment of the Prosecutor General

On February 18, 2020, the Parliament of Georgia elected Irakli Shotadze as the Prosecutor General with 82 votes against none. Deputies voted without considering the issue. Shotadze has already held the position of Prosecutor General once. He resigned in May 2018 after the end of the trial in the case of the murder of two juveniles was followed by public protest and escalated into large-scale rallies. The post of Prosecutor General became vacant after the Parliament of Georgia appointed Shalva Tadumadze as a judge in the Supreme Court on December 12, 2020.[10] This decision was criticized by observer or-

[3] Plenary Sitting of Parliament, 02 February 2021. <https://www.parliament.ge/ge/saparlamento-saqmianoba/plenaruli-sxdomebi/plenaruli-sxdomebi_news/parlamentis-plenaruli-sxdoma02022021.page> , accessed April 04, 2021

[4] "Aleko Elisashvili and Levan Ioseliani attend Parliament session for the first time as MPs", Imedinews, (2021) <https://imedinews.ge/ge/politika/184522/aleko-elisashvili-da-levan-ioseliani-deputatis-rangshi-parlamentis-sesias-pirvelad-estsrebian>

[5] "The party will not be able to receive funding if it does not seize at least half of the parliamentary seats", Tabula,)2020) https://tabula.ge/ge/news/659381-partia-dapinansebas-veghar-miighebs-tu

[6] "Irakli Chavleishvili left the "Republicans" and joined the Supreme Council of Adjara", Publika, (2020) https://publika.ge/irakli-chavleishvilma-respublikelebi-datova-da-acharis-umaghles-sabchoshi-shevida/

[7] The plenary session of the Supreme Court was held on April 03, 2020, <http://www.supremecourt.ge/news/id/2062>

[8] "Top Court Picks Vasil Roinishvili as Constitutional Court Justice", Civil.ge, (2020), <https://civil.ge/archives/354277>

[9] "Newly appointed judge Khvicha Kikilashvili was sworn in immediately", Reginfo.ge, (2020), <https://reginfo.ge/politics/item/17785-axaldanishnul-mosamartle-xvicha-kikilashvils-pizi-sasxrapod-daadebines>

[10] "Irakli Shotadze has been afresh appointed as Prosecutor General", Business Media, (2020), <https://bm.ge/en/article/irakli-shotadze-has-been-afresh-appointed-as-prosecutor-general-/49186/>

ganization and international community. For example, an Ambassador of the European Union to Georgia Carl Hartzell, says, "Irakli Shotadze's appointment as Prosecutor General is problematic." The Ambassador notes that this decision was "predictable."[11]

Covid-19 Pandemic, State Emergency and Restrictions of Human Rights

The first person to be infected with COVID-19 in Georgia was identified on February 26, 2020, who returned to Georgia from Iran. On March 21, 2020, in order to prevent the mass spread of COVID-19, in order to reduce public safety and life-threatening health crises, the President of Georgia declared a state of emergency in the country, and on March 21, 2020 issued a decree restricting the rights set in Articles 13, 14, 15, 18, 19, 21 and 26 of the constitution throughout the state of emergency. The law established isolation and quarantine rules, and it applied to infected, contacted, and persons crossing the Georgian border. Persons aged 70 and over were also prohibited from leaving their place of residence. Isolation/quarantine period was set at 14 days, later 12 days, and for foreigners 8 days. The law imposed a fine of GEL 2,000 on a natural person and GEL 10,000 on a legal entity for violating the rules. The Ministry of Internal Affairs was given the right to transfer the offender to the appropriate space. Repeated violation of the rules has resulted in criminal liability, house arrest for a term of six months to two years or imprisonment for a term of up to three years, violation of the state of emergency for a term of imprisonment of up to six years. During the period of isolation/quarantine, the law provides for some control over human behavior, arrest of persons violating the rules during curfew hours and citizens can appeal the restrictions in court. The Constitutional Court did not announce decisions until today and by November 20, 2020, 15 constitutional claims had been submitted to the court and constitutional review on Covid-19 issues was examined as ineffective.[12]

III. CONSTITUTIONAL CASES

№1/1/1404, 4 June 2020, Nana Sepashvili and Ia Rekhviashvili v. Parliament of Georgia and Minister of Justice of Georgia

The subject of dispute in the case was the Constitutionality of the norms of Law of Georgia on the "Procedure for Registering Citizens of Georgia and Aliens Residing in Georgia, for Issuing an Identity (Residence) Card and a Passport of a Citizen of Georgia" with regard to equality and freedom of religion, belief and conscience. The claimants due to their religious beliefs, refused to use an electronic ID card. The claimants argued that the electronic ID card is the way to the seal of the Antichrist, which is why possession of the said document is contrary to the orthodox faith. The Constitutional Court finds that the impugned norms are neither unconstitutional nor discriminatory against the Constitution.

№3/1/1459,1491, July 30, 2020, Public Defender of Georgia v. Parliament of Georgia

The subject of the dispute was the constitutionality of the norms of the Organic Law of Georgia on Common Courts, which concerned the selection of a candidate for a judge of the Supreme Court of Georgia by the High Council of Justice of Georgia. According to the claimant the disputed norms, which provide for secret ballot, do not require substantiation of the decision, do not take into account the good faith and competence of the candidate and do not protect the candidate's right to hold public office in case of superiority. The court noted that secret decision-making provides an additional guarantee that the board will perform its functions properly, as there are always risks that certain groups or individuals may want to influence a board member. The secrecy of the ballot greatly ensures the free expression of their will.

№3/3/1526, September 25, 2020 Citizens' Political Union "New Political Center", Herman Sabo, Zurab Girchi Japaridze and Ana Chikovani v. Parliament of Georgia

The subject matter of the dispute was the constitutionality of the norms of the Organic Law of Georgia, the Election Code of Georgia. According to the disputed norm, political parties and electoral blocs are obliged to submit a party list to the chairperson of the Central Election Commission for parliamentary elections so that at least one out of every four people on the list is of the opposite sex. If the party list is not compiled in accordance with the above requirement, the election subject must rectify the shortcoming, otherwise the party list will not be registered. According to the plaintiffs maintaining gender balance in the Parliament of Georgia can not be considered a valid legitimate goal of restriction because the voter must decide for himself, based on the political process, who will hold this or that elected position. The court declared unconstitutional the part of the norm that at least one person in every four on the parliamentary election list must be a man, while not satisfying the part of the claim stating that at least one person in every four on the electoral list must be a woman. The court said the legislature had the power to strike a balance between the right of men to vote in parliament and the legitimate interest in increasing women's representation as a result of artificial barriers to women.

№3/2/1473, September 25, 2020 Nikanor Melia v. Parliament of Georgia

The subject of the dispute in the case was the constitutionality of the resolution of Georgia "On early termination of the mandate of a member of the Parliament of Georgia for Nikanor Melia". For the plaintiff, the grounds for early termination of the term of office of a Member of Parliament became a guilty verdict of the Court of First Instance, despite the fact that the plaintiff had the op-

[11] "Carl Hartzell, Shotadze's appointment as Prosecutor General is problematic", First Channel, (2020), <https://1tv.ge/en/news/carl-hartzell-shotadzes-appointment-as-prosecutor-general-is-problematic/>

[12] "Covid-19 and Constitutional Control: Assessing the Effectiveness of the Constitutional Court of Georgia", IDFI, (2020) <https://idfi.ge/en/covid_19_and_constitutional_review>

portunity to appeal this verdict in the Courts of Appeal and the Supreme Court and it was not a final decision. The court held that even if the higher court found Nikanor Melia not guilty, it would be impossible for him to regain his authority as long as another member of parliament had already been recognized. If a person found guilty continues to serve in the legislature and is finally proven guilty by a court of last instance, this will cause irreparable damage to the work of Parliament. The Constitutional Court held that the ruling was not contrary to the Constitution of Georgia.

№1/2/1475, November 12, 2020
Bekanas Ltd v. Parliament of Georgia

The subject matter of the case was the constitutionality of the norms of the Code of Administrative Offenses of Georgia. The plaintiff considered unconstitutional the norm which provides for the unconditional confiscation of the weapon of the offense as a sanction for the use of the entrails without a proper license. According to the plaintiff, the unjustified restriction of the constitutional right to property is caused by the fact that the judge hearing the case, in the conditions of mandatory application of the administrative sanction, is not given the opportunity to determine the specific necessity of confiscation of the weapon in each individual case. The Constitutional Court ruled that the impugned norm restricted the constitutional right to property more than necessary. As a result, the court declared the disputed norm unconstitutional.

№/1/3/1312, December 18, 2020 Konstantine Gamsakhurdia v. Parliament of Georgia

The subject matter of the case was the constitutionality of the norms of the Criminal Procedure Code of Georgia. According to the plaintiff, during the legal proceedings the plaintiff repeatedly applied to the Chief Prosecutor's Office of Georgia with a request to provide copies of the materials of the criminal case. However, the claim of the plaintiff was not satisfied on the grounds that the Criminal Procedure Code of Georgia the victim has only the right to access the materials of the criminal case and the opportunity to obtain copies. The court ruled that the impugned norm restricts the human right to access information about it in public institutions to a greater intensity and extent than is necessary to achieve the legitimate aim of protecting the investigation. In the Court's view, the impugned norm failed to meet the requirement of necessity, was disproportionate and was declared unconstitutional.

№1/4/1380, December 18, 2020 Fatman Kvaratskhelia and Kakha Ekhvaia v. Parliament of Georgia

The subject matter of the dispute was the constitutionality of the norms of the Civil Code of Georgia. According to the disputed norm, a vehicle and/or auxiliary means of agricultural machinery, as well as a railway transport vehicle, as well as other real estate owned by a person.According to the plaintiff, the named norms restricted the use of immovable property owned by him or another person as a means of securing a claim under a loan agreement to be issued to individuals. The court found that the said restriction contributed to the attainment of the legitimate aim stated by the defendant. The state has an interest in restricting the right to sell property only to those whose activities carry special risks. Accordingly, the court found a violation of property rights only in the part of the vehicle and/or auxiliary technical vehicle of the agricultural machine, as well as in the part of the railway vehicle.

№2/1/877, December 25, 2020
Alta Ltd, Okay Ltd, Zummer Georgia Ltd, Georgian Mobile Import Ltd and Smiley Ltd v. Parliament of Georgia.

The subject matter of the dispute was the constitutionality of the norms of the Law of Georgia on Copyright and Neighboring Rights. The plaintiffs consider that the disputed norms contradicted the right of ownership, as it defines the person liable for the payment of royalties not the natural person who actually reproduces the work, but the manufacturers and importers of equipment and material carriers used in the reproduction for personal use. The Constitutional Court found that the impugned norm violated the right to privacy and communication protected by Article 15 of the Constitution of Georgia, as the law does not stipulate the obligation of the organization to ensure the confidentiality of information provided to producers and importers. The Court found that giving the organization the power to request information from individuals and legal entities for the calculation of royalties restricts the right to privacy of the person (in this case, the claimant) more than is necessary to achieve legitimate goals. The court partially upheld the claim and declared the norm in this part unconstitutional.

№2/2/1276, 25 December 2020
Giorgi Keburia v. Parliament of Georgia

The subject matter of the case was the constitutionality of the norms of the Criminal Procedure Code of Georgia. According to the constitutional claim, the plaintiff's personal search was carried out on the basis of information provided by the confidant. According to the plaintiff, in conditions when the search is conducted on the basis of information of an unidentified person and law enforcement officers are not required to conduct additional investigative actions, there is a risk of arbitrary restriction of the right to privacy. The Constitutional Court declared unconstitutional the normative content of the disputed norm, which allowed the use of an illegal item seized as a result of a search, provided that the possession of the seized item is confirmed only by the testimony of law enforcement officers. In order to obtain neutral evidence of the reliability of the search, the normative content of the disputed norm is examined. This envisages the use of evidence based on operational information ("Confident", "Informant") or information provided by an anonymous person, on one basis.

№2/3/1337, December 29, 2020 Khatuna Tsotsoria v. Parliament of Georgia

The subject matter of the dispute was Article 1455 of the Civil Code of Georgia, which stipulates that in case of division of the estate, the value of the property he received as a gift from the heir during the five years prior to the opening of the estate will be considered. According to the plaintiff, the disputed norm contradicts the right to property and inheritance guaranteed by the Constitution of Georgia. The Constitutional Court ruled

that the impugned regulation did not strike a reasonable balance between the property rights and public interests of the testator and the heir, and declared unconstitutional the normative content of the impugned norm. In this case the value of the transferred property would be included in the inheritance share of this heir.

№2/4/1412, December 29, 2020
Irakli Jugheli v. Parliament of Georgia

The subject matter of the case was the constitutionality of a norm of the Code of Administrative Offenses of Georgia according to which the plaintiff considered that the disputed norm established unequal treatment of substantially equal persons, as the maximum period of detention of persons detained during non-working hours was 48 hours while the period of detention of persons detained during working hours should not exceed 12 hours as a general rule.The Constitutional Court has ruled that as a result of the impugned norm, in some cases, the maximum period of detention for a relatively early detainee ends later than for another detainee later. Under the circumstances of the disputed regulation, the overcrowding of the court may force it to give priority to some persons over other previously detained persons which lacks any rational explanation and is a source of significant injustice. Based on the above, according to the court, the disputed norm does not meet the requirements of the test of rational differentiation and is contrary to the Constitution of Georgia.

December 29, 2020, Levan Meskhi, Nestan Kirtadze, Tamaz Bolkvadze and others (50 claimants in total) v. Parliament of Georgia

The subject matter of the dispute was the constitutionality of the norms of the Law of Georgia on State Compensation and State Academic Scholarship. The plaintiffs were former members of parliament who were reduced by 190 GEL under state compensation under the new law. The plaintiffs argued that the change in compensation from the State was an interference with property rights. The Court found that the appointment of compensation by the State serves to respect the special role of the Member of Parliament and not to fulfill the social obligations assumed by the State in exchange for his service. According to the Court, the property interest of the plaintiffs was not reduced in such a way as to substantially equate the substantial exhaustion of such interest and to impose on the plaintiffs an individual and excessively heavy burden. Based on the above, the court did not satisfy the constitutional claim.

IV. LOOKING AHEAD

The most significant political event in 2021 will be the local election to be held in October. The opposition is not represented in the parliament, they demand snap elections, the government refuses and overcoming the current political crisis caused after parliamentary elections is on the agenda of Georgia. The Constitutional Court will consider constitutional claims of members of parliament who asked the parliament for a termination of the membership of Parliament due the boycott, but Parliament has refused to make a decision. The Constitutional Court must also rule on several cases of human rights restrictions during pandemics and state of emergency. The changes in the law on appointment of the the Supreme Court judges should be considered in parliament. The appointment of judges to the Supreme Court of Georgia is in agenda and at least one new judge will be also appointed to the Constitutional Court by the President of Georgia.

V. FURTHER READING

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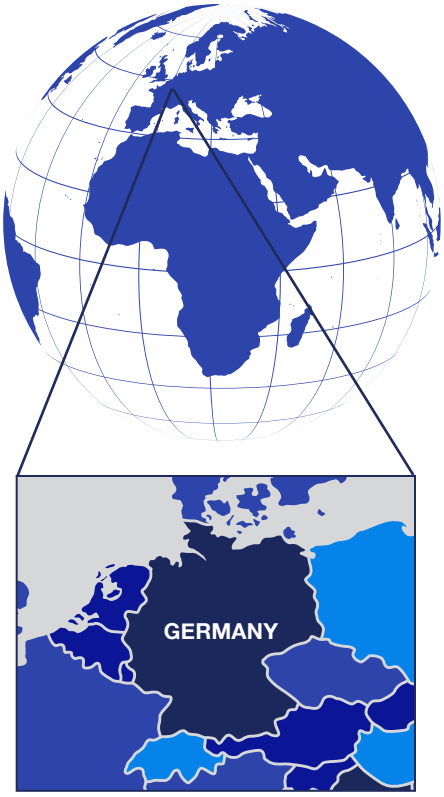

Germany

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I. INTRODUCTION

Ever since early 2020, just like the rest of the world, the German legal system was busy and immersed in dealing with the national ramifications of the global Covid-19 crisis. Over the course of the year, German courts faced thousands of lawsuits, many of them combined with motions for interim relief from a highly diverse and fluid field of restrictive measures.[1] After a short hiatus due to the first disruption of public life and the ensuing first lockdown in March of 2020, the courts overall successfully managed to reduce their corona dockets, remotely when necessary.[2] As federal law scarcely regulated restrictive anti-pandemic measures, subfederal units – including the so called 'Länder', administrative districts, and municipalities – introduced a flurry of temporary executive measures, which then were prolonged, loosened, and, at the end of 2020, re-tightened. Accordingly, subfederal administrative and constitutional courts bore the brunt of judicial review, whereas the subsidiary Federal Constitutional Court (FCC) intervened only occasionally.[3] Even though German society experienced unprecedented restrictions in 2020, the courts more or less upheld corona measures save only a small number of blanket and overly restrictive prohibitions[4]. Critical scholarly interventions – timely published in newspapers and blogs as *Verfassungsblog* – focused on the insufficiently specific legal basis for restrictive as well as positive measures (even after amendment); on the corresponding passivity of the legislatures; on the introduction of overbroad executive emergency competences; on the (dis) proportionality of widespread measures;[5] on the efficacy of legal knowledge production under conditions of uncertainty;[6] and, finally, on the preparation of decentralized executive measures in centralized, yet unaccountable and informal settings. In parallel, Covid-19 sparked an internal discussion on the – allegedly weak or self-serving – role of constitutional scholarship in times of (this) crisis[7] – all the while scholars were cited, interviewed and – sometimes even, albeit belatedly – heard like seldom before.[8] A rather problematic debate arose on the societal and political responsibility of scholarship – particularly constitutional law scholarship – and academic freedom. Critical scholarly interventions questioning the constitutionality of containment measures were at times appropriated by populist voices denying Covid-19

[1] The number of 880 Covid-19 proceedings in 2020 represents about 1/6 of all incoming matters, see (the first) FCC Annual Report 2020, p. 42, 59.

[2] See regarding the FCC Christian Rath, 'Die Impulsgeber', 22 February 2020, *Legal Tribune Online.*

[3] See, e.g., the early red lights concerning demonstrations, and religious services issued by the FCC, Decision of 15 April 2020, 1 BvR 828/20, of 17 April 2020, 1 BvQ 37/20, and of 29 April 2020, 1 BvQ 44/20.

[4] See, in more detail and nuance, Anika Klafki, ‚Kontingenz des Rechts in der Krise' (2021) *Jahrbuch des öffentlichen Rechts* (forthcoming).

[5] Hannah Ruschemeier, 'Kollektive Grundrechtseinwirkungen' (2020) *Rechtswissenschaft* 450.

[6] See Ralf Michaels, ‚Rechtliches Wissen in der Krise' (2020) *Kritische Justiz* 375.

[7] Friedhelm Hase, Corona-Krise und Verfassungsdiskurs' (2020) *Juristenzeitung* 697; Hans Michael Heinig et al., ‚Why Constitution Matters – Verfassungsrechtswissenschaft in Zeiten der Krise' (2020) *Juristenzeitung* 861.

[8] Thorsten Kingreen, 'Ein Sonderregime ohne Ende?' (25 February 2021) *Frankfurter Allgemeine Zeitung.*

as such or at least questioning its dangerous potential which again subjected these scholars to a critique on the part of representative of mainstream parties (in one case of the vice president of the parliamentary committee on legal matters).[9]

II. MAJOR CONSTITUTIONAL DEVELOPMENT: DAGGERS CAST AT THE SUPREMACY OF EU LAW BY FCC JUDGMENT OF 5 MAY 2020, 2 BVR 859/15 ET AL – PSPP

The Second Senate of the FCC issued a highly disputed landmark judgment on 5 May 2020 impacting severely the intricate relationship between the Court of Justice of the European Union (CJEU) and the FCC and fleshing out the hierarchical normative relationship between EU secondary law and German constitutional law from the perspective of the FCC.

With respect to individual constitutional complaints that have been filed against decisions by the European Central Bank (ECB) on the secondary markets public sector asset purchase programme (PSPP), the FCC found that the German Government as well as the Bundestag violated Art. 38 para. 1 1st sent. BL in conjunction with Art. 20 para. 1 BL falling short of their responsibility with regard to European integration (*Integrationsverantwortung*) by failing to challenge respective PSPP decisions adopted by the ECB whose compliance with the principle of proportionality has – according to the Court's view – not been substantiated by the Governing Council of the ECB.[10] The PSPP decisions constituted a "manifest and structurally significant, exceeding of the competences assigned to the ECB" as to be found in Art. 119, Art. 127 et seq. TFEU, Art. 17 et seq. ESCB Statute. The judgment of the CJEU of 11 December 2018[11] rendered based on the request for a preliminary ruling by the FCC did not alter this normative finding since it would be "simply not comprehensible, so that, to this extent, the judgment was rendered ultra vires". Hence, the FCC identified two *ultra vires* acts – the PSPP decisions of the ECB on the one hand and the preliminary ruling on the part of the CJEU on the other hand. In light of this "double ultra vires act" the FCC found that "the *Bundesbank* may […] no longer participate in the implementation and execution" of respective PSPP decisions "neither by carrying out any further purchases of bonds nor by contributing to another increase of the monthly purchase volume, unless the ECB Governing Council adopts a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the programme" (para. 235). This passage raised various questions since it appeared already to set a frame for the execution of the judgment (see § 35 of the Act on the FCC).

The FCC openly denied respecting the preliminary ruling by the CJEU and employed strong language ("simply not comprehensible") which – as its critics suggested – added fuel to contestations regarding the legitimacy of the CJEU and a general backlash against the Court's authority which could particularly be perceived during the "rule of law crisis" within the EU.

In terms of the normative context of this judgment – truly a "first" – two major points should be considered:

First, the FCC developed the concept of a "*ultra vires* review" as a tool to effectuate the limits of EU integration seen from the rationality of the German constitutional order in various previous decisions giving its prerequisites shape and determining the conditions for its future possible operationalization.[12] At the core of "*ultra vires* review" lies the idea that acts rendered by EU institutions beyond the competences that have been conferred upon them (see Art. 23 para. 1 BL) are not only devoid of the supreme status conventionally accorded to EU law (Anwendungsvorrang) but also legally void within the German legal order being merely non-acts provided that the violation of competences is sufficiently qualified. The FCC has very early on employed the term of a "manifest excess" of competences in the context of the "*ultra vires* review" which it tied to the idea of a "significant shift of competences to the detriment of the Member States" (para. 110). A "significant shift" can be identified "where the exceeding of competences has a considerable impact on the principle of conferral and on the extent to which respect for the legal order, as part of the rule of law, is upheld" (para. 110). Yet, since denying EU law validity within the national legal order entails a destabilizing potential regarding the EU as such, previous to declaring an EU act to be ultra vires the CJEU which has the primary competence to preserve the autonomy and consistency of EU law and to determine its authoritative interpretation is to be consulted within the preliminary ruling procedure and requested to determine the compatibility of EU acts in question with primary EU law. An *"ultra vires* review" is hence in the end only successful, if the ruling of the CJEU on potential *ultra vires* acts is itself ultra vires constituting a manifest excess of its competences. Consequently, from the perspective of the internal normative logic of the FCC its own doctrine required it to find strong words to establish that the PSPP decisions in question constituted ultra vires acts.

Second, it appears that the PSPP judgment is motivated by the conviction on the part of the Second Senate that the relationship of the FCC with the CJEU shaped by the idea of cooperation lost its balance necessitating a readjustment. Considering the whole context, one gains the impression that the FCC felt overheard by the CJEU. The PSPP judg-

[9] See Stephan Rixen 'Heribert Hirte und die Rechtswissenschaft' (20 January 2021) *Verfassungsblog.*
[10] See the English translation of the judgment <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html>.
[11] Judgment of the Court (Grand Chamber) of 11 December 2018, C-493/17 – *Heinrich Weiss and Others;* ECLI:EU:C:2018:1000.
[12] See e.g. FCC, Order of the Second Senate of 6 July 2010 – 2 BvR 2661/06; FCC, Order of the Second Senate of 30. July 2019 – 2 BvR 1685/14.

ment seems, therefore, to be intended as a moment to enhance the responsiveness of the CJEU to the jurisprudence of the FCC.

Nevertheless, the PSPP judgment ignites a potentially dangerous powerplay between the FCC and the CJEU and the evolution of the further court dialogue between the is to be monitored closely (as is the execution of the PSPP judgment).

One interesting contextual aspect became recently known: Regarding newly appointed judge at the FCC *Astrid Wallrabenstein* the Second Senate of the FCC found on 12 January 2021 upon a mo-tion to exclude her from the proceeding on the execution of the PSPP judgment (see § 35 of the Act on the FCC) that there is a concern of bias in terms of Wallrabenstein's participation in decid-ing upon the execution of the judgment. *Wallrabenstein* – generally considered to be EU-friendly – has shared her (critical) view on the PSPP proceeding in an interview[13] before taking office but after her election to the FCC.[14] The decision to exclude Wallrabenstein has been rendered "with dissenting votes".[15] Yet, the exact voting result has not been made transparent within the decision. What is more, the FCC initially refrained from publishing this decision in spite of its political ex-plosiveness and it became only known after a report by the *Frankfurter Allgemeine Zeitung.* All this suggests a general discomfort of the Second Senate with the exclusion of *Wallrabenstein.*[16] Meanwhile the decision has been published and subjected to close scholarly scrutiny.[17] Many crit-ics raised concerns in terms of double standards if *Wallrabenstein's* statements are compared to those of her colleagues.

III. OTHER CONSTITUTIONAL CASES

1. FCC, Judgment of 19 May 2020 – 1 BvR 2835/17: Basic Law's Global Reach – "Strategic Telecommunication Reconnaissance"

The wave of extraterritorial rights expansion has reached German shores. The FCC could not shy away – by ducking the question of German fundamental rights' territorial scope, a regular strategy applied in the past –, since the impugned provisions authorized the Federal Intelligence Service to surveil telecommunication activities of foreigners *outside* of Germany. The Court's answer could not be more straightforward: as least as their negative dimension is concerned (the duty to respect in human rights parlance), there is nothing in the BL – especially in Art. 1.3 BL ('The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.') – that limits the force of fundamental rights enshrined in the BL territorially. At a single stroke, this clear-cut verdict ended a laborious as well as labored German discourse on whether BL rights could apply extraterritorially at all. The entitlements of the German BL follow all routes of public powers wherever they may be exercised. As the Court only had to decide on the duty to respect, it could easily put international law concerns to rest: *refraining* from extraterritorial activities would not touch upon the jurisdiction of other states. The FCC also took into due consideration the com-mitment of the BL towards universal human rights (Art. 1.2 BL), and especially the jurisprudence of the ECtHR on the extraterritorial application of the ECHR. This ground-breaking judgment left it to future development to work out the details of the BL's global reach – today, the Court already hinted at possible modifications i.a. when assessing the proportionality of state conduct abroad; moreover, other fundamental rights dimensions might be looked at with more restraint by the FCC (particularly obligations to protect).

The provisions in question were declared unconstitutional by the FCC, not only with respect to formal requirements (the legislator did not confirm right restrictions explicitly as called for by Art. 19.1 2nd sent. BL) – the authorization to surveil also disproportionately curtailed Art. 10.1 BL (pri-vacy of telecommunications) and Art. 5.1 2nd sent. BL (freedom of the press). Therefore, the Court committed the legislative branch to deliver a new framework of strategic surveillance, with stricter guidelines for and more thorough control of the intelligence services. As comments to the recently adopted legal reform reveal, it will likely end up in Karlsruhe again. The FCC already referred to this landmark judgment in a decision on a motion to admit constitutional complaints concerning state liability claims in the Kunduz case, which have been rejected by the Supreme Court (Bun-desgerichtshof).[18] This case concerned an order of Colonel Klein to bomb tank trucks near the Kunduz river which led to the death of many civilians. The Court did not admit the complaints in question,[19] it made however clear that German state organs are bound by fundamental rights extra-territorially (para. 31) and hence state liability instruments – being essentially rooted in fundamental rights – extended to such "extraterritorial" constellations in principle.[20]

2. FCC, Judgment of 26 February 2020 – 2 BvR 2347/15 et al. – The Right to Terminate One's Life

Invalidating a recently created criminal offense of commercially assisted suicide, the FCC

[13] Konrad Schuler, 'New Kids in Karlsruhe' (21 June 2020) *Frankfurter Allgemeine Zeitung* (online).
[14] See on the background and broader context Christian Walter and Philip Nedelcu, 'Der Wallrabenstein-Beschluss und die politische Dimension des Verfassungsprozessrechts' (16 February 2021) *Verfassungsblog.*
[15] FCC, Decision of the Second Senate of 12 January 2021 – 2 BvR 2006/15 <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2021/01/rs20210112_2bvr200615.html>.
[16] See Walter/Nedelcu, *supra.*
[17] Ibidem.
[18] Supreme Court, Judgment of 6 October 2016, III ZR 140/15.
[19] FCC, Decision of the Second Senate of 18 November 2020, BvR 477/17.
[20] See Paulina Starski and Leander Beinlich 'Staatshaftung im Lichte der Grundrechte' (21 December 2020) *Verfas-sungsblog.*

recog-nized a (new) right terminate one's life as integral part of the general constitutional right to private life (the latter in *jurisprudence constante* also being judicially generated by reading Art. 2.1 in con-junction with Art. 1.1 BL: *"allgemeines Persönlichkeitsrecht"*). In principle, society and state are to respect the wish to die as a genuine expression of individual autonomy – therefore, the government is precluded from questioning the individual's motive to end one's life; also, the FCC neither lim-ited the right to suicide to adults nor to situations of incurable disease. The right to terminate one's life includes the freedom to seek assistance by third parties, although no one, i.e., medical person-nel, may be coerced to assist in the suicide of another person.

The state is tasked by the constitution – the FCC argues – to find the right balance between respect-ing the expression of autonomy, on the one hand, and meeting the positive obligations to protect the high-ranking right to life (Art. 2.2 1st sent BL) as well as to ensure a sufficient degree of au-tonomy for those willing to commit suicide, on the other (Art. 1.1 2nd sent. BL). While encroach-ments on the autonomy to seek help in suicide face strict judicial scrutiny the legislative bodies are allowed to penalize those forms of assisted suicide that may lead to limitations of the free will – as long as real access to individual assisted suicide is ensured.

Although the FCC recognized the legitimacy of slippery slope prevention the ban of commercially assisted suicide disproportionately denied this access – options abroad do not suffice to realize the right to suicide. The criminal ban not only violated the constitutional rights of those seeking suicide assistance; constitutional complaints by doctors, lawyers, and suicide-assisting organizations suc-ceeded as well. Looking to fill the legal vacuum created by the quashing of the criminal provision, bills upholding certain minimum requirements of assisted suicide – e.g., mandatory counselling; age restrictions – are currently being discussed in the *Bundestag,* the federal house of parliament.

3. Constitutional Court of Thuringia, Judgment of 15 July 2020, VerfGH 2/20; Constitutional Court of Brandenburg, Judgments of 23 October 2020, VfGBbg 9/19 and VfGBbg 55/19 – Compulsory Gender Parity in Parliament Denied, For the Time Being

The movement to achieve more equal gender representation in parliaments initially succeeded in part with the passing of electoral quotas in two East German subfederal political units: Thuringia and Brandenburg, as recent as 2019. However, it failed eventually when the respective 'Länder' constitutional courts declared these quotas unconstitutional as they were seized by opposition par-ties and MPs. In essence, both 'Länder' quotas forced political parties to alternate female and male candidates when filling up their electoral list. According to both courts, the quotas interfered with both the right to free and equal elections of voters and candidates alike (in substance Art. 38.1 BL) as well as the right of political parties to operate and decide on their policy agenda freely, including their right to equal opportunity (Art. 21 BL). They were not persuaded that these restrictions could be justified either by claims to democratic representation (dismissed by a formal understanding of representation at large) or by the constitutionally entrenched obligation to fulfill gender equality (see for a similar demand in federal constitutional law Art. 3.2 BL). Although the constitutional courts invalidated parity provisions of electoral law none locked the doors to constitutional amendment (ThCC, p. 44; VfGBbg 9/19, §§ 86, 169; VfGBbg 55/19, §§ 149, 209). Dissenting opinions added to the Thuringian judgment questioned the intensity of interference by quotas with constitutional interests as presumed by the majority, and correspondingly stressed a wider margin of discretion bestowed upon the legislature when balancing competing interests.

4. FCC, Decision of 14 January 2020, 2 BvR 1333/17 – Religious Garment Ban During Legal Traineeship Upheld

Regulating the attire of state employees has been a constant concern for authorities and likewise triggered a steady stream of lawsuits with constitutional scope, especially in a context of growing religious pluralism. Whereas the FCC's First Senate recently signaled it would apply strict scrutiny on religious garment bans in schools,[21] the ruling of the Second Senate of 2020 concerning a reli-gion-neutral obligation of legal trainees appears to depart from the liberal approach of its judicial twin. The general duty of civil servants to refrain from behavior, including wearing religious gar-ment, that risks to negatively affect trust in the neutral administration of public affairs becomes relevant for legal trainees as they are expected to stand-in for the prosecution and a judge at some point during their training.[22] Being shut out from this opportunity for a legal trainee, who complies with a religious command the obligation of neutrality impinges on her right to free religion. Alt-hough the Senate dismisses judicial impartiality and preservation of religious peace as inadequate to justify a general ban on religious garment in the court room, the Court considers religious neutrality of the state, proper administration of justice, and negative freedom of religion of individuals affect-ed by judicial proceedings to serve as legitimate constitutional goals which may justify restrictions of religious freedom of judicial personnel (Art. 4.1 and 4.2 BL). The Second Senate values the need to establish public trust in judicial proceedings highly, distinguishes schools as pluralist spac-es from court rooms where authority and control are exerted, and in the end does not find a viola-tion of religious

[21] Decision of 27 January 2015, 1 BvR 471/10 – the FCC demanded a sufficiently real and specific risk for legal in-terests, as e.g. school order, for a (local) ban to hold.
[22] Courts emphasize that significant restrictions of this kind require an act of parliament as legal basis, see also Fed-eral Administrative Court, Judgment of 12 November 2020, BVerwG 2 C 5.19.

freedom in this case.[23] The Court supported this result reasoning that the re-strictions at hand concerned only small elements of legal training, and legal trainees were not kept from acquiring their qualification. Nonetheless, in stressing the legislature's margin of discretion which prevents any interests from prevailing *a priori* over the other the FCC kept the door open for other 'Länder' parliaments to assess their local situation differently than the 'Bundesland' Hes-se did for their civil servants.

5. FCC, decision of 13 February 2020, 2 BvR 739/17 – Right to Democracy Delays EU Pa-tent Court

Another cog was added to the wheel of the FCC EU jurisprudence in the context of an EU en-hanced cooperation enabling a new EU unified patent protection – the Court ruled that the *Bundestag,* the federal parliament, did not reach the required absolute two-thirds majority quorum with its (unanimous) vote of only about 40 MPs (see Art. 23.1 3rd sent. in conjunction with Art. 79.2 BL, likening EU-related transferals of power to constitutional amendments). The resolution voted on intended to ratify the international treaty which erects a Patent Court linked to the EU patent reform. The FCC accepted the constitutional complaint against the Bundestag vote by using its jurispru-dence which gives individuals the right (read into the core of the right to free elections, Art. 38.1 BL) to block the transfer of power to transnational entities threatening to strip the German sover-eign of a democratic minimum of self-determination. The Court – with just a narrow 5:3 majority – clarified that this right to democratic self-rule includes the right to challenge decisions exclusively for their formal impropriety (the FCC calls this formal transfer control); moreover, it extended the formal requirements of Art. 23.1 BL, which is reserved for EU-related matters, to international treaties bearing a close relationship with European Union law. As the treaty at hand lays the foun-dation for the creation of a new transnational judicial body that in substance changes the (judicial organization of the) German constitution (with close linkages to EU law) the Bundestag had to reach the threshold of a two-thirds majority – which it rectified in a new vote in November 2020.

IV. LOOKING AHEAD

Covid-19 will keep constitutional actors and discourse on their heels in 2021: interim proceedings will be eventually decided on the merits; courts might scrutinize long-term restrictions more thor-oughly; the (un)equal treatment of vaccinated and non-vaccinated parts of the population will be a pressing issue in search of resolution. Furthermore, after repeated losses in the courts,[24] it will be interesting to see whether and how the gender parity movement tries to build momentum for consti-tutional entrenchment of equal gender representation in parliament. Finally, the FCC is expected to decide charged cases on the EU-Canada trade agreement (CETA), the recognition of so-called child marriages, insufficient climate mitigation measures, strict regulation of housing rent prices, and on the loss of subsidies by political parties whose activities violate the constitutional order.[25]

V. FURTHER READING

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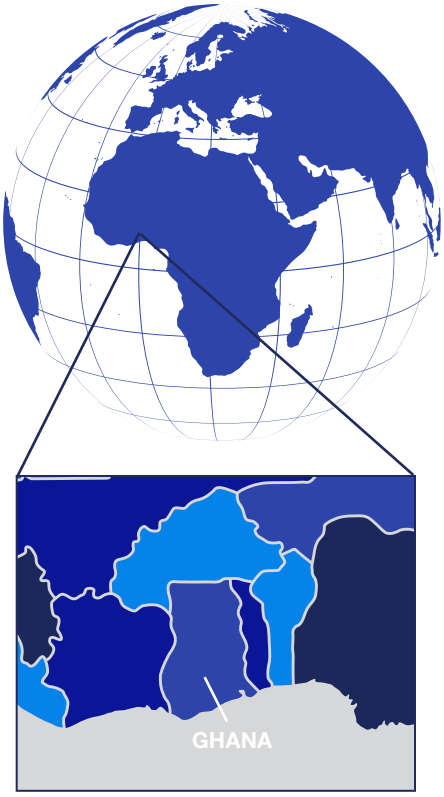
Anne Röthel, ‚Emanzipationsdebatten' (2020) *Juristenzeitung* 645.

Uwe Volkmann, ‚Die Dogmatisierung des Verfassungsrechts' (2020) *Juristenzeitung* 965.

[23] The dissenter Maidowski – without touching upon the wider issue of female judges wearing a veil – offered trans-parency as a solution: as long as the individuals affected as well as the public know the person with judicial func-tions in front of them is a legal trainee abstract notions of neutrality could not justify the trainee's exclusion from important parts of her education.

[24] See also Bavarian Constitutional Court, Decision of 26 March 2018, Vf. 15-VII-16.

[25] See further Annual Report 2020, pp. 90 et seq.



Ghana

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I. INTRODUCTION

2020 saw a number of noteworthy constitutional developments. Some worrying, others reassuring; all worth focused academic reflection. The pandemic opened new constitutional vistas as the government sought legal powers to contain it, sparking discourse on what the 1992 Constitution provides by way of emergency powers and when those powers are triggered. Most of the constitutional developments of 2020 were initiated by executive action, some of which was subjected to judicial review. Generally, the Court sided with the executive. The executive was, by no means, always in the wrong. Given that Ghana is a country with a history of judicial deference to the (overly powerful) executive, it is unsettling when a trend of judicial endorsement of challenged executive action emerges. This development invites introspection. Judicial independence and limited government do not require courts to be instinctively opposed to the executive. But they do not generally anticipate excessive synchrony either. 2020 was a year which provided the Ghanaian academy reason to examine and reflect anew on the judiciary-executive dynamic in a constitutional state. Now that the constitution has been in force long enough for much of the rights abuses of the dictators of the past to have been undone, the Court has lost its strident posture of the early days and rightly so. But what should its posture be now? And why? These are philosophically important questions which 2020 put on the table of the constitutionalism discourse in Ghana.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most frightening of all the constitutional developments of 2020 was the passage of Act 1012. Titled the *Imposition of Restrictions Act* (IRA), Act 1012 was passed shortly after the first cases of COVID-19 were reported in Ghana under a certificate of urgency, ostensibly to equip the president with special powers to combat the pandemic. The academy was vocal about it. Some scholars—myself included—considered the pandemic precisely the sort of eventuality for which the emergency powers contained in article 33 of the Constitution were provided. Other scholars disagreed and insisted that emergency powers are for extremely exceptional circumstances which, unfathomably, they did not consider a global pandemic to amount to. In their view, therefore, a separate Act specific to the circumstance was preferable. The use of the certificate of urgency methodology to pass the Act literally overnight did not go unnoticed. But the uncertainty of what the pandemic held for the Ghanaian populace made most critics hesitant to condemn the hasty manner in which such an impactful legislation was handled.

Moreover, even the supporters of a COVID-specific legislation were disconcerted by the staggering scope of presidential powers created by the Act. The Act allows the president to impose such restrictions on the freedoms of movement, association, and assembly as he thinks necessary on the advice of the "relevant person." Ghana's president now has the power to force citi-

zens to be physically present in, or remove themselves from, any location, and the only protection we have from abusive use of this power is the opinion of the "relevant person." No further particulars are provided as to the criteria for determining who may be treated as "relevant persons" for the purposes of this power. The sheer range of people who could meet such a murky criterion is depressing. The head of Military Intelligence, the President's favorite reality show star and everyone in between qualifies as a "relevant person" as long as the president chooses to think of them as such. Though couched as a clause intended to constrain the unfettered exercise of power, it in fact endorses it.

More worrying still are the grounds on which the president may impose restrictions on these rights under Act 1012. The grounds are public health or safety, national defense, the running of essential services, and to protect Ghanaians against unpatriotic teachings, defined therein for instance as teachings denigrating the flag or national symbols. The connection between COVID-19 and public health is obviously trite. Nonetheless, there remains great potential in that ground to oppress citizens. As the pandemic has shown, a private birthday party can create public health issues. However, under the circumstances the breadth of that ground cannot be helped. Again, citizens must of necessity rely on government to determine national security, so except in extreme cases, it is really up to the government to decide what counts as national defence and what is required to secure it. Essential services are undefined in the Act. Since beaches are proven to be relaxing spaces where citizens can de-stress and improve their mental health, which is especially important during this pandemic, are beachfront resorts essential services? With such protean parameters, there is no end to the sort of tyranny a malicious president could unleash under the aegis of this Act.

The last ground is the worst of them all. How does an unpatriotic teaching of any sort, much less one that denigrates the national flag and symbols, aggravate a pandemic? In any case, what counts as denigrating the flag or symbols of Ghana? Does making eagles look foolish in a cartoon denigrate the coat of arms? What about printing Ghana flags all over disposable diapers? These kinds of legislative provisions are far too reminiscent of the 1960 Constitution (as amended in 1964), and the outcome it wrought then is the only outcome Act 1012 can achieve now: oppression. Such is the nature of unfettered power. Beyond this, it is also arguably unconstitutional. Article 56 prohibits Parliament from enacting a law authorizing a body or person to impose a common program of a religious or political nature upon the citizenry. Patriotism is a political choice, so is un-patriotism. An obligation to not hold unpatriotic beliefs removes the choice a citizen has in how she will view and relate to her country. It follows then that a concerted effort to prevent people from access or subscription to unpatriotic teachings implies an obligation to hold patriotic views, which, by extension, implies a lack of choice in one's political position vis-à-vis Ghana. By necessary implication therefore, an agenda of collective, state-enforced patriotism imposes a common program of a political nature.

Another concern with the Act is that it does not contain a sunset clause. This means that these powers are now permanently part of a Ghanaian president's arsenal. The president need only issue an Executive Instrument (EI) to exercise them, thereby removing these clearly legislative EIs from under parliamentary supervision. Parliament is to be blamed for this, of course. If the House does not consider that such extensive powers require its supervisory effort, the value of its existence is highly questionable and perhaps the Ghanaian taxpayer should be spared the cost.

Act 1012 creates an umbrella criminal offence: the offence of failing to comply with a restriction. It is intended, we are told, to protect us from those who would irresponsibly expose us to the virus by not complying with a restriction imposed under this Act. From the ordinary citizen's seat at the back of the room though, what it seems most likely to achieve is to nip all resistance to executive authority in the bud. This overbroad offence is punished by a steep fine and/or a four- to ten-year custodial sentence, practically deifying the already imperial president.

Unsurprisingly, the EIs issued pursuant to this terrible Act have all been imperious and perturbing. By EI 63, telcommunications providers must now, upon demand, release to executive agents private user data, including data about who a user contacted and when, banking details, and mobile money transaction history. According to the Office of the President, the EI is to facilitate contact tracing. The unprecedented nature of the pandemic makes this explanation plausible. Yet it remains unnerving, and requests for information like bank details from state agents have done nothing to assuage the unease. EI 64 closed Ghana's borders with immediate effect to all human traffic, even citizens abroad. Loud voices from the academy—mine included—denounced the act of keeping citizens locked out as unconstitutional till eventually, government made efforts to repatriate Ghanaians stuck abroad due to the border closure.

Perhaps because Ghana has had relative success in controlling the pandemic, but, perhaps also, because government efforts notwithstanding, the pandemic has not subsided in Ghana, opposition to the Act has died down and these unhealthy powers have quietly but firmly slipped into the long-term arsenal of the executive wing of government. It can only be hoped that future presidents are as benignly disposed as Parliament, despite overwhelming experience and history to the contrary, seems to think Ghanaian presidents are.

III. CONSTITUTIONAL CASES

1. Government of Ghana and KelniGVG v Francis Kwarteng Arthur & MTN Ghana: Right to Privacy

This was the first case to arise under the IRA. The plaintiff challenged the directive to telecommunications providers to hand over his data as violating his constitutional right to privacy. He was joined by telecommunications giant MTN, which, though not his provider, was greatly troubled by requests for mobile money transaction details of their clients from state agents. The Court, disappointingly, but as noted above, under-

standably, did not respond to the invitation to strike down the offending sections of EI 63.

2. Ayine v Attorney -General: Limits of Parliamentary Legislative Power

The President appointed Mr. Martin Amidu to the office of Special Prosecutor, an office he created in fulfillment of a campaign promise to fight corruption. Mr. Amidu was at the time of his appointment 66 years of age, making him six years past the compulsory retirement age for public officers provided in article 199. The plaintiff therefore sought a declaration that Amidu's nomination, approval and subsequent occupation of the office were void. The discussion of constitutional relevance in the case was the issue of the extent of parliament's legislative power. The Supreme Court held, after much unnecessary circumlocution, that Parliament does have the power to make express provision for any matter ungoverned by express provisions of the Constitution provided it did not seek to derogate from it. This is fairly obvious because article 298 expressly says so. One of the plaintiff's more interesting arguments was the claim that the office of the Special Prosecutor is a constitutional office because Parliament's power to create public service offices stems from article 190. While nothing turned on this point, it would have been jurisprudentially beneficial for the court to have considered the relationship between the Constitution and parliamentary acts done under its authority. The plaintiff's belief should have been dispelled. The point in legislative powers is to deploy them in manner consistent with the Constitution for any matter affecting life in the society. This does not render every parliamentary act traceable to a specific clause in the Constitution an act mandated by the Constitution. Similarly, institutions created by Parliament pursuant to a constitutional power are not constitutional offices. They are statutory offices. Constitutional offices are created by the Constitution itself and regulated by Parliament. The plaintiff's confusion might have stemmed from the fact that constitutional bodies like the Commission on Human & Administrative Justice are also regulated by statute. But these bodies are constitutional bodies because they are expressly created by the Constitution itself. It is merely the nitty-gritty of their work and existence that are covered by Parliamentary Acts. The distinction is important because offices like the Special Prosecutor's that are created by Parliament are amenable to repeal by an ordinary Act of Parliament, whereas repeal of those created by the Constitution implicate constitutional amendment. Unless we are clear on this, institutions created for present exigencies will acquire unwarranted longevity and burden the public purse needlessly.

A final comment on that decision regards the Court's statement that a previous Act did a similar thing as the challenged parts of the Special Prosecutor Act, and so if the plaintiff did not find anything wrong with the 1993 Act, it could not see why plaintiff should take objection to the present Act. With the greatest respect, there is no doctrine of constitutional theory that holds one to a position for all time. If the unconstitutionality of a particular act escaped a plaintiff, that does not thereby confer constitutionality on a subsequent similar act. Nor does it preclude the plaintiff from patriotically noticing the error in our collective ways and bringing it to our attention at a later date. Furthermore, there is no statute of limitations on constitutionality. Thus, the longstanding nature of the previous act has no impact on the tenability of a present act. The earlier Act to which the Court referred was passed in the first year of the Constitution's life. Even were acquiescence a means of estoppel in constitutional matters, the fact that the people were emerging from eleven years of brutal dictatorial rule and the Constitution was only a year old at the time should have led the court to conclude that estoppel by acquiescence did not apply here. The Court's posture in this case does not behoove a constitutional enforcer.

3. NDC v. AG & EC: Proof of Citizenship

The academy is still reeling from shock following the Supreme Court's pronouncement that the Ghanaian birth certificate "quite obviously provides no evidence of citizenship." In this case, the plaintiff sought to resist the Electoral Commission's exclusion of the birth certificate from the list of documents accepted to prove citizenship for purposes of voter registration. It is clear from the judgment that Kotey JSC fixated on the absence of a picture on the birth certificate which distracted him from the critical issue of the point in and essence of a birth certificate. The birth certificate is not merely evidence of citizenship, it is the irrebuttable source thereof. A natural born citizen has no other way by which to assert conclusively that she is, not only eligible to be a citizen, but also, in fact, so. The bloodline prerequisite in the Constitution is merely an eligibility criterion. It is the birth certificate that translates eligibility to a right into possession of that right. It is most distressing to hear the Supreme Court devalue and delegitimize the birth certificate in this way. If it is not proof of citizenship, what, then, is it good for? It is hoped that an occasion soon arises for the Court to correct this egregious error.

IV. LOOKING AHEAD

2021 will be an eventful constitutional year. Several election-related cases are pending before the Court. The questions they raise include the strange turn of events by which citizens of Santrokofi Akpafu, Likpe and Lolobi were excluded from the December 7 parliamentary elections in *Margaret Kweku v AG & EC,* and whether dual citizenship amounts to owing allegiance to a country other than Ghana so as to disqualify a person from being an MP in *Ankomah-Nimfa v Quayson & EC.* Most sensational of them all, of course, is the petition challenging the results of the presidential elections by the main opposition party. This case is very embarrassing to the Electoral Commissioner, as the plaintiff is capitalizing on her mistakes in the conduct of the elections to question the results. There is little public sympathy for the new EC however. Her unnecessary rush to be the first EC ever to declare results within 24 hours of voting created preventable errors and confusion. The opposition party's case is not the easiest to follow at this time. But with the petition just filed, we look forward to the petitioner's case unfolding with greater clarity in 2021. It is hoped that this petition will not last as long as the 2013 one which took six months to get to a decision.

V. FURTHER READING

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I. INTRODUCTION

2020 was undoubtedly the year of the pandemic. A wide range of constitutional responses to COVID-19 through measures limiting constitutional liberties marked the year. The financial repercussions of the coronavirus have started to appear. Greece, having experienced the constitutional impact of the financial crisis, will hopefully have the necessary know-how to seek recovery.

A glass ceiling for women was broken when Katerina Sakellaropoulou, the former President of the Council of State, was elected President of the Republic by the Greek Parliament. The President of the Republic has mostly symbolic powers in the context of a parliamentary system.[1] Still, this was a landmark moment for gender equality.

A long-awaited ruling found several former MPs of the neo-Nazi party Golden Dawn guilty of heading a criminal organization and others guilty of participating in it. This brought closure not only to the relatives of their victims but most importantly to all citizens who believe in democratic values. Golden Dawn had already lost all its seats in Parliament in the 2019 general election. Still, as the Constitution seems to rule out the possibility of banning political parties because of their ideology, the question about how to protect democracy from its enemies had become crucial as this organization had gained momentum in the midst of the financial crisis.

The Constitution refers to the prevailing religion of Greece, which is the Greek Orthodox Church. This has been the source of numerous constitutional disputes before the Courts, that are subsequently often brought before the European Court of Human Rights. The constitution dictates that the state bears the responsibility of developing the religious conscience of citizens through education – this has once again led to constitutional litigation.

Although throughout 2020 constitutional debates mainly focused on the fast-track law making procedures used to impose pandemic control measures and the proportionality of such measures, the Courts are still reviewing fiscal measures that are remnants of the financial crisis. The constitutionality of pension reforms is one of the major issues resolved during 2020, and rulings of unconstitutionality with retroactive effect could have immense financial repercussions. How the financial aftermath of COVID-19 will interact with the unfolding effects of the recent financial crisis will play out in the years to come.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As in many liberal democracies, the constitutional discourse in Greece was preoccupied for most of 2020 with the measures dictated by the outbreak of the COVID-19 pandemic. Freedom of movement; freedom of assembly; the right to participate in the economic life of the country; freedom of economic activity; the right to work; freedom of religion, which includes the freedom of exercise of religion through worship, and property rights were severely restricted to protect the general interest and more specifically public health.

The first case was diagnosed on February 26th. On March 10th, with officially 89 cas-

[1] Presidency of the Hellenic Republic, "The President of the Hellenic Republic", https://www.presidency.gr/en/homepage/, (2021)

es and no deaths, all schools and universities across the country were closed. The country went into lockdown. Movie theaters, gyms and courtrooms (with some necessary exceptions to allow the administration of justice) followed. On March 13th, with 190 confirmed cases and one death, malls; cafés; restaurants; bars; beauty parlors; museums and archaeological sites were closed. On March 18th all stores were closed. On March 23rd, with 695 confirmed cases and 17 deaths, a nation-wide restriction of movement was enforced whereby citizens could leave their house only for specific reasons and filling a special form or sending an SMS. Going to work, visiting the doctor and the pharmacy, shopping in supermarkets, attending persons in need, individual exercise, walking pets and attending ceremonies were the only activities allowed. After a period of mild measures during the summer, a second lockdown was imposed in November. Freedom of movement was again restricted, and the special-form or SMS submission system was reactivated, while curfew from 9 pm to 5 am was imposed. Domestic travel was allowed only for specific reasons and non-essential stores were again closed. Wearing a mask in all public places became mandatory and schools were closed.

The legislative route chosen to impose measures to tackle the pandemic in Greece was the use of fast-track law making and not a declaration of a state of emergency. The state of emergency (state of siege) is provided for in the Greek Constitution (article 48) and refers to "war or mobilization owing to external dangers or an imminent threat against national security, as well as in case of an armed coup aiming to overthrow the democratic regime". The route of declaring an official state of emergency was not opted for, because it would require a very precarious on interpretation of "national security", which would have ominous and unnecessary repercussions. The use of fast-track law making by the executive, a well-known path as it had been largely employed during the financial crisis, is based on art. 44 of the Greek Constitution. According to it under extraordinary circumstances of an urgent and unforeseeable need the President of the Republic may, upon the proposal of the Cabinet, issue acts of legislative content. Such acts are submitted to Parliament for ratification within forty days of their issuance or within forty days from the convocation of a parliamentary session. Should such acts not be submitted to Parliament within the above time-limits or if they should not be ratified by Parliament within three months of their submission, they henceforth cease to be in force. This mechanism allows responding to the ever-changing demands of the COVID-19 crisis and has the safety valve of subsequent ratification by Parliament. Although it has been criticized because it evades Parliamentary debate, it is nonetheless a well-suited tool to allow efficient and prompt crisis responses.[2]

The constitutional debate was thus mainly focused on the proportionality of the measures imposed. During the first lockdown, the application of proportionality was fairly straightforward. Although proportionality is an ad hoc test applied on a case by case basis, the stakes and the balancing acts during a total lockdown are quite clear. Things become less clear when some activities are allowed whereas others are banned, which was the case during the second lockdown: proving necessity became much trickier. More so, as the reason for taking more burdensome measures appears to be the failure to implement less restrictive ones. Abidance by burdensome measures that limit constitutional liberties requires either persuasive nudges by the state or heightened policing and imposition of penalties. More policing would most probably convey a police state type of control, burdensome in itself. The most contested measures were those restricting public assemblies and the practice of religious worship. A four-day general ban on public assemblies, including a day when public protests traditionally occur, triggered strong reactions regarding the constitutionality of such total prohibitions. According to the Constitution (Article 11) outdoor assemblies may be prohibited by a reasoned police authority decision, in general if a serious threat to public security is imminent, and in a specific area if a serious disturbance of social and economic life is threatened as specified by law. Government orders to close places of worship were strongly attacked by the strong Greek Orthodox Church- the Holy Synod going as far as issuing statements urging priests to allow indoor worship.

During the second wave of the pandemic, it became necessary to revisit the analysis of the measures taken during the outbreak of COVID-19 to explore whether the same criteria apply months after the first shock. As many citizens seemed to be experiencing pandemic fatigue and were reluctant to follow recommended protective behaviors, the question posed to constitutional scholars is whether such a thing as constitutional fatigue exists. The pandemic crisis came as a shock to constitutions putting them under stress. The second wave however was not an unexpected shock, so perhaps the measures imposed will undergo stricter scrutiny. In total lockdown phases, proportionality is applicable to a number of rights all being simultaneously limited to achieve a specific goal: the protection of public health. During limited lockdown phases, multiple rights are limited in different degrees to achieve a set of goals, including the protection of public health and the protection of the economy. Proportionality must thus be further elaborated to be applied through more perplexing balancing acts. As we get closer to the availability of the vaccines, we will also come closer to more compelling dilemmas, posing the question of whether there be a paradigm change with regard to the ethics of compulsory vaccination.

III. CONSTITUTIONAL CASES

1. The Golden Dawn Case: A political party which was a criminal organization

Not a constitutional case in the sense of constitutional review but still a case of major

[2] Evangelos Venizelos, 'Pandemic, Fundamental Rights and Democracy - The Greek Example' (Dem-Dec, 28 April 2020), https://www.democratic-decay.org/research?rq=venizelos.

constitutional interest, the Golden Dawn case posed severe constitutional questions when a racist and neo-Nazi criminal organization disguised as a political party managed to enter Parliament and become a player in Greek politics. In the 2017 report on Greece, the Golden Dawn trial was featured as a major constitutional story that unfolded very slowly.[3] As is typical for the slow administration of justice in Greece, it is only in the 2020 report that the ruling of the Court can be analyzed. The Golden Dawn criminal trial had to determine whether the neo-Nazi party Golden Dawn falls within the definition of criminal organization in accordance with Article 187 par. 1 of the Greek Criminal Code). The hearing was characterized as the biggest trial of fascists since the prosecution of the Nazis at Nuremberg after the second world war.[4]

A series of criminal offenses before the Court included the murder of an anti-fascist rapper, the assassination attempt on an Egyptian worker and assassination attempts on members of the Greek Communist Party. Among the 69 defendants were 18 members of the Greek Parliament. The Golden Dawn party had managed in the turmoil of the financial crisis to gain 21 seats (out of 300 in Parliament). The Greek Constitution (art. 29) protects the participation of political parties however "organization and activities must serve the free functioning of the democratic political system". The option of banning a political party due to its ideology, even if it does not encompass the principles of liberal democracy was not available according to Greek constitutional tradition. As Yannis Tassopoulos analyses "the accepted meaning of the provision is that the Constitution prohibits any intervention of state authorities in the internal life and organization of political parties, and of course it strictly prohibits the enactment of a special law to dissolve political parties."[5]

The long-awaited ruling of the trial, that had begun in April 2015, occurred in 2020. The court ruled that seven (out of 18) Golden Dawn's former MPs, including the party leader were the heads of a criminal organization. However, most importantly Golden Dawn had lost all its seats in Parliament in the 2019 general election. Its political defeat preceded the Court's ruling, which nonetheless marked a victory for democracy. What remains is the necessity of reflecting on the reality that a criminal organization had managed to become the third largest political party in Greece. The conceptual lens of constitutional law revisiting the dominant interpretation of the constitutional provisions regulating political parties is necessary in order to determine whether other interpretative options, or even a constitutional revision, would shield the democracy from such phenomena.

2. Decision 1439/2020 Council of State (Plenary Session): a pilot judgement on pension cuts

The Council of the State in 2019 had accepted the Main Insurance Fund's petition for a pilot judgment procedure, so that the issues raised by the Council of State decisions that impact a wide circle of persons would be clarified. This judgement would decide the future of litigation in lower court, that as a rule follow the rational of Council of State rulings in the contexts of ad hoc diffused judicial review. Questions were raised by rulings finding aspects of legislation imposing pension cuts unconstitutional. Retroactivity would have an immense impact on the state budget.

Through the pilot judgement procedure, the Council of State issued decision 1439/2020 which was a landmark ruling regarding legal claims for retroactive compensation for pension cuts introduced by previous pension reforms. The 2016 pension reform had kept pensions of incumbent pensioners at the levels effective on 31 December 2014, following the pension cuts implemented in 2012. However, in 2015 the Council of State had declared the 2012 pension cuts unconstitutional from June 2015 onwards. The Council of State decided that pensioners needed to be compensated for the period starting from June 2015 until May 2016, when a new pension reform introduced a new system for future pensioners and a new level for pensioners.

According to the Plenary Session of the Council of State the system established by law 4387/2016 with regard to the continuation of the payment of the main pensions as they had been formed in 2014 with the reductions that had been imposed by laws 4051/2012 and 4093/2012 for the period from the entry into force of law 4387/2016 onwards, do not violate neither the Constitution nor the ECHR. These reductions, following the publication of Law 4387/2016, have as their legal basis provision of article 14 par. 2 para A of the law, and are from this point onwards constitutional.

3. Decision 1992/2020 Council of State (4th Chamber): the constitutionality of COVID 19 traffic regulations

The Council of the State reviewed a ministerial decision imposing traffic restrictions as part of the COVID-19 measures, which in reality were a test for the pilot implementation of an ambitious urban plan. The "Great Walk of Athens", was an urban project that required road configurations. The traffic measures were taken to experiment with regard to the future success of the project. According to the Council of State it was not apparent from the case, nor could it be concluded from common experience, that there was a causal link between the traffic restrictions in force in the area in question and the protection of public health. The delegation provision of the act of

[3] Albert, Richard and Landau, David and Faraguna, Pietro and Drugda, Šimon, "The I·CONnect-Clough Center 2017 Global Review of Constitutional Law", (19 July, 2018) https://ssrn.com/abstract=3215613.

[4] Helena Smith, 'Golden Dawn Guilty Verdicts Celebrated Across Greece', The Guardian, (7 October 2020) https://www.theguardian.com/world/2020/oct/07/golden-dawn-leader-and-ex-mps-found-guilty-in-landmark-trial.

[5] Ioannis A. Tassopoulos, 'An Exercise in "Constitutional Dismemberment"and Constitutional Continuity', Constitutional Change, (1 February 2021) https://www.constitutional-change.com/the-golden-dawn-case-an-exercise-in-constitutional-dismemberment-and-constitutional-continuity/.

legislative content provided authorization to issue ministerial decisions imposing measures to restrict the movement of vehicles, in order to address the risk of coronavirus spread in the area covered by the restriction imposed. The Council of State found that the regulations did not constitute measures aimed to restrict the free movement of persons and means of transport to achieve the aim of urgently preventing overcrowding. Adversely, they were traffic regulations adopted using as a basis the context of dealing with the health crisis in the country. The provisions of the impugned Act of Legislative Content issued on 25.2.2020 imposed measures to deal with the pandemic, taking into account the opinion of the National Committee for the Protection of Public Health against coronavirus COVID-19, based on the scientific data of medical science and addressed the need to take specific measures to tackle the pandemic. This did not allow, however, using it as the opportunity to make arrangements which, although might be considered as helpful to encourage social distancing, were not, dictated by reasons of extreme urgency and, could therefore, be adopted through the normal law-making channels.

It must be noted that the Council of State during the first phase of the pandemic mostly issued decisions of the Interim Measures Committee. These decisions dealt with the general ban of assemblies (Decision 263/2020) and the restrictions imposed on freedom of religious worship (Decisions 99/2020, 60/2020, 49/2020).[6] In these preliminary ruling procedures the Court demonstrated, as expected, self-restraint being very reluctant to intervene in the decisions of the executive aimed to combat the pandemic. The importance of decision 1992/2020 of Council of State lies in providing a preview of what the judiciary would not tolerate even when allowing a very large margin of appreciation to the executive with regard to the proportionality of the pandemic measures. Using the pandemic as a pretext to introduce, through the fast-track legislative procedures, measures that are not directly relevant with the pandemic emergency is a clear line drawn by the Council of State.

4. Decision 492/2020 Council of State (Plenary Session): Mandatory school prayer

The Council of State in Decision 492/2020 (Plenary Session) reviewed a presidential decree of 2017 regulating the organization and operation of schools. The impugned provisions provided for joint morning prayer with teachers and observing worship services on specific holidays. The Church and State relationship in Greece is the source of constant constitutional disputes. Greece is frequently convicted by the European Court of Human Rights for violations of freedom of religion. The Constitution refers to the prevailing religion of Greece, which often leads to dubious interpretations. In 2020, Greece was convicted by the EctHR because birth certificates reveal parents' choice not to christen their child. According to the Court leaving the section concerning the christening blank reveals implicitly the parents' choice not to christen a child. Such information appearing in a public document issued by the State is an interference with the right not to be obliged to manifest religious beliefs.

One of the main sources of constant woes is the interpretation of article 16 of the Greek Constitution, which states that the state is responsible for the "development of religious conscience" in conjunction with the concept of a dominant religion. Accordingly, the Council of State ruled in Decision 492/2020 (Plenary Session) that prayer and church service in the context of the educational process are the necessary means, by which the constitutional purpose of the development of the religious consciousness of the Greeks is served, that is, the cultivation of an orthodox Christian conscience (as is also in school religious education). Therefore, these practices apply only to students who embrace Orthodox Christianity and not to heterodox, non-religious or atheist students. These students enjoy religious freedom, which is guaranteed by article 13 of the Constitution and have thus the right to be exempted from prayer and church services, without any adverse consequences, as long as their parents submit a statement, that they do not wish, for reasons of religious conscience, their children to participate in prayer and church services.

5. Decision 2387/2020 Council of State (4th Bench): mandatory vaccination

In Decision 2387/2020 the Council of State approached the issue of mandatory vaccination as a prerequisite for enrolling to nursery schools and kindergartens. The Council of State ruled that expelling unvaccinated children from kindergartens and kindergartens, in case the parents refuse to vaccinate them, is not unconstitutional. According to the ruling this stems from the state's constitutional mandate to protect public health. It would also be against the principle of equality for a person not to be vaccinated, arguing that they are not at personal risk, as they live in a safe environment due to the fact that other people in their environment have been vaccinated. The parents argued that there were violations of the principle of equality, the right to free development of the personality and participation in the social life of the country, the rule of law guarantees and the principle of proportionality, because the child is "punished" for refusing two of the vaccines provided for in the National Vaccination Program. They claimed that there was a limitation to their kids' participation in social life, which was disproportional, since kindergartens and primary schools are the basic place allowing the socialization and development of infants and young children. The measure was according to them unnecessary, since there wasn't a pandemic outbreak and the other children enrolled in kindergarten had received the prescribed vaccines. They also argued that vaccination may not be mandatory: it can only be a recommended medical procedure.

[6] George Karavokyris, 'The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death' VerfBlog , (14 April 2021), https://verfassungsblog.de/the-coronavirus-crisis-law-in-greece-a-constitutional-matter-of-life-and-death/.

The Council of State stressed that public health is the state's constitutional mandate, under which the State must take the necessary measures to prevent the spread of infectious diseases that pose serious risks to public health. These measures include the vaccination of infants and children, which aims to protect health including public health and the health of individuals, and lead to the gradual elimination of infectious diseases. The Council of State recognized that the measure of vaccination is a serious intervention in the free development of the personality and in the privacy of individuals but found it nonetheless constitutionally permissible, subject to the following conditions: (a) that it is provided for by specific legislation, following the relevant scientific, medical and epidemiological findings and (b) that exceptions are allowed in specific individual cases for medical reasons.

This ruling sets important precedent because COVID19 vaccination will undoubtedly pose complex questions with regard to the balancing of competing rights and interests and the consequences that the refusal to get vaccinated may have.

IV. LOOKING AHEAD

The Constitutional litigation in 2021 is expected to resolve the constitutional controversies stemming from the pandemic. Due to the diffuse, decentralized, ex post system of constitutional review the "pandemic case law" will probably unfold after the pandemic is tamed. Nonetheless, the way the courts will review the limitations imposed on a variety of civil liberties, such as the right to protest and the free exercise of religion will create valuable precedent with regard to crisis response. What has also become apparent is that novel issues will emerge in the aftermath of the pandemic with regard to labour relations, privacy rights and bioethics. Will the right to free movement and the right to work be correlated to vaccination? Will there be a new approach to social rights? Another noteworthy development is that in early 2021 an Olympic gold medalist came forward and testified that she was sexually assaulted in 1998, when she was 21 years old, by a sports official. This triggered a (perhaps long overdue) #MeToo movement. The question is whether this will lead to legislative and institutional changes and if so in which direction.

V. FURTHER READING

Yannis Drossos, *The flight of Icarus. European Legal Responses Resulting from the Financial Crisis.* (Hart Publishing 2020).

George Karavokyris, 'The Coronavirus Crisis-Law in Greece: A (Constitutional) Matter of Life and Death', VerfBlog, (14 April 2021), https://verfassungsblog.de/the-coronavirus-crisis-law-in-greece-a-constitutional-matter-of-life-and-death/.

Ioannis A. Tassopoulos, 'An Exercise in "Constitutional Dismemberment" and Constitutional Continuity', Constitutional Change, (1 February 2021), https://www.constitutional-change.com/the-golden-dawn-case-an-exercise-in-constitutional-dismemberment-and-constitutional-continuity/.

Hong Kong

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I. INTRODUCTION

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 PRC Constitution. The Basic Law provides for Hong Kong's separate systems and high degree of autonomy. This includes the city's Chief Executive (who represents the SAR before the Central Government and heads both the SAR and its executive authorities), its executive authorities (vested with executive power), its legislature (entrusted with legislative power) and its judiciary (which has independent judicial powers including that of final adjudication). The Basic Law also provides that the Central Government is responsible for foreign affairs and defense matters, that the Standing Committee of the NPC (SCNPC) has the power to declare a state of emergency in Hong Kong, and that the SCNPC may interpret the Basic Law. Whilst the NPC may amend the Basic Law, such amendments cannot 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 under the principle of "One Country, Two Systems." In 2020, the PRC and the Hong Kong SAR Governments adopted a series of measures to safeguard national security and ensure the firm control of the SAR in the hands of "patriots." This Report discusses developments in three areas: (1) The Hong Kong National Security Law; (2) The postponement of the 2020 Legislative Council elections and subsequent electoral reforms; and (3) Three major constitutional law cases.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS:

Transformative events took place in 2020 in relation to the constitutional arrangement for Hong Kong. Between May and June 2020, the NPC decided to "establish and improve" the legal system, institutions and enforcement mechanisms in the Hong Kong SAR. This decision aimed at safeguarding national security citing, as the reasons for doing so, the civil unrest in 2019 in Hong Kong, interference of "foreign or external forces" in Hong Kong affairs, and the failure of the Hong Kong SAR to enact national security legislation pursuant to the Basic Law. The SCNPC thereafter enacted the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKNSL), and added it into Annex III to the Basic Law for application in the Hong Kong SAR. The promulgation of the HKNSL by the Chief Executive of the Hong Kong SAR on 30 June 2020 completed the process.

The HKNSL is a national law that overrides any local law that is inconsistent with its provisions.[1] It was drafted partly using the lexicon of law-making in China.[2] It serves the following purposes: (1) Establish general principles and duties for the Hong Kong SAR and its residents in relation to safeguarding national security; (2) Establish institutions of the Hong Kong SAR for safeguarding national security, particularly the Committee

[1] HKNSL, Article 62.

[2] Article 64 of the HKNSL is a glossary provision that translates some of the penal terms used in the HKNSL to specified terms used in the criminal law and criminal procedure legislation of the Hong Kong SAR.

for Safeguarding National Security (CSNS);[3] (3) Establish the Office of the Central People's Government in the Hong Kong SAR for safeguarding national security (CPGNSO);[4] (4) Prescribe criminal offences of secession,[5] subversion,[6] terrorism,[7] and collusion with a foreign country or external elements to endanger national security;[8] and (5) Prescribe the framework for the investigation, prosecution, and punishment of offences in the Hong Kong SAR, as well as the circumstances and framework for the CPGNSO to exercise jurisdiction in the Hong Kong SAR —and upon the exercise of such jurisdiction, the prosecution and adjudication of the relevant case by the PRC procuratorate and court respectively. Article 3 of the HKNSL instructs the executive authorities, legislature, and judiciary of the Hong Kong SAR to "*effectively* prevent, suppress and impose punishment for any act or activity endangering national security" in accordance with applicable laws (emphasis added). Article 8 further requires the law enforcement and judicial authorities of the Hong Kong SAR to "*fully* enforce" (emphasis added) the HKNSL and other applicable laws. Moreover, Article 6 of the HKNSL imposes on everyone in the Hong Kong SAR the duty to abide by the HKNSL and the laws of Hong Kong SAR that safeguard national security. Enforcement of the NSL in Hong Kong is primarily vested in the police force, whose new powers under the HKNSL will be exercised under the supervision of the CSNS.[9] The prosecutions of offences endangering national security are to be done by officers of a specialized division of the Department of Justice, who are appointed by the Secretary for Justice after obtaining the consent of the CSNS.[10] Court proceedings under the HKNSL are to be handled by judges and magistrates designated by the Chief Executive, who may consult the CSNS and the Chief Justice of the Hong Kong Court of Final Appeal (HKCFA) before their designation.[11] The introduction of the HKNSL poses challenges to adjudication of disputes by the Hong Kong courts, as will be considered in the next section.

In addition to the inception of a national security law, Hong Kong also experienced a postponement of a general election. On August 1, 2020, the Chief Executive decided, after consulting the Executive Council, to enact emergency legislation to postpone the general election of the Legislative Council, originally scheduled to take place from September 6, 2020 to September 5, 2021.[12] The purported reason for this move, which has the effect of overriding existing electoral laws and terminating the electioneering that was already underway then, was to control the COVID-19 pandemic.[13]

In the same month, the SCNPC decided that the Sixth Term Legislative Council would "continue to discharge duties" beyond its term for "not less than one year" until the Seventh Term Legislative Council is formed and begins its term of office.[14] Subsequently, in November 2020, at the request of the Chief Executive, the SCNPC decided on the qualification of members of the Legislative Council of the Hong Kong SAR. It prescribed that those members who have conducted themselves in way that could be regarded as endangering national security — such as by advocating or supporting "Hong Kong independence," denying the State's sovereignty over Hong Kong, or seeking interference of a foreign state or outside forces into Hong Kong affairs— would

[3] HKNSL, Chapter II. The CSNS is chaired by the Chief Executive and has a National Security Adviser designated by the Central Government. It is tasked with analyzing and assessing the national security situation of Hong Kong; "making work plans" and formulating policies to protect national security; "advancing the development of the legal system and enforcement mechanisms" of the Hong Kong SAR for protecting national security; and "coordinating major work and significant operations for safeguarding national security" in Hong Kong. Information relating to the CSNS's work is not subject to disclosure. Its decisions are not subject to judicial review (Article 14).

[4] HKNSL, Chapter V. The CPGNSO is staffed with officers of the PRC Public Security Ministry and State Security Ministry and performs the functions of analysis and assessment of the security situation in Hong Kong situation, "providing opinions and making proposals on major strategies and important policies for safeguarding national security"; "overseeing, guiding, coordinating with, and providing support to" the Hong Kong SAR in "the performance of its duties for safeguarding national security"; "collecting and analysing intelligence and information concerning national security"; and "handling cases concerning offence endangering national security in accordance with the law" (Article 49).

[5] HKNSL, Chapter III, Part 1, Articles 20 to 21. Use of or threat of force is not an element of the offence of secession.

[6] HKNSL, Chapter III, Part 2, Articles 22 to 23. The offences include engaging in the following acts "by force or threat of force or other unlawful means with a view to subverting" state power: "seriously interfering in … the performance of duties and functions in accordance with the law" by the authorities of the Hong Kong SAR, or attacking or damaging their premises and facilities, rendering such authorities "incapable of performing [their] normal duties and functions."

[7] HKNSL, Chapter III, Part 3, Articles 24 to 28.

[8] HKNSL, Chapter III, Part 4, Articles 29 to 30. The offences are of two types: (1) spying; and (2) requesting, conspiring with or receiving instructions, control, or support from a foreign or outside element to commit five categories of acts, including rigging elections in the Hong Kong SAR, "which is likely to cause serious consequences", and imposing sanctions or "engaging in other hostile activities" against the Hong Kong SAR or the PRC.

[9] HKNSL, Articles 16, 43. The police force carries out its duties under the HKNSL through a dedicated National Security Department.

[10] HKNSL, Article 18. The head of the specialized division, on the other hand, must be appointed by the Chief Executive of the Hong Kong SAR, who must seek the opinion of the CPGNSO before making the appointment.

[11] HKNSL, Article 44. The designation is for a duration of one year and a designated judge is to be removed from the designation list if he or she "makes any statement or behaves in any manner endangering national security" during his or her term of office.

[12] Emergency (Date of General Election) (Seventh Term of the Legislative Council) Regulation (Cap.241L, Laws of Hong Kong).

[13] Postponement of elections in the name of the COVID-19 pandemic occurred in numerous jurisdictions. A common concern was the impact of such postponements on democratic politics; see *IDEA – Global Overview of Covid-19 Impact on Elections* (18 March 2020 and regularly updated) (at: https://www.idea.int/news-media/multimedia-reports/global-overview-covid-19-impact-elections), last accessed on 25 February 2021.

[14] Decision of the Standing Committee of the National People's Congress on the Continuing Discharge of Duties by the Sixth Term Legislative Council of the Hong Kong Special Administrative Region (Adopted at the Twenty-first Session of the Standing Committee of the Thirteenth National People's Congress on 11 August 2020).

be disqualified from membership after ascertainment according to law.[15] The Hong Kong SAR Government announced on the same day that four members of the continuing Sixth Legislative Council were disqualified from membership. Their nominations for the now terminated elections were deemed to be invalid in July 2020 on grounds that were similar to those prescribed in the November 2020 decision of the SCNPC.[16] This disqualification prompted the resignation of fifteen other members of the legislature, constituting the bulk of the opposition (or pro-democratic) camp.[17]

III. CONSTITUTIONAL CASES

1. HKSAR v. Lai Chee Ying [2020] HKCFA 45, [2021] HKCFA 3: Constitutional review of the HKNSL

Jimmy Lai Chee-ying – owner of a major Chinese language newspaper in Hong Kong – is so far the most prominent person to be prosecuted under the HKNSL.[18] He was refused bail by the Chief Magistrate but obtained bail from a judge of the Court of First Instance on stringent conditions that required him to be confined to his residence and to not engage in hostile activities against the PRC and the Hong Kong SAR. The prosecution challenged the bail decision immediately, and on December 31, 2020, the Appeal Committee of the HKCFA granted leave to appeal on the basis that the judge might have misinterpreted the bail provision of the HKNSL, which states: "No bail shall be granted to a … defendant unless the judge has sufficient grounds for believing that the … defendant will not continue to commit acts endangering national security."[19] The Appeal Committee also ordered that Lai be detained pending the hearing of the appeal, notwithstanding the absence of express statutory power to do so.[20]

The HKCFA heard the appeal on February 1, 2021 and handed down its unanimous judgment on February 9, 2021. The HKCFA affirmed the principle laid down in a previous ruling that the courts of the Hong Kong SAR had no power to engage in constitutional review of any legislative act of the NPC and the SCNPC that "was done in accordance with the provisions of the Basic Law and the procedure therein."[21] Having recited the steps and processes the NPC and the SCNPC took to enact the HKNSL and to apply it to the Hong Kong SAR, the HKCFA proceeded on the footing that these "legislative acts" complied with such provisions and procedure,[22] thereby ruling out review of the HKNSL for compatibility with the fundamental rights guaranteed in the Basic Law.[23]

The HKCFA further held that the bail provision in the HKNSL created a "specific exception" to the legal regime governing the grant and refusal of bail in Hong Kong, requiring a "stringent threshold" of the defendant "not continuing to commit acts endangering national security" to be considered first. Only after the court is satisfied of the existence of sufficient grounds to believe that the defendant will not continue to commit such acts would the court "proceed to consider all other matters relevant to the grant or refusal of bail, applying the presumption in favor of bail."[24] The HKCFA found the lower court to have "misapprehended the nature and effect" of the bail provision set forth in the HKNSL and revoked its decision to grant bail.[25] Lai made a fresh application for bail before another judge of the Court of First Instance, who rejected the application on February 18, 2021 on the basis that the court was not satisfied that there were "sufficient grounds for believing that [Lai] will not continue to commit acts endangering natural security if bail is granted to him."[26]

2. Kwok Wing Hang v. Chief Executive in Council [2020] HKCFA 42: Control of Executive emergency rule-making and ban on facial covering

In this case, the applicants, who were members of the Legislative Council, challenged the constitutionality of the Emergency Regulations Ordinance (ERO) and certain provisions of the Prohibition on Face Covering Regulation (Regulation) made in accordance with that Ordinance. The Regulation was introduced by the Chief Executive in Council in October 2019 to deal with the sustained protests in Hong Kong. The Regulation prohibits the "wearing of facial covering that is likely to prevent identification" in all of the following situations: (1) unlawful assemblies; (2) unauthorized assemblies; as well as (3) authorized assemblies that do not fall

[15] Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region (Adopted at the Twenty-third Session of the Standing Committee of the Thirteenth National People's Congress on 11 November 2020).

[16] Announcement pursuant to the Decision of the Standing Committee of the National People's Congress on Issues Relating to the Qualification of the Members of the Legislative Council of the Hong Kong Special Administrative Region.

[17] 'Hong Kong pro-democracy lawmakers resign after China ruling', *BBC* (12 November 2020) (at: https://www.bbc.com/news/world-asia-china-54899171), last accessed on 22 February 2021.

[18] 'Jimmy Lai: Hong Kong's rebel mogul and pro-democracy voice', *BBC* (23 December 2020) (at: https://www.bbc.com/news/world-asia-china-53718901), last accessed on 23 February 2021.

[19] HKNSL, Article 42.

[20] *HKSAR v Lai Chee Ying* [2020] HKCFA 45.

[21] *Ibid* at [37].

[22] *HKSAR v Lai Chee Ying* [2021] HKCFA 3 at [32], [37].

[23] Cora Chan, 'Can Hong Kong remain a liberal enclave within China? Analysis of the Hong Kong National Security Law' [2021] Public Law (forthcoming).

[24] *HKSAR v Lai Chee Ying* [2021] HKCFA 3 at [52]-[54], [57]-[62], [66]-[68], [70], esp [70(b)], [70(f)].

[25] *Ibid* at [72]-[80], esp [80].

[26] *HKSAR v Lai Chee Ying* [2021] HKCFI 448 at [24].

within the aforementioned two categories. The applicants argued, firstly, that the ERO "impermissibly delegated" general legislative powers to the Chief Executive in Council, contrary to the Basic Law's vesting of legislative power in the Legislative Council.[27] Secondly, they argued that the ban in relation to the second and third categories of assemblies were disproportionate restrictions on the freedom of speech and assembly and the right to privacy, including the freedom to demonstrate anonymously.

The HKCFA upheld the constitutionality of both the ERO and the Regulation. The court stated that the power of the Chief Executive in Council to make emergency regulation and the resulting regulation were "controlled and restrained" by the "internal requirements" of the ERO, "by the courts, by LegCo and by the Basic Law."[28] The court also accepted that the ERO required the "conferring of 'wide and flexible powers' on the executive to deal with emergencies or public dangers of all kinds," matters which were, by nature, "not capable of exhaustive definition, and any definition that may be offered is bound to be general or broad."[29] The court further considered that "there can be no real criticism of the wide scope of regulations that the [Chief Executive in Council] may choose to make since the regulations are, by definition, in response to an emergency or public danger which, by nature, are not capable of specific or exhaustive definition in advance."[30]

Turning to the Regulation, the HKCFA found that the ban in relation to the second and third categories of assemblies were proportionate restrictions to achieve the legitimate aims of deterring and eliminating "the emboldening effect for those who may otherwise, with the advantage of facial covering, to break the law," and the "facilitation of law enforcement, investigation and prosecution."[31] In particular, the court emphasized that the 2019 events showed the fluidity of large demonstrations in Hong Kong: what might start off as peaceful protests might quickly escalate into violent ones. The ban on facial covering even in peaceful protests was therefore proportionate for the deterrent and preventive aims of the Regulation.[32]

The HKCFA was also of the view that the wearing of a facial covering "does not lie at the heart of the right to peaceful assembly." It is possible for people to demonstrate peacefully, even if they were not allowed to wear masks.[33] Taking into account what in the court's view was the grave impact that the ongoing protests have had on societal interest, and the limited extent of the harm to the rights in question, the court found that a fair balance has been struck.[34]

3. Leung Kwok Hung (also known as "Long Hair") v. Commissioner of Correctional Services [2020] HKCFA 37: Prison haircuts

In this case, the applicant, a social activist that often wears long hair, argued that a Standing Order requiring male prisoners but not female prisoners to have their hair cut short violates the Sex Discrimination Ordinance (Chapter 480, Laws of Hong Kong). The HKCFA laid down the following principles for assessing whether there is a direct discrimination on the basis of sex: (1) There must be differential treatment between the complainant and another person; (2) The two persons must share relevant circumstances that are comparable; (3) The complainant is subject to less favorable than that given to the other person; and (4) The differential treatment is on the basis of sex.[35]

The key dispute in this case was whether condition 3 was satisfied, i.e., whether the hair-cutting requirement treated male prisoners "less favorably than" female prisoners. The Commissioner argued that it did not, because that requirement was needed to "foster custodial discipline by imposing reasonable uniformity and conformity among the inmates (both male and female inmates) and reasonable restrictions are set by reference to the respective conventional standards for appearance for male and female inmates."[36] The argument went that the conventional hairstyle for men in Hong Kong was short hair whereas for women was that it could be long or short. Because the requirements on the length of hair treated both men and women according to conventional standards, male inmates had not been treated less favorably.[37]

The HKCFA ruled for the applicant.[38] It ruled that the Commissioner failed to show how the differential treatment in the hair length "has any reasonable connection with custodial discipline."[39] Even if the court accepted the argument that individuality had to be de-emphasized for custodial discipline, the government had not explained why

[27] *Kwok Wing Hang & Ors v Chief Executive in Council* [2020] HKCFA 42, s B.3.
[28] *Ibid* at [49].
[29] *Ibid* at [47], [50]-[51].
[30] *Ibid* at [52].
[31] See *ibid* at [102] for the purported aims.
[32] *Ibid* at [121]-[126].
[33] *Ibid* at [134].
[34] *Ibid* at [144]-[146].
[35] *Leung Kwok Hung (also known as "Long Hair") v Commissioner of Correctional Services* [2020] HKCFA 37 at [15].
[36] *Ibid* at [43].
[37] *Ibid* at [46].
[38] The HKCFA's judgment was produced by Chief Justice Geoffrey Ma, with whom the other members of the court agreed. This judgment was the last judgment that the Chief Justice wrote for the court before his retirement in January 2021.
[39] *Leung Kwok Hung (also known as "Long Hair") v Commissioner of Correctional Services* [2020] HKCFA 37 at [49].

female prisoners, but not male prisoners, could be given individual choice.[40] Also, the Commissioner had not shown that the conventional hairstyle for men in Hong Kong was short hair.[41]

Subsequently, the Commissioner sought to implement the CFA judgment by requiring female prisoners to have their hair cut short too.[42]

IV. LOOKING AHEAD

Elections for the Legislative Council and the Chief Executive Election Committee are expected to be held in 2021. The Central Authorities have mooted reforming the electoral system before then, with the aim of excluding from the electoral process those who are not "patriotic."[43] Also, the courts will begin to adjudicate cases prosecuted under the HKNSL in 2021, in addition to handling the ongoing adjudication of cases relating to the 2019 civil unrest. The results of these cases will be watched closely by the Central Authorities, politicians in Hong Kong, and the international community. Further, reforms to guarantee loyalty or instill patriotism in relation to politicians, the civil service, and the school curriculum are expected to continue.[44] Last but not least, the Chief Executive of the Hong Kong SAR will be able to appoint one permanent judge to the HKCFA.

V. FURTHER READING

Cora Chan and Fiona de Londras (eds.), *China's National Security: Endangering Hong Kong's Rule of Law?* (Hart 2020).

Michael C Davis, *Making Hong Kong China: The Rollback of Human Rights and the Rule of Law* (Association of Asian Studies, 2020).

Hualing Fu and Xiaobo Zhai, 'Two Paradigms of Emergency Power: Hong Kong's Liberal Order Meeting Authoritarian State' (2020) 50 HKLJ 489.

Carole Petersen, 'The Disappearing Firewall: International Consequences of Beijing's Decision to Impose a National Security Law and Operate National Security Institutions in Hong Kong' (2020) 50 HKLJ 633.

Eva Pils, 'The Hong Kong National Security Law: Challenging Constitutionalism in Hong Kong and Abroad', *Intl. Const. L. Blog.* Feb. 23, 2021, at: http://www.iconnectblog.com/2021/02/the-hong-kong-national-security-law-challenging-constitutionalism-in-hong-kong-and-abroad/.

[40] *Ibid* at [49].

[41] *Ibid* at [51]-[53].

[42] Ng Kang-chung, Chris Lau and Christy Leung, 'Hong Kong prisons start trimming female inmates' tresses just past shoulders after court ruling on sex discrimination', *South China Morning Post* (13 February 2021) (at: https://www.scmp.com/news/hong-kong/law-and-crime/article/3121579/hong-kong-prisons-start-trimming-female-inmates), last accessed on 23 February 2021. The CFA's judgment attracted some criticism. A former member of the HKCFA, who helped shape the anti-discrimination jurisprudence of the court in 1999, criticised the judgment, see Henry Litton, 'Do Judges Run Prisons?', *HKU Legal Scholarship Blog* (8 December 2020) (at: https://researchblog.law.hku.hk/2020/12/do-judges-run-prisons-henry-litton.html), last accessed on 23 February 2021.

[43] Jeffie Lam, Natalie Wong and Gary Cheung, 'Top Beijing official overseeing Hong Kong declares "patriots" must hold key roles in city's executive, judiciary, legislature and statutory bodies', *South China Morning Post* (22 February 2021) (at: https://www.scmp.com/news/hong-kong/politics/article/3122606/top-beijing-official-overseeing-hong-kong-declares-patriots), last accessed on 23 February 2021.

[44] Civil servants are now required to take a loyalty oath or sign an undertaking of loyalty, with disciplinary consequences for breach. The subject of liberal studies in secondary schools is to be replaced with an alternative that includes modules covering the PRC Constitution, the Basic Law and the HKNSL. Draft legislation will be introduced to require all District Councilors to take a loyalty oath.

India

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I. INTRODUCTION

India in 2020 grappled with the impact of the Covid-19 pandemic as well as extraordinary public protests surrounding amendments to several Indian laws, including a controversial change that excludes Muslims from an expedited citizenship process for illegal immigrants, as well as transformations to laws governing the sale of agricultural products in India.

The Supreme Court of India was called on to intervene repeatedly in legal proceedings relating to these protests, and in relation to a violent political riot in the capital city of Delhi in early 2020, which resulted in multiple deaths. Judicial interventions ranged from challenges on hate speech and civil liberties, to determining the grant of orders of bail to detained persons detained as part of the protests, and the constitutionality of protests.

During the Covid-19 pandemic, the Court also heard cases concerning the state of migrant laborers, the availability of medication and services, and challenges to the expansion of executive powers in the wake of nation-wide lockdowns. A series of cases concerning legislative powers and executive rule-making powers also established precedent for deeper judicial review of constitutional authorities, and in a challenge brought by military officers, the Court directed the Government of India to grant women equal rights to military commissions.

As in the last few years, 2020 was also defined by constitutional cases that were not heard by the Supreme Court; significant challenges to constitutional amendments, religious rights, and legislation governing electoral funding remained undecided for another year.

Finally, the conviction of a lawyer for contempt of court after he criticized the Chief Justice and the Supreme Court, against the recommendations of the Attorney-General, resulted in a nominal fine of Rs. 1, but has broader implications for freedom of speech and expression.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In January 2020, protests across India continued against a controversial amendment to India's Citizenship Act of 1955. The Citizenship Amendment Act of 2020 provides an expedited route for illegal migrants belonging to specified religions, with the exclusion of Islam, to gain Indian citizenship and formally came into effect in 2020.[1] The Supreme Court agreed to hear a group of over 140 petitions challenging the law, and in January 2020, ruled that it would not grant a temporary stay on the implementation of the Act while the case was being heard.[2] Concomitant with this, the Government of India also announced it would be taking steps to complete a 'National Register of Citizens,' (NRC) a court-monitored process

[1] "The Citizenship Amendment Act 2019", http://164.100.47.4/BillsTexts/LSBillTexts/PassedBothHouses/citizenship-47%20of%2019.pdf, (accessed March 1, 2021)

[2] IUML, Kunhalikutty, and others v Union of India", Writ Petition (Civil) 1470 of 2019 [Order dated 22 January 2020] Supreme Court of India <https://main.sci.gov.in/supremecourt/2019/44931/44931_2019_1_4_19796_Order_22-Jan-2020.pdf> (accessed 1 March 2021).

that began in 2003, by the Indian Supreme Court amidst concerns about illegal migration into India.[3] The NRC lists citizens who have sufficiently proved their status as legal, potentially disenfranchising and rendering stateless millions of others through a process before specialized courts. This process has been criticized for shifting the burden of proof onto citizens, improperly considering evidence, targeting religious minorities, and discriminating against citizens who were impoverished and illiterate and consequently might lack documentation.[4]

In April 2020, the Supreme Court ordered a conditional release of persons rendered stateless by this process and detained in detention camps, as a result of the ongoing Covid-19 pandemic in India, in a petition that it had taken up *suo motu* concerning prison conditions during the pandemic.[5] While ongoing challenges to the NRC process are still pending at the Supreme Court, during 2020 the Court prohibited the state from transferring the children to detention camps until the citizenship investigation was complete.[6]

The Supreme Court has since not taken up cases concerning the NRC or Citizenship Amendment Act for hearing in 2020, but in a decision concerning civil liberties, held that widespread protests against this law were subject to significant restrictions by the state, including barring protests in public areas.[7] Similarly, while a pending challenge to the alteration of the state of Jammu and Kashmir's semi-autonomous constitutional status has not been heard since 2019, the Court ruled that an indefinite internet lockdown in the State was subject to constitutional limitations.[8]

In early 2020, the capital of Delhi was the site of deep political violence and riots, which attacks being targeted on religious minorities, students, and protestors who had gathered to object to the citizenship law amendments.[9] The detention of individuals, often religious minorities who were victims of political violence, under anti-terrorism legislation, was appealed on several occasions to the Supreme Court of India, however, the grant of bail by the Supreme Court has been criticized for being inconsistently applied, and the Chief Justice in 2020 stated that they were attempting, through this jurisprudence, to discourage citizens from filing petitions to enforce fundamental rights.[10] Such criticism has since been in the shadow of the law of contempt of court, with the Supreme Court finding in 2020 that a lawyer who criticized the Chief Justice for violating lockdown prohibitions to ride a motorcycle and the Supreme Court for failing, in his view, to protect democracy was guilty of contempt of court. The offence can attract both jail time and a fine; when the lawyer refused to apologize for his statements despite repeated requests from the Court to do so, he was fined a nominal amount of Rs.1 and released.[11]

While the focus of the Court's jurisprudence this year has centered around civil liberties and criminal law, the Supreme Court has also passed a series of decisions concerning the power of legislatures and the government. In an unprecedented order, the Supreme Court prohibited an elected representative from entering a state legislature and ordered his removal as a minister from the state executive cabinet, holding that the legislature's Speaker had delayed a decision on the representative's disqualification for too long.[12] Invoking their plenary powers to "do complete justice" under the Constitution, the Court also asked the Parliament of India to consider amending the Constitution and transfer powers of disqualification away from the Speaker to an alternative mechanism.[13] An ongoing conflict between the Government of India and the Supreme Court concerning appointments to regulatory tribunals continued, with the Court again rejecting the Government's revised appointment rules for being inconsistent with their previous directions.[14] Finally, a slew of decisions by the Supreme

[3] Government of India, "Ministry of Home Affairs, Citizenship (Registration of Citizens and Issue of National Identity Cards) Rules (2003)", rule 4 <https://censusindia.gov.in/2011-Act&Rules/notifications/citizenship_rules2003.pdf>; Sarbananda Sonowal v Union of India [2007] 1 SCC 174 ; V. Venkatesan, 'The NRC Case: The Supreme Court's Role' (Frontline, 11 October 2019) <https://frontline.thehindu.com/cover-story/article29498707.ece> (accessed March 1, 2021).

[4] *See* Talha Abdul Rahman, 'Identifying the "Outsider": An Assessment of Foreigner Tribunals in the Indian State of Assam' [2020] 2 Statelessness & Citizenship Review 112; Kai Schultz, "As India Clamps Down on Migration, Millions May Lose Citizenship". The New York Times, (July 30, 2018) <https://www.nytimes.com/2018/07/30/world/asia/india-citizenship-assam-muslim.html> (accessed March 1, 2021)

[5] "In Re Contagion of Covid-19 Virus in Prisons", Suo Motu Writ Petition [Civil] 1 of 2020, Supreme Court of India, (Order dated April 23, 2020), <https://main.sci.gov.in/supremecourt/2020/9761/9761_2020_31_17_21596_Order_13-Apr-2020.pdf>, (accessed March 1, 2021)

[6] *Assam Public Works v Union of India and others* [2020] 2 SCC 741

[7] *Amit Sahni v Commissioner of Police and others* [2020] 10 SCC 439

[8] *Anuradha Bhasin v Union of India* [2020] 3 SCC 637

[9] Suhasini Raj et al, 'The Roots of the Delhi Riots: A Fiery Speech and an Ultimatum' (*The New York Times*, 26 February 2020) <https://www.nytimes.com/2020/02/26/world/asia/delhi-riots-kapil-mishra.html> accessed 1 March 2021; Hannah Ellis-Peterson, 'Inside Delhi: Beaten, Lynched, and Burned Alive' (*The Guardian,* 1 March 2020) <https://www.theguardian.com/world/2020/mar/01/india-delhi-after-hindu-mob-riot-religious-hatred-nationalists> (accessed 1 March 2021)

[10] Radhika Roy, 'We Are Trying To Discourage Article 32 Petitions: Supreme Court Issues Notice To UP Govt. On Plea For Release Of Journalist Siddique Kappan' (*Live Law,* 16 November 2020) <https://www.livelaw.in/top-stories/supreme-court-issues-notice-to-up-govton-plea-for-release-of-journalist-siddique-kappan-165915> (accessed 1 March 2021); Divya Trivedi, 'Supreme Court's contrasting views on petitions under Article 32 raise the hackles of experts' (*Frontline*, 18 December 2020) <https://frontline.thehindu.com/the-nation/article-32-and-the-supreme-court-contrasting-views-on-it-raises-legal-experts-hackles/article33213187.ece> (accessed 1 March 2021)

[11] "In Re Prashant Bhushan Contempt Matter" [2021] 1 SCC 745, (decided on August 14, 2020)

[12] "Keisham Meghachandra Singh v. Speaker", Manipur Legislative Assembly, SCC Online 617, (2020)

[13] *Id.*

[14] "Madras Bar Association v Union of India", SCC Online 962, (2020)

Court concerned measures taken during the Covid-19 pandemic, ranging from the administration of courts in online hearings, to the denial of relief to migrant laborers rendered unemployed by the lockdown. The Supreme Court has leaned towards deference to the executive on managing the Covid-19 response, while High Courts played a more active role in enforcing socio-economic rights during the lockdown.[15]

III. CONSTITUTIONAL CASES

1. Anuradha Bhasin v Union of India[16]*:* proportionality, judicial review, access to internet

The Supreme Court ruled that the complete and indefinite suspension of telephone and internet services in the territory of Jammu and Kashmir was unlawful. Applying the principle of proportionality, the Court ruled that drastic restrictions on freedom of speech and expression could only be implemented if they were 'necessary' and 'unavoidable', and no other less intrusive remedy was available. In the absence of information on all applicable orders concerning the suspension of phone and internet services, the Court chose not to review them itself, but directed the state to undertake such a review, and act accordingly. The Court admitted that a complete prohibition on freedom of speech could be constitutionally valid on occasion, but would have to be justified by reasoned orders. In a subsequent decision, the Court reproached the Government of India for continuing to prevent the Court from accessing orders authorizing internet and communication shutdowns, and directed the constitution of a committee to review all such orders.[17]

2. Kantaru Rajeevaru v Indian Young Lawyers Association and others[18] - right to practice religion, anti-discrimination,

In 2018, the Indian Supreme Court ruled that restrictions on women's access to the publicly-managed Sabarimala Temple were unlawful, amid widespread political and public conflict about the issue.[19] Multiple petitions were filed seeking review of this judgment, and in November 2019, five Supreme Court judges ruled by a majority of 3:2 that the question of whether a review could be heard should be decided by a larger bench of seven judges[20], in order to determine whether similar questions of access to worship within Islam and Zoroastrianism could be heard simultaneously. The Court accordingly framed a series of questions for determination, including issues of the scope of restrictions on religious rights and the jurisdiction of the court to examine issues of religious practices, and referred the matter for reconsideration by a larger bench.[21] In 2020, the Court constituted a bench of nine judges to rule authoritatively on this matter; however, the Court's ultimate ruling did not address the specific question of maintainability raised in the reference. Instead, the 2020 ruling established that the rules governing maintainability of review petitions do not apply to cases concerning the enforcement of fundamental rights, and held that scope of such review petitions could be expanded to hear cases that were not part of the original case being reviewed, including fresh petitions that raised new issues of law and fact.[22] While the review petitions are yet to be heard in substance, this order has implications for the finality of Supreme Court judgments.

3. Chief Information Commissioner v High Court of Gujarat[23] - access to information, transparency

In this case, the Supreme Court prohibited access to Court records under India's transparency law, the Right to Information Act 2005, ruling that the Gujarat High Court was free to determine how, when, and which information it would disclose to the public concerning cases that it has determined. While judgments are ordinarily published, pleadings are not – the Supreme Court held that such pleadings fall under the category of 'personal information' held in trust by the Court, even if the case is heard in open court, and consequently barred their disclosure under the Right to Information Act. The judgment consequently has implications for transparency and access to public information, which has been recognized by the Supreme Court as an aspect of the protections afforded to freedom of speech and expression.[24]

4. Secretary, Ministry of Defence v Babita Puniya[25]*, Union of India v Lt. Annie Nagaraja*[26]- national security, anti-discrimination, public employment

In two judgments, the Supreme Court held that female officers were entitled to permanent military commissions on equal terms as

[15] Gautam Bhatia, "India's Executive Response to Covid-19", The Regulatory Review, (May 5, 2020) <https://www.theregreview.org/2020/05/04/bhatia-indias-executive-response-covid-19/> (accessed March 1, 2021"; Mihir Desai, "Covid-19 and the Indian Supreme Court", Bloomberg Quint, (May 28, 2020) <https://www.bloombergquint.com/coronavirus-outbreak/covid-19-and-the-indian-supreme-court> (accessed March 1, 2021)

[16] 3 SCC 637, (2020)

[17] "Foundation for Media Professionals v Union of India and others", 3 SCC 637, 2020

[18] 3 SCC 52, (2020)

[19] "Indian Young Lawyers' Association v State of Kerala", 11 SCC 1 (decided on 28 September 2018), (2019)

[20] The Indian Supreme Court does not sit *en banc,* but ordinarily in benches of two and three; constitutional interpretation must be done by a bench of at least five judges, and larger benches may overrule smaller benches. Constitution of India 1950, art 145(3); Nick Robinson et al, 'Interpreting the Constitution: Supreme Court Constitution Benches since Independence' 46(9) Economic and Political Weekly (2011) 27

[21] "Kantaru Rajeevaru v Indian Young Lawyers' Association", 2 SCC 1, (2020)

[22] *Kantaru Rajeevaru v Indian Young Lawyers' Association* [2020] 3 SCC 52 (decided on 14 November 2019)

[23] 4 SCC 702, (2020)

[24] *See* Prashant Reddy, "Ruling against judicial transparency", The Hindu, (March 12, 2020) <https://www.thehindu.com/opinion/op-ed/ruling-against-judicial-transparency/article31043522.ece> (accessed 1 March 2021); "S.P. Gupta v Union of India", AIR SC 149, (1982)

[25] 7 SCC 469, (2020)

[26] 13 SCC 1, (2020)

male officers. In *Babita Puniya*'s case, the Court heard several petitions that sought enforcement of a Delhi High Court by which the Government of India was compelled to consider women in the Indian Army for permanent commissions in a manner similar to their male counterparts, and not confine them to short-service commissions, as was the existing norm. The Supreme Court rejected the Government of India's arguments against the enforcement of this order, and in particular, the Government of India's claim that the grant of maternity leave to women constituted a special benefit that was not given to men, and consequently justified discriminatory treatment. Holding that stereotypical characterisations of women as incapable of performing military functions did not constitute sufficient grounds for discrimination, nor were they warranted as an implication of national security, the Court directed the Government to comply with orders to consider women for permanent commissions. In *Lt. Annie Nagaraj*'s case, the Court passed similar directions with respect to women serving in the Indian Navy.

5. Amit Sahni v Commissioner of Police[27] - freedom of speech and expression, freedom of association

The Supreme Court ruled in *Amit Sahni*'s case that ongoing public protests concerning India's new Citizenship Amendment Act were subject to restrictions by the State. The Supreme Court heard petitions challenging the protesters' occupation of public spaces and roads, and initially attempted to 'mediate' with the protestors on behalf of the Government of India, before determining the legal issue concerning freedom of speech and express, and the right to association. When attempts to mediate were unsuccessful, the Court ruled that the right to public protest was subject to reasonable restrictions on location, duration, and size of protest groups, by the state. The bench held that while "Democracy and dissent go hand in hand, but then the demonstrations expressing dissent have to be in designated places alone."[28] A group of review petitions filed against this case were rejected.[29]

6. Prithvi Raj Chauhan v Union of India[30]

In 2018, the Supreme Court diluted provisions of the Scheduled Castes/Scheduled Tribes (Prevention of Atrocities) Act, 2018, a legislation aimed at penalizing crimes committed against persons subject to historic and ongoing caste-based discrimination in India, imposing conditions on arrests made under the Act to prevent ostensible misuse of the Act.[31] A review of the this case partially reversed the Court's order[32], and in 2019, the Parliament of India introduced an amendment specifically aimed at removing these judicial restrictions[33], and in *Prithvi Raj Chouhan*'s case, the Court found this amendment to be constitutional. The Court reiterated its finding in the review that that restrictions previously imposed by the Court could not be justified on the assumption that the law would be misused and that a statutory bar on anticipatory bail when a initial case of offences under the Act was made out, was lawful.[34] The validity of legislative overruling of Supreme Court decisions was not specifically considered, but the Court through this case effectively overruling its previous decision to uphold the amendment. In a concurring opinion, Justice R. Bhat held that the failure to enforce provisions of the legislation to secure against caste discrimination would vitiate constitutional prohibitions on such discrimination, as well as violating the constitutional principle of 'fraternity'.[35]

7. State of Punjab v Davinder Singh[36]*; Pravakar Mallick v State of Orissa*[37] - affirmative action; constitutional interpretation

The Supreme Court in *Davinder Singh*'s case called for a re-examination of previous decisions that treat historically-disadvantaged tribes and castes as a homogenous group for the purpose of affirmative action policies by the government. These policies, usually taking the form of reservations in public employment, were held to apply uniformly to all persons identified under Constitutional provisions as eligible for affirmative action, in a 2005 Supreme Court decision for all constitutionally-recognised tribes and castes.[38] In 2018, the 102nd Constitution (Amendment) Act inserted Article 324A in the Indian Constitution, which gave constitutional status to a statutory commission charged with evaluating whether groups not falling within constitutionally-recognised scheduled castes and tribes, i.e. 'other backward classes' could also be eligible for such affirmative action, and permitted sub-classification amongst them to establish eligibility. In *Davinder Singh*, the Court referred these issues to a larger bench for authoritative decision, noting that there was a potential conflict between the 102nd Amendment and existing constitutional provisions that might prohibit such sub-classification to exclude access

[27] 10 SCC 439, (2020)

[28] 10 SCC 439, para 17, (2020)

[29] "Kaniz Fatima v Commissioner of Police", Review Petition [Civil] 24552/2020 (Order dated February 9, 2021), Supreme Court of India <https://main.sci.gov.in/supremecourt/2020/24552/24552_2020_9_1003_26002_Order_09-Feb-2021.pdf> (accessed March 1, 2021)

[30] 4 SCC 727 (2020)

[31] "Subhash Kashinath Mahajan v State of Maharashtra and others", 6 SCC 454, (2018)

[32] "Union of India v State of Maharashtra", 4 SCC 761, (2020)

[33] Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act 2019

[34] 4 SCC 727, para 4, 10, (2020)

[35] 4 SCC 727, para 17, 24, (2020)

[36] 8 SCC 1, (2020)

[37] 15 SCC 297, (2020)

[38] "E.V. Chinnaiah v State of Andhra Pradesh", 1 SCC 394, (2005)

to affirmative action. The Court in this case has flagged constitutional questions that relate to the identification of discrimination in intersectional categories covering caste and class, as well as whether affirmative action is granted on the basis of membership in historically-disadvantaged groups or other considerations. In doing so, the Court has questioned much pre-existing jurisprudence on the issue of affirmative action. While this reference is pending, the Court in *Pravakar Mallick*'s case held that in affirmative action on promotions in government employment, the State is not obliged to provide reservations, and if it does so, must utilize quantitative data to demonstrate the need for affirmative action, in terms of the economic and other disadvantages faced by the beneficiaries of the policy, as well as the lack of actual representation in public employment.

8. Internet and Mobile Association of India v Reserve Bank of India[39]

In 2018, the Reserve Bank of India, India's central bank, issued a circular, directing banks and other financial entities that it regulates to refrain from dealing in any virtual (crypto) currencies, and to deny banking services to persons dealing in virtual currencies. The circular was challenged initially by an industry association of entities engaged in online services in India, and later by other persons, including shareholders, promoters, and private persons engaged in dealing in virtual currencies.[40] The Supreme Court held that while the RBI had the statutory right to regulate virtual currencies, this circular failed the test of proportionality, and constituted an unreasonable restriction on the right to occupation and profession protected under article 19(1)(g) of the Indian Constitution.[41] In doing so, the Court found that the RBI had not been able to establish that need for this regulation in proportion to the degree of harm caused to the petitioners by the prohibition on trading. The Court rejected the claims raised by private persons engaged in dealing in cryptocurrencies for non-professional ends, holding that the rights under Article 19(1)(g) did not extend to protecting 'hobbies', nor could they be invoked by corporate entities, but allowed the petition on behalf of shareholders and promoters who argued that their rights had been breached by the RBI.[42]

IV. LOOKING AHEAD

In several decisions over 2020, the Supreme Court of India has referred complex questions of constitutional law to larger benches, opening questions about the binding nature of previous decisions, as well as challenging the finality of decisions altogether by disregarding limits on its powers of review. From decisions in 2020, we anticipate authoritative determinations on the scope of judicial review in questions of religious practices as well as the classification of constitutionally-recognised categories of persons claiming affirmative action benefits.[43] In addition to these, there are pending cases on key constitutional issues from previous years that remain undecided, including challenges to amendments in India's Citizenship Acts, the validity of the national biometric card identity scheme, 'Aadhar', the validity of a scheme allowing the anonymization of electoral funding through purchasing bonds, questions about the powers of federal and state authorities in the capital territory of Delhi, amendments to India's transparency and anti-terror legislations, and a challenge to the removal of the semi-autonomous status of the state of Jammu and Kashmir.[44]

V. FURTHER READING

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5. Talha Abdul Rahman, 'Identifying the "Outsider": An Assessment of Foreigner Tribunals in the Indian State of Assam' (2020) 2 Statelessness & Citizenship Review 112

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[42] 10 S.C.C 274, para 196-199, (2020)

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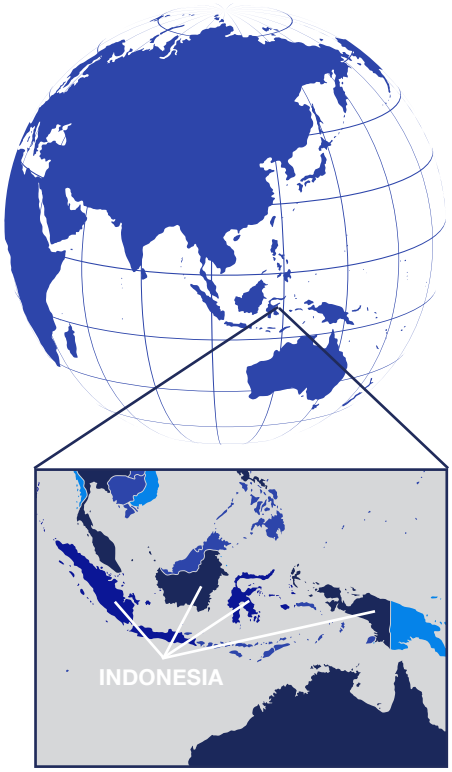

Indonesia

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I. INTRODUCTION

This report aims to offer a quick overview of Indonesian constitutional politics for comparative legal/political scholars who are interested in Indonesian constitutional development. The dynamics of the Indonesian Constitutional Court will not only become the focus on this report but also it is reviewing the constitutional politics from within the context of Jokowi administration policy in handling the COVID-19 pandemic and the administration's attempt to subvert the constitution during the pandemic.

When Anwar Usman was sworn in as the sixth Chief Justice of the Indonesian Constitutional Court on April 2, 2018, we predicted that he would never finish his term. Usman was appointed as the Associate Justice in 2011, and he was re-appointed in 2016, which means that his second five-year term will finish in April 2021. Considering that the term of Usman's appointment does not match with the term of his chief justiceship, he will never complete his term as the Chief Justice. Nevertheless, history has moved in a different direction with the amendment of the Constitutional Court Law in 2020, which extended the term of appointment from five to fifteen years. Interestingly, the new term will be applied retroactively, which means that the current Chief and Associate Justices will resume a new term of fifteen years instead of the old five-year term.

Under these circumstances, Anwar Usman might become the longest Chief Justice of the Constitutional Court. While his predecessors only enjoyed a short-term limit, he will stay on the bench for a much longer-term. Under Usman's tenure, the Court has retreated further into a deferential and non-interventionist approach. The rise of Anwar Usman is coinciding with the consolidation of executive power under the Jokowi administration. During the Covid-19 pandemic, the Jokowi administration has shown early warning signs of reversing liberal democratic values. Through the Emergency Regulation and the Omnibus Bill on Job Creation, the Jokowi administration has subverted the minimum sets of checks and balances between the elected branches of government. But this sweeping of power remains uncontested partly because the Constitutional Court has not been able to play a role in balancing executive power.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

There are several major constitutional developments in Indonesia in 2020. Like many other countries across the globe, Indonesia has been dealing with the coronavirus pandemic, hugely impacted the Indonesian constitutional system. On March 31, 2020, Indonesian President Joko Widodo, commonly known as Jokowi, issued Government Regulation in lieu of Law of the Republic of Indonesia No. 1 of 2020 on the National Finance and Financial System Stability Policy for Handling Corona Virus Disease 2019 (COVID-19) Pandemic and/or in Order to Face Threats that Endanger the National Economy and/or Financial System Stability ("the Emergency Regulation No. 1 of 2020").

There are two major provisions of the Emergency Regulation that are problematic. First, it provides that changes to the National State Budget during the COVID-19 response period or threats to the national economy in the future (until the end of 2022) can be carried

out by Presidential Regulation. On its face, this provision seems to violate the Constitution, which states that the President shall submit the bill on the State Budget for joint consideration with the House of Representatives (DPR), whose consideration, in turn, shall take into account the opinions of the Regional Representative Council (DPD). Secondly, the Emergency Regulation provides immunity to government officials to not be held liable civilly and criminally. The Emergency Regulation also exempts government officials from administrative liability.

The Constitutional Court eventually reviewed the emergency regulation, but the petitioners made a tactical mistake that ended up in the dismissal of the case. By the time the Court opened the hearing, the Emergency Regulation No. 1 of 2020 has been ratified by the House into a statute. In other words, the case is moot as the object of review no longer exists. The Constitution provides that the President shall have the right to establish government regulations in lieu of laws during the emergency period, but such government regulations must obtain the House's approval during its next session. The House moved quickly to ratify the Law, despite the fact that the Law curtails their authority to discuss the state budget with the President. Thus, the claimants made a tactical mistake by challenging the Emergency Regulation instead of waiting for the House to ratify the Emergency Regulation into a statute.

The second major constitutional development in Indonesia is enacting the so-called Omnibus Law on Job Creation (*Undang Undang Cipta Kerja*) to strengthen executive power. The administration initially submitted a draft Omnibus Law on Job Creation to the House in February. The bill's proponent says that it aims to boost economic growth by simplifying 79 laws that are believed to hamper business. Nevertheless, the bill gives sweeping powers to the President, with no sunset clause. During the pandemic, the members of the governing coalition in the House were pushing hard to pass the bill, as they wanted to seize an opportunity to pass it during the Covid-19 outbreak, which effectively quashes the possibility of massive street protests.

On November 2, 2020, President Jokowi officially signed the Omnibus Law on Job Creation into law. While its proponents claim that it is meant to bolster Indonesia's economy by reducing regulations, bureaucracy and corruption it may wind up contributing to a worrying trend of abusive constitutionalism in Indonesia. The notion of the omnibus law itself is a manifestation of constitutional borrowing, and Indonesian lawmakers did not shy from acknowledging that they borrow the concept from the United States. In the United States, omnibus bills, at the most basic level, is a budget measure and policy changes were originally a tool for lawmakers to bundle many proposals together in one place. But the practice has gotten out of control, with omnibus bills now encompassing so many issues that can span hundreds or even thousands of pages. Moreover, lawmakers often do not even know what is in an omnibus bill before they are asked to vote on it. Apparently, Indonesian lawmakers borrowed the notion of omnibus law as part of their political strategy to pass controversial provisions by wrapping them into a large bill of nearly 12,000 pages that not everybody knows the content of detail.

The Omnibus Law of Job Creation is also a manifestation of abusive constitutionalism, in which the Jokowi administration made an informal constitutional change at the sub-constitutional level. One of the success stories on Indonesian Constitutional reform in the late 90s and early 2000s was decentralization, which has bolstered public involvement at the regional level and empowered local politicians. Nevertheless, the Omnibus Law on Job Creation would likely reverse decentralization by reducing many local and regional officials' authority and shifting more political power to the Central Government.

The third major constitutional development is the amendment of the Constitutional Court Law, which was rushed through eight days of deliberation. The newly amended law increases the term of Justices from 5 to 15 years and allows Constitutional Court judges to hold office until the age of 70. This development can be seen as positive because the previous law did not guarantee tenure stability for judges, with a single five-year term. Nevertheless, many political activists posited the amendment is a "bribe" to sitting judges, who in return may offer favorable decisions to the President in anticipated contentious litigation against President Jokowi's ambitious projects. By the time of the writing of this report, there are several pending cases in the Constitutional Court concerning the constitutionality of the Omnibus Law of Job Creation.

Nobody knows the hidden agenda behind the amendment of the Constitutional Court Law. While there are positive aspects, this is uncharted territory in Indonesian judicial politics. The Court under the leadership of Anwar Usman, has retreated further into a non-interventionist approach. This report presented a trend of how the Court has frequently dismissed cases on the ground of standing and abandons its own precedent on loose standing. In sum, Anwar Usman has solidified its judicial approach by making strong deference to the executive and legislative branches through the application of strict standing. Under the newly amend-

[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

ed Law, it is not outlandish to envision the Anwar Usman Court will last for the next decade. The new Law might also give him breathtaking power to circumvent democratic progress in Indonesia by employing his strict deferential approach to the executive and legislature.

III. CONSTITUTIONAL CASES

1. The *Health Quarantine Law I* case (Decision No. 34/PUU-XVIII/2020)

The crux of the matter, in this case, is the interpretation of the term "person" in the Health Quarantine Law No. 6 of 2018. The issue arose out of the Jokowi Administration's decision to issue Large Scale Social Restriction (*Pembatasan Sosial Berskala Besar* – PSBB) aimed at limiting the spread of COVID-19. The Health Quarantine Law provides a measure of regional quarantine (*Karantina Wilayah*) in response to a major public health crisis. The Law prescribes that regional quarantine measures mean border restrictions in specific areas, and the Central Government must provide basic necessities for the people who live in areas under quarantine. Instead of imposing regional quarantines, the Jokowi administration chose to adopt the Large Scale-Social Restrictions as an implementation of the Health Quarantine Law, which restricts the movement of people and goods within a control zone but has stopped short of allowing regional administrations to close their borders. Moreover, the Large Scale-Social Restrictions did not impose a mandate for the Central Government to provide citizens' basic necessities within a control zone.

The Petitioners posited that the central government did not apply the Regional Quarantine due to its fear that the government would have to take on the burden of providing basic necessities such as food and medicine for millions of its residents nationwide, as mandated in Article 55 (1) of the Health Quarantine Law. Therefore, the petitioners ask the Court to interpret the term "person" in the challenged provision as "poor people" so that the central government must provide basic necessities for the poor people who live in the area under the quarantines.

The Court rejected the petition on the ground of standing. The Court held that the petitioners, who are individual lawyers, could not specify the injury they suffered through the Large-Scale Social Restriction (PSBB) implementation. The Court dismissed the petitioners' claim that they suffered immediate harm caused by the Large-Scale Social Restriction on the grounds that they were unable to use air transportation following the trial in Jakarta. Moreover, the Court also dismissed the petitioner's argument that they have standing as taxpayers. The Court reaffirmed its position that it has abandoned its own precedent that citizens can invoke taxpayer standing under the First-generation Court and has moved to limit taxpayer standing only to cases related to the state's financial affairs.

2. The *Health Quarantine Law II* case (Decision No. 36/PUU-XVIII/ 2020)

The case was related to the shortage of protective health equipment for medical personnel treating COVID-19 patients. Many medical workers, doctors, and nurses have been working overtime to treat COVID-19 without adequate protection, and some have fallen victim to it. The petitioners were an NGO and some medical personnel who demanded the government ensures more protection for medical personnel, health care workers, and health care facility employees in handling infectious disease outbreaks and health quarantine situations.

First, the petitioners argued there is no clarity of legal protection for health care personnel in dealing with the COVID-19 outbreaks. The petitioners posited that Law No. 4 of 1984 on Infectious Disease Outbreaks merely states, "for the medical personnel who involved in the containment of infectious decease, they can be rewarded for their dedication and risk that they endure in fulfilling their duties." The petitioners asked the Court to declare the provision to be interpreted as medical personnel "must be" rewarded for their dedication in fulfilling their duties.

Secondly, the petitioners asked the Court to interpret the constitutionality of article 6 of the Health Quarantine Law No. 6 of 2018, which states, "the Central and Regional Government have a responsibility to ensure the availability of resources in managing health quarantine process." The petitioners urged the Court to interpret the provision as a mandate for the government to provide resources, including protective health equipment and speedy testing equipment and facilities.

The Court considers the petitioners' demand that government "must" guarantee a reward for medical workers as baseless because the government has issued various regulations in the framework of providing rewards in different forms such as incentive packages, death benefits, or the Five Star Service Award. The Court held further that the petition involved the implementation of the norm instead of a constitutional provision. Furthermore, the Court considered that Parliament is conducting comprehensive reform on the Law concerning the Infectious Decease Outbreak, and therefore, it is a duty of Parliament to change the Law instead of the Court. Concerning the second demand for the Court to issue a mandate for the government to provide protective health equipment, the Court considered that the Health Quarantine Law has stipulated that the government has duties to provide financial resources in handling the pandemic, which includes protective health equipment and to finance research and technology in managing

[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 pandemic. The Court then rejected the petition entirely.

Three Justices issued dissenting opinions: Justice Aswanto, Justice Suhartoyo, and Justice Saldi Isra for the following reasons. First, the Constitution states, "the State shall have an obligation to provide sufficient medical and public service facilities (art 34 section 3). Moreover, the Constitution guarantees that every citizen shall have the right to obtain medical care (art 28H section 1). Therefore, the government has a duty to support medical personnel. Second, the dissents rebutted the Court's majority argument that the medical personnel have received incentive package and death benefits. The dissents argued that the government should go the extra mile in supporting and honoring the medical workers during the pandemic. In other words, the government must provide extra incentives compatible with the risk taken by medical workers in combating the outbreak. Third, the dissents argued that protecting public health in a general sense is insufficient without the States' obligation, especially in the time of the pandemic. Fourth, the dissents argued that Law No. 4 of 1984 on Infectious Disease Outbreaks has been outdated, as it was enacted 36 years before. Therefore, the Law is inadequate in dealing with the outbreak like Covid 19. Moreover, the Law was not framed within the context of the fulfillment of the right of healthcare and the govenrment's obligation to provide medical service because the Law was enacted long before the Constitutional reform that guarantees those rights. Moreover, the Law is not compatible with the International Covenant on Economic, Social and Cultural Rights (ICESCR), which the Indonesian Government has ratified in 2006.

In sum, the dissenters concurred with the petitioner that Law No. 4 of 1984 shall be declared unconstitutional unless construed as the medical personnel "must be" rewarded for their dedication to fulfilling their duties.

3. The *Water Resources Law III* case (Decision No. 73/PUU-XVIII/2020)

The petitioners, in this case, some members of the Union of Electrical Industry. They challenged the constitutionality of the Water Resources Law provision that stipulates the imposition of Water Surface Tax (*Pajak Permukaan Air - PPA*) and Water Resources Management Service Fees (*Biaya Jasa Pengelolaan Sumber Daya Air* - BJPSDA). The petitioners argued that those provisions could cause them to lose their jobs and livelihood because they are working in the Hydroelectric Power Plant (Pembangkit Listrik Tenaga Air – PLTA), which would no longer operate due to the imposition of the PPA and BJPSDA.

The Court rejected the petition on the ground of standing, that the petitioners cannot show any causation between the imposition of the Water Surface Tax and Water Resources Management Services Fees with the potential injury that the Petitioners will suffer. This decision reaffirmed the Anwar Usman's Court departure on the previous Court's decision on standing. In the earlier cases related to the Water Resources Law, the petitioner in the *Water Resources Law I* case were some NGOs chiefly led by the Legal Aid Institute Foundation (YLBHI). In the *Water Resources Law I*I case, the petitioner was an Islamic NGO, Muhammadiyah. But the Court never rejected those earlier cases for standing and the Court acknowledged those NGOs have standing as public advocacy groups. The Court under the leadership of Anwar Usman, however, has decided to abandon its own precedent on a loose standing approach and imposed a strict standing approach.

4. *The Deputy Minister II* case (Decision No. 80/PUU-XVII/2019)

The claimants are an NGO called the Forum of Law and Constitutional Studies (*Forum Kajian Hukum dan Konstitusi*) and a student activist. The claimants questioned the constitutionality of the deputy ministerial position appointed by the President under Law No. 39 of 2008 on State Ministries. According to the claimants, the Constitution only recognizes the position of a Minister in the Presidential cabinet, under which the Constitution states, "the President shall be assisted by Ministers of State." The case was closely related to the Court's decision in the *Deputy Minister I* case, in which the Court under the leadership of Chief Justice Muhammad Mahfud decided to strike down the elucidation of Article 10 of the State Ministry Law, which defined deputy ministers as career bureaucrats. The Mahfud Court held that deputy ministers were not members of the cabinet. The Court considered that Article 10 would cause legal complications because there was no clarity to the term of "deputy minister." The Court expressed concern that a deputy minister could stay in their position indefinitely as a career bureaucrat even though the President and their cabinet ministers had finished their term in office. Nevertheless, the Mahfud Court never explicitly struck down the position of the Deputy Minister itself. Thus, the Jokowi administration continued to appoint deputy ministers; three deputy ministers in its first term and twelve deputy ministers in the second. The claimants further argued that there are still many uncertainties with respect to the deputy minister's position in the Presidential cabinet. For instance, there is a prohibition for the cabinet minister to not hold concurrent positions in State-Owned enterprises or Private Companies. Nevertheless, the rule does not apply to the deputy ministers.

The Court considered that the case has merit, especially concerning the deputy minister position to hold concurrent positions in State-Owned Enterprises. The Court then wrote dicta that the deputy minister's appointment by the president signified that the deputy minister has a status as a member of cabinet minister. Therefore, the prohibition to hold concurrent positions shall also be applied to the deputy minister. Such prohibition is necessary so that the deputy minister can focus on their job.

Nevertheless, the Court ruled that the claimants have no standing to bring the case. The Court considered that it has not found any evidence that the claimants suffered any immediate harm caused by the appointment of the Deputy Minister. Therefore, the Court rejected the petition on the grounds of lack of standing. Again, this decision signalled a significant departure from the Court's previous approach. In the *Deputy Minister I* case, the claimants were the activists from the National Movement of the Eradication of Corruption (*Gerakan Nasional Pemberantasan*

Tindak Pidana Korupsi), but at that time the Court ruled that the claimants had standing to bring the case

5. The *Deputy Minister III* case (Decision No. 76/PUU-XVIII/2020)

In this case, a different claimant filed a judicial review of the constitutionality of status of the Deputy Minister. The claimant is a private attorney who asked the Court to review the provision in the State Ministry Law, which states that "Ministers are prohibited from holding concurrent positions." The crux of the matter is the provision does not apply to the Deputy Minister; while the Court already issued a dicta in the *Deputy Minister II* case, the claimant dismissed the case on the grounds of lack of standing. The claimant argued that as the Court only issued dicta, the legislators can easily ignore it.

Again, the Court dismissed the case on the ground of lack of standing. The Court ruled that the claimant cannot describe any concrete injury that he suffered. The Court considered that the claimant only alleged harm caused by implementing the Court's dicta in the *Deputy Minister II* case. But the claimant did not specify any concrete injury or injury in that caused by the provision that prohibits the Deputy Minister to hold concurrent positions.

6. The *Parliamentary Threshold VI* case (Decision No. 48/PUU-XVIII/2020)

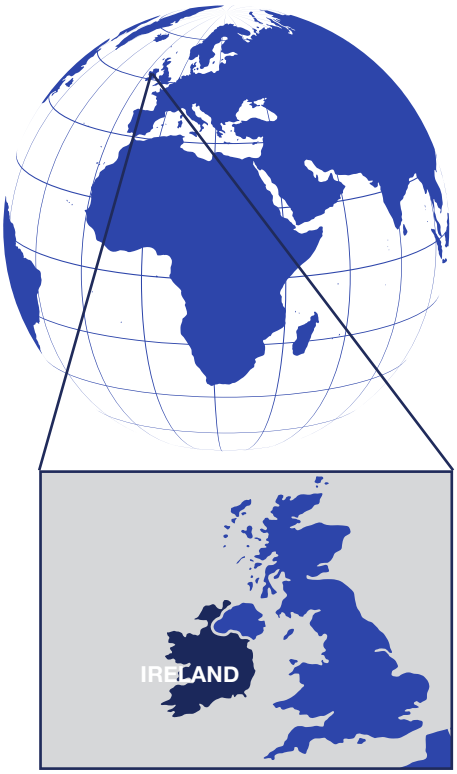
In this case, the petitioner challenged the constitutionality of article 414 of the General Election Law No. 7 of 2017, which states, "political parties must at least secure 4 % votes from the valid national votes in order to be counted to have parliamentary seats." The claimants posited that Parliament has been changing the parliamentary threshold in the last decade, from 2.5% (2008) to 3.5% (2012) and finally 4% (2017). Parliament argued that the parliamentary threshold is aimed to simplify and reduce the number of political parties in Indonesia. But the number of political parties in Parliament in the last three elections is still quite high: with approximately 10 political parties in each election. The claimant asked the Court to strike down the parliamentary threshold provision and interpret the provision as "political parties participating in the election must fulfill the threshold for vote acquisition is determined based on rational, mathematical calculations and is carried out openly, honestly and fairly following the principles of a proportional electoral system."

Again, in this case, the Court dismissed the case on the ground of lack of standing. The Court, however, did not investigate details of the standing requirement but rather it addressed the question of who has the right to represent an NGO before the Court. The claimant is an NGO called *Perkumpulan Untuk Pemilu dan Demokrasi* (the Association for Elections and Democracy – Perludem). The Court opined that it is the General Chairperson with one of the directors or the General Secretary that can represent the institution. Nevertheless, the Court found that it was the Treasurer and the under Secretary that represents the NGOs. Therefore, the Court ruled that the petitioner lacked standing to bring the case before the Court. Like in many cases in this calendar year, the Court merely considers the case on legal technical grounds, which is the standing requirement. Nevertheless, in this case, the Court did not really consider the five-prong standing test, instead, it was looking into the question of power of attorney and who has the right to represent an NGO.

IV. LOOKING AHEAD

Some constitutional controversies are waiting ahead in the coming year. First, the revision of the General Election Law is still hanging in the balance. The proposal to revise the Election Law, enacted only three years ago in 2017, has divided political factions at the House. The central debate over the revision of the law revolves around whether Indonesia should hold all regional elections simultaneously in 2024, as stipulated in the 2017 Election Law, or move some of them to 2022 or 2023.

The second controversial agenda for Parliament to discuss in the coming year is the revision of the Information and Electronic Transaction Law, especially several provisions that are often considered "rubber provisions" prone to a broad interpretation. Many activists and politicians have been charged with these provisions, and there is a big question mark as to what extent the Jokowi administration and the Parliament are willing to review these provisions.



Ireland

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I. INTRODUCTION

As with elsewhere, the year in constitutional law in Ireland was dominated by issues arising from the COVID-19 pandemic.

The equivocal outcome to the February general election in which three parties ended up with similar levels of seats and no clear path to a coalition arrangement had originally seemed likely to occupy much of the attention in 2020. That was particularly so given the relative success of Sinn Fein – a party which in its current incarnation had never held office in the Republic of Ireland but which forms part of government in Northern Ireland – which achieved the second highest number of seats.

The lack of a clear result meant that the pre-election Government still occupied office on a caretaker basis (as the Constitution requires) when the public health situation deteriorated. A national lockdown was announced by the incumbent Taoiseach (Prime Minister) in March. This response to the pandemic quickly became the dominant political issue with government ultimately not being formed until June. This was so even though the lack of a new government over an extended period of time created constitutional difficulties for the passage of legislation by the *Oireachtas* (parliament).

Following the formation of a new government in June, Covid-19 measures were gradually eased over the summer before being reintroduced to varying degrees in the second half of the year. A number of constitutional challenges to aspects of the measures were initiated in this later part of the year while public controversies also arose about individuals or events which were perceived not to have complied with public health requirements. Such controversies were complicated somewhat by the fact that what was advised by public health *guidance* was not always identical to what was required by Covid-related *laws*.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Covid-19 restrictions

In response to the deteriorating public health situation in Europe, a series of legislative measures were enacted by the Oireachtas in March 2020. On March 24th citizens were asked to stay at home from midnight March 28th until April 12th. This advice was given legal effect on April 8th with the introduction by the Minister of a statutory instrument restricting persons from leaving their residence without reasonable excuse; and restricting various events and activities. These restrictions were extended by further Ministerial order until May 2020.

The primary legal response to the Covid-19 situation was the passage by the Oireachtas in March of two pieces of legislation, The Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020, and the Emergency Measures in the Public Interest (Covid-19) Act 2020.

These variously provided for the conferral of powers on the Minister for Health to introduce Covid-19-related restrictions on travel, assembly and other activities; social welfare legislation to provide for Covid-19 related changes to sick pay and jobseeker payments; and amendments to various statutory regimes affected by the pandemic, including a three-month freeze on rents and evictions, the payment of wage subsidies to employees

of affected industries, suspension of certain redundancy rules in employment law, and changes to the time limits, appeal mechanisms and requirements to attend in person which previously applied under the planning, mental health and civil registration systems.

The sittings to pass the legislation were attended by 30% of members. This was arranged on a voluntary basis by parliamentarians in order to ensure compliance with public health advice on social distancing. Members attended in proportion to the representation of each political party. The legislation was passed without a formal vote and was signed into law by the President almost immediately following a request from the Seanad that he waive the usual five-day delay prior to promulgation.

Following the passage of this legislation, the majority of public health measures were introduced by Ministerial order. A complication in Ireland's response during this period was that the Seanad, for constitutional reasons discussed in *Bacik v An Taoiseach* (below) did not sit for several months. This had the significance practical effect that the Houses of the Oireachtas were unable to pass primary legislation from 29 March 2020 until 27 June 2020.

While the legislation was stated by the Oireachtas to be enacted in response to a public health emergency, it is important to note that there is a distinction in Irish law between the constitutional and statutory use of the term "emergency". Article 28. 3. 3 of the Constitution provides a formal mechanism for the suspension of certain aspects of the constitution during a period in respect of which the Houses of the Oireachtas have passed a resolution that a "national emergency" exists. However, this Article is confined to situations of "war or armed conflict" and so did not apply here. There are precedents in Irish law for referring in legislation to a perceived "emergency"[1]. However, this does not have any formal constitutional effects.

The legislation also included a sunset clause under which the powers of the Minister to introduce restrictions would cease to have effect on 9 November 2020 unless extended by a resolution of both the Houses of the Oireachtas. The Irish Council for Civil Liberties had called for the inclusion of such a clause in March when reports had circulated that emergency legislation was under consideration. In October, the powers were extended by resolution of the Houses of the Oireachtas until 9 June 2021.

The constitutionality of both the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 and the Emergency Measures in the Public Interest (Covid-19) Act 2020 were the subject of judicial review proceedings in *O'Doherty v Minister for Health*.[2] The High Court refused leave to bring the proceedings on the basis that the applicants had identified "no factual basis nor any supportive expert opinion" to ground their application.

Constitutional challenges were also brought to various measures introduced by the Minister during 2020. In addition to the *Ryanair v An Taoiseach* case discussed in more detail below, at least three other sets of proceedings were initiated – one challenging the restrictions placed on hospitality venues,[3] one challenging the restrictions placed on places of religious worship,[4] and one concerning the alleged restrictions on game shooting.[5] None had been heard before the end of 2020.

Judicial discipline

One of the major developments highlighted in the 2019 was the enactment of the Judicial Council Act 2019. Noting that this had been long called for after several controversies the report observed that one of its most "most significant innovations [in Irish terms] is the establishment of a complaint and sanctioning mechanism for the judiciary". This followed from the fact that the sole sanctioning power previously provided for was the removal of a judge from office by a vote of the the Houses of the Oireachtas. Irish law did not provide for a mechanism of dealing with complaints or concerns about judges that would not necessarily merit their removal from office; or for any body with responsibility or power to set or establish guidelines for judicial conduct in office.

This had (as covered in the 2019 report) led to a number of controversies in previous decades. These had been resolved in an essentially ad hoc manner. The difficulties of this approach were underlined in 2020 when questions emerged over the attendance of a newly appointed Supreme Court judge at an Oireachtas golf club dinner. Critically, this occurred when (as remains the case) the relevant sections of the Judicial Council Act 2019 had not yet been commenced.

The event in question too place on August 20th, two days after the government had announced new restrictions on gatherings which limited indoor events to 6 people with exceptions for religious services, weddings and businesses such as shops and restaurants. Religious services and weddings were permitted to have 50 people.

It was reported that approximately 80 people had attended the dinner on August 20th. One of these was a recently appointed Supreme Court judge, Mr. Justice Woulfe. Several other attendees resigned, including a Government Minister and an EU Commissioner As the controversy developed, the Taoiseach (Prime Minister) stated on August 24th that his view was that the judge should not have attended at the event but that this was a matter for "the judiciary themselves … to look at". He expressed concerns from the perspective of the separation of powers and judicial independence about a "slippery slope" of governments and parliaments becoming "embroiled in judicial issues".

[1] See, for example, the Financial Emergency Measures in the Public Interest Act 2009.

[2] [2020] IEHC 209.

[3] *Press Up Ltd v Minister for Health* 2020/6859 P.

[4] *Ganley v Minister for Health* 2020/825 JR.

[5] *Flannery v Commissioner of an Garda Siochána* 2020/826 JR.

The Chief Justice subsequently announced that an inquiry would be led by the former Chief Justice, Ms. Justice Denham, into the attendance of the judge at the event. A similar approach had been adopted to a previous controversy in the early 2000s.

The report by former Chief Justice Denham, concluded that "Mr. Justice Woulfe did nothing involving impropriety such as would justify calls for his resignation from office. Such a step would be unjust and disproportionate" and stated that it would be open to the Chief Justice to deal with the matter by way of informal resolution.

However, further controversy arose when a transcript of the reviewer's interview with Mr. Justice Woulfe was published. At the same time, it was reported that meetings were to take place as part of the informal resolution process referred to in the conclusions of Ms. Justice Denham's review. It was later reported that Mr. Justice Woulfe had requested the deferral of a number of the scheduled meetings for medical reasons. Four meetings were postponed.

The Chief Justice then released a statement that:

> The Chief Justice has indicated his very serious concern as to the damage which the continuation of this process is causing. The Chief Justice has made it clear that, should the meeting not go ahead as scheduled on Thursday, he will make alternative arrangements to convey his final views on the process to Mr Justice Woulfe.

The meeting referred to took place. On November 10th, the Chief Justice released a portion of the correspondence exchanged between him and Mr. Justice Woulfe in this period. In terms of how such issues had been dealt with previously in constitutional history, this was unprecedented.

The correspondence published included a final letter from the Chief Justice in which he noted that he had no powers under the Constitution or legislation to impose any formal sanction on a member of the judiciary but stated that Mr. Justice Woulfe would not be listed to sit as a judge until February 2021. He also suggested that he should make arrangements to waive or repay his salary for this period.

The letter went on to express the view that:

> "The manner in which you have met this problem has, in my view, added very substantially to the damage caused to the Court, the judiciary generally and thus to the administration of justice. In that context I would remind you of a telephone conversation on the evening of August 21st in which I informed you of my considerable concern that damage was being caused to the judiciary and that the public view was being formed by reasonable people and not by a media frenzy. The concentration on narrow and technical issues rather than recognising the serious public concern and the consequent damage to the Court has only added to the seriousness of the situation.
>
> Unfortunately, further serious issues now arise out of both aspects of the transcripts of your interview with Ms. Justice Denham and elements of the correspondence between us since the delivery of her report.
>
> That account appeared to show that you did not appreciate the genuine public concern about the event and your attendance at it, but rather continued to put the controversy down to a media frenzy. Indeed, your statement that you did not understand what you were apologising for at the time when you issued your limited apology would now significantly devalue any further apology. There would be legitimate public scepticism about the genuineness of any such apology."

The letter stated that it was the "unanimous view" of the members of the Court "that the cumulative effect of all of these matters has been to cause a very significant and irreparable damage both to the Court and to the relationship within the Court which is essential to the proper functioning of a collegiate court" and expressed his "personal opinion" that the judge should resign.

A reply from Mr. Justice Woulfe was also published in which he apologised for any adverse effect on the judiciary "however unintended"; expressed his determination to work and co-operate with the Court to remedy the matter insofar as possible; took issue with a number of the statements made in the correspondence regarding the compliance of the event with public health guidance; indicate that he had "thought very deeply" about the implications of a resignation in the situation for the independence of individual judges; and had "come to the conclusion that I should not resign".

As the extracts above demonstrate, the incident highlighted the inadequacies of Ireland's traditionally *ad hoc* system in balancing judicial independence with judicial accountability. Ms. Justice Denham's report highlighted the problem posed by the absence of clear guidelines on judicial conduct in the first place. The subsequent – and very public – stalemate between the Chief Justice and Mr. Justice Woulfe pointed to similar problems with the lack of a clear and defined process for addressing perceived concerns.

III. CONSTITUTIONAL CASES

1. Friends of the Irish Environment CLG [2020] IESC 49: Climate change and constitutional rights: These proceedings involved a challenge to the climate change plan adopted by the Government following the passage of the Climate Action and Low Carbon Development Act 2015.

The challenge was brought on both statutory and constitutional grounds. The constitutional claim was that the climate change plan was inadequate and that this contravened various constitutional rights, including the right to life, the right to bodily integrity and the right to a good environment. The latter had been recognized by the High Court in Merriman v Fingal County Council [2017] IEHC 695 in a decision which attracted a degree of international comment at the time.

Although the challenge to the climate change plan was ultimately successful, the Supreme Court's ruling in this regard was based on the

statutory aspects of the claim. The Court rejected the constitutional challenge. However, in so doing, the Court made a number of observations with implications for other constitutional litigation in Ireland.

First of all, the Court expressed a degree of skepticism over arguments for a doctrine of non-justiciability based on general separation of powers or institutional considerations. The Government had argued that climate change issues were policy matters and, therefore, non-justiciable. This was rejected on the fairly obvious ground that the matters had been made subject to legislation such that the issues raised before the Court were unquestionably ones of law. The fact that they might also engage policy consideration did not alter their legal or statutory character. Notably, however, the Court went on to observe that "[t]here may be an issue as to whether there are any areas which are truly completely outside the scope of judicial review on the grounds of a barrier, based on respect for the separation of powers, on the remit of the courts to review policy."

This reservation of the Court's position on arguments in favor of a policy-based doctrine of non-justiciability gestures at a subtle but critical distinction between non-justiciability and other forms of arguments against judicial scrutiny. Non-justiciability is an a priori categorical approach whereas others are fact-based and allow for a degree of initial review. Implications of argument about non-justiciability is that, by reason of the subject matter alone, the court can never conduct a review. That is something that the Supreme Court appears extremely skeptical about – perhaps not surprisingly given its reluctance to recognize an absolute immunity from review even in areas where there is an express constitutional privilege (see the discussion of *Kerins* and *O'Brien* in the 2019 report).

The second point to note is that the Court held that the claimant company here did not have standing to raise arguments of constitutional right. The Court held that the standing rules in Irish constitutional litigation are "flexible but not infinitely so". While there may be exceptions to allow companies to litigate constitutional rights, this would generally arise where there was some reason why a person could not bring that claim. The Court specifically referred in this regard to the relationship between the flexibility of the standing rules and the nature of the claims upon which the Court is asked to adjudicate.

Finally, and notwithstanding the finding on standing, the Court went on to comment on the High Court's recognition in Merriman of a right to a healthy environment. Addressing that decision specifically, the Supreme Court held that there was no such right under the Constitution. In the Court's view, a specific right to a healthy environment is too vague. It either does not extend existing rights and is unnecessary; or if it does extend these rights in some way, there is a lack of clarity about its precise parameters and scope. The Court would not rule out that constitutional rights and values could have a role in proceedings on environmental issues but that needs to be addressed in cases where they truly arise.

More generally, Clarke CJ also stated a preference for replacing the language traditionally used in Ireland to describe the doctrine of "unenumerated rights" with the phrase "derived rights". In his view, the language of unenumerated rights may give the impression that "judges simply identify rights of which they approve and deem them to be part of the Constitution". On the contrary, the phrase 'derived' would make clear that there must be some basis in the text or structure of the Constitution. In his view,

> What needs to be guarded against is allowing for a blurring of the separation of powers by permitting issues which are more properly political and policy matters (for the legislature and the executive) to impermissibly drift into the judicial sphere. Where it is possible properly to derive rights from the Constitution then no such risk arises. Where, however, judges are simply asked to identify rights which they consider might be "a good thing" then the separation of powers is truly blurred.

It is difficult to assess the longer term substantive significance of these comments. Given the long familiarity of domestic courts and scholars with the language of "unenumerated rights", the change attracted a considerable amount of comment at the time.

It is unclear, however, if the impact of the decision will be primarily linguistic or if it will have some broader effect on the Court's approach to rights issues. The Court's own reasoning would suggest that the effect is primarily linguistic. The decision emphasized that the use of 'derived rights' should not be understood to signify a move to a narrow textualist approach.

Moreover, the perception of judicial overreach which the change seems designed to address is one that has in recent decades rarely been associated with the courts' unenumerated rights jurisprudence. As the 2017 report observed, the courts approach to "the courts approach to this power has in recent decades been conspicuously cautious [such that t]here is accordingly considerable skepticism in Irish legal circles about whether the right identified in Merriman will be endorsed by the Supreme Court….". Further judicial developments will be required to fully assess whether this represents a major shift in constitutional rights caselaw or, perhaps more likely, a linguistic clarification issued in response to the perceived problems with a lower court decision.

2. Ryanair v An Taoiseach [2020] IEHC 673: The status and effect of Government guidance on Covid 19: As in many other countries, a recurring issue of note in Ireland's response to Covid-19 was the status and effect of government guidance. This was of particular relevance where government public health guidance differed from what was required by law.

The status of such guidance was the subject of judicial comment in Ryanair v An Taoiseach. These proceedings involve a challenge to the legality of the guidance issued by Government "requir[ing] anyone coming into Ireland … to restrict their movements for 14 days". The State defended the proceedings on the basis that the material published was advisory in character. The High Court expressed the view, in partial reliance on the decision of the New Zealand High Court in Borrowdale v. Director-General for Health that guidance could be amendable to judicial review if it amounted

to a clear disregard of constitutional norms such as, for example, representing unequivocally that there was a legal obligation on pain of penalty to comply with a particular measure. The High Court held that the information published by the government represented an accurate portrayal of the legal status of the travel advice.

The High Court also rejected the argument that the conferral by the Oireachtas of a power to disseminate information on infectious diseases on the Minister by way of statutory instrument did not preclude the Government from providing information or advice in other forms in the exercise of the executive power under the Constitution.

It also held that the publication of the travel advice was not inconsistent with EU law or the right to freedom of movement guaranteed thereunder.

3. Bacik v An Taoiseach [2020] IEHC 313: Constitutional requirements for a sitting of Seanad Eireann: A further issue which arose during the Covid-19 pandemic was that the upper House (the Seanad) did not for an extended period.

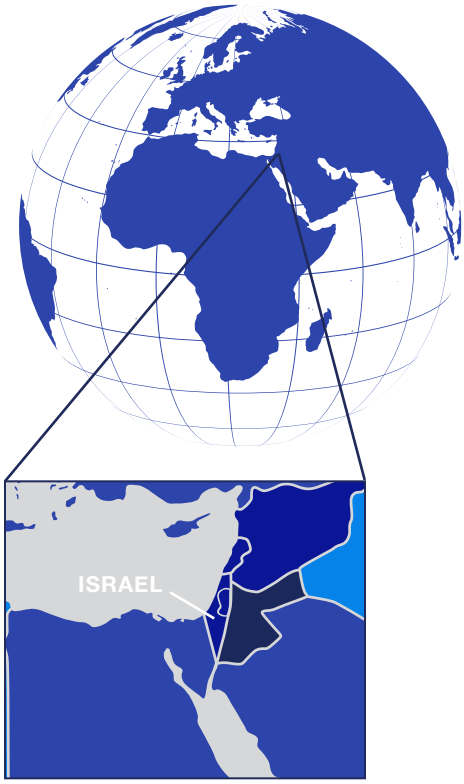
Under the Constitution, the Seanad is composed of 49 elected members and 11 nominees of the Taoiseach. However, because there was no new Taoiseach until the new Government was formed in June, no nominations were made until that time. The legal advice provided to the Oireachtas was that the Seanad could not lawfully sit in the absence of the 11 nominees, although this was questioned by some commentators.[6]

A number of the elected members of the Seanad initiated proceedings in which they contended that the Seanad could lawfully sit prior to the nominations being made. The plaintiffs argued that the constitutional drafters could not have envisaged that the Oireachtas would be prevented from enacting legislation in an emergency situation such as the Covid-19 pandemic. The Divisional High Court held that the text of the Constitution clearly and unambiguously required the Seanad to be comprised of its full complement of 60 members; and that the system of governance established by the People in the Constitution envisaged a Seanad including 11 nominees of the Taoiseach. This was 'an integral element of the constitutional architecture of the form of democracy chosen by the people'. The Court observed that the Covid-19 situation could not influence the interpretation of the Constitution's clear and unambiguous text.

V. LOOKING AHEAD

Given continued uncertainty over the course and impact of Covid-19, it is difficult to predict what may occur in 2021. At least some of the litigation challenging various Covid-19 measures will likely be heard by the courts. Aside from Covid-19, the most significant – and unpredictable – source of issues may be the exit of the United Kingdom from the EU at the end of 2020. The belated nature of the agreed terms on which this exit is due to take place means that there is considerable uncertainty over the practical effects of Brexit in Northern Ireland. However, given current levels of inter-community tension and increasingly salient discussions in political and other circles for near-term changes to Northern Ireland's constitutional status, there appears to be some potential for Brexit to trigger more serious political and social instability.

[6] Oran Doyle & Tom Hickey, "Oireachtas can pass laws in public interest without Taoiseach Seanad nominees", The Irish Times, (2020)



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I. INTRODUCTION

2020 in Israel is characterized by a fusion of at least three crises: a constitutional crisis, a political-governmental crisis, and COVID-19. At the time of the pandemic's outbreak a long-time caretaker government was serving, after three elections (April 2019, September 2019, March 2020) in which none of the major parties managed to form a coalition. The political situation is complicated mainly because a month before the third elections were held, an indictment was filed against the serving Prime Minister - Benjamin Netanyahu, based on bribery, fraud and breach of trust. Moreover, after the third elections, the Speaker of the Knesset refused to introduce a vote on his replacement on the Knesset's agenda which created a constitutional crisis and forced the court to intervene in inter-parliamentary proceedings. Finally, against the backdrop of COVID-19 and the political deadlock a rotating government was established, and - due to the lack of distrust between the political rivals - anchored by a major constitutional reform of Basic Law: The Government. This formation of government placed before the Supreme Court a delicate political issue: can a Knesset Member under criminal indictments can form a coalition. This report reviews these developments and summarizes the main constitutional cases of 2020.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2020, Israel has experienced some major constitutional developments, which have implications both for constitutional law and constitutional politics. During 2019-2020 three national elections were held, but in all elections none of the Knesset Members were able to obtain the required support in order to form a government. The last election, which took place on March 2, 2020, enabled a narrow parliamentary majority for a party bloc led by Blue and White, which was under the leadership of Benjamin Gantz. As a result, Gantz was granted by the President the mandate to assemble a coalition. On March 16, the 23rd Knesset was sworn but before the Knesset committees were formed, the caretaker government began to exercise emergency powers to address the coronavirus crisis. The two major parties began negotiating a broad government, yet alongside the negotiations, the Blue and White party sought to take advantage of its slim parliamentary majority to elect a permanent speaker for the Knesset on its behalf and to establish Knesset committees on the basis of the balance of power between the two political blocs.

At that time, the speaker of the Knesset, Yuli Edelstein from Likud, was still in office due to the constitutional rule of continuity until the Knesset would elect a permanent one. Nonetheless, he was not willing to put requests by 61 (out of 120) Members of the

Knesset to introduce a vote on his replacement on the Knesset's agenda. In a decision of March 23, an extended bench of 5 judges unanimously held that the Speaker's continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process. They ordered the Speaker to convene the Knesset plenum as soon as possible for the purpose of electing a permanent Speaker. Following the judgment, the Speaker announced his resignation and adjourned the session, thereby not allowing his replacement. After an urgent hearing, the court heavily criticized the disobeying of its judicial order and ordered that the longest serving Member of Knesset be granted limited, defined authority to convene and preside over a plenum session on in which the motion for the election of a permanent Speaker would be set on the agenda.

The next day, another political bomb landed, as Benny Gantz nominated himself for the position of Speaker and was indeed elected as the Speaker with the support of Likud. This move has caused the split of Blue and White party. It led to a power-sharing deal to form a national emergency government against the backdrop of the COVID-19 pandemic. Accordingly, a coalition agreement between the rival parliamentary groups Blue and White and the Likud was signed. According to the agreement, the government will be a rotating one: during the government's first 18 months Netanyahu will serve as prime minister and will then be replaced by Gantz. This coalition agreement was challenged before the High Court of Justice, and on May 6, 2020 the High Court of Justice unanimously rejected the petitions, paving the way for the new government. The government was sworn on May 17, 2020. Because the political partnership was characterized by acute distrust, the new 'rotating government' model was anchored and entrenched by a constitutional amendment to Basic Law: The Government. A few days later, on 24 May 2020, Netanyahu's criminal trial began in the Jerusalem District Court.

On July 23, 2020, the Knesset enacted the Law Granting Government Special Authorities to Combat Novel Coronavirus (Temporary Provision) 2020 that replaces the Israeli government's reliance on general emergency powers and empowers the government to declare a state of emergency due to COVID-19. It allows it to enact various temporary regulations to minimize the spread and scope of the disease.

Finally, the constitutionality of the constitutional amendment forming the alternate government was challenged and on October 27, 2020, the High Court of Justice held live hearings of the various petitions. The issue is still pending before the court. This is not the only burning question of a possible 'unconstitutional constitutional amendment' that is pending before the court. On December 22, 2020, an extended bench of eleven judges heard multiple petitions submitted against Basic Law: Israel - The Nation State of the Jewish People enacted in July 19, 2018. This hearing which brought to the fore the question of limits to the Knesset's constituent authority.

III. CONSTITUTIONAL CASES

1. HCJ 2592/20 Movement for Quality Government in Israel v. Attorney General (6.5.2020): Reviewing the coalition agreement and whether a Knesset Member under criminal charges can form a coalition

Against the backdrop of Netanyahu's criminal indictments and the political crisis, the petitioners raised two arguments: firstly, a MK facing criminal charges that violate the public's trust should not be allowed to form a government. Secondly, the coalition agreement contradicts constitutional principles and should therefore be disqualified. An extended bench of the court unanimously rejected both arguments and ruled that there was no cause for judicial intervention.[1]

The court began with the examination of the rules regulating the tenure of prime ministers,[2] and found that there is no prevention from serving under criminal indictment. However, in the famous Deri case,[3] the court ruled that beyond the rules-stipulated conditions for ministers, the appointing authority is required to exercise discretion ensuring the public's trust.[4] The court ruled that the same principle applies to the Prime Minister, but when the appointing authority is the MKs themselves, their discretion fulfilled the voter's will. Since this is clearly a political decision that is at the core of the democratic process, external intervention would violate majority rule. Thus, such intervention is limited to extremely rare circumstances, which do not exist in this case. The court emphasizes that this legal conclusion does not diminish the ethical difficulties in Prime Minister's tenure who is indicted for such severe offences.

Regarding the coalition agreement, the court ruled that although this agreement is unusual, there is no legal justification to repeal its clauses. The court divided the agreement's clauses into four main groups. The first two groups refer to uncompleted legislative proceedings, which their content may change until its final approval. The uncertainty justifies applying the basic principle of mutual respect between the authorities on these proceedings. The third group refers to commitments that required internal parliamentary processes. The petitioners argued that the agreement dilutes the representation of the opposition members in the various Knesset committees. Since the committee's compositions has not yet been determined, the principle of mutual

[1] On this case, see: Tamar Hostovsky Brandes, "Is it the Court's Role to Save a Country from Itself?: On the Israeli Supreme Court's Rejection of the Petitions Against Netanyahu", VerfBlog, (2020), https://verfassungsblog.de/is-it-the-courts-role-to-save-a-country-from-itself/

[2] Section 6-7 of the Basic Law: The Knesset; Section 17(C), 18 of the Basic Law: The Government; Section 4 of Government Law.

[3] 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.

[4] See generally: Yoav Dotan, "Impeachment by Judicial Review: Israel's Odd System of Checks and Balances", (2018), 19(2) *Theoretical Inquiries in Law* 705-744.

respect applies here too. The fourth group refers to the state of emergency regarding COVID-19. The petitioners argued that the period of emergency is not properly defined. In addition, they claimed that the parliamentary focus on COVID-19 related issues will paralyze the Knesset's other activities. The government clarified that the period of emergency will be limited to six months and that COVID-19 legislation will not prevent legislation regarding other issues. Therefore, the court did not disqualify these clauses, despite their problematic nature.

Deputy chief justice Hanan Melcer noted that if certain clauses would be exercised the court is likely to repeal them due to their unconstitutionality.

2. HCJ 2144/20 Movement for Quality Government in Israel v. Speaker of the Knesset (25.3.2020): Judicial Review of Inter-parliamentary proceedings

This petition was submitted against Knesset member Yuli (Yoel) Edelstein, who acted as the speaker of the Knesset by virtue of the continuity rule.[5] A day before the entering Knesset was set to be sworn, 61 Knesset members requested from Edelstein to perform elections of a permanent Speaker, Edelstein refused.

According to the petitioners, Edelstein's refusal is tainted by extraneous considerations. However, Edelstein argued that he has discretion in setting the plenum's agenda, and his decision was in accordance with the practice. Furthermore, Edelstein argued that delaying the election will increase the chance of forming a unity government and solve the political deadlock.

In its decision of March 23, an extended bench of 5 judges unanimously held that the Speaker's continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process.[6] Chief-justice Ester Hayut acknowledged that the Speaker has discretion according to the Knesset Rules of Procedure but stressed that it is "limited and defined", due to the fact that the Speaker was serving by virtue of the continuity rule, and thus maintains a severe conflict of interest. In this unique situation of a second caretaker government after a "failure of the public's representatives to constitute a permanent Government in Israel even after three rounds of elections", the decision to refuse to summon the plenary for electing a permanent Speaker is incompatible with the scope of his authority as acting Speaker, holding his office "as a temporary trust", and deviates from the margin of discretion granted to him.

Apart from that, the court's decision was based on two constitutional principles: respect of the parliamentary majority in parliamentary proceedings and the need for constitutional separation between the Knesset and the government. As far as the first principle is concerned, and even though the parliamentary majority the HCJ faced was not a solid coalition majority in its usual sense, the court emphasized that the Speaker could not exercise powers in a way that opposed the position of the majority. The defect in the speaker's conduct, the court noted, primarily inheres in the fear that it frustrates the will of the electorate.

Alongside accepting the parliamentary majority request, the court emphasized the separation of powers. Responding to the Speaker's argument that the election of a permanent Speaker is contingent upon the efforts to form a government, Chief-justice Hayut held that this approach "puts the cart before the horse". The Knesset is the sovereign and not – citing (former) Deputy Chief-justice Rubinstein – "the Government's cheerleading squad".

Chief-justice Hayut concluded her judgment by stating that:

"the Speaker's continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process. It clearly harms the status of the Knesset as an independent branch of government and the process of governmental transition, and this all the more so as the days pass since the swearing in of the 23rd Knesset. Therefore, in these circumstances, there is no recourse but to conclude that we are concerned with one of those exceptional cases in which the intervention of this Court is required in order to prevent harm to our parliamentary system of government."

The court thus ordered the Speaker to convene the Knesset plenum as soon as possible for the purpose of electing a permanent Speaker for the 23rd Knesset, and no later than March 25, 2020.

Following the judgment, on March 25, the Speaker announced to resign from his position and adjourned the session, thereby not allowing his replacement. In this speech, the Speaker said that his conscience does not allow him to follow the court's ruling that has violated the legislature's independence. In doing so, Edelstein violated the court's order.

After an urgent hearing (March 25th), the HCJ heavily criticized the disobeying of its judicial order: "[U]ntil today, never in the history of the State has any governmental office openly and defiantly refused to carry out a judicial order while declaring that his conscience does not allow him to comply with the judgment. That is what [the Speaker] … chose to do, and the harm of his conduct to the public interest in preserving the rule of law and compliance with judgments and judicial orders is immeasurably severe". The court accepted the path to solve the constitutional crisis presented by the Legal Advisor of the Knesset, and ordered that "the longest serving Member of Knesset be granted limited, defined authority" to convene and preside over a plenum session on March 26 in

[5] Section 20(A) of Basic Law: The Knesset.

[6] This second builds on Nadiv Mordechay & Yaniv Roznai, "Constitutional Crisis in Israel: Coronavirus, Interbranch Conflict, and Dynamic Judicial Review", VerfBlog (2020), https://verfassungsblog.de/constitutional-crisis-in-israel-coronavirus-interbranch-conflict-and-dynamic-judicial-review/

which the motion for the election of a permanent Speaker would be set on the agenda.

3. HCJ 1308/17 Silwad Municipality v. The Knesset (9.6.2020): Invalidation of a law that allowing the expropriation of private West Bank Palestinian land in order to retroactively legalize Israeli settlements.

In this petition the court in a majority opinion, repealed Regulation of Settlement in Judea and Samaria Law 5777-2017 (hereinafter: "Regularization Law") due to its disproportionate violation of Palestinian residents' basic constitutional rights of property, human dignity and equality.[7]

During the Six-Day War, the IDF forces entered the territories of Judea and Samaria. Since then, an extensive Israeli settlement has been established in the area, with the involvement of Israeli authorities. Some of these settlements were built on Palestinians' private lands. The Regularization Law, enacted in 2017, was intended to retrospective validate the illegal construction in the area, as long as it was in good faith and based on the "state's consent".[8]

The petitioners argued that the Regularization Law is unconstitutional and is violating the international law. The court did not determine whether the Israeli constitutional law applies in an area under belligerent occupation. However, the court ruled that the Israeli legislature is obligated to constitutional standards of the Israeli law.

The Court invalidated the Law by a majority of 8 to 1, determining that it violated the constitutional rights to property, dignity and equality, protected by Basic Law: Human Dignity and Liberty. The Regularization Law violates the Palestinians' right to property since it allows the government to expropriate their lands. The court found that the law also violates the Palestinians' right of human dignity and equality since it clearly prioritizes Israeli residents over Palestinian residents, without any legal justification.

The court made a distinction between the law's human purpose and its systemic purpose. The human purpose of preventing the destruction of buildings that were built in good faith and based on relying on the authorities' consent, was found appropriate. As opposed to the systemic purpose of retrospective validating the illegal construction in the area, that was found inappropriate. The Regularization Law does not stand the proportionality tests as there are alternative means that could accomplish the law's purposes, without such an offensive violation of rights.

Justice Noam Sohlberg in a minority opinion, noted that in light of the law's political nature, extreme caution is required. The Regularization Law reflects a proper balance between its political and human benefits on the one hand, and the violation of rights on the other.

4. HCJ 953/11 Salha v. Minister of Defense (28.8.2020): Market Overt principle in the territories

A post Six-Day War military order under the legal principle of Market Overt stipulated that acquisition transactions for abandoned property made by the supervisor of governmental property, could be recognize retroactively. According to the Market Overt principle, rights in lands seized in good faith, without awareness of the fact that they are privately owned, can overcome the property rights of the original owners.[9]

This petition was against "Mitzpe Cramim" village's transaction. In contrast with the Silwad case, which focused on the constitutionality of the Law, the Salha case took place under a framework of international law. The Court analyzed the military order and determined that it included a Market Overt clause but that the conditions of the clause were not met since the supervisor turned a blind eye regarding the warning signs indicating private ownership, and since that the purchaser "HaHistadrut HaZionit" took part in the settling of the area. The Court thus ordered the evacuation of Mitzpe Kramim within a timeframe of three years. A further hearing is planned to be heard.

5. HCJ 2293/17 Geresagher v. The Knesset (23.4.2020): property rights of infiltrators.

The court in a majority opinion accepted in part the petition against the "deposit law".[10] The court held that depriving a fifth of the infiltrators' salary, is a clear and powerful violation of their right to property under Basic Law: Human Dignity and Liberty. The court ruled that in general, the use of economic incentives is a legitimate mean for implementing immigration policy. However, requiring infiltrators to deposit a fifth of their salary until their departure from the country, does not meet the proportionality requirement. Furthermore, the irresistible pressure on the infiltrators in order to break their spirit and to expedite their departure cannot be considered as proper purpose Therefore, the law is unconstitutional and the court order on its nullity.[11] Justice Nil Hendel joined the ma-

[7] For a summary and comment on the case in context, see Tamar Hostovsky Brandes, "Constitutional Adjudication of International Law Violations: The Israeli Supreme Court's Invalidation of the Settlement Regularization Law", VerfBlog (2020), https://verfassungsblog.de/constitutional-adjudication-of-international-law-violations/, DOI: 10.17176/20200615-003627-0; Pnina Shavit Baruch, "The Supreme Court Ruling on the Regularization Law", *INSS Insight* No. 1335 (18 June 2020), https://www.inss.org.il/publication/settlement-law/; David Kretzmer & Yaël Ronen, "The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories" (2nd ed., Oxford University Press, 2021), 289.

[8] On the regularization law, see Orna Ben-Naftali, Michael Sfard, Hedi Viterbo, "The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory" (Cambridge University Press, 2018), 362-382.

[9] See Tamar Hostovsky-Brandes, "Silwad Municipality v. The Knesset: The Invalidation of the Settlement Regularization Law and its Aftermath", Int'l J. Const. L. Blog, Sept. 15, 2020, http://www.iconnectblog.com/2020/09/silwad-municipality-v-the-knesset-the-invalidation-of-the-settlement-regularization-law-and-its-aftermath/

[10] Section 4 of the Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel (Legislative Amendments and Temporary Provisions) law 5775-2014.

[11] For a useful background, see Rivka Weill & Tally Kritzman-Amir, "Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Entrants in Israel in a Comparative and International Context", (2019) 41 *University of Pennsylvania Journal of International Law* 43.

jority opinion, while stating that the nullity should be suspended for four months. This period is intended to provide the Knesset an opportunity to amend the law and reduce the infiltrator's deduction from his salary.

Justice Noam Solberg in a minority opinion, stated that every sovereign country has a right to determine its immigration policy. Justice Sohlberg found the economic incentive appropriate in relation to its benefit. Thus, nullity is unjustified.

6. HCJ 2109/20 Ben Meir v. Prime Minister (26.4.2020): data collection by security services re COVID-19

This petition was submitted against the government's decision to authorize the Israel General Security Agency (ISA) to collect and use "technological information" regarding those who came into close contact with COVID-19's verified patients (hereinafter: the decision). The decision was based on section 7(B)(6) of the General Security Service Law, 5762-2002, which allows the government to authorize the ISA to act when there are unforeseen circumstances that threats Israel's national security.[12]

The court accepted the petition in a majority opinion and ruled that at the time the decision was made, it passed constitutional review, given the exigent circumstances caused by the rapid spread of COVID-19. However, if the government would need further use of the ISA, it would require primary legislation that would meet the constitutional limitation clause stipulated in Basic Law: Human Dignity and Freedom.

The Court further held that due to the importance of freedom of the press, in the absence of consent regarding ISA contact tracing of journalists, a journalist would undergo an individual epidemiological investigation, and would be asked to inform any sources with whom he was in contact over the 14 days prior to his diagnosis.

Justice Noam Sohlberg in a minority opinion regarding the journalist's exception, stated that depriving the right of those exposed to journalist who have been verified as COVID-19 patients to be notified as soon as possible, is a severe violation of their and those close to them right to health. The right to life outweighs a fear of a violation of freedom of the press.

7. HCJ 2435/20 Loewenthal v. Prime Minister (7.4.2020): Closing an era due to COVID-19

The petition against the government's declaration on the city of Bnei Brak as a "restricted area" for six days, due to its high morbidity of COVID-19 was denied. The court ruled that there is no cause for judicial intervention in a professional governmental decision, and that the right of bodily integrity outweigh fundamental freedoms.

8. HCJ 1550/18 The Secular Forum v. Minister of Health (30.4.2020): freedom from religion

In this petition, a majority of the court ruled that hospitals have no legal authority to prohibit bringing leavened goods ("chametz") during Passover, as this prohibition violates fundamental rights of individual autonomy and freedom of religion.

This prohibition is based on a procedure adopted by the "Chief Rabbinate of Israel", as a condition for hospitals to receive a Passover kosher certificate, and not on a Ministry of Health's policy. The court stated that there is no explicit law provision that authorizes hospitals to infringe constitutional rights so severely. Therefore, the policy is invalid.

Justice Neal Hendel in a minority opinion, stated that there is no need for a judicial intervention. The court should enable the parties to reach an arrangement. Justice Hendel noted that if 2021 the parties will not reach an agreed arrangement, a new petition in this matter could be submitted.

IV. LOOKING AHEAD

In the realm of constitutional politics, legislative elections will be held in Israel on 23 March 2021, and this will be the fourth round of elections in two years, which reflects the political instability. Moreover, these elections will take place against the backdrop of the continuation of the criminal trial of Prime Minister Netanyahu will continue.

In the realm of judicial review, there are three major pending cases before extended benches of the Supreme court concerning the authority of the court to review constitutional norms and the possible application of the 'unconstitutional constitutional amendments doctrine' or abuse of constituent power doctrine: Amendment No. 8 to the Basic Law: The Government, which established the 'rotating government' model; Temporary Amendments to Basic Law: State Economy concerning the state budget; and Basic-Law: Israel - The Nation State of the Jewish People.[13] These cases could have a dramatic effect on the relationship between the branches.

V. FURTHER READING

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Doreen Lustig "We The Majority…": The Israeli Nationality Basic Law' (2020) 25(3) *Israel Studies* 256.

[12] An English translation of the judgment is available at: https://versa.cardozo.yu.edu/opinions/ben-meir-v-prime-minister-0

[13] On this question, see more generally: Suzie Navot & Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) *European Journal of Law Reform* 403.

Ittai Bar-Siman-Tov, 'Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures' (2020) 8(1-2) *The Theory and Practice of Legislation* 11

Mordechai Kremnitzer & Yuval Shany, 'Illiberal Measures in Backsliding Democracies: Differences and Similarities between Recent Developments in Israel, Hungary, and Poland' (2020) 14(1) *Law & Ethics of Human Rights* 125.

Moshe Maor, Raanan Sulitzeanu-Kenan & David Chinitz, 'When COVID-19, constitutional crisis, and political deadlock meet: the Israeli case from a disproportionate policy perspective' (2020) 39 *Policy and Society* 442.

Italy

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I. INTRODUCTION

The year 2020 will certainly be remembered for a long time because of the devastating impact of the global pandemic on every aspect of private and public life. The impact of the pandemic was significant also on the constitutional systems throughout the world, and Italy was not an exemption from this. Moreover, significant constitutional developments occurred independently of the pandemic: with a constitutional referendum held in September, the Italian electorate approved a constitutional amendment significantly reducing the number of MPs. However, this report will focus primarily on judicial developments.

Within this field, the impact of the pandemic on the case law of the Italian Constitutional Court (ICC) remained limited until the end of the year, and will most likely emerge massively in 2021 (see section IV). However, 2020 has been marked with important developments for the ICC. This report concentrates, firstly, on some significant innovations in the management of constitutional trials with regard to some changes to the internal procedural rules of the Court with the aim of opening new channels of communication with the ICC (Section II). Secondly, the report explores some significant developments in case law in 2020 (Section III).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major development of 2020 concerns some new procedural rules adopted by the ICC at the beginning of the year. Although they are the result of preliminary work carried out beforehand,[1] and their real impact will become clear only in the future, the new rules aim at opening new communication channels with civil society and expert knowledge, within the limits allowed by the legislation currently in force.

In Italy, the basic procedural rules on constitutional jurisdiction are set forth in the Constitution and in several constitutional and ordinary laws, particularly in law no. 87/1953. Article 22 of law no. 87/1953 also allows the ICC to establish its own procedural rules, as a complement to constitutional and statutory sources. Indeed, the ICC's own *norme integrative* (NI, integrative norms) are the most complete and detailed body of procedural rules on constitutional adjudication.

First issued in 1956 (when the ICC began its activity), the NI have been amended several times and entirely revised in 2008. On January 8, 2020, the ICC approved further amendments.

The main innovations are the new language of article 4 of the NI on third-party interventions

[1] Also by listening to legal scholarship in a seminar of 18 December 2018. See 39 *Quaderni costituzionali* 2, 361 (June 2019).

in incidental proceedings; and the addition of the entirely new articles 4 *bis,* 4 *ter,* and 14 *bis* NI on interveners' access to case files, on amici curiae, and on testimony by expert witnesses, respectively.

As regards third-party interventions, the new NI simply codify existing case law and practice. Incidental proceedings are public, in the sense that both the constitutional question and the final decision are published in the Official Gazette and that the oral hearing is also public, if it takes place. Nevertheless, normally only the parties to the principal judicial proceedings (in which the constitutional question is raised) and the President of the Council of Ministers (or the President of the Region, if a regional law is at stake) may participate actively in incidental proceedings, appearing before the ICC and filing briefs and documentation.

Only exceptionally may third parties intervene if they hold a legally qualified interested, directly and immediately connected with the specific object of the principal proceedings (see now art. 4, para. 7 of the NI). To illustrate this point, in a question concerning punishment for libel committed by the press, the National Association of Journalists was entitled to intervene, as it is legally mandated to rule on disciplinary sanctions against convicted journalists.[2] If the intervener wishes to access the case file, it must request the ICC to immediately review the admissibility of its intervention: access is granted only if the intervention is deemed admissible (art. 4 *bis* NI).

It should be clear that, although incidental proceedings often concern complex questions of broad public interest, participation is narrowly restricted. This is mainly a consequence of law no. 87 of 1953, which was enacted before the Italian legal system developed any concrete experience with judicial review of legislation, and has never undergone a major revision since then.

As a partial compensation, the NI now allow *"amici curiae,"*[3] whereby persons interested in the case may submit a written opinion (not exceeding 25,000 characters), although they do not become parties to the incidental proceedings (they may neither access case files, nor appear before the ICC). This is arguably the most striking – albeit still cautions and somehow experimental – latest innovation in the new NI.

However, not everyone can become an *"amicus"* to the *"curia."* Only non-profit organizations and public institutions may do so, if they represent class or general interests related to the constitutional question. Moreover, written opinions are admitted (by decree issued by the President of the ICC, after having heard the opinion of the rapporteur) only if they are deemed to offer useful elements for the knowledge and evaluation of the constitutional question considering its complexity.

Summing up, *amici curiae* are not parties' briefs but rather a spontaneous contribution to the ICC preliminary research and study, particularly when a case has implications that escape the general and legal knowledge (for example, economic and social impact or underlying scientific and technological issues). The metaphor of a mailbox comes to mind.[4]

A list of the *amicus curiae* briefs admitted to incidental proceedings is published in the official website of the ICC.[5] In 2020, very few amicus curiae briefs were admitted as the new NI only applies to existing proceedings that are pending in their earliest stage.[6] The first *amicus curiae* was admitted to the case decided through judgment no. 234 of 2020[7] and was filed by an association of pensioners. Other amicus curiae briefs were filed by associations of lawyers as part of criminal law cases.[8] Currently, the ICC website lists more than a dozen *amicus curiae* briefs filed and admitted in 2020, coming from a variety of associations (for example, political activists, lawyers, families, municipalities, and private companies).

Also, the new art. 14 *bis* of the NI regulates cases that require technical information. It provides that, if the need arises, the ICC may invite experts to participate in a private hearing with the parties to the proceedings. This provision may be considered a special instance of the general powers of inquiry already given to the ICC by art. 12-14 of the 2008 NI, and has already been applied in a case concerning the recruiting of middle-level managers for the National Revenue Administration.[9]

Overall, the new rules clearly signal the ICC's awareness that a growing number of constitutional questions have highly complex premises and implications, both legal and factual (economic, scientific, among others), and that – however thorough and accurate the ICC's own research may be – external contributions can improve the quality and legitimacy of constitutional adjudication.

III. CONSTITUTIONAL CASES

1. Judgment no. 278 of 2020: COVID-19 and suspension of prescriptive periods

This decision concerned the constitutionality of the suspension of prescriptive periods (statutes of limitations) provided for under Decrees-Law No. 18 and No. 23 of 2020 issued in order to combat the COVID-19 pandemic. The question was raised alleging a violation of the principle of no punishment without law set forth in art. 25 of the Con-

[2] See order no. 37 of 2020 (also see below, Part III, point 7), order no. 132 of 2020).

[3] This is the official title of the new art. 4-*ter,* although this expression does not appear in the body text of the article.

[4] Or, rather, e-mailbox: written opinions may be filed only via e-mail (art. 4-ter, para. 2, NI).

[5] https://www.cortecostituzionale.it/actionProcessoCostituzionale.do.

[6] Under art. 4-*ter*, para. 1, NI, an opinion may be filed within 20 days from the publication of (the judicial order raising the) the constitutional question in the Official Gazette. Therefore, in 2020 opinions could not be filed validly for questions which had already been published for more than 20 days.

[7] See below.

[8] See judgments nos. 260 and 278 of 2020.

[9] See judgment no. 164 of 2020. The audition involved two experts in public administration, organization and management.

stitution and previously considered as part of the "constitutional identity" of Italy (order 24/2017 in re *Taricco*[10]). The Court upheld the challenged regulations, reasoning that these provisions constitute one of the general grounds for the suspension of prescriptive periods provided for by the Criminal Code. In fact, art. 159 of the Criminal Code states that the operation of prescriptive periods shall be suspended whenever the suspension of the proceedings or of the criminal trial is required under a particular statutory provision, and this was the case of the contested legislation.

In classifying the new grounds for suspension of the trial under the general ground laid down by art. 159 of the Criminal Code – which as such is also applicable to prior conduct – the ICC went on to clarify that it cannot start to apply with reference to a time falling before the law providing for it. Finally, the judgment indicates that the brief duration of the suspension of trials (for example, from March 9 until May 11, 2020), and hence the related suspension of prescriptive periods, is entirely compatible with the right to a trial within a reasonable time. Moreover, the provision is justified in terms of reasonableness and proportionality by the need to protect public health in order to contain the risk of infection from COVID-19 during a period of exceptional health emergency.

2. Judgment no. 260 of 2020: Life imprisonment and summary proceedings

In its judgment no. 260, the ICC decided that the exclusion of summary proceedings in cases involving crimes punishable with life imprisonment is neither manifestly unreasonable nor arbitrary. The issue was submitted to the ICC via incidental orders of the Court of Assizes of Naples and the Ordinary Court of Piacenza, in the context of two trials against persons accused of murder of their father and their wife, respectively. In particular, the ICC acknowledged that through the law under review, the Legislator sought to ensure that, in cases involving the most serious crimes, public proceedings would be held before a court of assizes and not before a single-judge court, and that the victims too would have a chance to be heard. According to the judgment, the purpose of the law certainly entails proceedings of long duration where crimes punishable with life imprisonment are implicated, especially aggravated murder. However, the Legislator's discretion does encompass identifying the most suitable solution to ensure that proceedings can fulfil their purpose in a reasonable timeframe – that is, ascertaining the facts and respective responsibilities in observance of the rights of the defense – and the ICC cannot superimpose its own assessment.

In addition, the ICC found that the examined provisions do not fall foul of the constitutional right to a defense because the Legislator does have the power to exclude persons accused of particularly serious crimes, such as those punishable with life imprisonment, from accessing certain alternative proceedings. The ICC noted that there is no right of accused persons to have the proceedings against them conducted "behind closed doors" in order to protect their dignity and privacy. In fact, the principle of publicity of proceedings, especially those regarding the most serious crimes, is not only a form of protection for the accused of a crime, but also an identifying trait of the rule of law, one that protects impartiality and objectivity in the administration of justice under the scrutiny of public opinion.

Finally, the judgment emphasizes that the reform does not necessarily mean that accused persons found guilty at trial must then be sentenced to life imprisonment: the court of assizes can always recognize the existence of extenuating circumstances that justify the application of a more lenient punishment.

3. Judgment no. 245 of 2020: "decree to prevent prisoner release" does not violate the Constitution

With its decision no. 245 of 2020, the Court decided that provisions of a decree-law, enacted with the aim of limiting the release of specific categories of inmates, do not lower the health standards of protection established in the Constitution and in the European Convention of Human Rights (ECHR). This is also true with regard to prisoners posing a high risk to society, including those detained under the 41 *bis* prison regime (the strictest regime provided by in the Italian prison system). The decision of the ICC was triggered by two separate referral orders submitted by two supervisory courts. Both referrals concerned pieces of legislation enacted to regulate the release from prison of inmates convicted of particularly serious offences on grounds related to the COVID-19 emergency. The challenged provisions required supervisory judges who grant house arrest to specific categories of prisoners to re-evaluate the conditions underlying their decision periodically. Moreover, supervisory courts should obtain compulsory opinions on the decisions of house arrest by the District and National Anti-Mafia Prosecutors and consider additional specific circumstances.

The referring judges held that the contested legislation could breach the right to defense of the prisoners as supervisory judges were entitled a role that should have been exercised by a supervisory court. However, the ICC held that this anticipation is not unusual under urgent circumstances. In the ICC's view, prisoners can fully exercise their right to defense in the proceedings before the supervisory court, which should be completed within thirty days of any revocation measure that may have been issued, and in which a defense counsel has full knowledge of the documentation and opinions obtained. The ICC then interpreted that the provisions in question do not conflict with right to health of the prisoners and with the separation of powers. In fact, the law is not intended to exert undue pressure on the judge who granted house arrest. Rather, it aims solely at enriching the judge's knowledge on any intramural alternatives capable of protecting the health of the prisoners just as effectively.

4. Judgment no. 230 of 230: Same-sex parenthood

The decision dealt with a referral order raised by the Ordinary Court of Venice, concerning

[10] See our 2016 report: Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy', in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2016 Global Review of Constitutional Law* (The Clough Center for the Study of Constitutional Democracy 2017), 110.

the law on civil unions and on certificates of civil status. In the case referred to the ICC, a woman (the so-called gestational mother) who had registered a civil union with another woman conceived a child via donor fertilization carried out abroad, obtaining the necessary consent of the "intentional mother." The child was then born in Italy. The two women asked to be registered as the mothers of the child, while this was not allowed by the challenged legislation. In the ICC's view, recognition of the parental status of the "intentional mother" is an end to be pursued through legislation. It entails a choice – the outcome of which is not mandated by the Constitution – that, especially due to the ethical and value notions at stake, constitutes one of those interventions through which the Legislator interprets the collective will, balancing the fundamental values involved and considering the most entrenched positions in the conscience of society at that particular point in time.

The Court held that recognizing same-sex parenthood within a civil union between two women is not mandated by any constitutional provision, although the Constitution does not prohibit this outcome. However, any legislative measure is based on assessments that are for the Legislator to make. Broader protection of the best interests of the child – currently only partially afforded by case law, through a limited form of adoption – can also be provided for more incisively by the Legislator in the exercise of its discretion.

5. Judgment no. 186 of 2020: Refusal to allow applicants for international protection to register their residence in local municipalities is unconstitutional

In this case, the ICC decided on several referral orders that challenged the constitutionality of a piece of legislation that prohibited individuals waiting for a final decision on their asylum status to register their residence with local municipalities.

Referral orders held that the refusal to register was in violation of Article 3 of the Italian Constitution that contains an equal protection clause and a protection of social dignity of human beings. The ICC held, in fact, that the legislation was discriminatory in that it treated different classes of residents (Italian nationals, foreign national asylum applicants, and other foreign nationals) differently without any objective reason. Such a difference in treatment may result in many challenges including, *inter alia,* the social stigma of exclusion and the impossibility to access key services.

The ICC acknowledged that, in principle, there might be a need to control and monitor the residence of foreign nationals on the territory. However, the Court held that the contested legislation was also irrational on that specific ground, making the task of public authorities more difficult as it "increases, rather than reduces, the problems associated with the monitoring of foreign nationals who are lawfully resident within the national territory."

6. Order no. 182 of 2020: Referral for preliminary ruling (maternity allowances and EU directive direct effect)

In this case the ICC submitted, for the fifth time in its case law, a reference for preliminary ruling to the Court of Justice of the European Union, following its approach to dual preliminarity inaugurated with its decision no. 269 of 2017.[11] The ICC had been consulted by the Court of Cassation regarding the constitutionality of a rule that established specific conditions of eligibility for a childbirth allowance and a maternity allowance. First instance and appeal courts that decided on the case found that national provisions were contrary to an EU directive that they considered to be applicable and endowed with direct effect, while this was not the opinion of the public administration competent to grant the allowances. The ICC decided to refer a question to the European Court of Justice for a preliminary ruling asking whether the relevant norms of the EU directive are applicable in the cases at hand and if they are endowed with direct effect.

7. Order no. 132 of 2020: Jail for libel aggravated by the use of the press – one year for the legislator to correct the contested legislation

In this case, the ICC was called to decide on the compatibility with the Constitution and with the ECHR of pieces of legislation providing for imprisonment for libel aggravated by the use of the press and including the attribution of a given fact. With its order, the ICC postponed the decision on the legitimacy of this legislation to June 22, 2021, thereby granting Parliament time to enact new legislation on the matter in the meantime. It was the second time in its case law where the ICC decided through a "suspension" of its judgments (the first decision involved end-of-life choices through order no. 207 of 2018, see the Global Review year 2018).

8. Judgment no. 118 of 2020: Compensation for harms caused by vaccines

In this case, the ICC considered a referral order concerning legislation that precluded the payment of compensation for harm caused by the vaccine against Hepatitis A. The specific vaccine at hand was not mandatory, but had been recommended by the health service. Drawing on previous judgments in the field, the Court struck down the contested legislation as unconstitutional as it did not provide for the payment of compensation under such circumstances. Whilst the fact that a vaccine was recommended left scope for individual decisions, the fact that it pursued a public health goal engaged solidarity considerations under the Constitution and, hence, a duty of the State to pay compensation.

9. Judgment no. 97 of 2020: Absolute ban of exchange of goods in hard prison regime is unconstitutional

This case considered the constitutionality of a provision of the Prison Law that banned the exchange of objects of low economic value among inmates subject to "hard prison regime" applicable to inmates involved in criminal organizations. The Court held that, as a blanket rule, the provision was unreasonable

[11] See our 2017 report: Pietro Faraguna, Michele Massa, Diletta Tega, Marta Cartabia, 'Italy' in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2018 Global Review of Constitutional Law* (The Clough Center for the Study of Constitutional Democracy 2019), 160.

and purely punitive. It reasoned that it could not be justified by the purpose of the hard prison regime, that is, to cut ties between inmates and their criminal organizations, since inmates in the same socialization groups had ample occasions to communicate with words and gestures without resorting to the symbolic meanings of objects. The ICC pointed out that the rigorous application of ordinary prison rules sufficed to meet the needs claimed as a justification for the unconstitutional provision, citing specific rules already in place to permit the reshuffling of socialization of the members of the group and to limit the kinds and quantities of objects that could be brought into group settings.

10. Judgment no. 32 of 2020: Measures against corruption and retrospective nature of criminal law

The decision struck down a recent piece of legislation concerning anti-corruption law as unconstitutional. The contested provision extended the grounds of ineligibility for the adoption of alternative measures to incarceration, as laid down by the existing regulation provided for by the Prison Law for organized crime offences, to most types of offences against the public administration. In fact, it introduced more restrictive conditions under which a supervisory court could replace the term of imprisonment that a person convicted of a corruption offence has been sentenced to with a non-custodial measure. In fact, the ICC held that the living interpretation of the contested legislation made it applicable also to persons convicted of offences that have been committed before its entry into force.
The referral orders asked the Court to assess whether the retrospective application of this new legislation was compatible with the principle of non-retrospectivity of criminal law, enshrined in Art. 25 of the Constitution, considered in light of the recent case law of the European Court of Human Rights (ECtHR) on Article 7 of the ECHR. The ICC ruled that the enforcement of sentences is, in principle, governed by the law in force at the time of the execution of the decision and not by the law in force at the time of the commission of the offence, unless the legislative amendments enacted after the commission of the offence are so significant as to transform the scope of the punishment and its actual impact on the personal liberty of the convict. In the view of the ICC, this was the case in the decision at hand.

11. Judgment no. 18 of 2020: Inmates being mothers of children with severe disabilities

Through this decision, the ICC declared unconstitutional the legislation on special house arrest applicable to female inmates having children under the age of ten, in so far as the contested legislation did not apply to incarcerated mothers with severely disabled children of any age. In fact, the ICC considers that the limit of ten years of age violates the constitutional principles of equality, reasonableness, and protection of the fundamental rights of the human person (Articles 2 and 3 of the Constitution), along with those laid down in Article 31(2) of the Constitution (also invoked by the referring court) that provide for the protection of maternity. However, the ICC made clear that its decisions did not review further conditions that the legal order requires for granting the measure according to which female inmates will be eligible for house arrest in their own home, in another private residence, or within a facility offering care, assistance or hospitality only "if there is no tangible risk of the commission of further offences."

IV. LOOKING AHEAD

2020 is a year to be remembered (or, perhaps, forgotten) because of the global pandemic that disrupted many aspects of private and public life. As to constitutional developments, the pandemic had an enormous impact on the action of political and institutional actors. However, the ICC had a fairly limited impact in 2020. The impact will be much stronger in 2021, when the ICC is called to decide on several controversies that arouse during 2020. These will be related to the emergency measures and extraordinary limitations of personal freedom to prevent the spread of the coronavirus as well as challenges between State and regional bodies regarding the adoption of measures enacted to tackle the sanitary crisis. The impact on the case law of the ICC in 2021 will also be a quantitative one: because of a reduction of activity in lower courts, limited by the emergency measures aimed at ending the pandemic, the workload of the ICC will likely be impacted by a smaller number of referral orders submitted by judges.

V. FURTHER READING

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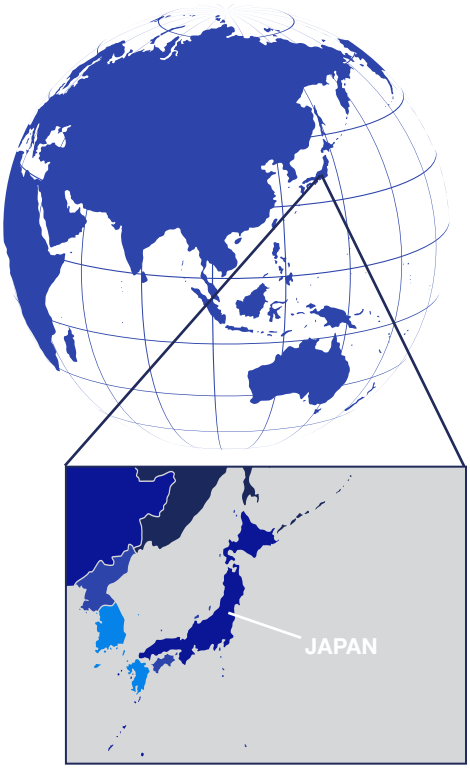

Japan

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I. INTRODUCTION

The year 2020 was a year of significance. In the spring of 2020, the new coronavirus spread to Japan, and a public health emergency was declared. However, Shinzo Abe's cabinet, which had failed to deal with the COVID-19 that had developed into a pandemic, resigned, and Yoshihide Suga took over as prime minister. Whereas Abe had the fervent support of the Internet right-wing, the new administration is supported by the socio-economic conservatives of the Liberal Democratic Party (LDP) and the New Komeito Party. Both prefer a pragmatic approach and are fed up with the constitutional politics promoted by Abe and his supporters. The possibility of constitutional amendment is fading away. On the other hand, however, the Suga administration has inherited the authoritarian traits of the previous administration, which under-enforced or even simply ignored some provisions of the Constitution. Thus, the seemingly return to the normal politics did not reverse the past eight year's "constitutional change without amending the constitution."

The Constitution does not contain an emergency clause. And the law did not foresee infectious diseases such as COVID-19, nor did it set forth coercive measures that would collectively restrict the freedom of many citizens. At first, Abe tried to show his strong leadership by declaring a national emergency to highlight the flaws in the Constitution and the need to amend it. Contrary to his expectations, however, public opinion criticized the government for its inefficiency and incompetence. In contrast, Suga embraces a non-coercive response to COVID-19 that is acceptable to socio-economic conservatives and, thus, close to zero-restriction. To be sure, Suga and his ruling coalition enacted the 2020 amendment to the Special Measures Law on Infectious Diseases (SMLID), which strengthened the government's regulatory power by levying fines against businesses that ignore the government demands to shorten their hours or shut down to prevent the spread of COVID-19. But, even under the revised statute, large-scale quarantine and lockdowns were impossible and suspension of business operations cannot be enforced by criminal sanctions.

Even with the new administration, the old authoritarian trend still persists. Suga's "living-with-corona" strategy relies on a social authoritarianism that imposes peer pressure as a functional equivalent to the government regulations. The new prime minister was still tied to the legacy of his predecessor, as seen in his unprecedented decision to block the appointment of several scholars to the governing body of the Science Council of Japan (SCJ), the nation's equivalent of a national science academy. The organic statute of SCJ requires the prime minister to appoint or remove SCJ members based on the recommendation of SCJ. The religious right, which has supported the Abe administration, has called for the dismantling of the SCJ. The SCJ was established at the initiative of the United States during the occupation as a remnant of the imposed postwar system. In response, liberal intellectuals protested the rejection of the appointment as a violation of the academic freedom.

Suga also maintains Abe's national security policy that made Article 9 of the Constitution obsolete. As evidenced by the renewed

dispatch of Maritime Self-Defense Force vessels to the Middle East at the request of the United States in 2020, the SDF are becoming an integral part of the U.S. military and are growing as an armed force capable of responding to global military operations. Thus, Suga's realism does not mean a departure from abusive constitutionalism. Nevertheless, at least it relieves the pressure on the courts to adjudicate the Ackermanian constitutional politics and enables them to go back to their daily business, such as cases and controversies on the due process of the nation's representative democracy.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Japanese politics in 2020 can be divided into three periods: (1) COVID-19 emerged as a national problem (January-April), (2) Abe cabinet declined in power and finally resigned (May-August), and (3) the Suga cabinet began its administration (September-December). During each period, the government sparked important constitutional controversies.

1. Government actions to combat the COVID-19 pandemic

On January 15, 2020, the first case of COVID-19 was reported in Japan. Since then, the Japanese government has been struggling to make decisions on how to respond to the COVID-19 pandemic.

In the early stages of the global pandemic, Tom Ginsburg and Mila Versteeg provided three useful categories for classifying the legal basis for COVID-19 measures adopted by each country: (1) the declaration of a state of emergency under the constitution, (2) the use of existing legislation dealing with public health or national disasters, and (3) the passing of new emergency legislation.[1] Within those three categories, they classified the measures adopted by the Japanese government as based on existing legislation. However, the Japanese government's response to COVID-19 would be better described as based on new legislation, to be accurate.

The Meiji Constitution, which was in effect in Japan between 1890 and 1947, was influenced by the constitutions of continental Europe, and explicitly granted various emergency powers to the Emperor. In quite contrast, the Constitution of Japan, which has been in effect since 1947 to the present, does not have comprehensive emergency clause, as does the U.S. Constitution. The response of the government to emergencies is permissible insofar as there is a legislative grant of authorization. In addition, legislation is not permitted to vest the executive power with powers beyond the normal constitutional framework. Although there have been calls for the introduction of an emergency clause in the Constitution, particularly by the LDP, such attempts have not yet been successful.

In Japan, the Act on Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases, the so-called "Infectious Diseases Act," is the general law that serves as the basis for the government's measures against infectious diseases.

However, the global swine flu pandemic in 2009 prompted the need for a legislation that would enable the rapid implementation of effective governmental measures against unknown infectious diseases, which led to the enactment of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (Pandemic Influenza Act) in 2012. This act introduced an emergency system as a measure to combat a pandemic, including the declaration of a state of emergency by the prime minister, as described below.

It was expected that the measures to prevent the spread of COVID-19 would also be based on this Pandemic Influenza Act, but the government interpreted this act as not applicable to COVID-19. While this Act is applicable to "new infectious diseases" other than influenza, the government argued that a "new infectious disease" under the act means an infectious disease for which the causative virus has not yet been identified. Therefore, since the causative virus of the COVID-19 disease had already been identified, it was not a "new infectious disease" under the act. In other words, the Japanese government interpreted that emergency measures to fight against COVID-19 were not possible within the framework of the existing legislation and that new legislation was needed.

Although there were some objections to this narrow interpretation by the government, the Diet amended the Pandemic Influenza Act on March 13, 2020 to render it applicable to COVID-19, based on the government's interpretation.

On April 7, prime minister Abe declared a state of emergency based on the revised Pandemic Influenza Act, Article 45 (Article 45 Declaration) for seven prefectures, such as Tokyo and Osaka, and on April 16, the declaration was expanded to cover the entire territory of Japan.

Although the declaration of a state of emergency of April 7 was widely reported around the world, Article 45 Declaration, contrary to its language, does not have a strong legal effect. It neither allows for extra-constitutional restrictions on fundamental constitutional rights nor concentrates power in the executive branch. The most important legal consequence of Article 45 Declaration is that prefectural governors can request and direct local residents to take necessary actions to prevent the spread of infection. But if they do not follow such directions, the governor cannot impose criminal and civil sanctions and can merely publish the names of those who do not comply with them.

Nevertheless, for the Japanese society, the declaration of a state of emergency by the national government had a significant psychological and symbolic effect. In the case of Tokyo, the governor requested that citizens stay at home and that places where many people gather, such as nightclubs and theaters, be closed based on the Article 45 Declaration. Complying with these requests was

[1] "Tom Ginsburg & Mila Versteeg, State of Emergencies: Part I, Harv. L. Rev. Blog (Apr. 17, 2020), https://blog.harvardlawreview.org/states-of-emergencies-part-i/".

a huge burden, but many abided by them.[2]

2. The End of the Abe Cabinet

The Abe cabinet, which came to power in 2012, was based on the right-wing faction of LDP, a conservative party, yet maintained a high approval rating in public opinion polls, partly due to the loss of popular support for the Democratic Party of Japan (DPJ), a liberal party that failed to manage the government from 2009 to 2012 was finally dissolved in 2016.

On the back of its high approval ratings, the Abe cabinet succeeded in passing a series of bills in the National Diet that were strongly opposed by liberals. However, in May 2020, the Abe cabinet failed in its attempt to amend the Public Prosecutor's Office Act, which regulates the appointment of prosecutors, and has ever since rapidly lost its ability to hold political sway.

Appointments in Japan's political system are extremely complex, and there are often discrepancies between the *de facto* and *de jure* powers of appointment. The authority to assign prosecutors is formally held by the Minister of Justice, who is also a member of the Cabinet. However, the practice has been that appointment plans are drafted internally by a bureaucratic organization composed of prosecutors and then approved by the Minister of Justice without any objection. This practice allowed prosecutors to act independently of the government and the ruling party. Successive cabinets have been reluctant to intervene in the appointment of prosecutors because the intervention of a political branch in the appointment of prosecutors could have resulted in a strong public outcry.

However, the Abe cabinet has been characterized by overturning traditional practices and exercising its legal authority directly to make appointments in accordance with Shinzo Abe's own wishes, as symbolized by his intervention in the appointment of the head of the Cabinet Legislation Bureau in 2013.

The Abe cabinet sought to extend this practice to the appointment of prosecutors. In 2020, the Abe cabinet faced several serious scandals that could be the target of prosecution. Therefore, how prosecutors would behave was an important political issue for the Abe cabinet. In this matter, the key figure was the Superintending Prosecutor Hiromu Kurokawa. The Superintending Prosecutor is the second highest rank in the prosecutorial organization after that of the Prosecutor General. Kurokawa was presumed to have a close relationship with the Abe cabinet, and the Abe cabinet intended to install Kurokawa as the top prosecutor, the Prosecutor General. The term of office of the incumbent Prosecutor General was until August 13, 2021. However, Kurokawa had to retire on February 7, 2020, in accordance with the provisions of the Public Prosecutor's Office Act which stipulates that the mandatory retirement age for prosecutors is 63. The plan of the prosecutor's organization did not propose Kurokawa as the Prosecutor General either.

However, in January 2020, the Abe Cabinet extended Kurokawa's retirement age, interpreting that the National Public Service Act, which is a general law on civil servant personnel matters, allows the retirement age of prosecutors to be extended. This interpretation was publicly criticized for ignoring the provisions of the Public Prosecutors Office Act.

In this context, the Abe cabinet submitted to the Diet a bill to amend the Public Prosecutor's Office Act. This amendment was meant to legitimize, through legislation, the Cabinet's interpretation, which had been criticized and to allow the retirement age of the Prosecutor General to be extended to 68, depending on the will of the Cabinet. The public opinion became increasingly opposed to the bill, claiming that the Abe cabinet was trying to control the prosecutors to prevent them from investigating the Abe cabinet.

Even Japanese celebrities, who usually refrain from making political statements, protested against the bill via Twitter, and the Abe administration's approval rating dropped to 29%. Furthermore, Kurokawa himself was suspected of engaging in gambling, which was prohibited by criminal act, and the bill was eventually repealed.

After the bill was repealed, prosecutors took aggressive action against the Abe cabinet: in June, Katsuyuki Kawai, who served as Minister of Justice in the Abe cabinet, and his wife, Anri Kawai, a member of the Diet, were arrested for bribing the electorate. And, in December, Abe's secretary was indicted for violating the Political Funds Control Act.

3. Formation of Suga Cabinet

The Abe cabinet, whose approval ratings had slumped, finally stepped down, and on September 16, 2020, the Diet nominated Yoshihide Suga, who became LDP president through an election within the LDP, as the new prime minister. Yoshihide Suga held the position of Chief Cabinet Secretary in The Abe cabinet for many years. Initially, The Suga cabinet's's approval rating was high because he was not as far to the right as Abe and was also considered to have good political skills. However, the Suga cabinet also suffered a decrease in support rate due to many attempts to change traditional personnel practices. Suga sought to change the personnel practices of the SCJ. The SCJ is a national academy. Its main mission is to make proposals about national policy on academic research, and it does not have any specific regulatory authority. However, for many years it has expressed a negative stance on military research at Japanese universities, which put it at odds with right-wing politicians.

According to the law, the members of the SCJ are appointed by the cabinet based on the recommendations of the SCJ itself. It was thought that the Cabinet could not reject the recommendation of the SCJ unless there were exceptional circumstances such as the nominee committing misconduct while carrying out research. In 2020, the SCJ recommended new members to the cabinet, but the

[2] "Ejima, Akiko: Japan's Soft State of Emergency: Social Pressure Instead of Legal Penalty, VerfBlog, 2020/5/13, https://verfassungsblog.de/japan-soft-state-of-emergency-social-pressure-instead-of-legal-penalty/".

Suga cabinet refused to appoint any of the nominees. All of the nominees rejected by the cabinet were academics who were critical of the national security policies being pursued by the Abe cabinet.

The Suga's cabinet's refusal to appoint the nominees was criticized as a violation of the Science Council of Japan Act and the constitutional right to academic freedom. In the end, Suga's forceful attitude resulted in a substantial drop in his initially high approval rating.

III. CONSTITUTIONAL CASES

1. Tattoo case: Freedom of Tattooing[3]

Tattooing (irezumi) has been one of the long-standing cultural practices in Japan since ancient times. Some of the tattoos are artistically sophisticated. At the same time, however, as members of the "yakuza" (Japanese gangsters) have traditionally gotten flamboyant tattoos to flaunt their own power, there is a persistent view that tattoos represent anti-social behavior. For example, many hot springs refuse to allow people with tattoos to bathe.

In that context, in 2015, several tattoo artists had been arrested for violating the Medical Practitioners Act. The Medical Practitioners Act stipulates that no one except a medical practitioner (medical doctor) shall engage in "medical practice" and imposes criminal penalties on those who violate this regulation. The prosecutor argued that tattooing customers is a "medical practice" that only doctors are permitted to engage in because it is an action that is likely to cause cutaneous damage. If the prosecutor's argument is correct, it would be necessary to obtain a medical license in order to tattoo others.

In response to the prosecutor's argument, the criminal-defense attorney challenged the prosecutor's interpretation of the Medical Practitioners Act and argued that requiring tattoo practitioners to obtain a medical license restricts the freedom of profession, and that tattoos are constitutionally protected as a freedom of expression because they express thoughts and feelings.

The Supreme Court did not directly refer to the constitutional issues, but settled the case only by interpreting the Medical Practitioners Act. The Supreme Court interpreted that "medical practice" is an act that belongs to medical treatment and health guidance, and that may cause harm to health and hygiene unless it is performed by a medical practioner. Then, the Supreme Court added that in determining whether or not an act constitutes a "medical practice", not only the perspective of health and hygiene but also society's perception of that act is a factor to be considered.

In this sense, the Supreme Court pointed out several social circumstances surrounding the practice of tattooing: 1) tattooing has been perceived by society as a cultural practice with symbolic elements and artistic significance, and was not considered to be a medical treatment, 2) tattooing requires knowledge and skills related to artistic practice, which is distinct from medical practice, and 3) historically, tattooing has been performed for many years by tattooists without medical licenses. In conclusion, the Supreme Court found the defendants not guilty on the grounds that the act of tattooing was not a medical practice.

The Supreme Court did not refer to tattoos as freedom of expression or to the freedom of the tattooist's profession. However, even without referring to the Constitution, it is often the practice of the Japanese Supreme Court to protect constitutional rights substantially by narrowly interpreting the scope of application of criminal penalties.

2. House of Councilors Election case[4]

In Japan, the population has been intermittently moving from rural areas to urban areas. This led to a disparity in the number of representatives per constituent population between urban and rural areas (the disparity in voting value). The LDP, which for many years held the majority in the Diet, was reluctant to correct the disparity in the value of votes, which would have reduced the number of representatives from rural areas, its main source of popular support. The Supreme Court, on the other hand, has ruled that equality in voting value is a constitutional requirement. Thus, each election has attracted attention as to how the Supreme Court will make a decision on the constitutionality of the disparity in the value of votes.

The Constitution of Japan adopts a bicameral system. The Diet consists of the House of Representatives and the House of Councilors. Voting value disparity has been a constitutional issue in both Houses. However, while the maximum disparity in the value of votes in the House of Representatives has ranged around two times, the disparity in the House of Councilors has been comparably high around five times throughout the 2000s.

There are different views on such a large disparity in voting value in the House of Councilors. The first view is that, given the fact that the House of Councilors' electoral districts are set on the basis of prefectures, the members of the House of Councilors are considered to be representatives of the prefectures, and that, like U.S. Senators, a disparity in voting value is constitutionally permissible. On the other hand, the second view is that, since the Constitution clearly states that members of the House of Representatives and the House of Councilors are not representatives of the prefectures but of the entire Japanese people, the House of Councilors cannot be positioned as a representative of the prefectures; on the contrary, from the standpoint of equality in voting alues a constitutional requirement, the number of seats in the House of Councilors in each prefecture should be allocated in proportion to the population, or the prefecture-based electoral districts should be abolished in the first place.

[3] "SaikōSaibansho [Sup.Ct.] Sept.16,2030, Hei30(a)no.1790,74(6) Saikō Saibansho keiji hanreishū [Keishū] 581 (Japan)."

[4] "SaikōSaibansho [Sup.Ct.] Nov.18,2020, Reiwa2(tu)no.28,1756 Saibansyo Jihō [Saiji] 20 (Japan)."

In 2012, the Supreme Court relied on the second view in its ruling, stating that the electoral system was unconstitutional, and recommending changes to the electoral system based on prefectures, although it did not nullify the election. Since the Diet did not make any drastic reforms in response to that ruling, the Supreme Court continued to make the same decision in its 2014 judgment, calling for the reform of the electoral system as it did in 2012. Following this, the Diet finally amended the Public Offices Election Act in 2015 to partially revise the system of using prefectures as the basic unit of constituencies, and merged the constituencies of the four less populated prefectures into two constituencies. As a result of this merger of constituencies, the voting disparity was reduced from five times to three times. However, as the disparity continued to exist even at three times, there were voices calling for further action such as stopping the use of prefectures as units for all constituencies

At the same time, there were strongly opposing views within the LDP against the merger of constituencies and the party made it a key item in the constitutional amendment to make prefectures an important factor to consider when determining constituencies.

Perhaps in part because of the campaign for such a constitutional amendment, the Supreme Court has stopped calling for more drastic reforms since the 2015 amendment to the Public Offices Election Act. In its 2020 judgement on the constitutionality of the ordinary elections for members of the House of Councilors held in 2019, the Supreme Court ruled that the electoral system on which the 2019 elections wre premised was not in an unconstitutional state, after commending the Diet for its continued efforts to reduce the disparity in the value of votes.

3. Iwanuma City Assembly Case[5]

In Japan, judicial precedents have adopted the legal doctrine that judicial review does not extend to legal disputes that are solely internal within the organization, from the perspective that the court needs to defer to the internal discipline of organization, since organizations, whether public or private, form a subset of society that differes from ordinary society. This legla doctrine has been called "the doctrine of sub-society." Not only universities and political parties, but also local assemblies, although they were public institutions, were considered to form a sub-society and were subject to the doctrine of this sub-society. Therefore, even when local assemblies impose disciplinary penalties on their members, they were sometimes considered to be internal matters of the sub-society and not subject to judicial review. The Iwanuma City Assembly case overturned such a previous precedent.

The City Assembly of Iwanuma, Miyagi Prefecture suspended X, who was a city council member, from attending the city council meeting for 23 days and provided him with reduced remuneration based on the ordinance of the city as a disciplinary action against him for making undignified remarks in the committee. Concluding that the disciplinary action of suspension for 23 days was unconstitutional and unlawful, Councilor X filed a lawsuit against Iwanuma City seeking to invalidate the disciplinary action, the payment of 278,300 yens of the congressman's remuneration reduced by the disciplinary action, and damages for delay. There was an aspect of this dispute in which a member of the majority in the assembly used the disciplinary power of the assembly to exclude a member of the minority. However, the suspension of attendance as a disciplinary measure by a local assembly against its own members was considered to be an area beyojnd the reach of judicial review based on the doctrine of partial society.

The district court dismissed the plaintiffs' claim, reasoning that "[l]ocal assemblies have autonomous legal norms which are provided for by the Constitution (Article 93 of the Constitution), the right to enact conference rules (Article 120 of the Local Autonomy Act), the right to punish members (Article 134, Paragraph 1 and Article 135, Paragraph 1 of the said Law), etc., and the suspension of attendance is only a temporary restriction on the exercise of the rights of members. Therefore, it is appropriate to leave the propriety of disciplinary actions to autonomous measures as a matter of internal discipline of local assemblies, and they are not subject to legal disputes nor subject to judicial review." X appealed and the high court said, "[i]f suspension of attendance leads to a reduction in remuneration for members of the assembly, the question of whether the punishment is appropriate or not should be subject to judicial review by the court as it is directly related to the public law and order assumed by the Constitution and laws." The high court remanded the case to the district court and hold that "[w]ith regard to the Actions, the illegality of the Disposition alleged by appellant (issue on the merits) should be determined, and further oral arguments are necessary for this purpose." X appealed this decision.

The Supreme Court ruled that, in light of the nature of the punishment of suspension and the degree of restriction on the activities of Diet members, this was only a temporary restriction on the exercise of their rights. The Supreme Court also stated that it cannot be said that the propriety of the resolution should be solely left to the autonomous resolution of the Council.

Therefore, the Supreme Court ruled that the propriety of the punishment of suspension of attendance for members of the assembly of an ordinary local public entity should be subject to judicial review, and the precedents of the Supreme Court thus far should be changed. In addition, Supreme Court Justice Katsuya Uga argued that a lawsuit against a local assembly member seeking to revoke the disciplinary suspension of his/her attendance was a legal dispute. In order to exempt a local assembly member from judicial review because of a legal dispute, he understood that it should be strictly limited to cases where there are constitutional grounds to justify an exception.

The ruling superficially limits the scope of the case to punishing a member of a local

[5] "SaikōSaibansho [Sup.Ct.] Nov.25,2020, Hei30(Gyo Hi)no.417,1757 Saibansyo Jihō [Saiji] 3 (Japan)."

government assembly for suspension of attendance. Therefore, even if the punishment is imposed by a political party, a university, or a local assembly, which has been subject to the legal principles of a partial society, this judgment does not immediately cover punishments other than suspension of attendance. However, this judgment does not use basic concepts such as "sub-society" which have formed the reasoning of judgment of the legal theory of partial society. Instead, it adopts a reasoning that the scope of judicial power toward local assemblies is determined by the nature of the disciplinary penalty and the degree of restriction on assembly members' activities. Thus, the reasoning of the judgement itself is significantly changed. Therefore, it may be controversial whether the new reasoning of judgment can change the conclusion that has been made in the doctrine of sub-society in past disputes other than those related to local assemblies.

IV. LOOKING AHEAD

Japan has experienced a series of developments since the beginning of 2021. The first is the revision of the Pandemic Influenza Act, which is the legal basis for measures against Covid-19. This revision is the government's response to criticism that the previous legal framework was inadequate in combating pandemic because it did not include coercive measures. At first, the government was considering introducing criminal penalties, but due to opposition from opposition parties, the government decided to impose administrative penalties. Thus, the revised law includes a provision that allows businesses that do not accept shorter working hours and infected people who refuse to be hospitalized to be fined as administrative penalties. Under this revised law, the government will be able to issue orders under a state of emergency to businesses that do not respond to requests for shorter working hours or leave from work and impose fines of up to 300,000 yens on those who violate such orders. Under the priority measures such as prevention of the spread of the disease, a non-penal fine of 200,000 yens or less is imposed on a business operator for violation of the law and those who refuse to be hospitalized or flee from their homes can be fined up to 500,000 yens. Even under the new revised act, no criminal penalties have been esetablished. However, there are still arguments that the new revised act is unconstitutional as it excessively restricts personal freedom. Interestingly, some constitutional scholars argue that the Constitution should be amended to incorporate a new emergency clause and then the same kind of restrictions as the revised acts should be introduced.

Second, on March 17, 2021, the Sapporo District Court made a noteworthy judgment regarding marriage between same-sex couples. Japan's Civil Code only recognizes marriage between opposite-sex couples. On the other hand, the Sapporo District Court ruled that while the Diet has broad discretion in matters related to marriage and family, the current system, which provides opposite-sex couples with the opportunity to enjoy the benefits of the marriage system, but does not provide same-sex couples with even a part of such legal benefits, is a violation of the principle of equality runder the law as guaranteed by Article 14, Section 1 of the Constitution. This was a landmark decision. Yet, the Sapporo High Court is currently continuing to examine the appropriateness of the Sapporo District Court's decision. It remains unclear whether the High Court or the Supreme Court will uphold the District Court's decision.

V. FURTHER READING

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Kazakhstan

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I. INTRODUCTION

Compared to the previous year the year 2020, all its testing challenges (first of all, due to the COVID-19 pandemic) notwithstanding, did not bring lots of new constitutional developments per se or significant changes in constitutional legislation. Nor was there any major shift in the national policies or reforms conducted by the highest political leadership of the country. This was purportedly due in part to State authorities focusing on dealing with the crisis caused by the pandemic.

The last year, though, did carry a symbolical significance as it marked an important milestone in the evolution of Kazakhstan's constitutional law: 2020 was the 25th anniversary of the adoption of the current Constitution. The existing flexible system of constitutional control embodied in the Constitutional Council presented a somewhat long analysis of the state of constitutionality and legality in the country for the last five years. However, it did not carry out any constitutional scrutiny or review of legal acts of nation-wide importance including those enacted by the Head of State (except for the Law "On Housing relations", see further below, section III).

This report describes certain developments in the country relevant from the constitutional legal point of view as well as the work carried out by the Constitutional Council of Kazakhstan throughout 2020. It also highlights some issues which could have been addressed or solved by the Council and provides an overview of its normative resolutions and other documents dealing with issues of constitutional significance. The report proposes that the existing constitutional system in the country basically continues to carry out the work expected from it by the current ruling elite and no big changes or true constitutional reforms are presently foreseen.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Despite the official pronouncements of the authorities,[1] not too much happened in the country during 2020 in terms of constitutional developments proper. In particular, no new constitutional legislation was adopted and no amendments to the Constitution itself were introduced. The only body of constitutional control, the Constitutional Council, issued several resolutions; however, it was addressed by a relevant authorized subject only once to consider matters involving constitutionality review. Despite this, there have been a couple of important developments which to varying degrees were relevant from the point of view of constitutional law in Kazakhstan.

The President of Kazakhstan, Kassym-Jomart Tokayev, signed a decree on the introduction of a state of emergency in the republic on March 16, 2020. This step, unprecedented in the history of independent Kazakhstan, was taken "in order to protect the lives and health of citizens" after the World Health Organization had declared COVID-19 to be a pandemic. The state of emergency ceased on May 11, but quarantine measures were kept in force throughout 2020. Legal responsibility for violating the

[1] See "An Address of the Chairman of the Association of Asian Constitutional Courts and Equivalent Institutions, Chairman of the Constitutional Council of the Republic of Kazakhstan Mr. Kairat Mami Due to the Situation of Widespread Dissemination of COVID-19," (24 April 2020), available at http://ksrk.gov.kz/en/aaks/news/address-president-association-asian-constitutional-courts-and-equivalent-institutions-mr.

state of emergency included both administrative sanctions (warning, fines, and arrest) and criminal sanctions (fines and imprisonment). The constitutionality of the decree has generally not been questioned, with the Constitutional Council never having been asked to make a pertaining scrutiny. The adoption of the decree has seriously and closely affected many important spheres of life of the society, law and State in the country such as: restrictions on the physical movement of people within the country's territory and moving in and out of it, judicial processes (e.g., switching to the online format of conducting trials which continued on even after the cancellation of the emergency period), the work of State bodies in general and the validity status of the acts issued by chief State sanitary doctors in the country among others.

Another occurrence could probably be more suitably labeled as "anti-constitutional" rather than "constitutional" since it has been regarded by the legal community as violating several important constitutional provisions. The active debates and heated exchanges among legal consultants (which themselves have been divided into two major opposing camps during the second half of 2020) on one hand and certain State structures and representatives such as Parliament and Governmental officials on the other revolved around the draft Law of the Republic of Kazakhstan "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on the Issues of Advocacy and Legal Assistance". The draft was developed in May 2020 at the initiative of the deputies of the Parliament of the Republic of Kazakhstan and encompassed specific changes into the acting Law on Advocacy and Legal Assistance of July 2018. In brief, the proposed Law provided for several significant changes directly influencing the development of the institution of legal consultants in Kazakhstan including the unification of all chambers of legal consultants into a single Republican Association of Chambers of Legal Consultants (RACLC) and an increase in the minimum number of members of the chamber of legal consultants from fifty persons to three hundred. Additionally, the draft amendments laid out a provision on mandatory accession to the Unified Legal Aid Information System (IS "E-Zan'-Komegi") plus regular RACLC membership payments for all lawyers. The proponents of the draft Law have put forward the following main argument: tightening the regulation of legal assistance in principle, as well as creation of a republic-wide structure with compulsory membership in particular, will improve the quality of legal aid which serves the interests of Kazakhstani society.

In the opinion of the leading representatives of Kazakhstan's legal community[2], the proposed draft amendments violate several significant provisions of the Constitution of the Republic of Kazakhstan. First of all, the issue involves the meaning and spirit of Article 1, para. 1 of the Constitution where the Republic of Kazakhstan proclaims itself as a democratic, secular, legal and social State, the highest values of which are a person, their life, rights and freedoms. The tightening of the State control and regulation of lawful activities go against the very concepts of the democratic State, State of law and social State. The proposed amendments appear to be serving certain narrow State agency interests and not the interests of the concerned layers of the society (i.e., people – legal aid beneficiaries) which is against the concept of the democratic State. Moreover, they contradict the notions of State of law and rule of law as depriving the access to qualified and competent legal assistance. The amendments, furthermore, prevent the State from ensuring the need for adequate protection of the rights and freedoms of citizens that is part of what the social State is supposed to do.

Second, by the same token and logic, the proposed amendments violate the State's obligation to provide for the right of everyone to receive qualified legal assistance (as guaranteed in Article 13, para. 3) due to the establishment of artificial bureaucratic barriers for lawyers and deprivation of freedom and flexibility needed for the legal consultant's profession in order to constantly raise professional standards and better the quality of legal aid delivery. Third, the entrepreneurship (business) aspect of the matter needs to be considered too. Article 39, para. 1 of the Constitution stipulates that human and civil rights and freedoms can be limited only by laws and only to the extent necessary in order to protect the constitutional order, public order, human rights and freedoms, health and morality of the population. Apparently, the self-regulation of the legal practice only contributes to the achievement of the protective aims above and helps create an environment of healthy competition where lawyers as entrepreneurs are encouraged to develop and improve their professional skills. Whereas the proposed restraining amendments – which have not been constitutionally justified by the project initiators – may play a rather demotivating role for joining the legal services market. In fact, they threaten a proper fulfillment of human and constitutional rights and interests that constitutional law aims to safeguard.

III. CONSTITUTIONAL CASES

In 2020, the Constitutional Council has issued four normative/additional resolutions where it provided official interpretation of certain constitutional issues and gave an annual address covering a period of five years, from 2015 to 2020. Again, it has not been requested by any authorized State institution or body on the issue of reviewing the constitutionality of existing or draft legislation except only for one instance which was as follows.

1. Normative Resolution #1 of 21 January 2020: Review of the Constitutionality of the Provision on Eviction in the Law of the Republic of Kazakhstan "On Housing Relations"

In issuing its first normative document in 2020, the Council was acting on the basis of the request from the Alatau District Court of Almaty on recognizing subpara. 8 of Article 107 of the Law of the Republic of

[2] See, for example, Arman Shaykenov, "О соответствии проекта Закона РК "Об адвокатской деятельности и юридической помощи" некоторым нормам Конституции РК" ["On the compliance of the draft Law of the Republic of Kazakhstan "On advocacy and legal assistance" with certain norms of the Constitution of the Republic of Kazakhstan"], published online (21 January 2021), available at https://online.zakon.kz/Document/?doc_id=35303616

Kazakhstan "On Housing Relations" of 16 April 1997 as unconstitutional. The Court was dealing with a civil case acting on the claim of the Communal State Establishment "Department of Housing Policy of Almaty City" against Mrs. Islamova and her family members (eleven people in total) concerning the eviction from an apartment rented from the State housing stock, without providing an alternative residence. The plaintiff asked the court to evict all these persons from the rented apartment. The Court considered that the cited provision of the Law "On Housing Relations" violated para. 1 of Article 21 (right to freedom of movement), para. 2 of Article 25 (conditions for citizens' housing to be provided by the State) and paras. 1 and 2 of Article 26 (right to private property and right to inheritance) of the Constitution. It also argued that the legal provision in question was in breach of the 1966 International Covenant on Economic, Social and Cultural Rights. The Council agreed with the Court and found that article 107, subpara. 8 of the Law "On Housing Relations" in its part where it allows the unconditional eviction of the tenant (subtenant), all members of their family and other persons living with them, from a public dwelling in the event that they acquired another dwelling, without taking into account the degree of their need for a dwelling, does not correspond to the basic principles of State social policy and the goals of lawful restriction of constitutional human rights. Thus it contradicts para. 1 of Article 1, para. 2 of Article 7 (use of Kazakh and Russian languages), Article 14 (equality before the law and court), para. 2 of Article 25 and para. 1 of Article 39 (lawful restriction of human and civil rights) of the Constitution of the Republic of Kazakhstan.

2. Additional Resolution #2 of 4 February 2020: Interpretation of the Council's Normative Resolution of 16 March 2011 on para. 3 of article 71 of the Constitution

In an open session, the Council considered the petition of the Chairman of the Mazhilis of the Parliament of the Republic of Kazakhstan on the interpretation of the normative resolution of the Constitutional Council of 16 March 2011 #3 "On the official interpretation of the norm of point 2 of para. 3 of Article 71 of the Constitution of the Republic of Kazakhstan". The question asked of the Council was: "How is the term of office of a member of the Constitutional Council appointed during the next six-year cycle determined?" The Council response was that according to para. 1 of Article 71 of the Constitution of the Republic of Kazakhstan, the term of office for members of the Constitutional Council is six years, and that in the event of early termination of the powers of a member of the Constitutional Council, in order to ensure compliance with the requirements of point 2 of para. 3 of Article 71 of the Constitution of the Republic of Kazakhstan, the person appointed to the vacant position shall be granted powers for the period remaining until the expiration of the six-year cycle.

3. Normative Resolution #3 of 15 April 2020: Amendments to the Regulations of the Constitutional Council

In this technical document the Constitutional Council has introduced the following amendment into its Regulations "Constitutional proceedings in whole or in part can be carried out in electronic format, about which a resolution is issued." The rationale for the addition was, supposedly and understandably, to be able to carry out its session work during the time of the COVID-19 pandemic. Another addition was: "The Constitutional Council has the right to adopt a resolution by which it draws the attention of State bodies or officials, organizations and other persons to the facts of violation of the law established in the course of constitutional proceedings, the reasons and conditions that contributed to the commission of offenses and requiring the adoption of appropriate measures, improper fulfillment of the legal requirements of the Council, as well as to the high conscientiousness and professionalism shown by individuals in the performance of civil or official duties, which contributed to a comprehensive and high-quality consideration of the appeal and strengthening the regime of constitutional legality." This second amendment probably illustrates the efforts of the Council to improve compliance with its decisions on the side of the State bodies and other organizations which demonstrates it is not oblivious to the instances of disregard or disrespect towards its recommendations in addressing the situations of unconstitutional practice or conduct. Whether these efforts turn out to be productive, time will tell.

4. Normative Resolution #4 of 15 December 2020: Abolition of Death Penalty and Ratification of the Second Protocol to the International Covenantal on Civil and Political Rights

President Tokayev requested the Council for its official interpretation of para. 2 of Article 15 of the Constitution and asked two questions: (1) Do the constitutional provisions of paragraph 2 of Article 15 of the Constitution oblige the authorities to establish in the criminal law the death penalty for all criminal acts provided for therein? (2) Is it possible, from the standpoint of constitutional requirements for the range of crimes for which capital punishment can be applied, to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty, together with its allowed reservation? Para. 2 of Article 15 of the Constitution states the following: "No one has the right to arbitrarily deprive a person of her life. The death penalty is established by law as an exceptional punishment for terrorist crimes involving the death of people, as well as for especially grave crimes committed during wartime, with the sentenced person being granted the right to apply for pardon."

The Council noted the tendency in modern international law towards abolishing the death penalty as well as the facts demonstrating that Kazakhstan has been taking that trend into account when working out its domestic law: introduction of alternative criminal punishment, i.e., lifetime imprisonment; introduction of a moratorium on the execution of death penalty in 2003; significant humanization of criminal policy thanks to the 2007 constitutional reform; reinforcing the procedural guarantees and fair trial rights for criminal cases involving capital punishment, and so on. The Council responses to the President's questions were as follows: (1) para. 2 of Article 15 of the Constitution should be understood in the following context: the Parliament of Kazakhstan, within its constitutional limits, is entitled to define in

criminal law a concrete list of crimes for the commission of which the death penalty can be imposed and whenever necessary to reduce the range of criminal violations in that list; (2) the norms of para. 2 of Article 15 of the Constitution do not impede the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aimed at abolishing the death penalty, as well as the corresponding harmonization of criminal legislation. The Council's progressive argumentation is to be noted here; by issuing this Resolution, it contributed positively to the matter of further improvement of Kazakhstan's compliance with international legal standards in the sphere of international human rights law and more proper domestic implementation of relevant provisions of public international law.

Furthermore, it contributed eventually to the subsequent actual ratification by Kazakhstan of the Second Optional Protocol. It entered a reservation to the effect that the Republic of Kazakhstan, in accordance with Article 2 of the Second Optional Protocol, reserves the right to use the death penalty in wartime against the persons who were found guilty of committing especially grave crimes of a military nature. It is safe to say so, even if the political decision had clearly been taken before the President requested the Council for its clarification. The State is now expected to bring its criminal legislation in accordance with the requirements of the Protocol.

4. Annual Address of 22 June 2020: Status of Constitutional Legality in Kazakhstan

This act of the Council was addressed to the Parliament of the Republic of Kazakhstan, in accordance with para. 6 of Article 53 of the Constitution, and this time it was rather comprehensive, covering the period of no less than five years: 2015-2020. It looked back at various events, developments and changes relevant for the constitutional law and State system that took place within this time and noted the 25th anniversary of the adoption of the Constitution in 2020. A critical look at this document reveals, time and again, the constant issue in the work of the Council: its political nature and reluctance to truly objectively and critically assess the situation with law and practice in Kazakhstan. This may be illustrated by the statements in the Address such as the following: "The transfer of powers of the Head of State, amendments to the Constitution and early elections of the President of the Republic were held in strict accordance with the requirements of the Constitution and the Constitutional Law "On Elections in the Republic of Kazakhstan". The text is, furthermore, abundant in generalizing statements such as this one: "In Kazakhstan, work continued on the consistent reinforcement of constitutionalism, enrichment of the values of the Supreme Law, guaranteeing the rights and freedoms of man and citizen …" One might even say that the Address represents a public announcement and listing of constant successes of the State during the reported five-year period in various spheres of life of the society and State, from political life to State programs to informational technologies to the country's international image and initiatives, and so on and so forth.

Be it as it may, and for the sake of fairness, it must be said that the Annual Address is also notable for its attempt to provide a critical evaluation of some areas of legislative work in Kazakhstan. The Council notes several issues in this regard: improper pension legislation, problems with laws dealing with enforced treatment of alcoholics, drug-addicts and toxicomaniacs, existing gaps in property legislation and discrepancy and non-correspondence between the exact meanings of legal texts in Kazakh and Russian languages. The Council also notes the need to further improve the acting Constitutional Law "On the Constitutional Council", for example, the necessity to expand the Council's authority. Interestingly, it does not argue for introducing the possibility for individuals (natural persons) and organizations (legal persons) to petition the Council for constitutional scrutiny of legislative acts; it just simply mentions the current absence of such a provision. Apparently, the Council is concerned with lack of enforcement of its previous decisions (similar to what is stated in its 2019 Annual Address): it laments the fact that some important recommendations it had made in the past have not yet been followed. In particular, it pertains to the issue of retroactive regulation of the new law when transferring administrative offenses to the category of criminal offenses, revision of the general legal consequences of a criminal record and termination of criminal prosecution based upon the so-called non-rehabilitating grounds, legislative regulation of the procedure (terms) for the authorization by the court of such a measure of individual prevention as preventive restriction of freedom of movement and grounds for refusal to issue a sanction, and some other unresolved problems with existing legislation. All in all, despite its mostly proclamatory nature, this act may still serve, in part, as a sort of indicator of lingering problematic issues that have been characterizing this country's legislation for years.

IV. LOOKING AHEAD

Whatever the expectations were from the system of constitutional control in Kazakhstan, it appears to project more or less the same image of a toothless State structure whose resolutions and recommendations have not been affecting much the decisions taken by other State bodies and highest decision-makers. In 2020, it continued to serve as an interpretative organ for confirming the already taken decisions of the executive/coordinative power. This may also be partially explained by the challenges posed by the pandemic that may have distracted the attention of the authorities. No new big issues facing the Council including possible expansion of its mandate or major constitutional reforms seem to surface in the foreseeable future. The same challenge as before remains: compliance with the Council's decisions by the State bodies.

V. FURTHER READING

E. Duysenov, "Some Problematic Issues of the Constitutional Legislation of the Republic of Kazakhstan" (2020) 3-4 (88-89) Pravo i gosudarstvo 60 [Law and State, in Russian]

I. Kravets, "Digital Constitutionalism and

the Future of the Information Society (In the Context of Globalization and Integration Processes)" (2020) 3-4 (88-89) Pravo i gosudarstvo 85 [Law and State, in Russian]

Ye. Sidorovoa, I. Serebrennikov, "On Some Problems of Implementation of the Principle of Legality in the Criminal Code of the Republic of Kazakhstan" (2020) 2 Nauchnyj dajdzhest Vostochno-Sibirskogo instituta MVD Rossii 65-69 [Scientific Digest of the East Siberian Institute of the Ministry of Internal Affairs of Russia, in Russian]

G. Vasilevich, I. Ostapovich, "Features of the Rule-Making Activity of the Constitutional Court of Russia, the Constitutional Court of Belarus and the Constitutional Council of Kazakhstan" (2020) 450 Vestnik Tomskogo gosudarstvennogo universiteta 191-205 [Bulletin of Tomsk State University, in Russian]

Kenya

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I. INTRODUCTION

The main focus of constitutional interest in 2020 has been proposals to change the Constitution – albeit, in the eyes of many, for the benefit of certain politicians. By the end of 2020 the popular initiative procedure under the Constitution (Article 257) had been appropriated by government and its close associates and bade fair to make a slew of changes to the 2010 Constitution, most of doubtful value. Two other highly unusual constitutional crises will be touched on.

Like many other countries, government responses to the coronavirus pandemic came before the courts, though many more cases are to come. Most other cases, while of importance to Kenyans, were not doctrinally very interesting. But one tried to sort out for the future the serious impasse created in 2019 by the inability to agree on the legislation to allocate national revenue between the national and lower-level governments, before it became necessary to pass annual budget legislation.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major development was foreshadowed in the 2019 ICON Report: namely the final report of the Building Bridges Initiative (BBI).[1] This had its genesis in the 2018 rapprochement between the President and his main defeated rival in 2017, Raila Odinga (and the concurrent side-lining of the Deputy President William Ruto). This initiative and its report deal with many issues that do not involve any change to the Constitution: with many changes to ordinary law, and administrative and policy changes. In fact, the theme of these is often "We should be implementing the Constitution".

Here the focus is on the actual changes proposed, and the process adopted. The latter is the "popular initiative" (Article 257). In brief this allows amendment of the Constitution by first a "suggestion" or a Bill, signed by at least one million voters. If the electoral management body is satisfied with the signatures the Bill (as it must then be) goes to the 47 counties, and if the assemblies of at least 24 counties approve it, it goes to Parliament. If Parliament rejects it, it goes to a referendum. If Parliament passes it, it may still have to go to a referendum if it affects any protected provision of the Constitution, such as independence of the judiciary (Article 255(1)).

The use of this process been the subject of many challenges in court, from early 2020 to early 2021. Cases have raised the question of funding of the BBI initiative as such, whether it is constitutional for this popular initiative procedure to be used by government and specifically whether it is right for public servants to be used to support it administratively and propagate it. They have asked what procedure county assemblies must use – including public participation, and the percentage of support needed. They have asked if "a suggestion" and "an amendment" can include many proposals with no unity of subject. And can – should - a referendum include a number of questions, one for each issue, or must all hinge on one yes or no question? No judicial answers were forthcoming by the end of 2020. Indeed, it is to jump the gun to

[1] https://www.bbi.go.ke.

refer to some of these because the litigation was not filed until 2021.

To turn to the substance (just a few examples), this writer counted 78 proposed changes to the Constitution text. The core proposal is to introduce more executive positions at the national executive level: in addition to the President and Deputy, there would be a Prime Minister (PM) and two deputies. This was touted as being "inclusive," that is ethnically. The model resembles that of Tanzania. The concept is that potentially disappointing presidents would be accommodated (although only by not contesting the presidential election, since the PM is to be the MP with the greatest support in the National Assembly). The runner-up in the Presidential race is however catered for – he or she becomes Leader of the Opposition with an automatic seat in the National Assembly (unless his/her party is providing the PM). There is no indication that the powers of the President are diminished, at least formally.

It is hard to read most of the other proposals other than as appeals to the support of counties or national legislators, certain regions of the country or women.

Under the Constitution now, an MP may not be also a Minister (or "Cabinet Secretary"). The model is that of the US. The Proposals include giving the President the option of appointing from in or outside the National Assembly (NA).

The makeup of legislative bodies would change in several respects. The number of members of the NA elected from regular constituencies would increase from 290 to 360. The Bill allocates the new constituencies to counties – in a way that pleases at least some "vote-rich" areas. One perceived benefit is that those areas will get more money – through the dubious practice of constituency development funds.

Forty-seven seats for women county representatives in the NA would disappear. So would 12 list seats intended for under-represented groups – to be replaced by six seats for persons with disability and youth. Gender equity would be guaranteed in the NA, though there are other provisions about the obligations of parties (and the electoral commission) to respect the two thirds rule (no more than two thirds of either gender).

In the Senate gender parity would be achieved: 47 county Senators, plus 16 women in lists plus four (list) seats for persons with disability and youth would be replaced by a man and a woman for each county.

At the second tier of government, the counties, the two thirds rule would remain guaranteed by the existing device of top up seats for women. A difference in this system would be that these seats would be allocated between parties on the basis of votes received not seats won by each party. This would shift the balance a little more towards proportionality but would not be a full mixed member proportional system.

The individuals chosen for gender top-up seats in the National and County Assemblies would no longer be from a list published in advance but from "candidates who stood for election with precedence being given to those who received the greatest number of votes" – another best loser principle. A sunset clause would be introduced for the top-up system: two more general elections only.

Two important provisions concern county finances. One would raise the minimum allocation from revenue raised nationally to counties collectively from 15% to 35%. This is greeted with great enthusiasm at the county level and surprisingly little objection nationally – no doubt because the Treasury has devised methods to present the annual calculations in a way that ensures the national level gets what it feels it needs (see case 3 below). It is worrying because no additional functions are conferred on counties – while the national government retains responsibility for the judiciary, military, most education and major transport infrastructure. More worrying – and almost ignored – is the provision that the per capita national allocation for any one county must not exceed three times that for any other county. At present a small rural, underdeveloped, historically neglected county may get many times the per capita allocation of the capital, with its 4 million dense population.

In short, the BBI proposals include a few good ideas, some that will not do what is promised, some that are unnecessary because the provision already exists and some bad ideas.

It is essential to mention two other developments. One is the national government takeover of Nairobi. Under the Constitution, Nairobi is like any other county. Tensions arose, especially when the Governor turned out to be seriously incompetent, and possibly corrupt. It seems that he was perhaps arm-twisted to agree to hand over many functions to the national government (under Article 187). Yet other articles would appear to be more germane. Article 190 allows the government to take over functions of a county temporarily when it cannot cope and assist it to get back on track. And Article 192 is for more serious situations, which may end in a county election. As it is, the national capital is largely governed by a military officer directly accountable to the national government and the President. Court cases are pending.

And the Chief Justice – under Article 261 - directed the President to dissolve Parliament for failure to comply with a court order to pass law to ensure the composition of Parliament satisfies the two thirds gender rule. The President has not. An interim court order is in place suspending the effect of the directive.

III. CONSTITUTIONAL CASES[2]

Most of these cases do not really involve the resolution of some major constitutional difficulty (though case No. 2 is significant). But they often form part of the continuing efforts to clarify the application of what is still a new Constitution, or they touch on something that is of considerable concern

[2] With grateful thanks for suggestions to Christine Nkonge, Executive Director Katiba Institute.

within the country from a constitutional perspective. Several of them are reiterating what has been well-established in the past (but evidently not sufficiently internalised in the minds of the relevant authorities). "PIL" – public interest litigation - among the key words or phrases means that the case was brought by or at least involved (as interested parties or *amici curiae*) people or organisations who were not the primary victims of the behaviour complained of. The one or two most relevant Articles of the Constitution are identified as key words.

The first group concern constitutional governance, and specifically issues related to devolution – which has been in effect only since 2013.

1. Senate of the Republic of Kenya v Speaker of the National Assembly [2020] eKLR[3]

This case concerns the National Assembly's failure to involve the Role of Senate in passing legislation; PIL, Article 96(2). The High Court decision essentially reiterates decisions of the Supreme Court to the effect that the Constitution requires that legislation affecting counties be passed by both Houses of Parliament. This case made an impact because it affected a considerable number of statutes passed by the National Assembly alone. The three judges held that no Bill can be introduced into either house without the Speakers going through a process to agree whether it concerns counties. All Bills currently before Parliament must be paused unless this process had occurred. It also declared that 23 statutes already passed were unconstitutional. However, it suspended the effect of its decision for nine months to allow for the failure to be rectified and the Acts to be considered as demanded by the Constitution.

2. Council of Governors v Attorney General [2020] eKLR;[4] impasse on financial legislation; PIL; Articles 261 and 218.

The budgeting process involves a series of steps including annual legislation on allocation of revenue from the national level to the counties collectively, then distribution between the counties, and the national Appropriation Act (and those for each county). In 2019 the National Assembly and the Senate could not agree on the first of these (The Division of Revenue Act) with the knock-on effect that other decisions could not be made. But the National Parliament went ahead to pass the Appropriation Act. The impasse reached the Supreme Court by way of the advisory opinion procedure. The Court laid down a series of guidelines about the relationship between the Commission on Revenue Allocation and Parliament, and the procedure to be followed including that the national Appropriation Act could not be passed before the Division of Revenue Act.

3. Council of County Governors v Attorney General & 4 others; Controller of Budget (Interested Party) [2020] eKLR[5]

Decided by a single judge of the High Court this case should make a radical difference to the way revenues are allocated between national and county governments; Article 203(1). The judge held that in the Division of Revenue Act 2016 the national government was allocated money in a way that violated the Constitution (but these have been standard practices). Particularly important is the decision that it was wrong to top slice from the revenue to be shared between the two levels certain funds to earmarked for the "national interest" as though this was certain specific activities of the national government. "National interest" is not just a matter for the national government.

4. County Government of Garissa v Idriss Aden Mukhtar [2020] eKLR[6] Dismissal county executive members; Articles 41, 179.

The Court of Appeal reviewed two previous conflicting decisions. One applied the "pleasure principle", holding that the Governor may dismiss a member of his/her executive at will – but added that the decision must not be arbitrary. The other held that the pleasure doctrine did not survive the Constitution. The Court of Appeal took the latter view. It said that the powers of the President were constitutional and his/her power to dismiss the executive constitutionally based, but those of the Governor were statutory. This is in line with a general reluctance to think of county governments as governments – and the insistence on the part of the courts that the system remains unitary. Thus, the courts feel able to apply – or reject – the pleasure doctrine for county executive members, despite the fact that that the doctrine was applicable to civil servants, and when it was abolished in the UK this change certainly did not apply to Ministers.

Other cases concerned governance and the rule of law more broadly.

5. Okiya Omtatah Okoiti v Attorney General [2020] eKLR[7] Government procurement procedures; PIL; Article 227.

The Standard Gauge Railway is a flagship project of the Kenyan government, a Chinese Belt and Road project. It is a matter of concern to many because of its cost, related debt to Chinese institutions, its environmental impact and whether it was needed at all. This case challenged particularly the procurement procedure used. The government insisted that this was a "government to government" contract and thus normal procedures did not need to be applied. Despite the project having been completed and indeed trains running, the Court of Appeal held that normal procurement processes (to be fair, equitable, transparent, competitive and cost-effective) ought to have been applied under Article 227 of the Constitution.

Realistically no consequences could follow from this decision. Other aspects of the de-

[3] http://kenyalaw.org/caselaw/cases/view/202549.

[4] http://kenyalaw.org/caselaw/cases/view/195034.

[5] http://kenyalaw.org/caselaw/cases/view/204528.

[6] http://kenyalaw.org/caselaw/cases/view/198254.

[7] http://kenyalaw.org/caselaw/cases/view/196972.

cision are worrying. First it seems that if the loan agreement had specified in advance that a certain Chinese corporation must be used that would have precluded the requirements of Article 227. In other words, a loan agreement that has the status of a treaty can exclude a provision of the Constitution. A loan agreement itself seemingly would be a service and thus must be procured in accordance with Article 227. Secondly the court agreed that evidence obtained illegally should be excluded. This goes much further than Article 50(4) of the Constitution which excludes evidence obtained in a way that violates a fundamental right (not enjoyed by government) but only if its admission would make the trial unfair or would be detrimental to the administration of justice.

6. Katiba Institute v Attorney General [2020] eKLR[8] Compliance with constitutional values in making parastatal appointments; PIL; Articles 10 and 232

The President and Cabinet Secretaries (Ministers) have been exercising powers conferred by statute to appoint members and chairs of parastatal boards. Some appointments are a matter of political patronage and go, for example, to recently defeated politicians. Appointments were challenged on the basis that constitutionally the power was that of the Public Service Commission. The court rejected the argument that the positions in question were offices in the public service and thus – by virtue of the Constitution - within the sphere of the Commission. However, it did accept that the Constitution required that certain values and principles were complied with including in the making of appointments (Articles 10 and 232). Thus "The appointments must … be transparent, accountable, competitive and merit based, subject to affirmative action." The court declared a considerable number of these appointments invalid on this account – though enough time had elapsed that many of those appointed were no longer in post.

The following cases touched on Kenyan's social realities, in terms of ethnic inequalities, sexual abuse, and police misuse or non-use of power.

7. Nubian Rights Forum v Attorney General; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR[9] Privacy; ethnic minorities; data protection; PIL' Article 31[10]

Various communities in Kenya have difficulty establishing their rights as citizens, including to receive identity cards. The government has embarked on a massive programme of replacing all existing ID cards with a new card that will do for all purposes – the Huduma Card and associated Huduma Namba. Nubians have had particular difficulty being recognised as Kenyan. Backed by a number of other NGOs the Forum challenged certain aspects of this programme, particularly the collection of personal and location (GPS) data. A three-judge bench of the High Court held that the provisions in the law on the collection of data about children was inadequate and a violation of privacy. Secondly the legal framework for the collection of data about adults was inadequate. They also held that there was no necessity for collection of the personal and GPS data. The process of collecting data must not continue until a satisfactory regulatory legal framework was in place.

8. Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission) [2020] eKLR[11] Police arresting and charging practices; bail; Articles 49 and 50.

A forceful opinion by Justice Joel Ngugi challenges common police practices, giving life to the Constitution's right to bail. The applicant was an MP allied to the Deputy President who is estranged from the President. The accused was taken to court within 24 hours of his arrest, but not charged. The police asked for 7 days – during which he would be detained – to complete investigations into possible charges. The main ground for refusing bail – in the view of the prosecution – was that the accused might interfere with witness. The Constitution provides that bail must be refused only for compelling reasons. Justice Ngugi found the reasons far from compelling, pointing out that the offences that were being investigated would mostly not be proved by members of the public but by police witnesses, experts, documentary or other non-human evidence. It appears the not uncommon practice of arresting without disclosing a reason why, if not technically unconstitutional, is justifiable in very limited circumstances.

9. Teachers Service Commission v WJ [2020] eKLR[12] (Court of Appeal). Liability of Commission vicariously and for its own failing when teacher sexually abused pupils; Article 156 and 237.

Sexual abuse of schoolchildren by teachers has become a matter of grave public concern. This litigation held to account the Teachers' Service Commission (TSC) – which employs teachers and posts them to schools. The (all woman) Court of Appeal upheld the decision of the (woman) High Court judge. The emphasis at the two courts differed a little. The High Court focused on the rights to health and education, and the TSC's own failings, though also finding that the TSC was vicariously liable for the behaviour of the teacher in question. The Court of Appeal cited international law (notably the African Charter on the Rights and Welfare of the Child). It also seems to have reproved the Attorney General for his defence of the TSC "despite Article 156 (6) of the Constitution which includes to 'promote, protect and uphold the rule of law

[8] http://kenyalaw.org/caselaw/cases/view/204635.

[9] http://kenyalaw.org/caselaw/cases/view/189189.

[10] See also the closely related case of *Okiya Omtatah Okoiti & 4 others v Attorney General & 4 others; Council of Governors & 4 others (Interested Parties)* [2020] eKLR delivered by the same bench on the same day.

[11] http://kenyalaw.org/caselaw/cases/view/200556.

[12] http://kenyalaw.org/caselaw/cases/view/193425.

and defend the public interest'".

10. Coalition on Violence Against Women v Attorney General of the Republic of Kenya & 5 others; Kenya Human Rights Commission(Interested Party); Kenya National Commission on Human Rights & 3 others(Amicus Curiae) [2020] eKLR[13] Liability for failure to investigate gender based violence; PIL; Article 2(6), Articles 156 and 157.

Violence erupted in late 2007/early 2008 following national elections (post-election violence PEV). Gender based violence was prominent among the atrocities that took place – over 1000 people were killed and many were made homeless. This case (brought by some individual victims and some NGOs) sought remedies for positive act of state bodies and failure to investigate the violence suffered. The court (a single judge of the High Court) held that in some instances individual petitioners had established that they had been victims of violence by state bodies, while some had been deprived of the right to a remedy by inaction on the part of the Police. There had been discrimination because victims of other aspects of the PEV, notably displacement, had been compensated. The PEV pre-dated the current Constitution, but the court found the previous constitution had the right to a remedy which is also in international treaties that are part of Kenyan law (Article 2(6) of the Constitution). Compensation was awarded (though exemplary damages denied).

As in many other countries, Kenya's official response to the COVID-19 pandemic has generated a good deal of litigation. Many cases were still to be resolved by the end of 2020. The cases so far are not generally innovative, but they indicate some of the sorts of issues that are facing the courts – or the sorts of issues that government faces, and a few are grouped here.

11. COVID-19 and the Constitution

In *Law Society of Kenya v Hillary Mutyambai Inspector General National Police Service; Kenya National Commission on Human Rights & 3 others (Interested Parties)* [2020] eKLR[14] the High Court issued a declaration that police use of force in enforcing the Curfew Order was unconstitutional and also ordered that the members of the Law Society and the Independent Police Oversight Authority be included in those exempt from the Order to enable them to monitor developments.

Law Society of Kenya v Attorney General [2020] eKLR[15] reached only interlocutory stage, but the High Court made the interesting order that the police must not obey orders issued by the National Security Advisory Committee about the holding of public meetings because that body has no power to instruct the police – under the Constitution.

In *Joseph Enock Aura v Cabinet Secretary, Ministry of Education, Science & Technology; Teachers Service Commission & 6 others (Interested Parties)* [2020] eKLR the High Court held that directives from the Cabinet Secretary (Minister) of Education for closure of schools because of the virus were unconstitutional because of the lack of consultation with the public and relevant bodies, in violation of Article 10 of the Constitution on national values.

IV. LOOKING AHEAD

2021 promises a wide range of constitutional developments if not crises. Unless one of the many cases challenging some aspects of the Building Bridges Initiative constitutional dimensions actually stop the juggernaut rolling, the Bill will go to Parliament. Since only a simple majority is needed for it to be passed, it probably will be. Then a referendum would be required only for matters listed in Article 255. But many of these are rather general and there is already controversy on whether it will actually need a referendum. The main protagonists of the process have been using "referendum" as a populist shorthand for the whole process. They will definitely try to ensure that there is a referendum of some sort.

A large number of cases on the whole process, at the High Court and for an Advisory Opinion of the Supreme Court are under way. COVID-19 litigation will generate a number of decisions.

Other issues of significance already under way in the courts include the continued failure of the President to gazette 41 judges. Beyond the political, the first major socio-economic rights case was decided by the Supreme Court early in 2021.

The process for appointing a New Chief Justice (the previous one having retired early in 2021) will be completed by the middle of the year.

Politics, and related legal issues will become more intense as the 2022 elections approach.

[13] http://kenyalaw.org/caselaw/cases/view/206218.

[14] http://kenyalaw.org/caselaw/cases/view/193192.

[15] http://kenyalaw.org/caselaw/cases/view/203655.

Kosovo

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I. INTRODUCTION

Kosovo underwent several constitutional crises during 2020. The constitutional crises were directly triggered by unstable political developments in this new democracy, which caused frequent changes of the government, legislative delays, and recurrent constitutional disputes addressed before the Constitutional Court (KCC). This introductory section will provide a brief overview of the major political and constitutional developments in Kosovo by way of chronological order.

One of the key events that marked the political developments in Kosovo was the toppling down of the government in March 2020, two months after the government was sworn in. The government of Kosovo collapsed after a vote of no-confidence in the Prime Minister Albin Kurti was backed by a majority of the Assembly of Kosovo (AoK). Another factor of political instability can be attributed to the deep political disagreements between the former President Hashim Thaçi and the government led by the Prime Minister Albin Kurti over the constitutionality of the government's measures undertaken to effectively contain the spread of the COVID-19 disease. Such constitutional conflict sparked high confusion and legal uncertainty among Kosovan citizens on what their course of action should be during the COVID-19 pandemic. This uncertainty lasted until the KCC rendered unconstitutional the decision of the government limiting the freedom of movement and freedom of gathering.

The KCC had a very busy year in 2020 dealing with several cases of abstract constitutional review. One such constitutional case was the decision of the KCC that found the AoK's confirmation of the government in June 2020 unconstitutional. The KCC ruled that the vote of the lawmaker Etem Arifi (a member of the minority Ashkali Party for Integration) for the cabinet of Prime Minister Avdullah Hoti was invalid and consequently "the government had not taken the majority of the votes of the lawmakers." The Court's decision dismissed any hope for the formation of a new government and paved the way for new elections scheduled to take place on February 14, 2021.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Constitutional dilemma on government formation following the motion of no-confidence

One of the issues that triggered one the major constitutional developments in 2020 was the vote of no-confidence of a recently elected government after a dispute over whether to declare a state of emergency to combat the coronavirus. The toppling down of the government in midst of the pandemic caused a heated constitutional debate on whether the President of Kosovo is constitutionally obliged to dissolve the AoK and call new elections, or to nominate a new candidate to form a new government. This was precisely the constitutional question, which members of the largest political party in the AoK addressed to the KCC.

The applicants referred the controversy to the KCC when the President turned to the second largest party to propose the candidate for the formation of the government after

three repeated letters addressed to the wining party did not result with a proposal of the candidate for prime minister. The submitting applicants alleged that the challenged decree of the President was not in compliance with constitutional rules on the separation of powers, dissolution of the AoK, and the powers of the president. More specifically, they argued that neither the Constitution, nor any law, provides for a deadline for proposing a candidate by the winning party and claimed that the president has no constitutional right to set deadlines arbitrarily.

However, the KCC found the complaint unfounded and concluded that the presidential decree to nominate the candidate for the post of the prime minister was constitutional.[1] The constitutional judges argued that the Kosovo Constitution of 2008 does not provide for the mandatory dissolution of the AoK after a successful vote of no-confidence of the government. According to the KCC, it is the President who undertakes an assessment of the political stability in the AoK and the voting of a motion of non-confidence of the government does not imply mandatory dissolution of the AoK and calling new elections.

The Court's main argument in this case is that dissolution is justified in constitutional terms only when a new majority needed to form a government cannot be formed after the vote of no confidence and when no political consensus can be reached within the parties represented in the AoK to dissolve the AoK. While the Court's judgment helped to overcome the constitutional crisis in Kosovo by enabling the AoK to elect the new Government, which it did on June 3, 2020, the elected government was again short-lived after the KCC declared the decision of the AoK on the election of the government unconstitutional.

2. Limitation of the freedom of movement and gathering during the COVID-19 pandemic

Another issue that sparked debate on constitutional interpretation in Kosovo concerned the disagreement between the government and the president concerning the constitutionality of the government's decision no. 11/15 of March 2020.[2] The decision introduced some COVID-19 related measures that affected the exercise of the freedom of movement and freedom of gathering in both private and public settings.

As far as legal basis is concerned, the decision was based on Article 55 of the Kosovo Constitution and certain articles of the Law No. 02/L-109 for Prevention and Fighting against Infectious Diseases as well as the Law No. 04/L-125 on Health. In a few televised statements, the president of the Republic contended that the government's introduced measures were unconstitutional and disproportional by stating that it would challenge the decision before the KCC for constitutional interpretation. On his referral to the KCC, the president argued that the government had acted ultra vires given the fact that neither the Constitution nor the legislation to which the Decision no. 11/15 refers enable the government to restrict freedom of movement and freedom of gathering on the entire territory of the Republic of Kosovo. The issuing authority, on the other hand, argued that the contested decision is constitutional, it is based on law, and pursues a clear legitimate aim that is necessary for the protection of the health of the citizens and residents of the Republic of Kosovo. It should be noted that Article 55 of the Kosovo Constitution contains a general limitation clause on human rights providing that human rights can only be limited by law, to the extent necessary for the fulfillment of the purpose of the limitation, and that in no way shall deny the essence of the guaranteed right. Article 56 of the Constitution, on the other hand, provides that derogation of the fundamental rights and freedoms may only occur following the declaration of a state of emergency (which the AoK did not declare) to the extent necessary under the relevant circumstances while providing that certain fundamental rights (e.g., right to dignity, freedom against torture, prohibition of slavery, right to fair trial, etc.) cannot be derogated under any circumstances.

While the KCC agreed with the government's constitutional interpretation on the derogation clause, it opposed the argument that the contested decision was based on law within the meaning of Article 2 (freedom of movement) of Protocol no. 4 of the European Convention for the Protection of Human Right and Fundamental Freedoms (ECHR). The KCC considered that the government acted beyond the authorization given in item b) of Article 41 of the Law on Prevention and Fighting against Infectious Diseases, prohibiting the movement to all citizens of the Republic of Kosovo in the whole of its territory. In other words, in the view of the KCC, the Law on Prevention and Fighting against Infectious Diseases and the Law on Health did not give the government the competence to limit the freedom of movement, gathering, and the right to privacy/family life at the level of the entire territory of the Republic of Kosovo and to all citizens of the Republic of Kosovo in general. Consequently, the Court argued that such "limitations made through the challenged Decision cannot be considered to have been made by law of the AoK nor in accordance with law or in its implementation" and are not in compliance with Article 55 [limitations on fundamental rights and freedoms] of the Constitution in conjunction with Articles 35 [freedom of movement], 36 [right to privacy], 43 [freedom of gathering]; read in the context of the equivalent guarantees provided by Article 8 (right to respect for private and family life), Article 11 (freedom of assembly and association) of the ECHR and Article 2 (freedom of movement) of Protocol no. 4 of the ECHR.

3. Incorporation of the Istanbul Convention into the 2008 Kosovo Constitution

It should be noted that during 2020, the AoK has also adopted the constitutional amendment to enable the incorporation in the Constitution of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, also known as the Istanbul Convention. The Istanbul Convention, along with several human

[1] *Aliu et.al. v Assembly of Kosovo* [2020] KO 95/20.

[2] *President of the Republic v Government* [2020] judgment KO 54/20.

rights treaties, including the ECHR are directly applicable and enjoy a very high constitutional status by prevailing over any other law provision in Kosovo's legal system.[3]

III. CONSTITUTIONAL CASES

1. Constitutional limitation of human rights during the COVID-19 Pandemic

This constitutional dispute was initiated after the government of Kosovo introduced certain measures to prevent the spread of the COVID-19 pandemic. In the context of such measures, on March 23, 2020, the Government rendered decision no. 01/15 by which it restricted the movement of citizens and vehicles in the entire territory of Kosovo and prohibited gathering in private and public settings.[4] On March 24, 2020, the president of Kosovo contested the decision before the KCC asking to review whether the rendered decision of the government was compliant with the Kosovo Constitution of 2008. In particular, the president alleged that the decision of the government affected the freedom of movement (Article 35) and freedom of gathering (Article 38) guaranteed by the constitution and claimed that the contested decision was taken in absence of proper legal grounds.[5]

The KCC found the referral admissible and ruled that the decision of the government was unconstitutional. The KCC argued that the decision of the government was contrary to the constitutional provisions on freedom of movement, freedom of gathering, and the right to privacy since it had exceeded the legal powers entrusted in the government by introducing such restrictive measures on the whole territory of Kosovo. The KCC held that the limitations contained in the challenged decision of the Government regarding the constitutional rights and fundamental freedoms referred to above are not "prescribed by law" and, therefore, were contrary to the guarantees contained in Articles 35, 36, 43, and 55 of the Constitution, which in its first paragraph clearly states that the fundamental rights and freedoms guaranteed by this Constitution may only be limited by law.[6]

2. Constitutional review of the President's decree nominating the candidate for forming the government

After the general elections held in Kosovo on October 6, 2019, the political party that won the majority of seats in the AoK was *"Vetëvendosje"* Movement. As a result of these elections, on February 3, 2020, the AoK voted the government. Shortly thereafter on March 20, 2020, a number of members of the AoK tabled the motion of no-confidence against the newly formed government led by Albin Kurti, which the majority of the AoK approved by bringing down the newly elected government during the difficult times of the pandemic. The president initially asked *"Vetëvendosje,"* the largest party in the Assembly, to nominate the candidate for prime minister. On April 30, 2020, after several attempts to receive the proposed candidate from Vetëvendosje, the President of Kosovo, following consultations with the political parties, nominated Mr. Abdulla Hoti as a candidate for the Prime Minister of Kosovo, as proposed by the second largest party in the AoK. However, members of the largest political party *Vetëvendosje* contested the constitutionality of the president's decree by arguing that, after the successful motion of no confidence, the president had a constitutional obligation to announce early elections for the AoK and not to mandate a candidate for prime minister. They further argued that during the procedure that resulted in the issuance of the decree on the appointment of the candidate for prime minister for the formation of the government, the president acted in contradiction with the procedures set forth in the Kosovo Constitution and in the decision of the KCC, KO103/14, given that *"Vetëvendosje"* is the party that won the elections of October 6, 2019 and is the only political party that should be consulted for the formation of the new government according to Article 95.5 of the Constitution and in conformity with Article 84.14 and Article 95 of the Constitution.

The KCC initially rendered a preliminary injunction on the decree of the president where it decided that the presidential decree no. 24/20, dated April 30, 2020, is in compliance with the Constitution.[7] The KCC noted that in "the circumstances of the present case, the political party that has led the Government against which a motion of no confidence has been voted, has not made a proposal for a new candidate for Prime Minister for the purpose of forming a new Government."[8] According to the KCC, the claim of the applicants that "the Court has stated that the President may bypass the winner of the election only if the latter expressly waives his right but under no other circumstances" is incorrect. The KCC stated that "the authorization of the winning political party or coalition to refuse the mandate only explicitly, namely the possibility to not propose a name for the candidate for Prime Minister, and at the same time, to hold this right by not refusing explicitly, would vest the winning political party or coalition with the undisputable right to block the process of nominating a candidate for Prime Minister by the President."[9] The KCC further argued that the allegation that the exercise of the right of the AoK to vote on the motion of no confidence in a government, as a will to create a new governing majority, results in the automatic termination of the constitutional mandate of the AoK itself, contradicts the principles and the spirit of the parliamentary system of government.[10] Ac-

[3] The constitutional amendment no 26 is available at https://gzk.rks-gov.net/.

[4] *President of the Republic v Government* [2020] judgment KO 54/20 [22], [23].

[5] *Ibid* [3], [4].

[6] *Ibid* [310], [325].

[7] *Selimi and others v Assembly of Kosovo* [2020] KO 72/20.

[8] Ibid [573].

[9] Ibid [574].

cording to the KCC, the president, even after a no-confidence motion, is not endowed with the authority to terminate the mandate of the AoK, without the consent of the required majority of parties and coalitions represented in the AoK as well as the exhaustion of the opportunity to elect a new government.[11]

3. Constitutionality of the election of the government of the Republic of Kosovo

In this constitutional referral, 17 deputies of the AoK challenged the constitutionality of decision No. 07/V-014 of the AoK on the election of the government, issued on June 3, 2020. The applicants alleged that the decision in question was contrary to the Constitution, namely paragraph 3 of Article 95 [election of the government] in conjunction with sub-paragraph 6 of paragraph 3 of Article 70 [mandate of the deputies]. This is because, according to the applicants, Etem Arifi, as member of the AoK, also participated in the voting procedure of the challenged decision but his vote was invalid due to his sentence to one year and three months imprisonment, rendered by a final court decision. It is important to mention that the new government received 61 out of 120 votes of the 120 member AoK, that being the minimum number of the required votes for electing the government.

A number of the deputies of AoK, however, claimed that the decision of the AoK for the election of the government was unconstitutional on procedural grounds since one of the deputies of the AoK, member of the Ashkali Party for Integration and who voted for the new government, was convicted with a final court judgment and thus the respective vote was invalid on constitutional grounds. As consequence, the government had not received the necessary majority of votes for its election as defined by the Constitution.

The applicants, referring to Article 70 paragraph 3 [mandate of the deputies] of the Kosovo Constitution, alleged that "[...] Deputy of the Assembly Mr. Etem Arifi is convicted by a final court decision, consequently his vote should be declared invalid, his mandate as a deputy was ended." According to the applicants, Article 70 clearly defines that the mandate of a deputy in the AoK ends if a member of the AoK is convicted and sentenced to one or more year's imprisonment by a final court decision of committing a crime.

The KCC declared the referral admissible and argued that it cannot "assign the constitutional legitimacy to the mandate of a deputy, for whom it has been confirmed that the conditions provided by the Constitution and relevant laws were not met, to be a candidate for deputy (when he run and was elected), nor to exercise the mandate of deputy."[12] The KCC went on to say that, when issuing the challenged decision of the AoK, Mr. Arifi did not have a valid mandate as a deputy in accordance with Articles 71.1 and 70.3.6 of the Constitution, Article 8.1.6 of the Law on the Rights and Responsibilities of the Deputy, and Articles 29.1 (q) and 112.1.a of the Law on General Elections.[13] The KCC held that the decision of the AoK on the election of the government of June 3, 2020, was not in compliance with paragraph 3 of Article 95 [election of the government] of the Constitution because the government had not received the majority of votes of all deputies of the AoK.[14] The KCC concluded that, since the government had not been elected according to paragraph 3 of Article 95 [election of the government] of the Constitution, based on paragraph 4 of Article 95 [election of the government] of the Constitution, the president of the Republic of Kosovo had to call an election, which had to take place no later than forty (40) days from the day of their announcement.

4. Venice Commission opinion on the draft Law on Government

By the letter of October 26, 2020, the prime minister of Kosovo requested an opinion of the Venice Commission on the draft Law on the Government of the Republic of Kosovo. The request asks the Venice Commission to analyze the draft law on two legal issues addressed in the course of the drafting the law: (a) the constitutionality of setting out the maximum number of ministers in the draft law (Article 4.3); and (b) to what extent the powers of the outgoing government may be restricted until a new government is elected (Article 31).

It is important to note that Article 96 paragraph 1 and paragraph 2 of the Kosovo Constitution provide: "1. Ministries and other executive bodies are established as necessary to perform functions within the powers of the Government; 2. The number of members of Government is determined by an internal act of the Government." The Venice Commission has precisely taken note of the above mentioned constitutional provision and stated that "if enacted in its present form, Article 4.3 of the draft Law would seem to constitute an encroachment by the Assembly on this competence." The Venice Commission further added that "such a conclusion could only be avoided if Article 96.2 of the Constitution were to be interpreted as not prohibiting a parliamentary intervention to define a maximum number of ministers, so long as this 'cap' leaves to the government sufficient leeway in determining the exact number of ministers."[15] The Venice Commission recalled the importance of the principle of legality as reflected in Article 16 of the Kosovo Constitution, which guarantees the supremacy of the Constitution and requires legislation to be compatible with the Constitution. But when it comes to restrictions on

[10] Ibid [389].

[11] *Aliu and Others v Assembly of Kosovo KO* 95/20 [2020].

[12] Ibid [268].

[13] Ibid [269].

[14] Ibid [281].

[15] Venice Commission opinion No. 1005/2020 on the draft Law on Government of the Republic of Kosovo, adopted by the Venice Commission at its 125th online Plenary Session (11-12 December 2020) CDL-AD(2020)034.

the outgoing government as provided in Article 31 of the draft law, the Venice Commission stated that the proposed Article does not appear "to raise any issues of compatibility with international standards" or constitutional norms applicable in Kosovo.[16]

IV. LOOKING AHEAD

Given the magnitude of constitutional developments in 2020, it is not difficult to predict what constitutional challenges will lie ahead in the year 2021. First, one of the major challenges in political and constitutional terms is establishing the new legislature following the general elections scheduled on February 2021, and the election of the new government by an absolute majority. Second, given president's Thaqi resignation in November 2020, it can be anticipated that the process of electing the new president will be soon on the table. The Constitution foresees that the position of acting president may not be exercised for a period longer than six (6) months. According to Article 86 of the Kosovo Constitution, the president is elected by a two thirds (2/3) majority of all deputies of the AoK, which cannot be easily attained in a politically polarized parliament. If a two thirds (2/3) majority is not reached by any candidate in the first two ballots, a third ballot takes place between the two candidates who received the highest number of votes in the second ballot, and the candidate who receives the majority of all deputies of the AoK shall be elected as president. The biggest fear is whether there will be a quorum, i.e. two thirds (2/3) of the total number of the deputies, present and voting in the AoK to initiate the procedure for the election of a president in the first and second ballot. Ten years ago, in the Pacolli case (KO 29/11), the KCC declared the decision of the AoK on the election of the president unconstitutional on the grounds that the AoK did not act in compliance with the procedural requirements implied in Article 86 of the Kosovo Constitution. It remains to be seen whether the prospective members of the AoK will act with constitutional pragmatism and loyalty as required by the precedent decision of the KCC when electing the new president of the Republic.

FURTHER READING

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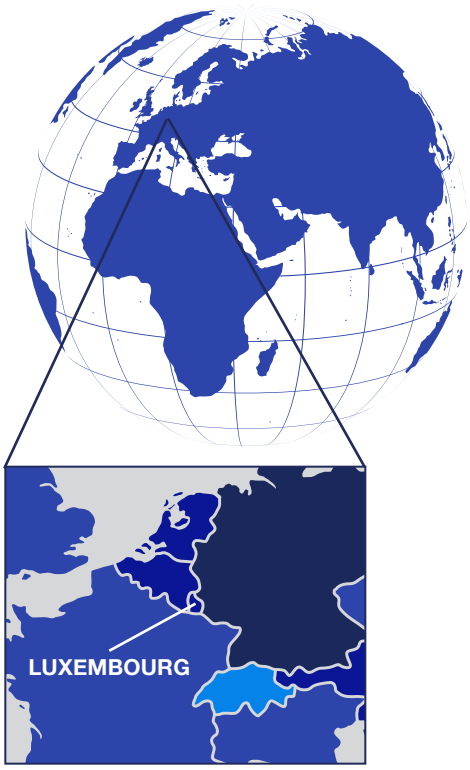
Qerim Qerimi, "Operationalizing and Measuring Rule of Law in an Internationalized Transitional Context: The Virtue of Venice Commission's Rule of Law Checklist." [2020] Law and Development Review 59-94.

Venice Commission opinion No. 1005/2020 on the draft Law on Government of the Republic of Kosovo, adopted by the Venice Commission at its 125th online Plenary Session (11-12 December 2020) CDL-AD(2020)034.

[16] Ibid [50].



Luxembourg

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I. INTRODUCTION

The year 2020 was rich in constitutional developments in the Grand-Duchy of Luxembourg. The four main events of constitutional relevance can be summarized as follows. First is the publication of the so-called 'Waringo report' by a former high civil servant, designated by the prime minister to investigate the functioning of the Grand-Ducal Court that made a series of concrete proposals to reform the functioning of the grand-ducal Court. Second, the COVID-19 pandemic led to the first application of the reformed 'state of crisis' mechanism of article 32(4) of the Constitution and to the adoption of several subsequent 'COVID statutes' imposing far-reaching limitations on social, economic and cultural life. Third, the constitutional amendment process went on with the final adoption of one punctual amendment and the filing of two major reform packages. Fourth, one of the national human rights bodies in Luxemburg, the Ombuds-Committee for children (ORK) was transformed into a new institution called ombudsman for children and adolescents (OKAJU).

By contrast little happened in the year 2020 with regards to constitutional justice and the case law of the Constitutional Court. The third part of this report is consequently rather short.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The publication of the 'Waringo report' in January 2020 - revealing a number of serious dysfunctions within the Grand-Ducal Court (Palace) - triggered an almost unanimous determination of the political parties to adopt a reform. Due to the COVID-19 pandemic and other urgent 'construction sites' the consequences have not yet been constitutional changes.

Former high civil servant, Jeannot Waringo, had been nominated as special representative of the Prime Minister to the Grand-Ducal Court and spent almost all of 2019 compiling the report from within the Palace. The 44-page printed result was presented to the Government Council on January 24th before being made public on the government website.[1]

The focus of the report is on three points which are the amount of public financing of the Monarchy in Luxembourg, the proposal to establish a new institution, called 'The Grand Duke's House' (*La Maison Grand-Ducale*) and measures to improve human resources management within the Court.
The report does not only disclose the main discovered dysfunctions but makes a series of tangible proposals for a reform. The government announced thus that such a reform will better define the future modalities of the State's financial participation in the activities of the Grand Duke's House, will delineate the Court's staff regulations and will elaborate the Court's organisational chart.

The overreaching message of the report is that the monarchy must be reformed, in terms of staff management at the Palace. Waringo wrote that the most important decisions concerning staff were taken by the Grand Duchess whether at the level of recruitment,

[1] Accessible at <https://gouvernement.lu/fr/publications/rapport-etude-analyse/me/rapport-du-representant-special-du-premier-ministre-aupres-de-la-cour-grand-ducale.html>

dismissals or department assignment. The media have speculated and reported on the Grand Duchess's role in all this, causing the Grand Duke to defend his wife in an unexpected public statement which provoked strong criticism from the Luxembourg Union of Journalists. The report confirmed that 51 employees of a total staff of 110 persons resigned or were dismissed in the period of time between 2014 and 2019. Waringo described an atmosphere of fear among staff and proposed all future recruitment to be signed by the Prime Minister.

He described internal communication as almost nonexistent. Administrative managers internally communicated very rarely, meaning staff were hardly informed about developments within the Court. Waringo was very clear on the need for change in this regard, warning the system would suffocate itself otherwise.

In his eyes, the Marshall of the Court and the Secretary of Property Administration would need to work together to take on an important role, allowing the government to approve changes. The government required more input into the use of taxpayer funds allocated to the Court.

Any future changes in staff should also require detailed justification in line with directives to be formulated. The report also highlighted that it was unclear exactly how many staff were required for the functioning of the Court. Waringo suggested the Palace could take note from other monarchies in dividing the staff required for official functions, and those required as personal staff to the royal family.

In his report, which also tackled the financial side to the Palace's operations, Waringo admitted he was unable to ascertain whether the royal couple's private activities were financed by the State or not. He said this question required an immediate answer. The Grand-Ducal Court confirmed it had received the report and said it would contribute constructively to the implementation of the improvements proposed in the interests of greater transparency and modernisation.

The implementation of the proposals took more time than initially expected. The report has first been presented to the members of the Committee on Institutions and Constitutional Revision (CIRC) of the Chamber of Deputies on Wednesday February 5, 2020. The CIRC met again on September 30, 2020, to discuss the Waringo report for the second time. Prime Minister Xavier Bettel already praised the report's increased transparency, with the Court of Auditors and Chamber soon to have more insight into the Grand Ducal Palace's functioning. All parties agreed that a modern reformed monarchy is paramount.

Preceding the launch of the 'Maison Grand-Ducale' Prime Minister Bettel appointed a new Court Marshal in April 2020. Yuriko Backes has thus become the first female Court Marshal in the history of the Grand-Duchy.

The new institution itself has finally been established in October 2020 by a grand-ducal decree rather than by statute as asked for by the opposition parties.[2] This text organizes the administration of the Grand-Ducal House giving large responsibilities to the Marshal of the Court and establishing two new committees to assist the Marshal and to guarantee a good cooperation with the government.

In addition, the monarchy's budget will now have to be 'transparent, clear and precise'. The Court of Auditors will have the power to assess the fair execution of the budget, and the proper management of public funds granted for the Grand Duke and his family. Through the implementation of the Grand-Ducal House, it is also a question of reviewing the status of the Grand-Duke's staff. From now on, they will be attached to the civil service, and no longer under private contract.

The year 2020 also led to the first declaration of a 'State of crisis' according to the amended Constitution. Article 32 (4) of the Constitution had been amended in October 2017. Since then, the clause states: 'In the event of an international crisis, a real threat to the vital interests of all or part of the population or imminent danger resulting from serious attacks on public security, the Grand Duke, having ascertained the urgency resulting from the impossibility of the Chamber of Deputies to legislate within the appropriate time limits, may take regulatory measures in all matters. These measures may derogate from existing laws. They must be necessary, adequate and proportionate to the aim to be followed and must be in conformity with the Constitution and international treaties. The extension of the state of crisis beyond ten days can only be decided by one or more laws voted under the conditions of Article 114, paragraph 2 of the Constitution, which fixes the duration of the state of crisis without the extension exceeding a maximum duration of three months. The Chamber of Deputies may not be dissolved during a state of crisis.'

Article 32 (4) of the Constitution of Luxembourg seems to be a good example of the necessity that any declaration of a state of emergency (SoE) must be limited in time. The shorter the better. The prolongations must, of course, be envisaged but should be limited in number and in duration in order to prevent the occurrence of the famous 'permanent situation of emergency' discussed by Agamben. It allows declaring the 'state of crisis' for an initial duration of ten days. Any prolongation going beyond these ten days needs to be approved by parliament *(Chambre des députés)* voting with a two-thirds majority and cannot go beyond three months in any case.

As the genuine aspiration of state of emergency law should be to secure the route back to the 'normal' constitutional state, a precise rule about the termination of the SoE undeniably has to be included in a SoE constitutional clause. The state of emergency, decreed by the government on 18 March 2020 and extended by a unanimous vote by the Chamber of Deputies for a maximum of three months from 24 March 2020, had given the government full powers. The aim was to

[2] Arrêté grand-ducal du 9 octobre 2020 portant institution de la Maison du Grand-Duc.

enable the executive body to quickly take the necessary measures to combat the spread of the coronavirus without going through the traditional legislative stages (Chamber of Deputies and Council of State).

When, in June 2020, Parliament regained its full rights, the statement of its President Fernand Etgen was clear: 'This delegation of powers was not a blank cheque for the government,' he explained during the last public session in 2020. 'I am proud to note that the Chamber has worked closely with the government and the Council of State in an exemplary and supportive manner, while at the same time remaining critical'. 'The Chamber has fully carried out its legislative and oversight duties', he added. Eighteen meetings at the highest level of elected representatives with members of the government were organised to provide weekly updates on the management and development of the pandemic in Luxembourg. The chamber held altogether 21 public sessions and 189 meetings in parliamentary committees and, unlike many parliaments abroad, the Chamber remained fully operational throughout the state of emergency.

The deputies have voted about 60 bills in the three months of the 'state of crisis', including the 'covid statutes' which provide the rules of conduct to continue the fight against the virus. Twenty-one public sessions have been organised. Initially the deputies were spread out in several rooms in order to respect the required interpersonal distances. Then the plenary sessions were temporarily transferred from the traditional building to the Municipal Circle. This temporary move made it possible to bring all the deputies together in the same room.

Regarding constitutional change, one amendment of Article 95ter of the constitution was adopted in 2020, as announced in the 2019 report. It added a new paragraph 6 to Article 95ter reading: 'The provisions of laws declared to be unconstitutional by a ruling of the Constitutional Court shall cease to have legal effect on the day following the publication of such ruling in the manner prescribed by law, unless the Constitutional Court has ordered another period of time. The Constitutional Court shall determine the conditions and limits under which the effects that the provision has produced are likely to be called into question'.[3] This clarifies the impact and the nature of the control performed by the Constitutional Court.

In addition, there are two ongoing constitutional amendment procedures. The first concerns the recasting of the chapter on justice (doc. parl. 7575) and the second contains a general amendment proposal following up to the amendment procedure which is discussed since 2005 (doc. parl. 7700).

Filed on May 5, 2020, the proposal for the revision of Chapter VI. of the Constitution has the purpose of recasting the chapter on Justice (doc. parl. 7575). It is part of a new approach to modernise the current Constitution. Indeed, the consensus existing in the past within the Committee on Institutions and Constitutional Review (CICR) on a new Constitution has been called into question, so that it has been necessary to agree on a step-by-step roadmap.[4] In this respect, it has been agreed to return to the original idea of making a substantial revision of the current Constitution instead of adopting a completely new Constitution. On the basis of a political agreement between the majority of the parties, it was agreed that: there is a common will to update the constitutional text the status quo not being an option, that the modernisation work takes account of the work carried out over the last fifteen years, that the current Constitution is being revised in stages and in blocks and in accordance with the priorities agreed in committee and that a provisional list of specific revisions will be realized on which a consensus was reached in committee.

The second proposal 'for the revision of Chapters I, III, V, VII, IX, X, XI and XII of the Constitution' was filed on November 17, 2020. This general amendment proposal is part of the said process of modernizing the current Constitution, initiated by the revision proposal n° 6030 tabled in 2009 and instructed by the CICR for many years. The publication of the 'Waringo' report on 31 January 2020 was another important step, inasmuch as some of the conclusions of this report had already been taken up by the revision proposal no. 6030 and included in the present revision proposal. The revision proposal thus intends to give the administration of the Head of State legal personality. It will be up to the Grand Duke to organise his administration taking into account the public interest.

The 1st of April 2020 marked a change for one of the four national human rights institutions existing in the Grand-Duchy. From this date the 'Ombudskomité fir d'Rechter vum Kand' (ORK, ombuds-committee for the rights of the child) became the 'Ombudsman fir Kanner a Jugendlecher' (OKaJu, ombudsman for children and adolescents) thanks to a new legal framework.[5] The OKaJU has its headquarters in Luxembourg City. It is also by the law of 1 April that the institution was attached to the Chamber of Deputies, guaranteeing its independence and neutrality. The OKaJu monitors compliance with the 1989 Convention on the Rights of the Child and wants to make it known in Luxembourg. Thanks to its new legal framework, OKaJu has more visibility and hopes to raise awareness among the general public and public actors. In addition, its missions may be developed in the future, for example by issuing opinions on draft laws which do not at first sight concern children, but which, through their application, will have an impact on children's rights.The new Ombudsman was appointed by secret ballot during the plenary session of 9 December 2020. 45 deputies voted in favour of Charel

[3] Amendment statute of May, 15th 2020, cf. Mémorial A - 406 of 15.05.2020; doc. parl. 7414B.

[4] Parl. doc. N°6030/27, Report of the Committee on Institutions and Constitutional Review of 6 June 2018.

[5] «Instituant l'Ombudsman fir Kanner a Jugendlecher», Mémorial A282, oi du 14 avril 2020.

Schmit, former president of Caritas.

III. CONSTITUTIONAL CASES

As mentioned above, the activity of the Constitutional Court was not very important in 2020 neither in quantity nor in quality. The *Cour Constitutionnelle*[6] issued 8 judgments *(arrêts)* in 2020, compared to 8 in 2019, 11 in 2018 and 4 in 2017. The usual low number of verdicts results 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 concerns the respect of the principle of equality laid down in Article 10*bis* of the Constitution. Hence this year again 6 out of the 8 cases decided by the Court concerned this principle alone.

In fact, only 7 distinct judgments have been rendered by the Court, as two judgments are identical in wording but concern different parties. According to the continuous numbering system of the Court, they carry the numbers 145/20 and 153-159/20. The six judgments issued on the basis of the principle of equality provided for by article 10 bis (1) Article 10bis, paragraph 1, of the Constitution stating: 'Luxembourgers are equal before the law', do not call for a distinct commentary. They do not introduce any new development into the Court's case law. They simply confirm the previous line of reasoning according to which 'the implementation of the constitutional rule of equality presupposes that the categories of persons between whom discrimination is alleged are in a comparable situation with regard to the measure invoked' and recalling, furthermore, that 'the legislator may, without violating the constitutional principle of equality before the law, subject certain categories of persons to different legal regimes, provided that the difference instituted results from objective disparities, is rationally justified, adequate and proportionate to its purpose.' The litigious legislative provisions have all been declared to conform to the principle of equality of the Constitution.

Only two judgments are worth mentioning in more detail. One case was indeed declared inadmissible by the Court in a judgement from April 24th, the reason for this inadmissibility stemming from the principle of adversarial proceedings, which the Court applied also to the necessary discussion whether a preliminary question is introduced by the ordinary judge or not.

Two other identical judgments issued on November 13, 2020, concern Article 107 of the Constitution, which recognizes the autonomy of municipalities as well as the European Charter of Local Self-Government.

1. Judgement from April 24th, 2020, in case 153/20

The preliminary question submitted to the Constitutional Court emanated from an appeal lodged by a couple against the decision of the Board of Directors of the *Caisse pour l'avenir des enfants* (hereinafter 'the CAE'), refusing to grant family allowances in favour of their child. During the proceedings the CAE raised in principal order the inadmissibility of the preliminary question under Article 6(3) of the Law of 27 July 1997 on the organisation of the Constitutional Court on the grounds that before the High Council of Social Security the spouses had not formulated a precise preliminary question and had confined themselves to asserting that the difference in treatment introduced by Article 271 of the Social Security Code was contrary to Article 10bis, (1) of the Constitution and that the Supreme Social Security Council had failed to invite the parties beforehand to submit their observations on a question not formulated by one of the parties involved, but formulated by the referring court.

Article 6 of the Act of 27 July 1997, cited above, provides in paragraphs 1 and 3 respectively: 'When a party raises a question relating to the conformity of a law with the constitution before a court of judicial or administrative order, the latter is obliged to refer the matter to the Constitutional Court' (...) and 'If a court considers that a question of the conformity of a law with the Constitution arises and that a decision on this point is necessary for the delivery of its judgment, it shall raise it ex officio after having first invited the parties to submit their observations'.

The Court found that, pursuant to the general principle of adversarial proceedings, enshrined in Article 65 of the New Code of Civil Procedure, the judge, including the constitutional court, must in all circumstances observe and uphold the principle of adversarial proceedings himself.

Neither the judgment of the Social Security Arbitration Board of 8 May 2019, nor the judgment of the High Council of Social Security of 19 December 2019, nor the conclusions exchanged by the parties in the context of the present proceedings allow the Constitutional Court to verify the precise wording of the preliminary question raised by spouses.

The Court thus decided that it was not possible to verify whether the question in the proceedings before the High Council of Social Security was substantially modified by the latter and whether the CAE was able to submit its observations in accordance with Article 6 of the Law of 27 July 1997 or even Article 65 of the New Code of Civil Procedure, cited above, before the question was submitted to the Constitutional Court.

Since the Constitutional Court was unable to verify compliance with the legal requirement of a prior adversarial debate before the referring court, the preliminary question was declared inadmissible.

2. Judgements from November 13, 2020, in cases 156 and 157/20

By judgment of 31 January 2020, the administrative court received in the form the appeal for reform introduced by the

[6] 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 13th, 1997, 1724.

municipality of Niederanven against a decision of the director of the administration of the direct contributions of 28 February 2018 concerning its participation in the product of the communal commercial tax generated in 2017 and the action for annulment brought by the same applicant against the decision of the Minister of the Interior and its annexes of 5 March 2018 entitled "Fonds de dotation globale des communes (FDGC) - participation directe au produit de l'Impôt commercial communal (ICC) et contribution au Fonds de l'emploi - Décompte 2017", and, before any further progress was made, referred six preliminary questions to the Constitutional Court.

The constitutional provision invoked is Article 107, paragraph 1 of the Constitution stating, 'Municipalities shall form autonomous communities, with a territorial basis, with legal personality and managing their own assets and interests through their bodies'. Furthermore the European Charter of Local Self-Government of 15 October 1985, approved by the law of 18 March 1987, hereinafter 'the Charter', which states in Article 3.1: 'Communal self-government means the right and the effective capacity of local authorities to regulate and manage, within the framework of the law, under their own responsibility and for the benefit of their populations, a significant part of public affairs'.

The Court considered itself to be 'required to apply the provisions of Article 107 of the Constitution, and more particularly its paragraph 1 enshrining the principle of municipal autonomy, in the light of the relevant provisions of the Charter, which correspond to it and overlap with it by corroborating it'. Hence it followed up its previous case law opening the way for the interpretation of the Constitution in the light of binding international agreements.

IV. LOOKING AHEAD

As already announced in the 'Looking Ahead' part of the 2019 report on Luxembourg, the Constitutional Court was expected to deliver in 2020 a preliminary ruling on a question referred to it by the *Cour administrative*[7]. This question gives the occasion to 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 those retroactive effects in the 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.[8] Finally, the judgment was given only in January 2021 and will thus be dealt with in next year's report.[9] Furthermore, the ongoing constitutional amendment procedures based on proposals no. 7575 and 7700 will certainly continue to occupy the political institutions in 2021.

V. FURTHER READING

Jörg Gerkrath (dir.), *La défense des droits et libertés au Grand-Duché de Luxembourg : rôle, contribution respective et concertation des organes impliqués* (Larcier 2020)

Basak Baglayan, Marc Bichler, 'Covid-19 et le respect des droits humains: Une obligation pour l'état, une responsabilité pour les entreprises' (2020) Revue Luxembourgeoise de Droit Public 70

Paul Schmit, 'L'article 32(4) de la Constitution et le covid-19' (2020) Revue Luxembourgeoise de Droit Public 53

[7] The Administrative Court is Luxembourg's supreme administrative court, i.e. it rules on appeals against judgments of the tribunal administratif.

[8] Administrative Court, n°42582C, (November 26th, 2019).

[9] Judgement no 152/21, (January 22, 2021).

Malaysia

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I. INTRODUCTION

The year 2020 witnessed the extraordinary fall of the new government that had taken office following Malaysia's landmark 2018 general election. This major realignment of political alliances took place at the start of the Covid-19 pandemic, and brought yet another new coalition to power, albeit one with a razor-thin parliamentary majority. The new government was immediately confronted with a worsening pandemic, adopting tough control measures which implicated constitutional issues. At the same time, because of the precarious position of the new government, held together by a loose coalition of Malay-centric political parties, pandemic control became closely intertwined with political survival, with the threat of snap elections constantly looming. Thus, on a deeper level, the events of 2020 produced not merely a remaking of the political landscape in Malaysia, but also perceptible changes in the role and influence of constitutional actors in the country. This is a dynamic situation that continues to unfold up to the present day.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Keen observers of Malaysian constitutional law and politics would have realized that this year was yet another tumultuous year in terms of constitutional developments. In 2020, events in Malaysia raised acute questions concerning the operation of constitutional conventions at the level of the monarchy, which will be of general interest.

The collapse of the Pakatan Harapan [Pact of Hope] (PH) coalition government in February 2020 and the appointment of a new government under Prime Minister Tan Sri Muhyiddin Yasin on 1 March marked a major political development with crucial constitutional implications. This was the second time since independence in 1957 that there was a change of government at federal level, the first being the election of the PH government in May 2018. However, unlike in 2018, this change of government was controversial, arising as it did from changed allegiances within parliament rather than from a general election. It raised constitutional questions concerning the dismissal and appointment of governments.[1]

In the days leading up to March 1 2020 tensions over prime-ministerial succession issues within the *Parti Keadilan Rakyat* [People's Justice Party] (PKR), the largest of the PH parties, led to a realignment of political parties and factions – including the defection of one PH component party and the formation of a rival coalition – with a view to the construction of a new government involving then-opposition parties. This development (known as the 'Sheraton Move' after the hotel where MPs met on 22 February to discuss this

[1] See Dian AH Shah & Andrew Harding, "Constitutional Quantum Mechanics and a Change in Government in Malaysia", I·CONnect, (8 April 2020) <http://www.iconnectblog.com/2020/04/constitutional-quantum-mechanics-and-a-change-of-government-in-malaysia/> (accessed 16 March 2021).

realignment) prompted the PH Prime Minister, Tun Mahathir Mohamad to resign on 24 February, on the basis that he no longer had the confidence of a majority of MPs.[2] The *Yang di-Pertuan Agong* (YDPA – the constitutional monarch) accepted his resignation and then appointed him as 'Interim Prime Minister'. However, the position does not in fact appear in the Constitution, and it was unclear whether Mahathir was in a position to advise the YDPA on who would likely command the confidence of the majority of MPs.[3]

The other pertinent constitutional question was how a government is to be formed in such circumstances – should there be a vote of confidence on the floor of the *Dewan Rakyat* (House of Representatives, the lower house of Parliament) or is it open to the YDPA to determine who enjoys such confidence through other means or evidence? There followed a period of confusion in which Mahathir tried unsuccessfully to construct a new government whose composition would bypass party affiliations, but the remnants of the PH regrouped in support of his continuing as Prime Minister. The YDPA then personally interviewed all MPs on 25 and 26 February to gauge their support, without being able to reach any conclusion. He also met with party leaders, and called a meeting of the Conference of Rulers (the official body of Malaysia's nine hereditary State Rulers) on 28 February. Meanwhile Mahathir insisted that he had the support, via statutory declarations, of 114 MPs, a small majority in a House of 222. Nonetheless His Majesty appointed as Prime Minister Muhyiddin, the president of a smaller party called Bersatu (which had earlier abandoned the PH coalition), who also claimed majority support. Muhyiddin took office as head of a new coalition called the *Perikatan Nasional* [National Alliance] (PN), which also comprises the Pan-Malaysian Islamic Party and former ruling parties who had lost the 2018 election, but it was unclear whether he indeed secured the confidence of a majority of MPs. Although it can be strongly argued – following Westminster conventions – that the issue of confidence should have been tested on the floor of the *Dewan Rakyat*, the House was not summoned until some seven weeks after the appointment.[4] Moreover, the Cabinet having resigned along with Mahathir, there was a Prime Minister but no government for a period of about 11 days prior to Muhyiddin's appointment, just as the Covid-19 pandemic took hold.

Developments regarding the role of Parliament were also controversial. Despite the convening of the Dewan Rakyat on 18 May, the government allowed no substantive business to be discussed, and the session adjourned until 13 July, when the PN government secured a change of Speaker. The Speaker was voted out of office by two votes, but his successor was declared Speaker without a vote, causing a ruckus amongst opposition MPs.[5] This was the first time in Malaysian parliamentary history that a Speaker had been removed in the middle of the parliamentary term. Then on 14 October, despite the filing of numerous motions of no confidence in the government, the new Speaker controversially refused to allow these to be debated without the consent of the law minister.[6] Thus the PN government was able to remain in office past the end of 2020,[7] despite the fact that its majority had not been tested in the ten months it had held office. Nonetheless the government was able to claim it had a majority, based on the passing of the budget in November.[8] Meanwhile five State governments also changed hands via a similar process as had occurred at the federal level i.e. defections by individual or groups of state legislators.

The other major constitutional issue emerged in October with the refusal of the YDPA – again after consulting the Conference of Rulers – to act on the advice of the government by proclaiming an emergency to avoid the need for the holding of elections.[9] In the run-up to that episode, a state-level election in Sabah on 26 September resulted in a massive spike in Covid-19 infections, and it was not unnoticed that the Opposition Leader had publicly claimed on 23 September that he had a sufficient parliamentary majority (again, through behind-the-scenes dealings) to form a new government. The YDPA's refusal to act on government advice was unprecedented, and since the official announcement did not deal with the legal basis for such refusal, constitutional experts were hard put to find legal support for it.[10] The best view is probably that the YDPA was exercising reserve powers. Nonetheless, after

[2] Federal Constitution of Malaysia, art 43(4) states: 'If the Prime Minister ceases to command the confidence of the majority of the members of the House of Representatives, then, unless at his request the *Yang di-Pertuan Agong* dissolves Parliament, the Prime Minister shall tender the resignation of the Cabinet.'

[3] Art 43(2) states that 'the Yang di-Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the Cabinet a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House.'

[4] For a full account and critique of this process from a constitutional perspective, see Shah & Harding (n 1).

[5] Al Jazeera, "Malaysia's Muhyiddin wins vote to replace Speaker by a whisker", Al Jazeera, (7 July 2020), https://www.aljazeera.com/news/2020/7/13/malaysias-muhyiddin-wins-vote-to-replace-speaker-by-a-whisker, (accessed 14 March 2021).

[6] V Anbalagan, "Speaker must allow no-confidence motion to test legitimacy of PM, says lawyer", Free Malaysia Today, (15 October 2020), https://www.freemalaysiatoday.com/category/nation/2020/10/15/speaker-must-allow-no-confidence-motion-to-test-legitimacy-of-pm-says-lawyer/, (accessed 14 March 2021).

[7] The proclamation of an emergency and the passing of an emergency ordinance in January 2021 resulted in the suspension of parliamentary business until 1 August 2021.

[8] Vincent Tan, "Malaysia's parliament passes 2021 budget", Channel News Asia, (26 November 2020) https://www.channelnewsasia.com/news/asia/malaysia-budget-2021-parliament-vote-confidence-test-muhyiddin-13637024

[9] Tharanya Arumugam, "King's decision on state of emergency set a precedent", New Straits Times, (26 October 2020), https://www.nst.com.my/news/nation/2020/10/635251/kings-decision-state-emergency-set-precedent, (accessed 14 March 2021).

[10] As Malaysia is a constitutional monarchy based broadly on the Westminster system, in general the King is required to act on ministerial advice except in certain limited circumstances specified in the Federal Constitution (which do not explicitly include the discretion on whether to proclaim an emergency): Federal Constitution, arts 40(1), 40(2), 150(1).

this event it appears to be assumed that the head of state has extensive personal powers regarding the summoning of parliament and the revocation of emergencies. Two limited emergency proclamations confined to small areas, designed to avoid by-elections, were in fact made following the refusal of a general proclamation.[11]

Malaysia's response to the Covid-19 pandemic in 2020 was based on the use of a particular statute, the Prevention and Control of Infectious Diseases Act 1988, to implement a series of 'Movement Control Orders' (MCO) throughout the country from 18 March onwards. Through these MCOs, varying degrees of restrictions on commercial activities and movement of persons were imposed depending on the severity of the outbreak in particular regions of the country, with the assistance of the police and the armed forces.

III. CONSTITUTIONAL CASES

1. Tan Sri Musa Bin Hj Aman v Tun Haji Juhar Mahiruddin & Another[12]*:* Whether a vote of no confidence is required before a Head of State may dismiss the Government

The Federal Court has granted leave to Musa Aman, a former Chief Minister of the State of Sabah, to challenge the constitutionality of his purported removal from that position by the Governor (Juhar Mahiruddin) in the constitutional crisis of May 2018.

Following the 2018 general election, Musa's political coalition won a one-seat majority in the Sabah state legislature, and he was sworn in as Chief Minister. The next day, six state legislators announced their defection to Musa's rival, Shafie Apdal, and the Governor requested Musa's resignation. When Musa refused, the Governor appointed Shafie as the new Chief Minister anyway, without the state legislature having sat or passed any motion of no confidence in Musa. Musa challenged the legality of Shafie's appointment.

The Federal Court held that the lawfulness of Musa's purported removal is a question of 'grave constitutional importance' that deserves to be determined by the apex court, despite subsequent events incontrovertibly demonstrating Shafie's majority support in the legislature. Thus, the Federal Court has opened the way to revisit the long-standing question of whether, and if so in what circumstances, a Head of State (such as a State Governor) can dismiss a sitting head of government based on his own subjective satisfaction that the latter has lost majority support, without a vote in the legislature.[13] This is an important question in the Malaysian context, given the shifting political allegiances at both state and federal level which can rapidly create or erase legislative majorities (no less than five state governments changed hands in 2020 due to lawmakers defecting).

The Federal Court now has an opportunity to revisit the landmark case of *Dato' Seri Nizar Jamaluddin,* which essentially held that a Head of State may act on the basis of extraneous circumstances demonstrating that an incumbent Chief Minister has lost majority support, without a formal vote of no confidence in the legislature.[14] The eventual determination of this case is also likely to further clarify the differences in the powers of hereditary state Rulers (exemplified by the judgment in *Nizar Jamaluddin*) and non-hereditary Governors such as the present defendant. Final judgment in this case is expected in 2021.

2. Letitia Bosman v Public Prosecutor[15]*:* Federal Court upholds constitutionality of the mandatory death penalty in Malaysia

The Federal Court has reaffirmed the constitutionality of the mandatory death penalty, which is provided for certain offences such as drug trafficking and murder. In *Letitia Bosman,* several defendants who had been convicted of drug trafficking challenged the mandatory death penalty imposed on them on the basis that: (a) the mandatory nature of the sentence deprived them of the right to a fair trial, in this case the right to present arguments in mitigation; (b) the mandatory death sentence was disproportionate and thus violated their right to equal protection of the law under Article 8(1) of the Federal Constitution and (c) the mandatory sentence was a legislative usurpation of the judicial power to determine the appropriate sentence in the circumstances of the offence.

While this was not the first time the mandatory death penalty has been challenged in Malaysian jurisprudence[16], the distinguishing features of this challenge were the application of the doctrine of proportionality (anchored in the constitutionally guaranteed right to equal protection) as a ground of constitutional review of legislation, and the defendants' reliance on a new, resurgent view of judicial power affirmed in a series of recent cases.[17] This case was therefore a bellwether of how far the apex court was willing to take these two concepts.

A special panel of nine justices was convened at the Federal Court, in line with the new practice (since 2018) of an expanded bench of the Court being convened to hear cases raising particularly significant consti-

[11] A Harding, "Acting (or not acting) on (law or unlawful) advice in Malaysia: From Windsor to Kuantan and back again", I·CONnect, (20 November 2020), http://www.iconnectblog.com/2020/11/acting-or-not-acting-on-lawful-or-unlawful-advice-in-malaysia-from-windsor-to-kuantan-and-back-again/, (accessed 14 March 2021).

[12] [2020] 12 MLJ 121 (Federal Court).

[13] See eg Dato' Seri Mohammad Nizar Jamaluddin v Dato' Seri Zambry Abdul Kadir; Attorney General (Intervener) [2010] 2 CLJ 925 (FC); Stephen Kalong Ningkan v Tun Haji Openg & Tawi Sli [1966] 2 MLJ 187 (High Court).

[14] Nizar (n 13).

[15] [2020] 5 MLJ 277 (FC).

[16] See eg Public Prosecutor v Lau Kee Hoo [1983] 1 MLJ 157 (FC).

[17] Semenyih Jaya Sdn Bhd [2017] 3 MLJ 561 (FC); Indira Gandhi a/p Mutho [2018] 1 MLJ 545 (FC); Alma Nudo Atenza [2019] 4 MLJ 1 (FC).

tutional questions (the Federal Court usually sits in benches of five). By an 8-1 majority, the Federal Court dismissed the constitutional challenge and upheld the validity of the mandatory death penalty. The majority ruled that whether the mandatory death penalty is disproportionate to the crime of drug trafficking is a question for the legislature, not the courts, and it would therefore be inappropriate for the courts to usurp the power to determine this question when Parliament had already clearly answered it by providing for the mandatory death penalty. Any change to this should come from Parliament and not the courts. Accordingly, the defendants had not been deprived of the right to a fair trial, as mitigation has no role to play once the validity of the mandatory sentence has been established. Moreover, the Federal Court held that the mandatory nature of the sentence did not infringe the judicial power vested in the courts as the power to determine the measure of punishment for criminal offences is a legislative power, not a judicial one. While the adjudication of guilt or innocence is a judicial function, it is for Parliament to specify the nature and range of punishments to be applied for particular offences, and the courts may only impose such punishment as is provided for by law.

Interestingly the majority also highlighted the absence of any prohibition on 'inhumane or degrading punishment or treatment' in the Federal Constitution and the fact that Malaysia has not acceded to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) in distinguishing precedents from countries that have such clauses in their national constitutions or have acceded to such international conventions.

3. Datuk Seri Anwar Ibrahim v Government of Malaysia[18]*:* Federal Court declines to rule on constitutionality of amended legislative procedure

On 11 February, the Federal Court dismissed a challenge to the constitutionality of the National Security Council Act 2016, which provides broad powers to the Prime Minister to impose emergency-like restrictions in a designated 'security area'. A prominent politician, Datuk Seri Anwar Ibrahim challenged this statute on the basis that, as anti-subversion legislation, it should have been enacted under Article 149 of the Federal Constitution and it disproportionately restricted the freedom of movement provided under Article 9 and was thus unconstitutional.

More significantly, Anwar challenged the constitutionality of amendments made to the legislative procedure in Article 66 of the Federal Constitution, which removed the power of the YDPA to block legislation enacted by the Houses of Parliament by withholding Royal Assent. The current Article 66(4A) (inserted by constitutional amendment in 1993) provides that if the YDPA does not assent to a bill that is presented to him, it shall become law thirty days after it was presented 'as if he had assented thereto'. In 2016, the National Security Council Act became the first law to be enacted in this way. It was now alleged that by removing the need for Royal Assent to legislation, the amendments of 1993 had violated the 'basic structure' of the Federal Constitution and were thus unconstitutional.

The Federal Court, by a majority of 5-2, declined to answer these constitutional questions on the basis that they were abstract and 'purely academic' because there was no real dispute underlying the questions and they 'existed in a factual vacuum'. The majority found that Anwar had not been subjected to any action under the Act, and was not in any particular group of persons specifically targeted by the Act. There was also no suggestion that his constitutional rights had been deprived by the amendments or by the Act itself, and so the court would not pronounce on 'abstract questions of law where there is no dispute to be resolved'. Thus, the majority dismissed the challenge, though not without expressing 'grave reservations as to the constitutional validity' of the Act.

The Chief Justice and the Chief Judge of Sabah and Sarawak gave dissenting judgments in which they held that the mere existence of the Act, and the possibility of its being void for unconstitutionality, provided ample justification to rule on the challenge. In the CJ's words, 'the appellant's action was brought with a view to vindicating the rule of law'. Both dissenting justices would have declared the Act unconstitutional for not having been enacted under Article 149, despite being anti-subversion legislation 'in pith and substance'. However, they would have also dismissed the 'basic structure' challenge on the grounds that Royal Assent remains part of the legislative process, and the amendments merely codified the convention in Westminster-model constitutional systems that royal assent shall not be withheld from bills that have been duly passed in the Houses of Parliament.

With great respect to the majority, their reticence to intervene resulted in a missed opportunity to identify and weed out unconstitutional legislation, which must surely be a core function of the court as the 'guardian of the constitution'. Given the sweeping scope of powers that it purports to vest in the Prime Minister, the Act in question was one of the most controversial in Malaysia's legislative history; it is no coincidence that it became the first bill to which the YDPA declined to signify royal assent. The majority's reliance on the 'abstract and academic' nature of the dispute was unfortunate, given that the constitutional reference procedure by which this case moved directly to the apex court would appear to provide sufficient justification for nonetheless engaging with the dispute (a point noted in both dissenting judgments).

4. Public Prosecutor v Najib bin Razak: Former Prime Minister convicted of corruption relating to 1MDB saga

The Kuala Lumpur High Court on 21 August convicted former prime minister Najib Razak on seven charges of corruption, criminal breach of trust and money-laundering

[18] [2020] 4 MLJ 133 (FC).

relating to the 1Malaysia Development Berhad (1MDB) scandal.[19] This saga involved the alleged siphoning-off of colossal sums of money from a supposed state investment corporation, which ultimately set off a worldwide investigation and led directly to the downfall of Najib's Barisan Nasional administration at the general elections of 2018. Najib thus became the first prime minister to be convicted for corruption in Malaysia. With the present government vowing not to interfere in the judicial process (despite Najib's UMNO party being technically a partner of the ruling coalition), this verdict appears to consolidate the legal accountability of public officials in Malaysia for acts done while in power.

Mr Najib was sentenced to twelve years' imprisonment and a fine of MYR 210 million (USD 50.8 million) for these offences; other criminal cases and a civil suit for misfeasance in public office are also pending against him at the time of writing. He is presently appealing against this conviction and sentence.

IV. LOOKING AHEAD

A state of emergency was proclaimed throughout Malaysia on 11 January 2021, ostensibly to deal with the surge in Covid-19 infections that had escalated to severe proportions by the end of the year. By January 2021, therefore, the PN government had obtained what it failed to get in October 2020: a nationwide proclamation of emergency. Constitutionally, the proclamation gives the executive branch wide powers to promulgate 'Emergency Ordinances' having the full force of law, besides allowing for most constitutional provisions and safeguards to be suspended for the duration of the emergency.

On 14 January 2021, an Emergency Ordinance was promulgated suspending all further sittings of Parliament and all elections due until further notice, again ostensibly to constrain the spread of Covid-19 infections. This has the effect of suspending state-level legislative elections that were constitutionally due to be held in Sarawak by August 2021. A notable consequence of this, however, is the loss of parliamentary scrutiny over government actions until Parliament is summoned again. This also removed the possibility of the government's slim parliamentary majority being tested through a motion of no confidence in Parliament. Since the reconvening of Parliament and the holding of elections is, in the present situation, effectively at the discretion of the government, it remains to be seen when – and under what circumstances – parliamentary democracy will be restored by the present government, which is only too aware of its precarious position. If and when elections are held in Malaysia, the new political alliances forged after February 2020 will be put to the test.

Important court cases to watch for include the appeals by former Prime Minister Najib Razak against his corruption convictions relating to the 1MDB saga, as these wind their way through Malaysia's appellate courts. Graft proceedings against other high-profile personalities associated with the previous government, particularly Najib's then deputy prime minister, are also before the courts, which are likely to reach at least first-instance verdicts this year.

In terms of constitutional doctrine, the sustainability of the idea of 'unconstitutional constitutional amendments' or the 'basic structure doctrine' in Malaysian jurisprudence remains an open question as a result of two landmark decisions delivered by the apex court as this chapter was written.[20] Due to the present wording of the Federal Constitution, developments on this issue will have significant implications on the future ability of the judiciary to exercise effective check and balance over other constitutional actors in Malaysia.

V. FURTHER READING

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Mexico

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I. INTRODUCTION

The COVID-19 pandemic that affected the whole world throughout 2020 had a major impact on Mexico. Initially, Mexico adopted a "denial" attitude towards the pandemic similar to Brazil and the United States. The Federal Government minimized the severity of the situation, despite being among the states with the highest number of deaths. On March 23, the Federal Government (through the *Consejo de Salubridad General*) recognized COVID-19 as a severe disease to be given high priority. A few days later, extraordinary measures were adopted. The health emergency was declared on March 30 (some twenty days after the WHO declaration), but the Federal Government did not order any "high impact" measures, such as mandatory social distancing. The only measures adopted by the Federal Government concerned the cancellation of massive events, the closure of museums, theaters, cinemas, and archaeological sites, and the suspension of non-essential educational and work activities. Social distancing was established, re-defining public, social, personal, and intimate spaces, increasing basic prevention measures, temporally suspending non-essential activities, and encouraging the population to "stay at home."

The administration of justice was deemed an essential activity, and urgent cases were processed under a strict social distancing scheme based partially on remote working. The 8/2020 Joint Agreement by the Federal Judicial Council enabled solving cases that procedurally were in the sentencing phase. Such agreement also established the possibility of processing and resolving matters through the "online trial" scheme. Subsequently, in order to regularize the jurisdictional activities of the judiciary, it was ordered that new cases be fully opened for processing through the "online trial" modality.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

One of the most significant constitutional developments in 2020 was the constitutional reform on health and education published in the Official Gazette of the Federation on May 8, 2020. Such reform amended Article 4 of the Mexican Constitution, which aims to guarantee the right to health protection for all persons. Firstly, the progressive, quantitative, and qualitative extension of health services for comprehensive and accessible care for people without social security will be guaranteed. An ordinary law will define a welfare health system. Secondly, the amendment added three paragraphs concerning financial support and pensions for vulnerable groups, such as the permanently disabled and people over 68 years old. Priority will be given to children under the age of eighteen, indigenous people, and Afro-Mexicans up to the age of sixty-four who live in poverty. Likewise, those over the age of 68 years old will be entitled to a non-contributory state pension. Indigenous people and Afro-Mexicans will be entitled to it from the age of 65 years old. Finally, student scholarships are included, which will be granted by the State through a system that

will apply to students at all school levels. Priority will be given to students from families living in poverty. It is a historic amendment that recognizes social rights as a basic principle of the rule of law and a fundamental pillar of President Andres Manuel López Obrador's political program.

Article 4 of the Constitution was also subsequently amended on December 24, 2020, with the addition of a paragraph that establishes the obligation of the State to promote the comprehensive development of young people through public policies with a multidisciplinary approach, which promotes their inclusion in the political, social, economic and cultural life of the country.

An important reform constitutionalizing the right to safe mobility was published on December 18, 2020. This reform affects different constitutional provisions and recognizes the right of all to mobility in conditions of road safety, accessibility, efficiency, sustainability, quality, inclusion, and equality. The constitutional amendment also establishes that municipalities will be entitled to formulate, approve, and administer zoning and municipal urban development, mobility, and road safety plans. Similarly, the amendment foresees the creation of a Metropolitan Development Council to harmonize and coordinate mobility and road safety criteria when two or more urban centers located in municipal territories of two or more entities form or tend to form a demographic continuity.

Furthermore, it is worth mentioning the constitutional reform of Article 28, published in the Official Gazette of the Federation on March 6, 2020. In addition to the prohibition of monopolies, monopolistic practices, and watertight under the terms and conditions established by law, it also prohibits tax exemptions. It should be noted that this measure is intended to reduce the financial losses of the public treasury. However, it was also used to recover tax credits about to expire or already expired.

Finally, it is also important to note the legal reform on migrant and refugee children published on November 11, 2020, which amended several sections of the Migration Law and the Law on Refugees, Complementary Protection, and Political Asylum. This reform will guarantee a more effective enforcement of the rights of migrant asylum seekers as well as refugee children and adolescents. With this reform's enactment, the Mexican State complies with several international treaties and recommendations of the human rights committees. The amendment paved the way for better enforcement of the rights of children and adolescents in mobility situation. The main advances achieved with these reforms are, namely: the non-detention of children and adolescents in a situation of mobility in immigration stations or stays, accompanied or unaccompanied, providing care alternatives; the determination of the best interests of children carried out by the Procurators for the Protection of Girls, Boys, and Adolescents, as a central element of the process of comprehensive guarantee of rights; the extension of the vision of protection to all children in a situation of mobility, not only to the unaccompanied; and the provisional regularization of the migratory status of all girls, boys, and adolescents in a situation of mobility, to avoid their expeditious return and thus guarantee that their fundamental rights are fulfilled, including access to international protection.

III. CONSTITUTIONAL CASES

1. Acción de inconstitucionalidad 90/2018: Unconstitutionality of restrictions to the right to marry based on mental disabilities (30/01/2020)

The State of Guanajuato amended its Civil Code to establish that mental disabilities shall be considered an impediment to marriage and shall constitute grounds for legal incapacity. The National Commission for Human Rights challenged the law arguing that it violates the right to equality and to legal capacity. It further argued that the law excludes a specific population group from legal protection and unjustifiably discriminates them in light of their disability.

The Supreme Court invalidated the law. The Court argued that the challenged legislation confused the terms of "legal incapacity" and "mental disability." The decision stated that categorically denying persons with a mental disability the right to marry violates the right of equal protection under the law and the prohibition of discrimination. Furthermore, the prohibition violates article 23 of the Convention on the Rights of Persons with Disabilities by being a prominent barrier to developing an individual's right to personal autonomy and dignity.

2. Contradicción de tesis 247/2017 (contradiction of criteria between the First and Second Chamber of the Supreme Court): Freedom of expression and the "correct usage of language" (30/04/2020)

The 2018 Telecommunications and Radio Broadcasting Federal Act prescribed that all programs transmitted through radio and television should promote the "correct usage of language" (article 223.IX). The Chambers of the Supreme Court clashed on the interpretation and constitutionality of such a disposition.

In its full composition, the Supreme Court determined, by a bare 6-5 majority, that the article was unconstitutional under a proportionality test which deemed it a "suspect category." The Court stated that the article establishes a restriction to the freedom of expression. During the discussion, it was argued that such a law might negatively influence an egalitarian society by reinforcing a predominant point of view in the public debate to the detriment of minoritarian views. CT 247/2017 proved the Supreme Court's current composition to be highly divided regarding the constitutionality of imposing language correction parameters on the freedom of speech.

3. Acción de inconstitucionalidad 112/2019 *y sus acumuladas* 113/2019, 114/2019, 115/2019, 119/2019 y 120/2019: The "Bonilla Act" (11/05/2020)

Jaime Bonilla was elected Governor of Baja California in 2019. Prior to Bonilla's election, the Baja California Congress had enacted a legal amendment to align state and federal elections. As stipulated by this amendment, Bonilla's term was to finish in October 2021 (much shorter than a usual Governor's term). However, after Bonilla took office, the Baja

California Congress amended the local Constitution to extend his term to five full years. This amendment, widely known as the "Bonilla's Act," was challenged in the Supreme Court by the National Commission for Human Rights and several political parties.

The Supreme Court emphatically declared the unconstitutionality of the law by unanimity in what is destined to become the Supreme Court's strongest precedent on electoral law. In the first term, the Court argued that the act violated the principle of electoral certainty. Such a principle requires –stated the Court- that political actors know beforehand the electoral process's fundamental rules, and that such rules may not be amended after the process if they impact the electoral outcome. In this case, the Court stated that the term of a position is an essential element of the democratic procedure. That is, citizens vote for a candidate "X" to fulfill the position "Y" for a "Z" term - which implies a concrete length of time in which a person serves office. To alter post-election the elected candidate, the position, or the term of office infringes the democratic nature of the election itself. In second term, the Court found that such an amendment violated the prohibition specified in article 105.II of the Constitution. The said article forbids significant amendments to the applicable electoral law 90 days prior to starting the electoral process. The ruling argued that the prohibition also applied to ex post amendments, such as the challenged act, which have a retroactive impact on the election by modifying one of its significative elements (the length of the term). Unanimously acclaimed by political actors and academics, the "Bonilla Act Ruling" has rapidly become one of the most prestigious Mexican Supreme Court decisions in its entire history.

4. Amparos en revisión 1071/2018, 140/2019, 963/2018, 27/2019, and 1051/2018: A further clash towards a constitutional theory of ecological taxation (06/02/2020 to 20/05/2020)

In 2017, the State of Zacatecas introduced to its legislation several ecological taxes levied on activities deemed as harmful to the environment (mineral extraction, gas emissions, soil contamination, and waste storage). Several mining and metallurgical companies appealed the taxes arguing that the local Congress lacked the competence to issue such legislation and that such taxes violated the constitutional principles of lawful taxation and tax justice.

In its five decisions, the Second Chamber of the Supreme Court determined the unconstitutionality of the "ecotaxes" on mineral extraction and waste storage because of the local Congress's lack of competence to issue such legislation. The Second Chamber upheld the remaining ecotaxes. The rulings raised doubts regarding its compatibility with the previous Supreme Court doctrine. In February 2019, the Supreme Court, in full composition, upheld the constitutionality of all such taxes (*Controversia constitucional* 56/2017), although only in terms of analyzing the competence of Zacatecas to issue them. The Second Chamber, in its 2020 decisions, formulated a general theory of ecological taxes as a palliative tribute to the consequences of the negative effects of production procedures. Therein, the Chamber argued that such taxes address the negative effects on the ecology caused by the free market, which usually transfers such costs to society and the state. Therefore, the Court argued that ecological taxes are not only to be levied based on the economic benefit received by the producer but also to promote the adoption of technologies that minimize a detrimental environmental impact.

5. Amparo directo en revisión 8577/2019: Child corporal punishment (03/06/2020)

The father of a child sued the mother for his child's full legal guardianship at a custody trial. *Inter alia,* he claimed that the mother had hit the boy with a cable and thus started a parallel criminal procedure. In the civil procedure, the child's mother argued that the child had misbehaved at school and, when confronted, attacked her; hence, corporal punishment had been necessary as a disciplinary method. The civil procedure concluded by granting custody to the father given the violent behavior of the mother. A Circuit Court overturned the judgment - stating that the disciplinary measures administered, in that case, could not be deemed as child violence by international standards.
The Supreme Court overturned the decision. The ruling analyzed the international *corpus iuris* pertaining to the corporal punishment of children. The Court examined the General Comments No. 8 (2006) and 13 (2011) of the Committee on the Rights of the Child (CRC). The First Chamber concluded that physical violence against children was unacceptable and may not be considered reasonable or moderate punishment, setting an important standard for forbidding corporal punishment.

6. Amparo directo en revisión 3727/2018: Marriage does not inhibit rights in *a de facto* relationship (02/09/2020)

A woman sued a man for alimony proving in the procedure that they have lived in a *de facto* union. The Family Court denied the allegation arguing that the defendant was currently married to a different woman. Article 65 of the Family Code of the State of Morelos defines concubinage as a cohabitation relationship between unmarried people and without impediment to marry.

The First Chamber of the Supreme Court declared that this provision violated the right to equality and non-discrimination. According to the Chamber, the aforementioned requirement does not have a constitutionally valid purpose when one of the persons in a *de facto* union at the same time maintains a marital relationship. The legal concept excludes these people from access to concubinage. Therefore, it excludes them from the rights derived from cohabitation, such as the right to alimony.

The Court argued that reality proves that the coexistence of concubinage and marriage is possible. The law cannot privilege a single form of coexistence and recognize legal rights only to marriage. Due to its restrictive legal definition, denying the recognition of a *de facto* union implies denying the legal recognition of a relationship between two people in the exercise of the free development of their personal life.

Consequently, the legal definition of concubinage cannot be justified by the alleged

protection of the family or the protection of couples' stability. This conclusion would have a negative consequence: to hinder the protection of families formed under a *de facto* relationship.

7. Review of the constitutionality of the matter of popular consultation 1/2020 (01/10/2020)

President López Obrador proposed a referendum *("consulta popular")* employing his constitutional attributions. Article 35 of the Constitution establishes that the Supreme Court must analyze the constitutionality of the consultation. President López Obrador proposed the following question: "Do you agree or disagree that, under the laws and procedures, the competent authorities investigate and, where appropriate, punish the alleged crimes committed during and after their terms by former Presidents Carlos Salinas de Gortari, Ernesto Zedillo Ponce de León, Vicente Fox Quesada, Felipe Calderón Hinojosa, and Enrique Peña Nieto?"

The Court's decision aroused great public controversy considering that the Constitution prohibits popular consultations on restrictions to human rights.The Court divided its study into two parts: a) the analysis of the constitutionality of referendum's scope, and b) the legality of the question itself. Concerning the first question, the Court determined by a 6-5 voting that the referendum's scope was constitutional. In the Court's opinion, the proposed scope should be interpreted as an attempt to consult the people on a process of clarification of the political decisions adopted in recent years. Such a scope would allow guaranteeing justice and victim's rights.
The Court decided that the question was not legal in the second place because it did not have neutral language and contained value judgments. Therefore, based on article 26 of the Federal Law of Popular Consultation, the Court modified the question as follows: "Do you agree or disagree with initiating a process of clarification of the political decisions of recent years, under the constitutional and legal framework to guarantee justice and the rights of possible victims?" This popular consultation will take place on August 1, 2021.

8. Amparos en revisión 226/2020 y 227/2020: The human right to health of people with HIV/AIDS (11/11/2020)

Two patients living with the Human Immunodeficiency Virus (acquired immunodeficiency syndrome, HIV/AIDS) complained of a lack of uninterrupted supply of antiretroviral drugs to treat their disease. They filed *amparo* lawsuits against this alleged omission. The claims were dismissed by a federal judge because, in his opinion, they did not prove the claimed omission. The petitioners appealed the decision before the Supreme Court.

The First Chamber of the Court determined that the lack of uninterrupted antiretroviral treatment violated the applicants' right to health, life, and integrity and thus overturned the decision. The Court stated that the right to health must comply with the characteristics of availability, accessibility, acceptability, and quality.

The precedent established that the lack of medical care constituted a breach of the state's obligation to advance, as quickly as possible, in the effective realization of the right to health, with the maximum of available resources. The ruling concluded that the state did not prove to have taken the necessary measures to avoid non-compliance nor exhausted all available remedies to guarantee the right to health. Furthermore, the ruling argued that the state did not consider that people with HIV/AIDS deserve reinforced protection.

Consequently, the Chamber granted the *amparo,* ordering to deliver the treatment required in a timely, permanent, and constant manner, without interruptions.

9. Amparo en revisión 307/2020. Digital justice: A remedy to the pandemic? (25/11/2020)

The 2013 Amparo Act introduced the possibility of the electronic filing and serving of documents and a full digital procedure of *Amparo* (a remedy for human rights violations). Before 2020, its usage by traditional lawyers was rather scarce. The pandemic notably accelerated the acceptance and usage of the digital procedure and even saw an expansion of it to encompass most ordinary procedures under the federal judiciary's competence. The *Amparo en Revisión* 307/2020 featured a case in which the plaintiff digitally served evidence using the electronic signature prescribed by law. However, the Judge granted such evidence a lesser value than a physical document.

The First Chamber of the Supreme Court overturned the decision. The Court analyzed the legal framework regarding the digital *amparo* procedure extensively, mainly (but not only) stated in the 2013 Amparo Act and the Joint Agreements 1/2013, 1/2014, and 1/2015 by the Federal Council of the Judiciary, the Electoral Court of the Federal Judiciary, and the Supreme Court of Justice. The First Chamber concluded that all documents served digitally should be treated as physically filed evidence, and a Judge may only require the physical documents in the exceptional case that the parties object to them, hence seeking their exclusion, or if doubts arise regarding their authenticity. This case is of paramount significance given the rapid digitalization imposed by COVID and the pragmatic interpretation settled by the Supreme Court which favors the digital procedure.

10. Amparo in revisión 329/2020: Do children have the right to attend bullfighting shows? (25/11/2020)

A mother and father claimed the unconstitutionality of article 45 of the Law for the Protection and Defense of the Rights of Boys, Girls, and Adolescents of the State of Baja California. This article prohibited minors from attending events displaying "extreme violence against animals" (such as bullfights).

In a controversial decision, the Second Chamber of the Court declared the unconstitutionality of the provision and granted the *amparo.* The Chamber stated that Congress failed to provide a reinforced motivation pertaining to the adoption of the prohibition. The ruling affirmed that the usage of age as

a distinction implies a "suspicious category" according to article 1 of the Constitution. In such a way, a reinforced motivation was required. For the Chamber, Congress had to present arguments based on a scientific investigation. This research had to show that, from a psychological point of view, it is indeed harmful to a child to attend these kinds of events. Furthermore, the Court appreciated that such prohibition violated the parent's rights to decide their children's education orientation. The Second Chamber stated that a child's education is strongly related to values, convictions, cultural, and family traditions, as well as the right of children to freedom of thought and conscience.

11. Amparo directo en revisión 6071/2018: Children's right to change the biological father's last name (25/11/2020)

A man stopped living with his biological daughter for five years. The child's mother married another man, with whom the girl developed a socio-emotional relationship. The newly formed couple conceived a son, bearing the surname of the man and of both children's mother. After several years of family life, the girl intended to change her biological father's surname to adopt her "social father's" surname (as her brother).

The case reached the First Chamber of the Court. The Chamber determined that surname modification does not alter a child's affiliation. The right to a name implies the possibility of modifying it, adapting it to the social and family reality of the child, as well as to the self-conception of the child. The Court argued that recognizing socio-affective paternity through a child's surname does not imply the biological link's disappearance or the end of the legal affiliation.

This case introduced the concept of "assembled families." Such families are built from family coexistence after the dissolution of a previous family bond. Children born in the original family context must be protected and educated within the new family environment. In the new family, its members share life with some stability, publicity, and recognition. Such a situation may not be unprotected by law.

The Chamber granted the *amparo* to recognize the child's rights to a name and to express her opinion in this regard.

IV. LOOKING AHEAD

The COVID-19 pandemic will pose a major challenge for Mexico in terms of vaccine distribution and economic reactivation. From a constitutional standpoint, the constitutional reform on presidential immunity has been approved in the first months of the year. The reform establishes that, during his term of office, the President of the Republic may be charged and tried for treason, acts of corruption, electoral crimes, and all those crimes for which any ordinary citizen could be prosecuted.

The amendment to the Federal Judiciary has also been approved. The amendment modifies the Federal Judicial Council's powers and introduces a system of binding precedents of the Supreme Court on the interpretation of the Constitution. Finally, on June 6, 2020, there will be elections to renew the Chamber of Deputies and various offices in the 32 states of the country.

V. FURTHER READING

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Montenegro

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I. INTRODUCTION

As if the global pandemic of Covid-19 was not enough of a challenge for constitutional courts anywhere, it seems that the Constitutional Court in Montenegro had a troublesome year as was anticipated in the last year's report. The so-called 'presiding judge' election in January 2020 unlocked a new burden for this institution. The consistent lack of public trust in public institutions in Montenegro continues to show that the current system of checks and balances is not working for the citizens. The procedure for appointing the President showed its vulnerability as it is not immune to institutions' overall politicization. This concern over the election of the so-called 'presiding judge' is shared in the latest PACE report.[1]

The Court's work in improving its decisions by applying the European Court of Human Rights (ECtHR) standards is notable. Still, the non-compliance of regular courts to follow those decisions remains. And although it is an overall assessment of the European Union that the Court continued to harmonise jurisprudence with the ECtHR case-law there are concerns about different approaches, understandings and interpretations of human rights protection standards between the Constitutional Court and Supreme Court which jeopardizes legal certainty and effective legal remedy in the national legal order.[2] It has been nine years since the negotiation started, and yet the EC Report for 2020 indicates that Montenegro is moderately prepared to apply *acquis communautaire.* When it comes to the judiciary as a whole, there are many challenges to independence, professionalism, efficiency and accountability. This inevitably reflects on the Court's work, and the independence of the judiciary is tied to the election of judges including the Court's President.

This year's Chapter on Montenegro inevitably addresses this issue, as in the last quarter of 2020, judges revoked their trust in the 'presiding judge' solution and declared the decision to elect her in the first place was unconstitutional. Also, I will reflect on two more decisions that in my view are important for the work and heritage of the Court.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

On March 13th, the Government of Montenegro adopted a set of interim measures aiming to prevent the introduction of infectious diseases into the country, to control and prevent their spreading, and to protect the population from the new coronavirus. The first case recorded was on March 17th. Officially the Covid-19 epidemic was declared on March 26th. As the country wide spread of the virus continued, on March 30th the Minister of Health issued an order that significantly restricted citizens' movement and in particular introduced a measure prohibiting citizens from leaving their houses. The introduction of so called 'curfew' measures meant restriction of the freedom of movement without previously introducing the state of emergency. But these measures do not stop here; the Minister also prohibited gatherings in residential buildings for all

[1] Mulder and Emanuelis Zingeris, "Post-Monitoring Dialogue with Montenegro", (CoE Parliamentary Assembly) Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), (2020), 15132 para 72.

[2] "Montenegro 2020 Report", European Commission, SWD, (2020) 353 final 31.

those who are not members of a joint family household. The CSO immediately raised the concern if this sort of restriction goes beyond the scope of the legally prescribed norms in situations where epidemic decease threatens an entire population's health.

While there was no question if measures imposed to fight Covid-19 are needed, the legal dilemma was if the executive branch overstepped in interpretation and application of the Law on Protection of the Population from Infectious Diseases. In particular, the issue at question was if point 4 of the Law that states "the prohibition of gatherings of the population in closed and open public places" can be legal grounds to prohibit gatherings in private spaces. As the number of positive cases increased, the National Coordination Body for Infectious Diseases (NKT) assumed the role of legislator and the Government. Most of the members of this body were members of the Government, and delineation, if they are acting on behalf of this body or the Government, was blurry. Opposition parties saw this as a pre-election campaign and the abuse of executive powers without officially declaring a state of emergency. At the same time, media and NGOs published reports and analysis that indicated that the system of checks and balances, as well as the principle of separation of powers, were fading against the frenzy in fighting the pandemic. As one of the examples of contradictory measures being made by the NKT was the prohibition to drive more than two people in the same car, while the Law on Trafic Safety still allowed that. As the rights' restrictions was an ongoing *modus vivendi,* the NKT was a body governing the State; all the while Government refused to declare a state of emergency or to inform relevant international treaty bodies of derogations of rights. The Council of Europe communicated a toolkit to its member states reminding them that "the principle of necessity requires that emergency measures must be capable of achieving their purpose with minimal alteration of normal rules and procedures of democratic decision-making".[3]

The legality of the NKT work and dilemmas whether the establishment of it corresponds to the coordinating body's description as prescribed by the Law emerged.[4]The controversy continued as the Decision to publish the list of people who were ordered a mandatory self-isolation measure was announced. I will discuss this decision in more details later in the text. Amidst all of these polemics, Court was apparently self-quarantined as the only thing we received from it was radio silence. According to Article 150 of the Constitution, Constitutional Court itself may initiate the procedure for the assessment of constitutionality and legality. According to Article 36(3) of the Law on Constitutional Court, the Court adopts a resolution that initiates the proceedings of examining the conformity of laws, regulations and general acts with the Constitution and ratified and published international agreements.

Another important point for Montenegro, and the Court as well, was the first democratic change of Government in the last 30 years as the long-reigning Democrat Socialist Party (DPS) lost elections on August 30th.[5] The political climate has now shifted and the nation's already polarized society has begun a new process of transition. A newly elected Government was formed out of a peculiar group of parties that are categorized differently in the ideological spectrum. The largest of them (DF) is the most radically right-wing, comprising a pro-Serbian and pro-Russian populist coalition. The second coalition is more civic in orientation, moderate and pro-European. The third is the smaller coalition, a civic, green and progressive party led by a member of the Albanian minority, who is now a Vice President of the Government. Although they all have different ideological views, they had one central common narrative: the core of their agenda was to defeat DPS and start the elimination of a corrupt legacy this party left. As previously stated, Montenegrin society has issues with politicized institutions who were often identified as a party mechanism rather than a body that serves all citizens equally. The judiciary was not immune to this polarization, which was evident in the mentioned process of electing the 'presiding judge' of the Court.

In the first quarter of 2021, the Parliament of Montenegro confirmed that the mandate of 2 judges was terminated as both fulfilled conditions to retire. The election of 2 new judges is subject to the politics that is being shaped by odd currents that are blowing in the society (the latest DPS congress confirmed this party to be distancing from the centre-right to be more right, or the rise of the far-right and extremist parties). It is also conditioned by a two-thirds majority in the Parliament, which the ruling majority does not have and most likely will not for the forseeable future. Not electing new judges, the Court will face a penumbra of difficulties.

III. CONSTITUTIONAL CASES

Covid-19 measures affected the organization and work of the judiciary as a whole. In the Constitutional Court case, sessions were not help in almost two months, and only three-judge panels met on two occasions. At the time of submission of this chapter, the statistics for 2020 were not available. However, it is expected that the backlog will increase. Looking back at 2019, the Court resolved 1436 out of 2320 received cases. This essentially means that agenda of the Court is still packed with cases pending from 2019. I am not aware of any proposed solution to help improve this situation. According to Article

[3] Council of Europe Information document "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states", available at: https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40

[4] Hraction, "USTAVNI SUD DA OCIJENI USTAVNOST MJERA U BORBI PROTIV KORONA VIRUSA", (HRA, 31 March 2020), <http://www.hraction.org/2020/03/31/ustavni-sud-da-ocijeni-ustavnost-mjera-u-borbi-protiv-korona-virusa/>, accessed 3 March 2021.

[5] Although, it is fair to state that there was no change of rulling party since 1945, since the transition between Communist party and the DPS was almost invisible as Communist party evolved in the DPS. More on this and elections see Florian Bieber and Jovana Marović, LSE blogpost, "Seizing the democratic opportunity in Montenegro", available at https://blogs.lse.ac.uk/europpblog/2020/09/08/seizing-the-democratic-opportunity-in-montenegro/

39 of the Law on Constitutional Court, the Court decides in each case no later than 18 months from the date of initiating the proceedings before the Court.

This section will offer a brief summary and commentary of three cases that I believe play an important role in shaping the Court's legacy. The first and second are cases dealing with the conformity of legal acts with the Constitution and the third is the constitutional complaint. The first two cases resolve some of the issues I have highlighted in the previous part of this chapter, while the chosen constitutional complaint is an excellent example of applying the ECtHR case-law standards but is also political to a certain extent, given the parties involved.

1. 703/20-1 – Constitutionality and legality of the election of the President of the Constitutional Court

On January 27th 2020, after not being able to reach a consensus as no candidate received the majority of votes, the majority decided to elect a so called 'presiding judge' and circumvent the laws and procedures by which the President of the Court would be the oldest judge as there was no Deputy elected either. The reasoning of this decision, although unconstitutional, was creative as they found that Article 22 of the Law on Constitutional Court is not applicable. It refers to the expiration of the office of the President but not to their mandate.

The Article's intention is clear: to make sure that the President's office will never be vacant. This creative reading of the Article led to the election of a 'presiding judge'. Desanka Lopicic, a judge who already served as President was elected again. As I claimed last year, this position does not exist in our legal system and it is unconstitutional.

According to the Constitution and its Amendments, there are seven judges in the Court and they are elected for 12 years. Judges elect the President of the Court amongst themselves on a mandate of three years, whereas one judge can only serve as President in one mandate without the right to be re-elected. The judges can also elect a Deputy-President.

According to the procedure, the oldest judge presides over the session for the President's appointment (Articles 13 and 22 of the Law and Article 12 of the Rules of Procedure). Each judge nominates two candidates for the President. If none of the judges gets the required majority, the President's office is conferred to the Deputy of the Court and if the Court does not have a seated Deputy, the oldest judge is President of the Court. The organization of the election of the new President falls on the judge who assumes the office under previously described circumstances.

It took ten months for the judges to declare Desanka Lopicic's 'presiding judge' election unconstitutional. On the Session of the Court from November 6th, they finally broke their silence. They announced that the existing legal framework has its mechanisms to elect the Court's President, and should there be no majority, the Court will be run by the oldest amongst them. The reason to do so, however, was the fact that the 'presiding judge' did not organize elections of the President as it was agreed when she was elected in the first place. The Decision also reveals that judges have initiated requests to organize elections, and those were declined on several occasions. Thus, they have broke with this experiment, the office of the President was assumed by the oldest judge, who in December organized the election and Court now has a new President.

2. U-II br. 22/20 – Constitutionality and legality of the Decision to publish data of citizens ordered to self-isolate by the National Coordination Body for Infectious Diseases

On March 21st 2020, the National Coordination Body for Infectious Diseases (NKT) adopted a Decision to publish a list of all people who were ordered to self-isolate. The same day, the Government's Public Relations office published this Decision on the official Government website, with the list of names and data of those who are under a mandatory self-isolation regime. This list was updated on multiple occasions. The constitutional review initiative was submitted by the Non-governmental Foundation 'Civic Alliance'.

The preliminary question for the Court was whether in its form this Decision is a general legal act that can be subjected to the proceeding before this Court. Judges determined that in nomotechnic sense, this act was not adopted in the manner general legal acts should, however, the nature of the act, its relevance and the fact it created legal consequences prevailed. Thus, the Court found that it can be subjected to conformity examination under Article 149(1(2)) of the Constitution.

Issues before the Court were: to determine to what extent published data (first name, last name, address and date of the beginning of the mandatory self-isolation) can be considered medicinal data; and whether the Decision to publicly disclose personal data is legal and proportional restriction, ie inadmissible interference of the State in the right to privacy per the Constitution and the ECHR, having in mind the legitimate aim of the measure – health protection.

In answering the first question, judges took a closer look at several WHO recommendations, the significance of the self-isolation measures, and the implications this has on the members of a family in shared households and determined that data published are indeed medicinal and, as such, are subject to strict scrutiny.

In answering the second question, the Court pointed out that both the Constitution and the ECHR establish boundaries of human rights restrictions. Any restriction must pass the test: legality, legitimacy and proportionality. The Court also reminded us that unlike some of our neighbouring countries, Montenegro did not declare a state of emergency and did not inform the Council of Europe on potential derogations of the rights as allowed under Article 15 of the ECHR. According to the relevant case-law of the ECtHR, States do enjoy a certain margin of appreciation outside of the scope of Article 15. However, in

the Court's view, the decision to publish data is unconstitutional as it is against Articles 24, 40 and 43 of the Constitution but also unlawful under the scope of the relevant international law. The Court determined that the issue falls under Article 8 of the ECHR and Articles 6 and 9 of the CoE Convention 108. Also, Court relied on the ECtHR case law, such as *Amann v. Sweden* (2000), *Gardel v. France* (2009) and *Z v. Finland* (1997) and determined that while the intention to protect public health was clear the impugned Decision did not achieve the balance between the need to protect the health and lives of citizens on one side and the right to privacy on the other.

It is interesting that in the Court's view, the publication of such data provides for social stigmatization and could deter citizens in need of medical help from seeking such help, which in turn would endanger their health and also spread the disease to other persons, which significantly endangers the public interest. Although provided data could not be traced as it was the case of *Breyer v. Germany,* it was sufficient for an unknown person to create a website that offered geolocation of citizens whose names and addresses were published.

Thus the Decision was declared unconstitutional and as such was revoked on July 23rd. Perhaps too little, too late, as around 163 lawsuits were filed against the State. The lawsuits seek compensation for non-pecuniary damage due to the suffered and future mental pain in connection to the violation of the right to privacy, the right to protection of personal data and the right to respect for private and family life.

3. U-III br. 412/16 – Constitutional complaint in defamation case

Following allegations of corruption by the Montenegrin press against the Prime Minister's (currently President) sister Mrs Ana Đukanović, she filed a civil suit against the "Daily Press". The case made its way to the Constitutional Court after she won in civil proceedings based on defamation as "Daily Press" claimed that its right to freedom of expression was breached.

The Court held that reasons for which regular courts rendered their judgment in favour of Mrs Đukanović could not be sufficient and relevant to interfere with the applicant's right to freedom of expression. The interference was not proportionate to the legitimate aim pursued and was not necessary "in a democratic society", which violated Article 47 of the Constitution and Article 10 of the ECHR.

The Court applied the standard test of scrutiny and determined that: the freedom of expression is *conditio sine qua non* in any democratic society and the Government can interfere only if three cumulative conditions are met. The Court's analysis showed that a) there was interference with the complainant's right to freedom of expression as regular courts in civil proceedings awarded compensation for the damage to one's dignity; b) the impugned judgment is based on prescribed law (legality test), and c) the interference aimed to protect the reputation of others (legitimate aim test). Once the Court determined that the interference with the complainant's freedom of expression in the present case was lawful and had a legitimate aim, the only question the Court had to resolve was if interference was "necessary in a democratic society".

The Court starts by referring to *Ivanović and Daily Press v. Montenegro* stating that "the adjective 'necessary' implies the existence of a necessary social need." Second, the Court asked if regular courts have applied ECtHR standards, meaning if facts of the case were read within the relevant criteria such as those defined in *Milisavljević v. Serbia:* (a) the contribution of the article to the discussion of general interest; (b) the identity of the person concerned and the subject of the reporting; (c) the conduct of the person concerned before the publication of the article; (d) how the information is obtained and its veracity; (e) the content, form and consequences of publication and (f) the seriousness of the particular sentence.

While regular courts acknowledged that writing about the privatization of Montenegrin Telekom affair was of general interest for society and that the plaintiff in the civil proceedings is a public figure, the Constitutional Court holds that a distinction must be made between private individuals and persons acting in a public context. Accordingly, while a private individual unknown to the public may seek special protection of their right to private life, the same does not apply to public figures *(Minelli v. Switzerland)*. Therefore the plaintiff must show a particularly high level of tolerance *(Ayhan Erdoğan v. Turkey)*. The Court sees no issues with the manner and content of the information published as the applicant wrote about the plaintiff in the context of the lawsuit filed by the US Securities and Exchange Commission in the U.S. District Court of the Southern District of New York.

As ECtHR makes a clear distinction between facts and value judgments so does the Court. The existence of facts can be proved, while the truth of value judgments is not subject to proof, and expecting so violates the very freedom of opinion guaranteed by Article 10. Since the facts are based on the official document from other jurisdiction, the applicant had sufficient reasons to believe that the information was accurate. As to the regular courts' findings that published words were offensive, the Court argues that disputed articles are based on the allegations from the mentioned lawsuit and thus no information was fabricated.

Finally, the Court determined that regular courts did not attempt to find a balance between the plaintiff's reputation and the complainant's freedom of expression to disclose the information of the general interest. The published articles did not address private affairs or family life but the plaintiff's professional engagement that is of general public interest. Her engagement was in regards to the privatization of a national company. Since the applicant had sufficient reason to believe the information obtained from the lawsuit in the US was accurate, and it did not intend to defame her. In any case, Mrs Đukanović, as a public figure has consciously exposed herself to public scrutiny.

The Court recalls that the nature and seriousness of a particular sentence must be taken into account in assessing the proportionality of the interference. Thus the amount of compensation for non-pecuniary damages of EUR 2000 may discourage the participation of the press in discussions on issues of public importance.

This decision empowers free media to pursue topics of public interest no matter who are the actors involved.

IV. LOOKING AHEAD

The upcoming year will be challenging on many fronts. First and foremost the election of 2 vacant seats, and the perplexing political process to reach a two-thirds majority to approve candidates might put a strain on the Court to keep itself above the process. Many cases are pending from previous years but also several new cases initiated by the new opposition minority regarding several procedural and legislative acts carried out by the new ruling majority. Such is the case of Amendments to the Law on religious freedoms, a highly politically sensitive issue, as in the eyes of the majority, amending this Law that stirred many controversies and public protests during the rule of DPS led Government was of paramount importance for the new ruling coalition.

Montenegro still did not sign or ratify Protocol 16 to the ECHR, which would essentially help clear out the relationship between the Supreme Court as the highest in the regular judicial system and Constitutional Court as a unique body separated from the judiciary entrusted to safeguard and protect constitutional order. It is doubtful that the Constitutional Court with its limited capacity will become more pro-active and use its powers to initiate constitutional review when there is an obvious need to do so. For the time being Court appears as a remote historian who after a while renders its view of an event and declares that something was unconstitutional. The real consequence of the work of the Court in respect to the conformity of general legal acts and their effect on legal certainty and protection of human rights in the times when it is most needed is almost non-existent.

V. FURTHER READING

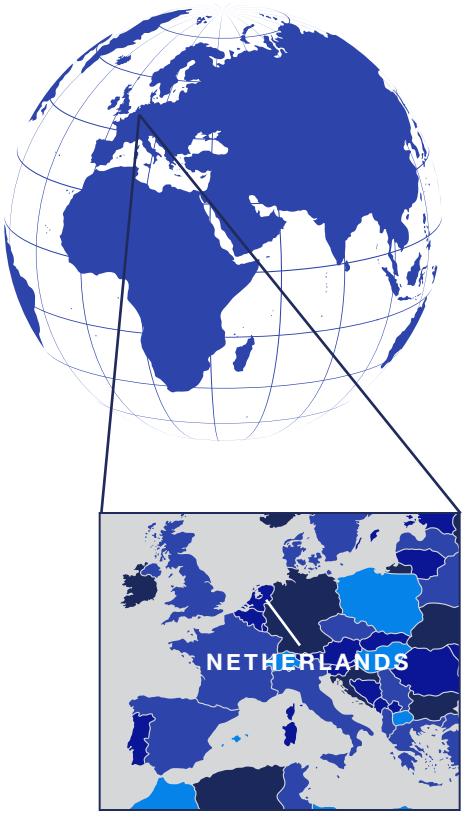
Anne Mulder and Emanuelis Zingeris, 'Post-Monitoring Dialogue with Montenegro' (CoE Parliamentary Assembly 2020) Committee on the Honouring of Obligations and Commitments by the Member States of the Council of Europe (Monitoring Committee)

'Montenegro 2020 Report' (European Commission 2020) SWD(2020) 353 final 31.

Council of Europe Information document "Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: A toolkit for member states", available at: https://rm.coe.int/sg-inf-2020-11-respecting-democracy-rule-of-law-and-human-rights-in-th/16809e1f40

Hraction, 'USTAVNI SUD DA OCIJENI USTAVNOST MJERA U BORBI PROTIV KORONA VIRUSA', available at http://www.hraction.org/2020/03/31/ustavni-sud-da-ocijeni-ustavnost-mjera-u-borbi-protiv-korona-virusa/

Florian Bieber and Jovana Marović LSE blog post „Seizing the democratic opportunity in Montenegro", available at https://blogs.lse.ac.uk/europpblog/2020/09/08/seizing-the-democratic-opportunity-in-montenegro



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I. INTRODUCTION

This report first addresses four major constitutional developments in part II: 1. the 'childcare benefits scandal' which resulted in the resignation of government Rutte III; 2. the impact of COVID-19 measures on constitutional rights, freedoms and democratic scrutiny; 3. the 'dikastocracy' debate on the role of the judiciary and 4. proposals for constitutional amendment following the advice of the State Commission on the Parliamentary System. Because Article 120 of the Dutch Constitution forbids the constitutional review of Acts of Parliament by the judiciary, this report does not include 'traditional' constitutional case law of decisions rendered by a Constitutional Court. There were nevertheless judgments rendered in 2020 in the Netherlands with a constitutional impact that is relevant to an international audience. Part III discusses these judgments as follows: 1. the judgement in the case the State v. Wilders, concerning the freedom of expression of politicians; 2. the judgment of the Court of Appeal to forbid and dissolve the Hells Angels Motor Cycle Club to protect democracy; 3. the Supreme Court judgment in the case of female foreign ISIS fighters v. the State, which invoked a question of separation of powers, and 4. a ruling of the District Court on the algorithmic risk model 'System Risk Indication'(SyRI). We conclude in part IV by looking ahead towards 2021.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. 'Childcare benefits scandal' and the resignation of government Rutte III

The use of technology by the Dutch government received a lot of attention in public debate and academic literature. Complexity and opacity result in tensions with public values, principles of the rule of law and principles of good administration. The two most important examples are the use of the algorithmic risk model SyRI (see below III.4) and the algorithms used by the Dutch Tax Authority in the so-called 'childcare benefits scandal' (*kindertoeslagenaffaire* in Dutch).

Following reports in 2013 that Eastern European gangs were committing fraud with childcare benefits, the authorities decided to tighten fraud policy and started hunting fraudsters down. However, when it became clear that amidst fraud investigations the Dutch Tax Authority had falsely accused about 26.000 families of childcare benefit fraud, the nation was shocked. Moreover, an investigation of the Dutch Data Protection Authority demonstrated that discriminatory algorithms were used that were based on variables such as dual nationality. The automated system identified people with dual nationalities as being potential fraudsters and thus discriminated on the basis of nationali-

ty, without providing sufficient accountability mechanisms or 'human' compassion.

Childcare benefit payments were thus wrongfully stopped, and families were unjustifiably ordered to repay the full amount they had received in years before, which led to severe financial and personal problems. These include divorces, people losing their homes and in one case suicide. In March 2020, government officials have apologized for the scandal and earmarked €500 million to compensate affected parents, which amounts to approximately €30,000 per family. Nonetheless, after a damaging report of a parliamentary investigatory commission of 17 December 2020,[1] Lodewijk Asscher, leader of the labor party PvdA and Minister of Social Affairs in the previous government, stepped down on 14 January 2021 as he had been made aware of a growing number of complaints but did not undertake any measures to respond. One day later, the government of Prime Minister Mark Rutte resigned in order to avoid the risk of losing a no-confidence vote in Parliament. The government Rutte III thus became a caretaker government, ahead of the general election of the House of Representatives planned on 17 March 2021.

The parliamentary report 'Unprecendented injustice' concluded that due to an overheated political reaction to fight fraud fundamental principles of the rule of law had been violated. Childcare benefits were reclaimed from parents identified as 'wilful fraudsters', although they only made trivial administrative errors such as a missing a signature on paperwork or wrongly filling in a form without malicious intent. According to the report, these victims were helpless against the powerful institutions of the State and did not receive the protection they deserved. The report recommended that everyone in the apparatus of the State should ask how such a thing could be prevented from happening again. On a regular basis, parents unsuccessfully appealed to the administrative judge and ultimately to the Council of State, for instance in cases that the court rejected an appeal to moderation or the principle of proportionality.[2] The report argues that the Council of State as a result actually strengthened the stringent "all-or-nothing" interpretation of the law by the Tax Authority so that the discretion to invoke the principle of proportionality was gradually reduced.

Only as of 23 October 2019, the Council of State revoked the stringent "all-or-nothing" interpretation of the law.[3] It is clear that the system of the State, with its checks and balances, failed to offer the necessary protection against unjustified action of government officials. The President of the Administrative Jurisdiction Division of the Council of State already stated that the court could have contributed earlier to the necessary correction of the system failure of the legislator and the law's application by the Tax Authority.[4] Nonetheless, the pivotal role and responsibility of the legislator cannot be denied.

2. Impact of COVID-19 measures on democratic scrutiny, constitutional rights and freedoms

In order to prevent the spread of the COVID-19 virus in 2020, the Dutch government took measures that affected various constitutional rights and freedoms. These measures affected among others the right to assembly and demonstration, the freedom of movement, the freedom to manifest one's religion and beliefs, the freedom of education and the right to respect for one's privacy as protected under the Dutch Constitution.

Although the Dutch system for restricting constitutional rights and freedoms requires that any restriction is sufficiently specific and based on an Act of Parliament, the Minister of Health, Welfare and Sports instead qualified the COVID-19 virus as *a severe danger to public health* under the Public Health Act. In conjunction with the Security Regions Act, a construction came into effect that transferred the authority of mayors to issue emergency decrees under Article 176 of the Municipal Act to the presidents of 25 safety regions. As a result, these presidents could issue emergency decrees under the instruction of the Minister that restricted the constitutional rights and freedoms of citizens.

This construction received a lot of criticism. The Dutch Constitution requires that measures aiming to restrict the exercise of constitutional rights are always based on an Act of Parliament that is specifically designed for that purpose, but Article 176 of the Municipality Act only provides for a general competence to issue emergency decrees. Besides, Article 176 of the Municipality Act allows for deviation of laws, but not for deviation from the constitution itself.

This construction was also criticized for its limited democratic scrutiny, as there are no representative bodies institutionalized at the level of the security region. Where municipal councils normally monitor the issuance of emergency decrees by mayors, they are unable to do so once the competence transfers from the mayor to the president of a security region. Even though, the Minister was in theory accountable for emergency decrees issued under his instruction, in practice he was not held accountable in Parliament.[5]

[1] Parliamentary Documents II 2020/21, 35510, no. 2, available at <https://www.tweedekamer.nl/sites/default/files/atoms/files/20201217_eindverslag_parlementaire_ondervragingscommissie_kinderopvangtoeslag.pdf> accessed 8 March 2021

[2] See, e.g., ABRvS 24 August 2011, ECLI:NL:RVS:2011:BR5679; ABRvS 9 July 2014, ECLI:NL:RVS:2014:2473

[3] ABRvS, ECLI:NL:RVS:2019:3535; ABRvS 23 October 2019, ECLI:NL:RVS:2019:3536, (23 October 2019)

[4] Bart Jan van Ettekoven, "Tussen wet en recht. Reactie van de voorzitter van de Afdeling bestuursrechtspraak van de Raad van State op het rapport Ongekend onrecht van de Parlementaire ondervragingscommissie Kinderopvangtoeslag", 101 NJB 98, (2021)

[5] Hansko Broeksteeg, "Verantwoording in tijden van Corona", (2020), 11 (3) TvCR 248; Geerten Boogaard, Michiel van Emmerik, Gert Jan Geertjes, Luc Verhey & Jerfi Uzman, "Kroniek van het Constitutioneel Recht, Constitutie in tijden van Corona" (2020) 35 NJB 2398

In response to this criticism, the Advisory Division of the Dutch Council of State held that in times of an immediate and life-threatening crisis where the State has a responsibility to protect the right to life, a restriction on constitutional rights and freedoms requires less specificity than compared to normal circumstances. However, the acceptability of such a construction decreases as time passes by.[6] For that reason, a proposal for the 'Temporary COVID-19 Measures Act' was made and entered into force on December 1st, 2020. This Act replaced the emergency decrees and provided a proper legal basis for the restriction of constitutional rights and freedoms. It also established more detailed requirements for proportionality and subsidiarity for restrictions on constitutional rights and freedoms. Furthermore, the Act contains a responsibility for the presidents of safety regions to report information to and answer questions from municipal councils within the safety region. In addition, the Act requires government to present ministerial decrees for specific measures to the House of Representatives, such as the Decree on Face Mask Obligations. Ministerial decrees enacted in emergency cases obtain immediate legal effect, but the House of Representatives has one week to confirm them. If a majority of this House disagrees, the regulation terminates ipso iure. Parliament will assess every three months whether the Act remains in force after hearing the Advisory Division of the Council of State.[7]

3. 'Dikastocracy' debate on the role of the judiciary

The year 2020 witnessed a political debate in the Netherlands on whether the judiciary is overstepping its powers by actively interfering in matters of public policy that are meant to be decided upon by a democratically elected legislature. In the Netherlands, courts are not entrusted with the power to review the constitutionality of acts of parliament and traditionally tend to exercise great restraint when societal interests are at stake. Since the balancing of those interests is intrinsically political in nature, this is considered a task that should be reserved for a political institution like Parliament. However, this so-called primacy of politics is challenged as civil courts are increasingly confronted with cases in which (groups of) citizens ask the court to interfere with government policies that often count on the support of Parliament.

The prime example of such a case is the *Urgenda* climate case, which was discussed elaborately in the 2019 Global Review of Constitutional Law. In short, a Dutch foundation called Urgenda lodged a number of claims against the State including 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 25% by the end of 2020 when compared to emissions in 1990. 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. This order was upheld in appeal and also by the Supreme Court in December 2019.[8] Another example is the case of female foreign ISIS fighters (see below III.3). In addition, administrative courts had to decide on several other controversial societal issues, such as the emission of nitrogen by farmers and the childcare benefits scandal (see above II.1).

In reaction to these court cases, right-wing politicians from a young political party called *Forum voor Democratie* argued that the Netherlands was becoming a '*dikastocracy',* a word that stems from the Greek term δικαστής (*judges*) and κρατειν (*governing*) and hence refers to a system of government by judges. Their main claim was that the judiciary was seizing power over the other institutions of government. The VVD, the largest party in Parliament, subsequently initiated a parliamentary hearing with experts on this matter. This hearing took place on 9 March 2020 and a majority of the participating experts were of the opinion that the judge had indeed regularly overstepped its power by entering in the political domain. This was considered problematic, because judges are not democratically elected and therefore allegedly lack the legitimacy to make these 'political' decisions.

At the same time, some argued that not the courts, but government and Parliament were to blame for this constitutional development. The argument was that the judiciary had been confronted with politically sensitive issues, because government and Parliament had been neglecting their legislative responsibility. Consequently, the judiciary was called upon to keep the government and Parliament in check. This put the judiciary in a position where it could be accused of overstepping its powers, which in the end could harm its independent position within the constellation of state powers. Instead of thus simply labelling judicial 'activism' as wrong and undemocratic, it might be more useful to assess the changing role of the judiciary within the *trias politica* because of the withdrawal of the parliamentary legislature in the administrative state.

4. Advice of the State Commission: proposals for constitutional amendment

In 2020, the report of the State Commission on the Parliamentary System of the Netherlands,[9] published in December 2018, resulted in several proposals to amend the Constitution. It is important to note that the Dutch Constitution has a rigid character: amendment requires two readings in both Houses of Parliament, with an intervening election for the House of Representatives, and a two-third majority vote in the second reading.[10]

[6] *Kamerstukken II* 2020/21, 25295, nr. 213

[7] Jan-Peter Loof, 'Constitutionele Consternatie over de Coronawet', (*De Nederlandse Grondwet,* 26 October 2020) <https://www.denederlandsegrondwet.nl/id/vld59z2vkvlu/nieuws/constitutionele_consternatie_over_de> accessed 4 March 2021

[8] Hoge Raad 20 December 2019, ECLI:NL:HR:2019:2006

[9] Full report available at <https://www.staatscommissieparlementairstelsel.nl/documenten/rapporten/samenvattingen/072019/18/download-the-english-translation-of-the-final-report-of-the-state-commission> accessed 8 March 2021

[10] Article 137 of the Dutch Constitution

On 17 July 2020, the government proposed two amendments to the Constitution, based on the report of the State Commission. One concerned the second reading of the amendment procedure itself.[11] Because amendments to the Constitution need a two-third majority in both Houses of Parliament in the second reading to pass, only twenty-six senators out of 225 members of Parliament (150 in the House of Representatives, and 75 senators) can block any amendment of the Constitution. A relatively small minority of members of the indirectly elected Senate can therefore reject a proposal that was adopted by two thirds of the members of the directly elected House of Representatives. According to the government, this veto power of the Senate does not sufficiently reflect the less political role of the Senate in the Dutch parliamentary system. Furthermore, it could lead to an undesired juxtaposition of both Houses of Parliament and political stalemate. The government proposed the second reading to take place in a joint session of both Houses of Parliament, while retaining the requirement of a two-third majority. This should create a more balanced role for both Houses in the amendment procedure. A theoretical consequence would be that only the 150 votes of the House of Representatives members could be sufficient in the final stage of the amendment procedure.

A second amendment bill concerns the term of the Senate.[12] Currently it is elected every four years by the members of the Provincial Councils (i.e. the provincial representative organs), shortly after the provincial elections. The amendment bill proposes that members of the Senate are elected for six years instead of four, and that half of the seats are contested every three years. Interestingly, the State Commission pondered this option in its report, but advised against it. Nonetheless, the government decided to propose such an amendment. It argues that it is necessary to clarify the role of the Senate in relation to the House of Representatives and the government. It argues that in order to function as a *chambre de réflexio*n the Senate needs to be distinct from the House of Representatives, both in terms of the method of election, and the term of its members. In the proposed system, shifting voter preferences are would be reflected less directly in the composition of the Senate.

Both proposals received the consent of the House of Representatives in the first reading on 8 December 2020. The report of the State Commission also fueled a private members' bill to amend the Constitution in order to introduce a binding legislative referendum.[13] In January 2021, the first reading was completed. After the elections of March 2021, it will be tabled for the second reading.

Twelve other constitutional amendments are currently pending.[14] The most noteworthy proposals concern the insertion of a general provision protecting the principles of democracy and rule of law, the insertion of a provision protecting the right to a fair trial, and a proposal to streamline the amendment procedure of the Constitution. The latter proposes that the House of Representatives that is elected after an amendment bill has been adopted in the first reading must commence and complete the second reading, or the bill will be deemed rejected.

III. CONSTITUTIONAL CASES

1. Outlaw motorcycle gangs: militant democracy

In recent years, the social and economic impact of organized crime in the Netherlands has considerably increased. Especially the so-called outlaw motorcycle gangs (OMG's), who serve as vehicles for various criminal activities that not only penetrate the licit economy but also undermine public trust in authorities and the rule of law in general. They have thus become a target for legislative, judicial and administrative actions.

Section 2:20 of the Dutch Civil Code enables civil courts to forbid and dissolve organizations – 'legal persons' to be precise – whose actions violate the public order. Traditionally, courts have applied this provision rather reluctantly. After several unsuccessful attempts by the public prosecutor, Dutch courts decided to dissolve motorcycle club Bandidos Holland in 2017, Satudarah MC in 2018 and Hells Angels Motorcycle Club Holland in May 2019. On 15 December 2020 the Court of Appeal upheld the 2019 decision of the District Court to dissolve Hells Angels.[15] It confirmed the interpretation of section 2:20 by the District Court that the public order is violated when an organization fosters a culture that facilitates and glorifies criminal activities and the use of violence.

2. State v. Wilders: "political cases" and freedom of expression of politicians

In Autumn 2020, the Court of Appeal in The Hague convicted Geert Wilders, a Member of Parliament and leader of the right-wing nationalist party PVV, for group defamation of Moroccan people living in the Netherlands.[16] During an electoral campaign, Wilders had asked the audience whether they wanted more or less Moroccans living in the Netherlands. When the audience responded with 'less', he said: 'Then we are going to arrange that'. From a constitutional point of view, this case is interesting for two reasons.

Firstly, Wilders argued that his prosecution concerned a 'political case' because of the involvement of the Ministry of Justice and Security. The Court acknowledged that there were political aspects to this case but found

[11] *Kamerstukken II* 2010/20, 35 533

[12] *Kamerstukken II* 2010/20, 35 532

[13] *Kamerstukken II* 2018/19, 35 129

[14] For an overview of all pending proposals to amend the Constitution, see <https://www.denederlandsegrondwet.nl/id/vi58ivmh0vx5/grondwetgeving_in_behandeling#p1> accessed 8 March 2021

[15] Hof Arnhem-Leeuwarden 15 December 2020, ECLI:NL:GHARL:2020:10406

[16] Hof Den Haag 4 September 2020, ECLI:NL:GHDHA:2020:1606

no indications for prosecution based on political motives. Neither did the Court find a violation of the constitutional principle of separation of powers, because it merely reviewed the facts in light of the Dutch Criminal Code and not the entire PVV or its program.

Secondly, the Court addressed the boundaries of freedom of expression of politicians under Article 10 of the ECHR. Although Article 120 of the Dutch Constitution prohibits judges from reviewing whether the application of the Criminal Code is compatible with the Article 7 of the Dutch Constitution (freedom of expression), Article 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) in the Netherlands. The Court ruled that conviction was permitted under Article 10 of the ECHR. Even though Wilders made his statements in a political context the Court argued that conviction was necessary because Wilders had a special responsibility as a politician to avoid expressions that potentially feed intolerance and undermine the respect for equality of all human beings, which are foundational to democratic and pluralistic societies.

3. Female foreign ISIS fighters v. the State: judicial restraint

A group of women from the Netherlands who had joined jihadist forces in Syria but were now detained in Kurdish camps under appalling conditions filed a lawsuit in 2019, claiming that the State was obliged to repatriate both them and their children.[17] The State rejected repatriation due to reasons of national security and international relations and given the safety risks involved in repatriation. The District Court, however, ordered the State to make efforts to repatriate the children. Moreover, in the case that repatriation of the children without their mothers would appear impossible, the State should also try to repatriate the women.[18] The State appealled against this decision, claiming that the government enjoys wide discretion in deciding upon matters of national security and foreign policy. In light of the separation of powers, the State argued that the Court should have exercised restraint when reviewing the decision of the government not to repatriate the foreign fighters and their children. The Court of Appeal in the end quashed the decision of the District Court and ruled that, considering the interests of the State and the fact that the women voluntarily left the territory of the Netherlands to take part in jihadist activities in an actual warzone, the State could have reasonably reached its decision to not repatriate them and their children.[19] The Supreme Court upheld this judgment in June 2020.

4. SyRI: algorithmic risk model

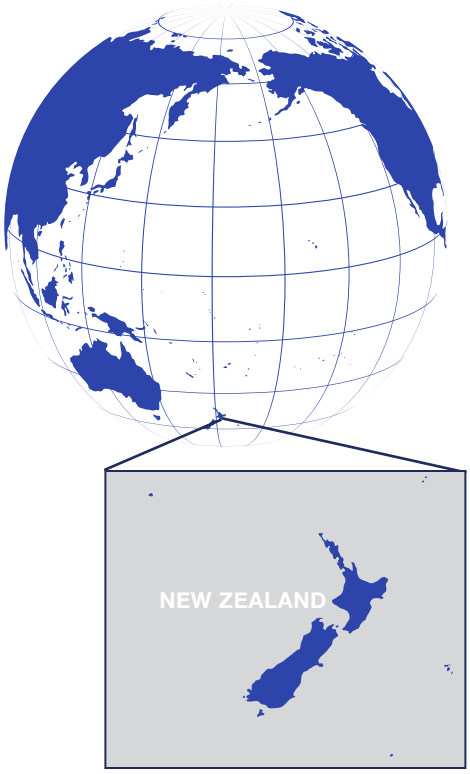
On 5 February 2020, the District Court in The Hague ruled on a landmark case about the use of algorithms and personal data in the so-called 'System Risk Indication' (*Systeem Risico Indicatie*) or 'SyRI'.[20] Despite objections from the Dutch Data Protection Authority, SyRI opaquely linked citizens' personal data from various government databases to generate risk profiles that warrant further fraud investigation in poor neighbourhoods.[21] Civil society interest groups and some concerned citizens filed a lawsuit arguing that the use of SyRI by the State to detect social benefits, allowances, and tax fraud violated higher law. The Court decided that the SyRI legislation violated the right to respect for private and family life as embedded in Article 8 of the ECHR and was declared to have no binding effect.[22] Pursuant to Article 8 of the ECHR, the Netherlands has a special responsibility when it applies new technologies. It must strike a fair balance between the benefits of using new technologies such as SyRI and its interference with the right to a private life. However, after analysing the objectives of the SyRI legislation; namely preventing and combating fraud in the interest of economic welfare in relation to the interference with private life, the Court ruled that in its current state the SyRI legislation did not comply with Article 8 (2) of the ECHR, as the use of SyRI was insufficiently transparent and verifiable (cfr. 'black box') and the legislator thus did not strike a fair balance.

IV. LOOKING AHEAD

On 15 January 2021 the government Rutte III offered its resignation because of the childcare benefits scandal (see above II.1), two months before the elections of the House of Representatives on 17 March. The formation of a new cabinet after elections usually takes at least several months. In the meantime, the caretaker government and Parliament will only deal with pressing issues and matters declared controversial by Parliament will remain on hold. It remains to be seen to what extent this hampers the ability of the government to effectively tackle the COVID-19 crisis.

This situation also directly affects proposed constitutional amendments that have not yet passed the first reading. Shortly after the cabinet offered its resignation, the Senate declared both amendment bills that affect the role of the Senate itself to be controversial. Consequently, these bills will not be debated until a new cabinet is formed. The second reading will therefore require another election for the House of Representatives, scheduled for 2025.

[17] Hoge Raad 26 June 2020, ECLI:NL:HR:2020:1148
[18] Rechtbank Den Haag 11 November 2019, ECLI:NL:RBDHA:2019:11909
[19] Hof Den Haag 11 November 2019, ECLI:NL:GHDHA:2019:3208
[20] Rechtbank Den Haag 5 February 2020, ECLI:NL:RBDHA:2020:1878
[21] 'Landmark ruling by Dutch court stops government attempts to spy on the poor – UN expert' (*United Nations Human Rights Office of the High Commissioner,* 5 February 2020) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25522&LangID=E> accessed 4 March 2021
[22] See extensively: Sonja Bekker, 'Fundamental Rights in Digital Welfare States: The Case of SyRI in the Netherlands', in Otto Spijkers, Wouter G. Werner, and Ramses A. Wessel (eds.), *Netherlands Yearbook of International Law* 2019 (T.M.C. Asser Press 2021)



New Zealand

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I. INTRODUCTION

As with the rest of the world, COVID-19 dominated all aspects of New Zealand society in 2020—its Constitutional Law included. The country moved relatively quickly in response to the virus' spread, first imposing international travel restrictions and mandatory isolation for all arriving passengers, then instituting a seven-week-long nationwide "lockdown" when the first case of community transmission was detected in March. Ongoing restrictions on daily life, including another four-week-long lockdown in the country's largest city, Auckland, subsequently remained in place until October. While these actions successfully eliminated the virus from New Zealand with only 25 COVID-19 related fatalities occurring, they involved unprecedented constraints on a wide range of rights and liberties. The legal basis for these constraints, as well as mechanisms to oversee how they were applied, became a matter of great importance. Parliamentary processes were adapted to permit continued political scrutiny of executive action, new legislation was enacted to provide specific powers to respond to the virus, and the High Court was asked to review the overall legality of the government's lockdown response. As such, the responses to COVID-19 revealed both the flexibility of New Zealand's constitutional arrangements as well as their ability to quickly and effectively coordinate the exercise of public power.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

New Zealand's response to COVID-19 was one of the world's most successful. By pursuing a "go hard, go early" strategy that sought to completely eliminate the virus from the community, it was able to not only minimize the resulting death toll but also return much of everyday life to something close to normal. The country admittedly enjoyed some advantages in achieving this result: "geographical isolation, a civil political environment, strong central government, recent experience with crises and disasters, and a small population."[1] However, these factors only provided the background context for a range of important public health and policy decisions.

When the virus first was detected circulating in the community in late March, the government ordered a nationwide lockdown of virtually all social activity. All businesses except those deemed to be "essential services" had to close, as did all schools and universities. All persons except limited "essential workers" were required to remain in their own homes at all times, apart for very limited reasons such as restricted exercise or purchasing essential supplies. All physical contact with others not in a person's family "bubble" was prohibited. The initial nationwide lockdown lasted seven weeks, with a subsequent cluster of cases triggering another four-week-long lockdown in the country's largest city, Auckland. When this lockdown response successfully eliminated the virus from the community, restrictions gradually were lifted until life within the country returned to near pre-virus normal. However, every individual entering New Zealand still was required undertake a mandatory 14-day "managed isolation" in a government-run hotel. Although this measure radically restricts the number of persons who can come into the country, it provides a barrier to the virus re-entering the community.

[1] Thomas Jamieson, '"Go Hard, Go Early": Preliminary lessons from New Zealand's response to COVID-19' (2020) 50 American Review of Public Administration 598, 598.

The initial legal basis for imposing these draconian measures on New Zealand's populace was the *Health Act 1956,* section 70. Where an epidemic has been declared, as occurred with respect to COVID-19 on March 23, this legislative provision empowers the Director General of Health—the public servant heading the country's Ministry of Health—to make a wide range of orders to protect public health. Failing to comply with these orders then is a criminal offence, subject to arrest and potential fines and/or imprisonment. The lockdown was underpinned by two such orders made on March 25 and then April 3. Whether the *Health Act 1956* actually authorized the imposition of such wide-ranging restrictions became a matter of some debate,[2] culminating in the important High Court ruling in *Borrowdale v Director General of Health*[3] (discussed in the next part).

In May, these legal doubts led Parliament to enact bespoke legislation granting the executive government powers to respond to the COVID-19 pandemic.[4] Not only did this legislation more clearly spell out the sorts of orders that could be made, as well as the process to be followed before doing so, but it also transferred the authority to make such orders to the hands of the elected Minister of Health. This legislation was introduced into Parliament by the government and passed through all legislative stages in a single day. Since its coming into force, thirty-three orders have been made under its authority requiring everything from a renewed lockdown in Auckland to mandatory COVID-19 testing of people in managed isolation.

The need for political scrutiny of the executive government's use of its emergency public health powers was recognized throughout the response to COVID-19.[5] The initial nationwide lockdown included a parliamentary adjournment, which would have meant there was no forum for questioning and debating the executive government's actions. In order to provide such, Parliament agreed to create an Epidemic Response Committee, chaired by the leader of the opposition and with a majority of members from parties not in the government. This committee had the power to inquire into all aspects of the response to COVID-19, including the ability to summon witnesses and documents. This latter power became the source of some conflict when the Committee sought to summon the legal advice provided to the government in relation to the initial lockdown measures, which was refused on the basis of legal privilege. Parliament's Speaker eventually sided with the government, citing precedent to the effect that parliament has no power to summon documents to which legal privilege attaches.[6]

While dominating 2020's events, COVID-19 did not completely displace all other matters. Before the virus arrived in the country, a general parliamentary election had been scheduled for September 19. Alongside this election, voters also were asked for their views on two referendum matters: whether voluntary euthanasia (or "assisted dying") should be available for terminally ill individuals; and whether cannabis should be made legal for personal use and regulated supply. But voting was postponed for a month when Auckland was put back into a lockdown on August 12. Under New Zealand's constitutional arrangements, the decision to set (and change) the election date is a prerogative matter that technically lies in the hands of the Governor General, but always is exercised on the Prime Minister's advice.

The election was thus finally held on October 17. It produced a ringing endorsement of the sitting coalition government's actions, with the larger partner in that government—the Labour Party—gaining 50% of the party vote. This result was unprecedented under New Zealand's MMP system of proportional representation, enabling the Labour Party to form a majority government by itself (although it chose to also enter a "confidence and supply agreement" with the ideologically allied Green Party).[7] In the twin referendum votes, the public endorsed the legality of assisted dying by a margin of 66%-34% while rejecting the legalization of cannabis by a narrow 51%-49% margin.

III. CONSTITUTIONAL CASES

As referred to above, the validity of New Zealand's COVID-19 lockdown was challenged in *Borrowdale v Director-General of Health.* It is the most significant public law case of a generation, and accordingly, we dedicate this section to solely discussing the case.[8] It centred on the legality of the Government relying upon the *Health Act* to impose the most severe of lockdown restrictions (known as "Level 4" and "Level 3") before Parliament enacted the bespoke legislation referred to in the earlier section.

[2] Compare Andrew Geddis and Claudia Geiringer, 'Is New Zealand's Covid-10 Lockdown Lawful?' (*UK Constitutional Law Blog,* 27 April 2020) <https://ukconstitutionallaw.org/2020/04/27/andrew-geddis-and-claudia-geiringer-is-new-zealands-covid-19-lockdown-lawful/> accessed 22 January 2021 with Dean R Knight and Geoff McLay, 'Is New Zealand's Covid-19 Lockdown Lawful? – An Alternative View' (*UK Constitutional Law Blog,* 11 May 2020) <https://ukconstitutionallaw.org/2020/05/11/dean-r-knight-and-geoff-mclay-is-new-zealands-covid-19-lockdown-lawful-an-alternative-view/> accessed 22 January 2021.

[3] *Borrowdale v Director-General of Health and Ors* [2020] NZHC 2090.[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>

[4] COVID-19 Public Health Response Act 2020.

[5] David Wilson, 'How the New Zealand Parliament Responded', in Study of Parliament Group, *Parliaments and the Pandemic* (January 2021) 187.

[6] Graeme Edgeler and Andrew Geddis, 'The Power(lessness) of New Zealand's House of Representatives to Summons the Crown's Legal Advice' (2020) 31 Public Law Review 229.

[7] Andrew Geddis, 'The Greens are now part of the "governing team", if not the government' (*The Spinoff,* 1 November 2020) <https://thespinoff.co.nz/politics/01-11-2020/the-greens-are-now-part-of-the-governing-team-if-not-the-government/> accessed 22 January 2021.

[8] This analysis is adapted from that in M. B. Rodriguez Ferrere, *'Borrowdale v Director-General of Health:* An unlawful but justified national lockdown' (2020) 31 Public Law Review 234.

Background

On 25 March 2020, the Director-General of Health, Dr Ashley Bloomfield, issued an order under section 70(1)(m) of the *Health Act* (Order 1) requiring all premises to be closed except private dwelling houses and essential businesses, and forbidding people from congregating in outdoor places of amusement or recreation.[9] That order was supplemented by an order on April 3—nine days later—issued under section 70(1)(f) of the Health Act (Order 2), which expanded the reach of these Level 4 restrictions. A third order was issued under sections 70(1)(f) and 70(1)(m) of the *Health Act* on 24 April (Order 3) to move the country into a slightly less restrictive Level 3 response. That order was revoked on May 14, replaced by less restrictive Level 2 controls imposed by the Minister of Health under the new *COVID-19 Public Health Response Act 2020.*

The parties to these proceedings (largely) agreed that in imposing the Level 4 and 3 restrictions, the government limited numerous rights under the New Zealand Bill of Rights Act 1990 (NZBORA).[10] On that basis, Dr. Andrew Borrowdale—a lawyer and former legislative drafter for the Parliamentary Counsel Office—argued that the government lacked the legal authority to impose those restrictions. Specifically, his causes of action were threefold:

a) That public announcements made by the Prime Minister and others unlawfully directed restrictions (beyond the scope of Order 1) for the first nine days under Level 4;

b) That all three orders made by the Director-General of Health imposing and extending the lockdown were ultra vires; and

c) That all three orders involved an unlawful delegation of the Director-General's power to determine which businesses were "essential services," and thus allowed to remain open during Level 4.

The Crown, in response, argued in each instance that the government acted within the scope of its power and imposed only justified limits on the NZBORA rights. The Court focused on the second cause of action first, for if it were to succeed, it would make the other causes of action immaterial.

Were the orders ultra vires?

Dr. Borrowdale's vires challenge to the three orders was multifaceted and required close and granular analysis of section 70 of the *Health Act.* When triggered by the issue of an epidemic notice, section 70 gives a "medical officer of health" a range of powers. Dr. Borrowdale challenged both the capacity of Dr. Bloomfield as Director-General of Health (and not a medical officer of health) to make orders under section 70 in the first place, and whether section 70 could authorize the extensive reach of the three orders.

Dr. Borrowdale conceded that the restrictions were a necessary, reasonable, and proportionate response, and thus a justified limitation under the NZBORA.[11] This concession meant the cause of action became an "orthodox vires challenge," demanding only the usual purposive textual analysis per section 5 of the *Interpretation Act 1999* to determine the limits of section 70 and whether the orders fell within them. Relevantly, the "special" powers of section 70—powers for use only in a public health emergency—contemplated individual rights yielding to the greater good.[12] Despite that restriction of individual rights, a "fair, liberal and remedial construction" was justified because "the internal restrictions and temporal limits on the exercise of the powers gives further assurance that it is safe to adopt such a construction, by limiting the potential for abuse."[13] Moreover, section 6 of the Interpretation Act allowed the Court to take an ambulatory approach to section 70. It was "always speaking,"[14] which allowed the Court to read section 70 "dynamically"[15] and adapt it for a 21st century context.

That interpretative approach enabled the Court to give section 70's scope an extremely generous reading, effectively scuttling every aspect of Dr. Borrowdale's challenge. Relevantly, "the short point is that in the present case the Director-General was qualified to act as a Medical Officer of Health under s 22" of the Act.[16] "When the 1956 Act is read dynamically, and in light of its purpose, it becomes plain that the s 70 powers cannot be viewed as requiring only regional responses."[17] "In order to achieve the purpose of s 70(1)—to prevent the spread of COVID-19—it was necessary to 'quarantine' the entire country,"[18] and it would have frustrated the purpose of the Act if it required the orders "to specify each and every kind of premises and place required to be closed."[19] For the Court, "context and purpose are everything:"[20] the context was an overwhelm-

[9] *Borrowdale (*n 3) [26].

[10] ibid [3]; New Zealand Bill of Rights Act 1990 [NZBORA], ss 16–18. The Crown put up a weak argument that s 17 – freedom of association – was not engaged because it solely referred to the ability to form and belong to associations such as trade unions or professional societies. This was given short shrift by the Court at ibid [88].

[11] *Borrowdale* (n 3) [97].

[12] ibid [100].

[13] ibid [103].

[14] ibid [104].

[15] ibid [114].

[16] ibid [111].

[17] ibid [114].

[18] ibid [128].

[19] ibid [134].

[20] ibid [134].

ing and global pandemic; the purpose of the Act was to prevent the effects of that pandemic; and, more or less, this gave significant latitude to the Director-General when exercising his power under section 70. The orders were thus intra vires and Dr. Borrowdale's challenge on this basis failed.

Dr. Borrowdale's third cause of action failed as well. Dr. Borrowdale and the New Zealand Law Society (who intervened in the case) argued that an unlawful delegation had occurred when the responsible government department (not the Director-General of Health) changed the list of essential services subject to Order 1. But the Court held that the definition of "essential businesses" in the first order was at all times "clear and fixed," meaning there was no unlawful delegation.[21]

Were the Government's directions lawful?

Even if the orders were intra vires, Dr. Borrowdale's first cause of action was that the public announcements by the Prime Minister (and others) when entering into Level 4 had the effect of limiting rights beyond the actual requirements of Order 1. The focus of the claim were the statements made in various press conferences held by the Prime Minister and others to explain and outline the effect of Level 4. Mr Borrowdale claimed that these statements "entailed directions requiring all New Zealanders to be confined to their homes and to stop all interactions with others outside an individual's immediate household or "bubble."[22] Since those directions went beyond the scope of the Order 1 (which was in place for nine days from March 25 to April 3), they unjustifiably limited NZBORA rights and moreover constituted the exercise of a pretended power of suspending or execution of laws contrary to the *Bill of Rights 1688*.[23] The Crown argued in response that the statements were merely informative; guidance, not commands.[24]

Although the Court accepted the importance of encouraging voluntary compliance with public health measures through education and communication, the "imperative language" and the context of the statements supported its view that the statements "conveyed commands, not guidance."[25] The Court held that it had "no doubt that the statements conveyed that there was a legal obligation on New Zealanders to comply: to stay home and remain in their bubble."[26] While Orders 2 and 3 imposed that obligation, Order 1 did not. Accordingly, given the statements restricted rights under the NZBORA in a manner not "prescribed by law," the government unlawfully limited those statutorily guaranteed rights.

While Dr. Borrowdale succeeded on this aspect of his challenge, he did not succeed on his *Bill of Rights 1688* argument. His claim had two aspects: first, that the statements unlawfully suspended the NZBORA; and second, that they constituted the unlawful execution of law in a manner impugned by *Fitzgerald v Muldoon*.[27] *Fitzgerald,* as "tolerably well-known,"[28] is arguably New Zealand's most famous public law decision of the modern era. It involved the attempt to suspend the operation of the *New Zealand Superannuation Act 1974* by then Prime Minister-elect Robert Muldoon via public announcement.[29]

Here, the Court rejected the applicability of the *Bill of Rights 1688.* The statements by the government did not suspend the operation of the NZBORA,[30] and "the analogy with *Fitzgerald* is misplaced."[31] The existence of the potential power, even if it was not used, meant that the capacity of the government to impose those restrictions existed. No correlative capacity existed in *Fitzgerald.* Moreover, this was not an "execution" of laws under the *Bill of Rights 1688:* "suspending the "execution" of laws involves suspending the operation of laws – by leaving them intact but rendering them impotent."[32] The Bill of Rights 1688 thus did not apply and this cause of action failed.

Relief

This left the question of relief: on the one hand, Dr. Borrowdale partially succeeded on his second cause of action; on the other, the unlawfulness was limited to a nine-day period. On balance, given the "weighty rule of law considerations," the Court held that a declaration was appropriate, holding that the "New Zealand Government stated or implied that, for that nine-day period, subject to limited exceptions, all New Zealanders were required by law to stay at home and in their "bubbles" when there was no such requirement. […] While there is no question that the requirement was a necessary, reasonable and proportionate response to the COVID-19 crisis at that time, the requirement was not prescribed by law and was therefore contrary to the New Zealand Bill of Rights Act."

Analysis

Context is everything. An unprecedented pandemic and public health crisis demanded swift and extensive government action. From a public health perspective, the eventual success—New Zealand was able not

[21] ibid [279].
[22] ibid [174].
[23] ibid [174]-[176].
[24] ibid [178].
[25] ibid [185].
[26] ibid [191].
[27] ibid [230]; *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).
[28] *Borrowdale* (n 3) [231].
[29] For an excellent and authoritative account of this case, see Justice Stephen Kós, 'Constitutional collision: *Fitzgerald v Muldoon v Wild*' (2014) 13 Otago LR 243.
[30] *Borrowdale* (n 3) [235].
[31] ibid [236].
[32] ibid [239].

only to suppress, but *eliminate* COVID-19 as a direct result of the lockdown—more than justified the means to achieve it. However, context left unchecked can be dangerous.

The Court's eager acceptance of a "dynamic" and "always speaking" approach to interpretation of legislation drafted in the 1950s, apparently justified by section 6 of the Interpretation Act 1999 (which, merely states "an enactment applies to circumstances as they arise"), may well have been appropriate in the circumstances. However, its failure to cite any authority—academic or judicial—for such an approach is unfortunate.[33] Had the Court done so, it may have engaged in a deeper analysis of exactly *which* statutory words or phrases in particular were "always speaking." Pursuing this further, it would have been able to explore whether it was appropriate to give further licence (in addition to that already demanded by the natural and ordinary meaning of the provision in light of the context and legislative purpose) to give section 70 a generous and expansive interpretation. While the *Health Act*—as the Court notes in its extensive analysis of its history—was drafted at a time when the "speed and ubiquity of both domestic and international travel" in 2020 would have been unimaginable,[34] the Act was drafted in response to a domestic pandemic,[35] and section 70(1)(m) was amended to reflect technological change as recently as 2006.[36] There are thus valid arguments against the Court's approach on this point. Emphasising the important of ambulatory interpretation helped the Court arrive at its conclusion, but the speed with which it did so and the relative lack of authority cited in the process undermines that conclusion.

Context also seemed to lead the Court to downplay the importance and significance of this decision. With regards to the second cause of action, the Court held that "the s 70(1)(f) power cannot be exercised retrospectively or by implication … a s 70(1)(f) power must be exercised unequivocally, and the requirement must be articulated precisely. That is what the rule of law requires." However, it then concluded:

> "It is important, however, to keep our conclusion in perspective. The situation lasted for nine days. And it occurred when New Zealand was in a state of a national emergency fighting a global pandemic. The Restrictive Measures could have been lawfully imposed had the Director-General's powers under s 70(1)(f) been exercised sooner – and he would have done so, if he thought it necessary."

The implication in this conclusion is that this was a *de minimus* infraction. Yet, as Janet McLean notes in an analysis of the lockdown, "the disagreement between lawyers about the meaning of the provisions, then, is not merely a disagreement between pedants but is an important disagreement about values and the proper bounds and limits of state authority."[37] The lockdown had extraordinary consequences for the vast majority of the population. Those consequences were doubtless justified, but the Court almost seemed reluctant to hold that the government imposed them without legal authority.
The Court itself states it best, when, in determining whether that declaration was necessary, it notes "although the state of crisis during those first nine days goes some way to explaining what happened, it is equally so that in times of emergency the courts' constitutional role in keeping a weather eye on the rule of law assumes particular importance."[38] One is left wondering, however, as to whether that weather eye was partially blinded by the dazzle of the extraordinary context.

IV. LOOKING AHEAD

The High Court's *Borrowdale* decision has been appealed to the Court of Appeal, which will allow for a re-examination of the judicial approach taken to the emergency powers in question. We also await the Supreme Court's decision in *Minister of Justice v Kim,*[39] involving the government's appeal against a Court of Appeal ruling that overturned a ministerial decision to extradite to the Peoples Republic of China a man suspected of murder.[40] Not only may this decision provide guidance on the use of "variable intensity or standards of review" in relation to governmental decisions, but it may prove challenging to New Zealand's diplomatic relations with its largest trading partner.

V. FURTHER READING

John Hopkins, 'Law, luck and lessons (un) learned: New Zealand emergency law from Canterbury to COVID-19' (2020) 31 Public Law Review 370.

Claudia Geiringer and Andrew Geddis, 'Judicial deference and emergency power: A perspective on *Borrowdale v Director-General'* (2020) 31 Public Law Review 376.

Hanna Wilberg, 'Interpreting pandemic powers: Qualifications to the principle of legality' (2020) 31 Public Law Review 384.

Dean R Knight, 'Government expression and the COVID-19 pandemic: Advising, nudging, urging, commanding' (2020) 31 Public Law Review 391.

[33] Without limitation, *Crown Health Financing Agency v P* [2009] 2 NZLR 149 at [318] (CA), citing *McCartan Turkington Breen (a firm) v Times Newspapers Ltd* [2001] 2 AC 277, and Dan Meagher, 'The "always speaking" approach to statutes (and the significance of its misapplication in *Aubrey v The Queen*)' (2020) 43 UNSWLJ 191.

[34] *Borrowdale* (n 3) [104].

[35] ibid [57].

[36] ibid [69].

[37] Janet McLean, 'Risk and the Rule of Law' (2020) 16(3) Policy Quarterly 11 at 14.

[38] ibid [291].

[39] [2019] NZSC 100.

[40] For discussion of the Court of Appeal's decision, see Andrew Geddis and MB Rodriguez Ferrere, 'New Zealand', in Richard Albert and David Landau and Pietro Faraguna and Šimon Drugda, *I·CONnect-Clough Center 2019 Global Review of Constitutional Law* (November 26, 2020) 239, 240-41 <https://ssrn.com/abstract=3736382> accessed February 3, 2021.

Nigeria

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I. INTRODUCTION

The credibility of the electoral process remains a recurring issue in Nigeria's democratic practice. The persistence of electoral malfeasance and the risk of a possible reversal of democracy were captured in the Nigeria Report for 2019. Surprisingly, the two off-cycle governorship elections held in 2020 did not follow the pattern of the 2019 general elections. Although there was a rancorous candidate-selection process within the ruling All Progressives Congress (APC) in Edo State; bickering between the incumbent governor and his deputy in Ondo State; threats of violence in the build-up to election day and intemperate campaign slogans, the voting, vote-collation and declaration of results were peaceful. The improved performance of the election management body, the Independent National Electoral Commission (INEC), in the conduct of the two elections is partly attributable to external factors, notably non-interference by the central government through deployment of compromised security personnel to aid its party candidates. The latter may have been because the national working committee (NWC) of the APC was embroiled in deep crisis that ultimately led to its dissolution.

The constitutional guarantee of freedom of association and the right to peaceful protest was not respected. A mass gathering of protesters at the Lekki toll plaza in Lagos was fired upon by soldiers deployed at the request of the Lagos State Government. Judicial commissions are currently holding hearings in some states on the protesters' grievances and how they were treated by the security forces.

Security of judicial independence was a major development in 2020. This was tested in judicial appointments and in the exercise of the authority of a state chief judge to empanel an investigation into allegations of gross misconduct upon a request by the legislature in the process of impeachment of a deputy governor. The Chief Judge of Ondo State insisted on the legislature's compliance with the letter of the Constitution as a prerequisite for exercising her power. This unprecedented judicial assertiveness incentivises the legislature to keep faith with the constitutional limits of its power.

Overall, despite the improvement in election management and resistance to abuse of power, democratic culture and processes are not yet institutionalized.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Transparent Elections

Despite the challenges of the COVID-19 pandemic and measures to control it, two elections for State Governor were conducted in 2020, in Edo and Ondo States in Southern Nigeria. Similarly to the 2019 general elections, it was a contest between Nigeria's two main political parties, the APC and the People's Democratic Party (PDP). It was quite uncertain in the build-up to the September 19, 2020 Edo State election that there would be transparency. The fear of violence was induced by the disqualification of the incumbent governor, Mr. Godwin Obaseki, by his party (APC) from seeking its nomination for re-electio and a fall-out and strained relation-

ship between him and Mr. Adams Oshiomhole, then APC national chairman. Earlier in the year, the APC local executive committee of Mr. Oshiomhole's ward in Edo State suspended his party membership, a decision ratified respectively by the local government and state executive body of the party. Six members of the APC from Edo State approached the Federal High Court (Abuja Division) to challenge his continued stay in office as national chairman despite his suspension. The court granted an interim order against Mr. Oshiomhole[1] which the Court of Appeal (Abuja Division) sustained.[2] (Coincidentally, Mr. Obaseki's resignation from the APC was on the same day that the Court of Appeal affirmed the suspension of Mr. Oshiomhole.[3])

The Appeal Court ruling on Mr. Oshiomhole created uncertainty as to his successor. Although an earlier order granted by the Federal High Court (Abuja) to the Deputy National Secretary of the party, Mr. Victor Giadom, to be interim chairman (on March 16 2020) was renewed on June 17 2020 by the same court[4]; a faction of the party supporting the deposed chairman stoutly opposed the emergence of Mr. Giadom, leading to a crisis in the APC that led to dissolution of the National Working Committee of the Party by the titular party leader, President Muhammadu Buhari, and its replacement with a caretaker/convention planning committee.[5]

Mr. Obaseki defected to the PDP to become its candidate for the election. Similarly his rival in the 2016 election, Mr. Osagie Ize-Iyamu, had earlier crossed from the PDP to the APC and emerged as the party's candidate for the governorship election.[6] Thus, the stage was set for a rematch between the two main candidates in the 2016 gubernatorial election albeit with either candidate now wearing the other's party label in the earlier election. Voters were as worried about election violence as they were about exposure to the novel coronavirus,[7] so much so that INEC threatened not to declare a winner should there be violence during voting and collation of results.[8]

The peaceful conduct of the September 19, 2020 election was therefore anticlimactic. There were a only few cases of attempted violence and voter inducement, for which the culprits were arrested.[9] There was live transmission of results by INEC on its dedicated portal for real time monitoring of the announcements of results at polling units, wards and local councils collation centres, and the final state-level collation.[10] The opposition candidate and incumbent governor was re-elected for a second (and final) term with 57.3% of the total valid votes cast.[11] In what seems to confirm the credibility of the polls, no election petition alleging electoral malpractices was filed by any of the losing candidates.

Pressure by the international community may be a secondary factor contributing to the peaceful conduct of the 2020 elections. Notably, days before the election in Edo State, the United States imposed visa restriction on some individuals for their actions during the 2019 off-cycle Kogi and Bayelsa governorship elections and stated that action had been taken against 'some persons for their actions in the run-up to the September and October 2020 governorship elections in Edo and Ondo'.[12] Similarly, the United Kingdom threatened sanctions, including travel ban against sponsors of violence in the two elections.[13]

The peaceful conduct of the election in Edo

[1] Fejiro Akpojotor, "Court Restrains Oshiomhole from parading himself [as] APC Chairman", Guardian, (4 March 2020), <https://guardian.ng/news/court-restrains-oshiomole-from-parading-himself-apc-chairman/> accessed 28/02/2021.

[2] Abiodun Alade, "Court of Appeal upholds Oshiomhole's Suspension as APC Chairman", Daily Trust, (16 June 2020), <https://dailytrust.com/breaking-court-of-appeal-upholds-oshiomholes-suspension-as-apc-chairman> accessed 28/02/2021.

[3] *Ibid.*

[4] Alex Enumah, "APC Crisis Deepens as Court renews order permitting Giadom to act as National Chair(man)", Thisday, (18 June 2020) <https://www.thisdaylive.com/index.php/2020/06/18/apc-crisis-deepens-as-court-renews-order-permitting-giadom-to-act-as-national-chair/> accessed 28/02/2021.

[5] Olalekan Adetayo, et.al., "APC caretaker panel meets today, to set up convention committees", Punch, (29 June 2020), <https://punchng.com/apc-caretaker-panel-meets-today-to-set-up-convention-committees/> accessed 28/02/2021.

[6] Nasir Ayitogo, "Edo 2020: Obaseki emerges PDP Candidate", Premium Times, (25 June 2020), <https://www.premiumtimesng.com/news/headlines/399672-breaking-edo-2020-obaseki-emerges-pdp-candidate.html>; "Ize-Iyamu emerges Edo APC 2020 Governorship Candidate", Guardian, (22 June 2020), <https://guardian.ng/news/ize-iyamu-emerges-edo-apc-2020-governorship-candidate/> accessed 26/02/2021. "Weak party institutionalization is a major challenge to democratic elections in Nigeria", See Henrik Angerbrandt, "Party System Institutionalization and the 2019 State Elections in Nigeria", (2020), 30(3) *Regional and Federal Studies* 415-440.

[7] Queen Iroanusi, "Edo 2020: Report shows voters scared of violence, covid-19, others", Premium Times, (1 September 2020), <https://www.premiumtimesng.com/news/headlines/411848-edo-2020-report-shows-voters-scared-of-violence-covid-19-others.html> accessed 26/02/2021.

[8] Kunle Sanni, "Edo, Ondo 2020: We won't declare results if election (is) characterized by violence – INEC", *Premium Times,* (11 June 2020) <https://www.premiumtimesng.com/news/top-news/397122-edo-ondo-2020-we-wont-declare-results-if-election-characterised-by-violence-inec.html> accessed 26/02/2021.

[9] Udora Orizu, "An Almost Violence Free Governorship Election in Edo State", Thisday, (23 September 2020), <https://www.thisdaylive.com/index.php/2020/09/23/an-almost-violence-free-governorship-election-in-edo-state/>
accessed 26/02/2021.

[10] Chuks Okocha, "INEC Inaugurates Portal for Live Transmission of Results", ThisDay, (7 August 2020). https://www.thisdaylive.com/index.php/2020/08/07/inec-inaugurates-portal-for-live-transmission-of-results/ accessed 26/02/2021.

[11] "Edo State Governorship Election 2020 Result", <https://inecnigeria.org/edo-state-governorship-election-2020-result/> accessed 28/02/2021

[12] Dennis Erezi, "US hit Elections Riggers in Nigeria with Visa Ban", Guardian, (14 September 2020), <https://guardian.ng/news/us-hit-election-riggers-in-nigeria-with-visa-ban/> accessed 26/02/2020

[13] Victoria Ojeme, "Edo, Ondo: UK threatens Visa Ban, Seizure of Overseas Assets of Offenders", Vanguard, (16 September 2020) <https://www.vanguardngr.com/2020/09/edo-ondo-uk-threatens-visa-ban-seizure-of-overseas-assets-of-offenders/> accessed 26/02/2021.

State was replicated in the Ondo State governorship election held on October 29, 2020. After a tense APC primary won by the incumbent governor Rotimi Akeredolu, like in Edo State, there was a rematch between him and the opposition PDP candidate in the 2016 election, Mr. Eyitayo Jegede. The incumbent governor was re-elected for a second (and final) term in an election adjudged to have sustained the improvements recorded in the Edo State.[14]

It is perhaps still too early to assume that future elections in Nigeria will necessarily follow the same path. Going by failure to leverage on the successes of the 2011 general elections,[15] the improvements recorded in 2020 may not signal future credible polls particularly the 2023 general elections, unless incentivization of electoral malpractices is effectively checked and democratic ethos prevail.[16]

2. The Right to Protest and 'EndSars' Agitation

The Nigerian Constitution grants a right to peaceful assembly and association,[17] which may be exercised through mass protests as public remonstrance against unfavourable public policy. In *Federal Government of Nigeria v Oshiomhole,*[18] the court refused government's request for a declaration that the mass protests planned by the Nigerian Labour Congress against fuel hike were illegal. The court ruled that the right to peaceful assembly and association permits public protest. A virile civil society that can hold government to account is germane to the consolidation of democracy.[19] Public protest is therefore an exercise of a democratic right necessary for deepening democracy. Social media has created a viable avenue for galvanizing public protests.

Public protests against police brutality, particularly the infamous Special Anti-Robbery Squad (SARS), reputed for excessive use of force, took place in October following the "EndSars Now" and "End Police Brutality" hashtags on Twitter. The "EndSars Now" hashtag actually dates back to 2017 but resurfaced in 2020 after a viral video on social media appearing to show SARS operatives gun down a Nigerian youth and stole his car. This sparked off a series of protests nationwide (October 7-20, 2020) with support from notable international figures demanding a civil approach to policing. The Federal Government immediately disbanded SARS and promised police reforms, but protesters were unrelenting because of the government's previous ambivalence on police brutality. They demanded justice for the families of victims of police brutality, retraining and redeployment of SARS officers, and an independent body to oversee investigations into police brutality.[20] While protesters were insistent, government was placid until the protest became widespread and expanded into agitations for good governance, accountability and revamping of the economy.

There was breakdown of law and order in certain areas where hoodlums exploited the situation to burn down police stations/barracks, public and private buildings and facilities and orchestrate jail breaks.[21] State governments issued orders proscribing public gatherings/protests and imposing day curfews. Ostensibly to enforce the ban on public gatherings, armed soldiers were on October 20, 2020 drafted to Lekki toll plaza area, the epicentre of the protest in Lagos, which was occupied by protesters. Soldiers arrived at about 6.45pm, and at 6.53pm power was turned off. The soldiers then opened fire on the protesters.[22] Photos and live-streamed videos from social media/reports by independent groups reveal victims of gunshot injuries and corpses.[23] The government recanted its initial denial of causalities with the admission by the Governor of Lagos State, Mr. Sanwo-Olu, that there were actually victims of gunshot injuries and two deaths and offering to take care of the cost of medical treatment.[24] Nonetheless, the military continues to deny any wrongdoing and in fact claims that no live rounds were fired, even though it admits the possession of live ammunition by the soldiers.[25]

Lagos State and other twenty-five states

[14] Mojeed Alabi and Alfred Olufemi, "Ondo Decides 2020: Akeredolu wins Ondo Governorship Election", Premium Times, (11 October 2020), <https://www.premiumtimesng.com/news/headlines/419976-just-in-ondodecides2020-akeredolu-wins-ondo-governorship-election.html> accessed 28/02/2021.

[15] See Sylvester Odion Akhaine, "Nigeria's 2011 Elections: The 'Crippled Giant' Learns to Walk?", 110(441) African Affairs 649-655, (2011).

[16] Juan J. Linz and Alfred Stephan, "Towards Consolidated Democracies", 7(2) *Journal of Democracy* 14-33, 15, (1996).

[17] S. 40 of Nigeria's Constitution.

[18] (2004) 9 WRN 129.

[19] Obiora C. Okafor, "Modest Harvests: On the Significance (but limited) impact of Human Rights NGOs on Legislative and Executive Behaviour in Nigeria,", 48(1) Journal of African Law 23, (2004).

[20] See "Nigeria: Horrific Reign of Impunity by SARS makes mockery of Anti-Torture Law", Amnesty International, (26 June 2020), <https://www.amnesty.org/en/latest/news/2020/06/nigeria-horrific-reign-of-impunity-by-sars-makes-mockery-of-anti-torture-law/> accessed 28/02/2021.

[21] Bose Adelaja, "Hoodlums hijack #EndSARS protests in Lagos", Vanguard, (14 October 2020), <https://www.vanguardngr.com/2020/10/hoodlums-hijack-end-sars-protests-in-lagos/>; Modupeoluwa Adekanye, "#EndSARS: Reactions as hoodlums hijack protest in Edo State", Guardian, (19 October 2020), <https://guardian.ng/life/endsars-reactions-as-hoodlums-hijack-edo-states-protest/> accessed 28/02/2021.

[22] See "Army deployed at least Seven vehicles to Lekki Tollgate CCTV Reveals", Guardian, (21 November 2020), <https://guardian.ng/news/army-deployed-at-least-7-vehicles-to-lekki-tollgate-cctv-reveals/> accessed 28/02/2021.

[23] Suyin Haynes, "The Nigerian Army shot dead at least 12 Peaceful Protesters in Lagos, Rights Group says", Time, (23 October 2020) <https://time.com/5902112/nigeria-endsars-protest-shootings/>; Nima Elbagir, et. al., "Nigerian army admits to having live rounds at Lekki Toll Gate protests, despite previous denials", CNN,

[24] (21 November 2020), <https://edition.cnn.com/2020/11/21/africa/nigeria-shooting-lekki-toll-gate-intl/index.html> accessed 28/02/2020.
Ifeoluwa Adediran, "#EndSARS: Sanwo-Olu confirms two deaths from Lekki Shooting", Premium Times, (22 October 2020), <https://www.premiumtimesng.com/news/headlines/422446-endsars-sanwo-olu-confirms-two-deaths-from-lekki-shooting.html> accessed 28/02/2021.

[25] Nima Elbagir (n 23).

have created commissions of inquiry to investigate allegations of brutality by Nigerian security agencies. However, citizens have little expectation of a useful outcome because previous investigations of serious police misconduct did not result in police reform.[26] The crackdown on the Lekki Toll Gate protesters is a despotic repression of the constitutionally guaranteed right to protest.

3. Judicial Assertiveness

The Constitution lays out a specific processes for impeachment and removal of the president, vice president, governor and deputy governor by the legislature for "gross misconduct." However, there has historically been reticence in judicial review of exercise of the impeachment power[27] although very early the Supreme Court nudged judges towards greater assertiveness.[28] In the removal process for governor/deputy governor, the Chief Judge of the state is constitutionally empowered to empanel a committee to investigate the allegations of misconduct contained in the House resolution upon a request of the state House of Assembly. Previously, chief judges simply acted on legislative requests even where there was obvious procedural non-compliance.[29] This attitude was rejected by the Chief Judge of Ondo State when a request against the deputy governor of the state was made by a resolution supported by a majority (14 out of the 26-member assembly) instead of the constitutionally prescribed super-majority. The Chief Judge, Oluwatoyin Akeredolu, hinged her refusal on the assembly's breach of the two-thirds majority rule in section 188(4) of the Constitution.[30] This refusal to empanel a committee effectively halted the removal of the deputy governor.

One of the key indicators of judicial independence is autonomy in making legal determinations of the competences of the executive and the legislature. The assertiveness of the Chief Judge enhances constitutional checks against abuse of power.

4. Judicial Independence and Appointment of a Chief Judge

Another indicator of judicial independence is the insulation of judicial recruitment process from political interference or other influence than professional considerations of competence. The selection of judges should be based on professional qualification and skill, a proven track record of integrity, and so on. In order to insulate judicial appointments from political manipulation, the appointment and promotion of judges is assigned to a body independent of the two political branches, the National Judicial Council (NJC).[31] However, participation in judicial appointments and promotions by the other two branches is not necessarily inconsistent with judicial independence provided the final selection of appointees is vested in a body in which members of the judiciary and the legal profession form a majority.[32]

When the seat of Chief Judge became vacant in Cross River State, the NJC in accordance with the constitution recommended the next most senior judge, Justice Akon Ikpeme, to the Governor for appointment who is required to send it for ratification by the State House of Assembly. Justice Ikpeme is a non-indigene of Cross River State (although married to an indigene) but has had a successful career in that state as a High Court Judge. After screening by House of Assembly's committee on judiciary, its chairman in a minority report recommended Justice Ikpeme's confirmation but other committee members opposed it on the nebulous ground of 'security concerns'. The House of Assembly consequently rejected her nomination. Though the majority report denied that her non-native status was the reason for its recommendation, it however admitted that the issue of place of origin was relevant to the 'security concerns' raised in their report. This justification is unacceptable. If the candidate's service hitherto with Cross River State judiciary does not raise security concerns, it is difficult to see how being the Chief Judge will imperil the security of the state. A plea for judicial reprieve by concerned lawyers on grounds of the non-discrimination clause in the Constitution[33] was refused by both the Federal High Court and the Court of Appeal on the ground that the allegation of discrimination was not proved.[34] However, Justice Ikpeme was subsequently confirmed, about ten months later, by the House of Assembly following the insistence of the NJC and the intervention of the Nigerian Bar Association.[35] This is a triumph for the independence of the judiciary and the autonomy of the NJC.

5. Appointment of Supreme Court Justices

[26] Adejumo Kabir, "#EndSARS: See the States that have set up Panels of Inquiry so far", Premium Times, (9 November 2020), <https://www.premiumtimesng.com/news/top-news/425275-endsars-see-the-states-that-have-set-up-panels-of-inquiry-so-far.html> accessed 28/02/2021.

[27] Balarabe Musa v Kaduna House of Assembly, 3 NCLR 463, (1982).

[28] Inakoju v Adeleke, 4 NWLR (pt. 1025) 423, (2007).

[29] For example, in Inakoju v Adeleke [n28], notice was by 18 members instead of the two-thirds of all 32 members required by s. 188(4) of the constitution. In Dapianlong v Dariye [2007] 8 MJSC 140, notice was by 10 members out of 24 (instead of 16).

[30] Koretimi Akintunde, "I won't constitute 7-man Panel against Ajayi, says Ondo CJ", Business Day, (10 July 2020), <https://businessday.ng/politics/article/i-wont-constitute-7-man-panel-against-ajayi-says-ondo-cj/> accessed 28/02/2021.

[31] See 3rd schedule, item 20 of the Nigerian Constitution.

[32] IBA Minimum Standards of Judicial Independence, Int'l Bar Assn., para. 3(a)., (1982)/

[33] S. 42.

[34] Olukunle Edun & Ors. v the Speaker, Cross River State & Ors. Suit no: CA/C/195/2020.

[35] Cletus Ukpong, "Cross River Assembly finally confirms Ikpeme as Chief Judge", Premium Times, (28 January 2021), <https://www.premiumtimesng.com/news/headlines/439186-breaking-cross-river-assembly-finally-confirms-ikpeme-as-chief-judge.html> accessed 28/02/2021.

Eight new Supreme Court Justices were appointed by the President Buhari based on NJC's recommendation and the Senate's approval, as the Constitution requires. They took oath of office on November 6, 2020 bringing the number of justices at the apex court to 20.[36]

III. CONSTITUTIONAL CASES

Hope Uzodinma & APC v Emeka Ihedioha & Ors

The governorship election was held in Imo State on March 8, 2019 and the candidate of the PDP who was elected assumed office on May 29, 2019. However the APC candidate, Mr. Hope Uzodinma, filed an election petition complaining of the exclusion of lawful votes cast during collation of results. Mr. Uzodinma contended that of the elections held in 3,523 polling units; INEC cancelled election in 252 polling units, collated results from 2,883 but excluded results from 388 polling units where he scored an overwhelming majority. He argued further that the PDP candidate was declared winner based on a wrong computation of votes from 2,883 polling units only. This argument was rejected by the election petition tribunal and by the Court of Appeal (with one dissent).[37] The Supreme Court, in a unanimous decision agreed with the contention of Mr. Uzodinma and ordered that the excluded votes from the 388 polling units should be added, thus giving him the highest votes in the election.[38] Mr. Ihiedioha was therefore not duly elected, and Mr. Uzodinma was instead inaugurated as Governor on January 15, 2020 for a four-year term.

PDP & Ors. v Biobarakuma Degi-Eremienyo & Ors.

Mr. David Lyon of the APC won the stiffly contested November 16, 2019 governorship election in the coastal state of Bayelsa. However, literally on the eve of his inauguration, February 13, 2020, the Supreme Court upheld an earlier ruling of a Federal High Court that nullified his candidature and voided his election. This was the culmination of a pre-election challenge filed by PDP and its candidate, Mr. Douye Diri, to disqualify the candidate of the APC from the election because the APC deputy-governorship candidate with him in the joint ticket, Mr. Biobarakuma Degi-Eremienyo, presented false information in his nomination form filed with INEC. The false information were conflicting names and dates in his primary, post primary and university certificates and his statutory declaration of age. There were conflicting assertions in three different sworn affidavits explaining the conflicting names in the academic certificates. The Federal High Court disqualified the APC candidate,[39] but this decision was reversed by the Appeal Court, majorly because of the use of the wrong originating process and presumed failure to satisfy the standard of proof. Reversing the Court of Appeal, the Supreme Court voided the votes scored by the APC candidate. Further to this, INEC issued a certificate of return to the PDP candidate.[40] An application by the APC and its candidates to the Supreme Court to review its decision was thrown out with punitive cost (against counsel personally) as "a gross abuse of court process."

The voided APC votes were more than the total votes of all other candidates put together. Shoddy candidate selection by the APC in the Bayelsa governorship election is wholly responsible for the outcome of this case. Whatever its legal merit, the decision is, unfortunately, subversive of popular choice expressed through the ballot.

IV. LOOKING AHEAD

Decisions from the Election Petition Tribunals and likely appeals up to the Supreme Court are expected 2021. Another off-cycle governorship election will hold on November 6, 2021 for Anambra State in South-East Nigeria. There is pending at the National Assembly the Electoral Act Amendment Bill, which includes provisions for electronic transmission of results. Two vacancies (by retirement) on the Supreme Court were expected in the first quarter of this year: Justices Olabode Rhodes-Vivour and Sylvester Ngwuta. The latter unexpectedly died in his sleep (March 6) as this report was being finalized.

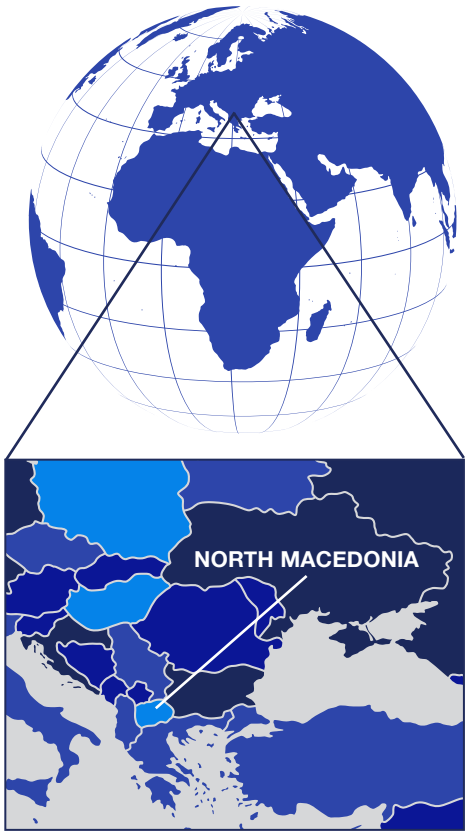
[36] See "Chief Justice swears in eight new Supreme Court Justices", Premium Times, (6 November 2020) <https://www.premiumtimesng.com/news/top-news/424874-chief-justice-swears-in-eight-new-supreme-court-justices.html> accessed 28/02/2021.

[37] Hope Uzodinma & APC v Emeka Ihedioha & Ors appeal no: CA/OW/EPT/GOV/5/2019 (Frederick Oho, JCA dissenting).

[38] Hope Uzodinma & APC v Emeka Ihedioha & Ors.: SC. 1462/2019 (delivered 14/01/2020).

[39] In line with ss. 187(1) (2) of the Constitution and 31(6) of Electoral Act 2018.

[40] PDP & Ors. v Biobarakuma Degi-Eremienyo & Ors.: SC.1/2020 (delivered 13/02/2020)



North Macedonia

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I. INTRODUCTION

The year 2020 brought unfulfilled expectations and unanticipated events in North Macedonia. As reported in the 2019 Global Review, the country changed its name to North Macedonia with the aim of overriding Greece's twenty-seven year veto against the country's integration into NATO and the European Union. On March 27, 2020, North Macedonia became a NATO member, but the country's progress towards EU membership was stalled by objections from France in 2019 and more recently Bulgaria. Further, between February 16 and August 31, the country operated under an interim government without a duly elected Parliament due to the termination of the previous government's mandate and delay in new elections due to the COVID-19 pandemic. Despite these immense challenges, there were some positive constitutional developments in North Macedonia in 2020.

In October 2019, the North Macedonian government's hopes that the European Council would approve the opening of accession negotiations were quashed by France.[1] Therefore, the leaders of major political parties agreed to organize early parliamentary elections on April 12, 2020. On February 16, 2020, Parliament dissolved and a so-called "technical (interim) Government" was set-up, with ministers from the former ruling and opposition parties. The President of the Republic declared a state of emergency on March 18 due to the COVID 19 pandemic. The interim Government postponed the early elections further due to the pandemic.[2] Finally, on July 15, 2020, the elections were held and a government, composed of two major parties SDSM[3] and DUI[4] and some smaller parties, was elected on August 31 with a majority vote of 62 of 120 MPs.[5]

The year 2020 will be remembered as both an extremely challenging year and a year of interesting constitutional developments, especially regarding the enforcement of the rule of law and a system of separation of powers. The state of emergency declared in March ended in June. The lock down and related "social distancing" measures occurred when Parliament was dissolved leaving the technical government to issue important decisions regulating the country by way of decrees with legal power, in accordance with the Constitution (articles 125-128) and the Government Law (article 36). Despite these developments it should be noted that the domestic law of North Macedonia does not provide clear guidance on the scope of the powers of the government let alone the interim technical government during a state of emergency.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major constitutional developments in the country involved the passage of emergency decrees by an interim technical government as a result of the COVID-19 pandemic, the

[1] See the Conclusions of the European Council October 17-18 2019, EUCO 23/19.

[2] Government of the Republic of North Macedonia, Decree with legal force regarding issues relating to election process, March 21 [2020].

[3] Social Democratic Union of Macedonia.

[4] Democratic Union for Integration, with mainly ethnic Albanians as members.

[5] Official Gazette no. 210/20, August 31 [2020].

passage of a Law against Discrimination, further developments related to the power of prosecutors and special prosecutors arising from wiretapping scandals in 2015 and the passage of a law on Public Prosecution.

1. Covid emergency decrees

The interim government passed a series of decrees with force of law regulating land for construction, extensions of lay judges' tenure, compensations/salaries of various categories of civil servants, experts and temporary staff, tax payment procedures, election of university management and media services. These were all reviewed by the Constitutional Court. Additionally, a controversial emergency decree regarding the Special Public Prosecution's Office was passed by Parliament and reviewed by the Constitutional Court.

The main controversy related to the scope of regulatory power by the interim Government during the emergency situation due to loopholes in legislation. By reviewing the Interim Government's decrees the Constitutional Court defined the main principles, which the government should apply when regulating various situations during the state of emergency.

2. A long journey to new anti-discrimination law[6]

Since 2016 the Government has been working on drafting a new anti–discrimination law to harmonize the country's anti–discrimination legislation with the relevant EU anti-discrimination directives, providing greater protection against discrimination and establishing an impartial and independent Anti-Discrimination Commission. It took Parliament three attempts and review by the Constitutional Court to pass this law in 2020. Article 75 of the Constitution of North Macedonia requires that the President must sign a promulgation decree if a law is adopted by an absolute majority in the Parliament. In North Macedonia, an absolute majority of the Parliament requires that 61 legislators adopt the law, which is 50% plus 1 of the 120 seats in Parliament. Parliament passed the Law on Preventing and Protecting against Discrimination in March 2019. However, the former President, Gorge Ivanov refused to sign the Decree for this and other laws due to their reference to the name North Macedonia within the laws, following the change of the country's name in January 2019.

In May of 2019, Parliament passed the above law for a second time and newly elected President Stevo Pendarovski signed the promulgation Decree. However, in May of 2020, the Constitutional Court repealed this law because it had not been passed by the required 61 votes (see discussion below). It remains unclear why the Parliamentary Speaker declared that the law had been adopted when this time Parliamentary record showed that only 55 MPs or about 46% had voted for the law. It is also unclear why the MPs raised no objection at the time for this violation of the Constitution. Finally, in October of 2020, an amended version of the law was passed by the requisite number of votes. On this third attempt 70 MPs approved the law and President Pendarovski signed the Promulgation Decree.

3. National prosecutors

Since 2015, North Macedonia has struggled with defining the scope and powers of prosecutors. Due to wiretapping scandals arising in 2015, Parliament passed a Law on Special Prosecutors. Although creating a special prosecutors' office and naming Katica Janeva as its head, this prosecutor was removed in 2019 due to corruption of which she was convicted and sentenced to 7 years' imprisonment by a first instance court. Due to this corruption scandal the entire special prosecution office was closed and the cases were sent to the national prosecutor's office.[7] The Organization for Security and Cooperation (OSCE)'s Mission to Skopje reported in its third interim report that as of January 15, 2020, before the pandemic lockdowns, the majority of cases related to the wiretapping scandal had been delayed mostly due to: "an improper mechanism for the presentation of the evidence before the trial panel, and because of frequent delays and postponements of hearings".[8] Most of the cases have not been heard due to a variety of reasons including the uncertainty about which office would deal with the "wiretapping" cases after the closure of the special prosecution office, a shortage of human and financial resources and Covid-19 emergency measures. In 2020, hearings were regularly held until the state of emergency was proclaimed. Until emergency was lifted only 2 judgments were proclaimed by the first instance court on March 31, 2020.[9] In mid-June, towards the end of the emergency, the hearings resumed and another first instance judgment was passed.

On June 30 2020, the new Law on Public Prosecutor's Office entered into force, transferring the special prosecutor's cases to the Prosecutor's Office thus easing the uncertainty of what would happen to the cases after the termination of the special prosecution's competence.[10] This Law repealed the Law on the Special Prosecutor's Office and regulated the use of illegally wiretapped conversations as evidence in criminal proceedings.[11] This Law stipulates that prosecutions cannot be based on illegally wiretapped materials or used as evidence in court, except for those cases submitted to the court by June 30, 2017. The law requires that the rest of the illegally wiretapped materials (i.e., those submitted after June 30, 2017) could not be examined again and that all illegally wiretapped materials

[6] U.no.115/2019-1, May 14 [2020].

[7] As indicated in the 2019 Global report, a decision by the Supreme Court called into question the Special Prosecutor's jurisdiction over the wiretapping cases and raised public concern about convicting those suspected of high-level corruption.

[8] OSCE Mission to Skopje. Third Interim and Project Final Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO), "Trial Observations: Analysis of Selected Issues", [2000] p.5.

[9] All for fair trial 'Judicial file' <http://sudskodosie.all4fairtrials.org.mk> accessed January 19, 2021.

[10] Official Gazette no. 42/2020, February 16 [2020].

[11] Official Gazette no. 159/15, September 15 [2015].

should be destroyed within 3 months following the last stage of an extraordinary legal remedy. The perceived controversy regarding these cases involving high level corruption and abuse of power, concern allegations about the influence of certain business and political "elites" aiming to curb criminal justice system and perpetuate impunity.

In April, the Interim Government passed a decree with legal force for the special prosecution of criminal offenses related to the illegal wiretapping scandal in 2015 during the pandemic.[12] This Decree sought to continue payment for those employed by the special public prosecutor's office related to the wiretapping cases submitted before June 30, 2017 to pay overdue operating costs and unpaid salaries. The Constitutional Court, as described in more detail below, found the decree null and void.

III. CONSTITUTIONAL COURT CASES

1. The Constitutional Court defines the Government's scope of powers during the state of emergency[13]

The Constitutional Court (the Court) dealt with a number of requests for examining the constitutionality and legality of Government decrees related to the pandemic mentioned in the previous section. The Court made it clear that the government cannot regulate an emergency situation without referring to specific Constitutional and legislative provisions, and that the emergency decrees must be clear and precise. The Court indicated that the government may only adopt emergency measures, which are directly or indirectly necessary to respond to the emergency or its consequences. The Court said that such measures must not be arbitrary, must have a legitimate aim, must be justified, reasonable and proportional, seeking to bring the emergency to its end. Furthermore, any limitation of human rights must apply only to derogable rights and be non-discriminatory.[14]

The Court declared null and void decrees, or provisions which were not connected with the state of emergency, which were not proportional to the aim pursued and had a prolonged duration beyond the declared state of emergency. It also declared null and void decrees which discriminated against certain officials because the restrictions only applied to groups of high-level officials and public employees, although all citizens were in the same legal situation, due to the proclaimed state of emergency. However, the Court did not examine whether or not the discriminatory measures were justified in these cases.

In the instance of judicial personnel, the Court indicated that the government cannot act within the scope of powers assigned to the Judicial Council, and thus infringe on the Constitutional principle supporting the separation of powers. The Court found that the government had overstepped its Constitutional competencies by taking over the role of the Judicial Council, an independent and autonomous body that protects and safeguards judicial independence. By taking over the Judicial Council's competencies, the executive branch of the Government had interfered with the judicial branch, contrary to the Constitution. Such interference ran against the separation of powers principle and endangered legal certainty, legal order and judicial independence.[15] In short, the government must not act arbitrarily and misappropriate and execute competencies belonging to the judicial branch.

The above decisions clarify the Constitutional provisions regulating the state of emergency and provide answers to a number of issues, which arose during the first ever declared state of emergency in North Macedonia since its independence.

2. The Constitutional Court and the anti-discrimination law

As mentioned above, Parliament's first attempt to pass the Law on Prevention and Protection against Discrimination in 2019 was unsuccessful, as President Ivanov refused to sign its promulgation decree. In May 2019, Parliament again passed the law, but President Pendarovski signed it although it was not legally approved by the requisite number of MPs in Parliament. In January 2020, the anti-discrimination Commission requested that the Constitutional Court examine the constitutionality of this second law, arguing that the law was not adopted by the majority required by Article 75 of the Constitution.

In May 2020, the Constitutional Court repealed the above law, because it was not passed by the required absolute majority of 61 votes. The Constitutional Court's decision signifies a positive example of observance of constitutional principles related to the rule of law and separation of powers, and their implementation in practice.

NGO activists raised concerns about the lengthy procedure for the adoption of the anti-discrimination law which undermined the protection against discrimination in the country. The adoption of the anti-discrimination law was also closely monitored by the EU and the Council of Europe, because it sought to align the country's domestic anti-discrimination law with European law and practice. Nonetheless, a lack of effective protection against discrimination and the requirements to harmonize legislation with EU acquis did not constitute a justified exception for Parliament to bend the Constitution's rules and violate the rule of law principle.'

[12] Decree with Legal Force for the Public Prosecution Officers, Investigators and other employees of the Public Prosecutor's Office for prosecution of criminal offenses related to and arising from the content of unauthorized interception of communications and for financing the Public Prosecutor's Office for Prosecution of criminal offenses related to from the content of unauthorized interception of communications during the state of emergency (Official Gazette, nos. 90/20 and 112/20 [2020]).

[13] U. nos. 44/2020-1, 50/2020-1, 94/2020-and 49/2020-1 May 12; 56/2020-1 June 3; 141/2020-1 and 84/2020-1 June 24; 154/2020-1 July 8; 209/2020-1 and 201/2020-1 September 23; 217/2020-1 October 7 [2020].

[14] See for example: U nos. 201/2020-1 and 209/2020-1, September 23; U no.114/2020, May 27 [2020].

[15] U no. 56/2020-1, June 3 [2020].

As mentioned above, after the Constitutional Court's decision, the Anti-Discrimination Law was passed on the third attempt in October 2020 with the requisite number of votes and signature of the President. The positive effects of the new anti-discrimination law remain to be seen next year, with the formation of the new Anti-discrimination Commission; which must be free from any public perception about political ties, conflicts of interest, and other undue pressures.

3. The Constitutional Court finds the emergency decree related to personnel of the special public prosecutor's office in relation to the wiretapping cases null and void.

The Constitutional Court, in a case initiated by Nikola Micevski, coordinator of the parliamentary group of the VMRO-DPMNE political party,[16] was asked to determine the constitutionality of an emergency decree (i.e., Decree with legal force) related to employees of the public prosecutor's office who were working on cases related to high level government wiretapping in 2015.[17] The law envisioned the continued payment of these employees as well as unpaid salaries and arrears during the state of emergency. After the case's initiation, the Government issued two opinions related to the legality of the decree.

The Constitutional Court declared the decree unconstitutional and null and void based on the country's Constitution and the European Convention on Human Rights, which require that laws enacted by the government under a state of emergency must be related to "the reason for which a state of emergency has been established" and last only during the state of emergency. The Court found that the government's decree regarding the Special Prosecutor's Office did not establish a connection between the employees of this Prosecutor's office and the state of emergency and the decree seemed to have effects that would outlast the emergency.

4. The Constitutional Court stops the examination of the impugned article of the Law on Presidential Pardon

In a 2019 decision[18] the Constitutional Court reviewed the constitutionality of Article 11-a as set out in the Law on Presidential Pardon[19] which states that the president's pardons in 2016 granted without a previous pardoning procedure in place may be retracted within 30 days from the day the amendment to the Law on Presidential Pardon entered into force. In its 2019 decision the Court declared the request admissible but adjourned so that Parliament could provide an "authentic" interpretation of the article as requested by the Court. Requesting an authentic interpretation is a mechanism whereby institutions can ask the legislature to provide an interpretation of a law, or its article, in case of ambiguity and uncertainty and enable the consistent application of the laws. Usually, it is only requested for controversial laws, or articles, such as the one reviewed by the Constitutional Court. Parliament, however, ignored the Court's request and the Court decided to discontinue the proceedings, as it established that the article in question was of a temporal character and had already expired. It should be noted, however, the Court did not analyze the legal effects of Article 11-a, which were the basis of the claim brought to the Court's attention.

5. The Constitutional Court on enforcement documents

The Constitutional Court decided two important cases regarding the enforcement of legal documents, such as court decisions and settlements and documents issued from notaries. In these two cases, the Constitutional Court struck down parts of these laws due to their violation of constitutional provisions and lack of clarity. In the first decision,[20] the Constitutional Court struck down the wording "reward" found in Article 9, paragraph 2 of a Ministry of Justice regulation, the Tariff for Reward and Compensation of Other Expenses for Work of the Enforcement Agents.

The article in question stated that when enforcement of a legal documents is stopped at the creditor's request or due to the revocation or modification of an executive title, then the creditor must pay "the cost of the enforcement actions and the reward of the enforcement agent". The payment of the reward of the enforcement agent was the subject of the controversy. The Constitutional Court struck down the wording of the paragraph relating to the above reward, because it was ambiguous and imprecise as to the creditor's obligations to pay the enforcement agent, especially considering cases when enforcement of an executive title was stopped, terminated, amended or invalidated, and no activities whatsoever were enforced by the enforcement agent.[21]

The second case[22] involved the constitutionality of Article 18, paragraph 2 of the Law on Enforcement.[23] The article in question dealt with defining the amount due as penalty interest for delays in payment that an enforcement agent could recoup in his or her work in ensuring the enforcement of certain documents defined in the law, including court and administrative decisions, settlements, notary documents, and other documents related to determining the costs of enforcement. The article in question refers to calculating the penalty interest by the enforcement agent upon the creditor's request for overdue payment of the costs of proceedings that are not stated in the enforcement document "from the day of enactment of the enforcement document until collection." In repealing the article in question, the Court's decision was concerned

[16] U.no.45 / 2020 -1, May 14 [2020].

[17] See footnote 5 for the law's official name.

[18] U no. 163/2016, November 27 [2019].

[19] Official Gazette no. 99/2016, May 2016.

[20] U no. 72/2019-1 January 15 [2020].

[21] Minister of Justice No. 21-648/7 in the Official Gazette no. 32/2019.

[22] U.no. 94/2019 -1 May 12 [2020].

[23] Law on Enforcement, Official Gazette nos. 72/2016, 142/2016 and 233/2018.

about calculating interest and costs for enforcement when the enforcement document does not envisage them or state how to calculate them. The Court was concerned that the article provides the creditor with authority to claim interest on costs not specified beforehand in a written document. The payment of a legal penalty interest, not specifically included in the enforcement document was not acceptable to the Court. By giving the right to the creditor to request the penalty interest for the delays in the payment of costs, which has not been included in the enforcement document, the creditor obtains a right that does not have a legal basis. The Court said that by giving an obligation to the enforcement agent to calculate such penalty interest he or she was given a role as an adjudicator. In addition, the impugned article was unclear about the starting date for calculating the penalty interest. These decisions came at a time when many citizens complained about having to pay excessive amounts for penalty interest on relatively small debts.

IV. LOOKING AHEAD

The biggest challenge ahead facing North Macedonia is related to overcoming the effects of the COVID-19 pandemic. Not only is combating the virus challenging, but it has also aggravated other demanding situations, such as holding fair and timely trials and conducting the census in 2021. In 2020, there were attempts to hold on-line trials, as the judicial proceedings were mainly on hold during the declared emergency. However, on-line trials are not foreseen in the legislation, but just appear in the Government Decree on judicial procedures' time-limits during the state of emergency and for courts and prosecution actions.[24]

In 2021, the judiciary also will face another challenge. In order to reinstate the public trust in the judiciary, the Judicial Council which is responsible for appointing, disciplining and removing judges, will probe into alleged unlawful and unfair trials, organized crime cases, time-barred cases, etc., in line with its internal plan for monitoring the work of the courts, their presidents and judges. The effects of such a review are uncertain. Implementing such a "filtration of the judiciary" in a manner which is publicly perceived as neutral and objective without causing harm to the judiciary and the citizens remains a big challenge for the country.

As to the census, this is a statistical procedure, which has become controversial and politicized. North Macedonia will hold a new census in 2021. Following the armed conflict with ethnic Albanian insurgents, a census was held in 2002. According to this census, ethnic Albanians accounted for approximately 25% of the population. All language, equitable representation and other rights are granted to populations accounting for at least 20% of the total population. The census in 2011 was interrupted and declared invalid due to a number of irregularities. Fear seems to be the biggest barrier regarding carrying out a credible census. On one hand, if the census shows that ethnic Albanians comprise less than 20% of the population, then they will not be able to enjoy the rights granted by the Constitution. On the other hand, if ethnic Albanians comprise more than 25% of the population, they will more actively pursue their rights, using various devices.

Local elections are yet another challenge in 2021. It will represent still another test for the Government coalition, which dealt with many challenges in 2020, including the stalled EU integration process, the management of the health and economic crises caused by the Covid-19 pandemic, and air pollution in larger cities.

V. FURTHER READING

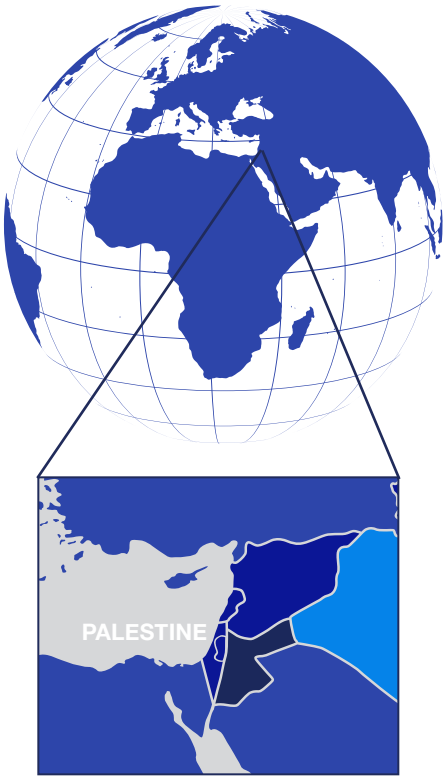
European Network of Legal Experts on Gender Equality and Non-Discrimination, *Country Report Non-Discrimination: North Macedonia* (2020)

International Foundation for Electoral Systems, *COVID-19 Briefing Series: Legal Considerations When Delaying or Adapting Elections* (2020)

Office for Democratic Institutions and Human Rights, Republic of North Macedonia Early Parliamentary Elections 15 July 2020, *Special Election Assessment Mission Final Report* (2020)

Organization for Security and Cooperation in Europe, Mission to Skopje, *Third Interim and Project Final Report on the Activities and the Cases under the Competence of the Special Prosecutor's Office (SPO), Trial Observations: Analysis of Selected Issues* (2020)

[24] Official Gazette nos. 84/20 and 89/20 [2020].



Palestine

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INTRODUCTION*

2020, the year of COVID-19 pandemic, has seen governments use emergency measures across the globe in order to legislate effectively in the wake of the pandemic crisis. However, the suspension of constitutional norms to achieve the required legislation has caused concern in Palestine due to its unstable track record in using emergency measures appropriately.[1] The decision to use emergency powers in response to the pandemic has triggered a heated debate among Palestinian academics and law makers who have begun to question if constitutional limits can and should be crossed during the pandemic in order to protect lives, or whether the protection of lives should only be achieved within constitutional limits. This debate has accelerated over the course of 2020 due to the on-going state of emergency declarations being issued by presidential decrees without any form of democratic limits or consultation. Indeed, since the start of the pandemic, the Palestinian president has declared and renewed a state of emergency several times despite these extensions having no constitutional basis according to the state of emergency set forth in the Palestinian constitution, the Basic Law (BL).[2] In this report, we suggest that these ongoing "state of emergency" measures confirm how the normalization of the use of exceptional powers in Palestine (which began after the Hamas-Fatah political crisis in 2007) is still ongoing.

The report also details three other significant constitutional issues alongside the declaration of states of emergency. This includes a discussion of the accelerating growth of Palestine's grassroots constitutional awareness movement; a civic educational campaign aimed at spreading constitutional awareness among the Palestinian public. Another area of significance concerns how legislation is given priority to be enacted with the power of law. This issue has reached a particular level of salience in Palestine in regard to the "Family Protection Law" which, despite being drafted over a decade ago, has yet still to be enacted —an issue which during a year of increasing domestic abuse has become a topic of national debate. The constitutional case in this report is connected to the status of women in Palestine and how this relates to the relationship between international agreements and the BL. This issue became a matter to be decided by the Supreme Constitutional Court which ruled on presidential decree No. (19) that established Palestine's ratification of the "Convention on the Elimination of All Forms of Discrimination against Women" (CEDAW).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Emergency Powers

2020 was a clear example of the urgent need to have an active legislative council in Palestine. As previously mentioned in the Palestine report of 2019, the Palestinian Legislative

*I would like to thank Ms.Rawan Nairat, Dr.Mahmoud Abu-Sway, Dr.Emilo Dabed and Dr.Francesco Biagi for the interesting discussions regarding the constitutional matters mentioned in this report.

[1] Sanaa Alsarghali, 'Palestine and the State of Exception: A Perfect Marriage?' in Simon Mabon, Sanaa Alsarghali and Adel Rushaid (eds) *State of Exception or Exceptional States: Law, Politics and Giorgio Agamben in Middle East* (I.B.Tauris, London 2021).

[2] According to Article 110/3 of the Basic Law, the state of emergency may be extended for another period of thirty days if a two-thirds majority of the members of the Legislative Council vote in favor of the extension.

Council (PLC) was dissolved in 2007 following the election of Hamas. Since this period, Palestine has been governed by the BL under the "state of necessity" set forth in Article 43.[4] This provision allows the president to issue decrees with the power of law during periods in which the PLC is "not-in-session." However, due to Palestine's exceptional circumstances, this "not-in-session" period has become perpetuated (a scenario that drafters could not have predicted). Thus, President Abbas has been using the "state of necessity" to rule by means of "decisions that have the power of law" without any time limit. This state of affairs has increased Palestine's constitutional issues during the pandemic.

In response to the pandemic, a state of emergency was declared via presidential decree on March 5 by President Abbas for thirty days.[5] This initial declaration of emergency was delivered on constitutional grounds as Article 110 of the BL requires the existence of a potential threat to national security (such as war, invasion, armed insurrection, or natural disasters) for a state of emergency to be declared by presidential decree. However, the BL demands approval by two thirds of the PLC in order to extend the state of emergency (whose purpose and territories to which it applies must also be stated by the emergency powers) beyond thirty days. The PLC is also authorised to review some (or all) of the procedures implemented during the state of emergency. However, due to the dissolution of the PLC by the Constitutional Court on December 12, 2018, many of these required constitutional clauses cannot be applied in accordance with the BL due to the PLC's absence.[6]

In order to extend the state of emergency then, as the pandemic has endured well beyond thirty days, the presidential decree that called for the extension argued that the exceptional conditions that Palestine was facing (that is, COVID-19) demanded that people's lives were to be the only concern at this stage —rather than constitutional accuracy regarding the PLC's necessary approval. Such a decree has merit (the premise of protecting lives).

However, the presidential decision to enforce this decree by means of a "decision that has the power of law" (use of Article 43) suggests a willingness on behalf of the President to replace the PLC authority with his own —as only the PLC can approve the extension of a state of emergency. This action that potentially replaces the authority of the PLC with that of the president sets a concerning precedent.

During this period of emergency, other laws have also been enacted that have a questionable constitutional basis, notably the decision with the power of law No. (7) that was issued on March 22. This particular law, also known as Palestine's new emergency law, provides the government with the ability to lift, adjust, and reinforce the emergency measures as necessary. It also includes, however, an authorization to delegate powers to the Prime Minister (or whoever the President delegates powers to during the emergency period).[7] This has little to no constitutional basis as it allows the Prime Minister (the delegated party) to issue decisions similar to laws —a power which is not mentioned in the Basic Law. This has already begun to cause some controversy as the Prime Minister, via this new capacity, issued decision No. (18) that criminalizes certain actions during curfew. To put it another way, it has allowed the Prime Minister to create laws that have no constitutional basis.

Another constitutional issue related to COVID-19 concerns Palestine's status as an occupied country and its inability to enact boarder control. The limited control the Palestinian Authority has over its boarders has prevented them from enacting restrictions on population movement —a crucial strategy in preventing the spread of the pandemic. For example, Palestinian boarders were often opened by Israel (despite objections made by the Palestinian Authority) to allow Palestinian labourers to work in Israeli factories before returning home to Palestine —massively increasing the risk of infection.[8]

B. Constitutional Awareness Campaign

2020 in Palestine also saw a significant constitutional development arising from grassroots organizations. This grassroots initiative developed in the form of a constitutional awareness campaign that emerged from a collaboration between the Constitutional Studies Center (CSC) at an-Najah National University, the Women Media and Development (TAM) NGO, and the Palestinian General Women Union.[9] Entitled *"My Constitution Should Include Me,"* this civic educational campaign developed around the aim of raising public awareness of constitutional issues and presenting *"The Constitution"* as a concept that can be understandable to all. Indeed, the campaign is part of a continuing effort to make marginalized groups more engaged in public and political life —a

[3] Asem Khalil and Sanaa Alsarghali, 'Palestine', in Richard Albert, David Landau, Pietro Faraguna and Simon Drugda (eds.), *Global Review of Constitutional Law, I•CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College,* 2020, 259-26. Available at SSRN: <https://ssrn.com/abstract=3593594or http://dx.doi.org/10.2139/ssrn.3593594>

[4] Rashad Twam and Asem Khalil ام بعد حالة الطوارئ المعلنة في فلسطين لمواجهة فايروس الكورونا: السيناريوهات ومحاذيرها (The Aftermath of the Declared State of Emergency in Palestine against Coronavirus Outbreak: Predicted Scenarios and Risks) (March 30, 2020). Available at SSRN: <https://ssrn.com/abstract=3564350>

[5] Presidential Decree No (1) of 2020 available at https://maqam.najah.edu/legislation/345/

[6] The Supreme Constitutional Court Interpretive Decision No. 10/2018.

[7] See full text of Decision with the power of Law No.7 at <https://maqam.najah.edu/legislation/338/> accessed 28 February 2021.

[8] Maayan Niezna. Maayan, 'Under Control: Palestinian Workers in Israel During COVID-19' (*Border Criminologies blog,* 07 July 2020) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/07/under-control> accessed 28 February 2021.

[9] For more information on the first constitutional awareness campaign visit <http://www.miftah.org/Display.cfm?DocId=26567&CategoryId=36> accessed 28 February 2021.

sphere which has traditionally always been limited to men and the political elite. In sum, the awareness campaign aspires to change this elitist and male dominated mindset, shed light on everyone's basic constitutional rights, and to open up the debate of whether Palestine needs to draft a new constitution.

In particular, the campaign is focused on raising awareness of three groups: women, university students, and the wider non-expert public. It has designed different activities and materials for each group.

For example, the campaign has provided for women of all backgrounds specific training workshops that detail how they can use the constitution as a tool to protect their rights, ensure equality, and achieve their goals. For university students, the campaign has made available webinars (also open to the public) hosted by law professors from West Bank and Gaza to discuss and explain various constitutional topics that range from defining a constitution to the role of constitutional courts. And for a wider non-expert audience, the campaign has produced short educational "character" videos,[10] all of which have also been posted on social media platforms to provide "bitesize," easily accessible, and digestible constitutional information.

In addition to these educational initiatives, the campaign has facilitated the invitations of international scholars to e-visit the Constitutional Court in Palestine. The resulting expert workshops and knowledge exchange developed understandings of different forms of interpretations —especially in regard to methods of interpretations that take gender into account.[11]

Since the campaign began, on October 10, 2020, it has had a successful level of outreach. Indeed, the campaign is frequently trending on social media, making local news headlines, and having its prominent advocates appear on national TV chat shows and radio interviews.[12] The scope of this campaign shows significant promise for cultivating an ethos of constitutionalism throughout Palestine, and could be an apt prologue for a future constitutional drafting process that is centered around public engagement.

C. Prioritizing legislation for its enacting with Article (43)

The unconventional legislative process in Palestine has caused issues regarding the priority of which decisions to enact with the power of law whilst the PLC is currently suspended. This issue has had increased prominence in 2020 due to COVID-19 and its associated rise of domestic violence. In the latest survey published by the Palestinian Central Bureau of Statistics regarding violence in the Palestinian Society, it indicated an increase in the domestic violence rate, revealing that 41% of women have suffered psychological violence and 32% have suffered physical violence.[13] 2019 statistics revealed that 27%, that is to say, one of three women, suffered some form of violence by their husbands, 17.8% suffered physical violence, 56.6% suffered psychological violence, and 8.8% suffered sexual violence.[14] These already high levels of domestic violence have only increased during 2020 and has put back into the limelight the debate about enacting a Family Protection Law. However, the current absence of a "normal" legislative process in Palestine has meant that certain areas of legislation (women and family issues) have not been prioritized.

The issue of a Family Protection law in Palestine is not new. The petition for enactment of such a law has been in the public debate for a while, but due to the increased cases of domestic violence, the law has since become a top priority for civil society and human rights organizations during the COVID-19 pandemic. The key pressure groups advocating for this legislation has largely come from NGOs, women and youth organizations, some political parties, and notable academics. They argue that this law could become an important tool for the collective effort to protect women, children, and families from violence, to support the empowerment of survivors, and hold perpetrators accountable for their acts. However, opposition to this law has also emerged from fundamental religious groups, such as the Islamic Liberation Party, who suggests that this law would be in clear contradiction to Islamic Sharia and Palestinian traditions.[15] Also, adding further complexity, in spite of the general support by NGOs and civil society organizations, these groups have many reservations about the current draft for the Family Protection Law, in particular about the ambiguous wording of certain articles (i.e., the proposed definition of violence).

For this potentially divisive law to pass, it would require a functioning legislative infrastructure in order for the bill to be effectively discussed and debated. As highlighted in the previous Palestine annual constitutional reports of 2018 and 2019, the absence of an active PLC since 2006 has created a legislative procedure dominated by the Executive.[16] As such, the "Family Protection Against Violence" law has not been given priority and is on a waiting list. Indeed, the government's reluctance to adopt this law stems from the governments fear of public reaction, especially from religious "extremist" quarters. For example, the reaction after issuing a different domestic orientated law "Decision

[10] Videos are available at Constitutional Studies Website https://ncsc.najah.edu and Women Media and Development Facebook page <https://www.facebook.com/TamWomenMedia/?hc_ref=ARSHdLdGpCEKHIry2_f5pUSclEPY0k55ujBaX1ZOw8u0tDZAu8--6NF2L6orM8BNFdU&fref=nf&__tn__=kC-R >.

[11] See <https://law.unimelb.edu.au/constitutional-transformations/projects/support-to-palestinian-constitutional-processes> accessed 28 February 2021.

[12] Examples of how this campaign has made headlines See <http://pnn.ps/news/547362 / https://cedaw.ps/campaign/5/ar> accessed 28 February 2021.

[13] Preliminary Results of the Violence Survey in the Palestinian society (PCBS 2019). For more details: http://www.pcbs.gov.ps/Downloads/book2480.pdf

[14] Ibid.

[15] *See* https://reform.ps/the-instigators-of-the-family-protection-law/ accessed 28 February 2021.

[16] As discussed earlier, since 2007 laws are prepared by the cabinet and signed by the president in accordance to Article 43 of the Basic Law.

with the power of law No. 21/2019," which lifted the age of marriage for both genders to 18 years old, caused significant controversy.[17] The failure to pass the Family Protection law to date, despite the increasing urgency of such a law in regards to domestic violence increases, is partly due to constitutional lacuna (in fact, as consequence of the absence of the PLC) and partly a political concern that fears the reaction of the electorate who are passionately opposing this law.

III. CONSTITUTIONAL CASES

Among the most important constitutional appeals adjudicated by the Palestinian Constitutional Court in 2020, was Constitutional Appeal No. (32) of 2019 which the court decided on December 24, 2020. The appeal considered if Presidential Decree No. (19) of 2009 concerning the ratification of the CEDAW (issued in Ramallah on March 8, 2009 and published in the Palestinian Gazette on April 27, 2009) was unconstitutional. This appeal also called into question the consequent decisions, decree laws, and any resulted legal impact including the accession of the State of Palestine to the international treaties on April 1, 2014.

The appellants based their complaint on many reasons related to women's status, the difference between equality and justice for women, and the need for the court to review the "will" of the Palestinian decision-maker and how this "will" was influenced by internal and external pressures —notably women organizations.[18] They also argued that the CEDAW contradicts Islam and Sharia's law. The complainants, however, erred in its appeal by not specifying exactly what constitutional article the presidential decree is in contradiction with. Thus, the court could have dismissed the case immediately due to the lack of clarity. As laid out by Article 28 of the Constitutional Court Law:

> "The decision issued with the referral to court or the legal pleading submitted before it according to the previous article,[19] should include the legal provision that is contested for being unconstitutional in addition to the relevant constitutional provision alleged to be in contradiction with the mentioned article in addition to the means of contradiction."

The decision to accept the case made by the appellants, despite its shortcomings, could suggest that the court took the opportunity to rule on the case in order to grant the Presidential decree perpetual immunity —if they ruled the decree as being constitutional. This became clear when the court dismissed the case for mere formalities and expanded its reasoning when it examined the personal interest of the claimants.

Indeed, the court based its decision, that the appellants' claim was inadmissible, on the following formal conditions: a) First: absence of actual harm, whereas the appeal had based its claim on potential or expected harm; b) Second: lack of any direct personal interest, which is a condition for accepting constitutional claims/appeals.

Since the court dismissed the case holding that the claims failed to meet these formal conditions (thus granting the presidential decree constitutional lawfulness), it would not typically have to offer any explicit reasoning for its decision. However, in order to clarify why they found a lack of direct personal interest (in regard to point 2), that is, if ratifying the CEDAW would impact those following Islam adversely, the court took the opportunity to explain how the decree is not in contradiction with article 4 of the BL. In its explanation, the court specified where a possible contradiction could occur between the decree and the BL by suggesting that the decree could be perceived as being in violation of the first and second paragraphs of the fourth article of the BL:

> "1. Islam shall be the official religion in Palestine. Respect for the sanctity of all other divine religions shall be maintained.
>
> 2. The principles of Islamic Sharia shall be a principal source of legislation."

However, the court also highlighted that the Presidential decree states:

> "the ratification of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in a manner consistent with the provisions of the Palestinian Basic Law."

And as such, the CEDAW (regardless of the fact that Palestine has joined it without any reservation)[20] as ratified by the presidential decree, does in fact create reservations where the convention is in contradiction with the BL. This would have been a potentially questionable decision if the court had not previously in its 05/2017 judgement stipulated that:

> "The Palestinian Declaration of Independence is an integral part of the constitutional system in Palestine, and even the highest of all, after which comes the Palestinian Basic Law, and then the International Treaties and Conventions that are lower than the Basic Law."

This previous decision, which clarified the relationship between the BL and international agreements, ensures that the presidential decree is consistent with the first and second paragraphs of the fourth article of the BL. Indeed, this ruling recognizes that the BL is superior to international treaties within the hierarchical of Palestine's legal system and

[17] See Palestine Report of 2019.

[18] The appellants filed their action by means of a direct, original action which is filed by an aggrieved person before the Supreme Constitutional Court pursuant to Paragraph (1) of Article (27) of the Law of the Supreme Constitutional Court No. (3) of 2006 and its amendments.

[19] '…the previous article' is Article 27 in particular section (1) which addresses the original direct action.

[20] United Nations Treaty Collections, see <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en> accessed 28 February 2021.

is thus in line with the decision regarding the constitutionality of Presidential Decree No. (19) of 2009.

Importantly, this case also relates to a previous court ruling (05/2017) that examined article 10 of the BL. Article 10 outlines the BL relationship with international agreements:

> "1. Basic human rights and liberties shall be protected and respected.
>
> 2. The Palestinian National Authority shall work without delay to become a party to regional and international declarations and covenants that protect human rights."

However, following the court's ruling, this article can no longer be read without the interpretative decision 5/2017. Specifically, section 4 of the judgment says that:

> "4. The respect for human rights and fundamental freedoms and the principles of obligation and commitment at the national level is to mainstream these various international human rights treaties and conventions into the regular legislation in the State of Palestine, and not to contradict the religious and cultural identity of the Palestinian people, and on the basis of respect for the constitutionality of these legislation with international treaties and conventions on human rights that are in conformity with the Basic Law."

This complement to article 10 of the BL by the Constitutional Court guarantees that the CEDAW cannot be in contradiction with the BL due to the procedures it has to go through to be effective in Palestine. By emphasizing religious and cultural identity, this complement ensures that the BL does not contradict itself, i.e., encouraging the ratification of international treaties that conflicts with other articles of the BL.

There are, however, two potential issues with the court's decision. First, in adding an explanation to article 10 of the BL the court has also set a precedent of granting itself legislative abilities; second, the wording of this complement is particularly ambiguous, i.e., the terms "religious and cultural identity." Whereas the BL specifies this identity in article 4 as being Islam, this wording is open-ended and grants the constitutional court additional leniency for when it makes decisions. Indeed, the current decision that ruled on the appellants' claim as inadmissible, party made use of this increased leniency. So, while this report welcomes the court's ruling in favor of CEDAW, the method it used to do so may have set a concerning precedent, one which reveals the courts tendency to manipulate its ruling decisions in favor of presidential decisions.

IV. LOOKING AHEAD

The Palestinian Authority's "state of emergency" declarations in response to COVID-19 emphasize how governance spheres have become blurred together (i.e., legal and illegal, political and juridical, public and private) in Palestine —in which exceptional laws are converted into "normal" ones. The absence of judicial intervention, despite the creation of a Constitutional Court in 2016, also poses serious questions about how the separation of powers operates within the BL. Indeed, there is a clear and present danger that when COVID-19 is over, and after the silence that such declarations have received, declaring them becomes the norm. Thus, we argue, that COVID-19 has re-opened discussion on the need for a new constitutional framework, with clear roles between constitutional institutions, and a push for elections that are both transparent and fair. Indeed, the additional issues highlighted in this report, the priority of which decisions to enact with the power of law and the decisions offered by the constitutional court, have also illustrated how constitutional reform is urgently necessary. There is promise in this regard as the recent efforts of the constitutional awareness campaign have shown. Indeed, a new dawn for constitutionalism in Palestine is not only possible but is in the making.

V. FURTHER READING

Elias Al-Hihi, and Asem Khalil, International Law within the Palestinian Legal System: A Call to Grant Human Rights Treaties a Special Constitutional Status (القانون الدولي في النظام القانوني الفلسطيني: دعوة لمنح صك دستوري وضع حقوق الإنسان قوة معاهدات [بالإنجليزية]) (May 16, 2020) Available at SSRN: <https://ssrn.com/abstract=3602467 or http://dx.doi.org/10.2139/ssrn.3602467>.

Sanaa Alsarghali, 'Palestine and the State of Exception: A Perfect Marriage?' in Simon Mabon, Sanaa Alsarghali and Adel Rushaid (eds) *State of Exception or Exceptional States: Law, Politics and Giorgio Agamben in Middle East* (I.B.Tauris, London 2021).

Asem Khalil, 'Palestinian Constitutionalism: A Stalled Project' (2020) 1 Journal of Constitutional Law in the Middle East and North Africa, 4-26. Sanaa Alsarghali, 'Palestine and the State of Exception: A solution?'(2020) An-Najah Constitutional Studies Centre publications <https://ncsc.najah.edu/en/publications> (in Arabic) accessed 28 February 2020.

Paraguay

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I. INTRODUCTION

As in other countries, the year 2020 in Paraguay was dominated by the COVID-19 pandemic. In this context, the Executive branch has been the main actor, while Congress and the Judiciary have been unwilling to discharge their constitutional duties properly.

Taking advantage of this situation, and based on a dubious interpretation of the Constitution, the Executive branch played a central role in the legislative, administrative, and financial activities intended to confront the crisis. It has restricted fundamental rights by issuing executive decrees and administrative resolutions that changed rapidly and created confusion. These measures have often been undertaken without regard to adequate levels of transparency, public debate, and clear criteria. Thousands of citizens were criminally charged for violation of these measures, the constitutionality of which is highly controversial.

Additionally, the Executive power was given extraordinary economic and financial resources. However, its execution was charged with serious accusations of corruption. At the same time, it exposed the profound disorganization and inefficiency of the State in the provision of basic services to the population.

The Paraguayan National Congress did not pass significant sanitary or punitive emergency bills into law, but only a financial, economic, and administrative emergency law. Thus, it waived its oversight powers and delegated its power as legislator for times of emergency to the Executive branch, undermining constitutional provisions that grant Congress a main role in the handling of emergency situations.

In turn, in the midst of the crisis, the Supreme Court of Justice seems to have forgotten the importance of keeping its independence and its institutional role. It publicly supported, ratified, and arguably prejudged the constitutionality of the measures and restrictions to fundamental rights ordered by the Executive. This alarming situation put in serious jeopardy the chance of citizens seeking to challenge the Executive actions.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Separation of Powers: Accumulation of Powers in the Executive branch

After the fall of the authoritarian government of Alfredo Stroessner in 1989, a new Constitution was enacted in Paraguay in 1992. The new Constitution removed most of the strong legislative powers held by the President and concentrated them in the Congress, even for times of emergency. In this manner, the framers of the Constitution sought to protect the new democracy from the greatest threat that Paraguay had been exposed to throughout its political history: the abuse of power by the Executive branch.

However, uncertainty and the sense of alarm provoked by the COVID-19 seemed to have prevailed over constitutional provisions. The judicial and legislative branches of government entrusted the task to the executive branch, which accumulated extraordinary powers beyond those granted by the Constitution.

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According to the Constitution, emergency regulations must be adopted by the National Congress.[1] The President only has the power of "urgent consideration," whereby the Executive can request Congress to urgently review bills that were submitted to it for its consideration.[2] This power has not been exercised even once during the pandemic. On the contrary, the Executive took matters on its own hand by issuing decrees and resolutions restricting rights, based on a dubious reading of the Constitution and on a pre constitutional law that finds itself difficult to adjust to the current Constitution.

Although Congress did not cease to function, remaining in session remotely without difficulty, the continuity of legislative activities during emergency situations was assumed by the Executive branch through a prolific and constantly changing series of decrees and administrative resolutions that, in many cases, created confusion and responded to unclear criteria.

On March 10, 2020, with two positive cases of COVID-19 in Paraguay, the Minister of Health Dr. Julio Mazzoleni issued Resolution No. 90, restricting for the first time fundamental rights in a general manner. It suspended nationwide for 15 days all educational activities, all events with massive attendance, and all indoor activities in enclosed spaces such as cinemas, theaters, conferences, clubs, discos, bars, cultural centers, etc.

On March 16, the President declared a State of Sanitary Emergency in Paraguay, closing national borders and authorizing the Ministry of Health to order a general preventive isolation for sanitary reasons. On March 20, a nationwide curfew was decreed, totally restricting the freedom of movement[3] and affecting several fundamental rights in consequence. The total curfew was extended until May 3, 2020. From May 4, some measures were relaxed in certain specific hours (05:00am to 11:00pm), that is to say, the strict restrictions on the freedom of movement and other rights were maintained except during such hours.

Throughout the entire year 2020, the Executive branch restricted through decrees and administrative resolutions an important[4] number of fundamental rights,[5] in a unilateral manner, not following the established procedures mandated by the Constitution nor providing transparent reasons for its decisions. Moreover, restricting the entire territory in a uniform manner during most of the time, providing the same treatment to territories with great viral circulation as well as to places where there was no presence of the virus attest to the lack of proportionality and rationality of the measures adopted.

From March to December 2020, 43 executive decrees and 32 sanitary resolutions have been issued, extensively restricting fundamental rights and even establishing criminal and/or administrative penalties to control abidance. For this purpose, Law No. 836/1980 (Sanitary Code) has been applied. Article 13 of Law No. 836/1980 empowers the Executive branch to declare a state of emergency in all or part of the national territory, determine its character and establish pertinent measures, and demand specific extraordinary actions to public and private institutions and to the population in general. It is important to note that this law was enacted prior to the 1992 Constitution, under a very different scheme of public powers, and specifically with broad powers reserved to the Executive branch. Thus, many scholars and other actors have questioned the validity of this law under the current Constitution.

Restrictions on rights by means of executive decrees continued in 2021, constituting a major setback and a real danger to the constitutional system and liberties. However, even though the adoption of these decrees has not been publicly discussed, it seems to have had a certain degree of uncritical acceptance by some sectors of the media and public opinion. Public debate lacked discussion over notions such as the parameters of necessity, proportionality, or limitation in time of the restrictive measures. Even though the decrees are valid for only a few days (approximately 20 days), they have been periodically renewed incorporating new and different restrictions, although the restrictions have on occasions been loosened regarding certain rights, persons, and activities.

Only in economic matters did Congress pass a relevant Emergency Law[6] establishing administrative, fiscal, and financial measures, authorizing the Executive to implement exceptional measures of a budgetary, fiscal, and administrative nature, of employment protection, and of economic and financial policy. This law had three specific goals for the Executive: 1) to strengthen the health system, 2) to protect employment, and 3) to avoid the cut in the chain of payments. The law could have also served as an occasion to establish, as the Constitution mandates, clear parameters as to which constitutional rights could be limited as well as the extent, conditions, duration, etc., of the limitations, although it said no such thing.

The aforementioned law authorized the Executive—through the Ministry of Finance—to unilaterally modify the General Budget of the Nation (GBN, 2020) without going through Congress, as is ordinarily required. Although the modifications to the GBN must be approved by law, this emergency law authorized the Executive in advance to make the modifications it deemed necessary, and

[1] Constitution of Paraguay, Article 202, No. 13.

[2] By means of this procedure, the bill must be studied by the Chamber of origin within thirty days of its receipt, and by the reviewing Chamber within the following thirty days. If the bill is not rejected within said terms, it shall be considered approved.

[3] With the exception of essential activities and services specifically qualified and listed by the Executive Branch.

[4] Even more and with greater scope than what can be restricted with the State of Siege, and which requires ratifica-tion by Congress.

[5] Directly, right to free movement, to education, to enter one's country, to work, freedom of assembly, to peaceful protest, to non-discrimination, to personal liberty and security, freedom from arbitrary arrest and detention, of de-fence and due process, to privacy and inviolability of the home, to health, freedom of competition, among several other rights indirectly as a result of the restrictions.

[6] Law No. 6524/2020.

such modifications were automatically accepted in advance.

In addition to the resources of the GBN and the important national and international donations, the Executive was authorized to enter loan agreements without need for ratification by Congress regarding each loan and its specific conditions.[7] This anticipated authorization established by Congress, with the purpose of simplifying the procedure for entering loan agreements for the Executive up to USD1,600,000,000, denotes a renunciation to important congressional oversight functions in violation of Article 202 (no. 10) of the Constitution.

As a result, it can be said that Article 3 of the Constitution was not observed, which establishes that no branch of government may attribute to itself, nor grant to another branch of government or to any other person, individually or collectively, extraordinary powers or the sum of the public power. In the meantime, the general public seemed to be more concerned by the pandemic than about debating and contesting the constitutionality of the measures that were being adopted.

Principle of Legality

In order to sanction individuals who violate the measures and restrictions established in its decrees and administrative resolutions, the Executive and the justice system have resorted to a 1996 law that punishes crimes committed "against the environment." However, this seems to bear no relation to the restrictions imposed. The said law establishes fines and prison sentences ranging from 6 to 18 months for those who "violate the sanitary quarantines."[8] That said, the system has resorted to a so called *"ley penal en blanco"* (blank criminal law) that is completed by the Executive in violation of the principle of legality and the separation of powers.

The Constitution and the Criminal Code[9] clearly require that the conditions for a conduct to be punished be expressly, strictly, and previously described in a law enacted by Congress. But in this case, they were established —and continue to be established— by the Executive in its numerous and changing decrees and administrative resolutions, falling back on the law with little or no application whatsoever to the current state of affairs.

Consequently, the police —hierarchically subordinate to the Executive branch— has detained, arrested, and seized vehicles of thousands of citizens without judicial order[10] "due to non-compliance of the presidential decree" [sic].[11]

On the other hand, the Public Prosecutor's Office, an agency in charge of representing society before the judiciary and ensuring the respect of constitutional rights and guarantees,[12] did not raise any objection. Instead, it criminally charged thousands of citizens "for punishable acts related to the Sanitary Quarantine, Law 716/96,"[13] including citizens who demonstrated against corruption in public protests. These charges were publicized as real institutional achievements.

Likewise, another major absentee was the Ombudsman, whose function is the defense of human rights on commission by the Legislature. Its performance during the pandemic was more similar to a social assistance agency than seriously engaging with the systemic violation of rights of the population.[14]

III. CONSTITUTIONAL CASES

1. Performance of the Supreme Court: Judicial Independence and Access to Justice.

Since the early stages of the pandemic, the Supreme Court of Justice seems to have validated the measures dictated by the Executive instead of affirming its independence. In fact, it publicly supported them. On March 10, 2020, the President of the Court attended the same act of announcement of the restrictions to fundamental rights by executive decree, thus, apparently providing institutional approval for such measures.[15]

Moreover, throughout 2020, the numerous regulations issued by the Supreme Court to regulate the jurisdictional activity in times of COVID-19, were explicitly based on the decrees of the Executive power. Hence, any chance of challenging the constitutionality of such decrees seems to be seriously jeopardized in advance.

Although it may seem surprising, there was not a single challenge before the Supreme Court against the constitutionality of the decrees and resolutions of the Executive in the entire year 2020. This makes sense, however, at a closer look. In fact, who would have incentives to challenge such measures when the Supreme Court itself based its own decisions on the Executive's decrees and resolutions? In the hypothetical case that any citizen presented a challenge, there are obvious concerns regarding the Supreme Court's ability to judge freely, objectively, impartially, and independently. Fur-

[7] As is normally required.

[8] Law No. 716/1996, Article 10.

[9] Constitution of Paraguay, Articles 9, 11 & 17. Criminal Code (Law No. 1160), Article 1.
For being "caught in flagrante delicto."

[10] In 2020, according to Police Procedures Report, 8,239 were arrested; 1,019 detained; 31,445 vehicles were im-pounded "due to non-compliance of the presidential decree."

[11] https://bit.ly/37GIlS4 > and <https://bit.ly/3qNBVh9 >, accessed 15 March 2021.

[12] Constitution of Paraguay, Articles 266 & 268.

[13] A total of 3,466 people in 2020, according to public information provided by the Public Prosecutor's Office.

[14] Mario J. Barrios Cáceres, 'Dispares respuestas a históricas falencias en un año de emergencia sanitaria' in Co-dehupy (ed), *Derechos Humanos Paraguay 2020* (Codehupy 2020).

[15] One of the measures was even the restriction of movement of attorneys, leaving people without the possibility of being legally assisted.

thermore, if the Court declares the Executive actions unconstitutional, their own resolutions may in turn be challenged, which would lead to an institutional chaos.

Indeed, the Supreme Court not only failed to remain impartial in the face of the measures of dubious constitutionality mentioned above, but it also even celebrated an agreement with the Public Prosecutor's Office[16] to allocate to social reparations the funds resulting from the penalties to the violators of the restrictions. Thus, the Court once again granted institutional approval in advance of the legality of the penalties and severely fixed the results of the sanctions.

This constitutes a dangerous precedent, since the Supreme Court seems to have prejudged the constitutionality of these measures, discouraging and severely depriving the people of the human right to seek protection and justice.

Given this situation, the procedural path chosen by affected individuals was the writ of amparo, which is exercised before ordinary judges (as opposed to Supreme Court Justices who solely hear cases where the constitutionality of laws and decrees is challenged)[17].

2. José A. Miranda v. Ministry of Public Health: Right to health and others *(Judgement no. 360/2020)*

This case challenged the constitutionality of a security resolution of the Ministry of Public Health, which prevented the admission of new patients to public nursing homes due to the COVID-19 pandemic.

In August 2020, after an emergency hospitalization at the Barrio Obrero Hospital due to his delicate health condition, Mr. José Miranda was discharged from the hospital. Since he had no relatives and no place to live, the authorities of the Barrio Obrero Hospital requested the Ministry of Health to admit Mr. José Miranda, of 72 years old, to a public nursing home for the elderly.

However, the response was negative based on a resolution issued by the Ministry of Health that communicated the decision to restrict all new admissions after the quarantine established in March due to the COVID-19 pandemic "in protection of elderly residents."

In view of this situation, María Mercedes Coronel, a public attorney, filed an *amparo* action on behalf of José Miranda against the Ministry of Public Health. She did so in defense of the rights of the petitioner and in accordance with the express responsibilities of the Paraguayan State established in the Constitution to provide comprehensive protection to the elderly (Article 57), to guarantee the right to health (Article 68), and to promote the quality of life, recognizing conditioning factors such as extreme poverty and the impediments of disability or age (Article 6).

In protection of the rights set forth in the aforementioned articles of the Constitution, the remedy of amparo was granted. Therefore, the transfer, admission, and permanence of Mr. José Miranda in the Santo Domingo Home for the Elderly in the city of Asunción was ordered.

3. Teófilo R. Zaldivar Boggiano v. Ministry of Public Health, President, and Attorney General of the Republic of Paraguay: Right to work, liberty of movement and others (Judgement no. 25/2020)

The present *amparo* action, filed in May 2020, challenged the constitutionality of Presidential Decrees No. 3576 and 3619 that established restrictions to fundamental rights due to the COVID-19 pandemic.

The first presidential decree prohibited the right to circulate and to work in person for people over 60 years of age. The second decree increased the age to 65 years and older, based on recommendations and with the endorsement of the Ministry of Health "in view of the global evidence" that people aged 65 years or older were those with the highest risk of complications and mortality from COVID-19.

The plaintiff Teófilo Zaldivar, who was 68 years old, director of a construction company, claimed that due to his age he had been prohibited from performing his duties of control and management of his works and projects. He argued that the prohibition to circulate due to his age was discriminatory and detrimental to his constitutional rights.

Particularly, he argued that the administrative measures of isolation violated his following constitutional rights: to liberty and security (Article 9), to work (Article 86), to non-discrimination among workers on the basis of age (Article. 88), and to freedom of movement (Article 41).

The *amparo* action was rejected by a lower court. According to it, the executive decrees have been issued by the President in legitimate use of his constitutional and legal powers, invoking the previously mentioned Sanity Code. Specifically, by its power to issue decrees and sanitary measures for preventing and combating the threats to public health and to life that could be caused by the COVID-19 virus.

In its judgment, the judge recognized that the rights claimed are fundamental rights recognized in the Constitution. However, under this circumstance, balancing rights becomes necessary, according to which the right to health and life prevails over the other rights claimed since in the absence of the latter, the rights claimed by the plaintiff would be meaningless.

Nonetheless, the judge stated, perhaps unconvincingly, that the right to work was not being violated since the plaintiff could designate a representative to perform in person the controls and inspections of the works that he is prohibited from doing, or carry them out virtually.

The judge considered that the restrictions did not constitute illegitimate acts of authority. As

[16] René Fabrizio Figueredo Corrales, 'La pandemia de la COVID-19: Constitución, Estado y salud' [2020] 43 (7) Revista Jurídica Paraguaya La Ley 2035.

[17] The following cases were selected from a presentation by Judge Elodia Almirón before the Paraguayan Institute of Constitutional Law on September 22, 2020. However, the descriptions of the cases corresponds to the author of this report.

a result, in her opinion, the first requirement for the *amparo* proceeding was not fulfilled.

Furthermore, the judge considered that the *amparo* action filed was not urgent, which constitutes one of the procedural requirements of this specific action. Likewise, it considered that it was not the appropriate legal remedy to obtain his claim —which in her opinion was the review of a decree issued by the President—, and that the proper course of action would have been to file a claim as to the constitutionality of the challenged laws in the Supreme Court.

In this regard, the judge considered that if the action were admitted, it would have resulted in the modification of a presidential decree or a ministerial provision of the Executive, violating the principles of separation, coordination, and checks and balances, between the branches of government. Given that no branch of government can invade the scope of competence of another branch of government, if the judge did grant the request, she would have violated the principle of separation of powers by interfering in constitutional powers attributed to another branch of government.

The rejection of the *amparo* was appealed and the Court of Appeals later confirmed the rejection.

IV. LOOKING AHEAD

As an impoverished country, Paraguay appears to be suffering the unequal distribution of COVID-19 vaccines around the world. This constitutes a major global concern for ending the pandemic.

In March 2021, with the health system on the verge of collapse, major demonstrations are taking place. Lack of basic medicines and the slowest management in South America to obtain COVID-19 vaccines have already forced the resignation of the Minister of Health and other ministers of the Executive to protect the President from an impeachment trial. Nevertheless, impeachment still looms on top of the President, thus raising questions as to the immediate political situation of the country.

For a country with low tax rates and high tax evasion, the large debts acquired during the pandemic and the economic contraction caused by it represent major challenges for the sustainability of social programs and for the economic system as a whole.

Postponed Municipal elections due to COVID-19 in 2020 are to be held in November 2021, implementing for the first time the "Open List" voting system in Paraguay. Among the population, there is high expectation that it could improve political representation.

V. FURTHER READING

Jorge Silvero-Salgueiro, 'El impacto del COVID-19 en el sistema político paraguayo: ¿hacia una democracia iliberal?', in L. G. Arcaro Conci and others (eds), *O Direito Público en tempos pandêmicos: 9 países, 11 trabalhos e una porção de inquietudes* (Tirant lo Blanch, 2020).

Camilo Filártiga Callizo and Rodrigo Ayala Miret, 'Hiperpresidencialismo y derechos fundamentales en tiempos de COVID-19. Un análisis del caso paraguayo' (2020) 18 (36) Derecho y Realidad < https://doi.org/10.19053/16923936.v18.n36.2020.12162 >.

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Peru

Maria Bertel, Dr, Elise-Richter-Fellow (FWF), University of Innsbruck

César Landa, Dr., former President, Peruvian Constitutional Court, Professor, Pontificia Universidad Católica del Perú

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I. INTRODUCTION

On January 26, 2021, the election of new members of Congress took place. This election was the aftermath of the dissolution of the previous Congress, which was ordered on September 30, 2019 by the former President of Peru (Martin Vizcarra)—for the first time in the constitutional history of Peru—after a second vote of no-confidence concerning his cabinet.

The elections of January 26 allowed the reconfiguration of Congress by displacing the opposition parties that in 2016 had obtained the majority of the seats. This gave them the power to question and censure ministers (including the President of the Council of Ministers, Fernando Zavala, in 2017) and to initiate a parliamentary summary process of vacancy against the former President Pedro Pablo Kuczynski (PPK) (2017–2018). The latter, due to the lack of guarantees of due process, resigned, and afterwards, Martin Vizcarra assumed the presidency. The newly elected members of Parliament will only sit until the end of the regular term, i.e., the elections of April 2021.

However, this reconfiguration to the Parliament, which was supposed to limit the excesses of the past Congress, ended in no victory. The recently elected parliamentary majority forged alliances with political forces with goals distant from liberal constitutional principles and centered its practice and agenda on populist goals, such as the use of force, manipulation of public resources in favor of certain emerging or informal economic groups, and the protection of some authoritarian political players.

Additionally, the COVID-19 crisis led to the declaration of a health emergency, which turned out to seriously challenge the newly elected members of Congress. This also led to constitutional problems with, for example, the "Ley de ascenso," which was partly declared unconstitutional by the Constitutional Court (see below). The new parliament also used the COVID-19 crisis for its own benefit and tried to postpone the elections scheduled for April 2021, hoping to extend its members' legislative terms.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The new Parliament was installed amid the state of health emergency issued by the Executive, due to the COVID-19 pandemic. However, the new Congress did not show the necessary organizational or leadership skills to tackle the sanitary crisis, due to the lack of experience of its new members. This was partly due to the constitutional prohibition against the immediate re-election of the Republic's parliamentarians established by a 2018 referendum.

On the other hand, this first period of activity of the Parliament was characterized by the issuance of controversial laws, such as those aimed at (i) protecting the abuse of the use

of force by the police and those that tried to prohibit toll collection (toll collection was declared unconstitutional by the Constitutional Court), (ii) eliminating the political parties' mandatory internal election processes, (iii) making possible the withdrawal of 4 Taxation Unit (UIT) from private pension funds, (iv) making possible the return of 100% of Social Security Office (ONP) funds, among other measures, which a large number of constitutionalists have qualified as populist measures.

In addition to this, the new political majority in the Parliament tried to postpone the general elections (presidential and congressional) scheduled to take place on April 11, 2021, under the excuse of the pandemic crisis. This measure—however—was intended to extend the mandate of the congressmen, insofar they were provided a limited period in office (until July 2021, since they were elected to replace the dissolved Parliament). The former President Vizcarra dismissed that possibility. For its part, the National Jury of Elections (JNE) initiated the electoral process specifying that, pursuant to Article 90–A of the Constitution, the current congressional representatives could not be reelected, as well as those elected in 2016 (and who were revoked).

This was a turning point. Thereupon, the Congress—composed of a majority in opposition to the former President Vizcarra—adopted an anti-systemic attitude. In that sense, the Congress decided (in the first vote, but not in the second vote) for constitutional reform with the purpose to extend the protections for congressional representatives, specifically to prevent the lifting of their parliamentary immunity (and therefore blocking the possibility of being prosecuted and/or convicted). Furthermore, they intended to extend the grounds for accusation against the President of the Republic for acts that occurred prior to his mandate and tried to eliminate the immunity and the pre-impeachment of the ministers of government, magistrates of the Constitutional Court, and the Ombudsman in case of denunciations. In view of the public opinion's rejection, these proposals did not obtain a positive second vote for them to become new constitutional norms.

However, amid the economic and social health crisis resulting from the pandemic, the Parliament —once again—raised the possibility of a presidential vacancy; this time, against President Vizcarra for permanent moral incapacity. The claim was based on news around the privileged contracting in which the government tried to incur with an entertainment personality. The Parliament entertained this situation and concluded that the President incurred such incapacity. The executive filed a competence claim before the Constitutional Court requesting to stop this (i.e., asking for precautionary measures). The Constitutional Court dismissed the claim; however, in Parliament, the proposal did not obtain the 87 votes required to vacate Vizcarra.

Nevertheless, later on, statements of people under investigation (before the Public Prosecutor's Office) were spread in the media and indicated that they had bribed Vizcarra when he was President of the Regional Government of Moquegua (2011–2014). Due to this new information, the Parliament filed a new request for a vacancy. On November 9, 2020, the Parliament obtained the necessary votes and vacated him over permanent moral incapacity grounds.

Insofar as this was the second presidential vacancy targeting the elected government of 2016, the new head of State became the second vice-president elected together with PPK. However, the second vice-president resigned in 2019. Thus, the government (the Executive branch) then became the President of the Parliament (Manuel Merino).

On November 10, the President of the Parliament—Manuel Merino—assumed the presidency and formed an ultra-conservative cabinet. However, the Parliament's decision to vacate Vizcarra had a strong response from the citizenship, who went to the streets to protest. The social unrest was ignited by the perception that the decision was an arbitrary use of the Parliament's power and was seen as a *coup d'état.* In the face of popular discontent, the Parliament ordered the police to repress the protestors, resulting in the death of two young persons and dozens injured. All of this finally resulted in the resignation of many ministers of the new government to the point that Merino, on his sixth day in the mandate, abandoned the presidential office. The political unrest was finally resolved on November 16, 2020, due to a pact between the parliamentary majority and minority, to elect—from the minority in Parliament—the new President of the Congress, Fernando Sagasti. Pursuant to Article 115 of the Constitution, he will remain in office until July 28, 2021. Although this election has been carried out through a political pact, this does not imply that the new government will be free from political games started in the Parliament, especially because the Constitutional Tribunal dismissed the demand filed by the Executive and therefore did not establish limits on the use of declarations of presidential vacancy due to permanent moral incapacity.

III. CONSTITUTIONAL CASES

1. Marco Antonio Paucarcaja Mercado vs Civil Chamber of the Superior Court of Justice of Huaura (Expediente 00943-2016-PA/TC): Right to Secrecy ("derecho al secreto"), and the Inviolability of Communications

The Constitutional Court had the opportunity to determine the constitutionality of interceptions of one of its employee's private communications made by an employer. The interception was done by accessing a website used by the employee while using one of the employer's electronic devices and was used as grounds for his dismissal. In this sense, it was essential to determine if the interception ran afoul of Article 2 (10) of the Constitution, which establishes the right to secrecy (*"derecho al secreto"*) and the inviolability of communications.

The Constitutional Court used this case to establish two things:

In the first place, it relativized its previous decisions where an employer's power to control the information exchanged through electronic devices (for example, by an institutional email) was restricted. In that sense, the Court stressed that it had to establish: i. the limits of technological devices in the workplace when they had no connection

with the employee's labor, and ii. the legitimacy of the control performed by companies to the use of those devices.

The Constitutional Court recalled that in a previous judgment (Exp. 3599-2010-PA), it could not determine the limits of that scrutiny; however, if the jurisprudence established by this body were to be followed, then the employers would have no possibility of controlling the content of the communications made through institutional emails. After revisiting the European Court of Human Rights and the Constitutional Court of Spain's case-law, the Court concluded that the employers —in some circumstances, and after complying with some requirements—could monitor and intervene an institutional email. Some of those requirements included respecting the principle of proportionality and communicating the possibility of monitoring to the employee.

Second, the Court analyzed the employer's power to intercept and monitor their employees' communications when using social media. The Court used the facts of this case to stress that even though the communication (the object of monitoring that triggered the dismissal of the employee) was made through the use of a device provided by the employer, social media—like a Facebook account—represented a means of communication not part of the company. In that sense, it stressed that the employer, even when the owner of the device could not intervene in those accounts. Therefore, it concluded that any intervention in private conversations represented a breach of the rights to secrecy and the inviolability of communications.

2. Caso sobre la disolución del Congreso de la República (No. 0006-2019-CC/TC): Conflict of competences on the dissolution of Congress

This decision of the Constitutional Court is a result of the events that took place during a severe political crisis in 2019, which culminated in the closure of Congress by then-President Vizcarra. The then-president of Congress, Pedro Olaechea, subsequently called upon the Court to decide whether Vizcarra had the power to close Congress in this situation. As a first step, the Constitutional Court accepted the case (Expediente 0006-2019-CC/TC Auto 1), then decided the case on January 14, 2020.

The underlying problem was the following: Vizcarra's government considered the selection and voting of new judges of the Constitutional Court to be not transparent. Therefore, the President of the Council of Ministers asked for the vote of confidence. Congress decided to first proceed with its voting on the new constitutional judges. Whereas the first new judge obtained the necessary majority, the second did not. The session of Congress was interrupted and continued only later that day, but then the motion of confidence was debated. In the meanwhile, Vizcarra decided to dissolve Congress according to Article 134 of the Peruvian Constitution. He argued that the parliament had denied the vote of confidence *de facto*. Yet, Congress was voting on the motion of confidence and approved Vizcarra's cabinet. Since the legality of the closure of Congress depended on Congress denying confidence to the cabinet twice, the question of whether the legal opinion, that Congress had *de facto* denied confidence held to be true, was crucial for the case.

In legal terms, the case was presented as a conflict of competences and the Constitutional Court had to decide whether president Vizcarra as the head of the executive power had acted in line with the competences it was provided with by the Constitution. The core question was therefore twofold: first, it was about the vote of confidence, and second about the closure of Congress. This entailed the question of whether the executive had the competence of tabling a motion of confidence concerning the reform of the Act that governs the process of selecting the new judges of the Constitutional Court.

Based on extensive elaborations regarding the concept of the separation of powers (Article 43 Peruvian Constitution), about the vote of confidence (Article 130 and Article 133 Peruvian Constitution) in general and its relation to democracy, the Constitutional Court decided in favor of recognizing the second refusal of the vote of confidence, therefore upholding Supreme Decree 165-2019-PCM (promulgating the closure of Congress). In its reasoning, the Court pointed to the fact that the executive had asked for the suspension of the voting process of the new judges and laid down that if the voting would continue, it would hold it as a *de facto* negation of the vote of confidence. The decision was taken with four out of seven votes of the judges of the Court, which reflects the different opinions of this action from the point of view of constitutional law.

The decision is remarkable in many ways: it largely relies on historical and comparative constitutional evidence, not only concerning different constitutional texts but also concerning "foreign" literature. Second, although being a conflict of competences, the Court seems to also address the people directly, due to the political impact of its decision. Since the decision was taken on January 14 and general elections to Congress were scheduled to take place on January 26, the Court made clear that its decision was not the last word, but that it was up to the people to finally decide the conflict by casting their votes.

3. Caso de la vacancia del Presidente de la República por incapacidad moral (Expediente 0002-2020-CC/TC): Conflict of competences—Vacancy of the Presidency of the Republic on the grounds of "moral incapacity"

The roots of this case go back to the political crisis and the tension between the executive and legislative power in Peru as well. The case was brought to the Constitutional Court by the executive power on September 14, 2020. The Constitutional Court was asked to decide the question of whether Congress had been competent to initiate and further process a motion to declare President Vizcarra morally incapable of further holding the post of the president of the republic. The motion was discussed in Parliament. A couple of days later, on the 18th of September, the first voting on the motion took place, but it did not obtain the necessary majorities. Finally, in a second vote on November 9, the president was declared to be morally incapable to hold the post as the president of the Republic. The Constitutional Court laid down that

it was not up to the Court to decide on the motion, because according to Article 110 of the Code on Constitutional Process, a conflict of competences and jurisdiction to take up such a case can only arise (amongst other reasons) when Congress makes a decision or refuses to do so. In the present case, Congress had neither made nor refused to make a decision. Therefore, the Constitutional Court could not decide on the motion. The Constitutional Courts' ruling not to decide on the motion was issued by a vote of 4-3.

4. Recurso de agravio constitucional contra resolución de fojas 321, de fecha 25 de enero de 2018, expedida por la Sala Penal de Apelaciones de la Corte Superior de Justicia de Apurímac, que declaró improcedente la demanda de habeas corpus de autos (Expediente 00964-2018-PHC/TC Apurimac Victalin Huillca Paniura y otros): Constitutional complaint against a decision of the Superior Court of Justice of Apurímac, which declared a habeas corpus petition inadmissible.

Victalín Huillca Paniura, the applicant, is the president of an organization called Frente Único de Defensa de los Intereses de Chalhuahuacho. In September 2017, together with other applicants, he challenged Article 2 of Supreme Degree 101-2017-PCM which laid down that, during the state of emergency, several fundamental rights of the Peruvian Constitution guaranteeing personal liberty and security, inviolability of the home, and the freedom of assembly and the freedom of movement would be suspended. The appellants aimed to challenge the state of emergency because it restricted them in their freedoms. The state of emergency had been prorogated several times and for some areas lasting up to 15 months. Yet, neither the public procurator of the Council of Ministers, the Preparatory Investigation Court of Cotabambas, nor the Criminal Appeals Chamber of the Superior Court of Justice of Apurímac remedied the situation. The Constitutional Court was therefore asked to annul Artilce 2 of Supreme Decree 101-2017-PCM.

On this occasion, the Constitutional Court laid down the criteria for the declaration of the state of emergency, taking into account the Advisory Opinion of the Inter-American Court of Human Rights OC-8/87 as well as the jurisprudence of the Inter-American Court of Human Rights. These criteria encompass setting a certain duration of the state of emergency and the proportionality of the state of emergency. Before the Constitutional Court could make a decision, the state of emergency was lifted. The Court decided that the application was legitimate and that the executive power should not engage again in actions leading to the filing of a similar lawsuit.

5. Matrimonio igualitario (Expediente 01739-2018-PA/TC): Same-sex marriage

The facts of this case are briefly explained: a same-sex couple—Peruvian and Mexican—were married in Mexico and tried to obtain legal acknowledgment of their marriage in Peru. They asked the (Peruvian) National Registry of Identification and Civil Status (Reniec) to register their marriage. The National Registry of Identification and Civil Status refused to do so. The couple filed an amparo action that was finally (after employing various courts) decided in favor of the couple, and the National Registry of Identification and Civil Status was ordered to register the marriage. Yet, the National Registry of Identification and Civil Status decided to appeal this decision, which led to its annulment because (according to the National Registry of Identification and Civil Status) the action of one member of the couple that had led to the order to register the marriage had been delayed. In the following, the same appellant addressed the Constitutional Court. The Constitutional Court decided that the couple could not register its marriage in Peru and the two men therefore did not obtain legal recognition of their marriage. According to the Constitutional Court the action was inadmissible, which allowed it to issue a very short decision. Four judges out of seven voted in favor of the inadmissibility, three judges voted against it. Contrary to the short decision of the Court, the six separate opinions of the judges were rather long. They show that similar to other countries, this topic continues to be very controversial.

6. Recurso de agravio constitucional contra la resolución de fojas 1005, de fecha 17 de mayo de 2016, expedida por la Primera Sala Penal de Apelaciones de la Corte Superior de Justicia de Cajamarca (Expediente 04038-2016-PHC/TC and Expediente 03882-2016-PHC/TC: Constitutional complaint against a decision of the First Criminal Court of Appeals of the Superior Court of Justice of Cajamarca

The case is linked to the Peruvian farmer Maxima Acuña, who has become known for her struggle against a big mining company. Said company used surveillance installations, such as cameras and drones to surveil Ms. Acuña and her family. Maxima Acuña took action against the company and—after her claim had been rejected— addressed the Constitutional Court, which decided in favor of Acuña. An interesting aspect of this case is the fact that the Constitutional Court laid down rules concerning the use of new technologies (especially drones) concerning the right to privacy.

In this case, the Constitutional Court set up seven criteria for establishing standards for the use of drones regarding privacy. It first stated that the use of drones could be regulated to avoid problems regarding the security and peace of people affected. Second, the Court pointed at the necessity of taking all measures possible to avoid violations of the right to privacy. Third, to do so, the operator of a drone should avoid accessing places where a high risk of a violation of the right to privacy occurs. Such places are, e.g., windows, gardens, terraces, or other private places where the public is not admitted. Fourth, in case of invasions into privacy, the proportionality and rationality of the utilization of drones have to be safeguarded. Fifth, except for situations of emergency, the operator should obtain authorization from the owner of the area the drone will fly over. Sixth, the collection of data shall only be allowed in areas owned or controlled by the operator. Seventh, even in public areas, it should be prohibited to overfly crowds of people.

7. Caso de la ley de ascenso, nombramiento y beneficios para el personal de salud (Expediente 00011-2020-I/TC): Law on promotion, appointment, and benefits for health personnel

In May 2020, Law 31.039 was passed which, according to its first article, aimed at regularizing the processes of automatic promotion in the career ladder, changes of occupational group, changes of career line, appointment, and changes to an indefinite term for health professionals, technicians and assistants, and administrative personnel, and to provide workers with better working conditions. Since the law foresaw automatic promotion in the career ladder (contrary to the former model of promotion on the grounds of a competitive process), it also meant a rise in public expenses. The Court decided that several articles of the law were unconstitutional because Congress had not taken into account the constitutional principles regarding the budget, the prohibition of members of congress on augmenting public expenses, and at least with regard to some provisions, had not respected the principle of cooperation between the legislative and the executive power.

IV. LOOKING AHEAD

For the balance of the rest of the year, it can be said that the main deficit of the national constitutional and democratic system is to be found in both its leaders and in the weakness of its institutions. This is especially reflected in the sensitive cases that the Constitutional Court had to address. All of this demands a generational renewal and new constitutional institutional mechanisms based on social, economic, and political consensus. Much will depend on the next election in April 2021. The election might bring constitutional changes or a completely new constitution. More than 20 candidates are running for the presidency and more than 20 parties have nominated their candidates for Congress. The year 2021 is the anniversary of the Bicentenary of Independence, and the people are hoping to go to the polls to improve the body politic and its health.

V. FURTHER READING

César Landa Arroyo, 'Control y balance de poderes. La cuestión de confianza y la disolución del Congreso peruano' in César Landa Arroyo (ed), D*erechos Fundamentales*. *Actas de las V Jornadas Nacionales de Derechos Fundamentales* (Palestra 2020).

César Landa Arroyo, 'Balance Constitucional 2020' (*Enfoque Derecho*, 4 January 2021) <https://www.enfoquederecho.com/2021/01/04/54910/> accessed 1 March 2021.

Poland

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I. INTRODUCTION

The year 2020 was challenging for the whole world due to the COVID-19 pandemic. One of the essential features of political development in 2020 involved waiving constitutional mechanisms to fight the emergency, which created a direct danger to civic and human rights. In this way, this crisis contributed to the degradation of the rule of law in Poland. However, other important factors, including the undermining of the independence of the judiciary, confirmed the democratic decay therein.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

When dealing with the pandemic, the parliamentary majority, instead of applying the constitutional provisions on extraordinary measures (Chapter XI of the Constitution of 1997), i.e., a state of natural disaster or a state of emergency, decided to introduce an extra-constitutional, long-term, quasi state of emergency on the grounds of ordinary legislation. Constitutional scholars severely criticized such an approach as inadmissible according to the Polish legal system.[1] The parliament passed various anti-COVID-19 measures in an overly hasty, not to say thoughtless, manner. Moreover, a number of necessary limitations of constitutional rights to prevent the spread of the pandemic resulted not from statutory provisions, but rather were introduced by means of government regulations. Such an approach presented a clear misuse of the hierarchy of laws, as the Polish Constitution clearly specifies in Art. 31, para 3. that limitations of constitutional rights and freedoms may be introduced only on a statutory basis. The regulations often contained provisions that breached both ordinary legislation and the Constitution. The academia and opposition parties criticized, among other things, the lack of a statutory basis for the imposition of the obligation to wear masks in public places and the lack of a constitutional basis for the practical ban on assembly. A number of lawyers, including scholars, rightly argued that all the necessary preventive measures should have been introduced by resorting to constitutional standards. The government maintained that announcing declaring a state of emergency like the one set forth in the Constitution would have limited civil rights more severely. Nevertheless, the real explanation of the government's reluctance at that time could be linked with the fact that, according to the Constitution, no general elections can be held during a state of emergency. But postponing the election was not politically convenient for the governmental camp hoping to reinstall Andrzej Duda as president.

The outbreak of the COVID-19 pandemic caused the world to face a disruption that was certainly beyond the challenges of

[1] The first anti-COVID-19 measures were introduced on 14 March 2020 by the Minister of Health on the basis of the Act of 5 December 2008 on Preventing and Counteracting Human Infections and Infectious Diseases.

the financial crisis of the 21st century. The COVID-19 pandemic started during the government's preparations to implement the budget act of 2020.[2] According to the plans of the Ministry of Finance, it was supposed to be the first balanced budget since 1990. As a result, it was announced that the total amount of state revenues, including taxes and other sources of income, should be equal to $435,3 billion PLN (Article 1(1)), and that the total sum of state expenditures should amount to $435,3 billion PLN (Article 1(2)). With that said, the Ministry of Finance declared that "there [would] be no state budget deficit on 31 December 2020." To tackle the economic outcome of the pandemic-induced lockdown starting from mid-March, the government proposed a package of legislation entitled "anti-crisis shields." The measures, including unique benefits for entrepreneurs, quickly resulted in a failure to meet the revenues and expenditures foreseen in the budget act. The shield financing mechanisms involved expenses made by the Polish Development Fund (a state treasury company), which were not formally incorporated into the state budget. The Fund provided public aid through a bonds issuance mechanism not included in the public sector debt. Subsequently, these bonds were purchased by the central bank (National Bank of Poland), theoretically on a secondary market within its monetary policy frameworks. However, formal budget expenditures had to also be extended and the plans of the government for eliminating the deficit were waived. On May 28, 2020, the Sejm passed an act amending the Act on Public Finances,[3] which allowed the suspension of the stability expenditure rule (SRW) to expand the disbursement of public sources beyond former legal limits. As a result, on October 28, 2020, the budget act for 2020 was amended.

In 2020, Poland was supposed to hold the presidential election. On February 5, 2020, based on the Constitution, the Speaker of the Sejm, Elżbieta Witek, issued an order to organize the presidential election, determining that the election would take place on Sunday May 10, 2020. Initially, the electoral process was in keeping with the electoral code provisions, i.e., until the end of the time limit for registering candidates. Due to the COVID-19 pandemic, the State Electoral Commission (SEC) urged all public authorities and electoral committees to cooperate in holding the election. Participants of the electoral process, including opposition parties, realized that voting under these new circumstances would have been complicated. On March 31, 2020, after the above-mentioned SEC appeal, the possibility of correspondence voting was extended to persons in quarantine and persons over the age of 60.

In April, the parliamentary majority passed a special controversial act on specific rules to hold the general election for President of the Republic in 2020. The new act suspended fundamental provisions of the electoral code, depriving the SEC of several vital competences. According to this new law, the election was supposed to be held only by correspondence voting. Mail-in ballots were supposed to be delivered by the Polish national postal operator as ordinary letters, and the collection of the ballots by voters did not require any signature. Such measures raised questions about the transparency of the election and evoked doubts that the secret ballot principle would be preserved. This act endowed the governmental administration with many powers hitherto reserved for the independent commission, including duties connected with deciding the format and printing of the electoral ballots. Taking all that into account, the press and prominent lawyers rightly argued that holding presidential elections in this way would reduce the election to a farce typical of authoritarian states. Public outrage was also caused by the fact that, before the promulgation of the new law (thus, with no legal basis at that moment), Prime Minister Morawiecki, together with the Minister for State Assets Jacek Sasin, engaged in preparing and printing mail-in ballots, which involved costs of approximately $70 million PLN (see below).

The passing of the new law by the Sejm triggered massive criticism from political circles, including Deputy Prime Minister Jaroslaw Gowin himself. As a result, the law never entered into force. Eventually, due to organizational and legal problems, the presidential elections due to take place on May 10 were called off without any clear legal justification. It must be noted that it was the first time in Polish history that a general election ordered in accordance with the Constitution was canceled. Amid this challenging situation, the State Electoral Commission adopted a resolution that the inability to vote on that day should be equivalent to an absence of candidates.[4] Opposition MPs declared that the government, particularly minister Sasin, should be politically responsible for the failure to hold presidential elections. However, given its secure majority in the parliament, the PiS easily rejected a no-confidence motion against Sasin.

Under these circumstances, on June 2, 2020, the Sejm passed the Act on Specific Rules for the Organization of the Elections of the President of the Republic of Poland in 2020. The act introduced a hybrid method of voting, i.e., personally in polling stations and by correspondence. On these grounds, Speaker of the Sejm Elżbieta Witek once again issued an order that called a presidential election and determined that it would be take place on Sunday, June 28, 2020. It is worth mentioning that pursuant to Article 128 of the Constitution of 1997, presidential elections must be held on a public holiday between 100 and 75 days before the end of the term of office of the incumbent president (unless martial law, state of emergency, or state of a natural disaster have been declared). As Andrzej Duda's five-year-long term of office should have expired on August 6, 2020, according to the regular schedule, the first round of

[2] Budget act for 2020 of 14 February 2020 (*Journal of Laws of 2020,* item 571).

[3] Act of 28 May 2020 on the amendment of the act on public finances (*Journal of Laws of 2020,* item 1175).

[4] Resolution no. 129/2020 of the State Electoral Commission of 10 May 2020 on determining the lack of possibility to vote for candidates in the election of the President of the Republic of Poland <www.pkw.gov.pl> accessed 20 Jan 2021.

elections could have been scheduled to take place on a public holiday between April 27 and May 22, 2020. Therefore, the new date determined by the Speaker was not justified in accordance with the Constitution, as the constitutional deadline for holding presidential elections ended on May 22.

According to the act of June 2, the right to stand as candidates for presidential elections was restricted to candidates who were registered for the elections to be held on May 10, 2020, but new candidates were given a limited time for registering.[5] The first round of voting brought the victory of the incumbent President of the Republic, Andrzej Duda, with 43,50% of valid votes. The second result awarded Rafał Trzaskowski from the Civic Coalition with 30,46% of valid votes. As no candidate obtained the majority of votes, another round of elections was held on July 12, 2020, which resulted in the victory for Andrzej Duda with 51,03% of votes against 48,97% of votes obtained by Rafał Trzaskowski.

All the questions and challenges mentioned above resulted in 5,800 complaints. In comparison with the 2020 presidential elections, after the elections of 2015 there were only 58 complaints. Having said that, only 92 complaints were considered to be justified in whole or in part. Nevertheless, the Extraordinary Control and Public Affairs Chamber of the Supreme Court – controversial because of its flawed composition – declared that these complaints did not impact the overall result of the election. Finally, by a resolution of August 3, 2020, the chamber confirmed the victory of Andrzej Duda in the presidential election. However, it was clear to many political commentators that the 2020 election was not entirely fair: first, due to many irregularities connected with the election's date and, second, because of the involvement of the public media and the state apparatus on the side of the incumbent. President Duda's win dashed the hopes of the democratic opposition of abandoning populism and an illiberal course in domestic and international politics.

In the shadow of the electoral affairs and the pandemic, the PiS government went on to use recent legislation (passed in recent years) to persecute independent judges. The government took several steps to prevent challenging the legal status of the judges appointed by the unconstitutional National Council of the Judiciary (the so called neo-NCJ). The assessment of new judicial appointments also had implications for the Supreme Court's Disciplinary Chamber's status – the cornerstone of the entire disciplinary mechanism, composed entirely of new appointees. Both issues have been the subject of several cases pending before the Court of Justice of the European Union (CJEU).

As of 2020, this court's most crucial judgment was ruled on April 8, 2020 (C-791/19). The CJEU ordered an interim measure that obliged Poland to immediately suspend the application of the national provisions on the powers of the Supreme Court's Disciplinary Chamber concerning judicial disciplinary cases. From the beginning, this ruling has been obeyed only partially, as the Disciplinary Chamber still operated in judicial immunity cases. Discretional waiving of the immunity also played an important role in persecuting judges who dared to criticize governmental actions that intimidated the judiciary. On the basis of the Disciplinary Chamber rulings, three well-known judges – justice Paweł Juszczyszyn, justice Igor Tuleya, and justice Beata Morawiec – were suspended from their duties. In turn, on April 29, the European Commission initiated a new infringement procedure against Poland regarding the law aimed at disciplining judges who question the judicial reforms introduced by the government, the so called "muzzle law," that entered into force on February 14, 2020.[6]

At the end of 2020, public debate in Poland was also dominated by the announcement that the Polish and Hungarian governments would use their power to veto the European Union's multi-annual budget and the European recovery fund. The threat of the veto stemmed from a desire to block the conditionality mechanism designed to link the allocation of funds to the fulfilment of the rule of law in EU member states. Both countries eventually withdrew their veto after measures adopted were mitigated.

The court cases described below demonstrate the continuing important role of the judiciary in restraining public authority confirming that many judges, against all odds, have remained independent.

III. CONSTITUTIONAL CASES

1. Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labor Law and Social Security Chamber of January 21, 2020 and the judgment of the Constitutional Tribunal of April 20, 2020 (file reference U2/20)

The resolution intended to solve the question raised on the interpretation of the provisions of the Code of Civil Procedure and the Code of Criminal Procedure concerning the unlawful composition of a court. According to this resolution, "[a] court formation is unduly appointed within the meaning of Article 439(1)(2) of the Code of Criminal Procedure or a court formation is unlawful within the meaning of Article 379(4) of the Code of Civil Procedure also where the court formation includes a person appointed to the office of a judge of the Supreme Court on the application of the National Council for the Judiciary formed following the Act of 8 December 2017 amending the Act on the National Council for the Judiciary and certain other Acts (Journal of Laws of 2018, item 3)." The resolution of the Supreme Court

[5] This rule was applied by the main opposition camp, the Civic Platform, which proposed a popular Mayor of Warsaw, Rafał Trzaskowski as a candidate instead of the former Sejm Speaker Małgorzata Kidawa-Błońska.

[6] Act of 20 December 2019 amending the Act - Law on the System of Common Courts, the Act on the Supreme Court, and certain other acts (*Journal of Laws*). See P Mikuli, G Kuca, and M Pach, 'Poland' in R Albert, D Landau, P Faraguna, S Drugda (eds), *The 2019 Global Review of Constitutional Law* s. (Boston 2020) 269.

allowed ordinary courts to evaluate the status of new judges appointed by the neo-NCJ on a case-by-case basis. The government criticized this approach and took all steps to invalidate the resolution. This was possible by taking advantage of the captured Constitutional Tribunal. In fact, in its judgement of April 20, 2020, the Constitutional Tribunal quashed the resolution of the Supreme Court as unconstitutional, although the majority of constitutional scholars expressed the opinion that the Tribunal acted beyond the scope of its competence. It is also worth noting that the intellectual justification of this judgment remained deficient and was based on a caricatured reading of both the principles of the Polish Constitution and EU law.

2. The judgment of the Voivodeship Administrative Court (VAC) in Gliwice of July 14, 2020 – Repealing the anti-LGBTQ resolution (file reference III SA/Gl 15/20)

Since 2019, local governments across the country have created dozens of largely symbolic "LGBT ideology-free" zones through resolutions aimed at stigmatizing LGBTQ people. The Voivodeship Administrative Court (VAC) in Gliwice upheld the complaint of the Ombudsman and repealed this kind of resolution passed by the Commune Council in Istebna. The resolution adopted a declaration to stop the "LGBT ideology." The resolution, referring to a "centuries-old culture based on Christian values," indicated that the community would not allow itself to be imposed on by the "exaggerated problems and artificial conflicts brought about by the LGBT ideology."

According to the VAC, the Istebna Commune Council exceeded the scope of competence of a commune council and interfered with the powers of other public administration bodies. The VAC ruled that the Council acted without legal justification and violated the constitutional principle of legality, which stipulates that public authority organs operate on the basis and within the limits of the law. The VAC further stated that the resolution restricted constitutional rights and freedoms, which was undoubtedly prohibited, as their limitation may only be regulated by way of legislation. The court argued that the resolution excluded its inhabitants from the local government community due to their sexual orientation and gender identity. In addition, it unlawfully interfered with the rights and freedoms of non-heteronormative and transgender people, violated their dignity, and restricted their right to private life based on their sexual orientation and identity. Referring to discrimination against LGBT communities, the VAC indicated that a phenomenon such as "LGBT ideology" does not exist and that there is no ideology unifying these communities.

It must be noted that this judgment changes the previous jurisprudence of administrative courts which rejected complaints against the resolutions of the decision-making bodies of the local government units regarding "LGBT-free zones." The most important aspect of this decision is that, in accordance with the court, the Istebna Commune Council issued the resolution without any legal justification and in violation of several constitutional principles, including non-discrimination and the obligation to respect private life.

3. The judgment of the Voivodeship Administrative Court (VAC) in Warsaw of September 15, 2020 – Invalidity of the decision of the Prime Minister on the postal elections (file reference VII SA/Wa 992/20)

The VAC in Warsaw, having examined a case of complaints by the Ombudsman and the Free Society Foundation against the Prime Minister's decision to order the national postal operator (Poczta Polska SA) to conduct the 2020 presidential election by postal voting, has overturned the appealed decision.

In the reasoning of the decision, the VAC indicated that the appealed decision was issued in gross violation of the law and without legal basis. The court stated that, on the day the decision was issued and in conformity with Article 157 §1 of the Electoral Code, the only competent authority appointed to organize and conduct the 2020 presidential election was the SEC. Moreover, Article 187 §1 of the Electoral Code indicates that the National Electoral Office (NEO) should support the SEC. This meant that the organizational, administrative, financial, and technical requirements connected with the organization and carrying out of the elections was the sole responsibility of the NEO. The court argued that Poczta Polska SA could not have undertaken any actions in this regard. The court held that, on the date the challenged decision was issued, there were no statutory provisions that excluded the application of Article 157 §1 and Article 187 §1 of the Electoral Code and transferred those competences to a different authority.

The court concluded that the Act of March 2, 2020 on special measures related to the prevention, counteraction, and fight against COVID-19, other infectious diseases, and emerging crises could not constitute a legal basis for the Prime Minister's decision.

4. Resolution of the Supreme Court of September 16, 2020 – Individual assessment of the criterion of "service for a totalitarian state" (file reference III UZP 1/20)

The Supreme Court's Chamber of Labor and Social Security Law, composed of seven judges, considered the legal issue regarding the government's law cutting pensions for communist officers. It adopted a resolution according to which the criterion of "service for a totalitarian state" set out in the legislation concerning the reduction of pensions of former officers of the communist security service should be assessed on a case-by-case basis.

The Supreme Court ruled that a particular officer's actions must be taken into account, i.e., verification must be made regarding a possible violation of fundamental human rights and freedoms. The judgment of the Supreme Court meant that those aggrieved by this act received a chance to obtain a fair settlement upon retirement without being subject to collective responsibility. The Supreme Court emphasized that "the state was entitled to make settlements with the former regime, which was effectively discredited in democratic conditions."

However, deprivation of pension rights may be applicable to those who, while serving for the totalitarian state, violated fundamental human rights and freedoms. This is the only fair solution because assigning responsibility

without assessing specific actions is clearly incompatible with the preamble to the Polish Constitution: "[...] mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland, desiring to guarantee the rights of the citizens for all time and to ensure diligence and efficiency in the work of public bodies [...]."

The Supreme Court pointed out that these standards clearly distinguish the current behavior of the authorities from the methods undertaken by totalitarian states. A democratic state ruled by law cannot use non-democratic methods to settle accounts with the past. If an officer of the security services violated human rights, the authorities must consider that their retirement pension may be subject to change. Nonetheless, the place of work and the period of service cannot be the only criterion to deprive an official of retirement rights.

5. The judgment of the Constitutional Tribunal of October 22, 2020 (file reference K 1/20)

The Constitutional Tribunal ruled that abortions in the case of fetal malformations violate Article 38 (right to protection of life), Article 30 (protection of human dignity), and Article 31, para. 3 (conditions for limitation of rights) of the Constitution of the Republic of Poland of 1997.

This ruling shattered the abortion compromise of the 1990s, which in practice meant that Poland had one of the most restrictive abortion laws in Europe. Abortion was permitted only if the pregnancy threatened the pregnant woman's life or health, if the pregnancy resulted from a criminal offense, or if there was a high probability of severe and irreversible fetal disability or terminal illness. The latter reason for abortion was invalidated by the decision of the Constitutional Tribunal, leading to further restrictions on the permissibility of abortion.
The decision was extremely controversial not only because of its substantive content but also because it was issued by a politically captured institution in the midst of a pandemic crisis. The part of Law and Justice (PiS) decided to use a puppet court in a bid to absolve itself of responsibility for this unpopular decision, all under pressure from far-right movements within its ranks. The reasoning for this judgment, published in January 2021, was full of ideological banality instead of a decent constitutional analysis. In fact, the ruling of the Constitutional Tribunal sparked mass protests at the end of the year, which were often violently dispersed by police riots under the guise of concerns related to the pandemic.

IV. LOOKING AHEAD

The steps taken by PiS in 2020, equally in terms of further eroding the independence of the judiciary, calling an election chaotically, and utilizing unconstitutional measures to combat the pandemic, perpetuate the crisis of the rule of law. The protests connected with the Constitutional Tribunal's verdict to an extent consolidated the government's opponents, but they have not contributed to a significant drop in the popularity of PiS, also due to the skillful use of propaganda mechanisms in the captured public media. In 2021, significant CJEU rulings are expected on the disciplinary regime of judges, judicial appointments including the status of persons elected by the neo-NCJ, and the systemic position of the Disciplinary Chamber. It is also likely that the European Court of Human Rights will have the chance to rule on the changes introduced to the Polish judiciary system, as several complaints in this respect were lodged in the previous years. The beginning of 2021 has also revealed some disagreements within the ruling camp, which may give hope for an end to the zeal in pushing through further controversial plans contributing to the decay of democracy in Poland.

V. FURTHER READING

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Kustra-Rogatka A, 'Populist but not Popular. The Abortion Judgment of the Polish Constitutional Tribunal' (*VerfBlog*, 3 November 2020) <https://verfassungsblog.de/populist-but-not-popular/>.

Mikuli P, 'The Façade of State Organs in Contemporary Autocratic Regimes: The Case of the Polish Parliament' in Daly TG and Sadurski W (eds), *Democracy 2020: Assessing Constitutional Decay, Breakdown & Renewal Worldwide* (2020) 180–83.

Portugal

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I. INTRODUCTION

Globally, 2020 was a challenging year and Portugal was not an exception to this trend. In the most recent years, the economy had been greatly improved following the severe crisis of 2011. The COVID-19 pandemic and the restrictive measures that were subsequently implemented not only hindered this growth, but also created an unprecedented social and sanitary crisis.

The pandemic led, for the first time since the transition to democracy, to a declaration of a state of emergency (followed by many others). Meanwhile, as we will see below, an administrative state of exception was also declared whereby the restriction of fundamental rights was allowed, but without the associated guarantees of a state of constitutional emergency.

Some of the measures implemented during this period have already been reviewed by the courts, which led the way to rulings of unconstitutionality due to the lack of the necessary powers. Furthermore, and for the first time, the Portuguese Constitutional Court (PCC) took a stand concerning the relation between Portuguese law (more specifically, the norms enshrined in the Portuguese Constitution) and European Union law. This landmark decision will, no doubt, elicit the interest of Portuguese and foreign doctrine and will, certainly, be considered in new judgements delivered by other Portuguese courts. Other rulings, regarding the right of pre-emption of tenants and the right of appeal in the case of a criminal conviction, are also noted.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The design of the constitutional exception

In the same way the Portuguese Constitution enshrines its amendment rules, it also establishes the substantial and procedural guidelines of the state of constitutional exception. Accordingly, the domestication of the state of exception joins the domestication of amendment rules.[1]

To prevent a unilateral suspension of rights, the Constitution provides a checks and balances mechanism through which the state of emergency is agreed between the three main political institutions: the President declares, the Parliament authorizes, and the Government executes the state of emergency. Furthermore, the Constitution puts a cap on the rights that may be suspended, besides imposing a time-limit of fifteen days (which can be renewed), and the obligation to respect proportionality. During a constitutional emergency, the Parliament cannot be dissolved (article 172 of the Constitution) and constitutional amendments (article 289 of the Constitution) and referenda[2] are prohibited.

Unlike the Spanish and the Brazilian Constitutions, that identify which rights can be suspended,[3] or the German *Grundgesetz,* that does not make such determination,[4] the Por-

[1] The rules on constitutional exception are distributed throughout the constitutional text (articles 19, 138, 172, 275, no. 7, 289).

[2] Article 9 of the Act on Referendum (Act no. 15-A/98, of April 3rd, amended by Act no. 3/2017, of June 18th).

[3] Article 136, § 1 of the Brazilian Constitution and articles 17, 18, § 2 e 3, 19, 20, § 1, a), and § 5, 21, 28, § 2, and 37, § 2 of the Spanish Constitution.

[4] Articles 115-A and ff. of the *Grundgesetz.*

tuguese Constitution has adopted a negative design: the Constitution explicitly mentions which rights cannot be suspended.[5] As stated in article 19, no. 6, the rights to life, personal integrity, personal identity, civil capacity, and citizenship, the non-retroactivity of criminal law, and freedom of religion can never be suspended.

2. Ordinary emergency law

The state of emergency is regulated in the ordinary legal arena, namely in the Civil Protection Framework Act,[6] in the Health Framework Act,[7] and in the Act on Public Vigilance of Health Risks.[8] The Civil Protection Framework Act authorizes some restrictions on fundamental rights such as temporary requisition of products and services and limitations to the freedom of movement of persons and vehicles. The Health Framework Act allocates powers to health authorities to address public health hazards, including the determination of confinement of individuals, the requisition of health facilities and professionals, and the decision to close public and private facilities. The Act on Public Vigilance of Health Risks focuses on public health emergencies and allows the suspension of activities.

3. Alternating between constitutional emergency and administrative exception

On March 18th, 2020, just two weeks after the first confirmed cases of COVID-19 in Portugal, the President of the Republic declared the state of emergency. The presidential decree enacted the partial suspension of certain fundamental rights such as cross-border circulation, the right to strike, and the rights to assemble and protest.[9] Notwithstanding the several declarations of emergency that took place during the following months, this was, in our view, the only situation in which the declaration of emergency did not consubstantiate a *constitutional obligation.* From a political standpoint, however, as Portugal was experiencing a disruptive moment of uncertainty and widespread panic – since, at that time, the pandemic was out of control in Spain and in Italy – this step forward was, almost certainly, the best option.

After this preventive state of emergency, the next two renewals of the constitutional state of emergency on April 2nd and 17th, took place in a more aggravated pandemic context. The emergency became reactive and consisted of further restrictions to fundamental rights and freedoms.

On May 3rd, the constitutional emergency ended and restrictions were relaxed to reopen the economy. While Portugal adjusted to constitutional normality, a degree of administrative exception was held via administrative states of alert, contingency, and calamity.[10] Between April and November, several COVID-19 related measures were implemented by Resolutions of the Council of Ministers, therefore escaping parliamentary appreciation (article 169 of the Constitution) and the possibility of veto or initiation of an anticipatory constitutional review of legislation by the President of the Republic (article 136 of the Constitution). In fact, since the restriction of fundamental rights belongs to the Parliament, it should have been previously authorized.[11] To sum up, administrative exception somehow masked a *de facto* constitutional emergency. The irony was that people still endured the disadvantages of a quasi-constitutional emergency (serious restrictions on fundamental rights) without having obtained its benefits (the mutual controls of checks and balances granted by the constitutional exception's design).

On November 6th, as the pandemic situation aggravated, Portugal returned to a state of constitutional emergency. The emergency decree was quite surgical, as the severity of the measures depended on the number of infected people per municipality. The state of constitutional emergency remains in force as we are writing this report.

4. Concerns

4.1. Checks and balances

Amid constitutional emergencies, the reinforcement of governmental powers is justified by the fact that executive powers are better equipped to immediately address the societal struggles of a situation of exception. Unsurprisingly, judicial power is passive and legislative power depends on the amount of time required for proper reflection and deliberation.[12]

The head of state also plays a relevant role in enforcing checks and balances. Unlike the veto

[5] Catarina Santos Botelho, "COVID-19 and stress on fundamental rights in Portugal: An intermezzo between the state of exception and constitutional normality" (2020) 3 *Revista Catalana de Dret Públic* 183 at 184-185.

[6] Act no. 27/2006, of July 3rd, *Diário da República,* 1st Series, no. 126.

[7] Act no. 48/90, of August 24th, *Diário da República,* 1st Series, no. 195.

[8] Act no. 81/2009, of August 21st, *Diário da República,* 1st Series, no. 162.

[9] Presidential Decree no. 14-A/2020, of March 18th, *Diário da República,* 1st Series, no. 55.

[10] According to the Civil Protection Framework Act, the administrative escalator of exception consists of three degrees of restrictiveness of measures taken by the Government. The state of alert is the less restrictive one (articles 13 to 15), while the state of contingency is an intermediate state (articles 16 to 18) and, finally, the state of calamity is the most limitative of the three (articles 19 to 31).

[11] Article 165, no. 1, b), states that: "Unless it also authorises the Government to do so, the Assembly of the Republic has exclusive competence to legislate on rights, freedoms, and guarantees".

[12] Gonçalo Almeida Ribeiro, "O estado de exceção constitucional", *Observador,* March 25th, 2020, available at: https://observador.pt/especiais/o-estado-de-excepcao-constitucional/

[13] According to article 136, no. 2: "If the Assembly of the Republic confirms its vote by an absolute majority of all the Members of the Assembly of the Republic in full exercise of their office, the President of the Republic must enact the legislative act within a time limit of eight days counting from its receipt".

regarding parliamentary legislation, which can be surpassed,[13] the veto concerning governmental legislation is definitive (article 136, no. 4).[14] Significantly, the President vetoed two diplomas related to changes in parliamentary activities: (i) the reduction of parliamentary debates with the Prime-Minister concerning European matters; (ii) and the raise in the number of signatures required for petitions from citizens to be debated in the Parliament's plenary (from 4,000 to 10,000). The President, Marcelo Rebelo de Sousa, considered that these amendments would be detrimental to the public perception of the national embeddedness in the European Union and to the vitality of democracy through the participation of citizens.

4.2. The length of the constitutional emergency

Empirical studies reveal that extended constitutional emergencies increase the risk of democratic erosion and autocratization by decree.[15] What could be done to prevent this situation? At a more fundamental level, a pandemic legislation must be approved, as the existing legislation is not able to adequately address the current pandemic. Nevertheless, pandemic legislation will not magically substitute states of constitutional emergency. In fact, some measures are so severe that they can only be addressed by constitutional emergency.[16]

How can the protection of human rights be combined with the strict constraints of managing the COVID-19 pandemic? In most respects, the key to this paramount task can be found in the delicate balance of ensuring public health without falling into the extreme of a "fascistoid-hysterical hygienic state" *(faschistoid-hysterischen Hygienestaat)*.[17]

III. CONSTITUTIONAL CASES

1. COVID-19 Jurisprudence[18]

After the expiry of the constitutional state of emergency, a Portuguese citizen travelled to the archipelago of the Azores[19] and was compulsorily confined (following a measure approved by the regional government of Azores) for a period of fourteen days, at his own expense. It should be stressed that measures implemented to address the COVID-19 pandemic were stricter in the archipelagos of the Azores and Madeira than in continental Portugal.

Disagreeing with such confinement, the citizen lodged a writ of *habeas corpus* against his (perceived) arbitrary detention. The Court of Ponta Delgada (Azores) ruled that the order of compulsory confinement violated freedom of movement and was organically unconstitutional. In fact, since the confinement order took place in the aftermath of the state of emergency, the restriction of this fundamental right could only have been legislated by the Parliament or the Government (with prior authorization from the Parliament).[20] Furthermore, the court held that imposing a confinement of a citizen that had not tested positive for COVID-19 disrespected the principle of proportionality.

Although this decision lacked any direct effect concerning people that were not involved in this action (it only had an *inter partes* effect), the President of the Government of Azores immediately announced new measures to contain the spread of COVID-19. As a result, compulsory confinement was replaced by voluntary confinement.

Later on, this case was brought to the PCC, becoming its first COVID-19 related decision, and the Court ruled unanimously that the regional norms which imposed the mandatory confinement were organically unconstitutional.

2. The principle of the precedence of European Union law[21]

In this judgement, issued under a constitutional review applied to a concrete case, the PCC addressed for the first time the issue of the principle of the precedence of European Union law vis-à-vis constitutional norms.[22]

In this case, a Portuguese firm was contesting the interpretation given by the Court of Justice of the European Union (CJEU) to article 19, no. 1, a), of the Commission regulation (EEC) no. 2220/85.

The norm in question determined that, when applying to export subsidies (to third countries), companies that wish an advance payment of such amounts must provide a bank guarantee. And, when asked, in a preliminary ruling, how long should this bank guarantee stand for, the CJEU stated that it could still be triggered when, after the prod-

[14] Although a Government with a parliamentary majority can always surpass the presidential veto, through article 197, no. 1, d): "In the exercise of its political functions the Government has the competences to present and submit government bills and draft resolutions to the Assembly of the Republic". Therefore, the Government can "copy-paste" its law-decree into a draft resolution to the Parliament. If the Parliament approve the draft and the subsequent act, the President can veto that act, but the Parliament is able to surpass the veto by an absolute majority (article 136, no. 2).

[15] Anna Lührmann and Bryan Rooney, "Autocratization by Decree: States of Emergency and Democratic Decline", (2020) *Comparative Politics* 1.

[16] It is relevant to emphasise that fundamental rights' suspensions can only occur within constitutional emergencies.

[17] Hans Michael Heinig, "Gottesdienstverbot auf Grundlage des Infektionsschutzgesetzes", *Verfassungsblog,* March 17th, 2020, available at: Gottesdienstverbot auf Grundlage des Infektionsschutzgesetzes – Verfassungsblog.

[18] Ruling of the PCC no. 424/2020, of July 31st (Justice José António Teles Pereira).

[19] Portugal is a partial and homogeneous regional unitary state. The archipelagos of Azores and Madeira enjoy limited legislative, executive, and international powers.

[20] See articles 18, 27, no. 3, 44, and 165, no. 1, b), of the Portuguese Constitution.

[21] Ruling of the PCC no. 422/2020, of July 15th (Justice José António Teles Pereira).

[22] Stressing the unprecedented nature of this decision, within the Portuguese jurisprudence, and the particular context surrounding its emanation – see Rui Tavares Lanceiro, "The Portuguese Constitutional Court judgment 422/2020 – a 'Solange' moment?", available at: https://eulawlive.com/op-ed-the-portuguese-constitutional-court-judgment-422-2020-a-solange-moment-by-rui-tavares-lanceiro/.

ucts are exported and customs are cleared, the non-compliance of other conditions (imposed for such payment) is verified, namely the lack of sound, fair, and marketable quality of the products.

However, the Portuguese undertaking considered that the CJEU's opinion was in violation of the principle of equal treatment (constitutionally enshrined in article 13) since it led to a different treatment of exporters, depending on whether they choose to receive such benefit before or after exporting, given that the provision of a bank guarantee (with all its associated costs) it is not required of the latter.

After exposing the state of the art concerning the principle of the precedence of European Union law, not only in the CJEU's jurisprudence, but also in the jurisprudence of other Member States' courts, the PCC recognized the need for this kind of principle, since, in its absence, the process of European construction would have been jeopardized due the assertion of regional idiosyncrasies and particularisms. The Court also stressed that this principle does not reflect a higher hierarchical position of European Union law. In fact, such precedence is recognized on matters where legislative powers belong to the European Union and contradictory national law is not void, but rather inapplicable. Furthermore, even though the CJEU has stated this principle in an absolute fashion, on several occasions its decisions have been built in a conciliatory manner, allowing the accommodation of national sensibilities and autonomy.

The Court then recalled article 7, nos. 5 and 6, and article 8, no. 4, of the Portuguese Constitution. In fact, while the first set of norms allows for the European integration, article 8, no 4, details its consequences. And according to the latter, European Union treaties and norms are applicable in the Portuguese legal order as defined by European Union law. Nevertheless, and inspired in the *controlimiti* doctrine, this acceptance of the precedence principle was made under the condition that EU law norms respect the fundamental principles of a democratic state based on the rule of law.

The PCC also recognized that the European project generally upholds and promotes such fundamental principles and values, namely through the CJEU, whose jurisdictional control is similar to the one provided by the PCC. Therefore, the PCC's jurisdiction will only apply to cases where European Union law is incompatible with a fundamental principle of a democratic state based on the rule of law that does not enjoy, within European Union Law, the same protection it is accorded in the Portuguese Constitution, namely because it stems from the Portuguese constitutional identity.

When such a scenario does not occur, European Union law enjoys immunity from the Portuguese constitutionality review system and the CJEU holds exclusive jurisdiction concerning its interpretation and validity control.

The Court also added that a mere reference to these principles is insufficient since the claim should have enough axiological density to elevate such references to a fundamental and national identity specificity level.
And considering that in this case the applicant's claim was based on a violation of the principle of equal treatment (a principle present both in the constitutional and European Union law levels, and similarly safeguarded by the PCC's and CJEU's jurisprudence), the PCC decided to abstain from deciding on the matter.

3. The right of pre-emption of tenants[23]

The PCC analyzed the constitutional compliance of article 1091, no. 8, of the Civil Code, under a subsequent abstract review of constitutionality, demanded by a group of members of Parliament.

According to this norm, lease contracts for housing purposes, concerning merely part of a building (e.g., part of a house or of an apartment) not set up in horizontal property, granted a pre-emption right on behalf of the tenant, should the owner decide to sell said building.

The claimants noted that the buyer of a building (an apartment or a house) is, generally, interested in acquiring it in whole. Therefore, the existence of a pre-emption right concerning merely a share of such building will most likely prevent the owner from selling it to a third party, leading to a disproportionate restriction of the fundamental right of ownership.

The PCC started by stressing that the pre-emption right, particularly regarding lease contracts for housing purposes, aims to protect the fundamental right to housing (article 65 of the Portuguese Constitution), facilitating tenants' access to owner-occupied housing. This right also provides protection from the loss of accommodation frequently provoked by real estate speculation.

However, the pre-emption right enshrined in article 1091, no. 8, did not equalize the tenant to the prospective buyer, since the latter aims at buying the whole building (and not just a share of it). A circumstance which is not in line with the typical characteristics of pre-emption rights.

And although the PCC admitted that the right to ownership may be restricted to accommodate other social values, the right to transfer one's ownership demands, in principle, contractual freedom and private autonomy. Therefore, the limitation of such right will only be acceptable when a space for self-determination is ensured.

And while pre-emption rights do limit contractual freedom, they do not interfere with the right to transfer one's ownership given that, from the owner's perspective, selling to the tenant or to a third party is economically indifferent. Yet, this was not the case of the pre-emption right analyzed in this instance, since it effectively prevented the owner from selling the whole building, forcing the creation of a co-ownership scheme.

In sum, the Court concluded that the legal norm under analysis strongly restricted the right to transfer ownership (and, therefore, the right of ownership). And it failed the pro-

[23] Ruling of the PCC no. 299/2020, of June 16th (Justice Lino Rodrigues Ribeiro).

portionality test since, in relation to its aimed goals, such restriction was not deemed to be adequate (since this pre-emption right did not ensure the access of the tenants to the full ownership of buildings, and, therefore, failed at ensuring housing stability), nor necessary (since less burdensome measures were available), nor, still, proportionate *stricto sensu* (since it did not strike a balance between the interests of the tenant and the owner, disproportionally hindering the latter).

Taking all these arguments into account, the PCC declared the unconstitutionality of article 1091, no. 8, of the Civil Code, with generally binding effect.

4. Right of appeal[24]

In this ruling, issued under a constitutional review applied to a concrete case, the PCC analyzed the interpretation given to articles 400, no. 1, e), and 432, no. 1, of the Portuguese Code of Criminal Procedure, according to which there is no right of appeal to the Supreme Court of Justice regarding rulings of the Courts of Appeal when the defendant is sentenced to the payment of a fine, even if the Courts of first instance produced a judgment of acquittal.

The Court noted that this regime reflects the intention of reserving the access to the Supreme Court of Justice to cases with higher penal merit, to ensure that all cases are ruled in due time.

Quoting its previous jurisprudence, the PCC remembered that while it is possible to limit the right of appeal to promote the expediency and the efficacy of the administration of justice, such restrictions cannot compromise the essential contents of the right, particularly when facing the first conviction within the process at stake.

The Court also stressed that even though the conviction, to which the analyzed norms refer, concerns the payment of a fine, this circumstance may still put a heavy burden on the defendant (and the defendant's fundamental rights, such as the right to property, the right to freedom of personal development, or the right to personal integrity). And to prevent the defendant from appealing the first conviction, in the process at stake, would mean that an unprecedented decision would be immune to reappreciation. To allow this lack of scrutiny would be incompatible with the jurisdictional function.

In conclusion, according to the PCC, the imposition of absolute limits on the right of appeal in this particular situation constitutes an unsubstantiated restriction to the right of appeal, due to the absence of compelling grounds to hinder the reexamination of convictions. For this reason, the aforementioned interpretation of articles 400, no. 1, e), and 432, no. 1, of the Portuguese Code of Criminal Procedure was deemed unconstitutional.

IV. LOOKING AHEAD

By the end of 2020, the Parliament passed an Act approving euthanasia, with 136 votes in favor, 78 against, and 4 abstentions. Upon receiving this legislation, the President of the Republic had three options: to promulgate, to veto, or to initiate a prior review of constitutionality. The President chose the latter since, in his opinion, regarding some aspects, the diploma was "excessively imprecise" and could lead to "legal uncertainty." The PCC's ruling will be known by the end of February 2021.

This year, the Court will also analyze other important issues, under the abstract review of constitutionality, in a number of cases launched by parliamentary initiative. One of them concerns the teaching of gender identity issues in public schools. Another aims at the recent changes to the Labor Code that expanded the trial periods in contracts entered into with younger people and reduced the duration of fixed-term labor contracts.

The Ombudsperson, Maria Lúcia Amaral, having the power to initiate an abstract review of constitutionality, sent two diplomas to the PCC, one regarding the exemption from rent payment established for tenants of shopping centers (during the confinement period) and another concerning data preservation in the communications sector.

V. FURTHER READING

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[24] Ruling of the PCC no. 31/2020, of January 16th (Justice Mariana Canotilho).

Romania

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I. INTRODUCTION

2020 was an electoral year in Romania. Local and general elections were due to take place in June and December, respectively. A permanent conflict between the Parliament and the Government arose throughout the year and the President of Romania chose to play an active role in the political game. However, the COVID-19 crisis brought changes to the electoral plans of political actors and set aside the recurring debates of the previous years, especially the independence of the judiciary and constitutional amendments. Regarding the Constitutional Court, the trend in 2020 was a decrease of constitutional conflicts and an increase of dissenting opinions.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Constitutional Issues Regarding Elections

A. The governmental crisis in January-March and the issue of early elections

Towards the end of 2019, a vote of no confidence brought a change of Government. Together with presidential elections, won by the incumbent of the position, this politically aligned both branches of the executive, which faced a hostile legislative. Local elections were planned to take place in May 2020 and parliamentary elections in November 2020. However, the COVID-19 pandemic and the fragility of the governing coalition proved to be a serious challenge for the Romanian political class.

Early in 2020, with a fragile and contextual support in Parliament, the Government decided to govern by issuing emergency ordinances. A vote of no confidence passed on February 5 led to an *ad interim* Government in a politically and otherwise complicated situation. On the one hand, the President of Romania, a minority of MPs, and some members of the ad interim Government were actively looking for ways to bring about a political shift in Parliament through anticipated general elections, the most brave decision considering the high degree of improbability of such an outcome under the current Constitution (Article 89). On the other hand, the Prime-Minister and the majority in Parliament used delaying tactics, keeping an eye on the sanitary crisis to come. By mid-February, the *ad interim* Government adopted a piece of delegated legislation in order to facilitate the organization of anticipated general elections. The Ombudsman challenged the constitutionality of this emergency ordinance and, in Decision 150/2020, the Constitutional Court found that it was breaching legal certainty because it made possible the simultaneous organization of parliamentary and local elections, thus puzzling the voters. A dissenting opinion adopted by one judge explained why the simultaneous organization of different types of elections is not unconstitutional and, in fact, regular parliamentary and presidential elections will actually take place in Romania in 2024.

Against this background, political consultations, set forth in Article 85 of the Romanian Constitution and meant to end-up with the designation of a candidate to the office of Prime-Minister, have been stalled based on political statements made by the President of Romania. In this sense, the President of Romania explicitly referred to early elections as one of the possibilities offered by the Constitution in order to sort out the constitutional crisis resulted from the vote of no confidence of February 5. The Speakers of the two Houses

of Parliament asked the Constitutional Court whether such political declarations obstructed on-going political consultations. In Decision 85/2020, the Constitutional Court considered that the President of Romania has conducted political consultations "formally" and obliged him to start them again, only this time also respecting his "obligation of loyal cooperation." A dissenting opinion signed by two judges explained why political declarations cannot trigger legal conflicts of constitutional nature and how the designation of a candidate to the office of Prime-Minister was a problem for the political crisis and not an institutional blockage.

Decision 85/2020 has been officially published on February 24, when the first cases of COVID-19 started to be registered on Romanian soil. Therefore, amid political distrust and out of necessity, the majority in Parliament reluctantly acquiesced on March 14 to grant confidence to a minority Government in a sort of political truce meant to last only during the sanitary crisis. On March 16, a state of emergency was declared and a total lockdown was imposed on March 22. Thus, a political crisis was narrowly avoided while the sanitary crisis was taking over.

B. The postponement of local elections from June to September

Regular local elections were scheduled to take place on June 6, 2020. However, since the electoral campaign should have started at least 45 days earlier, *i.e.* during the second month of total lockdown and while Romania was still in a state of emergency, the Government decided to postpone local elections until September 27. The duration of the mandate of locally elected officials being fixed through an organic law is technically possible without tampering with the Constitution. The extension of the mandates of locally elected officials has been decided through a piece of delegated legislation adopted by the Government on April 8, which was amended during its adoption by Parliament so as to fit the political interests of the political parties opposing the Government. The Government challenged the amendments in the Constitutional Court.

Later in April, the majority in Parliament, which opposed the Government, proposed and passed into law another bill on the same matter, but did not coordinate it with the piece of legislation proposed by the Government and already amended and approved by Parliament. The minority in Parliament supporting the Government challenged the law in the Constitutional Court. Three days before the expiry date of the mandate of locally elected officials, in Decision 242/2020, the Court ruled that the parliamentary initiative was unconstitutional because it lacked coordination with an existing piece of legislation, namely the delegated legislation adopted by Government. On the same day, in Decision 240/2020, the majority opinion of the Constitutional Court ruled that the delegated legislation had been adopted *ultra vires* and invalidated it as well, stating that Parliament could not adopt a valid law based on a flawed initiative (as was the one promoted by the Government).

A dissenting opinion appended to Decision 240/2020 noticed that the Court had been vested by Government with the law adopted by Parliament and not with its own piece of legislation. Hence, it was the majority of judges who ruled *ultra vires* when they declared the delegated legislation unconstitutional and not the law passed by Parliament, as it was specifically demanded by the claimant. Nevertheless, the mandate of locally elected officials had been extended *de facto* and the fate of local elections could not be settled until July 2020 when Parliament decided to adopt a law setting the date of local elections on September 27. Thus, local elections were organized on the same day as initially decided by Government, but it was the Parliament who finally decided so and not the Executive.

C. The general elections

A somewhat similar situation but with a different outcome occurred regarding general elections. The mandate of Parliament was due to end on December 11 and parliamentary elections had to be organised before that day. Government set the date of general elections on December 6 and started to organise them early September. But the majority in Parliament had the intention to extend the mandate of the legislative until the end of the sanitary crisis following the pattern provided by the local elections. However, unlike locally elected officials, MPs cannot see their mandate extended through a law beyond the constitutional duration of 4 years save during special circumstance exhaustively enumerated in Article 63 of the Constitution (mobilization, war, siege, or emergency).

Since the state of emergency had ceased on May 15, the precedent set by local elections could not be emulated. In consequence, the majority in Parliament passed a law providing that only Parliament could set the date of parliamentary elections that should have been held in 2020 due to the special circumstances provided by the sanitary crisis. Such a law would implicitly repel existing legislation which allowed only Government to set the precise date when elections should be held and referred only to the specific situation of parliamentary elections of 2020 while not establishing a general rule for future parliamentary elections.

Challenged by the Romanian President, the law was found valid by a majority of five constitutional judges who, by the same token, also annulled the normative act through which Government had set elections on December 6, although the RCC does not have jurisdiction over administrative acts (Decision 678/2020). Nevertheless, the law never came into force because the President made use of his prerogative to return the law to Parliament for reconsideration, and legislative procedures have been tactically delayed by MPs supporting the Government until it was too late. Parliamentary elections finally took place on December 6 and saw the lowest turnout since December 1989 (31,84% of the voters).

2. The COVID-19 Crisis and Separation of Powers

In Romania, like in the rest of the world, 2020 was "the year of the pandemic" when the sanitary crisis caused by the COVID-19 pandemic overshadowed almost all the other topics of public concern. The measures taken to restrain the spread of the virus have im-

portant constitutional and legal implications, especially on fundamental rights, but also on other aspects.

The general framework in which the measures were taken is set out in the Constitution, namely, the state of emergency instituted according to the law (declared between March 16 and May 15, 2020) and the state of alert (declared since May 16, 2020 and extended every 30 days until the present day, with slight modifications to the content of the measures).

The state of emergency was declared by decree of the President of Romania on March 16. According to Article 93 of the Constitution, the President shall ask for the Parliament's approval for the measure within 5 days of the date of the decree. On March 18, the Government notified the Secretary General of the Council of Europe that Romania would take measures derogating from its obligations under the European Convention on Human Rights as allowed in case of public emergency (Article 15).

From a constitutional point of view, the state of emergency –declared for the first time at national level, under the current Constitution– posed the problem of the separation of powers and of the scope of the executive powers in establishing and enforcing the measures restricting fundamental rights. In conformity with the constitutional text, the decision on the declaration of the state of emergency is a concurrent power: the President may issue a decree, but the approval of Parliament (by Resolution and not by Law) is necessary in order for the measure to take effect beyond the first 5 days. During the state of emergency, the Parliament is in session. Other constitutional provisions that are related to the state of emergency are that the Constitution cannot be amended during the state of emergency; the Parliament cannot be dissolved during the state of emergency; and the term of office of MPs may be extended if it is due to end during the state of emergency. Although the approval of the presidential decree by the Parliament is mandatory for it to take effect, the legislative does not have the explicit power to modify its content.

It is important to recall the political context in which the state of emergency was declared: a minority Government (see supra, II.1.), which managed to gather the necessary parliamentary majority to be appointed, but which ever since has had a permanent hostile majority in the legislative; a President supporting the Government and being in a permanent political conflict with the parliamentary majority; and a permanent electoral fight between political forces, which continued throughout the whole year until general elections took place in December. This troubled context negatively influenced the decision-making process and the coherent application of the anti-pandemic measures.

The declaration of the state of emergency was challenged in the Constitutional Court by the Ombudsman. Although the Court cannot review the constitutionality of presidential decrees and the Ombudsman cannot challenge parliamentary resolutions, the complaint was filed against the legal framework of the state of emergency, i.e. the Emergency Government Ordinance (EGO) 1/1999. However, in fact, it was aiming at the limitation of power of the Romanian President. The most important constitutional issue at stake was whether the principle of separation of powers had been observed in declaring the state of emergency. The Court did not find that the text of the EGO was in breach of the separation of powers *per se,* as the challenged text did not allow the President to take any measures of legislative nature. However, in a rather confusing argument, in Decision 152/2020, the Court admitted that the presidential decree is "a normative administrative act" (which can normally be challenged before the administrative courts). But, several paragraphs further, it added to the current legislation by stating that the presidential decree, "because it has to be approved by the Parliament, is an act that concerns the relationship with the Parliament" and is thus excluded from the jurisdiction of administrative courts. Moreover, the Court claimed that such a decree may be challenged before the Constitutional Court "via the resolution of Parliament that approves or rejects the state of emergency."

Based on these findings, it can be argued that the Court made a double error and substituted the legislator. The Court erroneously claimed that the presidential decree that declares the state of emergency is excluded from the jurisdiction of ordinary courts: it extended the scope of its own jurisdiction on presidential decrees, *via* resolutions of Parliament. This error is all the more obvious since the Constitution does not allow the Parliament to modify the decree, but only to approve or reject the state of emergency. Therefore, the parliamentary control cannot be extended to the content of the decree which is under the jurisdiction of ordinary courts. The dissenting opinion of two judges emphasized that such an extension of the competence of the Parliament would be by itself in violation of the separation of powers and of the access to justice.

The saga of separation of powers continued in the context of the new state of exception instituted after the second state of emergency expired. The state of alert is not provided for by the Constitution. At first, it was regulated by Emergency Government Ordinance 21/2004 (approved by a law in 2005). This ordinance was challenged by the Ombudsman and declared unconstitutional by the Constitutional Court for lack of clarity and predictability of the measures restricting fundamental rights (see below, III.1.). Yet, in order to give the exceptional measures an adequate legal framework, the Parliament hastily passed a new law (for more details, see here).

However, a few days after its entry into force, the new law was also challenged by the Ombudsman, *inter alia* on the grounds that it breaches the separation of powers. In Decision 457/2020, the Court decided in favor of the claimant. The Court found that the obligation imposed by the challenged law that the Parliament "approves" the Government resolution that institutes the state of alert is a clear breach of the separation of powers. It reasoned that it creates a "new type of Government resolution" without any constitutional basis and that by approving such an act, which is defined by the Constitution as an act of execution of laws, the Parliament would interfere with the executive powers in a way that is incompatible with the principle of separation of powers. Thus, the Par-

liament is not involved anymore in deciding the institution of the state of alert.

III. OTHER CONSTITUTIONAL CASES

1. Response to the COVID- 19 Crisis and Human Rights Issues: the quality of the law in Decision 155/2020

In Decision 152/2020, the Constitutional Court ruled that EGO 34/2020, which significantly increases fines for offences committed during the state of emergency against the imposed measures, is "wholly unconstitutional." Thus, the Government was "in breach of the constitutional limits of legislative delegation" because the ordinance "affected" fundamental rights, which is expressly prohibited in Article 115(6) of the Constitution.

The Court also ruled that Article 28 of the EGO 1/1999, which sets out the administrative offences during a state of emergency, lacks clarity and predictability in that it does not differentiate between the various degrees of seriousness of the offences, therefore leaving room for arbitrariness on the part of the agents when deciding to fine. Nevertheless, this decision was excessive in declaring EGO 34/2020 unconstitutional as a whole. In previous cases, administrative fines were set forth by emergency ordinances and the Constitutional Court endorsed them as constitutional as administrative fines can be established by secondary legislation. In the concurring opinion, two constitutional judges dissented from the majority's argument by stating that "the lack of elements allowing the differentiation of administrative penalties, corroborated with the substantial increase of the amount of the fines, can lead to the conclusion of infringing the principle of proportionality required by Article 53 of the Constitution and not of Article 115 (6) [on 'affecting' fundamental rights, n.n.]."

In Decision 157/2020, the Constitutional Court ruled on the EGO 21/2004 concerning the state of alert and stated that it is "constitutional insofar as the actions and measures prescribed during the state of alert do not restrict the exercise of fundamental rights." Thus, through an "interpretative decision," the Court decided that the provisions of the ordinance which provide a possible "evacuation from the affected area," "the participation to community work activities," and "any measures necessary for eliminating the *force majeure*" could again "affect" fundamental rights, thereby infringing Article 115(6) of the Constitution.

Unlike in its previous Decision 152/2020, the Constitutional Court did not rule that the challenged act is "wholly unconstitutional" but applied a substantive analysis of its provisions. Secondly, as stated in the dissenting opinion of two judges, the ordinance provides that the measures taken "should be proportional with the situations that determined them and are applied according to the conditions and limits provided by law," which may imply that constitutional provisions regarding limitation of rights are indirectly referred to.

Finally, in Decision 458/2020, the Constitutional Court assessed, at the request of the Ombudsman, the constitutionality of the legal provisions regarding some of the measures designed to prevent the spread of the virus, including the quarantine measure which was instituted on the basis of a piece of delegated legislation (EGO 11/2020) by order of the Minister of Public Health. Another challenged measure was the institution of the compulsory hospitalization of COVID-19 patients on the basis of a list of contagious diseases also adopted by order of the Minister of Public Health.

The Court declared both measures unconstitutional on the grounds that they had been adopted by acts of secondary legislation and therefore in violation of Article 53 of the Constitution, the measure of quarantine being qualified as "a true deprivation of liberty." This led, in practice, to a massive discharge of patients at request and to an increase of the number of cases, until the quarantine measure was included by the Parliament in the law on the state of alert. However, as stated in the dissenting opinion of one of the judges, the law declared unconstitutional did not actually enable the Minister of Public Health to restrict fundamental rights, but only to execute restrictive measures that were actually provided by the said law. Hence, the measures were already provided by primary legislation and respected the criteria set out in Article 53 of the Constitution.

2. Gender Identity in Schools and Universities

A peculiar case on fundamental rights arose from a law adopted by the Parliament in June 2020, by which it attempted to change the Law on National Education and to introduce a prohibition "in education institutions and in all spaces destined to education and professional training, of all activities meant to spread the theory or opinion on gender identity, understood as the theory or opinion that gender is a concept different from biological sex." The amendment was challenged in the Constitutional Court by the President of Romania, in the *a priori* judicial review.

In Decision 907/2020, the Court decided that the challenged law was unconstitutional on several grounds. Firstly, it stated that gender equality is a major goal in all member states of the Council of Europe and of the European Union and quoted from the jurisprudence of the European Court of Human Rights and of the Court of Justice of the European Union on the matter. Secondly, the Court ruled that the challenged text violated Article 29 of the Constitution (freedom of conscience) and human dignity: "a prohibition for the teaching staff and for pupils and students […] of any act to impart knowledge on gender identity, contrary to those opinions imposed by the state […] is contrary to human dignity." Thirdly, said the Court, the text breaches Article 32 of the Constitution concerning the right to education and Article 30 on the freedom of expression. And finally, the challenged text was also considered unconstitutional as being "contrary to the legal logic and lacking any reasonable motivation," as well as setting a "confusing and contradictory normative framework."

3. Other Cases

A. Interference with the Judiciary

One of the decisions that continued the series of cases in which the Constitutional Court interfered with the activity of the Judiciary was Decision 55/2020. The Court's assessment concerned the legality of gathering evidence in criminal cases by surveillance activities deployed by intelligence services, upon request of a judge, in the framework of the law on national security, a procedure prescribed by an article of the Code of Criminal Procedure.

The Constitutional Court ruled, in a majority opinion, that the provisions allowing complaints against such surveillance measures are not sufficiently precise and predictable and, therefore, unconstitutional. The dissenting judges emphasized that the existing legislation does not require a similar procedure regarding surveillance activities and recordings made by the interested parties or by other persons and that such evidence can be used in criminal trials. Moreover, in a decision back in 2017, the Court itself rejected unconstitutionality claims against the provisions on the latter types of gathering of evidence. Therefore, as the dissenting judges pointed out, there was no reason and no arguments for changing the case law in the present case. This is one of the blatant cases in which the Constitutional Court unjustifiably departed from its own case law.

B. Unmarked reversal of jurisprudence

The 2016 Report mentioned an interpretative decision of the Constitutional Court (Decision 405/2016[1]) as stirring a major societal debate due to the general perception that is was aiming at repressive authorities rather than clearly sanctioning the legislator. Indeed, while asserting that criminalizing conducts is the privilege of the legislative power, it actually decriminalized one category of the crime of abuse in public office, namely, the one referring to "faulty implementation."

This decriminalization has been addressed in subsequent judicial decisions. Decision 392/2017 established that a person can be convicted for the crime of "abuse in office" by "faulty implementation" only if s/he violates provisions contained in a law and not in secondary legislation. Moreover, Decision 518/2017 ruled that a person can be convicted for the crime of "negligence in office" by "faulty implementation" only if s/he violates provisions contained in a primary normative act. The Court went as far as to invalidate Article 4 of the Criminal Code concerning *lex mitior* because it was not in conformity with previous decisions of the Constitutional Court (in particular, Decision 405/2016) regarding decriminalization laws (see Decision 651/2018).

In Decision 384/2020, the Constitutional Court ruled that a legal provision which allows for the selected prosecutors in specialized sections (e.g., for fighting organized crime) to be revoked for "faulty implementation" of their specific professional tasks is unclear. A dissenting opinion signed by two judges explained that "faulty implementation" of specific professional tasks in the case of specialized prosecutors can hardly be considered constitutionally uncertain. Against this background, Decision 833/2020 comes as a big surprise since it validated the legal provision allowing for the withdrawal of police officers specialized in fighting organized crime who "faultily accomplish" professional tasks based on […] the explanation of the word "faultily" in the dictionary of the Romanian language (see paragraph 25). Thus, such an important change in the jurisprudence passed unnoticed.

C. The ascending trend of separate opinions

A trend which started in 2018 has been confirmed in 2020 statistics.[2] The Constitutional Court is facing more and more decisions adopted by a majority opinion, while judges expressing disagreement with the majority opinion resort to dissenting or, more seldomly, concurring opinions. After previous hesitations regarding the legal regime of separate opinions, in 2020 the Court resorted to a by-law in order to modify the decision-making process by this jurisdiction and align it rather with the seriatim technique specific to common-law jurisdictions (see here).

IV. LOOKING AHEAD

A fragmented Parliament (resulted from the 2020 elections) and a Government supported by a coalition made-up of 4 political parties presage political instability. At the same time, the economic consequences of the sanitary crisis will require a tremendous economic and social effort. The EU is expected to request the reduction of the budgetary deficit and that might bring along austerity measures and social instability. As a consequence, the design of the budget in 2021 will be a serious challenge. It is also predictable that restrictions generated by the COVID-19 crisis will continue, alongside the challenges of the vaccination campaign.

V. FURTHER READING

Elena Simina Tănăsescu, Bogdan Dima, 'The Role of the Romanian Parliament during the COVID-19 Sanitary Crisis. A Diminishment of the Executive Decision-Making Power', in Emmanuel Cartier, Gilles Toulemonde (eds), *The Parliament in the Time of Coronavirus* (Fondation Robert Schuman 2020), 2-10.

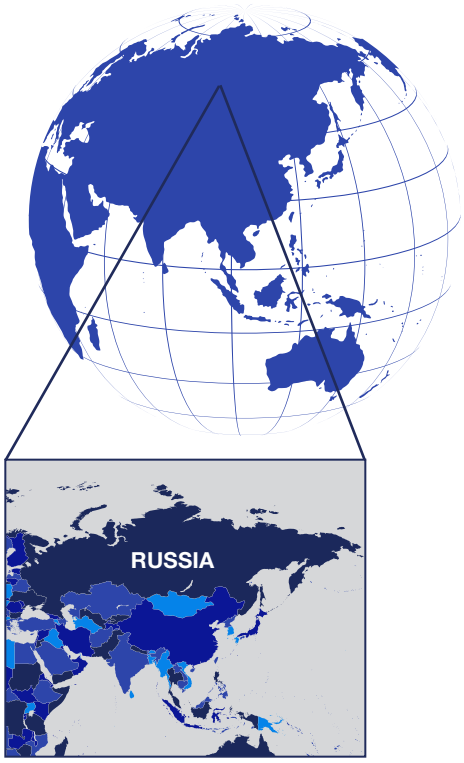
[1] The Constitutional Court ruled that the crime of "abuse in office" ("The action of the public servant who, while exercising their professional responsibilities, fails to implement an act or implements it faultily…") provided by Article 297 of the Criminal Code is consistent with the constitutional rules only if the phrase "implements it faultily" is understood as "implements by breaking the law." Moreover, the Constitutional Court ruled that "the law" shall be understood only as primary legislation (law or delegated legislation).

[2] In 2018, out of 831 decisions 32 had dissident opinions and 3 had concurrent opinions. In 2019, out of 866 decisions 21 had dissident opinions and 3 had concurrent opinions. In 2020, out of 908 decisions 38 had dissident opinions and 4 had concurrent opinions.

Elena Simina Tănăsescu, 'COVID-19 and Constitutional Law: Romania', in Serna de la Garza, José María (eds), *COVID-19 and Constitutional Law. Covid-19 et Droit Constitutionnel,* Universidad Nacional Autónoma de México (Instituto de Investigaciones Jurídicas 2020), 191-197.

Elena Simina Tănăsescu, 'On Separate Opinions and their impact on Constitutional Courts', (*Juridice – Essentials*, 20 November 2020) <https://www.juridice.ro/essentials/4385/on-separate-opinions-and-their-impact-on-constitutional-courts> accessed March 19, 2021.

Bianca Selejan-Guțan, 'Romania in the Covid Era: Between Corona Crisis and Constitutional Crisis' (*Verfassungsblog,* 21 May 2020) <https://verfassungsblog.de/romania-in-the-covid-era-between-corona-crisis-and-constitutional-crisis/> accessed March 19, 2021.



Russia

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I. INTRODUCTION

2020 will be remembered in Russia as the year of Putin's 'great' constitutional reform. This is a large reform package that includes the amendments to the constitution and numerous implementing laws that have been carried out at all costs despite the pandemic, the heavy economic crisis and a series of social protests. The symbolic relevance of the initiative, in the year of the 75th anniversary of the 'Great Patriotic War', was such as to overwhelm every possible obstacle including an unpredictable pandemic.

The reform was intended not only to solve the problem of the expiry of the last presidential term that Putin could run for with the Constitution unchanged, but also to perpetuate 'Putinism'; a political regime centered on nationalistic, patriotic, conservative, sovereign and identity elements that the reform expressly includes in the Constitution, distorting its original character. In the 1993 version of the Constitution, some typically Russian concepts (such as 'territorial unity and integrity' and 'power's unity') were mixed with principles of European constitutionalism such as the division of powers and the superiority of international treaties over internal laws in the event of inconsistency. Now, the Yeltsin's Constitution has become 'Putinian', increasingly distancing its own core value from the European constitutional heritage.

Regardless of the most evident political point, namely, the 'Tereshkova amendment', allowing the President-in-office to stand for 2 more terms despite having already run for 4 terms; the contextual environment of this reform must be considered, being linked to a desire for stability. In recent years, the fear of instability and of a power vacuum has grown in Russia. Mindful of the events of the past (such as troubles that followed the collapse of the USSR or the stormy Yeltsinian period), most citizens and power groups cannot allow themselves to lose a bastion of stability and solidity like the 'Putinian power'. It is an authoritarian solution, unacceptable in the eyes of Western observers but the only one capable of reassuring those who are fearful of the turmoil of globalization and the degradation of Western democracies. The year 2020 is therefore characterized by three major developments: the constitutional reform aimed at perpetuating 'Putinism', the fight against coronavirus (which the President has delegated to governors and administrative structures) and the fight against 'non-systemic opposition' with further restrictions on the activity of NGOs and the freedom of public assembly.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The 2020 reform is a set of changes and additions to the Constitution characterized by content-related and procedural anomalies. Instances of procedural strain include an incredible speed in the drafting process and two requirements not provided for by Articles 136 and 108 of the Constitution, i.e. a prior opinion of the Constitutional Court and a final 'all-Russian vote'. The latter, initially scheduled for 22 April, was moved due to the pandemic to 1 July 2020.

As far as the content of the project is concerned, it is a complex text. It largely takes to a constitutional level what had already been introduced in legislation, jurisprudence or political practice. It is very difficult to summarize its content, because it brings together different and apparently unrelated things. Furthermore, some relevant changes are in-

cluded in the inappropriate Constitution section (not to touch unchangeable chapters 1, 2, 9). However, the 'systemic' impact of the reform is very broad, confirming and symbolically placing the political vision of the Putinian elite in the Fundamental Law. This is a mixture of sovereignism, nationalism, conservative and identity values. As for the power structure, the already existing centralization of political power in the federal center has been confirmed and strengthened; especially in the hands of the head of state. Other state institutions (houses of parliament, government, bodies of subjects and local self-government, courts, prosecutors, council of state, presidential administration, security council, public chamber) remain as transmission belts of the political impulse coming from the presidential center and can be replaced and sanctioned, or simply ignored, if they do not support the messianic role of the head of state. At the same time the reform is also a symptom of weakness, of fear of disintegration and disorder. It is an attempt, as can be seen from the numerous references to social issues, to stem social dissent across the country.

The reform affects crucial points of the Constitution: powers and relations between the main constitutional bodies with a further empowerment of the head of state; the system of checks and balances (judges, prosecutors, regional and local authorities), which is weakened; identity issues (language, culture, religion, historical role of the country, family); sovereignty (relationship with international organizations and law, requirements for those who hold public offices) and social aspects (minimum wage, pension indexation, volunteering, protection of the disabled, education of children, health protection, voluntary work, environment).

As for the executive power, the ostensible redistribution of prerogatives of the President and Parliament's houses in the appointment of the Prime Minister and ministers is illusory. A double government is constitutionalized, one appointed by the President in collaboration with the Duma and the other (the so-called 'force block') in consultation with the Council of Federation. The President remains the arbiter of the appointment and dismissal of both governments and is directly responsible for managing the executive. The Duma can be dissolved in case of refusal of the Prime Minister's candidature proposed by the President and in case of refusal of more than a third of ministers' candidatures proposed by the Prime Minister. In both cases, Prime Minister and ministers are appointed equally. The President can dismiss the Prime Minister, head prime ministers and ministers at any time with no consultation. Some powers of appointment moved from the upper house to the President, who can propose to this house the dismissal of higher court judges under some circumstances. The Prime Minister no longer heads the government and is expressly accountable to the President. The President can challenge federal and regional laws before the Constitutional Court, including constitutional amendment laws, before their enactment, and even bills; he can appoint up to 30 federal representatives in the upper house. Former presidents may become senators for life.

A further centralization of power, both horizontally and territorially, is implemented through the concept of 'single system of public power', in which the organs of local self-government are included. The autonomy of the federation entities is further reduced by the transfer of some matters from the joint authority to the federal one, by the preventive appeal against regional laws, and by the elimination of the opinion of regional assemblies for the appointment of regional prosecutors.

Jurisdiction and composition of the Constitutional Court are partially modified, confirming for this institution a passive role, one supportive of the Kremlin politics. First of all, the number of judges is almost halved (from 19 to 11). The court is endowed with new powers (mostly already present in the legislation), of which the most important are checking the acts before their enactment and verification of the constitutionality (and thus the enforceability) of the decisions of international bodies / courts (The Venice Commission underlined the danger of this point for compliance by Russia with its international obligations). This latter power is added to other sovereign-type innovations concerning the so-called 'nationalization' of elites, i.e. the prohibition for all the highest federal and regional officials to have foreign citizenship, residence or bank accounts abroad (at the same time, compatriots abroad are formally protected!). The defense of national sovereignty is also pursued through the prohibition of alienation and incitement of alienation of parts of the territory, the inadmissibility of interference in the internal affairs of the state, and a series of patriotic aspects (homeland, USSR heritage, inadmissibility of diminishing the momentum of the defenders of the homeland, defense of historical truth).

Social and identity elements meet a social sentiment fed by official rhetoric with a strong anti-Western and conservative imprint (God, family, land). See, for example, the protection of the family based on marriage between a man and a woman and the education of children in a conservative, patriotic and family-centred manner. The overall amendments however are fully consistent with the Russian constitutional tradition since the original version of the 1993 Constitution, which was ambiguous and contradictory in certain respects (with a bill of rights in line with Western standards and the superiority of international law over inconsistent national laws), had been disavowed by the implementation practice, losing the few liberal elements and especially a limited division of powers. If the official rhetoric presents the reform as a dislocation of power towards parliament and parties, in reality, it is a strengthening of the centralist and authoritarian tendencies that have marked Russian politics in the last 20 years.

III. CONSTITUTIONAL CASES

1. Conclusion on the conformity with the provisions of chapters 1, 2 and 9 of the Russian Constitution of the provisions of the Law amending the Constitution of the Russian Federation with a view to 'Improving the regulation of individual issues of organisation and functioning of public authority' that have not yet entered into force, as well as the conformity with the Russian Constitution of the procedure for the entry into force of Article 1 of that Law (March 16, 2020)

It is a question of assessing in the light of the jurisdiction conferred on the Court by Article 3 of the Law amending the Constitution entered into force on March 14, 2020 the constitutionality of the not yet effective amendments (Article 1, Amendment Law) and of the special procedure provided for their entry into force in derogation from the current Constitution (Article 2). In particular the President asks the Court to verify the constitutionality of Article 81 paragraph 3-1 (on the re-eligibility, once the reform has come into force, of the President in office and the former Presidents). Confirmation of the constitutionality of Articles 1 and 3 allows the activation of Article 2 on the all-Russian consultation, upon the favorable outcome of which Article 1 of the Amending Law will come into force.

With regard to procedural issues, the Court justifies the legitimacy of its own intervention and of the popular consultation with the aim of reinforcing the amendment procedure.

With regard to the content of Article 1, all the 'identity' and 'sovereignty' provisions are deemed to comply with chapters 1 and 2 of the Constitution. The provisions checked do specify the constitutional aims and conditions of federal and regional institutions and therefore do not have an ideological character; they do not limit the democratic pluralism and the secular character of the state. The reference to the faith in God does not mean a renunciation of the secular character of the state but has a historical-cultural value with reference to the relevance of the religion in the creation and development of Russian statehood.

Concerning the protection of the family and traditional marriage, included in Article 72, this represents a value that ensures the perpetuation of the pluri-national people: even if the state must not interfere in the private life of citizens or discriminate against them on the basis of their sexual orientation, the purpose of the provision is to protect the 'traditional' family to favor the perpetuation of the human species.

With regard to changes in powers and composition of some constitutional bodies, the Court does not dwell much on the details, limiting itself to saying that it is up to the constitutional legislator to organize as it sees fit reciprocal powers and relations between these bodies. As to the constitutional status of the President, his powers and guarantees of office (Articles 80, para. 2, 82, para. 2, 83, 92-1 and 93), these 'agree with the nature and principles of the institution of the presidency'. With regard to the 'zeroing' of presidential mandates, according to the Court the number of presidential mandates the same person can hold can be decided by the Constitution in a different way: the bases of the Russian constitutional order do not provide an answer to these questions. The President in office has the right to stand again for election in competition with other candidates, and this exception is counterbalanced by the strengthening of parliamentarism. Furthermore, the exception for the President in office is justified due to the particular historical circumstances of the country: 'the constitutional legislator can also take into account the concrete historical factors in the adoption of the relative decision, including the degree of threat to the state and society, and the situation of the political and economic system'.

Concerning the amendments to chapter 7 (on the judiciary), all new powers of the Constitutional Court fall within the discretion of the constitutional legislator, including the reduction in the number of constitutional judges. The requirements for the civil service (i.e. the prohibition for senior officials to have foreign citizenship, permanent residence abroad or accounts abroad) are aimed at protecting Russian sovereignty, ensuring that these officials are not influenced by a foreign state (in Russia dual citizenship is allowed by the Constitution). Anyone wishing to become a higher official in Russia must renounce foreign citizenship.

With regard to local self-government, in particular its inclusion in the new 'unitary system of public power', this is a concept which, although not literally envisaged in chapter 1 of the Constitution, can be deduced from the basic concepts of 'statehood' and 'state' that indicate a political union of the multinational people of Russia.

2. On review of the constitutionality of Article 3.4 of the Samara Region Law 'On the Procedure for Filing a Notice on Holding a Public Event and Ensuring Certain Conditions for the Realisation of the Citizens' Right to Conduct Public Events in the Samara Region', challenged by 3 citizens (Judgement No. 27-P, 4 June 2020)

The challenged provision was the subject of consideration insofar as it includes places located closer than 150 meters from military facilities; buildings of educational organisations; buildings and objects used for worship and religious ceremonies and buildings occupied by organisations where in-patient medical care is provided into the list of places where meetings, rallies, marches and demonstrations are prohibited.

The challenged provision was found to be inconsistent with the Constitution of the Russian Federation insofar as the prohibition to hold meetings, rallies, marches and demonstrations in designated places was established beyond the constitutional limits of the legislative powers conferred on the constituent entities of the Russian Federation and disproportionately limits the freedom of peaceful assembly. Therefore, the Constitutional Court reiterates that the federal entities cannot arbitrarily limit the places for public demonstrations.

In November 2019, the Constitutional Court had declared as unconstitutional the prohibition, imposed by a law of the Republic of Komi, to hold public demonstrations near the buildings of the organs of regional and municipal power. Referring to this position the citizens of the Samara Region had attempted to carry out protests and received a refusal from the authorities, held to be legitimate by the courts, as the regional law prohibits such demonstrations near schools, hospitals, kindergartens and churches. The applicants therefore turned to the Constitutional Court, which affirmed that the regions do not have the power to autonomously and abstractly expand the list established by the federal legislator of places where mass actions are prohibited. The threat to public order and security must be assessed in each concrete case. The legislator of

the Samara Region, as well as those of other regions, must include the necessary changes in the regional laws. The federal legislator must specify the limits of the powers of the regional legislative institutions and the courts must review the applicants' cases.

The Constitutional Court stressed the fact that adoption of this judgement does not repeal Article 8, Section 21 of the Federal Law 'On Meetings, Rallies, Demonstrations, Processions and Pickets', according to which, after the executive authorities of the constituent entity of the Russian Federation determine specially designated (adapted) places wherein to hold public events, as a rule public events are held in such places.

3. On review of the constitutionality of Para. 5, subpara. 3 of the Governor of the Moscow Region Decree 'On the Introduction in the Moscow Region of a High Alert Regime for the Authorities and Forces of the Moscow Regional Emerg ency Prevention and Response System and some Measures to Prevent the Spread of a New Coronavirus Infection (COVID2019) across the Territory of the Moscow Region', challenged by a court in the Moscow Region (Judgement No. 49-P, 25 December 2020)

The challenged provision was the subject of consideration, to the extent that acting in conjunction with the general system of constitutional and legal and relevant special regulations, it established the obligation on citizens in conditions of high alert in order to prevent the spread of coronavirus infection, not to leave their places of residence or domicile (except for those cases stipulated in this provision), the breach of which would entail administrative liability.

The applicant in the main proceedings had infringed the disputed provisions by being in a public place and having consequently been the subject of an administrative offence report for non-compliance with the rules of conduct provided for in the event of an emergency situation or threat of its occurence.

The court of the city of Protivno in the Moscow Region, in whose jurisdiction the case arose, reached the conclusion that the constitutionality of subpoint 3 of point 5 of the Governor of the Moscow Region Decree of 12 March 2020 No. 108 (prohibiting citizens to leave their place of residence or domicile with the exception of a series of cases) had to be checked in order to exclude unfounded administrative liability of citizens. It suspended the proceedings and applied to the Constitutional Court with a request for verification of the constitutionality of this provision (ordinance of 11 August 2020). The appellant believed that the legal regulation by the decree in question had been carried out by the Governor of the Moscow Region exceeding his powers and had limited the freedom of circulation of citizens inconsistently with Articles 15, 17, 18, 27, 55, 71 and 72 of the Constitution.

The Constitutional Court declared the challenged provision consistent with the Constitution, since the constitutionally significant purpose for its stipulation was dictated by the objective need for a prompt response to the extraordinary (unprecedented) danger of the spread of the coronavirus infection (COVID-2019). Also, the measures it introduced were not in the nature of an absolute ban, allowing for the possibility of movement of citizens under valid circumstances, were short-term, and the possibility of their stipulation was timely confirmed in federal legislation.

According to the Court, the introduction of the limitations (forbidding citizens to leave their place of residence unless they needed emergency medical care or had to carry out work activities; they were also allowed to go to the nearest grocery stores, to let pets out - at a distance of no more than 100 meters from their place of residence or domicile - and to deliver waste to the nearest collection point) was due to the objective need to react operationally to the exceptional and unprecedented danger of COVID-19 spreading. The ban was not absolute and the measures taken were held to be temporary.

The supreme officials of the subjects of the Federation were obliged to develop and implement a set of restrictive measures and other measures, including special rules for moving around the relevant territory and for the use of public and private transport.

The Court also considered that the bodies called upon to apply the law, including the courts, would have to take into account circumstances attesting the existence of serious reasons whereby the citizen had been forced to leave his home or residence.

IV. LOOKING AHEAD

The 2020 constitutional reform will be further implemented in 2021, though the majority of implementing acts have been adopted in the second half of 2020 (the relevant legislative packages were submitted by the President to the State Duma on September 22, October 14, and October 31). Among them, the new law on government, and the amendment of laws on Constitutional Court, Prokuratura, and Council of Federation.

The State Duma general elections are expected to take place in September 2021. The entire 2021 risks being marred by repression of the 'non-systemic' opposition. As for constitutional case-law, given the new set of powers conferred on the Russian Constitutional Court with the 2020 constitutional amendments, one can expect a higher number of decisions. Considering the new role of the Court in the legislative process (the so called *ex ante review*), this could involve the Court in more sensitive political issues.

V. FURTHER READING

Angela Di Gregorio, 'Dinamiche di contesto e caratteristiche generali della Legge di Emendamento della Costituzione della Russia del 14 marzo 2020' (2020) 2 Nuovi Autoritarismi e Democrazie 1

William Partlett, 'Russia's 2020 Constitutional Amendments: A Comparative Perspective' (2020) SSRN

Anna Shashkova, Michel Verlaine, Ekaterina Kudryashova, 'On Modifications to the Constitution of the Russian Federation in 2020' (2020) 8 Russian Law Journal 1

Serbia

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I. INTRODUCTION

Since early March 2020, the major political and, more broadly, societal developments in Serbia were strongly influenced by the COVID-19 outbreak. The parliamentary elections, initially planned for April 26, 2020, were finally held on June 21, 2020. The elections resulted in a less pluralistic political representation in the National Assembly (NA) due to the election boycott by a significant part of opposition political parties.[1] The new legislature, like the previous one,[2] was supposed to proceed with the adoption of constitutional amendments,[3] mainly related to the judiciary and the relationship between the three branches of government.

It is also important to point out that, while the process regarding the accession of Serbia to the European Union (EU) was dragging along, the newly adopted enlargement methodology issued by the European Commission on 5 February 2020[4] has the potential to bring about some important changes in Serbia's path towards EU membership.

Lastly, the overwhelming majority of all opinions adopted by the Constitutional Court of Serbia (CCS) concerned constitutional challenges whereas other decisions mainly treated conflicts of constitutionality and/or legality of laws and other general acts. The CCS has also received 66 initiatives to review the constitutionality of the emergency measures adopted by Serbia in order to mitigate the effects of the COVID-19 outbreak.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

As was the case from 2017 to 2019,[5] the arduous process towards the adoption of amendments to the Constitution[6] was not

[1] The process of negotiations between the political parties of the majority and opposition – initiated in summer 2019, which intended to result in a set of rules improving the overall conditions under which the 2020 parliamentary elections were supposed to be held – was not successful, and resulted in a boycott of the elections by the majority of opposition political parties; See: Uroš Ćemalović, 'Serbia', in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2019 Global Review of Constitutional Law* (The Clough Center for the Study of Constitutional Democracy 2020), 288-292.

[2] See Uroš Ćemalović, 'Serbia', in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2019 Global Review of Constitutional Law* (The Clough Center for the Study of Constitutional Democracy 2020), 289.

[3] The term 'constitutional changes' is used because the Serbian Constitution comprises no mention of the term 'amendment,' but it only mentions 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.

[4] Commission Communication COM(2020) 57 on 'Enhancing the accession process – A credible EU perspective for the Western Balkans', available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enlargement-methodology_en.pdf>.

[5] See Uroš Ćemalović, 'Serbia', in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2018 Global Review of Constitutional Law* (The Clough Center for the Study of Constitutional Democracy 2019), 259; Uroš Ćemalović, 'Serbia', in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2019 Global Review of Constitutional Law* (The Clough Center for the Study of Constitutional Democracy 2020), 289.

[6] See fn. 3.

brought to an end in 2020. On the contrary, it seems that, in numerous aspects, it is turning into a more complex debate, with poor prospects of rapid and significant breakthrough in the forthcoming months.

In this respect, this chapter will focus on the following four developments. First, the NA's Committee for Constitutional Matters and Legislation effectively began their task on October 22, 2020 and, in spite of 14 sessions held until the end of 2020, they did not dedicate most of their time and energy to discussions revolving around the amendments to the Constitution. Second, on December 3, 2020, the Government adopted another ambitious proposal for changing the Constitution that concerned those provisions regarding the Judicial branch and public prosecution. Third, in its latest report on Serbia, the European Commission underlined that "very limited progress"[7] has been made in the field of the rule of law and fundamental rights, while "the constitutional reform aimed at strengthening the independence of the judiciary has been put on hold."[8] Finally, if applied swiftly and to its full potential, the new EU enlargement methodology presented by the European Commission could also be beneficial for strengthening the independence of judiciary.

After the June 2020 parliamentary elections, setting up the NA's committees took Serbia more than three months. Given the undisputed dominance of the ruling party in the NA (188 of 250 seats) and the cooperative attitude of practically all other represented political groups, it remains unclear why this process required so much time. Out of 14 sessions of the new Committee for Constitutional Matters and Legislation held in 2020, none of them was dedicated to debate the amendments to the Constitution. The Committee mainly carried out reviews of proposed laws and, on one occasion, treated an issue concerning the constitutionality of a law in the context of its examination before the CCS.

On December 3, 2020, the Government proposed new changes to the Constitution.[9] With a focus on constitutional provisions regarding the judiciary and separation of powers, this proposal includes modifications of a significant number of existing constitutional provisions, comprising those dealing with the separation of powers (Art. 4), competences of the NA (Art. 99) and the decision-making process within it (Art. 105), organisation of the judiciary and public prosecution (Art. 142-165), and the procedure for nominating and appointing judges to the Constitutional Court.

Without specifying the exact language that the new constitutional provisions should contain, the Government's initiative comprises a relatively detailed motivation that brings attention to the major weaknesses of the provisions currently in force. As for the organization of the judiciary and public prosecution, the Government's bill underlined that the existing constitutional provisions are unsystematic, inconsistent, partially overregulated in some respects but also underregulated in others, and formulated in an unclear way. Given that the NA is not formally tied to the content of the Government's proposal,[10] it remains to be seen how both the plenary and the Committee for Constitutional Matters and Legislation will react.

In its latest report on Serbia, the European Commission pointed out a number of weaknesses of the existing regulatory framework of the judiciary, but also some other problems related to the enforcement of the existing legislation. Due to the absence of progress regarding the constitutional reform, safeguards for judicial independence still have to be increased, while "the scope for continued political influence over the judiciary under the current legislation"[11] remains one of the most serious concerns. Moreover, the current system of recruitment, transfer, and promotion of judges and prosecutors has to be reviewed in order to "ensure that their careers are fully based on merit, with a clear link between performance evaluation and career advancement."[12] In this sense, the final decisions on these matters should be made by the High Judicial Council and not by the Parliament. Even the enforcement of the existing constitutional provisions is incomplete in some matters, as it is the case of the Act on the Financing of the Autonomous Province of Vojovodina, still not passed regardless of the mandate set forth in Art. 184 of the Constitution.

Thus far, Serbia's EU membership negotiations are moving slow[13] given that, more than six years after the first Intergovernmental Conference,[14] only half of the chapters of EU accession negotiations were opened, with no new chapters opened in 2020. The gloomy picture of the entire EU enlargement process was completed by a declaration adopted at the EU-Western Balkans Zagreb Summit,[15] held via video conference on May 6, 2020, which did not even mention the notion of membership in the EU. However, in spite of its "proclamatory style and excessive

[7] European Commission, 2020 Serbia Report, 18, available at <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/serbia_report_2020.pdf>.

[8] *Ibid.*

[9] Accessible at <https://www.srbija.gov.rs/prikaz/503030>.

[10] See Uroš Ćemalović, 'Serbia', in Richard Albert, David Landau, Pietro Faraguna, Ŝimon Drugda (eds.), *The I·CONnect-Clough Center 2019 Global Review of Constitutional Law* (The Clough Center for the Study of Constitutional Democracy 2020), 288.

[11] European Commission, 2020 Serbia Report, 5.

[12] Ibid, 21.

[13] For example, Croatia managed to open and close all negotiating chapters with the EU in less than six years.

[14] Serbia was confirmed as a candidate country on 1 March 2013; for more information on Serbia's membership status, see <https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/serbia_en>.

[15] Declaration of EU-Western Balkans 2020 Summit <https://www.consilium.europa.eu/media/43776/zagreb-declaration-en-06052020.pdf>, accessed 5 February 2021.

use of prescriptive (and often imprecise) formulations,"[16] once the new EU enlargement methodology (introduced by the European Commission in February 2020) is clarified and effectively put into practice, it could have a positive impact on swifter reforms necessary for the EU accession,[17] including those related to the independence of the judiciary.

III. CONSTITUTIONAL CASES

In 2019, the Constitutional Court of Serbia (CCS) adopted 480 different decisions.[18] The overwhelming majority were constitutional complaints (appeals) over potential violations of human rights and freedoms in general or minority rights in particular. Some of the other decisions treated issues of constitutionality and/or the legality of laws and general acts as well as issues related to conflicts of jurisdiction. As was the case during previous years, the activity of the CCS is characterized by a high number of pending cases[19] and the need "for more transparency […] including as regards accessibility for the public."[20]

Due to the COVID-19 outbreak, the state of emergency in Serbia was declared on March 15 and lifted on May 6.[21] The declaration of state of emergency was approved by the NA on April 29,[22] only a week before it was lifted. Until the end of September 2020, the CCS received "66 initiatives for assessing the constitutionality of the emergency measures and 10 appeals over possible violations of human rights."[23] On May 22, 2020, in its first decision involving some of those initiatives and appeals, the CCS decided to dismiss, on procedural grounds, a request to review the constitutionality of the procedure by which the state of emergency was declared, concluding that the requirements for the declaration of a state of emergency had been met. Considering the CCS' reasoning, as well as its potential influence on future case law in controversies related to possible violations of human rights during a state of emergency, this decision is worthy of a more thorough examination (explored in point 1).

During 2020, the CCS adopted six decisions involving constitutional issues and/or legality of laws and other general acts adopted by the NA. To begin with, in three of those decisions, the CCS dismissed requests to review questions of constitutionality. Secondly, in two other decisions, the CCS created a test for reviewing conflicts of constitutionality while in a decision of March 5, 2020 (analysed in point 2), the CCS deemed that a legal provision presented for review was unconstitutional.

Regardless of a previous decision whereby the CCS concluded that the declaration of the state of emergency due to the COVID-19 outbreak was constitutional, in its decision of October 28, 2020 (examined in point 3), the CCS reviewed several governmental decrees that restricted certain human rights as allowed by the Constitution and found that some provisions set out in those decrees are unconstitutional.

1. Case IUo-42/2020 – Constitutionality of the decision on the declaration of the state of emergency

The state of emergency on account of the COVID-19 pandemic was declared on March 15, 2020, through a joint statement of the President, the Prime Minister, and the Speaker of the Parliament.[24] This declaration was followed by various decisions of the executive branch, by which "the authorities aligned their actions to deal with the pandemic with World Health Organisation (WHO) recommendations and imposed wide-ranging temporary measures, including strict curfew hours, closure of schools and universities, bans on public gatherings, freezing of most air traffic and closing of borders."[25] The state of emergency was declared pursuant to Art. 200(5) of the Constitution, according to which, "when the National Assembly is not in a position to convene, the decision proclaiming the state of emergency shall be adopted by the President of the Republic together with the President of the National Assembly and the Prime Minister, under the same terms as by the National Assembly."

In the weeks following the declaration of the state of emergency, the CCS accepted a number of cases that asked the court to review the constitutionality of the decision by which this state had been decreed. On May 22, 2020, in a unique decision that addressed all

[16] Uroš Ćemalović, One Step Forward, Two Steps Back: The EU and the Western Balkans After the Adoption of the New Enlargement Methodology and the Conclusions of the Zagreb Summit", *Croatian Yearbook of European Law and Policy* 16, University of Zagreb, Faculty of Law, 183.

[17] Ibid, 181-188.

[18] Publicly accessible base of the case-law of the Constitutional Court of Serbia, published on its website; see <http://www.ustavni.sud.rs/page/jurisprudence/35/>, accessed 11 February 2021.

[19] For example, in 2019, the CCS had 36.892 pending cases, out of which 22.473 from previous years (European Commission, 2020 Serbia Report, 24). The situation in 2020 has not significantly improved, given that the global number of all decisions taken by the CCS (480) remained globally comparable with number of all decisions taken in 2019 (427).

[20] European Commission, 2020 Serbia Report, 24.

[21] The declaration of the state of emergency was accompanied by a governmental decree restricting – as allowed by the Constitution – certain human rights, including notably the freedom of movement and the freedom of assembly; particularly hard-hit by these restrictions were the persons over 65 years of age in urban areas and over 70 in rural areas.

[22] For the full text of the decision in Serbian language, see <https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/skupstina/odluka/2020/62/1/reg>, accessed 12 February 2021.

[23] European Commission, 2020 Serbia Report, 19.

[24] For the full text of the decision in Serbian language, see <https://www.pravno-informacioni-sistem.rs/SlGlasnikPortal/eli/rep/sgrs/predsednik/odluka/2020/29/1/reg>, accessed 12 February 2021.

[25] *Ibid,* 4.

the complaints received until then, the CCC decided to dismiss these cases on procedural grounds. Before turning to the CCS reasoning regarding its decision to dismiss them, we will first examine the main claims raised by the petitioners.

In some of the lawsuits filed in the CCS, the claimants invoked Art. 200(1) of the Constitution[26] to argue that the state of emergency can only be proclaimed if the survival of the citizens, and not only their security, is threatened by a public danger. On the other hand, many claimants contended that the appropriate legal framework to fight the viral pandemic was the declaration of an "emergency situation" (and not a "state of emergency"). Art. 2(1) of the Law on the Reduction of the Risk of Catastrophes and Management of Emergency Situations defines the notions of natural disaster and emergency situation. Certain claimants argued that the decision that proclaimed the state emergency did not specify the dates and duration of the declaration, which made it disproportionate and inadequate to the goal it intended to achieve. Finally, in some of the complaints, other claimants affirmed that the decision declaring the state of emergency should have been made by the NA in compliance with Art. 200(1) of the Constitution, and not resorting to the mechanism set forth in Art. 200(5) (only applicable when the NA "is not in a position to convene").

The CCS dismissed all the cases. It explained that, in spite of the fact that "in proceedings assessing the constitutionality and legality, the Court does not rule on the facts or about the facts," the COVID-19 pandemic can be considered a public danger that threatens "the survival of the state or its citizens" in the sense of Article 200(1) of the Constitution. Consequently, the CCS concluded that the requirements for the proclamation of the state of emergency were met. As for the difference between an "emergency situation" and a "state of emergency," the CCS affirmed that "in Constitutional Law doctrine, the prevailing approach is that it is difficult, if not impossible, to make a clear distinction" between them, thus striking down the argument that the Law on the Reduction of the Risk of Catastrophes and Management of Emergency Situations provided entirely sufficient legal framework to deal with the pandemic. However, it remained unclear what is the legal and practical *raison d'être* of the entire concept of an "emergency situation" if, in virtually every situation, it can be replaced by a more robust and much less nuanced "state of emergency" mechanism which is, on top of it, considerably more restrictive of fundamental rights and freedoms.

2. Case IUz-316/2015 – Constitutionality of Art. 10(7) of the Law on the Legalization of Buildings, adopted in November 2015

Many claimants, including the presidents of two municipalities of central Serbia (Paraćin and Čajetina), filed a case in the CCS for assessing the constitutionality of several provisions set forth in the Law on the Legalization of Buildings.

The case mainly concerned Art. 10(7) of the Law on the Legalization of Buildings which provides that, if a building constructed without a permit (illegal construction) is located on land that is jointly owned, the co-owner shall be deemed consenting with the construction if s/he "knew or could have known" about it. This provision is an exception to the general rule of Art. 6 of the Law on the Legalization of Buildings. In accordance with Art. 6, if the procedure of legalization concerns an illegal construction on land in co-ownership, it necessarily requires the written consent of all co-owners.

However, particularly interesting in this case is the fact that, in 2012, the CCS had already assessed in case IUz 295/2009 a similar provision set forth in the law then in force (Law on Planning and Construction, adopted in 2009). There, the CCS found that Art. 193(3) of that law was unconstitutional. It is, therefore, difficult to understand why the legislator decided to practically keep the same language in the newly adopted Law on the Legalization of Buildings, which was in fact meant to introduce an enhanced legal framework in this matter. In this decision, the CCS partially reiterated the reasoning it provided in its judgement of 2012 that Art. 10(7) of the Law on the Legalization of Buildings, as was the case of Art. 193(3) of the Law on Planning and Construction, is unconstitutional because it violates the right to property set forth in Art. 58 of the Constitution. According to Art. 58 of the Constitution, "peaceful tenure of a person's own property and other property rights acquired by the law shall be guaranteed" (Art. 58(1)) and "may be revoked or restricted only in the public interest established by law and with a compensation which cannot be less than the market value" (Art. 58-2). The CCS found that, even if the legalization of buildings as such constitutes a reasonable public interest, Art. 10(7) places a disproportionate burden on the rightful owners of property rights rendering it contrary to Art. 58(2) of the Constitution.

3. Case IUo-45/2020 – Constitutionality of governmental decrees related to the state of emergency

As allowed by Art. 200 of the Constitution, when the government declared the state of emergency on March 15, 2020,[27] it issued a variety of decrees, regulations, and orders that restricted certain human rights and fundamental freedoms, including the freedom of movement. For several weeks, those restrictions included an almost complete interdiction of the freedom of movement of the elderly (people

[26] According to this constitutional provision, „when the survival of the state or its citizens is threatened by a public danger, the National Assembly shall proclaim the state of emergency". Therefore, for the declaration of the state of emergency to be constitutional, the provision of Art. 200-1 of the Constitution allows – alternatively – the existence of a public danger for the survival of the state or of its citizens. Moreover, the claimants' understanding of this provision was somewhat restrictive, given that, especially in the first days and weeks of the pandemic, the distinction between the notions of *security* and *survival* (of the citizens) was practically impossible to establish.

[27] After three weeks from the declaration if the state of emergency, the authorities notified the Council of Europe of a derogation in time of emergency under article 15 of the European Convention on Human Rights, "without, however, providing detail about the measures taken as required under that article", European Commission, 2020 Serbia Report, 31.

over the age of 65 in urban areas and over 70 in rural areas).

In case IUo-45/2020, the CCS examined the Decree on Measures during the State of Emergency (hereinafter referred to as Decree 1) and of the Decree on Misdemeanour for Violation of the Order of the Minister of Interior on Restriction and Interdiction of Movement (hereinafter referred to as Decree 2). One of the main constitutional questions regarding these regulations were Art. 2 of Decree 1 and Art. 4(d)(2) of Decree 2 whereby, in the case of misdemeanour as a result of a violation of the restrictions on the freedom of movement, a defendant could be prosecuted repeatedly on the basis of the same facts. The CCS found that both provisions were unconstitutional because they violated the principle of *ne bis in idem*. In its reasoning, the Court resorted to, *inter alia,* the jurisprudence of the European Court of Human Rights (ECHR) in the cases of *Maresti v. Croatia*[28] and *Muslija v. Bosnia and Herzegovina,*[29] where the ECHR found that Article 4 of Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the guarantee that no one shall be tried or punished for an offence of which s/he has already been finally convicted or acquitted.

IV. LOOKING AHEAD

The preparation of the drafts concerning the constitutional reform, based on the initiative for constitutional changes[30] submitted by the Government on 3 December 2020, will depend on the political will of the ruling political party. The mandate of the legislature that resulted from the parliamentary elections held in June 2020 lasts until 2024. However, the announcement made by the President that the extraordinary parliamentary elections will be held "no later than April 3, 2022"[31] will probably lead to significant campaign activities, especially in the second half of 2021, thus hampering the adoption of the constitutional amendments. As for the CCS, constitutional appeals will continue to represent the overwhelming majority of cases before it, while the issues involving a high number of pending cases[32] and limited transparency of its decision-making process[33] are not likely to be swiftly settled.

V. FURTHER READING

1. Sergio Bartole, *The Internationalisation of Constitutional Law: A View from the Venice Commission* (Bloomsbury Publishing 2020).

2. Miguel Nogueira de Brito, Luís Pereira Coutinho, *The Political Dimension of Constitutional Law* (Springer 2020).

3. Uroš Ćemalović, 'One Step Forward, Two Steps Back: The EU and the Western Balkans after the Adoption of the New Enlargement Methodology and the Conclusions of the Zagreb Summit', Croatian Yearbook of European Law and Policy 16, 179-196.

[28] ECHR, Judgement of 25 June 2009, app. no. 55759/07, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22maresti%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-93260%22]}.

[29] ECHR, Judgement of 14 January 2014, app. no. 32042/11, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Muslija%20v.%20Bosnia%20and%20Herzegovina%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-155421%22]}.

[30] See fn. 3.

[31] See <https://www.rts.rs/page/stories/sr/story/9/politika/4119954/vucic-predsednicki-parlamentarni-izbori-2022.html> accessed 19 February 2021.

[32] See Chapter III and fn. 19.

[33] See Chapter III and fn. 20.

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I. INTRODUCTION

Developments in 2020 portend new possibilities for advancing constitutionalism in Singapore. A landmark general election saw the opposition strengthen its political hold and almost double the number of its parliamentary seats. The leader of the opposition was formally recognized for the first time in Singapore's post-independence history. COVID-19 also brought about profound changes to social interaction, economic activity, and even political competition; these could reshape state-citizen relations with potentially cascading effects on constitutionalism in practice, even if not on the books. Additionally, courts were fairly active in deciding constitutional challenges, despite restrictions put in place to deal with COVID-19, including expanding the use of video-conferencing for hearings and trials.[1] Of the five major constitutional cases decided by the Singapore courts, three of them dealt with the scope of protection of the freedom of speech and assembly. One addressed the scope of the right to vote and the other a test to be applied in equality challenges against executive decisions. What is significant about these judgements is that, in each of them, the courts were willing to interrogate foundational interpretive approaches to the Constitution. The courts sought to further expand the jurisprudence on existing doctrines such as the presumption of constitutionality, while also seeking to articulate more clearly tests to be applied to constitutional rights challenges such as in equal protection jurisprudence concerning decisions made by the executive. Overall, one can see a nuanced understanding of the distinctive and necessary role of constitutional law in striking a balance between the exercise of state power and the rights of citizens /individuals.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Government's response to COVID-19 entailed the use of legislative measures, rather than constitutional ones.[2] The only COVID-related constitutional amendment served to create a mechanism for separate but contemporaneous meetings among Members of Parliament if Parliament resolves that "it is or will be impossible, unsafe or inexpedient for Parliament to sit and meet in one place." The Amendment Bill only provides for a six-month validity of this mechanism though it could be extended in the future for six months at a time. These "continuity arrangements" essentially authorize Parlia-

[1] Aaron Yoong, 'Zooming into a New Age of Court Proceedings', [2020] *SAL Prac* 19, <https://journalsonline.academypublishing.org.sg/Journals/SAL-Practitioner/Advocacy-and-Procedure/ctl/eFirstSALPDFJournalView/mid/589/ArticleId/1531/Citation/JournalsOnlinePDF> accessed 25 March 2021.

[2] Jaclyn Neo and Darius Lee, "Singapore's Legislative Approach to the COVID-19 Public Health 'Emergency'" (Verfassungsblog, 18 April 2020) <https://verfassungsblog.de/singapores-legislative-approach-to-the-covid-19-public-health-emergency/> accessed 1 March 2021.

ment and its committees to "sit, meet and despatch business with Members of Parliament being present at 2 or more appointed places and in contemporaneous communication with one another."[3] While only procedural, this amendment is likely aimed at foreclosing any doubt about (and challenges to) the validity of any laws passed by Parliament sitting in multiple locations.

Among the most significant constitutional developments in 2020, outside of the courts, is the shift in parliamentary balance in favor of the opposition. While the ruling party still holds a great majority of seats in Parliament, the 2020 General Elections saw the party lose more than 10% of all elected parliamentary seats for the first time since the main opposition party, the Barisan Socialis, or Socialist Front, walked out of the first Parliament in 1965, leaving a political vacuum. The ruling People's Action Party or PAP has formed the Government after every single general election ever since. The 2020 General Election saw the main opposition party, the Workers' Party, not only increase its seat share in Parliament but also its party leader occupy the formal office of the Leader of the Opposition in Parliament. The establishment of this office in 2020 must be seen as a step in the consolidation of Singaporean democracy.[4] This is the first time in Singapore's post-independence history that it has a formal Leader of the Opposition, armed with resources and political legitimacy. However, despite the momentous nature of this new development, the Government curiously did not amend the Constitution to institute the change; in other words, the establishment of this Office did not have any legal underpinnings. This is not satisfactory from a constitutionalist perspective though a strong argument could be made that this should be seen as the crystallization of a constitutional convention, which should not be easily displaced by future Governments.[5]

III. CONSTITUTIONAL CASES

1. Wham Kwok Han Jolovan v. Attorney-General: Scandalizing Contempt of Court

While common law jurisdictions are increasingly abolishing the offence of scandalizing contempt of court, Singapore maintains the offence to guard against "[b]aseless attacks on the Judiciary," which "erode trust, and affect confidence in the administration of justice."[6] In 2016, Parliament passed the Administration of Justice (Protection) Act[7] ("AJPA"). Section 3(1)(a) of the APJA defines the offence of scandalizing contempt as involving the intentional publication of material which "impugns the integrity, propriety or impartiality of any court,"[8] and which "poses a risk that public confidence in the administration of justice would be undermined."[9] Notably, the latter element departs from the prior common law test – while the common law required proof of a "real risk" of undermining public confidence,[10] the AJPA requires only a "risk" – and this departure was intended specifically to strengthen protection of the judiciary's reputation.[11] A conviction for scandalizing contempt requires proof of the above elements, and proof that the material is not fair criticism, beyond reasonable doubt.[12] Moreover, section 12(3) of the AJPA empowers the court to order a person convicted for scandalizing contempt to publish an apology for his deeds.

The accused in Wham Kwok Han Jolovan v. Attorney-General,[13] a political activist, published a Facebook post stating that "Malaysia's judges are more independent than Singapore's for cases with political implications."[14] Wham was prosecuted for scandalizing contempt and convicted by the High Court. He then appealed, arguing that his post did not pose a "risk" of undermining public confidence in the administration of justice.[15] The Attorney-General counter-appealed, arguing not only that Wham's conviction should be sustained, but that he should also be ordered to apologize for his post.[16]

The Court of Appeal dismissed both appeals. In doing so, it offered a sensible even-handed view on scandalizing contempt, sensitive to the need to keep regulation in line with rea-

[3] Constitution of the Republic of Singapore ("Singapore Constitution"), art. 64A, inserted by the Constitution of the Republic of Singapore (Amendment) Act 2020 (No. 22 of 2020).

[4] Shirin Chua and Jaclyn Neo, "COVID-19 as an Opportunity for Democratic Conslidation?" (Verfassungblog, 24 February 2021), < https://verfassungsblog.de/covid-19-as-an-opportunity-for-democratic-consolidation/> 25 March 2021.

[5] For more, see Jaclyn Neo and Marcus Teo, "Singapore", in Richard Albert [et al]. Global Review of Constitutional Reform 2020 (forthcoming).

[6] K Shanmugam (Minister for Law), speech during the Second Reading of the Administration of Justice (Protection) Bill, *Singapore Parliamentary Debates,* Official Report (15 August 2016), vol 94 ("AJPA Second Reading").

[7] No. 19 of 2016 ("AJPA").

[8] Ibid s 3(1)(a)(i).

[9] Ibid s 3(1)(a)(ii).

[10] *Shadrake Alan v Attorney-General* [2011] 3 SLR 778, [29] (Court of Appeal).

[11] AJPA Second Reading (n 6) ("Under common law in Singapore, the test is 'real risk'. In the Bill, the test is 'risk.' ... This is the one change to the current law in the clauses on the substantive elements of contempt … Members may say, yes, but why not the current layer of protection as in the common law, which is 'real risk'? I have explained why. I want to make sure that the integrity of the Judiciary is pristine."

[12] AJPA s 3 Explanation 1; *Shadrake* (n 10) [78]-[79].

[13] [2020] 1 SLR 804 (Court of Appeal) ("*Jolovan Wham (Contempt)*").

[14] Ibid [6].

[15] Ibid [35].

[16] Ibid [71]. This order was denied by in the High Court; see *Attorney-General v Wham Kwok Han Jolovan* [2020] 3 SLR 482, [40]-[41] (High Court).

sonable public opinion. The Court held that Wham's post did pose a "risk" of undermining public confidence in the administration of justice. Yet, a "risk" under the AJPA was not one that was "in substance … non-existent,"[17] but "one that *the reasonable person coming across the contemptuous statement would think needs guarding against* so as to avoid undermining public confidence in the administration of justice?"[18] Wham's post fell foul even of this standard, since it was "a direct attack on the independence and integrity of Singapore's Judiciary."[19] However, the Court saw no need to order Wham to make an apology, since "an insincere apology made under compulsion can have the opposite effect of diminishing the standing of the Judiciary."[20] The Court held that "a mandated apology should only be considered in *exceptional circumstances,*" when the contempt uttered was so egregious that the need to signal disapproval of it eclipsed the apology's insincerity;[21] Wham's post was not an instance of this.[22] Jolovan Wham demonstrates that, even as Singapore's courts continue punishing for scandalizing contempt, they will ensure that they do so within limits which the public considers reasonable.

2. Wham Kwok Han Jolovan v. Public Prosecutor: Freedom of Assembly

Although Article 14(1)(b) of Singapore's Constitution protects freedom of assembly, Article 14(2)(b) states that "Parliament may by law impose … on [that] right … such restrictions as it considers necessary or expedient in the interest of … public order."[23] Singapore has various legislative regimes which regulate speech and assembly in the interest of public order, of which the Public Order Act[24] ("POA") is paradigmatic. Section 16 of the POA criminalizes the organization of public assemblies without permits, issued at the discretion of the Commissioner of Police. POA section 7(1) states that the Commissioner may refuse a permit if he reasonably apprehends that the assembly may lead to one of the consequences listed in section 7(2), which includes the promotion of a "political end" with "the participation of" non-Singaporean citizens or entities.[25]

Wham Kwok Han Jolovan v. Public Prosecutor,[26] however, marks an epochal change in Singapore's freedom of expression jurisprudence. The accused, same activist in the decision summarized above, organized an event titled "Civil Disobedience and Social Movements" without obtaining a license beforehand.[27] When he was prosecuted, Wham argued that section 16 of the POA contravened Article 14, but the High Court, in a decision we covered in last year's Global Review,[28] dismissed his challenge on grounds consistent with the general deferential approach courts had taken in prior free speech challenges.[29]

The Court of Appeal upheld the High Court's decision but on drastically different grounds. The Court first highlighted its constitutional role as guardian of the rule of law: "while it is undeniably Parliament that acts to derogate from the constitutional right for one of the purposes under Art 14(2)(b), *it is unequivocally for the judiciary to determine whether that derogation falls within the relevant purpose."*[30] It dismissed earlier judicial statements that there was a "presumption of legislative constitutionality" in Article 14 challenges which would "not be lightly displaced;"[31] the constitutionality of a law was a strictly legal question which the Court had to answer. Thus, while Parliament retained "the primary decision-making power regarding whether a derogation from the right is necessary or expedient,"[32] the Court still had to consider "whether the statutory derogation is objectively something that Parliament thought was necessary or expedient in the interests of public order and whether Parliament could have objectively arrived at this conclusion."[33] In doing so, the Court should follow "a three-step framework:"[34] (1) assessing whether the impugned law "restricts the constitutional right in the first place;"[35]

[17] *Jolovan Wham (Contempt)* (n 13) [38].

[18] Ibid [38], emphasis in original.

[19] Ibid [39].

[20] Ibid [75].

[21] Ibid [76], emphasis in original.

[22] Ibid.

[23] See e.g. *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582, [49]-[54] (High Court).

[24] Cap 257A, 2012 Rev Ed.

[25] Ibid s 7(2)(h).

[26] [2020] SGCA 111 ("*Jolovan Wham (POA)*").

[27] Ibid [5].

[28] Jaclyn L Neo [et al.], "Singapore", in Richard Albert [et al.] (eds.), *2019 Global Review of Constitutional Law* (I-CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2019) 293, 297-298.

[29] See e.g. *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582, [49]-[54] (High Court).

[30] *Jolovan Wham (POA*) (n 26) [28], emphasis in original.

[31] Ibid [26], disapproving of *Chee Siok Chin* (n 23) [49].

[32] *Jolovan Wham (POA)* (n 26) [22].

[33] Ibid.

[34] Ibid [29].

[35] Ibid [30].

(2) determining whether Parliament's stated purpose fell within the legitimate limitations in Article 14(2);[36] and (3) determining whether there was "objectively … a nexus between the purpose of the legislation in question and one of the permitted purposes."[37] Overall, "a balance must be found between the competing interests at stake."[38]

Applying this framework, the Court upheld the POA's licensing regime as constitutional because it achieved "a careful balance" between freedom of assembly and public order:[39] it contained exceptions for indoor assemblies involving only Singaporean speakers and participants;[40] all the grounds in section 7(2) of the POA had a "nexus" to public order;[41] the Commissioner always retained the discretion to authorise the assembly subject to certain conditions.[42] Yet, Jolovan Wham will certainly have broader implications for Singapore's constitutional law beyond the challenge the Court dismissed. Commentators have since described the Court's "three-step framework" as an "incomplete form of proportionality analysis"[43] and a *"Wednesbury*-esque" test for constitutionality.[44] More broadly, the judicial philosophy the Court drew from resonates with its broader approach to constitutional issues in recent years, which attempts to carve out a meaningful role for law and the courts in tandem with principles of due deference and institutional competence considerations.[45] After Jolovan Wham, Singapore law on freedom of expression will be marked no longer by unqualified judicial deference, but by a nuanced and contextual discourse between policy and constitutional principle.

3. Singapore Democratic Party v. Attorney-General / The Online Citizen v Attorney-General: Freedom of Speech

In last year's Global Review,[46] we analyzed Singapore's Protection from Online Falsehoods and Manipulation Act[47] ("POFMA"), which Parliament passed to tackle fake news and thereby protect "free speech and the infrastructure of fact."[48] To recap, POFMA empowers Ministers to issue directions against "false statements of fact" communicated online,[49] if satisfied that doing so would be a "necessary or expedient" means of furthering certain public interests.[50] These directions may require statement-makers to correct their statements by amending them to add the Government's chosen response to it.[51] These directions may be appealed to the High Court, via an expedited process, on the grounds, *inter alia,* that the statement was a true statement of fact.[52]

Despite POFMA's detailed legislative framework, its use in practice remains plagued with uncertainty. In the first two High Court decisions on POFMA – Singapore Democratic Party v. Attorney-General[53] and The Online Citizen v. Attorney-General[54] – two questions have risen to the fore. First, it remains unclear which party – the Minister or the statement-maker – bears the burden of proof vis-à-vis the veracity of the impugned statements, which may be of importance when the individual that makes the statement lacks the fact-finding capacity the Government has. Second, it remains unclear whether the Minister's interpretation of material published by the statement-maker online can be questioned by the court, which is of particular concern when the Minister's interpretation is unreasonable or acontextual.

In the case of Singapore Democratic Party, an opposition party made statements online involving the employment of "locals" in Singapore and received an order requiring it to correct those statements with the Government's response. On appeal, the High Court upheld the decision. However, it held, first, that in appeals under POFMA the burden lays on the Minister to prove the falsity of the impugned statement, rather than on the statement-maker to prove its truth. It was for the Minister to explain why the statement-maker's "constitutional right to free

[36] Ibid [31].

[37] Ibid [32].

[38] Ibid [33].

[39] Ibid [48].

[40] Ibid [42]-[44].

[41] Ibid [46].

[42] Ibid [46], [52].

[43] See Alec Stone Sweet, "Intimations of Proportionality? The Singapore Constitution and Rights Protection" [2021] Sing JLS (forthcoming).

[44] See Marcus Teo, "A Case for Proportionality Review in Singaporean Constitutional Adjudication" [2021] Sing JLS (forthcoming).

[45] See e.g. *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779, [1], [105]-[106] (Court of Appeal).

[46] See Neo [et al.], "Singapore" (n 28) 293, 293-294.

[47] No. 18 of 2019 ("POFMA").

[48] K Shanmugam (Minister for Law), speech during the Second Reading of the Protection from Online Falsehoods and Manipulation Bill, *Singapore Parliamentary Debates,* Official Report (7 May 2019), vol 94.

[49] POFMA s 10(1)(a).

[50] Ibid ss 10(1)(b), 4.

[51] Ibid s 11.

[52] Ibid s 17(5)(b).

[53] [2020] SGHC 25 (High Court) ("*Singapore Democratic Party*").

[54] [2020] SGHC 36 (High Court) ("*The Online Citizen*").

speech should be constrained,"[55] especially given the "clear information asymmetry" in the Minister's favor,[56] and since otherwise "the Minister would succeed in a situation where neither party provides any evidence of truth or falsity simply and solely because of the Minister's own earlier decision to cause the issuance of a [Direction]."[57] Second, context was relevant in the interpretation of statements impugned as false. Although a statement may have multiple potential meanings,[58] those meanings still "fall to be determined by reference to what a reasonable reader would understand from the material in question […] an objective assessment."[59]

The Online Citizen case, however, reached the opposite conclusion on both key issues. There, a Malaysian human rights group had made vivid allegations about the mistreatment of prisoners during execution, at the hands of Singapore Prison Service, which an online news site in Singapore reported about. The news site then received an order requiring it to correct its statement; the impugned statement, however, being the allegations made by the human rights group *in vacuo*. On appeal, the High Court upheld the decision, on grounds diametrically opposed to those in The Online Citizen case. First, the burden of proof lays on the statement-maker to prove the truth of his statement, rather than on the Government to prove its falsity.[60] The news site's constitutional right to free speech did not preclude this conclusion, because falsehoods were "not in the categories of speech covered by Art. 14."[61] Second, an impugned statement's context was irrelevant to its interpretation if the Minister's direction excluded it; the news site could not rely "on a reinterpretation of the 'subject statement' that includes [its] own *reporting* of the Subject Statement" to escape the direction.[62] This was because "POFMA not only seeks to capture those tale-makers who author falsehoods, but also implicates tale-bearers who receive false information and forward it to others without taking a position on the truth of the content."[63]

Singapore Democratic Party together with The Online Citizen expose drastic uncertainties in POFMA's day-to-day workings. At the time of writing, both cases are before the Court of Appeal. Given the importance of the rights and public interest at stake, a clarification on these issues is sorely needed.

4. Daniel De Costa Augustin v. Attorney-General: The Implied Right to Vote Confirmed

Singapore held a general election in 2020 in the midst of the COVID-19 pandemic. The case Daniel De Costa Augustin v. Attorney-General[64] involved an unsuccessful attempt to stop the election from going ahead on the ground that legally imposed health precautions unfairly disadvantaged opposition candidates, and would thus deprive the electorate of a free and fair election. Although the Constitution does not expressly refer to a right to vote, the Court of Appeal confirmed that the right is "plainly a constitutional right"[65] which is "best understood as a right that is found in the Constitution either as a matter of construing it in its entirety or as a matter of necessary implication" from certain constitutional provisions.[66] The Court also accepted "as a statement of principle elections must be free and fair,"[67] but held the appellant had not presented an arguable case as to what this requires, how the aspects of the principle attract constitutional status, and how a breach was threatened in the facts of the case.[68]

The judgment is another illustration of the Court's departure from the legalism of past cases, exemplified by the refusal to hold in the case of Rajeevan Edakalavan v. Public Prosecutor[69] that an arrested person has a constitutional right to be informed of the right to legal counsel of one's choice explicitly provided for by Article 9(3) of the Constitution. Then, the High Court took the view that "[t]o read into the right to counsel in Art 9(3) an additional constitutional right to be so informed will be tantamount to judicial legislation,"[70] and "[a]ny proposition to broaden the scope of the rights accorded to the accused should be addressed in the political and legislative arena."[71] It will be

[55] *Singapore Democratic Party* (n 53) [37].

[56] Ibid [38].

[57] Ibid [39].

[58] Ibid [89].

[59] Ibid [70].

[60] *The Online Citizen* (n 54) [20].

[61] Ibid [35].

[62] Ibid [55].

[63] Ibid [57].

[64] [2020] SGCA 60 (Court of Appeal).

[65] Ibid [10].

[66] The Court identified Art 66 which requires a general election to be held within three months of a dissolution of Parliament, and Art 39(1)(a) which states that Parliament consists of, among others, "such number of elected Members as is required to be returned at a general election": ibid [9].

[67] Ibid [13].

[68] Ibid [14].

[69] [1998] 1 SLR(R) 10 (High Court), though not yet overruled by the Court of Appeal.

[70] Ibid 18, [19].

[71] Ibid 19, [21].

interesting to see whether and how the Court fleshes out the implications of the right to vote and a free and fair election, given the constitutional text's silence on this point.

Also noteworthy is the Court's implication of a legally enforceable right to vote from various constitutional provisions, which raises the possibility of other rights being found to exist in a similar way.

5. Syed Suhail bin Syed Zin v. Attorney-General: Clarifying the Right to Equality and Equal Protection

In Syed Suhail bin Syed Zin v. Attorney-General,[72] the Court of Appeal clarified the applicable legal test when determining if executive or administrative action violates the right to equality before the law and equal protection of the law guaranteed by Article 12(1) of the Constitution. The appellant in the case had been sentenced to death for drug trafficking. He had exhausted his right of appeal and had not been granted clemency by the President. He applied unsuccessfully to the High Court for leave for judicial review on the basis that the fixing of his execution date by the prison authorities violated Article 12(1) because there were other prisoners on death row who had been sentenced to death before him but who had not yet been scheduled for execution.

The Court of Appeal reversed the decision and allowed the appellant to proceed with his judicial review application. In its judgment, the Court noted the fact that a prisoner sentenced to death who eventually stands to lose the right to life guaranteed by Article 9(1) of the Constitution at the end of the criminal process is still entitled to other legal rights. Thus, the State's discretion to determine the time and manner of execution is subject to legal limits, namely the usual principles of judicial review in administrative law and the fundamental liberties enshrined in the Constitution.[73] It cannot be disputed that a prisoner would be entitled to legally challenge an attempt to use an unlawful method of execution, or a decision of the State to schedule some executions at the earliest possible date while delaying others for years or indefinitely without legitimate grounds.[74]

Earlier cases had suggested that only "deliberate and arbitrary" executive action violated the right to equality. The Court held that while such action would be irrational or amount to taking into account irrelevant considerations or disregarding relevant ones, this ought not to be conflated with what is discriminatory under Article 12(1). If it were otherwise, the Article would be rendered nugatory since executive action would essentially only be challengeable on administrative law grounds. Moreover, since the standard required executive action to be both deliberate and arbitrary, it provided insufficient protection for the right to equality as even action that was irrational but carried out recklessly or negligently would not be unconstitutional.[75]

The Court held the correct test to be applied as follows: (1) it must be considered whether the executive action resulted in the applicant being treated differently from other equally situated persons; and (2) if so, the differential treatment infringes the right to equality unless it can be shown to be reasonable, that is, based on legitimate reasons.[76] The Court added that due regard must be had to the nature of the executive action in question. Since the case at hand "was concerned with a decision which was necessarily taken on an individual rather than a broad-brush basis, and one which affected the appellant's life and liberty to the gravest degree, the court had to be searching in its scrutiny."[77] This is an intriguing pronouncement as it suggests a judicial willingness to adjust the level of scrutiny according to the circumstances, a point not mentioned in previous equality cases. On the other hand, the Court also said it would "equally apply" searching scrutiny "when considering whether the appellant has discharged his evidential burden and thereby overcome the presumption of constitutionality."[78]

IV. LOOKING AHEAD

On any reasonable estimate, 2021 is shaping up to be an important year for constitutional law in Singapore. Three significant constitutional decisions will likely be rendered by the Court of Appeal within the year, two of which have already been heard. The first, of course, will be on the joint appeals of the Singapore Democratic Party and The Online Citizen cases, on POFMA. The second decision will be the appeal of Ong Ming Johnson v. Attorney-General,[79] on the constitutionality of section 377A of Singapore's Penal Code, which criminalizes male homosexual intercourse. While the High Court's decision in Johnson upheld the provision on reasoning largely similar to that employed in an earlier Court of Appeal decision to the same effect,[80] the Court of Appeal now has the opportunity to depart from its prior reasoning, which may have far reaching consequences for the constitutional principle of equality enshrined in Article 12(1) of Singapore's Constitution. The third decision will be the appeal of Aljunied-Hougang Town Council v. Lim Swee Lian Sylvia,[81] a case involving the duties and responsibilities of parliamentarians in managing Town Councils under

[72] [2020] SGCA 122 (Court of Appeal).
[73] Ibid [48].
[74] Ibid [48]–[49].
[75] Ibid [57].
[76] Ibid [62].
[77] Ibid [63].
[78] Ibid.
[79] [2020] SGHC 63 (High Court).
[80] *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (Court of Appeal).
[81] [2019] SGHC 241 (High Court).

the Town Council Act, which we touched on in last year's Global Review.[82] The hearing for Sylvia Lim has yet to take place, in part due to delays arising from a change of control over the plaintiff Town Council after Singapore's 2020 general elections,[83] but the Court of Appeal has already suggested that its decision will likely have far-reaching implications on the divide between public and private law in Singapore.[84] More broadly, constitutional law in Singapore will now develop against the backdrop of an evolving political landscape. In the wake of the landmark 2020 General Elections, the PAP is debating important issues such as women's rights,[85] climate change,[86] and criminal justice reform[87] at greater length than before. Meanwhile, Singapore's much-anticipated political succession has been put on hold for the moment, with the current PAP government led by Prime Minister Lee Hsien Loong determined to concentrate on seeing Singapore through the COVID-19 pandemic before handing over the reins.[88]

V. FURTHER READING

1. Marcus Teo, "The dawn of proportionality in Singapore" [2020] *Public Law* 631.

2. Marcus Teo & Jonathan Hew, "Context and Meaning in the Interpretation of Statements Under POFMA" (*Singapore Law Gazette,* June 2020) https://lawgazette.com.sg/feature/interpretation-pofma/.

3. Thio Li-ann, 'Ousting Ouster Clauses: The Ins and Outs of the Principles Regulating the Scope of Judicial Review in Singapore' [2020] Singapore Journal of Legal Studies 392.

4. Kenny Chng, 'The Theoretical Foundations of Judicial Review in Singapore' (2019) Singapore Journal of Legal Studies 294.

[82] See Neo [et al.], "Singapore" (n 28) 293, 298.

[83] From the PAP to the Workers' Party, the very party to whom the defendants belong to; see KC Vijayan, "Sengkang Town Council won't drop lawsuit against Workers' Party members: Law don" (*The Straits Times,* 4 August 2020) <https://www.straitstimes.com/politics/sengkang-town-council-wont-drop-suit-law-don> accessed 15 February 2021.

[84] See KC Vijayan, "AHTC case: Top court raises issues for parties to address; hearing due later this year" (*The Straits Times,* 21 September 2020) <https://www.straitstimes.com/singapore/courts-crime/ahtc-case-top-court-raises-issues-for-parties-to-address> accessed 15 February 2021.

[85] See Tan Tam Mei, "Singapore to conduct review of women's issues to bring about mindset change for gender equality" (*The Straits Times,* 20 September 2020) <https://www.straitstimes.com/singapore/singapore-to-conduct-review-of-womens-issues-to-inculcate-mindset-change-for-gender> accessed 15 February 2021.

[86] See Rei Kurohi, "Singapore Parliament declares climate change a global emergency" (*The Straits Times,* 1 February 2021) <https://www.straitstimes.com/singapore/politics/singapore-parliament-declares-climate-change-a-global-emergency> accessed 15 February 2021.

[87] See Tham Yuen-C, "Parliament: Criminal justice system works, and vital to uphold its integrity, says Shanmugam" (*The Straits Times,* 4 November 2020) <https://www.straitstimes.com/singapore/politics/parliament-criminal-justice-system-works-and-vital-to-uphold-its-integrity-says> accessed 15 February 2021.

[88] See Lianne Chia, "GE2020: PM Lee calls for support from all Singaporeans in getting through COVID-19 crisis" (*Channel NewsAsia,* 6 July 2020) <https://www.channelnewsasia.com/news/singapore/ge2020-pm-lee-lunchtime-rally-support-from-singaporeans-covid-19-12905296> accessed 15 February 2021.

Slovakia

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I. INTRODUCTION

The constitutional development in Slovakia in 2020 was heavily influenced by three factors which determined the agenda for the year in terms of both constitutional change and case law of the Constitutional Court: the general election, which resulted in a landslide victory of opposition parties, the Covid-19 pandemic and the revelation of endemic corruption in the justice system.

The first of the three events can be interpreted as a healthy sign of democracy. The general election took place on time, without complications,[1] with the highest turnout since 2002. 65.8% of the voters cast their vote at the ballot box on February 29. The high turnout was fueled by public anger over the 2018 murder of an investigative journalist and his fiancée and a general feeling of discontent with the Smer-SD party, which dominated Slovak politics for a decade.[2] Smer-SD was, somewhat surprisingly, unseated by the populist party OLANO that ran on an anti-corruption platform. OLANO carried 25% of the vote, which translated into 53/150 seats in the Parliament and afforded the party enough leverage to secure the position of the head of government.[3] OLANO formed a coalition with three other parties, securing a comfortable majority of over 90 seats to implement large-scale legal reforms.[4]

The other two developments were malign and caught the general public and political actors off guard. Shortly after the election, a domestic outbreak of the global Coivd-19 pandemic put the new government's readiness with a novice PM from OLANO at the helm to the test. The first case of the disease was confirmed in Slovakia on 6 March, just a week after the election. Although the government succeeded in containing the first wave of the pandemic,[5] it failed to prepare duly for the second wave that hit the country in the fall.[6] By early 2021, Slova-

[1] Prior to the election, the outgoing government sought to implement controversial new electoral rules that would prohibit the publication of opinion polls 50 days before an election. The Constitutional Court suspended the legislation pending decision on its merits so that the parliamentary election could proceed undisturbed. Simon 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>

[2] Agence France-Presse, "Slovakia election: seismic shift as public anger ousts dominant Smer-SD party", The Guardian, (2020) <https://www.theguardian.com/world/2020/mar/01/slovakia-election-centre-right-olano-wins-poll-on-anti-graft-platform>

[3] Tomas Mrva and Jan Lopatka, "Slovak anti-corruption opposition parties score emphatic election win, Reuters, (2020) <https://www.reuters.com/article/us-slovakia-election-idUSKBN20O15D>

[4] OLANO had previously been one of the most prolific parties in terms of submitted constitutional amendment bills, but once in power the party has been relatively passive when it comes to constitutional change. This is likely due to the focus on pandemic response and a strife in the coalition.

[5] Slavomíra Henčeková and Simon Drugda, "Slovakia: Change of Government under COVID-19 Emergency", Verfassungsblog (2020) <https://verfassungsblog.de/slovakia-change-of-government-under-covid-19-emergency/>; see also Max Steuer, "Slovakia's Democracy and the COVID-19 Pandemic: When Executive Communication Fails" Verfassungsblog, (2021) <https://verfassungsblog.de/slovakias-democracy-and-the-covid-19-pandemic-when-executive-communication-fails/>

[6] Dalibor Rohac, "What Happened to Slovakia's Coronavirus Success Story?", Foreign Policy, (2021), <https://foreignpolicy.com/2021/03/16/slovakia-coronavirus-success-eu-vaccine-russia-sputnik/>

kia was fourth, with the highest increase of COVID-19-related deaths in the world.

The pandemic revealed not only the lack of government preparedness but also that the Slovak constitutional framework governing the emergency response was not suitable to contain a crisis of this scale and duration. By the end of the year, the amending actors decided to amend the Constitutional Act on State Security in the Time of War, State of War, State of Emergency, and Crisis (CASS) in light of the country's first experience with the pandemic response.[7] These modifications will likely be soon used in practice since the pandemic did not recede, and it continues to affect the daily lives of the population adversely.

Finally, Slovakia has not been fighting only the pandemic. On the day when the Slovak government declared the state of emergency to contain the outbreak, the country's general judiciary was thrown into turmoil wholly unrelated to the deadly disease. On March 11, early in the morning, the police carried out the largest operation against judicial corruption in the history of the republic, under the code name "Storm."[8] The anti-crime unit of the National Criminal Agency charged and detained more than a dozen judges from courts in the capital region, including former MOJ State Secretary and a one-time candidate for the position on the Constitutional Court Monika Jankovská. These arrests were made after revelations in the investigation of the case of the murdered journalist. The investigation unearthed a web of corruption on a systemic scale. These developments enabled the new government to push for robust political and judicial reform.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most important constitutional developments in Slovakia, as explained above, concerned the judiciary and the constitutional framework governing emergencies. We examine each in closer detail.

Delivering on their pledge to clean up the system, the new government placed a high priority on the reform of the justice system. After consultation with key stakeholders,[9] the Ministry of Justice prepared an omnibus constitutional bill[10] covering multiple areas of judicial organization. This included reform of the selection and appointment of Constitutional Court judges, changes of the composition of the Judicial Council, limited judicial background checks, the mandatory age of retirement for general and constitutional judges, the establishment of the Supreme Administrative Court and other subject matter.[11] The amendment was adopted by a narrow majority of 91 MPs in December 2020. The key, albeit controversial change introduced by the amendment was the explicit prohibition of the judicial review of constitutional change. Although the Constitutional Court did not have this power in law, the doctrine of constitutional unamendability had been based on a judicial precedent from 2019. In a momentous judgment *PL. ÚS 21/2014,* the Court invalidated a constitutional amendment for breaching the Constitution's material core and domesticated the doctrine of constitutional unamendability. The provision in the constitutional amendment on judicial reform that effectively denies the judge-made doctrine was a direct response to the assertion of power by the Court.[12]

The second constitutional amendment in 2020 concerned changes to the constitutional framework governing the emergency response. The amendment passed through an expedited procedure in 21 days since the submission to the Parliament.[13] The amendment sought to modify the mechanism for declaration and extension of the state of emergency. The CASS previously limited the duration of the state of emergency to a maximum of 90 days, without a possibility of extension. The new amendment allowed for an extension of the state of emergency beyond the constitutionally permitted 90 days. The amendment enabled the government to extend the state of emergency by 40 days.[14] The modified mechanism for extending the state of emergency does not limit the number of extensions allowed or the maximum duration of the state of emergency. Despite the lack of an explicit cap on the maximum duration of an emergency, the amendment provided a checking mechanism against abuse of the mechanism. The Parliament must approve the extension of the state of emergency within 20 days. Without approval, the state of emergency expires by default. The Parliament's approval is also required in the case of a re-declaration of a state of emergency if 90 days have not elapsed since the end of the previous state of emergency declared for the same reason. Finally, the constitutional amendments also

[7] Constitutional Act No. 227/2002 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/227/20201229>

[8] "Kočner's judges charged and detained", The Slovak Spectator, (2020) <https://spectator.sme.sk/c/22355425/kocners-judges-charged-and-detained.html>

[9] Notwithstanding consultation with the relevant stakeholders, some members of the judiciary and opposition MPs criticized the amendment process for lack of inclusion and haste.

[10] Constitutional Act No. 227/2002 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2002/227/20201229>

[11] "Judiciary will see changes. MPs approved the reform", The Slovak Spectator, (2020) <https://spectator.sme.sk/c/22551831/judiciary-will-see-changes-mps-approved-the-reform.html>

[12] For more details on the process see Simon Drugda, "On Collision Course with the Material Core of the Slovak Constitution: Disabling Judicial Review of Constitutional Amendment", Verfassungsblog, (2020) <https://verfassungsblog.de/on-collision-course-with-the-material-core-of-the-slovak-constitution/>

[13] The expedited legislative procedure has been used to pass only 12 direct and indirect constitutional amendments since adoption of the Constitution in 1993. See the database compiled by one of the authors, Simon Drugda, "Constitutional change in Slovakia 1993-2020", (2020) <https://docs.google.com/spreadsheets/d/1SE65B-1Mo_DzCYfax2RKzidhHPIK1-yQtnrE2ydwTWF8/>

[14] Constitutional Act No. 414/2020 Coll. <https://www.slov-lex.sk/pravne-predpisy/SK/ZZ/2020/414/20201229.html>

codified a more comprehensive set of rules for constraint on fundamental rights during an emergency. Fundamental rights and freedoms that are not expressly listed in the CASS cannot be restricted in the state of emergency. The change permitted the government to limit the freedom of movement and residence further.

III. CONSTITUTIONAL CASES

This section reviews the most salient decision of the Slovak Constitutional Court in the year 2020. We focus specifically on the pandemic case law of the Court, as well as several high-profile cases on the criminal detention of lower court judges that arose after revelations of systemic judicial corruption.

1. Review of the State of Emergency PL. ÚS 22/2020

The General Prosecutor (GP) challenged the state of emergency declared on September 30, 2020, by the government based on the CASS. The GP also questioned a corresponding decision of the government imposing specific duties and obligations in different sectors of the national economy based on the statute No 387/2002 Coll. that governs emergency response on the sub-constitutional level. In the petition, the GP challenged various procedural aspects affecting the legality of the declaration of emergency. First, the declaration was adopted based only on the oral motion not supported by any written materials (including the absence of motives for the declaration in writing). Second, the declaration lacked clarity since it ostensibly applied to the whole territory of the Slovak republic, but the CASS requires the government to specify the affected territory.

It is important to note that the emergency results in adverse legal consequences in various legal fields, from harsher sentences in the penal code to restraints on the economic activity of various entities or stripping off opposition rights in the legislative process. The GP also claimed that the government could not invoke and use two different exceptional legal regimes having two different legal bases (namely emergency – constitutional statute and state of crisis – statutory basis) for the same motives on the same territory. The GP opined that the declaration did not specify the necessity criterion both in factual and legal aspects and entirely omitted to provide for restrictions of human rights and freedoms. The declaration was also challenged by a group of opposition MPs on the grounds that the emergency had been disproportionate to the imminent threat to life and health of people as provided in the constitutional statute. The MPs also claimed a violation of legal certainty and stability due to the vagueness of the declarations.

The Constitutional Court dismissed the two petitions on October 14, upholding the declarations of emergency. The Court emphasized, somewhat contradictorily, that it takes any exceptions from the regular order of things suspiciously but it nevertheless grants broad discretion to the government in responding to emergencies. The Court understood its role as only checking for the reasonableness of the government exercise and 'ensuring that manifest disproportionality did not occur in the executive action (para 43). This self-perception of the role of the Court in the judicial review of emergency set the tune for the remainder of the opinion.

When reviewing the legality of the declaration, the Court stated that although the CASS does not require a motive for declaring an emergency, still the government should provide reasons for the declaration, notwithstanding that such motive might be implied from factual, legal and social context. The Court took into account a recorded discussion at the government session before the declaration of the state of emergency and accepted that the motive had been the COVID-19 pandemic. However, it suggested that in future, the motives for the declaration of an emergency should be made to enable a judicial review of the declaration. Regarding the absence of a written motion for the declaration of the state of emergency, the Court argued that the legal regulation does not require such motion and

As far as the territorial scope of the declaration of emergency was concerned, the Court did not doubt that the government had in mind the whole territory of Slovakia. The Court also defended the government's discretion to determine whether or not to limit specific rights in an emergency. The Court found that it is theoretically possible that a state of emergency is called without any limitation of rights or freedoms. The Court remained indifferent to petitioners' claim that almost all criminal acts are punishable by harsher sanctions during an emergency, holding that it is up to the legislator to make necessary legislative changes in that regard.

The petitioners' last argument touched on the lack of proper motives for the emergency declaration because the public health sector was well functional. The Court relied on the World Health Organization's expert opinion and its announcement of the Covid19 global pandemic, the wide margin of appreciation afforded to the government in crisis management and the factual and legal situation in the spring of 2020 during the first wave of the pandemic. Consequently, the petitioners' argument failed. A critical legal question, raised by the GP, of whether it is legally permissible to have two parallel legal exceptions put in place simultaneously, on the same territory and for the same reason (namely emergency and crisis), fell on deaf ears too. In conclusion, it seems that the Court missed a historic opportunity to define the standards and limits for the emergency regime.

2. Pandemic Case Law

The Constitutional Court was confronted with a stream of individual constitutional complaints against the state authorities' anti-pandemic measures.[15] At the heart of these complaints was an assertion of unconstitutional human rights limitation, focused mainly on a potential infringement of freedom of movement and residence. The complainants argued that the Public Health Office exceeded its powers when it ordered that everyone

[15] Senate decisions in cases IV. ÚS 467/2020, III. ÚS 386/2020, III ÚS 387/2020, I. ÚS 438/2020, II. ÚS 410/2020

entering the territory of Slovakia after April 20 had to mandatorily quarantine in various state facilities for the time necessary to perform the laboratory diagnosis of Covid-19. After the negative COVID test results, the individuals concerned had to isolate further (a total of 14 days). The claimants argued that these human rights' restrictions adopted without a statutory basis unconstitutionally violated their rights.

The Court, in its decision, emphasized its role as the ultimate human rights guarantor. Nevertheless, the principal role for the protection of individual rights rests with the general courts. The SCC's jurisdiction remains auxiliary. The Court acts exclusively when the jurisdiction of other public authorities (especially the general courts) does not apply or when general courts cannot deliver an appropriate constitutional remedy. The Constitutional Court reminded the claimants that they could not pick an institution to decide their case and leapfrog the general courts. The claimants had to follow the relevant pathway for the litigation of grievances and human rights breaches set up by the statute. They may very well have their day in the Constitutional Court, but only after they exhausted all available means of legal protection.

The Court stated that the contested ordinance was an administrative act issued by a public authority. It was a sui generis decision, or a hybrid administrative act, subjected to an administrative review. The Constitutional Court defined the hybrid administrative act as an individual legal act with some normative legal act elements. The ordinance potentially involved an indefinite number of addressees (a normative element). Simultaneously, the distinctiveness of the Covid-19 pandemic shaped the specific subject of the regulation (an individual element). The ordinance contained restrictions on individual human rights, but these limitations stemmed from the statutory regulation. Therefore, the Court held that the Public Health Office issued the ordinance not as a generally binding norm, and, thus, within its legal competencies and under the constitutional limitation clause (Article 13).

The SCC ruled that any person affected by such measures could file a general action against an administrative act. If such administrative challenge concerned a fundamental right, it was constitutionally reviewable further by the general judiciary. The jurisdiction of the Court could be activated only afterwards. According to the SCC, this pathway provided a higher standard of human rights protection than single instance proceedings before the Constitutional Court. Consequently, the Court declined to hear all similar cases.

3. Criminal Detention of Lower Court Judges

Judges generally enjoy extensive privileges and immunities to safeguard their decisional independence. These immunities serve to protect judges from the pressure and unwarranted attention of the other branches of government. However, the principle of judicial independence is not an end in itself or personal privilege but works to benefit litigants. The extent of the constitutional protection of judicial independence in Slovakia has changed over time. The Constitutional Court (CC) had until 2012 the power to deny criminal prosecution or remand in custody of judges during their term of office. Presently the Court lost both the power to approve criminal prosecution or deny their detention following the constitutional amendment on judicial reform in 2020.

However, when the cases reviewed in this section took place in March 2020, the Court could still review the detention of general judges under now abolished Article 136(3) of the Constitution. When the police charged 13 judges in operation Storm, they have been transferred to pre-trial detention in the seat of the Constitutional Court in preparation for their testimony and potential release. Under Article 226 of the Constitutional Court Act (CCA), only the Prosecutor General could file a request for consent to the custody of a judge. The request must have been reasoned and appended with the investigation file.

Based on a request for consent for custody of a judge, the President of the Constitutional Court a plenary session of the Court, which heard the accused judges. The Constitutional Court acted promptly, for the general constitutional 48-detention rule also applies to judges. The Court heard the 13 detained judges, each in about half an hour, and eventually determined late at night on March 12 that eight of the judges were released.[16] The Court accepted the detention of the remaining five, who were then transported to the seat of the Special Criminal Court the next day, which had to decide on the lawfulness, as opposed to the constitutionality, of their detention.

According to the established jurisprudence, the Court would not approve custody over a judge if the request was made in a bad faith. The Constitutional Court's power to consent with custody over a judge was an expression of the principle of judicial independence, meant to protect judges from the potential abuse of repressive criminal law instruments by other state authorities against them, to prevent or retaliate for an unfavorable ruling.[17] The Constitutional Court's task was to assess whether, as a result of an unfounded or extremely arbitrarily reasoned charge or other established circumstances, the detention of a judge would be unconstitutional. The consent to the custody of a judge did not replace the decision of the competent general court on custody. It was only a prerequisite for the competent court's subsequent decision on custody, and the Constitutional Court's consent would not prejudge the custody decision. The Constitutional Court examined whether the indictments followed the proper procedure and ultimately concluded that it could not establish the existence of circumstances that constituted an abuse of law enforcement against five judges.

IV. LOOKING AHEAD

[16] "Four of Kočner's judges, including ex-state secretary Jankovská, taken into custody", The Slovak Spectator, (2020) <https://spectator.sme.sk/c/22357495/four-of-kocners-judges-including-ex-state-secretary-jankovska-taken-into-custody.html>

[17] Protection against such abuse of one type of power against another component of state power is granted not only to the judiciary but also to the legislative power, through the requirement of consent of the Parliament for criminal detention of an MP.

As per usual, forecasting future development is not an easy task. Fortunately, we do not have to guess, as several significant developments took place at the heels of the deadline for submitting this report. Let us focus on two developments, specifically the legal challenge to the constitutional amendment on judicial reform and the government reshuffle.

At the end of the year 2020, opposition MPs challenged the constitutional amendment on judicial reform in the Constitutional Court.[18] The case is still pending. They argue, among other things, that taking the power of judicial review of constitutional change away from the Constitutional Court is unconstitutional. Somewhat paradoxically, the Court must decide whether to accept the case or acquiesce to the clear intention of amending actors to disable judicial review of constitutional amendments. In February 2021, the same petitioner also filed a second challenge to the constitutional amendment on judicial reform.[19] The opposition MPs in the second case challenged six discrete provisions in the amendment regarding the composition of the Judicial Council, transfer of judges, their criminal liability for the abuse of power, and scrapping of the Constitutional Court's power to agree with or deny criminal detention of lower court judge and the Prosecutor General. The success of this second case hinges on the resolution of the challenge to the nullification of the power of the Court to review constitutional change.

Nevertheless, the case shows the tendency of the doctrine of unamendability to expand. The expansive nature of the doctrine has been criticized by some while praised by others. On the one hand, the expansive dynamic of the doctrine raises democratic concerns. If the doctrine expands over time, the amending actors cannot lawfully modify ever more subject matter, which may lead them "towards more disruptive mechanisms of change."[20] On the other hand, the doctrine of unamendability may have a real positive effect of weeding out bad constitutional amendment either after they have been adopted or even before, through the pre-emptive force that the doctrine can have on the public discourse and behaviour of amending actors.[21]

The second development that took place at the time of writing this submission is the government reshuffle. After three weeks of conflict among the government coalition parties and multiple ministerial resignations, the crisis seems to have been resolved by the PM's resignation and the proposal to reshuffle the government with a new leader at the helm.[22] Formally, this means that Slovakia will already have a second government, just one year into the four-year term of the Parliament, albeit with the support of the same parties and most of the personnel from the former Cabinet effectively returning to their positions in the new government.

What is interesting about the government reshuffle is that the opposition and even some government politicians suggested either calling a referendum or adopting a constitutional amendment to shorten the parliamentary term, which is a controversial subject. The parliamentary term of office was cut short by a stand-alone constitutional three time in the past,[23] each time with a critical reception from the legal profession and academia. For a short time, it seemed that if a parliamentary term were to be shortened again, the Constitutional Court could review and potentially invalidate the act based on the doctrine of the material core. However, after the most recent amendment on judicial reform, the power of the Court to review constitutional has been abolished. It is unclear if an amendment on shortening the parliamentary term would stand.

V. FURTHER READING

1. Simon Drugda, 'On Collision Course with the Material Core of the Slovak Constitution: Disabling Judicial Review of Constitutional Amendment' (Verfassungsblog, 3 December 2020) <https://verfassungsblog.de/on-collision-course-with-the-material-core-of-the-slovak-constitution/>

2. Slavomíra Henčeková and Simon Drugda, 'Slovakia: Change of Government under COVID-19 Emergency' (*Verfassungsblog,* 22 September 2020) <https://verfassungsblog.de/slovakia-change-of-government-under-covid-19-emergency/

3. Tomáš Ľalík, 'Slovakia on its way to Illiberal Democracy: Nullifying the Power of the Constitutional Court to Review Constitutional Amendments' (I·CONnect, 18 December 2020) <http://www.iconnectblog.com/2020/12/slovakia-on-its-way-to-illiberal-democracy-nullifying-the-power-of-the-constitutional-court-to-review-constitutional-amendments/>

4. Tomáš Ľalík, 'The Slovak Constitutional Court on Unconstitutional Constitutional Amendment (PL. ÚS 21/2014)' (2020) 16 European Review of Constitutional Law

5. Peter Čuroš and Hans Petter Graver, 'Dissimilar Similarities: Structural Reforms of the Courts in Norway and Slovakia' (Verfassungsblog, 26 November 2020) <https://verfassungsblog.de/dissimilar-similarities/>

[18] Petition Rvp *2879/2020,* filed on 17 December 2020 <https://www.ustavnysud.sk/documents/10182/132547263/f5393b8d-5a4f-4dbf-a870-4706eb5c7f87>

[19] Petition Rvp *414/2021,* filed on 26 February 2020 <https://www.ustavnysud.sk/documents/10182/138173793/89ad7116-85d4-4070-b46b-60236723aae1>

[20] David Landau, 'Abusive Constitutionalism' (2013) 47 UC Davis Law Review 1

[21] Yaniv Roznai, 'Who will Save the Redheads? Towards an Anti-Bully Theory of Judicial Review and Protection of Democracy' (2020) 29 William & Mary Bill of Rights Journal 2

[22] See Michal Ovádek, "The Impossible Art of Populist Government", Verfassungsblog, (2001) <https://verfassungsblog.de/the-impossible-art-of-populist-government/>

[23] Simon Drugda, "Constitutional change in Slovakia 1993-2020", (2020) <https://docs.google.com/spreadsheets/d/1SE65B1Mo_DzCYfax2RKzidhHPIK1-yQtn-rE2ydwTWF8/>

Slovenia

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I. INTRODUCTION

2020 was a particular and unprecedented year, a year that will long be remembered for its negative rather than positive effects. As everywhere around the world, in Slovenia the COVID-19 pandemic spurred many challenges too, including constitutional in nature. The first proclamation of the epidemic in March 2020[1] coincided with the establishment of the new Government following the collapse of the previous centre-left coalition. The unprecedented health crisis was thus mixed up with political instability, tension, and uncertainty. In order to contain the epidemic, the new Government quickly implemented a whole set of executive and legislative measures which, on the one hand, constrained several constitutional rights and, on the other hand, alleviated economic hardship. During the second proclamation of the epidemic in October 2020 (that still lasts at the time of writing),[2] which badly hit Slovenia, numerous measures limiting human rights had to be re-imposed. Due to their impact on daily human lives and activities, their duration, and a profound political conflict over them, the Slovenian Constitutional Court (hereinafter, "CC") has soon been overwhelmed with numerous constitutional challenges to the adopted governmental measures. The core of this report will thus be dedicated to the cases related to the epidemic, although some other cases of structural constitutional importance will be mentioned as well.[3]

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In the previous report, the deficiencies of the Slovenia's electoral system were pointed out.[4] A 2018 judgement (Decision No. U-I-32/15) on unequal representation in electoral districts and the unconstitutional electoral legislation stressed the need of reform. In 2020, the country's political parties still held differing positions on proposed changes to (and even the abolition of) districts along with the introduction of preferential voting, but no proposal had been put to a vote by the end of 2020.

In 2020, the CC addressed the question of the constitutionality of the Local Elections Act, which regulated the procedure for ensuring protection of the right to vote before the Municipal Council and the procedure for judicial protection before the Administrative Court. In Decision No. Up-676/19, U-I-7/20,

[1] Order on the declaration of the contagious disease SARS-Cov-2 (COVID-19) epidemic in the territory of the Republic of Slovenia (Official Gazette RS 19/20). The Slovenian government has formally called an end to the coronavirus epidemic by adopting the Ordinance on the revocation of the epidemic of contagious disease SARS-CoV-2 (COVID-19) (Official Gazette RS 68/20).

[2] Order on the declaration of the contagious disease COVID-19 epidemic in the territory of the Republic of Slovenia (Official Gazette RS 146/20).

[3] All decisions indicated in this article are available at <https://www.us-rs.si/>. See also the CC's Annual Report 2020 <https://www.us-rs.si/publications/?lang=en>.

[4] See Matej Avbelj, Katarina Vatovec, 'Slovenia', in Richard Albert, et al. (eds.), The I·CONnect-Clough Center 2019 Global Review of Constitutional Law, 2020, pp. 305–306.

dated June 4, 2020, the CC established that the challenged regulation is inconsistent with the Constitution as it is does not contain all the elements required to effectively guarantee the exercise of the right to a legal remedy and the right to judicial protection set forth in the Constitution. The CC found no constitutionally admissible reason for such a deficient and imprecise regulation of local elections. In the case at issue, the CC imposed on the legislature a one-year time limit to eliminate the unconstitutionality it found. It is however doubtful whether there exists a political will supported by enough votes to bring constitutionally consistent solutions.

Not only may the inability to adopt needed changes in the state and local electoral systems raise serious dilemmas about the legitimacy of future elections, but it is also indicative of the disrespect for the CC's decisions. The case on the regulation of the funding of private primary schools is an example of the latter. Back in 2014, the CC found this regulation to be unconstitutional as schooling of pupils that attend compulsory state-approved primary education programmes is free of charge, irrespective of whether it is carried out by a public law or a private law entity (Decision No. U-I-269/12). The decision of the CC remained unimplemented for over five years.[5] In 2020, the CC again reviewed, on the basis of several petitions, the regulation of the funding of education (Decision No. U-I-110/16, dated March 12, 2020).

With regard to the fact that the legislature has failed to respond to Decision No. U-I-269/12 within the specified time limit by remedying the established unconstitutionality and by adopting an appropriate law, the CC stressed that this failure deteriorates the unconstitutional situation and entails a violation of several constitutional principles (such as the rule of law and the separation of powers). Although the CC assessed that all the grounds, mentioned in its previous Decision, still continue to exist, it did not decide to abrogate the challenged statutory provision. According to the CC, such abrogation would entail an even more severe interference with the constitutional right to attend compulsory primary education free of charge. It did, however, underline that the legislature must ensure that the established unconstitutionality is eliminated without delay.

The petitioners in the case at issue further challenged the scope of the public funding of the non-compulsory part of the public primary education programme (which includes morning and afternoon out-of-school-hours care and remedial education) in private schools with a state-approved programme. Under current legislation, this extended part gets 85 % public funding in private primary education schools. The CC found the challenged statutory provision to be consistent with the Constitution, in particular because the extended part of the public primary education programme is voluntary, whereas the corresponded constitutional provision obligates the state only to fully finance the compulsory part of the programme of public primary schools in private schools. The decision was criticized both in dissenting opinions[6] and in the literature.[7]

As pointed out in the introduction, the CC did not escape the COVID-19 epidemic unaffected. To the contrary, in 2020 it received, for example, 89 challenges only against two acts dealing with COVID-19,[8] which increased its already heavy judicial burden. Besides hard public health related cases, the epidemic also spurred interesting cases, stimulating the modernization of direct democracy in light of the COVID-19 pandemic. At the initiative of the local community in a Slovenian village with 1300 eligible voters, a consultative referendum was called to decide on the change of the postal code, which now belongs to the neighbouring municipality. The COVID-19 pandemic and serious health concerns forced them to think out of the box. They decided to opt for a first electronic referendum and even bought the necessary equipment. However, the referendum was not held. The Slovenian Ministry of Public Administration withholding the decree on the implementation of such a referendum asked the local community to either stop with the electronic referendum or hold a classical type of referendum. The dispute came before the CC. The Government used two arguments: firstly, the consultative referendum on the regulation of postal code system does not fall within local jurisdiction. Secondly, the Slovenian legislation does not provide for electronic voting. In Order No. U-I-449/20, dated November 26, 2020, the CC decided on the temporary suspension of the implementation of the challenged decree on calling a referendum until a final decision.

III. CONSTITUTIONAL CASES

1. Decision No. U-I-83/20, dated August 27, 2020: Temporary Prohibition of Movement Outside the Municipality of one's Residence in Times of COVID-19 pandemic

As has been already mentioned, there were a number of petitions lodged before the CC mainly alleging the inconsistency of the measures, adopted by the governmental ordinances, in the fight against the COVID-19 pandemic with the Constitution and the Communicable Diseases Act. The CC has not yet decided on these cases. In the case at issue, the decision of the CC was limited to reviewing the constitutionality and legality of the measure that temporarily prohibited the movement outside the municipality of one's residence, adopted by two governmental ordinances. As this was considered a particularly important precedential constitutional question of a systemic nature, the CC carried out the review despite the fact that during the proceedings before the CC the or-

[5] See Matej Avbelj, Katarina Vatovec, 'Slovenia', in Richard Albert, et al. (eds.), The I·CONnect-Clough Center 2017 Global Review of Constitutional Law, 2018, p. 257.

[6] See, in particular, dissenting opinion of Judge Pavčnik.

[7] Matej Avbelj, Politični teater na ustavnem sodišču, <https://www.finance.si/8960419/Politicni-teater-na-ustavnem-sodiscu>.

[8] Namely, the Act Determining the Intervention Measures to Contain the COVID-19 Epidemic and Mitigate its Consequences for Citizens and the Economy (Official Gazette RS 49/20 et seq.) and the Act Determining the Intervention Measures to Mitigate and Remedy the Consequences of the COVID-19 Epidemic (Official Gazette RS 80/20 et seq.).

dinances ceased to be in force. An additional argument was that such a question could also emerge in connection with possible future acts of the same nature and with a similar subject matter.

By conducting a review based on the test of legitimacy and the strict test of proportionality, the CC decided that the challenged measure did not disproportionately interfere with freedom of movement as determined by the first paragraph of Article 32 of the Constitution. The Government pursued a constitutionally admissible objective, i.e., to reduce or slow down the spread of the COVID-19 pandemic and thus to protect human health and life. The CC assessed that this measure was not only appropriate but also necessary and proportionate (in the narrower sense) in order to prevent the spread of the virus. According to the CC, the previously adopted measures (i.e., the closure of educational institutions, the suspension of public transport, the general prohibition of movement, and gatherings in public places and areas) did not enable the assessment that they would prevent the spread of the virus to such an extent that the possible collapse of the health care system could be prevented. Moreover, the challenged measure was not an absolute prohibition of movement, as it included several exceptions. It is important to note that the CC stressed the need of a regular review of the situation and adjustments of the restrictive measure for the future because with the duration of this measure its interference with human rights becomes more invasive.

2. Partial Decision and Order No. U-I-445/20, dated December 3, 2020: Validity and Publication of Regulations in Times of COVID-19 pandemic Order No. U-I-473/20, dated December 21, 2020: Prohibition of Gatherings of Children with Special Educational Needs in Educational Institutions

In these cases, children with special educational needs and disabilities lodged the petitions. They challenged the regulation that (temporarily) prohibited gatherings of people in educational institutions and thus prescribed temporary distance education also for the children with special educational needs in times of the COVID-19 pandemic. This measure was adopted by the governmental ordinance and was prolonged three times. However, these ordinances on the prolongation of the challenged measure were not published prior to its entry into force.

The CC established that these ordinances were in fact regulations, i.e., acts that contain abstract norms, which cause legal effects. As determined by the Constitution, regulations must be published prior to entering into force. A regulation enters into force on the fifteenth day after its publication unless otherwise determined in the regulation itself. State regulations are published in the official gazette of the state. Due to the fact that the governmental ordinances were not published in the Official Gazette of the Republic of Slovenia, the CC established that they did not take effect and, consequently, they could not be applied. That also affected the validity of the adopted measure. The CC decided that its decision would take effect only after the expiration of three days from its publication in the Official Gazette. That gave enough time for the Government to respond accordingly and appropriately publish new governmental ordinance prolonging the contested measure.

The applicants further argued that there are many negative consequences of distance education for children with special needs. The individualized support and attention that these children receive in educational institutions cannot be replicated at home. The CC thus decided on the temporary suspension of the regulation that temporarily prohibited gatherings in educational institutions insofar as it referred to the children with special educational needs. Based on that order these children were allowed to continue their education in educational institutions.

3. Decision No. U-I-194/19, dated April 9, 2020: Intervention Culling of Bears and Wolves from the Wild

In this case, the CC had to assess whether the legislature – by adopting the contested act that determined the scope and conditions for the selective and limited intervention culling of 200 bears and 11 wolves from the wild – acted in accordance with the constitutional principle of the separation of powers. An initiative for assessing the constitutionality of this act was lodged by two non-governmental organizations functioning in the public interest in the field of environmental protection and nature conservation. The CC found that the content of the adopted legislative act was essentially the same as decisions adopted by governmental ordinances in past years, whose legality has been the subject of review before the Administrative Court several times.

The case gave the CC the opportunity to clarify the principle of the separation of powers. It stressed that this principle has two important elements: the separation of the individual branches of power and the existence of checks and balances among them. No individual branch of power may assume the powers of the other branches, nor may a branch inadmissibly interfere with the exercise of the authority of the other branches. The CC stressed that the legislative branch of power may not assume powers that are of a typically executive nature and thus pertain to the executive (or administrative) branch. Further, it may also not interfere with the typical powers of the judicial branch to decide on the rights, obligations, and legal benefits of individuals and legal entities or to review the exercise of the executive power to decide on concrete individual relationships. According to the CC, the requirement of an independent court competent to decide impartially on a right, obligation, or legal benefit is the reason for separating the judicial branch not only from the executive branch but also from the legislative branch, which significantly defines the content of the principle of the separation of powers.

In the case at issue, the legislature adopted the challenged regulation in the form of a law, although it has in its essential aspect the nature of an individual legal act. By doing so, it did not exercise its typical (legislative) power within the system of state authority but assumed the typical power of the executive branch (which is to decide in concrete individual relationships). At the same time, it inadmissibly interfered with the power of the judicial branch as it prevented it from exercising an independent judicial review of the work of the executive branch or a review of

the legality of individual acts issued by its bodies. Moreover, the legislature also deprived the non-governmental organizations of an important right that enables them to challenge individual acts related to environmental protection before the Administrative Court in order to protect common legal interests in the field of environmental protection and nature conservation. Since the contested act was inconsistent with the principle of the separation of powers, the CC invalidated it.

4. Decision No. U-I-474/18, dated December 10, 2020: Financial Independence of the National Council, the Constitutional Court, the Court of Audit, and the Human Rights Ombudsman

This case elaborates on the constitutional principle of the separation of powers in relation to the budgetary independence of several autonomous and independent authorities, established by the Constitution.

Upon a request of the National Council, the CC reviewed the constitutionality of several provisions of the Public Finance Act. Although only the National Council lodged a request, its arguments were in fact applicable to other independent and autonomous constitutional authorities such as the CC, the Human Rights Ombudsman, and the Court of Audit. The applicant argued that the Public Finance Act did not differentiate between state and independent budget users. The Act determined that the Ministry of Finance should review the financial plans proposed by direct budget users and recommend the necessary adjustments with regards to the instructions for the preparation of the draft state budget. When the Government could not reach a consensus with direct budget users that were independent authorities, it included its own financial plan in the draft state budget. Although the final decision was left to the National Assembly, this approach was considered to be constitutional disputable.

Based on established case law, the CC stressed that the separation of state power into legislative, executive, and judicial branches of power does not entail a relation of superiority or subordination, but a relation of the constraint and cooperation of constitutionality equal branches of power. Important element of any independence is financial (budgetary) independence. In the light of the above, the CC concluded that several provisions of the Public Finance Act insofar as it referred to the National Council, the CC, the Human Rights Ombudsman, and the Court of Audit, were inconsistent with the Constitution.

The CC stressed that independence (also a budgetary one) and autonomy are vested in the constitutional authorities by the Constitution. The legislation should take into account the special constitutional position of these constitutional authorities. The Act should ensure the inclusion of the financial plans as proposed by these authorities in the draft budget. The CC mentioned that this budgetary independence is not absolute. The Government should have the possibility to draw the attention to potential deviations from the common budgetary objectives and the envisaged scope of the budget. However, from a constitutional perspective, these independent authorities are on a par with the Government. Their independence also extends to the budgetary field. The challenged regulation that significantly interferes with the financial autonomy of the independent authorities and subordinate these institutions to the governmental interests when preparing the budget is thus unconstitutional. Another point to stress is that the respect for financial independence can only be ensured if supervision of the use of the budgetary funds of independent authorities is performed by an autonomous and independent authority, such as the Court of Audit. The Government, on the other hand, should have no supervisory competences with regard to these authorities because it entails dismantling the constitutionally determined relationship between these authorities.

5. Decision No. U-I-129/19, dated July 1, 2020: Constitutional Fiscal Rule

Much awaited was the decision of the CC regarding the constitutionality of the 2019 supplementary budgetary documents (namely the Revised State Budget for 2019 and the Implementation of the Slovenia's Budget for 2018 and 2019 Act). The case at issue has several interesting points and novelties in constitutional decision-making that need to be emphasized. The applicants were the deputies of the National Assembly. They argued that the limit for general government expenditure in the 2019 budgetary documents was not in line with the fiscal rule, which is embedded in Article 148 of the Constitution, while its implementation is defined by the Fiscal Rule Act.

The CC held that neither the Revised State Budget nor the Act were unconstitutional. It is important to note, first, that the CC carried out the review despite the fact that during the proceedings before the CC the budgetary documents either had no effects or ceased to be in force. It assessed that the review raises several particularly important precedential constitutional questions of a systemic nature on which the CC had not yet had the opportunity to take a position as they concern the interpretation of the Constitutional Act amending Article 148 of the Constitution (the so-called fiscal rule). Moreover, the nature of these documents spoke in favour of the review. The challenged acts are regularly adopted for a limited period of time and, as a rule, take effect only during that period. The validity of such acts may be too short for carrying their substantive review before the CC before the expiry of their validity.

Second, the CC's findings were based on the established case law that the state budget is a legal act sui generis and has the hierarchical status of a legislative act in the legal system, since – as a regulation – it contains general and abstract legal norms that cause external legal effects. Therefore, the CC has jurisdiction to review the constitutionality of the budgetary documents.

The decisive part then was the interpretation of the principle of balanced revenues and expenditures of the state budgets in the medium-term without borrowing, determined by the second paragraph of Article 148 of the Constitution. According to the CC, this constitutional principle should be understood as an obligation of such a fiscal management and planning, which focuses on public finances throughout the entire economic cycle and takes into account the stage of national economy in cycle. The CC further added that there are several ways to achieve the medium-term

balance without borrowing, and it is the National Assembly as the holder of legislative power to decide which way it will pursue.

IV. LOOKING AHEAD

In Case No. U-I-152/17, the CC referred to the CJEU questions on the validity of Directive (EU) 2016/681 in the use of passenger name record data[9] with respect to its conformity with Articles 7 and 8 of the EU Charter of Fundamental Rights for a preliminary ruling and, therefore, stayed the proceedings until the CJEU adopts its judgement.

Another case that will unfold in 2021 is an application of the leader of one of the Slovenian opposition political parties challenging the constitutionality of the Act on the Provision of Funds for Investments in the Slovenian Armed Forces in the Years 2021 to 2026 allocating 780 million euros to defense over this five-year period. The adoption of this Act sparked off a debate within the legal and public circles questioning, first, the appropriateness of such investments in times of economic and financial crisis and dealing with the COVID-19 pandemic. Secondly, another issue at stake is whether calling a legislative referendum on this Act was admissible as the second paragraph of Article 90 of the Constitution prohibits a referendum to be called "on laws on urgent measures to ensure the defence of the state, security, or the elimination of the consequences of natural disasters." There is a claim that this constitutional provision has been breached, as this Act is not an act on urgent measures to ensure defense and security. The National Assembly decided that calling a legislative referendum on this Act was inadmissible, but some commentators disagree. By Decision No. U-I-483/20, dated January 7, 2021, the CC has stayed the implementation of this Act pending a decision on its constitutionality.

The CC has thus a challenging year ahead of itself. Besides a few mentioned yet unresolved cases there are several petitions pending on the constitutionality of measures adopted in relation to the COVID-19 pandemic. Another thorny issue seems to be the election of a new judge. A term of one of the judges in the current formation expired on July 14, 2020 but she remains a judge until her replacement is appointed. In the meantime, there were two failed attempts to elect the CC judge as both professionals failed to gain enough support in the National Assembly.

V. FURTHER READING

Matej Avbelj, 'Constitutional pluralism and authoritarianism' [2020] GLJ 1023.

Samo Bardutzky, 'Limits in times of crisis: on limitations of human rights and fundamental freedoms in the Slovenian constitutional order' [2020] *Central European Journal of Comparative Law* 9.

Jernej Letnar Černič, 'Authoritarian dimension of judicial ideology of the Slovenian Constitutional Court' [2020] *Hrvatska i komparativna javna uprava: časopis za teoriju i praksu javne uprave.*

[9] Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119.

South Africa

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I. INTRODUCTION

In the context of constitutional law, 2020 will be remembered around the world as the year of the pandemic. As indicated in section II below, the legal and administrative choices made by the South African government to deal with the health crisis were strongly colored by political ideology, having considerable implications for the future of democracy in a global milieu of democratic retrogression. The legality of the government's measures was challenged in various cases, mostly without success as in the case discussed in III below, but more complete jurisprudential clarity should emerge in future.

The volatility of South African politics formed the backdrop for various constitutional cases in the year, ranging from the balancing of freedom of speech against the public use of inflammatory language amounting to incitement to commit criminal acts to the justification of punitive costs orders against public officials *de bonis propriis* in order to discourage wasteful and obstructive litigation involving public funds. In recent times high profile abuse of the legal process in this manner has given the courts occasion to impose personal liability on delinquent officials, but the Constitutional Court found it necessary to sound warnings against overuse of this instrument in order to limit its chilling effect on organs of state.

The system in use since 1994 for parliamentary and provincial elections, which requires all candidates to be members of registered political parties, was successfully challenged before the Constitutional Court because it excluded independent candidates to stand for election. The Court has allowed Parliament two years to review and restructure the electoral system in time for the next round of general elections.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

It may be said that the notion of liberal democracy as it was understood in the second half of the 20th Century, underpinned the efforts to fundamentally reconceive South African constitutional law in the 1990's. Globally liberal democracy however seems to be under pressure; a process which is captured by epithets such as populism, Trumpism, illiberal democracy, and imperial presidentialism among others. South Africa is not immune to this trend, and the political and economic challenges that the country faces exacerbate the tendency of democratic backsliding seen elsewhere.

At the time of South Africa's "constitutional moment" between 1990 and 1995, neither the outgoing nor the incoming political protagonists had a liberal democratic pedigree. The negotiation of a new constitution had to be guided by international best practice that at the time dominantly took the form of the post-war developments including the internationalization of human rights, decolonization, the flurry of constitution-writing under irresistible Western pressure and influence, a period of stark contrast between liberal constitutionalism and socialist/communist statism and the increasing prominence of globalization.

Current developments in South African constitutional law can only be understood against this background while noting the manner in which the implementation of the negotiated constitution, designed with close attention to the Canadian and German ex-

amples, has been unfolding under a political organization (the ANC) self-identifying, even after some 27 years of majority control over the government of a constitutional state, as a "revolutionary liberation movement" steeped in socialism.

The phenomenon observed by political scholars that liberation movements transformed into governments in Africa have a shelf life lasting only a few decades before they disintegrate, seems to be unfolding in South Africa. This is not necessarily a function of effective democracy, but rather of a mismatch between revolutionary ambitions and the demands of effective government.

Since its incumbency in government, the ANC has progressively used its parliamentary majority to introduce socialist policies with strong racial undertones, ostensibly to elevate the living conditions of the poor and underprivileged. These policies include an economic empowerment project based on forced redistribution of private ownership of enterprises to the advantage of black South Africans, converting private ownership of natural resources such as water and minerals into assets under the guardianship (control) of the government, obtaining full control by means of the 'deployment' of politically compliant managers across all state institutions and an exponential expansion of reliance by the population on social grants. The upshot of these policies has demonstrably not been the upliftment of the underprivileged but the creation of a privileged minority class of supporters of the ANC, rampant kleptocracy and corruption and de-professionalization of the civil service, the police, military and of educational institutions.

These trends have led to the near collapse of the economy, and widespread dysfunctionality of public services and governance. It is nevertheless remarkable that components of society important to the economy, such as agriculture and business have thus far succeeded in surviving the ravages of political irresponsibility.

An important pillar of constitutionalism that has not yet succumbed to the political onslaughts of revolutionism, is the judiciary. The quality of the dispensing of justice has largely been maintained, and the courts have developed an impressive constitutional jurisprudence and generally demonstrate a commitment to constitutionalism.

The challenges to which the country's constitutional stability has been subjected have been severely amplified by the demands on the government to deal with the pandemic. The crisis arrangements gave rise to many legal questions, especially concerning the extent of government powers in exceptional circumstances. The South African government could choose either to declare a state of emergency within the clear confines of the Constitution, or to engage the Disaster Management Act of 2002 (DMA). The choice taken was the latter. A "state of disaster" was declared on 15 March, subsequently periodically renewed for the duration of the year.

One implication was that, constitutionally, fundamental rights could only be *limited* in terms of the disaster management measures 'to the extent that the limitation is reasonable and justifiable in an open and democratic society' (section 36 of the Constitution). In the event of the declaration of a state of emergency, some fundamental rights may be *derogated from* (in effect suspended) in terms of section 37 of the Constitution. The government measures taken to contend with the health crisis caused a range of fundamental rights to be severely limited or even temporarily negated completely. This was not unusual in the global context but as a constitutional development in a country teetering on the brink of the official negation of the principles of constitutionalism, the implications are serious.

This is evident from the irregular manner in which the government chose to justify its emergency measures. The DMA provides in detail for arrangements and structures to deal with disasters, but the government deliberately chose not to use them opting to instead effectively replace them administratively – without any statutory foundation – with an ominously named 'National Coronavirus Command Council' (NCCC), and to forthwith classify the proceedings of this body 'secret'. This name resonates with that of the National Revolutionary Command Council established in Sudan in 1969 following a *coup d'état* and the Iraqi Revolutionary Command Council which governed Iraq between 1968 and 2003. The NCCC continued to function for the rest of the year as decision-making entity determining, among other things, whether tobacco and alcoholic goods may be traded, internal and international travel is allowed or not, and how medical equipment should be procured and distributed.

Whether the overbearing and "commanding" attitude of the government taken since March 2020 will dissipate when the pandemic threat has been conquered is uncertain but given the history of the past few decades it seems likely to strengthen the ANC's tendency to systematically undermine the principles of constitutionalism.

III. CONSTITUTIONAL CASES

1. Economic Freedom Fighters v Minister of Justice and Correctional Services 2021 (2) BCLR 118 (CC): Freedom of expression

The leader of the Economic Freedom Party (EFF) (the second largest opposition party) has a tendency to create controversy by his public utterances and disruptive conduct in the House of Assembly. In his style of public speaking characteristic of racial populism, Julius Malema had made various public statements in 2014 and 2016, in effect urging

[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.

his followers to occupy land unlawfully. His statements on this highly sensitive matter reportedly included the following: "I can't occupy all the pieces of land in South Africa alone. I cannot be everywhere. I am not [the] Holy Spirit. So you must be part of the occupation of land everywhere else in South Africa"; "If you see a piece of land, don't apologise, and you like it, go and occupy that land. That land belongs to us;" and "Occupy the land, because [the State has] failed to give you the land. If it means going to prison for telling you to take the land, so be it. I am not scared of prison because of the land question. We will take our land; it doesn't matter how. It's becoming unavoidable, it's becoming inevitable – the land will be taken by whatever means necessary."

Criminal charges were laid against Malema for incitement to commit a crime under two pre-constitutional statutes, the Riotous Assemblies Act of 1956 and the Trespass Act of 1959. The 1956 Act made an inciter liable to the same punishment of a person who actually committed the crime concerned. When the validity of the legislation was challenged by the EFF, a provincial high court declared the provision equating incitement to commit a crime with the actual commission of the crime to be unconstitutional. The court however found that the offence of incitement to trespass by occupying land registered in the name of another person without lawful permission or reason, had survived the constitutional protection of freedom of expression, being a reasonable and justifiable limitation on the right.

The Constitutional Court replaced the high court's order with its own, declaring the provision in the Riotous Assemblies Act which criminalizes incitement to commit "any offence" to be unconstitutional and then proceeded to fill the legislative lacuna thus created by judicially amending the relevant provision by "reading in". Thereby the Court created scope for parliamentary amendment to be undertaken within two years. In effect, the criminalization of incitement was retained, but limited to incitement to commit "any *serious* offence". In its consideration of the degree to which the right to freedom of expression might be limited appropriately, the Court stated (para 46): "Broadly speaking, it is when, for example, national interests, our democracy, the dignity or physical integrity of people or property could be imperiled, that free speech may ordinarily be limited."

2. New Nation Movement v President of the Republic of South Africa 2020 (6) SA 257 (CC): Independents in a Proportional Representation System

The system for the election of the South African National Assembly is required by section 46(1)(d) of the Constitution to result "in general, in proportional representation", and sub-section (2) leaves it to parliamentary legislation to provide for a formula to produce such a result. The Electoral Act of 1998 provides for a party proportional representation system, based on candidate lists provided by the parties. The question raised in this case, was whether the electoral system allowing individuals to be elected only on the basis of their membership of a political party conflicted with section 19 of the Constitution which provides for the right to the freedom of every adult South African citizen to make political choices and "to stand for public office and, if elected, to hold office". Whether these arrangements might also be inconsistent with the right to freedom of association guaranteed in section 19 of the Constitution, was also considered.

This was not a new issue. Already in 2002, the government had appointed a "Electoral Task Team" to review the system. The majority of the task team proposed a transition to a multi-membership constituency system with a compensatory national list, resulting in proportionality. The government however did not act on the proposals, preferring the closed-party list system, meaning that the compilation and precedence of candidates of each party is left exclusively in the hands of political parties.

The Court now undertook an extensive survey of the jurisprudence of other jurisdictions including the European Court of Human Rights, the African Court on Human and Peoples' Rights and judgments from Germany and Canada regarding the question whether freedom of association included freedom not to associate, and drew the following conclusion (para 52):

> Being coerced to form or join a political party is an issue that may fundamentally touch one's inner core; a matter that goes to one's conscience. And freedom of conscience is protected by section 15(1) of the Constitution. It is so that individual members of a legislature remain "free to follow the dictates of personal conscience". But they do so at their own peril because "if [they] wish to be re-elected they need to bear in mind party discipline". A classic Hobson's choice for somebody who does not want to be shackled by party politics and constraints.

The Court found (para 62) that the constitutionally protected right to stand for public office and, if elected, to hold office implicated three other fundamental rights, namely the right to freedom of association, freedom of conscience. and the right to dignity.

Section 1(d) of the Constitution proclaims "a multi-party system of democratic government" to be one of the foundational constitutional values. The Court interpreted this (para 72) "in no way" to mean that only political groups are allowed to organize and participate in elections and to field candidates. Furthermore, the constitutional requirement that elections must result "in general, in proportional representation", "does not equal exclusive party proportional representation" (para 78). The Court saw the introduction of a party proportional representation system at the time of the introduction of the new constitutional dispensation in 1994 as a justifiable transitional arrangement, but '[n]ow there is no reason not to afford individual adult citizens the opportunity to exercise the right [to participate in elections without par-

[3] See *2017 I-CONnect-Clough Center Global Review of Constitutional Law*, 262.

ty membership] that has always been there, but initially dormant and not exercisable' (para 105).

In the result, the Court found (para 120) that "insofar as the Electoral Act makes it impossible for candidates to stand for political office without being members of political parties, it is unconstitutional", but the prospective declaration of unconstitutionality was suspended for 24 months to afford Parliament an opportunity to remedy the defect, presumably in time for the next general elections in 2024.

3. Economic Freedom Fighters / Public Protector v Gordhan 2020 (6) SA 325 (CC); *Zuma v The Office of the Public Protector* [2020] ZASCA 138, and *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28: Punitive Costs Orders

Both the former South African president, Jacob Zuma and the Office of the Public Protector have been frequent litigants before the courts, enabling the judiciary to clarify various issues of a constitutional nature while dealing with topical political issues related to corruption.

Where political and public officials use or abuse their positions and access to public funds to litigate unjustifiably, a mechanism to curb such conduct is a costs order *de bonis propriis,* meaning the imposition of the responsibility to pay at least a part of the costs of the opposing party from the individual official's own pocket. This device has in recent years been used a number of times by South African courts, but on appeal the Constitutional Court has in 2020 called for caution due to the possible "chilling effect" that such orders may have on the proper exercise of public functions.

The first of three judgments on the matter were in the Gordhan cases (combined for the purpose of the judgment in May) where the Court re-emphasized a principle laid down in 2009 (para 77), namely that not the character of the parties, but the nature of the litigation at issue and the parties' conduct in pursuit of asserting constitutional rights should determine how litigation costs are awarded. The Constitutional Court overturned the personal costs order against the Public Protector on the basis that the facts before the court below did not justify the order (para 94).

The second case handed down by the Supreme Court of Appeal (SCA) in October concerned the institution by former president Zuma of an application in 2016 to review the report of the (previous) Public Protector on "state capture". At the time Zuma was still in office as president, and the remedial action instituted by the Public Protector was that he should appoint a commission of enquiry led by a judge of the choosing of the chief justice. The report implicated Zuma himself in nefarious events, rendering it undesirable that he should determine the membership of the commission. The high court dismissed the review application and ordered Zuma to pay the costs of the review application in his personal capacity *de bonis propriis*. Against the costs order Zuma then applied for leave to appeal to the Supreme Court of Appeal, which handed down its finding in October 2020.

The SCA pointed out (paras 19 and 20) that costs orders lie within the "true discretion" of a lower court and that an appellate court would interfere only if it found a "material misdirection" on the part of the lower court, where the discretion was not exercised judicially, the decision was influenced by wrong principles, the decision was affected by a misdirection on the facts, or the decision could not reasonably have been reached by a court properly directing itself to the relevant facts and principles.

The high court had held (reflected in paras 26 and 27 of the SCA judgment) that Zuma's conduct concerning the report of the Public Protector "was reckless and unreasonable, and taxpayers should not foot the bill for the actions of wayward officials who disregard constitutional norms", and "that the review application had been brought for an improper or unconstitutional purpose – to ensure that the serious issues raised in the Report which implicated Mr Zuma, his friends and his family, were not investigated at all – unless he got to choose the person to do the investigating and decide the terms of reference of the investigation." Zuma was motivated by personal interests instead of the public interest as is required by the Constitution (paras 34 and 35), his conduct was "subversive of our democratic ethos" (para 40) rendering the punitive costs order justified (para 41).

The conduct of the current Public Protector (Mkhwebane, who succeeded the previous incumbent responsible for producing the report on state capture) has been steeped in many litigious controversies, some of which led to the imposition of costs orders *de bonis propriis* against her. One such order was made in 2020 by the high court in connection with a dispute over her powers to order the tax authorities to provide her with the tax records of a taxpayer, in this case Jacob Zuma, who was suspected of having evaded the payment of tax on income received from a private source during his early incumbency of the presidency. The high court also declared that the Public Protector did not have the power to demand the tax records.

On appeal both against the costs order and the finding on the powers of the Public Protector, the Constitutional Court confirmed in December that the privacy of taxpayers was protected by the Tax Administration Act and could not be neutralized by a subpoena issued by the Public Protector: Mkhwebane might more readily simply have requested Zuma to reveal his tax records as was regularly allowed by the Act.

Her appeal against the costs order however succeeded. The Court reiterated the rule that an appeal court does not lightly interfere in a lower court's exercise of a true discretion (para 31). However, analyzing the high court's grounds for imposing the punitive costs order, namely conduct *in fraudem legis, mala fides,* 'proclivity' on the part of Mkhwebane to act outside of the law, and the expectation that a Public Protector would act with a "high degree of perfection", the Constitutional Court found that such grounds could not be substantiated, regardless of the less than praiseworthy conduct by Mkhwebane, even in conducting her appeal. The Court took a longer view on the matter, stating (para 44):

Personal costs orders may have a chill-

ing effect on the exercise of the Public Protector's powers, including litigating where necessary. Hers, an office specially created together with others under Chapter 9 of the Constitution, is an important cog in our constitutionalism as it and the others were created to "strengthen constitutional democracy". Axiomatically, the Public Protector's office is more important than any incumbent. The impact of certain types of conduct that shake its operations at the foundations may outlive the terms of office of a number of incumbents. Needless to say, as the Judiciary, we must not be guilty of contributing to the weakening of that office. You weaken it, you weaken our constitutional democracy. Its potency, its attractiveness to those it must serve, its effectiveness to deliver on the constitutional mandate, must be preserved for posterity.

In a concluding statement in the judgment the Court emphasized that it was not moved by "maudlin sympathy" for the Public Protector but demanded simply that courts should apply the law properly, not hesitating when punitive costs orders are actually warranted.

4. Mohamed v President of the Republic of South Africa 2020 (5) SA 553 (GP): Constitutionality of limitation of religious freedom to combat Covid 19

Almost from the outset, the Covid-19 disaster management arrangements inspired a raft of court applications concerned with the legality of various aspects of the government's measures, however with little forensic success. Some of these proceedings will probably only reach completion in 2021. The very first judicial response was a judgment of the Gauteng Division of the high court, handed down on 30 April in response to an urgent application by a group of Muslim imams and worshippers to declare the prohibition of gatherings unconstitutional because of their infringement on the applicants' right to practice their religion. The court declined the application, stating (para 75):

> In my view, in South Africa right now, every citizen is called upon to make sacrifices to their fundamental rights entrenched in the Constitution. They are called upon to do so in the name of "the greater good", the spirit of "ubuntu" and they are called upon to do so in ways that impact on their livelihoods, their way of life and their economic security and freedom. Every citizen of this country needs to play his/her part in stemming the tide of what can only be regarded as an insidious and relentless pandemic.

IV. LOOKING AHEAD

No doubt the lockdown arrangements will demand the courts' attention for some time to come. The reasoning offered for the justification of infringements on fundamental rights as part of the lockdown arrangements promises to be interesting.

The matter of endemic corruption across all facets and structures of government, facilitated by more than two decades of politicized "cadre deployment", concretely and viscerally exposed before the Zondo commission on state capture, may be expected to be uncovered further as the criminal prosecution of various senior politicians and bureaucrats unfold against the background of the upcoming municipal elections.

The highly contentious move by the government to amend the Constitution and legislation to empower the state to confiscate private property is due to be a central political, economic and constitutional issue in 2021.

The position of chief justice will become vacant in 2021, and the choice of a successor may prove to be complicated, if not controversial.

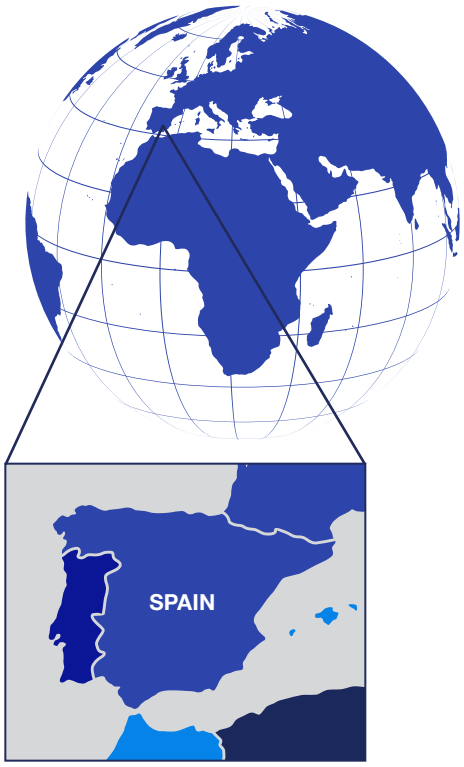
V. FURTHER READING

K Govender and P Swanepoel, 'The Powers of the Office of the Public Protector and the South African Human Rights Commission: A Critical Analysis of *SABC v DA and EFF v Speaker of the National Assembly* 2016 3 SA 580 (CC) 2020(23) PER/PELJ http://dx.doi.org/10.17159/1727- 3781/2020/v23i0a6249

IM Rautenbach, 'Unruly rationality. Two High Court Judgments on the Validity of the Covid-19 Lock-down Regulations' (2020) TSAR 825

Francois Venter, 'State Capture, Corruption and Constitutionalism in South Africa' in Charles M Fombad and Nico Steytler (eds), *Corruption and Constitutionalism in Africa* (OUP 2020)

S Viljoen, 'Expropriation without compensation: principled decision-making instead of arbitrariness in the land reform context (part 1)' (2020) TSAR 35



Spain

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Fernando Reviriego Picón (Uned University)
Enrique Guillén (University of Granada)
Argelia Queralt (University of Barcelona)
Camino Vidal (University of Burgos)
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I. INTRODUCTION

The Constitutional Court rendered 195 decisions during 2020. Since October 15, the Court only has 11 members after the resignation of Magistrate Fernando Valdés Dal-Re. It is important to note that this has changed the balance of the Court at a time when, given the political fragmentation and the confrontational climate between the various political forces, it seems that it will be difficult for Congress to agree on the replacement of the four judges whose term ended in 2019.

Two major questions were addressed in the decisions aimed at the protection of rights or ensuring the supremacy of the Constitution: the treatment of foreigners in the context of irregular immigration and limitations on the freedom of expression. Freedom of expression and freedom of information are some of the most controversial aspects in a society marked by deep divisions. To a large extent, the majority and minority opinions reflect serious differences when it comes to addressing these conflicts, understanding the reasons behind them, and articulating a legally appropriate solution. The Court has clearly laid out—with carefully distinct legal reasoning to that of the European Court of Human Rights (ECtHR) case law—many ways in which the concept of constitutional integration may be adopted.

In addition, the Court has continued to address a series of appeals linked to the Catalan independence process. The Court decisions agreeing to the pre-trial detention of the leaders of the process and rejecting the idea of freeing them on bail were not considered to violate their fundamental rights as those measures were taken with sufficient, proportionate reasoning, and flight or reoffending could not be discounted. These decisions had dissenting opinions.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The Gag Law

In March 2015, the Spanish Parliament passed a public order law called "Ley Mordaza" ["The Gag Law"] by its detractors due to the fact that many of its provisions aimed at limiting or censoring expressions of protest which were quite common at the time. This law was passed in the context of a serious economic crisis and protests had been particularly intense in the case of the 15M movement some years before.

The law was backed by the governing political party at the time, which enjoyed a clear majority in the two chambers of Parliament, but was opposed by all of the other parliamentary parties. More than a hundred members of Parliament from several parties petitioned for rulings of unconstitutionality against specific parts of the law, resulting in Decision 172/2020 five years later.

This decision dismissed practically all of the challenges, in some cases specifying that the interpretation of the legal clause was in

conformity with the Constitution, and only ruling as unconstitutional the "not authorized" subsection in one of the offences the legislation described as serious ("[s]erious offences include… the unauthorized use of images or personal or professional data of the authorities or members of the security services which may present a risk to agents or their families, protected installations, or the success of an operation, with respect to the fundamental right to information"). The Court ruled this contrary to the prohibition of censorship described in art. 20.2 CE.

One of the provisions that the Constitutional Court deemed compatible with the Constitution was one of the most controversial aspects of this legislation: the possibility of refusing entry to Spain to those foreign nationals who attempt to evade elements of border control, in particular in Ceuta and Melilla, Spanish cities bordering Morocco which make up the only external border of the Schengen area with Africa.

The Constitution therefore allowed so-called "hot returns" or "push back," a practice and draft rules that had been denounced by numerous national and international organizations. The Court made particular mention of especially vulnerable people, including minors, pregnant women, and those who may be suffering from some kind of disability, including the elderly; the security services should pay particular attention to them.

The Court's decision on this point though, was not unexpected, in light of the relatively recent ruling of the ECtHR in "N.D. and N.T. v. Spain [GC], nos. 8675/15 and 8697/15, 13 February 2020," which changed the criteria initially adopted by the third chamber of the ECtHR in its judgement of the October 3, 2017. The ECtHR reached a unanimous understanding, contrary to its initial finding, that turning over two people who had climbed over the fence in Melilla back to the Moroccan authorities did not violate any human rights.

It is interesting to note that very recently (January 2021) the court dismissed another appeal for a finding of unconstitutionality that challenged the same legislation. This appeal was specifically against categorizing all public order disturbances in public events, sports, or cultural events, and religious or official events as serious offences, when the events themselves do not constitute criminal offences.

2. Decision STC 190/2020

Decision STC 190/2020 was in response to a request for the protection of fundamental rights (*amparo* request) raised by an individual against a legal decision that found him guilty of offending Spain. The petitioner had been charged and found guilty for his actions during a work-related protest outside some military installations. While the Spanish flag was being raised, he used a megaphone to exclaim, among other things: "here you have the silence of the fucking flag" and "the fucking flag should be set on fire." The Spanish Criminal Code sets out that "[v]erbal or written offences or outrages, or those by action, against Spain, its Autonomous Communities or the symbols or emblems thereof, perpetrated publicly, shall be punished with the penalty of a fine for seven to twelve months."

The *amparo* request was raised based on the language of that provision having violated the petitioner's rights to ideological freedom (art. 16.1 CE) and freedom of expression (art. 20.1.a CE).

The Constitutional Court rejected this claim, although it was fairly divided (five of the eleven Magistrates wrote dissenting opinions). The Court reasoned that it was not even a question of overstepping the exercise of the freedom of expression as the speech under review was not protected by this right. In this case, the Court understood that they were disrespectful expressions that "were unnecessary, and furthermore, had been made out of the context of, and with no link to, the legitimate objective of raising labor grievances and which, furthermore, were rejected by some of the supporters of the protest."

It is interesting to note that the freedom of expression gave rise to other notable decisions in 2020, some of which were also very controversial. The possible violation of this right was also alleged in Decisions 192 (*amparo* request against a conviction for an offence against religious sentiment, by interrupting a religious ceremony), 172 (an appeal of unconstitutionality against this public order legislation), 142 (freedom of expression of a lawyer in carrying out their duties), 97, 51, and 41 (freedom of expression in public positions), 35 (freedom of expression on social networks, the "Strawberry" case), 6 and 8 (freedom of expression in prisons), and 1 (the assault of the "Blanquerna" cultural center).

These rather questionable decisions will no doubt have a subsequent airing at the ECtHR, where it is expected that Spain will again be found to have violated article 10 of the European Convention on Human Rights, in line with the ECtHR judgement from the March 21, 2018, in "Stern & Roura v. Spain." There were more than a few comments at the time about a chronicle of a ruling foretold, playing on the title of Gabriel García Marquéz's well-known novella. It seems as though that will once again be brought to mind.

III. CONSTITUTIONAL CASES

The Right to Political Representation. Decisions 3/2020; 4/2020; 11/2020; 68/2020; 97/2020; 193/2020; and 194/2020.

2020 began with a group of decisions in which the Constitutional Court responded to amparo requests raised by various members of the Catalan Parliament that belonged to pro-independence parties, who were (at the time they raised the *amparo* requests) being tried for alleged offences of sedition and misuse of public funds, among other things, and were being held in pre-trial detention.

Decision 3/2020 was in response to a petition from Jordi Sánchez Picanyol, a member of the Catalan Parliament, who claimed that his rights to ideological freedom, personal freedom, and political participation had been violated. He claimed that being remanded in custody unfairly prevented him from exercising his political rights as a member of Parliament, as he was unable to attend parliamentary sessions, had to vote by proxy, and had twice been prevented from defending his can-

didacy in Parliament as a future president of the autonomous government. The Court dismissed the petition, stating that the legal decisions had correctly applied the principle of proportionality, a conclusion that was reached by assessing, on the one hand, the risk that he would re-offend and, on the other, the restrictions on exercising in public office caused by being held in pre-trial detention. The Court recalled that the ECtHR had demonstrated that the European Convention for the Protection of Human Rights did not prohibit the application of pre-trial imprisonment to a member of Parliament or a candidate in parliamentary elections, nor did it prevent them from being kept in detention, and that such decisions did not automatically mean a violation of art. 3 of Protocol Nº 1 of the European Convention [ECtHR Judgement on November 20, 2018 ("Selahattin Demirtaş v Turkey," §231)]. This Constitutional Court decision had a dissenting opinion signed by two Magistrates, who thought that the weight given to the right of political representation was insufficient.

Decision 4/2020 dismissed the *amparo* request raised by the same pro-independence member of Parliament, Jordi Sánchez Picanyol, who had been denied permission to leave prison to attend the Catalan Parliament and participate in the investiture debate as a candidate for president of the autonomous government. The Constitutional Court referred to Decision 155/2019, and did not accept that this violated the right to political participation and representation, considering the decision to be proportionate, as the petitioner was in pre-trial detention due to the risk that he would commit the same offence again. This decision also had a dissenting opinion signed by two magistrates.

Decision 11/2020 was in response to the appeal raised by Oriol Junqueras Vies and Raül Romeva Rueda, pro-independence members of the Catalan Parliament, against legal rulings that removed them from the public offices they had held following their indictment (art. 384 bis of the Law of Criminal Justice lays out the suspension from public office for cases in which the accused is indicted for terrorist offences or rebellion and decreed pre-trial detention). Once again, the Court upheld the decisions of the lower courts, using the arguments of proportionality and reasonableness, citing the case law from Decision 71/1994.

The subsequent Decisions 97/2020, 193/2020, and 194/2020 applied the same doctrine to appeals from pro-independence leaders. Outside the context of Catalan Independence, Decision 68/2020 dismissed the petition of a member of Parliament in an autonomous community whose question to the president of the government was ruled inadmissible by the parliamentary bureau because it was not about the action of the government but rather the finances of the political party that had formed the government.

Freedom of Expression. Decisions 35/2020; 192/2020.

In Decision 35/2020, the Court responded to an *amparo* request from an individual, with the stage name César Strawberry. He had been found guilty of the offence of glorifying terrorism and humiliating victims of terrorism through comments made on the social network, Twitter, in which he ironically and sarcastically made fun of the murder of Carrero Blanco (president of Spain in the Franco era) by ETA terrorists and joked about the possibility of sending the King a letter bomb on his birthday. The Constitutional Court decided that the criminal sentence had violated the petitioner's freedom of expression by, in this particular case, "not having sufficiently assessed" whether the content of the tweets were the manifestation of an exercise of free expression, necessary for the free formation of public opinion and the open exchange of ideas in a democratic society, in accordance with Constitutional Court doctrine.

In Decision 192/2020, the Constitutional Court responded to another *amparo* request in which the petitioner had been found guilty of an offence against religious sentiment. The petitioner, along with others, had interrupted a mass protest in opposition to the projected reforms of the abortion legislation by throwing pamphlets and chanting "free abortion for all." At the same time, they displayed a banner near the altar reading "get your rosaries off our ovaries." The petitioner claimed in the Constitutional Court that their conviction had violated their freedom of expression. The Court dismissed the claim, noting that the petitioner had alternative means of communicating their message without disturbing the faithful, while interrupting the mass protest, and unfurling a banner whose content in this specific context could be considered harmful to the feelings of those worshippers.

Equality and Sex-Discrimination. Decisions 71/2020; 79/2020; 90/2020; 91/2020; 124/2020; 128/2020; 129/2020; 168/2020.

These judgements were in response to amparo requests raised by worker groups (all female doctors in the same hospital) related to the calculation of workdays for people working shorter hours because of childcare. The Court ruled that this had led to a violation of the right to equal treatment before the law and the right not to be discriminated against by reason of sex, a discrimination that was indirect (measures that are supposedly neutral but which have a disproportionate negative effect on women) in the calculation of paid leave. The law produces an implicit discrimination against women, as it is mostly them who have these reduced working hours in order to look after their children. In addition to these judgements, Decision 71/2020 ruled on an *amparo* request regarding violation of the right not to be discriminated against by reason of sex. This specific case revolved around the refusal of permission for leave requested by the petitioner to visit a family member who had been hospitalized after giving birth. The petitioner, a nurse in the hospital, had asked for two days of leave as her sister was in hospital. The rules for this kind of leave were for cases of "serious illness, hospitalization or death of parents" and the request was denied on the understanding that hospitalization for childbirth did not come under this category.

Taxes. Decisions 65/2020; 78/2020.

Legal reservation in tax matters was addressed with Decision 65/2020 following a request for a finding of unconstitutionality raised by the President of the government against an autonomous community's tax code. The judgement was that some parts of

the code were unconstitutional while others were not, and the Court went into some detail over the distribution of tax powers between the state and the autonomous communities. Decision 78/2020 was in response to a question of unconstitutionality raised against a decree-law which introduced tax measures aimed at reducing the high public debt where the Court invoked its established case law on the matter.

Local Autonomy. Decision 82/2020.

The Constitutional Court responded to an appeal of unconstitutionality raised by more than fifty members of Parliament against an autonomous community law regarding inclusive social services. Beyond the ruling that some of the sections of the law violated the principle of local autonomy, it is interesting to highlight the issues (which were not formulated strictly as causes of inadmissibility) raised about the relevance or otherwise of this appeal. The Court reasoned that "there are no natural settings or preferred routes for channeling the defense of constitutionally guaranteed local autonomy, but rather different types of constitutional processes with their own requirements for being legitimate and their own objectives, which may in practice overlap."

Truth Commission. Decisions 83/2020; 131/2020.

Decisions 83 and 131/2020 responded to appeals of unconstitutionality raised against Law 5/2019, on the recognition and reparation for victims of human rights violations in the context of the politically-motivated violence in the Autonomous Community of the Basque Country between 1978 and 1999. The law in question recognized a right to the truth about human rights violations, granting people access to the official archives, the right to examine possible violations and a right to compensation for harm. The petitioners claimed that the creation of a truth commission violated the exclusive jurisdiction of the Courts to declare the existence of events making up offences and determining who is responsible. The Constitutional Court rejected the idea that the commission replaced the work of the courts. Firstly, because the facts determining reparations must be taken starting from declared facts proven in the Courts. And secondly, when the criminal courts have not been able to carry out their investigative function to determine offences, those facts must be tested in accordance with the means that are commonly accepted in law.

Extradition. Decision 132/ 2020.

In Decision 132/2020, the Constitutional Court examined the extradition of a resident in Spain to Columbia to serve a prison sentence. The petitioner claimed that acceding to the extradition to Columbia had violated their rights to due legal process as they were sentenced *in absentia.* In the petitioner's opinion, in order to respect their right to due legal process, the Spanish government's handing over of a person should have been on the condition of the possibility of them being able to review the sentence imposed, or the possibility of a new trial which would allow them to present their defense in person. The Constitutional Court stated that the imposition of a sentence *in absentia* did not violate their right to due process as long as they were aware of the date of the trial and as long as they had unequivocally refused to appear at it. However, in the case in question, the Court ruled that the extradition granted by Spain to Colombia had violated the right to due process because there was no record that the extradited person knew the date of the trial or that they had refused to appear.

Catalan Foreign Affairs. Decision 135/2020.

The Spanish government raised a case in the Constitutional Court against the Catalan government agreement which approved the strategic plan for foreign action and relations with the European Union 2019-2022. The agreement in question centered on three strategic objectives. Firstly, the consolidation and strengthening of ties with the diplomatic and consular corps in Barcelona to develop the strategic objectives of the Catalan government's foreign activity. Secondly, to ensure the presence and influence of the Catalan government in multilateral forums in which global challenges are debated. Thirdly, the creation of a Catalan Public Diplomatic Council. The Constitutional Court ruled that these strategic objectives violated the exclusive jurisdiction of the state in the matter of international relations because they affect *jus legations,* attempting to frame Catalonia as subject to international law and violating the state's role in directing foreign policy.

IV. LOOKING AHEAD TO 2019

This year, the Constitutional Court has to deal with the four magistrates whose terms ended in 2019. However, it is more than likely that the fragmentation of Congress, who are responsible for naming the replacements, and the confrontational atmosphere between the different parties will make it very difficult for agreement to be reached. Without an agreement, the four magistrates will continue this year in an acting capacity. This is not the best situation for the Court when it must deal with questions such as those related to the health crisis, to the process determining the criminal responsibility of the Catalan pro-independence leaders, or to appeals raised against the forms of the oaths of office in various parliaments in the first legislature of 2019. Freedom of ideology, expression, and political rights will once again play a central role in the agenda.

V. FURTHER READING

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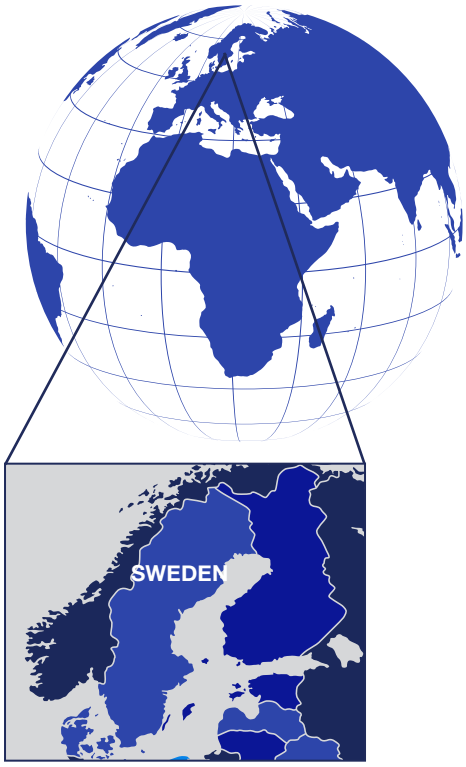
León Alapont, José, "Las comunicaciones entre periodistas y presos a raíz de la STC 6/2020, de 27 de enero y de la Instrucción 3/2020, de 16 de junio, de la Secretaría General de Instituciones Penitenciarias" [2020] La Ley Penal, 146.

Pena González, Wendy, "El Tribunal Constitucional se pronuncia sobre la libertad de expresión y la exaltación del terrorismo, comentario a la STC 35/2020 de 25 de febrero" [2020] Revista Aranzadi Doctrinal, 5.

Recoder Vallina, Tatiana, “La incidencia de la prisión provisional en el derecho fundamental al ejercicio de cargo público. Comentario a las SSTC 155/2019, 11/2020 y 12/2020” [2020] Revista de las Cortes Generales, 109.

Solar Calvo, Maria del Puerto, “Análisis de dos resoluciones revolucionarias: las SSTC de 27 de enero y 10 de febrero de 2020” [2020] La Ley Penal, 144.



Sweden

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I. INTRODUCTION

During 2020, Swedish Constitutional Law underwent several interesting developments and challenges. As in countries all over the globe, the COVID-19 pandemic put the Swedish Constitution to a stress test. The Swedish strategy in tackling COVID-19, which gave rise to discussions internationally, was affected by the nature of the Swedish Constitution. The Swedish Constitution does not specifically regulate peacetime crises and lacks formal rules on emergency powers. To fill that void, authorities resort to the principle of statutory anticipation whereby ordinary laws (that contain, in some cases, special provisions that may be put into operation) apply also in times of crisis. To illustrate this point, one example is the Public Order Act (*ordningslag* (1993:1617)), which allows the government to restrict the number of participants in public meetings or organized public events. Where these powers are deemed to be insufficient, the legislative procedure is expected to be sufficiently flexible to allow new powers to be created relatively speedily. The events in 2020 demonstrated that this approach suffers from several deficiencies.[1] The Swedish Government has, pursuant to the Constitution, relied on its expert governmental agencies. And this, in combination with the Swedish emergency management system being decentralized and fragmented, might have contributed to what has been described initially as a slow response to the COVID-19 crisis in Sweden.

Apart from the constitutional challenges that resulted from combating the COVID-19 crisis, interesting constitutional developments took place in the case law, which will be discussed below. Swedish courts decided, for example, important cases on the indigenous Sámi people's rights and freedom of expression. Many of the relevant cases concern the relationship between national Swedish law and international law. In addition, several major governmental inquiries over constitutional reform are ongoing. For instance, a proposal concerning damages for violations of constitutional rights and freedoms was introduced in August 2020.[2]

II. CONSTITUTIONAL DEVELOPMENTS

Several important governmental inquiries on constitutional reform have been launched during 2019 and 2020. For example, the right to compensation for the violation of constitutional rights and freedoms; whether racist and terrorist organizations should be criminalized; and reforms to protect the constitutional and democratic system in general and the independence of the judiciary in particular. Additionally, issues and questions arising from the COVID-19 pandemic have shed light on constitutional aspects such as whether the Constitution should remain silent on peace time crisis or not; if the Swedish emergency management system needs to be reformed; and how and to what extent the Swedish Parliament has been affected by COVID-19 and the measures taken to limit its spread.

[1] Iain Cameron and Anna Jonsson Cornell, 'Covid-19 in Sweden: A Soft Power Approach' (*Verfassungsblog* 24 February 2021) <https://verfassungsblog.de/covid-19-in-sweden-a-soft-power-approach/> accessed 12 March 2021.
[2] SOU 2020:44, https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2020/08/sou-202044/.

III. CONSTITUTIONAL CASES

1. NJA 2020 s. 3: The Girjas Case

Sweden has long been criticized for not ensuring an effective protection of the rights of the indigenous Sámi people.[3] However, in January 2020, the Swedish Supreme Court decided a landmark case regarding the rights of the Sámi people whereby it declared that the members of the Girjas Sámi District (*sameby)* had an exclusive right to confer hunting and fishing rights in the district.

The members of Girjas Sameby conduct reindeer husbandry in an area located in northern Sweden. Girjas Sameby sued the Swedish State in 2009 and demanded that the court declare that they had exclusive hunting and fishing rights in the district. While the district court decided in favor of Girjas, the court of appeals dismissed part of their claims.

The Reindeer Husbandry Act (RHA) (*rennäringslagen*) regulates the right of the Sámi people to conduct reindeer husbandry. According to the RHA, reindeer husbandry is a right that belongs to the Sámi people based on possession since time immemorial *(urminnes hävd)*. Only members of a Sámi district are allowed to conduct reindeer husbandry. The right to reindeer husbandry includes the recognition of other rights such as the right to fish and hunt. Moreover, the right to reindeer husbandry is protected as a property right under Chapter 2, §15 of the Instrument of Government (IG) (regeringsformen).

In the Girjas case, the Supreme Court focused solely on deciding if the Girjas Sámi had an exclusive right to confer hunting and fishing rights to others in the Sámi District in accordance with the RHA or, in the alternative, with custom or immemorial possession. As Girjas Sameby had not claimed ownership rights over the area, there was no reason for the Court to determine who was the legal owner of the land.

The Supreme Court first reviewed the Girjas' claim in relation to the RHA and concluded that the language of the RHA clearly prohibited the Sámi District from granting hunting and fishing rights to others. In conformity with the RHA, hunting and fishing rights may be instead granted by the county administrative boards (*länsstyrelse*).

The Supreme Court then considered whether the language of the RHA could be interpreted in a different manner taking into consideration a provision set out in the IG in relation to the Sámi people, as well as in light of indigenous rights in International Law. In this sense, Chapter 1, §2, para. 6 of the IG sets forth that the opportunities of the Sámi people and ethnic, linguistic, and religious minorities to preserve and develop a cultural and social life of their own shall be promoted. The Supreme Court asserted that this provision expresses a social goal to strive after but does not establish any legal rights for individuals. The Court indicated that Chapter 1, §2, para. 6 of the IG could, nevertheless, be relevant in adjudication where different interests are balanced against each other, whereby the Sámi people's interest in preserving its culture, including reindeer husbandry should be accorded particular importance.

The Supreme Court affirmed that Chapter 1, §2, para. 6 of the IG also reflects principles of International Law that protect the rights of indigenous peoples. The Court noted that the relationship between international and national law in the Swedish legal system is based on a dualist system by which a domestic court may apply rules of international law only after they have been incorporated into national law. However, in any case, principles of International Law may be considered when interpreting the law in force. Yet, the Supreme Court found that neither the IG nor the application of principles of International Law could be used to interpret the RHA in any manner other than in the grammatical and ordinary meaning of the language of that statute.

The Court then continued to examine whether the relevant provisions set out in the RHA could be considered discriminatory on the basis of the IG or the European Convention on Human Rights (ECHR). The key question was whether the RHA in fact entailed, as some statements in old preparatory works could be understood to imply, that the Sámi Districts were the actual holders of the hunting and fishing rights and that the county administrative boards administered those rights on their behalf, as the Sámi people were considered incapable of doing it themselves. If this were the case, it could be argued that the RHA breached the prohibition of discrimination set forth in Chapter 2, §12 of the IG and Art. 14 of the ECHR and should be therefore set aside. After an analysis of above all the preparatory works, the Court concluded that, under the RHA, the hunting and fishing rights belong to the state, and not to the Sámi districts. It was accordingly not possible to not apply the RHA on the basis of the IG or the ECHR. Thus, Girjas claim could not be sustained on the grounds of the RHA.

The Court then continued to consider whether Girjas' fishing and hunting rights could be based on custom or possession since time immemorial. In its analysis, the Court took notice of Art. 8.1 of the ILO Convention 169 on Indigenous and Tribal Peoples which establishes that, in applying national laws to indigenous peoples, due regard must be paid to their customs and customary laws. Although Sweden has not ratified the convention, the Court reasoned that it could be, in this respect, regarded as expressing a general principle of International Law. In disputes regarding land rights that concern Sámi people, their customs must accordingly be considered. The Court referred also to the UN Declaration on the Rights of Indigenous Peoples, the ICCPR, and international case law and asserted that International Law in this respect accorded well with Chapter 1 §2, para 6 of the IG.

The next question under consideration was thus whether the Sámi people in Girjas reindeer-herding areas had acquired exclusive

[3] See e.g. Report of the Working Group on the Universal Periodic Review: Sweden, A/HRC/44/12.

hunting and fishing rights on the grounds of custom or possession since time immemorial. The Court held that it was Girjas that had the burden of proof to show that it had hunting and fishing rights in that territory based on possession since time immemorial. Girjas' evidential burden was, however, somewhat relaxed due to the difficulty of investigating the relevant historical circumstances related to land use by Sámi people. After a thorough review of the evidence presented regarding the history of Sámi people's fishing and hunting practices in the area the Court concluded that, when the RHA of 1886 was enacted, disposal over hunting and fishing belonged exclusively to Sámi people. The Court further interpreted that, at the present time, these rights belonged to Girjas Sámi district. The Supreme Court concluded that the Girjas had an exclusive right to grant hunting and fishing rights in Girjas reindeer-herding areas without consent of the state, while the state lacked such rights.

2. NJA 2020 s. 293: The Mobile Phone Video

The background of this case is an incident that occurred in June 2010 when a parliamentary candidate representing the Sweden Democrats party, who later became a member of Parliament (hereinafter referred to as "politician"), got involved in a fight in central Stockholm. He filmed the course of events with his mobile phone and a part of the video was published with his permission on the Sweden Democrats' YouTube channel. A longer sequence of the video was later published on the website of a newspaper, including some parts that were not published on the Sweden Democrats' YouTube channel. Over the following years, the Swedish public service company SVT published, without the politician's permission, parts of the video and even pictures of it in its news reports and shows.

The politician brought an action against SVT seeking compensation and claimed that the company had breached his copyright to the video when it published it without his permission. SVT argued that their right to make use of the film was based on exemptions contained in the copyright legal framework and the right to freedom of information set out in the Swedish Instrument of Government, ECHR, and EU Charter. The lower courts ordered SVT to pay compensation to the politician for having used the film material without his permission. SVT appealed the case to the Supreme Court.

The Supreme Court asserted that the case raised questions about the relationship between the interest of protecting copyright held by an individual and the interest of society in the freedom of information. The Court noted that freedom of expression and freedom of information have a high constitutional status in the Swedish legal system, but that copyright is also protected at constitutional level. It further pointed out that the Swedish Copyright Act constitutes a lawful limitation of the freedom of information and contains exemptions with the aim of guaranteeing the citizens' freedom of information.

The Court concluded that the politician owned the copyright to the video under the Copyright Act and none of the exemptions were applicable to the case at hand. According to the Court, the provisions in the Copyright Act that contained exemptions from copyright could not be interpreted contrary to their language. Thus, it was not possible to interpret the exemptions in light of the EU's Information Society Directive in order to determine whether EU law required exemptions broader in scope in favour of the freedom of information than those provided by the Copyright Act.

Neither could the politician's statutory right to copyright be trumped by the freedom of expression and freedom of information that follow from Art. 10 of the ECHR and Art. 11 of the EU Charter. The Court pointed out that Art. 10 can sometimes be applied in criminal proceedings for copyright infringement and result in the defendant being acquitted. However, the current case concerned the copyright holder's right to compensation in civil proceedings, which meant that Art. 10 was not applicable due to the ECHR lacking direct horizontal effect. The Court asserted that, in cases like the one under review, it is particularly important that the copyright holder is not deprived of legally entrenched rights. It was accordingly not possible for the copyright holder to miss out on a statutory right to compensation through the application of Art 10 or Art. 11. The Supreme Court consequently upheld the decision of the lower courts and ordered SVT to compensate the politician.

3. NJA 2020 s. 430: The Romanian Arrest Warrant

The case concerned a European arrest warrant issued by a court in Romania in order to surrender a Romanian citizen (referred to in the case as "O.C.") to Romania for execution of a custodial sentence. The lower courts denied the request because they considered that it could not be guaranteed that O.C. would not be subjected to inhuman or degrading treatment in a Romanian prison in violation of Art. 3 ECHR. The prosecutor appealed to the Swedish Supreme Court and requested that O.C. be surrendered to Romania for execution of the sentence in accordance with the European arrest warrant. The question before the Supreme Court was whether the conditions of detention in Romania were such that there was a real risk that O.C. would be subjected to inhumane or degrading treatment in violation of Art. 3 of the ECHR and Art. 4 of the EU Charter.

The Supreme Court stated that the system of European arrest warrants builds on the mutual trust and recognition between the EU member states and that courts normally only need to control that the formal requirements for a surrender are met. However, a court cannot decide on a surrender if the surrender in the specific case would violate the ECHR. With that said, the Court observed that prison conditions in Romania have been very concerning for a long time. The Court pointed out that, in its previous case law on extradition to countries outside the EU, it held that material deficiencies in prison conditions did not entail that the extradition would violate Art. 3 of the ECHR. According to the Court, Romania had since 2018 managed to reduce overcrowding in prisons and improved the material conditions for prisoners. The Court nevertheless reasoned that there was still a general risk that a surrender of O.C. to Romania might not be compatible with Art. 3. Nonetheless, it noted that there must be a substantial reason to believe that there is a

real risk for inhuman or degrading treatment under the specific conditions of detention applicable to O.C.

The Court indicated that Romania had given guarantees as regards the specific conditions of detention during the execution of O.C.'s sentence and that such guarantees should usually be accepted if they are given by the authority that also issued the arrest warrant. Yet, it asserted that this was not the case here, as the guarantees had been given by the Romanian prison service and not by a court. Although the guarantees could not be accepted unreservedly, the Court held that they should be given considerable weight in the overall assessment. The Court found no reason to question the guarantees and held that surrendering O.C. to Romania would not entail a strong presumption of a violation of Art. 3 of the ECHR or Art. 4 of the EU Charter. Unlike the lower courts, the Supreme Court saw thus no reason to refuse to surrender O.C. to Romania.

4. HFD ref. 13: Registration of Parenthood

The case concerned a female same sex couple who moved to Sweden from Iceland. One of the women had given birth to a child with the help of assisted reproductive technology through insemination. Under Icelandic law, both women were considered parents to the child. A couple of years after the child was born, they got married and moved to Sweden. Upon their move to Sweden, the Swedish Tax Agency refused to register in the Swedish Population Register the parenthood of the woman who had not given birth to the child. According to the agency, Swedish law did not allow for the woman's parenthood to be registered. The Court upheld the Tax Agency's decision to not register the parenthood and, while there was consensus regarding the outcome, there were different opinions among the Justices as to the legal grounds of the decision.

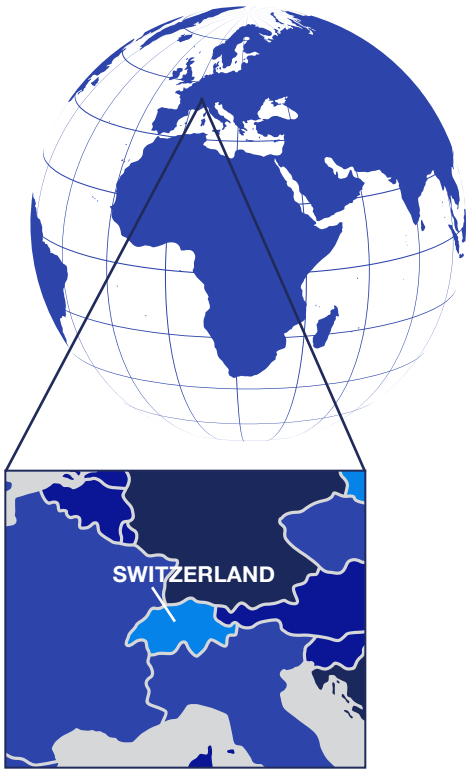
The majority of the Supreme Administrative Court held that the refusal to register the parenthood violated neither the right to respect for private and family life set out in Art. 8 of the ECHR nor the protection against discrimination contained in Art. 14 of the ECHR. As stated by the Court, there had been an interference with Art. 8, but the interference was in accordance with the law and served the legitimate purpose of guaranteeing the child's right to information about its genetic origins. The Court also considered that the interference had been proportionate and emphasized that it was possible to establish the parenthood within the framework of Swedish law, for example, through adoption. With regard to Art. 14, the Court asserted that there was no difference in treatment as regards heterosexual and female same sex couples who wanted to register parenthood after having used assisted reproductive technology through sperm donation abroad, regardless of whether the parenthood had been established abroad.

Three Justices dissented as to the grounds of the decision of the majority with regard to Art. 14. All three interpreted that the comparison should be made between people who have moved from other Nordic countries and have had their parenthood established in the country of origin. All three dissenting Justices further agreed that, as a paternity established in another Nordic country would also have been registered in Sweden, the refusal to register the woman's parenthood entailed that she had been treated differently on the basis of sex and sexual orientation. One of the dissenting Justices held that there had been no violation of Art. 14 as there was a reasonable justification for the difference in treatment and it could not be regarded as disproportionate. However, according to the two other dissenting Justices, there was neither a reasonable justification for the difference in treatment nor was it proportionate. These two Justices accordingly held that there had been a violation of Art. 14 together with Art. 8. Nevertheless, they regarded it primarily as the duty of the legislator, and not the courts, to guarantee that the examined regulations did not violate the ECHR.

The Swedish law was changed while the case was pending, and it is now possible in some situations for the Swedish Tax Agency to register parenthood in cases like this. One requirement is that the child has the right to access information about the sperm donor.

IV. LOOKING AHEAD

The main challenge throughout 2020 has been the COVID-19 pandemic and the legal and political measures taken to counter it. To a large extent, the Swedish strategy, which is based on non-mandatory measures rather than strict lockdowns and criminal sanctions for violations against quarantine rules and lockdowns, is a result of the Swedish constitutional model of semi-autonomous governmental agencies. The government has, to a comparatively large degree, depended on and let the responsible governmental agency set the path and pace for the Swedish strategy. This has been done, and not without criticism, with a reference to the Swedish constitutional model of semi-autonomous governmental agencies. In addition, the government hinted that a review into the constitutional regulation of peace time crisis will be initiated.



Switzerland

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I. INTRODUCTION: CURBING COVID-19 CONSTITUTIONALLY AND THE ELUSION OF POLITICAL RESPONSIBILITY

1. Federal Epidemics Acts: three-tier approach

When COVID-19 reached Switzerland at the end of February 2020, the *Federal Act of 28 September 2012 on Combating Communicable Human Diseases* (Epidemics Act, EpA)'[1] had been in place for more than four years. Previously, the EpA, whose aim is to 'prevent and combat the outbreak and spread of communicable diseases'[2], was subject to intense political debates culminating in a referendum on 22 September 2013.[3] After 60% of voters approved the bill, the EpA entered into force on 1 January 2016. The EpA set a *three-tier approach* in place, distinguishing between 'normal', 'special' and 'extraordinary' epidemiological situations. Accordingly, an aggravation of the epidemiological circumstances leads, based on a respective decision by the executive branch of the federal government (Federal Council) to a transfer of governmental tasks and responsibilities from the cantons (constituent states) to the Federation (federal government) on the one hand and from Federal Parliament (legislative branch) to the Federal Council (executive branch) on the other hand. The more the epidemiological situation escalates, the more *power is being concentrated in the Federal Council.* According to the EpA, a *'special situation'* exists when the authorities responsible for the prevention and combating of communicable diseases prove unable to prevent the outbreak and spread of such diseases, resulting in either an increased risk of infection and spread, a particular threat to public health or detrimental effects on the economy or on other areas of life.[4]

A 'special situation' also exists should the World Health Organization (WHO) identify an international health emergency threatening the health of the population in Switzerland. Such a 'special situation' allows the Federal Council, after consulting the cantons, to order 'measures' aimed at individuals or at the population as a whole to require doctors and other health professionals to participate in the fight against communicable diseases and to declare vaccinations compulsory for particular vulnerable groups of persons.[5] The most aggravated state of affairs – the *'extraordinary situation'* – allows the Federal Council 'to impose the necessary measures for all or part of the country', without consulting the cantons.[6] Despite these sweeping powers, the EpA remains silent as to the definition of an 'extraordinary situation'. In his dispatch to the Federal Parliament on the EpA, the Federal Council stated that the relevant clause is but a declaration of the emergency powers the executive branch of the federal government holds under the

[1] "Federal Act on Combating Communicable Human Diseases" (Epidemics Act, EpA), Classified Compilation of Swiss Federal Law (SR) 818.101. Available at: <https://www.fedlex.admin.ch/eli/cc/2015/297/fr> (official French version), (28 September 2012).

[2] Ibid, article 2 section 1 (outlining the purpose of the Act).

[3] See Swiss Federal Chancellery, 'Federal Act on the Control of Communicable Human Diseases'. Available at: <https://www.bk.admin.ch/ch/f/pore/rf/cr/2007/20071012.html> (in German, French, and Italian).

[4] EpA (n. 1 above) article 6 section 1a.

[5] EpA (n. 1 above) article 6 section 2.

[6] EpA (n. 1 above) article 7.

Swiss Federal Constitution (Federal Constitution)[7]. These powers allow the Federal Council 'to enact orders and take decisions in order to counter existing or imminent disturbances seriously threatening either public order or external or internal security'[8]. All such orders 'must be limited in time.'[9] As in most other areas of federal law, it is generally for the cantons to implement the measures imposed by the Federal Council during both 'special' and 'extraordinary' situations.

2. The first wave: emergency loans as a public-private partnership

Based on this legal framework, the Federal Council declared the epidemiological situation to be 'special' and banned all large-scale events involving more than 1,000 people on 28 February 2020.[10] On 16 March 2020, the federal executive branch went further and, amid the accelerated spread of COVID-19, proclaimed the *'extraordinary situation'*.[11] The Federal Council introduced stringent measures such as border checks and the closing of shops, restaurants, bars and entertainment and leisure facilities, prohibited public gatherings of more than five people and did not order but 'recommended' all citizens to stay home. When a*dministering emergency loans* to small businesses, the Federal Council, based on its constitutional emergency powers, took the unique approach to enter into close collaboration with more than 120 Swiss commercial banks.[12] With a simple declaration of one page, small and mid-size enterprises could apply for an immediate and interest-free loan worth up to 10% of their annual revenue, capped at Swiss Francs (CHF) 500,000 (approx. United States dollars [USD] 560,000 or Euros [EUR] 460,000). These loans were provided by a Swiss bank, underwritten with a full credit guarantee on the amount by the federal government.

Of higher amounts up to CHF 20 million (approx. USD 22.3 million/EUR 18.4 million), 85% each were guaranteed by the federal government, charged at 0.5% interest and again provided by a Swiss commercial bank. Running the scheme through the existing network of commercial banks based on existing customer relationships proved crucial for the initial success of the program, as the banks could rely on both the credit history and data of their clients. Within a week, more than 70,000 small and mid-size businesses received a loan through this public-private partnership.[13]

Soon after the first wave of COVID-19 subsided towards the end of May 2020[14] the Federal Council declared *the 'extraordinary situation'* to be terminated as of 19 June 2020, lifted most of the remaining restrictions, proclaimed the 'special situation' and thus handed most of the tasks and responsibilities in controlling and combating COVID-19 back to the cantons.[15] Regarding separation of powers at the federal level the extraordinary powers granted to the Federal Council to combat the COVID-19 epidemic are, as of 26 September 2020, enshrined in the *'Federal COVID-19 Act'* decided by Federal Parliament on 25 September 2020 and passed as an emergency federal statutory law.[16] As of 1 October 2020, the last relevant restrictive measure imposed by the Federation still in place – the ban on large-scale events for over 1,000 people – was lifted.[17] With the benefit of hindsight, it is difficult not to acknowledge that most restrictions were lifted both *prematurely and hastily.*

3. The second wave: elusion of political accountability and blame-shifting

During the second half of October, the laboratory-confirmed cases, hospitalizations and deaths due to COVID-19 rose dramatically once again and peaked in mid-November 2020. This *'second wave'* of the COVID-19 pandemic hit Switzerland worse than the first one. As of 19 February 2021, Switzerland accounted for 6,336 laboratory-confirmed cases and 106.42 deaths with a laboratory-confirmed COVID-19 infection per 100,000 inhabitants.[18] Based on cumulative confirmed COVID-19 deaths per million

[7] Swiss Federal Constitution (Federal Constitution), SR 101, (18 April 1999), Available at: <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html> (non-official English translation).

[8] Federal Constitution (n. 7 above) article 185 section 3 sentence 1.

[9] Federal Constitution (n. 7 above) article 185 section 3 sentence 1.

[10] Federal Council, "Coronavirus: Federal Council bans large-scale events", (28 February 2020), Available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-78289.html>.

[11] Federal Council, "Coronavirus: Federal Council declares 'extraordinary situation' and introduces more stringent measures",(16 March 2020), Available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-78454.html>.

[12] See « Ordonnance sur l'octroi de crédits et de cautionnements solidaires à la suite du coronavirus », (25 March 2020), Available at: <https://www.fedlex.admin.ch/eli/oc/2020/194/fr>.

[13] For an assessment see Sam Jones, "Swiss lead way with crisis loans to small businesses", Financial Times, republished at SWI Swissinfo.ch, (6 April 2020). Available at: <https://www.swissinfo.ch/eng/business/covid-19_swiss-lead-way-with-crisis-loans-to-small-businesses/45670144>.

[14] For official data on COVID-19 in Switzerland and Liechtenstein see Swiss Federal Office of Public Health (FOPH), "Status report: Switzerland and Liechtenstein", Available at: <https://www.covid19.admin.ch/en/overview>.

[15] Federal Council, "Coronavirus: Move towards normalisation and simplified basic rules to protect the population", (19 June 2020), Available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-79522.html>.

[16] "Federal Act on the Statutory Principles for Federal Council Ordinances on Combating the COVID-19 Epidemic (COVID-19 Act)", SR 818.102, (25 September 2020), Available at: <https://www.fedlex.admin.ch/eli/cc/2020/711/en> (non-official English translation).

[17] See FOPH (n. 14 above), "Table on the easing and tightening of measures", (15 December 2020), Available at: <https://www.bag.admin.ch/dam/bag/en/dokumente/mt/k-und-i/aktuelle-ausbrueche-pandemien/2019-nCoV/covid-19-tabelle-lockerung.pdf.download.pdf/Easing_of_measures_and_possible_next_steps.pdf> (with an overview of all the measures imposed and lifted at the federal level between 27 April and 30 November 2020).

[18] See FOPH (n. 14 above).

persons, Switzerland, as of February 2021, fared worse during the entire pandemic than neighboring Austria and Germany yet slightly better than France and Italy.[19] In view of *mounting discontent with the considerable powers of the Federal Council* under the EpA, both on the part of the political parties and the cantons, the federal executive branch shied away from reintroducing the 'extraordinary situation' and left the *'special situation'* in place instead. The Federal Council thus might still impose measures aimed at individuals or at the population but is under an obligation to consult the cantons beforehand.[20] Furthermore, each canton could enact its own additional measures. Still, the small scale of Swiss federalism – 26 cantons are assembled on less than 42,000 km2 inhabited by 8.7 million people – prompted many executive branches of the cantons, whose members are all elected directly by the people, to refrain from unilaterally imposing more restrictive and often unpopular measures despite increasing case numbers on their territory.

4. The silence of the courts

In spite of the severe restrictions of fundamental rights, courts have played a subordinate role at best during the pandemic. Although the Federal Court, Switzerland's highest court, had to adjudicate a number of appeals against measures to combat COVID-19 these proved to be manifestly unfounded to the extent that the court entered into the merits of the appeals at all. In contrast, some administrative courts of the cantons did in fact rule on the delimitation of the emergency powers of the executive branches of the cantons.[21] The Administrative Court of the Canton of Zurich held that the requirement to wear hygiene masks in shops and shopping centers did not constitute an impermissible interference with fundamental rights.[22] Based on federal constitutional law, one can identify *three major reasons for the courts' silence:* First, ordinances of the Federal Council may not be challenged in courts as such,[23] although specific sanctions imposed by officials based on these ordinances such as arrests or fines may indeed be contested. Second, the Federal Court largely deferred to the Federal Council in its past decisions defining the limits of executive emergency powers.[24] Third, the Federal Constitution commits all courts to adhere to federal statutory law, even in the event of a conflict with the Federal Constitution.[25]

5. Preliminary assessment: diffusing political accountability by direct democracy, federalism, separation of powers, and collegiate executive branches

Georg Wilhelm Friedrich Hegel observed in 1820 that the 'owl of Minerva begins its flight only with the falling of dusk'[26], pointing to the fact that phenomena can only be explained and evaluated once they have passed and become history. To the extent that a preliminary assessment of coping with COVID-19 from the perspective of constitutional law may nonetheless be reasonably ventured even before the pandemic has subsided; the *main conclusion* might be that the alignment of Switzerland's political system towards consensus and integration of linguistic, confessional and socio-economic minorities within the country, as underpinned by the Federal Constitution and as a salient advantage of the Swiss political system, comes at the price of the *diffusion of political accountability.* Direct democracy, federalism, the separation of powers between Federal Parliament and the Federal Council as well as the collegial decision making and interaction within the executive branches at both federal levels (Federation, cantons) all provide politicians not only with *loopholes to evade political accountability,* but also rhetorical munition to *shift blame* onto other actors within the political realm.

Owing to the Swiss system of *direct democracy,* 50,000 citizens are entitled to launch a referendum against any federal statutory law approved by Federal Parliament.[27] Empirically, such 'optional referenda' are launched against around a mere 6% of all the legislative acts that are constitutionally subject to this institution of direct democracy.[28] Roughly half of all federal acts actually put to an 'optional referendum' have been vetoed at the ballot box since 1874.[29]

This considerable political uncertainty posed by the optional referendum creates strong incentives to seek broad parliamentary consensus on important policy issues and forms a major factor of Switzerland's transformation from a majoritarian to a consensus democracy. Consensus democracy, however, also offers incentives to politicians to avoid political responsibility by passing on sensitive issues like a hot potato. Decisions at the ballot box on bills or treaties are very rarely

[19] See Our World in Data, "Switzerland: Coronavirus Pandemic Country Profile", (21 February 2021), Available at: <https://ourworldindata.org/coronavirus/country/switzerland?country=~CHE>.

[20] See EpA (n. 1 above) article 6 section 2.

[21] Administrative Court of the Canton of Zurich, decision AN.2020.00004, (25 May 2020), Available at: <https://www.zh.ch/de/politik-staat/streitigkeiten-vor-verwaltungsgericht/rechtsprechung-des-verwaltungsgerichts/urteile-in-der-entscheiddatenbank-suchen.html>.

[22] Ibid., decision AN.2020.00016, (3 December 2020).

[23] Federal Constitution (n. 7 above) article 189 section 4.

[24] See, e.g., Federal [Supreme] Court, decision BGE 123 IV 29 section 3b, (10 January 1997), Available at: www.bger.ch.

[25] Federal Constitution (n. 7 above) article 190; see Johannes Reich, «Verhältnis von Demokratie und Rechtsstaatlichkeit» in Oliver Diggelmann et al. (eds.), Droit constitutionnel suisse. Vol. 1, Schulthess, (2020), 333-55, Available at: https://doi.org/10.5167/uzh-184637.

[26] Georg Wilhelm Friedrich Hegel, «Grundlinien der Philosophie des Rechts», (1820; Suhrkamp 1986), 28 (translation by the author).

[27] Federal Constitution (n. 7 above), article 141 sections 1a&d.

[28] Alexander H. Trechsel & Pascal Sciarini, "Direct democracy in Switzerland: Do elites matter?", 33 European Journal of Political Research 99, (1998), 103-4.

[29] Adrian Vatter, "Das politische System der Schweiz", 3rd ed., Nomos, (2017), 370.

framed as a vote of no confidence in a member of government. Since 1959 not a single member of the Federal Council has resigned after a referendum that did not go according to his or her preferences.

Furthermore, due to the small-scale structure of Swiss *federalism,* a single canton has little incentive to unilaterally take potentially unpopular decisions. As many persons live and work in different cantons, each government of a canton can reasonably claim that a unilateral decision would be ineffective and thereby shift the burden to take unpopular decision upon the federal government.

All members of the Federal Council are elected by Federal Parliament for a *fixed period* of four years.[30] Owing to the lack of a vote of no confidence or a recall, political parties and their members of Federal Parliament face little pressure to fall in line with decisions taken by the Federal Council or to support them in public. With regard to the *separation of powers* between the Federal Council and Federal Parliament, the Federal Constitution merely provides that 'significant' and 'fundamental' provisions must be part of statutory federal law.[31] Such law generally rests outside the scope of judicial review.[32] In view of the powers granted to the Federal Council by the EpA,[33] this provides members of parliament with the opportunity to put pressure on the executive branch by threatening to overrule ordinances enacted by the Federal Council and to take credit for any adjustments, while avoiding any political accountability for such decisions.

The executive branches of both the cantons and the Federation are *collegiate bodies* consisting of an uneven number of members with identical rights and responsibilities.[34] Decisions are taken, to the extent possible, by consensus and all of the members of the executive are expected to faithfully represent and implement the decisions by the majority. Ideally, such structures lead to positive instead of mere negative coordination[35] and thus to better informed decisions. At the same time, each member of the executive branch is provided with an opportunity not only to hide behind the collegium but to cautiously distance him- or herself from the collective decisions or to leak his or her opposition to the media.

The COVID-19 pandemic thus highlighted that the merit of Swiss constitutional law in establishing consensus between linguistic, confessional, and cultural minorities has its shadows. It allows the cantons, members of the federal parliament and political parties to *shirk political responsibility* and *shift political blame onto other actors* instead.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS: GENERAL ELECTION OF THE SWISS FEDERAL PARLIAMENT

Swiss citizens were called to the ballot boxes three times in 2020 to decide upon nine subjects.[36] None of the proposed four amendments to the Federal Constitution, all of them popular initiatives, achieved the necessary majority of both the voters and the cantons.[37] The popular initiative '*For responsible businesses – to protect people and the environment',* was launched by a broad coalition of left-leaning parties, NGOs, and charitable organizations and brought forward a constitutional amendment to commit all companies with registered offices or headquarters in Switzerland to adhere to "internationally recognized human rights and international environmental standards" both in Switzerland and abroad and to ensure that these standards are "respected by the businesses under their control".

These obligations would have been made enforceable through torts claims before Swiss courts. The initiative was supported by 50.73% of voters but failed to gain a majority of the cantons and was thus rejected. The popular initiative *'For moderate immigration (limitation initiative)'*, which would have ended free movement of persons with the members-states of the EU and the European Economic Area, met the same fate. The popular initiative was roundly rejected by 61.7% of voters and more than 80% of the cantons. As popular initiatives seeking to commit the Federation to *'promote the supply of affordable rental housing'* and to bar the Swiss National Bank, Switzerland's central bank, and pensions funds from *'financing producers of military equipment'* were both defeated, the Federal Constitution remained unaltered in 2020.

III. CONSTITUTIONAL CASES: JUDICIALIZATION OF POLITICS, ISLAMIC HEADSCARVES, AND HOMESCHOOLING

1. Association 'Senior Women for Climate Protection' et al. vs. Federal Council et al.: climate change litigation on its way to the European Court of Human Rights[38]

'Senior Women for Climate Protection' (SEPO), an association under Swiss law, whose roughly 1,800 members are all female and on average 73 years old, and four of its members filed a motion seeking to commit the Federal Council and three federal admin-

[30] Federal Constitution (n. 7 above) article 175 section 2 sentence 1.

[31] Federal Constitution (n. 7 above) article 164 section 1.

[32] See section I/3 at n. 25.

[33] See section I/1 above.

[34] See, e.g., Federal Constitution (n. 7 above), articles 175 and 177 sections 1.

[35] Fritz W. Scharpf, 'Komplexität als Schranke der politischen Planung' in PVS 4/1972: Gesellschaftlicher Wandel und politische Innovation (VS 1972) 168, 173-5 (on positive and negative coordination).

[36] On all federal popular votes since 1848 see Federal Chancellery, 'Chronology of referenda. Available at: <https://www.bk.admin.ch/ch/d/pore/va/vab_2_2_4_1.html>.

[37] Federal Constitution (n. 7 above) article 140 section 1a & article 142 sections 2-4.

[38] Federal Court (n. 24 above) decision 146 I 145 (5 May 2020). Available at: <www.bger.ch>.

istrative agencies to take more stringent climate action in such a way that Switzerland's contribution to global emissions of greenhouse gases (GHGs) would be in line with the aim of the 2015 Paris Agreement to hold 'the increase in the global average temperature to well below 2 °C above pre-industrial levels'[39]. According to SEPO, this would mean reducing domestic GHG-emissions by at least 25 percent by 2020 compared with 1990 levels, instead of 20 percent as prescribed in federal statutory law. SEPO argued that the federal government, both by refraining from initiating a revision of the allegedly too lenient climate legislation and by ostensibly displaying undue restraint in implementing the statutory provisions, failed to meet the positive obligations deriving from the right to life and the right to respect for private and family life enshrined in both the Federal Constitution and the European Convention on Human Rights (ECHR). SEPO claimed that elderly women were significantly more and adversely affected in their invoked human rights by higher temperatures and heat waves caused by GHG-emissions.

On behalf of the Federal Council, the federal administration held *not to consider SEPO's claim on its merit.* The Federal Administrative Court (appellate court) and – on 5 May 2020 – the Federal Court both *affirmed* this decision.[40] The latter court held that the reprimanded omissions by the federal authorities would 'at the present time' fail to impair the complainants' rights to life and to respect for private and family life to the extent required by the Administrative Procedure Act in order to vindicate legal remedy. Having exhausted all domestic remedies, SEPO and four of its members filed an application with the European Court of Human Rights (ECtHR) on 26 November 2020. SEPO's motion thus arguably constitutes the first case of climate change litigation reaching the ECtHR in strict compliance with the admissibility criterion according to which the 'Court may only deal with the matter after all domestic remedies have been exhausted'[41].

2. Vischer et al. vs. Grand Council of the Canton of Basel-City et al.: fundamental rights for non-human primates or mere 'constitutional virtue signaling'?[42]

In the canton of Basel-City, a hub of life-science industry where pharmaceutical giants such as Novartis and Roche are headquartered, a popular initiative was submitted with the aim of amending the constitution of the canton with the following passage: 'This constitution guarantees […] the *right of non-human primates to life and to physical and mental integrity'*. The Grand Council of the Canton of Basel-City (Parliament) declared the initiative invalid owing to its alleged inconsistency with federal law, which takes precedence over any law of a canton.[43] The Court of Appeal of the canton overturned this decision. On further appeal, the Federal Court upheld this previous decision. The popular initiative 'basic rights for non-human primates' will thus be put to a popular vote. The Federal Court reasoned that the cantons are, in their own constitution, allowed to guarantee fundamental rights beyond the minimum standard set by both the Federal Constitution and the ECHR. The Federal Court emphasized that the initiative did not call for the application of existing fundamental rights applicable to humans to animals, but rather for the introduction of *new rights reserved for non-human primates only.* The Federal Court further underscored that fundamental rights would primarily, if not exclusively, grant protection against the government of the canton and its administration. Fundamental rights enshrined in the constitution of the Canton of Basel-City would therefore be directed against the authorities of the canton, including the University of Basel and the University Hospital of Basel, and of its municipalities, even though these entities currently neither own nor keep non-human primates. The Federal Court stressed that private law legislation forms an exclusive federal power. Subjects of private law, in particular life-science industry with its laboratories and other private research institutions, would therefore *not be bound* by the constitutional amendment the popular initiative advanced. As a result, the constitutional amendment would *largely fail to create any third-party effects among private entities.* Against this backdrop, the decision of the Federal Court illustrates the favorable conditions for regulatory experimentation and innovation that the interaction of federalism and popular initiatives creates. Still, the popular initiative, if approved, would essentially be reduced to what may be coined *'constitutional virtue signaling'* but largely fail to be of practical relevance.

IV. LOOKING AHEAD

On 7 March 2021, Swiss citizens will be called to the ballot box to decide on *the popular initiative 'Yes to the Veiling Ban'* seeking to prohibit all face covering in public places and in places opened to the public, with the exception of places of worship. Despite its neutral wording, the initiative primarily seeks to outlaw wearing specific Islamic female dresses, in particular the burqa and the niqab, in public. On 13 June 2021, citizens will vote on the referendum against the 'Federal COVID-19 Act' which was passed as an emergency federal statutory law and enacted immediately before an optional referendum could take place.

[39] Paris Agreement (12 December 2015; ratified by Switzerland on 6 October 2017), article 2 section 1a.

[40] For a critical assessment see Johannes Reich, Case Note, 121 (2020) Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht, 489-507. Available at: <https://doi.org/10.5167/uzh-190231>.

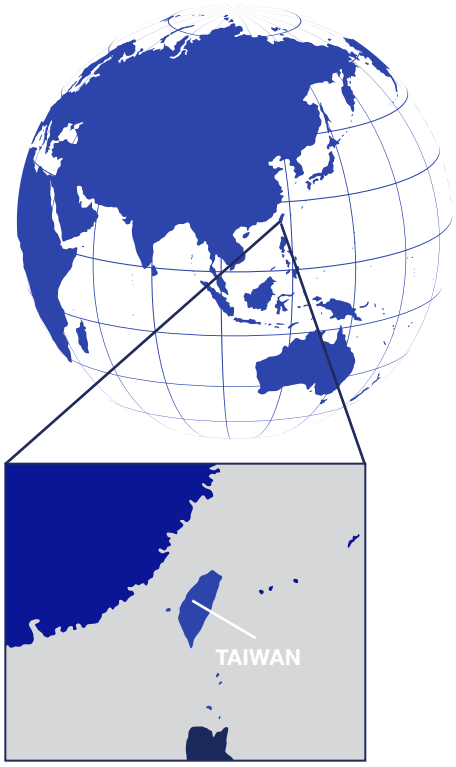
[41] ECHR, article 35 section 1.

[42] Federal Court (n. 24 above) decision 1C_105/2019 (10 January 1997). Available at: <www.bger.ch>.

[43] See Federal Constitution (n. 7 above) article 49 section 1.

V. FURTHER READING

Johannes Reich, 'Verhältnis von Demokratie und Rechtsstaatlichkeit' [Relationship between democracy and the rule of law] in Oliver Diggelmann et al. (eds.), *Droit constitutionnel suisse* (Schulthess 2020), pp. 333-355. Available at: <https://doi.org/10.5167/uzh-184637>.



Taiwan

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I. INTRODUCTION

President Tsai Ing-wen's reelection and the Democratic Progressive Party's (DPP) continuing control of the Legislative Yuan after the elections in January 2020 were the determining factor of Taiwan's constitutional development in 2020. President Tsai and the DPP's electoral landslide victory not only defied the political headwinds stirred by the seismic local elections and referenda in 2018, but also extended and deepened the reform agenda since 2016.

On the one hand, transitional justice, an unmistakable rallying cry for President Tsai and her DPP in the past decades, continued to play a pivotal role in Taiwan's constitutional development within and outside the Taiwan Constitutional Court (TCC). While the mandate of the Transitional Justice Commission has been extended for one year before it was due to publish the required comprehensive report in May 2020, the locomotive for the post-2016 transitional justice agenda – the Act Governing the Settlement of Ill-Gotten Properties by Political Parties and Their Affiliated Organizations – worked its way to the TCC. On the other hand, after a long lull, constitutional amendment entered the reform agenda in 2020.

As will become clear, the direction of the reform of the Capital-C Constitution remained unclear in 2020. Yet, on the general landscape of constitutional development, it was a mixed scene. Reform, whether in the form of government reorganization or the response to the global pandemic, entails means that seem to make an end run around the Constitution in the pursuit of higher constitutional ends. Even in a seemingly mundane broadcast license renewal process, freedom of speech entered the scene, raising constitutional issues concerning the regulation of accurate reporting. As suggested in the cases to be discussed, the TCC was part of the mixed scenes in the 2020 constitutional landscape in Taiwan. While standing firm on the reform agenda, the TCC showed its conservative facet when the petitions before it failed to resonate with the public. To see the mixed constitutional scenes requires first a closer look at the road to the current uncertain constitutional reform.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Constitution Amendment Entering the Reform Agenda

Although the drafting project to reform Taiwan's current Constitution, the Constitution of the Republic of China of 1947 – which had been continuously intertwined with Taiwan's road to constitutional democracy in the early days of its political transition –, was yet to be completed, it had ground to a halt with the introduction of the cumbersome amendment procedure in 2005. Returning from the political wilderness in 2016, President Tsai and her DPP government did not put constitutional amendment on the top of their political agenda.

Four years later, boosted by the landslide victory in the 2020 elections and pressured by the civil society, especially young activists, President Tsai included constitutional reform in her second inaugural speech on May 20, 2020. The Legislative Yuan then followed up with the establishment of an all-party ad hoc Constitutional Amendment Committee

(CAC) in October. Unlike previous attempts to push through constitutional reform, one issue emerged to command wide support: the lowering of the voting age from 20 to 18 to empower young people. Whether the 2020 consensus on the amendment concerning the voting age could set the train of constitution reform in motion was uncertain at the end of the year as many reform packages had been proposed and the CAC was yet to convene its first meeting.

2. Statutory Reorganization of Constitutional Organs

Two legislative moves in 2020 stood out for their constitutional significance: the statutory reorganization of the Control Yuan and the Examination Yuan in their respective organic laws.

Under the 1947 Constitution's separation of powers system divided into five organs, the Control Yuan and the Examination Yuan sit on par with the Executive Yuan, the Legislative Yuan, and the Judicial Yuan. Both had been the main targets of constitutional reform aimed at transforming the unwieldy quintipartite regime into a Constitution of executive, legislative, and judicial powers. With attempts to abolish the Examination Yuan stalled in the blocked channel of constitutional amendment, the Legislative Yuan lowered the membership of the collegial Examination Yuan from 19 to 7-9 in the amended Organic Law of the Examination Yuan of 2020 in an attempt to diminish its importance.

Equally important, the reorganization of the Control Yuan resulted from the advocacy for establishing an independent national human rights institution per the Paris Principles. To find a constitutional basis for such an independent institution, as required under the quintipartite separation of powers system but for a constitutional amendment, the Organic Law of the Control Yuan was amended to establish an all-purpose National Human Rights Commission (NHRC) attached to the Control Yuan. Considering the difference between the NHRC's broad competence and the Control Yuan's limited role as the ombudsman of good governance, the amendment of the Organic Law of the Control Yuan in 2020 amounted to reorganizing a constitutional organ bypassing the Constitution.

3. The Rule of Law Recalibrated Amidst the COVID-19 Pandemic

Before the full force of the COVID-19 pandemic hit the world, Taiwan had already responded to it in a strong manner. Apart from privacy concerns raised by information sharing as part of government responses to the disease, the legislative response was also in the spotlight in terms of the constitutional implications of the COVID-19 pandemic.

Although no presidential emergency decree was issued, a special statute (known as the COVID-19 Special Act) was promulgated by the President on February 25 with retrospective effect from January 15. Along with the existing Communicable Disease Control Act (CDC Act), the COVID-19 Special Act – which was scheduled to expire on June 30, 2021 but renewable subject to the consent of the Legislative Yuan – was aimed at creating broader powers required to combat the pandemic and providing financial relief to those affected. Among its provisions, article 7 is controversial as it essentially sets forth a blanket authorization to the executive regarding the power to implement necessary response actions or measures aimed at disease prevention and control. Such a broad delegation of rule-making powers raised concerns over its corrosive constitutional consequences on the delegation of legislative powers to the executive under the principle of the rule of law.[1]

4. Broadcast License Renewal and Freedom of Speech

Apart from constitutional amendment and statutory change, one administrative adjudication by the National Communications Commission (NCC) is worth noting. In November 2020, the NCC rejected CTI TV's application for the renewal of the broadcast license of its cable news channel, on the grounds of repeated violations of regulations of accurate reporting. Although the NCC justified its decision on a regulatory basis, CTI TV, a pro-China television company, accused the NCC of violating its constitutional right to freedom of speech by means of a content-based regulation politically censoring its pro-China news coverage. CTI TV's cable news channel ceased broadcasting on December 12, the day after the Supreme Administrative Court rejected CTI TV's appeal of the Taipei High Administrative Court's dismissal regarding an application for preliminary injunction to enjoin the NCC's decision.

III. CONSTITUTIONAL CASES

In 2020, the TCC received 634 new petitions in total of which 612 concerned constitutional interpretation (96.5%) and 22 involved uniform interpretation of laws and regulations (3.5%). Among these 634 petitions, 587 (92.6%) were filed by individuals, 39 by the courts, and only 8 by governmental agencies. Of these 634 new petitions and 619 pending petitions, the TCC disposed of 610 applications by rendering 12 Interpretations (Nos. 788 to 799) – with 44 additional petitions consolidated thereto – and dismissed 554 petitions (including one withdrawn).[2] All 12 Interpretations involved constitutional controversies. Among these 12 constitutional interpretations, 5 Interpretations (Nos. 788, 789, 793, 794, and 797) upheld the constitutionality of the challenged law in their entirety. On the other hand, 7 Interpretations declared the impugned law unconstitutional, either in its entirety (Nos. 791, 792, 795, 796, and 798) or in part (Nos. 790 and 799).

The 12 Interpretations involved six specific subjects, ranging from criminal law (Nos.

[1] See Ming-Sung Kuo, "A Liberal Darling or an Inadvertent Hand to Dictators: Open-Ended Lawmaking and Taiwan's Legal Response to the Covid Pandemic", *Int'l J. Const. L. Blog,* April 30, 2020 <http://www.iconnectblog.com/2020/04/a-liberal-darling-or-an-inadvertent-hand-to-dictators-open-ended-lawmaking-and-taiwans-legal-response-to-the-covid-pandemic/>.

[2] As of the end of 2020, there were a total of 643 pending cases before the TCC. For detailed information, see <https://www.judicial.gov.tw/tw/lp-1920-1.html>.

790, 791, 792, 796, 789, and 799), due process (Nos. 795 and 797), environmental law (No. 788), tax law (No. 798), freedom of speech (No. 794), to transitional justice (No. 793). In the following paragraphs, we will focus on four Interpretations of constitutional importance, namely, No. 791 on the decriminalization of adultery, No. 793 on transitional justice, No. 794 on tobacco sponsorship, and No. 799 on the compulsory medical treatment of sex offenders.

On the part of court procedures, the TCC held three oral arguments on Interpretations Nos. 791, 793, and 799, marking the highest number of oral arguments held within a calendar year[3] in the history of the TCC. Besides, the TCC further held two public preparatory proceedings on Interpretation No. 794 and a pending case regarding a court-ordered apology.

1. Interpretation No. 791: Decriminalization of Adultery

Interpretation No. 791 was the first milestone decision of 2020. In this decision, the TCC declared unconstitutional Section 239 of the Criminal Code that punished adultery as a crime. In fact, adultery has been considered a crime in Taiwan for more than three centuries.[4] Although Section 239 was gender-neutral on the face of it, more women than men were prosecuted and sentenced for committing adultery in practice. For long, some women's rights groups have condemned this provision as producing disparate impact discrimination on women and therefore violating gender equality under the Constitution. Most constitutional and criminal law scholars criticized its excessive intrusion into the individual right to privacy, among others. Many younger generations of judges and prosecutors also questioned its constitutionality. In November 2000, a young judge of the district court took the initiative and challenged the constitutionality of Section 239 in the TCC. However, the TCC handed down its ruling in Interpretation No. 554 (2002), holding the constitutionality of the criminal punishment of adultery. By virtue of Interpretation No. 554 and with the support of an overwhelming majority of Taiwanese people,[5] adultery had remained a crime for another 18 years, making Taiwan one of the few liberal democracies that regulated the criminalization of adultery until the TCC issued Interpretation No. 791 in May 2020.

In Interpretation No. 791, the TCC struck down two provisions: Section 239 of the Criminal Code and Section 239 of the Criminal Procedural Act. The former punished both the adulterous spouse and his or her partner (the third party) by imprisonment for no more than one year. Under Section 245 of the Criminal Code, an adultery offense was indictable only upon a formal complaint by the innocent spouse. However, Section 239 of the Criminal Procedural Act allowed the innocent spouse to withdraw his or her complaint against the adulterous spouse only, and continued to pursue the criminal punishment of the third party. Not surprisingly, this provision produced a disparate impact on the extramarital female partner of the adulterous spouse. Statistics showed that, during the past several decades, more women than men were convicted of adultery (up to about a 20% gap).

A total of 22 petitions were consolidated in Interpretation No. 791. A district court judge filed the first petition in July 2015, urging the TCC to overturn its Interpretation No. 554 and declare unconstitutional the criminalization of adultery. In May 2017, a three-judge panel from another district court filed a similar petition on the same issue. In October 2018, a convicted male adulterer also challenged Section 239 of the Criminal Code and questioned the wisdom of Interpretation No. 554. After the dust stirred up by Interpretation No. 748 (2017) on same-sex marriage settled, the TCC finally granted review of these three petitions in January 2020 and decided to hold oral arguments on February 21. After announcing the date of the oral arguments, the TCC received 19 more petitions, 14 filed by judges and 5 by individuals. On May 29, 2020, the TCC rendered Interpretation No. 791, which overturned the precedential Interpretation No. 554 and declared unconstitutional Section 239 of the Criminal Code and Section 239 of the Criminal Procedural Act.

Interpretation No. 791 resorted to the right of sexual autonomy as the major constitutional basis to strike down Section 239 of the Criminal Code. Although this was not a right expressly recognized by the Constitution of Taiwan, the TCC relied upon Article 22 of the Constitution, which has been employed by the TCC since the mid-1980s as the constitutional basis for recognition of unwritten constitutional rights.[6] In fact, Interpretation No. 554 already referred to the "freedom of sexual behavior" as a constitutional right that protected individuals against the criminal punishment of adultery, even though the TCC eventually declared adultery constitutional in this decision. Along this line, Interpretation No. 791 merely recasts "freedom of sexual behavior" as the "right to sexual autonomy" in order to emphasize the core interests of decision-making capacity vis-à-vis physical behaviors.

In reviewing whether the provision on adultery amounted to an excessive restriction to the rights of the defendants involved in the case, the TCC did also mention that the right to spatial and informational privacy was also infringed as an inevitable consequence of the investigation, prosecution, and trial processes. However, the TCC seemed to bring into

[3] In 2019, the TCC also held three oral arguments on three cases (Interpretation Nos. 781, 782, and 783). However, these three cases all involved the similar issues regarding pension reforms. The three oral arguments in 2020 concerned three different constitutional issues.

[4] Section 239 of Taiwan's Criminal Code was originally enacted in 1935 in China. After taking control of Taiwan from the defeated Japan in 1945, the then Republic of China government extended its application to Taiwan. However, from 1683 to 1895 when the Qing Dynasty ruled Taiwan and from 1895 to 1945 when Taiwan was a colony of Japan, adultery had been a crime in Taiwan for more than two centuries, though only married women were legally punishable until 1945.

[5] During the oral argument of Interpretation No. 791, the representatives from the Ministry of Justice strongly suggested that many opinion polls conducted in the first two decades of the 21st century consistently showed over 70% of the Taiwanese people polled were against the decriminalization of adultery.

[6] Interpretation No. 204 (1986) was the first TCC interpretation that referred to Article 22 of the Constitution as the constitutional basis for recognition of unwritten rights.

play the right to privacy only as a supplementary justification to invalidate the provision on adultery.

In its decision on the constitutionality of Section 239 of Criminal Procedure Code, the TCC resorted to the right to equality under Article 7 of Taiwan's Constitution to strike down this unique provision. Since it takes two to commit adultery, both parties to the adultery shall receive the same punishment. Under Section 239 of the Criminal Procedure Code, the innocent spouse may choose to continue his or her complaint against the non-spouse third party only, without implicating his or her adulterous spouse. Standing alone before trial, the non-spouse third party apparently suffered an inferior differential treatment than that given to the adulterous spouse. Based upon this analysis, the TCC found Section 239 of the Criminal Procedure Code unconstitutional because it violated the right to equality.

The application of Section 239 of the Criminal Code in practice has created a significant disparity between the number of male and female defendants prosecuted for and convicted of adultery. Statistics showed that female defendants, either as the adulterous spouse or the third party, had consistently outnumbered the male by a gap up to 20% during the past twenty years. Thus, the TCC further raised a concern about the apparent gender inequality in practice, resulting from the application of Section 239 of the Criminal Code together with the Criminal Procedure Code. However, the TCC stopped short of declaring the two challenged provisions unconstitutional on the grounds of gender inequality.

2. Interpretation No. 793: Transitional Justice

This Interpretation involved a highly political issue arising from Taiwan's authoritarian past. Since October 1945, the Nationalist Party (also known as Kuomintang, KMT) governed Taiwan for 55 years before the first transition of power to the DPP in May 2000. However, the KMT had continued to control the Legislative Yuan until January 2016. Under the color of law, the KMT acquired and accumulated an abundance of party-owned assets, including real estates and profit-making companies that maintained monopoly, oligopoly, or privileged status in a variety of the major sectors of the economy, among others.[7] It was reported that the value of the declared assets of the KMT in 2015 was around US$760 million, more than that of all other parties in Taiwan combined.[8]

During Mr. Chen Shui-bian's presidency from 2000 to 2008, the DPP government tried to enact special legislation that addressed the KMT's party assets and other transitional justice issues. All failed due to the objection by the then KMT-dominated Legislative Yuan. From 2008 to 2016, under the government of President Ma Ying-jeou, the KMT managed to sell or transfer much of its party-owned assets to several existing or newly-founded entities while alleging its intention to return its assets to the State. Only after the DPP won both the presidential and the Legislative Yuan elections in January 2016, the second DPP government under President Tsai Ing-wen could carry out another campaign seeking to resolve the issues of "authoritarian legacies."

With the ruling party's dominant majority in the Legislative Yuan, the DPP government finally passed the Act Governing the Settlement of Ill-Gotten Properties by Political Parties and Their Affiliated Organizations, which took effect in August 2016. A new independent agency, the Ill-Gotten Party Assets Settlement Committee (hereinafter "the Committee"), was established at the end of August and began to take legal actions, including investigation, determination of the party-affiliated organizations, requesting the return of properties to the State, and freezing or seizing the properties, among others. Not surprisingly, the KMT and its affiliated organizations brought lawsuits against nearly all of such actions taken by the Committee against them. During the trial process, two panels of the Taipei High Administrative Court (THAC) filed three petitions with the TCC, in 2018 and 2019, to challenge validity of the Act and suspended a total of three cases pending before them after issuing several injunctions against the Committee. Other panels of the THAC also suspended all of the remaining similar cases, waiting on the decision of the TCC. In early 2020, the TCC granted the said three petitions for constitutional interpretation and held oral arguments on June 30, 2020, on these three consolidated cases.

Interpretation No. 793 touched upon several important issues. First, petitioners argued that the duty of a political party to return its assets to the State shall only be provided for by a constitutional amendment, and not by legislation. The TCC rejected this argument and ruled that the Legislative Yuan had the power to pass such legislation without resorting to the constitutional amendment procedure. The TCC held that the purpose of this legislation did not aim at dissolving political parties, a procedure that would have to be otherwise regulated by a constitutional amendment. Nor did this legislation intend to deprive a political party of all current assets.

As for the second issue involving the organization of the Committee and the procedures regarding its exercise of power under this legislation, the TCC ruled that the organization of the Committee as an independent agency under the Executive Yuan was within the legislative and executive powers granted by the constitutional amendment. The TCC also found that this legislation did provide for mandatory formal hearings and judicial remedies for the actions taken against a political party. Therefore, it did not violate the due process of law.

Petitioners further argued that this legislation constituted impermissible discrimination against the KMT because it singled out the KMT for adverse differential treatment. The TCC agreed that, in reality, only the KMT's assets were subject to the enforcement mea-

[7] See Julian Baum, 'KMT Inc.' (August 11, 1994) *Far Eastern Economic Review* 62; Mitsutovo Matsumoto, 'Political democratization and KMT Party-owned Enterprises in Taiwan' (2002) 40 *The Developing Economies* 359.

[8] See Jeremy Page and Jenny W. Hsu, 'After Political Loss, Taiwan's Rich Rulers Now Face Financial One', *Wall Street Journal* (January 18, 2016) <https://www.wsj.com/articles/after-political-loss-taiwans-rich-rulers-now-face-financial-one-1453168130> accessed 12 March 2021.

sures set forth in this legislation, including the orders to transfer assets or make repayments to the State, and orders barring it from disposing of its assets without the approval of the Committee. The TCC therefore found that this legislation, as applied to the KMT, was indeed a law that targeted only one party and indeed raised an issue of equality. Nevertheless, the TCC determined that only assets obtained gratuitously or for an apparent unfair price after August 15, 1945, were subject to this legislation, leaving legitimate assets intact. In order to strengthen the rule of law in a liberal democracy and level the playing ground among all political parties in Taiwan, the TCC held that the government is allowed and mandated to pursue the objectives of transitional justice. Such compelling interests eventually outweighed the adverse impact on the KMT, without violating the right to equality.

Finally, the TCC also rejected the claim that this legislation was an unconstitutional ex post facto law. The TCC reasoned that it was a retroactive legislation against the KMT. However, it further found that the KMT could not claim any legitimate expectation for protection of its assets obtained in an authoritarian regime created and maintained by itself, not to mention that the KMT may have knowledge of the unlawfulness of its assets.

Despite that Interpretation No. 793 affirmed the prima facie constitutionality of the said legislation on political party assets, it did not solve all the constitutional conflicts at stake. As mentioned above, nearly all orders issued by the Committee were paralyzed by the petitioning court panels. Thus, all assets of the KMT were still intact without having been transferred to the State. After the issuance of Interpretation No. 793, the petitioning court panels resumed the judicial process of those litigated cases. There remain questions regarding the constitutionality of the enforcement measures of this legislation and their application to a specific case. The odds are high that the KMT and its affiliated organizations will bring about more lawsuits to the THAC and then to the TCC in the future.

3. Interpretation No. 794: Tobacco Sponsorship and Commercial Speech

This is the first TCC decision on tobacco sponsorship. A tobacco company used the English abbreviation of its company name in part of the flyers and posters, in Chinese, for a social welfare event related to the elderly of which it was a cosponsor. This company was fined by the Ministry of Health and Welfare pursuant to the Tobacco Hazards Prevention Act, which prohibited any tobacco advertising, promotion, and sponsorship under any circumstances or conditions by any company. The petitioner challenged the constitutionality of those restrictions on tobacco sponsorship only but did not question the provision regarding tobacco advertising and promotion.

In Interpretation No. 794, the TCC upheld all the provisions of the challenged tobacco regulation. The TCC considered tobacco sponsorship as a form of commercial speech and applied the intermediate scrutiny test to the question of constitutionality. The first criterion is concerned with the purpose of the regulation. In this sense, the TCC found that the purposes of reducing tobacco consumption and protecting national health certainly involved important interests and thus passed the purpose prong of the test. On the other hand, the second criterion requires an analysis of the means of the regulation. When it analyzed the means, the TCC held that the impugned regulation was not a total ban and still allowed the government to make a determination on a case-by-case basis. It further reasoned that the means of the regulation were substantially related to the achievement of its purpose and that, therefore, it survived the scrutiny under the means prong of the test.

In many aspects, Interpretation No. 794 appeared to be a conservative decision. It did not explore whether tobacco sponsorship could be considered a mixed form of high-value speech related to public interests and lower-value commercial speech in respect of which its restriction should be subject to a more rigorous test. On the scrutiny of the means, its rejection of the total ban argument seemed odd in that there has not been a single case of tobacco sponsorship by any private-owned tobacco company that had ever been approved by the government. The sponsorship by a state-owned tobacco and liquor company remains the only exception. As compared to Interpretation No. 744, whereby the prior censorship of cosmetics advertising was struck down, Interpretation No. 794 appeared to be a departure of the TCC's freedom of speech case law thus far.

4. Interpretation No. 799: Compulsory Medical Treatment of Sex Offenders

Interpretation No. 799 involved important issues concerning the compulsory institutionalization of sex offenders after serving their sentences for an indefinite period until the danger of recidivism had been remarkably reduced. There were two major issues on the constitutionality of "indefinite" institutionalization and the location and facilities of such medical institutions. On the first issue, the TCC decided that indefinite institutionalization was for the purpose of medical treatment and not for continuing imprisonment and, thus, did not constitute a double jeopardy nor did it violate the principle of non bis in idem. On the second issue concerning the attachment of medical institutions to prisons, the TCC only issued a warning requesting the government to produce and maintain a medical institution that was different from prisons, but fell short of declaring the impugned regulation unconstitutional.

Interpretation No. 799 was indeed a conservative decision. The TCC appeared too tolerant of the severity of the indefinite exclusion from society of sex offenders confined to a so-called hospital located on a different floor of the same prison building within a high-walled prison. The TCC's deference to the government regarding concerns about public safety and social order is understandable. However, whether it could survive a constitutional scrutiny and pass medical analyses definitely remains a big question.

IV. LOOKING AHEAD

What marked 2020 was the revived attempt to amend the Capital-C Constitution. The fate of the unfolding constitutional reform will bear on Taiwan's constitutional devel-

opment in the future. However, the wild card in the year to come is the several citizen-initiated proposals for referenda under the 2019 Referendum (Amendment) Act. Considering their wide implications to international trade and domestic politics, 2021 is expected to be another year full of politics involving citizen mobilization with issues such as energy policy and pork import put on the ballot.

V. FURTHER READING

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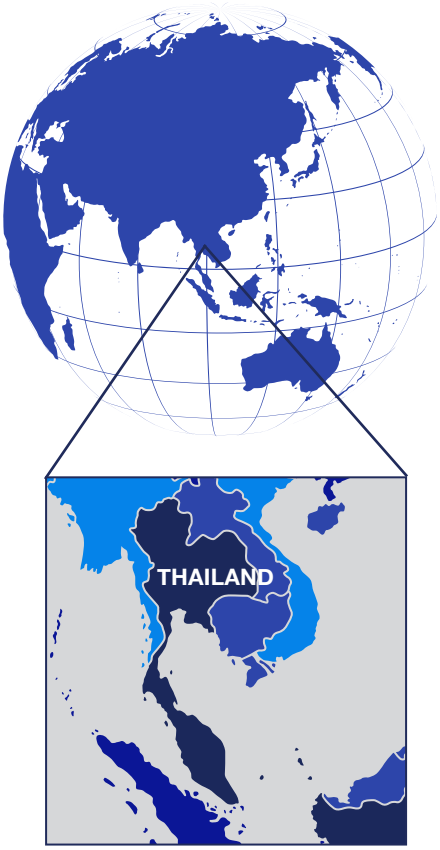

Thailand

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I. INTRODUCTION

The year 2020 is the year of continuous decline and resistance.

The government of Prayuth Chan-ocha, the former junta, continued to consolidate its power by dissolving major opposition. The Constitutional Court, though with a new panel appointed, remained its key ally.

COVID-19 hit Thailand at a particularly bad time. The country was highly polarized. The government suffered a legitimacy crisis and appeared incompetent. As well-connected businessmen monopolized the Thai economy, economic disparity was high. Thus, the government made several policy mistakes that inflamed the economic problem. However, given the current situation, COVID had little impact on rights and liberties which were already suppressed. Still, the government invoked the pandemic as the reason to further silence dissenting voices.

A combination of policy mistakes and injustice eventually triggered one of Thailand's largest demonstrations. Probably inspired by Hong Kong's Umbrella Movement, Thai youths led the country-wide movement which demanded, among others, a constitutional amendment. The 2017 Constitution was targeted because it facilitated Prayuth's transition from a military dictator to legally elected prime minister.

However, the youth movement posed an even more daring question; what should the role of the constitutional monarchy be? Protesters were driven by King Vajiralongkorn's series of scandals which clearly violated democratic norms, so they suggested a reform.

On one hand, Prayuth agreed to amend the constitution, but only under his conditions. On the other hand, such an existential threat to the regime faced violent responses from the government who deployed all tactics to suppress or intimidate the movement, most of them obviously violating civil and human rights.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A combination of (1) the opposition party's dissolution, (2) the government's mismanagement of COVID-19, and (3) the king's alleged involvement in politics, triggered one of Thailand's largest political protests.

First, the government continued to consolidate its power by banning the main opponent, the Future Forward Party (FFP) which positioned itself as an antagonist to a coup d'etat and conservatism in general.[1] The party was constantly hounded by right-winged radicals who were convinced that FFP was anti-monarchist. In 2019, the Constitutional Court dismissed Thanathorn Jungrungraungkit, the leader of FFP, from his MP status.[2] In February 2020, the Constitutional Court dissolved the party under the pretext of violation of campaign finance regulation.[3]

FFP's dissolution exposed flaws in the 2017 Constitution. The charter demanded the total eradication of corruption. This obsession with

[1] See Duncan McCargo & Anyarat Chattharakul, "Future Forward: The Rise and Fall of a Thai Political Party", Nordic Institute of Asian Studies Press, (2020).
[2] The I.CONnect-Clough Center 2019 Global Review of Constitutional Law, (November 26, 2020), 348.
[3] Khemthong Tonsakulrungruang,"Anakot Mai: 'lawfare' and Future Forward Party's Legacy", New Mandala (28 February 2020) at <https://www.newmandala.org/anakot-mai-lawfare-and-future-forward-partys-legacy/> accessed 11 February 2021.

clean politics provided convenient pretext for the government to crack down on opposition.[4] The 2017 Constitution was drafted under supervision of the junta. The majority of Constitutional Court judges and watchdog agencies were appointed by the junta-appointed senate. The court always showed inherent bias against the progressive camp.[5] It ruled categorically in favour of the government. The dissolution also seemed to be carefully timed to be a day before the first censure debate of Prayuth cabinet. Thus, FFP executives, who were also key figures, were not allowed to contribute.

The dissolution woke people to the fact that the government was currently above any scrutiny. Prayuth's regime continuously showed rogue behavior. The government ignored constitutional mandates. Human rights were being suppressed. There was no effective way to channel the people's grievance. FFP's ban triggered demonstrations country-wide, most of them in university campuses. Protests were gaining momentum when COVID-19 struck.

COVID-19 was the second catalyst. The pandemic hit Thailand at particularly bad time. The economy was fragile. Years of military dictatorship and instability scared foreign investments, putting more people in vulnerable positions. Prayuth enjoyed support from right-winged radicals who were willing to endorse the general regardless of his failings. Despotism and corruption prevented effective decision-making. As a result, Thailand adopted unnecessarily harsh lockdown measures that impacted millions of Thais but offered scant relief package.[6] Worse, the government further abused emergency power to quell dissents. In June, it became obvious that the first wave of the pandemic had ended but the government still maintained emergency powers.

On June 4th, one political activist in exile was abducted and possibly murdered in Cambodia. He was on the phone so his final struggle was recorded and widely shared. Wanchalerm Satsaksit was the ninth victim of such clandestine operation.[7] People are convinced that, since all activists were anti-royalist, the operation could be linked to King Vajiralongkorn. Wanchalerm's fate reminds the Thai people of other activists, including Muslim Malays, environmental NGOs, local activists and numerous others who were murdered by the Thai state with impunity. On July 8th the first protest took off and hundreds more followed. Led by mostly university students, the movement drew support from many other groups.

Initially, protesters focused on constitutional changes, from fairer electoral rules to an overhaul of the judiciary and watchdog agencies. Ultimately, they demanded a more inclusive charter drafting assembly for the next constitution.[8] Disappointingly, even when over 100,000 voters signed a petition for a new draft, the government remained callous.[9] It refused to consider the people's draft.

But in August, a radical agenda was proposed; that Thailand needed a monarchical reform. The role of the monarchy in politics had long been an elephant in the room.[10] Although constitutionally the monarch is above politics, King Bhumibol always acted as deus ex machina, intervening in major political crises.[11] He was described as successfully forging a network of royalists in powerful positions which, in his later years, was linked to anti-democratic fascist mobs and coups d'etat of 2006 and 2014.[12] But King Bhumibol's revered status made any public discussion on this topic unthinkable. This uneasy relationship between the monarchy and democracy was partly maintained by the draconian lese majeste law.[13]

Unlike his father, King Vajiralongkorn caused seriously greater tension between democracy and monarchy. He requested amendments into the 2017 constitution draft after the national referendum.[14] Then, he issued advice concerning whom to vote in the 2019 elec-

[4] Khemthong Tonsakulrungruang, "Thailand's Obsession with Clean Politics Dismantles its Democracy" VerfBlog (3 March 2020) at <https://verfassungsblog.de/thailands-obsession-with-clean-politics-dismantles-its-democracy/> accessed 11 February 2021.

[5] Bjoern Dressel and Khemthong Tonsakulrungruang, "Coloured Judgements? The Work of the Thai Constitutional Court, 1998–2016", (2019) 49 Journal of Contemporary Asia 1; New Mandala & Prachatai "Looking Back at Thailand's Constitutional Court: Somchai Preechasinlapakun", New Mandala (13 February 2020) at <https://www.newmandala.org/looking-back-at-thailands-constitutional-court-somchai-preechasinlapakun/> accessed 11 February 2021.

[6] Khemthong Tonsakulrungruang & Rawin Leelapatana, "Health before Rights and Liberties: Thailand's Response to COVID-19", VerfBlog, (8 May 2020) at <https://verfassungsblog.de/health-before-rights-and-liberties-thailands-response-to-covid-19/> accessed 11 February 2021.

[7] George Wright & Issariya Praithongyaem, "Wanchalerm Satsaksit: The Thai satirist abducted in broad daylight" BBC News, (2 July 2020) at <https://www.bbc.com/news/world-asia-53212932> accessed 11 February 2021.

[8] คณะประชาชนปลดแอก – Free People, "Announcement of Free People", Facebook Official Page, (12 August 2020) at <https://www.facebook.com/FREEPEOPLEth/posts/116256496854008> accessed 11 February 2021.

[9] "iLaw Charter Draft Favoured by Protesters Rejected", Bangkok Post, (18 November 2020) at <https://www.bangkokpost.com/thailand/politics/2021823/ilaw-charter-draft-favoured-by-protesters-rejected> accessed 11 February 2021.

[10] Thongchai Winichakul, "The Monarchy and Anti-Monarchy: Two Elephants in the Room of Thai Politics and the State of Denial" in Pavin Chachavalpongpun (ed.), Good Coup Gone Bad (ISEAS 2014).

[11] Id. 84-85.

[12] Duncan McCargo, "Network Monarchy and Legitimacy Crises in Thailand", (2005) 18 The Pacific Review 499; Ukrist PAthmanand "A Different Coup d'Etat?" (2008) 38 Journal of Contemporary Asia 124; Paul Chambers & Napisa Waitoonkiat, "The Resilience of Monarchised Military in Thailand" (2016) 46 Journal of Contemporary Asia 425.

[13] See David Streckfuss, "Freedom and Silencing under the Neo-Absolutist Monarchy Regime in Thailand, 2006-2011" in Pavin, Good Coup Gone Bad.

[14] Eugenie Merieau, "Thailand's New King is Making a Power Grab", The Diplomat, (4 February 2017) at <https://thediplomat.com/2017/02/thailands-new-king-is-making-a-power-grab/> accessed 11 February 2021.

[15] "Support Good People to Rule this Country, Says King of Thailand on eve of Election", Prachatai English, (24 March 2019) at <https://prachatai.com/english/node/7990> accessed 11 February 2021.

tion.[15] Later, he allowed Prayuth to omit an oath of allegiance to the constitution.[16] He also demanded that the parliament passed several acts that transferred army units into his personal command and the crown property bureau into his personal coffer.[17] These reckless behaviors and many more showed his ignorance, even dislike, of long-standing democratic conventions. They also confirmed his cosy relationship with the military junta. The upset crowd made a 10-point demand that the monarchy must subject itself to the constitution, not the other way around.[18] King Vajiralongkorn must stop amassing his personal wealth, act only upon recommendation of politicians, refrain from endorsing a coup and keep his neutrality.

A monarchical reform would disrupt the current constitutional arrangement. It would confirm that, contrary to the royalist narrative since early 1950s that the monarch generously granted the people democracy,[19] it is democracy that allow the monarchy to survive into modern day. This disruption might be the answer to Thailand's chronic problem of a coup-election cycle. Once the king could no longer signal or endorse a coup, the army would not dare stage one. So far, King Vajiralongkorn responded by hinting at a few prominent right-winged leaders to mobilize their men to counter the movement.[20]

The 2020 protests test the limit of freedom of expression. Despite his promise of democracy, Prayuth shows no tolerance of dissenting opinions. The government employed a tactic of 'lawfare' launching a barrage of legal actions, most of which were baseless, to harass and disrupt protesters. Police intimidation is common. On a few occasions without provocation police used brute force including water cannon, tear gas and rubber bullets towards unarmed protesters.[21] Often, the police brazenly told protesters that they would make an arrest first and later charge them. The police conveniently claimed that they were compelled to act in such manner because their superiors ordered them to. Such excuses raised one fundamental question regarding the rule of law, whether acting under the superior's command was an adequate excuse to ignore constitutional values such as human rights.

III. CONSTITUTIONAL CASES

One major change in 2020 was the five new judges to replace those who retired. Some of the retired judges had been on the bench since 2008, appointed by the 2006 junta-appointed Legislative Assembly.[22] They were known for hyper-conservative attitude and negative opinion toward Thaksin Shinawatra. They had played a crucial role in dismantling Thaksin's legacy through party dissolution and other decisions.[23] However, instead of being a breeze of fresh air, the incoming five were appointed by the 2014 junta-appointed Legislative Assembly. Arguably, the Constitutional Court's ideology remained unchanged.

1. Constitutional Court Decision 5/2563 (2020): Political Party Dissolution

Thailand's political party law imposed very stringent restrictions on campaign finances. A political party cannot accept donations exceeding 10 million bahts (300,000 USD) and a donation from an illegal source could lead to a party dissolution and revocation of political rights for party executives. The amount allowed was much lower than the actual campaigning. Plus, the National Council of Peace and Order (NCPO) Order forbade any political activities, including fund raising, until shortly before the 2019 election. The Future Forward Party borrowed 110 million bahts (30 million USD) from Thanathorn Jungrungraungkit, its party leader. The Election Commission filed an application to dissolve the party to the Constitutional Court.

The main issue was whether a political party may borrow. There was no law on a party borrowing money. While FFP opined that, as any other individual, it had liberty to do whatever that was not explicitly forbade, the EC regarded a political party closer to a state agency, which would not be allowed to act unless the law authorized so.

The court acknowledged the importance of a free, transparent and professional political party in democracy. It admitted that the law on borrowing was absent. But although it considered a loan not an income, it vaguely described the sum as political revenue which needed to be in accordance with the constitution. The term, political revenue, was newly invented and its legal status was unclear.

Then, the Constitutional Court ruled that the transaction was not in accordance with honest business practice. Here, the Constitutional Court asserted its personal opinion on the liberty of contract. The interest rates of 7.5 and 2 percent per annum were too low for business purposes, normal business interest rate in Thailand was 2-5 percent per annum. Thus, the Constitutional Court concluded that this transaction was not a genuine loan but unlawful donation. Thanathorn was trying to illegally control FFP, of which he himself founded and led.

The Constitutional Court continued, that an unlawful donation constituted a donation

[16] The 2019 Global Review of Constitutional Law 347.

[17] "Why are Thai students protesting against King Vajiralongkorn?", Al Jazeera (26 August 2020) at <https://www.aljazeera.com/news/2020/8/26/why-are-thai-students-protesting-against-king-vajiralongkorn> accessed 11 February 2021.

[18] "[Full statement] The demonstration at Thammasat proposes monarchy reform", Prachatai English (11 August 2020) at <https://prachatai.com/english/node/8709> accessed 11 February 2021.

[19] Thongchai Winichakul, "Toppling Democracy", (2008) 38 Journal of Contemporary Asia 11, 22-23.

[20] "Thai King in rare praise for pro-monarchists", BBC News, (24 October 2020) at <https://www.bbc.com/news/world-asia-54675173> accessed 11 February 2021.

[21] "Thailand: Police Violence Against Democracy Demonstrators", Human Rights Watch, (19 November 2020) at <https://www.hrw.org/news/2020/11/19/thailand-police-violence-against-democracy-demonstrators> accessed 11 February 2021.

[22] Dressel & Khemthong, Coloured Judgements?, 5.

[23] *Id.* 5-6.

from an illegal source. Principally, an illegal source should refer to a source linked to criminal activities such as a gambling den or drug trafficking ring. But the court was convinced that it also covered a source that was not complying with book-keeping rules. It therefore dissolved FFP and revoked the political rights of FFP executives for 10 years.

A length of political rights revocation was problematic too. In the 2007 Constitution, an executive shall be banned for 5 years but the clause was absent from the 2017 Constitution.[24] The court relied on another offence which imposed a 10-year ban. Such analogous technique should not be used as the measure had an adverse effect on one's basic rights. But judges suggested that this two-fold increase was already a sign of leniency. Some judges recommended a lifetime ban.

The FFP's demise was basically due to its transparency, that it secured a lawful source of funding and acknowledged it in a balance sheet. Meanwhile, other political parties avoided campaign finance regulation entirely, getting untold amount of money from undisclosed sources, the usual practice. The EC had never been after them.[25] The case's questionable reasoning was explained as the result of a political nature of this case. Rumours had it that the Constitutional Court took direct order from the power that be to axe FFP just a few minutes before deliberation. This would be the last case of the old bench so the departing judges unleashed their dislike of FFP in this 'midnight case'. As a consequence, FFP key members could not attend a censure debate a few days later, saving Prayuth's skin.

2. Constitutional Court Decision 17/2563 (2020): Judicial Review

This case is a repercussion from the 2019 controversy where Prayuth Chan-ocha omitted parts of an oath during the swear-in.[26] Although the Constitutional Court had cleared Prayuth from any wrongdoing, subjecting an oath to his majesty's personal preference, the opposition pursued the case further through the House Committee on Corruption which was presided by the opposition. The House Committee issued a summoning warrant for Prayuth to testify to which he refused.[27] Then the Ombudsman filed a complaint that the House Committee law on a summoning warrant was unconstitutional.

Prior to the 2011 law on House Committee meeting, the House Committee may summon a person and request document from civil servants but had no legal authority to sanction non-compliance. The 2011 law added more teeth. Failure to appear before the House Committee under the summoning warrant would result in no more than three months imprisonment or 5,000 bahts fine.

The Constitutional Court noted that the 2017 Constitution altered language on the House Committee's power. According to the new charter, the House Committee no longer had authority to issue a summoning warrant. Instead, it could simply summon a person. Furthermore, the House Committee's function was altered from investigation to fact-finding. The change was explained by the head of the drafting committee, Meechai Ruechupan, that while the House Committee may play important roles in checking upon politicians a criminal punishment for failing to follow the order was too much. It would violate checks-and-balances as it could force the executive to obey the order. There already were other measures to keep the executive in check, such as a censure debate. The Constitutional Court agreed.

The House Committee retained the power to summon a person and request document. But should a person disobey, no punishment would fell upon him or her. This rendered the Legislative's work on scrutinizing the Executive almost meaningless.

3. Constitutional Court Decision 29/2563 (2020): Conflict of Interest

The opposition coalition requested the Constitutional Court to review Prayuth's possible conflict of interest. When Prayuth staged a coup in 2014, he was then the Army Commander. Along with the title came benefits such as an accommodation. He retired a few months after but continued to live in the barracks. His dual role as the commander and the prime minister caused this complication once he became a democratically elected prime minister under the 2017 Constitution which forbade a politician to accept benefits from the administrative branch.[28] The restriction was to prevent a conflict of interest as a recipient might favour a particular agency. However, the rule had one exception; if that benefit was a normal course of business.

The 2005 Army Regulations allowed the Army Commander to live in the army housing. Once retired, a general generally had to evacuate but he might be exempted if the retiree continued to serve the nation. Although he owned a house, he always lived at the 11th Infantry Regiment for security reason. The Army paid his utility bills.

The case must be seen in a broader perspective. In February 2020, one NCO stormed the arsenal for automatic rifles, sped to a shopping mall, and shot dead scores of innocents before getting killed by the police several hours later. An investigation revealed that the mass shooter lost his money to a fraudulent housing scheme run by the Royal Thai Army. Unable to complain to his commander, who himself tricked the NCO and benefited from his loss, the NCO committed the tragic crime.[29] The tragedy spurred the Army Commander to promise reforms, which

[24] Constitution of Thailand, B.E. 2550 (2007), Sec 237.

[25] The 2019 Global Review of Constitutional Law, 345.

[26] *Id.* 347.

[27] "Panel Head Warns PM on Oath Issue", Bangkok Post, (27 October 2020) at <https://www.bangkokpost.com/thailand/politics/1780554/panel-head-warns-pm-on-oath-issue> accessed 11 February 2021.

[28] Constitution of Thailand, B.E. 2560 (2017), sec 184 & 186.

[29] "Army Whistleblower: Not enough done to prevent another Korat Shooting", Khaosod English, (1 February 2021) at <https://www.khaosodenglish.com/news/crimecourtscalamity/2021/02/01/army-whistleblower-not-enough-done-to-prevent-another-korat-massacre/> accessed 11 February 2021.

proved hollow. The public compared the case of Prayuth and that of the NCO and realized the exploitative nature of the Army. While a few generals were getting pampered, most of the low rank lived in poor condition.

The Constitutional Court cited the 2005 Army Regulation as the reason to acquit Prayuth. The regulation deferred to the army's decision which deemed Prayuth still serving the country. He had dual status, the court explained, so he was not living as a prime minister but a retired commander. The Constitutional Court accepted the prime minister's explanation that the housing provided for a prime minister was in a poor condition and needing repair so it was unsuitable for his living. Moreover, the Constitutional Court described a prime minister position as a very important job. The state had a duty to provide proper accommodation that would provide its resident honours, security, privacy and convenience so the prime minister could perform his duty.

4. Constitutional Court Decision 30/2563 (2020): Judicial Review

The decision must be considered a sister case to the above 29/2563 (2020). It was delivered on the same day. Perhaps it was an attempt to balance the image of the Constitutional Court.

Immediately after the coup, the NCPO issued an NCPO Order 29/2557 (2014) summoning a long list of people whom it regarded as possible dissenters to report themselves at the barracks. Most of them would undergo the program called attitude adjustment.[30] Basically, it was about brainwashing participants with nationalistic speeches and short videos. Some less unfortunate would face intimidation, even torture, before being forced to sign an agreement not to be politically active. An agreement was a condition to their release. Two weeks later, the NCPO issued another order 41/2557 (2014) that imposed two years imprisonment and a 40,000 bahts fine for those who fail to report themselves under the first NCPO order.

One of the victims was Worachet Pakeerat, a constitutional law professor at Thammasat University. Worachet was revered for his sharp legal opinion and criticism to the 2006 coup and lese majeste law. He had long been the target of assault by right-winged radicals. Worachet was traveling abroad so he made an appointment with the junta. However, upon his return, he was arrested and court-martialed.[31] During his trial, Worachet challenged the legality of the two NCPO orders. The court agreed to send them to the Constitutional Court.

The judiciary has long been known to be complacent to a coup maker. Once the junta succeeded, often as confirmed by the audience with the king, the judiciary accepted the junta as the sovereign.[32] Its order was law. Never has the judiciary struck down an order. In order to entrench the coup, the legality of such orders would be confirmed in the next constitution.[33]

But for this time, the Constitutional Court agreed with Worachet. First, it did not argue that the NCPO orders were not law. They were but, according to the Constitutional Court, they were promulgated because of particular necessity; that immediately after the coup, the junta had to maintain order and peace. With the promulgation of the 2017 Constitution, Thailand had transitioned into a normal democratic regime and that necessity was over. The NCPO orders must be subject to scrutiny. The 2017 Constitution demanded that criminal punishment had to be proportionate to the crime. The summoning order was, by nature, a pre-emptive measure. The NCPO had yet to prove that those appeared in the list had committed a crime. A punishment of up to two years imprisonment and 40,000 bahts fine violated the principle of proportionality. In the Criminal Code, a similar offence of failing to heed the officer's order faced with only 10-days imprisonment or 5,000 bahts fine.

Moreover, regarding the second order, the NCPO Order 41/2557 (2014), which was issued two weeks after the first order was made, was to apply criminal offence retrospectively. The Constitutional Court referred to the principle of nulla crimen, nulla poena, sine lege. Both NCPO Orders were unconstitutional.

The Constitutional Court's decision had far-reaching impact. Beyond Worachet, many people had fled the country in order to avoid being summoned. Now it is possible for them to return. However, it took Worachet six years to reach his victory. By then, the NCPO had completed its objective of cracking down on the pro-democratic movement; hundreds were arrested. Furthermore, it already won an election. Thus, the decision, bold and unprecedent as it may be, would not be detrimental to the government as it was hailed. It would probably not deter the next coup.

IV. LOOKING AHEAD

The coming 2021 is supposed to be a 'hot' year that continues with the same theme of decline and resistance. In response to the emerging protest, Prayuth and the palace network have mobilized ultra-conservative radicals.[34] They would flood political discussion with hateful comment and publicly demand for the use of violent force. Thus, they prevent the government from making any compromise with the protesters. Whereas protesters will press on their demands. None of their proposals are successful. The government reluctantly agreed to amend the 2017 Constitu-

[30] Amnesty International, "Thailand: Attitude Adjustment: 100 Days Under Martial Law", Amnesty International (2014).

[31] "Scholar Sees Chance to Sure NCPO", Bangkok Post, (4 December 2020) at <https://www.bangkokpost.com/thailand/special-reports/2029659/scholar-sees-chance-to-sue-ncpo> accessed 11 February 2021.

[32] See Piyabutr Saengkanokkul, ศาลรัฐประหาร ตุลาการ ระบอบเผด็จการ และนิติรัฐประหาร [Court and Coup: Judiciary, Dictator Regime, and Legal Coup] (Same Sky Books 2017) 154-186.

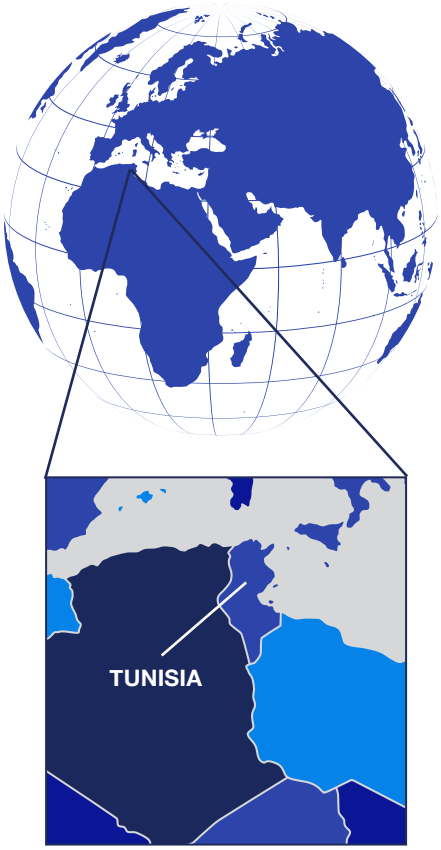
[33] 2017 Constitution, sec 279.

[34] See Janjira Sombatpoonsiri, 'Authoritarian Civil Society': How anti-democracy activism shapes Thailand's autocracy' (2021)16 Journal of Contemporary Asia 333.

tion but the government deliberately obstructs every single step of the process.[35] Also, King Vajiralongkorn shows no sign of compromise. Several mob leaders are charged with lese majeste, which must be approved by the palace, and the judiciary is under immense pressure to deny them bail, effectively incarcerating them in order to break the mob's fighting spirit.[36] The protests will continue to test the limit of freedom of expression and assembly and the judiciary's will to uphold them.

[35] 'Lawmakers vote for court review on charter change bill' *Bangkok Post* (9 February 2021) at <https://www.bangkokpost.com/thailand/politics/2065299/lawmakers-vote-for-court-review-on-charter-change-bill> accessed 11 February 2021.

[36] 'Protest at Pathumwan following activists' detention' Prachatai English (10 February 2021) at <https://prachatai.com/english/node/9062>; Chulcherm Yugala, คำถามถึงตุลาการ [Question to Judiciary] *Facebook Post* (7 February 2021) at <https://www.facebook.com/chulcherm.yugala/posts/10158482482343371> accessed 11 February 2021.



Tunisia

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I. INTRODUCTION

The design of the Tunisian constitution of 2014 shows that *the road to hell is paved with good intentions*. After the Tunisian Revolution, which kickstarted the Arab Spring and was the first in North Africa this century, ended around 60 years of autocratic rule in the country. The Tunisian constituency, experts, and international consultants tried their best to grant the country a perfect constitution. Still, noone can give the country perfect political actors.

Since the establishment of the modern Tunisian state, there has never been a democratic political life that involves multiple parties, power rotation, or authority sharing. Consequently, the different Tunisia parties don't have any respect for each other, shallow trust levels, and a total absence of a reference point for political interaction.

Therefore, if we are to label 2020 in Tunisia, it will be labeled the year of constitutional failures. In a troublesome year for the entire planet with the outbreak of a global pandemic, Tunisia started its year struggling to form a government to end it with a new government formation process.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Like any other country globally, 2020 in Tunisia was marked by the breakout of the global pandemic. Nevertheless, the first item in the country's constitutional agenda in January 2020 was to put an end to the endless consultations on government formation. In mid-November 2019, the president appointed Habib Al-Jamli, the El-Nahdha party candidate, as a designated-prime minister according to article 89 of the constitution by the 10th of January 2020, Mr. Al-jamli presented his government within the deadline of 60 days set by the same article. Al-jamli proposed the Al-Nahdha party-backed government as the biggest parliamentary bloc with 52 seats. According to article 89 of the constitution, *"the President of the Republic shall ask the candidate of the party or the electoral coalition which won the largest number of seats in the Assembly of the Representatives of the People to form a government…"*[1].

Days after the 2019 elections, the leaders of Al-Nahdha parties declared their willingness to form a governing coalition together with the "revolutionary parties" as a reaction to two anti-revolution parties associated with the old regime "Kalb Tounes," the second bloc of the parliament and the populist-nationalist right-wing party "free Destorian party." This decision leaves the party with limited negotiation options, namely with the Democratic Current, "Al Tayar," People's movement "Harakat Alshaab," and the Dignity coalition "Iatilaf Al-Karama." During the consultations, tensions were raised between Al-Nahdha Party and the democratic current, the people's movement. One of the primary reasons for this dispute was disagreement over who would be the Ministry of Interior and which party would nominate them. This led the consultations to a dead end. This unsuccessful round of talks pushed the designated PM to propose what he called a government

[1] Tunisian Constitution of 2014, Article 89, Paragraph 1

of technocrat lacking the needed parties' support[2]. On the 10th of January, the government was rejected by an absolute majority, following a humiliating 12 hours voting session to the designated PM and his proposed cabinet[3]. During the two-month consultations, the tension between the parties to propose this government geared the relations of the Tunisian constitutional authorities from consensus towards contentious conflict. Despite its ambitious financial plan and soci-economic initiatives, this government was born dead. This failure may be due to the strong association of Mr. Al-jamli with the Al-Nahdha party's head, also to his inability to strike a bargain with the so-called "revolutionary parties". Or maybe due to political regionalism, the country has what can be described as a de facto segregation system based on regional origins[4]. The man's unfavorable regional origins contributed to the strike down of his government.

In such Scenario, the article 89 paragraph 3 stipulate that: *"If the specified period elapses without the formation of the government, or if the confidence of the Assembly of the Representatives of the People is not obtained, the President of the Republic shall consult with political parties, coalitions, and parliamentary groups, with the objective of asking the person judged most capable to form a government within a period of no more than one month to do so."*[5]

Following the ten days consultations, the president asked Mr. Elyes Al-FakhFakh to form a government. Mr. Fakhfakh was supported by the Democratic Current, "Al Tayar," and People's movement "Harakat Alshaab" and Long live Tunisia party "Tahya Tounes." The designated PM presented the first formation of his government by the 15 of February. Although Al-Nahdha Party was represented in the government, one hour before the initial formation announcement, the party declared that they are not concerned by this government and will not vote for it in the parliament. The party explains this expected position by the need for a national unity government. They were referring to The PM position to exclude Tunisia's Heart party "Kalb Tounes" and the Dignity Coalition "Iatilaf Al-Karama.

The PM position is the initial position of Al-Nahdha following the elections. The largest party is associated with the old regime, and its head Mr. Nabil Karoui was arrested for money laundering charges during the elections and the second largest is a right-wing Islamist populism party[6]. Meanwhile, and in case the president dissolved the parliament and called the voters to a new election according to paragraph 4 of article 89, the Al-Nahdha bloc in the parliament presented a law proposal to amend the electoral law. This proposal introduced a threshold of 5% and suggests to not take into account white votes and votes collected by the electoral lists that didn't reach the threshold while calculating the electoral quotient in every electoral district[7]. This wasn't the only legal maneuver of the party as the head of the party illegally consulted the *Provisional Instance to Review the Constitutionality of Draft Legislation* on the possibility of using article 97 of the constitution as a last resort to avoid falling under the authority of the president. Article 97 of the constitution outlines the voting procedures of a motion of censure against the government. Al-Nahdha intended to vote a motion against the caretaker government, in a maneuver aiming to confiscate the government formation initiative even through such a forced interpretation of the constitution[8]. This can be understood as an unwillingness to find a consensus with the president and a lack of bone fide intent in interacting with him. The president translated it as such, and this was the starting point of the conflict between him and the chairman of the parliament, Mr. Rachid Al Ghanouchi, which will continue throughout the year. The president of the republic threatened the use of his powers stipulated in article 89, namely, to dissolve the parliament and call for a new election, in case the parliament refused to grant confidence to Mr. Al-Fakhfakh proposed government[9]. By the 19th of February 2020, the designated Prime minister proposed a second formation. Six ministers represented the Al-Nahdha party in the cabinet. On the 26th of the same month, the parliament approves the government following a long voting session of around 20 hours[10].

Four days following the approval of the government the country living under a perpetual state of emergency since 2015 confirmed its first COVID-19 case. This will put the new constitution, the constitutional authorities and newly established democratic system in test. The country flicked from consultations to lockdown and curfew. This brutal shift provoked enormous constitutional powers confusions in a nascent democracy, with a fragile institutional set and the inexistence of important constitutional institutions such as the constitutional court and the human rights commission. Despite the very low infection rate the President, the Prime Minister, and even the Supreme Judiciary Council started what seemed like a competition in exercising their constitutional powers.

[2] العربي، تميس الجملي بموافقهم يعزز حرص إسقاط الحكومة، الحكومة التونسية الجديدة أمام امتحان صعب نظرا لرفض كتل برلمانية التصويت لها في جلسة منح الثقة، الخميس 09 جانفي 2020. متاح على: https://bit.ly/3fD0sTn

[3] محمد عبد الكيم كرشيد، هل أسقط البرلمان التونسي حكومة النهضة أم مشروعها السياسي؟ الرأي اليوم، 13 جانفي 2020. متاح على: https://bit.ly/2PWZir7

[4] هيثم القاسمي، الاستعمارية الجديدة: الفتنة والجهوية والحرة، نواة، 10 ديسمبر 2016. متاح على: https://bit.ly/3ukHQLZ

[5] Tunisian Constitution of 2014, Article 89, Paragraph 1.

[6] فرانس 24، تونس: رئيس الوزراء المكلف إلياس الفخفاخ يقدم تشكيلة حكومته ويعلن مواصلة المشاورات، متاح على: https://bit.ly/39FgHLM

[7] الإذاعة الوطنية، حول تنقيح القانون الانتخابي.. مقترح النهضة يقصر على « العتبة » وأساتذة في القانون يدعون إلى مراجعة جوانب أخرى من القانون، 29 جانفي 2020، متاح على: https://bit.ly/39GTCbv

[8] الشارع المغاربي، مأزق تشكيل الحكومة: الغنوشي يستشير هيئة مراقبة دستورية القوانين، 18 ديسمبر 2020. متاح علىhttps://bit.ly/31N0iAM

[9] فرانس 24، الرئيس التونسي سيحل البرلمان وسيدعو للانتخابات مبكرة إن لم يمنح الثقة لحكومة الفخفاخ، 17 ديسمبر 2020، متاح على: https://bit.ly/3fGVHbp

[10] Ramy Allahoum, "Tunisia's Parliament approves gov't of PM-designate Fakhfakh", Aljazeerah, (2020) <https://www.aljazeera.com/news/2020/2/27/tunisias-parliament-approves-govt-of-pm-designate-fakhfakh>

On March 15, the Supreme Council of the Judiciary issued its notice N°166/2020, regarding prevention of the spread of COVID-19. The Notice instructed a strict application of the unconstitutional decree N°50/1978 regulating the state of emergency and a penalty of six months of prison based on article 312 of the penal code, to whoever breaks the control measures ordered in time of the epidemic[11]. Several notices issuing exceptional provisions were enacted by the SJC, which created a rivalry between this independent constitutional body and the ministry of justice. This rivalry gets accelerated by the governmental decree issued by the PM N°288/2020[12]. Within this decree, the Prime minister shifted the authority of administrating the judiciary system from the constitutionally competent body, the SJC, to the justice ministry[13]. The unjustified interference that recalls the recent history of authoritarianism, together with the legalism, made the regulation of the COVID-19 crisis chaos from a constitutional point of view. the number one victim of this chaos is the citizen's constitutional and fundamental rights. The Tunisian judiciary's resistance to adopting modern adjudication tools such as the principle of proportionality and their favoritism towards the inherited doctrine is manifested in the notice of the Supreme Council of Judiciary N°166/2020.

The President introduced a 12-hour curfew[14] by Decree N°24/2020[15] and total confinement by Decree N°28/2020[16] and ordered to deploy the army to urge people to respect the measures. Some measures can be proved disproportional, and manifestly unreasonable as there is no rational connection between deploying the military, arresting people, and imposing prison sentences and the prevention of a disease. Meanwhile, the President granted a presidential pardon to 1470 prisoners to prevent the virus from spreading in jails.

Reading the decrees and laws issued as a response to COVID-19, we can remark the poor drafting of the texts as most of them disregard the rules of legal certainty and thus fall short of rule of law standards. For example, the Law N°19/2020 dated April 12, 2020, regarding the delegation of powers to the PM[17], uses remarkably broad language; based on this law, the PM enacted Decree N°17/2020[18] which sets up a register with a unique identification number for every citizen. This is not only a violation of the law itself, as the delegation is limited to COVID-19 related issues, but it is also an infringement of individual rights, especially the right to the protection of personal data laid-down in article 24 of the constitution. It is also a grave violation of article 49 of the constitution which stipulates in its first paragraph that all right limitations or right-regarding actions shall be established by law, and law here refers to legislative acts as only the legislator is competent to issue right restrictions and regulations.

Following a couple of confusing months from a constitutional point of view, the presidency ordered the extension of the state of emergency for six months on May 29, 2020[19], and a week later, the end of the curfew by June 8.[20] This was just the opening of a new season of political clashes and government formation talks. As following some accusation of whitewashing corruption to the PM Mr. Elyes Al-Fakhfakh[21], the latest was forced to resign as the Al-Nahdha party leaders were keen to impeach him and his government on the ground of these accusations.[22]

After another round of consultation, according to the article 89 the president surprisingly nominated Mr. Hicham Al-Michichi by the 25th of July to formulate a government[23]. Mr. Al-Michichi announced a government of what he calls technocrats despite the contestation of Al-Nahdha party as the movement prefer a government that represents the political parties and the elections results[24]. The conflict between the president and the Al-Nahdha party continued as the party's leaders accused him of reshaping the Tunisian political and constitutional system towards a presidential

[11] مرسوم رئاسي عدد 24 لسنة 2020 مؤرخ في 18 مارس 2020 يتعلق بإحداث الديوان الوطني للأمراض المعدية والجائحة، متاح على: https://bit.ly/3sSzdYF

[12] أمر حكومي عدد 208 لسنة 2020 المؤرخ في 02 ماي 2020 المتعلق بضبط إجراءات الحجر الصحي الموجه، متاح على: https://bit.ly/3cMTIAk

[13] بسمة الدربالي الجديدي، جدلٌ بين القضاء والحكومة التونسية: خوف على استقلالية المؤسسات، 08 ماي 2020، متاح على: https://bit.ly/3cLfapr

[14] 'Tunisia Imposes 12-Hour Daily Curfew to Counter Coronavirus' (*Reuters*, 17 March 2020) <https://www.usnews.com/news/world/articles/2020-03-17/tunisia-imposes-12-hour-daily-curfew-to-counter-coronavirus>

[15] أمر رئاسي عدد 24 لسنة 2020 مؤرخ في 18 مارس 2020 يتعلق بمنع التجوال بكامل تراب الجمهورية، متاح على: https://bit.ly/3sSzdYF

[16] Décret présidentiel n° 2020-28 du 22 mars 2020, limitant la circulation des personnes et les rassemblements hors horaires du couvre-feu <https://legislation-securite.tn/sites/default/files/law/D%C3%A9cret%20pr%C3%A9sidentiel%20n%C2%B0%202020-28%20du%2022%20Mars%202020.pdf>

[17] Loi n° 2020-19 du 12 avril 2020, habilitant le Chef du Gouvernement à prendre des décrets-lois dans l'objectif de faire face aux répercussions de la propagation du Coronavirus (Covid-19). <https://legislation-securite.tn/sites/default/files/law/Loi%20n%C2%B0%202020-19%20du%2012%20avril%202020.pdf>

[18] Décret-loi du Chef du Gouvernement n° 2020-17 du 12 mai 2020, relatif à l'identifiant unique du citoyen. <https://legislation-securite.tn/sites/default/files/law/D%C3%A9cret-loi%20du%20Chef%20du%20Gouvernement%20n%C2%B0%202020-17%20du%2012%20mai%202020_0.pdf>

[19] Huaxia,"Tunisia extends state of emergency for 6 months", Xinhua, (2020) <http://www.xinhuanet.com/english/africa/2020-05/30/c_139099333.htm#:~:text=TUNIS%2C%20May%2029%20(Xinhua),November%202015%2C%20for%20six%20month>

[20] "Coronavirus: Tunisia lifts countrywide curfew", Alarabiya News, (2020) <https://english.alarabiya.net/coronavirus/2020/06/08/Coronavirus-Tunisia-lifts-country-wide-curfew>

[21] Al Mongi Al Saidani, "Tunisia: Fakhfakh's Government Accused of Whitewashing Corruption", Asarq Alawsat, (2020) <https://english.aawsat.com/home/article/2245036/tunisia-fakhfakh%E2%80%99s-government-accused-whitewashing-corruption>

[22] فارس 24، رئيس الحكومة التونسية إلياس الفخفاخ يقدم استقالته، 15 جويلية 2020. متاح على: https://bit.ly/3dCFyB2

[23] TRTعربي، من المشيشي الذي يراهن عليه سعيد في تشكيل الحكومة الجديدة؟، 26 جويلية 2020. متاح على: https://bit.ly/3sU9MWS

[24] فارس 24، رئيس الوزراء المكلف يعلن تشكيل حكومة تكنوقراط مستقلة عن الأحزاب، 25 أوت 2020. متاح على: https://bit.ly/3cOR3q1

system[25] by suggesting Mr. Al-Michichi. This conflict will soon affect the president-PM relations,[26] as the latest will step in the Al-Nahdha side shortly after his government's approval.[27] The struggle will swiftly shift towards a conflict within the executive between the president and the PM. According to the Tunisian constitutional arrangement, the PM minister is supposed to be the executive's, strong man. De facto, Mr. Al-Michichi is in the weakest position, being independent with no political support except the conditioned support of the Al-Nahdha party and its allies, the Heart of Tunis, the dignity coalition, especially that the stability of his government is in the hand of this troika.[28]

III. CONSTITUTIONAL CASES

1. Case N°7144774 Administrative court: rights Balancing.

On the 7th of March 2020, a Tunisian citizen traveled on a work trip towards the republic of Gabon. she got stuck in Gabon following the breakout of the pandemic; she caught the disease and passed away by the 24th of May. Her family asked for the repatriation of her corpse. The ministry of foreign affairs refused to issue the authorization. The justification was that Logistics's ministry issued an order on the 4th of April 2020 to all the airline companies to refuse any corpse repatriation. Exceptions can be made if they receive a medical certificate that approves that the reason for death is not related to a contagious disease and an authorization from the Tunisian embassy in that country to transport the corpse.

The judicial decision was issued on the 11th of July 2020 to refuse the corpse's repatriation for public health reasons related to the national efforts of combating the COVID-19 pandemic. Even though the judge qualified the right to Burial as a cultural right protected by the ICESCR ratified by Tunisia on the 18th of March 1969 and that the Tunisian authorities are not allowed to restrict these rights unless prescribed by the law, still he refused to authorize the repatriation. The decision acknowledged the function of the administrative judge in balancing rights. Still, the Tunisian judge steaked to the traditional balancing style of giving priority to the right over the other, especially collective rights over individual rights. Nonetheless, the judge mentioned article 49 of the Tunisian constitution without checking the decision's proportionality as stipulated by the article. According to the first paragraph of the judgment, the family presented certificates issued by the Gabonian authorities certifying that the corpse was placed in a sealed coffin. All the arrangements have been taken by the authorities in Gabon to minimize the risk of disease transmission. Therefore, the decision was disproportionate, and the authority encroachment on the right to Burial was evident, making the burden that the judge accepted to be placed on the rights unjustified. Tunisian judiciary resistance to adopting modern adjudication tools such as the principle of proportionality and their favouritism to the inherited doctrine is manifested in the way the judicial authorities administrated the COVID-19 crisis.

IV. LOOKING AHEAD

Due to the authoritarian history of the country, the Tunisian constitution that was built on the idea of excessive checks and balances to the extent that no single constitutional authority can get an action done without the approval of the other authorities. This led to a dead end instead of cooperation. The problem of the current constitution is that is realized on the notion of "consensus democracy". However, it looks like this notion can work efficiently in a consolidated democracy, but not in a country that still struggling to find its constitutional and legal identity.

The Tunisian democracy is still immature therefore, it needs maturity from its political actors after ten years of transition it is now time for the players to rethink their positions and outgrow the passive aggressive attitude they have been following and more forward to size political payoffs.

V. FURTHER READING

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Aymen Briki, 'Inherited Confusion COVID-19, Tunisian Democracy, and the Adoption of the French Doctrine' (*Verfassungsblog,* 18 June 2020) <https://verfassungsblog.de/inherited-confusion/>

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[26] صوات مغاربية، الصراع في تونس بين سعيّد والمشيشي سيتفاقم، 25 سبتمبر 2020. متاح على: https://bit.ly/3ukKKjR

[27] إياد الدهماني، وكالة الأناضول، البرلمان التونسي يمنح الثقة لحكومة المشيشي عقب جلسة مطوّلة، 09 سبتمبر 2020. متاح على: https://bit.ly/3fHaAuc

[28] نائحي البوغلي، بين إضطراب سعيد ومناورات الغنوشي: المشيشي أسير صراع قرطاج وباردو، 28 سبتمبر 2020. متاح على: https://bit.ly/39J5mKJ

Turkey

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I. INTRODUCTION

The year 2020 in Turkey, like most of the world, passed under the shadow of the COVID-19 pandemic. The rapid rise of the virus brought the country to a halt as early as March 2020. Since then, there have been increasing concerns regarding how the Turkish Government has responded to the pandemic. For Turkey, the significant risk of authoritarianism was already persistent before the pandemic. Since the 2016 attempted coup, especially with the establishment of the "Turkish style" presidential system in 2018, there have been credible signs of a drift toward full-fledged authoritarianism. Over the past year, the Turkish Government has further limited the political space for opposition voices, banned peaceful protests, targeted those who challenged the Government's official line on the pandemic and tightened its control. The pandemic has thus merely become another pretext for the Turkish Government to twist the authoritarian thumbscrew in the country further.

This report first zooms in on three major constitutional developments in Turkey during the last year – (1) Turkey's responses to the COVID-19 pandemic; (2) the Turkish Government's -continued-campaign to capture the Turkish Constitutional Court (TCC) and (3) the uneasy partnership between the TCC and the European Court of Human Rights (ECtHR). It then discusses a string of cases of the TCC over the past year. It finally looks ahead to several important issues that will arise next year (and beyond).

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Turkey's Responses to the COVID-19 Pandemic

As soon as the first COVID case was reported on 11th March 2020 the Turkish Government rapidly resorted to several extraordinary measures including limiting travels, closing schools and other public places, carrying out testing-tracing-sanitary controls and most notably declaring curfews. To accomplish them it relied on two existing pieces of legislation, namely the Law on Public Health No. 1593 (LPH) and the Law on Provincial Administration No. 5442 (LPA). While these two legislations confer wide-ranging powers on Turkish (local and central) authorities to maintain public safety in cases of contagious diseases, they are an old piece of legislation dating back to 1930 and most of the powers have little to do with the current COVID-19 crisis. Notably they do not provide explicit authorisation for several extraordinary measures resorted to the COVID-19 pandemic, *inter alia,* ordering curfews. The scope of the measures under these legislations is limited to only those "who are infected, suspected of being infected, or have been determined to be contagious", rather than measures affecting the population as a whole. As such, a fierce debate has raged regarding the legal basis of Turkey's pandemic measures. Yet, no significant changes to the relevant legal framework were needed, and the Turkish Government has not activated the emergency/derogation clauses.

What has been more concerning is that Turkey's pandemic response had not had any role for the legislature and the courts. President Erdoğan's Justice and Development Party (AKP), together with an allied far-right party, hold a parliamentary majority. And as we discussed in last year's report, already with the coming-into-force of Turkey's new presidential system in 2018, the Parliament's legislative and oversight functions have been severely curbed. To the best of the present authors' knowledge no standard mechanism, which might potentially provide effective oversight on the Government's response to the COVID-19 pandemic, has been employed by the Parliament. One notable exception to the Parliamentary inactivity was the adoption of early release legislation in April 2020 which released up to 90,000 prisoners, around one-third of Turkey's prison population.[1] The legislation drew sharp criticism as it deliberately excluded thousands of prisoners arbitrarily charged under terrorism offences.[2]

Similarly, Turkish courts have largely refrained from playing any role. The TCC found inadmissible an individual application challenging the legal basis of the pandemic-related curfews (imposed on citizens over 65), urging the applicant seek a remedy before the administrative courts as a curfew in its nature is an administrative measure.[3] Some individuals, however, have successfully challenged the fines imposed on them by the police for breaking pandemic rules. In one case, for instance, the Turkish Court of Appeals invalidated an administrative penalty imposed by police on an individual who refused to wear a mask on the ground that the police do not possess such authority under the LPH and the LPA. In sum, the Turkish Government has become 'unbound' during the COVID-19 crisis.

B. The Turkish Government's Campaign to Capture the TCC

Apart from the pandemic, the Turkish Government had continued its controversial steps to take control of the TCC. By making overtly political appointments, amending rules and constantly changing the court's structure the Turkish Government has already shaped the TCC into a loyal body. President Erdoğan's latest appointment, Mr. Irfan Fidan, the former Chief Prosecutor of Turkey, has been rightly dubbed as the final blow to the TCC.[4] Besides his close personal ties to Erdoğan Fidan was directly or indirectly involved in his former official capacity in many high-profile cases such as Gezi Park, Osman Kavala and Academics for Peace.

C. The TCC and the ECtHR: Uneasy Partners

It is well-known that the relationship between the ECtHR and the TCC has been under an almost permanent strain for the past half-decade, especially after the 2016 attempted coup. Last year, however, the tense relations had reached a new phase: for the first time the TCC has openly defied the ECtHR's authority in the *Yıldırım Turan* application in July 2020, which concerns a complaint lodged by a lower court judge to challenge his pre-trial detention since July 2016. Already in 2019, in the *Alparslan Altan* case, the ECtHR found that the detention of a former TCC judge was not lawful and lacked reasonable suspicion – thus invalidating a common Turkish post-coup emergency practice: a far-reaching interpretation of the discovery of *in flagrante delicto* in respect of Turkish judges based on suspicion of their links to the Gülen Movement in the complete absence of evidence.[5] The ECtHR reached an almost identical decision in the *Baş* case in March 2020. However, in July 2020, in its *Yıldırım Turan* decision[6], the TCC unanimously found: "The ECHR's final decisions/judgments are binding; however, it is for the Turkish authorities, holder of public power, and ultimately for the national courts to interpret the provisions of domestic law relating to the pre-trial detention of the members of the judiciary." In other words, the TCC held that its interpretation of the national law and the Turkish constitution could not be trumped by an alternative explanation of the European Convention by the Strasbourg Court. Turkey is by no means alone on this front – it seems that the TCC is also learning from its Russian counterpart, the Russian Constitutional Court, in expressing growing concern that its relationship with the ECtHR is one of 'subordination'.[7] Whether the Turkish Government will proceed with national legislation that may forbid compliance with an ECtHR judgment in case of a "discovered contradiction" similar to the Russian federal law from December 2015 remains to be seen.

III. CONSTITUTIONAL CASES

1 – Enis Berberoğlu Case: Political dissident, legal chaos

The most discussed decision of the TCC in 2020 has been delivered in the individual ap-

[1] Law No. 7242 on the Execution of Penalty and other Security measures amending certain legislations 14 April 2020 <https://www.resmigazete.gov.tr/eskiler/2020/04/20200415-16.htm> accessed 16 January 2021

[2] See also, Amnesty International, "Turkey: Prison release law leaves innocent and vulnerable prisoners at risk of COVID-19", (13 April 2020), <https://www.amnesty.org/en/latest/news/2020/04/prison-release-law-leaves-prisoners-at-risk-of-covid/ > accessed 19 January 2021

[3] *Senih Özay,* App. No. 2020/13969, Dec. 9 June 2020

[4] Ilker Gokhan Sen, "The Final Death Blow to the Turkish Constitutional Court – the Appointment of the Former Chief Prosecutor", Verfassunsgsblog (28 January 2021) <https://verfassungsblog.de/death-blow-tcc/> accessed 3 February 2021

[5] Emre Turkut, "The discovery in flagrante delicto, the Kafkaesque fate of a Supreme judge and the Turkish Constitutional Court: The Alparslan Altan case in Strasbourg", Strasbourg Observers, (6 May 2019) <https://strasbourgobservers.com/2019/05/06/the-discovery-in-flagrante-delicto-the-kafkaesque-fate-of-a-supreme-judge-and-the-turkish-constitutional-court-the-alparslan-altan-case-in-strasbourg/ > accessed 5 February 2021

[6] Yıldırım Turan, App. No. 2020/13969, Dec. 9 June 2020 – for press release, see: <https://www.anayasa.gov.tr/en/news/individual-application/press-release-concerning-the-decision-finding-inadmissible-the-alleged-violation-of-the-right-to-personal-liberty-and-security-due-to-the-applicant-s-detention-against-the-procedural-safeguards-afforded-to-members-of-the-judiciary/> accessed 5 February 2021

[7] Jeffrey Kahn, "The Relationship between the European Court of Human Rights and the Constitutional Court of the Russian Federation: Conflicting Conceptions of Sovereignty in Strasbourg and St Petersburg", (2019) 30.3 European Journal of International Law 933, 959.

plication of Enis Berberoğlu, a deputy of the main opposition party and former journalist. Since this case is quite symbolic in showing the rule of law's downfall, we decided to give it a more significant part in this chapter. Mr Berberoğlu was accused of disclosing confidential information about a freight belonging to the national intelligence service and going to the Syrian armed groups –allegedly– supported by the Turkish Government. He had been under investigation due to political and military espionage and aiding the Fethullahist Terrorist Organisation – an acronym used by the Turkish Government to describe the Gülen Movement for their alleged planning of the military coup in July 2016. With some other opposition MP's, his parliamentary immunity had been lifted through an unconstitutional constitutional amendment[8] in April 2016. The applicant had been sentenced to 25 years' imprisonment on 14th June 2017 by the 14th Chamber of the Istanbul Assize Court. The regional court of appeal quashed this decision and sentenced Mr Berberoğlu to five years and ten months' imprisonment. While the applicant was detained pending trial he was re-elected as an MP but albeit Article 83 § 4 granting immunity in case of re-election the Turkish Court of Cassation, where the appellate review of his case was still pending, rejected the request to be released and upheld the decision of the regional court of appeal. The applicant's status as an MP ended after his conviction decision was read out at the Parliament on 4th June 2020.

Mr. Berberoğlu, in his application to the TCC, argued that his right to be elected and to engage in political activities as well as his right to personal liberty and security had been violated. This would be because, although he was re-elected and regained his immunity, he was held in detention during the proceedings.

The TCC, in its decision delivered on 17th September 2020, found violations of the right to be elected and to engage in political activities as well as the right to personal liberty and security, as argued by the applicant, noting that the stripping of the applicant's parliamentary immunity runs contrary to the Turkish Constitution as well as the will of the constitution-maker.

The TCC eventually sent the decision to the Assize Court for execution of its decision. But the case had not been solved at that point. On the contrary, it became a major problem threatening the supremacy of the TCC in the Turkish legal system. The judge of the Assize Court, Akın Gürlek, who also prosecuted and found guilty some important dissident political figures like Can Dündar, a journalist living nowadays in exile in Germany; Selahattin Demirtaş, the former leader of the pro-Kurdish Peoples' Democratic Party, HDP, and Canan Kaftancıoğlu, the head of the Istanbul organisation of the main opposition party CHP, rejected to implement the Enis Berberoğlu decision, arguing that "the TCC overstepped its authority and that there is no ground for a retrial". In more collaquial terms, Mr Gürlek denied the supremacy of the TCC over his court (and over him).

Subsequently, Engin Yıldırım, the vice-president of the TCC, posted through his private Twitter account a picture of the TCC building in the nighttime lights on with the message "the lights are on". Immediately after that, the Ministry of Interior Affairs tweeted a picture of their building with the message "our lights are always on". Then the Government officials began making accusatory statements towards Judge Yıldırım as if he conspired to incite a military intervention implicitly, referring to the famous sentence in a documentary on the military coup in 1960 ('the lights are on'). After the Government's reaction, Judge Yıldırım deleted his tweet and apologised. The TCC published a statement stating that his tweet does not reflect the court's view. Accordingly the Government seemed to have sided not with the supremacy of the constitution and the TCC but with Mr Gürlek, who rejected implementing the TCC's decision.

Mr Berberoğlu, after an unsuccessful appeal, lodged another individual application arguing not only the previous violations but also the non-enforcement of the court's prior decision in his case. The TCC in this new application found the same violations again and, referring to the binding nature of its judgments, stated that "the failure to enforce the said judgments on any ground results in grave violations of the principle of the rule of law, as well as of the constitutional order based on this principle". That time, the TCC sent the decision not only to the Assize Court but also to the Parliament and the Council of Judges and Prosecutors. In the end, Mr Berberoğlu has finally been released from jail and continued his duties as an MP in February 2021.

2 – Yıldırım Turan Case: Non-compliance with the ECtHR's case

As already noted above in the major developments section, the TCC has openly defied the ECtHR's authority in the *Yıldırım Turan* application in July 2020. Again as noted above, in *Hakan Baş v. Turkey* case in March 2020, the ECtHR had decided that "the Turkish judicial bodies' assessment extending the scope of the concept of in flagrante delicto to the members of the judiciary detained in the aftermath of the attempted coup is ambiguous" and had condemned Turkey to pay compensation to the applicant. But in a similar case of Yıldırım Turan, the TCC did openly rejected this precedent and found the application inadmissible for being manifestly ill-founded. The TCC emphasised that, albeit taking into account the ECtHR's case-law in its assessments as to fundamental rights and freedoms, "[a] Although the ECHR is entitled to examine whether the Turkish courts' interpretation as to domestic law has been in breach of the rights and freedoms safeguarded by the Convention, it should not replace the domestic courts and interpret the national law at first hand. The Turkish courts are in a much better position than the ECHR to interpret the provisions of domestic law".

[8] Venice Commission, "Report on the Suspension of the Second Paragraph of Article 83 of the Constitution", § 80, <https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2016)027-e> accessed 17 February 2021

3 – Abdullah Yaşa Case: Binding effect of the ECtHR decisions

As a member of the Council of Europe, Turkey is bound to implement ECtHR decisions. Despite this, especially in some ethnic minority-related political cases, the Turkish first instance courts, affected by a nationalistic view, have trouble complying with the Strasbourg Court's decisions. Abdullah Yaşa was only 13 when he participated in a demonstration in Diyarbakır and got injured by a tear gas canister. The investigation into the incident was followed by a decision of non-prosecution and a criminal case against Mr Yaşa for having participated in an illegal demonstration. The ECtHR found a violation of the substantial aspect of the prohibition of ill-treatment and awarded compensation to Mr Yaşa. The Ministry of Interior rejected to pay the compensation, and the administrative court found the Ministry right in its omission, saying that Mr Yaşa had been injured because of participating in illegal events, namely as a result of his own fault. The Council of State upheld that decision. In his application, the TCC, reminding the binding effect of the ECtHR judgments under Article 46 § 1, found a violation of the right to an effective remedy for dismissal of the applicant's claim for compensation regarding the damages caused by the violation.

4 – Özkan Karataş and Others Case: Right to demonstrate under state of emergency

The applicants, who were dismissed from public service after the coup attempt in 2016, held a peaceful sit-in protest on a bench in front of the municipality building in Malatya province for 70 days. They were fined for failing to ask permission for their demonstration from the Governor, which is an obligation during a state of emergency. In their application the TCC decided that, although this permission was required for any meetings and demonstration marches during the state of emergency, since "the administration was aware of the sit-in protest from the first day it started, (…) the applicants' failure to seek permission was not necessarily a required element for the administration to take measures" and "punishment of the applicants, who had participated in a peaceful demonstration not interfering with daily life, traffic ve the public services" had not been proportionate and, therefore, violated the right to demonstrate.

5 - Rabia Nur Yazıcı and Selma Kocapiçak Case: Flood, death and impunity

A father and his two sons living in a ground floor apartment in a building built by the Administration of Public Housing (*Toplu Konut İdaresi* – TOKİ) on a riverbed after its improvement by the Directorate General of State Water Affairs lost their lives in a flood happened in July 2012. According to the penal investigation regarding the incident, permission to investigate all public officers was requested. However only for some officers was permission granted. In this limited investigation, the office of the Chief Prosecutor found no ground for a criminal proceeding. The applicants, relatives of the deceased, filed suit in the administrative court who found, after having recourse to some expert reports, that the related institutions have responsibility for the death of the father and sons and awarded the applicants compensation for pecuniary and non-pecuniary damages. The TCC found in this application a violation of the procedural limb of right to life, based on the decision of non-prosecution for the officers of the State Water Affairs despite the remarks in the expert reports, the assessments made by administrative and judicial authorities and the data exposing the responsibility of the public institutions, which is contradictory to the positive obligation of the state for an effective investigation.

6 – E.Ü. Case: Private correspondence through the corporate email account

The TCC, in an individual application lodged by an employee whose private correspondence through their corporate account was reviewed and used by the employer as a ground for rightful termination of his employment contract, ruled that the applicant's right to request the protection of their personal data and their right to freedom of communication had been violated. The applicant sued their employer based on unfair dismissal, but the first instance rejected this claim. The TCC recognised employers' legitimate interest in reviewing corporate email accounts but stated that unrestricted review of email accounts without providing clear and full notice to employees in advance would be disproportionate. Therefore, the court found a violation of the applicant's rights of privacy and freedom of communication.

7 – No punishment for civilians suppressing the coup

President Recep Tayyip Erdoğan, going live on a news channel during the 2016 attempted coup, had called on his followers to take to the streets and stand against the soldiers attempting to overthrow his Government. Thousands of civilians had followed his call and confronted the military. 161 people were killed and 1,440 wounded in overnight violence. Especially after the surrender of the pro-coup soldiers, graphic pictures were shared on social media and tv channels showing civilians beating some soldiers, and even in one case, beheading one of them.[9] There were obvious signs of torture and ill-treatment on their bodies. Knowing that the right to life and prohibition of ill-treatment and torture are rights of utmost importance that cannot be derogated from even during emergency periods, there were consistent calls to punish perpetrators.. To obstruct any sentence of the civilians and public officers involved in the suppressing of the military coup, the Turkish Parliament accepted a law granting a legal, administrative, financial and criminal impunity to people, regardless of being an officer or civilian or executing an official duty or not, who acted intending to suppress the coup attempt and terrorist activities as well as their continuing activities.[10] CHP, the main opposition party in the Parliament, argued that this was in es-

[9] "Turkey Coup", Independent, (16 July 2016) <https://www.independent.co.uk/news/world/europe/turkey-coup-latest-news-istanbul-ankara-erdogan-twitter-social-media-a7140541.html>
[10] Law no. 6755 8 November 2016, art.37 § 2.

sence an amnesty law and there should have been a qualified majority in the Parliament to pass the law, which lacked at the time. They also argues that the legislation is also in a violation of the constitution substantially because it restricts some rights, including the right to life and the prohibition of torture, disproportionally.

The TCC, to not quash the law, took a very creative approach. The court stated that there should first be a crime in the case for talking about an amnesty law. In its view, the legislation is not related to a crime but regulates that the acts to suppress the military coup attempt and terrorist activities, as well as their continuing activities, would not create any criminal responsibility. The Court consequently found that there was no need for a qualified majority in the Parliament to pass the law.

Secondly, the TCC checked the content of the legislations and, reminding the importance of the legal predictability, assessed the wording "and continuing activities" from this point. In the court's view, as it was not possible to list all of the activities related to the coup and terrorist activities as numerus clausus, the legislator chose this formulation and interpreted the word "continuing" as "in the limited time immediately after" those activities. Noting that a lot of "irregularities" occurred during the coup attempt, the TCC acknowleged that the Parliament passed the law to protect the civilians who "defended the right to sovereignty" of their country.

8 – Multiple bar associations in big cities

Bar associations which are under almost continuous attack by the executive branch, have always been on the country's rule of law problem. To limit the ability of the existing bar associations in larger cities, the Parliament passed a law permitting rival bar associations in cities where there are more than 5,000 attorneys. Many human rights organizations and civil society groups warned that this legislation would undermine the independence of the bar associations and produce an ideologically split legal profession.[11] In a constitutionality review application on this legislation, the TCC , without saying anything about the real intent and impact of the legislation on the independence of the judiciary, found that there is no limitation in the Turkish constitution to institute more than one public/professional organisation in one city and, upheld the said legislation.

IV. LOOKING AHEAD

We anticipate that 2021 will be a challenging year. Over the past year, Turkey's COVID-19 pandemic measures impacted upon social, legal and economic spheres of Turkish citizens on a wide scale and limited many fundamental rights and freedoms. Yet, as noted above, there had not been a flurry of legal actions before Turkish courts over the past year. In 2021, Turkish courts will likely to be (over)burdened with applications to rule on the measures taken to address the pandemic. The ECtHR's Grand Chamber ruling in the case of Selahattin Demirtas on 22nd December 2020 will bring forward important implications in terms of the state of democracy, human rights and the rule of law in the country in 2021 and beyond. Similarly, the -above mentioned- Yıldırım Turan decision will undoubtedly represent a significant milestone in a series of confrontations that raise serious questions about Turkey's future commitment to the ECtHR.

V. FURTHER READING

Başak Çalı, 'The Whole Is More than the Sum of its Parts - The Demirtaş v Turkey (No 2) Grand Chamber Judgment of the ECtHR' (*Verfassunsgsblog,* 24 December 2021) <https://verfassungsblog.de/the-whole-is-more-than-the-sum-of-its-parts/ > accessed 18 February 2021

Emre Turkut & Sabina Garahan, 'The 'Reasonable Suspicion' Test of Turkey's Post-Coup Emergency Rule under the European Convention on Human Rights' (2020) 38.4 Netherlands Quarterly of Human Rights 264, 282

Tarık Olcay, 'The Turkish Constitution as a Disrespected Idol' (*IACL-AIDC* Blog, 14 January 2021) <https://blog-iacl-aidc.org/cili/2021/1/14/the-turkish-constitution-as-a-disrespected-idol> accessed 26 February 2021

[11] For a detailed description of the situation of the independence of the judiciary in Turkey, please look at the report of the Commissioner for Human Rights of the Council of Europe: < https://rm.coe.int/report-on-the-visit-to-turkey-by-dunja-mijatovic-council-of-europe-com/168099823e >

Ukraine

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I. INTRODUCTION

Compared to the reported period, the year 2019 was active in terms of constitutional activities. For the first time in the history of independent Ukraine, two constitutional amendments were adopted during the calendar year and eight constitutional initiatives were introduced. On 7 February 2019, the Verkhovna Rada, adopted a constitutional amendment on the EU and NATO strategic course of Ukraine; on 29 August 2019, President Zelenskyy initiated seven draft laws amending the different provisions of the Constitution and on 3 September 2019, the Verkhovna Rada cancelled the immunity of parliamentarian members (MPs)[1]. In December 2019, President Zelenskyy presented a constitutional reform on decentralization but withdrew the draft law later, in January 2020.

In contrast, 2020 was quite the opposite with respect to constitutional developments. No doubt, the COVID-19 pandemic strongly affected the Parliament's activities, cancelling many plenary work sessions. However, no major constitutional "shift" took place in 2020, and no complex constitutional reforms have been introduced. However, some of the Constitutional Court's decisions raised a certain level of public concern in Ukraine and abroad while demonstrating some crucial yet unresolved challenges of the current constitutional design in the country.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constitutional Amendment Process in 2020

In Ukraine, there is a peculiar process of constitutional amendment. To amend the regular provisions (for Chapters II, IV-XII, and XIV-XV no referendum is needed) of the Constitution, first, the Constitutional Court of Ukraine (the CCU) must provide a positive approving opinion on the draft law, submitted by either the President of Ukraine, or at least 150 members of Parliament. Second, this draft law must be voted on twice: (1) previous approval by absolute majority, and (2) adoption during the next regular session of the Parliament by qualified (two-thirds) majority. Four of seven constitutional amendments of President Zelenskyy, initiated in August 2019, received a positive opinion of the CCU. Three of four draft laws have been previously approved by the Parliament in 2020. Cancellation of advocate monopoly[2] and technical amendment on advisory bodies[3] of Parliament have been voted on 14 January 2020. An amendment on reducing the total number of MPs from 450 to 300[4] have been voted on 4 February 2020. However, none of the amendments has been even voted by the Parliament for the second

[1] In Ukraine, MPs are called 'people's deputies'.

[2] Draft Law No. 1013 on Introducing Amendments to the Constitution of Ukraine (concerning the Abolition of the Advocate's Monopoly), 29 August 2019.

[3] Draft Law No. 1028 on Introducing Amendments to Article 85 of the Constitution of Ukraine (concerning Consulting, Advisory, and Other Subsidiary Organs of the Verkhovna Rada of Ukraine), 29 August 2019.

[4] Draft Law No. 1017 on Introducing Amendments to Articles 76 and 77 of the Constitution of Ukraine (concerning the Reduction of the Constitutional Composition of the Verkhovna Rada of Ukraine and the Incorporation of the Proportional Electoral System), 29 August 2019.

time, so these draft laws are now considered rejected by the Parliament. An amendment on people's legislative initiative[5] has not yet been voted on even once.

National Referendum Draft Law

Another important constitutional issue of the year was a draft law on national referendum. Since 2018, when the Constitutional Court declared the previous national referendum law of 2012 as unconstitutional, Ukraine lacked a proper referendum regulation as prescribed by the Constitution. A new draft law on national referendum was developed by the parliamentary working group including MPs, governmental officials, representatives of civil society organizations and independent experts. On 13 May 2020, the Speaker of the Verkhovna Rada requested the Venice Commission to provide an urgent legal opinion on this draft law. On 9 June 2020, President Zelenskyy submitted the Draft Law No. 3612 "On the Democracy through All-Ukrainian Referendum", which was subsequently adopted by the Parliament in the first reading on 18 June 2020. An Opinion, prepared by the Venice Commission jointly with the OSCE Office for Democratic Institutions and Human Rights, welcomed "Ukraine's efforts to amend its legal and institutional framework relating to national referendums", praised "[t]he transparent and inclusive character of the drafting process", as well as provided some valuable critical comments on the drafting text. Up to the end of 2020, the Parliament worked on this newdraft law version. It was voted on the second reading and eventually adopted on 26 January 2021.

III. CONSTITUTIONAL CASES

In 2020, the CCU delivered twenty-one decisions: ten decisions of the Grand Chamber on petitions of members of the Parliament and the Supreme Court; eleven decisions on constitutional complaints of individuals and legal persons (three decisions by the Grand Chamber, four decisions by each of the Senates[6]). The most important or relevant decisions are described as follows

1. Decision No. 4-r/2020 of 11 March 2020: The Judicial Authorities Case[7]

The CCU declared unconstitutional certain provisions of the Law No. 193-IX (Zelenskyy's judicial reform), namely: (1) reducing the composition of the Supreme Court from 200 to 100 judges; (2) reducing the financial remuneration of the Supreme Court judges; (3) introducing the new rules for the formation of the High Qualifications Commission of Judges; (4) introducing the establishment of the Commission on Integrity and Ethics; (5) amending procedural issues of disciplinary proceedings against the judges. The CCU also recommended the immediate amendment of the pertaining national legislation in compliance with the decision.

On one hand, the reduction of the Supreme Court's composition was obviously unconstitutional (as the constitutional parameters of introducing such a draft law were broken). On the other hand, some aspects of the case were both controversial and incomprehensible as the decision also lacked a strict and coherent argumentation. Cancelling the Commission on Integrity and Ethics was highly criticized by public and legal experts, however, the Court would not object to this institution if it had been established properly. Unfortunately, no necessary legislative amendment was made in 2020 to correct the situation in respect of judicial authority bodies.

2. Decisions No. 9-r/2020 of 28 August 2020 & No. 11-r/2020 of 16 September 2020: The NABU Case[8]

The CCU declared unconstitutional (1) the President's Decree of 16 April 2015 on appointing the Director of the National Anti-Corruption Bureau of Ukraine (NABU) and (2) relevant provisions of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" on the ground of which the President issued the decree. In both decisions, the Court reaffirmed the legal doctrine, developed in the past, which concerned the matter and limits of presidential powers[9]. Since the exclusive list of the President's powers is envisaged by Ukraine's Constitution, the presidential authority cannot be expanded by an ordinary law; it can be done only by way of a constitutional amendment. Hence, the Court stated that the President had neither power to establish any state law-enforcement agency beyond the executive branch system (i.e., non-accountable to the Cabinet of Ministers of Ukraine), nor the authority to appoint the Director of NABU (*ultra vires* acts). However, the CCU did not object against the NABU's legality as a state institution or any previous operational activities of its Director.

Because the Court did not choose the most

[5] Draft Law No. 1015 on Introducing Amendments to Article 93 of the Constitution of Ukraine (concerning the People's Legislative Initiative), 29 August 2019.

[6] Since 2017, Grand Chamber of the CCU (all judges) reviews constitutional petitions, and two Senates (nine judges in each) review constitutional complaints.

[7] Decision of the CCU No. 4-r/2020 in the case of the Supreme Court's constitutional petition on the conformity with the Constitution (constitutionality) of certain provisions of the *Laws of Ukraine No. 1402-VIII "On the Judiciary and the Status of Judges" of 2 June 2016, No. 193-IX "On Introducing Amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges' and Some Laws of Ukraine on the Activities of Judicial Self-Government Organs" of 16 October 2019. No. 1798-VIII "On the High Council of Justice" of 21 December 2016,* 11 March 2020.

[8] Decision of the CCU No. 9-r/2020 in the case of 51 People's Deputies of Ukraine's petition on the conformity with the Constitution (constitutionality) of the Decree of the President of Ukraine "On the Appointment of A. Sytnyk as a Director of the National Anti-Corruption Bureau of Ukraine", 28 August 2020; Decision of the CCU No. 11-r/2020 in the case of 50 People's Deputies of Ukraine's petition on the conformity with the Constitution (constitutionality) of the certain provisions of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine", 16 September 2020.

[9] See the following acts of the CCU: decisions No. 8-zp of 24 December 1997, No. 7-rp/2003 of 10 April 2003, No. 22-rp/2003 of 25 December 2003, No. 9-rp/2004 of 7 April 2004, No. 1-rp/2007 of 16 May 2007, No. 14-rp/2008 of 8 July 2008, No. 19-rp/2008 of 2 October 2008, No. 21-rp/2008 of 8 October 2008, No. 17-rp of 7 July 2009, No. 21-rp/2009 of 15 September 2009, No. 32-rp/2009 of 17 December 2009, No. 16-rp/2010 of 10 June 2010, No. 5-r/2019 of 13 June 2019; and opinion No. 7-v/2019 of 16 December 2019.

reasonable *modus operandi* in this case[10], both decisions caused many legal uncertainty issues. The current status of Director, appointed in an unconstitutional way, perhaps, was the most notable one. Urgent correction of NABU Law was the only option to preserve the constitutional order. Decision No. 11-r/2020 even had a postponed effect enabling the Parliament to take necessary legislative steps up until 16 December 2020. Sadly, the Parliament failed to adopt the remedial amendments, and the legal case with NABU is currently still far from being certain and fully closed.

This case also raised again the public concern with the doctrine of inherent powers of Ukraine's President, a highly speculated area in national constitutional law. This doctrine of the presidential system was used by many Ukrainian policymakers (and some scholars) in order to legitimize any presidential power claims beyond established constitutional parameters. Practical implementation of this doctrine has always been quite challenging for transitional regimes such as Ukraine's, because the President's office used to demonstrate authoritarian tendencies from time to time.

3. Decision No. 13-r/2020 of 27 October 2020: E-Declarations Case[11]

The CCU declared unconstitutional (1) certain provisions of Law of Ukraine "On Prevention of Corruption" concerning the powers of the National Agency for the Corruption Prevention (the NACP) to verify the accuracy of financial declarations (e-declarations) of public officials, and (2) Article 366-1 of the Criminal Code, penalizing both submitting false declarations and failure to submit a declaration by public officials. In its decision, the Court outlined at least two speculative points. First, any forms and methods of control in the form of inspections, monitoring, etc. of judges should be implemented only by the judiciary bodies but not by the NACP as an executive body. Second, penalization of both intentional submitting false declarations and failure to submit a declaration by public officials under the Criminal Code is too disproportionate a measure of state reaction to such offences.

It is noticeable that several judges of the CCU, including the judge-rapporteur and the Head of the CCU, voted in favour of this decision, were actually in a conflict of interest (i.e. the NACP had detected serious irregularities in their financial declarations, and criminal investigation was in order) and decriminalization of Article 366-1 would highly benefit them. That is why the Decision No. 13-r/2020 provoked a public scandal and was highly criticized by government, anti-corruption civic activists and academia, claiming the Court is about to undermine the national anti-corruption infrastructure. Also, four judges of the CCU presented their dissenting opinions.

The situation with the Decision No. 13-r/2020 and its aftermath revealed serious problems both within the national anti-corruption legislation and within constitutional design. The Venice Commission (on the request of Ukraine's President) analysed the situation following this decision and provided two separate opinions (see Further Reading), pointing out the most fragrant violations, legal and logical inconsistencies made by the CCU, and called for the effective reform of CCU. As a possible avenue for a reform of the CCU, the Venice Commission recommended establishing for competitive purposes a screening body, with an international component, for candidates for the office of judge of the CCU to ensure the adequate moral and professional qualities of future judges.

Many legislative responses (some of them even more controversial that the decision itself)[12] had been initiated to save the constitutional order in Ukraine. But in summary, in December 2020, the Parliament (1) inserted two new articles, Article 366-2 and Article 366-3, into Criminal Code of Ukraine to re-criminalize both submitting false declarations and failure to submit a declaration by public officials but with softer penalties, and (2) returned all the authorities in the area of verification of the accuracy of financial declarations to the NAPC. But most of the recommendations of Venice Commission (especially, on modification of judges' appointment process) remain unimplemented.

At the end of the year, on 29 December 2020, the President of Ukraine, in implementing the above-mentioned doctrine of inherent powers, issued a controversial decree on the suspension of Oleksandr Tupytsky[13], the Head of the CCU, from the post of the CCU's judge for a period of two months. Despite the fact that judge Tupytsky is currently under criminal investigation, no law actually provided for authority of the President to suspend any judge of the CCU (including the Head of the CCU) and it looks like more as a political rather than a legal solution for the case. Article 154 of the Criminal Procedure Code, cited in the degree, has no legal effect towards the judges of the CCU. This presidential action provoked a new round of political tension between the President and the CCU as a consequence of the e-declaration case.

IV. LOOKING AHEAD

The political conflict between the President's Office and the CCU is likely to continue in 2021, since no crucial reform on the CCU has been introduced, and three vacant seats in the CCU itself are to remain. Likely, in 2021 some attempts to reform the CCU and/or to appoint new judges will be on the table. Also, the Speaker of the Parliament requested

[11] Decision of the CCU No. 13-r/2020 in the case of 47 People's Deputies of Ukraine's petition on the conformity with the Constitution (constitutionality) of certain provisions of the *Law of Ukraine "On Prevention of Corruption" and of the Criminal Code of Ukraine,* 27 October 2020.

[12] For instance, Draft Law No. 4288, submitted by the President of Ukraine on 29 October 2020, called for sabotage of the Decision's No. 13-r/2020 implementation and for immediate dismissal of all the CCU's judges.

[13] Decree of the President of Ukraine No. 607/2020 "On Suspension of a Judge of the Constitutional Court of Ukraine", 28 December 2020.

an opinion of Venice Commission on the draft law on constitutional procedure (submitted in December 2020) and alternative draft law on the procedure for consideration of cases and exercising of the CCU judgements (submitted in January 2021). Since some delicate cases are still under review of the CCU (such as cases on language law, High Anti-Corruption Court, State Bureau of Investigation Law, "green energy tariff", etc.), civil society will be observing and expecting further action on the side of the CCU.

V. FURTHER READING

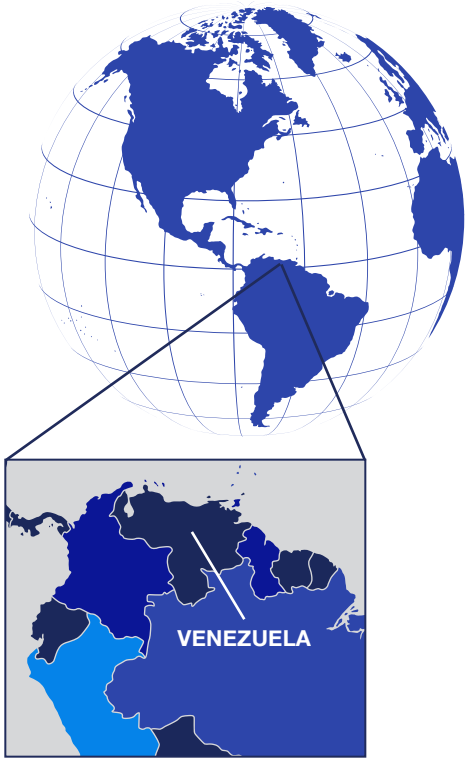
Venice Commission, 'Urgent Opinion on the Reform of the Constitutional Court', endorsed by the Venice Commission on 11 December 2020 at its 125th online Plenary Session (11-12 December 2020), CDL-AD(2020)039

Venice Commission, the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, 'Urgent Joint Opinion on the Legislative Situation Regarding Anti-Corruption Mechanisms, Following Decision No. 13-R/2020 of the Constitutional Court of Ukraine', endorsed by the Venice Commission on 11 December 2020, at its 125th online Plenary Session (11-12 December 2020), CDL-AD(2020)038

Venice Commission, the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe, 'Joint Opinion on the Draft Amendments to the Law On the Judiciary and the Status of Judges and Certain Laws on the Activities of the Supreme Court and Judicial Authorities (Draft Law No. 3711)', adopted by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), CDL-AD(2020)022

Venice Commission, OSCE Office for Democratic Institutions and Human Rights (ODIHR), 'Urgent Joint Opinion on the Draft Law No. 3612 On Democracy through All-Ukraine Referendum', endorsed by the Venice Commission at its 124th online Plenary Session (8-9 October 2020), CDL-AD(2020)024

Amicus Curiae developed by international technical assistance projects (EU Anti-Corruption Initiative in Ukraine, USAID New Justice Program and IDLO) as part of general support for the anticorruption and judicial reforms in Ukraine submitted to the Constitutional Court of Ukraine under part three, Article 69 of the Law of Ukraine On the Constitutional Court of Ukraine in the case of a request for constitutional review filed by 49 people's deputies of Ukraine regarding consistency with the Constitution of Ukraine (constitutionality) of Law of Ukraine No. 2447-VIII On the High Anti-Corruption Court dated June 7, 2018. Date: 1 October 2020.



Venezuela

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I. INTRODUCTION

2020 was another crucial year for Venezuela and its ongoing social, economic, and humanitarian crisis. It was a year of frustrated efforts to bring about a democratic transition in Venezuela, and of further continuation of Maduro's authoritarian project in the context of the COVID-19 pandemic.

As explained in previous reports, the origin of the ongoing crisis was Nicolás Maduro's insistence in keeping power for a second term following the May 20, 2018 presidential election. This contest and its results were deemed unconstitutional and fraudulent by most of the opposition and a large number of countries worldwide, including the United States, the European Union, and several Latin American countries. In January 2019, the President of the Parliament (National Assembly), Juan Guaidó, assumed the country's interim presidency 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 – elected in April 2013 – has retained *de facto* control over the Executive Branch and remained in power. To these ends, he has counted with the support of his party (the United Socialist Party of Venezuela, PSUV), the armed forces, and a number of countries, particularly authoritarian regimes like China, Cuba, Iran, Russia, and Turkey.

Thus, throughout 2019 and 2020 Venezuela had Maduro as *de facto* President, with internal control of the country and its state institutions, while more than 50 countries recognized Juan Guaidó. Interim President Guaidó has been focusing on foreign policy, but with little efficacy in Venezuela. More importantly, the interim Government has been unable to bring about a transition through electoral means. On the other hand, Maduro has failed to make his decisions recognized in many key countries that recognize Guaidó as interim President, and his regime faces a variety of pressures at the international level, including economic sanctions enacted by the United States, the European Union, and several countries.

The National Assembly and interim President Guaidó have enacted several acts to achieve a political transition, including 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." However, the Legislature's authority was successfully challenged by the *de facto* force of Maduro's regime, preventing the opposition from exercising the institution's prerogatives and allowing Maduro to rule unopposed and retain power. To these ends, Maduro counted with the *de facto* control of the rest of the regime,

including the Supreme Court and the Attorney General's office, and the open support of a politicized military. Moreover, Maduro's rule has also relied on an unconstitutional "National Constituent Assembly," installed in August 2017 and which continued operating until December 2020. This institution fraudulently claimed to have wide official prerogatives based on the regime's interpretation of constituent power theory, against the separation-of-powers principle and the Venezuelan Constitutional framework. The prerogatives included legislative functions, the right to convoke elections, the ability to appoint the attorney general, and other key political officers, among others.

The creation of the Constituent Assembly was denounced by the political opposition, several governments, and many scholars as fraudulent and unconstitutional. The Assembly's creation did not fulfil the imperatives established in the 1999 Constitution for its creation and the openly fraudulent election of its delegates in August 2017. However, although it remained an important threat against the opposition during its existence, the National Constituent Assembly failed to comply with its supposed role of writing a new constitution. Moreover, it failed to engage in a substantial discussion about constitutional reform and did not create a project to replace the 1999 Constitution (or any of its norms). The "Constituent Assembly" functioned as an authoritarian institution, seeking to safeguard Maduro's position in a challenging political environment and attempting to appear as a legitimate institution to the eyes of other countries and domestic actors.

In 2020, the National Electoral Council convoked and organized an election to the legislature (National Assembly), which was finally held on December 6. This election was rejected by the vast majority of the opposition members of the National Assembly elected in 2015 and by interim President Guaidó. The elections suffered from a variety of irregularities that compromised their integrity, including the exclusion of several opposition parties from fielding candidates. The outcome of the elections – the Maduro regime's candidates winning almost 70% of the vote in an election with about 70% abstention – resulted in the regime's takeover of the National Assembly, claiming to be the legitimate legislative representatives. On the other hand, a majority of opposition members in control of the National Assembly elected in 2015 denounced the election and voted to extend their term. A large part of the international community once again considered illegitimate this parliamentary election. Thus, in practice, Venezuela now has two institutions that claim to represent Venezuelans and seek to use their prerogatives, with none of them enjoying uniform international recognition.

The present report offers a survey of these developments, particularly the constitutional dimension of the crisis. It also 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. Guaido's Interim Presidency and the Opposition-Controlled National Assembly

On January 10, 2019, a new presidential term began without a candidate being elected in a legitimate fashion. The opposition-leaning Parliament considered this an usurpation of power and on January 15, 2019, based on Articles 233 and 333 of the Constitution, proceeded to issue a statement declaring its President –Juan Guaidó– as Venezuela's interim President, until the usurpation ceased and free and transparent elections were held. Thus, Guaidó assumed the interim presidency on January 23, 2019, and over the last two years has led an effort to ensure a transition back to democracy. In response to this decision, the Maduro regime denounced the opposition's efforts and sought to preserve power at all costs, in clear breach of the 1999 Constitution and at a significant cost for itself and for the nation as a whole. Two years 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, whilst the rest of the government and the state as a whole remain under Maduro's *de facto* control.

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." According to the Statute, the President of the National Assembly is the interim President of the Republic until the usurpation of power ceases and free and fair elections take place. Article 2 of the Statute states that "a transition is understood as the democratization and re-institutionalization itinerary that includes the following stages: liberation of the autocratic regime that oppresses Venezuela, formation of a provisional Government of national unity and holding free elections." In addition, the deep humanitarian crisis was identified as a problem to be solved during this transitional period.

Within the aforementioned Statute, the figure of interim President is crucial and includes a range of important prerogatives. For instance, it gives interim President Guaidó the power to designate several authorities in order 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 Prosecutor to defend the interests of the Bolivarian Republic of Venezuela in court (especially United States courts). Throughout 2019 and 2020, interim President Guaidó decreed several acts to restore democracy; designated ambassadors in several countries and in multilateral organizations (OAS and Lima Group); and sought to protect and recover the assets located outside of the country via negotiations or litigation. For example, during this time, several United States courts also recognized Guaidó as interim President and took several decisions to protect Venezuelan assets according to the requests of the Office of the Special Prosecutor. Some examples are: (i) The decision of the Supreme Court of Delaware which confirmed recognition of the Boards of Citgo and other State companies; (ii) The ruling by a United Kingdom court in London which denied the petition of the Maduro´s regime to take control of the Central Bank of

Venezuela's gold (later overturned); and (iii) The decision of the Southern District Court of Texas in the case "Enerset Electric LTD vs. PDVSA and Bariven," which agreed on the suspension of the proceedings until the cessation of the usurpation. Moreover, the United States Office of Foreign Assets Control (OFAC) extended restrictions to collect PDVSA 2020 bonds until January 2021. In April 2020, Guaidó's interim presidency filed a request before the Southern District Court of Florida to recover assets derived from corruption ("U.S. vs. Abraham Ortega" case).

On the other hand, in 2020, the National Assembly focused its efforts towards the political route designed in the "Statute to Govern a Transition." With this goal in sight, the National Assembly dictated several legislative acts, including the following:

(i) Instrument of Ratification by the Bolivarian Republic of Venezuela of the Inter-American Convention on Human Rights ("Pact of San José"), (01-16-2020)
(ii) Declaration on Cuban Interference in Venezuela (02-20-2020)
(iii) Declaration in Support and Gratitude to the Actions Taken by the International Community in Order to Restore Freedom and the Constitutional Thread of the Bolivarian Republic of Venezuela (02-20-2020)
(iv) Declaration for an Emergency Plan and Formation of a National Emergency Government (04-22-2020)
(v) Declaration to Ratify the Support of the National Assembly to Juan Gerardo Guaidó Márquez as President in Charge of the Bolivarian Republic of Venezuela and the Need for a National Emergency Government as a Solution to the Crisis in Venezuela (05-21-2020)
(vi) Declaration in Rejection of the Irregular Appointment of the Members of the National Electoral Council (06-22-2020)
(vii) Declaration that Ratifies the Comprehensive Political Route Proposed to the Country that Allows Free and Transparent Presidential Elections as a Way Out of the Generalized Crisis and to Generate Democratic Re-institutionalization in Venezuela (07-01-2020)
(viii) Declaration to Recognize the Great Democratic Demonstration of the People of Venezuela in the Popular Consultation of December 12, 2020 (12-15-2020)

Additionally, there were several declarations to request free and fair presidential and legislative elections and denounce fraud (in August, October, and November), and then to reject/ignore the results of the December 6, 2020 legislative elections convoked by the Maduro regime's electoral authority (CNE).
The Statute was reformed in January 2021. The reform declares the illegitimacy of the National Assembly's election celebrated on December 6, 2020, and declares void all the decisions that could be established due to the election (which potentially extends to all the decisions made in the future by its new members). Although the National Assembly's constitutional period ends on January 5, 2021, the reform of the Statute establishes that, since the December 6, 2020 election was void, the National Assembly will maintain its functions, according to the principle of constitutional continuity. According to the reform, the National Assembly will maintain its functions until (i) free, fair, and verifiable presidential and legislative elections take place; (ii) an unexpectedly and exceptional political event in 2021 occurs; or (iii) for an additional legislative period from January 5, 2021 until January 5, 2022 (i.e., an additional year). The National Assembly would function through the Delegated Commission, formed by the National Assembly's Board and the presidents of the permanent commissions. According to the Constitution, the Delegated Commission could convoke the National Assembly for extraordinary sessions. The Delegated Commission powers are limited and established in the Constitution and in a new rule of the Statute, which allows the Delegated Commission to exercise functions of the National Assembly. Finally, the reform enacted several rules to impose more control from the National Assembly on the interim President, and the creation of a new figure, named Political Counsel, which would serve as an office to coordinate, follow up, and evaluate the interim President's actions. The powers of the Political Counsel's office would be determined in a regulation dictated by the Interim President.

2. Nicolás Maduro's Authoritarian Governance: State of Emergency and the National Constituent Assembly

In the meantime, as Guaidó and the National Assembly pushed for a democratic transition, the Nicolás Maduro regime continued in *de facto* control of the National Executive and the state apparatus. In this regard, at least three major developments need to be chronicled: (i) Maduro's decisions as Chief Executive within the framework of two states of exception (in the context of the COVID-19 pandemic); (ii) The decisions of the National Constituent Assembly (now closed following the aforementioned December 6, 2020 elections); and (iii) The Legislative Elections in question and the country's lack of electoral integrity.

On the one hand, the State of Emergency (*Estado de Alarma*) decreed by the National Executive in March 2020, enacted on the occasion of discovering cases of COVID-19 in the country, is the main legal instrument employed to afford the government a wide scope of powers to confront the pandemic. The *Estado de Alarma* is one of the modalities of state of exception provided for in the 1999 Constitution, subject to the control mechanisms provided for in the Constitution and the Organic Law of States of Exception. The state of emergency was initially declared via Decree No. 4,160 and has been extended every month from March 2020. Throughout 2020, as in other countries around the world, the Maduro government tried a variety of measures across the country to try to control the spread of the virus. At different points, different compulsory measures were established, as well as restrictions on rights, including: (i) The use of masks that cover the mouth and nose; (ii) The suspension of educational activities; (iii) The suspension of any event of public nature or that involves an agglomeration of people; (iv) The obligation for food and beverage vendor establishments to sell only under via delivery or take-away orders; and (v) The closure of parks of any kind, beaches, and spas, public or private.

This "emergency rule" character of the Maduro regime during the COVID-19 pandemic has reinforced prior trends. During 2020, as has been the case since 2016, successive extensions of the state of economic emergency were also issued via Decrees No. 4,090; 4,145; 4,194; 4,242; 4,275; 4,358; and 4,396. In connection to the "economic emergency" the government has issued other decrees or pushed for exceptional legislation (such as the Anti-Blockade "Law" enacted by the National Constituent Assembly, mentioned below). This includes, for example, Decree No. 4,096 which orders the liquidation, sale, and payment of specific services in the "crypto-sovereign" currency called *Petro* (PTR).

Given that the Maduro regime lacked the support of the opposition-controlled National Assembly, it resorted to govern 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, unconstitutionally convened and elected in 2017, remained active during 2020. As we mentioned above, its creation was the breaking point of Venezuela's already-weak 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 helped to position it as an open threat against the opposition and as a key governance mechanism.

However, despite its wide powers, after more than three years the National Constituent Assembly did not produce a single debate or released a working paper regarding the new constitution that it was supposed to be producing. From a political perspective, the importance of the Constituent Assembly in 2020 was relatively marginal – as most major decisions seem to lie elsewhere in the Maduro regime, with the *de facto* President himself as the main decision-maker as chief executive. However, the National Constituent Assembly remained fulfilling the role of "last trench" of the regime, making decisions that still had 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 "laws" as the Constitutional Law of the Bolivarian National Armed Forces, several "laws" to reform important aspects of the Tax Law, and even a "law" directed to offer additional guarantees to investors and help the government sort out the difficulties caused by the international sanctions imposed on the Maduro regime.

3. The (Persistent) Lack of Electoral Integrity and the 2020 Parliamentary Elections

The December 2020 parliamentary elections corresponding to the 2021-2026 period openly violated international standards of electoral integrity, including Venezuelans' political rights and the democratic principles protected by the Inter-American System of Human Rights, especially by the Inter-American Democratic Charter. Under Maduro's control, the Venezuelan government violated the constitutional principles of political pluralism and free, fair, and competitive elections. Unfortunately, the 2020 parliamentary elections followed the same pattern of lack of electoral integrity that characterized the 2018 presidential election. Both elections were nationally and internationally rejected due to the violation of the essential electoral conditions.

Since 2018, the National Assembly tried to implement electoral reforms to enhance electoral integrity and allow for competitive elections. According to the "Statute to Govern a Transition to Democracy" referred above, the first step was to designate the five members (rectors) of the National Electoral Council according to the 1999 Constitution. This action required a consensus between the democratic opposition, the political parties that support Nicolás Maduro, and civil society. However, in June and July 2020, the Constitutional and the Electoral Chambers of the Supreme Tribunal of Justice prevented the National Assembly from advancing in that process. Acting in support of Maduro's authoritarian regime, the Court usurped parliamentary functions, proceed to appoint the five rectors of the CNE, modified the Statute of Election Procedures, and intervened the main opposition political parties (Constitutional Chamber's decisions 068, 069, 070, 071, 072, and 077/2020, and Electoral Chamber's decisions 119, 122, 124, 125, 126, and 127/2020). Moreover, the (illegitimate) new National Electoral Council illegally modified the constitutional rules to support the authoritarian regime's political party, undermining the basic principles of the Electoral branch of power, i.e., transparency, competitiveness, political pluralism, and citizen participation. This was the least competitive elections held in Venezuela since the beginning of its constitutional democracy in 1958. The parliamentary elections further reduced the already weakened conditions of electoral integrity that existed in Venezuela.

That backlash in terms of electoral integrity conditions were reflected in almost all the aspects of the election cycle, including: (i) The electoral authority unconstitutionally modified the electoral rules to favour the ruling party; (ii) The political rights of indigenous communities were undermined; (iii) The electoral registry maintained its lack of transparency; (iv) The electoral results were not transparent nor accountable; (v) The authoritarian regime maintained patterns of abuse during the electoral campaign and corruption in campaign financing; (vi) Coercion at the moment of voting; (vii) Lack of independence of the electoral authority and electoral justice; and (viii) The opposition parties and opposition leaders were banned to participate in the elections due to the illegal judicial intervention. To put it bluntly, Maduro's regime "chose" its contenders for the elections – it is the first time that undermining electoral integrity and political rights had the purpose of simulating conditions of electoral competitiveness. This failed process did not allow to move towards a democratic transition and did not help to achieve a political solution to the deep Venezuelan constitutional crisis. Instead, it worsened the crisis, resulting in an election that was not recognized by the opposition and many international actors.

III. CONSTITUTIONAL CASES

The Venezuelan Supreme Tribunal continues 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 has not been as significant as in previous years (as we mentioned above, the core of the Maduro's regime actions lie on the Executive branch), the Tribunal continues to offer the regime reliable support during this crisis. In addition to rulings, this support manifests itself in the open actions and declarations of several justices 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 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 five years and reducing human rights guarantees during Maduro's time in office (2014-2020); and, finally, allowing the President to convoke a constituent assembly in 2017 that concentrated the power in only one branch, consolidating a dictatorship (Urosa: 2019).

This year the Chamber continued to support the regime in a variety of crucial ways. The Chamber approved the constitutionality of both the economic emergency Decrees (decisions 002/2020; 056/2020; 060/2020; 080/2020; 081/2020; 132/2020; and 158/2020) and the state of alarm Decrees (decisions 057/2020; 058/2020; 063/2020; 074/2020; 81/2020; 116/2020; 143/2020; and 146/2020). The Constitutional Chamber also declared void several decisions taken by interim President Juan Guaidó, including the designation of the board of the public television channel *Telesur Venezuela,* the mining company *Corporación Venezolana de Guayana,* and the Venezuelan Central Bank. The Constitutional Chamber also approved a parallel board's designation in the National Assembly, promoted by the Chavista legislators. Finally, the Constitutional Chamber also designated members of the National Electoral Council, usurping the National Assembly's competencies. 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 prerogatives, 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. On one hand Maduro, as *de facto* President, keeps effective control over the Judicial branch, the Electoral branch, the Citizens branch, and the state's bureaucracy. Consequently, there is no independent judicial review system, impartial electoral arbitrator, and an overall lack of transparent and rule-abiding government. The Supreme Tribunal of Justice – particularly its Constitutional Chamber – and the National Assembly elected in December 2020 remain key political instruments in charge of supporting the decisions of Maduro's authoritarian regime. Maduro also enjoys the support of the military and of fellow international authoritarian allies, and there are no signs that this will change any time soon.

However, the Maduro regime remains illegitimate to the eyes of a large number of countries, faces a variety of economic sanctions, and has proven incapable to overcome the current humanitarian crisis. Moreover, the interim Presidency of Juan Guaidó and the opposition-controlled National Assembly elected in 2015 remain important actors, especially abroad. Thus, although the Maduro regime will seek to continue consolidating its rule in 2021, especially by holding state and municipal elections, the prospects of Venezuela remain uncertain.

V. FURTHER READING

Adriana Boersner, 'Venezuela 2019: A Tale of Two Presidents' [2020] *Revista de Ciencia Política* 539.

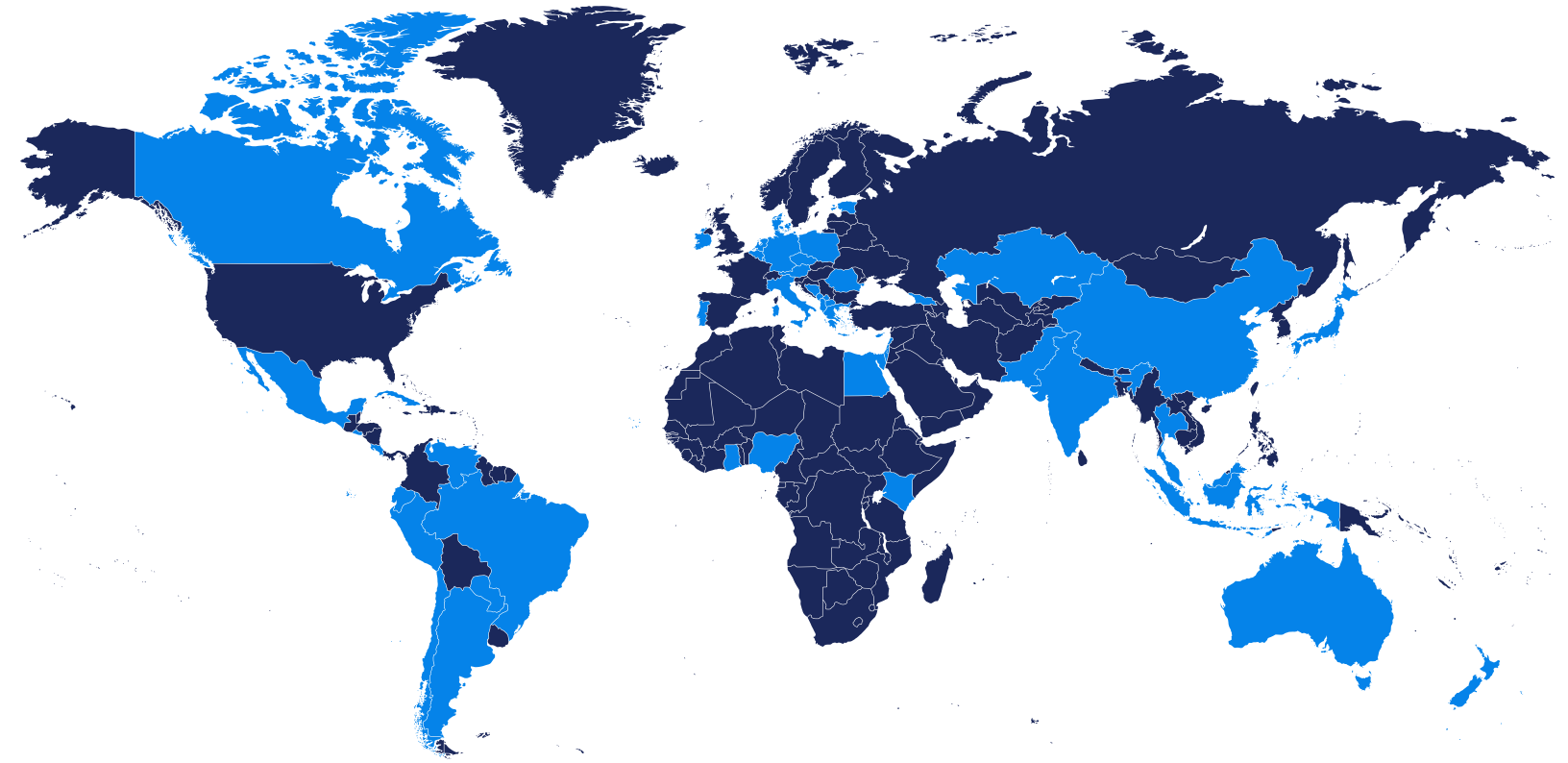
Allan R. Brewer-Carías et al, *Estudios sobre la ilegitimidad y la inconstitucionalidad de las elecciones parlamentarias de 2020* [2020] Caracas, Academia de Ciencias Políticas y Sociales.

Javier Corrales, 'Authoritarian Survival: Why Maduro hasn't Fallen' [2020] *Journal of Democracy* 39.

José Ignacio Hernández G., *Bases Constitucionales de la Transición en Venezuela: el Reconocimiento del Presidente de la Asamblea Nacional como Presidente Encargado de Venezuela* [2020] Caracas: Editorial Jurídica Venezolana.

José Ignacio Hernández G., 'The 2020 Parliamentary Elections and the Collapse of Venezuelan Democracy' [2020], The Electoral Integrity Project, December 15, 2020: https://www.electoralintegrityproject.com/eip-blog/2020/12/15/the-2020-parliamentary-elections-and-the-collapse-of-venezuelan-democracy.

SUMMARY



Afghanistan

2020 saw the Taliban inking a peace deal with the United States and holding talks with the Afghan Government for the first time. The outcomes of these talks would be vital in shaping not only conditions of peace in the country but also the future of Afghanistan's constitutionalism.

Albania

In 2020, the Constitutional Court continued to lack the quorum needed to decide cases on the merits. However, there were important developments in the process of constitutional reform involving the electoral system, the ongoing implementation of the judicial vetting process, and the creation and improvement of judicial institutions.

Argentina

On December 30, Congress passed into law a bill that decriminalizes abortion, culminating an extraordinary process of women's mobilization. Other than this, the Supreme Court found itself pressed by opposing political forces to settle sensitive questions. The outcome was bad constitutional law—perhaps the only that a country perpetually in crisis can produce.

Australia

In case of *Love v. Commonwealth,* the Australian High Court found that Aboriginal Australians and Torres Strait Islanders could not be considered aliens under s 51 (xix) of the Australian Constitution due to their unique spiritual, cultural and historical connection to the land of Australia. While the decision failed to recognise indigenous sovereignty adverse to the Crown, the case was an important step in furthering Aboriginal rights in Australia.

Austria

2020 was expected to be the centennial of the Austrian Federal Constitution. However, it was overshadowed by the coronavirus crisis. Many of the government's measures to prevent the spread of the coronavirus were declared illegal by the Constitutional Court for a lack of legal basis. Moreover, the Court's repeal of the assisted suicide ban aroused much criticism.

Belgium

The COVID-19 pandemic dominated the Belgian political and legal agenda in 2020. The pandemic accelerated the formation of a new federal government after a temporary minority government was granted special powers. The federal government decided to combat the coronavirus crisis mainly through ministerial decrees, which was criticized by constitutional scholars.

Bosnia and Herzegovina

Balancing measures to minimize the impact of the novel coronavirus while continuing economic flows and social interaction proved to be a controversial issue. Amid the pandemic, the country also faced the problems to organize local elections. These circumstances put enormous pressure on the Constitutional Court of Bosnia and Herzegovina.

Brazil

In 2020, Brazilian Constitutional Law was shaped by the (mis)management of the COVID-19 crisis and attempted assaults on the country's democracy. The Supreme Court played a central role in both areas. Brazilian democracy is still resisting such threats, but not without serious concerns about its future.

Canada

The Supreme Court adopted a new "principled approach" to remedies for unconstitutional laws. Judicial declarations of invalidity will not be suspended unless there is a compelling public interest for doing so. When a suspension is granted, the claimant will not be denied an individual remedy absent compelling reason.

Cape Verde

The first CV-US SOFA Referral was decided in 2020. The Constitutional Court decided that one of its clauses was incompatible with the national sovereignty principle when interpreted as recognizing the power of US Forces to judge its members on CV soil.

Chile

The state took economic and health-related measures in the context of the Covid-19 Pandemic. The Constitutional Court rejected a constitutional amendment to allow individuals to use part of their retirement funds. The Court used the unconstitutional constitutional amendment doctrine for the first time in its history.

Costa Rica

The global pandemic and the state's response to it dominated the social, political, economic, and legal landscape of Costa Rica in 2020. The government's measures to combat the pandemic, while successful in comparison with most other countries in the world, generated significant political and litigative backlash.

Cuba

The most transcendent issue in constitutional matters in the Republic of Cuba during 2020 was the adoption of several legal provisions, as a legislative complement to the Constitution approved in 2019. These were mainly focused on defining the powers of state bodies, as well as the exercise of fundamental rights.

Cyprus

2020 was challenging for Cypriot constitutional law, especially due to the outbreak of COVID-19. The unpreparedness of the Cypriot legal order to deal with an issue of that magnitude resulted in undermining the rule of law, with the adoption of legally ambiguous measures that have not undergone effective judicial scrutiny.

Czech Republic

In 2020, the Czech government repeatedly breached basic principles of democracy and rule of law when adopting anti-pandemic measures. Legal experts and courts responded swiftly, criticizing government actions and repealing some extraordinary measures, proving that democracy and rule of law still prevail in the Czech Republic.

Denmark

Due to Covid-19, the government was initially granted significant powers to implement restrictions without having to consult Parliament. This culminated in the government causing the permanent closure of an industry through actions accused of being outside of their mandate. Towards the end of 2020, Parliament regained more control of restrictions.

Ecuador

The COVID-19 pandemic presented several challenges to Ecuador's constitutional system. The Constitutional Court played a crucial role during this health crisis, legitimizing

itself as an independent institution. It found a balance between an ever-expanding set of executive powers and the protection of Ecuador's democracy and the citizens' rights.

Egypt

In 2020, Egypt amended its laws regulating the House of Representatives, the exercise of political rights, parliamentary elections, and emergency declarations. Egypt also issued the Senate Law. New members of the Senate and the House of Representatives were elected. The majority in both institutions was reserved for political parties associated with the regime.

El Salvador

The 1983's Constitution attributed the power to decide the processes of suspension or loss of citizenship rights to the Constitutional Chamber. However, this attribution was exercised until 2020, but had no legal procedure established so it was created by the Chamber itself through its jurisprudence.

Estonia

The participation of a right-wing populist party in the government provided for a tense political atmosphere that coincided with the Covid-19 pandemic. But the State Court also had to decide issues that, in terms of state organization, have been waiting for an answer for some time.

Georgia

This report provides a brief introduction to the Georgian constitutional system; constitutional amendments; parliamentary regional elections; appointments of judges to the courts; appointment of the General Prosecutor; COVID-19 pandemic regulations, landmark judgments of the Constitutional Court in 2020; developments expected in 2021 regarding the elections; court vacancies; Constitutional Court cases, and other related events.

Germany

The year 2020 witnessed two crucial developments: first, the FCC for the first time declared a judgment of the CJEU *ultra vires* testing the cooperative relationship been the courts, and second, it acknowledged that fundamental rights apply extraterritorially thereby strengthening constitutional accountability for state activities abroad.

Ghana

The Imposition of Restrictions Act, which was passed overnight under a certificate of urgency, equipped the president with dangerously wide powers which are to be exercised on opaque grounds and outside the supervision of Parliament.

Greece

2020 will be remembered for the constitutional response to COVID-19 through measures that limited constitutional liberties. This odd year was further marked by a long-awaited decision finding several former Members of Parliament (MPs) that belonged to the neo-Nazi political party Golden Dawn, and others of participating in it, guilty of heading a criminal organization.

Hong Kong

The Chinese Central Authorities introduced a national security law for Hong Kong which stipulates principles and duties for safeguarding national security in this special administrative region, creates new security offences for the region and establishes institutions and mechanisms for their enforcement.

India

In 2020, the Supreme Court of India imposed significant restrictions on the rights to freedom of speech, expression, and association holding that public protests against a controversial amendment to India's Citizenship Law were subject to state review concerning the location, duration, and size of the protests.

Indonesia

During the COVID-19 pandemic, the Jokowi administration undermined the minimum system of checks and balances between the elected branches of government through a series of laws. At the same time, the Constitutional Court under the chairmanship of Anwar Usman, has retreated further into a deferential and non-interventionist Court.

Ireland

From comparatively typical issues about the legality, constitutionality or content of emergency public health measures to more Irish-specific questions about potential non-compliance with measures by a sitting Supreme Court judge or the sitting of Seanad Eireann; the Covid-19 pandemic was central to Ireland's constitutional issues in 2020.

Israel

2020 in Israel is characterized by a fusion of three crises: constitutional, political and COVID-19. After three elections (April 2019, September 2019, March 2020) with no clear results, a rotating government was established, accompanied by a major constitutional amendment of Basic Law: The Government.

Italy

The year 2020 brought significant innovations in the management of the constitutional trial with some amendments approved to the internal procedural rules of the Court, with the aim of opening new channels of communication with the Constitutional Court.

Japan

In 2020, Japan was confronted with the Covid-19 pandemic. The Abe cabinet, which had been eager to amend the constitution, had failed to take action against the Covid-19 pandemic and was forced to leave office giving way to the new Suga cabinet.

Kazakhstan

The President of Kazakhstan, Kassym-Jomart Tokayev, signed a decree that declared a state of emergency in the country. This unprecedented step was taken "in order to protect the lives and health of the citizens" after the World Health Organization declared COVID-19 a pandemic.

Kenya

By the end of 2020, an amendment to the Constitution in a number of important aspects has become a real possibility. The Constitutional amendment process, though led by the President, is by means of a popular initiative designed for the people. Some incoherence and some concerning provisions are a likely outcome.

Kosovo

The Constitutional Court's verdict declaring unconstitutional the decision of the Assembly of the Republic of Kosovo on the election of the Government is the most important constitutional development in 2020, The Court's decision terminated the mandate of the government and prompted new elections, which will be held in early 2021.

Luxembourg

The main discussion yet to be settled is how the Constitution should be rewritten. The transformation of the Constitution into a "living instrument" continues to hold the attention of all institutions, including the strengthened Constitutional Court. The last filed amendment proposal contains some important input from the "Waringo report" on the reform of the Grand-Ducal Court.

Malaysia

The year 2020 witnessed a change of government for only the second time in the history of Malasya. Unlike the change of government in 2018, the events of 2020 saw the federal government collapse due to internal factionalism and the appointment of a new government without calling a general election.

Mexico

The Constitution incorporated new social rights related to vulnerable groups. Now, the State must guarantee financial support to people with permanent disabilities. Moreover, people under the age of eighteen, indigenous people, Afro-Mexicans over the age of sixty-four, and people living in poverty are to be prioritized. People over the age of sixty-eight have the right to receive a non-contributory pension.

Montenegro

After an unsuccessful experiment in electing the "presiding judge," which revealed the existing polarization amongst the judges, the Constitutional Court managed to embrace the ECtHR standards. However, as a remote historian, it offered a quantum of solace that the protection of rights subsists no matter who are the parties involved.

Netherlands

As childcare benefits were unjustifiably reclaimed from about 26,000 families wrongly identified as "wilful fraudsters," the parliamentary report "Unprecedented Injustice" concluded that, in the framework of an overheated political reaction to fight fraud, fundamental principles of the rule of law had been violated, which resulted in the resignation of Rutte III government.

New Zealand

As with the rest of the globe, COVID-19. How New Zealand responded to this threat casts new light on the role of its various constitutional actors, practices and principles. Judicial oversight of that response produced what may be this generation's most important public law case.

Nigeria

The persistence of electoral malfeasance in Nigeria imperils the nation's electoral integrity, casting a dark cloud over the 2023 general elections. The brutal repression of peaceful mass protests during the last quarter of 2020 lowers Nigeria's democratic performance. Though there is growing judicial assertiveness, key indicators of judicial independence and democracy remain unsatisfactory.

North Macedonia

Dealing with the unanticipated health and economic crises caused by the pandemic represented the biggest challenge for North Macedonia in 2020. On the positive side, the country became a NATO member in March 2020. However, the beginning of EU membership negotiations for North Macedonia has been stalled by Bulgaria.

Palestine

2020 has seen the Palestinian government enact emergency measures in order to face the pandemic. This suspension of constitutional norms, however, is cause for concern in Palestine due to its previous track record in using emergency measures inappropriately. Also, this year an interesting constitutional awareness campaign has emerged.

Paraguay

In Paraguay, the year 2020 was dominated by the COVID-19 pandemic. Based on a dubious interpretation of the Constitution the Executive Branch has taken a central role in the legislative, administrative, and financial activities while also establishing important restrictions to fundamental rights via executive decrees to confront the crisis.

Peru

The constitutional landscape of Peru is marked by the political scandals of the past. The tensions between the executive and legislative branches continued to be the subject of the Constitutional Court's work in 2020, which had to decide, for example, on the legality of the dissolution of Congress.

Poland

The government's approach to tackling the COVID-19 pandemic in 2020 by means of by-laws posed a direct threat to civil and human rights in Poland. Other important factors including the further undermining of the judiciary's independence, also confirmed an ongoing democratic breakdown.

Portugal

In Portugal, 2020 was strongly influenced by the Covid-19 pandemic and the measures implemented to deal with the sanitary crisis. The constitutional jurisprudence produced interesting rulings concerning not only those measures but also the principle of the precedence of EU law, tenants' right of pre-emption and the right of appeal.

Romania

In Romania, 2020 was an electoral year and Covid-19 was a game-changer at the political and constitutional levels. A permanent conflict between Parliament and Government - supported by a more politically active President, manifested. The Constitutional Court's decisions regarded less constitutional conflicts and had an increasing number of dissenting opinions.

Russia

Notwithstanding the pandemic, a deep economic crisis, and the rise of social protests, 2020 has been marked by the adoption of the "great" constitutional reform. As can be seen in the adjudication of the draft amendments, the role of the Constitutional Court is confirmed as a supporter of the rulers' choices.

Serbia

The parliamentary elections, initially planned for 26 April, were finally held on 21 June and resulted in a less pluralistic political representation in the National Assembly. The Constitutional Court received 66 initiatives for assessing the constitutionality of emergency measures adopted in order to mitigate the effects of the COVID-19 outbreak.

Singapore

Developments in 2020 portend new possibilities for constitutionalism in Singapore. A landmark general election bolstered opposition presence and led to the formal recognition of the Leader of the Opposition in Parliament. COVID-19 brought about profound changes to social interaction, economic activity and political competition potentially reshaping state-citizen relations and constitutionalism.

Slovakia

The constitutional development in Slovakia in 2020 was heavily influenced by three factors which determined the agenda for the year in terms of both constitutional reform and case law of the Constitutional Court, namely, the general election, which resulted in a landslide victory of the opposition party; the COVID-19 pandemic; and the revelation of endemic corruption in the justice system.

Slovenia

2020 was a tumultuous year for Slovenia. It was marked by a profound public health crisis and deep political cleavages. This was also reflected in the case law of the Constitutional Court which dealt with several important cases pertaining to the separation of powers, EU law and Covid-19 crisis measures.

South Africa

The party proportional representation system of South Africa, introduced in 1994 as a transitional arrangement to be reviewed in due course, was found to be unconstitutional because it excluded independent candidates from participation in elections. Parliament is required to rectify the legislation within two years.

Spain

In the controversial judgement 190/2020 the Constitutional Court determined that offending a symbol of the state, the flag, was not protected by freedom of expression. This ruling is expected to be reviewed by the European Court of Human Rights, as has happened with previous rulings around freedom of expression.

Sweden

The Covid-19 pandemic put the Swedish constitution to a stress test and the nature of the constitution was one of the reasons given to the Swedish corona strategy, which entails soft law measures rather than strict lock downs and criminal law sanctions for violations against quarantine rules and lockdowns.

Switzerland

Based upon the severity of an epidemic, the Swiss Epidemic Act of 2012 sets out a three-tier approach to transfer powers from the constituent states to the Federation and from the Federal Parliament to the Executive branch of the Federal Government. COVID-19 highlighted that the alignment of Switzerland's political system towards consensus facilitates eluding political responsibility.

Taiwan

The result of the elections in January determines Taiwan's constitutional development in 2020. While extending and deepening the transitional justice-centered reform agenda,

it puts constitutional change on the reform agenda after a long lull. Paralleling uncertainties surrounding constitutional amendment, mixed scenes of constitutional development emerge in the general constitutional landscape.

Thailand

The year 2020 will be remembered for the youth uprising. Fed up with corruption and human rights violations, people demanded the restoration of democracy, which has been in decline since 2006. Above all, protesters would like to settle the long-standing dispute between the monarchy and democracy for good.

Tunisia

In Tunisia, 2020 can be labeled as the year of government formation and reshuffle. In a troublesome year for the entire planet with the outbreak of a global pandemic, Tunisia began 2020 struggling to form a government to end it with a new government formation process.

Turkey

The Turkish Government used the pandemic to double down on autocracy. It also continued its campaign to take control of the TCC. Several cases delivered in 2020, such as Demirtas decided by the ECtHR's Grand Chamber and Turan adjudicated by the TCC, are critical landmarks regarding Turkey's commitment to human rights and the rule of law.

Ukraine

In contrast to 2019, the reported period was not an active year in terms of constitutional reform. The Parliament did not pass any constitutional amendments. Nevertheless, many national constitutional design challenges were in focus because of the Constitutional Court's activity in 2020.

Venezuela

2020 has been a year of frustrated efforts to bring about a democratic transition in Venezuela, and of further continuity of Nicolas Maduro's authoritarian project during the pandemic. This has been a period marked by dueling presidencies with Maduro acting as *de facto* President, while more than 50 countries recognized Juan Guaidó as president of Venezuela.

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