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Richard Albert, David Landau, Pietro Faraguna and Giulia Andrade
Editors









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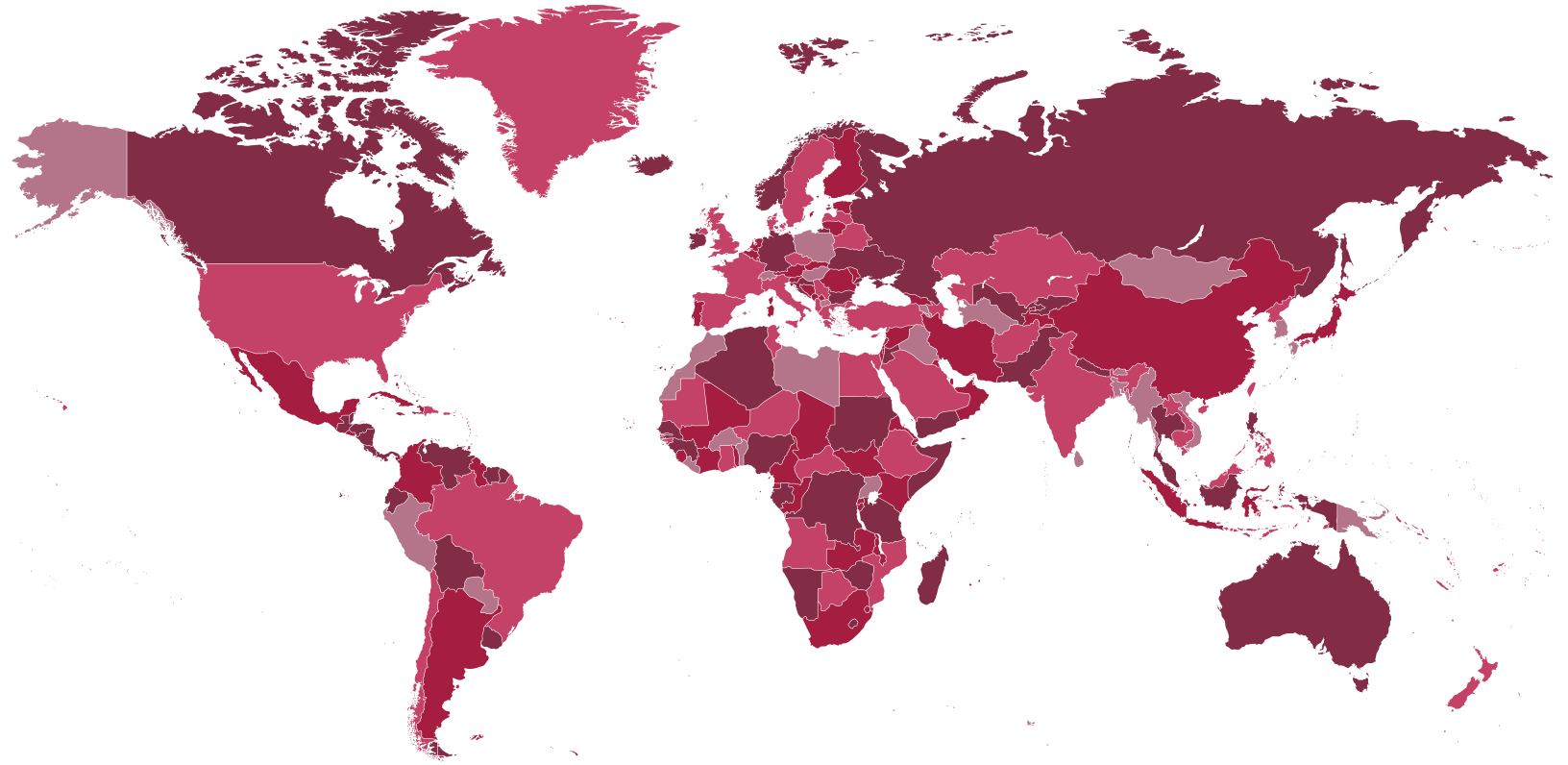
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INTRODUCTION



The World Continues to Grow Smaller

Richard Albert, David Landau, Pietro Faraguna and Giulia Andrade

When we created the Global Review of Constitutional Law in 2016, our aspiration was to make the world smaller and more familiar, by making the high court case law of the jurisdictions of the world available in English.

Seven years later, we continue to make the world smaller, and hope to make it ever more in the years ahead.

This edition of the Global Review is special for two reasons.

First, it marks the second year of our new relationship with our publisher, Edizioni Università di Trieste (EUT), an outstanding academic press that has partnered with us to produce this magnificent resource for constitutional scholars around the world.

Second, we have a new co-editor on the team: Giulia Andrade, a scholar and attorney in Brazil. Giulia brings an abundance of academic experience, complemented by her practical experience as a lawyer. We are grateful to have her on the team, and we look forward to many years together with her in this global collaboration.

As always, the principal purpose of the Global Review remains the same this year: 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 has been useful to judges, academics, elected and appointed officials, and also to laypersons and beyond. This, for us, makes it all worth the effort.

We close with a few thanks. First, to Mauro Rossi of EUT for publishing this splendid book. Second, to Elena Tonzar for her creativity and care in designing this beautiful volume. Third, to the Constitutional Studies Program at the University of Texas at Austin for sponsoring the publication of this book.

And most of all, we thank our contributors for their outstanding reports. It is because of them that this book is possible. We exclaim our enthusiastic thanks and gratitude to them.

We invite any scholars and judges interested in producing a report for the 2023 edition to contact us. And, of course, we always welcome feedback, recommendations, and questions from our readers.

Happy reading!

CONTRIBUTORS

Amal Sethi | *Afghanistan*
University of Hamburg

Sumit Chatterjee | *Afghanistan*
Karnataka High Court

Aditi Vishwas Sheth | *Afghanistan*
National Law School of India University

Sofia Seddiq Zai | *Afghanistan*
University of Hamburg

Arta Vorpsi | *Albania*
University of Tirana

Delfina Beguerie | *Argentina*
Yale Law School

Inés Jaureguiberry | *Argentina*
Universidad de Buenos Aires

María Victoria Ricciardi | *Argentina*
Universidad de Buenos Aires

Anahit Manasyan | *Armenia*
Yerevan State University

Marina Maqyan | *Armenia*
Yerevan State University

Ashleigh Barnes | *Australia*
Macquarie University

Joshua Aird | *Australia*
University of New South Wales

Anna Gamper | *Austria*
University of Innsbruck

Muhammad Ekramul Haque | *Bangladesh*
University of Dhaka

Ali Mashraf | *Bangladesh*
East West University

Nicole D. Foster | *Barbados*
University of the West Indies

Grigory A. Vasilevich | *Belarus*
Belarusian State University

Tatiana S. Maslovskaya | *Belarus*
Belarusian State University

Luc Lavrysen | *Belgium*
Ghent University

Jan Theunis | *Belgium*
Hasselt University

Jurgen Goossens | *Belgium*
Utrecht University

Sien Devriendt | *Belgium*
Open University (the Netherlands)

Benjamin Meeusen | *Belgium*
Ghent University

Viviane Meerschaert | *Belgium*
Belgian Constitutional Court

Cristina Pazmiño | *Bolivia*
Constitutional Court of Ecuador

Maja Sahadžić | *Bosnia and Herzegovina*
Utrecht University

Harun Išerić | *Bosnia and Herzegovina*
University of Sarajevo

Estefânia Maria de Queiroz Barboza | *Brazil*
University of Paraná and Uninter

Gustavo Buss | *Brazil*
University of Paraná

Renato Saeger Magalhães Costa | *Brazil*
University of Queensland

Bruno Santos Cunha | *Brazil*
Federal University of Pernambuco

José Pina-Delgado | *Cabo Verde*
Instituto Superior de Ciências Jurídicas e Sociais

Liriam Tiujo-Delgado | *Cabo Verde*
Instituto Superior de Ciências Jurídicas e Sociais

Carlos Brito | *Cabo Verde*
Instituto Superior de Ciências Jurídicas e Sociais

Catalina Salem | *Chile*
Universidad del Desarrollo

José Manuel Díaz de Valdés | *Chile*
Universidad del Desarrollo

Marisol Peña | *Chile*
Universidad del Desarrollo

Nicolás Enteiche | *Chile*
Universidad del Desarrollo

Sergio Verdugo | *Chile*
IE University - Universidad del Desarrollo

Chun Peng | *China*
Peking University

Yuxue Fang | *China*
University of Oxford

Jorge Ernesto Roa-Roa | *Colombia*
Externado University

Marcelo Lozada Gómez | *Colombia*
University of Oxford

María Alejandra Osorio Alvis | *Colombia*
Inter-American Academy of Human Rights

Bruce M. Wilson | *Costa Rica*
University of Central Florida

Olman A. Rodríguez | *Costa Rica*
Constitutional Chamber of the Supreme Court of Costa Rica

Sigrid Morales Carrasco | *Costa Rica*
Constitutional Chamber of the Supreme Court of Costa Rica

Evelyn Villarreal | *Costa Rica*
Consejo Nacional de Rectores

José Walter Mondelo García | *Cuba*
University of Oriente

Julio César Guanche Zaldívar | *Cuba*
Independent Scholar

Jonas Gentil | *São Tomé and Príncipe*
University of Sao Tome

J. Jhunior G. Ceita | *São Tomé and Príncipe*
Institute of Law and Citizenship of São Tomé

Mikele Schultz-Knudsen | *Denmark*
University of Copenhagen

Ana Morales | *Ecuador*
Constitutional Court of Ecuador

Arturo Rafael Rivas | *Ecuador*
Constitutional Court of Ecuador

Roberto Eguiguren | *Ecuador*
Constitutional Court of Ecuador

Ahmad A. Lotief | *Egypt*
The Egyptian Council of State

Eslam M. Saleh | *Egypt*
The Egyptian Council of State

Ahmed Rashwan | *Egypt*
Egyptian Public Prosecution

Manuel Adrián Merino Menjívar | *El Salvador*
Gerardo Barrios University

Paloma Krõõt Tupay | *Estonia*
University of Tartu

Katariina Kuum | *Estonia*
University of Tartu

Joosep Kuusk | *Estonia*
University of Tartu

Alemayehu Weldemariam | *Ethiopia*
Mekelle University

Assefa Fiseha | *Ethiopia*
Addis Ababa University

Corinne Luquiens | *France*
Constitutional Council of France

Nefeli Lefkopoulou | *France*
Sciences Po Law School

Eirini Tsoumani | *France*
Sciences Po Law School

Guillaume Tusseau | *France*
Sciences Po Law School

Malkhaz Nakashidze | *Georgia*
Batumi Shota Rustaveli State University

Stefan Martini | *Germany*
Kiel University

Paulina Starski | *Germany*
University of Freiburg

Alkmene Fotiadou | *Greece*
Centre for European Constitutional Law

Andrea Rabanales de la Roca | *Guatemala*
Universidad San Carlos de Guatemala

Alejandro Morales Bustamante | *Guatemala*
Universidad Rafael Landívar

Rafael Jerez Moreno | *Honduras*
Honduras Business Organization

Pui-yin Lo | *Hong Kong*
Nanyang Chambers

Zoltán Pozsár-Szentmiklósy | *Hungary*
Eötvös Loránd University

Bernadette Somody | *Hungary*
Eötvös Loránd University

Evelin Burján | *Hungary*
Eötvös Loránd University

Swapnil Tripathi | *India*
University of Oxford

Stefanus Hendrianto | *Indonesia*
Pontifical Gregorian University

Fritz Edward Siregar | *Indonesia*
Indonesia Jentera School of Law

Yaniv Roznai | *Israel*
Reichman University

Adi Tal | *Israel*
Reichman University

Gal Mechtinger | *Israel*
Reichman University

Emanuel Broza | *Israel*
Reichman University

Pietro Faraguna | *Italy*
University of Trieste

Michele Massa | *Italy*
University of the Sacred Heart

Daria de Pretis | *Italy*
Constitutional Court of Italy

Ayako Hatano | *Japan*
University of Oxford

Kayoko Ishihara | *Japan*
Kyoto University

Masahiko Kinoshita | *Japan*
Kobe University

Ryo Ogawa | *Japan*
Tokyo Metropolitan University

Mayu Terada | *Japan*
Hitotsubashi University

Kento Yamamoto | *Japan*
University of Kitakyushu

Tomoshi Yoshikawa | *Japan*
Osaka University

Tioko Emmanuel Ekiru | *Kenya*
High Court of Kenya

Jill Cottrell Ghai | *Kenya*
Katiba Institute

Visar Morina | *Kosovo*
University of Prishtina

Florent Muçaj | *Kosovo*
University of Prishtina

Sharaf Al-Sharaf | *Kuwait*
Kuwait University

Nawaf Alqahtani | *Kuwait*
Taibah University

Jolita Miliuvienė | *Lithuania*
Mykolas Romeris University

Jörg Gerkrath | *Luxembourg*
University of Luxembourg

Andrew James Harding | *Malaysia*
National University of Singapore and University of Reading Malaysia

Dian A. H. Shah | *Malaysia*
National University of Singapore

Wilson Tay Tze Vern | *Malaysia*
Taylor's University

Mohd Nazim Bin Ganti Shaari | *Malaysia*
Universiti Teknologi MARA

Tonio Borg | *Malta*
University of Malta

John Stanton | *Malta*
City, University of London

Antonia Baraggia | *Mongolia*
University of Milan

Geser Ganbaatar | *Mongolia*
University of Milan

Bayar Dashpurev | *Mongolia*
Max Planck Institute for Social Anthropology

Saloua Zerhouni | *Morocco*
Mohammed V University

Kawtar El Moutez | *Morocco*
Moroccan House of Representatives

Neha Tripathi | *Nepal*
Maharashtra National Law University

Anubhav Kumar | *Nepal*
Supreme Court of India

Sachi Chopra | *Nepal*
High Court of Delhi

Jurgen Goossens | *Netherlands*
Utrecht University

Gert-Jan Leenknegt | *Netherlands*
Tilburg University

Claire Loven | *Netherlands*
Utrecht University

Eva van Vugt | *Netherlands*
Masastricht University

Andrew Geddis | *New Zealand*
University of Otago

Solomon Ukhuegbe | *Nigeria*
Independent Scholar

Gabriel Arishe | *Nigeria*
University of Benin

Jasmina Dimitrieva | *North Macedonia*
University of Goce Delcev

Lydia Brashear Tiede | *North Macedonia*
University of Houston

Marva Khan | *Pakistan*
Lahore University of Management Sciences

Rodrigo Ayala Miret | *Paraguay*
Yale Law School

Giovanna Parini | *Paraguay*
University of Pennsylvania

César Landa Arroyo | *Peru*
Universidad Católica del Perú

Maria Bertel | *Peru*
University of Graz

Luis A. López Zamora | *Peru*
Max Planck Institute Luxembourg

Agnieszka Bień-Kacała | *Poland*
University of Szczecin

Anna Tarnowska | *Poland*
Nicolaus Copernicus University

Wojciech Włoch | *Poland*
Nicolaus Copernicus University

Michał Kołbuc | *Poland*
University of Szczecin

Marta Vicente | *Portugal*
Universidade Católica Portuguesa

Catarina Santos Botelho | *Portugal*
Universidade Católica Portuguesa

Ana Teresa Ribeiro | *Portugal*
Universidade Católica Portuguesa

Bianca Selejan-Guțan | *Romania*
University of Sibiu

Elena-Simina Tănăsescu | *Romania*
University of Bucharest

Kamil Baraník | *Slovakia*
University of Matej Bel

Marek Domin | *Slovakia*
Comenius University Bratislava

Tomáš Ľalík | *Slovakia*
Comenius University Bratislava

Samo Bardutzky | *Slovenia*
University of Ljubljana

Mohor Fajdiga | *Slovenia*
University of Ljubljana

Jaka Kukavica | *Slovenia*
University of Ljubljana

Ana Samobor | *Slovenia*
University of Ljubljana

María Luisa Balaguer | *Spain*
Constitutional Court of Spain

Camino Vidal | *Spain*
University of Burgos

Enrique Guillén | *Spain*
University of Granada

Argelia Queralt | *Spain*
University of Barcelona

Fernando Reviriego Picón | *Spain*
Uned University

Leonardo Álvarez | *Spain*
University of Oviedo

Anni Carlsson | *Sweden*
Uppsala University

Johannes Reich | *Switzerland*
University of Zurich

Jau-Yuan Hwang | *Taiwan*
Constitutional Court

Ming-Sung Kuo | *Taiwan*
University of Warwick

Hui-Wen Chen | *Taiwan*
University of Warwick

Khemthong Tonsakulrungruang | *Thailand*
Chulalongkorn University

Yacine Ben Chaabane Mousli | *Tunisia*
University Paris Panthéon-Assas

Serkan Köybaşı | *Turkey*
Bahçeşehir University

Volkan Aslan | *Turkey*
Istanbul University

Ülkü Uykun | *Turkey*
Istanbul University

Efe Eroğlu | *Turkey*
Bahçeşehir University

Adam Kyomuhendo | *Uganda*
Makerere Institute of Social Research

Oleksandr Marusiak | *Ukraine*
SMU Dedman School of Law

Sergiy Panasyuk | *Ukraine*
Charles University

Volodymyr Kochyn | *Ukraine*
Constitutional Court of Ukraine

Chris Monaghan | *United Kingdom*
University of Worcester

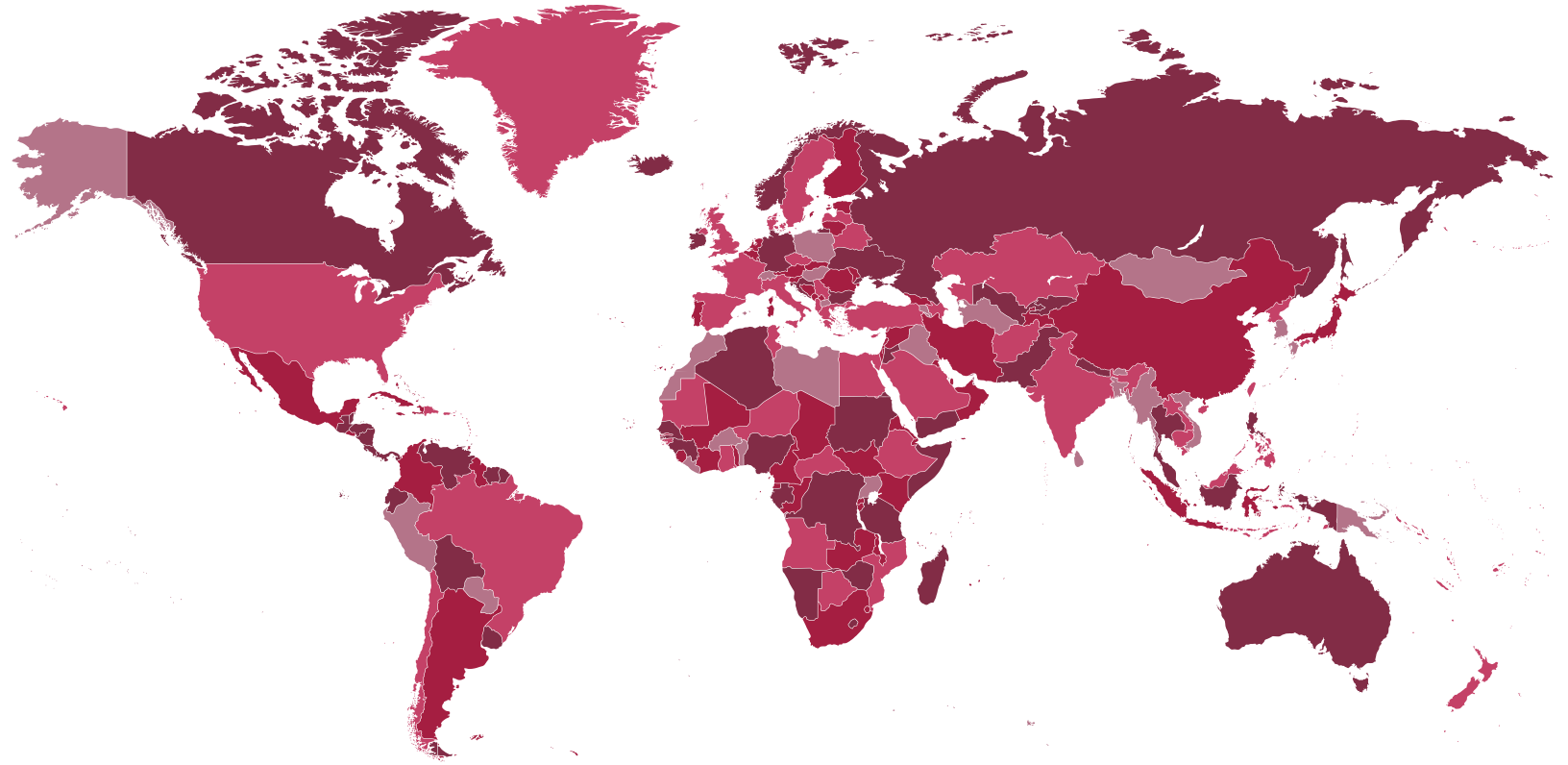
Eduardo G. Esteva Gallicchio | *Uruguay*
University of Montevideo

Carlos García-Soto | *Venezuela*
Universidad Monteávila Law School

Daniela Urosa | *Venezuela*
Boston College Law School

Raúl A. Sánchez Urribarrí | *Venezuela*
La Trobe University

JURISDICTIONAL REPORTS





Afghanistan

Amal Sethi, *The University of Hamburg*

Sumit Chatterjee, *Karnataka High Court*

Aditi Vishwas Sheth, *National Law School of India University*

Sofia Seddiq Zai, *University of Hamburg*

I. Introduction

Last year's report was divided into two halves: constitutional law before (pre-August 2021) and after (post-August 2021) the Taliban came into power. When that report was written, the Taliban had only been in power for about four months. Hence, last year's report contained much speculation and conjecture as it pertained to the Taliban, based on early signs and past experiences of their government in the mid-1990s. However, we now have more than a year and a half of Taliban governance to observe and study. We are, therefore, better positioned to comment on constitutional law under the Taliban in this year's report.

In 2022, the Taliban overhauled the constitutional order established by Afghanistan's previous regime. They also started setting up their own law and justice system. Thus, constitutional law in Afghanistan today and its enforcement are extremely different from what they were before the fall of the former Western-backed government. This year's report hopes to explain these developments.

II. Major Constitutional Developments

1.The Taliban's Constitutional Order

Last year's report discussed the establishment by the Taliban of an interim government similar to the one they established when previously in power. This interim government contains a shadow cabinet (whose members, in turn, head various ministries). This shadow government answers to a leadership council headed by the Amir, currently Hibatullah Akhundzada. The temporary arrangement has continued into 2023, and no timetable has been put forward for when a permanent government should be expected. Bar minor internal reshuffling and the addition of a handful of new members, the interim government, and top positions within it remain as they were at the time of last year's report.

Today, we can confidently say there is a strong reason the Taliban are continuing with this temporary setup. It is because there are currently significant internal divides within the Taliban, and not setting things in stone allows them to make tweaks to accommodate internal divides. Additionally, keeping things flexible allows the Taliban to make changes in response to global actions in ways that might help them attain a degree of international recognition—which is extremely vital to their regime's sustenance.

This leads us to another issue that the previous year's report did not address: the constitution under which the Taliban are operating. Since coming to power, the Taliban have been highly ambivalent on this front. Various Taliban members and spokespersons have given contradictory statements on the issue. Initially, the Taliban stated that the 2004 Constitution had been suspended and that they would temporarily govern under the provisions of the 1964 Constitution that are 'not in conflict with Sharia law.' Later, they changed their stance, stating that Afghanistan's 2004 Constitution was still in force but that its presidential and parliamentary provisions had been suspended.

In another publication, the authors of this report have highlighted the many reasons why this back and forth might have occurred, from the Taliban not wanting to give recognition to the 2004 Constitution by formally repealing it (as they considered it illegitimately imposed in the first place) to wanting to garner international acceptability for their regime (given that the 2004 Constitution was one of the most liberal in the Islamic World).[1] Following on from the contradictory statements on the 2004 Constitution, a few months after coming to power, a spokesman for the Taliban stated that they planned to form a commission within 2022 to draft a new Islamic Constitution. However, no such commission was formed that year. Moreover, despite what the Taliban claim regarding the temporary constitution, they are most certainly not operating under either the 1964 Constitution or the 2004 Constitution. Both these constitutions contained several features of modern constitutionalism, which are entirely absent in Afghanistan currently.

In fact, it is safe to say that the Taliban are *de facto not operating under any written constitution. Although they are highly opaque in their decision-making, it seems that the Taliban's Amir enacts important legislation via decrees.*[2] At the same time, less significant matters are legislated via the cabinet and ministries in the form of resolutions or directives.[3] The reality is that Afghanistan today operates under an 'unwritten constitution' comprising of decrees, directives, and informal codes enforced with intimidation and fear.[4] This has effectively ended a tradition of written constitutionalism in the country, which lasted for more than a century.[5]

Regarding the content of this 'unwritten constitution,' we mentioned last year how the Taliban stated that they would govern in accordance with Sharia. We also stated that what this entails depends on one's interpretation of Sharia. Moreover, as was mentioned last year, while Sharia can illuminate a wide range of subjects, including trade and economics, it offers no guidance concerning some of the more complex legislature required in modern states. That said, this year, we are better positioned to discuss the Taliban's version of Sharia, which is based on the Hanafi School of Islam, one of the four schools of Islam.

Although it is possible to interpret Hanafi-based Sharia in a modern fashion, the Taliban's version relies on pre-modern, medieval jurisprudential texts.[6] Furthermore, the Taliban's Ministry of Justice instituted a committee to review all existing laws drafted during the previous regime and assess their compatibility with Sharia. This committee was also vested with the power to remove statutes they found repugnant to Islamic dictates or the Hanafi school of jurisprudence. With 2022 now over, this committee has yet to finish its review, and much of the legal codes from the previous regime remain formally 'suspended'.[7] In practice, however, outside the judiciary (which will be covered in more detail later in this report), most administrative laws are still in use to keep bureaucracy and revenue collection running.[8]

2. The Taliban's Judicial System

The Taliban place significant importance on establishing a society based on Sharia. However, the quick pace at which they came into power in August 2021 has not yet given them enough time to pass sufficient Sharia-based laws and regulations. Furthermore, internal divides within the Taliban have proved an impediment to passing such laws and regulations (women's rights are a prime example of a contentious topic under the Taliban).[9] Thus, the judiciary in Afghanistan, particularly the Supreme Court, has assumed a heightened place in helping implement the Taliban's vision of Sharia.

In the current judicial setup of Afghanistan, the Supreme Court sits at the apex. Other courts under its supervision include lower provincial, city-level, and military courts. Upon the Taliban coming to power, judges from the previous regime were not only dismissed, but there were reports that many of them were being persecuted. The courts of Afghanistan are being packed with Taliban loyalists at a rapid pace. Although unsurprising, it is worth noting that all the judges appointed by the Taliban are male. Hizbullah Ibrahimi, the head of the Taliban Supreme Court's research and inspection directorate, has openly dismissed the need for female judges, alleging that they lack knowledge about jurisprudence and Sharia principles.[10]

On coming to power, the Taliban also dissolved the Afghanistan Independent Bar Association (AIBA) by storming its offices.[11] The former AIBA has since been incorporated into the Ministry of Justice. They have also required about 6,000 bar members to take and pass a new Taliban-approved entry exam conducted under the auspices of their Ministry of Justice.[12] This has been justified under the pretext of preventing bribery and corruption. Under the new entry exam, women lawyers have been disqualified from renewing their licenses; therefore, they can no longer practice law.[13] Similarly, the Taliban fired all prosecutors when they took control of Afghanistan. While some male prosecutors were reinstated in the months thereafter, all remaining prosecutors were ordered to halt their work in 2022 and transfer investigations to the courts.[14]

In accordance with the Taliban's top priority of ushering in a society based on Sharia, Amir Hibatullah Akhundzada has directly ordered the courts to issue and enforce decisions based on Hanafi law to the fullest possible extent.[15] Lower courts do not have the right to decide what Hanafi law is or requires;[16] instead, when faced with a legal question, they must make a referral to the Supreme Court.[17] The Supreme Court then determines the content of the Hanafi law and communicates its decision to the lower courts and other relevant authorities.[18] The Supreme Court's responses to such referrals also become part of the applicable law in the Taliban state.[19] The Supreme Court decided on almost 630 referrals in 2022,[20] playing an unprecedentedly transformative role in Afghan society.[21]

The Taliban have been expanding the court system primarily to ensure domestic support for their rule. Indeed, support for the Taliban has always been driven more by practical considerations than theoretical ones.[22] Nationally, the Taliban have championed law and order and the curbing of corruption—something the previous Western government was ineffective at doing. Even while in exile, maintaining a degree of law

and order and resolving disputes swiftly was one thing the Taliban government succeeded at in areas under their control.[23] Many local Afghans believed the Taliban was far better at this than the Western-backed government ever managed.[24]

III. Constitutional Cases

In previous reports on Afghanistan, we mentioned how Afghanistan's judiciary under the Western-backed regime was one of the least transparent public institutions in the world, providing hardly any details regarding its decisions and work. Things have, admittedly, changed on that front. The Supreme Court and the lower courts, under its supervision, publish detailed information and statistics about their work and decisions on both their social media pages and their websites.

A pertinent question arises: what explains this surprising move by an otherwise rudimentary authoritarian regime that is generally very non-transparent, especially considering that a large share of the Afghan population still lacks internet access? The situation is more complex than might appear at first glance. Although internet access is low in Afghanistan as a whole, with only about 20 percent of the population able to access the internet, in urban areas, internet use is relatively common (particularly the use of social media). It is these urban areas where the Taliban has no history of ruling—nor are they popular there. Instead, the Taliban's strongholds are in the rural areas where they held *de facto control even when the Western-backed regime governed the country. In fact, arguments have been made that the Taliban's court system while they were in exile was a large part of their maintaining relevance in parts of Afghanistan for all those years.*[25] Now, the Taliban are seeking to replicate their court system in urban areas and showcase to people how it is better than the previous Western-backed one and how law and order in the country is improving, and corruption is decreasing. In sum, the Taliban's embrace of the Internet aims to disseminate the work of its public institutions (particularly its courts).

It is for the above-mentioned reasons that the Taliban are now highly fond of providing detailed numbers of cases handled and resolved. For example, a typical press statement mentions the number of cases submitted to a particular court in a given time frame as well as the number of pending cases on its docket. It also states how many have been resolved and how many remain. At a more general level, one of the online statements issued by the Supreme Court asserted that the Taliban's judicial system had resolved 43,000 cases in the past year.

Nevertheless, even though the Taliban have improved the transparency of the courts, they do not publish the entire decisions nor provide rationales regarding these. At best, their public statements make vague invocations to supposedly Islamic principles. Moreover, the statements generally provide details on a bundle of cases at once rather than a singular case, which all typically entail the enforcement of the Taliban's version of Sharia law (or, at least, law and order broadly). It is unlikely that the courts under the Taliban are currently handling macro-constitutional issues. As was stated in last year's report, significant constitutional matters are generally handled in an authoritarian manner by the Taliban leadership (and at times by the Amir acting alone).

To understand what these court statements look like, consider one issued by the Supreme Court after the first-time individuals were punished in public under the current regime.[26] The statement mentions that 14 criminals (three of which were women) were punished for crimes such as theft, adultery, and other kinds of moral corruption. It also mentions that the sentence, described as an execution of Allah's will, was pronounced in the presence of government officials, religious scholars, and tribal elders. The reason the Taliban are limiting their court statements to certain types of offenses and keeping them brief is that, as they govern a primitive authoritarian state, it serves no purpose for them to do otherwise: keeping the populace updated on their supposedly successful enforcement of Sharia, maintaining law and order, and decreasing corruption, is all that is needed.

All this makes it hard for legal scholars to analyze Afghan cases (especially as they pertain to constitutional law). However, we can extrapolate based on the information in the public domain and discuss certain cases that might have constitutional implications. One obvious observation is that the types of punishments imposed by the Taliban under its pre-modern version of Sharia would, in most jurisdictions practicing modern constitutionalism, raise questions regarding issues such as cruel, human, and degrading punishment; the right to life; and the right to a fair trial.

However, before discussing a few cases, we need to understand the three types of crimes in Islamic Law: Hudud, Qisas, and Tazir. Hudud are crimes against God and include robbery, immoral sexual intercourse, blasphemy, and the consumption of alcohol.[27] The harsh punishment for these crimes, as fixed by the Quran or Sunnah (that is, the traditions and practices of the Prophet Muhammad), include flogging, death by stoning, and amputation of the hands or feet.[28] Tazir are those offenses not covered by Hudud, which are left to the court's discretion.[29] While punishment for Tazir crimes can also be severe, even including execution, Islamic courts are often careful not to impose penalties harsher than those prescribed for Hudud offenses. Qisas, finally, are crimes against a person, such as homicide and battery.[30] Punishment for these crimes is retributive in nature and set by law.[31] If a court approves, the victim (or their next of kin) can waive retribution by accepting financial compensation or pardoning the accused.[32] Under Islamic law, the evidentiary standards are incredibly high, and harsh punishments are rarely given for crimes.[33] Moreover, Islamic law generally states that harsh punishments should be avoided if there is any doubt, and leniency should be afforded to offenders whenever possible.[34] Generally, the purpose of listing harsh punishments in Islamic law is to have a preventive effect.[35]

Amir Akhundzada has ordered judges to implement Islamic law in criminal cases and to carefully investigate cases of kidnapping, robbery, and sedition. He has also asked the courts to implement and execute retributive punishments where the crimes required

them. Previously, the Taliban stated that they would govern moderately. As noted, even when a regime implements Islamic punishments, given the high evidentiary standards, there is tremendous scope to be lenient; however, the early decisions of the Taliban do not point towards a desire to govern leniently.

When it comes to Hudud punishments, as mentioned by Pasarlay, it seems that the Supreme Court must certify such punishments when they are decreed by lower courts and enforce them.[36] This might be because of the perceived severity in Islamic Law of so-called crimes against God. In the first instance of the Taliban enforcing such a punishment in April 2022, seven men were publicly lashed 35 times for consuming and selling alcohol.[37] Such punishments are considered excessive even in other contemporary societies that base their system on Islamic law and seem to signal a return to the punishments of the Middle Ages. Furthermore, the statements on social media regarding such punishments are generally accompanied by pictures of the audiences gathering in large stadiums to witness the enforcement of the punishments.

Considering the orders of the Amir, it is no surprise that the Taliban are also aggressively implementing punishments for Qisas crimes. Regarding Qisas crimes and punishments, two things might stand out for the global readers of this report. The first is how they are being carried out. For example, the Taliban have brought back public executions and have been allowing such punishments to be carried out by family members of the victims. In one case of a man charged with murder, the execution was done by the victim's father.[38] When human rights groups and journalists raised concerns about such public executions, Bilal Karimi, a deputy spokesperson for the Taliban, resisted, claiming that the executions are being carried out after due investigation and assessment in line with Islamic law.[39] Secondly, the Taliban have been convicting people of crimes carried out even before they first came into power in the mid-1990s. For example, in a much-publicized case, Abdul Qayyum was found guilty of the 1992 murder of the father of Gul Mohammad, deputy governor of the northern province of Jawzjan.[40] However, in this case, Mohammad forgave Qayyum; as a result, Qayyum was spared a retributive punishment.[41]

The Taliban have been equally open to enforcing Tazir punishments. Indeed, the bulk of their punishments seem to fall under this category. This might be because classical Islamic law texts do not cover many modern-day crimes. Consider one of the statements of the Supreme Court on dealing with such a punishment, which mentions how Tazir punishment was inflicted on 27 convicts (eighteen men and nine women) in the sports stadium of Charikar City for the crimes of false court testimony, forging official documents, buying and selling narcotics, and running away from home.[42]

Two final developments that might raise constitutional implications in other jurisdictions are convictions by Afghan military courts and the country's handling of divorce cases. Military courts in Afghanistan were traditionally authorized to investigate complaints against the staff of the defense and interior ministries and the intelligence department.[43] Hierarchically, the decision of a military court has to be confirmed by the other three levels of courts (primary, appellate, and the Supreme Court).[44] However, a military court recently overstepped its traditional mandate of investigating defense-related matters by trying Khalid Qaderi, a poet and journalist, for posting offensive content on Facebook, whereupon he was sentenced to one year in prison.[45] Qaderi was not provided with legal representation and was forced to renounce his right to appeal.[46]

Regarding divorce cases, the Supreme Court has been particularly proud of the reduction therein. However, local accounts tell of women approaching courts in search of a divorce, armed with evidence of domestic violence and cruelty, only to be cursed at by judges.[47] The judges dismissed the women with statements to the tune of: 'there is no such thing as a divorce in our court,' and 'your husband has the right to treat you however he likes because you are his wife. Even if he kills you, you have no right to get a divorce.'[48]

IV. Looking Ahead

It appears that the Taliban will be in power for a while. The unfolding of 2023 will give us more insights into how they seek to govern (and whether they can resolve their internal disputes). This will most certainly have tremendous implications for constitutional law in Afghanistan. For example, how internal disputes are resolved within the Taliban can have repercussions on how moderate or stringent they might be in their implementation of Islamic Law. Although the bulk of the internal divides within the Taliban are due to different power factions,[49] disputes also exist regarding moderate or extremist interpretations of Islamic Law.[50] It is also possible that the Taliban will make some concessions to Western countries that have halted billions in aid to Afghanistan and assume a comparatively moderate stance.

It is doubtful that constitutional law in Afghanistan will become comparable to any modern regime in the near future. Still, studying situations like that in Afghanistan can provide insights into constitutionalism in non-traditional societies (particularly authoritarian ones). Though it might not be a version of constitutionalism of which many of us approve, it is still worth investigating and understanding. In 2023, we will likely be able to delve deeper into Afghanistan's constitutional law and its 'unwritten constitution'.

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Albania

Arta Vorpsi, *PhD, Professor of Constitutional Law, University of Tirana*

I. Introduction

During 2022, there was one constitutional amendment presented and approved, which prolonged the mandate of vetting institutions for 2 more years.[1] This amendment was considered necessary in order to conclude the reevaluation process of judges and prosecutors which resulted to be more complicated and time-consuming than initially foreseen. It did not bring any substantial changes to the rest of the constitutional provisions. It was a technical amendment or an "ordinary housekeeping measure".

In June 2022, a new Head of State was elected by the Parliament with a simple majority.

Meanwhile, the implementation of the 2016 Justice Reform went slowly forward in 2022. Its focus was particularly to fill the last 3 vacancies of the Constitutional Court and also a further 4 new judges at the Supreme Court, in order to become fully operational after the vetting process.

As for the case law of the Constitutional Court, there are two decisions worth noting: the first one dealt with the role and responsibility of the Head of State in a parliamentary system, in dividing the power of government nomination/selection between parliament, the president, and the prime-minister equally, which is not in conformity with the constitutional text and previous case law of the Court. The second one was important because for the first time in its history the Constitutional Court had to decide on President's impeachment procedure, focusing on the interpretation of "political neutrality", "unity of people" and "lack of responsibility of President during its duty" as the most important features/qualities of head of state.

II. Major Constitutional Developments

1. Extension of vetting process

Although there was a formal constitutional amendment – which aimed an extension of the mandate for vetting institutions foreseen in the Annex of the constitutional body text – it did not bring any significant changes to be considered as a constitutional reform. The vetting process began in 2017, and it was supposed to end in 2022. This process has encountered several hurdles (process of recruitment, training, application of the procedures), upon which the COVID-19 pandemic directly impacted the activity of these institutions due to lack of logistical infrastructure, lack of electronic equipment, difficulty in accessing confidential documents, etc. Although the vetting process was planned and regulated to finish in 5 years, at least the major part of it, it was not possible to evaluate less than 60% of judges and prosecutors. After asking the opinion of the Venice Commission if the extension is in conformity with European standards, according to which an extraordinary evaluation process of judges should be time-limited and as swiftly as possible and it must not be done at the expense of the fairness of the procedures, the parliament approved the extension till end of 2024. It did not affect any part of the constitution, therefore, no

important discussion followed, except for the daily political rhetoric.

2. Election of the President of Republic

Although the parliament majority initiated two impeachment procedures against the President, one did not make it to ensure the necessary votes in Parliament, the second one failed before the Constitutional Court, he made it to finish his constitutional mandate of 5 years. Therefore, the procedure to elect a new President ended with the election of a new President of the Republic, who did not have any political background but came from military ranks.[2] As expected, although the Constitution foresees five rounds for the election of the President in order to reach a political consensus of a 3/5 majority,[3] the new President was elected in the last round with a simple majority. The opposition partly boycotted the process and partly voted against the candidate.[4] Again, the politics did not make it to find a consensual candidate for the position of Head of State.

The day after the new President entered in office, the "older one" immediately joined his political party, founded by him before he took office and for which he was accused by the majority as being impartial during his duty as President (see below).

III. Constitutional Court Cases

1. On President's Impeachment[5]

Last year it was reported the latest decision of the Constitutional Court on the impeachment process of the President, who was discharged by the Parliament. The Albanian Constitution foresees the possibility to discharge the President from duty for two reasons: serious violation of the Constitution and/or serious crime. The procedure should be initiated by at least ¼ of the MPs, and it should be supported by 2/3 of them. Parliament's decision for removal of the President from office should be checked and certified by the Constitutional Court. If the latter concludes that the President is guilty, it declares his/her removal from duty.

The Court did not find any serious violation of the Constitution, its decision was released 8 months after his discharge by the Parliament, and the decision was published in March of 2022.[6] This transition period between the Parliaments' and Constitutional Court's decision raised the question of the legitimacy of oath-taking by the government after the general elections of 2021, which has to be executed by the impeached President by the same ruling majority who discharged him. The Constitution does not provide for the suspension of the President during impeachment; therefore, an abnormal political situation took place where the parliamentary majority ignored any act of the President and the latter attacked publicly any political initiative of the majority.

The most important question raised in its decision by the Court was mainly: How much political activism is allowed for the Head of State?

According to the Albanian Constitution, the President of the Republic should not be held responsible for any act committed during his/her duty (Article 90(1). The head of state does not belong to any of the three classic state powers and does not have governing powers. He/she should be politically neutral, and should represent the unity of the Albanian people (Article 86(1). His/her role is similar to any other head of state in a parliamentary regime. The so-called non-executive presidents typically embody and represent the legitimate constitutional authority of the state, performing ceremonial and official functions in which the identity and authority of the state as such, rather than that of the incumbent government, is emphasized. The separation of offices between the head of government and the non-executive president helps to maintain a symbolic separation between the incumbent government, which is party-political, and the permanent institutions of the state as such, which are supposed to be politically neutral and universal. The president symbolically ensures that those who lead the government are at least notionally inferior to a higher authority that represents the democratic constitutional order, and that the leader of a ruling party or coalition is subordinate to a non-partisan embodiment of the whole. For this reason, non-executive presidents are particularly associated with those institutions that are supposed to be non-partisan. To sum up, a non-executive president is a symbolic leader of a state who performs a representative and civic role but does not exercise executive or policymaking power. A non-executive president may, nevertheless, possess and exercise some discretionary powers of extraordinary political intervention as a constitutional arbiter or guarantor.[7]

Going back to the Court's decision, it justifies the lack of political or any other kind of responsibility with "special protection of Constitution towards the President" (para 124 of Court's decision) which is merely not the aim of the provision. A non-executive President should not be held accountable during his/her duty because it is not his/her job to govern and he/she has no legitimacy to do so, therefore he/she could not bear any political liability. The Constitution does not offer 'special protection' for the President, more it offers a clear separation of powers among different organs in a parliamentary regime. For that reason, there is a provision that forbids the President to exercise any competence other than those provided for in the Constitution. The aim is not to protect institutions per se, but to ensure the rule of law, meaning the separation of powers. Having that in mind the majority of 2/3 to remove the President should not be considered as protection towards him/her, but more a procedural guarantee offered by a democratic constitution to prohibit that his/her position is not subject to the whims of the parliamentary majority.

Further, the interpretation of a "serious violation of constitution" by the Court is a bit confusing and does not follow a classic method of interpretation. However, it merely gives some orientation to what presidential behavior should not be. It tried to distinguish the term "incompatibility with constitution" from "in contradiction with constitution", which did not bring any clarification. Mostly, it confuses the reader with notions that are strange or unknown from the point of view of constitutional

law. Although the Court declares that "the President plays a balancing role and must intervene, as a moderating and encouraging body of the powers, identifying and recommending to them the principles that can offer acceptable solutions (para 168)" and "the exercise by the President of an active role in the political and social life of the country cannot be considered behavior contrary to the Constitution (para 170), the Court assesses that "the situation has been characterized by a polarized political environment and a lack of mutual trust between political actors. The tension, especially between the President and the Assembly, has culminated in several fierce public and institutional clashes between the parties throughout this period, among which can be mentioned the disagreements over the postponement by the President of the date of local elections and the election of members of the Court Constitutional, which were accompanied by the approval by the Assembly of the resolutions for each case and the initiative for the investigation of the President, as well as the setting in motion by both sides of the Venice Commission. As for the fact known also by the Court that the President has played an active role in the political and social life of the country, in particular during the election campaign, it justifies his personality and political past! (para 181-182). The court assesses that, even in the context of the active role that the President has chosen to play during his constitutional mandate, his position in the exercise of his duties, while wearing the official robes of the Head of State, materialized in statements and posts numerous through means of public communication and in content with political messages, before and during the election campaign, constitutes activity of a political nature. The court cannot dictate how the President should behave or communicate in a certain political or historical context, but it emphasizes that the constitutional text, the constitutional practice created over the years that reflects the way this function has been exercised, the expectations of the people, of political parties and actors, as well as the President's own reasonable awareness of his role, are the elements that determine how he should behave, and even how he should be seen (para 186).

However, the Court starts from the premise that the reason for the dismissal of the President is a serious violation of the Constitution or a serious crime, which, based on the criteria defined by it (para 144-149 of the decision), it must not only conflict with a constitutional provision, therefore violate a relationship, value, or issue that is expressly protected by the Constitution, but also be proven in terms of real consequences and effects in the life of the country, as well as of the irreversible nature of the impossibility of repairing the constitutional damage except by dismissing the President from office. Reiterating that the impeachment of the President interferes unusually in the functioning of the constitutional order, as an exceptional event, which aims to protect the Constitution to the extent that the benefits of its protection prevail over the loss that the impeachment would cause to the country his, in this particular case, the President's activity of a political nature, regardless of whether it was partisan or not, does not result in having real consequences and effects in terms of violating the essence of the basic rights and freedoms guaranteed in the Constitution, especially those who are applied during the electoral process, the constitutional order, or the functioning of the state institutions, in such proportions that would dictate the constitutional responsibility of the President and would justify his dismissal from office. Consequently, the Court assesses that the political activity of the President before and during the election campaign is not considered a serious violation of the Constitution (para 187). Also, the interference of the President in the electoral campaign in raising public awareness not to vote in favor of the socialist party is not considered a constitutional violation (para 190), because the level of interference was not high enough!

After this decision, the concepts of "unity of people" and "impartiality in political matters" foreseen in the constitution face a very wide degree of relativity which would negatively impact the relations between different branches of state power.

2. On the right to vote for Albanian diaspora

Recently, the right to vote for Albanians living abroad during general and local elections in Albania has gained a growing interest. Therefore, in 2020, the parliament amended the Electoral Code providing the right of Albanian citizens who live abroad to exercise their right to vote in Albania.[8] This provision was not implemented during the general elections of 2021. An association of the Albanian diaspora asked the Court to declare that the (in)activity of Albanian authorities responsible for organizing the election has infringed on their constitutional right to vote.

The Court stated that the ambiguity of the Electoral Code provisions in terms of the timeframe, the authorized body, and the criteria on the basis of which by-laws should be issued to make voting of this group of citizens possible violates the principle of legal certainty through a legal gap, which constitutes an infringement of the right to vote. Therefore, the right to vote has remained a void right due to the legal gap omission, which is effectively inapplicable, as result illusory. According to the Court, it is not enough to foresee the right to vote of Albanian citizens abroad, merely there should also be other aspects to make it happen. The arguments of the Court are valuable, and the elaborations stand correctly as far as the right to vote is concerned, but one could have difficulties identifying the role of parliament in providing all technical aspects which should be foreseen by the legislator. The law (Electoral Code) actually authorizes the Central Election Commission as the highest administrative body to organize the elections, which means that it is its competence to issue by-laws necessary to make the law applicable. The fact that the Central Election Commission has been inactive does not necessarily mean that there is a legal omission from legislators. Therefore, finding a legal gap as the reason for the inaction of an administrative body raises questions about the jurisdiction of the Court in this matter. The Court has given the legislator one year to fill the gap, it remains to be seen if there will be action by the legislator or by the administrative body and how the right to vote of Albanian citizens will be realized during the general elections in 2025.

IV. Looking Ahead

Further implementation of justice reforms and the establishment or renewal of the justice institutions is taking a considerable amount of time, which has led to a complex situation affecting the human rights of individuals seeking justice. The extension of the mandate for both vetting organs with two more years proves the complexity of this process. In 2022, the full functioning of the Constitutional Court and the Supreme Court was finally achieved. Although a significant reduction the backlog of cases before the Supreme Court is to be noticed, there is still a need for additional measures applicable also for lower courts in order not to become a systematic issue.

The election of a new non-political Head of State, despite the lack of political consensus, is a good sign for normalizing the relationships between different branches of state power but also in reflecting the unity of people's will despite their political views, which during the last years was seriously damaged.

Another overdue expectation which one could hope to be realized soon is the competence of the Constitutional Court to elaborate substantial constitutional rights through individual complaints as foreseen in the recent constitutional amendments of 2016.

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Argentina

Delfina Beguerie, *Yale Law School (JSD candidate)*

Inés Jaureguiberry, *Universidad de Buenos Aires*

María Victoria Ricciardi, *Universidad de Buenos Aires*

I. Introduction

We are taking over Ramiro Álvarez Ugarte and Juan González Bertomeu's previous reporting on Argentina. In 2021, their closing remarks expressed an emphatic plea: "The public deserves better." Throughout 2018-2021, their reports seemed to grow a sense of frustration, urging for a Court focused on the production of sound and impactful constitutional law. Their plea began to be heeded in 2022. This time, the image portrays novel and influential cases and public hearings regaining their pivotal position in the constitutional landscape.

II. Major Constitutional Developments

In 2022, the world started to move on from two consecutive years greatly affected by the Covid-19 pandemic. However, Argentina's institutional life remained shaped by the ongoing economic crisis and political turmoil. While 2020 witnessed the enactment of the safe, legal, and free abortion law and 2021 was characterized by Justice Highton's resignation, 2022 appears to be mired in a state of lethargy outside the courtroom.

After the President accepted Highton's resignation, the legal process required him to publicly nominate a new candidate within 30 days, launching a process of public opposition and support before submitting the proposal to the Senate. "If possible," the nomination process requires that the candidate should be elected so that the Court reflects "diversities of gender, expertise, and regional origin." As Highton's resignation left an only-male Court, many NGOs requested the President to nominate a female Justice. The year 2022 disappointed those expectations: It began with the Presidential announcement that no nomination would be made. This omission seems to pile over others, such as the inability to appoint the Attorney General and the Ombudsman.

In the Federal Congress, a modest number of 37 laws were enacted, rendering 2022 a year marked by relatively low legislative activity. The focus of the legislation revolved around public health (with laws addressing medical cannabis, HIV, and antimicrobial resistance), environmental matters, fiscal consensus, and public policy were also key concerns, reflected in laws pertaining to the voluntary surrender of firearms and the provision of essential services for gender-based violence.

Surprisingly, despite this modest inertia, the ruling coalition did succeed in proposing a bill to increase the number of Justices at the Supreme Court from 5 to 25. It is a paradox of politics because, even though the current number of Justices was also a result of the same coalition's actions, the bill received partial approval in the Senate through a close vote. Fortunately, the bill was not discussed in the House of Representatives and lost its legislative status by the end of the year.

Within the courtroom, but beyond its case law, we do observe a significant novelty: The Court resumed the practice of conducting both public and private hearings. In 2022, it conducted a private hearing in one of its most prominent cases, involving

a million-dollar lawsuit filed by the City of Buenos Aires against the Federal Government (see following section). Additionally, the Court reintroduced public hearings, inviting applicants, defendants, and amicus curiae to present arguments on the right to be forgotten and the medical use of marijuana (again, see the subsequent section). Comparing this year's agenda to previous years raises questions about novelty and continuity as well as what it reflects on the Court's perception of its authority.

At first glance, one may be led to believe that the post-pandemic Court has brought "rights" cases to the public forefront while keeping institutional cases behind closed doors. Is this division of publicity between rights and the distribution of power a historical trend of the Court? Not exactly. Compared to past hearings, 2022's agenda shows that the Court not only brings the individuals-State relationship to the public forefront but also delves into the "engine room." The rights agenda has indeed played a relevant role in the historical lineup of public hearings. The Court has opened its doors to discuss freedom of expression (recall hearings in "Patitó," 2008; "ADC c/ PAMI," 2012; "Grupo Clarín," 2013; and "Rodríguez María Belén," 2014), the right to housing ("Q.C.S.Y.," 2011), the right to a healthy environment ("Mendoza," 2011, 2012, 2016, 2018; "Laguna La Picasa," 2017), secular education ("Castillo," 2017), and the right of the police to strike ("Orellano," 2015). In this sense, 2022 appears to continue this trend. However, the Court has also called for public hearings to discuss the contours of federalism. It has examined issues such as the competence of the municipality of Córdoba to regulate Sunday rest ("Shi, Jinchui c/ Municipalidad de Arroyito," 2019), the taxing power of the municipality of Quilmes ("Esso," 2019), and the Province of Buenos Aires' competence to regulate the sale of medications by specific companies and the location of pharmacies ("Farmacity," 2018).

On another level, public hearings serve as a revealing indicator of how the Court perceives its authority. Judicial legitimacy is commonly thought to derive from a separation from the public that enables one to perceive the Court's reasoning as principled (Frankfurter's famous "judicial lockjaw" or the Argentinean Justice Fayt's famous statement that judges speak only through their opinions). Paradoxically, however, judges may strategically go public to enhance their independence and authority. As political scientist Staton showed with his study of the Mexican Court, tribunals face "a tension between the goals of constructing transparency and legitimacy" that may be navigated through strategic communication with the public. By shining a spotlight on public hearings, the Court aims to establish a connection with a broader audience and enhance its legitimacy. However, the question arises: How does the Argentine Court seek to legitimize itself through these hearings? Its historical tendency to convene hearings on matters pertaining to rights and federalism suggests a Court that is more comfortable asserting its authority as an arbiter of the relationship between individuals and the State, as well as between the Federal and local governments. Conversely, when it comes to discussions about the distribution of power among the federal branches of government, which could potentially raise questions about the Court's position vis-à-vis the Executive and the Legislative, it appears that the Court does not view public hearings as an appropriate platform for legitimization.

III. Constitutional Cases

The Supreme Court case law of 2022 shows prominent novelties on both fundamental rights and the "engine room."

1. Fundamental Rights

During this period, the Court ruled on several significant cases, many of which were initiated by women addressing cutting-edge issues. In these cases, as previously mentioned, the Court served as a mediator in the interaction between individuals and the State, demonstrating a strong dedication to striking down unjust limitations on fundamental rights, as further elucidated in the *Denegri* and *Condori* cases.

1.1. "Asociación Civil MACAME": medical use of marijuana

An association of mothers denounced the law that conditions the medical use of cannabis on the registration of a public program, as well as the criminalization of self-cultivation of cannabis for medicinal purposes, as unconstitutional. They contended that these restrictions infringed upon their children's rights to privacy and autonomy. The Court invited the parties to present their arguments in a public hearing, which resulted in a robust constitutional discussion.

Unanimously, the Court rejected the claims of unconstitutionality. It deemed the registration requirement for the medical use of cannabis justified, considering the state's duty to regulate medicines and differentiate between medical and non-medical cultivation, with the best interests of the population, especially children, in mind. Additionally, the Court viewed the registration as a reasonable measure of minimal interference. Contrary to prohibiting self-cultivation for medicinal purposes, it subjected it to regulation that ensures patient consent and medical intervention. Lastly, the Court concluded that under these conditions, the law had already decriminalized the self-cultivation of cannabis for medicinal purposes.

1.2. "Salvini": marijuana in prisons

The Court overturned a conviction for drug possession for personal use inside prisons. The prevailing criterion considered that incarceration does not deprive individuals of all their rights, and, like any other inhabitant, they have a constitutional right to privacy. Since "Arriola" (2009), this right prohibits the criminalization of drugs when there is no concrete harm or danger to others, regardless of any other disciplinary measure that may be applied.

1.3. "Orazi": prisoners' voting rights

Unanimously, the Court confirmed a ruling that ordered Congress to legislate "as soon as possible" on the voting rights of the incarcerated population.

1.4. "Asamblea Permanente por los Derechos Humanos": the use of religious symbols

The Court faced the crucial question of whether local celebrations honoring Catholic figures at public schools violated citizens' right to freedom of thought and religion enshrined in the Constitution and international treaties. The plaintiff NGO contended that opting out from celebrations would expose people as non-Catholics infringing upon their right to keep their religious beliefs private. Additionally, the NGO argued that these official celebrations at public schools breached the principle of institutional secularity and perpetuated preferential treatment of Catholicism, discriminating against other religious groups. The local Court had previously dismissed the claim, deeming the commemorations of the "Virgen Carmen de Cuyo" and "Patrono Santiago" as an integral part of cultural traditions rather than religious indoctrination. Thus, the issue seemed to hinge more on factual considerations rather than purely legal ones, albeit the blurriness of that distinction.

Justices Maqueda and Rosenkrantz argued that religious figures could sometimes be employed in a secular manner, asserting that these icons may undergo a transformation of meaning throughout history. When the religious significance of such icons diminishes, the state could utilize them without violating the principle of state neutrality (§5).

1.5. "C.G., A": migrant mother's rights

In 2016, the migration agency issued a deportation order against A.C.G. based on her prior felony conviction. She appealed seeking permission to stay because her three children would be left in complete abandonment without any parental care in Argentina. Her humanitarian plea relied on the agency's discretionary power to waive deportation in cases involving family reunification. The odds were against her: The agency rarely granted such exceptions, and previous court rulings affirmed the agency's discretionary powers. Furthermore, activists had been vocal against the court's recent rulings on migrant claims.

Before delving into the Court's decision, it is crucial to consider A.C.G.'s story. 21-year-old A.C.G. set foot in Argentina in 2009 and, joining the ranks of many other Bolivian migrants, she found work as an informal seamstress. Over four years, she became a mother to three children but suffered ongoing gender-based violence at the hands of her partner, who was also the father of her children. At the time of the Court's decision, she was employed at a community center, where they also received daily meals.

Just before the Court's decision, the migration agency granted A.C.G. a waiver, rendering the case moot. However, the Court decided to rule on the case and establish criteria for similar situations in the future (§17). In a 3 to 1 verdict, the Supreme Court determined that the agency's discretionary authority had a limitation in cases involving the risk of child abandonment. The constitutional right to family protection and the best interests of the child set a boundary for the use of such power("Condorí," §8, §11, and §12). In this particular instance, the risk of child abandonment was not merely hypothetical but directly linked to the act of deportation since A.C.G. was the sole caregiver to the children (§14).

1.6. "Denegri vs. Google": the right to be forgotten

TV anchor Natalia Denegri claimed a constitutional right to be forgotten contending that when her name was searched on Google the results displayed 30-year-old videos of her participation in TV shows and news articles related to the famous "Cóppla case". She argued that over time, these videos had lost their informational or journalistic significance. As a result, she requested that the search engine disassociate her name from the media coverage of the decades-old case. The Supreme Court conducted a public hearing with broad participation, which live-streamed passionate plea arguments.

The Supreme Court unanimously rejected Denegri's lawsuit. Dissociating her name from the search engine's results, which contained truthful information about a still public figure in a public interest case, would violate the constitutional right to freedom of expression. The Court emphasized that freedom of expression enjoys privileged constitutional protection as it is fundamental to democracy. This leads to the presumption that any restriction, sanction, or limitation on such freedom is, in principle, illegitimate. The Court stated that in "the context of a democratic society, true information relating to a public figure and an event of significant public interest—reflected primarily in the serious consequences resulting from the events in question—requires its continued presence and free access by individuals who comprise and will comprise said society [...] To conclude that the mere passage of time causes news or information that was part of our public debate to lose its attribute seriously jeopardizes history as well as the exercise of social memory, which draws from various cultural events, even when the past may appear unacceptable and offensive according to present-day standards." (§14)

Based on these standards of freedom of expression, the Court considered that any potential distress caused to a public figure, and potentially to their family, by the dissemination of truthful information, is not a sufficient argument to limit, without further consideration, the free circulation of ideas.

1.7. "Martel": gender and crimes against humanity

Since 2003, the Supreme Court of Argentina has been involved in the criminal conviction process for human rights violations committed during the last dictatorship (1976- 1983). Flagship cases include the nullification of amnesty laws and the unconstitutionality of Presidential pardons. In a recent episode of that saga, the Court applied a general beneficial calculation of time served for crimes against humanity, which triggered massive social mobilizations, an interpretive law, and a subsequent new ruling.

Against this sensitive backdrop, the Court ruled the "Martel" case in 2022. The issue revolved around whether the crimes of rape and sexual abuse committed against women during the last coup could only be attributed to the direct physical perpetrators (commonly referred to as *'delito propia mano'*). Despite being beyond the typical purview

of its jurisdiction, the Court unanimously overturned the decision that circumscribed the accusation to the physical perpetrators. Justices Maqueda and Lorenzetti highlighted the vague reasoning and emphasized the duty to judge crimes without perpetuating a message of tolerance of gender-based violence. In their concurring votes, Justice Rosatti relied on contextual analysis, and Justice Rosenkrantz pointed out flaws in the reasoning sustaining the previous decision. Although the Martel ruling is specific, it sets a precedent for gender standards in subsequent cases.

2. "Engine Room"

In 2022, the Court displayed a particular level of activism in two areas of the "engine room": Firstly, the Court upheld its commitment to federalism, as evidenced by its actions in previous years. As noted in previous reports, these decisions show the gradual consolidation of a criterion reinvigorating local powers. Secondly, it undertook a significant reform of the Judicial Council, the body responsible for appointments of federal judges -except Justices of the Supreme Court. Due to the centrality of the judicial issue in public discourse in Argentina in recent years, the Court's rulings during this period have been the subject of praise and criticism. Both cases sparked an intense confrontation with the government.

2.1. "The City of Buenos Aires v. Federal State": Coparticipation regime

As stated, the Court has devoted particular attention to rectifying the dysfunctions of the federal regime. Despite the constitutional reform of 1994, the Federal Government continued to expand its influence over the subnational units, primarily through a distorted tax-sharing system. In the last years, the Court has reaffirmed the authority of subnational governments to exercise their decision-making power within their exclusive jurisdiction, even amidst the pandemic, and enforced the autonomous status that the constitution bestowed upon the City of Buenos Aires. Both doctrinal lines converged in this case.

The lawsuit involves a multi-million dollar dispute between the City of Buenos Aires, governed by the opposing political coalition, and the Federal Government. In 2020, the City of Buenos Aires claimed that the Federal Government had significantly and unconstitutionally reduced the funds allocated to the City. The Federal Government argued that the reduction was justified because the increase in the tax share was based upon a previous political alliance, exceeding the costs of the transfer of public security functions.

After inviting both parties to come to terms in a private hearing, the Supreme Court dictated a provisional measure in favor of the City of Buenos Aires. Recalling that change in the distribution of tax revenues had traditionally been based on mutual agreements as mandated by the Constitution, the Supreme Court based its decision on three main arguments. Firstly, it emphasized the need for agreements between jurisdictions regarding the tax-revenue sharing system, stating that the Federal Government cannot unilaterally change the allocation of funds without a previous agreement. Secondly, it highlighted the importance of maintaining the agreed-upon terms when transferring functions and powers to the City, which should be as autonomous as mandated by the Constitution. Any retrospective change could hinder the provision of public services and thus impact residents. Lastly, the Court clarified that the ruling will not affect funds allocated to other provinces, as the City allocation only reduces the Federal Government's share in the tax-revenue sharing system.

The Court issued a Solomon-like provisional measure, ordering the Federal Government to increase the allocation of the City's participation in the tax-revenue sharing system from 1.40% to 2.95% (instead of the claimed 3.50%). The measure sparked some controversy. While some scholars believed that the case was rightly decided, they criticized the Court for not providing any argument justifying the 2,95% percentage. Additionally, the President threatened to disregard the order, and some governors from the official coalition accused the Court of involving itself in political affairs. As we will see, this opinion would have further political implications, but that is a matter for the future.

2.2. "Bar Association of the City of Buenos Aires": the Judicial Council

As chronicled in the previous report, in 2021, the Court issued a groundbreaking decision voiding the regulation of the Judicial Council due to its composition violating the constitutional requirement of equilibrium. In that ruling, the Court granted Congress a specific timeframe to pass a new law; otherwise, it would provisionally reinstate the previous law. In 2022, the Court issued three more decisions in the light of that case. Firstly, the Court ruled that Congress had not enacted a new law and that unlike lawyers, judges, and representatives from the academic sector, it had not elected its representatives to the Judicial Council. Secondly, the Supreme Court overruled the decision of a federal judge that had ordered the Senate and the Chamber of Deputies to refrain from appointing new members to the Judicial Council. The Supreme Court decided that the trial judge had acted without jurisdiction and had rebelled against its 2021 decision preventing its enforcement. The Court nullified all actions taken and communicated the decision to the Judicial Council to evaluate possible judicial misconduct. Finally, a few months later, another case regarding the same issue reached the Court. Following the 2021 decision in the Bar Association of the City of Buenos Aires and the expiration of the provided time to enforce a provisional remedy, the official and majority party in the Senate split and requested two extra seats on the Judicial Council instead of one. Consequently, the representation of the second party in the Council of the Judiciary was displaced. Two senators from the affected bloc claimed that the bloc division was simulated and fictitious, with the sole and illegitimate purpose of disregarding the Supreme Court's ruling. The Supreme Court declared the nullity of the Senate's decision that had made the appointments favoring the majoritarian party.

IV. Looking Ahead

2023 will mark a significant milestone for Argentina. Since the 1930 coup d'état, it will be the first time that our nation has enjoyed 40 uninterrupted years of democracy, a collective achievement we should not take for granted. However, amid a profound socio-economic crisis demanding unified efforts to address the immense inequalities plaguing our society, one of the greatest challenges we face is the restoration of legitimacy to our constitutional authorities. Recent electoral polls have revealed an alarmingly high skepticism toward the 'political class.' Therefore, it is incumbent upon the branches of government and the Court to redouble their efforts in developing institutional practices that promote transparency, democratic access to public employment, and efficiency in safeguarding fundamental rights. While global scholarship has been addressing abusive constitutionalism and democratic erosion, we still face long-standing challenges on this front. It has been decades without appointing the Ombudsman, and in 2023, we have the pending task of appointing a female judge to the Supreme Court and the Attorney General, which requires that the extreme political divide be left aside in order to achieve the majority required by the Constitution for a successful nomination.

Regarding the Court, it is desirable to strengthen further the path taken in 2022 by ensuring a proper and timely selection of cases to be decided in matters of powers, federalism, and fundamental rights. Equally important is preserving the continuity of participatory mechanisms before the Court, including both public and private hearings. Ensuring the prompt resolution of matters demonstrates the Court's commitment to upholding justice and fostering public confidence in its proceedings.

While the prominent theme of 2022 was the rise of significant case law, 2023 hints at an impending tumult around the corner: In January, the ruling coalition initiated impeachment proceedings against four Justices of the Supreme Court, foreshadowing a period of institutional strain.

Within an institutional history marked by successes and setbacks, a pressing challenge awaits the three branches of government: establishing a solid constitutional practice that upholds democratic values and reinvigorates legitimacy. It is crucial to strive for a governance framework that promotes inclusion, transparency, and the safeguarding of individual liberties, thereby fostering a more equitable society. In line with the principles set forth by our predecessors in this report: democracy deserves better.

V. Further Reading

Actualidad. IberICONect, available at: https://www.ibericonnect.blog/actualidad/.

"Los 10 fallos más destacados de la Corte Suprema en el 2022", Palabras del Derecho, available at: https://palabrasdelderecho.com.ar/articulo/4071/Los-10-fallos-mas-destacados-de-la-Corte-Suprema-en-el-2022.

Errepar, "Sentencias destacadas CSJN 2022", available at: https://www.errepar.com/sentencias-destacadas-csjn-2022.



Armenia

Anahit Manasyan, *Associate Professor at the Chair of Constitutional Law of Yerevan State University, PhD in Law*

Marina Maqyan, *Assistant to the Constitutional Court Justice, Magistrate at Yerevan State University, Law Faculty*

I. Introduction

Armenia's past constitutional year was marked by a number of key events that determined the vectors of legal developments. As such, the formation and activities of the Constitutional Reform Council and Constitutional Reform Professional Commission can be noted in this context. These bodies should predetermine the perspective of the country's constitutional system developments.

Several decisions of the Constitutional Court played a key role, through which an attempt was made to establish solidarity between the parliamentary majority and the opposition and to resolve the contradictions between them in the domain of constitutional justice.

During 2022, the new Criminal and Criminal Procedure Codes were adopted, the standards necessary for assessing the integrity of judges and members of the Supreme Judicial Council were defined and developed, the grounds for disciplinary action against judges were aligned with the goals of fighting corruption, new administrative and anti-corruption chambers were established in the Court of Cassation, the electoral legislation was revised, as well as wide-scale works started towards the implementation of reforms in the field of bankruptcy, etc.

This report presents the activities of the Constitutional Reform Council and the Constitutional Reform Professional Commission and the decisions of the Constitutional Court, including those adopted on the basis of the application of at least one-fifth of the deputies, which played an important role for the effective implementation of the constitutional mission of the representative body of the country.

The final section examines developments expected in 2023 related to the judiciary, Constitutional Court cases, and other related issues.

II. Major Constitutional Developments

1. The formation and activities of the Constitutional Reform Council and Constitutional Reform Professional Commission

On November 5, 2021, the Minister of Justice of the Republic of Armenia announced the start of a new process of constitutional reforms. RA Prime Minister Nikol Pashinyan's decision 111 A of January 27 approved the individual composition and procedure of the Constitutional Reforms Council. Afterward, by the Prime Minister's decision, the individual composition of the Professional Commission for Constitutional Reforms was also approved.

One of the important decisions of the Council in 2022 was the decision regarding the choice of the form of governance of the Republic of Armenia. On November 30, at the joint session of the Constitutional Reforms Council and Commission, the Constitutional Reforms Council voted in favor of preserving the parliamentary form of governance and improving this model by 8 votes in favor, 1 against, and 1 abstention.
The Council also decided to formulate new guarantees for the protection of socio-economic and cultural rights within the framework of the Constitution.

2. Judicial and Legal Reforms

Referring to judicial reforms, it should be mentioned that the judicial and legal reforms have been carried out in the Republic of Armenia since regaining its independence, mainly conditioned by the adoption of the Constitution of the Republic of Armenia in 1995 and subsequent amendments thereto. Taking as a basis the 4th part of Article 146 of the Constitution, part 8 of Article 11 of the Law "On the Structure and Operation of the Government", on July 21 the Government approved the 2022-2026 Strategy for Judicial and Legal Reforms of the Republic of Armenia and the action plan stemming from that. The first substantive direction of the strategy is the reform of the judicial system, which envisages the launch of the entire chain of anti-corruption courts. The other direction is the digitization of judicial processes and e-justice, which applies not only to courts but also to the entire system of criminal justice and preliminary investigation bodies. The strategy envisages checking the integrity of all acting judges, as well as prosecutors, investigators, and employees of the penitentiary institutions. Among the strategic directions is the provision of the possibility of appealing disciplinary decisions of the Supreme Judicial Council, reforms in the fields of advocacy, enforcement, bankruptcy, notary, development of alternative methods of dispute resolution, etc.

3. New Criminal and Criminal Procedure Codes

The new Criminal Code and Criminal Procedure Code of the Republic of Armenia entered into force on July 1, 2022. From that moment, the Criminal Code adopted on April 18, 2003 and the Criminal Procedure Code adopted on April 1, 1998 were recognized as invalid. Conceptually, a new Criminal Code and Criminal Procedure Code were developed, reflecting both national policy priorities and international commitments.

4. Election of Judges of the Constitutional Court

On September 15, 2022, Parliament elected two new judges of the Constitutional Court: Hovakim Hovakimyan, nominated by the President of the Republic, and Seda Safaryan, nominated by the Government.

5. Cooperation with the European Commission for Democracy through Law

The year 2022 was marked by effective cooperation with international partners. In particular, at the request of the Minister of Justice, the European Commission for Democracy through Law (the Venice Commission) discussed the draft aimed at introducing mechanisms for appealing the decisions of the Supreme Judicial Council to subject the judge to disciplinary responsibility.

In particular, the advisory opinion[1] states

> "45. It is not for the Venice Commission to take a firm stance on the question of constitutionality of the proposed model. What is important is that this model aims to bring the Armenian legal framework closer to the European standards and does not appear to be designed to cripple the constitutional provisions on the SCJ, but, to the contrary, to remove any risk of manipulations (through the use of the random selection of members of the two panels). Therefore, it is likely that the new model remains within the constitutional boundaries, even though the patterns of decision-making in two panels may be different from the decision-making in the plenary composition. It ultimately belongs to the Constitutional Court to resolve this issue if a constitutional complaint is brought before it after the adoption of the law.
>
> (…) 48. The draft Law seeks to respond to some of the earlier recommendations of the Venice Commission and GRECO. In particular, the draft Law introduces a new system of appeal against
> the decisions of the Supreme Judicial Council in disciplinary matters, by a second-instance panel created within the Council itself. The Venice Commission is of the view that the new mechanism
> would address the essence of the recommendation of the Committee of Ministers (CM/Rec (2010)12). An appeal to an external judicial body could be a better option, but it requires amending the Constitution. Therefore, the creation of an appellate instance within the Supreme Judicial Council appears to be an acceptable compromise".

Accordingly, the Commission positively assessed the implementation of the proposed reforms and emphasized that the draft aims to respond to the recommendations made by the Commission before.

Also, by letter of 12 September 2022, the President of the Constitutional Court of the Republic of
Armenia, Arman Dilanyan, requested an amicus curiae brief of the Venice Commission on certain questions related to the Law on Confiscation of Property of Illicit Origin adopted on 16 April 2020. The request for an amicus curiae brief has been submitted in the context of pending proceedings on the constitutional review of the Law on Confiscation of Property of Illicit Origin.
According to the Commission, international and European standards suggest that civil forfeiture may be an effective tool to prevent the illicit acquisition of assets and constitutes a public interest, which may justify the application of a presumption of illicit origin of certain property.

The Commission noted that the Law at issue contributes to implementing the international standards and recommendations of the relevant international bodies in the field of combat against corruption, organized crime, and money laundering[2].

In the near future, the Constitutional Court will determine the constitutionality of the provisions of the Law in light of the Commission's opinion.

III. Constitutional Cases

1. Decision of the Constitutional Court DCC-1627 of February 1, 2022

The Constitutional Court referred to the constitutionality of the provision of the Constitutional Law "Rules of Procedure of the National Assembly", providing for the possibility of applying disciplinary measures against the deputies by the head of the Parliament in order to ensure the normal course of the session.

Applying to the Constitutional Court, the members of the Parliament claimed that the contested regulations contradict the principle of Parliamentary immunity.

The respondent believed that the immunity of a deputy, guaranteed by the Constitution, does not exclude the application of disciplinary measures by the Speaker of the Parliament, whose purpose is to ensure the established procedure and exclude actions that do not comply with it.

A stable balance between the Parliamentary majority and minority in a democratic state creates opportunities for interaction, ensuring effective, democratic, and legitimate governance. It was this imperative that guided the Constitutional Court during the consideration of this case. In particular, the Constitutional Court stated: "Free speech, protected from any fear of litigation or external sanction, is essential cause MPs are to represent the people and debate matters of public importance. Otherwise, there would be a powerful chilling effect on debate within the legislature. Parliament has to be free to organize and determine its own procedure and to hear robust debate on any subject, without fear of external interference. As a counterbalance, there should be a system of parliamentary discipline within which the behavior of deputies is controlled by the Parliament itself so as to exclude abuse of the Parliamentary immunity by its members and ensure the effective functioning of the legislature. However, any interference with MPs' freedom of speech must be proportionate. The essence of freedom of speech of MPs regardless of the chosen means must not be destroyed.

(...) although the legislative regulations on the ad hoc Committee of Parliamentary Ethics are aimed at ensuring the ethical behavior of the deputy, examining his apparently unethical behavior, they cannot ensure the maintenance of order during the session of the National Assembly, guaranteeing the normal functioning of the legislature. It should be kept in mind that ensuring the normal course of the National Assembly session implies a quick and adequate response to actions disrupting it, and failure to take active measures may have unforeseen consequences. It is due to the mentioned circumstance that various legal regulations/structures, related to parliamentary ethics and aimed at ensuring the normal course of the National Assembly session, are stipulated in the Law.

Taking into account the above, the Constitutional Court noted that the contested regulation does not contradict the principle of Parliamentary immunity, which still plays an important role in new democracies.

2. Decision of the Constitutional Court DCC-1646 of April 29, 2022

Below will be presented one of the most discussed decisions adopted in 2022, by which the Constitutional Court examined the constitutionality of the criminalization of grave insult.

The amendments to the Armenian Criminal Code made "grave insults" directed at individuals because of their "public activities" an offense punishable with hefty fines or prison sentences of up to three months. Those individuals may include government and law-enforcement officials, politicians, and other public figures.

The Human Rights Defender appealed to the Constitutional Court, raising the issue of the constitutionality of the mentioned regulations. The applicant argued that the contradiction of the Article 137.1 of the Criminal Code of the Republic of Armenia, to the constitutional principles of legal certainty and proportionality leads to a risk of unlawful interference with the freedom of expression.

The respondent, in turn, noted that in the light of the legal practice of the Constitutional Court, freedom of expression is not absolute and argued that the impugned provision fully complies with the principle of legal certainty.

The Constitutional Court stated that: "the State is obliged to develop and implement a unified legal policy aimed at eliminating or, at least, significantly reducing vicious phenomena that threaten State security and public order, health and morality, or the honor and good name of others, other fundamental rights and freedoms. In this direction, the state should use all its potential, intelligently combining the methods of persuasion and coercion, and apply legal and other suitable means to restore the broken harmony. In this regard, it is more encouraging and sustainable to implement ideological and educational measures, so the state should use all the possibilities of the persuasion method to settle the problem in the long term. Considering the importance and urgency of the matter in question, the Legislator has preferred the criminal legal toolkit for combating grave insult". Moreover, the Constitutional Court considered it necessary to note that the constitutionality of the normative content of any legislation, especially those containing evaluative concepts, does not by itself exclude the unconstitutional interpretation and application of the norm in legal practice. In this regard, the Constitutional Court considered it necessary to state that the question of the presence or absence of swearing or insulting in an extremely obscene way, as well as the qualification of the act as a qualitative crime, based on a comparative analysis of all the factual circumstances of the case, is in the sphere of evaluation of law enforcement practice. Law-enforcement and judicial bodies should be guided by the imperative to form a unified practice of applying the disputed provision, which will contribute to increasing legal predictability and clarifying the limits of discretion in the assessment of abstract concepts.

Although the Constitutional Court recognized the disputed regulation as conforming to the Constitution, the offense of insult was not included in the new Criminal Code, which came into force on 1 July 2022 and was decriminalized.

3. Decision of the Constitutional Court DCC-1647 of April 29, 2022

The decision in question is important to the extent that the Constitutional Court carefully addressed the constitutional guarantees for the Parliamentary minority in the process of forming the bodies of the Parliament.

At least one-fifth of the deputies of the National Assembly applied to the Constitutional Court to decide on the constitutionality of

the decision made as a result of the election of the Chairperson of the Parliament. The applicant considered that elections should be held in the presence of all the candidates, and the absence of some of them regardless of their will leads to the unconstitutionality of the corresponding decision.

The Constitutional Court noted that the Parliamentary majority, formed in line with the will and political preference expressed by the people as a result of free elections, has a key influence in the exercise of legislative power and the implementation of other functions of the National Assembly defined by the Constitution, bearing political responsibility for it. However, it is not excluded that the majority of the National Assembly, based on the high public interest, for example, the need to ensure the solidarity of the polarized society, eliminate the division of the society, ensure public tolerance, decides to elect the representative of the Parliamentary minority as the Chairperson of the National Assembly. In such conditions, the decision of the Parliamentary majority will have clear socio-political justifications.

According to the assessment of the Constitutional Court, these considerations are also taken into account per Article 136 of the Constitutional Law "Rules of Procedure of the National Assembly", according to which each faction nominates one candidate. However, based on the fact that the Chairperson of the National Assembly is elected and recalled by a majority of votes of the total number of Deputies (Part 1 of Article 104 of the Constitution) and considering that the election is made by secret ballot (Part 6 of Article 136 of the Constitutional Law "Rules of Procedure of the National Assembly"), as well as the constitutional principle that a deputy represents the whole people and should be guided by conscience and convictions, the Constitutional Court recorded that each deputy evaluates the existence of socio-political prerequisites, motives, grounds for the election of the Chairperson of the National Assembly, reflecting it in his/her vote.

The Constitutional Court also emphasized that although it is assumed from the regulations contained in Articles 135 and 136 of the Constitutional Law "Rules of Procedure of the National Assembly", regulating the procedural details of the election of the Chairperson of the National Assembly, that the presented candidates, as a rule, physically participate in the election process. However, at the same time, the Court emphasized that it does not and cannot be derived from the mentioned regulations that the election of the Chairperson of the National Assembly is possible only in the presence of all the candidates. This approach of the legislature has a clear logic and is due to the high public interest in ensuring the smooth functioning of the newly elected National Assembly.

Taking into account the above, the Constitutional Court recognized the decision made as a result of the election of the Chairperson of the National Assembly as conforming to the Constitution.

4. Decision of the Constitutional Court DCC-1669 of November 22, 2022

Within the framework of an individual constitutional complaint, Albert Yedigaryan raised the question of the constitutionality of the provisions of the Law on Citizenship before the Constitutional Court. The applicant claimed that Article 17 of the Law provides an automatic basis for the loss of the child's citizenship based on the termination of the parent's citizenship and the acquisition of the citizenship of another state by the child, otherwise, this is not formulated with sufficient precision.

The respondent stated that it is clear from the legal provisions of the Law that the loss of citizenship takes place in the presence of the RA President's decree on termination of citizenship.

The Constitutional Court stated that the change of citizenship is one of the grounds for termination of citizenship, which ends the legal relationship between a person and the State, along with the rights and obligations inherent in it. A person can exercise the right to change his/her citizenship based on a clearly expressed will and a procedure established by law, with the exception of cases provided by law, which follow from the relevant constitutional and legal regulations.

The Constitutional Court noted that automatic and non-automatic ways of acquiring or terminating citizenship are distinguished. Due to the characteristics of the child's status, sometimes changing a parent's citizenship also affects the child's citizenship by law. This circumstance is justified by the argument that the child cannot create/have an effective link with the state, citizenship of which his parent has already lost. The Court emphasized that: "Citizenship is an important aspect of a child's identity, conditioning the child's ability to freely enjoy other rights. At the same time, children are the most vulnerable group in relation to violations of their rights and freedoms and have a very limited opportunity to defend them on their own. By virtue of the principle of the best interest of the child reflected in the 1989 Convention on the Rights of the Child, any public or private social welfare institution, courts of law, administrative authorities or legislative bodies, are obliged to assess and take into account the best interest of the child as a primary consideration in all actions or decisions regarding the child's citizenship, which has also been repeatedly emphasized in the reports of the Committee on the Rights of the Child. In order to realize this principle, it is necessary to establish sufficient guarantees in normative legal acts, especially in order to neutralize the risk of statelessness of children".

The disputed regulation provides material legal conditions, in the presence of which a child can lose citizenship. The Constitutional Court recorded that: "the substantive legal conditions are clearly established in the Law, and the procedure for terminating the citizenship of a child under the age of 14 was applied in legal practice as a result of a systematic interpretation of the contested legal regulation of the Law, considering/evaluating it in correlation with other relevant legal regulations; taking into account the nature and content of the institution of citizenship. Therefore, the impugned provision of the Law, according to the Court, is not constitutionally problematic. Taking into account the aforementioned, the interpretation of the Law given in legal practice has resulted in the fact that the citizenship of the Republic of Armenia of a child under the age of 14, whose parents have lost the

citizenship of the RA, does not automatically cease".

The presented decision is of particular importance from the viewpoint of excluding the situation of statelessness of the child because citizenship is an element of the child's identity. Guided by the principle of ensuring the best interest of the child, the Constitutional Court noted that in the absence of a corresponding presidential decree, the change of citizenship of the parent cannot automatically lead to the loss of the child's citizenship.

IV. Looking Ahead

In 2023, the proper implementation of judicial and legal reforms of 2022-2026 is of great importance. The Strategy envisaged 12 strategic goals and 41 strategic directions, the decisive part of which is planned to be implemented in 2023.

Also, the work of the Constitutional Reforms Council and Professional Commission continues. Currently, the Council is discussing the constitutional mission of the President of the Republic, accordingly determining the scope of his/her powers.

The President of the Republic appealed to the Constitutional Court, raising the question of whether or not the appeal of the decisions of the Supreme Judicial Council to the Administrative Court corresponds to the constitutional status of the Council. According to the President, the Council is a constitutional body, and the examination of the legality of its decisions in the Administrative court leads to the usurpation of the Council's powers by the Court. According to the Procedural decision of the Constitutional Court (PDCC-17, adopted on 10 March 2023), the examination of the mentioned case will begin on May 23, 2023.

Besides, the Constitutional Court is going to examine the constitutionality of the provisions of the Law on Confiscation of Property of Illicit Origin (adopted on 16 April 2020) in light of the advisory opinion of the Venice Commission. The decision to be made by the Constitutional Court will be important from the viewpoint of balancing private and public interests, fighting against corruption, and preventing unlawful interference with property rights.

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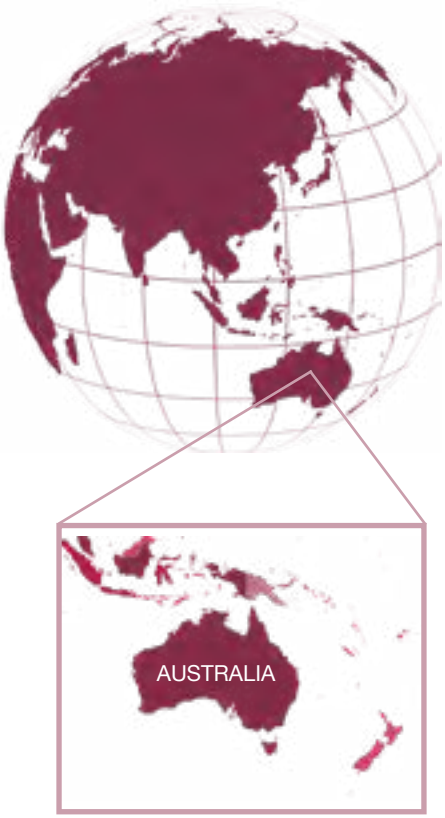
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Australia

Ashleigh Barnes, *Lecturer, Macquarie University, Sydney*

Joshua Aird, *PhD Candidate, University of New South Wales, Sydney*

I. Introduction

In 2022, the Australian High Court published 38 judgments in total. Of these, only eight cases concerned constitutional law and only one case saw the Court invalidate a law.[1] This is a comparatively small constitutional law caseload. Three types of constitutional cases were heard. The first being the separation of powers protected by Chapter III of the Australian Constitution featured centrally in five cases. Second, the implied freedom of political communication, the Australian free speech guarantee, featured centrally in two cases. The final case concerned the scope of the Commonwealth Parliament's power to make laws with respect to naturalization and aliens. A key case from each theme is considered in Part III.

Outside the courts, this Report considers two other constitutional developments brought about following a change in Federal Government in May 2022. The Labor Party formed a majority government for the first time since 2007. The new government pledged to bring about a referendum in 2023, which if successful, will enshrine an 'Indigenous Voice to Parliament' in the Constitution. The referendum provides a crucial opportunity for much-needed constitutional reform. The new government also withdrew a High Court challenge, *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs & Anor v Montgomery* ('*Montgomery*'). The high-profile case concerned the constitutional status of Aboriginal and Torres Strait Islander people.

II. Major Constitutional Developments

The first commitment of the new Prime Minister was to the "Uluru Statement from the heart in full". The Uluru Statement from the heart, developed by over 250 Aboriginal and Torres Strait Islander delegates in 2017, calls for two substantive changes to the Australian constitutional landscape: 1) a voice to Parliament enshrined in the Constitution; and 2) a Makarrata Commission to supervise agreement-making (commonly referred to as a treaty between First Nations people and the Commonwealth) and truth-telling about First Nations history.[2]

The Commonwealth Government has committed to holding a referendum to enshrine a Voice in Australia's Constitution in 2023.[3] The proposed amendment will add an additional section to the Constitution as follows:[4]

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:
there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

A First Nations Voice is a relatively novel

constitutional development internationally outside of a "plurinational" system.[5] While other states have treaties with, or constitutional recognition of, First Nations peoples, enshrining an advisory body within a constitution is without direct precedent. The closest examples are found in South Africa, Finland, and Canada. In South Africa, the Constitution expressly permits the establishment of institutions of traditional leaders at all levels of government.[6] Unlike the Voice proposal, the South African Constitution gives traditional leaders a more direct role in local government[7] and requires courts to apply customary law when applicable.[8] In Finland, their Constitution recognizes the right of Sami indigenous peoples to have "linguistic and cultural self-government" in their "native region" as provided for in legislation.[9] In Canada, the *Constitution Act 1982* protects "existing aboriginal and treaty rights", requiring the Canadian government to consult and accommodate First Nations people.[10]

The second significant constitutional development could be framed as a non-development. In July 2022, the Commonwealth Attorney-General decided to discontinue the *Montgomery* proceedings in the High Court.[11] *Montgomery* concerned the constitutional status of First Nations people in Australia. The decision is noteworthy, not only because the appeal sought to overturn the 2020 High Court decision in *Love*, which found that First Nations people were not 'aliens' within the Constitution,[12] but because it has made the court vulnerable to allegations of politicization.

Montgomery is one of several cases in the wake of *Love* brought by individuals seeking relief from deportation and/or immigration detention on the basis that they are First Nations people. Following *Love,* First Nations people who met the tripartite test of Aboriginality in *Mabo [No 2]* could not be deported or detained in immigration detention under federal legislation enacted pursuant to the 'aliens' power. The *Mabo [No 2]* test requires (i) biological descent; (ii) self-identification, and (iii) recognition by elders or others with traditional authority.[13]

Mr. Montgomery was born in New Zealand to an Australian mother and a Māori father. He moved to Australia when he was a child and lived on a special class of visa open to New Zealand citizens. Mr. Montgomery was adopted into the Mununjali clan of the Yugambeh people in Queensland as a young adult and came to identify and be accepted as a member of the clan. In 2018, Mr. Montgomery was convicted of burglary and received a 14-month prison sentence. A delegate of the Minister for Home Affairs in the former Morrison government subsequently canceled Mr. Montgomery's visa pursuant to section 501(3A) of the *Migration Act 1958* (Cth) and upon his release from prison, detained him in immigration detention.

Mr. Montgomery brought proceedings in the Federal Court, challenging the Minister's decision including on the basis that he could not be deported or held in immigration detention because he was an Aboriginal Australian. Ultimately, the Federal Court accepted that the Minister's decision was unlawful because the Minister did not give proper, genuine, and realistic consideration to the representations made by Mr. Montgomery as to his Aboriginality, as required under the *Migration Act 1958* (Cth), in light of the decision in *Love*.[14]

Before the High Court, the Minister (under the previous government) argued that *Love* was incorrectly decided, and as such, the detaining officer did not need to hold any suspicion as to whether or not Mr. Montgomery was Aboriginal. Following the election, and before the High Court's decision, the new government revoked the previous Minister's decision and discontinued the appeal.

First Nations affairs and immigration policy are vexing issues in Australian politics. Members of the more conservative coalition parties have publicly criticized *Love* as allowing, "violent non-citizens to subvert the *Migration Act*".[15] Notably, the appeal followed the appointments of two Justices to the Court by the former government, which caused some commentators to claim the High Court was being politicized.[16] The new Labor Government's decision to discontinue *Montgomery* received backlash from the former government and some conservative commentators.[17] The Labor Government has not publicly endorsed *Love*, instead stating that the decision to discontinue proceedings is reflective of its commitment to upholding the "law of the land".[18]

III. Constitutional Cases

The Australian Constitution has been described as a structural Constitution (or "thin" adopting Raz's nomenclature). It establishes the form of federal government and delineates the powers of the branches of government. It does not contain a bill of rights or express value statements, nor is there federal statutory protection of human rights. Notwithstanding this, the case law is arguably becoming increasingly value-laden.

1. Garlett v Western Australia:[19] Preventative Detention

Chapter III of the Constitution protects a strict separation of judicial power. Two core principles relevant to the validity of preventative detention legislation have emerged from earlier Chapter III jurisprudence. *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51 is the authority for the principle that State legislation which purports to confer upon a State Supreme Court a function which substantially impairs the institutional integrity of such a court in its role as a repository of federal jurisdiction is 'repugnant to or incompatible with' that role and is, therefore, invalid. This is because of the integrated system of courts postulated by the provisions of Chapter III of the Constitution. Another relevant principle comes from *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1. The *Lim* principle provides that the function of adjudging or punishing criminal guilt is exclusively the province of Chapter III courts, except where detention occurs for protective (as opposed to punitive) purposes. Exceptional cases aside, the involuntary detention of a citizen in custody by the State is penal or punitive in character and exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

Mr. Garlett challenged the *High Risk Serious Offenders Act 2020 (WA)* (the 'HRSO Act'). According to the HRSO Act, the State of Western Australia may apply to the

Supreme Court of Western Australia for a continuing detention order in relation to a 'serious offender' under custodial sentence for a 'serious offense.' The Court must make a restriction order if satisfied it is necessary in to ensure adequate protection of the community against an unacceptable risk that the offender will commit a 'serious offense.' Robbery is specified as a 'serious offense' for the purposes of the HRSO Act. Garlett, a 27-year-old Indigenous man, was sentenced to three years and six months imprisonment for offenses, including robbery. Shortly before Garlett's release date, the State applied for a restriction order. The primary judge held that the HRSO Act was valid in its application to Garlett. Garlett appealed, arguing that insofar as its provisions apply to a person who has been convicted of robbery it is contrary to Chapter III of the Constitution by reason of the *Kable* principle. He argued that the power exercisable under the HRSO Act was not judicial power such as might be conferred upon a court exercising federal jurisdiction consistently with Chapter III of the Constitution.

By a 5:2 majority, the High Court held the *Kable* principle was not attracted, and that the *Lim* principle had no role to play. The majority held that the function of the Supreme Court, under the HRSO Act, is not incompatible with the Court's role as a repository of the judicial power of the Commonwealth.[20] The HRSO Act establishes a non-punitive scheme, with the object of protecting the community from harm. The determination of the risk of future harm posed by offenders is judicial in nature.[21] The HRSO Act was materially indistinguishable from other preventative detention regimes targeting terrorist offenders or child sex offenders, which the Court had upheld. The inclusion of offenses such as robbery as 'serious offenses' reflects legislative judgment regarding the types of offenses which may cause harm against which the community requires protection distinct from that provided by criminal law.[22] Thus, their Honors were deferential to Parliament regarding what could be classified as a 'serious offense' and adopted a formalist approach to the interpretation of Chapter III. This approach has been criticized for avoiding consideration of the broader context and consequences of the law, including the institutional racism towards and structural bias against First Nations peoples that pervades the Australian legal system and the disproportionate impact of preventative measures against First Nations peoples.[23]

In their dissent, Gordon and Gageler JJ writing separately were critical of the potential creep of preventative detention measures and incremental undermining of the institutional integrity of courts.[24] Their Honors were more willing to scrutinize the HRSO Act, considered it to be punitive, and located their analysis in the constitutional values underpinning Chapter III.[25] Although aligning with the majority on validity, Edelman J's reasoning also shunned the formalism of the plurality.[26] He held the HRSO Act was punitive and acknowledged the practical and unequal impact of the laws on First Nations peoples.[27] Against the majority, Edelman J construed the legislation narrowly, which saved it from invalidity, despite coming 'perilously close.'[28]

2. Farm Transparency International v New South Wales:[29] Freedom of Speech

Freedom of political communication is an implied guarantee in the Constitution. The freedom of political communication ('IFPC') is derived from the text and structure of the Constitution, including the requirement of sections 7 and 24 that the members of the Senate and the House of Representatives be 'directly chosen by the people' of each State and of the Commonwealth respectively. These sections 'read in context, require the members of the Senate and the House of Representatives to be directly chosen at periodic elections by the people' and require that communication 'which enables the people to exercise a free and informed choice as electors' cannot be restricted.[30] There has been disagreement among the Court as to how the validity of interferences with the IFPC should be adjudicated. Since 2015, a majority of the bench has adopted a 'structured' proportionality analysis as an element of its reasoning, applying the following test:

1. Does the law effectively burden the IFPC in operation or effect?
2. If so, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with representative and responsible government?
3. If so, is the law suitable, necessary and adequate in its balance?[31]

Other members of the Court have resisted this approach and do not undertake the three-stage proportionality analysis.

In *Farm Transparency,* the High Court, by a bare majority, dismissed a constitutional challenge to provisions of the *Surveillance Devices Act 2007 (NSW)*. *Farm Transparency* concerned the validity of legislation that prohibits the possession, publication, and communication of recordings obtained by unlawful means using optical surveillance devices. Farm Transparency International is a company and a not-for-profit charity that seeks to raise public awareness of animal cruelty; to increase an understanding of the importance of the prevention and alleviation of animal suffering; and, to improve the treatment of animals including through changes to the law, policy, practice, and custom. It had engaged in the publication of photographs, videos, and audio-visual recordings of animal agricultural practices in Australia, including in New South Wales, which it obtained through acts of trespass.

Farm Transparency is significant because it illustrates the Court's current approach to proportionality testing. *Farm Transparency* confirms the role of proportionality testing in IFPC jurisprudence, bringing Australian constitutional jurisprudence closer to several other jurisdictions in this Review. Despite a change in the composition of the Court in 2022, the role of proportionality reasoning appears reasonably settled with five members of the bench applying it in *Farm Transparency*. However, *Farm Transparency* also exposes the ongoing tensions that underpin the approach, namely the tension between the role of Parliament and the role of the Court. Differences among members of the bench as to the scope of the constitutional challenge, the construction of the impugned provisions, and the appropriateness of reading down can be understood as reflections of

the Court's conception of its role, as opposed to merely technical matters of statutory construction.[32] For example, Gageler and Gordon JJ held that the impugned provisions should be read down but differed regarding the extent of reading down. For Gageler J, the provisions should be read down so as not to apply to the publication or possession of a visual record that is a political communication.[33] For Gordon J, the provisions should be read down to exclude third parties who were not complicit in the trespass. Conversely, Edelman J considered that reading down the impugned provisions in these ways would be tantamount of 'judicial vandalism.'[34]

Moreover, the *application* of proportionality analysis in *Farm Transparency* is significant. While the majority approach to proportionality has traditionally rejected adopting varying standards of scrutiny, it is arguable that in this case, their perception of the extent of the impugned provisions' burden on political communication was relevant to the strength of the justification required.[35] In addition, the case confirms the role of values in proportionality testing. The impugned provisions were understood as pursuing the legitimate aims of privacy and dignity. Notwithstanding the competing views as to the weight of these values, it is significant that the majority and minority judges are engaging in an explicit discussion of values and that these values played a role in the reasoning. The degree of specificity with which the legitimate purposes were articulated and the importance of those legitimate purposes was relevant throughout each phase of the analysis, and thus to the outcome of the case.[36] Finally, *Farm Transparency* illustrated the pivotal role of the 'necessity limb' and potentially distorted the role of 'obvious and compelling alternatives' in that analysis. While the Court has previously considered it relevant to consider whether there were obvious and compelling alternatives less invasive of the IFPC, the majority in *Farm Transparency* may have set the bar too high in their rejection of the comparators proposed by the plaintiffs, following a detailed articulation of the differences between the legislative schemes.[37]

3. Alexander v Minister for Home Affairs (2022) 96 ALJR 560: Citizenship Stripping

Alexander was a successful constitutional challenge to s 36B of the *Australian Citizenship Act 2007*, which purported to empower the Minister to strip dual nationals of their Australian citizenship as a result of conduct 'demonstrat[ing] that the person has repudiated their allegiance to Australia' and if the Minister was satisfied it was 'contrary to the public interest for the person to remain an Australian citizen'. Section 36B was part of a suite of discretionary powers to strip individuals of their citizenship which replaced conduct-based, 'automatic' provisions following a critique of those automatic powers as being inconsistent with the right to a fair trial and Australia's international commitments.[38]

Mr. Alexander was a dual Australian-Turkish citizen who had traveled to Syria in 2013, and he was subject to an adverse Australian Security Intelligence Organization report concerning alleged foreign incursions into the al-Raqqa province in Syria, where ISIS was based. His citizenship was stripped on 2 July 2021. Alexander argued that section 36B was invalid because: i) s 36B was not within the scope of the power of the Parliament to make laws with respect to 'naturalization and aliens' under section 51(xix) of the Constitution (the 'Aliens Power'); and ii) a 36B involved the exercise of an exclusively judicial function under Chapter III, breaching the separation of powers.

The Full Court found that, to some extent, the Aliens Power was capable of supporting citizenship-stripping legislation where objectively extreme conduct involves the repudiation of allegiance to Australia, such as foreign fighting for terrorist organizations. However, the joint judgment of Kiefel CJ, Keane, and Gleeson JJ (Gageler J agreeing) took a more expansive approach to the scope of section 51(xix), noting that: the Constitution empowers the Parliament to 'create and define the concept of Australian citizenship', to select or adopt the criteria for citizenship or alienage and to attribute to any person who lacks the qualifications prescribed for citizenship "the status of alien".[39] Parliament can, essentially, define the meaning of 'alien' and its power under the Constitution.

Conversely, Gordon and Edelman JJ, writing separately, emphasized that citizen (statutory) and alien (constitutional) were different concepts and that the scope of the Aliens Power was far more restrictive. Edelman J was highly critical of the "rot" of previous HCA authorities on the Aliens Power and advocated for an entirely different approach to determining its scope.[40]

However, six justices found that s 36B was invalid because it infringed the separation of judicial and executive power guaranteed in Chapter III. The reasoning was relatively united between the joint judgment of Kiefel CJ, Keane, and Gleeson JJ (Gageler J agreeing), and the separate judgments of Gordon and Edelman JJ.

The *Lim* principle, considered to be irrelevant in *Garlett,* was relevant. Under the *Lim* principle, the adjudging and punishment of criminal guilt is a function exclusively vested with the judiciary. The Minister had argued that citizenship stripping was not penal or punitive in character (and therefore was not exclusively judicial power) but rather was for the purpose of community protection and administrative in nature. However, the majority concluded that citizenship-stripping is one of the harshest consequences that could be imposed on a person, and has historically always been regarded as punishment. Given that s 36B imposed denationalization as retribution for conduct adjudged by the Minister to constitute the repudiation of allegiance, without a criminal finding of guilt and without any requirement for procedural fairness, the majority concluded that s 36B improperly reposed an exclusively judicial function in the Minister. As such, the law was invalid and Alexander remained an Australian citizen.

The extensive discussion of the Aliens Power in *Alexander* and the wide ambit which it provides the Commonwealth to determine the scope of its power, combined with the abortion of the judgment in *Montgomery* (discussed in Part II above), leaves the extent of the Aliens Power subject to continued discussion.

IV. Looking Ahead

The key question awaiting Australia is the outcome of the referendum concerning indigenous recognition in the Constitution. No referendum has been successful in Australia without bipartisan political support. The leading opposition party, the Liberal Party and their junior coalition partner, the Nationals, have opposed the Voice. Several jurisdictions in this Review are familiar with the obstacles to structural constitutional change. Whether the Voice is successful, there remains a movement at the state and territory level to implement First Nations Voices to state and territory parliaments.

V. Further Reading

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Austria

Anna Gamper, *Univ.-Prof. Dr., University of Innsbruck, Austria/Substitute Judge at the Constitutional Court of Liechtenstein*

I. Introduction

After the pandemic and several governmental crises, 2022 turned out to be a quieter year for the Austrian Federal Constitution despite increasing instability within Europe. Still, however, it brought a number of constitutional developments and decisions. Initially, COVID-19 remained on the agenda not only because of a prolonged lockdown targeted just at unvaccinated people but also because of the COVID-19 Mandatory Vaccination Act that was enacted in early 2022. This highly controversial Act obliged the population, with very few exceptions, either to be vaccinated against the disease or to be fined. The Act was not executed due to a temporary suspension which was also the main reason the Constitutional Court did not hold it unconstitutional. Still, the Act, resented by many, was repealed after some months, as the pandemic was more or less over. The Constitutional Court also dealt with several other COVID-19 measures, declaring most of them constitutional provided that an explanatory memorandum on the legality and proportionality of the respective measure had been submitted. As in previous years, the Court was moreover concerned with a large number of asylum cases as well as conflicts arising from parliamentary investigative committees. While the Federal Government, consisting of the conservative People's Party and the Greens, had to tackle heavy economic challenges, high inflation, climate change issues, and energy supply, the elections of the Federal President and the Tyrolean Land Parliament took place in late 2022. Constitutional reform discussions centered around Austria's military neutrality, freedom of information, and the establishment of an independent public prosecuting body. Apart from some piecemeal constitutional amendments, most of which concerned energy issues, however, no major constitutional reforms were enacted.

II. Major Constitutional Developments

As already explained in previous reports, the Austrian Federal Constitution is composed of different legal fragments among which the Federal Constitutional Act (B-VG) is the most important.[1] Federal constitutional law is, moreover, easy to amend by Parliament, since, apart from some more rigid hurdles in case of specific amendments, just a qualified quorum and majority in the National Council are required.[2] Still, the current Federal Government does not command a constitutional majority in the National Council, which makes it difficult to realize major constitutional reforms. However, some smaller constitutional amendments for which a qualified majority could be found were passed in 2022 while larger reform projects are still pending. These piecemeal constitutional amendments were, on the one hand, concerned with a prolongation of technical rules[3] which had been introduced during the pandemic and allowed the Federal Government as well as, under extraordinary circumstances, local councils to make their decisions in virtual meetings.[4] In striking contrast, even the most restrictive COVID-19 measures, finally culminating in a lockdown for unvaccinated persons and mandatory vaccination, were based on ordi-

nary laws instead of a specific constitutional entrenchment.

On the other hand, amendments were mainly concerned with transparency rules regarding political contract research[5] and regarding the political parties and their funding[6] as well as provisions on the Court of Auditors,[7] procurement issues,[8] and several matters pertaining to energy supply[9] and renewable energy[10]. Most of the latter provisions either allocated energy-related powers at the federal level or concerned the regulation of Austria's energy supply. They aimed both at energy transition and the security of energy supply which, in 2022, increasingly became a worry in Austria.

Due to the Federal Government's lack of a constitutional majority in the National Council, but also because of different political attitudes within the Federal Government, larger constitutional reform projects which had already been discussed in previous years were kept waiting: one of these relates to an envisaged Freedom of Information Act which would replace the prevailing constitutional requirement of official secrecy and introduce a new fundamental right to information. A respective ministerial draft[11] had been released in 2021, but has not yet been agreed upon between the two parties forming the coalition government. It was criticized for providing so many exceptions to freedom of information that it would not differ radically from the present law and furthermore increase bureaucratic constraints for the Länder and municipalities. According to the draft, a cooling-off period should be introduced for ex-politicians who stood for the office of a constitutional judge (which had occurred recently and ended with the respective judge's resignation). Still, the political discussion on the selection and appointment of constitutional judges, most of whom may be proposed to the Federal President by the Federal Government, did not ebb away in 2022, but rather increased, though with a differing focus: the President of the Constitutional Court proposed a model according to which all constitutional judges should, after a public hearing, be elected by a two-thirds majority of the National Council which would regularly require the consent of at least part of the opposition, too, and would thus enhance the chances of politically neutral candidates.[12] Even this model would, however, not make the election of judges unpolitical, as political trade-offs could not be excluded. Other criticism concerned the current possibility for constitutional judges to remain active as barristers.[13] Even though they would, according to the present law, have to declare themselves biased and abstain from judgment in individual cases where they had been involved as barristers, the general appearance of justice might suffer from such side jobs. On the other hand, also university professors may work in parallel as constitutional judges, and also the experience derived from other legal professions is generally regarded as beneficial to the work of a constitutional judge.

Another proposal for constitutional reform, which had been triggered by recent cases of alleged political corruption and the role of public prosecutors in these cases, concerned the question of whether or not public prosecutors should remain bound to instructions given by the Federal Minister for Justice. A working group established by the Federal Ministry for Justice proposed a "general public prosecuting body" which should be composed of senates each consisting of three members.[14] Instead of the Federal Minister for Justice, these senates should be entitled to bind public prosecutors to instructions. Crucial questions were left open, namely how and by whom the members of these senates should be appointed and whether they should be subject to parliamentary control in order to make them democratically legitimate.

Finally, the Russian invasion of Ukraine and the ensuing war posed an unforeseen challenge to Austria's neutrality. It had been established by a specific Federal Constitutional Act of 1955[15] in which Austria declared her "permanent neutrality" and that it would "never in the future accede to any military alliances nor permit the establishment of military bases of foreign States on her territory". However, Austria's accession to the European Union in 1995 considerably reduced the scope of neutrality with regard to the EU's common foreign and security policy. Even though Austria did not directly participate in any military operations in 2022, several political representatives declared their concern about the Russian invasion and their full support for Ukraine "except in military terms". While surveys show that the vast majority of people are still in favor of maintaining neutrality - as far as this is compatible with EU law - and of abstaining from NATO accession, others claimed a discussion on a possible abolition of Austria's neutrality.[16] The Federal Government, however, declined to enter into that discussion and stressed the constitutional status of Austria's neutrality. Still, the constitutional understanding of neutrality was becoming more diffuse and difficult, the more the EU became engaged with supporting Ukraine in that war.

III. Constitutional Cases

1. General Remarks

The majority of cases dealt with by the Constitutional Court in 2022, out of which just 563 have been published,[17] resembled those of 2021: A large number of decisions were concerned with the constitutionality of COVID-19 measures, appeals from asylum seekers and legal conflicts arising from parliamentary investigative committees; the decisions on asylum cases and investigative committee issues followed the same patterns that have already been dealt with by previous reports[18] and will thus not be revisited here. Many appeals were dismissed in fast-track procedures[19] because of a "lacking chance of success" or "constitutional irrelevance" without publication of the respective decisions.

Apart from the Constitutional Court's COVID-19 decisions, some other judgments taken in 2022 are worth mentioning here as well: they severally concerned the media, issues related to private life and equality as well as Austrian federalism. In another decision, the Constitutional Court for the first time applied Art 140a B-VG and held part of an international treaty ratified by Austria unconstitutional.

2. COVID-19 Measures

As in the two last years, the Constitutional Court upheld its case law on COVID-19 measures which had been developed in the early phase of the pandemic: accordingly, measures interfering with fundamental rights needed to be based on a law and be proportional, which had to be justified by the regulating authority - usually, the Federal Minister of Health Affairs - in an explanatory memorandum.[20] While, at the beginning, the Constitutional Court had repealed all regulations for the lack of such a memorandum (without itself seeking a possible justification), the submission of such documents which began soon after the first COVID-19 decisions had been taken have since regularly induced the Constitutional Court to declare their constitutionality.[21] In most of the decisions taken in 2022, the Constitutional Court found the challenged provisions on measures constitutional without inquiring too deeply into their proportionality. Among these measures dealt with by the Court were the lockdown for unvaccinated persons and mandatory vaccination which, not just concerning the intensity of the interference, but also the different treatment between vaccinated and unvaccinated persons, surely ranked among the most radical measures taken in Austria during the pandemic. But also numerous other cases, some of which even dated back to 2020, were treated by the court, even if only refused for formal reasons or dismissed in the aforementioned short-track procedure.

In a majority of the admitted cases, the Constitutional Court found the respective provisions - which had applied in different phases of the pandemic - constitutional: accordingly, the Court confirmed (even though retroactively, when the respective provision had already entered out of force) the requirement of a PCR test for participating in nightlife restaurants and bars,[22] the requirement of a PCR test in order to be allowed to enter certain places even for unvaccinated persons who had neutralizing antibodies,[23] the shutdown of hotels and cable cars,[24] the prolonged lockdown for unvaccinated persons[25] and mandatory vaccination[26].

In contrast, the Constitutional Court found the different treatment of gatherings for religious purposes, on the one hand, and for cultural purposes, on the other hand, unconstitutional: according to the Court, it was not reasonably justified to permit all kinds of religious gatherings while cultural events, including those that required an audience, were largely prohibited.[27] The Constitutional Court, moreover, found that the prohibition for unvaccinated persons to go to a hairdresser or use similar services violated the COVID-19 Measures Act which provided several exceptions from the lockdown for unvaccinated persons such as the need to leave home because of the "basic needs of everyday life";[28] as the lockdown for unvaccinated persons was not just limited to a single short period, but prolonged for months, the need for a hairdresser or similar services could be regarded as such a "basic need".[29] In the two latter cases, even the explanatory memorandum that had been attached to the respective provisions could not justify the measures in the Constitutional Court's opinion.

The decisions on the legitimacy of the prolonged lockdown for unvaccinated persons[30] and on mandatory vaccination[31] are of particular interest: in the first case, the Constitutional Court admitted that an ex-post perspective on that measure might differ from an ex-ante perspective but that the Court had to assess whether the measure had been legitimate due to the prognosis taken at the time of its enactment.[32] Further, the Court asserted that "when assessing a critical situation scientifically not every uncertainty or obscurity should have to be borne by those persons whose fundamental rights are interfered with."[33] Still, however, the Court found the measure constitutional, in particular since at the time of its enactment the intensive care infrastructure and staff at hospitals had been under enormous pressure.[34] Moreover, the Constitutional Court decided on mandatory vaccination, which was not limited to certain professional groups but applied to the population in general.[35] Due to massive protests, the requirement was temporarily suspended after the COVID-19 Mandatory Vaccination Act[36] had been enacted. Referring to that suspension and the need to evaluate the conditions for either a suspension or activation of the obligation in accordance with the ministerial empowerment contained in that Act, the Constitutional Court held the Act constitutional even though it strongly interfered with the right to private life under Art 8 ECHR.[37] The Court also stressed that mandatory vaccination did not imply the actual enforcement of a vaccination, but fines if persons were not vaccinated. Shortly after the judgment, however, the COVID-19 Mandatory Vaccination Act was repealed by the lawmaker itself,[38] due to much resentment by the people but also because the pandemic was finally ebbing away.

3. Unconstitutional International Treaty

Art 140a B-VG entitles the Austrian Constitutional Court to examine the illegality of an international treaty ratified by Austria. For the first time , the Constitutional Court declared the unconstitutionality of such a treaty, namely of two provisions of the Agreement between the Republic of Austria and OPEC, regarding the Headquarters of OPEC.[39] According to the Constitutional Court, Art 6 ECHR - which enjoys a constitutional status in Austria - was violated by these provisions because they excluded the jurisdiction of Austrian courts to decide on labor law-related conflicts of OPEC employees. Notwithstanding the immunity of an international organization that prohibited unilateral interference by the state in which the organization had its seat, access to justice could not be totally excluded; it could not be considered proportional not even to provide an adequate alternative mechanism for dispute settlement by that Agreement.

4. Media Issues

Amongst other decisions related to media issues, the Constitutional Court repealed part of the Austrian Broadcasting Act that had provided a fee for the terrestrial reception of programs by the Austrian Broadcasting Corporation.[40] The Court held it unconstitutional that persons who watched these programs via the internet did not have to pay that fee. As long as the lawmaker chose to finance public broadcasting by means of program charges, these persons ought not to be excluded from payment. Apart from the

equality problem, the Court also stressed that independent broadcasting was stipulated by the Federal Constitution and thus required the lawmaker to provide financial resources for the Austrian Broadcasting Corporation. As the Court set a deadline for the expiry of the repealed provisions, the lawmaker will have some time to decide on a new financing model.

Further, the Constitutional Court repealed a provision of the Data Protection Act which had generally excepted journalists from the application of the provisions of that Act.[41] The Court argued that the lawmaker had to consider freedom of communication and the function of the media as public watchdogs, but could not categorically prioritize journalistic work over individual rights to data protection; instead of the repealed provision, the lawmaker should balance between both requirements, even though the Constitutional Court could only make this informal suggestion without any positive obligation for the lawmaker.

In another decision, the Constitutional Court held provisions that prohibited covert advertising in TV programs and required a recognizable separation between commercials and other TV programs constitutional.[42]

5. Private Life and Equality

Several decisions taken by the Constitutional Court in 2022 concerned the rights to private and family life under Art 8 ECHR which, as all Convention rights, are part of the Austrian Federal Constitution as well as the right to equality entrenched in several constitutional provisions.

In a private international law context, the Constitutional Court found a foreign provision that prohibited the adoption of children by registered homosexual couples to be a violation of the Austrian public order and thus not applicable by Austrian courts;[43] however, a similar prohibition had been in force in Austria, too, until the Constitutional Court repealed it in 2014[44].

The Constitutional Court further repealed a provision of the Austrian Civil Code that had prevented a woman from becoming the legal parent of a child that had been conceived by her female partner in a natural way; according to the Court, it violated both Art 8 ECHR, the equality principle and the constitutional guarantees of child welfare to exclude parenthood of the mother's female partner in case of a natural conception, while it was permitted in case of artificial insemination.[45] These recent decisions followed the case law enacted by the Constitutional Court over the last decade in which the Court, deviating from its previous case law, had paved the way for the possibility of adoptions by same-sex couples,[46] of artificial insemination of lesbians,[47] and of same-sex marriage[48]. As the Court regularly based its reasoning on Art 8 ECHR and the equality principle, the same fundamental rights are applied in similar cases where rights emerging from marriage and parenthood are concerned. The respective decisions go beyond the ECtHR's respective case law on Art 8 ECHR and clearly promote the concept of social parenthood. On the whole, the judicial activism shown in this branch of the Constitutional Court's case law has largely replaced legislative decisions in this particular context, which stands in striking contrast to the constraint that the Court shows in other legal fields, not the least with regard to the proportionality of COVID-19 measures.

An appeal against the prohibition to consume cannabis, however, was dismissed by the Constitutional Court in a fast-track procedure: with very brief reasoning, the Court considered it within the lawmaker's margin of appreciation to regulate the use of drugs that were also regulated by international law more strictly than others as well as to generally distinguish between the legality or illegality of different drugs, even though all of them could be potentially dangerous.[49]

6. Federalism

The Constitutional Court also dealt with some interesting issues in the context of the Austrian federal system. In one decision, the Court repealed part of a federal law that had transferred several health planning tasks to a private limited company.[50] Since such issues constitute "indirect federal administration" for which the Länder are usually responsible, their approval would have been needed and could not be replaced by an intergovernmental agreement between the federation and the Länder. Neither was the federal lawmaker allowed to oblige the Länder to establish new authorities nor could a specific federal framework law oblige the Länder to privatize matters that required "authoritative" state administration instead of private law instruments. However, the Constitutional Court in this context affirmed the legality of a "mixed" regulation that, although being based both on federal and Land competencies, had been enacted as an incorporated document, because the issuing authority was responsible to carry out both matters. In turn, the empowerment of a private limited company to perform administrative issues requiring the authority of the state was considered constitutional due to the limitation of its tasks and the effective control exercised by the supreme bodies of state administration over that company.

Furthermore, the Constitutional Court repealed a provision of a regional constitution - the Constitutional Act of the Land Styria - which had empowered the Styrian Court of Auditors to scrutinize the performance of entities that are responsible for providing housing.[51] According to the Constitutional Court, that scrutiny power could not be made dependent on a contractual agreement between the Land Styria and the respective housing entity, but could only be established by formal laws, similar to the way the powers of the Federal Court of Auditors were established at the federal level. However, if the Land Constitution empowered the Styrian Court of Auditors differently from the corresponding empowerment of the Federal Court of Auditors - which was itself not prohibited by the Federal Constitution -, it could not require the Constitutional Court to decide over conflicts arising from that empowerment. Because the Land Constitution had thus not observed the limits of the Constitutional Court's competencies with regard to conflicts arising over auditing powers, the Land constitutional provision had to be repealed.

IV. Looking Ahead

In 2023, several elections of Land parliaments will take place that will not only have an impact on the representation of political parties in the federal second chamber (whose members are elected by the Land parliaments) but also on the political future of the fragile Federal Government. The Constitutional Court, after having finished its COVID-19 caseload, will, inter alia, have to decide on climate change appeals, asylum complaints, and controversies around parliamentary investigative committees. Moreover, the political appointment of constitutional justices as well as the controversial question of whether their office should be incompatible with the side job of a barrister will remain on the agenda. Whether the constitutional draft on freedom of information will be realized seems as uncertain as the introduction of an independent public prosecuting body, while the constitutional remains of Austria's military neutrality, which is still supported by a large majority, are unlikely to be eliminated in the near future.

V. Further Reading

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Bangladesh

Dr. Muhammad Ekramul Haque, *Professor, Department of Law, University of Dhaka, Bangladesh*

Ali Mashraf, *Lecturer, Department of Law, East West University, Bangladesh*

I. Introduction

The birth of Bangladesh as the independent, sovereign People's Republic of Bangladesh happened through its Proclamation of Independence (a unilateral declaration of independence) made on 26 March 1971.[1] It then adopted and enacted its current Constitution on 4 November 1972, which came into effect on 16 December 1972. As such, 2022 marked the 50th anniversary, i.e., the golden jubilee of the Constitution of Bangladesh.

While 2022 was the first year to experience no nationwide lockdown since the spread of the COVID-19 pandemic in March 2020, there were disruptions to the regular functioning of courts. Owing to a sudden spike in COVID-19 cases in January, 13 judges of the High Court Division of the Supreme Court (SC) of Bangladesh and numerous other judges and staff of the subordinate judiciary were infected with the coronavirus.[2] Consequently, the Chief Justice issued two circulars halting in-person hearings in the Appellate Division (AD) (vide memorandum no 146/2022 SC (AD)) and the High Court Division (HCD) (vide circular no 36 – A) of the SC. Both Divisions then resumed virtual hearings as per the provisions of the Use of Information-Technology by Courts Act, 2020 from 19 January 2022. However, this was a temporary measure as the SC resumed in-person hearings later, which continued throughout the year.

The most significant constitutional development in 2022 was the enactment of the Chief Election Commissioner and the Other Election Commissioners Appointment Act, 2022. It was the stepping-stone towards fulfilling the obligation of article 118(1) of the Constitution. Additionally, the judiciary pronounced multiple landmark verdicts upholding the fundamental rights of citizens, widening the ambit of fundamental rights, devising innovative mechanisms to provide remedies for violation of fundamental rights, etc.

II. Major Constitutional Developments

1. Enacting the Chief Election Commissioner and the Other Election Commissioners Appointment Act, 2022

It took Bangladesh 50 years to fulfill its constitutional obligation under article 118(1) of enacting a law on the appointment of the chief election commissioner (CEC) and other election commissioners (ECs). The Parliament passed the Chief Election Commissioner and the Other Election Commissioners Appointment Act, 2022 on 29 January 2022, concluding its efforts to enact this law, which began in 2021.[3]

Section 3 of the Act outlines the formation of a search committee composed of six members and headed by a judge of the AD (to be nominated by the Chief Justice).[4] Other members of the search committee shall be: one judge of the HCD (to be nominated by the Chief Justice), the Comptroller and Auditor General of Bangladesh, the Chairman of the Bangladesh Public Service Commission, and two prominent citizens

(to be nominated by the President), one of whom shall be a woman.[5] Section 5 lays out the qualifications of CEC and ECs. It states that the CEC and the ECs must be Bangladeshi citizens with a minimum age of 50 years and must have served in a government, judicial, semi-government, non-government, or autonomous position or profession for not less than 20 years.[6]

Section 6 details the disqualifications from being appointed as CEC and ECs. The disqualifications are: if someone is declared to be of unsound mind by any court of law, if someone is yet to become free from their liabilities after being declared bankrupt,, if someone obtains foreign citizenship or declares or pays allegiance towards a foreign nation, if someone is imprisoned after being found guilty of offenses involving moral turpitude, if someone is found guilty and punished for offenses under the International Crimes (Tribunals) Act, 1973 or the Bangladesh Collaborators (Special Tribunals) Order, 1972, and if someone occupies any office of profit of the Republic which, by law, exempts them from being appointed as CEC or ECs.[7]

The new CEC and ECs were appointed under the provisions of the 2022 Act on 26 February.[8] As the Election Commission faces some significant challenges with the upcoming national elections in January 2024,[9] the Government, following the directions of the President, must also promulgate the Rules under the Act,[10] to ensure credible, free, and fair elections.

2. Amendment to the Provisions of the Evidence Act, 1872

The Parliament extensively amended the provisions of the age-old Evidence Act of 1872. It included 'digital record' in the definition of documents,[11] inserted definitions of the terms – Digital record or electronic record, Digital Signature or electronic Signature, Digital Signature Certificate, Certifying Authority – in the Act,[12] and included forensic evidence under the definition of 'evidence.'[13] The Evidence (Amendment) Act, 2022 also incorporated provisions on digital evidence and their admissibility, the presumption of digital evidence, the mode of taking digital evidence by the court, the mode of proving digital evidence in the court, etc.[14]

In a welcoming move, the Act finally repealed the controversial section 155(4),[15] which enabled defense lawyers to impeach the credibility of a witness by showing that the prosecutrix in a rape or attempt to rape trial was 'of generally immoral character.' Section 146(3) of the Evidence Act, 1872 was also amended to refrain defendants from questioning 'general immoral character or previous sexual behavior of the victim' in cross-examinations.[16] The amended section provides that defense lawyers can only ask such questions with the court's permission (if such questions appear to be necessary to the courts for the ends of justice).[17]

These amendments are a step towards ensuring the fundamental rights to equal protection of the law, protection in respect of trial and punishment, equality before the law, non-discrimination on the ground of sex,[18] etc. This will also enhance Bangladesh's efforts to ensure the rule of law by speedy disposal of civil and criminal trials. Bangladesh ranked 127th in the World Justice Project's Rule of Law Index® with a score of 0.39 (out of 1) in 2022.[19] Its global performance in civil justice (ranked 130/140 with a score of 0.37) and criminal justice (ranked 120/140 with a score of 0.31) systems in the Index is concerning.[20] Thus, speedy disposal of civil suits and criminal cases is *sine-qua-non* to enhance its performance in these two factors.

3. Insertion of Rules Relating to Prevention of Sexual Harassment against Women in Workplaces in the Bangladesh Labour Rules, 2015

In a landmark decision in 2009, the HCD defined 'sexual harassment' and outlined directives in the form of guidelines for the protection of women and girls from sexual harassment in workplaces and educational institutions in both public and private sectors.[21] The HCD directed the guidelines to be followed until 'adequate and appropriate legislation' was enacted. In 2021, Ain O Salish Kendra filed a petition regarding the Government's inaction in implementing these guidelines issued by the HCD. During its hearing, the HCD, on 9 January 2022, sought a report within three months from four secretaries of the Government about the steps taken by the Government to prevent the sexual harassment of women and girls in all governmental and non-governmental workplaces and educational institutions.[22] While this rule was pending, the Ministry of Labour and Employment, in an unrelated move, amended the Bangladesh Labour Rules, 2015 by inserting the provision: 'Conduct towards women' in workplaces.[23] It lists 12 acts to be considered as sexual harassment in workplaces and provides for a sexual harassment prevention committee to deal with sexual harassment complaints.[24] Nevertheless, the Government is yet to prepare a uniform set of guidelines for all educational institutions in Bangladesh to prevent the sexual harassment of women and girls.

This amendment aims to uphold the Government's duty under article 19 (Equality of opportunity) and the fundamental rights enshrined in articles 27 (Equality before the law), 28 (Non-discrimination on various grounds), and 29 (Equality of opportunity in public employment) of the Constitution. Besides, this also ensures fulfillment of the Government's obligations under articles 11 and 24 and general recommendation no. 19 regarding article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Overall, it is a welcoming step as it ensures harmony between the two organs, the judiciary and the executive.

III. Constitutional Cases

The SC's landmark pronouncements in 2022 aided in interpreting constitutional provisions to elaborate contents of fundamental rights as guaranteed under its part III, re-emphasizing the doctrine of separation of powers among the three organs of the state, checking upon the powers of autonomous bodies when they exceeded their powers in their actions, devising an innovative mechanism to ensure remedies to citizens on account of the violation of their fundamental rights by state organs, etc.

1. Eriko Nakano v Bangladesh and others[25]

In this case, a Bangladeshi father brought his two daughters to Bangladesh from the custody of their mother (his wife, a Japanese citizen) during the pendency of a custody case in a Japanese Family Court. Then, he filed a family suit for custody in a Dhaka Family Court. Meanwhile, the mother came to Bangladesh and filed a *habeas corpus* writ petition for the custody of the children, during the pendency of the family suit in the Dhaka Family Court. During the pendency of both cases in Dhaka, the Japanese Family Court ruled in favor of the mother and granted her custody of the children. But since the father had already removed the daughters from her custody and brought them to Bangladesh, she could not enforce her right. Consequently, the HCD, based on the principle of welfare and the best interest of children, decided that the daughters be kept in the custody of their father and granted regular visitation rights to the mother. Furthermore, it refrained the father from taking the daughters outside of Bangladesh and imposed certain cost orders upon him regarding the travel to and stay in Bangladesh by the mother.[26]

On appeal, the AD, however, observed that the HCD exceeded its powers by deciding on the issue of custody since it is the family court's jurisdiction to decide on that issue.[27] Stating that the question of paramount importance was that of the welfare of the daughters, the AD declared the HCD's earlier order illegal and directed the daughters to remain in the mother's custody until the disposal of the family suit.[28] The AD also directed the Family Court to dispose of the suit within 3 months from the date of the receipt of the order.[29] Thus, the AD, in this instance, restated the power of the Family Court to decide custody matters and reversed the HCD's decision when the HCD decided upon custody of children in a *habeas corpus* writ petition.

2. Tafsir Mohammad Awal v Government of Bangladesh[30]

In this case, the HCD ensured that the fundamental right to movement of Bangladeshi citizens is not arbitrarily restricted/whittled down by any governmental or autonomous bodies. It observed the provisions in the Anti-Corruption Commission (ACC) Act of 2004 and the ACC Rules of 2007 do not authorize the ACC to pass an embargo on the petitioner from leaving and re-entering Bangladesh.[31] Hence, it declared the ACC's order of imposing the embargo upon the petitioner from leaving and re-entering Bangladesh as illegal. The HCD stated that to make such an order legal, it will have to be confirmed by an appropriate court of law within 3 working days of its issuance.[32] Thus, the HCD recognized that while the right to freedom of movement under article 36 of the Constitution is not an absolute right, it is subject to reasonable restrictions, which must be provided by a specific law and have a lawful justification.[33]

3. Mohammad Zahirul Islam v Government of Bangladesh and others[34]

In the full text of this case, released in 2022, the HCD ushered in a new era of the compensation jurisprudence of the Bangladesh legal system. Once again, the HCD underscored its power under article 102 to order compensation to be paid to victims of proven infringement of fundamental rights (in this case, families of victims who died due to the capsizing of a little ship) under article 32 of the Constitution. However, the HCD did not stop there. In a remarkable move, it added an 8% interest rate (to be calculated from the filing date of the writ petition till the date the amount is paid) to the original amount of compensation awarded worth BDT 2 crore 70 lakh to the victims.[35] Moreover, the HCD observed that the government could recover the quantum of compensation from its defaulting officials and deposit it in the public exchequer.[36] This precedent will prompt respondents to pay compensation to victims on time since they risk incurring more costs in the form of interest otherwise. The AD, however, stayed the decision until the disposal of its appeal.

4. Human Rights and Peace for Bangladesh v Bangladesh[37]

When the constitutionality of section 41(1) of the Government Service Act of 2018, which provided for seeking prior approval of the government/appointing authority before arresting any public servant on criminal charges was challenged, the HCD declared it illegal since it violates the provisions in articles 26, 27 and 31 of the Constitution.[38] The HCD elaborated on the unconstitutionality of this provision *vis-à-vis* various constitutional provisions and how it *de facto* frustrates the objective and application of the ACC Act, 2004.[39] It also relied upon an earlier decision where a similar provision (section 32ka of the Anti-Corruption Commission (Amendment) Act, 2013) was declared unconstitutional by the HCD.[40] Thus, the pronouncement sought to curb the undue privileges and protection conferred to a special class of citizens: public servants.[41] However, when the Government appealed against this decision, the AD stayed it until the disposal of the appeal.

5. Government of the People's Republic of Bangladesh v Md Nurul Islam Khan and others[42]

In this case, the AD emphasized the doctrine of separation of powers and restricted the HCD's interference in administrative affairs. It held that the HCD has no powers to pass 'any order or direction in a matter of administrative policy of the Government or any policy decision matter' in exercising powers under Article 102.[43] After a clear reading of the Local Government (Pourashava) Act, 2009, the Pourashava Ordinance, 1977, and the Pourashava Officers Service Rules, 1992, the AD held that the upgradation of posts was a policy decision and promotion was an administrative decision vested upon the higher administrative authorities.[44] It then modified the HCD's judgment and order and expunged the portion ordering the upgradation and promotion of posts. This is a classic example of the SC ensuring that it does not exceed its power by judicial overreach and stepping into the executive's shoes.

6. Sadekul Islam v Election Commission[45]

The HCD checked upon the Election Commission's unauthorized exercise of power

in this case. Outlining the specific instances when the Election Commission can cancel an election, the HCD stated that an election in a center could not be stopped solely because 'ballot boxes were removed illegally from the presiding officer's custody, damaged accidentally, destroyed intentionally, or lost.'[46] Interferences must be to the extent that the election result cannot be determined. Hence, the Election Commission cannot direct for re-election unless it is satisfied that the outcome of the other centers can in no way determine the election's result.

7. Shahidulla (Md) v Election Commission[47]

This case was another instance of the HCD restricting the Election Commission's unchecked exercise of its plenary powers. The HCD observed that the Election Commission's plenary powers to cancel election results and direct re-election are more specific and defined under the newly enacted laws (the Local Government (Union Parishads) Act, 2009, and the Local Government (Union Parishads) Election Policy, 2010), in contrast to the previous laws (the Local Government (Union Parishads) Ordinance, 1983 and the Union Parishads (Election) Rules, 1983). It can only cancel an election if the extent of the interference is such that the result of the election of that center cannot be determined due to the interference. The HCD further stated that the disputes based on which the Election Commission decided to cancel the election's result and direct re-election are matters for the Election Tribunal to decide in the exercise of its judicial authority. The Election Commission cannot exercise its plenary and supervisory authority, which is an administrative authority, in such circumstances. Thus, the HCD decided that in this case, the proper forum for the aggrieved persons was the Election Tribunal, not the Election Commission.[48]

8. Terab Ali and others v Syed Ullah and others[49]

In this case, the AD elaborated on the scope and ambit of article 111. It stated that 'case laws declared by any superior courts other than those of Bangladesh, including Pakistani courts after 25 March 1971 and Indian courts after 13 August 1947,' are not binding precedents in Bangladeshi courts.[50] Moreover, the AD held that such (foreign) decisions may have persuasive value, but 'cannot be relied upon *ipso facto* as done by the Sylhet court' in this case.[51] The AD further cautioned subordinate courts (who are bound to apply 'existing laws),' from citing or relying upon foreign case laws not covered under articles 111 and 149 of the Constitution[52] It went on to declare that the practice of relying upon reference books, other than recognized law reports as per the Law Reports Act, 1875, was inappropriate.[53] Therefore, this pronouncement is an attempt towards ensuring the constitutional supremacy and binding nature (precedent) of the pronouncements made by both divisions of the SC of Bangladesh only. It restates that decisions of foreign courts have merely persuasive effects, not binding effects on our courts.

9. Abdul Gaffar and another v Md Mohammad Ali and others[54]

In a surprising move, the AD, in this case, condoned two police officers from paying compensation of BDT 5000 each according to an HCD order due to their abuse of police power.[55] The AD factored in the issues of their failure to deal with the matter appropriately as junior police officers and the timeline of their entire service careers. Furthermore, the officers tendered unconditional apologies to the ADand nobody from the respondents (writ petitioners) appeared to oppose the appeal. The AD heard this appeal 18 years after the HCD judgment, while the incident of abuse of police power took place in 1994. The authors note that the SC should cautiously deal with such matters and stay vigilant against practices of police tendering unconditional apology in grave charges of abuse of power to escape liability.

IV. Looking Ahead

The next agenda for the Legislature is enacting a law on the appointment of SC judges (under article 95 (2) (c) of the Constitution). When questioned during a parliamentary session in January 2023, the Minister of Law, Justice, and Parliamentary Affairs responded that the new law would be tabled 'within a few days' in the parliament.[56] This will ensure formalizing the appointment of judges, a process that has been deeply scrutinized throughout the years due to the absence of a particular law.[57]

The review hearing of the 16th Amendment case is also due in 2023. The 16th Amendment handed over the power of impeachment of Supreme Court judges to the parliament (reverting to the original Constitutional provision of article 96). However, when it was challenged, both divisions of the SC declared it unconstitutional.[58] The government then filed a review petition against the AD's decision.[59] The AD's chamber judge even fixed the hearing on 20 October before the full bench. The petition appeared on AD's cause list for hearing on 15 December. However, the hearing did not take place. It is expected that the hearing of the review petition will commence in 2023.

V. Further Reading

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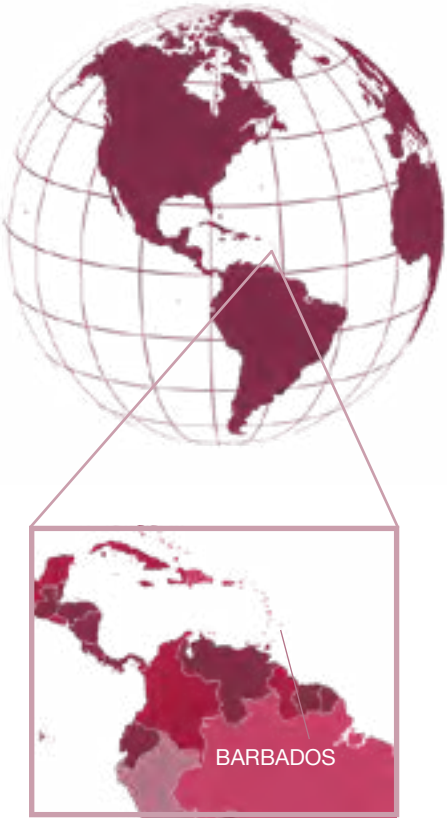
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Barbados

Nicole D. Foster, *Law Lecturer & Head, Law & Health Research Unit, Faculty of Law, University of the West Indies, Barbados*

I. Introduction

Barbados is a former British colony. It gained independence from the United Kingdom on November 30, 1966, and in 2005 replaced the British Privy Council with the Caribbean Court of Justice (CCJ) as its final Court of Appeal.[1] On November 30, 2021, Barbados transitioned from a constitutional monarchy to a Republic with Barbadian Dame Sandra Mason as its President and Head of State. Barbados remains a member of the Commonwealth.

In June Barbados' Constitutional Reform Commission began its work with wide-ranging town hall meetings and smaller consultations. In December, Justice Michelle Weekes also delivered a landmark oral ruling striking down sections 9 and 12 of the Sexual Offences Act, Cap. 154 which criminalizes buggery between consenting adults.[2] Finally, following its second consecutive 30-0 election win in January 2022, the Mia Mottley administration unsuccessfully tried to amend the existing Barbados Constitution to: i) lower the age eligibility for members of both Houses of Parliament to 18 years and ii) allow for the nomination of two Opposition Senators by the 'leader of the party in opposition who gained the most votes in the election' where there is no 'Leader of the Opposition'.[3] [240 words]

II. Major Constitutional Developments

On June 20, 2022, the 10 members of Barbados' Constitutional Reform Commission took the oath of office and commenced work on June 24, 2022. Constitutional reform in Barbados has tended to be somewhat 'piecemeal' with the last attempt at effecting comprehensive reform being the establishment of the Forde Commission in October 1996, whose report was submitted in December 1998 but remained largely unactioned. The current Constitutional Reform Commission was established under the Commissions of Inquiry Act Cap. 112. The Commission is chaired by retired Justice Christopher Blackman and its members are drawn from across society including the Muslim and Christian communities, education, business, and the legal fraternity. The Commission's mandate is quite broad: it is charged with making recommendations relevant to attaining its aims and objectives; analyzing the Constitution and all other related laws and matters needed to arrive at a new constitution; generating a draft Constitution for Parliament's consideration and recommending reforms needed for modern Barbados and to promote its peace, order and good governance.[4] The Commission is expected to complete its work by December 2023.

During the year, Justice Shona O Griffith handed down two important judgments that raised similar issues relating to the constitutional guarantees related to criminal matters and the principles informing the quantum of damages to be awarded for a breach of these rights. *Preston Devere Parris v Attorney General*,[5] involved a claim for redress for the alleged breach of the claimant's rights to a fair hearing within a reasonable time under section 18(1) of the Constitution, to the security of the person under section 11(a) of the Constitution and to the protection of the law under section 11(c)

of the Constitution. Criminal proceedings were commenced against the claimant in May 2017 for the offense of causing death by dangerous driving related to an accident that had occurred in July 2010. By the time of the constitutional motion in November 2020, the preliminary inquiry into the charge had not yet begun. The claimant argued that the length of delay in prosecuting the matter meant that he could no longer have a fair trial, that the reasonable time within which his trial should have been heard had expired, and that the delay had adversely affected his mental and physical health thereby breaching his right to security of the person. Justice Griffith dismissed the claim in respect of breach of the rights to security of the person and protection of the law. However, she held that the claimant's right to a trial within a reasonable time had been breached and that if the preliminary inquiry into the accident did not commence within 4 months of the date of her judgment, it would be permanently stayed. In reaching her decision, Justice Griffith undertook an extensive review of the principles of interpretation to be applied in respect of alleged breaches of the right to security of the person and protection of the law in particular. Justice Griffith next ruled in *Shamar Tyrone Patrick v The Attorney General*[6] a case that arose out of 2006 criminal charges for causing serious bodily harm, with intent. The claimant was granted bail and, after multiple adjournments, the preliminary inquiry into the matter commenced on 16 February 2007 and continued until 23 July 2010 at which point it was adjourned *sine die* and did not come on for hearing again. In July 2018 the claimant instituted constitutional proceedings arguing that the State had breached his rights to liberty and security of the person pursuant to section 11(a) and his right to a fair hearing within a reasonable time under section 18(1). In February 2019 a consent order was made recognizing that the claimant's right to a fair hearing within a reasonable had been breached and dismissing the charge of causing serious bodily harm, with intent. Justice Griffith's ruling was limited to whether damages were the appropriate remedy for breach of the claimant's right to a fair hearing and, if so, the quantum of damages to be awarded. The court held that damages were in fact an appropriate remedy in the circumstances and awarded the claimant Bds $35,000 for breach. Justice Griffith also reiterated the need for pecuniary damage to be proved unless the claimant's inability to provide evidence of a particular loss is due to the wrongdoer's conduct.

III. Constitutional Cases

1. Preston Devere Parris v The Attorney General: Fundamental Rights and Freedoms - Right to Security of the Person and Protection of the Law[7]

The facts of this case are set out in section II. The case is notable for Griffith J's discussion of the meaning and scope of the right to security of the person, including her reliance on international human rights principles in arriving at her ultimate conclusions.

Justice Griffith began her deliberations with the usual recognition that the Constitution is a *sui generis*, a living document that must be interpreted liberally while upholding judicial restraint and avoiding judicial activism. One of the key issues that the Court had to determine was whether or not the protection offered by the right to security of the person extended to psychological harm suffered by the claimant arising out of criminal proceedings. In reaching its decision, the Court relied heavily on the Human Rights Committee's interpretation of the right in its General Comment 35 on Article 9 of the International Covenant on Civil and Political Rights 1966 (ICCPR). This reliance was justified based on the ICCPR being the source of the right reflected in Article 11 of the Constitution. The Court endorsed General Comment 35's explanation that the right is intended to protect individuals, against 'intentional infliction of bodily or mental injury, whether the victim is detained or non-detained.' Griffith J then clarified that even though mental health is relevant, the protection offered under section 11 of the Constitution did not extend to indirect health impact arising out of civil or criminal proceedings such as the psychological harm the claimant indicated had been caused by the delay in prosecuting his criminal charge. In reaching its decision on the reasonableness of the delay in prosecuting the criminal charge in question, the Court applied the earlier binding CCJ decision in *Gibson v The Attorney General of Barbados* to the effect that the relevant period for assessment of delay is from the arrest of the accused until exhaustion of all appellate processes.[8] The court then held that the 41-month delay in the case amounted to a breach of the claimant's right to be tried within a reasonable time. The Court however rejected the claimant's allegation that the trial would be unfair unless he was provided with means to obtain the services of a collision reconstruction expert. In determining the appropriate remedy for breach of the claimant's right to trial in a reasonable time, the Court was again guided by the *Gibson* decision that where there is only a breach of the reasonable time guarantee, a permanent stay or dismissal would not normally be the appropriate remedy for the breach. Accordingly, the Court then turned its attention to whether or not there was also a breach of the claimant's right to protection of the law, which it found not to be the case as the claimant had not alleged any conduct on the part of the State relating to the delay which could be regarded as 'unconscionable or oppressive'. Bearing in mind that there was therefore solely a breach of the reasonable time guarantee, applying *Gibson*, the Court ruled since it was still possible for the claimant to receive a fair trial, damages were not an appropriate remedy and simply issued a declaration regarding the breach of the claimant's right. The judge ordered that his trial be expedited and commenced within four months from the date of the judgment, failing which the charge laid against him in May 2017 would be liable to be permanently stayed.

2. Shamar Tyrone Patrick v Attorney General: Fundamental Rights and Freedoms – Calculation of Quantum of Damages for Breach of Right to Trial in a Reasonable Time[9]

The facts of this case are set out in section II. This case established the approach to be adopted and the principles to be applied in determining whether damages for breach

of the right to trial in a reasonable time is an appropriate remedy and the quantum of damages to be awarded.

Griffith J began her analysis by noting that, although there were well-known regional authorities such as *Maharaj (No. 2)* v *Attorney-General of Trinidad and Tobago*[10] and *Attorney-General for Trinidad & Tobago* v *Ramanoop*[11] in the area of assessment of damages for breach of constitutional rights, the law in the area was still developing. The New Zealand case *Taunoa et al v Attorney General*[12] was found to be particularly useful in the instant case in so far as it clarified that it was inappropriate to approach the assessment of damages for breach of a constitutional right with the mindset of first identifying pecuniary and then non-pecuniary loss and that the better approach was to 'contextualize the nature of the right breached as against the nature or degree of its infringement … [and] … the effects of the breach ….'.

On the specific question of whether the claimant had to prove his alleged pecuniary loss resulting from the breach of his right to a trial in a reasonable time, Griffith J explained that regional authorities such as *Maharaj (No. 2), Ramanoop, Alleyne v Attorney General of Trinidad & Tobago*[13] *and Sam Maharaj* v *Prime Minister*[14] all turned on their particular facts and that they did not support the proposition that pecuniary loss in constitutional claims did not need to be proved. Griffith J also highlighted that what was critical in cases such as *Alleyne* was that the appellants' inability to present evidence to substantiate their loss was due to the wrongdoer's conduct. Accordingly, the claimant's unsupported claims for pecuniary loss were dismissed and the compensation ordered in favor of the claimant was assessed simply based on general loss flowing from the breach with the sum of Bds $35,000 being awarded. This sum reflected in part Griffith's J view that since the claimant was on bail throughout the entire period the charge was subsisting, the infringement was not at the same level as cases involving deprivation of liberty or related rights. The case was not thought equally to be one that merited an award of vindicatory damages.

3. Pedro De'roy Ellis v The Attorney General: Fundamental Rights and Freedoms – Deprivation of Liberty – Appropriate Remedy[15]

In May 2013, the claimant was arrested, charged with murder, remanded to prison, and remained in prison for the entire duration of his criminal proceedings. His trial commenced and concluded in October 2019 when he was found not guilty of murder. The jury was unable to arrive at a verdict on the lesser charge of manslaughter and was discharged. Although he had no further criminal charges against him, the claimant was remanded into custody by the trial judge until the end of October 2019. Without any further indictment being filed against him, the claimant was again remanded into custody and his bail application was denied. The claimant then appealed against the refusal of bail and the order remanding him into custody. The Court of Appeal upheld his appeal on 12 November 2019 and ordered his immediate release. By that date, the claimant had served eighteen days on remand. The claimant alleged breaches of his rights to liberty contrary to sections 11 (a) and 13 of the Constitution, of his right to security of the person contrary to section 11 (a) of the Constitution, and of his right to protection of the law contrary to section 11(e) of the Constitution. The claim for redress was limited by the court to the additional eighteen days that the claimant spent on remand after the conclusion of his criminal trial.

Griffith J, in deciding the matter, noted that it substantially engaged the same reasoning of the Court as *Preston Devere Parris v Attorney General*[16] and *Shamar Tyrone Patrick v The Attorney General*[17] and should be read in conjunction with those two decisions. On the breach of the claimant's right to liberty, Griffith J held that, since the Court of Appeal had held that there was no legal basis for the claimant's additional remand, the breach was patent and no submissions were required on the same.

On the matter of breach of the claimant's right to security of the person, Griffith J applied her earlier reasoning in *Preston Devere Parris* and held that the emotional and psychological effects of the Claimant's unjustified detention after his trial did not fall within the scope of the right to security of the person and could instead be accounted for either within the unlawful deprivation of the claimant's right to liberty or protection of the law. Griffith J then turned her attention to whether or not the trial judge's order remanding the claimant to prison for an additional eighteen days amounted to a breach of the claimant's right to protection from unlawful deprivation of his liberty. In so doing, she noted that the position was not as straightforward as it initially appeared given the patent nature of the breach of the claimant's right to liberty. In reviewing the relevant authorities from such as *Maharaj (No. 2)* v *Attorney General of Trinidad and Tobago,*[18] *Chokolingo* v *Attorney General of Trinidad and Tobago*[19] *and Independent Publishing Co. Ltd* v *Attorney General of Trinidad and Tobago,*[20] Griffith J noted that they were distinguishable as the Trinidad and Tobago Constitution spoke of 'not [being] deprived of one's liberty without due process' while the Barbados Constitution spoke of not being deprived of one's liberty, subject to the express exceptions set out in section 13(1). Based on the textual differences between the two Constitutions, Griffith J concluded a judicial error such as what occurred with the claimant's criminal proceedings, would not usually attract constitutional redress since there are remedies available to rectify such mistakes. In the instant case, however, it was felt that the case was one where constitutional redress was appropriate since the claimant did not have a remedy in private law to correct the judicial error made in his specific case.

Turning to the issue of whether damages were an appropriate remedy to be awarded and the quantum thereof, Griffith J was guided by her earlier decision in *Shamar Patrick* and accordingly looked first to the nature of the breach and the circumstances of the infringement and then to the damage proved by the claimant. In deciding on the matter, some weight was given to the fact that although the additional period of remand was relatively short, the claimant would already have been on remand for approximately six years and five months during the life of his criminal proceedings and therefore 'must have dealt a crushing blow to the Claimant's

physical and mental health and psyche.' In the circumstances, damages were thought to be an appropriate remedy, and an award of Bds $75,000 was made.

4. Pedro Deray Ellis also known as Pedro Deroy Ellis v The Attorney General: Fundamental Rights and Freedoms – Deprivation of Liberty – Refusal of Bail[21]

This case is a continuation of the case above and concerns the constitutional claim brought by the claimant in respect of his incarceration prior to his acquittal on his murder charge. As noted above, the claimant spent the entire period of his criminal proceedings, a total of six years and five months on remand due to his various bail applications being denied. His first bail application was made on 4 February 2014 and his last application was heard on 14 December 2016 and later denied on 13 February 2017. A Notice of Appeal regarding this decision was filed on 8 March 2017, but the appeal was not heard until 7 March 2018 and the Court of Appeal's decision denying the appeal was not delivered until 7 March 2019, approximately two years after the appeal was first filed. The State conceded that the claimant's right to a hearing within a reasonable time was breached because of the delay associated with the determination of the claimant's appeal against the High Court's denial of his bail application. Therefore, the case focused on what redress was the appropriate remedy for the breach of the claimant's right to a fair hearing of his bail application in a reasonable time and for the failure to grant the claimant bail pursuant to section 13(3)(b) of the Constitution. McCarthy J declined to make an order for damages for the agreed breach of section 18(8) of the Constitution, preferring instead to focus on what was the appropriate remedy for the breach of the reasonable time requirement under section 13(3)(b). In determining the matter, McCarthy J commented on the fact that the justice system was 'under-resourced and under-funded' and that this would undoubtedly continue to result in delays for the foreseeable future. He also noted that the delays in the trial of the murder charge were caused primarily by the claimant and that the State had made a reasonable attempt to prosecute the case. However, he did conclude that the State did not deal with the matter of bail as expeditiously as it should have and, relying on *Pedro Ellis v The DPP*[22], indicated that once section 13(3)(b) of the Constitution was referenced by the claimant, it should have been recognized that the Constitution prescribed that he ought to be released on bail, with or without conditions. McCarthy J made a declaration that the claimant's right to liberty was breached once a reasonable time for his trial had passed and a declaration that his detention from 28 November 2018 to 12 November 2019 was unconstitutional and the claimant was entitled to compensation and would be awarded Bds$ 60,000 in damages. Finally, it was ordered that the claimant was not to be retired for any offense arising from the facts that resulted in his acquittal for murder.

5. Trevor Brown v The Attorney General: Fundamental Rights and Freedoms - Reasonably Required Limitations on Right of Freedom of Association[23]

The claimants in the case were prison officers and alleged that their right to freedom of association under section 21 of the Constitution had been breached by unreasonable restrictions placed on prison officers by Part IV A of the Prisons Act, Cap. 168 (which incorporated the provisions of the Prison Amendment Act, 1982). Prior to the enactment of the 1982 Act, prison officers were free to join a trade union which could then represent them in relation to collective bargaining, disciplinary matters, and the like. The amendments introduced by the 1982 Act established a Prison Officers' Association which was empowered to advocate for Prison Officers on matters related to their welfare and efficiency, but it could not address issues related to discipline, promotion, transfer, posting, and leave. The 1982 Act also forbade prison officers' from becoming members of any 'unauthorized association' which was defined to include a trade union. It further provided that anyone joining an 'unauthorized association' could be dismissed from the service and was liable to forfeiture of all rights to pension or gratuity or other allowances. McCarthy J ruled that the 1982 Act's restrictions on the right to associate and to bargain collectively were a disproportionate and inappropriate means of fulfilling its objectives, that these restrictions were not rationally connected to the statutory objective and exceeded the express and implied legislative objectives. He further found that the offending provisions were inseverable and therefore declared the entire 1982 Act null and void.

IV. Looking Ahead

Apart from the outstanding written judgment in *McClean-Ramirez et al* mentioned above, there are some pending cases challenging the propriety of COVID-19 emergency measures, as well as, a claim brought by former Attorney-General Adriel Brathwaite, KC challenging the constitutionality of the composition of the Senate following the January 2022 elections. There is also an important decision in the constitutional claim brought by two teenage girls challenging their detention and treatment while in the Government Industrial School, a state institution for juveniles that are in conflict with the law. The Barbados Constitutional Reform Commission is also expected to submit its final recommendations, including its proposed draft Republican Constitution for Parliament's consideration and action. Finally, there is the possibility of some changes to the criminal justice system coming out of current consultations on the need for major reform of the same.

V. Further Reading

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Belarus

Grigory A. Vasilevich, *Professor, Belarusian State University*

Tatiana S. Maslovskaya, *Associate professor, Belarusian State University*

I. Introduction

The amendments and additions to the Constitution, adopted at the republican referendum on February 27, 2022, are the main changes in the constitutional law of the Republic of Belarus in 2022.

Work on new amendments has been carried out for several years. It started in 2018, and its most intensive period was during 2021-2022. On March 15, 2021, the Constitutional Commission was formed by the President of Belarus[1], and the draft submitted by the Commission in August 2021 was sent by the President for revision to a working group. On December 27, 2021, the draft of amendments and additions to the Constitution was submitted for public discussion.[2] Citizens' opinions on the draft and proposals for its improvement were sent to the National Center for Legal Information by e-mails or through a special electronic form. About 9,000 written opinions and proposals on the project were received during 3.5 weeks of nationwide discussion.[3] Moreover, a vigorous debate on the draft took place at meetings of citizens in student and labor collectives and at the place of residence.

78.63% of citizens included in the voting lists took part in the voting on February 27, 2022. 65.16% of citizens, the majority of citizens included in the voting lists, voted for amending the Constitution.[4] Amendments and additions to the Constitution of the Republic of Belarus entered into force on March 15, 2022.

Changes were made to the preamble, 85 articles of the Constitution (two of which became invalid), and 11 new articles appeared as a result of the constitutional reform of 2022.[5]

This report will focus on the main directions of constitutional reforms in the Republic of Belarus.

II. Major Constitutional Developments

The main vector of constitutional reforms in 2022 is the strengthening of the value component of the Constitution. Provisions about the right to preserve national identity and sovereignty, cultural and spiritual traditions as the basis for the development of the Belarusian statehood were enshrined in the Preamble of the Constitution, along with declaring a commitment to universal values; new value orientations (peace, civil harmony, the well-being of citizens, the prosperity of the Republic, the establishment of social foundations of a just society) were fixed.

The updated text of the Constitution also enshrines such values as marriage, which is the union of a woman and a man, patriotism, historical truth, and historical memory. In particular, the second part of Article 15 provides for the state to ensure the preservation of historical truth and memory of the heroic deed of the Belarusian people during the Great Patriotic War. The consolidation of some constitutional values is formally embodied in binding provisions. For example, the preservation of the historical memory of the heroic past of the Belarusian people and patriotism are recognized as the duty of

every citizen of the Republic in accordance with part 2 of Article 54.

Considering the fundamental importance of democracy as a constitutional value, let us pay attention to the addition to Article 4 of the Constitution. According to the article, democracy in the Republic is carried out on the basis of the ideology of the Belarusian state. Professor Vasilevich considers that "the basis of the ideology of the Belarusian state is a legal ideology, the content of which is predetermined by constitutional principles and norms".[6] However, it should be noted that this article retains the provision on the diversity of political institutions and opinions (Part 1 of Article 4).

The constituent act includes a provision on the direct effect of the Constitution throughout the territory of the Republic of Belarus (Part 2 of Article 7), which indicates the strengthening of the basis of legal statehood.

The second direction of constitutional reforms in the Republic of Belarus is the modernization of the constitutional status of an individual by securing new rights, freedoms, and duties, deepening the content of existing rights, and strengthening guarantees of the rights and freedoms of a man and a citizen.

The changes introduced, on the one hand, are aimed at strengthening the social nature of statehood, and on the other hand, at increasing the social responsibility of citizens. So, Part 3 of Article 21 of the Constitution provides for a provision on everyone's responsibility for making a feasible contribution to the development of the society and the state. The founding act enshrined certain achievements of the Belarusian state in the social sphere: guaranteeing state support for families with children, orphans, and children left without parental care (Part 4 of Article 32); ensuring equal opportunities for the disabled, special care for the disabled, the elderly (Parts 2, 3 of Article 47). The Constitution also included a new article about youth (Article 32).
The expansion of the electoral corps should be positively assessed in connection with the exclusion of the previous provision of Part 2 of Article 64 of the Constitution,[7] which conflictedwith the principle of the presumption of innocence (Article 26). Thus, citizens in custody now have the right to vote.

Let's pay attention to the new norms related to digitalization. For example, Article 28 of the Constitution includes the second part, which provides for the creation of conditions for the protection of personal data by the state, as well as the security of an individual and the society when using them.

The list of constitutional obligations has been expanded. In particular, the duties of parents were supplemented and parents must prepare children for socially useful work, instill culture and respect for the laws, historical and national traditions of the country in the process of upbringing (Part 3 of Article 32); the constitutional obligations of any persons on the territory of the Republic to respect state symbols (Article 52), to take care of natural resources (Article 55), as well as the provision that citizens take care of their own health (Part 1 of Article 45) have been stipulated.

The possibility of judicial appeal against decisions and actions (or inaction) of state bodies and officials that infringe on rights and freedoms has been strengthened (Part 1 of Article 60), a constitutional complaint is possible, i.e. the right of a citizen to directly appeal to the Constitutional Court of the Republic of Belarus with a complaint about the violation of his constitutional rights and freedoms by the law applied in a particular case if all other remedies have been used (Article 116).

The third direction of constitutional reforms is the improvement of the institutional system of the state. Powers were redistributed between the President, Parliament, and the Government. In particular, the appointing and control powers of the chambers of the National Assembly have been strengthened. Thus, the House of Representatives [8]now gives preliminary consent to the appointment of the Prime Minister by the President, and the Council of the Republic gives consent to the appointment of the Prosecutor General, the Chairman of the State Control Committee, the Chairman and members of the Board of the National Bank by the President, as well as the Council of the Republic has the power to give consent to their dismissal (Parts 6 and 9 of Article 84). The chambers of the Belarusian Parliament will annually hear information from the Prosecutor General, the Chairman of the State Control Committee, and the Chairman of the Board of the National Bank on the results of their activities (Parts 5-1 of Article 97, Parts 5-1 of Article 98).

The constitutional status of the Government has not undergone significant changes. At the same time, some of its powers were clarified (now, it is responsible not only for the development of a draft law on the republican budget, but also for the submission of draft laws on the republican budget and the approval of a report on its implementation to the House of Representatives after agreement with the President); the spheres of actions of the Government in the field of ensuring the implementation of a unified state policy were expanded, and it included innovations and public-private partnership. To a certain extent, the competence of the Government has also been expanded, which now submits proposals to the President on the annulment of decisions of local executive and administrative bodies in case they (decisions) do not comply with the laws. The fact that bills, the adoption of which may result in a reduction in public funds or increase in spending, are submitted to the House of Representatives only if they (bills) received the Government's conclusion, significantly enhances the influence of the Government on the socio-economic sphere. Before the 2022 reform, it needed the consent of the President.

The constitutional novelties relating to the organization and activities of the Parliament provide for an increase in its term of office from four to five years and a transition from two parliamentary sessions to one, which opens on the third Tuesday of September and closes on the last working day of June of the following year (Part 1 of Article 95). It also includes the introduction of an additional restriction for the dissolution of the Parliament in the last year of its powers and the consolidation of the principle of incompatibility of the positions of a deputy of the House of Representatives and a member of the Government.

Attention should be paid to some novelties related to the status of the President of the Republic of Belarus. Thus, the requirements for a candidate for the office of President are changed (raising the age limit from 35 to 40 years and increasing the residency requirement from 10 to 20 years immediately before the elections). Article 80 also provides for conditions relating to citizenship and special ties with a foreign state [9]. Although there is no constitutional prohibition to own property abroad, there is a restriction on the possession of a document of a foreign state that provides any advantages. For Belarus, this is relevant in connection with the adoption by Poland of the law on the Pole's Card. According to it, for example, persons who identify themselves as persons of Polish ethnicity acquire a number of benefits in the field of education, employment, etc. In Belarus, about 300,000 citizens identify themselves as representatives of a Polish ethnic group. On April 7, 2011, the Constitutional Court of the Republic of Belarus adopted a decision "On the position of the Constitutional Court of the Republic of Belarus on the Law of the Republic of Poland "On the Pole's Card". The result of the decision was the introduction into laws, including those on civil service, of a ban for a civil servant from receiving a Pole's card.

The Constitution also fixed the limitation for the re-election of the same person to the office of the President of the Republic of Belarus: "no more than two terms" (Part 1 of Article 81), expanded the circle of initiators and grounds for removing the President from office, changed the procedure for removal (Part 1 of Article 81, Parts 2, 3, 4, 5, 6 of Article 88), the power of the President to issue decrees which have the force of law has been abolished. The constitutional amendments also provide for the constitutionalization of the status of the President, who has ceased to exercise his powers. In particular, guarantees of his immunity, the possibility of lifelong membership in the Council of the Republic, and membership in the All-Belarusian People's Assembly are stipulated (Part 2 of Article 89, Article 89-2, Part 2 of Article 91).

Furthermore, a number of other fundamental changes have been made in the system of checks and balances, which will reformat the paradigm of power relations at the national level.

Particular attention is drawn to the amendments and additions to the Belarusian Constitution concerning the All-Belarusian People's Assembly. In accordance with Article 89, [1] the All-Belarusian People's Assembly (hereinafter referred to as ABPA) becomes the highest representative body of the people of the Republic of Belarus (the highest representative body of democracy). It determines the strategic directions for the development of the society and the state that ensure the inviolability of the constitutional order, the continuity of generations, and civil harmony.

Based on the provisions of the Constitution on the status of the ABPA, it follows that it is not only the highest collective representative body but also the highest rule-making body since its legal acts are even higher than laws in terms of legal force. In this regard, it is important to ensure the highest degree of legitimacy in the formation of the ABPA and its functioning and to pay special attention to increasing its authority among citizens.

In Article 89[2] of the draft Constitution, it is determined that the ABPA includes delegates. The term "delegates" suggests that these persons are delegated by someone to the ABPA. At the same time, the incumbent President and the President, who terminated the exercise of his powers due to the expiration of his term of office or ahead of schedule in the event of his resignation, are members of the ABPA ex officio. In our opinion, the provisions of this article should be interpreted in such a way that they acquire the status of delegates ex officio - delegates from the people. For these and other reasons, they should not acquire the status of "a delegate" through election by any body to the ABPA. The composition of the All-Belarusian People's Assembly includes the President of the Republic of Belarus; The Presidents of the Republic of Belarus, who terminated the performance of their powers in connection with the expiration of their term or early resignation; representatives of the legislative, executive and judicial authorities, local Councils of Deputies, and from civil society. The maximum number of delegates is 1200. The term of office of the All-Belarusian People's Assembly is five years, and its meetings are held at least once a year.

A delegate of the All-Belarusian People's Assembly takes part in the work of the Assembly without interruption from their work (service) activities.

Decisions of the All-Belarusian People's Assembly are binding, and ABPA can cancel legal acts and other decisions of state bodies and officials which are contrary to the interests of national security (except for the legal acts of the judiciary). Thus, the sovereign will of the people will be embodied in the acts of the National Assembly. In our opinion, this strengthens the people's sovereignty, therefore, it deepens relations between the people and the state.

Thus, the Constitution contains norms that can give new impetus to the work of representative bodies, that is, those institutions of power that are closest to the people. Representative democracy can eliminate the conservation of the system of relations, and it gives citizens more opportunities for self-expression.

One of the most positive outcomes of the referendum of February 27, 2022, is a significant expansion of the powers of the Constitutional Court of the Republic of Belarus, which indicates the desire of the Belarusian state to strengthen constitutional legality, ensure supremacy, and direct application of constitutional principles and norms.

Article 116 [1] of the Constitution looks very powerful. According to the first part of this article, there is the Presidium of the All-Belarusian People's Assembly among the subjects of appeal to the Constitutional Court (President, House of Representatives, Council of the Republic, Supreme Court, Council of Ministers). In our opinion, the right to apply to the Constitutional Court of the entire All-Belarusian People's Assembly is not excluded either.

According to the proposals of subjects named in Article 116 [1], the Constitutional Court gives opinions on the following issues:

On the interpretation of the Constitution. Previously, the Parliament had such a power, which brought our Constitution closer to the Italian Constitution in this regard. However, the acts of the Constitutional Court are more rational and professional. We believe that interpretation can be carried out both within the framework of abstract constitutional control and within the framework of resolving a specific dispute about the constitutionality of an act. According to Article 116 [1], the Constitutional Court issues opinions on the conformity of the Constitution not only with laws, decrees of the President, and resolutions of the Council of Ministers, but also with normative legal acts of other state bodies. Formally, we can conclude that the acts of the All-Belarusian People's Assembly can also be the subject of verification, although this is not directly indicated in the Constitution.

The formulation of the above-mentioned questions is within the competence of the six subjects of power. However, according to the second part of Article 116 [1], only the Head of State may submit proposals to the Constitutional Court for opinions on the constitutionality of draft laws on amendments and additions to the Constitution; on the conformity of the Constitution with the laws adopted by the Parliament prior to their signing by the President; on the constitutionality of issues submitted to the republican referendum; on compliance with the Constitution of international treaties of the Republic of Belarus that have not entered into force. We believe that these areas of activity of the Constitutional Court are very important for preventing possible disagreements of legal nature. Earlier, we drew attention to the fact that the practice of continuous preliminary control over the constitutionality of laws proposed to the President for signature is not needed anymore, and the approach of selectively (by decision of the President) sending certain laws to the Constitutional Court will be more effective. Currently, this idea is implemented in the Constitution. As it follows from the third part of Article 116 [1] in the cases provided for by the Constitution, the Constitutional Court within two weeks shall give conclusions:

At the suggestion of the Presidium of the All-Belarusian People's Assembly on the existence of facts of systematic or gross violation of the Constitution by the President, also, it would be correct not later than ten days before the consideration of the case in the Constitutional Court to send the materials that formed the basis for initiating the case in the Constitutional Court to the President of the Republic.
At the proposal of the President on the presence of facts of systematic or gross violation of the Constitution by the chambers of the Parliament.
The Constitutional Court gives opinions on the constitutionality of holding elections of the President, deputies of the House of Representatives, and members of the Council of the Republic after the motion of the Presidium of the All-Belarusian People's Assembly.
In accordance with the fifth part of Article 116 [1], the Constitutional Court, in the manner prescribed by law, makes decisions:
on complaints of citizens about violations of their constitutional rights and freedoms (the Constitutional Court checks the constitutionality of the laws applied in a particular case if all other remedies have been exhausted);
about the constitutionality of normative legal acts to be applied when considering specific cases by the courts (at the request of the courts).
As for the requests of the courts, the optimal version was invented here. The expression in the plural form ("at the request of the courts") means, in our opinion, that the courts themselves, when they need to clarify the constitutionality of an act, will apply to the Constitutional Court. The Supreme Court, with such wording, cannot block the request of a court to the Constitutional Court in such a way that only it has the right to send an appeal to the Constitutional Court. Of course, it is possible to provide for some organizational aspects in the legislation.
Thus, the analysis of the development of the Belarusian legislation indicates a significant expansion of the competence of the Constitutional Court of the Republic of Belarus. This will allow it to have a positive impact on social relations and strengthen law and order, which is an integral attribute of the rule of law.
In general, the content and nature of the changes and additions made allow us to talk about the modernization of the Constitution of the Republic of Belarus, and its improvement in accordance with the priorities of the state and society at the present stage of development.

III. Constitutional Cases

The website of the Constitutional Court (http://kc.gov.by) contains three interesting decisions in 2021. Two of them are decisions on the constitutionality of laws issued in the course of mandatory preliminary control over the constitutionality of laws before they were signed by the President of the Republic of Belarus: 1) decision of February 7, 2022 No. P-1302/2022 "On the Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On Amendment of Laws on the Activities of the Chinese-Belarusian Industrial Park "Great Stone"; 2) decision of January 4, 2022 No. R-1301/2022 On the Compliance of the Constitution of the Republic of Belarus with the Law of the Republic of Belarus "On Amendment to the Code of the Republic of Belarus on Education". These laws were found to conform with the Constitution.

IV. Looking ahead

Based on the updated Constitution of the Republic of Belarus, the current constitutional legislation should be updated. In particular, several laws have been amended and supplemented, including the Electoral Code, the Code on the Judiciary and the Status of Judges, the laws on the President, the National Assembly, the Council of Ministers, constitutional proceedings, political parties, public associations, the laws on the All-Belarusian People's Assembly, on foundations of civil society.

V. Further Reading

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7 Persons in respect of whom, in accordance with the procedure established by the criminal procedural legislation, detention as a measure of restraint has been chosen, shall not take part in the voting.
8 The Parliament of the Republic of Belarus - the National Assembly - consists of two chambers: the House of Representatives, consisting of 110 deputies, elected by direct general elections, and the Council of the Republic, consisting of 64 members, 8 of whom are appointed by the President, the rest are elected by indirect elections.
9A citizen of the Republic of Belarus by birth may be elected as a President ... who does not have and did not previously have the citizenship of a foreign state or a residence permit or other document of a foreign state that gives the right to benefits and other advantages (Article 80).



Belgium

Luc Lavrysen, *President of the Belgian Constitutional Court and Professor Emeritus at Ghent University*

Jan Theunis, *Professor at Hasselt University and Law Clerk at the Belgian Constitutional Court*

Jurgen Goossens, *Professor at Utrecht University, Montaigne Centre for Rule of Law and Administration of Justice*

Sien Devriendt, *Assistant Professor at Open University Heerlen*

Benjamin Meeusen, *Ph.D. Researcher at Ghent University*

Viviane Meerschaert, *Legal Officer at the Belgian Constitutional Court*

I. Introduction

In this contribution, first, we address the ongoing process of constitutional amendment focusing on the recurrent issue of long federal government formation, reform of the constitutional amendment procedure itself, the condemnation of Belgium by the ECtHR regarding the settlement of disputes on the credentials of parliamentary representatives, and the activities of the Dialogue Platform. Next, this article provides an overview of the main cases of the Belgian Constitutional Court of the past year that may be of interest to an international audience. Finally, we look ahead to several interesting pending cases, as well as to evolutions in the composition of the Constitutional Court.

II. Major Constitutional Developments

In Belgium, the formal constitutional amendment procedure embedded in Article 195 of the Constitution is a comprehensive single-track procedure.[1] All amendable constitutional provisions are subjected to one formal amendment procedure. As the next federal election in May 2024 approaches, steps have been taken to start the process of amending the Constitution. In May 2021, the federal government submitted a *provisional* list of constitutional articles to the House of Representatives and the Senate intended to be included in the final constitutional amendment declaration at the end of the legislative term. The proposed amendments relate to the recurrent issue of long government formation, the condemnation of Belgium by the ECtHR in the case of Mugemangango, and the constitutional amendment procedure itself.[2]

The list includes articles that are intended to be revisable in the subsequent legislative term. Through the technique of a *provisional* list, the government in fact makes a pre-selection for the final declaration to be submitted in 2024, at the end of the legislative term. Pursuant to the constitutional amendment procedure the House of Representatives and the Senate are automatically dissolved and new federal elections are organized once the final list with revisable constitutional amendments is published in the Belgian Official Gazette. By using a *provisional* list, immediate dissolution of Parliament and new elections are avoided in this stage.

First, Belgium still holds the world record for the longest time without a newly formed government in peacetime with 541 days of government formation negotiations in 2010-2011. Moreover, the formation of a federal government after the elections in May 2019 also proved to be arduous. The current government, De Croo I, came into power after almost 500 days of negotiations. As a result, the provisional list includes Articles 46 and

96 of the Constitution, respectively dealing with the dissolution of Parliament and the establishment of the federal government. It is believed that a constitutional amendment could provide a solution for protracted government formations, for example by introducing a formal deadline or mechanism to unblock certain situations.[3]

Secondly, the Coalition Agreement of De Croo I explicitly states that the provisional list "*must include at least Article 195 of the Constitution*".[4] In the explanatory memorandum to the list, the government states that an amendment of Article 195 makes it possible, among other things, to change the procedure for the amendment of the Constitution *itself*. Nonetheless, the aim of the envisioned amendment is broader. The government aims to implement a new state structure from 2024 onwards with a more homogeneous and efficient distribution of powers while respecting the principles of subsidiarity and interpersonal solidarity in order to strengthen the autonomy of the regions and the communities as well as the clout of the federal level.[5]

Thirdly, another topic concerns the condemnation of Belgium by the ECtHR in 2020, which concerns the impartiality of dispute settlement about the credentials of parliamentary representatives. It concerns a case involving a regional Parliament, the Walloon Parliament, and a violation of Article 13 ECHR and Article 3 of the First Additional Protocol.[6] Article 48 of the Constitution states that each parliamentary chamber examines the credentials of its members and settles disputes that arise in this respect. However, there is no legal remedy against the outcome of parliamentary decisions, which the Venice Commission and the ECtHR consider problematic. It is now the question of whether or not an amendment of Article 48 of the Constitution is necessary. The ECtHR judgment does not strictly prohibit the settlement of post-electoral disputes by an elected not yet constituted Parliament itself if several conditions are met to safeguard the impartiality of the competent organ and avoid arbitrariness. Nonetheless, the federal government intends to expand the power of the Constitutional Court to hear appeals against decisions related to the credentials of MPs by applying the appeals mechanism enshrined in Article 142, fifth paragraph of the Constitution. This provision offers the possibility of an appeal against decisions of legislative assemblies or their bodies regarding the control of electoral expenditure for elections of the House of Representatives.

Finally, one of the initiatives of the Dialogue Platform, established in 2021, was the participatory trajectory 'A country for the future', which aimed to collect a broad overview of the different opinions and visions on the Belgian state structure as well as the modernization, increase of efficiency, and deepening of the democratic principles of the state structure. This online participation platform was accessible from April 25, 2022 to June 5, 2022, and its report was published in February 2023. The report focuses, for example, on various models of the state structure that emerged from the survey. Other tackled topics were the role of the citizens, fundamental rights, the division of powers, the functioning of Parliament and government, and the organization of elections. The report is intended to serve as an important input to prepare the next state reform, to renew democracy, and supplement the above-discussed provisional list.[7]

III. Constitutional Cases

In 2022, the Constitutional Court delivered 171 judgments and handled 203 cases in total. Regarding the nature of the complaints, conflicts of competencies between the federated entities and the federal state represent 4% of the judgments in 2022. The majority of cases concern infringements of fundamental rights. In 2022, the principle of equality and non-discrimination was the most invoked principle before the Court (54%), followed by a review of compliance with the guarantees in taxation matters (8%), property rights (7%), the socioeconomic rights (6%), the right to private and family life (5%), the principle of legality in criminal matters (4%), the jurisdictional warranties (3%) and the freedom and equality in education (3%). References were made to the jurisprudence of the ECtHR in 35 cases. The jurisprudence of the CJEU is also reflected in the judgments of the Constitutional Court, with references to this case law in 17 cases. References to other sources of international law can be found in 27 cases. Last year, the Court referred one case for a preliminary ruling to the CJEU.

1. COVID-19 case law

As mentioned in our previous overview, the urgent measures in response to the pandemic were primarily taken by ministerial decree, based on the Civil Security Act. These ministerial decrees are beyond the jurisdiction of the Constitutional Court, which is limited to Acts of Parliament (primary legislation), as opposed to administrative acts and regulations, including royal and ministerial decrees (secondary legislation). The latter can be challenged before the Council of State (directly, through an action for annulment) and by the ordinary courts and tribunals, including the Court of Cassation (indirectly, through a plea of illegality). However, any question on the constitutionality of the legal basis of secondary legislation that may rise before the ordinary and administrative courts should be referred to the Constitutional Court.

Whereas the Court of Cassation refused to do so,[8] a police tribunal did refer some questions, following the prosecution of individuals for violating the ministerial measures. In judgment n° 109/2022 of 22 September 2022 the Constitutional Court ruled that the power delegated to the Minister of the Interior does not violate the principle of legality in criminal matters. Since various risk and emergency situations are involved which cannot be described in full and in detail, the legislature was entitled to adopt broad wording so that appropriate action could be taken in respect of those risks. Moreover, the Minister does not have unfettered powers, since these are sufficiently circumscribed by the Civil Security Act. More specifically, the Act clearly defines the essential elements of the offense, consisting of the refusal or failure to comply with the ministerial measures ordered under that Act. By contrast, the Constitutional Court considers it unjustified to prohibit the courts and tribunals from taking account of mitigating circumstances when assessing violations of those measures.

Incidentally, the Constitutional Court also settled an issue that was highly debated among legal scholars: exceptionally, direct delegation to the minister, rather than to the government,[9] may be justified if, as in this case, objective reasons exist that require urgent action by the executive branch, and only to the extent that any delay may aggravate the existing risk or emergency situation.

Both the Court of Cassation and the Council of State had previously accepted the Civil Security Act as a valid legal basis for the ministerial measures.[10] By its judgment n° 109/2022, repeated in judgment n° 170/2022,[11] the Constitutional Court thus confirmed that case law.

Other COVID-19-related case law concerns inter alia the databases of manual and digital contact tracing (judgment n° 110/2022) and the protection of tenants by imposing a moratorium on evictions to prevent the most vulnerable people from being left without housing in the context of the COVID-19 pandemic (judgment n° 97/2022).

2. Access to Justice

The Acts of 14 November 2019 and of 5 December 2019 amended the Code of Criminal Procedure. These Acts abolish the limitation period for criminal proceedings in cases of sexual offenses against minors, meaning that such offenses can be punished by law regardless of a certain period of time. The petitioners (including a human rights association) submitted an action for annulment of these Acts. On 9 June 2022, the Constitutional Court rejected the action for annulment in judgment n° 76/2022.

Firstly, the Court underlined that there was no right to a limitation period for criminal proceedings. Hence, the Court granted a wide margin of appreciation to the legislature. Secondly, the Court held that the impugned Acts have been adopted to combat sexual offenses directed at minors. Consequently, the Court found the objective of the Acts legitimate on the one hand and held that the impugned Acts lead to an appropriate measure on the other hand. More specifically, the Court acknowledged the special character of sexual offenses and considered children as particularly vulnerable persons. In its reasoning, the Court referred to the case law of the ECtHR (ECtHR, 22 October 1996, *Stubbings and Others v. the United Kingdom*, § 56; 4 December 2003, *M.C. v. Bulgaria*, § 150). Moreover, the Court declared that the impugned Acts do not disproportionately affect the right to a fair trial.

In its judgment n° 23/2022 of 10 February 2022, the Constitutional Court ruled that Article 43 Judicial Code violated the equality principle and the right of access to justice. The provision under review regulated formal aspects of the way in which court rulings should be communicated. While this measure required legal decisions to mention quite specific details concerning the procedure, it did not impose the obligation to specify details relating to legal remedies, such as the competent tribunal or the maximum time allowed for appeal. It fell within the margin of appreciation of the legislature to determine the manner in which judicial decisions should be served. Nevertheless, the Court noted that certain more specific judicial decisions, such as those in social security matters, already need to contain details concerning appeal procedures. The Court concluded that a reference to legal remedies in a judicial decision is an essential element of the right of access to justice. The right to a fair trial not only requires that legal remedies should be made clear but also that they should be communicated in an explicit way to the litigants. The Court, therefore, ruled that the article under review violated the Constitution, but maintained its effect until 31 December 2022 for reasons of legal certainty.

3. Privacy

The Act of 20 December 2020 extends the possibility for the tax administration to consult the Central Contact Point (CAP), a database within the National Bank of Belgium. It contains an overview of all kinds of financial data, accounts and contracts held with financial institutions, and provided by them. It aims to contribute to the fight against tax fraud, money laundering, and the financing of terrorism and serious crime. The tax administration has been given by that Act access to data on the balance of bank- and payment accounts and the total amount of certain financial contracts held by taxpayers. With its judgment n° 162/2022 of 8 December 2022, the Court found no violation of Article 22 of the Constitution, read in conjunction with Article 8 ECHR and Articles 7 and 8 EU Charter of Fundamental Rights. Although the collection and processing of data constitute an interference with the private life of the aforementioned persons, the Court ruled that the extension of the data to be communicated meets a compelling social need in a democratic society. The extension increases fiscal transparency and makes it possible to combat tax fraud efficiently and at a lower cost. It also benefits entities other than the tax administration (the judicial authorities, the Financial Information Processing Unit, and the intelligence and security services) in the context of their public interest missions. The restriction is proportional to the objective pursued, and the consultation procedure for tax officials is strictly framed in order to avoid improper use of the data consulted.

4. Multi-layered legal order

For reasons of procedural economy, the legislature decided in 2017 that the court to which the Court of Cassation refers a case after having annulled a judgment, must immediately comply with this judgment and not only after a second annulment on the same grounds, as was the case before. The Constitutional Court, in its judgment n° 159/2022 of 1 December 2022, held that the obligation to comply immediately with the annulment judgment of the Court of Cassation has disproportionate consequences insofar as the court to which the Court of Cassation refers a case is prevented from giving priority to EU law in such situation. This obligation would mean that the parties to the proceedings before that court could not meaningfully invoke a judgment of the CJEU against an annulment judgment of the Court of Cassation in defense of their rights and interests.

5. Platform economy

In its judgment n° 77/2022 of 9 June 2022, the Constitutional Court reviewed an Act of

the Brussels Capital Region and an Act of the Walloon Region, both Acts relating to 'taxi services and the rental of vehicles with a driver'. In a procedure before an ordinary court, multiple taxi associations and companies filed a court order to cease the activities of 'UberX', as they argued that the activities of this company violated rules relating to taxi services. That court submitted some questions for a preliminary ruling to the Constitutional Court.

The first provision, enshrined in the Act of the Brussels Capital Region, related to the prohibition of vehicles being equipped with smartphones. The Constitutional Court decided that this measure did not violate the freedom of enterprise. It was reasonably related to the legitimate aim of the government to protect the services of recognized taxi services. The second provision, incorporated in the Act of the Walloon Region, prohibited vehicles to use public roads or taxi stations when they were not ordered by customers at a recognized company located in the Walloon Region. As a result, taxi services officially recognized by the government of the Brussels Capital Region were partly restricted to operate on the territory of the Walloon Region. The Court ruled that this prohibition did not violate the freedom of enterprise, since it served the aim of preventing non-recognized drivers from operating as a taxi service.

In its judgment n° 148/2022 of 17 November 2022, the Constitutional Court reviewed the Act of the Brussels Capital Region imposing taxes on tourist accommodations. Airbnb Ireland argued that a provision imposing duties on mediating platforms to inform the regional government about the personal details of their client, the location of the accommodation, and the number of overnight stays during the past year, violated multiple EU directives, the freedom to provide services and the right to privacy. The petitioner also argued that the penalty of €10.000 for violating this measure was unreasonably high.
According to the Court, the duty to provide information as such did not violate EU law. After all, the freedom to provide services does not prevent member states from collecting information for tax purposes, as long as the duty applies equally to all accommodations, regardless of their location and way in which the mediating services function. Concerning the alleged violation of the right to privacy, the Court decided that the collection of information was reasonably justified, as the collection of personal data was necessary to calculate the tax basis and amount. The Court nevertheless ruled that the penalty of €10.000 violated the equality principle, the right to a fair trial, and the right to property because it did not allow the administration and courts to take into account mitigating factors.

6. Bioethical questions

The Act of 15 March 2020 amended the Euthanasia Act of 28 May 2002. The petitioners (including physicians) submitted an action for annulment of several provisions of the Act of 15 March 2020. On 17 February 2022, the Constitutional Court rejected the action for annulment in judgment n° 26/2022. The Court's main reasoning goes as follows. Firstly, the obligation of physicians who refuse to perform euthanasia to refer patients or designated representatives to specialized bodies dealing with the right to euthanasia does not violate physicians' freedom of conscience. The Court argued that the impugned Act serves a legitimate aim. In this sense, the Court ruled that it reinforces the right of patients to be able to request euthanasia, and therefore, their right to decide how and when their own life ends, which corresponds with the right to respect for private life. Additionally, the Court took into account the fact that Parliament considered the status of physicians since they had to refer patients or designated representatives to the above-mentioned specialized bodies rather than to other physicians, which was deemed more respectful of physicians' freedom of conscience. Secondly, the Court held that the statements by which individuals indicate that they want to have euthanasia performed if they are no longer capable of expressing their wishes (i.e., advance statements) may remain valid for an unspecified length of time (instead of the previous five years), as long as the individuals are able to withdraw or adapt the statements at any time.

Judgment n° 134/2022 concerns Article 3 of the Euthanasia Act of 28 May 2002. The Act provides penalties for non-compliance with the legal conditions for euthanasia. However, the penalty regime is not diversified. Consequently, the general provisions of the Criminal Code applied, creating a situation where even the violation of a mere administrative (i.e., procedural) condition would amount to the same criminal offense (i.e., murder by poisoning). Equating the acts, with the consequence that principally no difference would be made insofar as the penalty is concerned, would be a violation of a substantive condition.

On 20 October 2020, the Constitutional Court ruled that the penalties for non-compliance with the legal conditions for euthanasia are in violation of the constitutional principles of equality and non-discrimination. The Court found that the application of one and the same criminal offense (i.e., murder by poisoning) to a violation of any condition (i.e., both procedural and substantive conditions) of the Euthanasia Act, irrespective of the deferential seriousness of that condition, is disproportionate for the physicians involved. Hence, this exposed a deficiency in the impugned Euthanasia Act that the competent legislative body must correct.

7. Suspension of disability allowances for prisoners

Under an Act of 10 August 2015, disability benefits are completely suspended upon imprisonment, modeled on the suspension of unemployment benefits. In judgment n° 169/2022 of 22 December 2022, the Court examines the measure insofar as it applies to detainees without dependents (as was the case in the dispute before the referring labor tribunal). To the extent that the principle of equality also means that unequal situations cannot be treated equally, the Court considers that this principle has not been infringed. Both benefits are replacement incomes for employees who can no longer obtain a working income because of their state of health or labor market situation. The legislature could assume that imprisonment, during its time, becomes the determining cause of the inability to obtain a labor income. The leg-

islature can, therefore, suspend the disability benefit in that situation. While Article 23 does not grant any subjective social rights, it does contain a regression ban or 'standstill obligation', preventing the legislature from significantly reducing the level of protection offered by the applicable regulations, without reasons related to the general interest. Although the 2015 Act entails a significant decline in the right to social security (previously only half of the disability benefit was suspended), this decline is justified by reasons of public interest.

IV. Looking Ahead

On 1 January 2023, 230 cases were pending before the Constitutional Court, the lowest number in years, meaning there is less backlog. In a case directed against the federal Act of 25 December 2016, which concerned the processing of passenger data that imposes an obligation on carriers and travel operators to transfer PNR data, the Court referred some questions on the interpretation and the validity of different EU law provisions dealing with that matter to the CJEU. That Court delivered its judgment on 21 June 2022. In a case, concerning legislation on the administrative cooperation in the field of taxation that provides for mandatory automatic exchange of information on cross-border constructions, the Court referred the question to the CJEU asking whether the implemented Directive infringes the right to a fair trial and the right to respect for private life. The CJEU delivered its judgment on 8 December 2022. The Constitutional Court has to deliver its follow-up judgments.

The renewal of the composition of the Constitutional Court is going further ahead. By Royal Decree of 21 March 2022, Willem Verrijdt, a former law clerk with the court and an academic, has been appointed as Judge replacing retiring Judge Riet Leysen, while Kattrin Jadin, a former member of the federal Parliament and the Parliament of the German Speaking Community has been appointed by Royal Decree of 13 September 2022, to replace retiring judge Jean-Paul Moerman. In 2023, there will be one vacancy, due to the retirement of Judge Thierry Detienne in August.

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9 According to Article 108 of the Constitution regulatory powers should be exercised by Royal Decree.
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Bolivia

Cristina Pazmiño, *Lawyer , Law clerk / Constitutional Court of Ecuador*

I. Introduction

In 2022, Bolivia faced several challenges related to its structural problems of judicial corruption, gender-based violence, and the persecution of those accused of the coup in 2019. The lack of legitimacy of the highest Constitutional Court, the Tribunal Plurinacional Constitutional ("Court or TCP") overshadowed its intentions to solve these matters through its jurisprudence.

In one of the most relevant judgments of 2022, the Court ordered the register of a same-sex marriage couple. Thus, it was considered a first step into its legalization in Bolivia.

II. Major Constitutional Developments

This section will provide a brief overview of the judicial crisis that took place in 2022. This happened after the release of convicted murders and rapists by corrupt criminal judges. Secondly, it will deliver an outline on how the TCP handled the situation and why it was criticized.

1. Sexist violence and judicial corruption

In 2022, multiple scandals surfaced that regarded criminal judges who granted house arrest to convicted murderers and rapists in exchange for money. The condemned did not meet the requirements set forth in the Criminal Code to replace prison. These scandals brought to light a network of judicial corruption that included judges, court assistants, and doctors who issued health certificates in favor of the convicted.

In 2015, Richard Choque Flores was condemned to 30 years in prison without the possibility of pardon for the murder and rape of a 20-year-old woman. Despite having a conviction, in December 2018, Judge Rafael Alcón Aliaga ordered Choque's house arrest. When he was released from prison, Choque contacted more than 70 women through social networks using fake accounts and offered them job opportunities. Among these women, he contacted two teenagers who disappeared in May and August 2021 and whose bodies were later found buried in the house where he lived with his mother and sister. In January 2022, Choque was arrested again, and more legal proceedings were initiated against him for criminal possession of a weapon, human trafficking, rape, murder, and extortion.

Judge Rafael Alcón Aliaga was condemned for prevarication. After an investigation, it was found that Choque was not the only femicide to whom the judge had granted house arrest. According to the authorities, Alcón had done the same with at least three more convicted murderers all of which were sentenced to 30 years in prison without the possibility of pardon.

Similarly, in February 2022, it became public that Judge Abraham Aguirre Romero granted house arrest to Davis Apulaca Valdivia who was condemned to 30 years in prison for the murder of a woman. The judge made this decision on the pretext that the convicted suffered from obesity. In addition, the magistrate granted house arrest to the murderer

of Marcelo Quiroga Santa Cruz, a former socialist leader during the dictatorship of Luis García Meza.

The pressure of public opinion and women's demands for actions against violence and impunity forced the authorities to investigate. President Luis Arce created a Commission named "Comisión de Revisión de Casos de Feminicidios" to review the cases of femicides and rapists who were granted house arrest. The Commission's conclusions were socialized through an institutional video broadcasted on the government's social networks[1]. However, the authorities did not publish any official document detailing the cases that were reviewed and the disciplinary processes against the judges. The president of the Consejo de la Magistratura (Council of the Magistracy), Mr. Marvin Molina, announced the dismissal of 11 judges through a public conference.[2]

2. The accusations against the TCP

As in 2021, the TCP issued decisions that coincided with the national political scenario. For this reason, once again, the independence of the Court was questioned, and criticism arose because of its close relationship with the current ruling party. Additionally, in 2022, there were many objections towards the Court due to the bias in the resolution of pending cases and the unjustified delay in the notification of the judgments to the parties.

In March 2022, the TCP publicized judgment 0087/2021-S4 which granted constitutional protection to former President Evo Morales Ayma. The authority that regulates electoral issues, Tribunal Supremo Electoral ("TCE"), disqualified Mr. Morales as a candidate for senator for the department of Cochabamba. According to the TCE, he did not fulfill the requirement of permanent legal residence in Bolivian territory. In the court decision, the TCP declared that Mr. Morales' rights were violated.

The Court indicated that the TCE analyzed Mr. Morales' candidacy for senator of Cochabamba outside the legal term and that, in addition, the accusation against the former President did not contain any evidence. In its analysis, the TCP questioned the restricted interpretation of the TCE about the requirement of permanent residence in Bolivian territory. This happened when Evo Morales Ayma sought political asylum in México and Argentina due to the political inner crisis. Thus, the Electoral Authority concluded that he changed his residency and that it was not permanent. The TCP differed from this interpretation and clarified that the TCE had to verify the legal reasons or circumstances for which citizens exercise certain rights outside of the Bolivian territory. Therefore, the Court considered Mr. Morales a refugee, and, for this reason, he could not fulfill the requirement of permanent residence in the territory against his will.

Since the elections took place in 2020, the TCP indicated that its reasoning for the analysis of permanent residence would rule for the future. Furthermore, to repair Mr. Morales' rights, the Court ordered economic compensation that included legal expenses, lost earnings, and consequential damages. In other words, he had to receive the same income that a senator for Cochabamba would receive. This decision was controversial because the Court presumed that Evo Morales Ayma would have necessarily won the elections without any support to reach that conclusion. Mr. Morales praised the judgment through social networks and indicated that he would not accept economic compensation.

Even though judgment 0087/2021-S4 was issued on May 7, 2021, it was notified almost a year later. Oddly, it appeared when former President Jeanine Añez was sentenced to 10 years in prison because of the 2019 coup, and when the ruling party initiated new judicial procedures against her, and more people became involved.

As indicated before, the TCP has been accused of the disappearance of court decisions. In the 2021 report, it was indicated that judgment 0012/2021 which declared the unconstitutionality of trials in absentia vanished from the Court's official website. For this reason, public opinion and the media named it "the ghost judgment". The judgment was displayed on the TCP's website until Justice Minister Iván Lima publicly criticized the effects of the court decision and accused the TCP of creating barriers in solving corruption cases. After these public statements, the President of the TCP Paúl Franco announced that the judgment was just a draft, when in reality, the final decision had not been notified to the plaintiff. Hence, in 2022, many representatives questioned the TCP since the lawsuit was proposed in 2019 and the Court delayed solving the case. Also, in 2022, the members of the Asamblea Legislativa Plurinacional de Bolivia (Bolivian Legislative Assembly) demanded an explanation of why the Court posted the judgment on its official website and withdrew it coincidentally after Justice Minister Iván Lima's statements.

Former deputy Norma Piérola proposed the lawsuit demanding the unconstitutionality of trials in absentia in 2019. After the scandal of the lost judgment, she presented a complaint against the TCP in the Bolivian Legislative Assembly. Piérola requested actions against the magistrates, and, during the investigation, Justice Minister Iván Lima was also questioned since he knew the decision before it was notified to the parties. In the meantime, in April 2022, the President of the TCP Paúl Franco indicated that the decision would remain pending as more information and expert opinions were requested. Also, he was informed that the magistrates excused themselves from this case because of the doubts surrounding their conduct.

III. Constitutional Cases

1. Same-sex marriage and the first steps of Judgment 0577/2022-S2

David Víctor Aruquipa Pérez and Guido Álvaro Montaño Durán approached the Servicio de Registro Cívico (SERECI) to request the registration of their union as a same-sex couple, but it was rejected. Given this, they initiated an administrative procedure which was denied because Bolivia's regulations do not allow for same-sex marriage. Faced with the refusal of SERECI, David Aruquipa and Guido Montaño proposed a constitutional protection for the violation of their rights to equality and non-discrimination, motivation,

and the rights derived from the family bond, among others.

On July 3, 2020, the Second Constitutional Chamber of La Paz, through judgment 127/2020, declared that SERECI violated the rights of the plaintiffs and ordered the registration of their marriage. In addition, the judgment analyzed the case according to the Inter-American Court of Human Rights Advisory Opinion OC-24/17, the block of conventionality, the rights recognized in the Constitution of Bolivia, and developed in the jurisprudence. Given this, the SERECI ignored the court decision and requested a precautionary measure from the TCP to suspend the effects of judgment 127/2020.

On June 22, 2022, the TCP issued court decision 0577/2022 and indicated that the Constitution recognizes the application of the block of conventionality, therefore, it is an obligation to consider the human rights treaties ratified by the Bolivian State[3]. Likewise, the TCP recognized that Bolivia has the obligation to progressively eradicate all forms of discrimination. The Court stressed that discrimination related to sexual orientation and gender identity is not allowed under Bolivia's Constitution. On the other hand, the TCP stated that in Advisory Opinion 24/17 of November 24, 2017, the Inter-American Court of Human Rights indicated that the States that are part of the Inter-American System should adopt all the necessary measures to ensure access to the figure of marriage for same-sex couples.

Therefore, the TCP declared the violation of the rights of David Víctor Aruquipa Pérez and Guido Álvaro Montaño Durán and confirmed judgment 127/2020. The Court ordered SERCI to register their marriage. Also, it urged the Bolivian Legislative Assembly to adapt the legislation to the standards of the treaties ratified by Bolivia.

Judgment 0577/2022 presents certain particularities. To begin with, there was no consensus among the magistrates of the Court for the decision, due to this, they summoned the president of the TCP to settle the case with his vote. On the other hand, as indicated in the 2021 report, one of the criticisms faced by the TCP is related to the delay in resolving cases and notifying the parties. Case 0577/2022 was no exception since, despite the fact that it is dated June 22, 2022, the parties were notified in March 2023. Despite this, the judgment was considered an important step for same-sex marriage in Bolivia.

2. Requirements to grant house arrest

Bolivian legislation contemplates the "avocación" which consists of the possibility that a superior judicial body attracts for itself or demands the resolution of a case that ordinarily falls within the competence of another lower body. In other words, the "avocación" is an act of transferring jurisdiction so that a superior body can decide on a specific matter. For the first time, the TCP resolved to hear a case in which the First Criminal Execution Judge of the Department of La Paz granted house arrest to a person condemned to 30 years in prison without the right to pardon for the crimes of kidnapping and murder. The convict indicated that he suffered from several chronic diseases that required ongoing treatment and that his situation could worsen due to the COVID-19 pandemic.

In judgment 001/2022[4], the TCP identified the erroneous interpretation and application of the Criminal Execution and Supervision Law ("LEPS"), since Criminal Execution judges granted arbitrarily the benefit of home detention. For this reason, the Court indicated that Article 196 of the LEPS determined that people who turned 60 during the execution of their sentence could serve house arrest, except for those who were convicted of crimes that do not admit pardon. In the same way, article 196 determined that those who suffered from an incurable disease in the terminal stage could also request house arrest. Based on these, the TCP clarified that the Regulations for the Execution of Prison Condemns stated that an incurable disease in the terminal stage is one that cannot be overcome and that, according to clinical experience, will imply death in the approximate period of twelve months. Therefore, the TCP explained that house arrest is not a benefit that can be applied in cases in which there is a chronic illness that is not in a terminal phase, nor when continuous medical attention is required since these issues can be addressed through other administrative and judicial remedies. For this reason, the Court clarified that the benefit of house arrest is intended for the convicted to have a dignified death for humanitarian reasons at home and not in prison.

Additionally, the TCP determined that for judges to grant house arrest they must have a medical report that clearly identifies the incurable disease and whether it is in a terminal period. The decision of the judges must be reasoned so that, if there is doubt or lack of clarity about the medical certificate, the judge can have the extension of the procedural term to request a new report and resolve it. In addition, the medical certificate must be approved by a forensic doctor from the Institute of Forensic Investigations.

On the other hand, the TCP decided to modulate its jurisprudential line, since previous decisions limited the victims' ability to challenge the benefit of home detention. In this way, it determined that the victim must know and can appeal the benefit of house arrest for having a legitimate interest as the object of the offense that originated the sentence. For its part, the Public Prosecutor's Office can also appeal to the benefit of home detention for its role in the defense of the general interests of society.

3. Instability in the judicial service

In July 2022, the TCP notified judgment 0704/2020-S1 which had been rendered two years earlier, on November 9, 2020. The court decision granted constitutional protection to a former transitory judge. Pastora Cabrera Misericordia was dismissed from her position as judge through a notification and without being granted the regular procedure.

In context, after the approval of the Bolivian Constitution in 2009, the judicial branch went through a transition process. Evaluations needed to be held to elect new judicial operators and, after the new designations, the judicial ladder had to be reviewed. Meanwhile, the Bolivian Assembly enacted legislation allowing the figures of transitory

and provisional judges. On one hand, transitory judges were those who were in office and could participate in the selection processes carried out by the Judicial Council, and the Supreme Court of Justice, among others. On the other hand, provisional judges were not part of the judicial branch but were brought in to fill vacancies until the official designations.

Several transitory judges demanded job stability and the benefits of the judicial ladder. The TCP issued two judgments –1227/2012 and 0504/2015-S1- which clarified that all the judicial operators that were in office were transitory until the official designation. For this reason, they did not belong to the judicial career, there was no job stability, and they could be dismissed from their functions until a merit contest was held. However, the Court later issued a new judgment -0832/2015-S3- that stated that job stability guarantees independence in the administration of justice and highlighted the importance of the judicial career in the transition process.

The TCP decided to apply judgment 0832/2015-S3 in the case of Pastora Cabrera Misericordia since it had a higher standard of protection of rights. Thus, the Court indicated that the dismissal of temporary judges could not ignore their right to job stability and had to be done through a process that respects their guarantees and rights. Likewise, it questioned that one of the main reasons for dismissing temporary judges was the need for them to be trained in accordance with the principles of the 2009 Constitution. In this regard, the Court indicated that their dismissal is not a necessary and proportional measure. On the contrary, the authorities should find a way for judges to be permanently trained and evaluated for their suitability in their positions without being separated from the judicial branch.

The Court specified that the Council of the Magistracy does not have the attribution to remove transitory judges based on criteria of temporality or discretion. Also, the Council cannot decide the dismissal of judges on the grounds that a new judicial career has been established. The TCP considered that law allowed transitory judges to participate in the selection and appointment processes. Therefore, it was interpreted that the evaluation should be carried out while they were in office.

Likewise, the Court indicated that judges have the right to legal security and work. Therefore, the arbitrariness of their removal from office generates fear in decision-making and instability. Consequently, since they do not have guarantees of permanence, they may be susceptible to external or internal pressures. Consequently, the TCP recalled that judges can only be dismissed from office for the reasons provided by law.

Based on the reasons above, the TCP granted protection to Pastora Cabrera Misericordia and ordered her reinstatement of her duties. In addition, it ordered that within three months of the notification of the judgment, the Judicial Council issues regulations for the judicial career in which it clarifies the evaluation processes for selection, permanence, promotions, etc. Likewise, it required the authorities to analyze the situation of the current judges and of those who were separated from the judicial branch.

Judgment 0704/2020-S1 was publicly criticized by the government because, as in the case of Pastora Cabrera Misericordia, the former judges that granted illegal house arrest to convicted murders and rapists were temporary magistrates and there was not a regular process following their dismissal. In fact, all of them received just a notification because the regular procedure would last longer, according to the authorities. Therefore, different sectors of society and even the authorities questioned the TCP's lack of diligence in the notification of the judgment. In fact, the Legislature announced an investigation and the prosecution of the TCP judges because of the two-year delay in the notification of the judgment that favored Pastora Cabrera Misericordia. Moreover, they indicated that the court decision was a drawback to the current situation in Bolivia since more judges could initiate legal actions to recover their positions and income during their dismissal.[5]

IV. Looking Ahead

Bolivia faces several challenges for the following year. The authorities have focused their efforts on prosecuting those responsible for the so-called 2019 coup, instead of addressing social demands for security, a life without violence, and transparent and independent justice.

In 2023, Bolivia must adopt urgent and effective measures to stop corruption cases in the judicial system. Likewise, it owes a debt to women who continue to be victims of systematic violence. The challenge will be to prevent cases of gender-based violence and the sanction of those responsible.

In the same way, another challenge is related to the performance of the TCP. The country's highest Court continues its work amid severe criticism for its inefficiency and partiality. Next year it will have to face processes before the Bolivian Assembly for the cases of missing and contradictory judgments.

V. Further Reading

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Bosnia and Herzegovina

Maja Sahadžić, *Assistant Professor, Utrecht University*

Harun Išerić, *Senior Teaching and Research Assistant, University of Sarajevo*

I. Introduction

In 2022, Bosnia and Herzegovina (B&H) experienced the aftermath of the major political crisis that was initiated at the end of 2021. The Serb member of the Presidency introduced a document in which they pushed for withdrawing from state-level[1] institutions and ultimately threatened the independence referendum of the Republic of Srpska (RS) while the National Assembly of the RS adopted a handful of acts based on the introduced document. Consequently, these acts were challenged before the Constitutional Court of B&H.

Further divisions were brought forward by the Office of OHR (OHR). Seemingly, domestic and international stakeholders struggle to strike the balance between local and international presence and participation. On the one hand, local stakeholders invent ways to cautiously resist tedious international oversight and international stakeholders insist on Western governance standards that are hard to meet in the perplexing political and constitutional system of B&H. The role of OHR with its indefinite presence and constant hovering over the political and constitutional system, especially after imposing changes to the Election Law of B&H and the Constitution of the Federation of B&H (FB&H), once again raised the question of whether OHR indeed is "A European Raj". After all, B&H has been admitted to the Council of Europe.

II. Major Constitutional Developments

In 2022, the sweeping political and constitutional crisis that B&H faced at the end of 2021 got its fitting epilogue at the Constitutional Court of B&H. As a reminder, in October 2021, the leadership of the RS, led by the Serb member of the Presidency of B&H, publicly presented a document that introduced a basis for the declaration of independence of the RS if the powers that have been transferred from the RS to the state level are not returned to the RS. Related to this, the document featured the abolition of several laws and state-level agencies based on them and the establishment of similar laws and agencies at the level of the RS, and the repeal of a large number of decisions enacted by the OHR. A pretext for this was the OHR's Decision on Enacting the Law on Amendment to the Criminal Code of B&H, which introduced a criminalization of the denial and justification of a crime of genocide. Since the Serb political establishment in B&H often condones the 1995 genocide in Srebrenica this decision was met with a pushback. In response, the National Assembly of RS adopted the Law on Non-Applicability of the Decision of the OHR Enacting the Law on Amendment to the Criminal Code of B&H. The constitutionality of this law was challenged before the Constitutional Court of B&H (case U-15/21). In December 2021, as the National Assembly of the RS proceeded to adopt acts based on the document mentioned above (such as the Declaration on the constitutional principles, Conclusions regarding judicial institutions of B&H, and

several Conclusions regarding the transfer of powers), concerns were raised about (potentially) debilitating consequences of such actions on the legitimacy and stability of the whole system. Importantly, recovering powers previously transferred to the state level and the repeal of laws and decisions that have been adopted at the state level are mutually connected constitutional and legal issues associated with the division of powers in B&H and the role of the OHR in streamlining the process.

Based on the Constitution of B&H, the state level has exclusive but narrow powers. Theoretically, the state level can assume additional powers respecting the distribution of powers and mutual agreement of its Entities: the FB&H and the RS. Practically, only a few powers have been transferred to the state level. Even more so, the transfers were mainly initiated and enacted by the OHR to enable (better) coordination in matters such as the High Judicial and Prosecutorial Council (HJPC) and Value Added Tax (VAT). Reasons for this are manifold but can be consolidated into two strands of arguments. On one hand, the Serb political establishment fears the weakening of the RS and, therefore, opposes the transfer of powers to the point that it often threatens to organize independence referendums or referendums to abolish the institutions at the state level. On the other hand, the transfer of powers is entangled with different techniques in the distribution of powers in the FB&H between the levels of the FB&H and its 10 cantons (exclusive and shared). The issues related to the appropriation of state powers have finally been heard before the Constitutional Court of B&H (cases U-2/22 and U-17/22).

Importantly, as mentioned above, streamlining the appropriation of state powers has been mainly thanks to the OHR. The Office, envisaged to facilitate the implementation of the civilian aspects of the peace agreement, was introduced in Annex 10 of the Dayton Peace Agreement (DPA). However, it was subsequently reinforced from 1995 to 1999 due to the interventions of the Peace Implementation Council (PIC) (successor of the International Conference on Former Yugoslavia). While in its first resolutions, right after the conflict ended, PIC suggested the continuation of the supportive role of the OHR and hinted at the return to what could be understood as "local ownership", soon enough, the circumstances in B&H backslid. Throughout 1997, the PIC extended the powers of the OHR so that they can facilitate peace implementation as they "judge necessary". The so-called Bonn Powers were born. Other than OHR's presence that was already extended indefinitely in B&H, the Bonn Powers enabled excessive powers of the OHR to impose or amend legislation, and even to annul the decisions of the Constitutional Court of B&H and dismiss elected representatives and government officials. Some of OHR's decisions certainly supported peace implementation (such as the introduction of new banknotes, uniform license plate system, flag, and hymn). Some decisions, as seen above, have been met with pushback. Some decisions, however, have raised concerns over their controversial purpose. One such decision is the 2022 decision on changes to the Election Law of B&H and respectively the Constitution of the FB&H.

On 2 October 2022, just after the polls closed after the general elections in B&H, the OHR announced it imposed 21 amendments to the Constitution of the FB&H and amendments to the Election Law of B&H. Since this decision came after a long hiatus, this recent return to full Bonn powers is a continuation of decisions of the OHR that further deepens the understanding of the OHR as a divisive factor. The decisions referred to increasing the size of the House of Peoples (the upper house of the FB&H) and timely elections of delegates of the House of Peoples by the cantonal assemblies. They also shape the process for the nomination of the President and Vice-President of the FB&H, introduce unblocking mechanisms by simplifying procedures and introducing deadlines, introduce principles of cooperation, facilitate the appointment of judges to the Constitutional Court of the FB&H, etc. This intriguing circumstance caught local stakeholders off guard and caused many international stakeholders to raise an eyebrow. What makes this controversial is that, although apparently aimed at circumventing the so-called majorization of the Croats in institutional representation, the amendments will probably favor the Croat party HDZ (instead of Croats in general) in reshuffling important political positions. Other than that, the OHR did not tackle the implementation of important landmark cases of Sejdić and Finci v. BiH, Zornić v. BiH, Pilav v. BiH, Šlaku v. BiH, and Pudarić v. BiH in which the European Court of Human Rights (ECtHR) ruled that constitutional provisions regarding the position of "Others" are discriminatory.

Importantly, even before this, after the negotiations to change the Election Law of B&H had failed, the HDZ party tabled their own proposal on changes which also did not include the implementation of the landmark cases but defined a new way of electing members of the Presidency of B&H from the territory of the Federation B&H through two lists, whereby the Croat member of the Presidency of B&H would become the candidate who receives the most votes in the cantons with a Croatian majority while the representatives in the House of Peoples of the Parliament of the B&H would be elected according to a similar model. One could convincingly argue about the lack of talent of local authorities to run the country. Apart from talent, they lack accountability and mutual trust, at the very least. As a result, this proposal was challenged before the Constitutional Court of B&H (case U-14/22).

III. Constitutional Cases

1. U-15/21: Legal nature of laws enacted by the OHR and their implementation on the territory of the Entities

This case challenged the constitutionality of the RS Law on Non-Applicability of the Decision of the OHR Enacting the Law on Amendment to the Criminal Code of B&H (RS Law) by which it has criminalized the justification and denial of the genocide. Article 1 of the RS Law prescribes that the relevant authorities of the RS shall not cooperate with the relevant authorities of B&H as to the application of the Decision of the OHR. Article 2 states that the government of RS will ensure the protection of the citizens of RS from the applicability of the OHR decision.

The appellant (seven delegates of the Council of Peoples of the Republic of Srpska) argued that the contested Law violated two articles of the B&H Constitution: 1) Supremacy clause, claiming that the Decision of the OHR was the decision of the institutions of B&H to which RS authorities have to comply with and 2) Rule of Law principle since the RS Law is not harmonized with the B&H Constitution and decision of its institutions.

Already in 2000, the Constitutional Court of B&H discussed the powers vested in the OHR to enact laws and the legal nature of such laws (case U-9/00). The Court concluded that such a situation amounts to the functional duality: an authority of one legal system that intervenes in another legal system. In such a situation, the OHR acts as the authority of B&H, substituting itself for the domestic authorities (more specifically, the Parliamentary Assembly of B&H). The fact that the law was enacted by the OHR and not by the Parliamentary Assembly of B&H does not change its legal status, either in form or substance. Namely, the law that he enacted is, in nature, a national law, and it gets published in the Official Gazette of Bosnia and Herzegovina. It is also subject to review by the Constitutional Court. Finally, the Parliamentary Assembly of B&H is free to modify the whole text or part of the text of the law in the future. The Constitutional Court referred to this conclusion in all subsequent cases (U-16/00, U-25/00, U-26/01).

In evaluating the case, the Constitutional Court followed its previous case law on Supremacy Clause (case U-14/04, U-2/11, and U-2/22). In case U-2/22, the Court held that entities should comply with decisions of B&H that are in legal force, including laws passed by the Parliamentary Assembly, and cannot claim any powers for taking any legislative activities in fields regulated by such decisions/laws. The Constitutional Court concluded that the Law enacted by the OHR is a decision that has substituted the Parliamentary Assembly. Thus, per Article III (3) (b) of the Constitution, Entities are obliged to comply with such law. RS's failure to do so resulted in the violation of Article III (3) (b) and Article I (2) which proclaims the Rule of Law principle.

2. U-17/22: Supremacy Clause and division of powers

This case challenged the Law on Pharmaceuticals and Medical Devices of the RS (RS Law on Pharmaceuticals) and the Law on Amendments to the Law on the Republic Administration (RS Law on PA). The RS Law on Pharmaceuticals, *inter alia*, establishes the Agency for Pharmaceuticals and medical devices of RS and determines the scope and method of its operation as well as its powers, while the RS Law on PA proclaims the Agency as one of RS independent administrative organization and lists its powers.

The appellant (Member of the Presidency of B&H) requested the constitutional review of the provisions of laws and the Constitution of B&H. The appellant alleged that the above-mentioned laws are not following: (1) Article I (2) which proclaims the Rule of Law, (2) Article I (4) which proclaims the freedom of movement of goods, services, capital, and persons, (3) Article III (3) (b) that represents a Supremacy Clause and (4) Article III (5) (a) that speaks about additional powers of B&H. The appellant pointed out that the Law on Pharmaceuticals and Medical Devices of Bosnia and Herzegovina (B&H Law on Pharmaceuticals), which established the institutional and legal framework in the field of medicines and medical devices in B&H, establishes the Agency for Pharmaceuticals and Medical Devices of B&H (B&H Agency), as a single regulatory body at the level of B&H in this field. In the applicant's opinion, RS does not have any jurisdiction when it comes to the field of medicines and medical devices. Thus, parallel legislation by RS cannot exist due to the impossibility of the entity to passing such a piece of legislation-due to interference of the RS Agency with the powers of B&H Agency.

The Constitutional Court reviewed contested laws in light of Article I (2) and Article III (3) (b) of the Constitution. The Court first reviewed the content of the contested RS laws and compared it with the B&H Law on Pharmaceuticals. It concluded that challenged laws pertain to the same matter as that prescribed under the B&H Law on Pharmaceuticals. Furthermore, the Court pointed out that B&H Law established the obligation of the Entities and Brčko District to harmonize its regulation in the area of pharmaceuticals and medical devices with the state law. The impugned legislation enacted by the RS essentially restates the wordings of the B&H Law on Pharmaceuticals and creates an institution akin to the authority created under the B&H Law that is vested with the powers to execute the Law. The Court also concluded that the creation of a separate legislative framework in the area of pharmaceuticals and medical devices, and an executive authority for the implementation of such framework at the RS level does not accommodate the obligation of the harmonization. Finally, the Court stated that an entity could regulate further the area of pharmaceuticals and medical devices, only in the part where a certain issue has not already been regulated by the state law, or to prescribe which authority has been in charge of this area in the entities. However, this can be done only in the part where the responsibility of the B&H Agency has not already been prescribed. The Court concluded that RS laws were contrary to Article I (2) and Article III (3) (b) of the Constitution.

3. U-2/22: Disputes over power division between the Entities and the State

At the peak of political crises in 2021, the National Assembly of RS adopted a Declaration on the Constitutional Principles and a set of conclusions regarding the transfer of powers from the Entity level to the State level, in fields of judiciary self-regulatory body, defense and security, and indirect taxation. Essentially, the National Assembly of RS calls up on the unilateral return of transferred powers from the state level. The appellant (15 members of the House of Representatives of the B&H PA) challenged the constitutionality of such acts, calming for these to violate various articles of the B&H Constitution, including Article I (2) – Rule of Law principle and Article III (5) (b) – Supremacy Clause.

The first question raised was the issue of admissibility since the contested acts were not the Entity constitution or its laws but general

acts, of a lower legal rank than the law. First the Court noted that when considering the jurisdiction, it is not limited to the type of acts, but it is necessary thoroughly to examine the content of the disputed acts and the consequences thereof. Analyzing the content of the Declaration, the Court concluded that firstly National Assembly of RS expresses the general political views and then it gives specific tasks to the public authorities in RS to perform, among others to declare the right of the National Assembly of RS and the Government of RS to suspend the application of any act, measure, or activity of bodies and institutions at the state level, which have no basis in the Constitution of B&H.

Concerning the conclusions, the Court noted that these were made in the same methodological manner and they are of a similar content.

The Court concluded that it has jurisdiction over articles and paragraphs of the Declaration and conclusions which establish certain obligations or tasks for the Government of RS and the President of RS, and set a deadline for their fulfillment. The Court considered that certain provisions of Declaration and Conclusions raise issues under Article III (5) (a) of the B&H Constitution that speaks about the transferred powers to the state level and as such establishes a dispute between the State and the RS.

Deciding on the merits of the case, the Constitutional Court recalled its case law on powers transferred to the state level. Once they are transferred, such powers become the powers of B&H per Article III (5) (a) of the Constitution of B&H, and they are not covered by the part of the provision of Article III (3) (a) of the, which speaks of the powers of the Entities not expressly assigned in the Constitution to the institutions of B&H. By adopting laws in certain areas, at the level of B&H, the matter prescribed by these laws has become the power of B&H. Entities agreed to transfer powers to the level of the State of B&H in the following areas: justice, defense and security, and indirect taxation. The main legal issue raised was the possibility of "reinstating the assumed powers". For the Constitutional Court, an important question to answer was whether and what effect the withdrawal of consent may have on the additional powers already established at the level of B&H. The Court noted that B&H Constitution does not stipulate the possibility of reinstating the assumed additional powers based on the withdrawal of consent of one of the Entities or based on the re-consent by the Entity. On the other hand, in the view of the Court, such a reversible transfer of powers would not be contrary to the Constitution of B&H, if there is a decision made by the Parliamentary Assembly of B&H. Bearing in mind the fact that there are state laws in areas of transferred powers, it was sufficient for the Court to conclude that this issue falls within the competence of the State and its institutions.

4. U-14/22: Legislative veto mechanism: destructive consequences upon the vital interest of constituent peoples

This case raised the issue of the Election Law proposal, made by the Croat People Caucus, for which the Bosniak People Caucus in the Parliamentary Assembly of B&H claimed to be detrimental to the vital interest of the Bosniak People. The law was proposed, after the long-term efforts of national and foreign actors, to reach a political agreement on amendments to the election legislation and the Constitution of B&H.

The mechanism of the protection of vital national interests is a veto mechanism in the Upper House of the Parliamentary Assembly, exercised by caucuses of Bosniak, Croat, or Serb peoples. It is described by the Court as *very important in the states with multi-ethnic, multilingual, and multi-religious communities or communities that are distinctive due to their differences.* After one of the caucuses declares a proposal for a law or any other decision detrimental to the vital interest, a special procedure is followed. If the agreement among caucuses is that the proposal is detrimental to the vital interest, the final decision is made by the Constitutional Court.

The Bosniak People Caucus presented a few arguments for such a claim. Firstly, according to the Proposal (Article 5), the election of a Croat member of the Presidency is conditioned by majority support in five FB&H cantons: Herzegovina-Neretva Canton, Central Bosnia Canton, West Herzegovina Canton, Canton 10, and Posavina Canton. This raises a vital interest since candidates for a member of the Presidency of B&H from amongst the Bosniaks must win the largest number of votes among Bosniak candidates in the entire FB&H, unlike candidates for a member of the Presidency of B&H from amongst the Croat people who should win a majority in one of the five cantons which will be enough for them to be elected. The second reason presented is that no Bosniak could run for the Presidency seat from RS. Article 6 of the Proposal that speaks on the election of Serb delegates to the House of Peoples of B&H PA was contested because of the inability of Bosniak to stand for the election of delegates by the National Assembly of RS to the House of People of B&H PA. Articles 9 and 10 of the Proposal contain provisions on the election of delegates to the House of Peoples of the Parliament of the FB&H, according to which cantons in which the representation of one of the constituent peoples is less than 5% concerning the total number of that constituent people in the FB&H shall jointly elect one delegate to the House of Peoples of the Parliament of the FB&H.

The Court first considered the procedure on the protection of vital interest, then it decided on the merits of the case. The Court recalled its previous case law on the meaning of the vital national interest, pointing out that the effective participation of the constituent peoples in adopting political decisions, in terms of the prevention of absolute domination of one people over the other, represents the vital national interest of each constituent people. Considering the proposed election of Bosniak and Croat members of the Presidency, the Court found the presented objections to be contradictory. Namely, it is claimed that the proposed provision on the election of Croat members deepens the existing discrimination, and at the same time is requested that such discrimination be applied in electing Bosniak Presidency members. In the view of

the Court, the Proposal of the Law does not change the current method of electing Bosniak members of the Presidency. The same stands for the election of Serb Presidency member and Serb delegate to the House of Peoples of the B&H PA. The Court also noted that the vital national interest cannot be raised by the claim that a proposal of a law does not enforce judgments of the ECtHR. Finally, the Court examined the method of electing delegates to the House of People of the FB&H Parliament. It referred to its previous decision in case U-3/17, in which it found that the proportional representation of each of the constituent peoples in the respective canton according to the last census was not in violation of the vital interest of the Bosniak people.

IV. Looking Ahead

Just like in the previous years, in 2022, the Constitutional Court continued to hear numerous cases where it ruled on a violation of the right to a fair trial concerning the adoption of a decision within a reasonable time limit. It is expected that, in 2023, 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 the land was applied in either an arbitrary or discriminatory manner.

The Court keeps functioning with seven judges out of nine. Two domestic judges retired in August and November 2022, and so far, the Parliament of the FB&H and the National Assembly of the RS failed to elect new judges. It resulted in the blockade of the Grand Chamber, which decides on all human rights cases. Thus, important human rights cases are discussed by the Plenary Session which includes foreign judges. Such blockade could result in a violation of a right to the adoption of a decision within a reasonable time limit. At the same time, in the absence of a majority of votes, no decisions can be made in split cases like the constitutionality of the appellate jurisdiction of the Court of B&H.

V. Further Reading

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Maja Sahadžić, 'Constitutional Asymmetries as an (In)Effective Counterbalancing Tool in Protecting Territorial Self-Government' in Ferran Requejo and Marc Sanjaume (eds), How self-government can be protected from the Tyranny of the Majority? (Routledge, 2022).

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1 "State level" is a neutral term to describe the federal level or central level in B&H due to continuous discussions and disagreements on the nature of the constitutional and political system of B&H.



Brazil

Estefânia Maria de Queiroz Barboza, *Professor of Constitutional Law at the Federal University of Paraná and Uninter, Brazil*

Gustavo Buss, *PhD Candidate at the Federal University of Paraná, Brazil*

Renato Saeger Magalhães Costa, *Associate Lecturer at T.C. Beirne School of Law, The University of Queensland, Australia*

Bruno Santos Cunha, *PhD Candidate at the Federal University of Pernambuco, Brazil / Visiting Scholar at The Ohio State University Moritz College of Law*

I. Introduction

In 2022, Brazil experienced one of the most divisive presidential elections in its history, with themes related to the elections dominating the docket of the Supreme Court (*Supremo Tribunal Federal*, or "STF") for a significant part of the judicial term.

After winning the presidential election in 2018 with 55.1% of the votes in the second round, Jair Bolsonaro's presidential term was marked by a shift to the right in Brazilian politics. From 2019 until the end of 2022, his government faced significant criticism for its poor handling of the COVID-19 pandemic, attempted assaults on the country's democratic institutions, environmental controversies, and human rights issues. The 2022 presidential election brought a clash between the reappointment of Bolsonaro and the election of an old acquaintance of the Brazilians: Luiz Inácio Lula da Silva. After a very tight electoral victory (50.9% of the votes in the second round) on October 30, 2022, Lula da Silva and his political allies began working on the government transition scheduled for January 1st, 2023.

Despite the elections in October of 2022, the STF was asked to rule on matters related to constitutional issues arising from the registration of political parties and the constitutionality of specific political campaigns and activities by the political actors since the beginning of the judicial term. Among these questions were several issues about free speech related to the electoral proceedings. Justice Alexandre de Moraes, who was also the President of the Superior Electoral Court (*Tribunal Superior Eleitoral*, or "TSE"), imposed limits on the constitutional freedom of expression and opinion under the guise of protecting the democratic state to prevent false and misleading information from circulating before the federal elections. Bolsonaro's supporters and part of the legal community perceived his decisions as politically biased, with many deeming them as an unwarranted intrusion of non-elected judges into the political arena. The exchanges that followed between Justice Moraes and President Bolsonaro, as reported in the media or official documents, were often contentious.

Due to the tenuous relationship among the high political and legal institutions, the uncertainty surrounding the polling results, and the sluggish economic and social recovery from the impacts of the COVID-19 pandemic, Brazil endured a notably erratic year in 2022.

II. Major Constitutional Developments

As the vaccines became more widely accessible, the scientific efforts to monitor, treat, and control COVID-19 proved successful, and the public health crisis gradually subsided with the lift of the pandemic restrictions, discussions around constitutional issues started to re-emerge and diversify in the Brazilian

context. A wider range of topics of constitutional relevance was reintroduced in the political debate beyond those related to the health crises and their immediate legal and political repercussions. One of the consequences of the expansion of regular constitutional and political debates was the gradual return of deliberations in the National Congress on proposed constitutional amendments.

The Brazilian Constitution is often called a "patchwork quilt" due to the numerous amendments to its original text of 1988. In 2022, the number of changes reached a new record high for a year, with 14 constitutional amendments approved by the National Congress. Some of these amendments raised important constitutional issues in the Brazilian constitutional scenario. They covered a broad range of topics as diverse as taxation, electoral rules, public administration budget, and human rights.

Notable changes to the text included the addition of an explicit reference to the protection of personal data, including in digital media, as a fundamental human right under Article 5 of the Constitution. Critical in ensuring privacy, security, and dignity for individuals, as well as promoting trust and accountability in organizations that handle such information, the protection of personal data was a key issue of Constitutional Amendment 115, which also provided that the Federal Union shall have the power to organize and supervise the protection and processing of personal data and the exclusive power to legislate on the matter.

In an attempt to increase and encourage female political participation, Constitutional Amendment 117 imposed a new political scheme requiring political parties to comply with two additional obligations: (i) political parties must apply at least 5% of their party fund resources for the creation and maintenance of programs for the promotion and dissemination of women's political participation; (ii) parties must allocate resources based on the number of women candidates and should distribute a minimum of 30% of the Special Fund for Campaign Financing and the party fund portion reserved for electoral campaigns to their female candidates. Although the numbers have slightly increased in the last decades, Brazil still falls short of the worldwide average for women's political participation. After the 2022 general election, only 17.7% of the seats in the lower house of the National Congress (Chamber of Deputies) were occupied by women (91 out of 513 seats); in the upper house (Federal Senate), female participation is even more limited, with only 16% of the seats occupied by women (13 out of 81).

Other significant constitutional developments brought by constitutional amendments included: (i) the addition of a provision establishing tax immunity from local taxes on urban buildings and urban land property for temples and religious entities, even if the entities covered by the immunity are only tenants of the real estate (CA 116); (ii) the addition of rules governing appeals to the Superior Court of Justice (*Superior Tribunal de Justiça*, or "STJ") (CA 125); (iii) a raise from sixty-five to seventy years in the maximum age for the choosing and appointing of members of the STF, STJ, Federal Regional Courts, Superior Labor Court, Regional Labor Courts, Federal Accounting Court, and the civil ministers of the Superior Military Court (CA 122). After the 14 amendments of 2022, there have been 137 amendments to the Brazilian Constitution of 1988: 128 regular constitutional amendments, 6 revision amendments, and 3 arising from international human rights treaties and conventions equivalent to constitutional amendments (approved following the procedures established by CA 45 and Article 5, §3º of the Constitution).

Advancing to the political turmoil surrounding the presidential elections of 2022, President Bolsonaro, alongside his political allies, made declarations that carried significant constitutional implications, leading to heightened anxiety and sparking lively debates within the legal community: the idea of packing the Brazilian Supreme Court with conservative justices sympathetic to his political agenda in the case of his reelection.

Right after the first round of elections, on October 7, 2022, vice-President Hamilton Mourão – who had just been elected to the Federal Senate by the state of Rio Grande do Sul – announced the plan in an interview for a major TV network. According to Mourão, "the STF has frequently encroached upon the Executive and Legislative branches' responsibilities, disregarding legal procedures. This topic should be debated and resolved within the National Congress. It's not just a matter of increasing the number of seats on the Supreme Court. We must define the term of office for Supreme Court justices. In my opinion, it should not extend more than 10 to 12 years".

The next day, Bolsonaro echoed his Vice President's ideas and explained that he would propose to add at least 5 justices to the Supreme Court. He stated, "if you increase the number of Supreme Court justices, you pulverize their power. They would have less power, and of course, they do not want that…".

The proposal was seen as a clear attempt to pursue partisan and ideological goals by manipulating the Court's composition. But Bolsonaro's plan sparked broad disapproval from the outset, including from members of the Court, who viewed it as an assault on the Judiciary's independence. Many legal professionals and politicians also contended that the plan would erode the Court's ability to function and operate fairly within the principles of justice and the rule of law.

As the plan received a negative response from the public and with the approaching of the elections' second round, Bolsonaro's idea to increase the number of seats on the Supreme Court cooled down. A notably contradictory and retreating political movement occurred live during the Presidential Debate on October 16, 2022 (a week after his first declarations on the topic), when Bolsonaro committed that there would be no such proposals if reelected, as he had "never studied the topic in depth".

Bolsonaro's presidency has been characterized by his confrontational style and controversial statements, which have significantly impacted his relations with the other branches of government, particularly with the judiciary and with members of the STF.

His tendency to make inflammatory remarks and engage in public disputes with political opponents has strained relations with many lawmakers and judicial officials. The results of the clash between Bolsonaro and the STF and the ongoing tensions between the Executive and Judicial branches can be seen in most of the rulings examined in the next section of this report.

III. Constitutional Cases

The STF issued several rulings in 2022, many of which directly scrutinized the policies of Jair Bolsonaro's government, limiting his ideological agenda and safeguarding the integrity of the 2022 Presidential Election in Brazil.

1. Daniel Silveira's Conviction (AP 1.044): Freedom of expression

On April 20, 2022, the STF ruled on the criminal action AP 1.044, convicting Congressman Daniel Silveira of the crimes of incitation to the violent abolition of constitutional institutions and coercion during the proceedings. The sentence amounted to 8 years and nine months of reclusion. According to the majority's opinion, led by Justice Alexandre de Moraes, the actions taken by the congressman eloped the mere criticism protected by freedom of expression. He was indicted and faced criminal charges before the same Court against which he had criticized. Ultimately, he led a fierce campaign to intimidate the justices to change the results of his sentencing.

There were two dissenting opinions, issued by the only two Justices appointed by Jair Bolsonaro: (i) Justice Nunes Marques upheld the acquittal of Daniel Silveira, as he understood that parliamentary immunity applied to the case and that the opinion of the congressman should be protected under broad freedom of expression; (ii) Justice André Mendonça upheld a partial acquittal, to convict the congressman only for coercion during the proceedings, as he understood that there was never a true incitation against the STF as a constitutional institution.

The investigations concerning the congressman took place within Inquiry 4.828, initiated by the STF to address the production and dissemination of antidemocratic and misinformative online content directed against the Court and its justices. The Inquiry became highly controversial, especially among Jair Bolsonaro's supporters, who saw the STF as politically biased, and, therefore, as part of the opposition. Daniel Silveira often used social media and other platforms to attack the STF and individual justices. He ushered in his videos that violent measures should be taken against individual justices.

The criminal conviction represents a unique incursion on the limits of the freedom of expression granted to members of parliament in Brazil. According to the decision, the Brazilian Constitution protects the opinions of congresswomen and congressmen, even when they are satirical or erroneous. It does not protect those who collide with the rule of law. The STF reinforced that hate speech and attacks directed against constitutionally protected institutions are not permissible.

Given Daniel Silveira's proximity to Jair Bolsonaro, the conviction was considered extremely political and a response to the mobilization of the former President's supporters' criticism of the STF. The proximity to the 2022 Presidential Election was also relevant. The decision stressed the authority of the STF and the Electoral Court in issues of democracy and federal elections. The response to Daniel Silveira set the ground for an active defense by the STF of democratic standards during the electoral dispute.

For the same reasons, on the day following the decision, Jair Bolsonaro edited a decree to pardon Daniel Silveira in which he expressly stated that the congressman was protected by parliamentary immunity in his exercise of freedom of expression. It was seen as an unprecedented attempt by a President to devoid a conviction by the STF. The decree was subject to constitutional challenges, arguing that the President would not have such a broad margin of discretion to nullify a verdict by the Supreme Court, but this issue remains unresolved (ADPF 964, ADPF 965, ADPF 966, ADPF 977).

2. TSE Fake News Resolution (ADI 7.261): Electoral disinformation

On October 20, 2022, the TSE edited Resolution 23.714 to restrict the spread of disinformation that could jeopardize the integrity of the electoral process. The Brazilian General-Prosecutor challenged the constitutionality of the newly approved Resolution before the STF (ADI 7.261), claiming that it would be unconstitutional censorship. He also requested an injunction to suppress it altogether. The STF asserted the constitutionality of the TSE Resolution. They reassured the constitutional need to fight against disinformation and safeguard free electoral decision-making. The only dissenting opinions presented were by Justice Nunes Marques and Justice André Mendonça, the two appointees of Jair Bolsonaro, who emphasized arguments centering on the freedom of expression within the internet to propose the unconstitutionality of the TSE's regulation.

The Regulation came in the context of intensified work by the Electoral Court on monitoring and repelling misinformative campaigns, especially those directed at the electronic voting system, the electoral voting process, and the electoral justice branch. To achieve such goals, it worked with social media platforms, news agencies, and other relevant organizations to establish an alert system regarding the spread of disinformation and a national front to address and take measures in response to it. The TSE response was firmly centered on reassuring public trust in the electoral authority, in great part because Jair Bolsonaro and his close allies, adopting similar tactics employed by Donald Trump in the US, were constantly raising doubts about the integrity of the Brazilian electoral system.

The majority of the STF refused the preliminary request to suspend the effects of Resolution 23.714 because the Brazilian Constitution conceived an independent Electoral Justice entrusted with overseeing and regulating the electoral procedure. The Court stressed that the TSE has the constitutional authority to defend electoral integrity and must do so comprehensively. In particular, the spread of disinformation in the electoral

context was seen as a potential threat to the conscient and informed manifestation of the elector's free will, authorizing an energetic approach by the electoral court in the form of regulation and an increase in digital accountability.

3. "Secret" Federal Budget (ADPFs 850, 851 and 854): Budgetary transparency

In 2021, an issue surfaced surrounding the payment of non-budget earmarks managed by the Federal Budget General-Rapporteur in Congress (the 2021 Global Review of Constitutional Law addressed the injunction decisions issued on this subject). Because of the introduction of significant changes to the procedure of legislative approval, the Brazilian Congress' presidency saw an increase in power, having the ability to approve correcting earmarks (RP-9) to the Federal Budget without meeting some transparency standards. This led to politicizing the Federal Budget, with discrepancies in the allocation of funds amounting to several billion reais.

During the mandate of President Jair Bolsonaro, the use of the "Secret" Federal Budget was intensified as one of the primary bargaining chips to secure some legislative alignment with items on Bolsonaro's agenda. Therefore, the incursion of the STF on the subject matter was seen as particularly keen on the balance of powers between the executive and legislative branches. The constitutional challenges presented before the Supreme Court were instigated by political parties of the opposition, which felt impaired by the lack of isonomy in the allocation of the funds. In the days preceding the STF decision, the Brazilian Congress' Presidency was extremely vocal about the importance of maintaining the existing structure.

However, on December 19, 2022, the STF decided on the unconstitutionality of the RP-9 earmarks to the Federal Budget. Six of the Supreme Court's Justices endorsed the prevailing reasoning, with five dissenting opinions. Despite denying the unconstitutionality of the RP-9 earmarks themselves, the dissenting opinions still voiced concerns and proposed an increase in transparency and the adoption of more transparent rules as to how the funds should be distributed. The majority's view, on the contrary, following Justice Rosa Weber, opined that the anonymity and lack of identification of proponents and recipients in the payment of non-budget earmarks managed by the Federal Budget General-Rapporteur in Congress violated several constitutional principles demanding transparency, impersonality, and morality in the conduction of the budgetary administration. Furthermore, according to Justice Ricardo Lewandowski, the earmarks of the "Secret" Federal Budget subverted the constitutional system of checks and balances, impairing the Executive branch and reducing governability.

4. Firearms Decrees (ADIs 6.119, 6.139 and 6.466): Ideological contention

During the last decade, Brazil saw an increase in elected representatives allied with military and police forces, nicknamed *bancada da bala* ("bullet bench" in a literal translation). They promote a pro-gun legislative agenda. Former President Jair Bolsonaro rose to power partly because of his ties to this group, to the extent of using a gun gesture with his hands as his presidential-campaign symbol. During Bolsonaro's term in office, he acted to facilitate access to firearms by issuing presidential decrees with reduced obstacles to the purchase and carrying of guns.

Two opposing parties instigated the STF's scrutiny of the constitutionality of such decrees in 2019. Still, only on September 5, 2022, Justice Edson Fachin issued an injunction to limit their scope. He stressed the urgency of the matter, as several cases of political violence surfaced in the months anteceding the presidential election. The majority of the Supreme Court endorsed the injunction order, with two dissenting opinions, issued by the only two Justices appointed by Bolsonaro, for whom the Court could not interfere with the discretionary decision of the Executive branch to alter the regulations on firearms and ammunition.

The majority ruled that constitutional guidelines should be followed to limit access to firearms to those cases concerning public safety and the defense of national integrity. In particular, the STF decision excluded the decree's authorization to grant access to firearms and ammunition for personal reasons. The decision limited the number of guns and ammunition allowed in private arsenals, stressing that the quantitative limitations should be proportional to the needs of safekeeping and personal security. Finally, the STF nullified the decrees' presumed situations where an individual's need to access firearms was not demonstrated.

The STF ruling was seen as a clear setback to Jair Bolsonaro, particularly considering his strong endorsement of a pro-gun agenda. Nonetheless, it aligned with the ruling of the Court issued in the ADPF 635, concerning the lethality of policing operations in Rio de Janeiro. In that instance, the majority of the STF stated that the use of lethal force by public agents is constitutionally limited to the previous exhaustion of other viable measures, and only authorized in cases where it becomes imperative to protect the citizens against concrete and imminent threats.

During the four-year term of Jair Bolsonaro's presidency, the STF ruled on many of the government's proposals, broadly understood as part of his ideological agenda. His gun endorsement was one axis of this articulation, but other issues were brought before the Constitutional Court. On July 4, 2022, the STF issued a decision obligating the Federal Government to reinstate the budget for the Climate Fund, after Bolsonaro attempted to prevent the organization's functioning, in particular, because of his views regarding the inexistence of a human-propelled climate change (ADPF 708). On November 3, 2022, it issued a similar order for Bolsonaro's government to reactivate the Amazon Fund, after it was shut down in the context of relaxing oversight over deforestation activities (ADO 59). Finally, on November 29, 2022, the STF ordered the development of an Executive action plan to protect the remaining Brazilian autochthonous peoples from the imminent threat of extermination, particularly urgent due to the suppression of protective guidelines enforced during Bolsonaro's presidency (ADPF 991).

5. *Protective Measures Against Domestic Violence (ADI 6.138)*: Gender perspective

On March 23, 2022, the STF considered valid a legislative alteration to Law 11.340/06 (known in Brazil as Law *Maria da Penha*) directed at allowing the exceptional removal of a domestic-violence aggressor from his residence by police authority without previous judicial authorization. The flexibilization of the requirement of judicial authorization was introduced because of the lack of judicial authority in several small municipalities in Brazil. This could lead to a potential risk of delay in the removal of the aggressor and, consequently, an inadmissible life hazard to the women subject to domestic violence.

The unconstitutionality of the amendments was evoked by the AMB (the Association of Brazilian Magistrates), according to which it would institute a police state incompatible with the doctrine of separation of powers and the constitutional safeguard of judicial jurisdiction (ADI 6.138). The central argument was that the Judiciary was the only competent institution to decide on such matters. According to the STF, however, this was not a strong argument. The STF decided that the amended law required the restrictive measure undertaken without previous authorization to be subject to judicial review in the following 24 hours.

The decision by the Supreme Court set an important precedent for the concrete enforcement of gender perspective in its decision reasoning. Despite the constitutional challenge having been evoked without an evident argument against the validity of gender protection, the STF stressed the importance of undertaking measures to suppress the cycle of violence against women in Brazil. Therefore, the central argument to the Court focused on the constitutional need to prevent domestic violence, which claims for preventive and timely interventions by police authorities. The prevailing opinion issued by Justice Alexandre de Moraes stressed that if a situation is urgent and imposes risks to the integrity of the woman, the police authority cannot return the potential aggressor to his home only because a judge is unavailable to decide on his removal, especially in a country with high numbers of femicides (occurring mainly in the victim's residence).

IV. Looking Ahead

Looking ahead to 2023, several developments of constitutional and political significance are likely to occur in Brazil. Firstly, there will be two new appointments to the Supreme Court of Brazil by President Lula da Silva, which will not only cause political controversy but will probably increase the progressive-leaning mentality held by the majority of the Court's judges. The new Justices will replace Ricardo Lewandowski, who is expected to retire in May, and Rosa Weber, expected to retire in October, as both will reach the compulsory retirement age of 75 outlined in the Constitution. Secondly, incoming President Lula da Silva will play a crucial role in determining the country's future trajectory, even in constitutional matters. If the President adopts a conciliatory tone, the country may start to recover from its political and economic turmoil. However, if the political actors continue to stoke tensions via belligerent discourses, Brazil could face more years of uncertainty and instability.

V. Further Reading

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Cabo Verde

José Pina-Delgado, *Associate Professor of Public Law and Legal Theory-ISCJS, Chief Justice-Constitutional Court of Cabo Verde)*

Liriam Tiujo-Delgado, *Associate Professor of Public Law - ISCJS*

Carlos Brito, *Assistant Lecturer of Criminal Law – ISCJS/Legal Adviser-CCC*

I. Introduction

This report aims at presenting the political, legislative, jurisprudential, and doctrinal evolution of CV Constitutional Law in 2022. The state of the liberal democracy remained stable, at least according to major international indexes[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 CCCV delivered a couple of important opinions. 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

2022 was a year of political stability but also marked by some social unrest and demonstrations, by elections in the two main opposition parties, which chose new leaders, by some internal contestation to the chairman of the party in power and PM, by the inability of Parliament to agree on the election of members of external organs, and by the conviction of a MP for a crime of attack against the State.[3] Despite the fact the Sars-Cov-2 pandemic developed in a more favorable direction in 2022, the increasingly negative effects of climate change led to another year of reduced rainfall, and, especially, the invasion of Ukraine and its economic impacts proved to be challenging for the State and CV civil society.[4] The political and legislative agenda was heavily marked by this context.

Specifically, regarding pandemic control measures, the Cabinet kept using the *Civil Protection Act* provisions and executive resolutions to manage the spread of the disease,[5] to impose a third shot of the vaccine,[6] and other complementary measures.[7] Since July, with the confirmation of a pattern of stabilization in Sars-Cov-2 numbers, the state of alert was ended and consequently face masks and the obligation to present a test or vaccination certificates for domestic or international travel requirements were dropped.[8] The hydric crisis and extremely low precipitation the previous year justified the intervention of the State in order to approve measures aimed at mitigating its effects on agricultural productivity and food and nutritional security of families, especially in the most affected islands and counties.[9]

Lastly, the war between Russia and Ukraine, which the Cabinet unambiguously classified as an aggression,[10] led to a pattern of voting in the General Assembly of the United Nations to condemn Moscow. As a matter of fact, CV was one of the African countries that voted mostly to condemn the invasion,[11] which is explained by its Centre-right pro-Western government, the protective vision of liberal democracy espoused by the State, and by the traditionally close relationship with the US and with the EU. In the only situation that the country abstained, important government party members, as the former Chairperson of Parliament, Spencer Lopes, demanded explanations from the Minister of Foreign Affairs.[12] Anyway, the hostile global environment created by the war and its impact on the very fragile CV economy led to the

adoption of three kinds of measures.[13] Firstly, on macroeconomic policy, measures aimed at containing the escalation of prices of food and energy, promoting its stabilization and strengthening the country's economic resilience,[14] or at establishing special regimes for insurance contracts related to the reduction of economic activities.[15] Secondly, on the social security level, legislation designed to establish special measures of support for families, companies, municipalities, and other entities,[16] to approve an emergency minimum social income for situations of poverty and/or social vulnerability,[17] with the parallel reinforcement of the related administrative structure.[18] Thirdly, an inter-ministerial commission was created to follow up on the situation of CV citizens in the conflict zones of Europe,[19] and special criteria for the concession of temporary protection of persons 'displaced' by the war in Ukraine were enacted.[20]

Climate change and environmental issues led to other important moves to bind the State to treaties from the Doha Amendment to the Kyoto Protocol;[21] and to loan agreements concluded with international banks aimed at financing the implementation of renewable energy projects designed to increase energy efficiency in the country and decrease its dependence on imported fossil-based energy.[22] At the domestic level, in the environmental field, measures directed to the conservation of specially protected fauna and flora;[23] at providing for incentives to the acquisition of electric vehicles and the establishment of charging stations;[24] and of a national climate change adaptation plan, were also approved.[25]

Other important legislative initiatives worth mentioning were the fourth amendment to the Criminal Procedure Code[26], the legal regime of prevention and special attention to HIV/AIDS[27], and the Prevention and Control of Nicotine Addiction Act[28]. Social rights or protection of vulnerable persons related initiatives were also seen, namely on the field of basic and secondary education curricula and assessment systems,[29] gender equality,[30] and the right to housing.[31] And other policy instruments related to territorial cohesion,[32] decentralization,[33] and regional and local development as well.[34]

At the international and diplomatic level, the State bound itself to the non-proliferation of nuclear weapons treaty and became a member of the International Agency of Atomic Energy;[35] and to human rights treaties covering the rights of children (as the Convention on Civil Aspects of International Child Abduction;[36] the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance;[37] and the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures);[38] and to the especially important International Convention for the Protection of All Persons from Enforced Disappearance,[39] as well. Likewise, for education-related treaties such as the Convention against Discrimination in Education;[40] the Global Convention on the Recognition of Qualifications concerning Higher Education;[41] and the Revised Convention on the Recognition of Studies, Certificates, Diplomas, Degrees and Other Academic Qualifications in Higher Education in African States.[42]

The Instrument of the Amendment of the Constitution of the International Labour Organization,[43] and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore[44] were approved as well. Also, more than half-dozen intellectual property related treaties were ratified by the State (the Banjul Protocol on Marks;[45] the Protocol on Patents and Industrial Designs within the Framework of the African Regional Intellectual Property Organization, two patent treaties;[46] the Geneva Act of the Lisbon Agreement on Appellations of Origin and Geographical Indications;[47] the Madrid Agreement Concerning the International Registration of Marks;[48] the Paris Convention of the Protection of Industrial Property;[49] the Lusaka Agreement (African Regional Intellectual Property Organization - ARIPO);[50] and the Arusha Protocol for the Protection of New Varieties of Plants within the Framework of the ARIPO).[51] These instruments were linked to the approval of a national policy plan for the sector.[52] Finally, CV became a member of the African Telecommunications Union.[53]

At the bilateral level, diplomatic endeavors to establish closer relations with Morocco - signaled by the conclusion of several treaties, covering trade,[54] tourism,[55] fisheries,[56] the merchant navy,[57] air services,[58] and visa concession,[59] and the opening of a CV Embassy in Rabat and a special-consulate in Dakhla, - raised domestic and international concerns about the position of the country in regards to the repeal of the recognition of the Sahrawi Arab Democratic Republic of 1976,[60] which was suspended in 2007, especially after the MFA Figueiredo Soares declared that CV supported Rabat's position concerning the autonomy of the region in the framework of the Moroccan State.[61] Furthermore, at this level, a visa waiver agreement in ordinary passports with Sao Tome and Principe[62] and social security agreements with the Netherlands[63] and Portugal[64] were signed.

No polls were held in 2022, despite the fact the spectrum of anticipated elections was permanent in the two main municipalities of the country, namely in the capital, due to permanent political instability in their respective minority governments.[65] However, important intra-organic elections were made, namely to choose the new Chief-Justices of the CCCV and of the Supreme Court (SC). Professor Pina-Delgado[66] and Judge Benfeito Ramos[67] were unanimously elected by their respective peers to lead the two courts. Likewise, Judge Bernardino Delgado was reelected by his associate members as President of the Judicial Council.[68] On the other hand, Parliament, due to last-minute differences between the two main parties, failed to elect the new substitute-justices of the CCCV and new members of the Judicial Council and the Public Prosecutors Council.

At the level of the Cabinet, the Health Minister, Mr. Do Rosário, a physician, was replaced by Ms. Gonçalves, the former Minister of the Council of Ministers and of Parliamentary Affairs,[69] a lawyer and politician, who will be assisted by a secretary of state, Dr. Monteiro.[70] These portfolios were transferred to the Minister of Defense and Territorial Cohesion, Ms. Lélis, also a lawyer,[71] lowering the number of Cabinet members by two, and reducing the full number to seventeen ministers and nine secretaries

of state. The PR nominated five new members of the Council of the Republic, its main advisory body.[72] Among them, four women with the argument that the other members that serve in their institutional capacity (the Speaker, the PM; the CJ of the CCCV) are all male.[73] The PR following a Cabinet proposal also nominated the Chief of Staff of the Armed Forces.[74] Lastly, it is also important to give notice that the Cabinet created a Competition Authority[75] and nominated a former MP to head it.[76]

III. Constitutional Cases

The number of constitutional decisions decreased in the last year, even though more constitutional complaints were made. The CCCV delivered fifty-one opinions, most of which – thirty-two – were related to rulings on *amparo* procedure files, some of which had also appended adoption of provisional measures requests. Nineteen of these – with one exception all unanimous and all written by CJ Semedo – were on the admissibility of the complaints, of which seven led to admissibility decisions (R-8/2022; R-13-2022; R-15/2022; R-16/2022; R-19/2022; R-27/2022; R-49/2022); consequently, twelve of the requests were not admitted to the merits stage (R-9/2022; R-10/2022; R-11/2022; R-12/2022; R-14/2022; R-17/2022; R-18/2022; R-26/2022; R-39/2022; R-41/2022; R-42/2022; R-48/2022). Of the seven pleas related to the adoption of provisional measures only one was granted by the CCCV (R-15/2022). In addition, seven decisions written by CJ Semedo or by AJ Pina-Delgado were made after requests of clarification, reform, or nullity of Judgments delivered by the CCCV itself (R-1/2022; R-3/2022; R-4/2022; R-5/2022; R-40/2022; R-44/2022; R-45/2022). The CCCV decided thirteen constitutional complaints on the merits, which were all related to the interpretation of rules of the Criminal Procedure Code by ordinary courts in criminal trials that allegedly violated the constitutional rights of the defendants. Five of the judgments favored the plaintiffs (J-29/2022; J-28/2022; J-31/2022; J-34/2022; J-37/2022), one favored partially the plaintiff (J-38/2022), and seven others led to decisions according to which no violation of rights could be established (J-2/2022; J-6/2022; J-22/2022; J-23/2022; J-43/2022; J-33/2022; J-36/2022). Most of these cases were decided unanimously with references to precedents of the CCCV.

Concerning rulings on other matters, the CCCV dismissed its first-ever *habeas data* request due to the unfulfillment of the admissibility requirement of passive legitimacy (R-7/2022), it also rejected appeals against the non-admissibility of concrete review of constitutionality requests by ordinary courts (R-46/2022); adopted a ruling on the need of clarification of a referral of a norm for constitutional review purposes by the Ombudsman (R-47/2022) and rejected, for procedural reasons, an appeal made against the legitimacy of a party conference and deliberations taken by delegates to it (R-20/2022). Finally, important decisions were taken on whether trainee-lawyers could sign memos and requests in a concrete review of constitutionality procedure, a question that the CCCV answered twice negatively in opinions written by AJ Pina-Delgado for the Court (R-21/2022; R-24/2022). This same Justice penned a summary decision rejecting the admissibility of a concrete review of the constitutionality request, on grounds that the norm was not applied by the appealed court (Summary Decision 1/2002).

Three electoral cases were decided by the CCCV in 2022 (J-30/2022; J-32/2022; J-35/2022, all opinions written by AJ Pina-Delgado). Two against the National Electoral Commission challenging decisions of rejection of payment of electoral subsidies. One on grounds that the absence of a decision about the candidacy financing and spending report within the limit of the legal deadline would lead to a duty to pay the subsidies; the other rejecting the grounds presented by that organ that the candidate didn't demonstrate the legality of his financing and spending. They were both dismissed by the Court due to their lack of merits. And the last concerned an internal election for a regional organ of MpD, the political party that holds most seats in Parliament, which was also dismissed by the CCCV for procedural reasons.

1. J-25/2022 (Referral by the Ombudsman to Review the Constitutionality of Rules that Reduced Job Security Guarantees of Public Servants)[77]

The Ombudsman challenged a norm of the Public Servants Act that allowed the Administration to sign employment contracts in the sense that they could be indefinitely renewed without granting stability to the public servant on grounds that it violated the constitutional regime of public service, an individual right to hold public office, the right not to be discriminated against, a right to be promoted and to have a career in the public administration, and the right to job stability. In the opinion written by AJ Pina-Delgado for a unanimous Court, the Justices rejected the idea that the Constitution forbade the hiring of employees through limited duration contracts and also found no unconstitutionality on the coexistence of tenured and non-tenured functions, arguing that, due to the meritocratic nature of public hiring and the collective interest in having an effective public administration, there was no obligation to treat all job positions alike. By the same token, it understood that there was no basic right to be promoted or to have a career in Public Administration. But, on the other hand, it found that the fact that the limited duration contracts could be endlessly renewed without granting any protection against discretionary unilateral dismissal by the State would infringe on the right to job security.

2. Rodrigues and Cruz v. SC (Constitutional Complaint)

This case concerned a possible violation of constitutional rights by a SC decision that refused to grant a *habeas corpus* request in a situation in which two young men were imprisoned after a judge revoked a community service sentence for non-appearance in the workplace without notice and without hearing the convicts. As far as the ground of the judgment was that the *habeas corpus procedure* was not suitable for seeking such a relief under CV Legislation under the segment of "a prison that the law doesn't allow" enshrined in Article 18 of the Code of Criminal Procedure. The CCCV lengthily discussed the constitutional right to *habeas corpus* es-

tablished by Article 36, and, through *obiters*, reflected on the justification of criminal penalties, stressing that the BL didn't adopt an absolutist model, but a rather pragmatic one, by balancing the value of personal freedom and the postulate of individual responsibility.

3. J-50/2022 (Aniceto v. TRS, Concrete Review of Constitutionality of Article 12 of the Criminal Procedure Code)[78]

In this case, the plaintiff challenged a norm of the Code of Criminal Procedure that didn't establish the prohibition of the judge that conducts a hearing and that decides on a pre-trial measure of detention to participate in the trial. The Court, in a unanimous opinion written by AJ Pina-Delgado, dismissed the plaintiff's allegations that the fact that the Constitution didn't recognize the CCCV jurisdiction to scrutinize legislative omissions would lead to an incompatibility between the Basic Law (BL) and Natural Law. Likewise, it blatantly rejected another appellant's argument which suggested that the fact that Portugal had a norm that forbade the judge that ordered a pre-trial measure of detention to participate in the trial was a reason to censor the 'omission' of the CV legislator, calling it a "self-imposed intellectual neocolonialism". Anyway, it framed the question as a challenge to an interpretation possibility of a norm that could lead to the debilitation of the constitutional guarantee of one being judged by an impartial court – a right that it recognized from the independence of the courts and the due process clauses and by incorporating Article 14, paragraph one, of the International Covenant on Civil and Political Rights, and Article 26 of the African Charter on Human and People's Rights – and accepted to review it.

The CCCV stressed that the adversarial model leaning criminal procedure adopted by the Constitution was not absolute. Nevertheless, one of the effects of the model was that the role of public prosecutors and judges should be clearly distinct, and that, tendentially, judges who intervene in a stage of the criminal procedure and who decide upon a pre-trial matter should not participate in the trial themselves. However, it also said that the mere imposition of a pre-trial detention measure, differently from a decision on a preliminary hearing, didn't amount to a situation in which the judge would display an internal conviction about the guilt of the defendant to the point that his impartiality would be hampered. Adding that a norm that didn't forbid it was not unconstitutional, namely because if reasons for suspecting the impartiality of a judge rose in a concrete case, the defendant could always request his disqualification.

4. The Amadeu Oliveira Criminal Trial

Mr. Oliveira, an elected MP who was suspended by Parliament, was convicted by the Appeals Court of Barlavento to seven years of imprisonment, forfeiture of his mandate, and prohibition of standing for election or any public office for four years for a crime of Attack against the State as established by the Crimes of Responsibility of Holder of Political Offices Act. The indictment related to the fact that he allegedly helped a man convicted of murder to evade the country while his appeals were still pending at the CCCV.[79] The judgment relied extensively on a decision regarding pre-trial measures delivered by this last judicial organ. Besides different challenges to the waiver of his immunity by Parliament and to his subjection to pre-trial detention, he appealed the decision to the SC, which by the end of the year in review was still pending. The case was followed with intense academic interest, namely by one of the main drafters of the CV BL, Professor Brito, who declared that the detention of Mr. Oliveira was illegal,[80] but his interpretations were challenged by other legal analysts, namely by Mr. Olavo Freire that accused him of lack of preparation, recklessness, carelessness, shallowness and insufficient mastery of constitutional matters.[81]

IV. Looking Ahead

In 2023, important legislation, that was already announced, can be approved. These are the cases of a new Public Servants Act and amendments to the Nationality Act. On the other hand, despite last year's announcements, it is far from certain that the constitutional amendment procedure will be triggered. 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 the Public Prosecutors Council. Certainly, it would be the year that the new CJ of the CCCV will be sworn-in, and that the many appeals and requests made by Mr. Amadeu Oliveira will be heard and decided by the SC and by the CCCV.

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Chile

Catalina Salem, *Centro de Justicia Constitucional - Universidad del Desarrollo*

José Manuel Díaz de Valdés, *Centro de Justicia Constitucional - Universidad del Desarrollo*

Marisol Peña, *Centro de Justicia Constitucional - Universidad del Desarrollo*

Nicolás Enteiche, *Centro de Justicia Constitucional - Universidad del Desarrollo*

Sergio Verdugo, *IE University Law School | Centro de Justicia Constitucional - Universidad del Desarrollo*

I. Introduction

Previous reports on Chile published by the Global Review of Constitutional Law, starting in 2019, referred to the constitution-making process aimed at replacing the 1980 Constitution. 2022 was an important year for that process, as Chilean citizens rejected a proposal presented by an elected Constitutional Convention in an exit referendum. We will summarize the main events of this major failure in the section on "Major Constitutional Developments." The other parts of this report engage with selected cases of the Chilean Constitutional Court (*Tribunal Constitucional de Chile*–henceforth the CC). We will show that modifications in the composition of the CC may explain relevant changes in its case law.

II. Major Constitutional Developments

The most critical constitutional development that occurred in Chile in 2022, refers to its constitution-making process. In 2019, after massive protests took over the streets and violent episodes erupted, most political parties agreed on launching a constitution-making process.[1] In a referendum in 2020, 78.3% voted for replacing the Constitution, and 79% supported the election of a Constitutional Convention—as opposed to a mixed organ composed of elected representatives and sitting legislators.[2] In 2021, Chilean citizens elected a strongly leftist Constitutional Convention, including many independents and members of grassroots organizations.[3] These could be partly explained by the electoral rules—which favored independent candidates and provided for reserved seats for indigenous peoples—and the anti-party narratives that existed at that time. The low rate of approval levels of the center-right President Piñera may also have explained (at least partly) the poor performance of the candidates from the right-wing coalition.

Many elected constitution-makers tried to echo the anti-establishment narratives and respond to the social rights demands by proposing initiatives that tried to reboot the political institutions. Many were influenced by the decolonization and post-liberal political ideas promoted by public intellectuals like Boaventura de Sousa Santos elsewhere.

Despite a series of scandals, divisions, and the virtual exclusion of the right-wing and most center-left delegates from the discussion,[4] the Convention delivered a 178-page constitutional proposal, including 388 articles and 57 transitory rules. The text included substantive changes to Chile's constitutional framework. It reflected identity politics, welfare demands—such as better education, transportation, healthcare, and social security—and several trends of Bolivarian constitutionalism that have prevailed in countries like Venezuela, Ecuador, and Bolivia. For example, it comprised a plurinational state (recognizing a substantive-but-undefined degree of legal pluralism), strong indigenous

rights, and provisions about the rights of nature and animals. The CC and the judiciary were downplayed, and a new judicial council would appoint the judges. The proposal replaced the Senate with a weaker regional chamber and kept a more moderate version of presidentialism—this is probably an important difference between the proposal and the Bolivarian model. It also set down several institutions referring to global warming, the environment, and water and guaranteed new social rights like the right to housing.

The proposal was subject to several substantive criticisms. Among other things, it was accused of dissolving the Chilean nation into several ethnic identities, distorting equality in favor of groups such as women and indigenous peoples, weakening property rights (including those over pension funds), and weakening the takings clause and water rights. It did not try to solve the main problems of the political system (relations between the Executive, Congress, and the political parties).[5] It opened the gates to permissive (but unpopular and controversial) regulations on abortion. Thus, the proposal seemed to be at odds with the average Chilean voter.[6] Criticisms from academia were also strong,[7] despite the existence of several constitutional scholars that defended the proposal.[8]

Alerted by the polls, which showed an increasing rejection of the proposal, the Government –supported by an undisciplined political coalition—decided to push for amendments to the text. Thus, the main political message during the campaign encouraged voters to approve the proposal, promising subsequent amendments (*Apruebo para Reformar*). On the contrary, most center-left movements and right-wing parties called to reject the proposal, vowing to launch a new constitution-making process. Notable examples included *Amarillos* and a group of Christian Democrats that used to be allies of the center-left coalition that ruled Chile for most of the post-Pinochet era. Many Socialists—particularly Socialist Senators—did not campaign in favor of approving the proposal, and Ernesto Ottone—Ricardo Lagos's most crucial advisor during Lagos' Socialist administration, called to reject it.[9] Moreover, in the context of the electoral campaign, Congress lowered the legislative majority requirement for amending the ruling Constitution.[10] The previous procedure required achieving the votes of two-thirds or three-fifths of both chambers of Congress (the majority requirement depended on the Constitution's chapter to be amended), and the current amending process only requires four-sevenths of both chambers.[11] This move favored the rejection of the text because it provided more certainty to those who did not endorse the Convention's proposal but still favored constitutional reforms or enacting a new Constitution.

In the end, the proposal failed. 61.89% of Chilean voters—with a turnout of 85.86%—rejected it in the referendum that took place in September of 2022. Scholars are still discussing how to interpret the results, rival interpretations exist,[12] and some explanations for the failure focus on different dimensions of the problem.[13] However, the rejection triggered a response from the political parties, who designed a new constitution-making process that is now taking place in 2023. Unlike the previous process, the political parties are firmly in control of the current one. They agreed on twelve "bases" that the new constitution would need to respect (a framework that may be compared to the South African interim constitution arrangement). Those "bases" include, for example, establishing a social state, a separation of powers, recognizing Chile as a unified nation (even though the recognition of indigenous peoples is also a requirement as part of the Chilean nation), a list of rights that need to be recognized, and respecting the independence of specific fourth branch institutions like the Central Bank. The parties organized in Congress would appoint an experts' committee to draft a new proposal. Then, an elected organ modeled on the electoral rules of the Senate — somewhat restrictive of independent candidates — would review the expert's draft. During the process, a technical committee composed of prestigious jurists (primarily academics, not judges) may be called upon to decide whether the experts or the elected organs comply with the twelve "bases." This process is undoubtedly the most critical constitutional development taking place in 2023 in Chile.

III. Constitutional Cases

The CC continued to operate during the 2019-2022 failed constitution-making process, although its 10-member composition has changed considerably in this period.

In 2022, President Gabriel Boric—who is supported by a leftist political alliance—appointed two new justices to the CC: law professors Nancy Yáñez—who also became the new CC's Chief Justice—and Daniela Marzi. They replaced Justices Iván Aróstica (who returned to academia) and María Luisa Brahm after their tenure elapsed. Considering that Justices Aróstica and Brahm were appointed by former President Sebastián Piñera—a center-right politician—many think the balance of the CC has shifted. Also, Justices Gonzalo García and Juan José Romero left the CC after completing their tenures but have not been replaced yet (by Congress).

In 2022 the CC received 1,226 cases, reducing its work by more than half (in 2021, there were 2,668 cases).[14] As in previous years, most of the CC's work involved resolving inapplicability cases (1,192), where a party before an ordinary court requests the CC to rule on the constitutionality of a legal provision. The decision of the Court only applies to the specific case, where the ordinary judge cannot use the legal provision if declared inapplicable. Thus, if a party requires the inapplicability of the same legal provision in another case, it must initiate a novel procedure before the CC.

We selected one non-inapplicability case of 2022 that seems particularly important (STC 13,449), but all of the other cases are remedies of inapplicability. We will show how the CC has changed its inapplicability jurisprudential lines due to the changes in the composition of the CC. This should come as no surprise, as large parts of our previous reports have also focused on inapplicability decisions mainly because the rights-based jurisprudence of the CC is strongly attached to that specific mechanism. The jurisprudential lines in which these changes have been most salient are those of Public Procurement cases (STC 12,264 and STC 12,882) and Sanitary Fines (STC 11,786 and STC 11,787).

Although inapplicability cases are analyzed casuistically, this time, we will focus on the change in the jurisprudential line and its reasons. We ignore concurrent and dissenting opinions for the sake of briefness.

1. The Mapuche liberation movements case (STC 13,449)

The CC is entitled to declare the unconstitutionality of political parties and other movements. According to Article 93, No. 10 of the Constitution, anyone can bring a claim to the CC and request the declaration of the unconstitutionality of organizations, movements, or political parties. Article 19, No. 15 of the Constitution, states that the declaration of unconstitutionality proceeds if the organizations, movements, or political parties do not respect the basic principles of the democratic and constitutional regime, seek the establishment of a totalitarian system, or make use of violence, advocate or incite it as means for political action. These constitutional provisions reflect the idea of militant democracy that scholars like Loewenstein have theorized in the past,[15] which is common in many constitutions.[16] Despite the existence of militant democracy clauses in other constitutions, these powers are not particularly consequential in practice,[17] and, as we will show, the Chilean CC decision helps to confirm that assessment.

Pablo Urquizar, a civil servant during the previous Administration, asked the CC, in 2022, to declare the unconstitutionality of a few organizations that aim to advance indigenous rights and the autonomy of indigenous peoples by violent means. The case was situated in a political context in which illegal deposits of weapons were found in the center-south of Chile, and episodes of violence existed, which were attributed to these organizations. Many politicians have called these organizations terrorists. The organizations included the *Coordinadora de Comunidades Mapuche en Conflicto Arauco Malleco*, *Weichan Auka Mapu*, *Resistencia Mapuche Malleco*, and *Resistencia Mapuche Lafkenche*. Urquizar argued that the organizations had used illegal and undemocratic methods to achieve political objectives which do not conform to the Constitution. Urquizar exemplified this accusation by showing actions such as violent land seizures, territorial resistance, and armed skirmishes.

On this occasion, a chamber of the CC resolved the case. It is relevant to note that the CC is divided into two chambers composed of five justices each. Generally, the chambers are responsible for deciding the admissibility of cases (first screen).

The first chamber declared the requirement of unconstitutionality as inadmissible. The CC also stated that the declaration of unconstitutionality is an institution of *ultima ratio* (other means should be tried earlier)[18] and that the facts should be investigated by the criminal courts first.[19] This decision was particularly relevant due to the complicated situation that Chile is experiencing in the south (Mapuche's ancestral territory). The fact that the CC declined to intervene triggered political criticisms, particularly against the new justice, Nancy Yáñez.[20] However, this was not only a signal of how President Boric's new appointments were changing the CC's *modus operandi* in politically salient cases but also a reaffirmation of a long-standing case law that renders the militant democracy clause irrelevant.

2. The Public Procurement cases: Overruling the CC's jurisprudence (STC 12,264 and STC 12,882)

In a previous instance, some of us commented on the case law regarding a provision of the public procurement statute (the *Ley de Compras Públicas*).[21] The provision (Article 4, par. 1) orders that if someone is sentenced for anti-union practices, violating the employees' human rights, or for bankruptcy crimes established by the Criminal Code, the company shall be prevented from entering into contracts with the State for two years. This is a drastic measure that may put private providers out of business. Moreover, this provision has been subject to challenges of unconstitutionality on the grounds that it harms the constitutional rights of due process and non-discrimination.

The CC had previously decided that Article 4 did not violate the Constitution (see also STC 1,968, STC 2,133, STC 2,722-2,729), thus, setting an important precedent for those seeking to punish the companies that infringe on their employee's human rights or engage in anti-union practices. Still, the new case law stated the opposite. In the previous report cited above, we described how two specific decisions (STC 3,570, STC 3,702) changed the case law of the CC while protecting the companies' interests. That jurisprudence applied to cases between 2018 and March 1, 2022 (STC 11,920).[22]

Nonetheless, this doctrine was overruled on August 2, 2022 (STC 12,264).[23] A workers' union sued Finning Chile S.A. for violation of fundamental rights. The company was exposed to the application of Article 4, par. 1, for which it asked the CC to declare its inapplicability. The company argued, following what was decided in the previous judgments of the CC, that this provision violates the Constitution.

The CC returned to its original approach, declaring that Article 4 does not violate the Constitution. In its decision, the CC explicitly mentioned the new appointments as a part of the justifications for overruling the previous case law.[24] In addition, the CC reasoned about the causes, consequences, and conceptual reasons for the change in a jurisprudential line.[25]

Regarding the specific reasons for rejecting the *inapplicability cases* filed by the companies, the CC claimed that the State could design contractual policies. These policies have different effects, but the State can choose to contract with some people and not with others.[26] To deny the violation of due process (Article 19, No. 3, par.6 of the Constitution), and equality and non-discrimination (Article 19, No. 2, of the Constitution), the CC transcribed the criteria from the first rulings that rejected the inapplicability of Article 4, Par. 1.[27] Then, the CC concluded that the punishment against the companies did not violate the equality before the law provision, due process.[28]

3. The change of jurisprudence in the case of the Sanitary Fines (STC 11,786 and 11,787)

Some of us had previously commented on the declaration of inapplicability of legal provisions that allow a non-independent administrative agency (*Secretaría Regional*

Ministerial de Salud) to apply fines without a judicial procedure. The landmark case that accepted the inapplicability of articles 163, 166, 167, and 174 of the Sanitary Code is STC 8,823 of December 21, 2020[29].

The STC 10,383, on November 25, 2021, and STC 9,707, on January 4, 2022, confirmed the case law started by STC 8,823. For example, in STC 9,707, the CC argued that Articles 166 and 171, Par. 1 of the Sanitary Code violated the due process clause. The CC explained that the challenged statutory provisions allowed an inspection report drawn up on-site by an administrative agency was sufficient to establish an infraction. The CC concluded that this statutory figure was contrary to the Constitution because it rendered the right to defense in these administrative proceedings illusory.[30]

As in the Public Procurement cases, the CC had originally rejected inapplicability claims against the Sanitary Code provisions (STC 2,495, and STC 3,601). Moreover, STC 9.707 was the last occasion where the CC declared the inapplicability of such provisions.

Canal 13 Spa, was sanctioned by the Institute of Public Health. The administrative agency applied articles 163, 166, 167, and 174, for which the company asked the CC to declare its inapplicability. In STC 11,786 and STC 11,787, on June 7, 2022, the CC rejected the inapplicability claims, and subsequent cases followed the same path.[31] Therefore, as in the Public Procurement cases, the modification of the justices switched the case law of the CC.[32]

The reasons for grounding these last decisions of the CC are that administrative acts can be judicially challenged,[33] that administrative acts have different requirements and stages,[34] that criminal responsibility is not presumed,[35] and that the powers of the courts, due process,[36] or the principle of legality is not affected.[37]

IV. Looking Ahead

During 2023, the most critical constitutional events will probably be connected to the constitution-making process. The experts should present their draft in June. The elected council should deliver its proposal by November, and an exit referendum should occur in December. Also, we expect two new appointments to the CC (this time by Congress) and, perhaps, further changes in the jurisprudence of the CC due to its new composition.

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13 For example, focusing on the procedural problems of the constitution-making process, see also Guillermo Larraín, Gabriel Negretto and Stefan Voigt, 'How Not to Write a Constitution: Lessons from Chile' (2023) 194 Public Choice 233.
14 See the statistics on the website of the CC: https://tramitacion.tcchile.cl/tc/buscador. In that search engine, the user must search manually according to the year and procedural stage of the cases.
15 Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 The American Political Science Review 417.
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18 Also, see STC 13,449, part. 24.
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23 Other judgments that have confirmed the new criteria are STC 12,583, STC 12,866, and 13,311.
24 "After recent integration changes, this Magistracy will modify the jurisprudential line that, always in a divided vote, was determined by a majority of the plenary from June 2017 until the beginning of the current year to reject the present action following the grounds that later this sentence will develop", STC 12,264, part. 6.
25 STC 12,264, parts. 5-16.
26 STC 12,264, parts. 17-25.
27 STC 12,264, parts. 26-29.
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30 STC 9,707, part. 4.
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China

Dr Chun Peng, *Associate Professor, Peking University Law School, China*

Ms Yuxue Fang, *DPhil Candidate, Faculty of Law, University of Oxford, UK*

I. Introduction

In 2020, the Chinese Communist Party's adherence to the "zero-covid" policy amid the surge of Omicron cases dragged the country to pervasive civil disobedience that eventually pressured a drastic policy turn. Bottom-up political contestations, yet, seemed to have little impact on the Party-State's resolute stride towards authoritarian consolidation foreshadowed by the 20th National Congress of the Chinese Communist Party.

In the lost hope for judicial constitutionalism[1] and the muffled debate on constitutionalism (*xian zheng*),[2] the National People's Congress (NPC) and its Standing Committee (NPCSC) are supposed to put the PRC Constitution in action, which are explicitly mandated by the Constitution. While the Constitution does not clarify how exactly the NPC and the NPCSC shall implement it, in 2017, the Chinese Communist Party (CCP) announced for the first time to enhance "constitutional review" by the NPCSC. Specifically, it means that the NPCSC ought to start using the long-existing, yet dormant mechanism, known as "record and review" (R&R), where rulemaking bodies at various locales and levels first "record" their drafts with the NPCSC, which can then "review" their validity on various grounds, including their compatibility with the Constitution.[3] For the past five years, the NPCSC has been increasingly active in constitutional review through the R&R system. According to its own working report, it received and handled 17769 requests from citizens and private organizations for reviewing rules subordinate to national laws enacted by the NPC and NPCSC, which are out of reach under the R&R system. Against this background, although there is no court-adjudicated constitutional case in China, there are constitutional cases that are dealt with by the R&R mechanism, and several of them feature the year 2022.

II. Major Constitutional Developments

Amid the resurgence of Covid-19, 2022 was marked by a significant retrogression of the rule of law and the rise of contentious politics in China. While the first domestic Covid-19 outbreak beginning in late December 2019 was quickly brought under control by late April 2020, the country was faced with constant risks of clustered infection domestically and imported cases internationally. This continued to be the situation in 2022. Local governments (consisting of a four-layered hierarchy at the provincial, municipal, county, town, and village levels) and grass-root level self-governance organizations (residents' or villagers' committees), in pursuance of the CCP's zero-covid policy, adopted an array of measures such as massive nucleic acid tests, vaccination, area-based risk-rating, health status pass, community-based quarantine and lockdown, to regularly monitor and respond to the Covid situation.

In the renewed endeavors for covid-control, the legal regime on public emergency management established after the outbreak of severe acute respiratory syndrome (SARS) in 2003 was largely dysfunctional in regulating public powers, not least because of the doctrinal deficiencies and the law-politics tension embedded in the party-state. Doctrinally, notwithstanding that Articles

67 and 89 of the Constitution of the PRC provide that the NPCSC and the State Council shall decide on the entry into 'the state of emergency' of the whole or part of the country when necessary,[4] no substantive constitutional or legislative arrangements for the state of emergency are in place. In theory, this means that when legally mandated emergency measures are inadequate in tackling extremely severe crises and the state of emergency is declared, the government resorting to extra-legal measures in the name of necessity would face little constitutional constraint. In practice, both the procedural requirements for deciding and declaring the state of emergency and the substantive legislative requirements for rights protection were largely ignored by local governments. For example, during the Shanghai lockdown that spanned from late March to early June 2022, no state of emergency was decided on by the NPCSC. Yet, the local public authorities and grass-root level policy enforcers (mainly including local police officers, community cadres, contracted labor, and volunteers whose legal statuses are highly questionable) adopted extensive measures far more intrusive than those authorized in the Prevention and Control of Infectious Diseases Law of 2004[5] and the Emergency Response Law of 2007,[6] among which strict mobility control, invariably transferring close contacts of confirmed Covid-19 cases to designated cabin hospitals for concentrated quarantine, forceful breaking-in to disinfect private residence and pets-killing were the most notorious. Lacking formal legal mandates, these measures breached the requirement of proportionality enshrined in Article 11 of the Emergency Response Law of 2007 which prescribes that government emergency response measures shall be appropriate for the social damage of an emergency and conducive to the maximum protection of private rights and interests. Due to mismanagement, many local public authorities also failed in their positive obligations of guaranteeing basic living conditions such as food supply and medical care during emergencies. It was reported that due to logistic failures in cities such as Xi'an, Changchun, and Shanghai, many citizens, during lockdowns, suffered from food shortages.[7] Many were deprived of timely treatment for urgent medical circumstances, which led to innumerable humanitarian incidents.[8] Moreover, expanded government emergency powers were exploited for sinister purposes.[9] In June 2022, depositors in several fraudulent village banks in Zhengzhou, Henan Province found that despite the fact that they were covid-negative, their covid health passes in the official surveillance apps were curiously changed into red codes, which prevented them from joining protests to pressure government solutions for the defaulting banks. It was later found out that this technical manipulation was instructed by the local cadres in the Zhengzhou Municipal Chinese Communist Party Committee and the Municipal Directing Headquarter for Covid Control to obstruct dispositors' collective actions. While this misuse of covid health passes was soon criticized by the central government and put under rectification, the massive surveillance and collection, storage and use of personal data by the state during covid control continue to worry the public in the post-pandemic era.[10]

The pervasive local power abuses were not surprising given that the political system in China is highly centralized, and local governments, led by the CCP cadres, are politically accountable to higher Party authorities rather than local citizens. Impotent covid-control can easily trigger political and administrative liabilities.[11] Yet, excessively intrusive emergency measures violating the law and citizens' rights usually would not attract legal liabilities, not only because the Administrative Litigation Law of 2017 does not allow for direct challenges to general government measures, [12] but also because the judiciary has an inherent function of safeguarding the Party Centre's policy and tends to suppress individual claims contesting the policy. As the Party dominates every branch of the state institutions, the legislature, executive, procuracy, and judiciary mainly co-operated with each other to facilitate the Party's policy,[13] with the administrative self-regulation, the Party's commissions for discipline inspection and the state's supervision commissions only play a limited role in overseeing local bureaucratic behaviors to calm public outcries.

Prolonged disruption of socioeconomic orders and legal anomalies exacerbated political contestations. Backlashes from civil society to the draconian zero-covid policy ranged from individual disobedience,[14] confrontations with grass-root level policy enforcers,[15] collective actions against specific government decisions,[16] online condemnation of government measures,[17] to street protests against the zero-covid policy in general,[18] and even the CCP's rule.[19] After a building fire in Urumqi, during a lockdown, claimed over 10 people's lives on 24 November 2022,[20] a memorial gathering in Shanghai ignited the accumulated public distress and triggered a series of protests and demonstrations in more than 21 provinces and 207 colleges against the zero-covid policy and beyond. [21] The political activism eventually led the zero-covid policy to a drastic end, [22]signified by relaxed measures issued by the State Council on 7 December 2022.[23]

The 20th National Congress of the Chinese Communist Party, held from 16 October to 22 October 2022 in Beijing, was another significant constitutional event of the year. [24] Convening 2379 delegates representing more than 96 million CCP members nationwide, the conference decided on the personnel arrangement for top party positions for the next five years, reshaped the intra-Party power dynamics, and set a basic ideological tone for the country's future development. The conference consolidated Xi's individual authority over collective leadership by factional CCP elites to a degree unprecedented since Mao Zedong. It formally confirmed the third term of Xi Jinping as the General Secretary of the CCP and the Chairman of the Central Military Commission incorporated Xi's ideological developments into the Party's Constitution, and promoted Xi's allies to the Politburo. In the new seven-person band of the Standing Committee of Politburo of the CCP, the highest decision-making body in China, the two remaining members apart from Xi (Wang Huning and Zhao Leji) had served as Xi's right-hand men in ideological and anti-corruption campaigns, and the four new members are all Xi's loyal supporters (Li Qiang, Cai Qi, Xue Dingxiang and Li Xi). These changes imply that the room for intra-Party checks and balances and deliber-

ation is shrinking, which would have served as self-corrective mechanisms to moderate the Party's policy lines.

III. Constitutional Cases

As mentioned earlier, constitutional cases are handled through the R&R mechanism in China. It should be clarified, however, that the R&R system does not exclusively deal with constitutional cases in which the PRC Constitution is explicitly invoked to evaluate the constitutionality of subordinate rules, it also processes those cases where national legislation promulgated by the NPC and NPCSC, instead of the Constitution *per se*, is utilized as evaluative criteria. Therefore, not all cases that go through the R&R mechanism are qualified as constitutional cases. Furthermore, not all constitutional cases are published, and in fact, only a small fraction of them are specifically mentioned in the annual reports on R&R work published by the NPCSC. The NPCSC announced in late 2022 that, for the previous five years, around 25,000 pieces of rules had been revised or repealed for failing to pass the R&R scrutiny.[25] It is unclear, though, how many of those 25,000 cases involved a review of constitutionality and therefore constituted constitutional case *stricto sensu*. As a matter of fact, for the year 2022, based on what has been disclosed by the NPCSC in the R&R work report, there is no constitutional case. Therefore, this review will focus on three constitutional cases that were disclosed in the 2021 R&R work report issued by the NPCSC.[26]

1. Regulation on Population and Family Planning of Chongqing Municipality: Compulsory Paternity Tests

The first case concerns the constitutionality of compulsory paternity tests. In June 2021, a Chinese citizen filed a R&R request to the NPCSC to contest the lawfulness of two articles in the Regulation on Population and Family Planning of Chongqing Municipality, which is in the Chinese legal hierarchy a local regulation (*difangxing fagui*) promulgated by local people's congresses. Article 24 of the 2016 Regulation stipulates that "the health and family planning agencies shall conduct investigations on those suspected of breaking the family planning limit and giving birth illegally. When necessary, the municipal or county health and family planning agencies may require the suspect to conduct a paternity test to find out the facts, and those who are asked to do so shall cooperate. If the result of the paternity test demonstrates that the suspected has indeed given birth illegally, the cost of such tests shall be borne by him/herself; if the result of the paternity test shows otherwise, the cost of such tests as well as the transportation expenses and salary loss incurred shall be borne by the health and family planning agencies". Article 47 of the Chongqing Regulation further states that "if one violates the provisions of Article 24 of this Regulation and refuses to accept a paternity test, a fine of not less than 10,000 yuan but not more than 50,000 yuan shall be imposed". The citizen's request suggested that the mandatory paternity test, as an enforcement tool, has no basis in higher-level laws and tends to undermine the credibility of administrative agencies because it is neither compatible with the central policies nor in line with the social conditions and public opinions in China. On this front, Chongqing is actually not the exception but the rule as many other localities across China also established similar rules on compulsory paternity tests for families thought to have breached the one-child limitation by the authority. In response to the citizen's request, the NPCSC made the following statement: "The role of paternity testing is to determine the parent-child relationship, which is related to citizens' personal dignity, identity, privacy and family stability, and affects the healthy upbringing of minors. It concerns the fundamental rights of citizens. Therefore, public authorities should not force citizens to carry out paternity tests, which would then interfere with the parent-child relationship". More importantly, the NPCSC made explicit reference to the PRC Constitution: "We found that the third paragraph of Article 33 of the Constitution of China stipulates that the state respects and protects human rights; Article 38 stipulates that the personal dignity of citizens shall not be violated; Article 49 stipulates that marriage, family, mother and children are protected by the state. In the absence of higher-level laws, local regulations that set compulsory paternity testing as a measure of administrative investigation are inconsistent with the spirit and principles of the Constitution" The NPCSC concluded that "local regulations should not stipulate for compulsory paternity testing, nor should they set related administrative penalties or other sanctions". As a result, Chongqing and other localities with similar provisions have all abandoned compulsory paternity testing as a way to investigate possible violations of the one-child policy.

2. The Supreme People's Court Interpretation on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases: Unequal Standards of Personal Injury Damages

The second case touches on the constitutionality of unequal standards of personal injury damages between rural and urban residents. The Interpretation on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases issued by the Supreme People's Court in 2003 provides in Articles 25, 28, and 29 that the calculation of three types of personal injury damages including disability compensation, death compensation, and living expenses for dependents ought to be based on different criteria for different populations. For those with rural household registration (*hukou*), these damages will be calculated according to the per capita net income of rural residents in the previous year where the court adjudicating the lawsuit is located; for those with urban household registration, the baseline is the per capita disposable income of urban residents of the same. In an unevenly developed country with a huge urban-rural divide like China, it is unsurprising that urban residents will, by definition, receive more compensation than their rural counterparts *ceteris paribus*. In 2020, citizen requests were lodged with the R&R system to the NPCSC, arguing that inconsistencies in calculation standards lead to unfairness, which is inconsistent with the spirit of the Constitution. After reviewing the requests and the relevant judicial interpretation issued by the Supreme People's Court, the NPCSC held that "with social-economic progress and integrated development of urban and rural areas, the differences in the

calculation standards should be gradually changed and eliminated; it is recommended that the drafting agency revise and improve the relevant judicial interpretations in due course to unify the compensation standards for personal injuries of urban and rural residents". In April 2022, the Supreme People's Court formally revised the 2003 judicial interpretation, and all residents will receive personal injury compensation based on the per capita disposable income of urban residents in the previous year where the court adjudicating the lawsuit is located.[27]

3. Regulations on Ethnic Education in Ethnic Autonomous Regions: Native Language Education

The third case focuses on the constitutionality of native language education in ethnic autonomous regions. The so-called ethnic autonomous regions are those areas where people of ethnic minorities live in concentrated communities and organs of self-government are established for the exercise of autonomy by the ethnic minorities. There are nowadays in China five such regions at the provincial level including Guangxi, Inner Mongolia, Ningxia, Tibet (Xizang), and Xinjiang.[28] The 2021 R&R work report of the NPCSC revealed that "relevant departments of the State Council put forward constitutional review requests targeting regulations on ethnic education in some ethnic autonomous areas, and suggested that some provisions in those regulations have constitutionality problems and are not conducive to promoting communication and integration between ethnicities. Upon review we found that the Constitution and relevant legislations have clearly required the promotion and popularization of the national standard spoken and written language. All regions of the country, including ethnic minority areas, should fully implement the national standard spoken and written language in education and teaching, which means that the relevant provisions in the regulations should be amended". It is unclear, though, what exactly triggered the constitutional review. In 2020 there was another case on ethnic education, which has been widely regarded as the first constitutional case, dealt with by the NPCSC through the R&R mechanism. In that case, the NPCSC addressed the constitutionality of native language education in ethnic autonomous regions under the R&R system.[29] According to Article 4 of the PRC Constitution, "all ethnic groups shall have the freedom to use and develop their own spoken and written languages and to preserve or reform their own traditions and customs." Against this background, the 2016 Inner Mongolia Autonomous Region Regulation on Ethnic Education prescribed in Article 19 that minority ethnic schools at all levels and of all types in the autonomous region shall use their own spoken and written languages for teaching. While this might seem to be compliant with the requirement of respecting the freedom of minority ethnicities to use and develop their native language as stipulated in Article 5 of the Constitution, the NPCSC came in 2020 to the opposite conclusion. It found that asking minority ethnic schools to teach in native languages contradicted Article 19 (5) of the PRC Constitution, which prescribes that "the state shall promote the common speech used nationwide—*Putonghua*."

Three observations can be made about the above constitutional cases specifically and China's constitutional review system more generally. First, different from a constitutional review in many countries, a constitutional review with Chinese characteristics is highly limited in addressing grievances of individual citizens or private entities in specific disputes. As prescribed by Article 110 of the Legislation Law, two types of R&R requests can be filed. The first type of request is mandatory, meaning that the NPCSC must produce a reply to such requests that are lodged by state authorities including the State Council, Central Military Commission, State Supervision Commission, Supreme People's Court, Supreme People's Procuratorate, and the standing committees of the people's congresses at the provincial level.[30] The other type of requests, filed by state organs other than those just listed, social groups, enterprises, and citizens, is non-mandatory and the NPCSC has the discretion to reply only when it considers necessary. This means that when citizens and private entities want to redress their grievances they consider to be generated from the application of unconstitutional rules, they are not guaranteed a response from the NPCSC under the R&R system. More problematically, even if the NPCSC does respond positively in finding certain rules unconstitutional, the aggrieved parties will still not receive personal remedy as all that the R&R mechanism does is declare unconstitutionality, with no effect upon how individual disputes are to be decided.

Second, despite that Article 67 of the PRC Constitution endows the NPCSC with the power to revoke administrative regulations, decisions, and orders formulated by the State Council as well as local regulations and resolutions formulated by the Provincial People's Congress that conflict with the Constitution, the NPCSC has in fact never openly revoked any rules it finds contradictory to the Constitution. For all the above-mentioned three cases, instead of "striking down" the unconstitutional rules, the NPCSC "communicated" with the rule-making agencies, which subsequently amend or repeal the problematic rules. Up to date, there has been no reported case where such communication from the NPCSC falls on deaf ears. Yet it is not a *de jure* obligation for the rule-making authorities to comply with such communication. According to the 2019 Working Procedures on the Record and Review of Regulations and Judicial Interpretations, the NPCSC shall first make communication with the relevant rule-making authorities to require revision or repeal of the impugned rules. Only when such communication fails to prompt revision or revocation will the NPCSC issue a written opinion to the rule-enacting agencies, which shall reply in writing within two months. And only if the rule-enacting agencies do not revise or rescind rules as demanded will the NPCSC trigger the "atomic bomb" of revocation.[31] In other words, there are multiple windows of opportunity for the rule-making agencies to "correct mistakes" before having their rules stricken down by the NPCSC. The difference between correction after communication and correction by revocation is that the former can be behind the door whereas the latter must be open. Given that no formal revocation has taken place, in most cases constitutional review in China is still "invisible" to the public.

Last but not least, in all disclosed constitutional review cases, the aforementioned three in-

cluded, no extended explanation is provided. It is therefore, rather difficult, if not impossible, for outsiders to "decode" the reasoning behind the NPCSC's decisions. Take the third case as an example. The NPCSC only stated that "some provisions in those regulations have constitutionality problems and are not conducive to promoting communication and integration between ethnicities". It leaves unspecified which provisions are deemed unconstitutional and in what way. In the 2020 case on ethnic education, while disclosing more facts regarding what precisely is considered unconstitutional, the NPCSC does not elaborate on how asking minority ethnic schools to educate in native languages contradicts the constitutional provision on promoting *Putonghua* (mandarin). As touched upon before, to come to the conclusion, the NPCSC needs to assess to what extent native language education in minority ethnic schools advances the constitutional freedom of minority ethnicities to use native languages, which should then be balanced with its "harm" to the constitutional requirement of promoting mandarin. Without the NPCSC shedding any light on how it engages in constitutional interpretation, it remains a challenging task to fully understand Chinese constitutional jurisprudence.

IV. Looking Ahead

As indicated by the 2018 Amendment of the PRC Constitution that eliminated the two-term limits for the national presidency, as well as the 20th National Congress of the CCP that affirmed Xi's third term as the General Secretary of the Party, it is certain that Xi Jinping will be the President of the PRC for the next five years. The affirmation of Xi's status as the national president and the allocations of top government positions among Xi's political allies would be formally unveiled at the First Plenary Session of the 14th National People's Congress and the First Plenary Session of the 14th Chinese People's Political Consultative Conference in March 2023. It remains to be seen how the Party-State institutions are to be reconfigured to tackle governance challenges as socio-economic ramifications of the zero-covid policy and its abrupt abandonment are unfolding gradually.

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Colombia

Jorge Ernesto Roa-Roa, *Constitutional Court of Colombia and Externado University*

Marcelo Lozada Gómez , *Dphil in Law candidate at the University of Oxford*

María Alejandra Osorio Alvis, *Inter-American Academy of Human Rights*

I. Introduction

The year 2022 in Colombia was marked by presidential and congressional elections. In Section II we discuss its implications for the constitutional landscape in the country. Furthermore, the agenda of the Constitutional Court in that year featured legal debates related to liberties, democracy and political rights, and Social Rights and Sustainable Development. Section III discusses nine judgments of the Court in three subsections. First, three rulings concerning liberties are discussed. These cases revolve around the right to abortion, the right to a dignified death, and the right to access information in cases of sexual abuse. Secondly, three cases concerning Social Rights and Sustainable Development are analyzed. These cases relate to the conditions of inmates in temporary detention centers, safety measures for former guerilla members, and the constitutionality of recreational fishing. Thirdly, three cases concerning democracy and political rights are discussed. These cases address the status of Venezuelan children in situations of abandonment, the annulment of a Mayor's election, and the scope of extraordinary law-making powers of the Colombian president. Finally, Section IV provides an overview of potential constitutional developments in the years to come.

II. Major Constitutional Developments

On August 7, 2022, Gustavo Petro and Francia Márquez assumed office as President and Vice President of Colombia, respectively. After two rounds of presidential elections, the coalition "Pacto Histórico" won by three percentage points over the independent candidate Rodolfo Hernández. On the same day, a new Congress with a center-left majority was installed. This means that during his government (2022-2026), Petro will have a strong bench in the Senate and the House of Representatives, which might enable him to pursue his government program, including a large number of reforms with a particular emphasis on labor and social rights.

The path of this traditional leader of the opposition to the presidency has been long and complex. Petro became, allegedly, the first leftist president of Colombia after a long political career as a senator and Mayor of Bogotá (2012-2015). The campaign of 2022 was his third presidential candidacy. This time, his political campaign employed a discourse of popular representation, distancing himself from the elites. At the same time, his campaign was significantly boosted by Francia Márquez, the first black vice president in the history of Colombia.

On August 8, just one day into Petro's presidency, the national government submitted a tax reform bill to the consideration of Congress. This bill aimed to levy around $4 billion annually between 2022-2026 and was passed by Congress on November 3. Among other measures, this tax reform raised income taxes for the upper middle class and duties on coal and crude oil, cut tax benefits for both companies and individuals, and imposed taxes on ultra-processed beverages and food products, single-use plastics and carbon[1].

Members of the opposition claim that the overall revenues will be lower, accompanied by greater instability in the economy and a decline in foreign investment. As of December 2022, Colombia faced a high level of public debt, an economy still heavily dependent on fossil fuels, annual inflation rates of 13.1%, and strong devaluation of its currency (down 20.82%), according to the Colombian Central Bank[2].

In 2023, it is expected that the government's next reform will relate to the health system, encompassing profound legal and institutional changes. This is of particular importance for the constitutional jurisdiction in the country, given that 24.79% of the *tutela* actions filed in Colombia concern the right to health, according to statistics from the Constitutional Court[3].

III. Constitutional Cases

1. Cases Concerning Liberties

Three decisions concerning liberties stand out that suggests a tendency for the increased protection of rights. On the one hand, in 2022, the protection of the right to an abortion and to a dignified death was expanded. On the other hand, access to information and freedom of expression in cases of sexual abuse committed by members of religious groups was also expanded.

1.1. The right to abortion: moving from a grounds-only regime to one of terms and grounds

In ruling C-055 of 2022[4], the Constitutional Court modified its precedent established in judgement C-355 of 2006[5] in relation to the right to abortion. In the latter, the Court had declared that the norms criminalizing the voluntary termination of pregnancy (Penal Code, Article 122) were compatible with the Constitution. However, the Court allowed abortion in only three cases. First, when the continuation of the pregnancy constituted a danger to the life or health of the woman. Secondly, in the presence of a serious malformation of the fetus that makes its life inviable. Finally, when the pregnancy is the result of conduct, duly denounced, constituting carnal access or sexual intercourse without consent, abusive or non-consensual artificial insemination or transfer of fertilized egg, or incest.

Seventeen years later, the same norms were reviewed by the Court. This was a strategic litigation case in which a group of organizations (*Causa Justa*) asked the Court to review its 2006 decision and move towards the full decriminalization of abortion. The lawsuit argued that women's sexual and reproductive rights, the right to equality, the free exercise of the medical profession, freedom of conscience, the secular State, and the purposes justifying penalties, were violated. These organizations considered that the system of grounds established in 2006 was not sufficient to guarantee the free exercise of the right to abortion.

One of the most interesting aspects of this decision is the Court's justification of the aforementioned norms once more. The Court argued that the grounds of the new case had not been considered in the 2006 decision. Additionally, the Court posited that there was no *res judicata* because, in the last fifteen years, there were relevant normative changes (domestic and international) that modified the material interpretation of the Constitution (new material meaning of the Constitution). The Court thus analyzed the evolution of its own jurisprudence on abortion and the changes in the content of that right at the international level.

In its decision, the Court made incremental progress in protecting the right to abortion. The Court ruled that Congress must enact norms to protect the right to life (at all stages) but argued that criminal law was not adequate to resolve the tension between all the rights involved in the voluntary termination of pregnancy. The most significant development of this decision is the Court's modification of the 2006 regime of explicit exceptions towards one of the time limits. The Court decided that in no case can abortion be penalized when it is performed within 24 weeks of pregnancy. Additionally, it upheld the regime's exceptions for abortions after the 24th week. This means that the exercise of the right to abortion cannot be prosecuted during the first 24 weeks of pregnancy, while it can only be punished outside of the three grounds established in 2006 after the 24th week.

In a similar way to the 2006 decision, a significant share of the justices dissented (Ibáñez, Ortiz, Meneses, and Pardo). Even those who supported the majority position presented special reasons through concurring votes (Fajardo, Reyes, and Rojas). With this decision, Colombia became one of the countries with the most expansive right to abortion in Latin America. The Constitutional Court sought to eliminate the material barriers that prevent women from freely exercising this right. However, this does not seem to be an outcome that should be entrusted to a single ruling. It is necessary to eliminate the material barriers (cultural, educational, economic) that prevent the free exercise of sexual and reproductive rights of women.

1.2. The right to a dignified death: medically-assisted suicide should not be prosecuted

The second decision concerning liberties did also involve a revisiting of precedents for the Court. In Ruling C-164 of 2022[6], the Court analyzed the norms that criminalize the assisting of suicide. In Judgment C-239 of 1997[7], the Court had established that the right to life with dignity included the right to a dignified death. Thus, facilitating the death of a person under intense suffering from an incurable disease should not be prosecuted.

In the ruling of 2022, the Court decided that the crime of assisted suicide is not materialized when the treatment is provided by a professional physician and in the presence of prior, informed, free, and conscious consent of the patient. This treatment can only be performed on patients suffering from an incurable condition causing severe pain. In other words, the Court held that suicide assistance is an act performed by a qualified person in the exercise of the constitutional duty of social solidarity. It entails a human being acting with the aim of putting an end to the suffering of another at her request.

This decision (as the previous one) has in common an essential line of contemporary constitutional jurisprudence: the inadequacy of criminal prosecution as a mechanism to protect or regulate fundamental rights. In both decisions, the Court invited the State's response to assisted suicide to steer away from criminal prosecution. With these rulings, the Court addressed a sustained phenomenon of criminal populism in which criminal punishment is the only answer to social problems. This jurisprudence not only limits the application of criminal law but also sends a message: the deepest social disagreements should not be resolved with a mechanism of punitive punishment.

1.3. Access to information in cases of sexual abuse committed by church members

The third case relates to a *tutela* action filed by a journalist for the protection of the right to the access of information[8]. The journalist had published several books including allegations of sexual abuse against members of the Catholic Church. However, the religious authorities had imposed barriers to access information about 900 other people (priests) who could be involved in the same acts. In particular, the religious authorities denied him the information alleging it was private information, that it could affect the outcome of investigations inside the church, and that the information could potentially threaten the children involved.

In its decision, the Constitutional Court upheld the prevalence of children's rights. Among these rights, the Court referred to the right to truth, justice, and reparation to which children who have been victims of sexual violence are entitled. In this context, the Court reiterated that access to information is important to the proper functioning of the democratic system. Additionally, it is a fundamental right that acquires greater value when its holders are investigative journalists. Furthermore, the Court indicated that this information was semi-private but had public relevance and interest. The social relevance of information justifies that journalists can access such data as a tool to investigate and punish the conduct of sexual violence. Finally, the Court warned that such information must be managed with the utmost respect for the presumption of innocence.

The Court ordered the religious authorities to provide the journalist with the relevant information. The Court argued that norms of Canon Law cannot prevent access to information and concluded that the request was not for information about children but about priests who may have committed acts of sexual violence. The Court emphasized that the information had social relevance given the journalistic role of the person requesting access to it.

This decision is intended to ensure open public debate, even in the face of serious cases of violations of children's rights by religious authorities. It also clarifies the limits of access when it comes to documents that may compromise the presumption of innocence and due diligence in the handling of such information.

2. Cases concerning Social Rights and Sustainable Development

2.1. Unconstitutional state of affairs in relation to temporary detention centers

An important ruling from the Constitutional Court in 2022 addressed the living conditions of prisoners in temporary detention centers in Colombia[9]. Yet, to facilitate the understanding of this judgment, we will provide some context.

In1998, in the decision T-153/98[10], the Constitutional Court declared an unconstitutional state of affairs in the prison system due to the grim conditions and overpopulation facing inmates. This situation has been reiterated by the C[11] [12] . Of particular importance was the decision T-388/13, in which the Court ordered a set of structural measures to address the overpopulation in prison.

Among those measures, the Court developed the downward balance (*equilibrio decreciente*) rule, which implied that prisons could accept new inmates in any number only if an equal or higher number of inmates had left the prison in the same period. This principle aimed at slowly reducing the occupancy levels in prisons up to the point of equilibrium, in which the number of prisoners met the capacity of the prisons, granting them suitable conditions.

Fast-forwarding to 2022, the Court revised several *tutela* actions filed on behalf of prisoners kept in temporary detention centers (mainly cells in police stations). The petitioners claimed to live in inhumane conditions, mainly due to overcrowding and the lack of infrastructure and basic services in such temporary centers, originally designed exclusively for short-term imprisonment (up to thirty-six hours). This meant that inmates in these facilities were not guaranteed the same rights as those kept in larger prisons. Hence, the claimants asked the Court to declare a violation of their fundamental rights and order the public authorities responsible for the prison system to act accordingly.

In its reasoning, the Court discovered that the overcrowding of temporary detention centers was partly attributable to the strict application of the aforementioned downward balance requirement set by the Court itself. Indeed, judges and prison directors were rejecting applications for inmates in temporary facilities to be transferred to prisons in the application of the rule of balance set by the Court. Thus, police stations were forced to keep an exceeding number of prisoners in facilities not suitable for long stays. This imbalance created a systematic violation of the rights of inmates kept in temporary facilities, further aggravated by the lack of infrastructure and services regularly offered in permanent prisons, e.g., healthcare facilities, rooms for private interviews with lawyers and relatives, etc.

Consequently, in a 5-3 decision, the Court extended the unconstitutional state of affairs of the prison system to the conditions of temporary detention centers, in light of the systematic violation of rights evidenced in the case at hand. To address the situation, the Court devised a six-year action plan with short and long-term measures aimed at facilitating the necessary structural transformations in the prison system and ultimately guaranteeing the fundamental rights of prisoners.

The short-term plan included a suspension of the downward balance rule in order to allow all prisoners kept in temporary detention centers to be transferred to permanent prisons within two months of the judgment. At the same time, the Court ordered the public authorities in charge of temporary facilities to ensure minimum sanitary conditions, access to healthcare, and facilities for private visits for their prisoners.

Finally, the Court's long-term plan encompassed measures addressing structural problems of Colombia's prison system. Among others, the Court ordered the Ministries of Justice and Finance to ensure the funds necessary to increase the operational capacity of the prison system and ordered governors and mayors to build more prisons or refurbish existing ones.

2.2. Safety of former guerrilla members

Another declaration of an unconstitutional state of affairs in Colombia was issued by the Constitutional Court in relation to the safety of former guerrilla members signatories of the peace agreement of 2016[13]. A group of former combatants lodged *tutela* actions for the protection of their rights to life and personal integrity, in light of constant threats from illegal arms groups. According to the claimants, the National Protection Agency (UNP) had consistently ignored their petitions for upgraded security schemes, thus putting their lives at risk.

In the study of the case at hand, the Court highlighted the importance of ensuring the safety of former guerrilla members to achieve the stable and lasting peace pursued by the peace agreement of 2016. The Court further ascertained that around three hundred former combatants had been murdered in recent years. Many of the interveners in the case, including the president of the Special Jurisdiction for Peace, suggested that the continuous threats on the life of the claimants were partly attributable to their stigmatization by local and national public authorities.

Therefore, the Court recalled the obligation of the State at all levels to ensure the safety of the petitioners and the need to ensure that the State's public statements in relation to former combatants were issued in respectful and constructive language.

Given the widespread threats on the lives of the claimants and the State's systematic failure to comply with its obligations to protect them, the Court declared an unconstitutional state of affairs concerning the personal integrity of former guerrilla members. Consequently, the Court ordered the National Protection Agency to implement the necessary security measures to protect the life and physical security of former combatants. At the same time, the Court ordered the government to allocate the funds necessary to ensure the safety of the claimants.

The justices Meneses, Ortiz, and Lizarazo dissented. In their view, the Court was wrong in declaring an unconstitutional state of affairs in relation to the safety of former guerrilla members. Their safety concerns did not imply a situation in which public authorities systematically neglected their constitutional obligations towards former combatants. Furthermore, the dissenting justices argued that the Court's intervention in this case went beyond the scope of its authority, as it became a *de facto* enforcer of the peace agreement of 2016. Finally, the dissent claimed that the deadlines granted by the Court to comply with its orders were exceedingly short (1-2 months in some cases). For the dissenting justices, such short terms disrupted the institutional framework for the enforcement of the peace agreement.

3. Recreational Fishing vis-à-vis the protection of animal welfare

Last but not least, a very interesting ruling was handed down by the Court in relation to the constitutional protection of animal welfare. In the decision C-148/22[14], the Court reviewed a series of norms regulating recreational fishing in Colombia[15] after a citizen challenged the compatibility of such norms with the Colombian Constitution[16].

The petitioner claimed that such norms were inconsistent with articles 8 (obligation of the state to protect natural and cultural heritage), 67 (right to education and culture), 79 (right to a healthy environment), 80 (management and use of natural resources), and 332 (state property of natural resources) of the Colombian Constitution. In the view of the petitioner, the practice of recreational fishing, legally defined as fishing with no purpose other than the enjoyment of the fisher, ran counter to the purpose of environmental education enshrined in the constitution. Furthermore, recreational fishing violated the mandate of sustainable development and the right to a healthy environment under the constitution by depleting the stock of fish available for other legitimate purposes.

In an 8-1 decision, the Constitutional Court sided with the claimant and banned recreational fishing in Colombia. The two main grounds for the decision were the protection of animal welfare and the precautionary principle. Concerningthe former, the Court recalled the precedent set by the judgment C-045/19, where the Court banned sport hunting in Colombia[17]. Drawing on this precedent, the Court concluded that fish were sentient beings in a similar way as the mammals and birds involved in sport hunting. Thus, they deserved to be protected from unjustified harm inflicted on individual beings and not simply for their value as biodiversity.

In relation to the latter, the Court concluded that recreational fishing posed a high risk of negative impacts on the environment and the welfare of aquatic fauna. Since the only aim of recreational fishing is the entertainment of the fisher, the risk of environmental harm and animal cruelty posed by this activity was unacceptable. To prevent the potential environmental effects and the cruelty caused by recreational fishing, it was insufficient for the State to simply regulate such activity. Its prohibition was then necessary. Finally, the Court declared that the effects of its judgment would only take place one year later, in order to provide the State and the citizens with enough time to adapt to the decision.

4. Cases concerning Political Rights, Democracy and Separation of Powers

4.1. Colombian nationality for Venezuelan children in situation of abandonment

In the decision SU-180/2022[18], the Court considered the case of a Venezuelan child with ir-

regular migrant status in Colombia. The child was under the protection of the ICBF, the authority in charge of the integral protection of children in Colombia. After a thorough enquiry, the ICBF concluded that the child did not have any known relatives that could look after him. The authorities attempted to take the child back to Venezuela, but the broken diplomatic relation with the neighboring country made it impossible. At the same time, authorities sought to facilitate the adoption of the child. However, such an alternative was unfeasible because the child, despite residing in Colombia, did not have Colombian nationality.

The authorities then requested that the Ministry of Foreign Affairs grant the child Colombian nationality through adoption. Yet, such a request was further denied due to the irregular migrant status of the child. The plaintiff thus claimed that there was a legal vacuum regarding Venezuelan minors in conditions of abandonment which entailed a discriminatory treatment of children based on their origin, which posed an imminent risk of "factual statelessness".

In its decision, the Court took into account articles 44 and 100 of the Colombian Constitution on the principle of the best interest of the child and the prevalence of their rights, together with the rules of international law on the protection of unaccompanied or separated migrant minors. The Court then concluded that there is a duty of assistance and protection of children that should prevail over the application of legal requirements. In the view of the Court, maintaining legal barriers, even more so when the regulations for obtaining nationality by adoption allow for exceptional cases, reinforces the situation of discrimination against this population, particularly disproportionate and unreasonable in the case of a minor.

In its decision, the Constitutional Court protected the fundamental rights of the child and extended the effects of the judgment to all children of Venezuelan origin, irregular migrants in a situation of abandonment who could prove at least one year of domicile in Colombia. At the same time, it ordered the Colombian President to adopt the necessary mechanisms to promote the search of the child's relatives in Venezuela. Finally, it ordered Congress to regulate the migrant status of Venezuelan children and adolescents in situations of abandonment.

Fajardo, Linares, Lizarazo, and Ángel dissented. Although they upheld the need to protect the rights of the minor, they disagreed with the decision to extend the effects of the ruling to all children in the same situation. They consider that the granting of nationality to facilitate the process of adoption is not always an adequate solution to safeguard the rights of minors in irregular migration situations. For them, it is important to review the measures according to each specific case.

4.2. Electoral nullity due to double militancy: Mayor of Girón, Santander

By means of Decision SU 213/2022[19], the Constitutional Court confirmed the annulment of the election of the former Mayor of Girón, a municipality in the northeast of the country. In July 2019, Roman Ochoa, a member of the *Alianza Verde* party, registered as a candidate for the mayoral elections of the municipality of Girón with the endorsement of a coalition of eight political parties and two political movements. The EC (highest authority of the administrative jurisdiction) declared the electoral nullity of his election based on the grounds of double militancy in the modality of support provided in Article 2 of Law 1475 of 2011[20].

In the view of the EC, by being a member of the *Alianza Verde* party, Ochoa should have supported the candidacy registered and endorsed by this party for the election of the Governor of Santander. Despite this, Ochoa endorsed the candidacy of another political party. Even though his party had formed a coalition with the other party for the election of Mayor of Girón, it decided nevertheless to form an alliance with a different set of parties for the election of Governor. Consequently, Mr. Roman Ochoa filed a *tutela* action against the decision of the EC for violation of the right to due process, to elect and be elected, and to the autonomy of the parties.

On this occasion, the Constitutional Court confirmed the decision issued by the EC and established that coalition candidacies are not exempted from the constitutional and statutory prohibition of double militancy. According to the Court, the candidates of a coalition must demonstrate loyalty and discipline, first, to their party of origin and, second, to the other parties and political movements that are part of the coalition.

Three justices dissented. For Justice Ortiz, when determining the scope of the prohibition of double militancy, the Court should have taken into account the constitutional principles of free choice of candidates, autonomy of political parties, and full observance of political rights. In the case of coalitions of parties or movements, the Constitution created this figure precisely to unite ideology and political parties of different origins and positions, hence its scope of exercise goes beyond the interest of the party of origin. Justices Linares and Lizarazo further claimed that the decision SU 213/2022 ignores the criteria of restrictive interpretation of the prohibition of double militancy.

4.3. Exceeding of presidential powers

In Decision C-090/2022[21], the Constitutional Court resolved a challenge against the constitutionality of Title XIII on "strengthening of the fiscal responsibility process" of Decree Law 403/2020 and concluded that the President of the Republic exceeded the legislative competence conferred by the derived constitution.

For the plaintiff, the transitory paragraph of Article 268 of the Constitution, introduced by Legislative Act 04 of 2019[22], granted the President of the Republic extraordinary lawmaking powers in relation to the matters expressly outlined in this article and in the legislative act, which deal mainly with the labor regime of the officials of the Government Accountability Office and preventive fiscal control. For the plaintiff, the general term "fiscal control" cannot be an enabling subject to reform any type of content related to this figure, in this case, to modify the fiscal responsibility procedure.

On this occasion, the Constitutional Court warned that none of the articles that modi-

fied, added, or introduced new figures to the fiscal responsibility process in Decree Law 403/2020 regulated the matters expressly indicated in the transitory paragraph of Article 268 of the Political Constitution, nor developed the reforms of Legislative Act 04 of 2019. For the Court, a restrictive reading of the enabling norm must prevail in accordance with the principles of separation and harmonic collaboration of public powers. Therefore, it found no connection between what is regulated by Title XIII and the material scope of the norm that granted extraordinary lawmaking powers to the President.

Justice Menéses dissented. He argued that the act under review sought to adapt the new model of fiscal control to the issues regulated in the constitutional amendment. He also pointed out that the enabling norms do not usually have the level of detail required by the judgment. Therefore, in his view, the Court, in this case, adopted an overly restrictive interpretative standard, which curtails the lawmaking powers of the President.

IV. Looking Ahead

Despite the relevance of the political and constitutional events that transpired in 2022, the immediate future can be predicted as increasingly challenging for Colombian institutions. The government is pushing forward its ambitious reforms despite corruption scandals and disagreements with political parties that joined the government in its early stages. At the same time, the Constitutional Court faces legal debates of the utmost importance for the future of the country. Among them, the Court will review the Statutory Act on the Judicial System, the Escazú Agreement, and the compatibility of the sanctioning powers of disciplinary quasi-judicial authorities to affect the political rights of elected officials[23]. Furthermore, in recent weeks the Court handed down two important judgments. In the first one, the Court established that it was within its competence to suspend laws temporarily in the course of its judicial review, as a way to prevent potentially unconstitutional laws from having irreversible negative effects[24]. In the second one, the Court ordered the State to reduce the number of weeks women have to work to earn a pension, grounded in reasons of gender equality[25]. These and other rulings could spark an open debate about the role of the Court vis-à-vis the Executive and the Legislator[26].

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Costa Rica

Bruce M. Wilson, *Professor & Interim Director, School of Politics, Security and International Affairs, University of Central Florida*

Olman A. Rodríguez L., *Senior Law Clerk, Constitutional Chamber of the Supreme Court of Costa Rica*

Sigrid Morales Carrasco, *Law Clerk, Constitutional Chamber of the Supreme Court of Costa Rica*

Evelyn Villarreal, *Research Director, Estado de la Justicia, CONARE, Estado de la Nación, Costa Rica*

I. Introduction

The results of the 2022 general elections created a significant shift in Costa Rican politics: The governing party was all but wiped out, no political party secured a majority of the congressional seats, and a political neophyte from a newly formed political party won the presidential election. The electoral campaign's unusual level of acrimony continued after the inauguration of the new president. The new president felt he had been unfairly treated by the national media during the campaign. Once in office, he harnessed the power of his office to push back against his critics most notably through executive decisions that obliquely attempted to undermine the financial health of the country's leading daily newspaper.

Due to the lack of a political majority in the congress, the new president issued numerous decrees many of which have been challenged at the Constitutional Chamber of the Supreme Court with several early cases decided against the executive branch's actions. For example, the government's efforts to revoke pandemic-related health measures, including ending mandatory vaccinations for all government employees, were rejected by the Constitutional Chamber of the Supreme Court and other Courts. Moreover, media and constitutional scholars assert that the sole legal responsibility to lift the health restrictions rests with the National Commission of Vaccination and Epidemiology, not the executive branch.

Another area of contention revolved around the executive's attempts to alleviate the cost of living by abolishing mandatory professional service fees. Professional associations challenged the decree before the Administrative Contentious Court. Finally, as discussed in detail in this report, the Constitutional Chamber of the Supreme Court resolved cases against executive orders that sought to limit the freedom of press and information.

II. Major Constitutional Developments

In 2022, the Constitutional Court received a record number of new cases (28,553) and resolved almost 31,000 cases; this number includes cases filed in previous years but resolved in 2022. In keeping with the historical pattern, almost 90 percent of all the cases filed with the Constitutional Chamber of the Supreme Court were simple cases of Amparo (writs of protection). Amparo cases in Costa Rica have become a popular, effective, and low-cost legal opportunity that is open to everyone in the country. Amparos have few requirements or formalities and do not require filing fees, lawyers, or even an understanding of the specific constitutional infringement that the case concerns. As in previous years, more than 60 percent of amparo cases concern issues of health, labor, or prisoners' rights, and the right to petition. Two general types of cases helped drive

2022's record caseload: labor cases and prisoners' rights cases. Workers at the Ministry of Education, one of the largest employers in the country with more than sixty-thousands teachers, frequently litigated individual amparo cases against the Ministry of Education's payments of salaries, assistance, and job-related benefits. Prisoners similarly filed hundreds of claims of Habeas Corpus against conditions in the Judicial Police's (OIJ) chronically overcrowded prisons.

In 2022, congressional proposals related to Constitutional jurisdiction were mainly focused on the question of the appointment process of superior court magistrates. A constitutional reform, previously approved by the relevant congressional commission, aimed to limit the period of re-election for superior court magistrates. The first congressional approval vote came despite strenuous opposition from academics, civil society, and the members of the judicial branch. These groups argued that the judicial reform could potentially harm the judicial branch's independence from the popular branches by undermining the existing quasi-life tenure of magistrates and the stability of the court system.

Interestingly, while some members of Congress pushed these judicial reforms, Congress, as an institution, continued to ignore the Constitutional requirement that it is to appoint new magistrates to the Constitutional Chamber of the Supreme Court within one month of being notified of a vacancy. Since Magistrate Nancy Hernandez resigned from the Court to join the Inter-American Court of Human Rights in November 2021, Congress has failed to elect a replacement magistrate. Since 2021, the Constitutional Chamber has operated with just six full (*propietario*) magistrates, rather than the full required number of seven magistrates. Currently, at the Supreme Court, there are four magistrate vacancies as a result of Congress's failure to appoint replacement magistrates within the constitutionally mandated time frame. The Court functions with a full bench by using a roster of "substitute" magistrates during short absences (for illness or vacations) and the use of an alternative justice to replace a magistrate during longer vacancies.

In 2022, an old constitutional reform proposal was re-animated to relocate the Constitutional Chamber of the Supreme Court outside of the Judicial branch as a standalone, independent public body. This proposal has yet to receive sufficient congressional support to advance to the legislative agenda.

Similarly, in 2022, the State of the Justice Report published a report on the Constitutional chamber's jurisprudence using advanced data science techniques to identify important patterns in the generation of court resolutions. The report used a proprietary database that coded all four hundred thousand plus constitutional resolutions handed down in the thirty-three years of existence of the Constitutional Chamber of the Supreme Court. The main characteristics of the structural resolutions include all cases that refer to a fundamental right, declared in favor, and specify a mandate to an institution, the period, and the monitoring of compliance with those decisions. However, the study found that the magistrates do not necessarily agree on the definition of what constitutes a structural sentence. To find the structural sentences, the automated analysis filtered the sentences according to their main features; it identified those that mandate specific contents and deadlines with specific instructions for personnel and institutions. The report finds that only 17,065 resolutions fulfilled those criteria.

The research also found a 12% group of cases named "reference sentences" that are frequently quoted by other sentences, and organize arguments used in the Sala Constitucional to interpret rights or decide between conflicted rights. The data science techniques used in this exploratory study will allow scholars and stakeholders a better understanding of the scope and impact of the Constitutional Chamber of the Supreme Court's rulings by processing thousands of sentences that were not previously possible.

III. Constitutional Cases

1. Mandatory Covid-19 Vaccinations

Some groups resisted and defied the previous administration's mandatory Covid-19 vaccination policy that was administered by the National Commission on Vaccinations and Epidemiology.[1] Multiple appeals were filed with the Constitutional Chamber of the Supreme Court to challenge the government's vaccine mandate that was enforceable by all public health authorities.

During the presidential election campaign, the eventual winner promised to relax the Covid-19 vaccination requirements in general[2] and to exempt children, if parents objected to their child's inoculation. Parents of one child challenged a hospital's legal authority to vaccinate their 6-year-old son. They filed an appeal with the Constitutional Chamber against the decision to vaccinate their child claiming that the Covid-19 vaccination was an experimental drug rather than an approved one.[3] However, the Constitutional Chamber upheld the hospital's decision to vaccinate the child because the child had many risk factors that made him particularly vulnerable to the Covid-19 virus. The Court noted that some of the parents' arguments against the vaccination were previously debunked because the vaccine was properly registered by the relevant national authorities and the United States by the U.S. Food and Drug Administration. The Court also noted that national law[4] and the Court's previous jurisprudence that imposed obligations on the parents or legal guardians to make timely decisions on mandatory vaccinations.

The rights of patients to be informed and to freely make their decision concerning medical services is diminished by the bulk of information that leads to the protection of the general interest and welfare.[5] This should be carried out following the protocols and sanitary arrangements for those that should be exempted. But in the case –at hand, the medical history of the child, the health authorities' determination, the social worker reports, and the *Patronato National de la Infancia* (National Children's Agency), were all conclusive and recommended the child be vaccinated even if the parents were opposed.

2. Freedom of the Press and of Expression

After the general election for all 57 deputies of the unicameral Congress, no political par-

ty secured a working majority. Simultaneous elections for president and two vice presidents resulted in no candidate receiving over 40% of the votes cast, thus requiring a runoff election between the top two candidates. The second-round election, held in April 2022, was won by Rodrigo Chaves, a political neophyte and leader of a new political party. Chaves and his party presented themselves as political outsiders and non-traditional politicians. During the election campaign, Chaves was scrutinized by the national media, which revealed serious issues he faced when he was a senior member of the World Bank in Washington D.C. Candidate Chaves lashed out against several journalists, news outlets, and their owners during the election campaign alleging that the media was biased and corrupt and that he would end that corruption once in office.

Once in office, President Chaves's Ministry of Health suspended the operating permit of Parque Viva, an entertainment park owned by the parent company of the newspaper *Periódico La Nación*, to undermine the financial well-being of the parent company of the country's largest daily newspaper, *La Nación*. A writ of amparo was immediately filed against the suspension of the park's operating permit.[6]

The Chamber's decision noted[7] that freedom of expression is a fundamental pillar of any democratic society as it protects the universal and fundamental freedom to express thoughts and opinions and to receive them from others. Both freedoms and democracy are intrinsic, hence restricting either one limits the other. The Constitutional Chamber's holding went on to note the significance of the intricate relationship between the Costa Rican Constitution and many human rights instruments and treaties concerning the Freedom of Expression and Thought, the jurisprudence of international courts including the European Court of Human Rights and the Inter-American Court of Human Rights. Thus, the Freedom of the Press and the Freedom of Expression needed to be protected.

The Constitutional Chamber noted that article 13.3 of the Inter-American Convention of Human Rights prohibits indirect censorship and concluded the Ministry of Health's actions were a form of soft censorship since the purchase of Parque Viva by Grupo Nación S.A. was driven by an effort to provide profits to the group and finance the *La Nación* newspaper. The Chamber found that the motivation for the President's actions against *La Nación* was due to the paper's unfavorable reporting on his prior scandals and campaign promises. According to the court, the press conferences and other governmental measures revealed the President's clear intention to shutter the Parque Viva as a means of damaging the financial health of *La Nación*.

Other cases related to the Freedom of the Press and Expression were similarly problematic for the new government. Journalists were concerned about the President's orders to suppress the rights of senior public officials and other public workers to publicly give their opinions to the press. In all instances, the Constitutional Chamber ruled that the government's restrictions on the free speech of public officials constituted "unlawful conduct."

In a notable case involving the Health Ministry's requirement that public officials could only address media questions through the ministry's Department of Communications. The Court noted its jurisprudence had previously established the legitimacy of the state's use of a single office to control information to and from the public. But the Court reaffirmed that the Health Ministry could not abridge the public official's freedom of speech in their personal capacity.[8] Rather, the Court held that public officials may publicly express their views or provide information to a third party. Any threats or actions against those individuals, through administrative disciplinary procedures or punishments, would be an illegitimate use of state power that diminished the right to freedom of expression.

When the Ministry of the Presidency ordered senior public officials to avoid participating in specific opinion and news programs, the Court reiterated its understanding of the centrality of the freedom of the press in a democratic context,[9] and restated its previous holdings that it was illegitimate for the state to hinder access to public information. The Court argued that information dissemination, including criticism, should be timely, expeditious, and in an uncomplicated process that safeguards the population's right to be informed and the freedom of expression.

3. Environmental protection

The Ostional National Wildlife Refuge (Refugio Nacional de Vida Silvestre Ostional) is widely recognized as a major turtle nesting site in Costa Rica. Under Costa Rican law, there are different regulations to protect the environment[10] that impact land usage for residents and owners. In the case of reserve areas, protected zones, national parks, wildlife refuges, and other protected forests, land may be owned by the state or remain in private hands. In the case of the Ostional National Wildlife Refuge, the area is wholly state-owned.

A law was passed that amended the legal status of the Ostional National Wildlife Refuge to establish a mixed form of land usage with the goal of permitting some low-impact commercial uses to benefit the residents. Opponents argued that these reforms would place a heavy toll on the environment of the protected areas.

The constitutional right to a healthy and ecologically balanced environment is closely tied to several standards previously upheld by the Constitutional Chamber.[11] Existing environmental legislation requires a technical justification to support any legal amendment to public property status that was designated as an environmentally protected area. When the reform to the Ostional National Wildlife Refuge law was passed, ownership changed from the public domain to a mixed form that granted private individuals land rights to encourage the development of low-impact construction and tourist enterprises.

According to the Constitutional Chamber, the legislative branch, by approving the change in land use, ignored an important requisite that consequently harmed the environment.[12] Legislative records show that lawmakers did not request expert advice or technical studies to justify the reform measures before the bill

became law. Because of this failure of Congress to include the required technical studies, the Constitutional Chamber struck down these provisions of the law. These standards are enshrined in article 50 of the Constitution, as well as, the body of domestic law that protects the environment and numerous international standards.[13]

4. Public Employment Law

In 2019, under the previous administration of President Carlos Alvarado, the Legislative Assembly began discussions on wide-reaching legislation designed to reign in public spending. The bill, if it became law, would have had major impacts on the functioning of the other branches of government and the many state-owned autonomous agencies. In 2021, in response to a request initiated by some congressional members, the Constitutional Chamber of the Supreme Court issued an advisory opinion on the bill. In that opinion, the Court highlighted its concern about the constitutionality of some parts of the bill that could impact the independence of the other three branches of state: Legislative, Judicial, and the Supreme Electoral Tribunal (TSE).[14]

The Court's opinion directed Congress to amend the bill to harmonize the constitutional principles regarding the separation of functions of the independent branches of government and the numerous state-owned autonomous institutions. Once the bill was modified to address the Court's objections, the bill was subjected to a new vote in Congress. In 2022, the modified bill was reexamined by the Constitutional Chamber.[15]

The modified bill accommodated the Court's objections to the original bill by allowing each branch of government and State autonomous agency, in accordance with their unique circumstances and constitutional or legal function, to determine which employees were covered by the executive decree and which ones were not. As a result, workers who carry out ordinary administrative tasks in each agency or branch of government were too covered by Executive directives, while professionals with exclusive constitutional function remained outside the reach of the executive decrees.

The timing of the bill, though, brought up a separate question concerning the constitutional prohibition that prevents the Legislative Assembly from passing bills in Congress that explicitly impact electoral matters. Article 97 of the Constitution stipulates that in "… the six months prior to and four months after a popular election is held, the Legislative Assembly may not enact any law based on bills concerning matters about which the Supreme Electoral Tribunal had expressed disagreement." The Constitutional Chamber of the Supreme Court considered this matter because the approval and enactment of the law fell within the constitutionally prohibited period before an election: A general election was scheduled for February 2022, the same time that the bill was still being discussed in the Legislative Assembly. The Supreme Electoral Tribunal (TSE) expressly objected to the bill, but the Congress moved ahead with the final legislative approval on March 7, 2022, right in the middle of the presidential runoff election campaign.

The Constitutional Chamber was split on the question of the timing of the bill. A majority held that the bill's content was not covered by the constitutional restrictions as it did not impact the Tribunal's exclusive control over the elections, and that the bill did not explicitly intrude on electoral matters. A minority of the Court, though, dissented. One concerned the pretorian nature of the rule to exclude the different Branches of Government, which also entails objective criteria and driving principles on how that would be accomplished. They were not regulated at all by the law.[16] The dissent also noted that electoral matters refer to both the object and the subjects involved in electoral processes. Hence, there needed to be some precautions on how to read future bills that could interfere with the organization of the Supreme Electoral Tribunal during future electoral processes.

5. UPAD Case

The administration of President Alvarado Quesada created an agency to seek and obtain assessment and counsel at his request. This was created through the Executive Decree 41996-MP-MIDEPLAN[17] under the authority of the Office of the President. The office aimed to process relevant data to enhance the decision-making process for public policy. This process would utilize and combine all digitalized information available to different parts of the central government to be used by the office of the President.

A citizen claimed that his rights to privacy and confidentiality were at risk from the new process. He argued that the legislation did not provide the necessary protections or any other form of consent to the usage and processing of personal data. The Attorney General (Procurador General) of the Republic agreed with the claimant noting that it did not protect the confidentiality of personal data and that no informed consent was included before processing information. The Attorney General added that only a law passed by the Legislative Assembly could authorize the Executive Branch to have access to the private information of the citizens.

In its decision,[18] the Constitutional Chamber found that the use of data involving the performance and delivery of public services was part of the State interest. It allowed the transfer to and the processing of certain information in the power of the different public institutions and agencies. Accordingly, the governmental departments within the State have a legitimate aim for administrative planning and have the interest to request and receive information that will provide such data. Nevertheless, this came with a caveat from the Chamber. Information cannot involve personal data or people's confidential information. Hence it is possible to request statistics and general information of the performance of public agencies, but not information that people are entitled to prevent other people from knowing, which is regulated in the Constitution and in the law relating to personal data protection.[19] The Court recognized that this Law contained some exceptions, but those do not imply granting the state access to personal and confidential information. That the law uses ambiguous language for some of its exemptions, means that they must be read as never authorizing the search and processing of data that deviates from protecting personal data and confidential information.

IV. Looking Ahead

Unresolved questions remain about how the Constitutional Chamber will respond to the unorthodox actions of the current government: Will it adhere to its long tradition of exercising a strong accountability function and support for the Rule of Law, and maintain its progressive, assertive interpretation of the rights or will it be pressured to accommodate the new political realities.

The Public Employment law (*Ley de Empleo Público*) will be implemented in 2023 and will generate many challenges. Ongoing state deregulation has created a growing number of environmental protection cases. Similarly, the government's ongoing attempt to fight crime and citizen insecurity will impact citizens' Constitutional rights and freedoms and protections of international conventions.

Another likely constitutional case concerns the executive branch's goal of regulating the movement of migrants and asylum seekers. Previously the Constitutional Court invalidated a similar prohibition on travel for all refugees and asylum seekers in Costa Rica.

The slow pace of filling vacancies in the Constitutional Chamber remains an ongoing concern; the current vacancy created in late 2021 when Nancy Hernandez joined the InterAmerican Court of Human Rights remains unfilled.

V. Further Reading

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Cuba

José Walter Mondelo García, *Law PhD , University of Oriente, Cuba*

Julio César Guanche Zaldívar, *History PhD, Independent Scholar*

I. Introduction

The year 2022 can be considered the year of the beginning of the establishment of the constitutionality of Cuban Law, when the National Assembly of People's Power (ANPP), after a two-year delay due to the coronavirus pandemic, set in motion an ambitious legislative schedule consisting of 27 Laws, in addition to 14 Decree-Laws under the competence of the Council of State (Legislative Schedule https://www.gacetaoficial.gob.cu/sites/default/files/goc-2022-ex5.pdf). For the first time in the country's legislative history, such a comprehensive program was implemented, aimed at making the entire Cuban legal order compatible with the constitutional frameworks, which for many decades was structured and in practice was established without condition or correspondence with the contents of the Constitution, especially the most important material content, which defines Cuba as a democratic Republic and as a socialist State governed by the rule of law. The implementation of such a comprehensive legislative program in such a short period of time will be a real challenge, given the urgency of the reforms and their absolute need to transform a bureaucratic and centralized model, with many signs of already being exhausted.

Let us see how the new Cuban Constitution (hereinafter, NCC) enshrines and delimits these contents, its merits and deficiencies, and the ways in which it can operate as the normative and axiological framework to refound the legal order of the Cuban Republic, affected by long-standing needs and of very diverse types so that the legislative reforms underway can yield their best results. The following analyses are devoted to this objective.

II. Major Constitutional Developments

According to the NCC, the official name of Cuba is the "Republic of Cuba", and the official discourse assures that it is a democratic Republic. In practice, the emphasis has been placed on "socialist democracy". Its bases have been placed on social participation and grassroots consultation, with centralized decision-making "from above"; social justice based on state property (with a non-interdependent vision of rights, which prioritized social rights), and on nationalism and sovereignty, with a state-run approach to them. However, the contents that explain "socialist democracy" do not cover the entire surface of the classic items of the democratic-republican tradition: 1) the democratic (fiduciary) construct of property over the means of existence and production, 2) political authority and power are a "mandate" granted under the control of the people, 3) freedom is an inalienable constitutive right; 4) the law is within the law and must prevail as an instrument of popular sovereignty. [1]

The democratic-republican thesis asserts that there is a right to property, but also rights to property, and it bases the need for its redistribution as a democratic necessity. The idea emphasizes the democratization of access to property, whether in the form of goods, or more recently, as resources (as a demerchandizing of rights), or as the capacity to make decisions (in the sphere of labor).

The NCC establishes the preeminence of social property and state enterprise and planning as marks of the new socialist model it regulates. The text recognizes for the

first time since 1976 the existence of the market and private property. With this, it allows the transition to a model that "complements" the different forms of property and the relations of production.

The NCC reissues state management – neither public nor common – of property. Through it, the State, which should be an agent – representative – becomes the principal and operates, in practice, as the owner. The constitutional text always mentions state businesses, not public businesses. In Cuba, historically, the public is often confused with the state and the state with the government.

It also prohibits the concentration of private property but allows the monopoly of state property, and omits to regulate social guarantees of self-management (self-management, co-management, savings banks, community enterprises, communes, and other associative forms). Also, it does not mention issues of home economics, individual self-employment, micro-enterprises, or popular networks of producers or supplies, nor does it explore the principles of the so-called "Social and Solidarity Economy", a growing reality in today's world.

The NCC does not promote new instruments--with respect to the previous Magna Carta- in the hands of workers to defend their labor rights. It does not recognize political rights such as the right to strike, it does not promote union power or other forms of workers' self-organization, nor does it mention the word "poverty". Concerning state employment, it does not improve the democratization of the labor sphere, nor does it impose minimum wage regulations or protections against the "economic" loss of real wages.

Regarding political representation, the demo-republican thesis states that political authority is to be understood as a trust: political magistrates are trustees, servants of the trustor: the citizens.

The post-1959 Cuban tradition has celebrated direct democracy (and execrated "representative democracy"), it used the term "mandate" and established, as rights, the control and revocation of representatives. However, the NCC disproportionately enhances indirect participation and does not regulate requirements or content for elections and referendums.[2]

The parliament is given additional powers to interpret the Constitution, establish or extinguish taxes, and approve territorial regimes of administrative subordination, but has not been granted more operating time: the Assembly as a whole will continue to meet regularly for two sessions, for only two days each year. Under these conditions, it is very unlikely that it can become an effective seat of representation of popular sovereignty.

The constitutional text also contains valuable novelties: rules of incompatibility of positions, term limits (time in office and age), the General Comptroller's Office -subordinate to the President- and the National Electoral Council -defined as autonomous, although accountable to the Assembly- is established on a permanent basis.

Regarding the issue of freedom as an inalienable right, it is necessary to remember that the idea of Soviet Marxism on the State became strong in the political culture of how to manage power in Cuba: The technology of the State, working towards "socialism", "only" can do good. The State is the executor of the citizen, and it is properly the citizen's interest. The impossibility of challenging state action produces a transfer of sovereignty. The sovereign becomes the State: its rights take precedence.

In Cuba, the drafting of the NCC was entrusted to a Drafting Commission composed of parliamentarians and other experts. The drafting of the Constitution by an already constituted parliament poses problems. The parliament gives itself the norm that should regulate it – it is the judge, jury, and executioner – and controls the fundamental part of the process: the elaboration of the preliminary draft, the primary decision on the topics and approaches to be included, and the approval of the whole, prior to the referendum.

Until 2019, the ANPP was the only subject legitimized to reform and elaborate the Constitution in Cuba and to activate the constituent referendum. The 1976 Constitution transferred sovereignty from the people to the Assembly. It considered it as the Constituent Power when it should be the citizens' power.

Now, on the other hand, the NCC grants constitutional initiative to fifty thousand citizens. It will be necessary to observe the political and legislative practice regarding this right -the popular legislative initiative for ten thousand citizens, existing since 1976, has never been put to work-, but the insertion of the new constitutional initiative in the NCC is a change that should be noted among its successes.

On another note, the NCC enshrines constitutional supremacy, establishing "the duty of all to comply with the Constitution". However, it regulates that the PCC (Communist Party of Cuba) is the "higher and leading force of society and the State". It is difficult to find parallels in the world with this type of regulation, not, of course, in liberal constitutionalism, but neither in the New Latin American Constitutionalism nor, for that matter, in the Chinese or Vietnamese Constitutions, referents of the NCC.[3] In the latter, it is specified for the first time since 1959 that the PCC is "unique", and that it "directs and guides" the State. The Party, a part, rules over the State, which must be the whole. It is a way of transferring sovereignty and alienating the freedom of the sovereign people.

The new constitutional text establishes the general principles on which social organizations are based and recognizes the performance of other associative forms but submits their regulation to a subsequent law. The Constitution does not mention civil society. Herein lies a crucial problem regarding the inalienability of freedom. Cuban civil society has gained ground in diversity, organization, and visibility, while at the same time, political behaviors generated outside the State are penalized, as has already happened several times after the entry into force of the NCC, notably on July 11 and 12, 2022.

As for Law and law, for the Republican tradition, they are one and the same. Law is not opposed to law and law is the foundation of freedom. Freedom is in the law

-with the law or against the law-, but outside the law, there is only whimsicality.

The new text introduces the "Socialist State of Law" for the first time in post-1959 Cuban constitutionalism with some of its contents: constitutional supremacy, the rule of law, a proposal for institutional strengthening and expansion of rights. It establishes new rights: the Right to life, to the free development of personality, to property over goods, to personal and family privacy, to due process, and to claim before the courts when rights are violated by State institutions. It extends the use of the contentious-administrative process -with a very limited scope in current practice-, and establishes more rights in the criminal process.

It also constitutionally recognizes Habeas Corpus and Habeas Data. At the same time, it eliminates an important clause of "conditionality" of rights: before, their exercise was limited to "the purposes of the socialist society" and within the state-recognized organizations. Now, it is subordinated only to the framework of the law.

With regard to international human rights treaties, the new text does not reflect the most advanced doctrine, which favors the most favorable standard of protection in all cases. There is international consensus that the human rights outlined in a treaty can only yield to a broader rule of domestic law and in no case more restrictive. However, according to the NCC: "The provisions of international treaties in force for the Republic of Cuba form part of or are integrated, as appropriate, into the national legal system. The Constitution of the Republic of Cuba takes precedence over these international treaties." (art.8)

The 1976 Constitution, with its reforms, regulated marriage as the "voluntarily arranged union of a man and a woman". The preliminary draft of the current Constitution wanted to radically change this content: "the voluntarily arranged union between two persons". Finally, the NCC regulates it differently: it is a "social and legal institution". Finally, marriage equality was recognized in the Family Code, approved by referendum in September 2022.[4]

III. Constitutional Cases

In Cuba, there is no constitutional jurisdiction, neither in the form of a Constitutional Court nor as a Chamber of the Supreme Court nor as a Constitutional Council, the most usual forms in the world. However, in May 2022, the National Assembly approved, two years behind the NCC mandate, the most relevant legal text for the establishment of constitutional law within Cuban law, the Law on the Process of Protection of Constitutional Rights, No. 153/22. For the first time since the abolition in 1973 of the Constitutional and Social Guarantees Chamber, a legal procedure is established to sue State officials and agents for the violation of the constitutional rights of citizens. However, it suffers from important limitations, which jeopardize the full exercise of the regulated right, and the effectiveness of the legal remedy that should guarantee the observance and respect by the State of the rights of citizens. Among them are the following:

1. It will not allow discussing the constitutionality of laws

The constitutional remedy enshrined in the Law, unlike many of its Latin American counterparts and the one established by the 1940 Constitution, does not recognize the possibility of discussing, through this instrument, the constitutionality of laws and other legal norms. To justify its exclusion, it reproduces the criterion, theoretically erroneous and completely ineffective in practice, established since the 1976 Constitution, that only the National Assembly of People's Power exercises control over the constitutionality of laws and other legal norms. The National Assembly can't dictate the laws and be able to impartially evaluate the constitutionality of its own creations. This is proven by the fact that the Assembly has not declared unconstitutional a single normative act, law, decree-law, decree, resolution, or regulation in over 45 years.

2. It may not be used to challenge rulings of other courts

The constitutional protection remedies of several Latin American countries (Argentina, Peru, Venezuela, Guatemala, Honduras, and Panama) not only allow the constitutionality of laws to be challenged but also allow citizens to use this instrument to challenge decisions made by other courts that they consider to be contrary to their constitutional rights. The Spanish writ of constitutional protection also allows fighting through this recourse against sentences of the ordinary courts. Cuban law cancels this remedy.

3. It may not be used to discuss situations that have another judicial solution

Although it leaves the exception open due to the "legal-social transcendence of the alleged violation", which requires an "urgent and preferential" action. In practice, this will mean that many of the rights recognized in the NCC will face a very difficult path, which, depending on the interpretation that the acting judge may decide on, may become impossible to overturn in order to obtain the protection of article 99.

Note that these three exclusions greatly limit the scope and effectiveness of the protection, using the law as a brake on the exercise of the constitutional right recognized in Article 99 of the NCC, a right that cannot be waived in a State governed by the rule of law. This brings us to the last observation.

4. The Law does not guarantee that the violation of constitutional rights can be remedied in a rapid and concentrated manner in the courts

This is because Article 8 of the Law opens a wide door for the courts to dismiss the appeals for a writ of constitutional protection without practicing the proposed evidence and without offering exhaustive arguments for their decision, which may declare the appeal inadmissible by means of an order. It would have been much better, in order not to leave defenseless those who intend to resort to this route (the only way to claim in court for the violation of constitutional rights), to establish the obligation of the courts to admit and resolve all appeals for a writ of constitutional protection. With the exclusions explained above, judicial control over the actions of State officials and agents who violate constitutional rights will be quite

weak and its practical effects almost irrelevant. Although there is no official data, in a recent congress of Constitutional and Comparative Law (Cuba ConPara, Havana, 2023) the figure of 24 lawsuits filed in the courts throughout the country in the year since the entry into force of the Law was handled, and not a single one of them was admitted by the judges. No need to comment.

Due to the social relevance of its contents, in addition to its status as a law that regulates and restricts such essential rights as freedom and equality before the punitive power of the State, as well as the limits thereof, an approach to Law No. 151/22, Penal Code, is obligatory. Let us take a look at its contents: On the positive side, the effort of the drafting committee and the legislators to modernize and update, according to the most modern trends of the international criminal doctrine, our Penal Code, in its structure, order, and wording, must be acknowledged.

Other unquestionable successes are the strict prohibition of the use of analogy in Criminal Law, the elimination of the figure of pre-criminal social dangers, the limitation of the duration of the deprivation of liberty to a maximum of forty years and the substantial improvement in the definition of criminal offenses such as rape and the so-called pederasty with violence, now merged into a single figure, sexual aggression. This helps to standardize criminal legislation and make it more consistent with constitutional frameworks. It also introduces new regulations on environmental crimes, Cybercrime, gender violence, and transnational criminal networks.

However, the new Cuban Penal Code, contrary to the worldwide trend to humanize and reduce excessive punishments and punitive intemperance, instead of reducing the number of crimes punishable by death, increased them (from 20 to 24), as well as those punishable by life imprisonment (from 24 to 31), and exhibits a predilection for deprivation of liberty for over 20 years, which used to be the limit for this type of punishment before the 1999 penal reform. The death penalty, in particular, is now particularly difficult to accept, given its almost impossible fit with Articles 40, 41, and 46 of the NCC. The first establishes that human dignity is the supreme value underpinning the recognition and exercise of the rights and duties enshrined in the Constitution: no greater denial of human dignity is conceivable than to put a human being to death, even by a court sentence. The following article obliges the State to guarantee to the individual the enjoyment and exercise of human rights, which cannot be waived and are inalienable. Article 46 lists the fundamental human rights (which are then developed in the following precepts), and the first on the list is the right to life. Moreover, strictly speaking, capital punishment is incompatible with the purposes of criminal law, except for repression, which is not an end in itself, but a notion inherent in the very idea of criminal law, which is based on *jus puniendi* (the right to punish).

Also problematic is the refusal to set the age of criminal responsibility at 18 years, as established by the International Convention on the Rights of the Child (1989), to which Cuba was a signatory from the very beginning. The new Code, which had the opportunity to eliminate this flagrant contradiction between the international treaty and domestic law, did not do so, and therefore we will continue to judge minors as adults. Thus, Cuban criminal law is far from the most progressive and advanced standards in the matter, in addition to the conflict between the provisions of the Convention, as an obligation of the Cuban State, and the norm of domestic law, which will continue to prevail in the criminal arena, with all the problems that such a practice entails in the international arena.

For all of the above, the new Penal Code announces a steep and thorny path for the application of its precepts, of extreme punitive rigor, and which collides head-on with the values and principles of the Constitution, which should constitute the axiological foundations of the interpretation of those precepts. This means that the criminal norms must be interpreted by the courts in light of those values and principles, and in any case preferring, of the possible interpretations, those that contribute to the realization of the constitutional values and principles to a greater extent, or at least do not diminish or restrict them. The central question will be how judges will interpret the norms of the new Penal Code. Ideally, by way of interpretation (and art. 3.1 of the Law of the Courts of Justice constitutes the legal basis for this) they reduce the exaggeratedly repressive and punitive bias of the Code, which would be consistent with the guaranteeing and pro-rights nature of the Constitution, and certainly an important step towards recovering the idea of Criminal Law as the last resort, an inalienable legacy of the Enlightenment.

Other laws of unquestionable importance are the Procedural Code (Law 141/2021), the Criminal Procedure Law (Law 143/2021), the Administrative Procedure Law (Law 142/2021), and the Law of the Courts of Justice (Law 140/2021), all in force since January 1, 2022, in addition to the Criminal Enforcement Law (Law 152/2022), which made up the most profound procedural and judicial reform in Cuba in the last decades. In all cases, these are legal texts that bring to the constitution the respective matters subject to regulation, by legislatively developing them within the new constitutional framework. The Law of Criminal Procedure develops the due process of law (a right recognized in the Constitution), and introduces the principle of restorative justice, which favors a balance between the social re-probation of the crime and the punishment of the offender, on the one hand, and the restoration of the rights and affectations suffered by the victims, on the other. It also expands the rights of the victims and recognizes the right to defense from the beginning of the process, a long-standing aspiration of Cuban jurists. The Administrative Process Law expands the variety of matters that can be judicially resolved, for example, claims against the confiscation of property or against a certain administrative resolution, which is a first step towards the requirements of the Rule of Law proclaimed in the NCC. The Code of Proceedings transforms the Cuban evidentiary regime, giving greater importance to the figure of the active judge, with broad powers and competencies in evidentiary matters: it eliminates the use of fixed evidence and regulates free appraisal as a universal method for all means of evidence, and incorporates rules of appraisal

for each of them, in order to guide the interpretative and weighing work of the court.

On the other hand, the Law of the Courts of Justice, which defines, organizes, and regulates in detail the mission, structure, composition, and functions of the judicial system, is of special importance for a State of the Rule of Law, since judges are in charge of resolving conflicts, declaring the applicable law and defending justice in accordance with the Law. This is even more relevant considering that under Articles 98 and 99 of the NCC, the courts may declare the liability of the organs, officials, and agents of the State for actions or omissions that generate damages or harm to citizens or affect their fundamental rights.

IV. Looking Ahead

In conclusion, we are facing the biggest, deepest, and most ambitious legal reform plan in Cuba in the last 6 decades. Of course, it is not enough that the legal texts, beginning with the NCC (despite its inadequacies), incorporate a set of advanced values, principles, and institutions, the question is to bring all this to reality, to the operative character of the Law and its institutions in general to manage the growing diversity and complexity of society. Much will have to do with the transformation of a mentality based on the exercise of power justified by the higher interest of the Revolution, into one that understands such exercise in the framework of the Law, as established in Article 1 of the Constitution. The way in which state institutions, government institutions, and courts, manage the translation of constitutional values, principles, and norms into judicial and administrative acts and decisions, meaning, into legal practice *vis-à-vis* citizens, will be a crucial factor in this process.

V. Further Reading

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2 With the exception established in Constitutional Article No. 228, which requires a referendum when "the reform refers to the integration and functions of the National Assembly of People's Power or the Council of State, to the powers or the term of office of the President of the Republic, to the rights, duties, and guarantees enshrined in the Constitution."

3 It is in the Constitution of North Korea, whose influence has not been publicly appealed to, that the idea can be found: all activities of that State are carried out under the direction of the Party, without expressly imposing constitutional obligations on the Party.

4 Although the referendum that approved it was of questionable constitutionality, the new Code is undoubtedly the most advanced piece of legislation in Cuban law and, indeed, the one that most rigorously develops and translates into specific norms, the values, principles, and generic norms contained in the NCC.



Democratic Republic of São Tomé and Príncipe

Jonas Gentil, *Professor of Law, University of Sao Tome and Principe & School of Magistracy of the State of Rio de Janeiro, Brazil, Associate Justice/Jurisconsult and Researcher Legal on CEDIS, NOVA School of Law, Portugal, Former judge of the, Santomean Constitutional Court, Founder of the Santomean Institute of Law and Citizenship, Director of the Santomean Law Yearbook*

J. Jhunior G. Ceita, *Jurisconsult and Author, Master in Legal and Political Sciences, Specialist in Administrative Law, Oil and Gas and Researcher Legal, Executive President of the Institute of Law and Citizenship of Sao Tome and Principe and Deputy Director of the Santomean Law Yearbook, Member of the Scientific Council of the Center for African Studies for Development and Innovation*

I. Introduction

This report aims to present the political, legislative, jurisprudential, and doctrinal evolution of the Democratic Republic of Sao Tome and Principe's (DRSTP/STP) Constitutional Law in 2022. In this regard, and among all, we would bring about the controversial September, 25th 2022's Legislative, Local, and Regional Elections and all judicial implications around it, mainly the need for International Community Intervention, especially those of the Economic Community Of Central African States (ECCAS or CEEAC)[1], European Union (EU), CPLP[2], as well as the acute intervention of the United Nations Development Programme and other UN agencies and its representative for the Region, measures adopted by the Santomean Authority to prevent the all similar situation from happening again, as well as all repercussions around the 2022 Election. As it happened to be, we must stress the importance of the acknowledgment of the State of Liberal Democracy at Sao Tome and Principe as it proved to be stable, at least according to the main international and regional indicators at least according to all their report[3], which is also the internal understanding. Regarding that, there were no major constitutional changes as no constitutional amendments were proposed nor tabled at the Sao Tome and Principe House of Parliament, but the same cannot be said of the political conflicts as some relevant political conflict happened during 2023 that brought some challenges to the entire national and international community namely the above stated in relation to the controversial September, the 25th of 2022's Legislative, Local and Regional Elections and some yet persistent absence of legislation deemed very important to the improvement and strengthening of the constitutional Order and all national Democratic and Republican Institutions.

Additionally, it must be stated that apart from those issues regarding Elections, there are two points worthy of reporting that have occurred in 2023. First is the manifestation of the intention of Sao Tome and Principe House of Parliament's Speaker of a meaningful proposal of eventual Constitutional Amendments deemed needed long ago, according to her own words when on the 8th of November 2023, she took office during the constitution of the new National Legislative Assembly which had a lot of impact since this is the first time since the democratic opening of the country in 1991 that a woman occupies the presidency of the National Assembly of Sao Tome and Principe[4]. Second, by the end. of the year, there was an attempted reversion of the Constitutional Order by force by an armed group whose members are

now identified, and which was avoided due to the coordinated work between the armed forces and the secret services of Sao Tome and Principe at 25th of November 2023[5]. In the same way, relevant legal opinions and studies on political, constitutional, and legal matters about DRSTP were published[6]. Thus, we can conclude that this process is necessary, as some significant events have happened, although no significant changes in the constitutional system have happened as expected. Nevertheless, and as stated in our last report, we must say that the country managed in the best way possible with the adversities despite fear of some international organisations such as the Freedom House in its 2022 report, "São Tomé and Príncipe holds regular, competitive national elections and has undergone multiple transfers of power between rival parties. Civil liberties are generally respected, but poverty and corruption have weakened some institutions and contributed to dysfunction in the justice system. Threats to judicial independence have been a growing concern in recent years."[7]

1. Sao Tome and Principe's democratic history

The DRSTP is an African island State located in the Gulf of Guinea (GG), in the Atlantic Ocean (West Africa) and is the second smallest State on the African continent as well as the smallest State among those belonging to the Community of Portuguese Language Countries (CPLC or CPLP)[8], with an area of 1001 km^2, of which 859 km^2 (Sao Tome) and 142 km^2 (Principe). However, during the 26th United Nations Conference on Climate Change (COP26), which took place in November 2021 in Glasgow, Scotland, Carlos Vila Nova, President of the DRSTP, claimed that the country has already lost 4% of its territory due to rising levels of the sea, a consequence of climate change. So Sao Tome and Principe President also declared that, although the island of Príncipe is part of the World Biosphere Reserve, the island suffers the same threats and that the archipelago as a whole, which had an area of 1001 square kilometers, currently only has 960 kilometers squares. [9] We do not know, however, what the official data to take such a position is based on. The country's capital is the City of Sao Tome, and the country is composed of five districts (Água Grande, Mé-Zóchi, Lembá, Lobata, e Caué) and an autonomous region (Principe Island). According to the latest official data from the National Institute of Statistics (NIS) for 2020 on the general population, the population is estimated at 210,240 inhabitants[10].

The DRSTP is a former Portuguese colony that gained independence on July 12th, 1975[11]. Independence was negotiated between Portugal and the Movement for the Liberation of Sao Tome and Principe (MLSTP), with the two parties concluding a transitional agreement on November 26th, 1974, in Algiers. This Movement, after independence, was based on the Soviet model, governed the State in a one-party regime between 1975 and 1991. According to Kevashinee Pillay and Nélia D. Dias, "[d]ue to political and economic failure, in 1990 the socialist regime was replaced by a multiparty democracy with a semi-presidential regime."[12]The change to the multiparty system occurred after a constitutional *referendum* held on August 22nd, 1990[13]. Since then, the democratic system in the DRSTP has functioned with relative normality, and presidential elections have been held regularly, despite ongoing political instability and a frequent change of government[14]. However, in our recent democratic history, we have had political stability for eight years corresponding Vis a Vis to the last two legislatures period (2014-2018 and 2018-2022, led by Prime Minister Mr. Patrice Trovoada (President of the ADI Party, 2014-2018) and Prime Minister Doctor Jorge Bom Jesus (President of the MLSTP-PSD Party, 2018-2022) both of them having completed their mandate to the end opening the way to a culture of, we hope and constitutional and political stability.

The first Constitutional Law dates from 1975[15] and was revised in 1980, 1982, and 1987. In 1990, with the adoption of representative democracy and the rule of law, a new Constitution was adopted (on September 20th, 1990[16]) and was revised in 2003[17]. The Constitutional Law No. 1/2003 amended the original text of the 1990 Constitution in four main areas*:* i) rearrangement of presidential power and the other organs of sovereignty[18]; ii) the creation of a State Council; iii) regulation of the Santomean Constitutional Court; and iv) introduction of a system of judicial review of constitutionality, and the technique applied for the elaboration of the constitutional drafting was heavily influenced by the Portuguese constitution of 1976, both in terms of the legal systematization adopted and the legal institutions which were used. Following closely the Portuguese Constitution, the semi-presidential system was adopted as the system of government. In our view, regarding the guarantee and revision of the Constitution, a complex judicial review system of constitutionality and legality was introduced for a State with the characteristics of DRSTP.

2. The Constitutional Court

The judiciary organization is referred to in the Constitution (Articles 120-133) and detailed in the current Basic Law of the Judiciary (Law No. 7/2010) and the Organic Law of the Constitutional Court (Law No. 19/2017). The Basic Law of the Judiciary provides, in Article 57 (with Constitutional support), for the possibility of creating the following specialized courts: i) criminal investigation; b) family and children; c) labour; d) commerce; e) maritime; and f) execution of sentences.

The Santomean Constitutional Court (SCC) is the upper Court in the Judiciary Pyramid regarding constitutional matters (Articles 126, 129, 131-134 of the Constitution), its responsibility is that of administration of justice in legal and constitutional matters, having the last and final saying according to the Constitution and the law. The SCC also validates the final election results (Article 133 of the Constitution). It is composed of five judges, three from the judiciary (judges and attorneys) and two Lawyers of merit (academics, researchers, professors, and other national citizens of recognized legal reference). The SCC judges are nominated by the President of the National Assembly (PAN) and elected by the members of the National Assembly for five-year terms, which can be renewed once.

Before January 2018, when the autonomous SCC was established, the Supreme Court of Justice (SCJ), with five judges, also ruled on constitutional issues (Articles 156 and 157 of the Constitution). Thus, the structure of courts under the Santomean Constitution in-

cludes: i) the Constitutional Court; ii) the Supreme Court of Justice; ii) courts with general jurisdiction, which includes the Court of First Instance, the Regional Court, and the District Courts[19]; iii) the Court of Auditors; iv) the Military Tribunals, which have jurisdiction in relation to the "judgment of essentially military crimes defined by law"; and v) "arbitration courts."[20]

The 1990 Constitution, revised in 2003 (currently in force), provides for a very complex system of review of constitutionality and legality, organized based on the system of the Portuguese Constitution of 1976, which includes: i) prior review of constitutionality (Article 145); ii) abstract review of constitutionality and legality (Article 147); iii) concrete review of constitutionality and legality (Article 149); and iv) unconstitutionality due to omission (Article 148). This system has many relevant particularities; however, one is worth noting. According to this system and the Law, when the unconstitutionality or illegality of a rule has been examined and declared in three specific cases, the Constitutional Court should declare the unconstitutionality or illegality of that rule as generally binding.

II. Major Constitutional Developments

As stated in our previous report, the Santomean Constitution has not been revised since 2003 due to the lack of parliamentary consensus in twenty years. Therefore, as stated at the beginning of 2022, there are some main events worth reporting we take as examples of this: i) The controversial September, the 25th 2022's Legislative, Local, and Regional Elections; ii) The controversy under the Specific Date for the Swearing-in of Members of Parliament; iii) Desire of Constitutional amendments proposed but not tabled at Sao Tome and Principe House of Parliament; iv) Attempting reversion of the Constitutional Order, the most recent being the alleged *attempt* at a *Coup State* on 25th November 2022, which led to the massacre and the cruelest *gross* violation of Human Rights in the country, which culminated in the death of four nationals, among them Arlécio Costa, one of the 12 members of the *Buffalo Battalion*, which on 16th July 2003 staged a *coup state* in Sao Tome and Principe.[21]

1. The controversial September, the 25th 2022's Legislative, Local and Regional Elections

In September 2022, as a result of the expiration of the mandate of the previous legislature that had begun in 2018 and led by the former Prime Minister Doctor Jorge Bom Jesus, legislative, regional, and local elections were held in Sao Tome and Principe, conducted in accordance with the Constitution and the Laws in force in the Democratic Republic of São Tomé and Príncipe in this matter.

In this election, in which 11 political forces compete to obtain parliamentary, local, and regional mandates, in addition to some regional and local movements, both in the national territory and in the Diaspora, for the first time in the democratic history of the country, the results of the local elections and regional elections were known on the day they were held and at the latest the day after the election day.

The controversy around these elections has arisen in relation to the Legislative Election, the one that serves for elections of the mandates of the National Assembly Member Parliament, since the results were not, as they should have been, published on the day the elections were held nor in the days following this, causing great suspense in Sao Tome and Principe regarding the announcement of the mandates obtained by the 11 political forces that disputed the legislative elections of September 25th, 2022. According to the *Organic Law of the Constitutional Court,* after the elections, it must, within one week from the date of the closure of the general provisional counts and announcement of the partial results by the *National Electoral Commission (Electoral Commission),* declare the final results and assign mandates according to the results obtained at the polls. Thus, after the counts and partial results, the ADI party, led by Mr. Patrice Emery Trovoada, declared itself as the winning party with an absolute majority of the number of votes cast and thus having the absolute majority of mandates in parliamentary representation in the National Assembly.

Nevertheless, other parties did not accept those claims, and they kept fighting for other results as they kept demanding a recount, and the *Electoral Commission* refused, as it used to do, to provisionally assign mandates to each competing party according to the votes obtained causing great outcry national and internationally so much so that the International community's intervention, especially those of CEEAC[22], European Union, CPLP[23], as well as the acute intervention of United Nations Development Programme and other UN agencies and its representative for the Region were needed.

The Head of the European Union Election Observation Mission (EU EOM) to Sao Tome and Principe, Mrs. Maria Manuel Leitão Marques, Member of Parliament, in a press conference that "The elections took place in a context of general respect for fundamental freedoms and nominally independent democratic institutions" and that "[at] the same time, the process was characterised by some politicised interpretations of the legal-electoral framework and a limited role for civil society. We also noted a weak capacity of state institutions to make information accessible to the public and a reduced participation of women in highest political positions."[24]

It is worth informing that the EU EOM observers were also present during the final tabulation of the local elections and the regional elections in the Autonomous Region of Principe (ARP/RAP) conducted by the competent District Court judges in separate assemblies. The proceedings were efficient and transparent, even though not identical in the various courts, and concluded within a day, on 3 October and 6 October, respectively, after which it has recommended that there is still a need for the Authorities to "Establish clear and precise procedures for the consistent tabulation of final results, including step-by-step activities, throughout the different stages and for the different institutions involved in the result tabulation process."

The judicial implications around the situation were also calamitous as it took the Constitutional Court more than the normal time to act according to the Law in force in the country, and that has caused a great stir both nationally and internationally as almost all cooperation partners, including Angola, Portugal, Guinea Bissau, Cape Verde, United States of Amer-

ica, Brazil, Mozambique, Equatorial Guinea, European Union, ECCAS Members States, African Union, and others International Institutions had already sent congratulatory messages to the winner of the elections which was already clear by that time. Indeed that was a cause for Constitutional and Political Concern for the Country, and everybody and every institution involved in future election have to draw lessons from what happened so that it can be prevented from reoccurring again.

As for the acting Governing Coalition made up of MLSTP-PSD and other minor political parties, among which we can highlight the BASTA Movement led and mentored by the then President of the National Assembly, Mr. Delfim Santiago das Neves, as they kept refusing to recognise the results laid out in the ballot boxes and already known to everyone but that was later solved, and the results became accepted by all.

Nevertheless, the BASTA movement also tried a post-electoral coalition in the counting of votes, with the aim of obtaining more mandates than those that the Ballots said, in this case, there were only 2, thus avoiding the elimination of parties that had not reached the required minimum percentage to continue as a party in the national political landscape in accordance with the *New Electoral Law* in force since 2021 (Law No. 6/2021, published in the *OJ* No. 13, I Série, of February 15, 2021) and approved by the same political parties that were now complaining about the results.

The intention of the Coalition was rejected officially by all members of the Constitutional Court as per the request of ADI of Patrice Trovoada (the *New* Prime Minister Elected), ruling historically against the BASTA Movement of Delfim Santiago das Neves.[25] Therefore we believe that this decision will be one of the most important references in democratic history, especially with regard to party coalitions in the country, and represents a significant gain in clarifying the concept of the pre-electoral Coalition and mere agreements of parliamentary incidences, which, indeed, are permitted by law in Sao Tome and Principe.

From a more academic perspective on the issue, the Portuguese constitutionalist, the distinguished academic Jorge Bacelar Gouveia, considered on that date that the solution found by the political parties for the pooling of votes "[would be] an electoral fraud." It is his understanding that "transferring votes from parties that did not elect any Member Parliament to other parties that elected some [as the three political forces in the country intend] and thus elect Member Parliament where they had not elected before" violates all the principles and defrauds all electoral processes. According to the professor at Universidade Nova de Lisboa, the Santomean Electoral Law, "is clear in saying that there may be coalitions, but before elections." We share the opinion that there should be no coalitions made up after the election process has taken place. He still considers, therefore, that "[although] there may be a norm [which frames the formation of coalitions, article 26º, nº 3 of the [Santomean Electoral Law], which is a little strange and can sometimes generate many doubt," this norm "can never generate a doubt to the point of allowing that, after casting the votes, there may be a transfer [of them] by agreement between the leaders of the parties," going so far as to consider this bizarre option, "illegal and unconstitutional" and that there is no post-electoral coalition alternative in any State in the sense of "taking advantage of votes cast in two [or more parties] that failed to elect Member Parliament (MP), joining these votes in a third party so they could elect more Member Parliament." He still argues and questions that "[this] violates the truth of the voters' vote. Because, if voters voted for a party that did not elect any MP, how are the leaders of those parties going to transfer [the votes] to another party for which voters did not vote for?" In these terms, he recommended that the SCC "must outright reject the request that was made for the transfer of votes, because that is not what is in the Electoral Law," a solution that would be accepted by the TC, considering, it is a "manifest illegality and unconstitutionality."[26]

In this chain, given that the mandates are assigned to the political parties individually considered in the process of installing the Parliament, and after that, there may be other types of coalitions and agreements - in the latter case, it is not about electoral coalitions, but rather parliamentary coalitions. That is, nothing prevents the parties, through their deputies, from coming together to vote in favour of certain things and against others, however, this has nothing to do with the distribution of mandates and votes as the three Parties intended to do. It is, therefore, a question of the vicissitudes of Parliament itself after it began to function.

2. The controversy under the specific Date for the Swearing-in of Member of Parliament

Relegating the previous questions to another debate, the concrete date for the inauguration of deputies generated another constitutional conflict in the country. In strict connection, "the São Tome Parliament asked the Constitutional Court for an assessment of the unconstitutionality or legality of the Resolution approved" by the Permanent Commission of the National Assembly (Commission), which defined, in a second moment, the 8th of November as the date for the taking of office of elected MPs. At stake was, therefore, the lack of precision about the date of inauguration of the MPs elected in the legislative elections of 25 September, the dates under discussion would be the 2nd, the 8th and/or the 22nd of November.

Thus, on the 14th of October, the Commission, consensually, set the swearing-in of new MPs for the 8th of November, thus annulling the previous date scheduled for the 22nd of November, following a request for amendment submitted by the ADI, who understood that the new Electoral Law, revised less than a year before the elections, that is, in 2021, "provides in one of its articles that the mandate of deputies begins in the first session of the elected National Assembly, which must take place 30 days after the proclamation of the results of the general tabulation." The Santomean Parliament, with this request, because of the uncertainties and quarrels around the subject, intended (and rightly so) that the Constitutional Court rule on the constitutionality of the Resolution, which fixes the swearing-in of MPs for the 8th of November. Thus, the discussion centered around the interpretation of the Constitution and the Electoral Law, Article 102 of the Fundamental Law, and Articles 22, 153, and 160 of the Electoral Law.

In this connection, the ADI understood that, considering that the "[the] definitive results of the legislative elections were proclaimed on the 3rd of October by the Constitutional Court, attributing the victory to the ADI, (...), which obtained a total of 36, 212 votes," the which would correspond to 30 mandates, above the 28 needed to have an absolute majority in Parliament, with 55 seats being the total number of mandates, on the one hand, and, as provided for in the aforementioned provisions of the Electoral Law, on the other hand, taking. The inauguration of the MPs could not take place on the date defined by the Parliament, that is, the 8th of November.

In a more attentive reading of the provisions of the Sao Tome and Principe Electoral Law, it can be concluded that: *a)* at first: "[the] mandate of the MPs begins in the first Session of the elected National Assembly, which must take place 30 days after the proclamation of the results of the general tabulation" (article 22) and, *b)* in a second moment: "[the] results of the general tabulation are proclaimed by the [SCC] president and published in the Diário da República (*State Official Journal*)." From here, we can infer that the constitutional legislature considers, and well, the proper separation between proclamation and publication, giving different effects to these two figures (they may coincide or not). For that reason, considering the proclamation of the electoral results to be the highest public act concerning the electoral process and this process being a process that requires speed, the legislator understood that its pronouncement does not require simultaneous publication in the *Official Journal*, being the fulfillment of this last formality the legal observance of the acts and regulations of the State (Article 76 of the Fundamental Law). So much so that the "National Electoral Commission (…) closes [its operation] 30 days after the proclamation of the results," coinciding with the inauguration of the newly Elected MPs (Article 13 of Law No. 07/2021, of 15/02 – National Electoral Commission Law). In these terms, considering that the proclamation took place on the 3rd of October, we understand that the inauguration should take place on the 2nd of November, thus complying with the provisions of our legal system.

3. Perspectives of Constitutional Amendments manifested but not presented in the Santomean Parliament

Another important fact that happened at DRSTP of political and Constitutional relevance is the manifestation of the intention of Sao Tome and Principe House of Parliament's Speaker, Mrs. Celmira Sacramento,[27] of a meaningful proposal of eventual Constitutional Amendments deemed needed long ago, according to her own words when at the 8th of November 2023, she took office during the Constitution of the new National Legislative Assembly and which had a lot of impact since this is the first time since the democratic opening of the country in 1991 that a woman occupies the presidency of the National Assembly of Sao Tome and Principe[28]. According to her declaration, consensus *revision of the Constitution* is one of the challenges of her mandate, promising to fight all *blocking forces* from Members of Parliament.

The President of the Assembly, who is also vice-president of Independent Democratic Action (IDA or ADI), Mrs. Celmira Sacramento, was elected by a large majority for the position of Speaker of the National Assembly and has declared that her "work agenda to the next four years (...) working hard to create consensus for a much needed amendment of the Fundamental Law as well as other laws of great importance for the country." In order to do so, the need to seek "better working conditions for parliamentarians and the most diverse technical support services, with a view to their modernization, effectiveness, improvement of the procedure and the legislative process, introducing greater transparency and speed," including permanent training of deputies and parliamentary staff are also part of the priorities of the new president of Parliament, who promised to adopt "mechanisms that favour the approximation of parliamentarians to their voters and the policy of gender quality," in addition to the end of "inequalities and regional asymmetries," and for that, it intends "the reform of the National Assembly, in order to make it a more dynamic institution, more oriented to the citizens and the real problems of the community, more respected, more credible, more productive and more flexible" was also mentioned[29].

Although her will was openly expressed and known to the public, we think that since the legislature is still in its initial months of a long period of 4 years, we believe that for such an idea to be successful and to be embraced by all members of parliament or at least the necessary 2/3 of the Members of Parliament in the effectiveness of functions, a lot of work will have to be done, among which many negotiations and concessions by the party that supports the Government to the opposition parties, since the eternal relationship of distrust still reigns in the Sao Tome and Principe political landscape. In this sense, we express our skepticism in relation to an eventual implementation, in the short term, of a possible constitutional amendment in the Democratic Republic of Sao Tome and Principe.

4. Attempting reversion of the Constitutional Order

By the end of the year, there was an attempting reversion of the Constitutional Order by force by an armed group whose members are now identified, which was avoided due to the coordinated work between the armed forces and the secret services of Sao Tome and Principe at 25th of November 2023[30].

At the beginning and the sequence of that, it was confirmed that four people died in circumstances that came under investigation, and 16 were detained, including 12 military personnel. These numbers were upgraded further to 60 people, civil and military, among whom was the Deputy Chief of Staff of the Armed Forces.

It is important to bring the information that among the dead is the former officer of the *Buffalo Battalion,* Arlécio Costa, convicted in 2009 for attempted *Coup State* and named as suspected of being one of the masterminds of the attack along with the former President of the National Assembly Delfim Neves – both held by the military in their respective homes (the latter one being later handed over to the judiciary Police and under the leadership of the Public Prosecutor's Office under the watchful guidance of the Attorney

General of the Republic that was later aided by the Portuguese Judiciary Police[31] and the Portuguese Public Ministry, as well as medical assistance (legal medicine) from the Portuguese Government by invitation of Sao Tome and Principe's Government[32-33].

Following these events, the President of the Republic stated that all the acts that occurred after the attack on the military Headquarters should be thoroughly investigated and the culprits held accountable.[34]

Furthermore, while the Government defends that there was an attempted *coup*[35], the Opposition parties are defending that it was nothing more than a false flag operation[36] to cause greater division in the country and eliminate political opponents.

As it stands the Public Prosecutor's Office under the watchful guidance of the Attorney General of the Republic has concluded the First phase of the investigation of the Coup and all Human Rights violations that took place following that and has charged and accused 23 soldiers of murder and torture in the assault on their HQ, including "…Olinto Paquete, former Chief of Staff of the Armed Forces, and Armindo Rodrigues, current Deputy Chief of Staff, for 14 crimes of torture and four crimes of murder. Qualified, following the attempted assault on the military headquarters of the Armed Forces, on 25 November 2022." According to reports from the Sao Tome and Principe Public Ministry, "The soldiers accused of involvement in the attack and the five civilians were brutally tortured in the military installations. The soldiers now accused are: Daniel Carneiro, 3rd Sergeant of the Military Police (in custody); Absallyn Trindade, Lieutenant of the Military Police (in prison pre-trial detention); Geldenitdo Benildo, Military Police officer (under pre-trial detention); Inicial Sousa, Military Police Sergeant-Adjutant (under pre-trial detention); Nuno Quintas, Military Police Lieutenant (under pre-trial detention); Stoy Miller, Police Captain Military (in custody); Abdlu Tomé, Lieutenant of Transmissions (in custody); Ajax Managem, Sergeant of Artillery (in custody); Nílton d'Assunção, Lieutenant of Engineering; Alex Viegas, Lieutenant of Infantry; Jakson Paquete, 2nd Sergeant (in custody); Valdinílson Santos, 1st Infantry Corporal (in custody); Aykemss Danouá, 1st Sergeant of the Sports Section (in custody); Lívio Trindade, Artillery Sergeant; Rodolf Bento, 3rd Sergeant of the Military Band; Alcio Eusébio, Sergeant Chief of Engineering; Jayde Pereira, Captain of the Armed Forces; Ailton Cardoso, Furriel from Agropecuária; Waldimyr da Mata; Gerson Vaz; José Maria Menezes, Colonel of the Armed Forces; Armindo Rodrigues, Captain of the Sea and War of the Coast Guard, Deputy Chief of Staff of the Armed Forces; Olinto Paquete, Brigadier General, former Chief of Staff of the Armed Forces."[37]

In the meantime, in our opinion, we should be cautious and let the Judicial Institutions do their job and that all those responsible be brought before the bars of justice and duly sanctioned so that the country follows its path of growth and institutional maturity, as well as galvanize and strengthen the resilience of the country's republican institutions.

IV. Looking Ahead

In 2023, multiple scenarios are open. Despite the fact that since the outbreak of the pandemic (Covid-19) to the financial, social, and political crisis and the discussions on justice reform, including legal and constitutional, that the country has been going through in recent years, it is expected that political parties recognize this need for amendments and taking a position, however, it is doubtful whether there is the degree of consensus desired for its effective implementation. In addition, a major Constitutional amendment was already announced by the Speaker of the House of Parliament and political parties, although the political polarization is still a reality, those reforms, above all, the constitutional amendment need, in our view point, to go ahead.

What also remains open is how the tension between the executive and the judiciary shall be played out, as the implementation of the Memorandum for justice reform much needed over the years. Lastly, with the probable commercial oil discovery this year in DRSTP and as it is a post-electoral year, we believe that some conflict between the political parties is foreseen, causing further division and lack of consensus for the well-needed Constitutional Law as planned by the ruling party.

V. Further Reading

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2 Acronym for Community of Portuguese Speaking Countries. See: CPLP - Comunidade dos Países de Língua Portuguesa. [Accessed 11 April 2023].

3 The country is still classified as free by the Freedom House Report 2022. See: Freedom House. São Tomé and Príncipe: Freedom in the World 2022 Country Report. [Accessed 11 April 2023].

4 See 'Celmira Sacramento quer revisão consensual da Constituição – DW – 08/11/2022' [accessed 11 April 2023].

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8 The DRSTP is a founding member of the CPLC (1996), an international organization that unites the states that have adopted Portuguese as their official language.

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12 See Pillay, Kevashinee and D. Dias, Nélia, 'São Tomé and Príncipe: Legal System and Research', (2018) HGLSP, NYUSL, available at: https://www.nyulawglobal.org/globalex/Sao_Tome_Principe1.html [accessed on 15.11.2021].

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14 The DRSTP had eighteenth governments during the application of the Constitution of 1975, being the current one directed for the fourth time by the Mr. Patrice Trovoada. Only the last one Governments managed to fulfill their mandate, this can be justified by the parliamentary majority for the recent pandemic. The organization of political power is based on the "principles of separation and interdependence" of sovereign bodies, pursuant to Article 69/1 and Article 154/f. The organs of sovereignty, under Article 68, are the President of the Republic (Articles 77 to 87), the National Assembly (Articles 92 to 107), the Government (Articles 108 to 119), and the Courts (Articles 120 to 134).

15 See text in the Official Journal [OJ], of December 15, 1975. Prior to the 1975 Constitution the Basic Law adopted on 12 July 1975, published in OJ No. 1, July 17, 1975 was in force.

16 See Law No. 7/90, published in the OJ of September 20, 1990.

17 See Law No. 1/2003 (Law of Constitutional Revision), published in the OJ of January 29, 2003.

18 Discussions on constitutional matters in DRSTP have focused primarily on the issue of the system of government and the distribution of powers between the President and the Government. A recurring theme has been the replacement of the semi-presidential system, adopted in the 1990 Constitution, for a presidential system, despite the strengthening of presidential powers not normally accompanied by the provision of oversight mechanisms at the level of the representative body. The attraction of a presidential system is explained by Gerhard Seibert, in 'Instabilidade política e revisão constitucional: semipresidencialismo em São Tomé e Príncipe', in Marina Costa Lobo and Octávio Amorim Neto (org.), O semipresidencialismo nos países de língua portuguesa, (2009, Lisboa, Imprensa de Ciências Sociais, 2009). Seibert considers in this article that "[in] this context the configuration of political power introduced in 1990 was also a significant rupture with the past".

19 See Law No. 7/2010 (Basic Law of the Judiciary), published in the OJ of August 6, 2010, and provides, in article 15/1, for the existence only of "courts of first instance and the Supreme Court". See also article 126 of the Fundamental Law.

20 The Basic Law of the Judiciary provides, in Article 57, for the possibility of creating the following specialized courts. See also article 126 of the Fundamental Law.

21 See <https://www.rfi.fr/pt/sao-tome-e-principe/20170818-sao-tome-arlecio-costa-desmente-peter-lopes> [accessed 03 May 2023].

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23See: CPLP - Comunidade dos Países de Língua Portuguesa. [Accessed 11 April 2023].

24 It is important to note that The Election Observation Missions are independent from the institutions of the European Union. The views and opinions expressed in this report are those of the authors and do not necessarily reflect the official policy and position of the European Union. See: <"A MOE UE apresenta o seu Relatório Final, incluindo 22 recomendações | EEAS Website (europa.eu)">. [accessed 11 April 2023].

25 See "Líder da ADI quer que TC são-tomense rejeite coligação pós-eleitoral (rfi.fr)" [accessed 11 April 2023].

26 Note that the translation is ours. See https://jornaleconomico.pt/noticias/sao-tome-eleicoes-transferencia-de-votos-seria-uma-fraude-eleitoral-diz-bacelar-gouveia-944115 [accessed 03 May 2023].

27 See <https://www.stp-press.st/2022/11/09/celmira-sacramento-assume-parlamento-e-quebra-jejum-de-mais-trinta-anos-apos-alda-espirito-santos/> [accessed 04 May 2023].

28See "Celmira Sacramento quer revisão consensual da Constituição – DW – 08/11/2022" [accessed 11 April 2023].

29 Ibid.

30See "Tentativa de golpe em São Tomé e Príncipe foi promovida "pelos que não respeitam as urnas", diz ativista - 25/11/2022 - UOL Notícias" [accessed 11 April 2023].

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32See "São Tomé e Príncipe: 23 militares acusados por homicídio e tortura no assalto ao quartel (rfi.fr)". [accessed 11 April 2023].

33See "São Tomé: PR pede investigação a mortes após ataque – DW – 02/12/2022". [accessed 11 April 2023].

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35 Ibid.

36See "São Tomé e Príncipe: MLSTP pede a demissão do ministro da Defesa (rfi.fr)" [accessed 11 April 2023].

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Denmark

Mikele Schultz-Knudsen, Postdoc, Centre for European and Comparative Legal Studies, Faculty of Law, University of Copenhagen

I. Introduction

This year felt like a conclusion to an unstable and divisive period of constitutional politics, which eventually led to a new parliamentary alliance. The major political case that Danish politics had centered around for the last two years – the legality of the government's decision in 2020 to cull all mink to hinder mutations of Covid-19 – came to a conclusion. The commission investigating the case delivered its report, which eventually caused the government to lose its majority in Parliament, triggering an election.

Due to a never before used election law technicality, the alliance supporting the Social Democratic government gained a majority in the new Parliament, despite not receiving the majority of the votes. However, instead of forming a government with its traditional allies, the Social Democrats opted for an alliance across the aisle, forming a government with their main political opponent, Venstre (the Liberal Party), as well as the newly formed Moderates. Only once before has Denmark had a government across the two traditional political blocs, and last time – more than 40 years ago – the government collapsed after one year. Thus, the sitting government is a completely new political landscape in Denmark.

During the year, Denmark also abolished its opt-out of EU's military cooperation through a referendum triggered by the invasion of Ukraine.

II. Major Constitutional Developments

1. Change in Denmark's EU relationship due to the invasion of Ukraine

Security policy in the Nordic countries has long been a complicated affair. While Finland and Sweden have not been members of NATO, they have been active members of the EU's European Defence Agency (EDA). For Denmark, the situation was the opposite. While Denmark is a founding member of NATO, it was the only EU country not participating in EDA. This was due to the opt-outs to the EU treaties that Denmark gained after the population rejected the Maastricht Treaty in a referendum in 1992. One of these opt-outs concerned the EU's Common Security and Defence Policy, which Denmark has not participated in.

Following the Russian invasion of Ukraine in 2022, Denmark decided to take steps to join the EDA and held a referendum on the issue. More than two-thirds of the voters voted "yes" to remove the opt-out, meaning that Denmark can now participate in the EU's security and defense cooperations.

Denmark still has three remaining opt-outs to the EU cooperation, although one of these is no longer of any practical importance. The remaining two opt-outs concern the Economic and Monetary Union and the Justice and Home Affairs. Each of the two remaining opt-outs has already had referendums, one of them held in 2000 and the other in 2015, where the population voted "no" to removing them, making the 2022 referendum the first successful attempt at removing such opt-outs.

At the time of writing, it has been announced that both Finland and Sweden will join NATO, meaning that Denmark, Finland, Norway, and Sweden will now all participate in both NATO and EDA (Norway as a non-EU member). This makes the security policy across the Nordic countries much more uniform. In March 2023, these four Nordic countries announced their intention to combine their air forces into one shared fleet, creating a unified Nordic air defense.

The invasion of Ukraine has also led the government to take several other steps, including supporting Ukraine with military equipment and making more lenient regulations for refugees from Ukraine.

2. Political commission triggered early election

Two important commissions, described in more detail in my reports from previous years, delivered their final reports in 2022.

The Tibet Commission has investigated situations during official visits from China, where Danish police illegally hindered demonstrations supporting Tibet from being visible to Chinese representatives. In its final report from 2017, the Commission had placed the responsibility for these actions solely on the police in Copenhagen. However, the Commission was reopened due to new information. In its (second) final report from 2022, the Commission severely criticized the Foreign Ministry and the Security and Intelligence Service, finding that both had over several years put significant pressure on the police to get demonstrations removed or hidden during state visits from China. The Foreign Ministry was criticized for placing the aim of not offending Chinese guests above the Constitution and the European Convention on Human Rights (ECHR).

The Mink Commission delivered a report which was even more politically explosive. The Commission investigated the government's decision in November 2020 to cull all mink to prevent new mutations of Covid-19. The Commission found that the government had not had the necessary statutory authority to make this decision. The Commission provided severe criticism of ten high-ranking civil servants, including the heads of the Prime Minister's Office, the Ministry of Law, the Ministry of Food, and the Danish police. Following the report, employment proceedings were initiated against all of these, initially leading to reprimands for most of them. See my comments in the "Looking ahead" section at the end of this report regarding the continuing development of these employment cases.

The Commission also described statements from the Prime Minister, in which she had informed mink farmers that they had to cull all their mink, as "grossly misleading". However, it found that the Prime Minister had not known about the lack of a legal basis and had not deliberately misled the farmers. The Commission was not tasked with determining whether the Prime Minister had conducted gross negligence by announcing this decision without realizing the lack of a legal basis. If the Prime Minister has been grossly negligent in this regard, she could potentially be criminally liable, but that was not for this Commission to determine.

Due to the lack of a conclusion regarding the Prime Minister's potential criminal liability, the opposition parties argued that an attorney-led investigation should determine whether the actions described in the Commission's report could be classified as gross negligence, in which case the Prime Minister should stand in an impeachment trial. The coalition of parties supporting the government rejected this process. However, one party in this coalition, the Social Liberal Party, argued for a political consequence instead of a legal consequence. The party demanded that the Prime Minister should announce early elections or lose their support. The party made this declaration during the summer holidays. Since this was not an ideal time for elections, they informed the Prime Minister that she had to announce the election at the latest in early October, causing an unusual situation where the elections had not been announced but were expected to happen. In early October, the Prime Minister announced that elections would take place. The elections were crucial for the Prime Minister since if the opposition were to win, they could have continued their plans for a potential impeachment trial. The result of the election is described in the following two sections.

3. Challenges to the traditional stability of constitutional politics

For more than 100 years, Denmark has had two political blocs that have taken turns ruling Denmark, with the dominant political parties being very stable. The "Red Bloc" has always been led by the Social Democrats, with support from socialist and communist parties. The "Blue Bloc" has primarily consisted of the Liberal Party (Venstre) and the Conservative Party, which have taken turns being the dominant party of that bloc, with Venstre being the dominant party for the last 30 years. Historically, the Social Liberal Party was placed between the blocs, but for the last 30 years, this party has increasingly been seen as a member of the Red Bloc. Since WW2, Denmark has only once had a government formed between the blocs: For one year, between 1978-79, the Social Democrats and Venstre formed a minority government, which has historically been regarded as a failure.

However, during the latest election cycle, this traditional bloc model and the stability of the dominant political parties became challenged by significant players.

Denmark's last election was held in 2019. The Blue Bloc lost its majority, causing Prime Minister Lars Løkke Rasmussen to resign. Against his will, he was forced to also step down as the chair of Venstre. This caused him to create a new political party, the Moderates. Rasmussen regarded it as a problem that both political blocs had become dependent on political parties far removed from the political center (communist parties in Red Bloc and nationalist parties in Blue Bloc). His vision was to create the foundation for a government across the aisle, leaving his traditional partners in the Blue Bloc. When Prime Minister Mette Frederiksen announced the elections of 2022, she stated that she now also aimed to form a government across the political aisle, thereby leaving her traditional partners in the Red Bloc.
Lars Løkke Rasmussen's departure from Venstre had also been part of another form of instability in Danish politics, causing a

significant crisis in Venstre, which had until then been the dominant political party of the 21st century, holding the prime minister post for 14 years between 2001-2019. The crisis became exponentially worse when their former vice-chair Inger Støjberg left the party after a majority of MPs, including Venstre, had voted to initiate an impeachment trial against her. She also created a new political party, "The Danish Democrats – Inger Støjberg", based on a populist agenda.

Her departure from Venstre also triggered a split in the Danish People's Party, where an internal conflict had caused a new chair to be elected. Eventually, 11 of this party's 16 MPs decided to leave the party with eight of them joining the Danish Democrats. Due to these and similar dramatic crises in other parties, most significantly in the Alternative (a "Green Party"), where four out of five MPs left the party after a change in leadership, the period between 2019-2022 has been described as the most unstable ever with a record number of MPs leaving their party. In total, 24 MPs (14 % of all MPs) have directly left their political party during this election cycle. Another 8 MPs (5 %) have left the Parliament without first having left their party, meaning that almost one in five of the MPs elected in 2019 no longer represented the party they were elected from in 2022.

These events appear to highlight that Danish politics have become much more fixated on the person in charge of the political party than on the political ideologue, with new political parties being formed around a popular politician and with MPs changing their party when a new leader has been elected. If this tendency continues, it will create instability for the traditionally stable political parties. It has also been speculated that voters might feel disenfranchised because of these significant shifts in-between parties between elections.

The 2022 election became a success for the new political parties, while it was a disaster for several of the traditionally dominant parties, including Venstre (which lost almost half of its voters), the Social Liberal Party (which lost more than half of its voters), and the Danish People's Party (which lost two-thirds of their voters). Such significant shifts in voting patterns further highlight an increased instability in Danish politics.

4. Election law technicality led to the first Centrist Majority Government

On election night, with 99 % of the vote counted, the national TV channel (DR) predicted that the Red Bloc would get 89 and the Blue Bloc 90 mandates, while the other main TV channel (TV2) predicted the exact opposite. It turned out that DR had forgotten to include a specific provision in the election law in their calculations.

During elections, Denmark is divided into ten districts. In each district, MPs are elected directly to the Parliament. After each district's MPs have been assigned, any party that has not received enough regional MPs compared to their total voter share will be assigned extra MPs. This leads to each party ideally receiving the same proportion of MPs as their proportion of votes.

However, a specific provision in the election law states that if a party were to have received more regional mandates than the number of MPs that they are supposed to get due to their national vote share, then the party gets to keep the extra mandates, despite thereby being overrepresented in Parliament compared to their national vote share. This provision had never been used before, since it would only happen if one party became much larger than any other party across all districts. However, due to the collapse of the other major political party (Venstre), the Social Democrats received twice as many votes nationally as the second-largest party. This caused them to win an extra mandate than their national vote share should technically give them, tipping the majority to the Red Bloc, which had already been favored by also winning three out of the special four mandates from Greenland and Faroe Islands.

The election was followed by the longest government negotiations since WW2 (six weeks). The extra mandate gave the Social Democrats the choice between continuing their government based on the Red Bloc or forming a new government across the aisle. True to their election campaign, they aimed for a coalition across the aisle and formed a coalition of the Social Democrats, the Moderates, and Venstre. As described above, this is unusual in Danish politics. The inclusion of Venstre was especially significant. They had been leading critics of Mette Frederiksen during the last election cycle and had run an election campaign arguing against a coalition across the aisle.

The three parties in government have a majority on their own in Parliament. This is also unusual in Danish politics. There have only been four other majority governments since WW2 (the last one 30 years ago). Having the majority on their own creates more stability for the new government, but it also means that many compromises will be made "behind closed doors" instead of in an open societal debate between the government and other parties.

The new centrist government appears to have ended the divisive political rhetoric of the preceding three years, bringing political opponents together in a coalition. The new political movements also appear to have taken some of the energy out of the immigration and integration debate, which has been the major political theme of the preceding 20 years. The government itself is claiming that cooperation across the aisle will allow for economic reforms. It awaits to be seen whether the centrist government will be the new normal in Danish politics, or a successful one-off event that creates long-lasting reforms before the old blocs are reestablished, or if it will eventually be a failure.

III. Constitutional Cases

1. Supreme Court, 31 May 2022: The Ministry of Defense was not liable for abuse carried out by Iraqi forces despite collaborating with them

In this court case, 23 Iraqi individuals sued the Danish state for abuse carried out against them by Iraqi forces during a military operation that the Danish military participated in. The Danish courts found that 18 individuals had received inhumane treatment. The Su-

preme Court found that Danish authorities could be held liable for actions carried out by foreign countries' forces against detainees when Danish forces have supported these forces' ability to carry out these detentions and have had concrete reasons to assume that detainees will receive inhuman treatment. However, according to the Court, the bar for assessing such circumstances could not be set too low, as this could preclude Danish forces from contributing to stabilizing conflict areas with a questionable human rights situation. In the concrete case, the Danish forces were carrying out decisions made in the Danish Parliament and the UN Security Council and had no concrete reason to assume that the detainees would be abused. Further, concerning ECHR art. 3, the Danish forces had not had jurisdiction over the detainees. Thus, the Danish Ministry of Defense was neither liable according to Danish liability law nor according to the ECHR.

2. *Supreme Court, 30 March 2022:* Rules on retention of electronic communication data were not invalid

This case relates to legislation discussed in my reports from earlier years. It has long been thought that Danish rules might be in breach of EU rules, which preclude general and indiscriminate retention of traffic and location data of electronic communication. Because of this, Denmark changed its rules in 2022. Prior to this, an organization had sued the Danish state, arguing that the Danish rules were invalid and that the Danish state had been too slow at correcting them. Quite unusually, the Danish Parliament decided that the new legislation from 2022 was to enter into effect at the exact moment the Danish Supreme Court made its decision in this case. This was to avoid the new legislation making it impossible for the organization to get an assessment of whether or not the old legislation had been a breach of EU rules. The Supreme Court found that the old rules could not be declared generally invalid. Instead, it would have had to be decided in concrete cases whether the specific use of the rules was in breach of EU rules. The Court also refused to assess whether the Danish government had been too slow in adopting legal change following ECJ decisions, finding that the organization had no legal interest in having this assessed.

3. *Eastern High Court, 4 November 2022:* Child conceived with sperm from a Danish donor did not have Danish citizenship

In 2018, a boy was born to a single mother with Cuban citizenship living in Denmark. The child was conceived at a Danish clinic through assisted reproduction using sperm from a donor, who was a Danish citizen. Children born in Denmark do not automatically receive Danish citizenship unless one of their parents has Danish citizenship. The mother argued that since the child's biological father was a Danish citizen, the child should receive citizenship. The Danish law on citizenship did not contain any definition of the term "father". However, the Court found that this term had to be understood similarly to the definition in the Danish law on children, which states that a sperm donor is not legally considered to be the father of a child conceived through assisted reproduction. For this reason, the child did not receive Danish citizenship. The Court found that this was not a breach of the Convention on the Rights of the Child and also not a breach of article 14 of ECHR, since the child was not discriminated against in comparison to other children without a legal father.

4. *Supreme Court, 1 February 2022*: Danish doctors had been permitted to carry out a blood transfusion on an unconscious patient, despite the patient earlier having refused such procedures due to religious beliefs

In 2014, doctors were informed by family members of an unconscious patient that had been brought in following an accident that he was a member of Jehovah's Witnesses and did not want to receive blood transfusions. The man was carrying a signed document from 2012, where he made the same views clear. Despite this, the doctors gave him a blood transfusion in an unsuccessful attempt to save his life. Following his death, his wife made a complaint regarding the blood transfusion. The Court found that Danish health law required patients to have made an informed decision in relation to the concrete medical condition before doctors had to comply with a refusal to receive blood. Thus, the patient's earlier views on the matter were not binding for doctors. The Court found that the doctors' decision was not against the ECHR. In this connection, the Court noted that case law from the European Court of Human Rights did not appear to prevent legislators from setting specific conditions for when a patient's refusal to receive blood was binding for doctors. There were legitimate reasons for having prioritized other considerations when making these conditions, including the difficulties for doctors in determining with certainty an unconscious patient's views on blood transfusions in a life-threatening situation.

5. *European Court of Human Rights, 6 December 2022*: Case of K.K. and Others V. Denmark: Denmark could not prevent children born from surrogacy from being adopted

In my review from 2020, I described a decision from the Danish Supreme Court, where a Danish couple had used a surrogate mother from Ukraine to give birth to two children. The Danish man was recognized by the authorities as the father of the children because they were biologically his. However, the authorities refused to let the Danish woman adopt the children due to a complete ban in Denmark on adoption in situations where a surrogacy mother has received payment. In its decision, the Supreme Court informed the Danish authorities that such a complete ban was against the ECHR. However, in its concrete assessment of the case, the Supreme Court's majority still decided that this specific mother could not be allowed to adopt the children because their interest in being recognized legally as her children did not outweigh the general interest in assuring that children are not sold and that vulnerable women are not exploited. This year, the case reached the European Court of Human Rights, where the majority reached the opposite conclusion. Although the Danish authorities had given the woman joint custody over the children with the biological father, the majority found a breach of the children's private life due to the lack of legal recognition of their parent-child relationship. In

this connection, the Court did not accept the Supreme Court's balance between the children's interest versus the more general interest, stating that in cases concerning a child, the best interests of that child are paramount.

IV. Looking Ahead

The central question of 2023 will be how well the new political experiment of a coalition government across the political aisle will do.

Denmark has sued the EU Commission in an act of annulment at the European Court of Justice, believing the new minimum wage directive to be in breach of EU treaties. The directive is seen as an intervention in the special Danish labor law model.

Last year's review described the controversial court case against both a former Minister of Defense and the head of the Danish Defense Intelligence Service, both of which have been accused of leaking confidential information. As an MP, the former minister had immunity against being prosecuted for these charges. In 2022, the Parliament refused to waive this immunity because the confidentiality surrounding the case made it impossible for MPs to be informed about the exact charges. This is the first time the Danish Parliament has chosen not to waive the immunity of an MP (excluding cases concerning statements made in Parliament, which are regulated in a separate article of the Danish Constitution). However, since the former Minister did not run in the elections, he is no longer protected by immunity. The court cases against both men are therefore ongoing.

As mentioned in the above section on constitutional cases, Denmark changed its regulation on the retention of electronic communication data because it was in breach of EU rules. However, as described in last year's review, the new rules were likely to still be a breach of EU rules. Less than a week after the new rules had been implemented, the ECJ made a new decision on the same topic in a case concerning Ireland (C-140/20). The result of the case made it clear that the new Danish rules were still in breach of EU rules.

Based on this decision, the Danish government is now considering further changes to Danish legislation while still attempting to go to the very limit of the European Charter of Fundamental Rights.

In early 2023, the Mink Case turned out not to have concluded. During employment proceedings, the head of the Danish police was acquitted of the critique that the Mink Commission had raised against him (as described above) due to the new proceedings reaching different conclusions than the Commission. Following the acquittal of the head of the police, several other civil servants critiqued by the Mink Commission have had their reprimands retracted, including the heads of the Prime Minister's Office and of the Ministry of Law. This might not be the conclusion to the case: Towards the end of 2022, a lobby organization for Danish farmers sued the state, arguing that the decision to cull the mink had been a breach of the European Convention on Human Rights.

V. Further Reading

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Ecuador

Ana Morales, *Law Clerk, Constitutional Court of Ecuador*

Arturo Rafael Rivas, *Law Clerk, Constitutional Court of Ecuador*

Roberto Eguiguren, *Chief of Staff , Constitutional Court of Ecuador*

I. Introduction

The year 2022 witnessed significant constitutional developments in Ecuador, including the partial renovation of the Constitutional Court ("CCE") and a failed attempt at constitutional reform. Ecuador also grappled with issues relating to the security crisis and the balancing of powers between the executive and the legislative branch which, alongside the advancement of constitutional rights, marked the agenda of the Constitutional Court. This report examines these developments and highlights key judicial decisions that shaped the country's constitutional landscape.

The report begins with the most important developments in constitutional matters across 2022. At the beginning of the year, the Constitutional Court underwent a partial renovation, marking a historic moment for the institution. A transparent transition solidified the Court's reputation as an independent body, free from political influence. However, the new composition faced challenges in terms of the Court's institutionalization and ideological trajectory. On the other hand, late 2022 was marked by President Guillermo Lasso's attempt to amend the Constitution, which was denied in a popular referendum held in February 2023. The proposed amendments covered various areas, including the role of the armed forces, institutional competencies, the size of Congress, and environmental protection. The Court played a crucial role in reviewing these proposed amendments. It determined that certain changes could proceed through a less demanding process of amendment, while others required stricter procedures due to their sensitive nature.

After mentioning these developments, the second part of the report presents the most salient cases of the jurisprudence of the CCE during 2022. Across the year, the Court focused on addressing important issues relating to the exercise of executive power and balancing of power issues with the legislative body, freedom of expression, religious freedom, fiscal sustainability, women's rights, indigenous people's rights to prior consultation, and children's rights. These cases underscored the Court's commitment to protecting fundamental rights, as well as acting as a balancing force against the worst excesses of the rest of the branches of government.

The report ends with a look at the possible future scenarios for Ecuador in 2023. It highlights the likely possibility that President Lasso will face impeachment proceedings and the important role that the Constitution assigns to the Constitutional Court if such an event occurs. Next year will also be marked by the Court's intention to address problems arising from corruption and weak institutionality within Ecuador's judicial system and rectify abuses of constitutional guarantees.

II. Major Constitutional Developments

This year, Ecuador's most impactful constitutional developments included the partial renovation of the Constitutional Court and a failed constitutional reform attempt. A third of the Court changed in early 2022, while an important effort to amend the Constitution, led by President Guillermo Lasso in late 2022, was denied in a popular referendum conducted in February 2023.

Ecuador's previous reports highlighted the transformation of the Constitutional Court, under the composition seated in 2019, into an autonomous, independent, and highly regarded institution. Early 2022 marked a crucial moment for the Court as it went through a partial renovation of a third of its members. It marked the first fully transparent transition of a High Court in Ecuador's history, consolidating the image of the Court as an independent institution freed from political control.

The Court's partial renovation had several consequences for its functioning in 2022. Numerically, the renovation slowed down the production of the CCE, as the institution issued considerably fewer judgments than its record-setting numbers of 2021. The new composition also faced enormous challenges in continuing the process of the Court's institutionalization. As is true with any High Court, the composition of the CCE can play a pivotal role in shaping its ideological trajectory. The renewal of one-third of the Court's members has, in certain respects, altered its ideological stance, rendering the judges' political positions less predictable. As most of the new judges were nominated by the President, they also had to endure undue pressure in politically sensitive decisions. Soon after being seated, the new composition of the Court faced an enormous challenge early on as it was tasked with adjudicating the constitutionality of a series of proposals made by President Lasso to amend the Constitution.

Ecuador's 2021 report foresaw social discontent being fueled by President Lasso's weak government, its strained relations with the National Assembly, and lingering COVID-19 effects. Under such conditions, direct democratic mechanisms such as popular referendums were predicted as potential avenues for the President to pursue his agenda. This prediction proved to be quite accurate, as President Lasso proposed a massive set of constitutional amendments in late 2022. His proposal included changes in the participation of the armed forces in the internal security of the state, institutional competencies of the Citizen Participation Council, the reduction of the number of members of Congress, and the protection of the environment.

To be amended, Ecuador's Constitution establishes a complicated process that includes constant CCE involvement. It establishes three different mechanisms for reform and requires that any proposal be reviewed by the Court to determine the appropriate avenue. The propositions put forth by President Lasso were subject to several opinions issued by the CCE before granting them approval to be consulted in elections that would be held next year.

In October, the Court considered Case 4-22-RC/22 regarding eight proposals for amendments made by President Lasso. The Court determined that the less demanding process of amendment was appropriate to (i) allow the extradition of Ecuadorians who have committed crimes related to transnational organized crime; (ii) reinforce the autonomy of the Attorney General's Office; (iii) reduce the number of national assembly members; (iv) strengthen the requirements for political parties; (iv) incorporate a water protection subsystem into the National System of Protected Areas; and (v) create economic compensation for environmental actions.

On the other hand, the Court concluded that a stricter reform process was necessary for proposals aimed at allowing the involvement of the Armed Forces in the internal security of the state –a historically sensitive issue for Ecuador– and eliminating the power to designate authorities assigned to the Council for Citizen Participation. President Lasso then changed his proposal to conform to the Courts' standards. In case 6-22-RC/22, the Court ruled that the new proposal could be processed by a lighter amendment process, as this second attempt structured an adequate balance in the power of the government branches involved in the designation of public authorities.

Ecuador's amendment process includes a second pronouncement from the CCE to establish the constitutionality of popular referendums for amending constitutional texts; after case 6-22-RC/22 was emitted, in case 6-22-RC/22A, the Court ruled on the constitutionality of the questions and their introductory considerations that would be submitted to popular consultation. Alongside his proposals for constitutional reform, Ecuador's President also put forward a package of legislative reforms to the Integral Organic Criminal Code and the Internal Tax Regime Law. The modifications sought to allocate the confiscated values for crimes linked to organized crime to education programs, typify the crime of organized extortion, and add a tax incentive to those who employ people over the age of 45. However, the Court denied viability to the proposal because it considered that the material and formal constitutional parameters had not been met.

Following the constitutional control process conducted by the Court, the President's proposals for constitutional and legislative reforms underwent popular voting in February 2023, coinciding with the regional elections in Ecuador. The President faced a resounding rejection as all his proposals were denied. These results highlight the President's vulnerability and may incentivize his political opponents to explore alternatives to the premature termination of his presidency in 2023.

III. Constitutional Cases

1. Relationship between the executive power and the Ecuadorian Constitutional Court

Ecuador's 2021 report indicated that the country faced an increase in violence because of the consolidation of armed criminal organizations involved in the international traffic of illicit substances. In 2022, Lasso's government response to the security crises was limited to issuing several states of emergency. Reviewing the constitutionality of these declarations in resolutions 2-22-EE/22, 3-22-EE/22, and 6-22-EE/22, the CCE determined that the overflow of crime must be faced with a structural and comprehensive vision and not be limited to extraordinary measures. In addition, the Court established that the abuse of states of exception is not compatible with the democratic regime and is not an appropriate tool to solve this problem. The Court warned that public forces must respect standards for the progressive use of force and guarantee respect for human rights.

The Court also had to review declarations of emergency related to social mobilization in which indigenous organizations demanded solutions to economic and social problems. Over 18 days in June, Ecuadorian society descended into chaos. Strikes led by indigenous communities mutated into a multi-pronged social outburst that threatened the entire constitutional order. Ecuador's weak political institutions faced the risk of collapse under this social explosion, so President Lasso issued two declarations of emergency to gain control of the situation. In resolutions 4-22-EE/22 and 5-22-EE/22, the Court declared the constitutionality of both declarations but ordered dialogue mechanisms with an intercultural approach and participatory inclusion. The Court also warned that state agents could not act under excesses to control possible acts of violence.

As an additional issue, in 2022, the small town of Zaruma faced an existential crisis created by sinkholes caused by years of continued illegal mining activity under the area of the city. This situation was also confronted through a declaration of emergency that the Court ruled constitutional in decision 1-22-EE/22. The CCE excluded the intervention of the armed forces, stating that they have ordinary jurisdiction to respond in the face of disasters. The Court also highlighted that coordinated action had to be taken under the ordinary regime to prevent new episodes of subsidence that could threaten the structure of the entire town.

Besides controlling the constitutionality of states of emergency, the Court also enforced constitutional limits on the relationship between Legislative and Executive powers within the framework of the legislative process. Ecuador's Constitution includes a Presidential veto for approval of legislation that can be made for reasons of convenience or constitutionality. In this second case, the Court must rule on the constitutionality of the intended measures. In 2021, the Court mandated the enactment of a law regulating access to abortion in the case of rape. After the National Assembly passed a bill in 2022, the Ecuadorian President vetoed it for reasons of convenience, against which the Constitutional Court does not have any power of review. Despite this, the Legislature sent the text to the Court because, in its opinion, the objection was made on constitutional grounds. In decision 1-22-OP/22, the Court determined that the National Assembly had exceeded its powers, since veto powers rest exclusively on the Executive and is, therefore, the only one that can determine whether or not the objection made is constitutional. Through this decision, the Court assured the maintenance of the balance of powers between these two branches of government.

2. Freedom of expression and free exercise of religion

In 2022, the Court protected the right to freedom of expression, controlling the constitutionality of a new law intended to regulate communication, and developed this right in the context of the Internet and social networks in educational settings. President Lasso vetoed reforms to the Communication Law on constitutional grounds, which led to the decision 3-22-OP/22. The CCE showed that the reduction in frequencies for public and private media was not based on technical criteria or constitutional principles. Moreover, the Court observed that the new regulations unconstitutionally allowed an administrative agency to examine and control the content disseminated by the media and decide whether to exclude frequencies or not. In the Court's opinion, this constituted censorship and violated the right to freedom of expression.

In Case 785-20-JP/22, the Court reviewed a case in which a student was penalized for publishing satirical memes of teachers and authorities of an educational institution. In front of that, the Court analyzed the limits of freedom of expression and determined that, in this case, the limitation to the right of freedom of expression was greater compared to the guarantee of other rights. Therefore, the Court concluded that the publication of memes on the Instagram social network constituted a legitimate exercise of his right to freedom of expression.

Regarding the right to free exercise of religion, in decision 112-20-JP/22, the Court reviewed two cases filed by Adventist students who observed the Sabbath and argued that their constitutional rights were violated because their universities refused to accommodate their schedules on Saturdays. The Court established that when there is a possible conflict between academic activities and the free exercise of religion, educational centers must make accommodations and reasonable adjustments so as not to impede sincere religious practices, and in turn, allow the fulfillment of educational activities.

3. Decisions on fiscal sustainability

In 2022, the Constitutional Court played a decisive role in matters pertaining to taxation and fiscal sustainability. In case 110-21-IN/22, the Court predominantly declared the constitutionality of the Organic Law for Economic Development and Fiscal Sustainability enacted in response to the financial crisis caused by the COVID-19 pandemic. The law proposed by the current government aimed to considerably increase tax revenue to comply with agreements made with the International Monetary Fund.

Moreover, fiscal sustainability faced a huge challenge because of unrealistic increases in the salaries and retirement benefits of public-school teachers included in the reforms of the Organic Law of Intercultural Education. After reviewing the reforms, the CCE concluded that they lacked a comprehensive analysis of fiscal sustainability and the identification of adequate funding sources. Consequently, the Court directed the Executive and Legislative branches to rectify these shortcomings. The new version of the reform once again caused a conflict between the executive and legislative branches, which was solved in the Court through cases 32-21-IN/22 and 2-22-OP/22. Despite the President's opposition, the CCE declared the constitutionality of reforms that established higher salary levels for teachers. The Court verified that, prior to its implementation, a reasonably adequate financial feasibility analysis was conducted and evaluated the reform's impact on public finances as well as identified potential sources of funding.

4. Decisions on women's rights

The Ecuadorian Constitutional Court strengthened the protection of women's

rights through jurisprudence. In case 791-21-JP/22, the Court ruled that the separation of a woman who applied for the recruitment and selection process of the National Police after receiving the diagnosis of an ovarian cyst larger than 2 cm (about 0.79 in) was excessive considering the rights to equality and non-discrimination and education. In accordance with Article 11 of the Ecuadorian Constitution, the Court established that the requirements to access the National Police must respect the right to equality and non-discrimination and cannot be based on sex, emphasizing the importance of knowledge and respect for the functioning of a woman's body.

5. Indigenous people's rights to prior consultation and extractive industries

Building on developments made in previous years, in 2022, the Court advanced the collective rights of indigenous communities to free, prior, and informed consent before the adoption and implementation of legislative or administrative measures that may affect them. In case 273-19-JP/22, the CCE ruled in favor of the Community A'I Cofán of Sinangoe for violations of their right to consent to the authorization of 20 mining concessions and another 32 pending concessions around the Chingual and Cofanes rivers, zones where the community develops its regular activities. The Court determined that the state had not obtained prior consent from the Sinangoe Community before granting mining concessions. Therefore, it confirmed a lower-level decision that revoked all acts granting them. The Court also referred to the necessary conditions to assure the participation of communities in obtaining their consent and the obligation to compensate them for the social, cultural, and environmental damage that follows the exploitation of natural resources.

Likewise, in case 1325-15-EP/22, the Court protected the right to the prior consent of Shuar indigenous communities in the approval of the license and environmental impact study by the Ministry of the Environment for the advanced exploration phase of the Panantza-San Carlos mining project. The CCE concluded that the social participation procedure carried out by the promoter of mining activity did not comply with the obligations derived from this right.

Finally, in case 28-19-IN/22, the Court ruled on the constitutionality of Executive Decree 751, under which the *Tagaeri Taromenane intangible zone* inside the Amazon region was expanded, and the area of authorization for oil exploitation in *Yasuní National Park* was reduced. In its analysis, the Court determined that prior and informed consultation was necessary given the presence of indigenous communities in the area. The Court established that there was a lack of pre-legislative consultation, as a duty of the Ecuadorian State, to guarantee the right of the community to be consulted before establishing the area redefined by the decree.

6. Children's rights

In 2018, Ecuador approved a constitutional referendum that determined that there was no statute of limitations to pursuing sexual crimes committed against children. In 2022, the CCE applied the principles of the best interests of the child and favorability to interpret this reform and determined that it does not include sexual offenses committed by adolescents, which are subject to temporal limitations.

In addition, the Court exercised judicial review of a norm that established the impossibility of altering the order of a child's surname after their registration at birth. The case arose from the fact that three adolescents had been subject to harassment that specifically originated from the paternal surname. The Court ruled that, when there are effects on the psychological integrity of children and adolescents due to the order of their surnames established at the time of birth registration, an exception to the literal interpretation of Article 37 of the Organic Law on Identity Management and Civil Data was necessary. The Court established that judges must, at least, listen to and consider the views of the children involved, provide relevant technical assessments, and listen to the parents or legal representatives and evaluate their agreement or conformity with the requested change of order of the surnames. The decision must always be grounded in the principle of the best interests of the child.

7. Rights of people in situations of human mobility

In case 1214-18-EP/22, the Court ruled that the rights to personal liberty, personal integrity, and the principle of nonrefoulement were violated in favor of a group of migrants from Cameroon and Nigeria. These migrants were denied entry into the national territory and were detained in the transit or international zones of Quito's International Airport. The Court determined that they were unjustifiably held at the airport for more than 24 hours, which violated Ecuador's Constitution, leading to the conclusion that their deprivation of liberty was arbitrary.

The Court found that the conditions under which these individuals were held at the airport were incompatible with their human dignity and personal integrity. They lacked proper accommodation, including adequate space, ventilation, natural light, access to private toilets, and sufficient food.

Finally, the CCE concluded that the non-admission of these Cameroonian and Nigerian nationals without analyzing their possible risks in case of being returned to their last point of departure violated the principle of nonrefoulement.

IV. Looking Ahead

In December of 2022, digital media presented a series of journalistic reports that proposed to show an alleged corruption scheme within public enterprises revolving around the brother-in-law of President Guillermo Lasso. In the first days of 2023, these reports motivated the creation of an investigative commission inside the National Assembly, tasked with determining whether there are merits to initiate impeachment proceedings against the President. The consequences of these actions will reverberate through 2023 and mark the future of the President as well as the country's political stability. Given the current composition of the National Assembly, it is very likely that 2023 will be marked by an attempt to

remove the current President that, if successful, could trigger a Presidential succession or even more extreme mechanisms such as the possibility of dissolving the National Assembly explained in last year's report.

As it has become common in recent years, it can be expected that the political branches will try to drag the Constitutional Court into this potential conflict. If impeachment proceedings end up being activated against the President, then the Court's involvement can be guaranteed, as the Constitution establishes that the Court must grant admissibility to the impeachment petition. Given the high level of distrust shown by citizens in Ecuador's politics, this will demand that the Court remain and appear impartial and independent of political influence.

Besides mediating conflicts between the political branches, the Constitutional Court's attention in 2023 is expected to be aimed at addressing the increasing problem of the judicial system of Ecuador, marked by weak institutions and rampant corruption. In recent years, several cases representing grave distortions of constitutional judicial guarantees have been filed and granted abusively to serve unlawful purposes, mainly by convicted criminals and politicians. This crisis threatens the legitimacy of the system itself as it has decreased citizens' confidence in the constitutional mechanisms created to protect their rights in the courts. The jurisprudence of the CCE during 2023 can be expected to be centered on addressing this issue.

The Court has already signaled its intention to actively respond to this abuse and sanction judges that grant such actions. Using its discretionary selection mechanism, the Court has chosen several cases where such abuse has happened to correct it and rectify the damage caused to persons affected and the system of administration of justice. The Court has already issued some judgments where it identifies and sanctions the deformation of constitutional guarantees, but it still needs to increase its efficiency to intervene in a timely manner and must establish strong and structural limits so that judges do not have incentives to engage in corrupt distortions of judicial guarantees.

In addition, the CCE can be expected to take a tougher stance against judges that engage in these practices through jurisdictional declarations of inexcusable error and manifest negligence. This mechanism works as a preliminary and obligatory step for the administrative body of the judicial branch to sanction a judge with expulsion from the bench. The CCE already began to do so in late 2022 with the emission of judgment 964-17-EP/22. The Court reviewed several arbitrary decisions – such as granting a non-existent remedy and allowing a measure that should be provisional to subsist definitively– and declared the inexcusable error and manifest negligence of judges. Thus, it can be expected that the Court will increase its judicial policy aimed at correcting the misuse of constitutional actions for unlawful purposes.

V. Further Reading

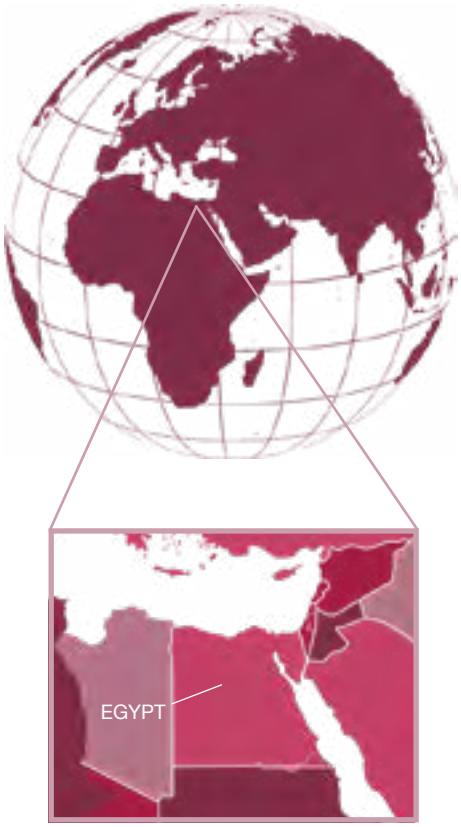
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Egypt

Ahmad A. Lotief, *Judge, The Egyptian Council of State*

Eslam M. Saleh, *Judge, The Egyptian Council of State*

Ahmed Rashwan, *Public Prosecutor, Egyptian Public Prosecution*

I. Introduction

In 2022, Egypt witnessed a myriad of events that provoked constitutional controversies. This report emphasizes some of the most debatable developments of the executive and legislative acts regulating constitutional compliance, rights, and freedoms, along with court decisions related thereto.

Firstly, we highlight the integration of Egypt's New Administrative Capital into the borders of Cairo Governorate to comply with constitutional provisions on the location of the Supreme Constitutional Court and both Houses of Parliament. Then, we raise questions of the (un)constitutionality of a new law that forces public servants to go through a compulsory drug test as a condition to remain qualified for service. Also of significance was the presidential appointment of acting heads for the "independent authorities," overturning the constitutional procedure of the President-House appointment mechanism.

In the second section, rulings of Egyptian courts are analyzed for their critical role in environmental protection and rights to private life. The first case was handled by the criminal justice courts that convicted a chairperson of a cement factory for violating environmental law, while the second introduced a conservative perception of the Supreme Administrative Court on university professors' freedom of expression on social media.

II. Major Constitutional Developments

1.The New Administrative Capital Posing Constitutional Issues

The New Administrative Capital of Egypt is a mega project introduced by the Egyptian President in March 2015 during Egypt Economic and Development Conference. The new capital was designated to accommodate the Presidential Palace; the headquarters of the Cabinet of Ministers; the seats of both Houses of Parliament; and the seats of all judicial bodies and authorities including the Supreme Constitutional Court.

On 8 July 2022, the Presidential Decree No. (314) of 2022 was issued, stipulating in its First Article that the eastern administrative border of the Governorate of Cairo be amended according to an attached map and geographical coordinates. The attached map and coordinates clearly showed the integration of the lands constituting the New Administrative Capital into the borders of the Governorate of Cairo.[1]

It is widely believed that one of the reasons behind the integration was to conform with constitutional and legal provisions governing the geographical location of the seats of both Houses of Parliament (the House of Representatives and the Senate) and the seat of the Supreme Constitutional Court, without the need to introduce amendments to such provisions.

The last iteration of the Constitution of the Arab Republic of Egypt, adopted in 2014, states in Article (191) that "The Supreme Constitutional Court is an independent and

autonomous judicial body, seated in the City of Cairo, and can convene in another location within the country's borders only in cases of emergency, …", emphasis added.[2] Additionally, the Supreme Constitutional Court Law No. 48 of 1979 states in Article (1) that "The Supreme Constitutional Court is… seated in the city of Cairo", emphasis added.[3]

Furthermore, Article (114) of the Constitution states that "The seat of the House of Representatives is the City of Cairo … and the convention of the House otherwise, and the decisions taken thereof are void", emphasis added.

On 23 April 2019, several amendments were introduced to the 2014 Constitution, after being approved in a public referendum.[4] One of the amendments established the Senate as the upper house of the Parliament of Egypt, making the House of Representatives the lower one. Hence, Article (254) of the Constitution, being one of the added articles, states that "Articles No. …, 114, … apply to the Senate …"

Going through the above-mentioned constitutional and legal provisions, it becomes clear that the convention of any of the three bodies, and any decisions taken thereof, would be regarded as legally void if the geographical location of convening was outside the administrative borders of 'Cairo'. Therefore, the government was left with two options; the first was to amend the constitutional provisions governing the restrictions on the geographical location of the seats of the three concerned bodies, and the second was the integration of the newly established administrative capital into the existing Governorate of Cairo.

The practice of changing the administrative borders of Governorates to conform with constitutional provisions on the geographical location of seats of specific bodies is not something new to Egypt. A relevant example is that, in 2008, the City of Helwan was established as a separate Governorate from the Governorate of Cairo, but due to the seat of the Supreme Constitutional Court being located within the then newly established governorate against constitutional provisions, a presidential decree was issued amending the borders of both governorates to make sure that the geographical location of the seat of the Court falls within the administrative borders of the Governorate of Cairo.[5]

2. Executive Regulations of the Law of Conditions of Public Service Raises Questions on Bodily Integrity

The law of holding and remaining in public office, issued earlier by the Law No. 73 of 2021, added a new rule to the conditions of service in the public sector i.e., non-use of drugs. The condition of being in a drug-free status to hold a public post has been already provided for under the Public Service Law.[6] Accordingly, the new law practically emphasized the drug-free condition to remain qualified for public posts. Conventionally, the Egyptian Legislature does not stipulate conditions to remain qualified for public service after the appointment. However, it is well established under the case law of the Council of State, that a public servant shall always meet the conditions of good conduct and reputation.[7]

The Executive Regulations of the said law were issued by the Prime Minister Decree No. 1 of 2022 on 1 January 2022 and came into effect on 3 January 2022. According to these regulations, the government has the right to terminate the service of any public servant if proven to use drugs via an abrupt, inductive drug test conducted by the government.[8] The public servant, should he fail the test, will be immediately suspended from service. However, another confirmatory test will be conducted on the same sample; the later test is decisive with no recourse to appeal. If the sample does not pass the confirmatory test, the servant in question shall be immediately separated from service.

This set of procedures raises three constitutional questions that have not been challenged yet before the Supreme Constitutional Court; the first of which is the constitutionality of the compulsive drug test. According to the Law and the Regulations, any public servant who refuses or evades the test or deliberately spoils the sample shall be treated the same as if he failed the test, pushing the test to be a compulsory one. The Egyptian Constitution adopted the principle of bodily integrity; Article (60) of the Constitution explicitly prohibited the performance of medical and scientific experiments without the documented free consent of the subject. Conversely, the Constitution does not clearly prohibit compulsive medical sampling.

While the constitutionality of this compulsory drug sampling has not been checked by the Supreme Constitutional Court, the legality of sampling was judicially reviewed by the criminal courts. For the enforcement of the Traffic Law, the police repeatedly launch security campaigns against driving under the influence of drugs "DUI," arresting drivers with positive results of compulsive drug sampling.[9] In a similar case, yet with the consent of the driver, the Court of Cassation, in 2021, acquitted the defendant, previously convicted as guilty of drug use and DUI, on the ground that positive drug sampling shall be inadmissible and illegal whenever the stop and search process has not been in a *flagrante delicto* as specified by the Criminal Procedures Law.[10]

Secondly, the question of constitutionality is also aroused regarding the arbitrary exclusion of armed forces and civilian police personnel from the process specified by the Executive Regulations. Such an exemption was granted under Article (6) of the Regulations, which was later amended to extend the exclusion to the personnel of the Presidency, General Intelligence Service, and the Administrative Control Authority.[11]

Finally, the termination of service administrative decree based on a positive confirmatory test result would be practically unchallengeable, as its legal ground would be a matter of expert evidence that could not be perceived within the discretionary power of the administrative court concerned, an outcome that might seemingly violate Article (97) of the Constitution, which reads "… it is forbidden to grant any administrative act or decision immunity from judicial review…". However, it is believed that the concerned servant might target, before the court, the administrative acts associated with sampling, testing, and results.

3. Presidential Appointments of 'Acting' Heads for 'Independent' Authorities

The Constitution of 2012, written after uprisings against President Mubarak, and its widely amended version known as the Constitution of 2014, introduced to the constitutional design in Egypt, for the first time, the concept of "independent authorities," mandated with critical competencies in the economic, financial, and anti-corruption sectors. To guarantee the independent functioning of such authorities, both versions of the Constitution embodied a *de jure* balanced distribution of powers between the President and the House of Representatives in the sphere of the procedural process of appointing their heads.[12]

According to Article (216) of the Constitution of 2014, heads of independent authorities and oversight agencies shall be appointed by a Presidential Decree for a renewable-for-once four-year term, yet after the approval of the House of Representatives. Although Article (215) of the Constitution of 2014 named a number of these authorities, the Central Bank of Egypt "CBE," the Financial Regulatory Authority "FRA," the Central Auditing Organization "CAO," and the Administrative Control Authority "ACA," such an article delegated the House to establish, by law, other independent authorities and oversight agencies to operate under the privileged constitutional guarantees of independence.

That being said, a constitutional practice on the appointment of heads of independent authorities has been developed to form a trend during 2022, circumventing the President-House procedure as provided by the Constitution; that is, the presidential appointments of acting heads for one year without submitting the nomination to the House. In August 2022, the President issued three Presidential Decrees to appoint acting heads for three of the four constitutionally specified "independent authorities."

Upon the Presidential Decree No. (353) of 2022, a new acting head for the Financial Regulatory Authority "FRA" was appointed for one year succeeding Dr. Mohamed Omran, who was also serving as an acting head for a whole year after his first four-year term, approved by the House, had expired.[13] It is noteworthy to highlight that the House, in June 2020, asked Dr. Omran to be present before the House, as MPs scrutinized the 2020/2021 proposed budget he submitted for approval. Dr. Omran's absence had fueled tensions with the FRA, ending up with the House's General Assembly refusing the proposed budget.[14] Considering these tensions, a question is raised whether or not the House would have approved the nomination of Dr. Omran, had his name been submitted by the President for a second term.

As for the Administrative Control Authority "ACA," the President, by the Presidential Decree No. (397) of 2022, appointed a new acting head for a one-year term. In fact, this Decree followed the appointment of two other acting heads, each of whom served for two consecutive one-year terms. As such, appointing acting heads for the ACA had begun earlier in August 2018.[15] Of significance, in this regard, is to highlight that General. Mohamed Erfan was the last head of the ACA whose nomination went through the constitutional President-House mechanism; General. Erfan was appointed in March 2017 to a four-year term that should have ended in 2021.[16] However, it was suddenly announced, in August 2018, by the President's Spokesman that a Presidential Decree was issued to appoint General. Erfan to serve as an Adviser to the President for Governance and Informatics Infrastructure.[17] No further explanations were made on General. Erfan's resignation or replacement.

While appointing acting heads for both the FRA and the ACA had started earlier, such a practice is seen to be a landmark constitutional development of 2022, because for the first time after the Constitution of 2012, a new Governor of the Central Bank of Egypt was appointed as an acting Governor for a one-year term, a step which broadly expanded the consistency of this practice. According to the Presidential Decree No. (367) of 2022, Mr. Hassan Abdallah was appointed as acting Governor replacing Mr. Tarek Amer, a day after approving the resignation of the latter by the President.[18] It is worth mentioning that Mr. Amer was serving for his second four-year term approved by the House; such a term should have ended, had it been completed, in November 2023.[19] As the case of General. Erfan of the ACA, Mr. Amer was appointed as an Adviser to the President on the day of his resignation, and no further announcements were made on the grounds for his ouster.[20] However, Mr. Amer stated to the press that he resigned "to leave room for new blood to take responsibility and push forward Egypt's successful development process under the leadership of the president".[21]

III. Constitutional Cases

1. *The Public Prosecution v. the Chairman of Alexandria Company for Portland Cement:* Judicial Enforcement of Environmental Protection

The Egyptian constitutional legislator conserved environmental integrity under Article (46) of the Constitution, which reads: "Every individual has the right to live in a healthy, sound, and balanced environment. Its protection is a national duty. The state is committed to take the necessary measures to preserve it, avoid harming it, rationally use its natural resources to ensure that sustainable development is achieved, and guarantee the rights of future generations thereto". Furthermore, the constitutional legislator devoted separate articles to preserve some environmental elements e.g., Article (44) to preserve River Nile, and Article (45) to conserve seas, seashores, and lakes.

Even though the Egyptian legislator issued the Environment Law by Law No. 4 of 1994, the principle of environmental integrity has not always been adopted in Egypt's constitutional principles. In fact, the first time the constitutional legislator noted the importance of environmental protection was in 2007.[22]

Titan cement factory is located in the Wadi Al-Kamar area, west of Alexandria City. The southern fence of the factory is roughly tens of meters away from a residential block, where the inhabitants filed complaints against the factory for using coal.[23] After the 2011 revolution, the residents staged a pro-

test close to the factory, and counter-judicial proceedings were initiated by the factory against the residents afterward. The factory accused some of the residential block inhabitants and other environmental activists of illegal gathering, banditry, intrusion, and arson. The Public Prosecution referred the accused inhabitants to Alexandria Criminal Court, and the trial ended with the acquittal of all defendants.[24]

In 2016, the Public Prosecution accused Mr. Michel Cigales in his capacity as the Chairman of Alexandria Company for Portland Cement of three felonies: failure to take sufficient precautions to prevent or limit leakage of air contaminants, failure to take sufficient precautions to process environmentally friendly production of hazardous substances in solid or liquid forms, and negligently causing harm and injuries to others. The criminal case was brought before Al-Dekhila Misdemeanor Court under Case No. 6645 of 2016. On 18 January 2018, the Court fined Mr. Cigles 20,000 Egyptian Pounds for each of the first two felonies and 200 Egyptian Pounds for the third felony and ordered the tort case to be referred to the competent civil court.

The Misdemeanor Court found that the accused had violated articles 22, 33, 34, 35, 40, and 43 of the Law No. 14 of 1994, as amended by the Law No. 9 of 2009.[25] Article (22) obliges any entity or enterprise to maintain an environmental record to register the entity's environmental impact, and Article (33) requires the existence of hazardous substances' disposal procedures record; both articles stress compliance with holding these records, regular registration process, and correct recording. Articles (34) and (35) set forth the legal commitment to comply with safe levels of air contaminants, while Article (40) requires fuel combustion to be processed under the legally specified precautions and limitations, as stated by the Law and the Executive Regulations. Finally, as for Article (43), it states that the duty of the entity's owner to the utilization of proper machinery and equipment to ensure the occupational safety of the site's personnel.

Back to the Case, The Court of First Instance relied on environmental assessment reports along with medical reports filed by the Public Prosecution; those reports proved the factory's failure to comply with the legally required environmental regulations.

Mr. Cigales appealed before the Dekheila Appellate Court of Misdemeanors under the Appeal No. 2322 of 2018. On 21 March 2018, the Appellate Court upheld the sentences imposed by the Court of First Instance. The defendant later challenged the sentences, as a last resort, through a Cassation Procedure heard by the Cairo Court of Appeal. On 24 July 2022, the Court of Appeal reinstated the verdict of the first instance.[26]

In addition to the globally salient constitutional and legal debate on the need for more effective judicial protection of environmental rights, the significance of this case lies in the fact that the numerous cement and steel factories operating in Egypt are claimed responsible for jeopardizing environmental integrity and causing harm to people.[27] Thus, judicial precedents convicting cement and steel factories' chairpersons are believed to hopefully push for deterrence-motivated compliance with environmental laws.

2. *Mona Prince v. the Suez Canal University*: University Professors' Rights to Private Life and Freedom of Expression under Spotlight

On 15 May 2018, the President of Suez University issued decision No.187, reading in its first Article "Pursuant to the decision issued by the Faculty Members Disciplinary Board on 13 May 2018 in case No. 12 of 2017, Assistant Professor. Mona Prince Ahmed Radwan – Lecturer in the English Language Department of the Faculty of Arts, is to be sanctioned by removal from her position while keeping her retirement pension".

Fourteen months earlier, Prince was suspended from work and referred to the university-level Faculty Members Disciplinary Board. According to her own statements, the Disciplinary Action was based on three incidents. First, her publishing videos depicting her "belly dancing" and photos depicting her wearing a "bikini swimsuit" on her social media accounts, second, allegations of religious defamation reported by several students and faculty members, and finally, her not attending her work hours specified by law.

Prince challenged her termination, reaching the highest appellate level, the Supreme Administrative Court. She submitted that publishing videos of herself on her social media accounts shall fall within her rights to freedom of expression and private life. Furthermore, she denied the allegations of religious defamation and affirmed that she had been satisfying her work duties.

The Supreme Administrative Court issued its decision, on 12 September 2022, dismissing Prince's appeal and upholding the Board's decision. The Court reasoned that university faculty's expression of personal beliefs and opinions outside the university affects the proper functioning of the university as a public entity, and hence, a faculty member cannot publicly display him/herself dancing in the manner the plaintiff did, as it takes away from her image in front of her students. Additionally, the Court said that academic freedom does not mean denying what is necessarily known in religion.[28]

The decision of the Supreme Administrative Court instigated controversy in public discourse, with many human rights organizations and activists criticizing the Court's reasoning on balancing personal freedoms and private life with social and religious beliefs.[29]

IV. Looking Ahead

With the term of the President ending in April 2024, the National Elections Commission is expected to start the presidential election process by the end of 2023. Such a step would provoke a political dialogue not only among politicians but also among the public, given the economic challenges Egypt has been experiencing recently.

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El Salvador

Manuel A. Merino M., *Professor of Constitutional Law, Gerardo Barrios University*

I. Introduction

2022 was defined by the phrase "exception regime" in El Salvador. On March 26th, a record-breaking 62 homicides occurred in a single day, which was a shocking number for a country with 6 million inhabitants and 21,000 square kilometers, comparable only to the times of the civil war. In response, the Legislative Assembly declared an exception regime in the early hours of March 27th. This measure, typically used during constitutional emergencies, allows for the suspension of certain essential rights of citizens, such as freedom of expression, freedom of assembly, and the duration of preventive detention. The duration of an exception regime, according to the Constitution, is 30 days, which can be extended for another 30-day period. However, in El Salvador, the exception regime has been extended 13 times since its implementation.

II. Major Constitutional Developments

In accordance with Article 29 of the Constitution, the suspension of certain guarantees established in Articles 5, 6.1, 7.1, and 24 of the Constitution may occur in the event of war, invasion, rebellion, sedition, catastrophe, epidemic or other general calamity, or serious disturbances of public order. These guarantees pertain to the freedom of expression, the freedom of association and assembly, inviolability of private correspondence, and entry and exit from Salvadoran territory. The suspension may apply to all or part of the territory of the Republic and must be decreed by either the Legislative or Executive Branch, depending on the circumstances. The exception regime, according to Article 30 of the Constitution, cannot exceed 30 days and may be extended for an additional 30 days if necessary.

Historically, the exception regime had been utilized only twice since the Constitution's promulgation in 1983: during the civil war (1980-1992) and at the outset of the COVID-19 pandemic. However, its employment during the pandemic was deemed unconstitutional by the Constitutional Chamber in ruling 21-2020 ac. In 2022, the Legislative Assembly reactivated the exception regime to address the pervasive violence caused by gang activity in El Salvador.

The regime has been extended more than 16 times since its implementation in March 2022, raising questions as to whether the regime's repeated usage qualifies as a genuine "exception" or if it has been inappropriately utilized and rendered permanently applicable.

In the 21-2020 ac. ruling, the Constitutional Chamber stated that the suspension of fundamental rights may sometimes be the only means to address situations of public emergency and preserve the higher values of a democratic society. However, one cannot ignore the abuses that may arise. Therefore, this can never entail the temporary suspension of the Rule of Law or authorization for rulers to overlook the constitutional legality to which they must always adhere. While certain legal limits on the actions of public power may be different when suspended than those in normal conditions,

they should not be considered non-existent. Consequently, it cannot be understood that a government is invested with absolute powers beyond the conditions in which such exceptional legality is authorized.

For this reason, states of exception do not invalidate the Constitution or international human rights instruments, and they are not, nor can they be, a de facto state, so they do not have an absolute degree, since they are limited by various types of controls that seek to prevent excesses and guarantee the fundamental principles that support the Rule of Law.

Given the above, a sort of paradox has arisen in El Salvador: on the one hand, the majority of the population approves of the success that the exception regime has had in combating crime, which has practically dismantled and eradicated the activities of the gangs[1]; on the other hand, there are those who denounce that under the shadow of the exception regime, serious human rights violations have been committed, such as illegal detentions, deaths while in state custody, violation of due process guarantees, etc[2].

The truth is that, to date, there is no pronouncement from the Constitutional Chamber evaluating the constitutionality of the extensions of the exception regime. Nevertheless, as individual actions, hundreds of habeas corpus petitions are filed daily before the Constitutional Chamber denouncing illegal detentions.

The paradox, then, seems to come down to the following terms: security without democracy versus democracy without security. The solution to this dilemma would exceed the space and purpose of this report, but the discussion is underway.

III. Constitutional Cases

Since the removal of the magistrates from the Constitutional Chamber on May 1st, 2021, the "new"[3] Constitutional Chamber has not issued any relevant cases.

IV. Looking Ahead

The issue that will continue to capture attention both nationally and internationally will undoubtedly be that of the constitutionality of the exception regime and the possible human rights violations committed during its validity. On the other hand, a new presidential election is approaching in 2024, the first since the "new" Constitutional Chamber authorized presidential re-election despite being prohibited by an unamendable clause of the Constitution, a matter that will certainly reignite the issue of presidential term limits.

V. Further Reading

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Estonia

Paloma Krõõt Tupay, *Associate Professor of Constitutional Law, University of Tartu*

Katariina Kuum, *Postgraduate, University of Tartu*

Joosep Kuusk, *Postgraduate, University of Tartu*

I. Introduction

Given the generally low number of constitutional decisions in Estonia and taking into account the fact that Estonia has approximately 1.3 million inhabitants,[1] 2022, with its nine substantive constitutional rulings, does not stand out in particular. However, the Court made severalrulings of significant social and legal importance.

Socially, the greatest attention since February 24, 2022, has been and continues to be devoted to Russia's war of aggression against Ukraine. This is understandable considering that Estonia itself borders Russia and was illegally annexed by the Soviet Union for more than 50 years. Estonia has provided Ukraine with military assistance worth more than 1% of its GDP, placing it first in the world in terms of its population-to-GDP ratio.[2] Although changes to the state defense law are also planned, as a result, these were not yet presented for public discussion in 2022.

II. Major Constitutional Developments

In matters of jurisdiction during 2022, the public undoubtedly paid the greatest attention to the judicial assessment of the Corona restrictions. However, in 2022, the Supreme Court of Estonia (SC) made another decision that was met with interest, especially in legal circles. This concerns the competence of the court in matters in which the European Court of Justice (ECJ) has found a domestic norm to be contrary to EU law and the question arises whether in this case an additional examination of the conformity of the norm at issue with the Constitution of Estonia (CE) can also be carried out. All relevant rulings are discussed in detail below.

Another question of constitutional nature was raised by a change of government in the spring of 2022. After a long period of political disagreement, Prime Minister Kaja Kallas asked President Alar Karis to dismiss the ministers of the coalition partner.[3] A one-party minority government emerged, and the Prime Minister began to look for a new coalition partner, without Parliament as a whole, having censured neither the Prime Minister nor the government.

A public debate arose on the question of whether or not in such a situation the Prime Minister should not resign to allow Parliament to participate in the formation of a new government. In fact, under the CE, it is for the Parliament to decide whether to give the prime minister-designate a mandate to form a new government. At the same time, the CE also states that the Prime Minister does not need Parliament's approval to replace ministers in the government.

If the Prime Minister were to replace the members of the coalition without resigning, a new government could thus be formed, in essence, without the involvement of the Parliament. However, according to the CE, the Estonian Parliament has the right to censor the Prime Minister at any time. Prime Minister Kaja Kallas also argued that if the Prime Minister were constantly obliged to resign when a coalition partner fell out of office, the Prime Minister would not be able to form

in such a situation a minority government.[4] However, the situation was resolved in such a way that the Prime Minister resigned after successful coalition negotiations and received a mandate from Parliament to form a new government on 15 July 2022.

III. Constitutional Cases

1. Cases concerning the Corona pandemic

The last restrictions imposed as a result of the Corona pandemic were lifted in Estonia by June 1, 2022. Although the Estonian pandemic restrictions can be qualified as one of the least intensive in comparison with the rest of Europe,[5] several court cases were initiated against the restrictions.

1.1. Combatting new dangerous infectious diseases[6]

In the case at hand, the complainants sought to declare unlawful provisions of the Communicable Diseases Prevention and Control Act (CDPCA)[7] that permitted the government to impose temporary restrictions to combat the spread of infectious diseases via administrative acts issued in the form of governmental orders. By its orders, the government i.e., provided for mandatory quarantine of persons diagnosed with COVID-19 and those who had come into contact with persons infected with it and also stipulated the requirement to provide a certificate to prove vaccination, previous contraction of the disease, an exemption from the previous requirements, or evidence of a corona test as conditions to participate in certain activities such as vocational activities, entertainment (e.g. cinema, theaters), and public events. The complainants argued that the governmental orders essentially imposed an obligation for people to vaccinate, overstepping the mandate assigned to the government by the CDPCA. According to the claimants, the imposition of quarantine and other restrictions were furthermore of permanent nature, which is contrary to the nature of the legal basis provided by the CDPCA that allows the government to impose temporary restrictions only. The claimants also argued that the provisions of the CDPCA were unconstitutional due to their legal unclarity and violation of the reservation of the law principle, as they were too general and contained undefined legal terms (e.g., "high infectivity", "rapid or extensive spread of infection") which provide the government with extensive powers and the possibility to impose unproportional restrictions. The administrative court agreed with the claimants and declared the contested provisions unconstitutional. This led to proceedings in the Constitutional Review Chamber (CRC) of the SC.[8]

The CRC affirmed that the CDPCA's government orders brought about serious infringements upon several fundamental constitutional rights – the right to liberty of movement, the right to education, the right to engage in enterprise, freedom of occupation, and equal treatment. However, the CRC declared that although the powers granted to the government by the CDPCA were broad, the distinction between general and specific regulations is not clearly identifiable. In the case at hand, the orders of the government were in the Court's view not so broad as to necessitate legislative parliamentary norms, especially because the measures and provisions of the CDPCA were intended to combat a new and unknown disease. Therefore, the CRC did not find the provisions of the CDPCA to be in violation of the EC.

The CRC, however, added that respective future orders of the government could prove to be unconstitutional, as uncertainty and the rapidly changing nature of the disease were in the case at hand important arguments for allowing the government to impose measures relatively at their own discretion. Taking into account the increasing research regarding the COVID-19 disease, the CRC instructed the Parliament to improve on developing legislative initiatives to specify relevant provisions regarding the prevention of a spread and other negative effects of (new) diseases. Over time, more specific legal measures could be developed.

1.2.Equal treatment/compensation of damages to travel operators caused by the pandemic[9]

The claimant, a travel operator, applied for aid to partially cover damages incurred due to the spread of the pandemic. The provision of aid was established by a regulation of the Minister of Economic Affairs and Communication and purported to alleviate damages suffered by tourism companies as a result of COVID-19. The relevant government agency refused to satisfy the claimant's application and reasoned that it did not meet the regulation's requirement of a decline in turnover of at least 70% in six months (April-September) of 2020 compared to the previous year's same time period, taking into account the turnover for April-September 2019 declared to the Estonian Tax and Customs Board (ETCB).

By law, turnover is usually calculated on a monthly basis. However, the regulation did not take into account that in order to facilitate the calculation of the taxable amount of travel services provided, the law provides for a special regulation for travel operators that allows them to calculate their turnover not monthly, but on the basis of their average annual turnover, which is only corrected at the end of the year. Due to the complainant using this special arrangement, its turnover within the aforementioned six-month period in 2020 was not at least 70% lower in comparison to the same time period in 2019. However, the complainant argued that this would have been the case if they would not have used the exceptional calculation method. By disregarding this when determining whether or not to grant the aid, travel operators applying the facilitated calculation method were for no good reason treated differently than other tourism companies. The Ministry of Economic Affairs and Communications argued that the reason to distribute aid on the basis of the turnover of the mentioned six-month period exclusively was to ensure the quick and easy distribution of help to enterprises. The CRC stated that the aim to ensure a prompt distribution of aid was not sufficient enough to justify the unequal treatment of travel services providers compared to other tourism agencies.

2. Unequal treatment of a prison officer due to hearing loss and the relationship between EU and national law[10]

Preparing for its accession to the EU in 2004, Estonia had to ensure, among other things, the

conformity of its legal system with EU law. In order to meet this challenge, the legislator decided to draft the Constitution of Estonia Amendment Act (CEAA), a four-paragraph constitutional amendment act, which was adopted by referendum in 2003.[11] According to § 2 of the CEAA, the CE will apply to Estonia's membership of the European Union (EU), "subject to the rights and obligations arising from the Treaty of Accession".[12] This way, the legislator created a broad right for the courts to assess the compatibility of Estonian law with EU law.

The particular 'EU-friendliness' of the SC's jurisprudence has been stressed by several legal scholars since.[13] I.e., with regard to the CEAA, the Court has noted the following: "Preference should be given to interpreting Estonian law as consistently as possible with EU law. However, if it turns out that Estonian law is in conflict with EU law, the conflicting Estonian law must be disapplied without initiating constitutional review proceedings."[14]

This is the background against which decision 5-19-29/38 of the SC has to be understood, in which the Court decided i.e., to further develop its existing legal practice on the question of the extent to which the Court is able to exercise constitutional review in the case of EU-related legislation.

The facts on which the decision was based concerned a national provision contained in a regulation issued by the Government of Estonia, which introduced a standard of hearing as an absolute bar to performing the duties of a prison service officer. In so doing, the provisions did not leave any room for discretion as to whether, despite a hearing loss below the required threshold, an officer could still be able to perform his duties, for example, after taking reasonable accommodation. In the case in question, the applicant appealed with the Court seeking a declaration that the order of the Director of Tartu Prison, which was issued on the ground that the hearing levels of the applicant did not comply with the provision in the abovementioned regulation and which dismissed the applicant, was unlawful on the ground that it was unconstitutional and contrary to the Estonian Equal Treatment Act. Although the court of first instance did not consider the action to be well founded, the court of appeal found that the provision in question was contrary to the general right to equality under Article 12(1) CE and the principle of legitimate expectation, and therefore disapplied the provision in relevant part and referred the decision to the CRC for constitutional review.

It was not until the constitutional review proceedings before the SC that the question of the compatibility of the provisions with EU law arose. Thus, the CRC found that since the obligation of public authorities not to discriminate against persons with disabilities also derives from EU law and neither the text of Directive 2000/78/EC nor earlier case law of the ECJ provide sufficient answers for the resolution of the present case, a preliminary ruling from the ECJ had to be sought on the interpretation of the contested national provision. However, following the delivery of the judgement of the ECJ, which implied the incompatibility of the provisions with EU law, the question of the relevance of the given provision in a national constitutional review procedure was raised. Namely, according to the CE and the Constitutional Review Court Procedure Act, the SC may only examine the constitutionality of provisions that are relevant to the resolution of the case in question. There was disagreement as to whether or not a national provision which, according to the decision of the ECJ must be disapproved on the ground of incompatibility with EU law, could be regarded as relevant.

Whereas in previous case law, the SC had held that a national provision must be disapplied and the constitutional review procedure must be dismissed in the event of a conflict with EU law,[15] in this case, the SC held that constitutional review is still possible because such review does not necessarily jeopardize the primacy, unity, and effectiveness of EU law.[16] Therefore, the Court also found that the provision could be considered relevant for the solution of the case. With this, the SC changed its long-standing practice in relation to the exercise of constitutional review of norms relating to EU law, interpreting its supervisory powers more broadly than in the past.

It remains to be seen to what extent the judgment signals a change in the case law on the assessment of the interaction between EU and national law.

3. Municipal or state responsibility? Issues concerning the scope of municipal autonomy

As already mentioned in the global review for 2020,[17] issues concerning the delimitation of municipal and state tasks are frequently the subject of constitutional rulings.

Although the SC ruled already, in 2009, that the legislator had to regulate and distinguish more clearly the responsibilities between the state and the municipalities,[18] the legislator has done little in this regard. This leads to tensions between the municipalities and the state, disputing the allocation of responsibility in frequent court cases.

3.1. The municipalities' right to protect cultural heritage of local importance[19]

One of the constitutional review judgments which tackled the question of defining the competencies of the municipalities and the state concerned the municipality's right to protect the cultural heritage of local importance. Namely, the Planning Act gives municipalities the right to determine the measures to preserve locally significant cultural heritage and the general conditions for the use of such heritage. In the case at hand, the Municipality of Põlva found that this right of protection or conservation conferred on the municipality by law could not be implemented due to the absence of the necessary provisions or – alternatively - the lack of legal clarity of national provisions, especially in the field of setting property restrictions for the protection of sacred forests (i.e., historical places of worship). This, the municipality argued, restricts unproportionally local governments' constitutional right to self-administration.

However, in its analysis, the CRC took the view that local authorities have sufficient autonomous legal means to protect trees and

forests that are part of the cultural heritage, including the possibility to impose restrictions on forest management. In the view of the court, the municipalities' autonomous decision-making options were therefore not unproportionally narrow.

3.2. National and local obligations relating to the compulsory lien of immovable property[20]

The present decision concerned questions of the municipality's constitutional financial guarantees. Inter alia, according to Article 154(2) CE, "expenditures related to obligations of the state imposed by the law on a municipality shall be funded from the state budget." In this case, the Municipality of Jõelähtme found national provisions imposing on the municipality an obligation to decide on the imposition of a compulsory lien on real property in the public interest without, at the same time, allocating in its favor additional state budget resources to carry out this obligation, unconstitutional. The municipality argued that it is unjust to impose the costs of the compulsory possession proceedings on the municipality when the applicant for the compulsory possession is not in any way connected to the municipality through ownership, management bodies, or the performance of tasks ordered by the municipality itself. For example, in the case of network operators performing public tasks, such as the transmission and distribution of electricity, electronic communications, and natural gas.

In its judgment, the CRC held that local and state tasks cannot be distinguished from each other solely on the basis of whether the municipality has an interest in the performance of the task in a particular case or whether the imposition of an expropriation is (indirectly) necessary for the municipality to perform other local tasks. Thus, in its analysis, the SC held that since spatial planning is also the responsibility of local authorities, the obligation to conduct proceedings for compulsory possession is not a state task but a matter of local life which is the responsibility of the municipality and which does not have to be financed from the state budget. The CRC, therefore, considered the provisions to be constitutional and dismissed the application.

4. Other significant constitutional issues

4.1. Rules on the remuneration of lawyers for state legal assistance[21]

In the present case, the court of first instance considered unconstitutional a provision according to which the fee for inspecting a criminal case file within the scope of state legal aid is determined without taking into account the total time spent on this task. The Court found such limitations unconstitutional, as it infringes on the freedom of profession of the lawyer providing state legal assistance, the freedom to conduct business, the inviolability of property, and the right to equal treatment, as well as on the right of defense of a person suspected of a criminal offense.

In its decision, the SC didn't find the established rates of state-funded legal aid unconstitutional, as there is no obligation on the attorney to provide state-funded legal aid, and the lawyer is free to designate himself as a provider of state-funded legal aid. Moreover, an attorney providing state-funded legal aid may continue to act as a contractual representative, i.e., provide legal services for a fee that is not regulated by the state. With that being said, the CRC, however, expressed by way of an *obiter dictum* concerns about the sustainability of the current state legal aid system and its rates. The SC acknowledged that the obligation of the Bar Association to ensure the uninterrupted organization and provision of state-funded legal aid may lead to a situation where the Bar Association is obligated to find a legal aid provider even if no attorney has registered or if no attorney accepts a specific appointment. The SC found that in such a hypothetical case, the question of the legality of the obligation imposed on the Bar Association to provide state-funded legal aid may arise.

4.2. Forensic psychiatry expert fees[22]

In the case at hand, a person was accused of several offenses and had an expert assessment performed on them. The experts conducting the assessment applied to double its fee, as it was asserted to have been exceptionally difficult and extensive. The regulation on the procedure for payment of expert fees provides for an option to multiply the usual expert fee up to three times if the complexity, time spent, or extensive nature of the expertise justifies it. However, the court of second instance considered the maximum fee restriction provided by law to be insufficient and in violation of the CE. The Court argued that the expert fees foreseen were even below the national minimum hourly wage rate. In the Court's view, this situation entails the danger of incorrect court decisions, as experts already had and would continue to decline low-paid work. According to the Court's view, this could lead to an encroachment of human dignity, the principle of guilt, and the right to personal honor of individuals subjected to criminal proceedings.

The CRC stated that the Code of Criminal Procedure (CCP) provided a general principle for calculating expert fees, according to which the usual fee for conducting expertise could not be lower than the national minimum hourly rate of pay for a person in an employment relationship. The CRC, therefore, stated that the regulation was already, for this reason, not in accordance with the CCP and therefore unconstitutional, as according to the CE state power shall be exercised solely on the basis of the CE and laws in conformity with the CE.[23]

IV. Looking Ahead

In 2022, Estonia's society was shaped in particular by Russia's illegal invasion of Ukraine and the resulting discourse on security policy. The main political decisions focused on military as well as political support for Ukraine, and thus, essentially on foreign policy issues. The upcoming parliamentary elections in the spring of 2023 meant that the agenda at the national level focused more on current political issues than on fundamental legal ones. Thus, it can be said that 2022 was rather a year of waiting for Estonian constitutional law. It is to be expected that the elections in March 2023, as well as the subsequent plans of the new government after the crisis years of the Corona pandemic and the Ukraine war, will bring all the more fundamental reforms of constitutional significance.

V. Further Reading

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Ethiopia

Alemayehu Weldemariam, *Lecturer-in-Law, Mekelle University School of Law and PhD Student, Indiana University Maurer School of Law, Bloomington, Indiana*

Assefa Fiseha, *Professor of Law, Addis Ababa University and Visiting Fellow, Institute for Advanced Study, Princeton, New Jersey*

I. Introduction

Ethiopia, with an estimated population of 115 million, is one of the most diverse and the second most populous country in Africa, after Nigeria. For centuries, it existed as a devolved autocratic empire, but in the last century, it has largely been a centralized state. Ethiopia has been plagued by civil wars stemming from a lack of an inclusive governance system, an uncontested constitutional design, and a disregard for constitutionalism. This has led to a proliferation of politically mobilized ethno-national based cleavages, with many of them seeking political autonomy and sometimes secession. Unfortunately, the hegemonic and authoritarian center has failed to respond to such demands, leading to conflicts.

Two prominent events that highlight the above tensions are the crisis in Oromia and the war that erupted in early November 2020 between the federal government and the Tigray regional state, resulting in the death and displacement of millions of people. The Tigray war is also linked to the constitutional dispute over the postponement of the national and regional elections in 2020, which was attributed to the COVID-19 pandemic. The war then triggered the Pretoria peace deal between the rebels and the federal government, signed in 2022.

The talks between the federal government and the Tigray People's Liberation Front (TPLF) culminated in a peace deal signed in Pretoria on November 2, 2022, which marked a significant political development for the year. Military commanders from both sides met in Nairobi on November 12 to finalize the agreement's details, which included a return to the pre-war status quo, an end to the two-year siege, resumption of essential services, and an inclusive interim administration in Tigray.

It is important to note that the civil war had constitutional roots, as discussed below. The first civil war ended in 1991 with the overthrow of the socialist military dictatorship known as the *Dergue* (1974-1991), which had ruled Ethiopia since the overthrow of Emperor Haileselassie in 1974. After the military regime's collapse, the Ethiopian Peoples Liberation Front (EPRDF) oversaw the drafting and adoption of a federalist constitution (1991-1994) that aimed to ensure self-government for ethnonational groups.

The second civil war ended in 2022 with the signing of the Pretoria peace accords between the federal government and the TPLF. This could pave the way for a national dialogue that could lead to a comprehensive constitutional reform and a lasting political settlement. If the process falters, it may lead to the dismemberment of Ethiopia.

II. Major Constitutional Developments

1. The Constitution of the Federal Democratic Republic of Ethiopia

The Constitution of the Federal Democratic Republic of Ethiopia (FDRE, 1995) establishes a federal and parliamentary form of government wherein the "Nations, Nation-

alities, and Peoples of Ethiopia" possess sovereign power. It declares the Constitution as supreme and invalidates any law that conflicts with it.

Chapter Three of the Constitution, which lays out the most fundamental rights that are to be interpreted in line with Ethiopia's international human rights commitments, featuring prominently the right of self-determination of the nations, nationalities, and peoples, should be noted, is the most difficult part of the Constitution to amend. Yet, the enforcement of the Constitution and such generously granted rights is left to the House of Federation (HoF), the non-legislative second chamber, a political body that represents the ethnonational groups. The effect, as shown in section three, is the enforcement and interpretation of the constitution have fallen into the hands of the hegemonic party that controls the center including the HoF, making the Constitution an instrument of power. The result is rule by law, not rule of law.

The division of governmental power is both horizontal and vertical. Horizontally, it is in the parliamentary sense where the legislature and executive are fused. Vertically, it is between the federal government and nine autonomous regional states, which include two federal cities (Addis Ababa and Dire Dawa), drawn along ethnolinguistic lines. It is arguably a contested constitutional arrangement: its proponents hail it as one that has dealt with the right to self-government head-on, while its critics label it as 'ethnic federalism' that has brought security problems to the country.

The Constitution defines the powers, institutions, and responsibilities of both federal and state governments. Member states have the authority to design socio-economic policies that are tailored to their local context within the perimeters set by the federal government. They can also establish and implement their own constitutions within their legislative mandates. Every state has enacted its own Constitution, which provides additional details on the powers and institutions of state administration. While the federal government's working language is Amharic, each state has determined its own working language. However, hegemonic political parties and centralized decision-making have made the promise of self-government hollow. Despite the coming to power of a new regime in 2018, there is more continuity than change in this respect.

2. The Unravelling of the SNNPR

The SNNPR in Ethiopia is the most diverse region with fifty-six different ethnic groups. Most other regional states are dominated by one ethno-national group. Both pragmatic and political considerations dictated lumping all these groups as one regional state in 1995, but there were a dozen unhappy groups who wanted to have their own state but were suppressed. The demand for statehood increased after the appointment of Prime Minister Abiy Ahmed in 2018 with the promise of political reform.

To its credit, the Prosperity Party (PP) has conceded to some of the demands for self-government. Some dozen ethnonational groups within the SNNPR exercised their local autonomy and demanded regional statehood by petitioning the National Electoral Board of Ethiopia (NEBE) and the SNNPR council. The Sidama case was the only one that reached NEBE, and the rest were tabled to the council, but the party did not want to see the opening of Pandora's Box. In July 2019, Sidama youth, working with Sidama elites, declared regional statehood unilaterally as federal institutions were lagging behind their demands. NEBE responded by stating that it can only organize a referendum in November 2019, causing protests by the local political elite. The federal government sent the federal army, and clashes resulted in the death of people and property destruction. A referendum was eventually held, and Sidama emerged as the tenth state in June 2020. The South West state became the eleventh state in 2021, and many others pushed for the same. The federal government resorted to a top-down process nicknamed 'clustering,' that is, putting together many groups in one geographic zone focusing on administrative convenience denying the right to self-government to the different groups. The ruling party was not willing to see the proliferation of new states and had blocked the council from facilitating referendums. Two groups, the Ghuraghe and Wolyta, in particular, resisted the top-down approach and insisted on being a regional state, and tension and conflict continued throughout 2022. The trend seems to be that there will be more states but not in accordance with the wishes of the different ethnic groups. Overall while the number of states increased, the federal constitution was not amended to reflect the changes, nor has the age-old practice of a top-down approach changed.

III. Constitutional Cases

Disputes among the different branches and levels of government are common in working constitutional systems. In many jurisdictions, an impartial Supreme Court or Constitutional Court serves as the guardian of the Constitution. However, Ethiopia's unique institutional arrangement presents challenges in achieving this goal.

Ethiopia has empowered its second chamber, the HoF, to adjudicate constitutional disputes. Interpreting the Constitution and resolving constitutional disputes require technical legal expertise, so the HoF is assisted by the Council of Constitutional Inquiry (CCI), a body composed of eight legal experts (two of whom are the President and Deputy of the Federal Supreme Court) that are appointed by the president of the country and three members from the HoF itself. The CCI's role is limited to providing advisory opinions to the HoF, which has the discretion to adopt, modify or even reject them.

Two trends seem to be emerging. Cases involving horizontal and vertical division of power and power politics are prone to political manipulation because the HoF is a political body controlled by the same hegemonic party. However, in most other cases, the HoF has manifested some level of impartiality.

1. Constitutional Adjudication and Democratic Order: *NEBE vs. HPR [2020], Postponement of National and Regional Elections*

Ethiopia was supposed to hold its sixth national and regional elections in 2020, following the previous elections in 2015, where legislators were elected to serve a five-year

term. However, the newly appointed National Election Board of Ethiopia (NEBE) announced on March 31, 2020, that the elections scheduled for August 29 could not take place due to the COVID-19 pandemic. This decision sparked a nationwide debate on how to handle the election deadlock. The ruling party issued an emergency decree to regulate the pandemic, but the scheduled elections remained a contested issue, as the federal government and nine regional states' mandate would end in the first week of October 2020.

In May 2020, the House of People's Representatives (HoPR) sought constitutional advice from the Council of Constitutional Inquiry (CCI), which recommended postponing the elections until the pandemic was no longer a public health threat. It also recommended extending the term of Parliament and regional state councils until the sixth general elections were held, which the HoF endorsed.

Experts had varying opinions on whether the Constitution allowed for the postponement of elections and the extension of Parliament's term, given the five-year term set out in the express clause of the Constitution. The CCI's recommendations were criticized for failing to limit the government's powers during the extension and giving the government an open-ended discretionary power to decide when to hold the sixth national and regional elections.

The HoF's decision to extend its own term exposed a defect in the Constitution's design, rendering Parliament a mere rubber stamp for the ruling party and allowing it to become a judge in its own case. Additionally, the HoF's endorsement of the CCI's recommendation to extend the term of the nine state councils and postpone regional elections demonstrated a disregard for federalism and constitutionalism.

Tigray's outright objection to the HoF's decision escalated the conflict to the point of no return and provided an excuse for the impending war. The HoF's decision to extend the term of state councils without providing detailed justification for doing so was a violation of the autonomy of the states, which have a say on certain issues regarding elections for state councils, including determining the length of their term through their Constitution. The CCI's one-page decision chose to ignore the states' rights and suggested extending the term of state councils, demonstrating a conflict of interest for the HoF.

The war that broke out between the federal government and Tigray in early November 2020 was due to a political disagreement between the ruling Prosperity Party and the TPLF over conflicting visions for the country, but the dispute over the holding of elections before the expiry of Parliament's term provided an excuse. The TPLF argued that postponing the elections would be unconstitutional and lead to a power vacuum. It insisted that the current Parliament's mandate would end on 10 October 2020 and could not be extended under any circumstances. The TPLF also resolved to hold a state-wide election in Tigray if the national elections were postponed beyond the set date, claiming that holding regional state elections was part of the right to self-government.

However, the Tigray Democratic Party challenged the constitutionality of the measures taken by the TPLF in terms of establishing an electoral board and holding elections. The HoF declared that the Tigray state government's actions were unconstitutional and nullified the election. Tigray did not have representatives in the HoF, and its claim that holding regional state elections at a time when NEBE declined to conduct the elections was part of their right to self-government was not given due consideration. This was the immediate cause of the tragic civil war that ensued.

2. Constitutional Rights of Suspects and due process: *Osman Seyed vs. Ethiopian Revenue Authority [2022, file no 91/13]*

The applicant, a former employee of the Ethiopian Revenue and Customs Authority (ERCA), was charged with corruption for allegedly failing to discharge his responsibilities dutifully. A businessman imported goods from abroad and was supposed to pay ETB 346,127.42 of customs duty due to ERCA but did not pay either because of corruption or irresponsible discharge of duties by the applicant. The lower courts in the Amhara region set the applicant free, stating that this was administrative malpractice, not a crime.

ERCA brought the case to the Cassation bench of the Federal Supreme Court, and the Court decided that the applicant was guilty under the anti-corruption law. The applicant applied to the CCI, and the latter, after reviewing the relevant laws and evidence, found out that the applicant was charged based on the Revenue and Customs Proclamation, which does not make minor maladministration errors a crime. Yet, the Cassation bench cited a new anti-corruption law issued while the case was pending before the Court that made such administrative malpractices an act of corruption and found him guilty. The applicant brought the case to the CCI, and the latter criticized the decision of the Cassation court on two grounds. First, the applicant was charged in the lower courts based on the ERCA proclamation, and this law does not make it an offense. The anti-corruption law was issued while the case was pending before the Court, and thus the law cannot apply retroactively and make the applicant a criminal, as he was not at the time. Secondly, the applicant was not charged under the new anti-corruption law, and his right to be presumed innocent and all other basic rights of suspects related to due process under the constitution (Articles 21-22) were violated, according to the CCI. Therefore, the decision of the Cassation Court was unconstitutional, and the CCI recommended that the HoF quash the decision and release the applicant. The HoF endorsed the CCI's opinion and ordered the Court to release the applicant.

3. Secularism: *Melake Hiwot H. Mariam vs. Ethiopian Orthodox Church and Semen Shewa Selassie Hagere Sibket* [2022, file no 90/13]

The applicant was a priest serving in a local church in North Shewa of the Amhara region. He was dismissed from his church service and sued the local church administration for unlawful dismissal in a tribunal of the Church. The church tribunal investigated the matter and ordered his reinstatement and payment of his salary, but the local church

failed to comply with the orders. The applicant brought the case to the regular court, including the Cassation Court, but they refused to order the execution, citing the principle of secularism enshrined in Article 11 of the Constitution, which prohibits regular courts from interfering in the affairs of the Church.

The applicant then brought the case to the CCI, which found that the Cassation Court's decision was flawed. The CCI reasoned that the Church has a legal personality and hence can sue or be sued. The Church has also the mandate, within the purview of Article 27 of the Constitution, to establish its own tribunals to resolve disputes that arise within the Church. However, in this case, the request was for the execution of a decision of the Church because the local Church failed to comply with the orders of the tribunal. The CCI argued that citizens have the right to get a court order for the execution of their rights and that such a request does not violate the principle of secularism, as the substance of the decision has already been made by the Church. It criticized the regular courts' position and recommended the HoF examine the matter and address the applicant's rights.

However, the HoF rejected the CCI's opinion, stating that it violates the principle of secularism, and dismissed the case. It is our position that the CCI's position was the right interpretation of the principle of secularism. Secularism does not create walls between civil courts and the Church. Substantive issues that matter to the Church should be left to the Church, but procedural matters that affect the rights of citizens, like the applicant's case, should be rectified by the regular courts. Religious or other institutions cannot be allowed to violate the Constitution under the guise of secularism. The right to access justice under Article 37 of the Constitution is broad enough to cover such an interpretation.

4. Property Right and Due Process [2022, File Number 79/12]: *Birhane Teiumelissan, Romanwork Nigatu vs. Privatization Agency, Construction and Business Bank, Ministry of Defense*

The applicants owned 2,000 square meters of land in Addis Ababa, which they leased to a private company during the imperial era. To construct a building on the land, they took a loan from the Construction and Business Bank, which held a mortgage on the title deed of the building. However, after the military regime assumed power in 1974, the expropriation of what it called "extra houses and urban land" under Proclamation number 47/1974 began. The expropriated buildings and land were later administered by the Agency for Government Houses, which was later replaced by the Privatization Agency after a change of government in 1991. The Privatization Agency was tasked with investigating cases of abuse of power by government officers who expropriated land and buildings outside the requirements of Proclamation 47/1974. If proven, the Agency could order the return of the buildings to the rightful owners.

In this case, the applicants sued the respondents before the Privatization Agency, presenting proof of their title deed. However, the Ministry of Defense, the institution now in possession of the building, presented counter-evidence showing a title deed issued by the relevant Sub City Municipality. The Privatization Agency closed the file, stating the latter's evidence is valid, and the title deed of the applicants regarding the building was lost when it was expropriated in 1974. The applicants submitted the same case to relevant courts, including the Federal Cassation Court, but their case was dismissed, stating that the Privatization Agency had already closed the file based on evidence and that its decision could not be reviewed.

The applicants brought their case before the CCI and argued that their right to property and access to justice, protected by the Constitution, had been violated. The CCI examined the case and recommended that the courts had not done proper hearings and should have examined whether the applicants' case was expropriated within the limits of the law and whether the right to own property had been violated. It also proposed that the right to access justice had not been respected by the courts.

However, the HoF dismissed the CCI's opinion, stating that the Privatization Agency and the courts had done their job within the mandates as defined in the different laws. This decision raised two issues. Firstly, the Privatization Agency is an administrative body empowered to hear cases, but its establishment law does not require it to ensure due process and fair hearings. The evidence from the records of the case showed the Agency had decided without following due process of law. Lack of due process and fair hearing is a risk associated with quasi-judicial bodies as part of the executive, where the principles of impartial justice and due process are often violated.

Secondly, the right of access to justice, as enshrined under Article 37 of the Constitution, demands that citizens have the right to a fair and transparent hearing, and the decision of the Privatization Agency did not ensure this. This lack of proper hearing and decision-making is likely to have affected the applicants' right to property. It is also unclear whether the building was expropriated following the procedures set in Proclamation 47/1974. Moreover, whether the right to property, as enshrined in the 1995 constitution, should be violated by an archaic law issued in 1974, whose constitutionality remains suspect, should have been investigated by the HoF.

5. Land and Right to Property: *Borchu Genore vs. Bitsuan Amare* [2022, File Number 101/13]

The applicant, in this case, had his land and property in the SNNPR expropriated by local authorities in the name of promoting investment. The applicant sued both the respondent and the local government in a local court for adequate compensation and substitute land, but the Court dismissed his case, alleging that expropriation is done for the public interest and promoting investment. He appealed all the way to the Federal Supreme Court Cassation bench but found no remedy. He finally submitted to the CCI seeking Constitution interpretation, citing his right to property under the federal constitution has been violated and mentioning that regular courts have not given him any remedy.

The CCI investigated the case and found that the applicant had been evicted and lost his

property. The regular courts failed to examine the applicant's case judiciously, violating his right to access justice as enshrined in Article 37(1) of the constitution. The CCI further noted that by virtue of Article 48 of the Constitution, property holders have the right to adequate compensation if their property is expropriated for public purposes. The applicant was not compensated despite making such demands in the different court hierarchies. The HoF approved the CCI's recommendations and subsequently quashed the decision of the Supreme Court Cassation bench as unconstitutional, ordering the Court to take appropriate remedies.

Borchu's case is not unique, as there are many other cases related to land rights in Ethiopia. As per the Ethiopian Constitution, Article 40 (3) states that land is publicly owned, and farmers have the right to obtain land without payment for their livelihood. The Constitution also allows them to lease their plot of land under their possession. However, in rural areas, there is a widespread practice of selling under the guise of a lease contract, which, in effect, evicts peasants from their possession. Lately, peasants have been reclaiming their possession of land, alleging that the lease contract was a disguised sale of land, which violates Article 40(3) of the Constitution.

Individual peasants have filed complaints to the HoF, having exhausted remedies from courts that have legalized such disguised lease contracts that, in effect, sell land. The HoF has, as a result, declared many such transactions null and void and restored the farmers' right to possession of the land.

IV. Looking Ahead

The country is currently in the midst of a political and constitutional crisis, and only a comprehensive constitutional reform can effectively address the enormity and gravity of the situation and break the vicious cycle of civil wars. To achieve this, a political settlement among the major political parties through an all-inclusive dialogue is the best option available. This must include addressing the contradictory perspectives of different political forces and the issue of marginalization.

However, this option is facing difficulties. While there is continuity in the practice of centralized rule under the EPRDF and its successor PP, the latter's determination to use violence to crush political demands for self-government and inclusion has been witnessed in the devastating wars and series of emergency decrees issued in regional states. This record in Ethiopia's recent history makes issues related to political settlement, constitutional reform, and democratization a remote possibility.

V. Further Reading

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France

Corinne Luquiens, *Member of the Constitutional Council*

Nefeli Lefkopoulou, *PhD Candidate at Sciences Po Law School*

Eirini Tsoumani, *PhD Candidate at Sciences Po Law School*

Guillaume Tusseau, *Professor of Public Law at Sciences Po Law School*

I. Introduction

In 2022, presidential elections and elections to the National Assembly took place. Emmanuel Macron was the first president to be re-elected to a five-year term and the first whose re-election under the Fifth Republic did not put an end to a situation of cohabitation, where the President faces an opposition majority. In 2017, the second round of the presidential election pitted President Macron against far-right leader Marine Le Pen, while the parties that had dominated the Fifth Republic were severely defeated. For the first time since 1988, the legislative elections did not give an absolute majority to the President. His party faces radical forces of opposition from the left and the far right. As no alliance between these two is imaginable, no alternative majority is bound to emerge. It has thus been difficult for the President and his Prime Minister to implement their platform. For the second time in France, a woman was appointed to the latter position, Elisabeth Borne being the first to be officially called "Première ministre." To pass legislation, she frequently had to use Article 49 para. 3 of the Constitution, which allows a bill to be adopted without a vote of the National Assembly, provided a motion of censure is not adopted. For the first time as well, a woman was elected Speaker of the lower house of Parliament.

Before the elections, three new members were appointed to the Constitutional Council. They were in charge of advising the Government on the organisation of the elections, monitoring the voting operations, announcing the results, and dealing with the ensuing litigation. They also had to examine the first statutes passed in the new political situation. In this respect, the long-awaited Rules for Ex Ante Review came into force. They complement the Rules for Electoral Litigation and the Rules for the Preliminary Ruling of Unconstitutionality, thus enriching French constitutional law of procedure.

II. Major Constitutional Developments

A series of decisions had to do with the topic of digital constitutionalism.[1] The Constitutional Council has been one of the first courts to recognise a right to an Internet connection.[2] In Ruling 2021-834 DC, it addressed the use of video surveillance and onboard cameras by public authorities, it limited biometric and sound recording, as well as automated facial recognition, and automated matching or interconnection with personal data processing. In the context of the ex-ante review, Ruling 2022-841 DC considered that, as they were regulated, injunctions to remove online terrorist content did not violate freedom of expression and communication. Although dereferencing is less brutal than the taking down of online content, it impacts freedom of speech too. In Ruling 2022-1016 QPC, the Council upheld the administrative power to take measures, among which dereferencing, to stop fraudulent commercial practices committed from an online interface. As it was regulated, it did not infringe on the right to a fair trial or on the right to free enterprise.

Four decisions specifically dealt with the requisition or the conservation of data in

the context of repressive procedures. In Ruling 2021-974 QPC, the Council had to rule on Article 77-1-1 of the Code of Penal Procedure. Under this text, the prosecutor or a police officer or a police agent she authorises, in the context of a preliminary investigation, can request information held by any public or private person, including information from a computer system or personal data processing. The Council had already declared this provision unconstitutional in Ruling 2021-952 QPC: "Connection data include in particular data relating to the identification of individuals, their location and their telephone and digital contacts, as well as the online public communication services they use. Given their nature, their diversity, and the processing to which they may be subjected, connection data provide numerous and precise information on the persons in question and, where applicable, on third parties, which is particularly invasive of their privacy." Moreover, the requisition was possible for any kind of offense and did not need to be justified by any emergency, nor was it limited in time. Because no guarantee had thus been established by the legislator to proportionately balance the right to private life based on Article 2 of the 1789 Declaration of the Rights of Man and the Citizen and the search for criminal offenders, the provision was declared unconstitutional. The Council had postponed its derogation to 31 December 2022. In light of the *res judicata* principle, the Council considered it did not need to examine the new case.

In two other cases, the Council used the same balancing test for similar provisions regulating *flagrante delicto* investigation. In Ruling 2022-993 QPC, and contrary to the previous rulings, it was noted that the relevant requisitions only applied to the case of *flagrante delicto,* punished with jail time. The investigation was limited to eight days and could be prorogued only under strict conditions. The requisition of connection data must be decided by the prosecutor, a police officer, or a police agent acting under the supervision of the former. This is why the Council concluded that the legislator had struck an appropriate balance between the constitutional objective of searching for criminal offenders and the right to private life.

Ruling 2022-1000 QPC addressed provisions granting roughly similar prerogatives to the investigating judge (*juge d'instruction*) or a police officer to whom the formerly granted authorisation and who acted under her supervision in the case of "judicial information." The requisition, which could be made by a judge whose independence was constitutionally guaranteed, was possible only for a specific offense within the framework of a specific penal procedure, which must be limited in time depending on the facts to be investigated, the complexity of the case, and the rights of the defense. It was mandatory only in criminal matters as well as for specific serious offenses and possibly for other offenses only in limited circumstances. This is why the Council upheld the legislation.

In Decision 2021-976/977 QPC, the Council ruled on the constitutionality of Article L. 34-1 of the Post and Electronic Communications Code. This text dealt with the processing of personal data in connection with the provision of electronic communications services to the public. It provided that these operators may be required to retain certain categories of connection data, including traffic data, for one year, to investigate, establish, and prosecute criminal offenses and to make such data available to the judicial authority. The Council admitted that these provisions aimed at preventing breaches of public order and searching for criminal offenders, which are objectives of constitutional value. However, "the connection data kept under the contested provisions relate not only to the identification of users of electronic communications services but also to the location of their terminal communications equipment, the technical characteristics, date, time and duration of communications and the identification data of their recipients. Given their nature, their diversity, and the processing to which they may be subjected, these data provide numerous and precise information on these users and, where appropriate, on third parties, which is particularly invasive of their privacy. [Moreover], such retention applies generally to all users of electronic communications services. [Finally], the obligation to retain applies equally to all connection data relating to these persons, regardless of their sensitivity and without regard to the nature and seriousness of the offenses that may be investigated." This is why the criticised provision violated the right to private life disproportionately and must be struck down. The effect of the ruling was limited, though, as, first, the legislation had already been modified and, second, the Council deemed it appropriate not to call into question the validity of the past measures taken on its basis.

These decisions testify to a consolidated approach that can pave the way to the drafting of a charter of digital rights. Until now, all parliamentary attempts at adopting one have failed, so the protection of fundamental rights online is viewed as a continuation of traditional constitutional guarantees rather than as a revamped 2.0 strategy.

Two other decisions appear to be important too, not so much for what they ruled, since in both instances, they validated the laws that were referred to the Constitutional Council's *ex ante* review, but because of the conditions they imposed for these laws to comply with the French Constitution.

Decision 2022-842 DC of 12th August 2022 deals with the abolition of the television fee that used to fund French public broadcasters and has been replaced until 31st December 2024 by the allocation of a fraction of the value-added tax. The applicant Members of Parliament criticized this provision for unduly limiting freedom of communication and thought as well as threatening the independence and pluralism of the media. The main reason was that these resources did not ensure the sustainability of the financing of public broadcasting after 2024. The Constitutional Council recognized that the public broadcasting sector contributes to the protection of freedom of communication provided for in Article 11 of the Declaration of the Rights of Man and the Citizen. It explained that radio listeners and television viewers were among the main beneficiaries of this freedom and should be able to exercise their free choice without private interests or the State imposing their own decisions. Thus, the re-

sources that constitute an element of its independence should not be jeopardized. Nevertheless, it ruled that the contested provision complied with the Constitution since financial assistance would come for the next three years from an amount of VAT. For the following years, it admitted the validity of the statute only under the condition that, when taking future decisions, the legislator would take into account the fact that the public broadcasters should receive the means allowing them to carry out the public service missions entrusted to them. However, the Constitutional Council rejected the request of the applicants, which recognized the fact that the public sector should be financed by a license fee as a fundamental principle acknowledged in the laws of the Republic.

Decision 2022-843, of the same day, applies to the law on emergency measures to protect purchasing power. Two main provisions were targeted. The first one empowers the Minister responsible for Energy to impose, by order, that an operator of a floating methane terminal maintain its operation and lay down the rules regarding such installation. The second provides for procedural derogation, in particular to the Environmental Code, to carry out the project of installing a floating methane terminal in the Le Havre harbour. The applicants challenged the constitutionality of these provisions by invoking the constitutional objective of protecting the environment, recently recognized by the Constitutional Council, in light of Articles 1, 6, and 7 of the Charter for the Environment. The Constitutional Council admitted that the contested provisions are likely to harm the environment but only implement the "constitutional requirement inherent in the safeguarding of the fundamental interests of the Nation, as well as the essential elements of its economic potential." Through an interpretative reservation worded in unprecedented terms, it held that, according to the Charter for the environment, care should be taken to safeguard the environment along with the other fundamental interests of the Nation and that choices designed to meet the needs of the present generation should not jeopardize the ability of future generations and other people to meet their own needs. Finally, considering the obligations set out by the legislator to limit the environmental impact of these provisions, such as the different rules and controls imposed on the floating methane terminals and the period limited to five years set out for the new installation in Le Havre harbour, the Constitutional Council considered that the contested provisions complied with the Constitution provided there was no threat to the security of electricity supply.

III. Constitutional Cases

1. Decision 2021-971 QPC of February 18, 2022 – Full right extension of some mining concessions

Provisions relating to the extension of former mining concessions in perpetuity were criticized for allowing this extension without the administrative authority having to take into account the adverse effects on the environment of such a decision. In this light, the Constitutional Council noted, first, that the decision to extend a mining concession determines the general framework and scope of mining works. Given its object and its effects, it is thus likely to adversely affect the environment. Secondly, before the entry into force of the law of August 22, 2021 on the fight against climate change and strengthening resilience to its effects, the contested provisions did not subject the extension of the concession to any other condition than that of the exploitation of the deposit as of December 31, 2018. Neither these provisions nor any other legislative provision provided that the administration should take into account the environmental consequences of such an extension before making a decision. The Constitutional Council deduced from this that, for this period, the legislator disregarded Articles 1 and 3 of the Environmental Charter. Nevertheless, since the entry into force of the law of August 22, 2021, the provisions authorizing the extension of the former concessions in perpetuity should not be interpreted as preventing the consideration of the consequences on the environment of the decision to extend these concessions. The Constitutional Council, therefore, deduced that, since this date, and subject to this reservation, these provisions no longer violate Articles 1 and 3 of the Environmental Charter and comply with the Constitution.

2. Decision 2022-1004 QPC of July 22, 2022 [Regime for associations carrying out religious activities]

The applicants claimed that, by requiring associations to declare their religious character to benefit from the advantages specific to the category of religious associations, Article 19-1 of the Act of 9 December 1905 instituted a system of prior authorization leading the State to recognize some religions. They also argued that, as the obligations imposed on these associations have been increased, these provisions would allow the State representative to refuse or withdraw this religious status in many cases. This would result in a breach of the principle of secularism, freedom of association, and freedom of religion and worship. The applicants also denounced the excessive constraints imposed by Articles 4 and 4-1 of the Act of 2 January 1907.

Firstly, the Council ruled, on the one hand, that the sole purpose of the disputed provisions is to institute a declaratory obligation to enable the State representative to ensure that associations are eligible for the benefits specific to religious associations. They have neither the object nor the effect of the Republic recognizing a particular religion or of impeding the free practice of worship within the framework of an association governed by the Act of 1 July 1901 or using meetings held on individual initiative. On the other hand, the representative of the State can only oppose an association benefiting from the advantages specific to religious associations or withdraw these advantages after an adversarial procedure and solely for a reason of public order; or in case the practice of worship is not the exclusive purpose of the association; or if its constitution, composition, and organization do not meet the conditions listed in Articles 18 and 19 of the Act of 9 De-

cember 1905. Consequently, the disputed provisions do not infringe on the principle of secularism.

Secondly, the Council highlighted that the infringements of the freedom of association must be necessary, appropriate, and proportionate to the objective pursued. The declaration imposed on associations by the disputed provisions to benefit from certain advantages is not intended to regulate the conditions under which they are formed and carry out their activities. On the other hand, the withdrawal of the benefit of these advantages by the State representative is likely to affect the conditions in which an association carries out its activity. Consequently, and subject to the reservation that this withdrawal cannot lead to the restitution of benefits that the association enjoyed before it lost its religious status without disproportionately infringing on the freedom of association, the objection alleging infringement of the freedom of association must be dismissed.
Regarding the constraints imposed by Articles 4 and 4-1 of the Act of 2 January 1907, the Council stated that while such obligations are necessary and appropriate to the objective pursued by the legislator, it will nevertheless be up to the regulatory power to ensure that the constitutional principles of freedom of association and freedom to practice worship are respected when setting out the specific procedures for implementing these obligations. Subject to this second reservation of interpretation, the objection alleging infringement of freedom of association and freedom to practice worship was equally dismissed.

3. Decision 2022-1003 QPC of July 8, 2022 – Access to medically assisted procreation

The Constitutional Council found that the legislative provisions granting access to medically assisted procreation to couples consisting of a man and a woman, two women, or unmarried women while depriving single men or men in a same-sex couple of the same access are constitutional. Consequently, it also found it constitutional to exclude individuals who were assigned female at birth but obtained a modification of their gender while retaining their ability to become pregnant from accessing medically assisted procreation. The members of the Council rejected the argument that the contested provisions, establishing a difference in treatment between individuals with a gestational capacity based on their gender marker according to register office records, were contrary to the principle of equality before the law and equality between men and women. The Council noted that the difference in the situation between men and women regarding civil status rules could justify a difference in treatment regarding access to medically assisted procreation.

4. Decision 2022-841 DC of August 13, 2022 – Bill containing various provisions on the prevention of the dissemination of terrorist content online to adapt to European Union law

The Council addressed a provision adopted by the French Parliament as a consequence of European Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on the dissemination of terrorist content online. It determined the competent authority to define, respectively, the authority that would have jurisdiction to order hosting service providers to remove terrorist content, the penalties applicable in the event of failure to comply with such orders, and the remedies available against such orders. Based on Article 11 of the Declaration of the Rights of Man and the Citizen and Article 34 of the Constitution, which defines the mission of the legislator, the Council admitted the constitutionality of the disputed norm. It seemed that terrorist content represents abuses of freedom of speech and communication, undermining public order and third-party rights. The conditions under which an injunction can be imposed by the administration are limited in scope so that contents dedicated to education, journalism, art, research, or prevention are preserved. It must be precise and motivated. It must additionally be transmitted to the independent Regulatory Authority for Audiovisual and Digital Communication, which can refer the measure to an administrative court. Moreover, the providers of hosting or content services also have several possibilities to ask the administrative judge to review the injunction. Finally, penal sanctions can only be imposed on them in strictly defined circumstances. As a consequence, freedom of expression and communication is duly preserved.

5. Decision 2022-1010 QPC of September 22, 2022 – Right of inspection by customs officers

The Constitutional Council declared unconstitutional the provisions allowing customs officers to conduct searches of goods, means of transport, and individuals, without effective judicial control, with or without using coercive measures. The Council found that these provisions violate individual freedom, freedom of movement, the right to privacy, and the right to defense. It also noted that the legislator failed to provide a sufficient framework for these operations, leading to an imbalance between the prevention of breaches of public order and the search for criminal offenders. These are both necessary to safeguard constitutional rights and principles, the protection of freedom of movement, and the right to privacy.

6. Decision 2022-1016 QPC of October 21, 2022 – ContextLogic Inc. [Dereferencing an online interface]

Although dereferencing is less brutal than the taking down of online content, it severely impacts freedom of speech too. In Ruling 2022-1016 QPC, the Council examined Article L. 521-3-1 of the Consumer Code. It allowed the administrative authority in charge of competition and consumption to take measures to stop certain fraudulent commercial practices committed from an online interface, such as enjoining the operators of online platforms to proceed to the dereferencing of the electronic addresses of the online interfaces whose contents are illegal. According to the Council, by adopting this legislation, the legislator intended to protect consumers and to ensure the fairness of online commercial transactions, which serves the public interest. It underlined the fact that dereferencing can only be decided for specific offenses, in case of manifestly illegal content, and if the author is not identified or has not executed a preceding injunction. As the provider is given 48 hours to dereference, the interested parties can ask for judicial review of the mea-

sure, the judge ensuring it is proportional to the situation. The Council did not admit an undue violation of free enterprise, as it insisted on the fact that even when they are dereferenced, the online addresses remain fully accessible.

7. Decision 2022-3 RIP of October 25, 2022 – Draft Bill creating an additional contribution to the exceptional profits of large companies

The Constitutional Council ruled on a draft bill that intended to increase taxation of the fraction of profits above 1.25 times the average taxable income of companies with a turnover exceeding 750 million euros for the fiscal years 2017, 2018, and 2019. The proposed law aimed to establish an additional tax on the exceptional profits of large companies and was considered to have the sole effect of supplementing the state budget. This is done through a limited measure that increases the level of the existing taxation of the profits of certain companies. Consequently, according to Article 11 of the Constitution, the proposed law does not fall within the meaning of a reform related to the economic policy of the nation. Therefore, it does not meet the conditions of the procedure of the referendum on a shared initiative - a referendum initiated by a fifth of the members of Parliament on a draft bill, which the Constitutional Council has declared to comply with the Constitution, and which is supported by one-tenth of the voters.

IV. Looking Ahead

2023 is a year without any election. However, governing without a stable majority may prove complex and could lead to a deadlock. President Macron and Prime Minister Borne cannot expect any durable support from the left or the far right. Only the right-wing party *Les Républicains* could help but at the price of depriving itself of its very *raison d'être*. If Macronist political reform is paralysed, the President may contemplate the possibility of dissolving the National Assembly. As President Chirac's failed attempt in 1997 proved, this is a difficult choice. All across the political spectrum, except for the far-right *Rassemblement National*, the appointment of party leaders in 2022 exposed their deep internal divisions. As President Macron cannot run for another election, his potential successor will be chosen in the months to come, possibly leading to tensions inside the current majority and an increased division of the French political landscape.

V. Further Reading

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Note di chiusura

1 On the multiple dimensions of digital constitutionalism, see Guillaume Tusseau, Taking Chaos Seriously: From Analog to Digital Constitutionalism(s), forthcoming.

2 Ruling 2009-580 DC.



Georgia

Malkhaz Nakashidze, *Professor, Jean Monnet Chair, Batumi Shota Rustaveli State University*

I. Introduction

This report provides a brief introduction to the Georgian constitutional system including reform of the High Council of Justice, judges' complaint to the constitutional court, local elections, abolition of the State Inspector Service, media freedom, granting EU candidate country status to Georgia, election of public defender. It provides an overview of other landmark judgments of the Georgian Constitutional Court in 2022. The final section examines developments expected in 2023 related judiciary, EU integration, Constitutional Court cases, and other related issues.

II. Major Constitutional Developments

1. Election of Members of the High Council of Justice

One of the main challenges of the Georgian judicial system is the independence of the High Council of Justice. In previous years, international and European monitoring organizations have constantly pointed to the need for its reform, to the clan rule and corporatism of a certain group of judges in the judiciary. In 2022, there was an expectation that this situation would change, but the opposite happened. On October 23, the conference of judges elected 2 members of the High Council of Justice, Levan Murusidze and Dimitri Gvritishvili.[1]Also on October 31, 2022, the conference of judges elected 2 new judges of the High Council of Justice, Paata Silagadze and Giorgi Goginashvili. It is believed that Silagadze and Goginashvili are members of the so-called clan of judges, and both are appointed lifelong judges of the Tbilisi Court of Appeal. Murusidze and Gvritishvili are the most influential members of the judicial system, and their return to the Council of Justice is seen as a strengthening of corporatism in the judicial system. In addition, the High Council of Justice is still not fully formed. Non-judge members have not been elected to the council for a year, and this also hinders the council's independence.

2. Claim of Judges to the Constitutional Court

One of the important issues in 2022 was the case of five judges of the General Court to the Constitutional Court. Judges Complained About "Common Courts" Amendments to the law, which, among other things, envisage imposing sanctions on judges for "violation of political neutrality". According to the plaintiffs, the new norm restricts any form of expression, whether it is textual, symbolic, audio, video or photo expression against Russia's occupation of Ukraine or Georgia and the war on social networks.[2]

3. Final Abolishing of the State Inspector's Service

A new law was adopted in 2022 by which cancels the State Inspector job and creates special Investigative and personal data protection bodies. Work of the State Inspector service in the country has been evaluated positively by existing qualified non-governmental organizations. This decision drew criticism from international and local experts because it was against development of a strong democratic institute and rule of law.

4. Midterm Elections of Local Self-government

In 2022, several midterm elections of members of self-government bodies were held in the country. The ruling party of Georgia, the Georgian Dream, won a majority in almost all the city councils of Georgia, although there were several city councils where it did not succeed, and during the year a certain crisis was created in these cities. For example, it was Senaki City Council, where in 2021 local Self-government elections then the majority None of them the party Can't gained and Self-government organ permanent boycott mode worked. Here midterm elections was held on October 1[3] and the majority the ruling party gained and the council elected chairman from the ruling team.[4] The second midterm elections were held in the second largest city of Georgia - Batumi. In this council, no party could win a majority and the ruling party did not have enough votes to create a majority. After the elections, one member of the opposition suddenly died and the seat of the majority MP became vacant right after that. The opposition attributed his death to his bribery by the ruling party. Finally, in the midterm elections on April 2, the candidate of Georgian Dream, Ramaz Jincharadze, won, one member of the City Council left the one of the parties and announced the continuation of independent work, however, later after Jincharadze was elected as the chairman of the City Council, he took the post of deputy, and thus the ruling party managed to create a majority in the Batumi City Council.[5]

5. Restriction of Media Freedom

On May 16, 2022, the court sentenced Nika Gvaramia, the director of one of the critical TV channels to the government, Nika Gvaramia, to three years in prison. He was sentenced to prison for the losses caused to a private company while he was in charge of his former TV company. The public defender identified a political motive in the case of Nika Gvaramia, the organization "Reporters without Borders" called the case politically motivated and aimed at weakening the opposition media. The International Committee for the Protection of Journalists included Georgia for the first time in the list of countries where journalists are imprisoned for their work.[6] This disputed verdict was also included in the resolution of the European Parliament, "On violation of freedom of the media and protection of journalists in Georgia",[7] and with another resolution, the European Parliamentarians asked the President of Georgia to pardon Gvaramia.[8] Nevertheless, in 2022, Gvaramia is still in prison.

6. Granting the EU Candidate Country Status to Georgia

On June 23, 2023, Ukraine and Moldova received the status of candidate countries for EU membership, and the European Union gave 12-point recommendations to Georgia and said that it will receive the status only after these recommendations. Among the recommendations are de-oligarchization, an end to political justice and an end to attacks on the media.[9] After this decision, a mass rally was held against the government, where they demanded the resignation of Prime Minister Irakli Gharibashvili and the formation of a government with national consent. Georgia has important reforms to implement in order to join the European Union, however, in 2022, the government failed to fully implement the recommendations. This year, the government of Georgia was distinguished by its criticism of the European Union and the government of Ukraine, and did not take an unequivocal position in support of Ukraine. This year, the government of Georgia was distinguished by its criticism of the European Union and the government of Ukraine, and did not take an unequivocal position in support of Ukraine. Moreover, the government announced that it would not join the sanctions against Russia. The government's policy caused a great protest in the Georgian society, more than 85% of which are in favor of Georgia joining the European Union. The actions of the government also contradict Article 78 of the Constitution of Georgia, where it is determined that the state authorities must take all measures for the integration of Georgia into the European Union and NATO.

7. Election of the Public Defender of Georgia

In Georgia, the Public Defender plays an important role in the protection of human rights and democratic principles. At the end of 2022, the current ombudsman's term of office expired, and at the extraordinary session of the parliament held on December 22, where the candidates for the public defender were voted on, the parliament could not elect a public defender.[10]. Ruling Pattia did not support several independent candidates nominated to the parliament. The appointment of an independent candidate for the post of ombudsman as a result of a transparent process is one of the 12 recommendations of the European Commission, which Georgia failed to fulfill. The Parliament will re-vote candidates for the post of Public Defender in the spring session in 2023.

III. Constitutional Cases

1. Shalva Natelashvili against the Parliament of Georgia (No. 1/7/1688, November 4, 2022)

The subject of dispute in the case was the constitutionality of the resolution of the Parliament of Georgia "On early termination of the powers of Shalva Natelashvili as a member of the Parliament of Georgia", by which the Parliament of Georgia prematurely terminated the powers of a member of the Parliament of Georgia during the next session for not attending more than half of the regular sessions due to dishonorable reasons. According to the plaintiff, he was in the parliamentary boycott mode. The Constitutional Court explained that the boycott should not endanger the effective functioning of the politically pluralistic higher representative body, for this reason the right to miss sessions does not include the possibility of continuing the boycott indefinitely or for the entire term of office and refusing all parliamentary activities.

2. Public Defender of Georgia against the Minister of Justice of Georgia (No. 1/10/1676, December 21, 2022)

The subject of the dispute in the case was the constitutionality of the norms of the order of the Minister of Penitentiary and Probation of Georgia. The plaintiff party considers the content of the disputed rule as problematic, on the basis of which, as a general rule for placing the convict in a cell, his placement

in a single-bed cell is determined. According to his explanation, the mental health of the convict may be significantly damaged by such treatment. The Constitutional Court recognized the contested norm as unconstitutional. The court explained that due to the lack of procedural guarantees, the disputed norms do not meet the guarantees of protection of convicted persons from arbitrary solitary confinement without adequate grounds. Thus, such imprisonment does not meet the positive obligations of the State in the area of impunity for ill-treatment and punishment.

3. Londa Toloraya and the Public Defender of Georgia against the Parliament of Georgia (No. 1/9/1673,1681, November 17, 2022)

The subject of dispute in the case was the constitutionality of various norms of the Law of Georgia "On Special Investigation Service" and the Law of Georgia "On Personal Data Protection". In the case, the cancellation of the state inspector's service was appealed based on the law of Georgia. According to the claimant, the newly created Special Investigation Service and the Personal Data Protection Service enjoy the same powers that the State Inspector Service had in the given field. The claimant fully meets all the requirements imposed on the heads of the new services, although his official authority as a state inspector has been terminated unconditionally. The Constitutional Court of Georgia satisfied the claim only partially and declared unconstitutional the normative content of the contested act, which provided for the dismissal of the state inspector and his deputies without offering an equivalent position or providing fair compensation.

4. Constitutional submission of the Tetritskaro District Court (No. 3/4/1648, April 21, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Organic Law of Georgia "On General Courts" and the Organic Law of Georgia "On the Constitutional Court of Georgia". The case concerns the suspension of proceedings in the Tetritskaro District Court due to the filing of submissions to the Constitutional Court of Georgia. According to the plaintiff, in order not to violate the right to a fair and timely consideration of the case, it should not be impossible to resume proceedings before the Constitutional Court resolves the issue of the constitutionality of the contested norm. The court satisfied the constitutional claim and explained that due to the change of situation and circumstances, the disputed norm no longer represents the law applicable to a specific case, the impossibility of resuming the proceedings suspended in the general court before the decision of the Constitutional Court becomes self-serving, no longer serves to achieve legitimate goals and unjustifiably violates the timeliness of the case. right to review and resolution.

5. Archil Morbedadze and Amalia Badaliani of Georgian Education and against the Minister of Science (No. 2/3/1559, December 23, 2022)

The subject of the dispute in the case was the constitutionality of the norms of the "Regulation on Conducting Unified National Exams" approved by the order of the Minister of Education and Science of Georgia. According to the contested norm, "failure to appear for testing deprives the entrant of the right to request additional testing, regardless of whether the failure to appear for testing was caused by an objective reason or not." According to the claimant, the disputed norm excludes the possibility of conducting additional testing, including in cases where the entrant's failure to appear for the test is caused by force majeure or other impeding objective reasons, as a result of which he loses the opportunity to receive higher education for one year. The Constitutional Court considered that neither in the interest of saving material resources nor in the interest of equal assessment of points, can it be justified to limit the right to receive higher education and its financing in the form provided for by the contested norm. The court considered that the appealed regulation contradicts the requirements of the Constitution of Georgia and should be declared unconstitutional.

6. Giorgi Lashkhi against the Government of Georgia (No. 1/1/1558, February 23, 2022)

The subject of the dispute in the case was the constitutionality of Article 5 of the "Rule of wearing a mask" approved by the resolution of the Government of Georgia. According to the lawsuit, the plaintiff was fined for violating the rule of wearing a face mask in an open public space based on the disputed resolution. According to the explanation of the claimant, the Government of Georgia had no legal basis to find the claimant and, at the same time, it itself was not authorized to define the action as a violation of the law and impose responsibility on it. The court upheld the constitutional claim and explained that the government expanded the range of punishable actions provided for in the Code of Administrative Offenses and introduced a new sanctionable action. According to the court, according to the constitution, the government of Georgia has no right to adopt a law establishing responsibility and it should be declared unconstitutional.

7. Levan Darsalia against the Parliament of Georgia (No. 2/2/1506, April 13, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Criminal Procedure Code of Georgia. The first part of Article 180 of the Criminal Procedure Code of Georgia establishes the procedure for placing a person in a state medical institution for examination. According to the plaintiff, when requesting to place the accused in a medical institution for examination, the disputed norm excludes, on the one hand, the oral hearing of the petition, and, on the other hand, the appeal of the decision made by the court to a higher instance. The court satisfied the constitutional claim and explained that the disputed norm violates a reasonable balance between the limited right of a person and the legitimate public goals to be achieved, the contested norm disproportionately limits the right of the plaintiff.

8. Nikoloz Lomidze against the Parliament of Georgia (No. 1/5/1472, June 17, 2022)

The subject of dispute in the case was the constitutionality of the first part of Article 93 of the Criminal Procedure Code of Georgia. The contested norm established the possibility of the parties to file a petition in the cases directly provided for by this Code and in the prescribed manner at any stage of the criminal proceedings. Plaintiff argued that the statute

at issue allowed the court to use inadmissible evidence on the basis of which it subsequently entered a guilty verdict. The Constitutional Court rejected the constitutional claim and explained that the legislator actually equipped the parties with all the guarantees through which they can ensure the justice of the process, including effective means and effective right of access to the court.

9. Mikheil Khaindrava against the Parliament of Georgia (No. 1/4/1464, June 17, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Criminal Procedure Code of Georgia. The claimant noted that by prohibiting appeal, the disputed norm excludes his possibility to question the legality of the formal and factual circumstances established by the Idavo court's decision on detention. According to the claimant, the restriction imposed by the disputed norm does not have a legitimate purpose. The Constitutional Court rejected the constitutional claim and explained that the impossibility of appealing the decision on arrest in the Supreme Court, the provider of judicial control in the matter of consideration of the petition on the application of arrest and restraining measures, as well as taking into account the legal mechanisms for compensating the damage caused by illegal arrest, does not represent any obstacle to the restriction of a person's freedom for effective judicial control and does not reduce its effectiveness.

10. Otar Marshava and Mikheil Nozadze against the Parliament of Georgia (No. 2/1/1434,1466, February 25, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Criminal Procedure Code of Georgia. Several norms on the case were arguably thin. In the opinion of the author of the constitutional claim, the disputed norm equips the investigative body with wide discretion to seize the property of the bona fide purchaser for a long period of time. According to the explanation of the claimant, the issue of the period of validity of seizure of the property is also problematic. The court upheld the constitutional claim and explained that such regulation, which allows for the continuation of seizure of property for a very long period of time, cannot be considered a proportionate means of limiting the right to property, the norm violates a reasonable balance between the right violated as a result of the restriction and protected interests, and disproportionately restricts the constitutional right to property, and It should be declared unconstitutional.

11. Lasha Janibegashvili against the Parliament of Georgia (No. 1/6/1424,1490, November 4, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Law of Georgia "On Lawyers". For the plaintiff, the part of the norm, which established the mandatory membership of the Georgian Bar Association for the lawyer, was unconstitutional. The Constitutional Court rejected the claim and explained that the legal scope of providing the right of self-organization of lawyers by law does not in any way imply the obligation of an individual lawyer not to join one or another organization, including a professional corporation. The Constitutional Court did not find a reason to consider the disputed norm, in particular, the obligation to join the lawyers' association, as an alleged interference in the collective right of lawyers to self-organize.

12. Constitutional submission of the Tbilisi City Court (No. 3/3/1387, April 21, 2022)

The subject of dispute in the case was the constitutionality of the norms of Article 260, Part 3 of the Criminal Code of Georgia. According to constitutional submissions, it was controversial to impose imprisonment as a thin sanction for multiple purchases and possession of hemp resin (not exceeding 0.1315 grams) for personal use. According to submissions, the imposition of such a punishment may represent a clearly disproportionate punishment and contradict the requirements of Article 9, Paragraph 2 of the Constitution of Georgia. The Constitutional Court upheld the constitutional claim and explained that the consumption of hemp resin does not usually lead to the rapid formation of addiction and the implementation of aggressive, anti-social actions. Accordingly, the imposition of imprisonment as punishment for repeated purchase and possession of hemp resin for personal use is not related to the achievement of the goal of public safety, and the contested norm is contrary to the Constitution of Georgia.

13. Dimitri Ghongadze against the Parliament of Georgia (No. 1/3/1377, June 17, 2022)

The subject of dispute in the case was the constitutionality of the first part of Article 57 of the Civil Procedure Code of Georgia. Article 57 of the Civil Procedure Code of Georgia regulates the issue of guarantee of procedural security. According to the first part of the mentioned norm, if in the cases provided for by the Code of Civil Procedure, the party is obliged to provide compensation for the loss that the opposing party may suffer by performing the relevant procedural action, unless the parties have agreed on something else. The claimant believed that the said normative content of the contested regulation unjustifiably limited the claimant's right to a fair trial in a civil dispute and should be declared unconstitutional. The Constitutional Court rejected the claim and explained that the disputed norm meets the requirements of the first paragraph of Article 31 of the Constitution of Georgia. Therefore, he cannot discuss what kind of arrangement of the issue would be better, desirable or expedient.

14. Constitutional submissions of the Tetritskaro District Court (No. 3/5/1341, 1660, June 24, 2022)

The subject of dispute in the case was the constitutionality of the first sentence of Article 200, Part 6 of the Criminal Procedure Code of Georgia. According to the disputed norm, the court, at the request of the prosecutor or on its own initiative, in order to ensure the use of bail, sentences the accused, to whom the detention is used as a measure of legal coercion in criminal proceedings, to full or partial (but not less than 50%) bail. According to the author of the submissions, the position of the judge is not decisive in terms of imprisonment, as well as according to the author of the constitutional submissions, the current record does not provide for the possibility of assessing the fairness of the imprisonment ratio. The Constitutional Court upheld the claim and explained that another,

less restrictive means of achieving the legitimate goal of the orderly implementation of justice would be for the judge to check the necessity of imprisonment for a person in each specific case. The restriction provided by the contested norm is wider than what is objectively necessary to achieve this legitimate goal. Thus, the contested regulation does not meet the requirements of necessity.

15. Giorgi Labadze against the Parliament of Georgia (No. 3/2/1277, April 21, 2022)

The subject of the dispute in the case was the constitutionality of the norms of the Organic Law of Georgia "On Political Unions of Citizens". According to the disputed norm, within one week after the founding congress of the party, the political party is required to submit a list of at least 1000 members of the party to the National Public Registry Agency. The plaintiff pointed out that the contested norm may in the future lead to the violation of the plaintiff's right to form a political association. The Constitutional Court upheld the constitutional claim and explained that the disputed norm does not serve to determine the minimum support for the party, nor to check the existence of the internal party structure, there is no logical connection between the right-limiting measure and public interests, and the challenged norm cannot meet the requirements of effectiveness, it disproportionately limits the creation of a political party and the right to participate in its activities.

16. Constitutional submissions of Bolnisi District Court (No. 3/1/1239,1642,1674, April 21, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Criminal Code of Georgia, which provides for the possibility of imprisonment as a punishment for illegally importing dried marijuana (in the amount of 6.7 grams) into Georgia for personal use. The authors of the constitutional submissions point out that the use of imprisonment as a sanction is a clearly disproportionate punishment and contradicts the Constitution of Georgia. The Constitutional Court upheld the constitutional claim and explained that these amounts of dried marijuana do not pose an obvious, imminent danger of its distribution and recirculation. Imprisonment as punishment for a person cannot be justified in the framework of international cooperation in order to protect the interests of other states.

17. Giorgi Logua against the Parliament of Georgia (No. 1/8/926, November 4, 2022)

The subject of dispute in the case was the constitutionality of the words of the first part of Article 255 of the Criminal Code of Georgia: "illegal distribution or advertising of a pornographic work, printed publication, image or other object of a pornographic nature, as well as trade in such an object or its storage for the purpose of sale or distribution". According to the claimant's explanation, the disputed norm prohibits the distribution of pornography, although the concept of pornography is not defined by the Georgian legislation and there is a possibility of equating it with obscenity, sexual act or other similar term. The contested norm does not clearly define the composition of prohibited actions, which is why it contradicts the requirements of the definition of the norm. The Constitutional Court partially satisfied the claim and explained that the contested norm, based on vagueness and unpredictability, is unconstitutional in relation to the first sentence of Article 31, Clause 9 of the Constitution of Georgia.

18. British American Tobacco Georgia Limited" of Georgia against the Parliament (N1/2/876, May 20, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Georgian Law "On Tobacco Control". According to the claimant's explanation, the challenged norm forbids the free price formation of tobacco products by the producer, the realization of his own views on other economic agents working in the field of tobacco. The Constitutional Court satisfied the claim and explained that the disputed norm prohibits the sale of tobacco products at a price lower than the cost price even in the case when the economic agent has reasonable business interests and, in this sense, limits the economic agent's right to freedom of entrepreneurship more than is objectively necessary to ensure the aforementioned legitimate goals.

19. Aleksandre Melkadze against the Parliament of Georgia (No. 3/6/813, December 22, 2022)

The subject of dispute in the case was the constitutionality of the norms of the Organic Law of Georgia "Election Code of Georgia". The plaintiff considered that the disputed norm, which connects the entry into the unified list of voters and the realization of the right to vote with the registration according to the address of the place of residence, is unconstitutional, since Article 28 of the Constitution of Georgia does not recognize a similar basis for limiting the right to vote. The court satisfied the claim and explained that the limitation established by the disputed norm violates the fair balance between the limited and protected interests and cannot provide a proper guarantee of the active right to vote.

IV. Looking Ahead

In 2023, the independence of the judicial system, the reform of the Supreme Council of Justice, corporatism in the judicial system, as well as the implementation of the 12 recommendations for Georgia's accession to the European Union will still be relevant for Georgia. The Constitutional Court of Georgia should announce important decisions in 2023, including the case of judges of general courts regarding the right of judges to express themselves.

V. Further reading

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Germany

Stefan Martini, *Dr., Walther Schücking Institute for International Law / Kiel University*

Paulina Starski, *Prof. Dr., Chair of German and Comparative Public Law, European as well as International Law, University of Freiburg*

I. Introduction

Although the German courts and legal community were still processing a few aftershocks of the fading Covid-19 era (see also below III.1), the Russian military aggression towards Ukraine took over as the last year's defining theme in public life, not without reverberations in the legal sphere. Shortly after Russia's attempted invasion, Chancellor Scholz famously proclaimed the 'Zeitenwende',[1] a dramatic turning point in Germany's external and military policy, aiming at, *inter alia*, (1) a major increase of the Federal army's capabilities to adhere to the NATO 2 percent budget goal, (2) realizing energy independence from Russia, and (3) agreeing to deliver tanks and weapons to victims of aggression by another state – like Ukraine – previously shied away from. To ensure that the sheer volume of the new special fund for military spending does not violate constitutional budget norms (the so-called 'debt brake' in Art. 109, 115 of the German Basic Law – BL), the BL was amended mid-year: the new Art. 87a(1a) BL allows the onetime establishment of a special trust, not exceeding € 100 bn. Simultaneously, the legal basis for the special trust was adopted. A high-profile case involved the German affiliate of Russian Gazprom, which, in the name of energy supply security was, at first, placed under temporary fiduciary management by the Federal Network Agency and, eventually, expropriated (the latter, again, an unprecedented move, for which a new legal basis had to be created). While the recent weapon delivery decisions find a basis in existing laws, an overhaul of the current arms export control law is being discussed, which is intended to reflect both a more restrictive stance and the new expansive German strategic alignment.

II. Major Constitutional Developments

1. Curbing Chancellor's Speech, Judgment of the Second Senate of 15 June 2022 – 2 BvE 4/20, 2 BvE 5/20[2]

The Merkel Court reached (or even passed?) its self-reflective zenith by releasing its own Merkel decision. 'Merkel Court,' a moniker for the German Federal Constitutional Court (GFCC) coined by German constitutional scholar Florian Meinel before the publication of this judgment, is meant to represent an (alleged) 'constitutional mindset' of the Karlsruhe Court, put on display in the last decade or so. This era roughly corresponds with Merkel's tenure, marked by both her rational governance style (decision-making 'without alternative') and the support of large parliamentary majorities and is defined, according to Meinel, by the GFCC reading 'an administrative, apolitical model of government' into the BL.[3] Meinel traces this supposed judicial shift towards administrative rationality, *inter alia*, in the Court's line of jurisprudence on the limits of speech by state officials.[4]

The GFCC's denunciation of one of Merkel's public statements from last year is the latest emanation of this jurisprudence, which imposes quite strict expectations of neutrality and objective factuality on bearers of even high(ly political) governmental offices. However, the Court hints at some evasive strategies. That the GFCC's Second Senate arrived at the decision with a bare majority (5 to 3) and that one member attached a forceful dissenting opinion to the judgment may even hint at future relaxations of this stricture.

The actual legal dispute revolves around a press briefing by Chancellor Merkel while on an official visit to South Africa. When asked to comment on a controversial election of the prime minister in Thuringia, one of the sixteen German sub-federal units called the 'Länder', she heavily criticized the involvement of the extreme right-wing party 'Alternative für Deutschland' (Alternative for Germany, AfD) in the election of the aforementioned position – in line with the policy of her party, the Christian Democrats: She found the occurrence 'unforgivable and the result must therefore be undone;' for her, it was 'a bad day for democracy.'

Petitioned by the AfD, the GFCC concluded that these statements violated the AfD's right to equal participation of political parties in the formation of the political will derived from Art. 21(1) first sentence BL. To ensure all political parties' equal opportunities in public discourse and political competition, Karlsruhe recalled its *jurisprudence constante* that state organs are to remain neutral in their official conduct expanded from election time to, in principle, all phases of political life and competition. In the Merkel judgment, the GFCC, for the first time, affirms the existence of this duty for the most prominent and principal member of the Federal Government – the Chancellor (after having adjudicated on ministers and the office of the federal president before), although the Court concedes that the Chancellor's right to give political statements is wider in substance than that of ministers.

In applying this duty of neutrality to official acts, the Court draws a very sharp line between the latter and private statements or statements as a figure of party politics. Only in the private and party realm is the politician free to criticize competing parties and their members harshly. In contrast, when acting in an official capacity, members of government are prohibited from unduly using state resources and the authority of their office if their statements and actions can be read as taking part in the competition for voters with other political parties – irrespective of the fact that voters and the public do not tend to distinguish clearly between the roles of office holder and party functionary.

The Court now adds to its jurisprudence that the interference with the right to equal opportunity of political parties can be justified when based on legitimate reasons of comparable constitutional weight; in balancing competing constitutional interests the principle of proportionality applies. Examples of competing interests the Court mentions are governmental stability and preserving trust and good standing in international relations, for which, respectively, the Chancellor is afforded a wide margin of appreciation. While the GFCC respects the right of the government, including that of the Chancellor, to inform the public and maintain public relations, this right ends where undue influence on political competition begins – here, the Court, for the first time and only in principle, recognizes the government's right to defend the values of the Basic Law, thus handing the government a lifeline for future cases. In this case, though, the GFCC was unforgiving: Merkel did not make it sufficiently clear, according to the Court, that she was speaking as a party politician, thus subjecting her to the strict principles of the duty of neutrality. Because of her negative portrayal of the AfD, she unduly influenced political competition. The GFCC could not accept any exceptions or justifications: neither the stability of Merkel's government nor Germany's standing in the international community was in jeopardy. In this vein, the Court also could not infer from her terse statements that Merkel voiced these to defend Germany's democracy.

The dissenting opinion by Judge Astrid Wallrabenstein (one of the three Judges not siding with the majority) could not disagree more and discards the high standard of neutrality applying even beyond electoral campaigning. The majority should have considered the perceived dual role of politicians in high government office in more depth. Additionally, the expectation of neutrality by the public should only extend to exercises of administrative functions, not to unspecific acts of governance, and not, as in this case, personal statements. Whereas she rejects content-based restrictions, she does accept the prohibition to use the financial resources of the office to gain an unfair advantage over political competitors.

III. Constitutional Cases

1. *Covid-19 Vaccination Mandate Upheld: Order of the First Senate of 27 April 2022 – 1 BvR 2649/21*[5]

Instead of introducing a highly controversial universal Covid-19 vaccination mandate, the *Bundestag*, the federal parliament, at the end of 2021 adopted an indirect obligation to get vaccinated in limited fashion *ratione personae*. Only staff in the health and care sector had to provide proof of full vaccination or recovery from COVID-19 illness – otherwise, the local public health authority could, on mandatory notice from the employer, eventually issue a work ban at the specific place of work. After the obligation became operative in March 2022, implementation suffered, and, what's more, the new law swiftly expired at the end of 2022, *inter alia*, because of the receding dangers caused by the pandemic. The GFCC decision, though, was issued while the vaccination obligation was still in effect.

The numerous constitutional complaints directed against the health care vaccination provisions were, if not already inadmissible, unsuccessful on the merits. The indirect interference with the right to physical integrity (Art. 2(2) first sentence BL), especially regarding its autonomy limb, was, per the GFCC, justified to protect vulnerable groups from contracting Covid-19 infection and severe illness. Not only at the time of the law's adoption but also at the time of its decision, the GFCC accepted the legislator's factual assessment of the risks involved with

Covid-19 and the vaccination's effectiveness. Taking into consideration the legislator's margin of appreciation, the weighty constitutional duty of protection towards vulnerable persons, the fallback options of the affected workers, and the vaccination's limited health risks, the Court did not object to the legislative's balancing of interests, despite the intensive interference with bodily autonomy and occupational freedom.

In the same vein, a couple of months later, the GFCC upheld a duty to provide proof of a measles vaccination[6] for children attending daycare facilities.[7] Interestingly, without attaching a dissenting opinion to the decision, one unnamed judge voted against the constitutionality of one controversial aspect of the provision – the GFCC approved the (indirect) measle vaccination obligation even when, as is currently the case and foreseen in the vaccination regime, only combination vaccines are available in Germany. The additional interference with the right to parental care (Art. 6(2) first sent. BL) did not change the decision's outcome – to the contrary, because of the duty to be guided by their child's best interests, the parents' freedom to choose for their children is narrowed compared to decisions concerning their own health.

2. *Next Generation EU: Judgment of 6 December 2022 – 2 BVR 547/21, 2 BvR 798/218*

The judgment of the GFCC of 6 December 2022 presents a further example of the operationalization of constitutional barriers to the integration of the German constitutional order into the EU legal order. The Court rejected two constitutional complaints lodged against the *Eigenmittelbeschluss-Ratifizierungsgesetz* (Act Ratifying the EU Own Resources Decision) with the reasoning that the latter does neither constitute a justiciable *ultra vires* act[9] nor encroach upon the constitutional identity[10] of the BL. The EU Own Resources Decision [henceforth: Decision] authorized the EU to borrow on capital markets (limited up to 750 billion euros). Ultimately, the GFCC gave the Decision a constitutional blessing, yet central to this result was the exercise of judicial restraint on the part of the GFCC. The nucleus of the rationale supporting the judgment was the exceptionality of the situation surrounding the COVID-19 pandemic. The judgment was adjoined by a fairly critical dissenting opinion by Justice Müller questioning the validity of this 'exceptionality topos:'[11] Müller characterized the reasoning of the majority of the Second Senate with the famous quote by Bertolt Brecht, 'To see the curtain down and nothing settled.'[12]

In detail:

The GFCC regarded the constitutional complaints in question admissible since the claimants made a violation of the 'right to democratic self-determination' as derived from Art. 38(1) BL read in conjunction with Art. 20(1) and (2) as well as Art. 79(3) BL plausible. In terms of the merits, however, a violation of respective rights could not be asserted: First, the adoption of the Decision did – the GFCC found – not overstep the integration agenda inherent to the treaties, in a manifest manner, considering the particularly exceptional circumstances surrounding the COVID-19 crisis.[13] It was – in the eyes of the GFCC – not implausible to regard the authorization to borrow entailed in the Decision as compatible with Art. 311(2) and (3) of the TFEU: 'Authorizing the European Union to borrow on capital markets as "other revenue"' would 'not amount to a manifest violation of Art. 311(2) and (3) TFEU when the funds are used for the exercise of competences conferred upon the European Union and, to that end, are from the outset strictly assigned to such specific purposes'.[14] To argue that Art. 122(1) and (2) TFEU functioned as legal bases for the Decision would not be implausible, although doubts ultimately remained in that respect.[15] A circumvention of Art. 125(1) TFEU was not 'manifestly evident'.[16] Second, the Decision did not affect the constitutional identity of the German constitutional order shaped by the BL since the budgetary responsibility of the German Parliament (*Bundestag*), which roots in Art. 20(1) BL (and Art. 110) and thereby falls within the scope of Art. 79(3) BL, had not been undermined. In that regard, the fact that the Decision did not install 'permanent mechanisms that entail an assumption of liability for decisions taken by other Member States or that structurally affect the *Bundestag's* budgetary powers' was regarded as crucial by the GFCC.[17] The Bundestag would 'retain[s] sufficient influence in the decision-making process as to how the funds provided will be used.'[18]

3. *CETA and its Provisional Application – Order of 9 February 2022 – 2 BvR 1368/16, 2 BvR 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16*[19]

The GFCC rejected several constitutional complaints as well as one application concerning the violation of rights of organs (*Organstreit*) regarding the provisional application of the CETA based on Council Decision (EU) 2017/38 of 28 October 2016.[20] While the complaints against the participation of the German representative in adopting the Council Decision were regarded as admissible, they were dismissed on the merits. The Council Decision could – the GFCC posited – neither be qualified as an *ultra vires* act nor did it affect the constitutional identity of the BL (here especially Art. 20(1) and (2) BL). In both cases, the high thresholds for these emanations of a constitutionally mandated 'integration control' had not been met. In its reasoning, the Court took particular account of the declarations and statements of Member States in terms of the interpretation of CETA as reflected in the Council minutes[21] as well as the reservations which set limits to the scope of the Council Decision.[22] The provisional application concerned – as the GFCC stressed – aspects of CETA that lay unquestionably within the treaty-making competencies of the EU and issue areas that appeared problematic with respect to the distribution of competencies between Member States and EU (e.g., investment protection, portfolio investments) fell outside the scope of CETA's provisional application.[23] While questions remained with regard to the CETA Joint Committee and its competencies, it 'appear[ed] doubtful whether decisions taken by the Committee would meet the level of democratic legitimation and oversight required under Art. 20(1) and (2)' [BL],[24] the GFCC did not regard it necessary to adjudicate on these issues in light of the reservations and declarations made with regard to the provisional application of CETA.[25] It was clear that 'any position to be taken by the Eu-

ropean Union and its Member States within the Joint Committee regarding a decision of said Committee must be adopted by common accord'.[26] Therefore an encroachment of Art. 79(3), and the constitutional identity of the BL could not be asserted.[27]

4. *Shutting the Extreme Right Out: Orders of the Second Senate of 22 March 2022 – 2 BvE 9/2028 and 2 BvE 2/20*[28]

Pursuant to the Rules of Procedure of the German federal parliament, the *Bundestag*, every parliamentary group is represented as a deputy of the Bundestag president. At the beginning of the penultimate term, but also on later attempts, (only) the candidate of the extreme right party AfD did not garner enough votes to be elected by a majority of members of parliament.[29] The other parties were not ready to support extreme candidates for such a representative position. The AfD parliamentary group's complaint against the *Bundestag* for failing to ensure their deputy seat in so-called *Organstreit* proceedings (a dispute between organs and bodies of the state) was flatly rejected by the GFCC. Although the AfD group has the right to equal participation in the parliamentary decision-making process (see Art. 38(1) sent. 2 BL), including access to one of the presidential deputy seats, the position is subject to an election pursuant to Art. 40(1) BL. Apart from controlling procedural propriety, the Court was unwilling to place parliamentary voting under judicial review, for reasons of democratic legitimacy. The rules of procedure as a lower-ranking, purely internal body of law could not change these constitutional requirements. Furthermore, an application of an AfD member of parliament was also rejected as unfounded by the GFCC on the same day: That he – as an individual MP as opposed to a parliamentary group – was not allowed to nominate a candidate for the presidential deputy position was justified for reasons of ensuring effective workings of the parliamentary process.

5. *Constitutionality Control of Sports Arbitration: Order of the First Senate of 12 July 2022 – 1 BvR 2103/16*[30]

The complainant in this case – a professional athlete appealing a doping ban – challenged the line of jurisprudence which precluded access to ordinary courts due to a standard arbitral clause that channels disputes exclusively to the Court of Arbitration of Sports (CAS). After already having won her case before the European Court of Human Rights (ECtHR), at least in this regard,[31] the GFCC as well, agreeing with the ECtHR and considering the power wielded by international sports associations, held that the blanket denial of a public hearing constituted a violation of her right to access to justice (invoking Art. 2(1) in conjunction with Art. 20(3) BL, combining the general freedom of action with considerations of the rule of law). Although waiving one's right to bring an action in front of ordinary state courts in favor of arbitration fulfills legitimate purposes (ensuring global uniform sports jurisdiction), this presumptively voluntary self-constraint of one's legal options resulting *de facto* in compulsory arbitration can only be justified if minimum standards of the rule of law are observed.

6. *The European Patent Office and 'Integration Control' – Order of 8 November 2022 - Order of 8 November 2022 – 2 BvR 2480/10, 2 BvR 561/18, 2 BvR 786/15, 2 BvR 756/16, 2 BvR 421/13*[32]

The GFCC held various constitutional complaints against the appeals system within the European Patent Office to be inadmissible. Nonetheless, various aspects touched upon within this order merit a second look: On the one hand, the GFCC posited that the 'integration control' to be exercised concerning Art. 24(1) BL forming the basis for German participation in the European Patent Organisation is structurally similar to Art. 23(1) BL.[33] Irrespective of the fact whether sovereign rights are transferred in the international or the supranational context, the 'control' exercised by the GFCC and its normative foundation remain (structurally) equivalent. While this point appears striking at first glance, it proves normatively logical at a second glance due to the similar processes at hand.[34] Furthermore, before the constitutional amendment, which led to the insertion of Art. 23 BL, the supranational integration process was founded on Art. 24(1) BL.

On the other hand, when delineating the minimum standard of effective protection within an institution to which judicial competencies have been transferred commanded by the BL, the Court referred to EU fundamental rights as well as the ECHR. In terms of spelling out aspects of judicial independence, the GFCC took the 'rule of law' jurisprudence of the CJEU developed particularly with regard to the dismantlement of the constitutional order in Poland and the political capture of the judiciary orchestrated by the government under the leadership of *Prawo i Sprawiedliwość* into account.[35] In the end, the GFCC found that the constitutional complaints did not pass the admissibility threshold, since the claimants failed to establish that the minimum standard of effective legal protection as commanded by the BL was not upheld within the European Patent Office.[36] In that regard, the structural reform of the European Patent Office of 2016 played a crucial role.[37] Overall, the order of the GFCC presents an interesting example of a multilevel dimension of fundamental rights protection within the German constitutional order.

IV. Looking Ahead

After the German federal legislator has recently made rather sweeping changes to its electoral law, skewing it towards a more full-fledged system of proportional representation, opposition parties, potentially adversely affected by the new law, have already signaled they would challenge the changes before the GFCC. Meanwhile, after recent oral hearings, the Court will judge on the constitutionality of the current electoral system, itself a product of a controversial amendment under the former government and, at this time, only relevant for a locally confined by-election.

Other expected high-profile judgments deal with Germany's constitutional responsibility for the US-American drone program whose strike decisions are routed via an airbase in Germany, the exclusion of unconstitutional though legal, political parties from state funding, and the budgetary legality of a special federal climate trust.

V. Further Reading

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Amadou Korbinian Sow, 'On Reaching a Crime Scene Ahead of the Criminal: Dreams of Police and Technology from the 1970s to Today' (2022) 23 German Law Journal 597.

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2 English translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/es20220615_2bve000420en.html.
3 See F. Meinel, 'The Merkel Court: Judicial Populism since the Lisbon Treaty' (2023) 19 European Constitutional Law Review 111, 139 et seq.
4 Meinel (n 3) 130 et seq.
5 See English translation here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/04/rs20220427_1bvr264921en.html.
6 Children may attend daycare without vaccination if they can prove a contraindication towards the vaccine or have immunity.
7 Order of the First Senate of 21 July 2022 – 1 BvR 469/20 et al.; see here for an English translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/07/rs20220721_1bvr046920en.html.
8 See here for an English translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/12/rs20221206_2bvr054721en.html.
9 The GFCC has established a high threshold for an ultra vires control, see Order of the Second Senate of 6 July 2010 – 2 BvR 2661/06; see here for an English translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html. The most recent – and rare - example for an act declared ultra vires by the GFCC was the PPSP Program by the ECB: see Judgment of the Second Senate of 5 May 2020 – 2 BvR 859/15; see here for an English translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html.
10 As well as the ultra vires control, the identity control is only activated if strict conditions are met, see Order of the Second Senate of 15 December 2015 – 2 BvR 2735/14; see here for an English translation: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2015/12/rs20151215_2bvr273514en.html.
11 See Dissenting opinion of Justice Müller (n 8) para. 1 et seq.
12 See Dissenting opinion of Justice Müller (n 8) para. 1.
13 See e.g. GFCC (n 8) para. 149.
14 See GFCC (n 8) para. 171.
15 GFCC (n 8) para. 171.
16 See GFCC (n 8) para. 203, 210.
17 See GFCC (n 8) para. 217.
18 See GFCC (n 8) para. 217.
19 See for an English translation here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/02/rs20220209_2bvr136816en.html.
20 https://eur-lex.europa.eu/eli/dec/2017/38/oj.
21 E.g. GFCC (n 19) para. 21, 182.
22 GFCC (n 19) para. 186.
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24 GFCC (n 19) para. 190.
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26 GFCC (n 19) para. 191.
27 GFCC (n 19) para. 191.
28 English press release here: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-026.html.
29 The situation has not changed in the current term. A similar dispute concerns several committee chair positions: while an application for interim relief was unsuccessful (GFCC, Order of the Second Senate of 25 May 2022 – 2 BvE 10/21), the main proceedings are still pending.
30 See an English translation here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/06/rk20220603_1bvr210316en.html.
31 ECtHR (Section III), Judgment of 2 October 2018, 40575/10 and 67474/10 (Mutu and Pechstein v. Switzerland).
32 German translation see here https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2022/11/rs20221108_2bvr248010en.html.
33 Cf. GFCC (n 32) para. 118.
34 See P. Starski, "Die 'strukturelle Vergleichbarkeit' von Art. 23 I GG und Art. 24 I GG", GRUR 8/2023, 537-544.
35 See GFCC (n 32) para. 144 et seq. E.g. CJEU, ECLI:EU:C:2019:531 – European Commission v Republic of Poland; ECLI:EU:C:2019:982 – A. K./Krajowa Rada Sadownictwa; ECLI:EU:C:2018:586 – Minister for Justice and Equality; ECLI:EU:C:2021:311 – Repubblika v Il-Prim Ministru.
36 GFCC (n 32) para. 176.
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Greece

Dr. Alkmene Fotiadou, *Research Associate, Centre for European Constitutional Law, Athens, Greece*

I. Introduction

With the pandemic receding, case law on the constitutionality of Covid-19 measures serves as a reminder of the slow administration of justice in Greece. The pandemic case law is characteristic of a fear that imposing severe restrictions on constitutional rights may potentially open the way for future restrictions without the overwhelming pressure of the pandemic. Proportionality showed its capacity for protecting rights during emergencies. Other major issues were litigated, dominating constitutional discourse: the constitutionality of the creation of a special university police force and the privatization of water. The appeal trial for the jailed Golden Dawn neo-nazi political party leaders, convicted for participating in a criminal organization and other charges, including murder, started in 2022. The end of the year was marked by a wiretapping scandal with several constitutional aspects.

II. Major Constitutional Developments

Two major political issues with severe constitutional facets emerged in 2022 and are expected to impact the years to come: the wiretapping scandal and the attempt of imprisoned Golden Dawn members to form new political parties in order to participate in the 2023 general elections. It must also be noted that as the migrant crisis remains an ongoing problem, a conviction at the European Court of Human Rights served as a reminder of the problem with pushbacks and human rights violations.[1]

The wiretapping scandal erupted during the summer of 2022 when the head of an opposition party revealed attempted monitoring of his mobile phone with the use of illegal spyware, which was immediately linked to similar accusations by investigative journalists. In July 2022, the Special Permanent Committee on Institutions and Transparency was convened, but its concluding reports remain confidential. After a newspaper published an investigation linking the then General Secretary (and nephew) of the Prime minister to the company that supplies the spyware in Greece, he resigned from the position of General Secretary (filing, nonetheless, a SLAPP suit against the newspaper) and less than an hour later the leader of the National Intelligence Service also resigned. An inquiry commission was later upvoted in Parliament to investigate the issue – nonetheless, the proceedings did not last long, and no evidence was published about the use of the illegal spyware.

Three points of constitutional significance must be stressed: Firstly, in July 2019, the newly elected Prime minister placed the National Intelligence Service (NIS) under his direct control. Secondly, in March 2021, the law regarding wiretapping by the NIS changed, removing citizens' right to be informed of their surveillance after it had been concluded. It must be noted that only in 2021 about 15.000 surveillance orders were issued. According to article 19 par. 1 and 2 of the Greek Constitution, the confidentiality of communications is guaranteed and supervised by an Independent Authority. Law 3115/2003 and Presidential Decree 40/2005 have established ADAE, which supervises the interception of communications by the

intelligence service. The head of the authority with two members had publicly stated their concern about the change brought about by the 2021 law, its compatibility with the Constitution, and the case law of the European Court of Human Rights. Throughout the entire crisis, the Head of ADAE remained firm in his quest for transparency. Thirdly, in the midst of the turmoil about the backslide of rule of law guarantees concerning the confidentiality of communications, a new law was passed (Law 5002/2022) to regulate the procedure for legal interceptions of communications, cyber security, and the protection of citizens' data. Safety valves were added, nonetheless, the constitutionality of certain provisions was criticized by constitutional scholars- as the safety valves established were deemed insufficient, and the role of ADAE was reduced rather than enhanced. Article 19 par. 1 of the Constitution provides that the secrecy of letters and all other forms of free correspondence or communication are inviolable. The guarantees under which the judicial authority is not bound by this secrecy for reasons of national security or to investigate, especially serious crimes, are specified by law. The two options are thus constitutionally allowed for legal interceptions protecting national security and investigating serious crimes. Delineating what constitutes national security reasons is challenging. In addition, further questions are posed with regard to intercepting the communication of members of Parliament and how this connects not only to rule of law guarantees but to the smooth functioning of representative democracy. New episodes will be added in this unfolding story in 2023, putting a strain on rule of law guarantees as it is not merely the wiretapping per se, which posed serious issues, but also the reaction of the constitutional players involved toward it.

In 2020, a former member of Golden Dawn was sentenced at the first instance court to 13 years imprisonment for his key role in the criminal organization/political party Golden Dawn formed a new party. The Greek Constitution in Art. 29 protects the participation of political parties whose organization and activities serve the free functioning of the democratic political system. The accepted meaning of the provision in Greek constitutional theory and practice rules out the option of banning a political party due to its ideology, even if it does not encompass the principles of liberal democracy. Dissolving political parties due to their ideology is considered prohibited. Nonetheless, the conviction of the Golden Dawn members showed that perhaps some measures should be taken to protect democracy against serious threats- an option which, if not explored soberly through the consent of major political parties, will pose serious problems, as the far right appears to be resurfacing.[2] Tackling this problem will set forth serious constitutional dilemmas in 2023.

III. Constitutional Cases

1. *Decision 1684/2022 of the Council of the State* (Plenary Session)*: Mandatory vaccination*

The Decision of the Council of State on mandatory vaccination delineates the extent to which the Court is willing to accept restrictions imposed on rights due to an unprecedented emergency. It balances rights through proportionality and stresses the two aspects of the right to health protected as an individual and a social right. The constitutional principles of proportionality and solidarity demonstrate their capacity during a crisis.

The Court analyzes that the right to health is enshrined in the Constitution having two facets: it is both an individual and a social right. As an individual right, it includes the protection of the individual's health and physical and mental integrity from infringements and risk and the freedom to self-determination, i.e., the freedom of individual persons to make their own decisions about their health. As a social right, it dictates the state's obligation to provide citizens with high-level health services and the obligation to take the necessary positive measures aimed at protecting health, ensuring public health, preventing diseases, and promoting the health of citizens, who correspondingly have the right to demand from the state the fulfillment of this obligation. Therefore, in cases where public health is at serious risk, such as the case of the pandemic due to a virus highly and rapidly transmissible with the potential to cause serious and even life-threatening health problems, the state, guided by the precautionary principle, must take all appropriate and necessary measures to limit the spread of the disease, and, also to reduce the pressure exerted on the health services, until science comes up with an effective solution. Citizens have the right to demand the fulfillment of this obligation by the state. The appropriateness and necessity of the measures depend on various factors, such as the mode of transmission, and are evaluated on the basis of scientific evidence and medical and epidemiological data.

These measures may even constitute a serious interference with the enjoyment of fundamental human rights, such as the free development of personality, freedom of movement, and privacy. Such interference is constitutionally tolerated under the condition that: a) it is provided for by special legislation, which takes into account relevant serious scientific, medical, and epidemiological findings b) the measures imposed to deal with the health crisis are not unjustifiably discriminatory, c) an exception is possible in special circumstances d) these measures are taken for the necessary period of time and, in any case, until solutions for stopping the pandemic are found. The intensity and duration of pandemic measures must be reviewed periodically by the competent state bodies depending on the existing epidemiological data and the evolution of scientific knowledge.

In case such infringements, according to the prevailing scientific opinion about the evolution of the pandemic, are deemed necessary and appropriate for the protection of the health and, therefore, the lives of the citizens, in combination with the constitutionally mandated state obligation for safeguarding the operation of the health system, they cannot be considered disproportionate to the aim of the aforementioned constitutional aim. Legislators, in choosing the pandemic measures, perform a weighing act using medical data, in combination with the effects of the pandemic and the measures taken on the economic and social life of the country, in which they have a wide margin of appreciation to determine their appropriateness and necessity.

Consequently, the judicial review of compliance with the principle of proportionality is limited to judging if the contested measures are either manifestly inappropriate or manifestly exceed the measure necessary to achieve the intended purpose. In the globally unprecedented situation of the pandemic, the state has to take all appropriate and necessary measures available based on internationally accepted scientific findings. Such measures include mandatory vaccination aimed to protect health both at the collective and individual level and are appropriate and necessary to protect the health of those vaccinated as well as others (e.g., people who have not yet been vaccinated, people who are not allowed for medical reasons to be vaccinated) and not disproportionate to the aim sought.

2. *Decision 2332/2022 of the Council of the State (3rd Chamber)*: re-evaluation of pandemic measures and proportionality

Decision 2332/2022 of the Council of State marks the evolving nature of the pandemic linking proportionality to temporality. Restrictive measures can be deemed constitutional only for limited periods and must be constantly re-evaluated. As the pandemic is, by nature, an evolving phenomenon, the proportionality of measures cannot be determined through a one-off balancing act. Re-evaluation and temporality are integral to proportionality during crises. The Court accordingly found disproportional, and thus unconstitutional, the provision of Law 4917/2022, which extended the validity of paragraph 8 of Article 206 of Law 4820/2021 on the re-evaluation of the mandatory vaccination of workers in health facilities until 31-12-2022. Furthermore, the Court annulled a ministerial decision regulating the procedure for hiring fixed-term staff in accordance with the provisions of Article 50 of Law 4825/2021.

According to the Court, as accepted in its prior jurisprudence, the measures taken to protect public health against Covid-19, such as the mandatory vaccination of special categories of employees (i.e., Decisions 1684/2022 regarding medical workers and 1400/2022 regarding the Fire Service's Special Disaster Management Unit employees) impose severe restrictions upon fundamental rights, such as the free development of personality and privacy, is, however, constitutionally tolerated under the condition that these measures are taken for the necessary period of time until the pandemic recedes. The intensity and duration, due to the temporary nature of such measures, must be reviewed periodically by competent state bodies to keep up with evolving epidemiological data and scientific knowledge. Accordingly, a period of more than eight months had passed since the adoption of the compulsory vaccination of medical staff, i.e., a period which, due to the nature of the measure and its consequences clearly exceeds reasonable, without reassessment and up-dating in accordance to new scientific and epidemiological data, on the effectiveness and impact of vaccinations against the coronavirus and the evolution of the pandemic. As it is not proved that such re-assessment of the measure according to the above criteria was carried out by a competent scientific body, the extension of the measures was found disproportionate to its aim. Furthermore, the occurrence in a statistically very small number of cases of serious side effects of certain vaccines, does not make the legislative provision of compulsory vaccination constitutionally impermissible and is nevertheless tolerable to serve the public interest, in view of the principle of social solidarity (article 25 par. 4 of the Constitution), under the self-evident condition that the relevant legislative measures are based on valid and documented scientific data.

The Court added that it must, however, be considered that it is possible, in view of article 4 par. 5 of the Constitution, which guarantees the equality of citizens before public burdens, that those who suffer side effects even not caused by illegal but by legal action of the State may be compensated for damage. This is because, in such cases, the damage caused by the vaccination exceeds for the sufferer the reasonable level of tolerance and solidarity, which the State is entitled to claim for the sake of the interest of society as a whole. Article 25 par. 4 of the Constitution establishes an obligation for individuals to demonstrate social solidarity by tolerating, under the conditions set out above, limitations of their rights. An obligation to maintain their individual health, arises from Article 25 par. 4 of the Constitution in order not to transmit the disease to others and also not to burden the health system. Ensuring the uninterrupted operation of the national health system is a constitutional obligation of the State.

3. *Decision 1681/2022of the Council of the State (Pilot Trial Procedure)*: restriction of the right to free assembly for public health reasons

The four-day ban on public gatherings with the participation of more than four people throughout the country, on dates, when demonstrations take place, for reasons of public health and the imposition of an administrative fine for violating the ban, was found constitutional. The Court uses the same analysis of the right to health and reviews the proportionality of permissible restrictions. The state has a constitutional obligation, in accordance also to the precautionary principle, to take all appropriate and necessary measures to safeguard public health, which is a necessary prerequisite for the exercise of all individual rights. Just as serious restrictions can be imposed on other equally fundamental individual rights (free development of the personality, freedom of movement, privacy), the law may also provide for the imposition, of proportional restrictions, for a limited period of time on the exercise of the right of assembly including the prohibition of certain, time-specific, public outdoor assemblies by reasoned decision of the police authority, if they pose a serious risk to public health according to scientific evidence. The Court explains that historical experience led the drafters of the Constitution to the wording of Article 11 protecting freedom of assembly, which does not explicitly provide for an exception aimed at the protection of public health in contrast to Article 11 par. 2 of the ECHR. This omission, according to the Court, does not impact its interpretation, i.e., it does mean that the constitutional legislators, while allowing serious restrictions to be imposed on the exercise of other fundamental human rights (such as freedom of movement, which is a necessary condition for the exercise of the right of assembly) when public health is seriously endangered, they meant to exclude the right

of assembly. In other words, the Constitution allows imposing proportional restrictions on the exercise of the right to assembly if serious risks to public health and human life are posed. According to the Court the concept of "serious risk to public safety," in the case of which the prohibition of outdoor gatherings is permitted according to sec. b) par. 2 of article 11 of the Constitution, includes the "serious risk to public health," while the concept of "serious disruption of socio-economic life," includes the serious risk to the operation of vital infrastructures, such as the National Health System. Proportionality review in the case of banning outdoor gatherings, when there is a serious risk to public health, as well as in cases of serious interferences with other fundamental individual rights to achieve the aim of public health protection, is limited to judging whether the ban manifestly exceeds the necessary measure for the realization of the intended purpose.

4. *Decisions 2046-7/2022 of Council of the state (Plenary Session)*: University Campus special police force

A prerequisite for understanding these decisions is knowing that the Greek Constitution provides that University level education can only be provided by Public Universities. According to Art 16 para 5, "Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. These institutions shall operate under the supervision of the State and are entitled to financial assistance from it; they shall operate on the basis of statutorily enacted by-laws." The controversy took the form of a culture war. It must be noted that for many years the dominant opinion in Greek constitutional theory was that the police cannot enter campuses without permission from the police authorities, except when serious crimes were being committed. This constitutionally derived concept of "university asylum" underlies the controversy. The Court chose to address it with reference to the constitutive Parliament of the 1975 discussions rather than respond to the bulk of constitutional theory produced thereafter. The context to understand the taboo of police presence at universities goes back to the repression of the Polytechnic student movement against the military regime in 1973. Nonetheless, as years passed by and democracy was firmly established, rethinking how to police Universities became possible, triggering political controversy.

The Court found constitutional the provisions of articles 18-20 of Law 4777/2021 on the establishment of University Institutions Protection Groups (OPPI) and rejected two applications for annulment directed against the announcement of a competition hiring special guards in the Hellenic Police for the creation of OPPI.

The Court ruled (with six members dissenting) that the principles of academic freedom and full self-governance of Universities (Article 16 par. 1 and 5 of the Greek Constitution, respectively) are not violated by creating a University Police Force of special guards, who are hired for this purpose, receive special training, do not carry firearms and cooperate with the university authorities and institutions (articles 18-20 of Law 4777/2021). This is because when the legislator considers that the public interest, which consists in the protection of public order and security but also in ensuring the unfettered exercise of academic freedom, imposes policing on the campuses, in continuation of a series of previous milder security and protection measures of the personnel and property, which were deemed by the legislator unsuitable to serve these purposes, they are not obliged by the above constitutional provisions (that do not protect an independent concept of "university asylum") to assign to University authorities the responsibility of maintaining public order and security. The prevention and suppression of crime constitute specific manifestations of public order and security which are exercised, according to the Constitution, by the state through security forces such as the police.

5. *Decision 190/2022 Council of the State (Plenary Session)*: blocking the privatization of water

This decision dealing with water policy is a reminder of the serious constitutional issues set forth due to the financial crisis. The beginning of the water controversies goes back to the attempts to privatize water as a result of the crisis. There are many episodes in the water case law where it appears that the Court drew a red line, refusing to allow the privatization sought by consecutive governments. It must be remembered that In May 2014, the Council of State blocked the transfer of the government's stake to the privatization fund, i.e., the Hellenic Republic Asset Development Fund (HRADF), Council of the State Decision 1906/2014 (Plenary Session). The Court had stated that the alienation of the Greek State from the majority of the share capital of the water company EYDAP is unconstitutional, as it violates the provisions dictating that the state is responsible for protecting the right to health. The preservation of share capital is necessary so as to avoid the transformation of a public enterprise into a private one, risking the continuity of the supply of affordable and high-quality services by the enterprise.

Decision 190/2022 found unconstitutional the transfer of a controlling stake of Athens Water SA (EYDAP) and Thessaloniki Water SA (EYATH) to the Hellenic Corporation of Assets & Participations (HCAP). The Council of State ruled that the Greek state must have full control of the country's water utilities, both in board and equity stake. Impugned Law 4389/2016 was found thus unconstitutional with regard to the part which provides for the transfer to HCAP of 50.003% of the share capital of the public company EYDAP SA which cannot be transferred to private individuals, in accordance with the decision 1906/2014 of the Council of the State. The transfer by Law 4389/2016 from the State to the HCAP of a percentage greater than 50% of the share capital of EYDAP SA violates the provisions of Articles 5 par. 5 and 21 par. 3 of the Constitution, since the State, although it is the sole shareholder of HCAP, the shareholder of EYDAP SA henceforth, does not exercise control over the Board of Directors. Therefore, the constitutional condition according to which the control of EYDAP SA by the Greek state mandated is not fulfilled. This fulfillment cannot be achieved only by exercising supervision but also through holding the share capital. In addition, focusing on the purposes served by the HCAP is crucial. The State, by

holding the share capital of EYDAP SA, is not allowed to pursue, prior to or in parallel, financial, or other purposes, even if dictated by the wider public interest when these purposes compete with or endanger the uninterrupted and high-quality provision of water and sewerage services.

The legal nature of water was tackled also by Decision 2519/2022 of the Council of the State (4th Session), which unanimously annulled, in its entirety, decision No. 135275/19.05.2017 of the inter-ministerial National Water Commission, on water pricing rules, as contrary to EU Directive 2000/60 and the relevant national legislation. The Court stressed that water is not a commercial product and noted that the Directive aims to ensure the quality of water, which must not be managed as a commercial product, but as a public good. This means that national policy for the provision of water supply services, including their pricing, is designed by the member states as a policy for the provision of public utility services aimed at achieving the environmental objectives of the Directive.

IV. Looking Ahead

The possibility of two general elections taking place in a short period is open. According to Article 54 par.1 of the Constitution, the upcoming general elections will be held in accordance with the law passed by the SYRIZA-ANEL co-government, i.e., with a proportional representation system, while the subsequent ones will take place with the new law passed by the current government of New Democracy, with a system of enhanced proportionality which favors the first party. The repeat parliamentary elections are held within thirty days of the failure to form a government through exploratory mandates. In the meantime, the President of the Republic appoints a caretaker government, with the caretaker Prime Minister one of the Heads of the country's three Supreme Courts. The resurgence of the far right and the attempt of former Golden Dawn members to re-enter Parliament set serious issues regarding the way in which such political parties must be constitutionally handled. 2023 is expected to be a constitutionally breathtaking year.

V. Further Reading

George Karavokyris, 'Secrecy, Democracy, and the Greek Wiretapping Case', (VerfBlog, 28 August 2022), https://verfassungsblog.de/secrecy-democracy-and-the-greek-wiretapping-case/, accessed 1 March 2023.

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2 Alkmene Fotiadou, 'Greece', in R. Albert/D. Landau/P. Faraguna/S. Drudga, I·CONnect-Clough Center 2019 Global Review of Constitutional Law, 2020.



Guatemala

Andrea Rabanales de la Roca, *Professor and Independent Researcher, Universidad San Carlos de Guatemala*

Alejandro Morales Bustamante, *Professor and Independent Researcher, Universidad Rafael Landívar (Guatemala)*

I. Introduction

This article presents the situation of Guatemala during 2022, categorizing three types of events with political and constitutional relevance that defined the year. First, it presents a series of designations and elections in high-level public positions that have raised concerns and dissent in different sectors of the population. Afterward, it points out that several legislative initiatives related to the exercise of human rights and the configuration of public authorities were promoted. Furthermore, it highlights the worsening situation of criminalization and intimidating practices against press freedom, in addition to attacks on judicial independence and human rights defenders. The article also includes a summary of prominent jurisprudence issued during the year by the highest court in the country in matters of defending the Constitution and human rights: the Constitutional Court (*Corte de Constitucionalidad*), and it concludes by calling on the international community to be attentive to the country's democratic conditions and human rights situation.

II. Major Constitutional Developments

Controversial appointments and elections occurred in high-ranking positions in public institutions. The President of the Republic, Alejandro Giammattei, reelected Consuelo Porras as Attorney General and Head of the Public Ministry for the 2022-2026 period. This decision was questioned for several reasons: the Commission responsible for submitting to the President the list of possible candidates for the position was compelled to include Porras by a ruling of the Constitutional Court; several national and international sectors have accused Porras of using her position to favor certain political and economic groups; during her administration, a significant number of prosecutors with a trajectory in the institution were fired; she was included in the list of corrupt and anti-democratic actors ("Engel´s list") elaborated by the United States of America, for allegedly obstructing the investigation of corruption cases in exchange for political favors.

The Congress of the Republic reelected Shirley Rivera, a member of the ruling party, as the president of that branch and appointed a new Human Rights Ombudsman at the end of the term of Jordán Rodas, with whom the ruling party and allies had been in open confrontation[1].

After a long legal battle, the Constitutional Court nullified the appointment made by the University of San Carlos de Guatemala -the only public university in the country- of Gloria Porras[2] as Justice of that Court and ordered a new designation, which was made in favor of Héctor Pérez[3], thus completing the integration of the Court for the 2021-2026 period.

Walter Mazariegos was elected as the new Rector of the University of San Carlos de Guatemala through elections that were described as fraudulent since people with covered faces prevented representatives of academic units that did not support Mazariegos from accessing the polling station, resulting

in the rest of the representatives voting unanimously for him. In reaction to this, students, professors, and administrative staff from all the university's campuses nationwide formed the protest movement *Digna Resistencia*, which has promoted an academic strike that included taking over every university facility[4], as well as presenting various legal actions against the election.

Although the constitutional mandate of the Justices of the Supreme Court and Judges of all the Courts of Appeals was supposed to end in October 2019, they continue to hold their functions, as the selection of Justices and Judges for the 2019-2024 period remains pending. This is due to the fact that Congress has not complied with a ruling of the Constitutional Court ordering the representatives to orally justify their vote for those who meet the capacity, suitability, and honesty requirements established in Article 113 of the Constitution and to exclude people whose honorability is compromised because they are subjects of a criminal investigation[5].

Regarding the parliamentarian field, Congress amended the Judicial Career Act (*Ley de la Carrera Judicial*)[6], strengthening the position of the Supreme Court of Justice in making decisions on that matter. This resulted in the minimization of the role of the Judicial Career Council, contrary to the original purpose of that act.

Based on Article 25 of the ILO Convention on the Rights of Indigenous and Tribal Peoples, a new act was approved instructing the Ministry of Health to respect and recognize traditional midwives (*comadronas*[7]), without discrimination, in the exercise of their service and to consider their ancestral practice as a healthier alternative[8]. It also orders that financial resources be allocated to them as part of their dignification.

On the other hand, the legislators approved the Protection of Life and Family Act (*Ley para la Protección de la Vida y la Familia*)[9], which increased prison time for women who have abortions, banned same-sex marriage and prohibited teaching "non-heterosexual behaviors as normal" in schools, among other regulations. However, the President, pressured by certain sectors of the population, announced that he would veto the act, as it was contrary to the Constitution and international treaties. In response, instead of submitting it for promulgation, the Congress decided to dismiss it.

For the third time in the last four years, a bill was presented seeking to grant amnesty for the extinction of criminal responsibility for political and related common crimes committed during the internal armed conflict (1960-1996)[10]. Initiatives like this not only contradict international human rights standards but could also lead to impunity in several cases currently being processed for crimes against humanity committed during that period.

In 2022, there was an intensification of criminalization, stigmatization, and intimidating practices (which have even prompted people to leave the country) against journalists, judges, prosecutors, and human rights defenders[11].

In several cases, those affected have been criminally prosecuted and remanded in custody in an overall climate of intimidation. For example, José Rubén Zamora directed one of the country's main newspapers and was a beneficiary of precautionary measures from the IACHR due to threats received while exercising journalism. He was apprehended under accusations of having committed the crimes of Extortion and Money Laundering; while that occurred, the bank accounts of the newspaper were blocked, and its workers were kept in lockdown for more than 16 hours. International organizations such as the Inter-American Press Association[12], Committee to Protect Journalists[13], and the International Press Institute stated that Zamora is a victim of a strategy of persecution and harassment against the press.

The Special Rapporteurship for Freedom of Expression of the IACHR has indicated that the judicial prosecution of journalists coincides with the weakening of judicial independence in Guatemala[14]. UN Special Rapporteur on the Independence of Judges and Lawyers has stated that criminal law is being abused to target civil servants and justice officials, the very people who protect and guarantee human rights[15].

It is worth mentioning the situation of former prosecutor Virgina Laparra. After being remanded in custody for nearly a year, she was sentenced to 4 years of commutable imprisonment by a court that considered that she committed the crime of Abuse of authority because, when she worked in the Special Prosecutor's Office against Impunity, she made an administrative complaint against a judge, considering that he had engaged in acts of corruption[16]. She has been declared a Prisoner of Conscience by Amnesty International[17].

In other cases, threats and harassment ended up forcing people to go into exile to protect their safety. Former judges Miguel Ángel Gálvez and Erika Aifán are paradigmatic examples of this. After 23 and 19 years on the bench, respectively, and having overseen high-profile criminal cases related to government corruption, organized crime, and transitional justice[18], they resigned from the judiciary and left the country[19]. Similarly, well-known journalists such as Michelle Mendoza, CNN's correspondent in Guatemala, and Juan Luis Font, who directed a political analysis radio program, also left the country due to threats and harassment.

In addition to the above cases, there are several other people, especially journalists, former officials of the Special Prosecutor's Office against Impunity, and human rights activists, who have gone into exile or been criminally prosecuted.

III. Constitutional Cases

1. *Constitutional Court. Appeal of Amparo Ruling. Case 4791-2019*: Right to consultation of indigenous peoples[20]

In the present case, traditional local authorities of the Xepache and Llanos del Pinal communities, Tomás Ixtazuy and Santos Pérez, as well as Domingo Pérez and María Velásquez, filed an *Amparo*[21] against the Ministry of Energy and Mines, because this

institution granted a mining exploitation license (pumice stone) in the area where they and their communities are located, without having consulted it with the indigenous people of the region as stipulated by ILO Convention 169.

As the petitioners argued, pumice stone has been extracted from their community since 2000 without respecting their rights as indigenous people. They also claimed that despite several attempts at conciliation, including one promoted by the Ministry of Environment and Natural Resources, their territories continue to be affected. In this context of disagreements, Pedro Chan García initiated the procedure to obtain an exploitation license, which was granted to him in 2014 for 20 years.

For the applicants, the granting of the pumice stone exploitation license without consultation affects their right to life, peace, integral development, democratic participation, self-determination of their development model, a healthy environment, and ecological balance, as well as the principles of due process, justice, and legality.

The *Amparo* was granted by the Supreme Court of Justice in the first instance, and consequently, the mining exploitation license was rendered legally void. The arguments presented for granting the *Amparo* were based on the fact that the Guatemalan State, through the Ministry of Energy and Mines, should carry out the consultation stipulated in ILO Convention 169 and that not doing so undermines the effectiveness of the right to consultation. This ruling also emphasized that the purpose of prior consultation is to ensure that potentially affected communities are informed in advance of the scope that the measures may have on their territories.

However, the owner of the company that obtained the mining license appealed this decision, arguing that the extraction of pumice stone is carried out on his property and also that, due to the community's rejection, a barrier had been installed that was preventing his commercial activity, causing him economic losses as a result. He also argued that consultation with indigenous peoples is not regulated in national legislation and therefore tends to be influenced by political interests. Furthermore, he argued that the Supreme Court did not rule on the legitimacy of the petitioners to defend diffuse rights and that it was never proven that the mining site was on the ancestral lands of indigenous peoples.

The Constitutional Court (CC) resolved both the viability aspects of the *Amparo* and the merits of the case in a ruling dated March 31st, 2022.

Regarding the viability aspects of the *Amparo*, the CC continued with the jurisprudential line established in several previous rulings. The CC held that the *Amparo* applicants have a legitimate interest because they act not only on their behalf but also as indigenous authorities (elected in accordance with their practices and traditions) recognized to act in defense of the rights of the indigenous communities to which they belong. Concerning the identification of the Ministry of Energy and Mines as responsible for the human rights violations, the CC held that this is correct since it is the State of Guatemala, through that ministry, the one responsible for promoting the consultation process when authorizations for exploration, exploitation or use of non-renewable natural resources are requested. The CC also confirmed its jurisprudence regarding the fact that there are no other instances in the justice system to challenge the failure to carry out consultation with indigenous peoples, so the direct promotion of *Amparo* is correct, and that the violation of the right to consultation is considered of a permanent and continuing nature, thus an exception to the usual time limit (30 days) required to present the *Amparo*.

When deciding the merits, the CC followed the jurisprudential line that has been upheld since 2009, which indicates that the right of the indigenous peoples to be consulted is recognized in Guatemala by Article 46 of the Constitution and the international obligations stipulated in the ILO Convention 169. It also stands that consultations should be developed beforehand when administrative measures may affect their territories, worldview, and way of life. This allows the indigenous peoples to express their development priorities based on having access to information (in their language and with cultural pertinence) about the implications of the measures to be adopted so that they can deliberate and reach a consensus on proposals to safeguard their living conditions and their existence as peoples with their own identity, culture, and worldview.

The ruling refers to the standards set by the Inter-American Court of Human Rights about environmental studies and how the traditions and culture of indigenous peoples must be respected in their making. It also states that the Inter-American system has defined that, in certain circumstances, obtaining the consent of indigenous peoples is mandatory, specifically when the implementation of development projects involves the displacement of communities, when concessions for the exploitation of natural resources are granted, and when the deposit or storage of hazardous materials is intended in indigenous territories.

In this decision, the CC reiterated its jurisprudence that consultation must be carried out prior to the implementation of the administrative measure or license, that it must be a free and informed process, that it should involve a good faith dialogue with constant communication and not be limited to the mere transmission of information; because it should aim to reach agreements and consensus as means for decision making; that it should be conducted through culturally appropriate procedures and that it should be a systematic process.

Based on the above, after verifying that the affected population was predominantly indigenous and therefore entitled to the right to consultation, the CC confirmed the constitutional protection granted in the first instance.

2. *Constitutional Court. Appeal of Amparo Ruling. Case No. 2284-2022*: Unfeasibility to invoke indigenous tradition for the exclusion of the criminal responsibility for the crime of Rape committed against a girl22

The underlying issue, in this case, began when a 19-year-old young man initiated a relationship with a 12-year-old girl. Months later, the girl became pregnant and

gave birth at the age of 13. The young man was charged with the crime of Rape with aggravated penalties due to the pregnancy resulting from it.

The young man was acquitted in the trial court and at the appeal court as well, with the argument that the relationship with the girl was in accordance with indigenous traditions. However, when ruling an extraordinary appeal action ("*Casación*"), the Supreme Court of Justice (SCJ) found him guilty of Rape, and he was sentenced accordingly.

The SCJ considered in his conviction that the legislator established that, due to the physical and psychological development of childhood, the expression of the will of someone under 14 years of age is not sufficient for sexual intercourse to not be considered rape since at that age they do not have the capacity to self-determine their sexual life. The SCJ also considered that the respect for the traditions of indigenous peoples has as a limit: the observance of human rights and that sexual freedom and sexual indemnity must be considered as a parameter for respect of those rights. SCJ reiterated the importance of special protection in cases where children and adolescents are victims due to their level of development and special vulnerability.

Against this resolution, the defendant filed an *Amparo*, arguing that the ruling of the SCJ did not take into account that in Guatemala, the protection and conservation of the traditions of indigenous peoples are recognized, and therefore his affective and sexual relationship with the alleged victim is not a crime since it is a behavior commonly accepted in the community to which they both belong.

The Constitutional Court (CC) denied the *Amparo* and confirmed the SCJ resolution that declared him guilty of Rape.

In its resolution, the CC invoked several international treaties ratified by Guatemala for the protection of women and children. CC also highlighted the Inter-American Court of Human Right's ruling in the case of V.R.P., V.P.C., and Others v. Nicaragua, in which the Regional Court emphasized the importance of the State´s fulfilling due diligence duty when investigations and criminal proceedings related to cases of sexual assaults against girls. The CC also emphasized that the Human Rights Council of the United Nations has stated that child marriage is a violation of human rights.

The CC also emphasized the importance of ensuring appropriate Conventionality Control and that in cases of violence against women, gender perspective and intersectional approach are properly applied. In this regard, CC pointed out that the ILO Convention 169 contemplates that indigenous peoples have the right to maintain their traditions as long as they are not incompatible with fundamental rights defined by the national legal system or with internationally recognized human rights. The CC highlighted that the situation under analysis, in addition to its criminal implications, undermines the fulfillment of the girl's human rights, such as the right to education, the freedom to choose her life options and the right to her sexual and reproductive health.

3. *Constitutional Court. Consultative Opinion. Case No. 6248-2021*: Irresponsibility of opinions expressed by parliamentarians in the performance of their duties23

Article 161(b) of the Constitution of the Republic of Guatemala establishes that congressmen are representatives of the people and dignitaries of the Nation, and as a guarantee for the exercise of their functions, they have, among other prerogatives, "irresponsibility for their opinions, for their initiative and for the manner of dealing with public affairs, in the performance of their duties." In a 2009 ruling (Case No. 3127-2007), the Constitutional Court interpreted it to refer to the right of representatives to express opinions, objections, and observations, which is discretionary and can only be limited by law or self-determination.

The President of the Republic, exercising one of his attributions provided in a law that regulates the procedures and institutions related to constitutional justice, requested an advisory opinion from the CC to clarify whether this prerogative applies only to expressions of opinions related to public affairs or extends to any opinion expressed by a representative in any means and any place, even if unrelated to those topics. He made that request arguing the lack of clarity on the extent of this right in the normative and jurisprudential framework.

To address such a request, the Constitutional Court referred to the democratic and representative system of government that characterizes the State of Guatemala according to Article 140 of the Constitution. The CC highlighted that the primary function of the Legislative Branch (and because of that, the main responsibility of the representatives) is to create laws that integrate the country's legal system.

The CC noted that it is in the debates and discussions that take place in the Plenary of Congress for the fulfillment of that attribution and other ones established in the Constitution and in the Law of the Legislative Body, where the opinions that the representatives express in the performance of their duties can arise. This also includes, when appropriate, the activities carried out by Congressmen and Congresswomen when representing Congress in official commissions within or outside the country.

Furthermore, the CC emphasized that, according to Article 55 Bis of the aforementioned Law, representatives have the duty to exercise their functions with probity and respect for the principles contemplated in the Constitution, behaving in accordance with parliamentary practices and, in general, in such a way that their conduct satisfies "the most detailed scrutiny by citizens" in accordance with the importance and dignity of the Congress.

The CC concluded that the prerogative regulated in the constitutional precept under analysis encompasses only those opinions that representatives externalize in the development of their legal and constitutional functions and other inherent attributions of their position, the exercise of which, in any case, must comply with the rules of decorum, dignity, and correctness, which are inherent to their position.

IV. Looking Ahead

In 2023, the electoral process for the election of the President, Vice president, Congressman, Congresswoman, Mayors, Local Councils, and Central American Parliament members will take place. There are serious concerns that electoral authorities and/or courts may prevent the participation of candidates not aligned with the ruling party and its allies and, in general terms, that the electoral process may be judicialized to the extent that its course and results may be altered at the expense of the will of the people. A call is made to the international community to be attentive to the electoral process, given the precarious democratic conditions and the limitations of the freedom of expression in the country.

V. Further Reading

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Jody García and Nina Lakhani, "Top corruption prosecutor held in jail as Guatemalan elite bids to purge foes" (The Guardian, September 1st, 2022). <https://www.theguardian.com/world/2022/sep/01/guatemala-prosecutor-jailed-virginia-laparra-corruption>.

References

1 Rodas is currently in exile.
2 Porras, who was a Constitutional Court's Justice from 2011 to 2021, is currently in exile.
3 And who, moreover, is supposed to take office as President of that Court in 2023.
4 Which continues up to the date of writing of this article (April 2023), with some exceptions of academic units that recently ended the academic strike and are teaching classes online.
5 In February 2020, investigations carried out by the Special Prosecutor's Office against Impunity of the Public Ministry were made public, regarding organized networks to unduly influence the appointment of judges, involving alleged acts of corruption by judges, lawyers, and politicians (the lawyer who was serving as the head of that Office at that time was removed in 2021 and is now in exile).
6 See: https://www.congreso.gob.gt/detalle_pdf/decretos/13562
7 Women who accompany mothers from the early months of pregnancy and then attend and care for them during childbirth, based on indigenous peoples' traditional medicine and knowledge. They have contributed to the reduction of maternal and infant deaths and the promotion of breastfeeding.
8 See: https://www.congreso.gob.gt/detalle_pdf/decretos/13576
9 See: https://www.congreso.gob.gt/detalle_pdf/iniciativas/66#gsc.tab=0
10 See: https://www.congreso.gob.gt/detalle_pdf/iniciativas/5967#gsc.tab=0
11 The Protection Unit for Human Rights Defenders in Guatemala claims to have verified 3574 aggressions against individuals, organizations, and communities defending human rights during 2022; mainly on justice operators (prosecutors, assistant prosecutors and judges), people seeking justice against government corruption or gross human rights violations cases, journalists and indigenous peoples defending their land. Defamation, stigmatization and hate speech in social networks; unfounded criminal complaints; misrepresentation of the law; arbitrary detentions and harassment were among the most recurrent patterns of aggressions reported: https://youtu.be/ot22pcjm-ek. The Association of Journalists of Guatemala reported more than 100 attacks on freedom of speech during 2022, including cases of criminalization, threats of violence, and unjustified prosecutions: https://www.prensalibre.com/guatemala/justicia/terrorismo-judicial-acecha-a-la-prensa-el-informe-de-la-apg-sobre-la-situacion-de-libertad-de-expresion-en-guatemala-breaking/
12 See: https://en.sipiapa.org/notas/1215330-ia-pa-calls-on-guatemalan-president-to-release-jose-ruben-zamora.
13 See: https://cpj.org/2022/12/cpj-joins-open-letter-to-guatemalan-president-calling-for-release-of-journalist-jose-ruben-zamora/
14 See: https://www.oas.org/en/iachr/expression/showarticle.asp?artID=1251&lID=1.
15 See: https://www.ohchr.org/en/press-releases/2022/11/guatemala-un-expert-condemns-targeting-prosecutor-and-judge
16 The process that led to the conviction began with a criminal complaint filed by the same person whom she had previously reported administratively.
17 See: https://www.amnesty.org/en/latest/news/2022/12/guatemala-amnistia-internacional-exige-la-inmediata-e-incondicional-liberacion-de-la-presa-de-conciencia-virginia-laparra/
18 Gálvez presided over cases such as "La Línea", "Cooptación del Estado" (associated with the downfall of President Otto Pérez and Vice President Roxana Baldetti in 2015), and "Diario Militar" (driven by victims of gross human rights violations during the internal armed conflict). Aifán presided over cases such as "Odebrecht" (a corruption scandal that affected several Latin American countries) and "Comisiones Paralelas" (related to organized networks for the anomalous influence on the appointment of judges).
19 According to information provided by the IACHR within its Annual Report, they joined the more than 30 judicial officers who have left the country during the current government, denouncing being criminally prosecuted because of their judicial work: https://www.oas.org/en/iachr/docs/annual/2022/Chapters/10-IA2022_Cap_4B_GU_EN.pdf.
20 See: http://138.94.255.164/Sentencias/849668.4791-2019.pdf
21 Legal action regulated in the Constitution (Article 265), aimed at obtaining judicial injunctions that secure and established the effective fulfillment of human rights when they are violated by authorities, or that prevent the imminent threat of their violation.
22 See: http://138.94.255.164/Sentencias/850784.2284-2022.pdf.
23 See: http://138.94.255.164/Sentencias/848877.6248-2021.pdf.



Honduras

Rafael Jerez Moreno, *Legal Advisor, Honduras Business Organization*

I. Introduction

For the 2022 edition of the Global Review of Constitutional Law, the analysis of the case of Honduras focuses on a year characterized by the transition of power in the Executive and Legislative branches. During the transition process for appointing the authorities of the newly elected Congress, a political and constitutional crisis erupted when two different Boards of Authorities were elected. What role did the Constitutional Chamber of the Supreme Court play during the legislative crisis? This analysis will address this question and set the basis for a broader analysis of the constitutional control of legislative acts other than legislation.

Despite the renewal of the Executive and Legislative branches of government, the cohort of 15 judges of the Supreme Court of Justice continued its tenure and, apart from having some involvement in the congressional crisis, it issued other decisions that are relevant for understanding the scope of the constitutional supremacy principle in the legal system. One of these cases concerns the unconstitutionality declaration of an Executive Decree that conferred the administration of an Agricultural Development Program to the Armed Forces, contravening the role the Constitution assigns to this military institution as a cooperator of other ministries without assuming competencies that belong to civil institutions. The analysis of the 2022 Global Review is a preamble for the next edition, in which the critical object of study will be the appointment process of the 15 judges of the Supreme Court and the first decisions with constitutional relevance of the new cohort of judges for the period 2023-2030.

II. Major Constitutional Developments

The beginning of 2022 was marked by the transition of power in the Executive and Legislative branches after the November 2021 general elections. The Constitution foresees that on January 21, after the election, the newly elected Congress must reunite to appoint the provisional Board of Authorities. Afterward, on January 23, Congress must meet again and confirm a definitive Board of Authorities. The provisional and definitive Board can be voted with a simple majority of 65 of the 128 members of Congress. The 2017 general election at the legislative level left a power share in which the Freedom and Refoundation (Libre) Party, to which the newly elected president of the Republic belongs, registered 50 congressional members; the National Party registered 44 members; the Liberal Party 22; the Savior of Honduras Party (PSH) 10; the Christian Democratic Party of Honduras (PDCH) 1; and the Anti-corruption Party (PAC).[1]

An essential fact in this analysis is that the result of the 2021 general election at the presidential level signified the first woman's victory to be elected president. Nevertheless, this happened because a political alliance was signed between the two major candidates of the opposition, Xiomara Castro and Salvador Nasralla, both former presidential candidates in the 2013 and 2017 elections. The alliance had two relevant elements, one was that Nasralla resigned from his candidacy in the PSH party and joined Xiomara's ballot as one of the three presidential designates (a figure similar to the vice president),

but in exchange, Nasralla would have the power to nominate the Congress member who would receive the support of the PSH and Libre Party in the Legislative Power to become president of Congress.[2]

With the outcome of the general election, Libre and PSH did not reach the 65 minimum votes required to elect the Board of Authorities in Congress by themselves. The congressional session to elect the provisional Board of Authorities on January 21st arrived, but a political crisis emerged. Jorge Calix of Libre Party, the most voted Congress member nationwide, with the support of some members of his party, decided to negotiate with members of the National Party, Liberal Party, the PDCH, and PAC, receiving 85 votes to rise as president of Congress with a Board of Authorities integrated by his allies.[3] His party peers denounced this political move by Calix as treason, and after he was sworn in, physical violence episodes occurred in the chamber of Congress, making Calix and his supporting Congress members leave the chamber. Afterward, Congress members that supported Luis Redondo, the PSH Congress member designated by Nasralla following the Libre-PSH agreement, was also sworn in as the president of Congress, alongside a Board of Authorities with members of these parties, with the support of proprietary and deputy legislative members in the floor of Congress.[4] Both Boards were confirmed on the January 23rd session.

This episode created a constitutional crisis over the legitimacy of any of the two Boards of Authorities, not just for the functioning of Congress but for its repercussions in the democratic system. For instance, on January 27th, Article 244, the Constitution foresees that the president of Congress must swear in the newly elected president. In its absence, the president of the Supreme Court must take the president's oath. However, if none of these are present, any judge of letters or peace of the Republic can take the president's oath. Even after both Boards were confirmed by their Congress supporters, Castro was sworn in by a judge of letters, with Redondo standing beside them.[5] The political part of the problem concerning who exercised power in the Board of Authorities of Congress was solved on February 7th, 2022, with an agreement between Jorge Calix and Manuel Zelaya, coordinator of the Libre Party and husband of the president, in which Calix and his supporters recognized the Board of Authorities led by Redondo.[6] However, the Board of Authorities' legitimacy is still subject to debate.

Congress and the Executive Power were renewed, but the 15 judges of the Supreme Court continued their office during 2022 and finished their 7-year tenure in 2023. During 2022, the only constitutional amendment approved by Congress was the derogation of the Zones of Employment and Economic Development (ZEDE) on April 21. The ZEDE was a figure created in 2013 through a constitutional reform of Articles 294, 303, and 329 concerning the departmental and municipal regime, the organization of the Judiciary Power, and the economic system. The ZEDE are zones subject to a special regime to attract national and foreign investment. However, its regulations give them powers that collide with constitutional provisions concerning the allocation of the national territory and the State Powers' capacity to exercise their jurisdictions.

The constitutional amendment led to Congress approving a special law to regulate the ZEDE, which was ruled on its constitutionality by the Constitutional Chamber of the Supreme Court in 2014.[7] The Constitutional Chamber that issued this decision was integrated by judges appointed in 2012 after Congress removed the judges initially appointed according to the constitutional process in 2009. The Inter-American Court of Human Rights is currently analyzing cases of violation of human rights that occurred during the removal.[8] The constitutionality of the ZEDE was questioned by local and foreign organizations, arguing the risks associated with human rights violations of indigenous and Afro-descendent communities, in particular.[9] Through Legislative Decree 32-2022, Congress approved an amendment to derogate the ZEDE and all of the legislation derived from the 2013 constitutional reform. However, the constitutional amendment is not applicable, considering that Article 373 requires all constitutional amendments to be ratified by the subsequent legislature to be enforceable. The derogation of the ZEDE must be ratified in 2023. To the date of drafting this analysis in July 2023, Congress has yet to approve the ratification.

III. Constitutional Cases

1.The appointment of the Board of Authorities of the National Congress

As explained in the previous section, the appointment of the Board of Authorities of the National Congress opened not just a political debate but a constitutional one overall. Amid the controversy, constitutional claims were filed on the Supreme Court. On February 2, 2022, the Judiciary Power communicated that it did not admit an amparo claim, filed in favor of Jorge Calix and Beatriz Valle, both members of the Board of Authorities led by Calix.[10] Concerning the amparo claim, Article 182 of the Constitution foresees that any person who feels injured, or anybody representing the latter, has the right to file an amparo claim in two scenarios. The first is to preserve or restore the enjoyment of the rights and guarantees recognized in the Constitution, international treaties, and instruments. The second scenario involves petitioning the Judiciary Power to declare, in concrete cases, that a regulation, fact, act, or resolution from an authority does not oblige the petitioner, nor is it applicable because it contravenes, diminishes, or distorts the rights recognized in the Constitution. Article 9 of the Law of Constitutional Justice foresees that the Constitutional Chamber of the Supreme Court has the competence to review amparo claims in cases of violations committed by the president of the Republic or cabinet members, Appellation Courts, the Superior Oversight Tribunal, the National Electoral Council, the Attorney General of the Republic, and violations committed by the rest of high officials with authority nationwide. The Constitutional Chamber may review amparo claims related to the second scenario established in Article 182 of the Constitution. When it addressed the amparo claim in favor of Calix and Valle, the Constitutional Chamber explained that the claim did not follow the types of acts that can be contested, and the claimant did not indicate

which legal resource must have been used to remedy the situation. According to the only public information the Court made available of the case, the lawyer that presented the claim challenged the decisions of Luis Redondo, the leader of the other Board of Authorities, who, according to the claimant, assumed an authority illegitimately and supplanted the functions of the Board of Authority that Calix led.

On the other hand, the Constitutional Chamber unadmitted an unconstitutionality guarantee claim against the Board led by Calix, arguing that the claim did not comply with the scenarios in which an unconstitutionality guarantee can be filed.[11] The petition referred to the elected provisional Board of Authorities on January 21, 2023, led by Jorge Calix, and asked for the total nullity of the Board and its actions. Article 76 of the Constitutional Justice Law foresees that unconstitutionality claims proceed against laws and norms with a general character that infringes constitutional provisions and is not subject to contentious administrative jurisdiction. The second case in which an unconstitutionality claim proceeds is when a constitutional reform is approved without complying with the requisites contained in the Constitution. The third case is when an international treaty that affects constitutional provisions is approved without following the procedure mandated by the Constitution. The last scenario allows unconstitutionality claims in cases where secondary laws contradict international treaties or conventions to which Honduras is a member. Despite the conclusion of the Constitutional Chamber that the claim focusing on the appointment of the Board of Authorities led by Calix did not comply with the scenarios foreseen in the law to declare unconstitutionality, it is worth analyzing what other avenue exists to solve a controversy of this nature.

It is undeniable that an appointment of two simultaneous Board of Authorities creates a constitutional crisis, one in which the president of the Republic prefers to be sworn in by a judge instead of by the person exercising as the president of Congress, and where both Boards of Authorities led sessions to approve legislative decrees. At the same time, the issue was not entirely solved by the political agreement between Manuel Zelaya and Jorge Calix. The question that arises from this case is the capacity of the Judiciary Power to exercise constitutionality control of legislative acts other than laws and constitutional reforms. Addressing this question may require an analysis dedicated exclusively to it; however, to open the debate, it is essential to consider the following. Chapter One of Title Five of the Constitution develops the process of enacting laws. It speaks about those who can propose legislation and Congress's steps to approve every law. For instance, a legislative project can only be voted on by passing three debates in three days unless there is a qualified urgency. In the latter case of urgency, it can be voted in one debate if a simple majority of Congress members determines it. Another critical part of enacting legislation is that the legislation project must be sent to the Executive Power for sanctioning purposes after being approved by Congress. After the Executive's sanction, the project must be sent for publishing in the official report of the state.

Article 218 of the Constitution, Section 1, explains that the Executive sanction is not required in cases of the appointments of high officials made by Congress. Congress appoints the Board of Authorities, but the appointment itself is not legislation, meaning that the appointment of the Board itself cannot be subject to constitutional review because it is not classified as a law. The Organic Law of the Legislative Power, issued in 2014, describes the general characteristics of appointing the provisional and definitive Boards of Authorities of Congress. Among the critical requirements, the law explains that the session to swear in the provisional Board must be led by the Ministry of the Interior, which must take the oath of its members. The Organic Law also explains that voting procedures can be nominal by writing each member´s name electronically or lifting each member´s hand. The law also describes a figure called motions of order that Congress members can present to address an issue with a preferent character. For instance, the supporters of Calix´s Board ground their arguments on the fact that he had more votes in his favor than the simple majority voting requirement and that this gave him enough legitimacy.

Additionally, the Ministry of Interior was the one who took the oath to Calix. However, when the procedure occurred on the floor of Congress, there was no certainty about the compliance of the provisions concerning registering the vote of each Congress member. In Redondo´s case, after violent episodes expelled Calix and his Congress member allies from the floor, substitute Congress members were part of the voting procedure that presumptively elected him and his Board of Authorities. However, Section 20 of Article 22 of the Organic Law explains that the President can integrate substitute Congress members into Congress sessions in cases of temporal or definitive absence of permanent Congress members. What validity did the integration of substitute members have in this case? After permanent Congress members were absent during the provisional installment of the Board of Authorities session because violence erupted.

On October 18, 2019, Congress enacted an amendment to its Organic Law.[12] This amendment added a provision that classified what should be understood as legislative function through 10 categories. Among the categories of the legislative function, it is comprehended the elaboration, reading, discussion, approval, and signature of law projects; participation and voting on the floor of Congress; presentation of motions, written and verbal manifestations; and legislative resolutions and other actions derived from the activities in the legislative process. This new provision explained that, against the legislative function, the only claim that can proceed is the unconstitutionality one. In sum, the Constitutional Justice Law foresees that unconstitutionality claims proceed against laws and norms of a general character. The Constitutional Chamber has issued decisions clarifying that the unconstitutionality claim is not the legal remedy for correcting an administrative procedure. Should the Constitutional Chamber address the appointment of the Board of Authorities of Congress through the expansive view of what is considered legislative function according to the amendment of the Organic

Law of the Legislative Power approved by Congress in 2019? Despite rejecting to review the claims concerning the legitimacy of either Board of Authorities of Congress, the controversy will continue to be subject to analysis, awaiting the moment for the Court to address it.

2. The Involvement of the Armed Forces in Public Management Endeavors

On February 22, 2022, the Constitutional Chamber of the Supreme Court issued a decision of an unconstitutionality claim addressing the Decree number PCM-052-2019 issued on September 5, 2019, of the Executive Power concerning the designation of the Armed Forces to manage an Agricultural Development Program through the Ministry of Defense.[13] A Directorate of Agricultural Development would be created within the Ministry. Title Five of the State Powers, Chapter Ten of the National Defense in the Constitution, refers to the Armed Forces as a national and permanent institution characterized by its apolitical, professional, and non-deliberative character. The Armed Forces are created to defend the territorial integrity of the state and the sovereignty of the Republic, to preserve peace, the enforceability of the Constitution, the principle of freedom to vote, and alternation in the Presidency of the Republic. Article 274 of the Constitution foresees that the Armed Forces can cooperate with the ministries and public institutions, at the request of these, in labors concerning education, roads, agriculture, environment, literacy, communications, healthcare, and agrarian reform.

The Constitution establishes that the Armed Forces can participate in international peace missions following international treaties, logistic support in technical advisory activities, in communications and transportation, the fight against drug trafficking, collaboration in episodes of natural disasters and emergencies that suppose a threat to people and goods, and in programs of academic education and technical training of its members, and programs to protect the ecosystem. They will also collaborate in public security activities, at the Ministry of Public Security's request, to combat terrorism, weapon trafficking, and organized crime, to protect the State Powers and the National Electoral Council, during its installment and functioning, at the request of these.

The legal representation of the National Center of Farm Workers and the Council for the Integral Development of Farming Women filed the unconstitutionality claim arguing that the Agricultural Development Program assigns budget and recognizes faculties to the Armed Forces different from the ones delegated by the Constitution. The faculties involve increasing productivity and agricultural profitability by investing productive assets and establishing an entrepreneurial mentality developing knowledge, skills, attitudes, and abilities as essential elements that generate producers' wealth and well-being. The faculties assigned to the Armed Forces through this decree violate the Constitution.

The budget assigned to this program was 66 million Lempiras in 2019 and 3,843 million for the next four years. The claimants argued that the Armed Forces´ contributions could only have a cooperative character; however, the decree confers faculties that correspond to institutions like the Ministry of Agriculture and Livestock, the National Agrarian Institute, the Forest Conservation Institute, the Agricultural Development and Ecological Conservation Experimental Center, violating basic principles of public management that refer to efficiency, and the correct, transparent and legal management of public resources. As an example of the transferal of the faculties of public institutions, the claimants cited the articles of the Public Administration General Law concerning the Ministry of Agriculture and Livestock, referring to the formulation, coordination, execution, and evaluation of the politics related to the production, conservation, and commercialization of food, cattle raising, fishing, aquaculture, animal and vegetable health, transference of agricultural technology, irrigation and drainage in agricultural activities.

Resorting to an integral view of the Constitution and the scope of the unconstitutionality claim according to the Constitutional justice legislation, the Constitutional Chamber declared the unconstitutionality of the Executive Decree PCM-052-2019, concluding that the allocation to the Armed Forces of the administration of the Agricultural Development Program is an "unconstitutional usurpation," contrary to the Constitution and the legal system. Mainly, the Chamber argued that Executive Decree PCM-052-2019 violated Article 274 of the Constitution that established the Armed Forces' cooperative character.

IV. Looking Ahead

The 2023 Global Review of Constitutional Law will address the appointment process of the 15 judges of the Supreme Court of Justice after the finalization of the period of the 2016-2023 cohort. The process started in August 2022 and finished in February 2023 through two stages. According to the Constitution, the first stage is led by a Nominating Board integrated by private, academic, social, and public sectors, and Congress oversees the second stage. The tenure of the new cohort of judges will extend from 2023 to 2030.

Considering the outgoing cohort of judges issued decisions on the final days of their tenure, the 2023 Global Review will address the first decisions of the new cohort of judges, and it will aim to identify criteria that contribute to the continuation of jurisprudential precedents or, on the contrary, innovations on the reasoning of the Court, particularly, the Constitutional Chamber. One of the first innovations right after the appointment of the 15 judges was an agreement to amend the Internal Regulations of the Supreme Court of Justice. This amendment addressed a legal loophole that the internal regulations had concerning the existence of substitute judges. Before the agreement, the president of the Supreme Court had the directionality to appoint substitute judges in cases of the absence of a permanent judge. With the amendment to the internal regulations, the maximum number of substitute judges is six, approved by a three fourth of the votes of the permanent judges. This amendment could be perceived as a seemingly minor detail, but it is part of a more significant political negotiation behind the appointment of the new cohort of judges of the Supreme Court.

V. Further Reading

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Hong Kong SAR, China

Pui-yin Lo, *Barrister-at-law, Nanyang Chambers*

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 a high degree of autonomy, including constituting the city's Chief Executive (CE) (who represents the SAR before the Central Government and heads both the SAR and its executive authorities/Government), its executive authorities (which are vested with executive power), its legislature (which is vested with legislative power) and its judiciary (which is vested with independent judicial power including that of final adjudication). The Basic Law also provides that the Central Government is responsible for foreign affairs and defense and that the Standing Committee of the NPC (SCNPC) has the power to declare a state of emergency in Hong Kong, the power to interpret the Basic Law, and the power to vet Hong Kong SAR (HKSAR) legislation. 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.[1] These basic policies express the PRC's approach to territorial reunification under the principle of "One Country, Two Systems." In 2020 and 2021, the PRC and the HKSAR Governments adopted measures to safeguard national security and ensure the firm control of the SAR by "patriots." This Report discusses developments in three areas: (1) The Hong Kong National Security Law (HKNSL), its 2022 interpretation by the SCNPC, and the prosecution of offenses endangering national security; (2) The reconfigured political system of the HKSAR by amendments to the Basic Law and electoral laws; and (3) three major constitutional cases.

II. Major Constitutional Developments

The Hong Kong Report in the 2020 Global Review of Constitutional Law discussed the enactment of the HKNSL and its features, as well as the first case on the judicial approach turning against exercising constitutional review of the HKNSL.[2] In 2021 and 2022, prosecutions were underway of persons alleged to have committed offenses created under the HKNSL.[3] as well as local offenses deemed to be "offenses endangering national security" by the HKNSL, which included offenses of seditious intention.[4] The first conviction recorded was against Tong Ying-kit by the Court of First Instance, consisting of three judges, of one count of incitement to secession and one count of terrorist activities,[5] and the court sentenced him to a total of nine years imprisonment.[6] At the time of the writing of this Report, about 259 individuals had been arrested for allegedly contravening offenses endangering national security, about 160 individuals and five companies had been charged, and about 80 individuals had been convicted.

Convictions were entered against individuals of the HKNSL offenses of incitement of secession and incitement of subversion. These offenders were sentenced based on the court's categorization of the circumstances

of the offending: If the court considered the case to be "serious," the relevant tier of punishment, specifying a minimum term of imprisonment, would seem to apply. This was confirmed by the Court of Appeal in the *Lui Sai-yu* case,[7] which indicated that local sentencing laws should operate with the HKNSL to achieve "convergence, compatibility and complementarity" with the provisions of the HKNSL specifically on sentencing. Local sentencing laws on mitigation, such as a usually generous discount for guilty pleas, would only apply if they do not compromise the purpose stated above. Hence local sentencing laws may not apply to reduce the sentence below the minimum term prescribed for the "serious case" tier, which was five years imprisonment. Additionally, the Court of Appeal reasoned that several provisions of the HKNSL that refer to the obligations of the "judicial authorities" under the HKNSL stipulate an "*Imperative*" on the strict and full application of the HKNSL and local laws to further the "*primary purpose*" of the HKNSL of "*preventing, suppressing and imposing punishment*" of offenses and activities endangering national security.

Convictions were imposed against individuals for acts done, words uttered, and publications of "seditious intention," a statutory concept of British colonial vintage that serves in Hong Kong to proscribe a wide range of "intention," including, *inter alia*, that of exciting disaffection or bringing into hatred or contempt of the Central or the SAR Government; raising discontent, disaffection, ill-will or enmity amongst Hong Kong residents or between different classes of them; or counseling disobedience to law. Many were caught under this species of offenses for social media posts or the administration of online channels. Others who have been prosecuted included news editors and the publishers of children's picture storybooks.[8] The defendants had challenged the constitutionality of the offenses on the bases that their vagueness and wide scope meant they could not meet the principle of legal certainty and that they were disproportionate restrictions on freedom of expression. The trial courts had rejected such submissions, holding these statutory offenses to be prescribed by law and permissible restrictions of freedom of expression for safeguarding national security and public order (ordre public), and paying little attention to the comparative jurisprudence and scholarship cited against the validity of such offenses.

Controversy arose towards the end of 2022 when Jimmy Lai, the former owner of the *Apple Daily* newspaper, sought the assistance of Tim Owen KC, a UK barrister, to lead his defense in an upcoming trial involving offenses endangering national security. Owen required the permission of the High Court before he could represent Lai, and the Chief Judge of the High Court admitted Owen to practice in Hong Kong for the *ad hoc* purposes of the trial. The Secretary for Justice appealed against the admission, contending, eventually but belatedly, that due to national security concerns, no barrister not generally admitted to practice in Hong Kong should be admitted to act for a defendant in a trial of an offense endangering national security. The appellate courts dismissed the Secretary's appeals, principally because the Secretary's argument was a late and dramatic change of position raising "undefined and unsubstantiated issues," while indicating that in a proper case, national security considerations "are plainly of the highest importance to be taken into account."[9] That was insufficient to satisfy the Central Government and the CE. In a report to the Central Government responding to its request, the CE questioned the appropriateness of overseas lawyers to act in cases concerning an offense endangering national security due to the lack of effective means to eliminate conflicts of interest and manipulation from their country and to ensure compliance with the HKNSL's confidentiality requirements. The CE proposed that the Central Government should request the SCNPC to interpret the HKNSL to deal with the said question. After deliberation, the Central Government requested the SCNPC to interpret the HKNSL. On 30 December 2022, the SCNPC adopted an interpretation stipulating that the question concerning overseas lawyers practicing in cases concerning an offense endangering national security was one that the court should seek binding certification from the CE under Article 47 of the HKNSL; and that if the courts had not requested or obtained such a certificate, the Committee for Safeguarding National Security of the HKSAR (CSNS) established under Article 14 was competent to "make relevant judgements and decisions on such situation and question" of "whether national security is involved," and such a decision would be respected and implemented by all concerned, including the courts.[10] Although this SCNPC Interpretation did not resolve the question the CE submitted, it confirmed the roles of the CE and the CSNS he chaired as the final, authoritative, and unimpeachable arbiter of whether a matter concerns national security, including a matter before an HKSAR court. The Hong Kong Judiciary responded by a press release that indicated it "respects the lawful exercise of power" by the SCNPC and it would, as required by the HKNSL, "continue to effectively prevent, suppress and impose punishment for any act or activity endangering national security in accordance with law."[11]

Turning to the political system of the HKSAR, in March 2021, the SCNPC adopted amendments to the Basic Law to provide for "improved" methods for selecting the CE and for forming the Legislative Council. The amendments reconfigured the political system through two institutions, namely the Election Committee and the Candidate Eligibility Review Committee. The former institution, which is composed of 1,500 members divided into five sectors of 300 members each,[12] is to nominate and elect the CE,[13] nominate candidates in the Legislative Council elections,[14] and elect 40 members of the reconstituted Legislative Council of 90 members.[15] The latter institution is to examine and confirm unquestionably the eligibility of candidates in elections against the criteria of upholding the Basic Law and pledging of allegiance to the HKSAR,[16] with the assistance of the CSNS and the police force. Although the amendments to the Basic Law were *not* adopted pursuant to its provisions on amendment,[17] but through a Decision of the 2021 NPC Session determining the parameters of the amendments and entrusting the SCNPC to make them,[18] no question was raised about that in Hong Kong.[19] After Hong Kong's electoral laws were amended to conform with the 2021 SCNPC Amendments,[20] elections were held of the Election

Committee and the Legislative Council in 2021 and of the CE in 2022.

III. Constitutional Cases

The Hong Kong Report in the 2019 Global Review of Constitutional Law discussed the Court of Final Appeal (HKCFA)'s judgment in the *Comilang* case[21] in terms of it determining the structure and limits of human rights protection under the Basic Law, noting the HKCFA's preference of "coherence" in the relevant system under the Basic Law. The HKSAR courts have furthered this preference in the following cases:

1. *Kwok Cheuk Kin v Director of Lands* [2021] HKCFA 38: *Prima facie* Discriminatory Indigenous Land Rights Constitutionally Protected

The HKSAR Government has maintained a policy allowing an adult indigenous villager in the "New Territories," who descended through the male line from a resident of a recognized village in 1898 – the year the British authorities obtained the "New Territories" from the Qing Imperial Government – to apply for permission to erect, for once in a lifetime, a "small house" within his own village. This "Small House Policy" was challenged by Kwok, a social activist, in the courts. Before the HKCFA, Kwok's lawyers argued that the "Small House Policy" was inconsistent with Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights (HKBOR) (both of which outlaw discrimination). The Government cited Article 40 of the Basic Law, which provides for the protection of "lawful rights and interests of New Territories indigenous inhabitants" by the HKSAR. The HKCFA held that although the "Small House Policy" was *prima facie* discriminatory on grounds of both sex and social origin, Article 40 was the "dominant provision," and it qualified and limited the application of Article 25 and Article 22. Further, the "Small House Policy" was one of the "lawful rights and interests of New Territories indigenous inhabitants" that Article 40 would protect. The HKCFA reached these conclusions by a historical overview of the "existing rights and interests" peculiar to "New Territories indigenous inhabitants" at the time of the enactment of the Basic Law and potentially open to challenge in the absence of constitutional protection, by identifying Article 40's purpose as giving effect to the principle of continuity by protecting an existing entitlement of a class of persons, and by adopting the principle of construction that the specific prevails over the general. The HKCFA considered that "lawful" within the meaning of Article 40 was *not* intended to require the absence of discriminatory features of the "existing rights and interests": If consistency with the anti-discrimination provisions was treated as a condition of the inherently discriminatory rights and interests being protected by Article 40, then either the discrimination was justified (in which case Article 40 was unnecessary) or it was unjustified (in which case Article 40 applied to nothing).

2. *Sham Tsz Kit v Secretary for Justice* [2022] HKCA 1247: Recognition of Same-sex Marriage Denied by *Lex Specialis*

Sham, who is a homosexual Hong Kong permanent resident, applied for judicial review against the HKSAR's legislative scheme of not recognizing same-sex marriages entered outside Hong Kong and not providing an alternative framework for recognition of same-sex relationships equivalent to marriage. Sham's application was denied at first instance, and he appealed to the Court of Appeal, contending that Article 25 of the Basic Law (which guarantees the right to equality) and Article 14 of the HKBOR (which guarantees the right to privacy) provide for a positive obligation of the HKSAR to recognize same-sex marriages and/or establish a framework for same-sex relationships to be recognized as equivalent to marriage. The Court of Appeal dismissed the appeal, citing Article 37 of the Basic Law (which protects the freedom of marriage of Hong Kong residents and their right to raise a family freely) and Article 19 of the HKBOR (which recognizes the right of men and women of marriageable age to marry and found a family) as the *lex specialis* which grants freedom of marriage only to heterosexual couples and consequently qualifies and limits the "coherent scheme" of protection of fundamental rights under the Basic Law and the HKBOR. The general guarantees of equality and privacy, it was decided,[22] cannot establish indirectly a right to marry for same-sex couples not provided for under Article 37 or impose a positive duty on the HKSAR to legislate for the claimed alternative framework. Hence it is not discriminatory for the HKSAR not recognizing foreign same-sex marriages.

3. *Q v Commissioner of Registration* [2023] HKCFA 4: Policy Requiring Full Sex Reassignment Surgery for Amending Gender Marker on Identity Card for Transgender Persons Held Disproportionate

Two female-to-male (FtM) transgender persons (Q and Edward), who had undergone medical and surgical treatment designed to affirm their male gender identity, were denied by the Commissioner of Registration to have the "gender markers" on their Hong Kong Identity Cards amended to reflect their "acquired gender." The Commissioner relied on his published guidelines that a FtM transgender applicant must have had a hysterectomy and surgical genital reconstruction of "a penis or some form of a penis" (so-called "full SRS") before the application would be considered,[23] notwithstanding that post-treatment, Q and Edward were each "medically certified to have been sufficiently attenuated to enable their social integration and psychological well-being without the need for additional surgical procedures;"[24] and that medical evidence indicates that full SRS, the most invasive surgical intervention in the range of treatment, "is not medically required by many transgender persons whose gender dysphoria has been effectively treated, and who are successfully living in their acquired gender."[25] Q and Edward challenged the Commissioner's decisions in the courts, complaining that the decisions violated their right to privacy guaranteed under Article 14 of the HKBOR. Their applications were initially unsuccessful in that although it was common ground that the rights protected under Article 14 include the right to gender identity and the right to physical integrity, both the Court of First Instance and the Court of Appeal considered that the Commissioner's policy under the guidelines was proportionate in seeking to establish "a

fair, clear, consistent, certain and objective administrative guideline" for decision-making.[26] Q and Edward appealed to the HKCFA, which unanimously reversed the lower courts and held that the Commissioner's policy went further than "no more than reasonably necessary" to accommodate the Commissioner's legitimate concerns and to justify interference with their rights; and also that the policy imposed "an unacceptably harsh burden on the individual concerned," thus failing the proportionality *stricto sensu* or "reasonable balance" test. The Commissioner's claimed justifications were rejected, including, *inter alia*, the claim that "a full SRS is the only workable, objective and verifiable criterion" for decision-making; and practical administrative problems "due to incongruence between the external physical appearance of the holder and the gender marker would arise if some other line was drawn."[27] Rather, the HKCFA reminded us that the function and purpose of the "gender marker" in identity cards "is to help verify the identity of the holder. It does not signify recognition of the holder's sexual status as a matter of law."[28] This assumes importance in the case of a transgender person where an incongruence is likely to occur between the holder's appearance – especially the outward appearance following hormonal treatment – and the contents of the identity card. In the great majority of the incidents of incongruence, the unamended "gender marker" produces confusion or embarrassment.[29] A transgender person should not be pressured to undergo full SRS in order to obtain an identity card marking the acquired gender. Such pressure, the HKCFA found, is objectionable in principle.[30] The HKCFA, therefore, declared the policy unconstitutional, quashed the Commissioner's decisions, and opined that the Commissioner should re-formulate the relevant policy consistently with the rights protected under Article 14.

The cases above illustrate what the Chief Justice of the HKCFA had summed up recently:

> "When fundamental rights are restricted by law that is binding on the court, or law that is put beyond the court's jurisdiction to review, the court must take the law as it is and accept the limit of its jurisdiction, and administer justice accordingly."[31]

IV. Looking Ahead

Legislative amendments to the law regulating the High Court's power to admit overseas barristers to practice in a particular case, which some other common law jurisdictions would have regarded as part of judicial power, have been passed to vest with the CE the unimpeachable power to determine whether a court case involves national security and whether a particular overseas lawyer acting as a barrister in such a case will not be contrary to the interests of national security. Drafting of local national security legislation is ongoing, with attention paid to progress abroad, such as the UK National Security Act 2023. Three big didactic trials of offenses endangering national security involving Jimmy Lai,[32] Benny Tai,[33] and the editors of Standnews,[34] are expected to conclude within 2023. Appeals on the constitutionality of the seditious intention offenses will be heard. And the HKCFA will hear Sham's appeal over the recognition of same-sex marriages[35] and Lui's appeal over HKNSL sentencing.[36] Last but clearly not least, the Party and State Institutions Reform Plan released after the 2023 NPC Session will inaugurate within the year a Hong Kong and Macao work office of the Central Committee of the Communist Party of China on the basis of the Central Government's Hong Kong and Macao Affairs Office – which will continue to exist only in name – responsible for the planning, coordination, and performance supervision over the implementation of the "One Country, Two Systems" policy, the Centre's comprehensive jurisdiction, the governance of Hong Kong and Macao, the safeguarding of national security, the protection of livelihood and welfare, and Hong Kong and Macao's integration in national development.[37] Whilst the Basic Law stipulates the HKSAR to be directly under the Central Government and that no department of the Central Government may interfere in the affairs which the SAR administers on its own,[38] it does not regulate the Party's institution's exercise of functions over Hong Kong. We shall soon know whether this reform is merely an alignment with reality or profoundly a constitutional transformation.

V. Further Reading

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2 See HKSAR v Lai Chee Ying [2021] HKCFA 3 (9 February 2021).
3 HKNSL, Ch III.
4 Crimes Ordinance (Cap.200) ss 9, 10.
5 See HKSAR v Tong Ying Kit [2021] HKCFI 2200 (27 July 2021).
6 See HKSAR v Tong Ying Kit [2021] HKCFI 2239 (30 July 2021).
7 See HKSAR v Lui Sai Yu [2022] HKCA 1780 (30 November 2022).
8 For examples of prosecutions of offenses of seditious intention, see HKSAR v Lai Man Ling & Ors [2022] HKDC 981 (7 September 2022) and HKSAR v Cho Suet Sum Chloe & Anor [2022] HKDC 119 (31 January 2022).
9 See Secretary for Justice v Timothy Wynn Owen KC & Anor [2022] HKCFA 23 (28 November 2022).
10 See Interpretation by the Standing Committee of the National People's Congress of Article 14 and Article 47 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Adopted at the Thirty-eighth Session of the Standing Committee of the Thirteenth National People's Congress on 30 December 2022) https://www.elegislation.gov.hk/hk/A406B.
11 See 'Judiciary responds to interpretation of Hong Kong National Security Law by Standing Committee of National People's Congress' (30 December 2022) https://www.info.gov.hk/gia/general/202212/30/P2022123000679.htm.
12 Members of the Election Committee either come from the Hong Kong members of Chinese state and national bodies or are nominated from 'designated bodies' (as indicated in the 2021 SCNPC Amendments) and/or elected from 'specified bodies' (as provided in local electoral law). One sector of 500 members is reserved for the Hong Kong members of Chinese state and national bodies.
13 A candidate for the office of the CE must be nominated by not less than 188 members of the Election Committee, with not less than 15 members from each of the five sectors.
14 All candidates in a Legislative Council election must, apart from securing the requisite nominations from the relevant constituency, also secure the requisite nominations from members of each of the five sectors of the Election Committee.
15 Of the 90 members of the Legislative Council, 40 are returned by the Election Committee of 1,441 electors, 30 are returned by functional constituencies of 214,664 voters (including corporations) and 20 are returned by ten geographical constituencies of 4.4 million voters. The numbers are 2022 figures.
16 The criteria for ascertaining candidates and elected officers as "patriots" were discussed in the Hong Kong Report of the 2020 Global Review of Constitutional Law.
17 Hong Kong Basic Law art 159; Annex I art 7 and Annex II art III.
18 See the Decision of the National People's Congress on Improving the Electoral System of the Hong Kong Special Administrative Region (Adopted by the Fourth Session of the Thirteenth National People's Congress on 11 March 2021) https://www.elegislation.gov.hk/hk/A118, referring to Articles 31 and 62(2), (14) and (16) of the PRC Constitution and "relevant provisions" of the Basic Law and the HKNSL.
19 Instead, when the Court of First Instance rejected a judicial review of the CE's introduction of amendments to the local electoral laws to conform with the 2021 SCNPC Amendments, the judge cited HKSAR v Lai Chee Ying (n 2) to suggest that the courts do not have the power to review the NPC and SCNPC decisions concerned; see Kwok Cheuk Kin v Chief Executive [2021] HKCFI 1085 (27 April 2021).
20 See Annex I and Annex II to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Amended by the Twenty-seventh Session of the Standing Committee of the Thirteenth National People's Congress on 30 March 2021) https://www.basiclaw.gov.hk/en/basiclaw/annex1.html and https://www.basiclaw.gov.hk/en/basiclaw/annex2.html.
21 Comilang v Director of Immigration [2019] HKCFA 10 (4 April 2019).
22 Sham Tsz Kit v Secretary for Justice [2022] HKCA 1247 (24 August 2022) at [39].
23 Q v Commissioner of Registration [2023] HKCFA 4 (6 February 2023) at [38].
24 Ibid, [4].
25 Ibid, [39].
26 Ibid, [49].
27 Ibid, [63].
28 Ibid, [66].
29 Ibid, [87]-[89].
30 Ibid, [66], [103].
31 See Andrew Cheung Kui-nung, 'CJ's speech at Ceremonial Opening of Legal Year 2023' (16 January 2023) https://www.info.gov.hk/gia/general/202301/16/P2023011600599.htm.
32 HCCC 51/2022.
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35 FACV 14/2022. Sham's lawyers are expected to cite the Grand Chamber judgment in Fedotova v Russia App no 40792/10 (ECHR, 17 January 2023).
36 FAMC 7/2023.
37 See 'China releases plan on reforming Party and state institutions' (Xinhua, 16 March 2023) http://english.www.gov.cn/policies/latestreleases/202303/16/content_WS6413be82c6d0f528699db58e.html.
38 Hong Kong Basic Law, arts 12, 22.



Hungary

Zoltán Pozsár-Szentmiklósy, *Associate professor, ELTE Eötvös Loránd University Faculty of Law*

Bernadette Somody, *Assistant professor, ELTE Eötvös Loránd University Faculty of Law*

Evelin Burján, *Assistant lecturer, ELTE Eötvös Loránd University Faculty of Law*

I. Introduction

At the beginning of 2022, the Hungarian legal and constitutional system functioned in a special legal order (state of danger) because of the COVID-19 pandemic. From the 24th of February, public discourse in Hungary - as elsewhere in the world - was dominated by the full-scale invasion and war of Russia against Ukraine, Hungary's neighboring country. However, in February 2022, the official campaign period for the parliamentary elections to be held on the 3rd of April had already started. Therefore, the attitude of Hungarian politics towards the war became a central theme of the electoral campaign. While the 'unified opposition' (a coalition of parties and political movements formulated for the 2022 elections) expressed solidarity with Ukraine and urged the Government to take effective measures to support the neighboring country, the governing Fidesz party (led by prime minister Viktor Orbán) was reluctant to express solidarity in explicit terms and positioned itself as a 'pro-peace' political force in contradiction with the 'pro-war' labeled unified opposition.

The parliamentary elections were monitored by the OSCE Office for Democratic Institutions and Human Rights (ODIHR). According to the Final Report, the parliamentary elections were 'well run, but marred by the absence of a level playing field.'[1] The governing Fidesz party won the parliamentary elections and obtained the two-thirds majority of the parliamentary seats for the fourth time. Therefore, the governing party is able to formally amend the constitution (the Fundamental Law, hereinafter FL) on its own, even in the absence of the support of any other political force or state organ. Shortly after the new National Assembly was convened, the Tenth Amendment (24 May 2022) passed in parliament, which introduced a new cause for introducing special legal order, namely, war or armed conflict in neighboring countries, reflecting on the war in Ukraine. Based on this amendment, the Government ordered special legal order in Hungary for the rest of 2022 in two consecutive decisions.

In 2022, the Constitutional Court (hereinafter CC) delivered decisions examining important cases related to certain restrictions of fundamental rights introduced by governmental decrees related to the COVID-19 pandemic, the autonomy of the Hungarian Academy of Sciences and civil organizations, the political campaign, institutional design related to the prosecution service, and the institutional safeguards related to the independence of the judiciary. However, the CC remained reluctant to effectively control the Government and the Parliament based on constitutional standards.

II. Major constitutional Developments

On 27 April 2022, the European Commission officially triggered the so-called conditionality mechanism against Hungary. Based on Regulation 2020/2092,[2] the mechanism allows the European Union to cut off an EU Member State from receiving EU funds if it breaches the principles of the rule of law. The European Commission raised its concerns regarding a number of issues related to the widespread

corruption and the public procurement system in Hungary, including the systemic irregularities, deficiencies, and weaknesses in public procurement procedures.[3]

In order to reach an agreement with the European Commission and to access EU funds, Hungary initiated 17 remedial measures, including reinforcing the prevention, detection, and correction of illegalities and irregularities concerning the implementation of EU funds through a newly established Integrity Authority ensuring the transparency of the use these funds by public interest asset management foundations (established by the Government in many sectors); the introduction of a specific procedure in the case of crimes related to the exercise of public authority or the management of public property; strengthening cooperation with OLAF (European Anti-Fraud Office), among others.[4]

In May 2022, a few days before the end of the third period of the state of danger based on the Covid pandemic, the Parliament adopted the Tenth Amendment to the FL, which altered the text of both the FL then in force and the Ninth Amendment (which latter entered into force later in 2022). In both texts, the grounds for declaring the state of danger were supplemented by 'the event of an armed conflict, state of war or humanitarian crisis in a neighboring country.' The new text referred to the war in Ukraine. While the effects of the Covid pandemic were subsiding and the third period of the pandemic-based state of danger was nearing its end, the Government declared a new, fourth, and later fifth period of the state of danger, this time based on the armed conflict in Ukraine. The Tenth Amendment to the FL has created the possibility for the Government to maintain the state of danger despite the changing circumstances.

III. Constitutional Cases

1. *Decision 3050/2022 (II. 4.) AB:* A general ban on assembly in the special order

Since the state of danger is permanent in Hungary, constitutional complaints before the CC keep raising the question of the standards of the restriction of fundamental rights in the special legal order. In more cases, the Court dealt with the misdemeanor sanctions on those who had participated in demonstrations against the Government's pandemic management during the first wave of Covid-19. The participants of the demonstrations protested by staying in their cars and honking the car horns, however, the complainants were sanctioned since they participated in the demonstration under a general ban on assembly introduced due to the pandemic. The complainants stated that since they had remained in their car and not contacted others, no pandemic risk had justified the restriction of their rights to assembly. The CC based its decision on the fact that the complainant had stayed at the location of the demonstration under the general ban on assembly and violated traffic rules by using the car horns. As the dissenting opinions draw attention to that, the Court did not assess whether an actual legitimate aim justified the restriction of the complainant's freedom of expression regarding the pandemic.

2. *Decision 30/2022. (XII. 6.) AB*: The autonomy of the Hungarian Academy of Sciences

As mentioned in our previous report, in 2019, the National Assembly amended the Act on the Hungarian Academy of Sciences and reorganized the institutional structure and the financing of the system for research, development, and innovation. The research centers and institutes previously under the control of the Academy and operated partly from its property were placed under a new governance structure, i.e., a newly established Research Network. According to the new regulation, the Hungarian Academy of Sciences is obliged to ensure the right of use of its assets used by the research centers to the latter.

The amendment raised the infringement of the Academy's rights to property and the guarantees of its autonomy, so that of the freedom of science. The Government argued that the reorganization aimed to improve efficiency in research, development, and innovation. However, the scientific community refused the reorganization since they considered it a threat to the freedom of science. The regulation was challenged before the CC by the constitutional complaint of the Hungarian Academy of Sciences and the posterior norm control petition of the Members of the Parliament.

The CC ruled that the Parliament caused unconstitutionality by omission since it failed to regulate the present and future property relations between the new research network and the Hungarian Academy of Sciences as the former operator of the network. The Court acknowledged that the Hungarian Academy of Sciences, as the institutional guarantee of the freedom of science, is constitutionally protected. However, the fact that a public duty, i.e., the operation of the research network, was transferred to another organization does not infringe on the FL. The Academy is entitled to the right to property, but it also can be restricted proportionately, along with substantial and procedural guarantees. Though the regulation failed to fulfill these guarantees, the CC found that the unconstitutionality could be rectified by amending instead of annulling the challenged provisions. The Court called upon the Parliament to meet its related legislative duty by 30 June 2023, which is still to be fulfilled.

3. *Decisions 3410/2022. (X. 21.) AB, 3411/2022. (X. 21.) AB, 3412/2022. (X. 21.) AB, 3413/2022. (X. 21.) AB, 3414/2022. (X. 21.) AB*: The autonomy of civil organizations

In 2017, significant international attention was attracted by the Act that prescribed the registration of the so-called 'organizations receiving foreign funds' (NGOs receiving annual foreign funding above a certain amount) in a state register. These NGOs were also obliged to use the mentioned term in all their publications. Besides the protests and the boycott proclaimed by leading NGOs falling in the new category,[5] the Venice Commission also expressed its concerns.[6] The European Commission launched an infringement procedure against Hungary for the Act. In 2020, in its decision, the European Court of Justice declared that Hungary had introduced discriminatory and unjustified restrictions on foreign donations to civil society organizations by which it broke its obligations in respect of the free movement of capital as well as the right to respect for private and family life, the right to the protection of personal data and the right to freedom of association.[7]

Ten months later, the Government repealed the regulation. In 2017, affected NGOs also initiated constitutional complaint procedures before the CC, however, the Court did not examine the regulation. The decisions of the CC were delivered only in 2022 when, referring to the developments, instead of a substantial constitutional review, the procedures were closed.

4. *Decision 3216/2022. (V. 11.) AB*: Limiting the campaign during parliamentary elections and national referenda

As mentioned in Chapter I, on the 3rd of April 2022, parliamentary elections were held in Hungary. On the same day, voters could also vote on four questions of national referenda initiated by the Government. The questions were formulated in line with the Government's political agenda to campaign against the LMBTQI+ movement, claiming that the duty of the state to protect children requires such actions. In reality, the questions did not reflect on any actual challenges of child protection but rather on imaginary risks (e.g., subjecting minors to sessions on sexual orientation in public schools without parental consent, promotion of sex change treatments for minors, subjecting minors without any restriction to sexually explicit media content, making available minors to media content that depicts sex change) all of which could be handled properly based on the already existing regulation. Therefore, the only function of the national *referendum* questions was to echo anti-LMBTQI+ propaganda during the electoral campaign, which served the political interests of the Fidesz-Government. Moreover, these questions were incompatible with the constitutional framework of Hungary, which prohibits the organization of national referenda in questions that are regulated in the FL (the questions explicitly affect certain provisions on fundamental rights) and requires the unequivocal formulation of the questions (the questions contain notions the meaning of which is not precise). However, the questions were authenticated by the National Election Commission (hereinafter NEC, the state organ responsible for the supervision of organizing elections and referenda),[8] and the Curia (the Supreme Court), as well as the CC, rejected the complaints against these decisions.

Civic movements and NGOs expressed their opinion on the deeply problematic nature of the Government's propaganda referendum and urged citizens to cast invalid votes on referendum day.[9] According to the provisions of the FL, the result of a national referendum is binding on the parliament only in the case the majority of the voters cast valid votes – if a significant proportion of referendum votes are invalid, then the referendum has no legal effects. The NEC declared the NGOs campaigning for casting invalid votes on the national referenda breached the principles of the Act on Electoral Procedure (also applicable in the case of national referenda) on the protection of fairness of the elections and the exercise of rights in good faith and in accordance with their purpose. In the NEC's view, the activity of NGOs targeted the very function of direct democracy, therefore also fined some of them 3 million HUF (approx. 8 700 USD). One of the concerned NGOs turned to the Curia, claiming the review of the decision of NEC.[10] As Curia did not examine the claim on the merits, the NGO turned to the CC with a constitutional complaint, claiming the unconstitutional limitation of its right to a fair trial and freedom of speech. However, in its decision, the CC rejected the constitutional complaint, arguing that – based on the requirement prescribed in the Act on CC – it did not raise constitutional law issues of fundamental importance, rather, it only related to the interpretation of the Curia. It is worth noting that campaigning for invalid votes in a national referendum campaign falls under the protection of the freedom of speech based on the practice of the European Court of Human Rights, expressed in a former case related to Hungary.[11]

5. *Decision 28/2022. (XI. 8.) AB*: Interpreting the principle of the monopoly of prosecution

The CC held that a new section of the Criminal Procedure, adopted by the Parliament in order to comply with the conditionality mechanism against Hungary (mentioned in Chapter II.), does not violate the principle of the monopoly of the prosecution that the Prosecution Service in Hungary is entitled to, and is therefore not contrary to the FL.
The National Assembly – on the Government's motion before the final vote – has initiated that the CC carry out a preliminary examination of the new section of the Criminal Procedure's conformity with the FL. In essence, a new procedural order was introduced for the enforcement of prosecution, the aim of which is, in the first instance, to obtain by procedural means the judicial correction of the decision of an investigative authority or the prosecution service refusing to carry out proceedings commenced based on a major offense relating to the exercise of public authority or the management of public assets. This allows the investigation to continue in the right direction.
In the motion for preliminary norm control, the Parliament requested an examination of whether this new special procedure of the Act on Criminal Procedure is in line with the principle of the prosecution service's monopoly of prosecution as laid down in Article 29 (1) of the FL. In its decision, the CC explained that with the Act, the legislator creates a special procedural opportunity for subjects of the law acting in the interest of the protection of public funds to act as an enforcer of a criminal punishment claim by filing a motion to initiate court proceedings. The Court found that the principle of the monopoly of prosecution does not preclude the introduction of an additional element in the framework of criminal proceedings concerning public assets, which directly ensures the protection of these. [Decision 28/2022. (XI. 8.) AB]

5. *Decision 3436/2022. (X. 28.) AB*: Deference in interpreting the independence of the judiciary

In 2019 the National Judicial Council (the state organ controlling the activity of the President of the National Office for the Judiciary, hereinafter NJC) has on several occasions examined the fulfillment of the legal obligations of the President of the National Office for the Judiciary (responsible for the administration of the judicial system) and it has criticized the practice of the President in relation to the appointment of judges. As a result of the disputes between the two judicial bodies, the Commissioner for Fundamental Rights (the ombudsman) has

requested the CC to interpret Article 25 (5) and (6) of the FL regarding the requirement of democratic legitimacy of the NJC and the remedies available if a legitimacy issue arises. As to the questions raised by the ombudsman, the CC found that all of them were related to the election of the members of the NJC and the functioning of the NJC based on democratic legitimacy but could not identify any real, concrete constitutional problem behind them. In this case, the Court waited until 2023 to rule in a case initiated in 2019. As time passed, the underlying constitutional issue became irrelevant.

IV. Looking Ahead

As a further step in the developing interpretation of public power-related bodies' standing in constitutional complaint procedures, in 2022, the CC expressly stated that fundamental rights not only applicable to human beings by their very nature are also granted to legal persons, including those exercising public power. Since the latter does not exclude the possibility of lodging a constitutional complaint, in 2022, the CC upheld even the Government's constitutional complaint.[12] However, as one of the first conditions of access to EU funds (mentioned in Chapter II.), the possibility for public authorities to challenge final judicial decisions before the CC had to be removed. To comply with the EU requirements, a new amendment to the Act on the Constitutional Court expressly excludes initiating a constitutional complaint procedure by an entity exercising public power. How the CC will interpret the new regulation is still an open question.

In 2023, the legal and constitutional system of Hungary continues to function under the special legal order of the state of danger, based on the new cause introduced by the Tenth Amendment to the FL (war or armed conflict in a neighboring country). As the Government controls two-thirds of the parliamentary seats, the end of this period is unpredictable.

The CC tends, as can be seen from the above decisions, to be reluctant to effectively control the Government and the Parliament in politically sensitive cases. Moreover, the CC tends to delay its decisions on truly relevant and pressing constitutional issues and then, as time passes, not examine the case at all because of the loss of relevance.

In 2023, the non-renewable 12 year-term of four members of the CC expires, therefore, the National Assembly has to elect four new justices with two-thirds majority votes, based on the nomination of a regular parliamentary committee. We expect that the governing supermajority will elect the new members of the CC with the unilateral votes of their MPs, as it happened in the past twelve years.

V. Further Reading

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3 The European Commission also raised some concerns regarding the independence of the judiciary; these problems were addressed by Hungary in 2023.
4 Council Implementing Decision (EC) 2022/2506 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary [2022] 15 December 2022.
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India

Swapnil Tripathi, *DPhil Student (Gopal Subramanium Scholar), University of Oxford*

I. Introduction

After battling with the pandemic in the year 2021, India returned to normalcy in 2022. The Courts were at the center of constitutional developments in the country. On the administrative front, the Supreme Court saw the tenures of three Chief Justices this year. The Chief Justice of India ('CJI') has a fixed tenure and is not appointed for life. S/he holds the office till the age of 65 years and is appointed based on seniority. This year, Chief Justice N.V. Ramanna retired in August, followed by the retirement of Chief Justice U.U. Lalit in November. Thereafter, Chief Justice D.Y. Chandrachud was sworn in as the CJI and will hold the office for two years. The three Chief Justices successively worked towards making the Courts more transparent and accessible and, to that effect, decided to live stream the proceedings of the Court. This measure started with CJI Ramanna, who live-streamed the proceedings of his Court on the last day, a practice followed by CJI Lalit as well. However, CJI Chandrachud made this a norm, and today, the Supreme Court live streams cases of constitutional importance alongside other progressive jurisdictions.

On the judicial front, through a series of progressive decisions, the Court upheld the values of liberty, equality, and dignity, which are central to the Constitution of India. India is currently at a pivotal point in history, wherein a strong Supreme Court is face to face with a super-majority government. This has resulted in a deadlock, especially in matters of judicial appointments. In India, judges of the Supreme Court and High Courts are appointed by a 'Collegium' of five senior Judges of the Supreme Court, and the government is merely obligated to issue a notice of appointment. However, presently, the government has exercised a pocket veto several times and either refused to clear the names issued by the Collegium or returned them for reconsideration.

II. Major Constitutional Developments

In May, the Supreme Court passed a historic interim order wherein it urged the Union and state governments to refrain from registering any criminal complaints under Section 124A, i.e., the provision concerning the offense of sedition. The interim order was passed in a case challenging the constitutionality of the provision.

Section 124-A makes it a punishable offense for anyone to commit an act that brings hatred or contempt or promotes disaffection towards a government established by law. The Section is a relic of the colonial era, which was used to muzzle dissent and arrest Indian freedom fighters during the infamous British rule in India. Since independence, there were demands to repeal the Section, however, it continued to remain the law and was often invoked to arrest critics of the government. During the proceedings, the Chief Justice questioned the Attorney General whether retaining a colonial law used to suppress freedom fighters was necessary. The Attorney General had informed the Court that the Union government agrees that prima facie the provision is not in accordance with the

current social milieu and was intended for a time when the country was colonized. In light of the above, the Court urged the governments to refrain from registering complaints or continuing investigations for the offense of sedition. It also kept in abeyance any pending proceedings under the Section and granted the affected parties the option of approaching the Courts for bail.

In September, the Supreme Court in *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi (C.A. 5802/2022)* held that all women, irrespective of their marital status, are entitled to seek an abortion. The Court passed this judgment while hearing a petition filed by a 25-year-old unmarried woman who was seeking a termination of her pregnancy of 23 weeks. The petitioner was 25 years old, unmarried, and the pregnancy arose out of a consensual relationship where her partner refused to marry her. She initially approached the Delhi High Court, which refused relief to her, citing the Medical Termination of Pregnancy Act and Rules which, is the governing law on abortion and does not include pregnancy arising from a consensual relationship as a ground for abortion. Thereafter, she filed an appeal before the Supreme Court, which granted her interim relief allowing her to abort the pregnancy.

Rule 3B of the Rules, allows the following categories of women to abort their pregnancy within the term of 20-24 weeks i.e., (a) survivors of sexual assault, rape, or incest; (b) minors; (c) change of marital status during the ongoing pregnancy; (d) women with physical disabilities; (e) mentally ill women; (f) foetal malformation that has a substantial risk of being incompatible with life or if the child is born it may suffer from such physical or mental abnormalities; (g) women with pregnancy in humanitarian settings, disaster or emergency situations. The Court observed that when the Act was enacted in 1971, it was largely concerned with married women. However, since societal norms have changed, the law must adapt as well. The Court observed that ground in Rule 3B (c) i.e., concerning change of marital status, must be interpreted to include unmarried women as well. It observed, "if Rule 3B(c) is understood as only for married women, it would perpetuate the stereotype that only married women indulge in sexual activities. This is not constitutionally sustainable. The artificial distinction between married and unmarried women cannot be sustained. Women must have autonomy to have free exercise of these rights."

The Court held that discriminating between married and unmarried women is violative of the right to equality under Article 14. Further, upholding the principles of autonomy and dignity, it observed that the decision to terminate is firmly rooted in the women's right to bodily autonomy, and forcing a woman to carry an unwanted pregnancy would violate her dignity. Coincidentally, the judgment was delivered on International Safe Abortion Day.

III. Constitutional Cases

The Supreme Court delivered numerous judgments this year, however, its important decisions can be divided into three categories i.e., (a) concerning political institutions; (b) upholding personal liberty; and (c) promoting equality.

1. *Ashish Shelar and Ors. v. Maharashtra Legislative Assembly & Anr.: W.P. (c) 797/2021*

India follows a quasi-federal parliamentary structure consisting of the Executive, Judiciary, and Legislature for the Federal/Union government and the state governments, respectively. In July 2021, the Legislative Assembly of the state of Maharashtra passed a resolution suspending 12 opposition members for alleged disorderly behavior. The effect of the resolution was that the members were suspended not just for one session of the Assembly but for a period of one year.

The Court held that the resolution was unconstitutional and beyond the powers of the Assembly. It observed that, as per law, a member can be suspended only for sixty days which means, in effect, a suspension can only be limited to an ongoing session and not beyond it. As per Article 190(4) of the Constitution, a seat is considered vacant if a member remains absent in the House for 60 days. By ordering a suspension for one year, in effect, the seat of the member will be vacant which is akin to expulsion. Further, the Court observed that suspension beyond a session was a punishment for the constituency represented by the member since it would remain unrepresented in the Assembly. It also observed that such a suspension could be dangerous to democracy as it can result in manipulation of the majority in the House when voting on important matters.

The Court also explained the rationale of suspension in a parliamentary democracy. It observed that suspension is a disciplinary measure to restore order in the Assembly session. It cannot be punitive in nature. A major limb of the Court's reasoning was democracy and the need for effective opposition. It observed, "Not only that, the opposition will not be able to effectively participate in the discussion/debate in the House owing to the constant fear of its members being suspended for a longer period. There would be no purposeful or meaningful debates but one in terrorem and as per the whims of the majority. That would not be healthy for democracy as a whole."

2. *Hotel Priya A Proprietorship v. State of Maharashtra: SLP (C) No. 13764 of 2012*

The Commissioner of Police in Mumbai had issued certain conditions governing orchestras and bands in licensed bars. One of the conditions capped the number of artists that can be on stage at the same time and allowed only four women and four men to remain present on the stage. This condition was unsuccessfully challenged before the High Court and thereafter before the Supreme Court. It was argued before the Court that the conditions are violative of Article 14, i.e., the right to equality, Article 15(1), i.e., discrimination on grounds of sex, and Article 19(1)(g), i.e., the right to freedom of profession. The state's justification was that the conditions were aimed at promoting the welfare of women and preventing human trafficking in women.

The Court struck down the condition as unconstitutional. It observed that the condition

capping the number of women performers stems from gender-based stereotypes. Rejecting the state's argument of the protective nature of the condition, it observed, "such measures – which claim protection, in reality are destructive of Article 15 (3) as they masquerade as special provisions and operate to limit or exclude altogether women's choice of their avocation." As per the Court, the onus on the state is to run the extra mile and create safe and conducive situations for women rather than stifling their choice. Ultimately, the Court held that the state is correct to regulate the number of performers on stage, however, it cannot fix the combination of performers based on gender.

3. Satender Kumar Antil v. Central Bureau of Investigation, M.A. 1849 of 2021

In July, the Supreme Court acknowledged the state of prisons in India which are flooded with undertrials i.e., persons incarcerated during ongoing trials. It observed that more than 2/3 of inmates in prisons are undertrial, and most of them are poor and illiterate. It also observed that the root cause behind this mounting number is the unnecessary arrests carried out by the authorities, often in violation of the Code of Criminal Procedure. To that effect, the Court held, "it certainly exhibits the mindset, a vestige of colonial India, on the part of the Investigating Agency, notwithstanding the fact arrest is a draconian measure resulting in curtailment of liberty, and thus to be used sparingly. In a democracy, there can never be an impression that it is a police State as both are conceptually opposite to each other."

Relying on the Right to Life enshrined under Article 21 of the Constitution, the Court observed that bail is the rule and jail is the exception. This principle facilitates liberty which is a core element of Article 21. To enforce this principle, the Court laid down substantive guidelines, some of which read: (a) the Union government must consider the introduction of a separate enactment in the nature of the Bail Act to streamline the grant of bails, (b) the investigative authorities are obligated to comply with the Code of Criminal Procedure and judgments of this Court while carrying out arrests, (c) Bail applications must be disposed within two weeks, except if provisions stipulate otherwise.

In another case concerning the bail application of a journalist (*Mohammed Zubair v. State of NCT of Delhi)*, the Court observed that bail conditions must bear a nexus to impose them, and they ought to be proportional to that purpose. The Court was approached by a fact-checking journalist who was arrested after several criminal complaints were filed in response to some of his tweets. The state government urged the Court to impose a condition barring the journalist from tweeting while he was out on bail. The Court rejected the contention on the ground that the right to dignity cannot be made illusory by imposing disproportionate bail conditions. It observed that restraining the journalist from tweeting would amount to a gag order which would cast a chilling effect on freedom of speech.

4. Peoples Union for Civil Liberties v. Union of India and Ors., M.A. 901 of 2021

In 2015, the Supreme Court, in a judgment, struck down Section 66A of the Information Technology Act as unconstitutional. The Section made it an offense to send 'grossly offensive' or 'menacing' information/ messages through communication services. The Court at the time had observed that the said Section is vague, over-broad, and casts a chilling effect on the freedom of speech.

However, subsequently, a public interest organization approached the Court asking whether the above-mentioned judgment has been complied with. The Union Government submitted that despite the judgment several complaints were still being registered under the Section, and citizens were facing prosecution, despite the unconstitutionality of the Section. As a result, the Court passed significant directions that promote free speech. First, it observed that no citizen can be prosecuted for violation of Section 66A of the Act. Second, all citizens facing prosecution under the Section will have the said charge dropped. Third, it directed all the Director Generals of Police and competent officers to direct the police force to not register any complaint for a violation of this Section.

5. Shaheen Abdullah v. Union of India and Ors., W.P. (C) 940/2022

In October, the Supreme Court issued important directions to address the rising instances of hate speeches in the country. The Court was approached through a petition seeking judicial intervention into the alleged menace of targeting and terrorizing Muslims in India. The petitioner had alleged that the authorities were not taking any action against hate crimes.

The Court directed the state governments to file a status report regarding the actions taken on hate speech crimes that happened in their jurisdiction. The Court went ahead and directed the state governments to initiate *suo motu* action against any incident of hate speech crime without waiting for a complaint. The Court emphasized that the action must be taken, regardless of the religion of the speaker. The Court reiterated its duties to uphold the fundamental rights of the citizens and observed, "We feel the court is charged with the duty to protect the fundamental rights and also protect and preserve the constitutional values in particular the rule of law and the secular democratic character of the nation." The Court also emphasized that any hesitation by the government to act as per its directions will invite contempt of the Court.

6. Aishat Shifa v. State of Karnataka, Civil Appeal 7095 of 2022

Earlier in the year, the state government of Karnataka had passed an order directing the schools to abide by the prescribed uniform. The order also stated that a headscarf does not form part of the uniform and hence, must not be worn by students. This order was challenged unsuccessfully before the High Court and the Supreme Court.

The petitioners had alleged that their right to wear the headscarf was protected under Article 25 of the Constitution i.e., the Right to Freedom of Conscience and Religion, Article 19(1)(a) i.e., Right to Freedom of Expression, and Article 21 i.e., Right to Privacy and Dignity. The Court delivered a split verdict (1:1), with Justice Gupta up-

holding the order and Justice Dhulia finding it unconstitutional.

Justice Gupta observed that permitting one religious group to wear their religious symbols would violate the principle of secularism, which requires equal treatment of all religions and preference for none. He further observed that religion has no place in a secular school and any reasonable accommodation if granted, would be violative of the right to equality. On the other hand, Justice Dhulia observed that the denial of wearing hijab in the classroom violates the right to dignity of the students and denies them secular education. He observed that wearing a headscarf is a matter of choice that must be protected. In his opinion, accommodating the religious belief of the students would promote diversity and empathy among students. Due to the divergence of opinion amongst the Judges, the case has now been referred to a larger bench for a conclusive opinion.

7. State of Jharkhand v. Shailendra Kumar Rai, Cr. A 1441 of 2022

The Supreme Court prohibited the use of the 'two-finger test' in rape cases. The test is used as part of the medical examination of rape or assault victims, wherein a medical practitioner inserts two fingers into the vagina of the victim to determine whether the hymen is broken, as well as to test the laxity of the vagina. The text is used to assess whether the woman is sexually active, an assumption that often leads the authorities to conclude that sexually active women cannot be raped. In 2014, the Ministry of Health issued guidelines that specifically prohibited the use of the two-finger test; however, the guidelines were not enforced.[1]

The Court deprecated the use of the test and observed that it lacks scientific basis and in fact, re-victimizes and re-traumatizes them. It observed that the test is based on an incorrect assumption that a sexually active woman cannot be raped. The Court observed, "the probative value of a woman's testimony does not depend on her sexual history. It is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped merely because she is sexually active." The Court directed the Union and state governments to ensure that the guidelines issued by the Ministry of Health are circulated to all government and private hospitals. It further directed them to conduct workshops for health providers and communicate appropriate procedures for examining the survivors of sexual assault.

8. *Budhadev Karmaskar v. State of West Bengal*, Criminal Appeal No. 135 of 2010

The Court held that the basic protection of human decency and dignity is available to sex workers as well. Taking note of the rising abuse of sex workers at the hands of the police, the Court passed detailed directions to the governments, including the obligation to sensitize the police and other law enforcement agencies to the rights of sex workers. The Court also directed the media, to not publish pictures of sex workers or reveal their identity while reporting rescue operations and warned them that the offense of voyeurism will be invoked if they fail to abide by the Court's direction. The Court observed, "basic protection of human decency and dignity extends to sex workers and their children, who, bearing the brunt of social stigma attached to their work, are removed to the fringes of the society, deprived of their right to live with dignity and opportunities to provide the same to their children."

9. Janhit Abhiyan v. Union of India, Writ Petition (Civil) No. 55 of 2019

In 2019, the Government of India passed the 103rd Amendment to the Constitution, which inserted a new clause to Articles 15 and 16 of the Constitution. The erstwhile articles allowed the state to make special provisions for the socially and educationally backward classes, scheduled castes, scheduled tribes, and other backward classes of citizens ('protected groups'). Using these provisions, governments have granted *inter alia* reservation benefits to these groups. However, the new Amendment allows the state to make special provisions for the advancement of economically weaker sections who belong to the non-protected classes of citizens. This necessarily meant that the Amendment protected economically vulnerable but socially forward classes of citizens. Apart from any special measure that the government may deem fit, the Amendment specifically recognized the right of the union and state governments to make reservations for such classes of citizens in public employment and educational institutions, subject to the maximum limit of ten percent.

This Amendment was challenged before the Supreme Court, and the Court upheld it by a verdict of 4:1. While upholding the amendment, the majority of judges observed that reservations are a facet of equality and are necessary to support the economically weaker sections. The amendment would alleviate the conditions of economically disadvantaged groups. All five judges agreed to this conclusion.

It must be noted that in an earlier decision, the Supreme Court held that reservation benefits granted under Articles 15 and 16 can't exceed an upper limit of 50%, which means no more than half of the seats for a position can be reserved. The 103rd Amendment, by introducing an additional 10% reservation, breached this ceiling. However, the Court ignored this breach and held that the 50% rule is not inflexible and only applies to existing reservations in favor of protected groups.

One of the grounds for challenging the amendment was its exclusion of protected groups from enjoying the benefits of the new economic reservation. On this point, the majority of judges held that such exclusion does not violate the equality clause of the Constitution because (a) the protected groups already enjoy reservation under Articles 15 and 16, and thus, their exclusion from the amendment constitutes a reasonable classification; and (b) if the distinction was not made it would confer an excessive advantage upon the protected groups which would disturb the balance of the principles of equality and compensatory discrimination. The dissenting judge found the exclusion as violative of the principle of non-discrimination.

IV. Looking Ahead

In August 2022, while hearing a case concerning maternity leave, the Court passed some interesting observations on the idea of a family. It observed that the traditional idea of a family consisting of a single unchanging unit with a mother, father, and their children is incomplete. It ignores that familial relationships may take the form of domestic, unmarried partnerships, or queer relationships. These manifestations of love might not be typical but are as real as their traditional counterparts and deserve equal protection and benefits under the law. These observations are relevant, especially because the Court is currently hearing several petitions challenging the constitutionality of marriage laws in India. The petitions argue that the existing law, by recognizing only heterosexual unions, violates the constitutional rights of the LGBTQ+ communities. The Court will pronounce a judgment on these petitions in 2023. The Court will also deliver a judgment in the federal dispute concerning the powers of the Union-appointed Lieutenant Governor in Delhi versus the elected Chief Minister. It is also hoped that the Court will finally take up contentious and politically sensitive cases like the challenge to the citizenship amendment acts, Article 370, electoral bonds, and others, which it has selectively avoided.

The Court is currently at loggerheads with the Executive over judicial appointments. The Executive has refused to clear or send back several names recommended by the Supreme Court, which has forced the Court to initiate contempt proceedings against the Executive. The proceedings will continue in the next year as well.

V. Further Reading

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Indonesia

Stefanus Hendrianto, *Lecturer, Pontifical Gregorian University*

Fritz Edward Siregar, *Lecturer, Indonesia Jentera School of Law*

I. Introduction

This report will highlight several critical constitutional developments in Indonesia from early 2002 until early 2023. One of the significant issues in Indonesian constitutional politics in the past year is the tenure of Constitutional Court Justice. As reported in the previous years, the Government and the Parliament adopted the amendment of the Constitutional Court Law in 2020, which extended the term of appointment from five to fifteen years. These provisions have been challenged in several cases in the Court, and this report will explore how the Court deals with those cases in more detail. The politics of the tenure of justices, however, did not stop in the judicial review, but it also involved the power struggle and cooptation. They have marked the removal of Justice Aswanto by the Parliament using the loopholes under the new Law.

Apart from the scandals in the Court, the last term witnessed the continuation of democratic blockages and electoral monopoly under the Jokowi administration, especially in election-related cases. In addition, the saga over the relocation of capital, which we predicted in the last report, did not come to fruition as Jokowi quickly solidified his plan to relocate the capital without any opposition. Finally, in the last report, we observed that the Court began to employ more weak-form reviews, such as the suspension order in several high-profile cases. We were optimistic that this trend signified a positive trend for the Court to be more responsive to several issues of democratic blockages in the country. Nevertheless, the Jokowi administration has ignored a major Court decision that ruled that the Omnibus Law is "conditionally unconstitutional." So not only did the Suspension Order have no bite effect, but also the Jokowi administration overruled it through the emergency declaration that reinstated the Omnibus Law.

II. Major Constitutional Developments

The significant turmoil in Indonesian Constitutional politics in the past year is the shake-up and scandals in the Indonesian Constitutional Court. First, in May 2022, Chief Justice of the Constitutional Court Anwar Usman married the younger sister of Indonesian President Joko "Jokowi" Widodo. While the marriage is a private matter, Usman's wedding has sparked public debate over to what extent he can avoid a potential conflict of interest as the Chief Justice, as the Court must deal with many judicial review cases against the Jokowi administration. The problem is that the Law on the Indonesian Constitution does not explicitly require recusal when there is personal bias or other conflicts of interest. Consequently, the new familial bond between Chief Justice Usman and President Jokowi raised concerns about Chief Justice's impartiality.

Usman has been on the bench since 2011 and served as the Chief Justice since 2018. His tenure was supposed to finish in April 2021, but he had his tenure extended to 2026 following a September 2020 amendment to the Constitutional Court Law that increases the justice tenure from two five-year terms to 15 years. During his tenure as Chief Justice, Usman is out of his depth in constitutional pol-

itics and prefers to portray himself as a judicial soldier. Moreover, Usman's marriage with the President's sister cemented the new political dynasty in Indonesia.

The second upheaval is the dismissal of Justice Aswanto by the House of Representatives. Aswanto was initially appointed by the House of Representatives in 2014, and according to the new Law, which allows the Justice to serve for fifteen years, Aswanto was supposed to serve until 2029. Following the implementation of the Law, the Court sought to notify the House that the three sitting justices proposed by the House, namely Aswanto, Arief Hidayat, and Wahiduddin Adams, would have their tenures extended and end their terms in 2029, 2026, and 2024, respectively, in line with the revised Law.

Nevertheless, following a majority vote in a closed-door meeting of the House Judiciary Committee, the House plenary session decided to replace Aswanto. The Chair of the Judiciary Committee, Bambang Wuryanto, said the decision to replace Aswanto was due to his "disappointing performance" and lack of "commitment" to the House. He used an analogy that justices nominated by the House are much like a "director" appointed by the "owner" of a company. Presumably, what Wuryanto meant by "owner" is the shareholder. Thus, like the shareholder that can remove a director from the company if the director is guilty of misconduct or simply neglecting their duties, the House can remove a justice when he fails to show his allegiance to the House. Wuryanto stated, "how come the legislation produced by the House is annulled by him when the House itself nominated him?" While Wuryanto did not explain the reason behind the dismissal, there was some speculation he referred to Aswanto's decision to join the Court's majority opinion that declared the Omnibus Law of Job Creation as conditionally unconstitutional.

The Judiciary Committee replaced Aswanto with Guntur Hamzah, the General Secretary of the Constitutional Court. Hamzah's appointment created a new chain of scandals. First, President Jokowi gave a nod to the controversial dismissal despite the pleas from many people that President Jokowi should not approve the replacement. According to the Law, the appointment of the Constitutional Court Justice must be ratified through a presidential decree. So theoretically, the President could refuse to sign a decree, but Jokowi follows the House's plan to remove Aswanto.

On November 23rd, 2022, Hamzah took the oath of office in a ceremony at the State Palace, with President Jokowi in attendance. Hamzah's inauguration created another scandal. It came only hours before the Court rejected the petition to ask the Court to issue an injunction to stop the removal of Justice Aswanto. In just six hours after his inauguration, Hamzah immediately made the editorial changes to the Court's decisions concerning the removal of Aswanto. The Court announced its decisions: "therefore, the dismissal of a Constitutional Court judge before the end of their term can only be done for these reasons." Nevertheless, in the decision minutes, the phrase "therefore" is changed to "in the future." Even though the changes were only made to two syllables, it had a significant impact as the phrase "therefore" meant that the Court declared the replacement of Aswanto was unconstitutional. Nevertheless, the phrase 'in the future' signified that the replacement of Aswanto is lawful.

After a lengthy investigation, the Constitutional Court's Ethics Council concluded that Hamzah had directed a clerk to change the text of the judgment. Therefore, he violated the code of ethics, and they sanctioned him with a written warning. Presumably, Hamzah made the editorial change to secure his position, as the term "therefore" meant that his appointment was unlawful. Nevertheless, the Court decisions only applied prospectively and not retroactively, which means that the word swap did not affect his appointment. But meddling in the legal wording of a court judgment is a serious matter, and, therefore, it would have been reasonable for the Ethics Council to render a heavier sentence for Hamzah – like a severe warning or even dismissal -- instead of giving him a light sentence.

Finally, on March 15, 2023, Anwar Usman was re-elected as the Chief Justice by his fellow Justices to lead the Court amid the diminished public trust in the institution. The re-election of Anwar Usman shows the Court majority care less about the Court's reputation as the public has questioned Usman's impartiality as President's brother-in-law. Moreover, during his tenure, Usman has led the Court to retreat further from the heroic and interventionist model of judging, and apparently, the Court majority prefers Usman's leadership style. On March 20, Usman took an oath of office as the Chief Justice for the 2023-2028 period in front of his brother-in-law, President Jokowi.

III. Constitutional Cases

1. *Constitutional Justice Tenure I Case* - Decision Number 90/PUU-XVIII/2020

The petitioner is a professor from Indonesian Islamic University. The petitioner filed a formal and material review against Law No 7 of 2020 on the Amendment of the Constitutional Court Law. First, concerning the formal review, the petitioner argues that the discussions of bill No. 7 of 2020 were carried out behind closed doors without any public participation. Regarding the material judicial review, the petitioner challenged that the minimum age limit to be a constitutional court justice is 55 years old. The petitioner argues that the new provision has created legal uncertainty because the minimum age to be a constitutional justice under the previous law was 47 years old, but the House just arbitrarily increased the minimum age without any rational basis. Finally, the petitioner inserted a potential injury that he must wait another eight years to be considered a potential Constitutional Court justice.

The Court rejected the petition because the petitioner had no legal standing to bring the case. The Court ruled that regardless of whether the petitioner's argument is proven, he has no legal standing because there is not even a potential injury in this case. The Court considered that the petitioner only has a master's degree in law, while the requirement to become a constitutional justice is a doctoral degree. Thus, the petitioner must still meet the educational qualifications to be a potential constitutional court justice.

Justice Wahiduddin Adams filed a concurring judgment and dissented in part. Justice Suhartoyo also concurred in part and dissented in part. Meanwhile, Justice Saldi Isra issued a dissenting opinion. Justice Adams concurred with the Court majority, but he believed that the Court should uphold the new Law because the new Law contains substantive and fundamental changes that strengthen judicial independence, such as granting a longer tenure for the justices. So, the positive contribution of the Law outweighs the flaws in the process of lawmaking. Moreover, Adams argues that the abolition of two-five years term (article 22) signifies that the Constitutional Court justice's tenure is no longer interpreted as an open legal policy of the legislative branch but rather as a qualitative improvement for the judicial independence in Indonesia.

Justice Adams, however, dissented with the Court majority on the standing issue. In his view, the claimant's interest is not merely his ambition to become a constitutional court justice but rather his aspiration as a good citizen who wants to see the Constitutional Court become an independent institution. Adams expressed his concern that if the Court easily dismisses a case on the ground of standing, it would narrow its scope into examining private interest instead of public interest. Adams further criticized his colleagues by stating that the dismissal based on standing would create a perception that the Court downplayed the importance of the issue at stake. Adams argues further that his concern was also supported by the fact that the Court has been playing with time by delaying the announcement of all the Court's decisions related to the tenure of the Constitutional Court Justices.

On the case's merit, Adams questioned the constitutionality of the "transitional provisions." The provisions provided that the Chief Justice, Deputy Chief Justice, and all Associates Justices shall remain on the bench according to the Law. Adams argued that these provisions grant privilege to the current Constitutional Court justices, and some Constitutional Court Justices also try to take benefit from these provisions. Adams believes the lawmaker intended to create these transitional provisions as a "benefit" for most Constitutional Court Justices. Therefore, he argued that these provisions must be declared unconstitutional.

Justice Suhartoyo agreed with the Court majority that the petition must be rejected, but it was based on different reasoning. Suhartoyo argues that if the petitioner questioned the legislators' intention in extending the tenure for the Constitutional Court Justices, then the concerns should be addressed directly to the legislature instead of the judiciary. Moreover, Suhartoyo believes that the tenure of constitutional justices is part of the "open legal policy" of the legislators. Therefore, it is not the domain of the Constitutional Court to review such policy.

Justice Saldi Isra issued a dissenting opinion based on several grounds. First, he believes there is a potential injury for the claimant even if he has no doctoral degree as the prerequisite of the candidacy to be constitutional justice. Second, Isra questioned the legislators' decision to change the minimum age requirement from 47 to 55 years old. The House argued that increasing the minimum age to 55 was intended to increase the quality of constitutional justice. Isra, however, argues that the original Law on Constitutional Court No. 24 of 2003 stipulated that the minimum age was 40. Therefore, the first-generation Court under the chairmanship of Jimly Asshiddiqie was staffed by justices under 50, such as Asshiddiqie (47 years old) and Palguna (42 years old). Nevertheless, nobody questioned their integrity and performance, even though they were much younger than the minimum age requirement under the current Law. Moreover, from the comparative perspective, the minimum age for a constitutional court justice in the countries like South Korea, Germany, and Hungary are ranged from 40 -45 years old. Third, Isra argues that it has happened before for the Court to deal with the minimum age requirement issue. Previously, the Court ruled over the retirement age for administrative clerks, junior clerks, and substitute clerks at the Constitutional Court, which was 62 years old. In a different instance, the Court even ruled on changing the maximum age limit to be nominated as a constitutional court justice from 65 years old to over 65 years old for the second term. Finally, Isra posited that the Court does not need to be explicit in determining the age limit, but rather the Court can provide remedial interpretation such as ordering the lawmaker to synchronize the minimum age limit for the Constitutional Justice with the judges at the Supreme Court, which 45 years old.

2. *Constitutional Justice Tenure II Case* - Court Decision Number 96/PUU-XVIII/2020

The petitioner filed a judicial review against the transitional provision in Law No. 7 of 2020 on the Amendment of the Constitutional Court Law. Article 87 of the Law provides the following:

Constitutional Court Justices in the position of Chief Justice and Deputy Chief Justice shall remain as the Chief Justice and Deputy Chief Justice until the end of their term in office according to the Law.
Constitutional Court Justices on the bench shall remain in office until they reach the retirement age of 70 years old or their tenure does not exceed 15 years.

The petitioner argues that he is a lawyer who aspires to be a constitutional justice. He has fulfilled the requirement to have a doctoral degree and reached a minimum age of 55. But according to Article 87b, the current justices will remain in office for a while. Therefore, the petitioner claims that he won't be able to secure a nomination for constitutional justice soon.

The Court ruled that Article 87b is intended as a "bridge" that connects the old regulation and the new regulation concerning the tenure of constitutional court justices.

The old regulation recognizes the periodization of the judge's office of two five-year terms. In contrast, the new regulation provides that the judges may serve for fifteen years or until the retirement age of 70. Moreover, the Court ruled that they did not find any bad intention from the legislators in designing the transitional provision, but rather the legislators wanted to keep continuity with the current justices without having to

undergo a new selection process. Therefore, the Court rejected the petition concerning the constitutionality of Article 87b.

Nevertheless, the Court ruled differently concerning the constitutionality of Article 87a. First, the Court ruled that there is no clarity on the meaning of the phrase "shall remain as the Chief Justice and Deputy Chief Justice until the end of their term in office according to the law." Does this mean that the Chief Justice and Deputy Chief Justice will stay in office until the end of their "term in office" as constitutional justice or their "term in office" as the Chief Justice and Deputy Chief Justice? This unclarity is caused by the fact that the term in office for constitutional court justices differs from the term in office for the Chief Justice. The former is 15 years, and the latter is five years.

Secondly, the Court ruled that the Constitutional explicitly states that constitutional justices shall elect the Chief Justice and Deputy Chief Justice. Therefore, the Chief Justice and Deputy Chief Justice cannot automatically assume office without an election process by constitutional judges. Therefore, the Court declared Article 87a unconstitutional. Nevertheless, it holds that to prevent an administrative vacuum, the current Chief Justice and Deputy Chief Justice shall remain in office until the Court holds an election to elect the new Chief Justice and Deputy Chief Justice. Therefore, the Court must elect a new Chief Justice and Deputy Chief Justice at the latest within 9 nine months after the decision was announced.

3. *Constitutional Justice Tenure III case* - Constitutional Court Decision Number 100/PUU-XVIII/2020

The petitioners are a group of lecturers, researchers, and legal analysts who challenged the constitutionality of Law No. 7 of 2020 on the Amendment of the Constitutional Court Law, especially concerning the provision of the requirements to become constitutional court justices and extension of tenure for the constitutional court justices. Moreover, the petitioner also filed a formal review against the enactment of the Law by arguing that the bill was discussed behind the closed door without soliciting any public participation. Moreover, the bill was discussed during Covid 19 pandemic as the pretext for not involving public debate and discussion.

The Court rejected the petition and held that the petitioners had no direct interest in challenging the Law. Moreover, the Court pointed out that the petitioners could not show the injuries they suffered from the enactment of the Law. The Court considered further that the petitioners did not fulfill the minimum requirement to be constitutional court justices, that is, to have a minimum of fifteen years of experience in the legal field. Therefore, the Court majority rejected the petition based on the lack of standing.

Justice Wahidudin Adams and Suhartoyo issued a concurring opinion. While Justice Arief Hidayat and Saldi Isra issued separate dissenting opinions. Justice Adams and Suhartoyo did not issue a different opinion than their previous concurring in the *Constitutional Court Justices Tenure I* case. Justice Arief Hidayat issued a dissenting opinion in which he agreed with the petitioners that the bill was discussed without any public debate and discussion. Therefore, he argued that the Court should accept the petition for formal review that the enactment of Law No. 7 of 2020 is invalid and, therefore, must be declared unconstitutional. Justice Saldi Isra reiterated his dissent in the *Constitutional Court Justice I* case that the minimum age requirement of 55 years old must be declared unconstitutional. Nevertheless, he added a new dissent concerning one of the requirements to be a constitutional court justice: having a minimum of fifteen years of experience in legal practice and/or the nominee from the Supreme Court that is a High Court Judge or Supreme Court Justice. Justice Isra argued that the requirements to be a High Court Judge or Supreme Court Justice must be struck down because it has no legal basis. Moreover, it restricts the candidates to a limited group of High Court Judges and Supreme Court Justices. Justice Isra expressed his concern that such restriction might also be applied to the candidates that the President and the House of Representatives nominate.

4. *Constitutional Justice Tenure IV case*, Decision Number 103/PUU-XX/2022

The petition was related to the dismissal of Associate Justice Aswanto by the House of Representatives on September 29, 2022. As explained earlier in this report, the crux of the matter of this case is the letter from the Constitutional Court to the House Judiciary Committee, which sought to notify the House that the three sitting justices proposed by the House, namely Aswanto, Arief Hidayat and Wahiduddin Adams, would have their tenures extended and end their terms in 2029, 2026, and 2024, respectively, in line with the Court decision in the *Constitutional Court Justice Tenure II* case. Upon receiving the letter, the Judiciary Committee decided to replace Justice Aswanto. The Chair of the Judiciary Committee, Bambang Wuryanto, explained that the House decided to replace Aswanto because he did not carry out his duties to represent the interest of the House that appointed him in the first place. Then the Judiciary Committee moved to appoint Guntur Hamzah, the Secretary General of the Constitutional Court.

The petitioner challenged the replacement of Justice Aswanto by asking the Court to issue an injunction to stop the replacement of any sitting constitutional justices and prevent the issuance of any administrative decree that reaffirms the replacement of the justices. The petitioner argues that the House has arbitrarily interpreted the Court's decision in the *Constitutional Court Tenure II* case as an opportunity to replace Justice Aswanto. Moreover, the House's interpretation can potentially create a bad precedent as the President and the Supreme Court may also arbitrarily replace any sitting Constitutional Court Justices.

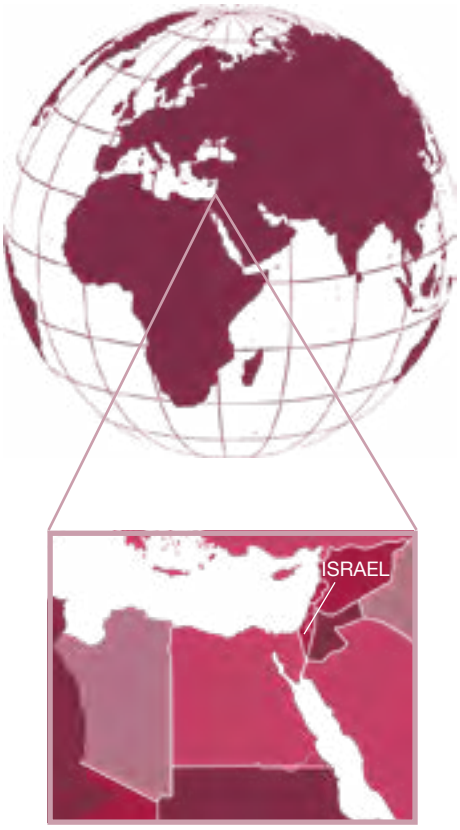
The Court opined that the petition constitutes a constitutional complaint instead of a statutory judicial review. Considering that the Court has no authority to hear a constitutional complaint, it would exceed its statutory authority by reviewing a constitutional complaint. Therefore, the Court rejected the petition. Nevertheless, the Court issued a dicta that later became a new scandal involving Justice Guntur Hamzah. If one read

the text of the judgment, the Court stated, "in the future (*ke depan*), the dismissal of a Constitutional Court judge before the end of their term can only be done for these reasons." Moreover, the Court stated in its written judgment, "if there is a dismissal for a sitting constitutional court justice, the dismissal process can only occur after there is a request from the Chief Justice of the Constitutional Court." Nevertheless, if one reviews the video recording of the Court announcement, Justice Saldi Isra, who read the judgment, read the phrase differently: "therefore (*dengan demikian*), the dismissal of a Constitutional Court judge before the end of their term can only be done for these reasons." Obviously, in the final written judgment, the phrase "therefore (*dengan demikian*)" is changed to "in the future" (*ke depan*). As explained earlier, Justice Guntur Hamzah had directed an administrative clerk to change the text of the judgment.

IV. Looking Ahead

On February 14, 2024, Indonesia will hold a General Election. In recent years, there have been many rumors and speculation that President Jokowi and his supporters have been plotting different scenarios to extend his term, either by constitutional amendment or delaying the General Election. Nevertheless, by the time of writing this report, at least two presidential candidates declared their intention to run as the next president. Therefore, it is less likely that President Jokowi will stay in power after the end of his second term in 2024.

In the meantime, two constitutional justices, Justice Manahan Sitompul, and Justice Wahidudin Adams, will reach their mandatory retirement age in the next term. Previously, the Supreme Court nominated Justice Sitompul, and the House of Representatives nominated Justice Adams. So, we will see how the respective institutions will fill the vacancies in the coming term.



Israel

Yaniv Roznai, *Professor, and Vice-Dean, Harry Radzyner Law School, Reichman University*

Adi Tal, *LLB Student, Harry Radzyner Law School, Reichman University*

Gal Mechtinger, *LLB Student, Harry Radzyner Law School, Reichman University*

Emanuel Broza, *LLB Student, Harry Radzyner Law School, Reichman University*

I. Introduction

Israel has been in a political crisis for several years. In 2022, it held its fifth general election in less than four years. The most interesting constitutional development in 2022 was the dissolution of the Knesset after the diverse unity government formed in 2021 suffered from political difficulties in governing.

The November 2022 elections resulted in a majority of 64 members out of the 120-member Knesset for the right-wing and religious parties' bloc, headed by Netanyahu's Likud party. After the left-wing parties failed to unify, left-wing party Meretz, which had been represented consecutively in parliament since 1992, did not pass the electoral threshold for being elected, missing 3,800 ballots for entering the Knesset. The new government, formed in December 2022, has proposed a package of dramatic judicial reforms that have caused unprecedented civil protests across the country. The impact and developments of these events will be detailed in the upcoming 2023 report.

II. Major Constitutional Developments

The major constitutional development was in constitutional politics. The thirty-sixth government of Israel, which was formed in June 2021, was based on a coalition between 8 parties, ranging from the left wing to the right wing, including an Arab party. This government was led by two prime ministers during its existence: first, according to a rotation agreement, Naftali Bennett of the Yamina party served as Prime Minister, and then he ceded the position to Yair Lapid of Yesh Atid after the coalition fell on June 30, 2022. Lapid then served as caretaker Prime Minister until elections were held on November 1, 2022. These elections were held after Bennet and Lapid initiated legislation to dissolve the Knesset, thereby sending Israel to its fifth general election in three-and-a-half years.

In the November 2022 elections, the right-wing and religious coalition, headed by Netanyahu's Likud party, achieved a majority of 64 members out of the 120-member Knesset. For the first time since 1992, left-wing party Meretz did not pass the electoral threshold, missing 3,800 ballots for entering the Knesset, after the left-wing parties failed to unify.

The new Knesset was sworn in on November 15, 2022. Despite ongoing criminal proceedings on corruption, fraud, and breach of trust charges before the district court in Jerusalem, Netanyahu was given the mandate to form a new government, which he ~~did~~ successfully accomplished in December 2022.

III. Constitutional Cases

1. *HCJ 6654/22 Kohelet Policy Forum v. Prime Minister of Israel (13.12.2022) (Isr.)*: Referendum or Knesset's approval for an international agreement

This legal case concerns a petition challenging the legality of an agreement between the

State of Israel and the State of Lebanon regarding an undetermined natural gas reserve in the maritime region between the two countries.[1] The petition raised several legal queries, including whether Basic Law: Referendum applies to the agreement, whether the present government's transitional status allows it to sign the agreement, and whether the agreement must be approved by the Knesset.

Kohelet Policy Forum, the petitions, has argued that the Knesset should supervise the government on diplomatic matters during the transition government. It also argued that the government should not approve an agreement that contains a diminution of territory in which Israeli law and jurisdiction applies, as such an agreement requires a majority of 80 Knesset Members or approval by a referendum. In response, the Attorney General has argued that she has recommended that the agreement be voted in the Knesset, yet there is no legal duty to bring the agreement to the Knesset's approval.

In a unanimous decision, the High Court of Justice rejected the petitions. Due to the urgency of the matter, the ruling was handed down without detailed grounds for the decision, which were published later.

The judges concluded that Basic Law: Referendum does not apply to the agreement as it was not subject to the approval mechanisms established in the law.[2] They also upheld the principle of government continuity, stating that the incumbent government continues to act as the executive authority of the state until a new government gains the confidence of the Knesset.[3] Furthermore, the judges found that the agreement promotes security and economic goals and that completing the negotiations is a public essential and urgent need due to the unique opportunity window created with Lebanon.[4] They ruled that the government acted lawfully within its authority and responsibility and that its discretion should not be interfered with based on confidential and rare security and political reasons.[5]

Overall, the judges concluded that the government had conducted a fruitful and in-depth discussion involving relevant professional factors and that there was no legal obligation to bring the agreement to the Knesset for approval. This legal case highlights the complex nature of international agreements[6] and the role of government continuity in ensuring stability and continuity in the country.[7]

2. HCJ 1765/22 Tomer Warsha Law Firm v. Minister of Interior (03.07.2022): Policy of foreign entry quotas

The High Court of Justice of Israel received a petition filed by the Ukrainian Ambassador to Israel, challenging the Ministry of Interior's decision to allow 5,000 Ukrainian citizens into Israel amid the ongoing conflict between Ukraine and Russia.[8] The policy excluded citizens who were eligible to enter Israel under the Law of Return and the 20,000 Ukrainian citizens who had already arrived in Israel. The petitioner argued that the Minister of Interior lacked the authority to bar Ukrainian citizens from entering the country for non-touristic purposes or staying for more than three months.[9]

The court maintained that the policy pertained to emergency circumstances and not normal circumstances, and the Minister of Interior has the discretion to determine who may enter the country.[10] However, the court ruled that the Minister must follow Israeli law - including an order that exempted Ukrainian Citizens from visas, and not base decisions on individual discretion.

The state argued that the petitioner lacked standing since he was not an Israeli citizen and that the policy did not affect those who remained in Israel. The court refrained from exploring the petitioner's standing but noted that the issue falls under the jurisdiction of government authorities and because refraining from hearing the case due to standing would provide a quasi-immunity to the governmental decisions, in an issue with wide implications and in a case that raised arguments of ultra vires.[11]

While the state claimed that the petition was theoretical, citing existing quotas for Ukrainian citizens to enter Israel, the court clarified that Ukrainian citizens were requesting entry into Israel.

The ruling emphasized the Minister's obligation to follow Israeli law while exercising discretion in deciding who may enter the country, thereby providing clarity on the parameters of the Minister's discretion in such situations.

3. *HCJ 4988/19 Rosenzweig-Moisa v. Public Services Authority (20.01.2022)*: The right to electricity supply

The petition deals with the arrangements applicable to the collection of debts of domestic consumers for electricity consumption and the possibility of disconnecting the electricity supply to their homes. This is given the potential damage of these arrangements to disadvantaged populations.

The right to electricity supply is directly related to the right to a minimal existence with dignity, which was recognized as a derivative right of Basic Law: Human Dignity and Freedom.[12] In certain contexts, a regular electricity supply is part of the fundamental aspects required for a person's basic existence and therefore deserves constitutional protection.[13]

The right to a minimal existence with dignity should guide the decision in determining the standards. Accordingly, the Electricity Authority must amend the standards to include a procedure for hearing consumer complaints before making decisions regarding disconnection from the electricity supply.[14]

Consequently, the High Court of Justice ordered the Electricity Authority to amend the standards it had established in such a way as to recognize the possibility of proving an unusual economic situation or economic hardship combined with a medical condition as a reason for not disconnecting a consumer from the electricity supply.[15]

4. *HCJ 8076/21 Committee of Judges for the Granting of Israel Prize for 2021 in the Area of Mathematics and Computer Science Research v. The Minister of Education (29.03.2022):* Minister's Refusal to Grant Israel Prize

The petitioner, the committee of judges, recommended awarding the Israel Prize in the field of mathematics research and computer science research to Prof. Oded Goldreich. The

Minister of Education did not approve the recommendation. It is due to Prof. Goldreich's signature on a petition, within the framework of which the European Union was asked to implement its policy and to refrain from scientific cooperation with Israeli academic institutions that operate in the Judea and Samaria regions.[16] This policy was expressed in the agreement the Israeli government signed with the European Union for scientific and industrial cooperation, in which the Judea and Samaria region was excluded.[17]

The petition sought to cancel the minister's decision. The question around which the discussion revolves was whether Prof. Goldreich's signature on the petition is such an unusual act that justifies consideration of an unprofessional consideration in the awarding of the award, which is generally given based on professional considerations.[18]

The decision of the Minister of Education does not include criticism of the committee's recommendations, which are based on social considerations concerning the character of the candidate or his duties. There should be no room for external considerations in the nomination for the award, these go beyond the professional framework and may harm freedom of expression. These external considerations will be considered in extremely exceptional cases.[19]

Professor Goldreich's signature on the petition does not fall within the scope of these exceptional cases, especially when the government's agreement on the subject is in the background.[20]

5. AdminA 3091/21 State of Israel - Minister of the Interior v. certain (22.5.2022): Residence Permit by a resident of Judea and Samaria

The Supreme Court accepted the state's appeal against the decision of the Court of Administrative Affairs (District Court) regarding an administrative petition, which revolved around the rejection by the Minister of the Interior of the request of a resident of Judea and Samaria, who married an Israeli permanent resident in 1997, knowing that he was married to another woman, to receive a residence permit in Israel According to the Law on Citizenship and Entry into Israel (temporary order).[21]

The grounds for accepting the appeal are threefold:

> First, there was no flaw in the minister's decision that justified the involvement of the district court. The minister's decision was reasoned, reasonable, and given within the framework of broad discretion granted to him in such cases.
>
> Second, the Citizenship Law does allow the granting of citizenship for special humanitarian reasons, but the petitioner's marriage knowing that her husband is married to another woman, and the mere fact that the two have children together is not a special humanitarian reason.
>
> Third, the State of Israel is struggling with the offense of plural marriage, and the ruling of the District Court contradicts the consistent ruling on this issue.

IV. Looking Ahead

While 2022 focused on constitutional politics, the main developments in 2023 centered on the judicial overhaul/proposals of major constitutional reforms in the Israeli judicial system. On January 11, 2023, Israel's Minister of Justice, Yariv Levin, published memorandums outlining the first steps in the constitutional overhaul planned by Netanyahu's new government.

The proposed legislation include laws limiting the power of the Supreme Court to strike down Knesset legislation, limiting the power of the Supreme Court to review administrative acts. Additionally, they aim to increase the influence of the executive and legislative branches on judicial and government legal advisors' appointments, and reducing their legal powers.

The proposed "legal reform" has been severely criticized by the opposition parties, academia, and legal professionals, including the Chief Justice, the Attorney General, and the Chair of the Israel Bar Association. The response to these proposals, has led to unprecedented protest movement, involving hundreds of thousands of demonstrators participating in mass rallies every week. At the time of the writing, the proposals have gone through some stages in the legislative process but have not been legislated. The coalition has been negotiating the reform, with the opposition, under the auspices of the President, to attempt to bring a more balanced reform in a broad consensus. However, it is unclear how these negotiations will end.[22]

V. Further Reading

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3 Ibid. At 19.
4 Ibid. At 43.
5 Ibid. At 49.
6 See generally, Ruth Lapidot, 'National Treaty Law and Practice: Israel' in Duncan Hollis, Merritt Blakeslee and Bejamin Ederington (eds.), National Treaty Law and Practice (Brill 2005) 385-413.
7 See generally, Rivka Weill, 'The Living-Dead' (2015) 38 Fordham International Law Journal 387.
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11 Ibid. At 13.
12 LCA 4905/98 Yosef Gamzu v. Na'ama Yishayahu, IsrSC 55 (3) 360, 375-376 (2001).
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14 Ibid. at 39.
15 Ibid. at 40.
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17 IIbid. at 4.
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Italy

Pietro Faraguna, *Associate Professor of Constitutional Law, University of Trieste*

Michele Massa, *Associate Professor of Public Law, Catholic University of the Sacred Heart, Milano*

coordinated by Daria de Pretis, *Vice President of the Constitutional Court of Italy*

I. Introduction

The Italian Constitutional Court (hereafter ICC or "the Court") has characterized its 2022 case law with a consolidation of previously emerged trends. In particular, the Court engaged a relational approach toward the legislator, utilizing a wide range of decisional methods and stimulating its intervention through multiple warnings and recommendations. On a "vertical" dimension, the Court's case law in 2022 was characterized by a fine-tuning of its jurisprudence inaugurated in 2017, affirming an ever-integrated and multi-layered model of protection of fundamental rights. However, the Court reaffirmed some of the basic principles governing the relations between domestic law and EU law.

II. Major Constitutional Developments

The year 2022 has been characterized by the consolidation of recently well-settled trends in the jurisprudence of the Italian Constitutional Court (hereafter ICC). These trends are related both to the ICC's position within the national constitutional system, and the Court's approach towards other constitutional institutions, including the ICC's position in international and supranational dimensions.

As for the first front, the ICC's pushed its recent jurisprudence further in a constant dialogue with State and regional legislators to whom reminders and warnings were addressed in a spirit of sincere institutional cooperation. After the steady growth recorded with the 10 'warnings' issued to the legislator in 2018, which doubled in 2019 to reach 25 in 2020 and 29 in 2021, the figure for 2022 stabilized at 22.

These warnings and recommendations concerned a variety of issues. These included, among others: the representation of both sexes in the electoral lists of small municipalities (see judgment no. 62 of 2022, reported below in section III); the complete phasing out of judicial psychiatric hospitals and their replacement with residential facilities (see judgment no. 22 of 2022, reported below); the new arrangement whereby the attribution of both parents' surnames is the default rule in the transmission of family surnames (see judgment no. 131 of 2022, reported below).

Along with this jurisprudence, the Court consolidated its approach aimed at avoiding any "judicial review free-zone". In fact, the Court accompanied its relational approach toward the legislator with a firm stance with regard to its own role as a guardian of the principle of proportionality. The Court has spared no effort in corrective interventions even where there was no univocal normative solution to fix the legal system: in these cases, the Court often found that any pre-existing normative "point of reference" might be enough to fill the legal void that would have emerged from the mere annulment of a law. This method has been applied in the most diverse sectors of the legal system, including electoral matters (see judgment no. 62 of 2022 reported below) and criminal law.

As for the second front (the international and supranational position of the ICC), 2022 has been characterized by a fine-tuning of an interesting process started in 2017. Back

then, with its decision no. 269 of 2017[1], the Court – with an important *obiter* – decided that when both the Italian Constitution and the EU Charter of fundamental rights were allegedly violated, referring judges were free to access the ICC also before referring the question of the preliminary ruling to the Court of Justice. This conflict rule seemingly acted as a derogation of the general rule traditionally adopted by the ICC, since its seminal decision no. 170 of 1984, in cases of a violation of a provision of the EU endowed with direct effect, namely the immediate and autonomous disapplication of the national rule if needed after a preliminary reference to the Court of Justice. However, the ICC in 2022 clarified that its new approach in cases of "dual preliminarity" does not derogate from the core of the conflict rule inaugurated in 2017. Particularly in its decision no. 67 and 263 (further reported below), the Court recognized once more the exclusive competence of the Court of Justice to interpret and apply the Treaties, for purposes of ensuring its uniform application throughout all the Member States. Moreover, the ICC reaffirmed the central role played by the preliminary ruling procedure, which does not only provide a channel for interconnection between the national courts and the Court of Justice for resolving interpretive uncertainties but also helps to ensure and reinforce the primacy of European law. Within this framework, the ICC reiterated that "disapplication is not dead": on the contrary, disapplication remains an essential tool to be combined with the preliminary reference procedure, both aiming at guaranteeing the full effectiveness of EU law. The ICC adhesively referred to the Court of Justice's stance, explaining that the failure to disapply a national provision that is held to conflict with European law violates "the principle of equality between the Member States and the principle of sincere cooperation between the European Union and the Member States, recognized by Article 4(2) and (3) TEU, with Article 267 TFEU and […] the principle of the primacy of EU law" (Judgment of 22 February 2022 in case C-430/21, RS, point 88).

Lastly, a remarkable development concerned procedural aspects regulating public hearings before the Court. In 2022, starting from the hearing of 21 June 2022, the ICC started to apply a dialectical approach to its hearings. These procedural innovations were implemented through the "Supplementary Rules – Rules of Procedure of the Constitutional Court of the Italian Republic", approved by the Court in May 2022, published in the Official Journal of the Italian Republic on 31 May 2022 and completed by a decree from President Giuliano Amato. According to this new model of managing public hearings, five days before each hearing, judge-rapporteurs may address written questions to the lawyers in their case. Along with this novelty, the traditional initial report of the hearing by the judge-rapporteur has been replaced by a brief introduction, typically lasting no longer than five minutes.

During the hearing, each lawyer or defense counsel is typically allotted 15 minutes to present their defense and respond to the judge-rapporteur's written questions. Any judge – not only the judge-rapporteur – may engage directly with the lawyers, with questions and objections, further enriching the discussion of the case.

III. Constitutional Cases

1. *Judgment no. 236 of 2022*: The ICC Episode in the Lexitor saga

The Constitutional Court, with its decision no. 263, entered the extensive debate that, in Italy and beyond, has been triggered by the so-called Lexitor preliminary ruling of the Court of Justice (C-383/2018). This decision interpreted an EU Directive 2008/48/EC – lacking direct effect – in the sense that it attributes to consumers the right to a proportional reduction of all credit costs, in the event of early termination of the contract by the consumers themselves. However, the Italian legislator provided for an unusual implementation of the Court of Justice Ruling in July 2021: the Parliament stated that the ruling of the Court of Justice had to be followed only in respect of "new contracts" (entered since July 25th, 2021); while for contracts signed before the existing legislation continued to apply, along with "secondary rules contained in the Bank of Italy's regulations". The Constitutional Court declared the unconstitutionality of the implementing law, limited to the part in which it refers to the Bank of Italy's secondary rules. As for the remaining part of the regulation, the Court affirmed that a conforming interpretation of the rule resulting from this decision could be enacted.

2. *Judgment no. 183 of 2022*: Unlawful dismissals from work and political discretion

The Court heard a referral order questioning the compensation payable to workers unlawfully dismissed by small businesses (15 or less employees, 5 or less in agriculture): its limited amount (3-6 months' remuneration) apparently infringed the principles of reasonableness and equality, as well as the right to work (protected by Articles 4 and 35 of the Constitution). The referring court relied on judgments nos. 194 of 2018 and 150 of 2020, which had struck down different compensation criteria for their unreasonable rigidity: according to these precedents, also from the perspective of multilevel guarantees of social rights (including through the European Social Charter), an effective protection of workers from unlawful dismissal demands that judges enjoy a certain degree of discretion in determining the compensation, so that every relevant factor may be taken into account adequately. Again, in this case, the Court finds that the modest amount, as well as the small difference between minimum and maximum, are in violation of the Constitution. Yet, this violation may not be redressed by the Court: a wide range of varied plausible solutions exist, and it belongs to the Parliament to make the relevant choices. Accordingly, the Court rules that the question is inadmissible. That being said, the Court admonishes that the legislation should be reformed soon, and that, should a constitutional challenge be raised again, future rulings could be less deferential.

3. *Judgment no. 149 of 2022*: ne bis in idem in the fight against violations of intellectual property

With this decision, the Court declared a provision of the Italian criminal code unconstitutional as it did not set forth an obligation to discontinue proceedings when the defen-

dant had already been adjudicated for the same behavior in administrative proceedings which might potentially lead to the imposition of a punitive sanction (according to the *Engel* criteria of the Strasbourg Court). The constitutional challenge originated from a case where a defendant in a criminal trial, concerning an intellectual property offense, argued that he had already been punished by an administrative body for the very same infringement of copyright law, albeit qualified differently in law. The Court limited the effects of its decision to the specific field of offenses against intellectual property at issue in the main proceeding. The Court applied the criteria set forth by the ECtHR in *A and B v. Norway* and found that the legislation in force in Italy did not establish a sufficient connection in substance and time between the two sets of proceedings envisaged for essentially identical offenses.

4. *Judgment no. 131 of 2022*: Once again on the child's surname

In this case, the Court heard once again a challenge to a provision regulating the transmission of family surnames to children. After declaring unconstitutional the prohibition to transmit also the mother's surname, as long as parents agree to do so (judgment no. 286 of 2016), the Court was now called to assess the constitutionality of the prohibition to give only the mother's surname, in cases where both parents agreed to do so. The Court, with an unusual decision to refer a case to itself, extended the scope of its ruling to the constitutionality of the default rule, i.e., to the transmission of the father's name as a default rule.

The Court found this default rule to be in contrast with the child's inviolable right of personal identity and with the principle of equality between parents and struck down the contested provisions as unconstitutional. The new rule emerging from the Court's decision requires the assignment of both parents' surnames to children, in the order agreed upon by the parents themselves, except where they agree to give only one of their surnames.

Once again, the Court issued a firm warning to the legislator, signaling an urgent need for broad legislative reform in this matter, taking into account the need to regulate the effects of its decision on successive generations and siblings.

5. *Judgment no. 79 of 2022*: On adoption and family ties

With its decision no. 79 the Constitutional Court declared Article 55 of Law No. 184 of 1983 to be incompatible with Articles 3, 31, and 117(1) of the Constitution insofar as it requires the rules laid down in Article 300(2) of the Civil Code for the adoption of adults to be applied to the adoption of children "in special cases", i.e., adoption of minors permitted under different conditions from those required for so-called full adoption. This form of adoption is meant to promote the effectiveness of a relationship that has been established with the child or to make the adoption accessible to children whose full adoption is extremely difficult, if not legally impossible.

The rule provided for in Article 300(2) of the Civil Code precluded the recognition of family ties between children adopted in these "special cases" and the family of the adoptive parents.

The Court affirmed that the non-recognition of family ties with adoptive parents' relatives is tantamount to disregarding a child's identity, which derives from belonging to the new network of relations that are important to a child's family life.

6. *Judgment no. 67 of 2022*: Disapplication is not dead

In this case, the Court considered two referral orders from the labor division of the Supreme Court of Cassation concerning a provision excluding third-country nationals legally residing and working in Italy, when the members of the family unit did not reside in Italy from benefiting a family unit allowance, which was offered to Italian and European citizens living in Italy. The Supreme Court of Cassation had already referred a question on the same matter to the Court of Justice of the European Union with a reference for a preliminary ruling. The Court of Justice held that the provision violated EU law and the principle of equality of treatment. Nonetheless, the Supreme Court of Cassation referred the case to the Constitutional Court, on the assumption that it could not disapply the provision, given that EU law did not provide a complete framework to fill the gap that would be left by the disapplied provision. The Constitutional Court disagreed with this assumption and held the questions inadmissible as irrelevant. The Constitutional Court affirmed that the Supreme Court of Cassation was, indeed, able to simply disapply the provision, leaving in place the domestic provisions governing the family unit allowance, which would no longer be withheld from third-country nationals residing and working legally in Italy, when members of the family units reside temporarily abroad.

7. *Judgment no. 63 of 2022*: Principle of proportionality of penalties

In this decision, the Court declared that the sentence of five to fifteen years imprisonment, envisaged by the Consolidated Law on Immigration for anyone who has helped someone enter Italian territory illegally by plane using false documents, is manifestly disproportionate and incompatible with Articles 3 and 27(3) of the Constitution. The Constitutional Court held that such a dramatic increase in the ordinary penalty envisaged for the basic offense of facilitating illegal immigration (imprisonment from 1 to 5 years) may be justified in other instances, concerning different aggravating circumstances, e.g., when the migrant's life is endangered or the migrant is subjected to inhuman or degrading treatment during transportation; but is wholly unreasonable with respect to the circumstance at issue.

8. *Judgment no. 62 of 2022*: Gender equality in local elections

In its judgment no. 62 of 2022, the Court stated it is unconstitutional for municipalities with fewer than 5,000 inhabitants not to require their electoral lists to have candidates of both genders. The decision reiterated that having both genders on municipal electoral lists is a minimum guarantee of equal opportunities for access to elected office. This obligation applies to municipalities with

under 5,000 inhabitants, which represent 17% of the Italian population. However, the regulations on presenting lists provided no sanctions for non-compliance, while the decision of the Court states that the exclusion of non-compliant lists from elections is an appropriate legal consequence, although the legislator may subsequently introduce different consequences.

9. *Judgment no. 54 of 2022*: Maternity allowances, third-country workers and EU law

This judgment follows up on a reference for a preliminary ruling by the Constitutional Court to the Court of Justice of the European Union (CJEU) and on the CJEU's answer. The challenged provision stipulated that the eligibility of third-country nationals for (childbirth and) maternity allowances was conditional upon the holding of a long-term resident's EU residence permit. The question was whether this was compatible with EU Directive 2011/98, as it excluded some third-country workers from said allowances. Resuming its proceedings, the Constitutional Court enforces the CJEU's ruling and annuls the provision: both national (Articles 3 and 31 of the Constitution) and EU law (relevant in the light of Article 117 of the Constitution) are infringed by a system irrationally more restrictive towards some third-country nationals who still hold a valid EU (albeit non-long-term) residence permit, and who can be in the greatest need of social protection. It is worth recalling that some lower Italian appeal courts had found that the EU directive was not only applicable, but also endowed with direct effect, and therefore had decided their cases without raising constitutional challenges. Instead, the Court of Cassation referred the question to the Constitutional Court, whose ruling, summarized above, quashes the challenged provision once and for all.

10. *Judgment no. 28 of 2022*: Principle of proportionality of penalties of financial nature

The referring court challenged a provision establishing that the amount of the fine replacing short custodial sentences cannot be below 250 € per day, arguing that such a provision could lead to the imposition of disproportionately harsh penalties for offenders of limited financial means. The Constitutional Court struck down the provision, holding it to be incompatible with the principle of equality enshrined in Article 3 of the Constitution, as well as the principle of proportionality of penalty based on Articles 3 and 27(3) of the Constitution, which the Court considered applicable also to financial penalties. In this respect, the Court underlined that the offender's financial means are an important factor to consider when assessing the severity of a fine and its proportionality to the seriousness of the offense. The Court held that the impugned provision led to the imposition of fines that are much higher than what most people in Italy today can afford based on their income and assets. This ends up "transforming the fine in lieu of prison into a privilege for wealthy offenders alone", in clear breach not only of the principle of the proportionality of penalties but also of the equality principle.

11. *Judgment no. 22 of 2022*: Security residence for offenders with mental disorders

After the closing of judicial psychiatric hospitals (criminal asylums), offenders with mental disorders – when they are considered *socialmente pericolosi* (socially dangerous), and the danger cannot be controlled in alternative ways – may be restricted in special residential facilities ("residenze per l'esecuzione delle misure di sicurezza", REMS): small units designed to contribute to the gradual social rehabilitation of their inmates while containing their threat to society itself. Under Italian law, the decision to place an individual in a REMS is a judicial order, issued by a criminal court. However, only a fraction of the relevant rules are set out in primary legislation: most are contained in secondary legislation and agreements between the State and local government (regional) bodies. Moreover, hundreds of people are currently on waiting lists for allocation to a REMS, with an average waiting time of approximately ten months, although some of them have committed serious and violent offenses; and, as REMS are part of the general health care system, governed by regions, the national Ministry of Justice has no direct power in the management of REMS. Both points violate the Constitution, which requires that any limitation of personal liberty be disciplined by primary legislation (Article 13); and endows the Minister of Justice with responsibility for all the services relating to the administration of justice (Article 100). However, the Court does not declare the current legislation unconstitutional: such a decision would result in "the abolition of the entire system of REMS" and would leave "an intolerable gap in the protection of constitutionally significant interests". Instead, the Court calls upon the legislator to implement a comprehensive reform in order to ensure an appropriate legislative framework, the establishment and efficient operation throughout the country of a sufficient number of REMS, the enhancement of alternative non-custodial facilities, as well as the appropriate involvement of the Minister of Justice. It is worth noting that this judgment has been preceded by a rare fact-finding order by the Constitutional Court, which led to the disclosure of much data on REMS and their operational problems and also gave impulse to better coordination between the Ministry and Regions.

12. *Judgment no. 18 of 2022*: Censorship of prisoners under enhanced surveillance regime correspondence and right to defense

In this decision, the Court addressed another issue concerning the legal protection of persons subjected to special conditions of detention, stating that Article 41-bis of the Prisons Law, which (according to the interpretation of the Court of Cassation) provides for the mandatory censorship of correspondence between detainees subjected to the enhanced surveillance regime and their lawyers, infringes the right of defense enshrined in the Constitution.

The judgment notes that, according to the settled case law of the Constitutional Court and the ECtHR, the right of defense includes the right to communicate, in confidence, with one's own lawyer, and stresses that detainees serving a custodial sentence also enjoy this right. This is necessary, inter alia, in order to ensure effective protection for the prisoners against any abuses committed by the prison authorities. This right is not absolute and may be restricted, insofar as this proves to be reasonable and necessary in situations in

which other constitutional rights are at stake and provided that it does not make the rights of defense ineffective. The Court holds that the censorship of correspondence between prisoners and lawyers is not an appropriate instrument for achieving this aim, and thus unreasonably impairs the detainees' rights of defense. Since prisoners are entitled to speak in private with their lawyer at any time (on this issue the Court ruled with its decision no. 143 of 2013), censorship on correspondence cannot be deemed a suitable means to prevent the exchange of information between prisoners and the criminal organization to which they belong. Moreover, the provision under review provided that the censorship occurred automatically, even where there were no specific grounds to suspect any unlawful conduct on the part of the lawyer.

IV. Looking Ahead

The year 2023 has started with the publication of multiple seminal decisions concerning the much-debated restrictions enacted to fight COVID-19: we will report these decisions next year, along with other decisions connected to vaccines. In fact, it was maybe because of the central role played by vaccines in public (and, specifically, legal) debate during the pandemic crisis, that constitutional controversies on vaccine-related issues (even unrelated to COVID-19) have significantly increased in 2023. The Court will then deal once again with the constitutional limits to state immunity and reparations for World War II crimes, ruling on the enforcement of its decision n. 238 of 2014, by which the Court has affirmed the jurisdiction of Italian courts on the responsibility of Germany for such reparations.

V. Further Reading

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Japan[1]

Ayako Hatano, DPhil Candidate, University of Oxford

Kayoko Ishihara, Junior Associate Professor, Kyoto University

Masahiko Kinoshita, Professor, Kobe University

Ryo Ogawa, Assistant Professor, Tokyo Metropolitan University

Mayu Terada, Professor, Hitotsubashi University, Visiting Scientist, RIKEN AIP

Kento Yamamoto, Associate Professor, The University of Kitakyushu

Tomoshi Yoshikawa, Associate Professor, Osaka University

I. Introduction

This review reports four significant events for the Constitution of Japan in 2022. The most unpredictable of these events was the assassination of the former Prime Minister of Japan, Shinzo Abe, on 8 July 2022. As the criminal's motivation is said to have been based upon a perceived close relationship between Abe and the Unification Church (the World Christian Unification Church), this cult's exploitation of its followers has attracted much attention amongst members of the public. This, in turn, has led to ongoing discussions around the amending of the Religious Corporation Act. In August 2022, the Cabinet of Japan led by Prime Minister Fumio Kishida refused to hold the extraordinary session demanded by opposition Diet members based upon the provisions of the Constitution, just as the previous Cabinet led by Abe did in September 2021.

While negative aspects of Abe's legacy still affect Japan's constitutional order, two liberal decisions made by the Supreme Court of Japan (SCJ) are also worthy of note. One is the case verdict that upheld the constitutionality of the regulation of hate speech, and the other is the verdict in the case surrounding the unconstitutionality of the lack of a mechanism for Japanese overseas nationals to exercise their rights in the national review of the SCJ Judges.

II. Major Constitutional Developments

1. Prime Minister Abe's Assassination and the Unification Church Issue

On 8 July 2022, the former Prime Minister of Japan, Shinzo Abe, was tragically assassinated. The suspect, whose mother was a member of the Unification Church, claims the organisation's exorbitant demands for donations had broken his family. The suspect stated that he had committed the crime because he believed that Shinzo Abe had a close relationship with the Unification Church. In fact, Shinzo Abe had appeared in a video at a Unification Church event (September 2021). Subsequent investigations have further disclosed that numerous Diet members from the Liberal Democratic Party (LDP) had previously attended or addressed Unification Church gatherings. This religious organisation has been a source of controversy in Japan since as far back as 1970 due to its practices of forced recruitment, excessive donation requests, and purported psychic sales. Although the Unification Church was not directly involved in the shooting, as the suspect's motivations have become clearer, greater public attention has been drawn to the harm caused by this organisation. The subsequent need to strengthen legal measures against religious organisations engaging in antisocial activities has become a pressing issue.

At this time, the discourse has centred on (A) the method of addressing the Unification Church and (B) the approach to be taken toward managing all organisations that engage in antisocial conduct, including religious organisations. (A) The Religious Corporation Act grants legal personality to religious organisations. Upon being granted religious corporation status, these organisations automatically become "corporations in the public interest, etc." and become eligible for preferential tax treatment. According to Article 81 of the Religious Corporation Act, a court may issue a dissolution order to a religious corporation that has engaged in activities seen as detrimental to the public welfare upon the request of the competent authorities. However, to date, the government of Japan has narrowly interpreted this dissolution order as applying only to religious corporations found to be violate criminal laws. The question at hand is whether the Unification Church, which has only been recognised for organisational torts under civil law, should be subject to a dissolution order. It remains to be seen whether a dissolution order will be sought and, if so, how the court will rule. (B) In December 2022, *the Act on the Prevention of Malicious Donation Solicitations by Corporations* was enacted. This Act prohibits corporations from engaging in improper solicitations of donations and contains provisions for administrative action against those who do. In 2018, the Consumer Contract Act was also amended to allow individuals to rescind their intention to offer or accept a contract in cases involving psychic sales. This Act was amended once more in December 2022 to strengthen the measures afforded. These measures not only target acts committed by religious organisations but also regulate antisocial conduct by organisations in general.

Following former Prime Minister Shinzo Abe's assassination, a state funeral was held on 27 September 2022. Some constitutional scholars have claimed that this state funeral violated the Constitution and other laws. However, most legal scholars believe there were no legal issues concerning the state funeral.

2. Convocation of an Extraordinary Session

On 18 August 2022, opposition members of the Diet demanded, based on Article 53 of the Constitution, that the Cabinet should convoke an "extraordinary session" of the Diet. The Japanese Diet only works during the designated period termed "session," and an extraordinary session is one that the Cabinet can convoke when necessary. However, according to Article 53 of the Constitution, the Cabinet "must" hold an extraordinary session when a quarter or more of the total members of either House demands to do so. Given the close relationship between the Cabinet and majority members of the Diet (at least in the House of Representatives) in the Japanese parliamentary system, the significance of this article resides in the fact that it enables even minority members to take some initiative in organizing the Diet.

In spite of the provision outlined in Article 53, it took until 3 October, almost a month and a half after the demand was first made, for the Cabinet to convoke the extraordinary session. The background to this circumstance is that Article 53 does not specify a deadline for when the Cabinet must convoke the session by when it "must" do so based on demand.

According to the recent governmental interpretation, "the Cabinet must decide to convoke an extraordinary session within a period that does not exceed a reasonable time to prepare for the convocation, considering the issues that are to be discussed in the session."[2] Considering the importance of this article for minority Diet members, constitutional academics have also pointed out that the Cabinet must convoke an extraordinary session within a reasonable period and that the Cabinet should not make this decision based on its political judgement. However, it has sometimes taken more than a month for the ruling Cabinet to convoke the session, as evidenced by this most recent case. In 2017, the Abe Cabinet did not convoke an extraordinary session for three months after the demand was initially made. The Abe Cabinet received criticism that this delay constituted an amount longer than "a reasonable period of time" and that the Cabinet was intentionally evading parliamentary discussion. Three lawsuits were filed over this issue, arguing that the delay was unconstitutional. 2022 high courts dismissed the plaintiffs' arguments in all three cases. Although one of the high courts' rulings acknowledged the Cabinet was obliged to convoke an extraordinary session within a reasonable period, it dismissed the plaintiffs' appeal because the Cabinet did not have any professional legal obligation to the members of the Diet who demanded the convocation, aimed at protecting those Diet members' rights and benefits.[3]

There was also an attempt to overcome this issue through legislation. The opposition members of the Diet proposed to amend the Diet Law to specify a set deadline for the convocation. Ironically, the current ruling party, the LDP, had also made this proposal as part of its constitutional amendment plan when it had stood in opposition. However, as the LDP displayed a negative attitude toward this proposal at this time, this issue remains as yet unresolved.

III. Constitutional Cases

1. Constitutionality of Osaka City Ordinance against Hate Speech

1.1. Background

Since the early 2000s, these hateful campaigns have been widespread across Japan, drawing criticism from UN human rights treaty bodies.[4] In response, the Japanese government enacted *the Act on Promotion of Efforts to Eliminate Unfair Discriminatory Words and Behaviours Against Persons from Outside Japan* (hereinafter 'the Act') in 2016, which was the first national legislation against hate speech in Japan.[5] However, the Act does not prohibit hate speech nor impose any penalties for engaging in such behaviour, instead only opting for a negative stance against it. Therefore, local governments remain responsible for developing their own strategies for addressing hate speech within their jurisdictions.

The Osaka City Ordinance Dealing with Hate Speech (hereinafter 'the Ordinance') is the first anti-hate speech ordinance in Japan, which came into effect in July 2016.[6] This Ordinance was introduced in response to the proliferation of hateful demonstrations and campaigns primarily targeting residen-

tial Koreans and their descendants in Osaka, home to Japan's largest Korean community. The Ordinance has a broader definition of hate speech than the Act, which includes expressions disseminated through the Internet. It also provides more extensive enforcement mechanisms than the Act does. According to the Ordinance, if the city mayor determines, based on the examination by the board of experts, that an expressive act targeting individuals who reside, work, or study in Osaka City, or is conducted within the city, constitutes hate speech, the city government is authorized to take specific measures. These measures include requesting internet intermediaries to remove offensive content and publicly disclosing the identity of the perpetrator. However, the Ordinance does not go so far as to provide for any sanctions, such as penalties.

Following the course of Osaka City, several local governments have enacted hate speech ordinances. For instance, Tokyo passed an ordinance in 2018 that restricts the use of public facilities by groups found to have previously engaged in hate speech.[7] In 2019, Kawasaki City became the first municipality in Japan to impose penalties on individuals who engage in hate speech.[8]

1.2. Osaka City Ordinance Case

After Osaka City decided to disclose the identity of an individual who uploaded a hateful video online, eight residents filed a case claiming that the Ordinance violated their freedom of expression, protected under Article 21(1) of the Constitution and was therefore invalid. The plaintiffs argued that the use of public funds for implementing the Ordinance was, therefore, illegal.[9] Those claims, however, were rejected by the Osaka District Court and the Osaka High Court.[10] On 15 February 2022, the SCJ declared the Ordinance constitutional, dismissing the plaintiffs' appeal.[11] This ruling marked the first time that the SCJ had given a constitutional judgement on an ordinance concerning hate speech.

The SCJ acknowledged the significance of freedom of expression to the political process of constitutional democracy but also recognised that it is subject to "reasonable, necessary, and indispensable" restrictions for public welfare.[12] The court states that to determine whether restrictions under a specific provision are approved, within these limits, it weighs the extent to which such restrictions are necessary for the purpose of the provisions identified, alongside the content and nature of the freedom to be restricted, and the specific form and extent of the restrictions to be placed on it.

In the application of these criteria, the SCJ deemed the purpose of the Ordinance to be reasonable and justifiable. The court underscored the importance of deterring discriminatory behaviours that intend to incite or encourage discrimination or hatred of persons belonging to a particular racial or ethnic group or to incite criminal acts that may harm the life or body of such persons. The court clarified that these provisions apply even if these behaviours target unspecified people, such as an entire ethnic group, which may not immediately give rise to civil or criminal liability. The SCJ recognised the urgent necessity of hate deterrence based on the growing prevalence of malicious and extreme acts of expression in Japan. The court also noted that the content and nature of the expressive activities restricted by the Ordinance are limited to extreme and highly malicious discriminatory speech and behaviour and that the manner and extent of the restrictions permitted are only subject to ex post facto anti-proliferation measures by the Osaka City mayor. The SCJ also stated that the mayor may request the removal of signs and postings or the deletion of expressions on the Internet but that there is no sanction for those who do not comply with such requests, and there is no further enforcement mechanism in place to identify the name of the offender after publishing their handle or username. Therefore, the restrictions on freedom of expression under the Ordinance were deemed to be limited to a reasonable, necessary, and indispensable extent. As the provisions of the Ordinance were not unclear or overly broad, the SCJ concluded unanimously that the Ordinance did not violate Article 21 (1) of the Constitution.

1.3. Foreseeable Impact of the Case

This ruling is expected to have a significant impact on the ongoing discussion regarding the delicate balance between freedom of expression and the implementation of anti-hate speech ordinances in different parts of Japan. The ruling may potentially catalyze the adoption of similar ordinances in other areas, thereby promoting the movement against hate speech in alignment with the principles in Japan's Constitution and international human rights law. The ruling's significance lies in its potential to foster a broader recognition and understanding of the importance of addressing hate speech while safeguarding the fundamental right to freedom of expression.

2. Overseas National Review Case

2.1. Background

On 25 May 2022, the Grand Bench of the SCJ ruled that the Act on National Review of Judges of the SCJ (hereinafter 'the National Review Act') violated the Constitution by failing to provide any mechanism for Japanese overseas nationals to exercise their rights in a national review (*Overseas National Review Case*[13]). This decision represents the eleventh time that the SCJ has ruled that a statute violates the Constitution.

The Constitution provides for a national review of judges of the SCJ. On the same day as general elections (i.e., for the members of the House of Representatives), the people can decide whether newly appointed judges and judges who have been on the bench for ten years since their most recent review should be dismissed from office by a majority vote (Article 79 (2) and (3)). The right to review has generally been considered a constitutional right as part of the citizens of Japan's "inalienable right to choose their public officials and to dismiss them" (Article 15 (1)). However, the Constitution does not specify the functional details of this system, including the methods and procedures for the national review, the body that should administer it, and the scope of eligible persons. Instead, "[m]atters pertaining to review shall be prescribed by law" (Article 79 (4)). Thus, the Diet enacts the National Review Act.

The National Review Act is partly linked to the Public Offices Election Act (hereinafter 'the POEA'). First, Article 4 of the National

Review Act prescribes that voters eligible to take part in general elections - Japanese nationals over the age of 18 (cf. Article 9 (1) of the POEA) - shall have the right to review. Second, the National Review Act utilises the list created by the POEA on which eligible persons must be registered to exercise their rights. In order to ensure the proper administration of elections, the POEA stipulates that only those registered on a list compiled by municipal election administration commissions may *exercise* the right to vote (cast a ballot). There are two sets of lists: "the lists of voters" and "the lists of overseas voters." The latter was first introduced when the POEA was amended in 1998 to allow Japanese nationals overseas to vote in the Diet membership elections. Although the overseas voting system initially covered only elections for the Diet members elected by proportional representation (not by electoral districts)[14], the 2006 revision of the POEA expanded this system to encompass elections of all Diet members. However, due to the inaction of the Diet, there was no corresponding system for national review. Thus, Article 8 of the National Review Act stipulated that only "the lists of voters" used in general elections should be used for national review. In this way, the National Review Act failed to provide a system for eligible Japanese overseas nationals to *exercise* their right to review.

2.2. Substantial Constitutional Issues

In the *Overseas National Review Case*, the SCJ held that the National Review Act's failure to allow Japanese overseas nationals to exercise the right to review violated Article 15(1) and Article 79(2), and (3) of the Constitution. It is noteworthy that the SCJ, characterised by its general tendency to defer to legislative determinations, applied the most stringent test to determine the constitutionality of the National Review Act. The SCJ stated, "it is in principle impermissible to restrict the people's right to review or its exercise," and that to restrict them, "there must be grounds due to which such restriction is found to be unavoidable."[15] It continued, "[s]uch unavoidable grounds cannot be recognized unless it is found to be practically impossible or extremely difficult, without imposing such restriction, to allow the exercise of the right to review while securing the fairness in the national review."[16] It then concluded that "it is absolutely impossible to say that there were unavoidable grounds" for the total absence of an overseas review system, pointing out that the overseas voting system has been operated correctly since its introduction, and that the technical difficulties claimed by the government could be resolved by proper system design[17].

This constitutional test is the same as that applied in the *Overseas Election Case* in 2005,[18] wherein the SCJ found the POEA specification limiting the overseas voting system to a proportional representation election only to be unconstitutional. In this case, the SCJ stated that the equal opportunity to vote is constitutionally guaranteed and that the most stringent test should be applied to its restriction. As the justification of this ruling, the SCJ referred to the right to vote "as the core of parliamentary democracy," representing the principle of popular sovereignty proclaimed in the Preamble and Article I of Japan's Constitution and to the constitutionally guaranteed right to take part in national administration "as the sovereign."[19]

On what grounds did the SCJ extend the test applied in the *Overseas Election Case* to the context of the national review? The SCJ stated that the Constitution guarantees the right to review as the right of the people in light of the position and power of the Supreme Court, which ultimately holds the final say on constitutional matters (Article 81) and so forth. It then stated, "the right to review has the same nature as the right to vote in that both rights constitute part of the power of the sovereign that is clearly prescribed in the Constitution based on the principle of sovereignty of the people,"[20] and referred to the fact that the Constitution stipulates that the national review and a general election must be held together. Thus, according to the SCJ, "it is appropriate to consider that the Constitution guarantees the opportunity to exercise the right to review equally to all the people in the same manner as it guarantees them the right to vote."[21]

2.3. Constitutional Litigation Issues

The Constitution of Japan adopts the concrete judicial review system, not the abstract judicial review system. As such, it does not permit actions before the courts solely on the basis that a statute is unconstitutional. The courts may only engage in constitutional review to the extent that a lawful action is brought under the procedural rules and to the extent necessary for the resolution of that action. As a result, those seeking to challenge the constitutionality of statutes have first struggled to show that the case in question is lawful under procedural rules.

In this case, the plaintiffs had brought declaratory judgement actions and claims for compensation for damages under the State Redress Act. In those declaratory judgement actions, the plaintiffs sought two declarations: (i) a declaratory judgement that they have the status to be able to exercise the right to review in the next national review (hereinafter 'the declaration of the status'); and (ii) a declaration that it is illegal not to allow the plaintiff to exercise the right to review in the next national review (hereinafter 'the declaration of illegality').

With regard to the declaration of the status, the SCJ noted that "this approach … is found to be an effective and appropriate means for solving a legal dispute on the existence or nonexistence of his/her status"[22] and thus affirmed the legality of the plaintiff's action for the declaration of the status. However, the SCJ rejected the declaration that the plaintiff had the status to exercise the right to review in the next national review on the grounds that the existing National Review Act did not allow for the exercise of the right to review by Japanese overseas nationals[23].

With specific regard to the action seeking the declaration of illegality rather than legal status, there was no precedent for admitting such action, which led some to assume prior to this ruling that the action itself was not lawful. However, the SCJ held that the action for the declaration of illegality was legal on the grounds that 1) the plaintiff's legal status was in actual danger, 2) the right to review is meaningless unless it can be exercised, and 3) once illegality is declared, the Diet would take prompt action per Articles 81 and 99 of the Constitution. In conclusion, the SCJ declared that it would be illegal not to permit

Japanese overseas nationals to exercise the right to review in the next national review.

In summary, the SCJ cannot declare that the right to review can be exercised as long as the legislation of the Diet does not permit it, but it can declare that it is illegal for the Diet not to admit the exercise of the right to review. Although this may appear as formalism, one could say that the SCJ complied with the principle of separation of powers in that it is exclusively the jurisdiction of the Diet to give concrete effect to the right[24]. In any case, the Supreme Court's recognition of the action for declaration of illegality has blurred the boundary between abstract and concrete constitutional review in Japanese constitutional practice. In his concurring opinion, prominent administrative law scholar and Supreme Court judge Katsuya Uga argues that the ruling on this action for the declaration of illegality is in line with the purpose of the 2004 amendment of the Administrative Case Litigation Act, which was aimed at revitalizing administrative litigation.

Although compensation for damages caused by legislative inaction by the Diet is only recognized in exceptional cases, the SCJ ordered the government to pay ¥5,000 in damages to the plaintiffs who could not exercise their right to review.

IV. Looking Ahead

The Japanese government and scholars continue to discuss the issues raised above. The Religious Corporation system, in particular, is currently being examined by a task force from the Agency for Cultural Affairs. While there is no doubt that these issues are leading to some significant changes in Japan's legislative landscape, Japan is also experiencing a new, though long-standing, problem in securing equality for LGBTQ+ people. Marriage for All Japan, a Public Interest Incorporated association dedicated to overturning Japan's ban on same-sex marriage, sued to have the ban on same-sex marriage declared unconstitutional and won in two lower court cases. In addition, the SCJ decided in December 2022 to refer to the Grand Chamber the case concerning the unconstitutionality of Article 3 (4) of the Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder. This article stipulates that a person who wishes to correct their gender in the family register must undergo surgery to eliminate their reproductive capacity. This is an opportunity for Japan to end severe discrimination against LGBTQ+ people. Whether the courts will make the right decision will have to be carefully observed.

V. Further Reading

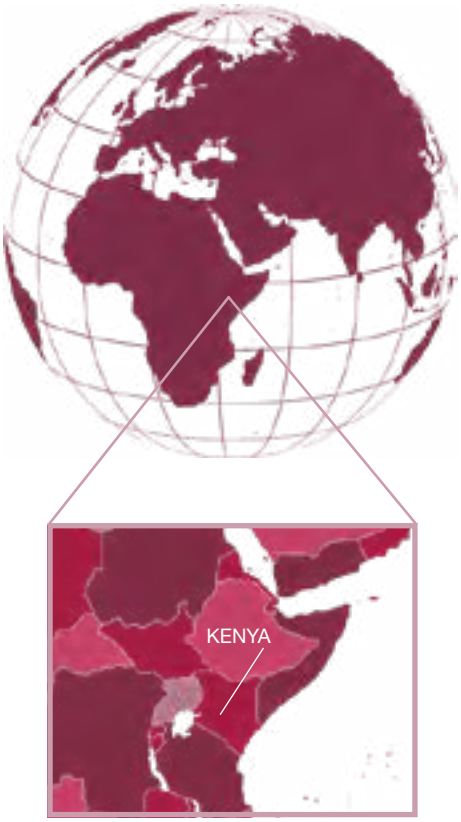
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Kenya

Tioko Emmanuel Ekiru, *Advocate of the High Court of Kenya, utorial Fellow at Daystar School of Law*

Jill Cottrell Ghai, *Katiba Institute, Nairobi*

I. Introduction

Kenya, like many other countries, has been grappling with various challenges, including the enduring impact of the COVID-19 pandemic; extreme climate situation coupled with prolonged drought and starvation; run-away inflation; the rising cost of living; unhealthy debt burden, and the fall of the Kenyan shilling against the dollar and other global currencies.

The main politico/constitutional event was on 9th August 2022: the third general election under the 2010 Constitution. This was for the president, members of parliament (including a woman for each county in the National Assembly), senators, county governors, and members of county assemblies. The presidential election was very close. After a fierce legal battle launched by the most narrowly defeated candidate, Raila Odinga, the Supreme Court, on 5th September, upheld the election of William Ruto as the President-elect. Odinga still (October 2023) refuses to accept the result.

After the announcement of the presidential election results, the Independent Electoral and Boundaries Commission (IEBC) was at a crossroads. Four of the seven commissioners had rejected the presidential election results announced by the chairperson, terming the process "opaque." By the end of the year, a tribunal to consider the removal of those commissioners was sitting, and three had resigned (pre-empting the risk of their being unable to hold state office in the future under Article 75(3)).

The election saw a gradual improvement in the representation of women. Hon. Martha Karua was the first-ever female presidential running mate for one of the major coalitions (Azimio la Umoja Coalition). In the National Assembly, the gradual increase in female constituency MPs continued: 27 women were elected for constituencies (as opposed to 23 in 2017) and, with the 47 county women, and four of the 12 list (or "nominated" members), make up 78 of the 349 members or 22.35% - still short of the constitutionally mandated not less than one third (actually "not more than two-thirds of either gender"). The same number of women county Senators (namely three) were elected as in 2017, but seven women were elected county governors as opposed to the three in 2017.

II. Major Constitutional Developments

With a new government – and one that was at odds, indeed daggers drawn, with its predecessor - much attention was naturally focused on espoused policies and the signs of how far these would be carried forward. More constitutionally significant were some issues of appointment.

President Ruto started his official duties by appointing four Court of Appeal judges and two Environment and Land Court judges whom his predecessor, Uhuru Kenyatta, had refused to appoint - on the basis of alleged adverse reports from the intelligence service casting doubt on their characters and integrity. These judges' names were among the 40 (supposedly binding) recommendations by the Judicial Service Commission (JSC) to the president.[1]

Other controversial appointments were those that seemed to favour political friends, including those disappointed in the elections, particularly to positions in parastatals. And the reappearance of a creature created by the previous President, called Chief Administrative Secretaries (CASs - a sort of Assistant Minister, though, like their superiors, the Cabinet Secretaries, not members of Parliament) also stirred controversy. The government believed that obstacles to the whole idea of CASs arising from a court case decided in 2021[2] had been overcome. The Public Service Commission (PSC) had recommended the creation of the post, thus overcoming the problem that the President could not alone create a post in the public service. However, controversy remained because the PSC had recommended 23 of them, but the President had appointed 50.

Tribunals were appointed to consider the removal of two superior court judges: Justices Farah Amin in January and Said Chitembwe in May. The removal of the latter was recommended by the Tribunal; he appealed to the Supreme Court. The matter is now still pending in that court.

Many of Kenya's constitutional dramas/controversies are played out in the courts. It was there that the death knell of the Building Bridges Initiative, at least in its original form was sounded (see below).

III. Constitutional cases

1. Supreme Court

1.1. *Attorney General v David Ndii &79 others* [2022] KESC 8 (KLR) March (2022) (Supreme Court)3 Basic structure doctrine; popular initiative for amendment

A bench of all seven judges of the Supreme Court rendered the final verdict on the Building Bridges Initiative (BBI) declaring it unconstitutional on various grounds, largely affirming the decisions of the High Court and Court of Appeal.[4] In brief, the BBI was an initiative to try to be more inclusive in politics, including amending the Constitution (over 70 times) to introduce a Prime Minister from Parliament, make the leading unsuccessful contender for President the Leader of the Opposition in the National Assembly, guarantee the elusive gender rule in Parliament, and appeal to a number of interests to get broad support.[5]

Unlike the lower courts, however, the Supreme Court concluded that the basic structure doctrine is not applicable in Kenya. This issue attracted much academic interest, and seven foreign scholars were admitted as amici curiae.

The finding that the BBI was unconstitutional was based on two grounds: First, the President, as the head of state, cannot initiate a popular initiative, a process for citizens, to amend the Constitution, and since BBI was seen as the President's initiative, it was declared unconstitutional.

Secondly, the Court held that requiring the creation of new constituencies by this Bill was unconstitutional because it did not involve a participatory, consultative, and inclusive process provided in Articles 10(2)(a) and 89 of the Constitution.

The various other issues included whether civil proceedings could ever be instituted against the President (or anyone performing the functions of that office) personally while in office in respect of anything done or not done contrary to the Constitution. The court held they could not.

Finally, the court, disagreeing with earlier judges, held that the IEBC, even though it did not have the statutorily specified number of commissioners during the BBI process, had the quorum necessary to review and verify the amendment process because the Constitution specified a minimum of three commissioners for any commission.

1.2. *Institute for Social Accountability & Another v. National Assembly & 3 Others*, SC Petition No. 1 of 2018; [2022] KESC 39 (KLR).6 Separation of powers, accountability, good governance

The Constituencies Development Fund Act of 2013 set up a system under which money was allocated to National Assembly constituencies for expenditure on local projects, through a system involving MPs. Although the Supreme Court accepted that the Kenyan Constitution did not follow a "pure" separation of powers model, it set out a before two-pronged test for violation of the doctrine. First, whether a state agency has encroached on the core domain of another branch of government, and second, whether the impugned power would threaten the values and principles provided in The Article 10 of the Constitution.

The court then found that the Constitution was clear on the power of an MP - which entails representation, legislation, and oversight over the government. But, under the CDF Act, an MP "influences the selection, allocation of funds and monitors the implementation of the projects, which were executive functions."[7]

The Supreme Court also held that the Act infringed the "vertical" separation of powers (between national and county governments). It also found that the 2013 amendment Act had transferred the constitutional basis of CDF from Article 202(2) of the Constitution (which authorizes the national government to make "additional allocation" to county governments) to Article 206(2) of the Constitution (which authorizes the withdrawal of money from Consolidated Fund) changed the manner of transfer for the CDF to counties, thus "creating an effect on the functioning of county governments." Therefore, it should not have been passed without the involvement of the Senate, the roles of which include participating in making laws concerning counties (Article 96(2)).[8]

The Court further held that the issue was not "moot" (since the matter was still of active importance) even though the Constituency Development Fund (CDF) Act 2013 had been replaced with the National Government Constituency Development Fund Act 2015, which had not settled the issues between the parties.

1.3. *Sonko v. Clerk, County Assembly of Nairobi City & 11 Others*, SC Petition No. 11 (E008) of 2022; [2022] KESC 26 (KLR)9 Impeachment of county governor

The former Governor of Nairobi, Mike Mbuvi Sonko, challenged his removal through the impeachment process. Specifically, among other things, he argued that his impeachment

violated the sovereignty of his constituents and undermined their democratic vote since his removal was not conducted within the scope of due process and fairness as provided in Article 50 of the Constitution.

The apex court outlined the role of courts in petitions challenging the process of impeachment of County Governors. It stated that the process is the responsibility of legislative bodies, that is the County Assembly and the Senate. Courts may intervene to interfere with the actions of legislative bodies where there has been a failure to comply with the Constitution, including human rights provisions.

However, the Court found that there was no violation of the Constitution or the law as alleged by the petitioner, in agreement with the lower courts upholding the removal of Governor Sonko from office.

1.4. *Senate & 2 others v Council of County Governors & 8 Others* Petition No. 25 of 2019 (2022) KESC 7 (KLR) 10 Senate/ County Government relations

This case challenged the constitutionality of a 2012 amendment of the County Governments Act establishing County Development Boards in each county and allocating significant authority over county governance to Senators, who would serve as chairs of those Boards. The Supreme Court upheld the Court of Appeal's decision, holding the amendment unconstitutional. It was inconsistent with the hierarchy of power in the county system and involved Senators in responsibilities that belonged to the County Assemblies (namely oversight of the county government) or the county executive (namely coordination or implementation of county projects).

1.5. *Senate v. Council of County Governors & 6 Others*, SC Petition No. 24 & 27 of 2019 (Consolidated); [2022] KESC 57 (KLR)11 Senate oversight role; summoning Governors

This judgement addressed whether the Senate had powers to summon County Governors in the performance of its oversight role over county revenue and held that it clearly did. It also elaborated on the relationship between the county assemblies and the Senate. It said that "the County Assemblies provide the first tier of oversight while the Senate provides the second and final tier of oversight".[12] It warned against the Senate trying to supervise the county assemblies or take over their roles. If the Senate acted within its mandate, it posed no challenge to the separation of powers or the roles of independent offices such as the Controller of Budget and the Auditor General.[13] The Constitution (Art. 96(3)) says that the Senate "exercises oversight over national revenue allocated to the county governments." However, the Supreme Court, in this case, said that the Senate's oversight responsibility extends to all county revenue, reversing the Court of Appeal on this point.[14]

2. The Court of Appeal

2.1. *Njenga v Judicial Service Commission & 9 others* (Civil Appeal 234 of 2017) [2022] KECA 1429 (KLR)15 Two-thirds gender rule in judiciary

Largely disagreeing with the High Court, the Court of Appeal held that for the seven-person Supreme Court to include fewer than three women judges was unconstitutional. This was not affected by the fact the judiciary that men made up no more than two thirds of the judiciary as a whole. The Judicial Service Commission had an obligation to work progressively towards achieving the gender rule throughout the levels of the judiciary. (However, by the time of the decision, the Court was compliant, having three women judges).

3. High Court

3.1. *Khalifa and another v Principal Secretary, Ministry of Transport & 4 others* [2022] KEHC 368 (KLR)16 Access to information

This case was filed after the government had declined to disclose contracts, concessions, memoranda of understanding, and other documents related to the construction and financing (by Chinese agencies) of the Standard Gauge Railway (SGR). The Court found that the government had violated the petitioners' rights to access information under Article 35 of the Constitution by failing to respond properly to the petitioners' requests for information. The Court also held that the government should have published the information on its own initiative because it qualified as information that is important to the public as provided under Article 35(3) of the Constitution.

The Court further held that if the government contends that it cannot divulge information (here for alleged reasons of national security), it must provide adequate evidence to show that the information falls within the alleged exception. It is not enough to recite the provisions of the Access to Information Act exempting certain information from disclosure.

3.2. *PAK and Salim Mohammed v AG* (Constitutional Petition E009 OF 2020) [2022] KEHC 262 (KLR)17 Criminalisation of abortion; reproductive rights

This is one of several cases exploring the implications of the constitutional provision that generally prohibits "abortion" but says this is unless needed as emergency treatment or if the life or health of the mother is in danger (Article 26(4)), while the criminal law still penalizes it in broad terms.

The High Court stated that abortion is a fundamental right (though not an absolute right) under the Kenyan Constitution. The Court issued an order directing that the parliament should take necessary steps to align the Penal Code with the Constitution. It also quashed criminal charges against one petitioner and held that the forced medical examination of her violated her constitutional rights to freedom from torture and cruel, inhuman and degrading treatment, and her rights to life, human dignity, freedom and security of the person, and to privacy.

3.3. *Katiba Institute & another v Attorney-General & another* [2022] KEHC 17072 (KLR)18 Police use of firearms

This case challenged paragraphs 1(c), (d), and (e) of part B of the Sixth Schedule to the National Police Service (Amendment) Act providing that firearms could be used to protect life and property, prevent a person

charged with a felony from escaping lawful custody, or prevent a person who attempts to rescue such a person. The amendments reversed legislation soon after the 2010 Constitution that limited the use of firearms to "saving or protecting the life of the officer or other person, and in self-defence or in defence of another person against imminent threat of life or serious injury." The petitioners argued that the impugned amendments curtailed the constitutional gains, thus threatening various constitutional rights.

The High Court found that the amendments of the National Police Service Act were unconstitutional for contravening the rights to life, dignity, and to a fair hearing as recognized in Articles 26, 28, and 50 of the Constitution respectively. And they failed to comply with the necessary safeguards in Article 24 of the Constitution about when and how rights may be limited.

3.4. *Katiba Institute v Independent Electoral Boundaries Commission & 3 others; Law Society of Kenya & another* (Interested parties) [2022] (eKLR)19 campaign expenditure regulations, parliamentary approval, adequate public participation

In this case, the constitutional validity of section 29(1) of the Election Campaign Financing Act was challenged. The Act authorizes the Independent Electoral Boundaries Commission (IEBC) to make regulations with regard to the transparent, accountable, and responsive use of political campaign-finances. The regulations were adopted by the IEBC in 2022, but Parliament failed to approve them. The section was challenged before the High Court.

The Court ultimately found the above section of the Act to be incompatible with Article 88(4) of the Constitution which vests responsibility for developing election regulations in the IEBC alone. Section 29 of the Act was found unconstitutional because it required the Commission to get parliamentary endorsement of the draft regulations – so Parliament would be "usurping the role of the Commission" because "what will eventually be gazetted will be what the Parliament would have come up with and not the Commission".

The Court also held that regulations to be made by the IEBC according to its Article 88(4) mandate are statutory instruments (and therefore to comply with the procedures under the Statutory Instruments Act).

It also ruled that spending limits established under sections 12, 18, and 19 of the Election Campaign Financing Act do not require parliamentary approval but do require public participation and consultation as provided for in the Constitution.

Apart from declarations of unconstitutionality, the Court "called on" the IEBC to develop regulations as envisaged by the Constitution.

The case is significant in the sense that it highlights the need to embrace transparency, accountability, and responsiveness in the use of political campaign finance and the need for government bodies to comply with the constitutional processes when establishing regulations that aim to affect the general public.

4. Environment and Land Court

4.1. *Njeri & others v Nyakiongora, &3 others* Environmental & Land Petition 47 of 2018 [2022] KEELC 2366 (KLR)20 Property, demolition, children, elderly, women; compensation

The case was about individuals who were forcefully evicted from their homes. The petitioners had complained of massive loss of property as well as the destruction of churches, mosques, and schools resulting in destitution for men, women, children, the elderly, and the disabled.

The Environment and Land Court held that the evictions were unlawful and that they violated the petitioners' fundamental rights to dignity and freedom from inhuman and degrading treatment, rights to property, rights to education, rights to adequate housing, and the rights of children, the elderly, and persons with disabilities as guaranteed by the Constitution. There was inadequate consultation or notice and no alternative accommodation for the vulnerable.

Given the grave nature of the illegal and forceful evictions, the petitioners were also awarded one million Kenya shillings each as compensation, compensation being a remedy specifically recognized by the Constitution (Article 23(3)(e)). In arriving at this quantification of compensation, the court considered at some length the relevant principles applicable to the award of damages for violation of a fundamental right, especially in the jurisprudence of a number of other jurisdictions.[21]

The decision is, however, rather disappointing in its application of the principles to the case, not really explaining the basis for the one-million-shilling awards.

It can be said, however, that this decision aims to serve as a pointer to state organs and non-state actors that they must always carry out any form of evictions in a humane and lawful manner that resonates with the constitutional values and principles.

4.2. *Kitelo & 2 others v County Government of Bungoma & another* [2022] KEELC 4901 (KLR)22 Conversion of community land to forest land; right to access information, right to information

This case was one of several cases that have been filed by or on behalf of the indigenous forest-dwelling Ogiek community about being driven from their ancestral lands, before not only Kenyan courts but also the African Court of Human and People's Rights. The Environment and Land Court affirmed in this case that the community's ancestral land had been converted in a manner that violated the Constitution and the relevant laws. The Court also agreed with the plaintiffs' submissions that the failure by the County Government to carry out an Environmental Impact Assessment (EIA) on the said land runs contrary to the Constitution, as it violates the rights of the Ogiek Community such as the right to access information and the right to information under article 35 of the Constitution.
Although not based on the Constitution of Kenya, it is perhaps relevant to note that, also in 2022, the African Court ordered reparations to the Ogiek for violations of their

rights to life, property, natural resources, development, religion, and culture, under the African Charter on Human and Peoples' Rights.[23]

IV. Looking ahead

Barely two months after assuming office, President Ruto proposed to his members of Parliament through the speakers of the two houses various constitutional changes involving the creation of the office of the official opposition leader and amending the law to speed up the implementation of the two-thirds gender rule. This was in addition to changing the parliamentary standing orders to allow the participation of Cabinet Secretaries to respond to questions before members of Parliament on the floor of the house (as opposed to before committees which is specifically envisaged in the Constitution).

Although the above constitutional amendments were premised on the notion of enriching Kenya's democratic experience, the move has prompted backlash from different players including members of the opposition who are accusing the President of exhibiting hypocrisy on matters he previously opposed in the BBI, which had proposed, among other things, the mechanism of creation of the office of the opposition leader and the criteria for implementation of the two-thirds gender rule.

Another issue that has been mooted by one of the ruling coalition members of Parliament is the possible plan to remove presidential term limits in Kenya and impose an age limit of 75 for any individual running for the presidency.

President Ruto has dissociated himself from any such debate affirming that he is a democrat and he will obey the term limits imposed by the Constitution. Even though the debate on this issue has been reserved for now, there are fears that if resurrected and carried through in the near future, it would allow the current President to dominate the Kenyan political scene for a long time, turning the country into an authoritarian state as it was under the repealed Constitution.

The Kenyan Constitution, Article 142(2), sets a two-term presidential limit. Amending this requires compliance with complex and stringent constitutional mechanisms including approval in a referendum.

Some of the cases summarized here have been appealed to higher courts, including case No. 6.

On another issue, the former Nairobi Governor, Mike Sonko has gone to a regional court (East African Court of Justice) in Arusha inviting it to quash the decision rendered by the Kenyan Supreme Court with respect to his impeachment. One wonders how he has framed his case, and his chances of success, given the issue of jurisdiction before the regional court, which bars the court from revising, reviewing, or quashing a decision of a member state's court.

V. Further reading

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The Star Newspaper, Nairobi, carries a weekly (Friday) column under the auspices of Katiba Institute, called Katiba Corner (Katiba is "constitution" in Kiswahili). Available on the website of the Star from the following Monday) - https://www.the-star.co.ke/ - or the Katiba Institute site - https://katibainstitute.org/.

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Kosovo

Prof. Dr. Visar Morina, *Professor of Constitutional Law, University of Prishtina/Faculty of Law*

Prof. Ass. Dr. Florent Muçaj, *Assistant Professor of Constitutional Law, University of Prishtina/Faculty of Law*

I. Introduction

In 2002, Kosovo witnessed several significant legal initiatives and developments, which will be discussed in greater detail in the following section. In the context of parliamentary law, the Assembly of Kosovo adopted its new Rules of Procedure, which had not been revised since 2010. Moreover, the Assembly of Kosovo initiated a mass of critical legislation concerning the justice system and for the vetting of judges and prosecutors. Nonetheless, on certain proposed legislation, such as the proposed constitutional amendments for the vetting of judges and prosecutors and the draft Law on the State Bureau for verification and confiscation of unjustified the Venice Commission has called upon the Kosovo authorities to ensure full respect for the constitutional rights and freedoms and the principles of the rule of law in the course of reviewing the proposed legislation.

Referrals to the Kosovo Constitutional Court continued at a high volume in 2022, with cases involving constitutional review of legislation, constitutional protection of individual rights, and constitutional protection of local autonomy all being brought before the Court for interpretation. It is widely acknowledged that the Constitutional Court of Kosovo played a crucial role in protecting constitutional rights and that it issued the first judgement in Kosovo's constitutional jurisprudence on constitutional guarantees of local autonomy.

II. Major Constitutional Developments

One of the main legal developments that occurred in Kosovo concerned the Venice Commission Opinion which dealt with the concept paper on the vetting of judges and prosecutors and drafts amendments to the Constitution adopted by the Venice Commission at its 131st plenary session. In response to the Government's initiative for a full vetting of judges and prosecutors, the Venice Commission recommended introducing legislative changes that would improve the current system of judicial discipline, mainly through strengthening the system of asset declarations and strengthening the vetting units within the Kosovo Judicial Council (KJC) and the Kosovo Prosecutorial Council (KPC). The Venice Commission considered constitutional amendments only as a last resort and for managerial positions with the KJC and the KPC and added that "constitutional changes should be considered only for underpinning integrity checks of the members of the KJC and the KPC, court presidents, and chief prosecutors". In the view of the Venice Commission, while reform of the judiciary in Kosovo is indeed necessary, many elements of such a reform can be adopted on the level of ordinary law, and any vetting or integrity checks system introduced could be limited to KJC and KPC who exert disciplinary power over the other members of the judicial system.[1]

Another significant legal development that was relevant because of its potential implications with constitutional rights contemplated in the 2008 Kosovo Constitution was the

draft Law No 08/L-121 on the State Bureau for verification and confiscation of unjustified assets (hereinafter as "Law on State Bureau"). The Draft Law aims to introduce, in Kosovo, a system of non-conviction-based confiscation.[2] On July 14th, 2022, the Assembly of Kosovo approved the draft Law on the State Bureau, which for its potential implication with constitutional rights anchored in the Kosovo Constitution was referred to the Venice Commission concerning its compliance with European and international standards. The draft Law foresees that all public officials in Kosovo will be subject to verification of assets if there are any suspicions that they were acquired illegally and in the case of a discrepancy between income and property, the Bureau will send the case to court for confiscation.[3]

In its Opinion on the Draft Law No 08/L-121 on the State Bureau, the Venice Commission recalled that "despite their justified purpose, non-conviction based civil confiscation proceedings must be designed and implemented in compliance with the national Constitution, which includes the direct application of the European Convention on Human rights and taking into account European standards concerning the rule of law and respect for human rights". [4] Whereas the Commission welcomed the initiative of the authorities to seek remedies to combat organized crime and corruption, to prevent the exploitation of illegally acquired funds, and to prevent the use of such funds for further criminal activity, it added that the proposed new legislation alone could not be expected to resolve all the problems of corruption and needed to be embedded in a broader approach which would include a range of practical measures aimed at enhancing the effectiveness of the law enforcement system. In order to ensure that the proposed draft satisfies the constitutionality test and the principles of legal certainty and foreseeability, which are key characteristics of a high-quality legal drafting process, the Venice Commission advised the authorities to consider a number of legal issues during the preparation of the final version of the Draft Law.[5]

The ratification of the Assembly of Kosovo's new Rules of Procedure was a further significant development in the realm of parliamentarism.[6] This act went into effect on August 9 and seeks to enhance the legislative, supervision, and other parliamentary capacities of the Kosovo Assembly. The new Rules of Procedure are the result of a decade's worth of parliamentary efforts to update the previous Rules of Procedure adopted in 2010 and resolve the deficiencies identified in the functioning of the Assembly of Kosovo. According to Article 76 of the Kosovo Constitution, "The Rules of Procedure of the Assembly are adopted by a two-thirds (2/3) vote of all its deputies and determine the Assembly's internal organization and method of work."[7]

III. Constitutional Cases

1. Trade Union of the Institute of Forensic Medicine vs. Judicial Power and exercising the control of legality of general acts by regular courts

This case was initiated on the constitutional grounds of violation of human rights, according to Article 113.7 of the Constitution of Kosovo. The applicant, respectively the Trade Union of the Institute of Forensic Medicine, challenged the judgement of the Supreme Court of Kosovo, ARJ.nr 115/ 21, related to the judgments of the Court of Appeals and the Basic Court, regarding this matter.[8] The Trade Union of the Institute of Forensic Medicine, as a party, challenged the judgement of the Supreme Court with the Constitutional Court, alleging that the regular courts violated fundamental rights and freedoms, namely the right to a fair and impartial trial from Article 31 of the Constitution, the right to legal remedies and judicial protection of rights, according to Article 54 of the Constitution of Kosovo.[9] The applicant (the Trade Union of the Institute of Forensic Medicine) claimed that the rejection of each regular judicial level to evaluate the legality of the regulation of the Institute of Forensic Medicine, alleging that regular courts do not evaluate the constitutionality of general acts, had violated the rights of employees of the Institute of Forensic Medicine, stemming from articles 31, 32, and 54 of the Constitution of Kosovo.[10] As mentioned above, the essence of the violation committed by the regular courts in this case, and which was found by the Constitutional Court, had to deal with the fact that the refusal of regular courts to review the regulation of the Institute of Forensic Medicine, on the grounds that this regulation does not constitute a final act in the administrative procedure, was issued in violation of the right to access to court, related to Article 31 of the Constitution of Kosovo and Article 6 of the ECHR.[11] In this case, the Constitutional Court of Kosovo, among others, built a standard, according to which, from now on, the regular courts of Kosovo will evaluate the legality of general acts, respectively regulations that were issued in violation of the constitution and the law. It is worth emphasizing that before the examination of this case by the Constitutional Court, the parties, whose rights were violated in the administrative procedure, could not file a litigation against the general acts, because the general acts (regulations or administrative instructions) did not constitute a final act in the administrative procedure.

2. Supreme Court vs. Constitutional Court and review of constitutionality of Article 94 of the Law on Labour

This case was addressed to the Constitutional Court, according to Article 113.8 of the Constitution or as incidental review, wherein a Judge of the Supreme Court doubted the constitutionality of Article 94 of the Law on Labour.[12] In this case, the Supreme Court requested that the Constitutional Court review the constitutionality of Article 94 of the Labor Law, in relation to Articles 3 and 24 (equality before the law), Article 31 (the right to a fair and impartial trial), and Article 54 of Constitution (judicial protection of rights).[13]

The Supreme Court's primary concern regarding Article 94 of the Law on Labour pertained to the authority and jurisdiction of the Labour Inspectorate, as outlined in the disputed article. The Supreme Court alleged that the Labour Inspectorate made decisions on employee issues and claims related to labor relations in parallel with the courts, based on Article 94 of the Law on Labour. The Supreme Court alleged that the Labour Inspectorate's decision was made in a manner that would give it the status of an enforcement document. The Supreme Court

was examining whether two entities, namely the inspectorate and the court, can concurrently make decisions on a singular matter. Consequently, the Supreme Court, by challenging Article 94 of the Law on Labour, alleged that the Labour Inspectorate was assuming the powers of decision-making, instead of the court.

The Constitutional Court determined that the exclusive authority to perform judicial functions lies with the courts in accordance with both the law and the Constitution, precluding any other entity from doing so. This finding was made during the constitutional review of Article 94 of the Labour Law. [14] The Constitutional Court determined that inspection bodies, including the Labour Inspectorate, are limited to an inspection role as part of the executive branch. They are prohibited from exercising any judicial role, as this would contravene the principle of the separation of powers.[15] The Constitutional Court concluded that Article 94 of the Law on Labour is not in contradiction to the Constitution, thus giving instructions on how the Labour Inspectorate shall apply Article 94, in order to refrain from acquiring judicial powers.[16]

The Constitutional Court set a precedent that restricts the authority of executive bodies, such as the Labour Inspectorate, from making final decisions on legal matters. Only courts are deemed suitable for this purpose. This case will prompt the Labour Inspectorate in Kosovo to revise its decision-making approach with regard to cases evaluated under Article 94 of the Labour Law.

3. Municipality of Kamenica vs Ministry of Education – two cases that violated the municipal autonomy in the area of education

The applicant, in this case, is the Municipality of Kamenica, which filed a petition with the Constitutional Court challenging a decision made by the Ministry of Education with respect to the organization of alternative education in some Kamenica Municipality schools.[17]

The context of the case was focused on the initial decisions of the Municipality of Kamenica, which decided to reform the municipal education system, due to the decrease in the number of students in some of its schools, as some schools had less than five (5) students. [18] In addition, the Municipality of Kamenica faced difficulties and a high budget burden and thus decided to restructure the education system, issuing decisions to close some schools. [19] After the reorganization of schools in the Municipality of Kamenica, the Ministry of Education issued the decision 01B/24, which was challenged in the Constitutional Court. The decision of the Ministry of Education was about the alternative and accelerated organization for 441 students, who were affected by the closure of schools, as a result of the reorganization. The Ministry of Education based its decision on its obligation to guarantee the right to education.[20]

The Municipality of Kamenica petitioned the Constitutional Court to evaluate the Ministry of Education's decision. In the case of challenging the Ministry's decision, the primary argument of the Municipality of Kamenica was that the local autonomy, or the Municipality's self-owned authority over the organization of education, was violated. In accordance with Article 17 of the Law on Local Self-Government, the ability to provide public primary and secondary education is a municipally-owned competence. In this instance, the arguments led to the conclusion that the Ministry of Education had violated municipal autonomy and municipal authority over the organization of education through its decision.[21]

Furthermore, the Constitutional Court found that the decision of the Ministry of Education, through the organization of accelerated alternative learning with the students of the municipality of Kamenica, constitutes a breach of the responsibility of the Municipality of Kamenica for the provision of public education, such as pre-school, primary, and secondary education, pursuant to Articles 12.2, 123, Paragraph 1 and 3, and Article 124 of the Constitution.[22]

Another case, similar to which the Municipality of Kamenica challenged in the Constitutional Court, was the Administrative Instruction of the Ministry of Education No. 104/2020 on the Criteria and Procedures for Establishment and Termination of Activities of Pre-University Education Institutions.[23] The main allegation of the Municipality of Kamenica, as the applicant, was that the Administrative Instruction of the Ministry of Education No. 104/2020, in some of its articles, was issued in violation of the Law on Local Self-Government as well as the Law on Education in Municipalities, pursuant to Articles 12, 123, and 124 of the Constitution.[24]

In this case, the Constitutional Court concluded that Articles 3 (par 5, 6, and 7), Article 6 (par 2 and 3), and Article 9 of the Administrative Instruction of the Ministry of Education No. 104/2020 on the Criteria and Procedures for Establishment and Termination of the Activity of Pre-University Education Institutions" are not in compliance with Article 12.2, Article 123, paragraph 1 and 3, Article 124, paragraph 2 and 3 of the Constitution.[25]

4. Bukurije Haxhimurati vs Supreme Court – Violation of the right to privacy in court proceedings

The decision on this case was published on 05 January 2022. This case is an individual case, filed by Bukurije Haxhimurati with the Constitutional Court, with the aim of protecting her rights and freedom guaranteed by the Constitution. The Applicant alleged that the regular courts violated her right to a fair and impartial trial and the right to privacy during the conduct of criminal proceedings, in which she was accused and sentenced.[26] In her referral to the Constitutional Court, the Applicant emphasized three main allegations: the judgments of regular courts in her case were based on inadmissible evidence, as her telephone text messages were taken retroactively and not from the time the court order was issued and onwards; she was not given access to the case file by the prosecution office; and she was not permitted to cross-examine a protected witness known as witness "C.".[27]

The Constitutional Court in this case concluded that despite the interpretations made by the regular courts, it is not allowed to intercept telephone conversations retroactively in a criminal case.[28] In this case, among other

things, the Constitutional Court established a new standard for the regular court in the Republic of Kosovo, requiring that telephone interceptions occur only after a court order is issued.[29] The Constitutional Court determined that the Applicant's right to privacy, as outlined in Article 36 of the Constitution, was violated in this instance. However, the Court found that this violation did not impact the fairness or impartiality of the trial process, as claimed by the Applicant. Thus, it affirmed the contested decision of the Supreme Court.

V. Further Reading

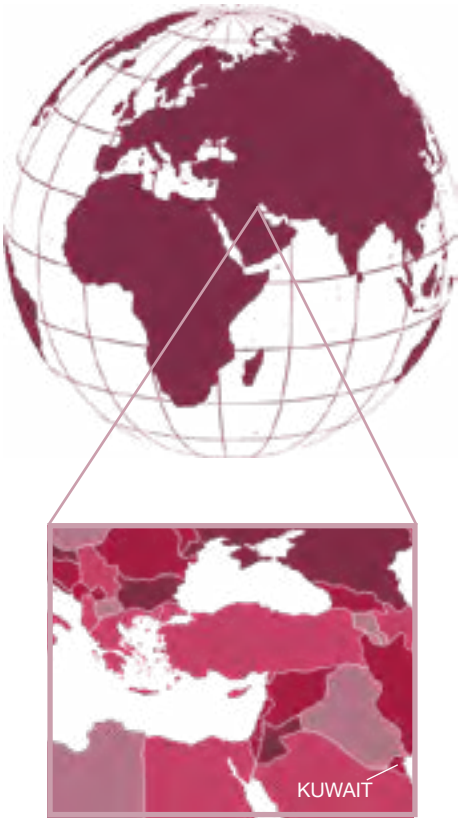
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Venice Commission Opinion on the Draft Law N°08/L-121 on The State Bureau for verification and confiscation of unjustified assets, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022)

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Kuwait

Dr. Sharaf Al-Sharaf, *Assistant professor, School of Law - Kuwait University*

Nawaf Alqahtani, *Lecturer, School of Law - Taibah University (Saudi Arabia)*

I. Introduction

Kuwait's Constitution was issued in 1962, following its independence from the United Kingdom. The Kuwaiti Constitution is based on democratic principles, and it guarantees fundamental rights and freedoms to all citizens. It establishes a system of government that is based on the separation of powers between the executive, legislative, and judicial branches, with the Emir serving as the head of state and the chief of all authorities. Kuwait's constitutional system distinguishes itself from the GCC monocracy system in its focus on democracy, an independent judiciary, and the role of institutions.

1. The structure of the Constitution

The executive branch is headed by the Emir of Kuwait, who is responsible for appointing the Prime Minister and approving the chosen ministers, as well as approving laws passed by the National Assembly. The Emir has significant powers, including the ability to appoint and dismiss the Prime Minister and other high-ranking officials. The Emir also has the power to dissolve the National Assembly "the country's parliament" and call for new elections.

The legislative branch in Kuwait is represented by a single chamber embodied in the National Assembly, which consists of 50 members who are elected every four years. The Kuwaiti constitution requires that the number of ministers as members of the National Assembly does not exceed one-third of the number of representatives (meaning that it does not exceed 16 ministers). The National Assembly has the power to enact laws, approve the government's budget, question government officials about their policies and actions, and oversee the government's performance generally.

The judicial branch is independent and is responsible for interpreting the Constitution and enforcing the law. The Constitutional Court is responsible for reviewing the constitutionality of laws and resolving disputes between different branches of government, and the other courts are responsible for interpreting the laws and enforcing them. The highest court of law in Kuwait is the Court of Cassation, which is responsible for reviewing appeals from lower courts and ensuring that the laws are being applied correctly.

Overall, Kuwait's Constitution provides a system of government that is based on the principles of democracy, the rule of law, and respect for human rights. While there have been challenges and controversies in the implementation of the Constitution, Kuwait has made significant progress in expanding the rights and freedoms of its citizens and enhancing the powers of its institutions.

2. The History of Constitution

The Kuwaiti Constitution has not been amended since its inception in 1961 because the process of amending the Constitution is intentionally difficult. According to Article 139 of the Kuwaiti Constitution, any amendment to the Constitution requires the approval of two-thirds of the members of the National Assembly. Additionally, the Emir must approve the amendment, who has the power to veto any proposed amendments.

This high threshold for amending the Constitution is meant to ensure that any changes to the country's fundamental laws are carefully considered and supported by a broad population consensus. It also reflects Kuwait's commitment to stability and continuity in its political and legal systems. While there have been some calls for constitutional reforms in recent years, no amendments to the Constitution have been made since 1961.

As with any legal system, the Kuwaiti constitutional law has its own set of disadvantages or challenges that may affect its effectiveness or implementation, such as political instability; Kuwait has experienced political instability in the past, including political protests and multiple dissolutions of the National Assembly. This instability can make it difficult to implement and enforce constitutional provisions effectively and challenging to ensure that the system operates effectively and in line with the principles of democracy and the rule of law.

Overall, improving the effectiveness of Kuwaiti constitutional law will require a comprehensive and sustained effort by the government, civil society organizations, and the wider public. It will also require a commitment to upholding the principles of democracy, the rule of law, and respect for human rights.

II. Major Constitutional Developments

The most significant constitutional event of 2022 was the dissolution of the National Assembly by the Deputy Emir of the State of Kuwait on 2 August 2022 as a result of the conflict between members of Parliament and the formation of a new government headed by a new Prime Minister. The elections were held on 29 September 2022, as stipulated in Article 107 of the Constitution that: "Elections shall be held no later than two months from the date of dissolution", the people have chosen their representatives, with a vote percentage of 63% (an excellent attendance ratio), which led to a 54% change in the former Parliament and the opposition's acclamation of the presidency of Parliament.

However, the Constitutional Court later ruled that the elections held in 2022 and the membership of representatives of Parliament were null and void. That was due to a procedural error caused by the Government. So, the will of the electorate - going to vote and choosing their representatives - came untrue, where the elections were held on the basis of null and void procedures, and therefore the former Parliament of (Parliament of 2020) should be brought back by the force of law to act as Legislative power.

That was not the first time that the Constitutional Court invalidated the will of the nation and the elections for a reason due to the executive branch - the decree to dissolve the National Assembly and the proceedings were incompatible with the provisions of the Constitution - as it had already ruled in 2012 and 2013, causing the people to be frustrated, especially when the Constitutional Court renders the fate of Parliament and the validity of its proceedings to the action of Government, which may misuse by calling elections wrongfully. Therefore, the Constitutional Court should have taken into account the people's going to polling places and their will of choosing the representatives in Parliament as a remedy for any null and void action caused by the Government.

One of the constitutional developments that Kuwait went through in 2022, was the amendment of the electoral registration. The Government issued a decree dated 18/08/2022 to make voting at the address registered on the Civil ID at the time of the election. The electoral registration system previously allowed the voter to vote in the constituency where his father's home address or a newly chosen address (usually a false address created for an electoral purpose), which allowed the formation of new electoral clusters and polarizations when new elections are held, so that the latest people's choice of their representatives is true based on their will elections. This was a step in the right direction by the Government to prevent fraud and abuse of erroneous electoral restrictions, but this decree was provisional for the only 2022 election.

The lack of parliamentary sessions in the event of the Government's absence from attendance was again raised in 2022. The chairperson used to cancel many sessions due to the Government's lack of attendance. Unfortunately, that has become a constitutional norm due to the cancellation of Parliament sessions applied by the chairpersons of previous parliamentary terms even though there is no explicit constitutional provision. This constitutional norm puts the fate of Parliament into the hands of the Government, which decides to attend whenever it wants. That undoubtedly represents an anomalous system that does not exist in all other democratic states, which calls for us to resolve the issue either by resorting to the Constitutional Court or by amending the law on the Rules of Procedure of Parliament. The opposition always seeks to find and support a strong and independent chairperson of parliament who increases the powers of the parliament so that it does not cancel the parliament session even if members of the government are absent. The opposition also avoids the option of resorting to the Constitutional Court to challenge the constitutionality of canceling sessions in the absence of members of the government, fearing that the court would endorse this cancellation (i.e. the constitutional norm) and, therefore, the norm would gain more constitutional legitimacy.

The aforementioned political situation, which successively and repeatedly prevents Parliament from monitoring the actions of the Government, is due to the failure to develop the electoral system and the failure to amend the Constitution since its promulgation. Failure in these two matters has caused a constitutional stalemate that requires many reforms and amendments, especially with regard to the unregulated fixed period in which the Government must be formed, as well as the suspension of Parliament's work in the absence of the Government. Also, one of the disadvantages of the Kuwaiti electoral system is that it is individual voting, not lists according to an electoral program or an action plan, as in political parties or electoral lists. In addition to the fact that the fate of Parliament is threatened by the Constitutional Court, which monitors the election proceedings - After a while since the end of the elections - and then rules that the proceedings - which were due to the Government - are invalid and dissolve Parliament and call for new elections. Such oversight should be preceded by the electoral process elections, where the Constitutional Court could decide

whether or not the proceedings are correct before the elections take place.

III. Constitutional Cases

1. *Jalawi Al-Jomaih v the Prime Minister and the Ministers of Interior and Health (Case No.3/2022)*: the Right to health

The case's beginnings go back to February 2021, when the Council of Ministers issued a decision to impose institutional quarantine on those arriving in the country for 7 days in a local hotel, and that the accommodation costs will be at the arrivals' own expense.

The plaintiff claimed that the decision to compel the Kuwaiti citizens to bear the expenses of the institutional quarantine violates Articles 11, 15, and 25 of the Constitution. These texts expressly state that one of the State's duties is to sponsor health care for citizens, maintain public health, and provide all means of treatment. The State should also support enduring the solidarity of society (societal solidarity) in bearing the burdens caused by public disasters and tribulations.

The Court justified its refusal of the lawsuit by stating the Constitution has indeed stipulated in Articles 11 and 15 of the State's commitment to sponsoring health care for citizens and taking the necessary means for the prevention and treatment of diseases and epidemics. Accordingly, the State must be committed to providing health care services to every citizen equally and without discrimination. However, the Constitution did not include a text to provide these services without charge (free); moreover, it did not include a text requiring the State alone to bear all financial burdens to fulfill its health commitment, but instead left the State the right to assess, whether obligating citizens to financially contribute to these burdens or exempting them.

In addition, Article 25 of the Constitution cannot be invoked in this issue, as the State's duty is limited only to sponsoring and supporting society's solidarity in enduring the burdens caused by disasters and public tribulations, and these burdens should be fairly distributed among members of society. This article also did not impose a direct commitment to the State to bear these burdens alone.

The Court praised the efforts made by the Kuwaiti government in the face of the Covid-19 virus and indicated that the government bears most of the financial costs of these efforts. Thus, the costs of institutional quarantine that fall on the citizens can be categorized within the framework of their societal participation alongside the State in the face of disasters and tribulations. It does not mean the State failed to fulfill its constitutional commitment to citizens. (Case dismissed)

2. *Ayad Al-Harbi v. Minister of Higher Education and Head of the Civil Service Bureau (Case No.1/2022*): the Right to Education

Ayed, a Kuwaiti national, completed his bachelor's degree in engineering in Jordan. However, the Ministry of Higher Education did not act to equate (recognize) his degree under the pretext that he got his university degree without obtaining a study leave from his employer in advance. So, not equating (recognizing) his degree means not benefiting from it at all, whether in employment or promotion. Ayed filed a lawsuit to invalidate Article 11 of the Regulations for Equivalence of Academic Degrees from Abroad issued in 2019, which states the equivalence of academic degrees obtained by an employee in government agencies or a worker in non-government agencies is not considered unless he gets study leave or scholarship for the entire period specified for obtaining the degree. Ayed claimed that Article 11's limitation to equivalence only to academic degrees whose holders got a study leave or scholarship was not based on objective grounds. In addition, the article ignored other considerations, such as the importance of the academic degree, the scientific reputation of the university, and the ministry's academic recognition of the university (Al-Zaytouna University), which is considered a restriction on his right to education as guaranteed by the constitution in the following articles 13, 14, and 40.

The Court affirmed that education is one of the essential functions of the state. Moreover, the state should abide by the laws issued by the legislator in regulating this right. These laws regulating the right to education should be based on objective grounds such as the nature of education, the requirements of the study, and the goals of society. Proceeding from the state's responsibility to supervise education, it must periodically review the educational process, including the level of output, the quality of education, and academic programs, in a way that brings the greatest benefit to the citizen and society as a whole.

Based on the foregoing, the regulation requirement to obtain a study leave from the employer for equating a degree is an objective and justified condition, as it is difficult for one to combine devotion to full-time job duties and study, especially for a bachelor's degree, at the same time. Moreover, this requirement was intended; 1) to provide the employee with an enormous possible amount of science, knowledge, and training, and 2) to close the door to worthless academic degrees whose holders lack worthiness and competence.

Finally, while education is a right of the individual, it is also society's right and tool to progress and prosperity, and therefore it must be developed and protected. (Case dismissed)

3. *Hamed Jassim v. Public Prosecution, (Case No.5/2022)*: the Right to Freedom

The facts of the case say that the Kuwaiti Public Prosecution has prosecuted Hamed for imitating the opposite sex (a man who imitated a woman in this case) based on Article 198 of the Kuwaiti Penal Code. Article 198 states that "whoever makes an indecent gesture or act in a public place…, or imitates the opposite sex in any way, shall be punished for a period not exceeding one year and a fine not exceeding 1,000 Dinars or one of these two penalties." The phrase (imitation of the opposite sex) was not in the original text of the Penal Code once issued in 1960 but was added through an amendment in 2006. The explanatory memorandum justified this amendment by stating that imitating the opposite sex is socially reprehensible and prohibited according to the hadith of the Prophet: "Allah has cursed men who imitate women and women who imitate men."

The defendant's lawyer challenged the constitutionality of article 198, stressing that the text of the article was broad and loose and did not categorically specify the prohibited acts that could be categorized as an imitation of the opposite sex. In the presence of such a loose imitation text, the addressees and law enforcement officers will be confused about what act is/is not imitation. Moreover, the discretion of such issues should not be left to law enforcement officers. The Court upheld the opinion of the defendant's lawyer, especially in light of the express texts of the Constitution in Articles 30 and 32, which affirm that personal freedom is guaranteed and that there is no crime or punishment except by law.

The Court clarified that these two constitutional principles function in harmony. Therefore, although the legislator has discretionary power to define crimes and impose penalties, this power is restricted by citizens' freedom. Consequently, the legislator is required to define the prohibited acts clearly and decisively, in a manner that does not raise any confusion with other acts, and to be within narrow limits. Thus, criminal texts should always be enacted within narrow limits, specifying the crime and the type and amount of punishment, to ensure that the acts of the citizen and the law enforcer do not lead to a violation of the rights guaranteed by the Constitution.

Based on the aforementioned, the Court found that the phrase "imitation of the opposite sex in any way" was enacted without an objective ground that reveals actions that are considered to be an imitation of the opposite sex and what are not. The example cited in the explanatory memorandum of the law regarding the dressing of one sex in the clothes of the opposite sex reveals the extent of the looseness and ambiguity of this phrase and its lack of objective ground, which ultimately leads to leaving the matter to the discretion of law enforcement officers without clear restrictions.

In February 2022, the Court ruled that the criminalization of *"imitating the opposite sex in any way"* is unconstitutional.

4. *Anwar Al-Dhafiri v. Deputy Prime Minister, Chairman of the Committee for Candidacy for the Kuwaiti National Assembly Elections (Case No.4/2022)*: the Right to Run for Elections

Anwar sought to run in the National Assembly elections in 2022 after the previous Parliament was dissolved. However, he found that he was removed from the list of candidates due to the final judicial ruling issued against him in 2013, which ruled that he should be imprisoned for two years in the case of the crime of insulting the emir (The Emir of Kuwait at the time - Sheikh Sabah Al-Sabah). However, the sentence was suspended for three years. Anwar challenged the constitutionality of clause 2 of Article 2 of Law 1962 (National Assembly Elections Law), stressing that permanently depriving him of running for parliament elections contradicts the rights and freedoms guaranteed by the Kuwaiti Constitution. The Court cited the constitutionally challenged text, which reads as follows: "Anyone who has been convicted by a final court ruling in a crime of insulting: 1- Allah; 2- The Prophets; 3- The emir [the Emir of Kuwait]."

The Court affirmed that the right to vote is inseparable from the right to run for elections, and they are political rights granted by the Constitution and the law, not absolute natural rights. Therefore, the laws only recognize the right to run for elections for individuals qualified to exercise this right. Accordingly, it is permissible for the legislator to set requirements for the exercise of this right in accordance with its representative nature, responsibilities, and duties.

Clause 1 of Article 2 of the Kuwaiti Elections Law (1962) allows those who have been convicted of a felony or a crime involving moral turpitude or dishonesty to run for elections after serving their sentence. Unlike Clause 1, clause 2 does not state whether the convict (of insulting Allah, the prophets, or the emir) could regain his right to run for elections after serving his sentence. The Court differentiated between conviction of crimes a felony or a crime involving moral turpitude or dishonesty (group 1), and crimes of insulting Allah, the prophets, and the emir (group 2):

The first group is committed against ordinary individuals and public institutions, while the second group is committed against sacred figures.

The second group (sacred figures) enjoys explicit constitutional protection, as the emir is a symbol of loyalty to the homeland and the people according to Article 91 of the Constitution, unlike the first group (individuals and public institutions).

The Court also expressed that the text of clause 2 (depriving permanently a person convicted of insulting Allah, the prophets, or the Emir of the right to run) is in line with the tasks entrusted to a member of Parliament, as a person who has previously been convicted of these crimes should not represent the people. It is because Insulting Allah or the prophets is an insult to the general feeling of society and their sanctities. Moreover, insulting the emir is nothing but an insult to the symbol of loyalty and devotion to the homeland. Therefore, the one convicted of insulting sacred figures, including the emir, does not fit to be a representative of the people. Finally, this prohibition from exercising the right to run for a seat is not considered a violation of the principle of equality. (Case dismissed)

IV. Looking Ahead

Several issues and challenges are likely to shape the development of constitutional law in Kuwait in the coming years such as electoral reform by allowing the list voting, activation of the separation of power by assuring the parliament sessions without the government attendance, and enforcing civil and political rights such as the freedom of expression, assembly, and strike. While the Kuwaiti Constitution has remained largely unchanged since it was first adopted in 1961, there are calls for constitutional reform in recent years. Some have called for a more comprehensive review of the Constitution to address some of the issues and challenges facing the country.



Lithuania

Jolita Miliuvienė, *Dr., professor of Constitutional Law, Mykolas Romeris University Law School*

I. Introduction

The year of 2022 for Lithuania and the whole European region was the worst year for peace and security since the end of the Cold War. The unprovoked Russian aggression in the territory of the independent state of Ukraine casted a shadow on many legal developments of that year. Although it was not Lithuania that was attacked, the painful historical past when Lithuania was occupied by the Soviet Union for 50 years reminds us that Russia's actions cannot be ignored, and freedom or independence cannot be taken for granted. The decisions related to the war started by Russia in Ukraine have so far been mostly of a political nature (increase in the GDP for defense from 2.05 to 2.52 percent, the application of EU sanctions towards Russia, parliamentary resolutions condemning the war and the aggressor, active participation in the creation of the special tribunal and investigation of Russia's activities on the Ukrainian soil); nevertheless, there have also been some legal changes (such as the temporary prohibition on the rebroadcast and/or distribution of radio programmes and TV programmes directly or indirectly managed, controlled or financed by Russia or Belarus, the temporary suspension of granting citizenship to Russian and Belarusian persons, etc.). Some of these issues, especially those related to freedom of expression, might become a constitutional problem in the future.

However, notwithstanding the difficult geopolitical situation in the neighbourhood, life in the state, governed under the rule of law, continued and rather significant constitutional developments took place. 2022 is significant for the development of national constitutional law: three amendments were introduced directly to the text of the Constitution. First, the age of a parliamentary candidate was lowered from 25 to 21. Second, direct mayoral elections were allowed in implementing the relevant constitutional ruling. Third, the ban on impeached people from running for office that requires an oath was lifted. However, this report will not discuss them as they are presented in detail in the 2022 International Review of Constitutional Reform.

The report will present instead some significant legislation and the important constitutional justice cases adjudicated in 2022. Last year, the legislature finally finished the codification of electoral law and adopted the Electoral Code, implementing several constitutional rulings. Also, the new Law on Writing Names and Surnames in Personal Identification Documents is worth discussing. The particularities of the use of the national language for foreign names in ID documents have been reviewed by the Constitutional Court more than once and new cases are still ahead. The new office of the Intelligence Ombudsperson was established and its constitutionality was examined. Finally, the constitutional answer regarding the dismissal of the highest instance judges whose conduct has discredited the name of judges was given.

II. Major Constitutional Developments

1. The codification of electoral law

Until 2022, electoral law in Lithuania was dispersed and consisted of six ordinary laws adopted by the Parliament on different sorts of elections (national, presidential, European, and municipal). The reform of electoral law was undertaken a few years ago, particularly with reference to the adoption of the Constitutional Law on the List of Constitutional Laws[1], which came into force in 2012 and, for a long time, remained a 'death letter', as none of the enlisted constitutional laws were adopted. However, the said constitutional law provided that the Republic of Lithuania's Constitutional Law on the Approval, Entry into Force, and Implementation of the Electoral Code is included in the list of Lithuania's constitutional laws. It meant the obligation for the legislature to adopt the constitutional law specified in that list.

In the hierarchy of legal acts, constitutional laws have a legal force that is lower than that of the Constitution itself but higher than that of ordinary laws. Constitutional laws differ from other laws primarily in terms of the procedure for their adoption and amendment. This is related to their special place in the legal system and the specific relations between the norms of constitutional laws and constitutional norms.

Under the Constitution, the Parliament has wide discretion on what to include in the list of constitutional laws. The Constitutional Court has clarified that the above-mentioned list establishes a list of laws governing social relationships with respect to which greater stability should be ensured compared to social relationships to be governed by ordinary laws. A more complex procedure for adopting and amending constitutional laws makes it clear that constitutional laws govern the constitutionally important areas of social relationships and particularly significant issues in the life of the state and society[2]. Obviously, the legislature decided that election law is one of such important areas. Elections constitute an instrument of direct democracy and they are closely linked to the nation's sovereign power to govern the state. Therefore, election rules must be stable and ensure the expression of the true will of the people. Since the inclusion of the Electoral Code in the list of constitutional laws, this field may not be regulated by means of lower-ranking legal acts – laws and sub-statutory legal acts. The Parliament may adopt only laws designed for implementing constitutional laws, or sub-statutory legal acts specifying in detail the general rules laid down in constitutional laws.

The new Electoral Code[3] does not contain many content changes compared to the previously existing system of elections. However, transfer from an ordinary law to a constitutional law means that this area will be protected from frequent amendments and political interventions or attempts to change the regulation according to the wishes of the governing political party. On the other hand, some scholars argue that the regulation enshrined in the new Electoral Code is too detailed for a constitutional law, and that it might cause obstacles to the effectiveness or improvements of the electoral system. The recommendations of the Venice Commission propose that electoral law should be codified in order to avoid fragmentation; however, too detailed regulation in the acts of the constitutional level might prevent the legal system from some necessary timely improvements.[4]

2. The use of the national language in personal ID documents

Another major piece of legislation concerns the use of the national language in personal identification documents. The Law on Writing Names and Surnames in Personal Identification Documents[5] was adopted in January and entered into force on 1 May 2022. By adopting this regulation, the legislature aimed to respond to the need of the Lithuanian citizens of non-Lithuanian origin to write their names on passports in their original form. It was the second attempt to regulate this issue, as previously, the strict and unambiguous rules of writing names and surnames on identification documents had been enshrined in a sub-statutory law and had been upheld by the Constitutional Court. Therefore, the new regulation is not a novelty and has its constitutional history, which is worth recalling.

On 21 October 1999, the Constitutional Court decided that, in the passports of citizens of the Republic of Lithuania, the names and surnames of individuals of non-Lithuanian nationality must be written in Lithuanian characters, according to pronunciation and either in conformity to the grammatical rules (by adding Lithuanian inflexions) or without conformity to the grammatical rules (without Lithuanian inflexions).[6] The Constitutional Court emphasized that the Lithuanian language is a constitutional value. The state language preserves the identity of the nation; it integrates a civil nation; it ensures the expression of national sovereignty, the integrity and indivisibility of the state as well as the smooth functioning of the state and municipal establishments. The constitutional consolidation of the status of the state language also means that the legislature must establish by law that the use of this language is ensured in public life; in addition, it must provide for the means of the protection of the state language. In other spheres of life, persons may use any language acceptable to them without restrictions. Taking account of the fact that the passport of a citizen is an official document certifying a permanent legal link between an individual and the state, also the fact that citizenship belongs to the sphere of the public life of the state, the name and surname of an individual must be written in the state language (using the Lithuanian alphabet only). Otherwise, the constitutional status of the state language would be denied.

This ruling was twice interpreted seeking to find out whether there might be some exceptional cases when the Lithuanian Constitution permits the use of non-Lithuanian characters, of Latin origin, in the identification documents of Lithuanian citizens. In its decision of 6 November 2009,[7] the Constitutional Court held that, under the Constitution, Lithuanian characters and essential issues related to their use, *inter alia*, the principles of a corresponding transcription, must be defined by the legislature or a state institution authorized by it. The basis of the characters of the Lithuanian language, as the state lan-

guage of Lithuania, as well as of the absolute majority of the state (official) languages of European countries, is Latin characters.

In the decision of 27 February 2014,[8] the Constitutional Court developed this doctrine by stating that, while establishing the legal regulation of writing the name and surname of a person on the passport, the legislature needs special knowledge; thus, it must receive an official conclusion, *inter alia*, an explicit position, and clear proposals, which the legislature may not disregard, from a state institution composed of professional linguists – Lithuanian language specialists. These language specialists enjoy the powers to take care of the protection of the state language and to establish, within their competence, the guidelines on the state language policy (or to propose that the respective legislative and executive institutions establish the said guidelines by means of legal acts), as well as the powers to carry out the state language policy. This institution must pay heed to the constitutional imperative of the protection of the state Lithuanian language and must assess any potential danger to the common Lithuanian language and its distinctiveness. Therefore, the State Commission of the Lithuanian Language should provide the conclusion of whether or not it is also possible to establish such rules of writing the name and surname of a person in the passport of a citizen of the Republic of Lithuania that are other than those established in 1999 (only Lithuanian characters and pronunciation). The above-mentioned commission should decide whether, in certain cases, when writing non-Lithuanian names and surnames in passports of citizens of the Republic of Lithuania, it is possible to use not only the letters of the Lithuanian alphabet but also other exclusively Latin-based characters, to the extent that they are consistent with the tradition of the Lithuanian language and do not violate the system and distinctiveness of the Lithuanian language.

The Law on Writing Names and Surnames in Personal Identification Documents adopted in 2022 provides that, at the request of a non-Lithuanian citizen of the Republic of Lithuania, his or her name and surname, as well as the names and surnames of his or her children, may be written on the identification documents in the Latin alphabet (without diacritical marks), e.g., by using the alphabet also containing three letters – x, q, and w, which are absent in the Lithuanian alphabet. Perhaps, it was time to follow the principle of an open society, enshrined in the preamble of the Lithuanian Constitution, and implement pluralistic democracy where the right of a person to have his or her name is respected. The answer will be given by the Constitutional Court next year.

III. Constitutional Cases

The official constitutional doctrine developed by the Constitutional Court while interpreting the constitutional norms and principles is part of the living Constitution and, therefore, has the same supreme legal force as the Constitution itself. In 2022, the Constitutional Court adopted several important rulings, which will be presented in this section.

1. The application of impeachment proceedings: judicial independence and judicial responsibility

In 2021, the Lithuanian legal community, as well as, the rest of society, was shocked by the scandal of corruption of judicial power. The news on that particular day mentioned several judges of the highest instances (the Court of Appeal and the Supreme Court). The President of the Republic used his power provided for by the Constitution to dismiss those judges from office, stating that certain information available to him from the ongoing investigation allowed him to decide that the judges concerned had by their conduct discredited the name of judges.

The dismissed judges of the highest instances filed applications with courts asking to decide on the lawfulness of the dismissal of judges of the Supreme Court and the Court of Appeal. They argued that, under the Constitution, judges of the highest instances may be removed from office only through impeachment, which is a completely different procedure, based on specific grounds to be proved, involving, to a greater extent, the participation of the Parliament and requiring the conclusion of the Constitutional Court. Whereas, in that case, they were dismissed by a simple majority of parliamentary votes after the President of the Republic had submitted the question to the Parliament.

The courts of ordinary jurisdiction dealing with the question at issue addressed the Constitutional Court by challenging the parliamentary resolution on the dismissal of the judges of the Supreme Court and the Court of Appeal concerned. The questions of the separation of powers and that of judicial independence, granting specific guarantees in the case of removal from office, were at stake in that instance.

In its ruling of 15 April 2022[9], the Constitutional Court noted that impeachment proceedings may be used only for the removal of judges of higher instances. However, one of the important aspects of the independence of judges is that, while administering justice, all judges have an equal legal status from the point of view that no different guarantees of judicial independence may be established. The grounds for impeachment are a gross violation of the Constitution or a breach of an oath. However, not any conduct of a judge by which the name of judges has been discredited is in itself a gross violation of the Constitution; and not any conduct of a judge by which the name of judges has been discredited is in itself a breach of an oath. Therefore, if the Constitution is interpreted in such a way that judges of the highest instance may be dismissed only through impeachment proceedings, this would lead to a situation in which such judges could not be dismissed from duties for the conduct by which the name of judges is discredited. However, the Constitution is not grossly violated and the oath is not breached, although judges of lower-level courts could be dismissed from duties for the same conduct in accordance with item 5 of Article 115 of the Constitution. The Constitution prohibits such situations.

Such an interpretation of the Constitution under which a judge of the Supreme Court or the Court of Appeal whose conduct has

discredited the name of judges may be dismissed from duties in accordance with the above-mentioned item 5 of Article 115 of the Constitution or may be removed from duties through impeachment procedure (i.e. by applying one or the other constitutionally provided procedure as alternatives) creates the preconditions for ensuring a higher standard of responsibility for judges of higher courts, who, among other things, must also meet very strict ethical and moral requirements. This also ensures the greater protection of the people against the actions of the judges of courts of higher instances based on their personal or group interests instead of the interests of the people and the State of Lithuania since, if the President of the Republic did not institute proceedings for releasing a judge from duties where his or her conduct discredits the name of judges. This could be done by members of the Seimas by initiating the removal of the judge concerned from duties through impeachment procedure and *vice versa*.

The prohibition on diminishing the exclusive constitutional powers of the President of the Republic in the formation of the judiciary was also invoked because if the Constitution were interpreted in a way that only impeachment proceedings are possible for the dismissal of judges of higher courts, the President of the Republic would lose his or her influence, as he or she would not participate in the initiation or conclusion of impeachment. The participation of the President of the Republic in the formation (thus, appointment or dismissal) of the judiciary is one of his or her exclusive competencies under the Constitution, of course, only with the presence of the special judicial body, which is competent to advise the President on any aspect of judicial nomination or dismissal.

Therefore, this ruling closed the discussions on whether or not judges of higher courts benefit from stronger constitutional protection as far as their dismissal is concerned (impeachment proceedings were seen as giving more guaranties to a judge), and a balance was drawn between two constitutional provisions, namely item 5 of Article 115 and Article 116 of the Constitution.

2. The establishment of the Intelligence Ombudspersons

In 2022, the Law on Intelligence Ombudspersons establishing a new independent control institution, came into force. According to the provisions of this new law, the newly appointed intelligence ombudspersons will have the power to investigate complaints from applicants about the abuse of authority or bureaucratic intransigence by intelligence institutions and/or intelligence officials. Having regard to the purpose of intelligence institutions, their specific activities, and special tasks, i.e., the particularities of intelligence activities when performing the function of the protection of state security, especially the non-public nature of these activities, the legislature aimed to ensure the greater protection of human rights and freedoms, specifically, the right to the privacy of persons who have fallen under the control of the said institutions. The number of cases examined by international jurisdiction, i.e., the European Court of Human Rights, including one Lithuanian petition that is still pending, showed that the legislation was necessary.

Despite the good intentions of the legislature, the said law was challenged before the Constitutional Court. The petitioner based its doubts on the fact that such a legal regulation limited the function of the Parliamentary Ombudspersons, which is *expressis verbis* consolidated in the Constitution, to investigate complaints of citizens about the abuse of authority or bureaucratic intransigence by state and municipal officials (with the exception of judges).

In its ruling of 29 December 2022[10], the Constitutional Court held that the Constitution aims to create a harmonious system of the Parliamentary Ombudspersons and, where necessary, other control institutions established by the Parliament. The Parliamentary Ombudspersons Office is an independent control institution of general jurisdiction ensuring the non-abuse of powers by state and municipal officials. However, the Constitution allows the Parliament, where necessary, to delegate by law to other established institutions of control the powers to investigate complaints of citizens about the abuse of authority or bureaucratic intransigence by certain state and municipal officials operating in a special field. The legislature has the discretion to decide on the areas in which other, i.e., separate, specialised institutions of control may be established to control the activities of state officials, as well as to establish their relationships with the Parliamentary Ombudspersons. The legislature must only not assign them such powers that would deny the very essence of the powers of the Parliamentary Ombudspersons.

The function of national defence of the state requires a separate institutional system, which is composed of military and paramilitary state institutions. Their activities, including security services carrying out intelligence activities, *inter alia*, in the exercise of the function of the protection of state security, may and must be subject to control in accordance with the Constitution. It is necessary in order to ensure that, in the exercise of their functions, they will respect the imperatives arising from the constitutional principle of a state under the rule of law, among others, and that they will not violate human rights and freedoms.

The Constitutional Court concluded that the establishment of the independent specialised institution of control tasked with ensuring control over the activities of intelligence institutions – so that, when performing the special functions assigned to them, those institutions would comply with the constitutional imperatives of the protection of the right to privacy – did not deny the very essence of the powers of the Parliamentary Ombudspersons to investigate complaints of citizens about the abuse of authority or bureaucratic intransigence by state and municipal officials (with the exception of judges). This is because the Intelligence Ombudspersons are assigned to control the lawfulness of the activities of only two institutions that carry out specific activities and implement special tasks in order to strengthen the national security of the Republic of Lithuania. Especially, the Intelligence Ombudspersons are not only tasked with examining complaints from applicants about the violations of their rights and freedoms due to the abuse of authority or bureaucratic intransigence by intelligence

institutions, but they are also granted other important powers that are wider than those previously granted to the Parliamentary Ombudspersons (e.g. the power to assess, on their own motion, the lawfulness of intelligence gathering and the use of intelligence methods, as well as the lawfulness of other activities of intelligence institutions and/or intelligence officials).

It will obviously take some time until the newly established Intelligence Ombudspersons Office will engage in the activities entrusted to them under the Constitution. However, it is expected that the greater protection of human rights and freedoms, especially the right to privacy and to professional secrecy, will be ensured, thus allowing the avoidance of future cases in the European Court of Human Rights.

IV. Looking Ahead

Constitutional review is not a sprint but rather a marathon with respect to every particular question. It always takes time because of the requirement enshrined in the Constitution for individuals to exhaust all other existing legal remedies or for politicians to refer a question to constitutional jurisdiction.

In the year to come, the constitutionality of the Law on Writing Names and Surnames in Personal Identification Documents will be reviewed. The applicant challenged the provisions permitting the use of three letters that are non-existent in the Lithuanian alphabet and the possibility of writing names with diacritic signs. The Constitutional Court should finally adopt some important decisions concerning COVID-19 restrictions (total suspension of economic activities during the first wave and the issue concerning the 'green pass'). In the Parliament, the new Law on Civil Union, providing for the validation of relationships of same-sex couples, was registered for consideration. After the European Union has ratified the Istanbul Convention, the national parliaments will be encouraged to do the same. However, as this convention is perceived controversially in Lithuania because of the notion of gender, prior to its ratification, the Parliament will probably address the Constitutional Court asking it to deliver the conclusion on the compatibility of the Istanbul Convention with the Constitution.

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Luxembourg

Jörg Gerkrath, *Prof. Dr., University of Luxembourg*

I. Introduction

In 2022, Luxembourg's constitutional law was mainly influenced by the adoption of four constitutional amendment acts and some interesting cases decided by the Constitutional Court.

II. Major Constitutional Developments

The major constitutional development in Luxembourg during 2022 was clearly the final vote by the Chamber (*Chambre des deputés*) of four constitutional amendment acts on December 22nd, 2022. Thus, the constitutional amendment procedure which had been officially launched in 2009 when the parliamentary commission on institutions and constitutional revision (CIRC) tabled a fully-fledged amendment draft, registered as parliamentary document no. 6030, came finally to a fruitful end. As the preliminary work within the CIRC started back in 2005, the whole amendment procedure ran over 18 years.

These are the main changes in the revised text of the Constitution:

The four constitutional revision acts (parliamentary documents no. 7575, 7755, 7700, and 7777) have taken over most of the provisions of the original revision proposal (doc. parl. no. 6030). However, on the one hand, there are some adaptations (e.g., the right to found a family and respect for family life or the provision on the interests of the child are not just an objective of constitutional value but have been transferred to the public liberties section), and on the other hand there are some novelties, such as the principle of presumption of innocence and a specific reference to the fight against climate change.

From a structural point of view, the revised Constitution now contains 132 articles, compared to 121 in the current text. There is also a greater structure than in the current text. Chapter II, devoted to rights and freedoms, now contains four sections dealing with nationality and political rights, fundamental rights, public freedoms (*libertés publiques*), and objectives of constitutional value. Chapter III incorporates provisions relating to the Grand Duke previously included in Chapter I, and the chapter is divided into two sections: one relating to his 'function' (he now has constitutional attributions and no longer 'prerogatives') as Head of State, and the other relating to the constitutional monarchy. Chapter IV deals with the Chamber of Deputies, which is now divided into five sections. The fourth section deals with the 'other powers of the Chamber of Deputies', including the right of petition and inquiry, the new right of parliamentary initiative, and the new institution of an Ombudsman.

Chapter VII on justice contains five sections: the first deals with its organization, the second with the status of 'magistrates', the third with the (new) National Council of Justice, the fourth with the guarantees for the justiciable (in particular procedural guarantees, which are now integrated into the body of the Constitution), and the sixth with the Constitutional Court, which receives additional powers.

Chapters XI and XII deal with constitutional amendments and transitional provisions.

From the point of view of substance, the following points can be noted, among others. The Constitution now includes the symbols of the State (anthem, coat of arms, emblems) and enshrines the Luxembourg language as the language of the Grand Duchy of Luxembourg. The form of the State and the founding principles are also included in the constitutional text (constitutional monarchy, respect for the rule of law and human rights). The participation of the Grand Duchy in European integration is included in Article 5.

A qualified majority of two-thirds is now required for certain votes with a significant constitutional impact, apart from constitutional revision laws as such:

In Chapter 2, the catalog of rights and freedoms is expanded and structured into political rights, fundamental rights, public freedoms, and objectives of constitutional value (which do not constitute invocable subjective individual rights). The definition of the precise scope of rights and freedoms is one of the matters reserved for the law.

The catalog of rights and freedoms now includes additional rights and freedoms that are not included in the text of the current Constitution, such as new 'fundamental rights' as there is human dignity (Art. 12), respect for physical and mental integrity, and the prohibition of torture and degrading treatment (Art. 13). Among the public freedoms, the right to found a family and respect for family life and the interests of the child (Art. 15(4) and (5)), the equality of persons with disabilities (Art. 11(6)), the principle of the presumption of innocence (Art. 17(4)), and the right to informational self-determination (Art. 31) were enshrined. Finally, among the new objectives of constitutional value, we find social dialogue (Art. 39), the right to a dignified life and adequate housing (Art. 40), the fight against climate change (Art. 41 para. 2), culture and its heritage, and the promotion of freedom of scientific research (Art. 42 and 43).

In Chapter III, the '*prerogatives' of* the Grand Duke are replaced by his *function* and his constitutional powers, in particular the executive power which he exercises jointly with the Government (Art. 44). From the point of view of his regulatory power (Art. 45), it is expressly provided that he shall issue regulations for the direct application of the legal acts of the European Union. With regard to treaties in general, the reference to secret treaties disappears, and the effect of the denunciation of treaties, as with their conclusion, now occurs only after parliamentary approval. The status of civil servants is now determined by law (with the exception of civil servants of the Chamber of Deputies). The Grand Duke's right of pardon is determined by law, the budget of the Grand Ducal House is the subject of an allocation fixed by a budgetary law, and the Grand Duke must take account of the public interest when organizing his administration, an administration which now enjoys (for reasons of independence and legal certainty, according to the authors of the text), civil personality (art. 54). Finally, substantial additions are made to the part relating to the constitutional monarchy, particularly with regard to succession, regency and the abdication of the Grand Duke, where the powers of the Chamber are strengthened (see Art. 60, etc.).

In Chapter IV, the role of the Chamber in the control of government action is emphasized. Disqualification from voting and from standing for election may, in certain cases, be ordered by the courts (Article 64(3)). An appeal may be lodged with the Constitutional Court against decisions of ineligibility or incompatibility taken by the Chamber (Art. 67 (3)). It may be noted that the internal organization of the Chamber, including the status of its officials (in principle regulated by law), is organized by its Standing Orders (Sec. 68). Early elections are held in case of a motion of censure or rejection of a motion of confidence of the Government (Sec. 73), the powers of inquiry of the Chamber over the Government are reinforced (Sec. 75, 81). A right of popular initiative and an Ombudsman are introduced (Sec. 79 and 83).

With regard to the Government, Chapter V makes a distinction between the exercise of governmental power in the Council or individually for matters for which they are responsible (art. 90). Article 91 does not mention the Prime Minister as head of Government but specifies his coordinating function for the unity of governmental action to the exclusion of any hierarchical power. The Government determines its organization by means of internal regulations, except for matters reserved to the law. The responsibility of the members of the government is also modified, integrating, in addition to collective responsibility, an individual criminal responsibility of ministers, and in article 94 (3), it is henceforth the public prosecutor's office that intervenes to initiate and direct the proceedings.

Chapter VII on Justice undergoes numerous modifications. From an organizational point of view, the general nature of the competencies of the courts of the judicial order is specified and the competences and jurisdictional role of all the different courts are detailed (Art. 98 to 103), integrating (following the Constitutional Court's judgment 150/19) the precision of the absolute effect of the annulment of a regulation and the possibility of modulation by the administrative judge of this effect (Art. 103). This chapter also incorporates a constitutional status for magistrates (now a unified term, who may be of the judiciary or of the public prosecution service). In order to strengthen their independence (Art. 104 to 106), a National Council of Justice is established to ensure the proper functioning of the judiciary and its independence, by being in charge of disciplinary procedures. Section 4 enshrines in the body of the Constitution certain procedural guarantees enshrined in treaty law (Article 6 ECHR) or European law: the impartiality of the judge, the fair and equitable trial, the reasonable time limit, respect for the adversarial process, and the rights of the defense (Article 110). Finally, in addition to its judging function, the Constitutional Court is now given the task of settling conflicts of jurisdiction between the various courts, particularly those of the judicial and administrative orders, and its powers may be extended by a qualified majority vote of the Chamber of Deputies.

Chapter X incorporates into the Constitution not only the conditions for the creation by law of public agencies (*établissements pub-*

lics) and their organization and competencies but also those concerning professional chambers and bodies of regulated professions with legal personality. Their regulatory power within the framework of their object shall respect the law and the grand-ducal regulations (Art. 129).

III. Constitutional Cases

The Constitutional Court (CC) adjudicated seven cases in 2022. This low number of cases, which corresponds more or less to the average number since 1998, stems from the fact that the only competence of the Court under the current text of article 95ter of the Constitution is to "rule, by way of judgment, on the conformity of laws with the Constitution". The Constitutional Court can only be seized "on a preliminary basis (…) by any court to rule on the conformity of laws, with the exception of laws approving treaties, with the Constitution".

The 2022 decisions are numbered from 169/22 to 175/22. The names of the parties are anonymous. As usual, the vast majority (six) of these judgments have been rendered solely or partly based on article 10*bis*, par. 1, of the Constitution, which states that "Luxembourgers are equal before the law". One decision (173/22) is based on article 11, par. 5, stating "The law regulates the principles of social security, health protection, workers' rights, the fight against poverty and the social integration of citizens with disabilities". Three of the 2022 decisions are particularly interesting. They deal, on the one hand, with the constitutionality of restrictive measures adopted in 2020 to fight the COVID-19 pandemic, and, on the other hand, with the interpretation of the Constitution in light of the ECHR.

1. Covid 19 pandemic measures, judgements in cases 170/22 (September 30, 2022) and 172/22 (November 25, 2022)

The two cases were brought before the Constitutional Court by preliminary questions submitted by two Luxembourg Police Courts (*tribunal de police d'Esch-sur-Alzette, tribunal de police de Luxembourg*) all of which relate to the amended law of 17 July 2020 introducing a series of measures to combat the Covid-19 pandemic (hereinafter "the law of 17 July 2020").

By its questions, the Luxembourg Police Courts asked the CC if the restrictive measures imposed by the law of 17 July 2020 respect different fundamental rights and freedoms as the principle of equality of all persons before the law as enshrined in Article 10a(1) of the Constitution, article 11(1) of the Constitution guaranteeing the natural rights of the human person, article 11(3) of the Constitution guaranteeing the protection of privacy, article 12 of the Constitution, guaranteeing individual freedom, and article 24 of the Constitution guaranteeing the freedom to express one's opinions.

The CC recalled that "the guarantee of the "natural rights of the human person and the family" encompasses all the rights that have their basis in natural law, to the exclusion of those that have their basis in positive law. Article 11(1) of the Constitution establishes the natural rights of the human person as a guarantee of positive constitutional law; they coexist with, but do not replace, the constitutional provisions that constitute special expressions of them".

Examining the different legal restrictions established in 2020, the Court considered, in general, that "restrictions on rights and freedoms imposed to protect others, given the nature of the pandemic, are likely to be justified in a spirit of solidarity among members of the same society and should be accepted provided that proportionality between the risks to some and the restrictions imposed on others is respected". No breach of the Constitution was thus identified.

2. Judgement in case 175/22, December 9, 2022

In this case, the Court of Appeal referred four questions to the Constitutional Court for a preliminary ruling. These questions can be summarized as "does Article 448 of the New Code of Civil Procedure, insofar as it establishes a derogation from the public nature of the proceedings, comply with Articles 10bis (1) and 88 of the Constitution, read alone or in combination with Article 6 of the ECHR?" According to the CC's judgment, "The principle of publicity of court hearings guaranteed by both Article 88 of the Constitution and Article 6(1) of the ECHR is not absolute but may be subject to derogation by a court decision ordering the hearing to be held in camera, in cases where such publicity would be dangerous to public order or morality, where the needs of protection of the interests involved so require". *In casu*, the Court did not find any contrary to the Constitution, considering that the litigious legal clause (Art. 448 of the NCPC) was by nature alien to both Article 88 of the Constitution and article 6 ECHR. The main interest of this decision is the confirmed willingness of the CC to read the Constitution in the light of relevant international treaty provisions following thus the case law of the Belgian Constitutional Court. The latter considers indeed in its stable case law that fundamental rights provisions of the Belgian Constitution which are also enshrined in an international treaty must be considered as "an inseparable whole". The finding in case 175/22 is rather laconic as the CC simply declares "that the questions referred for a preliminary ruling do not entail non-compliance with Articles 10bis (1) and 88 of the Constitution, taken together with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms".

IV. Looking Ahead

The amended Luxembourgish Constitution from 1868 will come into force on July 1st, 2023. This will very likely trigger political discussion and constitutional litigation as many of the numerous "small" changes in the wording of the constitutional document have not yet been exhaustively considered.

One major case is already pending at the *tribunal administratif* which will have to decide whether individual members of Parliament have a right to obtain documents detained by the government regarding the ordering of COVID vaccines in cooperation with the European Commission.

Parliamentary elections will also take place in October 2023.

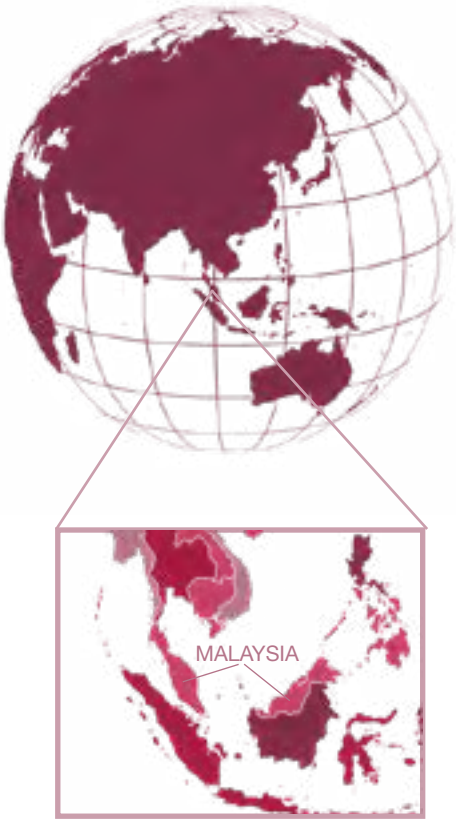
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Malaysia

Andrew James Harding, *Visiting Research Professor, Faculty of Law, National University of Singapore*

Dian A. H. Shah, *Assistant Professor, Faculty of Law, National University of Singapore*

Wilson Tay Tze Vern, *Senior Lecturer, Taylor's University, Malaysia*

Mohd Nazim Bin Ganti Shaari, *Senior Lecturer, Faculty of Law, Universiti Teknologi MARA, Malaysia*

I. Introduction

As we go to press, it is pleasing to begin with the report that it appears, some months following the general election of 19 November 2022, that Malaysia has finally achieved some degree of political stability after about five years of acute instability. On 24 November 2022, Anwar Ibrahim was appointed Prime Minister of a 'unity government'. The dramatic constitutional consequences of political instability during 2018-22 have been highlighted in our last three entries in the Global Review (2020-2) and the ICONNect blog.[1] While unity may remain a mirage, the voters were relieved to have a government with a clear majority, which looks likely to remain in office for a while. Nonetheless, the appointment of this government was not without difficulty (as was the case in 2018, 2020, and 2021). Following the election, parliament was hung, bringing into the matter the powers of the *Yang di-Pertuan Agong* (King, at the federal level) to appoint the Prime Minister. The outcome of this episode is discussed further in our Report below.

Other momentous developments also took place in the constitutional landscape this year, as Parliament finally amended the Federal Constitution to deter the practice of 'party-hopping' or floor-crossing by elected legislators, which has resulted in chronic political instability at both Federal and State levels in Malaysia. Elsewhere, the contestation over the so-called 'basic structure doctrine' continues at the Federal Court (Malaysia's apex court). The rule of law appeared vindicated when a former prime minister began serving a prison sentence following the dismissal of his final appeal in a corruption case linked to the notorious 1Malaysia Development Berhad (1MDB) scandal.[2]

II. Major Constitutional Developments

Numerous major constitutional developments took place in Malaysia during the period of review; however, due to constraints of space, two in particular will be focused on, namely the possibly watershed general election of November 2022, and the anti-party hopping amendments to the Federal Constitution.

1. The November Election

This federal-level general election was fought between three main coalitions. The first was *Perikatan Nasional* (National Alliance, PN, led by Muhyiddin Yasin), which held office without its majority being tested from March 2020 until Ismail Sabri took office in August 2021. The PN government was maintained in office by the equivocal support of BN MPs. The second was the *Pakatan Harapan* (Coalition of Hope, PH, led by Anwar Ibrahim), which had been in office under Mahathir Mohamad from May 2018 to March 2020. The third was the *Barisan Nasional* (National Front, BN, led by Zahid Hamidi), which held office from 1955 to 2018.

Two elements in this election were new. The voting age was reduced from 21 to 18,

and the anti-party-hopping law was passed the previous month, which prevented MPs from resigning from the political party they belonged to without losing their seats in parliament. Both these changes were introduced via constitutional amendment.[3]

In this election, the increasing complexity of Malaysian politics was evidenced by a contest between no less than 36 parties and five coalitions. Not only is it virtually impossible in such a system for a single party to obtain a majority; but it is also difficult even for a multi-ethnic, multi-party coalition to do so. In a first-past-the-post British-style electoral system, parties with too-narrow an appeal cannot obtain sufficient seats, forcing them into one of the coalitions that have held power for all of Malaysia's history - since 1957.

The results in the elections for the 222 seats in the lower house, the *Dewan Rakyat*, were just as predicted by numerous polls – a hung parliament dominated by the three coalitions, none of which was anywhere near close on its own to obtaining the 112 seats needed to form a government. PH obtained 82 seats, and the largest share of the popular vote at 37%. PN obtained 73 seats and 33% of the vote. The BN was reduced to its worst-ever result, with only 30 seats and 23% of the vote. Other seats were won by coalitions of parties from Sabah and Sarawak, and some smaller parties.[4]

Typical of constitutions in 'Westminster'-style parliamentary systems, the Federal Constitution of Malaysia says in Article 43(2)(a): 'the *Yang di-Pertuan Agong* (King) 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.' In the last fifteen years or so, Malaysians have become used to an assertive monarchy that sees itself as not necessarily confined by constitutional texts.[5]

This power to appoint the Prime Minister had never before been exercised following a general election with a hung parliament, and therefore, presented challenges for the monarchy and the constitutional system as well as for the politicians.

The King moved quickly to orchestrate the process of constructing a majority, requiring party leaders to report to him by 2 pm on 21 November with their candidate for Prime Minister and evidence of a majority in terms of statutory declarations by MPs expressing support for the candidate of their preference. This process of gathering statutory declarations has, since 2018, become the usual method of ascertaining majority support, rather than a parliamentary vote, or just relying on consultation with leading politicians. This clearly indicated a more proactive role by the head of state than would generally be seen in parliamentary democracies. Such a proactive role had also been apparent on previous occasions, notably the appointment of the Prime Minister in March 2020 and August 2021, when the King went so far as to interview all sitting MPs to ascertain their allegiance.[6]

Over the days following the election, the question was which two of the three largest coalitions, together with which other parties or coalitions, would be able to share the government, based on control between them of 112 or more seats. Given the stated reluctance of PN to work with PH, the 30 BN MPs were in the limelight, but they were split on the question of which side to join, requesting from the King an extension of time in order to resolve their internal issue. A 24-hour extension was granted.

The King continued to play an active role in encouraging, cajoling even, the leaders to find a way of constructing a government with a majority. At one point he appeared to encourage PN and PH to form a unity government – a suggestion Muhyiddin as PN leader seems to have rejected. The BN then announced it would go into opposition. In the event, however, with encouragement from the King, the BN threw its weight behind Anwar Ibrahim. Despite Muhyiddin's spurious claim (as it turned out) to have 115 statutory declarations of support, it was clear that Anwar had a slight edge, given that his 82 seats with 30 from the BN gave him exactly 112. As normally happens in Malaysian politics, once the outcome became clear, various smaller parties lent their support opportunistically to the candidate in prime position. Anwar was sworn in at 5 pm on 24 November, and within a few hours, he was able to describe his coalition as a 'unity government'. He embraced not just his old enemy, the BN, but also the two coalitions from Sabah and Sarawak, bringing another 29 seats.

This outcome represented a huge vindication for the 75-year-old Anwar, who had spent 24 years attempting to become Prime Minister under the banner of reform, 11 of those in jail on sodomy and corruption charges. He was prevented by the BN and later the PH leadership under Mahathir from taking power despite strong performances by his party in the 2008 and 2013 elections, and an apparent promise by Mahathir to give way to him a short time after the 2018 election.

Now that the dust of political conflict has settled, what should one make of these turbulent events? Do they represent a sea-change, a potential victory of reform over entrenched conservatism, or an opportunity for democratic enhancement to replace the relative chaos of the last four years?

While many see Anwar's appointment as a big turning point, it might be good to be cautious in one's expectations. As it turns out, Anwar has not just a majority but one, virtually large enough for government-sponsored constitutional amendments to be passed, for which a two-thirds majority is required in both houses of parliament.[7] However, the coalition Anwar leads relies heavily on those who, in essence, lost the election – the BN – who represent Malay ethnic dominance, and will be opposed to any move towards a more reformist or more multicultural policy. The likelihood is that reform will be pursued, but it will have to be pursued in a way that keeps together an uneasy alliance of parties with deeply differing objectives. If reform is to prove a reality and not an illusion, it will require the utmost political skill on Anwar's part, and patience on the part of those who consider they have already waited for too long for reform, or are concerned about the ability of the new unity government to embrace real change without falling foul of the schismatic politics of recent years.

One issue of more general importance that arose was what conventions govern the hung

parliament situation. Strong opinions were voiced to the effect that the party with the largest number of seats should be given the first chance to form a government. Although the factual outcome may be seen as reflecting such a convention, there is no evidence that such a convention exists,[8] and the only relevant convention is the 'confidence of a majority' rule, embodied in Malaysia by virtue of Article 43(2)(b), quoted above. In fact, the notion of 'first attempt' seems even perhaps irrelevant, given the proactive approach of the King in constructing a government with a majority.

Ultimately, the real importance of these elections may well prove to be that Malaysia moved a step forward both democratically and constitutionally. The potential instability of a hung parliament was avoided, at least for now. A transition of power was accomplished without violence, in compliance with the Constitution, and with a degree of smoothness and certainty of purpose. Accordingly, we may now be able to claim that Malaysia, in a world of democratic backsliding and abusive constitutionalism, has emerged as a genuine constitutional democracy.

2. The Anti-Party Hopping Amendments

'Party-hopping' or floor-crossing by elected legislators has been a perennial problem in Malaysia, resulting in the collapse of incumbent governments at both federal and state levels and the onset of political instability. Up to 2022, there was no law at the federal level prohibiting elected lawmakers from 'hopping' to another political party and taking their seats with them, thereby potentially collapsing the parliamentary majority of the party on whose ticket they had been elected. Various State governments had made attempts to restrict the practice; yet one such amendment to the State Constitution of Kelantan was declared unconstitutional for violating the freedom of association guaranteed by the Federal Constitution.[9]

With the fragmentation of the political scene following the 14th general election in 2018 and the coming and going of governments with razor-thin parliamentary majorities, all sides of the political divide became acutely aware that 'party-hopping' could simply result in their majorities being wiped out overnight, as sitting prime ministers found out to their cost in February 2020 and July 2021. The impetus to put an end to this source of instability was the landmark Memorandum of Understanding (MoU) between the then ruling coalition and the major opposition bloc in September 2021,[10] in which a cornerstone agreement was the enactment of 'anti-hopping' legislation at the federal level. Accordingly, the Ismail Sabri government brought forward draft amendments to the Federal Constitution; these were passed into law with the requisite super-majorities in July 2022, and came into operation in October, ahead of the impending general election.

The anti-hopping provisions take the form of a new constitutional provision (Article 49A) which provides that a member of Parliament shall lose his seat if, having been elected as a member of a political party, he "resigns" or "ceases to be a member" of the political party. An MP also loses his seat if, having been elected as an independent candidate, he joins a political party as a member. For the first time, the term 'political party' is clarified in the definitions clause of the Federal Constitution (Article 160(2)), and notably includes *a coalition* of political parties. This effectively ties an MP, not only to the politics of his or her own party, but also those of the coalition as well, given that the vast majority of Malaysia's MPs since independence have been elected on coalition, not single-party, tickets.

There are three exceptions in which an MP's seat will not become vacant if he changes parties: the dissolution or deregistration of his original political party; if he resigns upon being elected as Speaker of the House; or "the expulsion of his membership of his political party". This curiously worded clause raises the question of what the difference is between "expulsion of his membership", which does not deprive the MP of his seat, and "ceases to be a member", which does. To maintain adherence to party diktat, political parties predictably scrambled to amend their respective constitutions in order to provide explicitly that an MP's sacking from the party would amount to "ceasing to be a member" and not "expulsion", regardless of the grammatical implausibility of this.

The anti-hopping amendments may already have had an effect in maintaining an enforced loyalty to the party line, given it is now known that at least 10 BN MPs secretly signed statutory declarations supporting Muhyiddin Yassin of PN as the prime minister immediately after the indecisive results of the 15th general election in November. However, when BN chairperson, Zahid Hamidi, committed his coalition to backing Anwar Ibrahim of PH shortly thereafter, the 'renegade' MPs were left with no choice but to toe the line, since they were elected on the coalition's ticket and to cross the floor would have meant the loss of their seats.

III. Constitutional Cases

As a post-colonial state with a multi-ethnic and multi-religious society, issues concerning the identity markers of race, religion, and royalty (the so-called 3Rs) have always been present in Malaysia's public discourse. Every now and then, some local politicians would attempt to provoke others regarding anything that could be remotely linked to the Malays, Islam, and the Malay Rulers. In 2022, there were two decisions handed down by the High Court regarding the constitutionality of the vernacular schools in Malaysia. Since Malay is the national language of Malaysia, national schools use the Malay language as the main medium of instruction. Nonetheless, the Federal Constitution allows the Minister for Education to provide for government-aided schools which use Mandarin or Tamil, the language of Malaysia's Chinese and Indian ethnic minorities respectively, as the main course of instruction.

In two notable cases, the High Court reaffirmed that the use of Mandarin and Tamil as the main medium of instruction in government schools is constitutional. While there has historically been much controversy over this issue, ostensibly over 'defending' the position of Malay as the National Language, it is noteworthy that none have ever challenged the use of *English* as the main

medium of instruction in some schools and universities in Malaysia. This includes some public universities that use English as their main course of instruction.

1 *Mohd Alif Anas bin Md Noor (in his capacity as President, and on behalf of Gabungan Pelajar Melayu Semenanjung (GPMS)) & Ors v Menteri Pendidikan Malaysia and another suit* [2022] 12 MLJ 455

In this case, the Plaintiffs, who are well-known Malay rights advocates, challenged the constitutionality of 'vernacular schools' (government-aided schools which use Mandarin or Tamil as the main medium of instruction). They sought a declaration that the legal provisions in the Education Act of 1996, which allow for the establishment and maintenance of these schools, are against the National Language provisions in Article 152 of the Federal Constitution, and are therefore void. In a clear and straightforward judgment dismissing the application, Nazlan J reiterated the principles of constitutional interpretation which require the Constitution not to be interpreted in the same way as an ordinary statute, invoking the presumption of constitutional validity, the "prismatic approach" to constitutional interpretation, the "historical background and context", and the lesser need to place reliance on judicial precedent when interpreting the Constitution.[11] The Court highlighted that the history of these schools in Malaysia predated the Federal Constitution and there was never an intention by the government to close such schools since the early days of Independence. Finally, the Court affirmed that vernacular schools do not come under the definition of 'official purpose' and 'statutory authority' for the purposes of the National Language clause of the Federal Constitution, thereby allowing for the use of Mandarin or Tamil as their main medium of instruction.

2. *Mohd Azizee bin Hasan (in his capacity as President, and on behalf of, the Muslim Teachers' Association (i-GURU)) v Minister of Education, Malaysia & Ors* [2022] 11 MLJ 615.

The same legal issues were present in this case, namely whether the legal provisions enabling vernacular schools to use Mandarin or Tamil as their main medium of instruction[12] are *ultra vires* the National Language clause of the Federal Constitution. Judicial Commissioner Mohamad Abazafree referred to the decision above but reached a different conclusion regarding "official purpose", determining that vernacular schools are established under Act 550 and do come under the definition of a statutory authority for the purposes of the National Language clause. Nonetheless, the High Court affirmed that the usage of Mandarin and Tamil in such schools is constitutional, endorsing Nazlan J's historical analysis of the vernacular schools and the fact that these schools have never been specifically prohibited by the Malaysian government. Thus, the Court arrived at the same conclusion as in the *Mohd Alif Anas* case.

The plaintiffs in both cases relied heavily on the earlier case of *Merdeka University*, in which the Federal Court upheld the government's refusal to allow the establishment of a university that would use Mandarin as its medium of instruction.[13] There is a concern about whether or not the filing of these two cases was just a form of performativity. Again, nothing was mentioned regarding the policies of some public universities in Malaysia which use English as their main medium of instruction. This is remarkable since the case of *Merdeka University* would fit in with the legal and factual matrices of these local public universities. Next, there seems to be an inconspicuous disregard for the fact that currently there are many private universities, including the branches of well-known global universities in Malaysia, all of which do not use the Malay language as their main medium of instruction. This is notably different from the local scenario in the 1980s in Malaysia, during which there were not that many universities to begin with. There is even a branch of the Xiamen University of China established in Sepang, which similarly does not use the Malay language as its main medium of instruction. While the issue of national language in Malaysia is an important factor for the purpose of national unity, the cultural rights of the minorities must also be respected and protected. This is very crucial in an ethnically and religiously diverse post-colonial state like Malaysia. The existence of legal prohibitions designed to protect the sensibilities of this diverse "melting-pot" such as the *Penal Code* and the *Sedition Act* does contain the implied message that cultural and religious diversity in Malaysia are not only embraced but are also protected by law.

3. *Dhinesh a/l Tanaphll v Crime Prevention Board & Ors* [2022] 3 MLJ 356

In *Dhinesh a/l Tanaphll*, the Federal Court revisited the thorny question of whether the 'basic structure doctrine', according to which Parliament may not amend the Federal Constitution in a way that destroys the 'basic structure' of the Constitution even if it musters the requisite parliamentary super-majority, applies in Malaysia. This issue had been the subject of a back-and-forth between the different panels of the Federal Court in the preceding years, with no clear answer emerging.[14]

The crux of the matter in *Dhinesh a/l Tanaphll* was section 15B of the Prevention of Crime Act 1959, which purported to oust judicial review over any act or decision of the Prevention of Crime Board, which was empowered to order the detention without trial of suspects under the Act. This amounts, in principle, to legislative restriction of the judicial power of the courts to inquire into acts of the executive, which is constitutionally problematic given the doctrine of the separation of powers.[15] This necessitated, in turn, a consideration of whether certain amendments purportedly made to the judicial power clause of the Federal Constitution were invalid because they destroy the 'basic structure' of the Constitution. However, in a split and complicated decision in the previous year, a different panel of the Federal Court had cast doubt on the applicability of the 'basic structure doctrine' itself in Malaysian jurisprudence.[16]

In *Dhinesh a/l Tanaphll*, Justice Nallini Pathmanathan (with whom the rest of the panel agreed) critically analyzed the three judgments in the earlier *Maria Chin* case, highlighting that the different reasons given by the 'majority' judgment, the con-

curring judgment, and the two dissenting judgments meant that there was in fact no controlling ratio in that case as regards the 'basic structure doctrine'. Thus, the Court was at liberty to forge its own path with a view of earlier jurisprudence. Anchoring its view on Article 4(1), the supremacy clause of the Federal Constitution, the Court held that to allow Parliament to pass any law that would restrain the judicial review powers of the courts would be tantamount to allowing Parliament to 'supersede, contravene and undermine' constitutional safeguards. Accordingly, section 15B was declared unconstitutional on the ground of inconsistency with the supremacy clause.

The true significance of *Dhinesh a/l Tanaphll* lies in its effective dissection and disposal of the problematic judgment in *Maria Chin Abdullah*, which had cast doubt on an earlier line of cases reaffirming the separation of powers and the inviolability of judicial power in Malaysian constitutionalism. It is also a highly instructive instance of how the supremacy clause itself can be used in tandem with the abstract doctrine of the separation of powers in protecting judicial power from legislative interference.

4. *SIS Forum (Malaysia) v Kerajaan Negeri Selangor; Majlis Agama Islam Selangor* [2022] 4 CLJ 449

On 21 February 2022, the Federal Court declared Section 66A of the Administration of the Religion of Islam Enactment (Selangor) 2003 unconstitutional. The crux of the issue in this case was – once again – about the demarcation of jurisdiction between the civil and syariah courts in matters implicating Islam and the power of the civil courts to conduct judicial review. SIS Forum had sought to challenge the validity of a *fatwa,* issued in 2014 pursuant to Section 66A, which had determined the organization as "deviant" for spreading ideas associated with "liberalism" and "religious pluralism". In this particular case, however, SIS Forum challenged the validity of Section 66A on the basis that it could not have conferred judicial review powers on syariah courts (as creatures of state-level statutes). In other words, it was argued that the power of judicial review belonged exclusively to the civil courts, per Article 121(1) of the Federal Constitution.

In a unanimous decision, the Federal Court – sitting in a full bench – agreed with the petitioners that judicial review powers vested solely in the High Courts (civil courts). It held that the Ninth Schedule of the Federal Constitution (item 1, State List), which deals with matters pertaining to Islam that state legislatures could regulate, could not be "reasonably construed" to allow the state legislature to enact laws conferring judicial review powers on syariah courts. Crucially, the Federal Court highlighted that the Ninth Schedule also establishes limits on the substantive jurisdiction of syariah courts, and thus conferring judicial review powers on syariah courts via Section 66A had breached such limits. Notably, the Court also emphasized that civil courts are not empowered to examine the substantive contents of a *fatwa,* as that is a matter within the exclusive jurisdiction of the syariah courts. However, the issuance of a *fatwa* (or the conduct of religious authorities, for that matter) must comply with written law – including the Federal Constitution – and any challenge against the constitutional or statutory validity of any *fatwa* or action would fall within the purview of the civil courts.

Leaving aside the legally (and politically) salient issues on civil-syariah jurisdictional boundaries, on a broader scale, this decision was significant in espousing the notions of constitutional supremacy, judicial power, and the separation of powers in Malaysia's constitutional scheme.

IV. Looking Ahead

State-level elections are due by mid-2023 at the latest in six of the thirteen States that form the federation of Malaysia. These States include the northern heartland of the majority Malay ethnic group and the industrialized states of Selangor and Penang. These elections are expected to be a litmus test of the durability of Anwar Ibrahim's 'unity government', which presently includes political parties which have historically been deeply antagonistic to each other.

Of some concern is the fact that the current Opposition bloc at the federal level (which is also the incumbent government in some of the northern and eastern States) is made up entirely of Malay- and Muslim-based political parties, whereas the parties capable of representing Malaysia's sizeable ethnic and religious minorities are exclusively grouped in the 'unity government'. This situation potentially opens the door to political agitation based on racial and religious sentiments, particularly as the crucial round of State-level elections approaches.

Other controversies on the horizon include whether former prime minister Najib Razak – jailed in 2022 on corruption charges over the 1Malaysia Development Berhad (1MDB) saga – will receive the royal pardon that he and his well-placed supporters are presently angling for. Given that Mr. Najib continues to face other charges on which the courts have yet to pronounce judgment on, any decision to pardon the former premier is likely to trigger litigation, which will in turn compel Malaysia's courts to reconsider its traditional reticence in reviewing the prerogative of mercy.[17]

V. Further Reading

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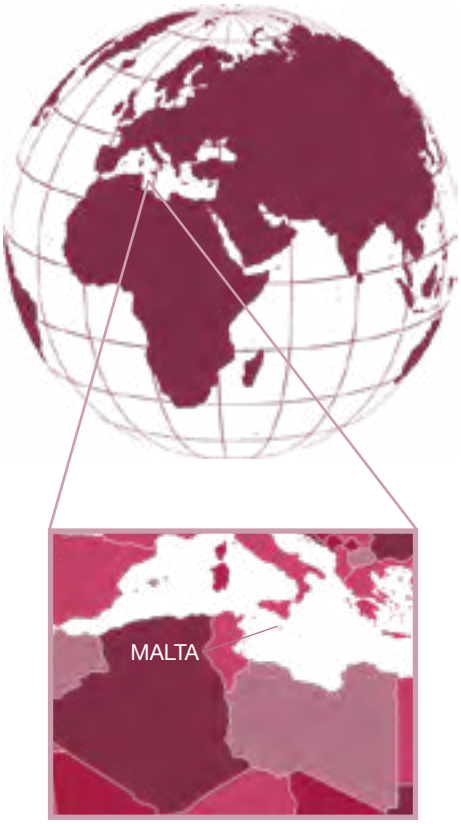
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12 Education Act 1996 (Act 550) ss 17, 28.
13 Merdeka University Berhad v Government of Malaysia [1982] 2 MLJ 243 (Federal Court).
14 See Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545 (Federal Court); Maria Chin v Director General of Immigration & Anor [2021] 1 MLJ 750 (Federal Court); Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals [2021] 2 MLJ 822 (Federal Court).
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Malta

Tonio Borg, *Associate Professor, University of Malta*

John Stanton, *Senior Lecturer in Law, City, University of London*

I. Introduction

There were no formal constitutional amendments introduced in Malta in 2022, however, several important legal and political developments have made notable adjustments to the system that operates on the archipelago. During the March 2022 general election, for instance, the recently introduced gender corrective mechanism was applied for the first time, seeing twelve additional seats being allocated to the female candidates from both parties who came closest to being elected. The total number of MPs in the Maltese Parliament is currently 79, the highest ever in the country's constitutional history. Recently, important constitutional judgments in the realm of human rights law have included an enforcement by the apex Court of a judgment of the European Court of Human Rights against Malta, a decision relating to juridical interest in litigation challenging the validity of an electoral corrective mechanism, and the enforcement of a right to a fair hearing in tax disputes.

II. Major Constitutional Developments

Legal actions concerning the assassination of investigative journalist, Daphne Caruana Galizia, have developed over the last year but remain ongoing. Alfred and George Degiorgio, the two brothers who were charged with carrying out the murder (by placing a bomb in the journalist's car), stood trial in October 2022. They each changed their pleas to guilty on the first day of the proceedings and were sentenced to 40 years in prison. A third individual who participated in the assassination, Vince Muscat, pleaded guilty in February 2021 and is serving a 15-year sentence. The case against Yorgen Fenech, a prominent businessman who was charged with masterminding the attack, is ongoing. He was formally indicted in August 2021 for his involvement in the assassination.

The most notable constitutional development in Malta, though, concerns the first outing of the new gender corrective electoral mechanism. Introduced into the Constitution in 2021, article 52A (1) provides that "[i]f at a general election … in which only candidates of two parties are elected … and in the event that the number of Members of Parliament of the under-represented sex … is less than forty per cent (40%) of all the Members of Parliament, then the number of Members of Parliament shall increase by not more than twelve (12) Members of the under-represented sex".[1] It was noted in the 2021 Global Review that this "reform was motivated by the reality that, before the 2022 election, 'only nine of Malta's … 67 members of Parliament … [were] women'".[2] At the 2022 General Election, only four women were elected in the election proper. Since the total number of female elected candidates did not reach the 40% figure, the gender corrective mechanism was employed for the first time. As a result, twelve additional seats were allocated in equal proportion to the party in government and the one in opposition from amongst those female candidates who came closest to being elected at the initial vote. Once these additional candidates had been declared elected, the total number of MPs in the House of Representatives increased to 79, the highest in Maltese constitutional history.

III. Constitutional Cases

1. Arnold Cassola v. State Advocate: Gender corrective mechanism and juridical interest

The new gender corrective electoral mechanism was the focus of our first case.[3] The constitutional amendment, introduced in 2021, provides that the mechanism only takes effect where "candidates of two parties are elected".[4] In Malta, there are two main parties: the Nationalist Party (PN) and the Labour Party (PL). If a candidate from a third party were to be successfully elected, then the mechanism would not be used, regardless of the number of Members of Parliament of the under-represented sex. Arnold Cassola, an independent politician, brought a challenge to this aspect of the mechanism. He argued that it discriminated against female candidates who stood for election either independently or with a party other than PN or PL because, even if they attracted more votes than female candidates from the two main parties, they would not be able to make use of the mechanism to win a seat in Parliament. Moreover, Cassola argued that the mechanism restricted voters' freedom to have an equal say in elections since because the mechanism only applies to elections where two parties are returned to Parliament, votes for those two parties would be of greater value than those for other parties or independent candidates.

The Court of first instance ruled that Cassola had no actual juridical interest in the case because article 52A (1) of the Constitution applied to political parties, not individual candidates. Moreover, and this point notwithstanding, Cassola was not a female candidate and therefore did not directly suffer in the manner reflected in his case. The Constitutional Court, however, overruled this decision and stated that such juridical interest existed not because Cassola was a potential parliamentary candidate but because he wished to vote for candidates who did not represent the two main parties, PN or PL. The Court stated that "[i]n the opinion of the court this means that the applicant is part of a class of persons affected by Article 52A of the Constitution, as this article makes it clear that for the purposes of the mechanism it contemplates, the applicant's vote for candidates which are not members of the Labour Party or the Nationalist Party does not count and will be disregarded".[5] The consequence of this finding is that the case is referred back to the Court of first instance to be decided on the merits.

2. Human rights cases against Malta

During the first half of 2022, a number of human rights cases were brought against Malta, both in the domestic Constitutional Court and the European Court of Human Rights in Strasbourg. The domestic cases included the first time that the Maltese Constitutional Court enforced a judgment of the European Court of Human Rights against Malta, article 6 of the Convention being applied in respect of a plan of action relating to a child custody case.[6] They also included a decision of the Constitutional Court to follow Strasbourg's jurisprudence in refusing to apply the right to a fair hearing to a decision taken by the tax authorities.[7] Such a decision, said the Court, was not a determination of a civil right or obligation.

In Strasbourg, two cases were decided against Malta before the European Court of Human Rights. In the case of *Shorazova v. Malta*,[8] the applicant's assets were repeatedly subject to a freezing order whilst she awaited trial. The Court ruled, however, that the order amounted to an unlawful interference with the applicant's right to protection of property, contained in article 1 of protocol 1 of the Convention, since "she had been deprived of relevant procedural safeguards against an arbitrary or disproportionate interference".[9] In *Spiteri v. Malta*,[10] the applicant had been subject to criminal proceedings for suspected money laundering. Though he was charged and committed to trial in 2008, his case was still ongoing in 2019. As a consequence, the applicant brought his case to the Strasbourg Court claiming that his right to a fair trial under article 6 of the Convention had been breached due to the length of the proceedings. The prosecution had been suspended in 2019 pending the outcome of the human rights claim. The European Court of Human Rights ruled that the article 6 right had indeed been breached, however, they refused to grant just satisfaction and award any damages because the applicant had himself contributed to delays in the proceedings.

IV. Looking Ahead

The most important questions in the immediate future relate to the validity of laws empowering public authorities, such as the Financial Intelligence Analysis Unit, to impose hefty administrative fines. There are 15 pending constitutional cases on the matter. One of them has only recently been decided by a court of first instance. The Court found in favor of the applicants, deciding that only a court of law can impose such fines since article 39(1) of the Constitution of Malta provides that "[w]henever any person is charged with a criminal offense he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial *court established by law*".[11] In other words, only a court of law may decide criminal cases. Hefty administrative fines are so punitive that they retain their criminal sanction character and, therefore, can only be imposed by a court of law. An appeal has been filed to the Constitutional Court.

V. Further Reading

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Mongolia

Geser Ganbaatar, *Ph.D candidate, University of Milan*

Bayar Dashpurev, *Ph.D. candidate, Max Planck Institute for Social Anthropolog*

coordinated by Antonia Baraggia, *Associate Professor of Comparative Law, University of Milan*

I. Introduction

This is the first time Mongolia has been covered by the Global Review of Constitutional Law.

The year 2022 marked the 30th anniversary of Mongolia's democratic Constitution, which was adopted two years after the fall of the socialist authoritarian system in 1990 that had lasted for nearly 70 years. Despite being landlocked, sandwiched between two colossal powers, Russia and China, and having a relatively low level of economic development, Mongolia was able to make a peaceful transition to democracy.

Since the transition, the country held nine democratic elections for the unicameral legislature, the State Great Khural. The recent elections of 2016 and 2020 have had a significant impact on the country's de facto political system by shifting from a two-party democracy to a one-party dominant system. The Mongolian People's Party (MPP) obtained 45% of the votes in the 2016 and 2020 elections and converted into vast 86% and 82% of legislative seats respectively, surpassing the threshold of three-quarters for making constitutional amendments single-handedly. Eventually, the Parliament amended the Constitution in 2019 by adjusting the checks and balances system. The democracy indices of the V-Dem project show that the state of democracy in Mongolia has backslid to the level of its initial transition period within the past few years.[1]

One contributing factor to the consolidation of the one-party system and the overall deterioration of democracy was the split of the Democratic Party, the main opposition party, into two factions due to a disagreement over leadership and legitimacy. The split of the party caused its support base to fragment, which has weakened its role in the opposition.

II. Major Constitutional Developments

The Mongolian Parliament has amended the democratic Constitution four times. Each time, the Parliament, with three-quarters of the votes, amended the Constitution regardless of the possibility of a popular referendum procedure in the Constitution.[2] The first time was in 1999; however, the Constitutional Court of Mongolia found the amendments unconstitutional for not following the constitutional amendment procedure.[3] Consequently, in 2000, the Parliament amended the same articles for the second time. The 2000 amendments revised six articles from chapter three, with most revisions focusing on the competencies of the Parliament, the Government, and the President.[4] Unlike these previous amendments, 2019's constitutional amendments were extensive.[5] Nevertheless, the majority of them have covered the same provisions from the 2000 amendments. The fourth time, the Parliament amended the Constitution in 2022 as a result of the Constitutional Court's judgment that found the 2019 constitutional amendment of Article 39.1. unconstitutional.[6]

1. Strengthening the Government and the Prime Minister

The first set of major amendments aimed to strengthen the Prime Minister's competency and to ensure the Government's stability. In

the original text, the President exercises the prerogative power to submit a proposal to appoint the Prime Minister to the Parliament.[7] Also, the Prime Minister lacked the power to submit his/her proposal on the structure and composition of the government to the Parliament without the President's consensus.[8] The amendments of 1999 and 2000 changed the power dynamic between the Prime Minister and the President.

The 2000 amendments ensured that the President shall submit the proposal to appoint a nominee who has the majority support from the Parliament for the Prime Minister within five days.[9] In addition, the amendments secured that the Prime Minister shall have the power to submit his/her proposal on the structure and composition of the government to the Parliament if the Prime Minister fails to reach a consensus on this issue with the President within a week.[10] Furthermore, the amendments ensured that if the Parliament fails to decide on a proposal for appointing the Prime Minister within forty-five days, then either the Parliament shall dissolve itself or the President shall dissolve the Parliament.[11]

The 2019 amendment further ensured the Prime Minister's position and the stability of the government. This was done by keeping the 2000 amendments' parameters to respect the Prime Minister's competency while constraining the competencies of the Parliament, the President, and the Prime Minister's own cabinet members. For instance, the 2019 amendment deleted the article that requires the government to resign if half of its members resign.[12] The amendment further constrained the Parliament that the Parliament shall not increase the amount of budget expenditure and deficit submitted by the government.[13] In terms of the President's competency, the amendment reduced the presidency term to one time for six years.[14] In addition, the 2019 amendment restricted granting powers to the President outside the constitutional mandate and so forth.[15]

2. Safeguarding the Parliamentary Democracy

The second bundle of constitutional amendments deals with the Parliament's competencies. Many constitutional scholars criticized that the 2000 amendments have undermined Mongolia's parliamentary democracy. These criticisms were reflected in two key amendments, including the Parliament session time being reduced from seventy-five to fifty working days in each half-year.[16] In addition, the 2000 amendment undermined the validity requirement for the Parliament session from overwhelming majority to simple majority presence.[17] Because of that, the Parliament session shall be deemed valid if the majority of members are present at the session, and of those, a simple majority could pass any legislation.[18] Nonetheless, the 2000 amendments also brought positive changes that promoted parliamentary democracy in Mongolia, such as the possibility of having a vice speaker for political groups in the Parliament and open ballot voting, etc.[19]

The 2019 amendments corrected and revised many of these previous changes. For example, the 2019 amendment reverted to the original text that the Parliament session shall last no less than seventy-five working days.[20] The 2019 amendment corrected that for legislation to pass, a majority vote of entire Parliament members was required.[21] The 2019 amendment kept the whole amendment as it was in the 2000 amendment concerning the election of the speaker, vice speaker, and open ballot voting. Additionally, the 2019 amendment empowered the Parliament to establish an interim review committee to oversee and check executive actions.[22]

3. Constitutionalizing Key Institutions

The third bucket of amendments from 2019 has constitutionalized several new institutions, i.e., the sovereign wealth fund, the judicial disciplinary committee, the judicial council, and a political party. Article 19,[1] where a political party becomes a state institution, was a new addendum to the Constitution. This article sheds light on many political party issues relating to political party membership, funding, ways in which the political party operationalizes, etc.[23]. The Parliament introduced key and thorough modifications to Article 6.2. governing the state's natural resource governance while securing and highlighting the principle that Mongolian citizens shall have greater control over natural resources.[24] In doing so, the amendments introduced the sovereign wealth fund to accumulate wealth generated from resource extraction and redistributing benefits in a fair and equal manner. The judicial council and the judicial disciplinary committee became constitutional institutions for the purpose of enhancing judicial independence and accountability.[25]

4. The Amendments led to Constitutional Cases in 2022

Last but not least, the amendments led to two constitutional cases concerning the separation of powers and the electoral system. The original constitutional text provided that Parliament members may not hold any position concurrently.[26] However, the 2000 amendment added an exception to the same clause, stating that Parliament members can also hold ministerial positions.[27] Under the 2019 amendment, the number of positions that a Parliament member could hold in government was limited to four.[28] However, this limitation triggered a constitutional case in August 2022.

The other amendment that led to the constitutional case concerns the text of the parliamentary election.[29] According to the Constitution, the Parliament has the authority to write legislation concerning the election procedure. Many argued that the Constitution failed to define an electoral system. The 2019 amendment prohibited the adoption or amendment of election law within one year prior to the regular parliamentary election. Still, the issue of whether the Constitution specifies the electoral system was ambiguous.[30]

III. Constitutional Cases

1. The dual mandate-related constitutional amendment was ruled unconstitutional

The topic of the dual mandate[31] has always been a hot topic in Mongolian politics ever since the democratic transition. Originally, the constitution-makers have ultimately removed from the drafting process provisions that completely separated the executive and legislative branches and instead left such

matters to be regulated through ordinary laws. In 2000, the Parliament amended the Constitution, which allowed members of the government to simultaneously hold parliamentary positions. Since then, appointing ministers almost entirely from the Parliament has become a popular method, which has shifted the balance of power towards empowering the executive and increasing its influence on the legislative process.

In 2019, Parliament amended the Constitution and introduced a separation-of-powers provision, which limited the number of ministers who could concurrently be members of parliament to four (Article 39.1). This provision was widely appreciated as it was expected to insulate the legislative and executive powers. Previously, the executive payroll vote in the legislative process weighed about one-fourth of the total votes, which imposed significant influence from the executive power on the small unicameral legislature of 76 seats. This move proved rewarding for the MPP, as it helped them guarantee their landslide victory in the 2020 election by continuing their super-majority dominance in the legislature.

Three years later in 2022, the CCtM ruled that the 2019 amendment contained an unconstitutional provision[32]. The Court viewed Article 39.1 of the Constitution, which limited the number of dual-mandated ministers, as unconstitutional, despite its widespread popularity among the public. The Court interpreted its role as a guardian of the Constitution and endorsed its power to strike down constitutional amendments if they violate the core principles and basic structure of the Constitution.[33]

The CCtM ruled that the provision limiting dual mandates "deteriorates and creates the risk of destabilization of the parliamentary system […] and uncertainty in governance, […] restricts rights of members of parliament and weakens the checks-and-balances, […] undermines principles of democracy and the rule of law, and […] it is attacking the authority of Prime Minister and weakening the executive power"[34] and ruled such provision as unconstitutional by lifting the restrictions.

mmediately after the Court's decision, the Prime Minister increased the number of dual-mandated ministers from four to thirteen. The ruling of the Constitutional Court seems to have favored the process of executive aggrandizement. This latter development urges to keep a close eye on the issue of the Court's independence, especially under the current one-party dominant system, where the majority of justices of the Court are nominated by the President and the Parliament which are currently presided over by the MPP.

2. The Case of the Parliamentary Election Law

Does the Constitution specify an electoral system? The CCtM answered this question three times. In 2012, the Court found that combining party listing with plurality voting did not violate the Constitution.[35] Yet just two months before the parliamentary election in 2016, the Court ruled that the Constitution only intended the plurality electoral system.[36] Ultimately, due to the constitutional amendments of 2019, the Court reconsidered the question and overruled all prior decisions on this matter.[37]

The original constitutional text was "the rules of procedure for the elections of members to the Parliament shall be prescribed by law."[38] Particularly, the Parliament has the power to set the rules governing election procedures. Since the first parliamentary election in 1992, except for 2012, the Parliament has always preferred the plurality electoral system in each election law. The amendment in 2019 did not change the original substantive text. Instead, it simply added another sentence that the Parliament cannot change the election law of the Parliament within one year prior to the regular election.[39]

In June 2022, petitioners argued that this addendum would be considered as new circumstances under the Constitutional Court procedure law; therefore, the Constitutional Court should reopen the case.[40] Interestingly, the Constitutional Court reviewed the petition but lacked to respond to why this simple addendum was considered a new circumstance to review the constitutionality of the electoral system.[41] Though the Constitutional Court did not address this question, the Court focused solely on the substance of the dispute.

The Constitutional Court reviewed each preceding decision and overruled all. The 2011 parliamentary election law introduced the party listing along with plurality voting.[42] This law allocates 48 seats based on plurality voting and the remaining 28 based on the percentage of votes received by political parties or coalitions.[43] According to the 2011 election law, if a candidate loses the plurality vote, they will also be listed in the party listing based on the votes secured in the plurality vote. It was ruled unconstitutional because the party listing must be free of plurality voting.[44] Strictly speaking, the Court did not address the constitutionality of the proportional electoral system, i.e., party listing. The Court has acknowledged this difference in the latest decision.

In 2016, the Constitutional Court responded to the constitutionality of the party listing and found it unconstitutional.[45] In this decision, the Constitutional Court alleged that 1992 Constitution drafters voted against proportional representation.[46] Additionally, the Court heavily focused on constitutional language from two interrelated articles. The former is that citizens who qualify to vote shall directly elect Parliament members, and the latter is that any *citizens* of Mongolia who have attained the age of twenty-five years and are qualified to vote are eligible to be elected to the parliament.[47] Based on terms such as "direct suffrage" and "any citizen," the Court concluded that the Constitution only specified a plurality election system, not party listing.[48] Consequently, the Constitutional Court ruled that the party listed in the election law of 2015 violated the Constitution.[49]

However, in June 2022, the Constitutional Court conceded that ambiguity exists among past decisions.[50] The Court said that it is unlikely that the drafters intended a plurality electoral system only because the State Small Khural (upper house of the parliament in 1991) voted against a mixed election system.[51] In addition, nothing has been shown that the same question was presented to the

constitutional convention, and the convention has voted on the question.[52]

The Court argued that "the Constitution prescribes that state power belongs to Mongolia. According to the Constitution, the Mongolian people exercise their power by directly participating in state affairs and/or electing representatives to the State authorities. Thus, Parliament has the authority to prescribe both election procedure rules and electoral systems as long as they ensure universal, free, direct suffrage and secret ballot voting."[53]

Consequently, the Court ruled that the Constitution does not specify any electoral system but that the Parliament is responsible for defining the electoral system. Soon after this decision, the Mongolian Parliament proposed a mixed electoral system in a new election law. Yet, it is likely that the discussion of the electoral system will continue to dominate Mongolian political discourse for some time to come.

IV. Looking Ahead

A new draft of the Constitution has been proposed by the former President, Prime Minister, and Speaker of the Parliament N. Enkhbayar who holds an influential position within the MPP. He has emphasized the current Constitution as being merely "transitional" in substance and argues that it has served its role for more than thirty years. He proposes adopting an entirely new one that is sought to resolve existing political and constitutional challenges.

Concurrently, the government has also submitted a proposal to amend the Constitution. The proposal seeks to increase the number of parliament members and calls for a mixed electoral system that includes 76 majoritarian and 76 proportional representation seats.

Many other political parties support constitutional amendments that propose structural changes because they expect to gain more seats in a larger parliament with a mixed electoral system. Therefore, it is highly likely that the Constitution will be modified once again before the 2024 legislative elections. It remains to be seen whether opposition parties can increase their representation and whether the MPP will continue to dominate the legislature after two consecutive terms. Once again, Mongolian democracy faces a test.

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Morocco

Prof. Saloua Zerhouni, *Mohammed V University in Rabat, Morocco*

Dr. Kawtar El Moutez, *PhD in constitutional law, Head of service in the Moroccan House of Representatives*

I. Introduction

Morocco is a reigning monarchy that has been able to maintain power for almost four centuries and adapt itself to changing historical environments. While the centrality of the monarchy in the system is constant, the nature of the political system has evolved. Morocco has witnessed several political and socioeconomic changes that pushed the monarchy to adapt itself to different challenges. Political authority in Morocco has resulted from a combination of pre-colonial forms of political structures, the established administrative and military apparatus under the French protectorate (1912-1956), and modern political institutions established following the adoption of its first constitution in 1962.

Morocco provides an interesting case for looking at how constitutionalism has functioned in a context characterized by a consistent combination of "traditional" forms of political authority with "modern" forms of political institutions. In its quest for some form of political modernity and democratic legitimacy to face the challenges of the 20th and 21st centuries, Morocco remains currently incapable of detaching itself from the weight of its authoritarian past.

For this first review of Morocco's constitutional justice, we deemed it necessary to introduce a brief history of its development and provide cases that illustrate its role and evolution since the introduction of the principle of judicial review in the Kingdom.

II. Major Constitutional Developments

Understanding recent constitutional developments in Morocco requires looking at how constitutionalism has evolved since the first attempts at writing a constitution in the early 1900s. We distinguish here between three main phases: The birth of constitutionalism (1901-1961), the constitutional dynamics under Hassan II's rule (1961-1999), and constitutionalism under Mohammed VI's rule (1999-Present). We will devote a specific section to constitutional justice development.

1. The birth of constitutionalism (1901-1962)

In Morocco, the first attempts at constitution-making date back to the early 1900s when governing elites, some intellectuals, and religious scholars of Fez drafted a memorandum (1904), and then two projects of constitution respectively in 1906 and 1908. The liberal constitutional project, critical of what they considered as "unlimited and absolute authority of the ruler", aimed at establishing a social contract with the Sultan by considering the *Bay'a* (oath of allegiance) as containing a series of duties and rights for both the King and the people. These attempts failed mainly because Sultan *Abdelhafid* disregarded the constitutional demands and French officials warned him against the limits that constitutionalism would set against his power. Ultimately, Morocco lost its sovereignty when the Sultan signed the protectorate treaty in Fez in 1912 and Marechal Lyautey, a monarchist by conviction, wanted to gradually rehabilitate in the long term the place of the monarchy in the Moroccan political system.

Since then, the protectorate influenced the evolution of Moroccan constitutionalism as it has laid the foundations of a political and administrative organization that had a significant imprint on the institutional design of independent Morocco. Inspired by the 1908 constitutional project and against the colonial authorities' excesses, the nationalist movement expressed demands for reforms during the French protectorate. During the transitional phase between 1955 and 1962, the supremacy of the Sultan was reestablished while some measures of representative regimes were adopted.

2. The Constitutional Dynamic under King Hassan II Rule

Morocco adopted its first constitution in 1962. Since then, a constitutional dynamic, under the umbrella of the monarchy, was activated to modernize traditional institutions (such as the monarchy), and, at the same time, the liberalization of political life through the establishment of modern political institutions (such as the Parliament), and the recognition of human rights and individual liberties.

Indeed, Morocco's claim to being a democratic state started with its first constitution, which stipulates, "Morocco is a democratic, social and constitutional monarchy." The Constitution established a multiparty system and guaranteed the citizens several human rights and individual liberties. The constitutional initiative was largely the work of King Hassan II, who designed the first constitution and those that followed in 1970, 1972, 1992, and 1996. All constitutions were submitted for ratification by popular vote and the process was regularly orchestrated by the Ministry of the Interior.

From one constitution to the other, the monarchy reinforced its role and powers within the Moroccan political system. For instance, the monarch accumulated the status of the "supreme representative" in 1972. Over the years, the monarchy surrounded itself with several political institutions and deployed different strategies to retain its position as an arbiter and the only vital institution for the functioning of the political system.

For some analysts, the 1962 constitution established a 'constitutional monarchy' in which the King reigns and governs. This text takes the form of "Palimpsest"; the successive writings from 1970 to 2011 do not affect the initial structure of the organization of powers, which remain marked by the supremacy of the throne, (Madani, 2021).

3. Constitutionalism under King Mohammed VI Rule

The 2011 Constitution was adopted in the context of the popular uprisings that shook different countries in the MENA region, and more specifically, the demands expressed by the February 20 movement for a "democratic constitution." To absorb social unrest and to guarantee the stability of the country, the Monarchy announced the reform of the Constitution on March 9th of the same year. The King drove the entire process of constitutional reform. He appointed the Commission on Constitutional Reform, which oversaw the drafting of the 2011 Constitution. The Commission did not result from an elected constituent assembly, as was the case in Tunisia. In the end, the Constitution was 'validated' by the Royal Cabinet before the referendum that took place on July 1st, 2011.

In general, the new text introduced some significant changes compared to the 1996 Constitution in terms of the recognition of human rights and the reinforcement of the powers of the Parliament and the Government. Nevertheless, the past 12 years show that there have been limits in terms of the effective implementation and institutionalization of these important changes.

The 2011 Constitution proclaims many human rights in its preamble and its first two chapters. Although this is a step forward, several rights are without precise normative content; for example, the rights to life and physical integrity are not accompanied by a clear abolition of the death penalty.

The powers of the Parliament were reinforced in the fields of legislation (enlargement of the domain of lawmaking) and government oversight (one meeting per month is reserved for the head of the government to respond to general policy questions, the motion of interpellation). The new text defines a status for the opposition, enlarges the prerogatives of the Parliament to public policy evaluation, and reinforces its powers in revising the Constitution.

Nevertheless, the new text constitutionalized the secrecy of committee meetings, which contradicts the right of access to information and the transparency of parliamentary work. The Parliament remains subordinated to the government and the Monarchy. Both institutions have the power to dissolve the Chamber of Representatives. Its powers in terms of constitutional revision are limited by binding conditions, notably the requirement of the majority of two-thirds of its members to initiate or approve constitutional revisions.

The King also maintains significant powers over the executive. The Constitution distinguishes between the Council of Ministers, headed by the King, and the Council of Government, chaired by the head of government. The Council of Ministers decides on strategic issues and has veto power over all decisions made by the Council of Government.

Despite advances in the text, the 2011 Constitution has not established a true parliamentary monarchy. The King remains at the center of political and constitutional life, and he continues to concentrate significant executive powers.

4. Constitutional Justice Developments in Morocco

The principle of judicial review was first stipulated in the constitutional project of 1908 but was never implemented. The Council of Notables had the prerogative of reviewing all acts issued by the Council of the Nation. It was implemented with the 1962 Constitution, which established the Constitutional Chamber as part of the Supreme Juridical Council with the mission to review the constitutionality of both organic laws and parliamentary bylaws. Judicial review was further developed with the 1992 Constitution, which established the Constitutional Council as an independent body of the ordinary judicial system. The Council had the prerogatives

of controlling the constitutionality of the bylaws of both chambers of the Parliament, organic laws and ordinary laws, and the announcement of the results of referendums. The same provisions were maintained in the 1996 Constitution.

With the 2011 Constitution, a Constitutional Court replaced the Constitutional Council, and its prerogatives were reinforced. While the Court keeps the prerogatives of the Constitutional Council, it also has the power to take cognizance of a pleading of unconstitutionality that is raised during a trial, when one of the parties maintains that the law on which the issue of litigation depends infringes on the rights and freedoms guaranteed by the Constitution. Moreover, the court's jurisdiction was expanded to include the review of the constitutionality of the bylaws of councils regulated by organic laws and of international conventions and treaties.

III. Constitutional Cases

1. The Establishment of Committees of Inquiry in Morocco

Since its first legislature, the Parliament established different kinds of committees in its bylaws. The Parliament proposed an "inspection committee" to investigate emergency cases and major issues raised by Parliamentarians. It has also established a "Research and Oversight Committee". While reviewing the constitutionality of the bylaws, the Constitutional Chamber declared that the Parliament has no right to create an "inspection committee" (decision N°1/1963) as this prerogative is not stipulated explicitly in the Constitution. The Chamber required that the Parliament change the label of the "inspection committee" and the quorum for its establishment. As for the "Research and Oversight Committee", the Chamber did comment on it.

When the Parliament amended its bylaws in 1970 and 1971 and referred it to the Constitutional Chamber for review, the latter did not raise any issues about the Research and Oversight Committee (Decisions N°58/1971, N°60/1971, N°63/1971). The Parliamentarians perceived the absence of comments by the Chamber as a sign of tacit approval of this committee.

On April 20, 1978, the Chamber declared articles 101,102, and 103 on the "Research and oversight committee" as unconstitutional (decision N°4/1978). The judgment was motivated by the fact that the Constitution does not refer to a "Research and oversight committee" as an oversight tool. Therefore, the Constitutional Chamber was required to cancel the three articles. This decision spurred a controversy between the Constitutional Chamber and the Parliament.

In response to the Chamber requirement, the Parliament amended the bylaws and changed the name of the committee from "Research and Oversight Committee" to "Research and Investigation Committee". Nevertheless, the Chamber did not accept the amendment and vindicated its decision by the fact that establishing committees of inquiry by the Parliament was not listed explicitly in the Constitution (Decision N°18/1979). Relying on the principle of *res judicata*, the Parliamentarians considered that the chamber's decision concerns only the proposed change in the name of the committee. Thus, the Parliamentarians kept the name as it appeared on the original version and established the first "Research and Oversight Committee" on the "Leaking of baccalaureate exam" in 1979.

In 1985 and 1991, the Parliament amended its bylaws, more specifically the articles that concern the "Research and Oversight Committee". Nevertheless, the Chamber refused the amendments (decisions N°182/1985 and N°238/1991) for the same reasons mentioned above. Despite the Chamber's decision, a research and oversight committee was established in 1990 to investigate the strikes that took place in some cities in Morocco.

After all these controversies, the constitutional legislator realized the effectiveness and usefulness of this oversight mechanism. To fill this constitutional void, the 1992 Constitution mentioned explicitly "Parliamentary Inquiry Committees". Since the constitutionalizing of this committee, the parliament created eight inquiry committees on different issues.

In 2011, the Constitution reinforced the role and effectiveness of the committees of inquiry. For instance, it reduced the quorum for their establishment and, when necessary, the presidents of the two Houses of Parliament can refer the committee report to the judiciary. During the past 11 years, the House of Councilors created four committees of inquiry.

This case illustrates the will of newly established institutions to put into practice their constitutional prerogatives. The Parliamentarians were defending their right to oversee the government, and the Constitutional Chamber was trying to play its role in controlling the conformity of the Parliament's bylaws to the Constitution. The controversy played a role in reinforcing the oversight powers of the Parliament through the constitutionalizing of the committees of Inquiry.

2. The Use of New Technology in Electoral Disputes

The rapid development of modern communication technology, particularly through the Internet and social media, has created unprecedented opportunities for targeted and cost-effective electoral communication. However, this has also made it difficult for countries to regulate this field due to the speed of technological advancement, the complexity of its pathways, and the challenges of monitoring it. As a result, many countries have struggled to adapt their electoral laws to modern communication technologies.

In Morocco, the legislator did not explicitly regulate the use of these technologies in law No. 57.11, leaving room for the constitutional judge's discretion. In 2014, the Constitutional Council encountered a challenge while assessing the case of an appellant presenting evidence, including online publications, for the cancellation of the partial legislative elections in the "*Moulay Yacoub*" district. The Council canceled this election (decision N° 946/2014) by referring to the violations of the principles of equality and equal opportunity between candidates. More specifically, the Council mentioned the violation of article 118 of law No. 57.11, which prohibits the use of national symbols in programs and electoral campaigning. The Council considered

that the materials and programs broadcasted through the Internet and social media during electoral campaigning are subject to the same general principles that govern communication through other means. The Council stated that the use of these symbols affects the voters' choices and was contrary to the law.

The Council's decision set an important precedent as the constitutional judge accepted the online evidence presented by the appellant. This decision paved the way for an increasing reliance on the Internet and social media by candidates and political parties in the 2016 legislative elections for providing evidence in electoral disputes. This resulted in many electoral appeals related to the use of these methods. As a result, judicial jurisprudence has evolved to address modern communication technologies by drawing on general principles applied to other means of communication.

While the Constitutional Court has accepted the use of social media as evidence in electoral disputes, questions remain about the effectiveness of the law and the extent to which the constitutional judge is aware of the various possibilities and problems that may arise in the future. The use of social media presents new challenges, given its increasing influence in guiding public opinion and its potential to influence the outcome of elections.

3. Ensuring the Right to a Fair Trial

The judiciary is the most important guarantor for respecting and protecting human rights. It is entrusted with ensuring the rule of law and the equality of all before it. The third case relates to the defendant's right to a fair trial. In Morocco, the right to defense is guaranteed both by the Constitution and by the judiciary. Article 120 of the 2011 Constitution states the right to defense, which includes a range of other rights such as the right to access and obtain the documents included in the indictment file available to the public prosecution. The judiciary has also adopted the principle of equality of the prerogatives of defense and accusation. This principle is a manifestation of equality before the law and requires that both the defense lawyer and the civil party lawyer enjoy the same conditions and deadlines for preparing the defense.

The issue about the right to defense was raised when the Parliament presented the law 129.01, which amended article 139 of the Code of Criminal Procedure to the Constitutional Council on July 26, 2013. Before referring it to the Council, the discussion of the draft law in Parliament resulted in a disagreement between the majority and the opposition. Indeed, 87 members of the House of Representatives considered the amendment as not complying with the Constitution. The main reason for disagreement between the majority and the opposition was about the provision granting discretionary powers to the investigating judge in terms of providing a copy of the record or other documents in the indictment file, wholly or partially, to the defense of the defendant.

The Constitutional Council assessed the accordance of the law 129.01 with the fundamental principles of the judicial system in Morocco. These principles include the independence of the judiciary, the impartiality of judges, and the protection of individual rights and freedoms. By considering these principles, the Council ensured that this case complied with the Constitution and its values as well as the principles of the rule of law.

The Constitutional Council's decision N°921/2013 acknowledged the importance of providing the right conditions for a good investigation of serious and complex crimes. At the same time, it emphasized the need to respect the rights of citizens, especially the right to defense and the right to litigation, which requires a balance between the state's interests in combating crimes and in protecting the rights of suspects. Therefore, the legislator may establish special rules and procedures for investigating these crimes, but these procedures must be consistent with the civil and political rights stipulated in the Constitution. Moreover, the constitutional judge emphasized the fact that the law should guarantee the impartial exercise of the discretionary exception of the investigating judge.

The Constitutional Council declared that the law 129.01 is unconstitutional because it does not ensure a balance between the requirements of a proper investigation and the requirements of the right to defense. For instance, the law states that the delivery of the judicial police report and other documents of the case to the defendant's lawyer and the civil party's lawyer is not possible before ten days after the start of the detailed interrogation. The Council considered the law incompatible with the Constitution, thus it cannot be applied. The judge was diligent in ensuring that the principles of the Moroccan judicial system were persevered and that citizens' fundamental rights were protected.

The Constitutional Council's declaration of the unconstitutionality of this law indicates its commitment to preserving the progress made by Morocco in the field of human rights, particularly the right to a fair trial.

4. The Constitutional Court's Case on the Exception of Unconstitutionality

In Morocco, article 133 of the 2011 Constitution regulates the settlement of the exception of unconstitutionality. The conditions and procedures of its implementation were presented in the Draft Organic Law (DOL) 15-86 in July 2016. Following its assessment by the Constitutional Court, the latter declared the unconstitutionality of the DOL in Decision n° 18/70 on March 6, 2018. The Parliament amended the DOL in light of the Court's decision. A revised version was adopted on January 17, 2023, and was referred to the Court for a second examination. The Case is still pending. We will focus on the controversy that spurred between the Court and the Parliament concerning the DOL.

The DOL defined whom, when, and how Moroccans can plead unconstitutionality. Indeed, all litigants can raise the claim of unconstitutionality when the issue pertains to the violation of the rights and freedoms guaranteed by the Constitution. The claims could be submitted before Moroccan courts of all kinds and degrees. In terms of procedures, the claimant has to observe formal and substantive requisites such as submitting a written brief separately from supporting documentation. As for assessing the merit of claims, the DOL assigned the filtering process to the Court of Cassation.

The main issues raised by the Court in its decision n° 18/70 were about procedural restrictions on the exception of unconstitutionality. For the Court, entrusting the Court of Cassation with the filtering of claims erodes its exclusive authority over post-facto review. The Court required that the DOL limits the scope of intervention of the Court of Cassation solely to formal conditions and procedures. The Court considered the prerogative of assessing the seriousness of claims and taking the decision to refer them to the Constitutional Court as an act of passive screening of their constitutionality (Article 11 of the DOL). Thus, this prerogative is inconsistent with the Constitution, which provides the Constitutional Court with an exclusive comprehensive mandate over the constitutional review of laws. The Court recommended that the Court of Cassation should only examine the legality of claims (the formal procedures of filling the claim). Then, it should refer both the form and substance of claims to the Constitutional Court. In its decision n° 18/70, the judge recommended the creation of a filtering mechanism in the Constitutional Court whose composition and rules are to be defined in an organic law.

The DOL also contains restrictions on citizens' access to constitutional justice. The litigation procedures before the Constitutional Court should be written in separate briefs, the litigants must pay fees, and all comments on the pleadings should be presented in writing by the different parties. These procedures may hinder the full exercise of this right by the majority of citizens who are necessarily well aware of the mechanism itself.

Establishing a mechanism to enhance citizen access to constitutional justice is crucial for ensuring better protection of fundamental rights and freedoms. It provides individuals with the opportunity to challenge the statutes that threaten their rights and interests. The establishment of this mechanism in Morocco could play an important role in enriching constitutional jurisprudence and promoting convergence between international conventions and national legislation, especially in the field of Human rights.

For this mechanism to achieve its goals, Morocco should guarantee the right conditions and the adequate legal framework for its implementation. If not, the mechanism could be instrumental for claims that aim at wasting the time of the courts to protect their interests. These attitudes will constrain judicial efficiency.

IV. Looking Ahead

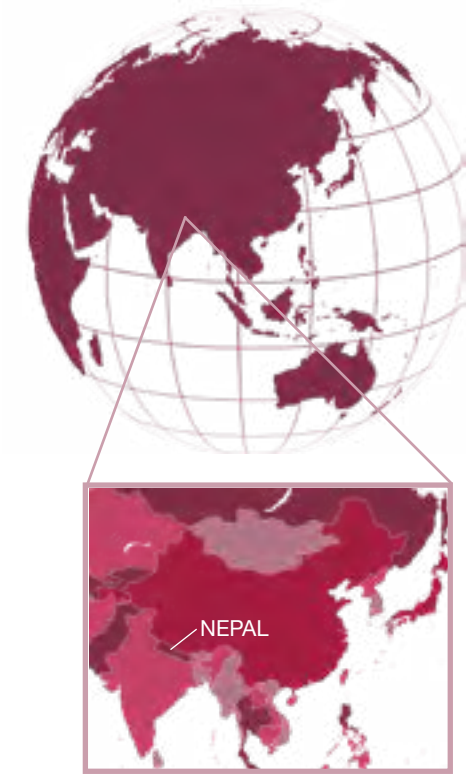
The constitutional developments evoked above show that Morocco has made significant efforts for establishing modern political institutions. These include the introduction of the principles of the separation of powers and the rule of law, recognizing and protecting individual and collective rights and freedoms, and promoting a more inclusive economic, social, and cultural development. Furthermore, the different constitutional cases reveal that the Constitutional Court plays a critical role in preserving the Constitution's integrity and in ensuring better protection for citizens' rights. Indeed, the 2011 Constitution puts no limitations on the constitutional interpretation by the Court and establishes the right of citizens' access to constitutional justice.

Nevertheless, Morocco still faces several challenges in its path towards more liberal principles of governance. The unresolved equation of the dualism between "traditional political authority" and the principles of liberal democracy still inhibits Morocco's progress toward democracy and the rule of law. There are ambiguities at the level of the text of the 2011 Constitution, which challenge the way to interpret its provisions. For instance, the text states that Morocco adheres to human rights as universally recognized, and to the prevalence of international conventions over national laws, at the same time, it stresses the Islamic identity of the kingdom and 'the constants/ permanent character of the Kingdom'. The dual allusion could be misleading for the constitutional judge when interpreting the text. In the case of the exception of unconstitutionality, would the court interpret the provision according to the supremacy of international conventions over the national legislation, or would it decide upon tradition and the principles of Islamic law? Thus, the competitiveness between traditional and liberal principles would be a challenge for Morocco that needs to be dealt with.

V. Further Reading

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Nepal

Neha Tripathi, *Assistant Professor (Law), Maharashtra National Law University, Aurangabad, India*

Anubhav Kumar, *Advocate & Researcher, Supreme Court of India*

Sachi Chopra, *Advocate & Researcher, High Court of Delhi, India*

I. Introduction

The Constitution of Nepal of 2015, was a result of huge political turmoil and people's protest with a plan to transform and have a democratic federal republic in place. The constitutional developments in 2022 saw a tussle between branches of government and instances of having them at loggerheads with each other, however, what is important is the role of the judiciary in trying to maintain the *status quo* and upholding the spirit of the Constitution by interpreting the provisions in tune with various international human rights instruments. Yet, with judicial independence in peril and excessive bureaucratic control and pressure coupled with corruption, a stable constitutional structure is far from being materialized in reality. According to the Freedom House Report, Nepal has been categorized as "Partly Free" on the parameters of *Political Rights* and *Civil Liberties* with important concerns being raised in relation to gender violence, underage marriages, and bonded labor.[1] The discourse surrounding the constitutional crisis in Nepal continued in 2022 with respect to concerns relating to federalism, election concerns, judicial appointments, and the proposed amendment to Nepal Citizenship Bill. Political instability continues against the backdrop of various social, geo-political, and economic factors in Nepal. On the human rights front, the Supreme Court of Nepal rendered various important constitutional decisions, including a recent judgment wherein the Court ordered the Government to recognize same-sex marriage between a Nepali citizen and a German citizen.[2]

II. Major Constitutional Developments

1. The Chief Justice Conundrum

Nepal plunged into the year 2022 with a *constitutional* leap of faith, hoping to settle the awful chaos around its Judiciary, when the lawmakers voted to impeach the Chief Justice of Nepal's Supreme Court on February 13.[3] While the step was a perspicuous attempt to infuse optimism in the country's political ethos and mark a closure upon the looming constitutional crisis but, on the contrary, and as feared by many, the crisis has grown into a colossal constitutional and political catastrophe. Chief Justice Cholendra Shumsher Rana was accused of reinstating the K.P Oli government of Nepal back in power in return for ministerial posts for his relatives. It is important to highlight that the step was set to have ramifications not only in the political corridors of Nepal but also on the 'relationship' with countries like the US, China, and Pakistan, who are crucial partners for Nepal especially post-Pandemic. The crisis over the Supreme Court of Nepal after February 2022, has only deepened. As of the day of writing this report, the Court is functioning without a permanent Chief Justice and with many significant vacancies for the post of Judges which are yet to be filled, thereby hampering the delivery of Justice.[4]

There have been efforts by the Nepal Bar Association (NBA) to mitigate the crisis and bring to the notice of the current Prime Minister about the void of permanent Chief Justice to Nepal's Supreme Court but nothing effective apart from

assurances have emerged.[5] In these circumstances and considering the method of appointment of Judges in Nepal, the constitution of the parliamentary committee is pertinent which presently seems to be the biggest hurdle due to the constant two-fold political tussle i.e., amongst each other and with the Judiciary. Nepal effectively needs constitutional redemption and stability over its Chief and other judges for its worthwhile functioning and steering the country's direction.

2. Environmental destruction and 'Ecocide'

We are all aware that, when it pertains to the adjudication of rights, the Supreme Court of Nepal is perhaps one of the most progressive constitutional courts across the globe, let alone in South Asia. The top court of the Himalayan country, in a landmark judgment, encapsulated the jurisprudence of 'Ecocide' while ruling on the excavation of the Chore Range of Nepal.[6] The region is home to significant biodiversity and includes national parks and wildlife corridors that cover approximately 13% of Nepal's territory. The Top court held that the excavation of such a large scale in the region is in direct violation of Article 30 of the Constitution[7] which provides for the Right to Clean and Healthy Environment. The quintessential aspect of this constitutional development is the discussion and jurisprudence of "Ecocide" which means 'unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts'. The idea of Ecocide is a tempting one in climate litigation across the globe as it is currently in its nascent stages of being proposed as an additional crime in a Rome Statute and not found in any jurisdiction barring one or two.[8] The Supreme Court of Nepal's discussion on the Jurisprudence of 'Ecocide' could be a focal point to trigger new avenues in how the world looks at the role of the court in climate litigation. It can be a factor that ensures effective sustainable development and furthers its principles by locating some extra degree of responsibility.

III. Constitutional Cases

1. Appointment of Inspector General of Nepal Police

In July 2022, the Supreme Court of Nepal dismissed the petition, filed by Bishwo Raj Pokharel, the then Additional Inspector General of Police (AGP), challenging the validity of the appointment of Dhiraj Pratap Singh as Inspector General of Police (IGP).[9] The petitioner had raised an issue with respect to the decision of the Government to appoint Dhiraj Pratap Singh as IGP, even though he was junior to the petitioner. The petitioner alleged a violation of the seniority rule and claimed that the government's decision is against the Rule 41 of Police Rules, 2014, additionally, Dhiraj Pratap Singh was promoted within one month of him being conferred the post of AGP. However, the Supreme Court affirmed the decision of the Government on the pretext that the rule does allow the Government to appoint on the basis of merit, work execution, and the candidate's ability to lead and gracefully hold responsibility of the position. The decision is highly critical considering that the successive governments have tried to erode the sanctity of police forces by appointing candidates who are suitable to their own interests and side-lining seniority and organizational norms, in spite of a clear directive of the Supreme Court of Nepal in this regard.[10]

In a case with similar facts, even though the Supreme Court of Nepal had quashed the petition in a similar fashion as in the instant case, yet had authoritatively stated that seniority should be a high priority in case of appointment of officials in high posts of security forces and if seniority is undermined without any justified reason, it would lead to arbitrariness and will have an unwanted impact on human resource management with security forces.[11]

2. Resignation required before running for local elections

The petitioner challenged the constitutional validity of Section 36 of the Election Code of Conduct, 2078 (2022) which required the local representatives to resign from their posts in order to be eligible to contest the upcoming local election.[12] The petition claimed that Sec. 36 is violative of Article 17(2) (f), 18(1), 25; 215 (8) (a) of the Constitution as well as Sec. 13 (d) of Local Level Election Act 2073 (2017). Sec. 13 (d) is a disqualification clause for the candidates wherein a person taking any kind of remuneration from the local level authorities is disqualified. Here, the petitioner claimed that Sec. 13 (d) only excludes the one taking remuneration and the local representatives are those who only take the facilities and not the remuneration. So, as per the Act, they cannot be forced to resign in order to contest elections, and thus, Sec. 36 of the Code of Conduct should be declared as invalid. However, the Court held that although local representatives only take the facilities and not the remuneration, still they are the holders of the office of profit. Thus, Sec. 36 of the code of conduct cannot be said to be against the constitutional principles.

3. Environmental concerns over Nijgadh Airport

In 2022, the Supreme Court of Nepal came down heavily on the government for not giving due regard to the environment in clearing the ambitious Nijgadh International Airport and stopped the construction of said Airport[13]. The Court, taking into account the "Public Trust Doctrine" and the "Intergenerational Equity principle," observed that the destruction of the environment, in the name of development, cannot be allowed. It was apprehended that more than a million trees would have to be cut down in order to build this airport. The Court, with a split verdict of 3:2, found that the construction site had not been chosen carefully and while ordering the government to find an alternative site, the Court also found multiple errors in the "Environmental Impact Assessment" (EIA) report. The bench stated that – "*EIA was completed three years after the government decided to build the airport at the disputed site and this cannot be termed an act in accordance with law and procedures".* It is also important to note that while highlighting the paradox in the report and clearance, the court said that the EIA report itself states that since there are 2,450,319 big and medium-sized trees on the site, the argument

that the construction of the airport won't adversely impact the environment cannot be accepted. In this regard, the bench issued the writ of certiorari to quash all of the government's decisions regarding the airport construction at the disputed site and also issued the writ of *Mandamus* against the government to build the airport at a suitable place by completing all the mandatory provisions, including consultation with the experts and ensuring minimum impact on the environment. On December 6, 2019, Supreme Court Justice Tanka Bahadur Moktan issued a stay order asking the government to immediately stop the felling of trees at the site, which a division bench of Chief Justice Cholendra Shamsher Rana and Justice Kumar Regmi upheld on December 22 of that year.[14]

4. Court blocks election commission from suppressing social media campaign

The Supreme Court of Nepal has directed the Election Commission of Nepal to not take action against the famous "No Not Again" campaign on various social media Platforms. In an interim order dated November 10, 2022, the top court observed that *"Campaigns such as No Not Again is an example of freedom of opinion and expression and a significant condition for effective enfranchisement practice"*. The Election Commission of Nepal had warned to take action and stop the dissipation of fake news and hate speech against the candidate.[15] It said the campaign is in violation of Section 47 of the Electronic Transaction Act 2063, Section 23(1) of the Election (Offences & Punishment) Act 2022 as well as Section 4 of the Election Code of Conduct 2022 and warned that campaigners may face imprisonment of up to five years or a fine of Rs. 1,00,000 (USD $750) or both. "No Not Again" was a social media campaign that called for boycotting long-term politicians in the coming elections. The users expressed their sense of fatigue and used images of leaders of various political parties with the caption "you have contributed enough now it's time for the new faces."[16] Interesting to note that Article 17 of the Nepali Constitution guarantees freedom of speech and on that ground, the petitioners approached the top court. The single bench of J. Hari Phuyal ordered not to implement the EC decision which was later given continuity by the division bench consisting of J. Sapana Pradhan Malla and Sushmita Mathema. The Election Commission is therefore prohibited from punishing the "No, not again" campaigners until the final disposition of the case.[17]

5. Tobacco Industry's challenge to 90% pictorial warning dismissed

In a dispute between tobacco consumption and public health protection, the Supreme Court of Nepal dismissed the Tobacco industry's challenge to mandatory pictorial health warnings on all tobacco packages. The Tobacco Control Rules in Nepal are governed by the Tobacco Product (Control and Regulatory) Act, 2011, it increased the size of the graphic health warnings from 75 percent to 90 percent on all tobacco product packaging. The tobacco producers petitioned against this law arguing its stringent nature and exceeding the obligation mandated by the WHO's Framework Convention on Tobacco Control, which mandates 30% coverage. The Supreme Court directed the immediate implementation of the law and referred to Section 45 of the Public Health Service Act, 2018 which restricts advertisement of alcohol and tobacco products having adverse effects on public health, and Section 5 of the Advertising Regulation Act, 2019 which prohibits the advertisement of things prohibited by existing law, issued an interim order to the State to form a committee to monitor thereof role of the State.[18] The pictures of the adverse health impacts of tobacco use have proved to be effective where literacy rates are low or multiple languages are used and significantly motivate smokers to quit or reduce intake. In view of the studies showcasing 20 percent of youth consuming tobacco in Nepal and the WHO's estimates that around 27,000 deaths accounting for 15 percent of all deaths occur annually from tobacco use, the verdict embarks upon the public health safety agenda over the corporate interests of the tobacco industries.[19]

6. Constitution bench annuls parliament secretariat's decision to invalidate impeachment of the Chief Justice

Over allegations of abuse of power and following the registration of the impeachment motion, the Chief Justice of Nepal Cholendra Shumsher Rana was suspended on February 13, 2022. An Impeachment Committee was further formulated in March 2022, wherein based on Article 101 (2) of the Constitution, the majority of members recommended impeachment of the suspended Chief Justice and submitted its report in September 2022, however the same could not be tabled.[20] The Parliament Secretariat, in a reply to Shumsher Rana's letter, held the impeachment motion to be ineffective with the November 2022 election of new House of Parliament in terms of Article 89 (c) & Article 91 (6a) wherein term of the lawmakers and Speaker expires respectively and Article 111 (10) wherein pending bill lapses on the dissolution of the House.[21] Pursuant to the said suspicious decision of the Parliament Secretariat, Shumsher Rana announced his return to the Supreme Court instigating circles of judicial and political ripples. The Supreme Court in a writ moved by the Nepal Bar Association against the stand of the Parliament Secretariat, maintaining the balance of convenience issued an interim order not to implement the decision of the Parliament Secretariat to invalidate the impeachment motion.[22] The Constitution Bench formulated the question of whether the Parliament Secretariat has the authority to exercise such power to issue a letter invalidating the Chief Justice's impeachment or whether it is the sole jurisdiction of the Parliament.[23] The proceedings remain pending while the impeached Chief Justice retires.

IV. Looking Ahead

The year 2023 is placed to be a significant year in Nepal's political and constitutional ecosystem as the country is witnessing dark clouds over the fate of its Prime Minister. In 2023, a quintessential case to look forward to pertains to a show-cause notice issued by the Supreme Court of Nepal to its Prime Minister Pushpa Kamal Dahal 'Prachanda' in an incident of "Maoist violence" where close to 5000 Murders took place allegedly based on his public speech.[24] This year is also important from the perspective of the ongoing tussle on the Appointment of Judg-

es to the Supreme Court of Nepal between the government and the Court. The Supreme Court is still working without a permanent chief justice, and as many as half a dozen positions for judges are still vacant which is consequently affecting the pendency of cases at the top court.[25] Resolution of these two pertinent issues would be relevant to avoid a constitutional crisis over Nepal in 2023.

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The Netherlands

Jurgen Goossens, *Full professor of Constitutional Law, Utrecht University, Montaigne Centre for Rule of Law and Administration of Justice*

Gert-Jan Leenknegt, *Associate Professor of Constitutional Law, Tilburg University, Department of Public Law and Governance*

Claire Loven, *Assistant Professor of Constitutional Law, Utrecht University, Montaigne Centre for Rule of Law and Administration of Justice*

Eva van Vugt, *Assistant Professor of Constitutional Law, Utrecht University, Montaigne Centre for Rule of Law and Administration of Justic*

I. Introduction

Since Article 120 of the Dutch Constitution still prohibits the constitutional review of Acts of Parliament by the judiciary, this report does not include traditional constitutional case law. Instead, this report addresses two major constitutional developments. The first one relates to initiatives to modify the prohibition of constitutional review. The second development is that of constitutional change. In 2022, the Constitution was amended six times; the seventh amendment was adopted just after the turn of the year on January 17, 2023. We will discuss the following amendments: the inclusion of a general provision in the Constitution, the explicit extension of non-discrimination grounds to disability and sexual orientation, the modernization of the right to privacy of communications, the embedment of the right to a fair trial, the establishment of an electoral college for the Upper House for non-resident nationals, and the 'recalibration' of the constitutional amendment procedure. We conclude by looking ahead.

II. Major Constitutional Developments

1. Modification of the prohibition of constitutional review?

The prohibition of constitutional review of Acts of Parliament[1] by the judiciary as laid down in Article 120 of the Constitution has been aptly described as the 'evergreen' of Dutch constitutional law.[2] Since most States adopted at least some form of constitutional judicial review, the prohibition of constitutional review by courts is seen as a unique aspect of Dutch constitutionalism, but also as a controversial one. Every once in a while, the discussion revives but, so far, attempts to modify Article 120 have proven to be unsuccessful.[3] Yet, developments in 2022 create the impression that this might change in the near future.

In July 2022, the Minister of the Interior and Kingdom Relations and the Minister for Legal Protection sent a letter to Parliament. In this letter, they present the view of the current Government on the prohibition of constitutional review.[4] According to the Government, all courts should be competent to review the constitutionality of Acts of Parliament that have entered into force (*ex post* review). Furthermore, the letter suggests limiting constitutional review to the civil and political rights that are enshrined in Chapter 1 of the Constitution. Finally, judgments on the constitutionality of Acts of Parliament should be binding and judges should be allowed to disapply Acts of Parliament if application conflicts with the Constitution.

The Government believes that constitutional review by the judiciary could strengthen the legal protection of citizens vis-à-vis the State. As described in our previous reports

of 2020 and 2021, the "childcare allowance scandal" painfully demonstrated that the State had failed on all fronts to protect citizens against unjustified actions by government officials. As a result, the prohibition of constitutional review is now back on the political agenda. It must now be awaited whether the Government (or Members of Parliament) will also submit a bill to amend Article 120, and whether or not such a bill will make it to the finish line this time. Due to several scandals, like the childcare allowance scandal mentioned above, the timing seems right: political parties are increasingly in favor of constitutional review by the judiciary as a means to strengthen the position of citizens vis-à-vis the State.

The legal debate on amending Article 120 is centered around fundamental questions about the role of the judiciary and, more generally, the system of checks and balances. Conclusions of Advocate-Generals and actual judgments show an interesting development in this regard. Indeed, in recent administrative law cases, judges are showing less restraint when it comes to reviewing secondary legislation.[5] Judges are now willing to display provisions of secondary legislation based on the principle of proportionality. This is seen as an important step forward in terms of effective judicial protection. Despite this development, however, the Administrative Jurisdiction Division of the Council of State held that reviewing Acts of Parliament based on the proportionality principle is still a bridge too far because of the prohibition of constitutional review.[6]

2. Constitutional reform of 2022-2023

The Dutch Constitution is known as a sober and rigid constitution. The modesty of the Constitution, a text 'without frills', can be considered part of the Dutch constitutional culture. Proposals for constitutional amendments seem to require 'constitutional maturity' and a 'societal consensus' on the necessity for change before being adopted.[7] The constitutional amendment procedure in Article 137 of the Constitution is a comprehensive single-track procedure.[8] This entails that all constitutional provisions (comprehensive) are subjected to one formal amendment procedure (single-track). The procedure encompasses two readings, an intervening election, and a qualified majority in the second reading. The rigid amendment procedure, in combination with increasing political fragmentation, makes constitutional amendment initiatives less likely to succeed.

The incidental and exceptional nature of constitutional amendments in the Netherlands makes it quite remarkable when several constitutional amendments are approved in the same period.[9] Yet, that is what happened in 2022, with a small extension to January 2023. In total, no less than seven constitutional amendment bills were adopted, which was reason to label these amendments as potentially the most extensive constitutional reform in forty years. In the period from 1814 to 2023, 142 amendment bills have been adopted in total, which results in an average amendment rate of 0.68, which is in line with the international average. At the same time, however, empirical, quantitative research by Goossens and Haex showed that these 142 amendment bills consist of 1240 amended constitutional articles.[10]

Below, six of these seven amendments will be discussed. One amendment is not discussed, as it only concerned the removal of transitional provisions that had become irrelevant.

III. Constitutional amendments

1. General provision

Unlike the Constitution of many other countries and the Charter for the Kingdom of the Netherlands of 1954, the Dutch Constitution has no preamble nor one or more introductory general provisions. It is remarkable that in 2022, the Constitution was enriched with a general provision that, according to the Government, identifies "the core principles of our Constitution" or even "the foundations of our state."[11] Therefore, Stremler points out that for the first time since 1814, the constitutional legislator seems to have committed itself explicitly to an abstract normative ideal.[12]

The road to adoption in 2022 of the unnumbered, 'sober', or short general provision at the beginning of the Constitution is a long one.[13] It is an "Article 0" so to speak, though explicitly not called a "preamble".[14] It all started with ambitious proposals developed by the National Convention in 2006 regarding the inclusion of a preamble and/or a chapter of 'General Provisions' in the Constitution. Subsequently, at the request of the Cabinet in response to the advice of the National Convention, the State Committee on the Constitution of 2010 explored the desirability of a preamble and proposed a (sober) general provision instead of a preamble. The initial reaction of the Government was negative, but ultimately, a concise general provision was adopted that reads as follows: "The Constitution guarantees fundamental rights and the democratic rule of law."

The future role and relevance of this general provision will undoubtedly be entangled with a potential future modification or abolishment of the prohibition of constitutional review. In such a case, Acts of Parliament and potentially even constitutional amendments to the Constitution might be reviewed against the three principles now enshrined in the General Provision: fundamental rights, democracy, and the rule of law. At this moment in time, it is obvious that these three principles are an explication of widely shared and strongly supported constitutional principles in the Netherlands, though one never knows what the future might bring (in terms of anti-constitutional and anti-democratic initiatives). Even though the provision is sober and in that sense in line with the constitutional tradition and culture in the Netherlands, it undoubtedly has important symbolic value. Moreover, constitutional actors may interpret other constitutional provisions and other legal norms in view of the general provision.

2. Extension of non-discrimination grounds to disability and sexual orientation

A second constitutional amendment concerns the prohibition of discrimination. Since a major revision in 1983, Article 1 of the Constitution prohibits discrimination on grounds of religion, belief, political

opinion, race, sex, or on any other ground. Ever since 1983, it has been discussed whether these grounds should be reformulated, whether grounds should be added, or whether it would be better to not include any grounds at all.[15] This discussion has now resulted in the addition of disability and sexual orientation to the enumeration of non-discrimination grounds.[16]

Already in 2010, three Members of Parliament submitted a draft bill to revise Article 1 of the Constitution.[17] They proposed to add disability and sexual orientation in the light of, *inter alia,* changes in society and a need to take action for the disadvantaged position of people with a disability and to promote the acceptance and equal treatment of homosexuals.[18] They also chose those two grounds because it concerned 'suspect grounds', distinguishing them from age for example.[19] Because of the 'heavy' procedure to revise the Constitution[20] and the fact that it took political parties some years to get really invested in preventing discrimination and promoting diversity and equal treatment, it was only in the first weeks of 2023 that adding disability and sexual orientation to the prohibition of discrimination was finally approved by Parliament. This constitutional amendment is considered to have a primarily symbolic value. After all, discrimination on the grounds of disability and sexual orientation was already prohibited based on the previous text of Article 1 ("or on any other ground"), in secondary legislation, and numerous international and European treaties ratified by the Netherlands.

3. Modernization of the right to privacy of communications

Article 13 of the Constitution was also modernized in 2022. The 1983 version of that provision protected the privacy of correspondence (section 1) and of the telephone and telegraph (section 2). As a result, its wording was based on specific types of communications technology. The Dutch word used in section 1 was "*brief*", which translates to "a letter". As early as the 1990s, it was noted by legal scholars and politicians that the provision had become outdated due to its dependence on traditional – analog – means of communication. Its scope of protection in relation to digital information and communication technologies was limited, and there was general agreement that it needed to be modernized. The wording should protect the privacy of communications in general, without referring to specific technologies. For a long time though, there was much less agreement concerning the question of possible limitations. On the one hand, limitation of the right to privacy of communications would be necessary, especially regarding security issues. On the other hand, too much room for limitations could render that right practically meaningless. It was argued that the new provision should not allow for unlimited surveillance of digital communications.

After many long deliberations and various proposals for amendment, a new Article 13 was finally adopted in 2022. It protects the privacy of correspondence and of telecommunications (first section), which widens its scope to all types of communications, either analog or digital, independent of the platform or technology used. The second section provides a carefully worded limitation clause. Limitations are possible in cases determined by an Act of Parliament, with authorization by the court, or, in case national security is at stake, by those authorized by an Act of Parliament. In the latter situation, prior authorization by a court is not required. The actual substantive and procedural aspects of limitation of the right to privacy of communications are thus determined wholly by Acts of Parliament, which is typical of the system of limitation of fundamental rights in the Dutch Constitution.[21]

4. The right to a fair trial

Until recently, Article 17 of the Constitution only stated that "no one can be prevented against his will from being heard by the courts to which he is entitled to apply under the law". In 2022, this principle of *ius de non evocando* was supplemented with the right to a fair trial. The first section of Article 17 now reads: "Everyone shall have the right, in the determination of his rights and obligations or of any criminal charge against him, to a fair trial within a reasonable time before an independent and impartial court." Although one might find it remarkable that the Constitution of a mature democracy like The Netherlands did not yet comprise the right to a fair trial, codification of this right was met with some scepticism. No one questioned the importance of the right to a fair trial, but whether codification of this right would have added value was a point of discussion. After all, the right to a fair trial is already enshrined in both the European Convention on Human Rights (Article 6) and the EU Charter of Fundamental Rights (Article 47): international documents that take precedence over the application of domestic law in the Netherlands.

However, Article 17 (1) of the Constitution fills a lacuna in the protection of the right to a fair trial, since the scope of both Article 6 ECHR and Article 47 of the EU Charter is limited. Article 6 ECHR is only applicable to disputes related to civil rights and obligations and to criminal proceedings. It therefore does not apply to administrative law proceedings that fall outside these categories. Article 47 of the EU Charter on the other hand only applies when EU Member States implement Union law.[22] Article 17 (1) moreover aims to stimulate courts to engage more actively in the legal protection of citizens against the Government. The codification of the right to a fair trial can therefore also be seen as a response to the already-mentioned childcare allowance scandal. Lastly, the codification of the right to a fair trial enables courts to provide more legal protection than the minimum level of protection that follows from Article 6 ECHR and Article 47 of the EU Charter. This could ultimately improve the dialogue between Dutch courts, the European Court of Human Rights, and the Court of Justice of the EU.[23]

5. Electoral college for the Upper House for non-resident nationals

Article 55 of the Constitution determines the method of electing the Upper House of Parliament (the Dutch Senate, called 'First Chamber'). According to that provision, the Upper House is elected by the members of the Provincial Councils, who in turn are directly

elected by the Dutch nationals of each province (Article 129, section 1, of the Constitution). Article 55 has been amended twice in recent years. Amendment became necessary after 2010, when three Caribbean Islands, Bonaire, Saba, and St. Eustatius – until then part of the former country of the Dutch Antilles within the Kingdom of the Netherlands – became an integral part of the European country of the Netherlands as 'Caribbean public bodies.' These three islands now have a legal status similar to Dutch municipalities. At the same time, three other Caribbean islands (Aruba, St. Maarten, and Curaçao) became separate countries within the quasi-federal structure of the Kingdom of the Netherlands.

After 2010, Dutch residents of the three Caribbean public bodies initially had no influence on the composition of the Upper House. Since the islands are not part of any province, they could not elect provincial council members, who would then elect the members of the Upper House. This was not in accordance with Article 4 of the Constitution, which grants every Dutch national an equal right to take part in elections for the 'general representative institutions.' The institutions referred to in Article 4, encompass both Houses of Parliament (and Provincial and Municipal Councils). In 2019, Article 55 was amended. Electoral colleges were created for each of the three Caribbean public bodies; the directly elected members of these electoral colleges will take part in the elections for the Upper House.

The attention then shifted to a second group of Dutch nationals who had no influence on the composition of the Upper House: Dutch nationals living abroad. These Dutch nationals did have the right to vote for elections of the Lower House, but as they do not have a residence in a Dutch province, they cannot elect members of a Provincial Council. Therefore, their right to be represented in the Upper House, implied by Article 4 of the Constitution, was practically non-existent. With the 2022 amendment, a provision was added to Article 55. Members of an electoral college, directly elected by Dutch nationals living abroad, will also take part in the elections for the Upper House.[24]

6. The "recalibration" of the constitutional amendment procedure

In 2022, the constitutional amendment procedure itself was also amended. Since 1848, this procedure consisted of two rounds ("readings") with intervening elections and a qualified majority of votes in both Houses in the second reading. The first reading comes down to the enactment of a law that declares that a change to the Constitution shall be considered.[25] Until 1995, both the Lower and the Upper House were dissolved and re-elected after the publication of this so-called "Consideration Act" before they could consider the proposed amendment to the Constitution in the second reading. Since 1995, only the Lower House has been dissolved and re-elected between the first and second reading. Sections 3 and 4 of Article 137 stated: "3. After publication of the Consideration Act, as referred to in section 1, the Lower House is dissolved. 4. After the new Lower House is assembled, both Houses consider the proposed change to the Constitution in second reading […]."

Article 137 (4) was not clear on whether "the new Lower House" was obliged to consider (and decide on) a proposed amendment in the second reading or whether that could also be another, subsequently elected Lower House. This question arose when a proposal that aimed at partly lifting the ban on constitutional review remained pending in the second reading for so long that the Lower House was eventually re-elected three times (!) after the first reading had been completed. After seeking advice from the Council of State, the Lower House decided in 2018 that this proposed amendment was no longer under consideration.

In 2022, the procedure was clarified by rephrasing section 3 of Article 137 as follows: "The Lower House that is elected after publication of the Consideration Act, as referred to in section 1, considers the proposed changes in second reading. In case this Lower House does not vote on the proposed amendment, this proposal lapses *ipso iure*. As soon as the Lower House adopts the proposed amendment, the Upper House considers it in second reading […]."

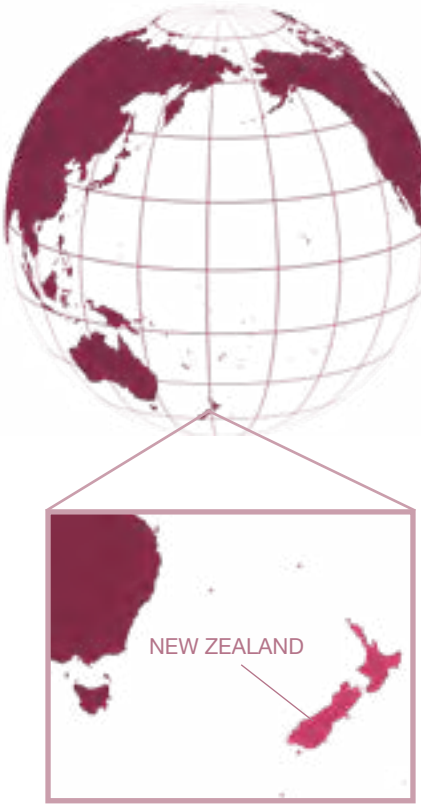
This so-called "recalibration of the amendment procedure" presumably speeds things up but could also turn out to be too rigid.[26] After all, in a situation where the Lower House lacks time to carefully consider a constitutional amendment proposal, e.g. due to a lengthy and cumbersome formation of cabinet combined with a premature dissolution of the Lower House because of a cabinet crisis, the subsequently elected Lower House cannot consider the proposal and the amendment procedure simply starts all over again.

IV. Looking Ahead

Seven bills proposing amendments to the Constitution are currently pending; another is waiting for introduction. Not all of these proposals seem equally feasible. One of those bills proposes another amendment to the constitutional amendment procedure itself: the second reading of amendment bills, required by Article 137, would as proposed no longer take place in each of the Parliamentary Houses separately, but in a Joint Session of both Houses. As a two-thirds majority is required in the second reading, the proposal would prevent a minority of 26 (indirectly elected) Members of the Upper House, consisting of 75 members, from blocking amendments that are wanted by two-thirds of the directly elected Lower House, consisting of 150 members. Other bills concern the introduction of a binding corrective referendum, and the lengthening of the term of the Upper House to six years, with one-third of its members being re-elected every two years. All these proposals may take considerable time to materialize, as they are currently pending in the first reading. The second reading must take place after general elections for the Lower House. Due to the government crisis of July 2023, these will probably take place in November 2023.

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New Zealand

Andrew Geddis, *Professor, Faculty of Law, University of Otago*
Sarah Jocelyn

I. Introduction

New Zealand's response to COVID-19 continued to have lingering effects on New Zealand's constitutional landscape in 2022. Last year's review discussed the slow unwinding of a "go hard, go early" approach to combating the virus through mandatory lockdowns, which, over time, morphed into a system of mandatory vaccinations for certain sectors of the workforce. Reaction to these requirements had a significant impact, as 2022 began with an anti-mandate and anti-vaccine occupation of New Zealand's Parliament grounds. This occupation lasted just over three weeks and involved over 1,000 participants before coming to a violent end. As the year progressed, COVID-19 discourse finally began to fade, and other constitutional concerns came to the fore. In particular, the passage of the New Zealand Bill of Rights (Declarations of Inconsistency) Act of 2022 and a roiling debate regarding the reform of water infrastructure and associated co-governance arrangements with the indigenous Māori peoples.

II. Major Constitutional Developments

In February, an extended protest on New Zealand's Parliament grounds commenced, which lasted for three weeks before being forcibly ended on March 2nd with none of the protestor's demands being met. By way of brief background, COVID-19 vaccinations became a mandatory requirement for those working in certain workplaces (such as teaching, healthcare, defense, and emergency work), as well as to enter many public buildings and participate in gatherings of more than 25 people. This requirement functioned by way of a "vaccine pass", guided by a traffic light system of risk level. The protest on Parliament grounds purported to oppose these vaccine mandates and associated restrictions on those who chose to remain unvaccinated. However, this message was intermingled with wide-ranging conspiracy claims and calls for violence against various members of the government. On March 2nd, the police moved to end the occupation by forcing the remaining participants from Parliament's vicinity and removing their encampment. This action was met with violent resistance and significant damage was done to the Parliament's grounds, including the burning of a slide in the children's playground. Remarkably, no serious injuries occurred as a result.

Managing the extended protest, which morphed into an occupation of not only parliamentary grounds but also surrounding streets, involved a complex interplay of rights. The rights of protestors to freedom of peaceful assembly and expression clashed with the rights of those who lived and worked nearby in Wellington to pursue something like a normal form of life. Attempts to halt the protest ranged from turning on the sprinklers on the parliamentary lawn to the issuing of hundreds of parking tickets to protestors' vehicles. The protest also led to the issuance of over 150 trespass notices by the Speaker of the House, banning people from Par-

liament's precincts for the next two years. Amongst those issued with such notice was the former Deputy Prime Minister, Winston Peters, after he visited the occupation site and conversed with those participating in it. Despite the notice being rapidly withdrawn, the initial decision to issue it was the subject of a later judicial review.[1] By consent of both parties, declarations were made that the Speaker's exercise of power against Mr. Peters was unreasonable and irrational, and the Speaker's warning was an unjustified limitation on Mr. Peters' right to freedom of movement.

The issue of individual rights and their appropriate limits also was central to Parliament's enactment of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act of 2022. This legislation responds to the Supreme Court's affirmation of a judicial power to issue a declaration of inconsistency (DoI) where some parliamentary enactment limits a right guaranteed in Part 2 of the New Zealand Bill of Rights Act 1990 (NZBORA), and that limit cannot be "demonstrably justified" as per s 5.[2] While such a DoI cannot affect the enactment's validity or its application to the case at hand – the NZBORA, s 4 specifically disavows such an outcome – it marks a formal judicial finding as to that law's effect. In order to recognize and respond to such findings, the Amendment Act inserts a new ss 7A and 7B into the NZBORA. These sections require the Attorney-General to formally bring any such DoI to the attention of the House of Representatives and require that the executive government provide a written response to the declaration within 6 months of this notice being presented. Parallel changes to the Standing Orders of the House of Representatives require that the notice also be sent to a select committee of the House for examination, with that committee to report back to the House within four months. This amendment legislation's passage (and the associated changes to Standing Orders) implicitly gives parliamentary recognition to the judiciary's self-declared role in scrutinizing parliamentary enactments for consistency with the Bill of Rights. Not only does Parliament accept that the courts may do so, but it recognizes the importance of such DoI's and the need to consider what they say. However, in keeping with the NZBORA's status as a parliamentary bill of rights, the procedural changes retain the right of elected representatives to decide how to respond to the judiciary's views on rights and their appropriate limits, if at all.

A further important constitutional development in New Zealand is a debate over "co-governance" arising from the government's "Three Waters" policy reforms. Introduced in October 2021, these reforms are intended to ensure that safe, reliable drinking water, wastewater, and stormwater are able to be provided to New Zealanders. They propose that ownership and management of such assets be shifted from New Zealand's 67 separate territorial authorities to four new publicly-owned Water Services Entities. A key aspect of the reforms is a co-governance element, whereby each Entity will have an equal number of representatives from territorial authorities and local Māori. This co-governance proposal proved controversial, with an equal partnership arrangement between elected representatives and mana whenua (the Māori people of the area) attracting the disparaging label of "un-democratic". The inclusion of co-governance proposals in these reforms became something of a lightning rod for wider constitutional moves to give Māori a greater decision-making role in public policy, leading the Government to announce a pause on work on a draft plan designed to meet commitments made under the United Nations Declaration on the Rights of Indigenous People (UNDRIP).

III. Constitutional Cases

1. Make It 16 Incorporated v Attorney-General: reviewing the voting age

In November of 2022, the Supreme Court of New Zealand declared that the provisions of the Electoral Act of 1993[3] and the Local Electoral Act of 2001[4] that provide for a minimum voting age of 18 years are inconsistent with the right to be free from discrimination on the basis of age under the NZBORA, s 19. The appellant, Make It 16 Inc, is a group seeking to have the voting age for both parliamentary and local body elections lowered to 16 years old. Under the NZBORA, s 19, individuals over the age of 16 have the right to be free from discrimination on the basis of age.[5] The NZBORA, s 12(a) also guarantees every New Zealander over the age of 18 the right to vote in parliamentary elections. Irrespective of this clear limitation on the right to vote, Make It 16 sought declarations that the provisions setting the minimum voting age at 18 for both national and local elections are inconsistent with the right to be free from discrimination on the basis of age. The power of the Court to make a declaration that legislation is inconsistent with the Bill of Rights was confirmed in *Attorney-General v Taylor*[6] and, as discussed in the previous section, has been further affirmed by the enactment of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

The Supreme Court was required to determine the following issues:

1. Whether it is appropriate for a court to engage with the issue at all;
2. What effect the NZBORA, s 12(a) has on the right to be free from discrimination under s 19;
3. Whether any inconsistency with s 19 is justified under s 5;
4. If the inconsistency has not been justified, should the declarations being sought be made.

On the first point, the Court found that the courts below were correct to inquire into the consistency of the minimum voting age requirements with the NZBORA, s 19.[7] Despite the issue's political content, it involved the Court resolving a question of law: the relationship between two pieces of legislation.[8] On the second point, a majority of the Court found that the NZBORA, s 12(a) does not create an exception to the general right to be free from age-based discrimination under the NZBORA, s 19. By guaranteeing the voting rights of those aged over 18, the NZBORA simply creates a floor to that right. Any decision to exclude those aged under 18 from it, must still be justified.[9] On this point, however, Kós J dissented, finding that the effect of s 12(a) is to carve out a specific exception to the general right against discrimination by

specifying when the right at issue becomes "live".[10]

The Court then turned to assess whether or not the voting age provisions' limit on the right of those aged 16-and-17 to be free from discrimination can be justified. The Court found that it was not persuaded that the limit is justified on the material placed before it. It is not enough to argue that 18 *could* be a reasonable age at which to permit voting, which the legislature then happened to select. There remains a requirement to provide some evidence to demonstrate why it *is* reasonable, in the particular circumstances of elections, to distinguish between those who are 18 and persons who are 16-17 years old. As the government had, by admission,[11] not even attempted to do so, the Court had no choice but to find that the limit on the NZBORA, s 19 right was not justified. However, the Court was careful also to note that it was not finding that there is *no* possible justification for a legislative decision that 18 is the appropriate voting age.[12] That fact then was reflected in the DoI the Court then issued, which stated only that the voting age of 18 imposes a limit on the right not to be discriminated against on the basis of age that "has not been justified"; wording deliberately chosen as "it is not appropriate to use a formulation of the declaration which would pre-empt the ability of Parliament to reach a view that an age other than 16 or 17 was a justified limit on the protected right."[13]

The issue thus was returned to the political branches of government for consideration. The government's immediate response was to indicate that it would introduce legislation to lower the voting age to 16 for all elections. However, an entrenchment provision in the Electoral Act 1993, s 268 requires that 75 percent of all members of Parliament support changes to the voting age for parliamentary elections. As opposition parties indicated they would not offer this support, the government modified its proposal so that the voting age for local election will be lowered to 16 (as this only requires a bare parliamentary majority), while the Court's DoI will be examined using the recently enacted NZBORA ss 7A and 7B procedure discussed in the previous section.

2. *X v Chief Executive Oranga Tamariki:* damages for a breach of natural justice

The case involved Mr. Y and Mrs. X, a couple in their early 50s, who had become approved caregivers and then carers of four young brothers at the request of Oranga Tamariki (the government department responsible for the well-being of children). Unfortunately, the placement failed because X and Y received no training and were given very little support. When the placement failed, the children were removed from the care of X and Y, and a range of allegations were made by the children against them (including physical abuse).[14] Several processes followed including a review by the Chief Executive's Advisory Panel, which produced a six-recommendation report.[15] In response to those recommendations, Oranga Tamariki revoked X and Y's caregiver approval. This decision was then the subject of a judicial review. X and Y claimed that Oranga Tamariki's "investigation into the various allegations against them, the process of it preparing a Caregiver Assessment Report, and its decision to revoke their caregiver approval was a breach of their right to natural justice under s 27(1) of the Bill of Rights Act 1990".[16] Effectively, X and Y were not given the opportunity to be properly informed and respond to the accusations against them before the decision was made to revoke their caregiver approval. A closed mind concerning the decisions made exacerbated this poor process, particularly in the face of serious allegations. At trial, the High Court found that X and Y's right to natural justice was breached, and made declarations to that effect.[17] However, damages were not awarded, and X and Y appealed this point to the Court of Appeal.

On appeal, the Court concluded that an award of damages is required in order to compensate for the seriousness of the breaches and their consequences in the case. The Court stated that "the seriousness of [the] consequences heightens the need for vindication."[18] Further, the Court noted that the actions of the respondents in relation to X have "harmed her mana, a concept closely related to dignity."[19] In assessing the quantum of damages available to both X and Y, the Court considered previous cases where Bill of Rights damages had been granted; the circumstances in full; and what responsible members of New Zealand society would consider appropriate.[20] Based on these considerations, Y was awarded a sum of $20,000 and X was awarded a sum of $10,000.

The case is notable for two reasons. First, a damages remedy for a breach of the NZBORA guaranteed right to natural justice in administrative proceedings has not previously been considered appropriate.[21] While never ruled out entirely, the courts have emphasized that such an award;[22]

"…would be confined to circumstances where there is no other effective remedy, where human dignity or personal integrity or (possibly) the integrity of property are also engaged and where the breach is of such constitutional significance and seriousness that it would shock the public conscience and justify damages being paid out of the public purse."

Here, the Court concluded that the treatment of X and Y, allied to the impact that failing to follow a proper process of investigation had on them, warranted going beyond mere declaratory relief and justified awarding a monetary sum. Of particular importance was the effect of Oranga Tamariki's decision on the Māori concept of "mana": "one's standing, dignity and authority [that] can be gained and lost depending on one's actions and reputation."[23] The need to ensure that the mana of X and Y was appropriately restored underpinned the Court's decision to make a damages award as the remedy best suited to vindicate the harm done by the breach of rights. This explicit acknowledgment of Māoritanga (Māori culture and traditions) in the development of the law is part of a wider trend in Aotearoa New Zealand.

3. *The Waitangi Tribunal Stage 2 Report on the Northland Claim*: Is the New Zealand State's authority legitimate?

The third "case" for discussion is not a court judgment. Rather, it is a report by the Waitangi Tribunal, which, in turn, is a standing commission of inquiry established under the Treaty of Waitangi Act of 1974. This Tri-

bunal may make recommendations on claims brought by New Zealand's indigenous Māori relating to legislation, policies, actions, or omissions of the New Zealand government that are alleged to breach the promises made in the Treaty of Waitangi, a compact signed in 1840 between the chiefs of various Māori "tribes" and the British Crown. While the Tribunal's reports and recommendations have no binding legal force, they are considered to be a highly influential form of "soft law" given the Tribunal's standing and the importance of the subject matter in question.

In December of 2022, the Tribunal released a report into the Crown's actions toward Māori in the region of Te Raki (Northland) in the period between 1840 and 1900.[24] The report examined how the Crown had come to assert sovereignty over this area and how it had acted to toward Māori after doing so. The Tribunal found that the two proclamations issued by the Queen's representative, Captain William Hobson, in May 1840 declaring the Crown's sovereignty over the North Island and then all the islands of New Zealand breached the principles of the Treaty of Waitangi, as Te Raki Māori who signed the Treaty had not ceded sovereignty. When negotiating this Treaty, the Crown did not clarify to Te Raki Māori that it intended to establish a government and legal system under its sole control, nor did it explain that it would assert sovereignty over the whole country.

The Tribunal also determined that the New Zealand Constitution Act of 1852, which transferred authority from imperial to colonial Government, breached Treaty principles. The Act did not allow for Māori representation in Parliament until four seats were added in 1867. The Crown had promised to protect Māori interests and independence under the Treaty, but it failed to build these protections into the Constitution. Instead, it progressively handed governmental authority to the settler population, fundamentally undermining the Treaty relationship.

The Tribunal then made a number of recommendations to support the Crown and Te Raki Māori in future Treaty settlement negotiations. It recommended that the Crown acknowledge the Treaty agreement it entered into with Te Raki rangatira (chiefs) in 1840 and that it apologize for its Treaty breaches. It also recommended the Crown return all Crown-owned land in the district to Te Raki Māori; provide economic compensation; and enter into discussions with Te Raki Māori to determine appropriate constitutional processes and institutions at the national, iwi (tribal), and hapū (family group) levels to recognize, respect, and give effect to their Treaty rights.

Although the Tribunal's report and recommendations cannot compel a response from the government, they reveal a flaw at the foundation of the country's governing arrangements. The assertion of governing authority by the Crown – or, the New Zealand state – overlaid a pre-existing set of governing arrangements within and between Māori groups. The process by which this occurred did not involve a willing grant of sovereignty by Māori; indeed, it took place in the shadow of Treaty assurances that Māori would be able to continue exercising "tino rangatiratanga" (sovereignty). Māori continue to assert that right, even whilst being subject to the authority of the Crown in practice. How, then, can that Crown authority be legitimated? What forms of institutions and governing practices can recognize and accommodate the ongoing right of Māori to govern themselves? Is sovereignty as a concept able to be shared between two different forms of governing authority? The Tribunal's report requires confronting and trying to answer fundamental questions of this nature.

IV. Looking ahead

On October 14th, New Zealand will have a general election. The lead-up to that event will color every constitutional and political issue in 2023. Then, in November, an independent electoral review set up by the Minister of Justice to review New Zealand's electoral laws will issue its report and recommendations on change. Given the scope of issues, the review has been charged with examining, these could potentially be quite extensive. The New Zealand Supreme Court will issue a judgment in the case of *Attorney-General v Chisnall*, determining whether the Court of Appeal[25] was correct to issue a DoI to the effect that Part 1A of the Parole Act of 2002 and the Public Safety (Public Safety Protection Orders) Act of 2014 are generally inconsistent with the NZBORA, and whether or not the Court was correct not to make declarations that specific extended supervision orders and public safety orders made under this legislation are inconsistent with the NZBORA. This case may well clarify the interpretative approach to be taken to legislation that on its face appears to be inconsistent with the rights guaranteed by the NZBORA.

V. Further reading

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6 [2018] NZSC 104, [2019] 1 NZLR 213.
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24 Waitangi Tribunal, Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry – the second volume of the Te Paparahi o Te Raki (Northland) district inquiry report (Wai 1040).
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Nigeria

Solomon Ukhuegbe, PhD, *Ontario Bar, Formerly Adjunct Professor, American Heritage University of Southern California*

Gabriel Arishe, PhD, Professor, *Department of Public Law, University of Benin, Nigeria*

I. Introduction

Nigeria's democratic credentials remained unimpressive in 2022, marked by a decline in critical indicators. Aside from regular elections and respect for presidential term limits, little or no progress was made in consolidating democracy in the year under review. On the Economist Intelligence Unit's Democracy Index 2022, Nigeria remained a hybrid regime ranked 105, just four steps away from the group of "Authoritarian Regimes".[1] The country's democratic stagnancy has relegated it to an electoral democracy with, sadly, persistently flawed elections. The only bright side of Nigeria's democracy is that since a failed presidential term limit violation in 2006,[2] no further attempt at contravention has been made.

Though enforcing social integration remains a heavy lifting for Nigeria's Constitution,[3] political contests of ethno-religious leverages in 2022 showed, in addition, the absence of social coordination by the Constitution[4] perhaps, because "there is a lack of symmetry between text and reality."[5] Unfortunately, loss of faith in the electoral process, lack of judicial autonomy, and slow pace of justice administration intensify Nigeria's social disintegration.

II. Major Constitutional Developments

1. Party Primaries

Preparatory to the general elections scheduled for the first quarter of 2023, the eighteen registered political parties had to conduct their primary elections from the first week of April to June 3, 2022.

By section 84(8) of the Electoral Act 2022, only elected party delegates were eligible to choose party candidates thus excluding political office holders including President Buhari and his vice; serving and former members of the National and State Houses of Assembly; serving and former governors and deputy governors; National Working Committee and state/local government executive committee members of political parties. The National Assembly proposed a fresh amendment close to the commencement of party primaries to qualify legislators and elected public officials as automatic delegates but this amendment was vetoed by President Buhari. The president's refusal to assent to the amendment drastically reduced the number of delegates at the presidential primaries, for example, from over 7,000 to a little over 2,000 for the All Progressives Congress (APC) and from over 3,000 to less than 1,000 for the Peoples' Democratic Party (PDP). Serving legislators watched helplessly as delegates decided the fate of their return ticket at the primaries based on the dictates of state governors. Consequently, many members of the National Assembly lost at the primaries.[6] All of the 18 political parties scheduled their presidential primaries on the last seven days of the period earmarked for the exercise.[7] The agitation for a generational shift went unheeded as the ruling APC and the main opposition PDP produced septuagenarians as their candidates. Two issues shaped the outcomes of the presidential primaries of the APC and the PDP: alleged vote buying[8] and judicial selection/validation of candidates[9] which reduced the democratic essence of party primaries.

The fundamental challenges of the presidential primaries were the ethnic and religious identities of the candidates. There was an agitation for the emergence of presidential candidates from the southern part of the country in keeping with the understanding of power rotation between the north and the south. With the tenure of President Muhammadu Buhari from the northern state of Katsina coming to an end (May 28, 2023), the expectation was for the emergence of candidates from the south, particularly from the ruling APC. There is, however, a misunderstanding of the correct interpretation arising from the death in May 2010 of President Umaru Musa Yar'Adua from Katsina State, who succeeded President Olusegun Obasanjo (May 1999-May 2007) from Ogun State (Southern Nigeria). President Yar'Adua's vice, Dr. Goodluck Jonathan from the southern state of Bayelsa, assumed office in 2010 for the unexpired term of the Late Yar'Adua and he was elected president in 2011. Dr. Jonathan's quest for further reelection in 2015[10] failed largely because of the agitation of the northern part of the country for the position of president. From May 1999 to May 2023, the south has ruled for a cumulative period of thirteen years compared to the north's eleven. As part of brinkmanship, both parties declined to allot the presidential slot to either the south or north.

At their primaries, the APC produced the former governor of the southern state of Lagos (May 1999-May 2007), Bola Ahmed Tinubu, as its presidential candidate and the former governor of the northern state of Bornu (May 2011-May 2019), Kashim Shettima, as the vice-presidential candidate. The PDP, on the contrary, produced former vice president (May 1999-May 2007), Atiku Abubakar, from the northern state of Adamawa, as its presidential candidate and the serving governor of the southern state of Delta, Ifeanyi Okowa, as its vice-presidential candidate. The emergence of a candidate from the north polarized the PDP as a dissident group of five of its state governors (of four southern states: Abia, Enugu, Oyo, Rivers; and, one north-central state: Benue) declined to support Mr. Atiku's campaign for the presidential poll.

Two of the remaining sixteen political parties that had large followership in some states, the Labour Party (LP) and the New Nigeria People's Party (NNPP), followed the pattern of the two major parties. The vice-presidential candidate of the PDP in the 2019 election, Mr. Peter Obi, from the southeast state of Anambra defected to LP earlier and emerged as its presidential candidate before the primaries of the PDP. Dr. Yusuf Datti Baba-Ahmed from the northern state of Kaduna emerged as the LP's vice-presidential candidate. On the contrary, the NNPP produced Mr. Rabiu Kwankwanso (former governor of Kano State, north) as its presidential candidate and Mr. Isaac Idahosa (Edo State, south) as vice.

The religious affiliation of the candidates was an unpleasant campaign strategy. The candidates of the APC, NNPP, and the PDP were Muslims, while that of the LP was a Christian. There was a call for the nomination of a Christian from the north as the running mate to the APC candidate for a religious balance in the government. The presidential candidates had running mates with a different religious identity as theirs, except for Mr. Tinubu of the APC, whose running mate was also a Muslim. This was a repetition of the 1993 scenario under the Social Democratic Party where the acclaimed winner of the undeclared results, Mr. Moshood Abiola and his running mate, Mr. Babagana Kingibe, were both Muslims. Mr. Tinubu downplayed the role of religion in his selection of a running mate at a meeting with select Christian leaders insisting that competence as proven by his previous performance as Governor of Borno State guided his choice of Kashim Shettima.[11]

The strenuous agitation for the emergence of a Christian politician from the south as president exposed the fragility of the Nigerian State and its democracy.[12] The APC and its candidate, Mr. Tinubu, won the presidential contest of February 25, 2023 but discontents with the same faith ticket, failure of electronic transfer/upload of results to the Independent National Electoral Commission's result portal in a timely manner, and allegations of electoral malpractices have undermined its legitimacy. The victory of Mr. Tinubu seems to suggest that religion is a secondary consideration among the majority of voters.[13] However, it is difficult to predict whether or not a reverse ticket of a Christian/Christian or presidential candidate from the south of the Muslim faith with a running mate from the north of the Christian faith will yield the same outcome in a future election.

2. Use of Electronic Accreditation Machine in Elections

The Electoral Act 2022 gave the Independent National Electoral Commission (INEC) the discretion to use electronic voting machine[14] but made electronic accreditation of voters compulsory.[15] Relying on the new law, INEC adopted the Bimodal Verification Accreditation System (BVAS)[16] device for verifying voters together with a Result Viewing Portal (iREV) for real-time reporting of results of polling units.[17] However, it maintained manual voting using ballot papers and boxes. The BVAS accredits a voter who presents a Permanent Voter's Card through fingerprint or facial authentication, self-records the number of accreditation done, and is used to scan/upload polling unit results to INEC's server and iREV[18] in real-time on election day.

The Electoral Act 2022 did not mandate electronic collation but electronic storage of all polling units and collated results.[19] The bid of LP to compel a compulsory electronic collation of results through a suit filed in August 2022 was rightly refused by the Federal High Court (Abuja) on the basis that it was not a statutory requirement.[20]

The first test of the BVAS was in the off-cycle Ekiti governorship election which was held on June 18, 2022. There was pre-election day violence and threats to voters and vote-buying on election day. The BVAS malfunctioned in some instances raising concern about its workability in future elections.[21] The device, however, proved to be a check against ballot box stuffing. The election petition of the Social Democratic Party (SDP) candidate, Mr. Segun Oni, which was premised, in the main, on alleged irregularities in the primaries that produced the APC candidate was dismissed by both the post-election tribunal[22] and the Court of Appeal.[23]

The first major case for judicial assessment of the BVAS was the Osun State governorship election held on July 16, 2022. The election was reported to be peaceful except for pockets of skirmishes which were curtailed by security personnel raising hopes of improvements in the country's electoral process.[24] The candidate of the PDP, Mr. Ademola Adeleke, was declared the winner but the APC and its candidate, Mr. Adegboyega Oyetola, contested the declaration at the election tribunal. In its ruling on January 27, 2023, the majority (two justices) reversed the victory of Mr. Adeleke because the analysis of the data from the storage server showed that there was over-voting[25] for both candidates, which after deduction by the tribunal, left Mr. Oyetola with the majority of the lawful votes.[26] The dissenting judgment (Justice Ogbuli) upheld the victory of Mr. Adeleke on the basis that the record of accredited voters on the BVAS machines used for the election did not show over-voting and the manual voter registers used for the election were not relied on in proving alleged over-voting. Justice Ogbuli preferred the records on the BVAS machine which is the primary source of the data to the backend data extracted from the server. This position was defended on the basis of inadequate internet connectivity that delayed the transmission of BVAS data on the day of the election. The BVAS machine works online and offline such that accreditation data were not transmitted simultaneously but subsequently upon access to internet connection. The intermediate court in its ruling on March 24, 2023, reversed the majority decision in favor of Mr. Adeleke and the PDP.[27] A further appeal has been lodged at the Supreme Court by Mr. Oyetola. The Osun State experience showed the further challenge of inadequate technological infrastructure, which greatly limits the utility of integrity-enhancing devices in the country's electoral system.

3. Judicial Independence

Fiscal autonomy is one of the indicators of judicial independence. Nigeria has formal provisions on fiscal autonomy for the judiciary[28] though compliance remains elusive. In June 2022, a letter signed by the serving fourteen justices of the Supreme Court and addressed to the Chief Justice of Nigeria (CJN), Honorable Justice Tanko Muhammad, and the National Judicial Council, which he chairs, went public. The justices outlined many operational challenges of the court including non-release of funds for basic support facilities such as data for internet, diesel supply to electricity generating set, utility vehicles, legal assistants, overseas training, and failure of the CJN to convene a meeting of the justices for over a year.[29] By the tenor of the letter, the justices seemed to have blamed the CJN for the non-release of funds as they alleged that despite an increase in the budgetary allocation to the judiciary, he alone had access to some of the facilities, particularly overseas visit with family members.

The CJN denied the allegations while admitting that economic difficulties and inflationary trends in the country greatly limited the spending capacity of the court.[30] However, Muhammad CJN resigned from office on June 27, 2022, on health grounds, some eighteen months and three days before his scheduled retirement date, December 31, 2023. It may have been a forced resignation.[31] Consequently, the next most Senior Justice, Olukayode Ariwoola, assumed office in an acting capacity in line with the Constitution (section 231(4)). Following senate confirmation on September 21, 2022, of his nomination by the President,[32] he became the 18th Chief Justice of Nigeria on October 12, 2022. He is due to retire in August 2024.

III. Constitutional Cases

1. *Soni Ogbuoji & Others v David Umahi:* Restriction of Anti-Defection Clause to Legislators

Mr. David Umahi was elected to the office of governor of Ebonyi State (South-East Nigeria) in 2019 under the platform of the PDP. In November 2020, he defected to the APC. Consequently, the governorship candidate of the APC in 2019, Mr. Soni Ogbuoji, approached the Ebonyi State High Court for an order to sack Mr. Umahi and his deputy from office and make him and his running mate in the 2019 election to become governor/deputy instead. The Court (Njoku J.) and the Court of Appeal dismissed the request of Mr. Ogbuoji because the anti-defection ban in Nigeria's Constitution[33] is limited to legislators only.[34] A similar suit had been filed at the Federal High Court Abuja by the PDP, where curiously, Justice Ekwo ruled that the PDP could substitute Mr. David Umahi and his deputy with new names to take over as governor/deputy to complete his unexpired term on the rationale that an electoral victory belongs to the political party[35] and not its candidates.[36] The Court of Appeal explained, however, that while votes are necessary for the determination of the winner of an election, the subsequent removal of the occupant of a political office is governed by the express provisions of the Constitution.[37] Admittedly, the change of party label by governors, their deputies, and legislators is a recurring decimal in Nigeria's political space. More than a decade and a half ago, the Supreme Court affirmed the restricted scope of the anti-defection clause to legislators only.[38] The strenuous challenge of Mr. Umahi's defection at the high courts and the Court of Appeal despite the earlier Supreme Court decision was perhaps for moral retribution only. Nonetheless, the anti-defection ban has hardly deterred legislators who prefer to switch their party label to ruling parties, although judicial enforcement of the constitutional sanction is gaining momentum.[39]

2. Nduka Edede v Attorney General of the Federation: Judicial Amendment of Legislation

The controversy that bedeviled the new electoral code did not end even after the presidential assent. When President Buhari signed the Electoral Act 2022 on February 25, 2022, he requested the National Assembly to amend the law by deleting section 84(12)[40], which barred a political appointee from being a party delegate or being voted for at a party convention or congress.[41] This provision effectively disenfranchised political appointees from seeking elective public positions while still in office except upon resignation thirty days before the party convention or congress. Rather than deleting this section, the lawmakers sought to

reverse their self-proscription from being party delegates which the President refused to give assent to.[42]

Following the legislature's refusal, the President resorted to the judiciary for the deletion of section 84(12). Mr. Justice Anyadike of the Federal High Court sitting at Umuahia, Abia State (South East Nigeria) on March 18, 2022, declared the section unconstitutional and ordered the Attorney General of the Federation to delete it from the Electoral Act.[43] The PDP approached the Court of Appeal which reversed the decision because the plaintiff, Mr. Edede, had no locus standing or protectable interest being a private legal practitioner who was not a political appointee.[44] This ruling was in spite of the concurrence of the appeal court on the unconstitutionality of section 84(12).

3. *Nnamdi Kanu v Federal Republic of Nigeria*: Unlawfulness of Extra-ordinary Rendition

We reported, in 2021, the extraordinary rendition of the leader of the Indigenous People of Biafra (IPOB), Mr. Nnamdi Kanu. Mr. Kanu challenged his trial in the Nigerian Federal High Court on grounds of his extraordinary rendition which he argued divested any court in Nigeria of the authority to try him for the alleged offense(s) that precipitated his forcible abduction and transfer to Nigeria. The Court of Appeal upheld his submission thereby reversing the decision of the Federal High Court which claimed it had jurisdiction over him.[45] The Court of Appeal ruled that the extraordinary rendition was against international law and violated Mr. Kanu's human rights.

The appeal court, however, stopped the enforcement of its ruling following the appeal lodged by the federal government at the apex court.[46] Mr. Kanu further approached the apex court for the nullification of the stay of execution order of the Court of Appeal insisting that there must be a compliance with the initial order freeing him before the appeal of the Federal Government can be heard by the apex court.[47] Though a ruling on Mr. Kanu's application is expected, the delay has heightened suspicion of deliberate stalling by the apex court.[48]

IV. Looking Ahead

Mr. Peter Obi (LP) and Mr. Atiku Abubakar (PDP) are challenging Mr. Tinubu's victory at the Presidential Election Petition Court in Abuja. The court's decision is due in the first half of September 2023 with a possible appeal to the Supreme Court. The decision of the apex court on the Osun State governorship appeal which touches on evidence from the BVAS and server is expected in 2023.

The apex court reviewed the power of the Central Bank of Nigeria over currency by extending the validity period of old currency notes outlawed by the bank to December 31, 2023. There were speculations that the currency redesign policy was politically motivated with high-ranking officials of the APC presidential candidate alleging that it was a ploy to stop their principal from winning. Now that Mr. Tinubu will assume office as president on May 29, 2023, it remains to be seen if he will ratify the currency redesign policy. A full review of the controversial implementation of the 2022 demonetization policy and a judicial review of the policy will be provided in the 2023 review.

The Supreme Court was depleted by the end of 2022. There are only 13 Justices, or 60 percent of its bench, serving by the end of the first quarter of 2023.

Three off-cycle elections in the states of Bayelsa, Kogi, and Imo will be held in 2023.

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North Macedonia

Jasmina Dimitrieva, *Associate Professor, Law Faculty, University of Goce Delcev*
Lydia Tiede, *Professor, Department of Political Science, University of Houston*

I. Introduction

The year 2022 proved yet another challenging year for North Macedonia in terms of the EU integration process, access to justice, and a functional economy. The war in Ukraine has impacted North Macedonia as far as politics, security, energy, and the economy. There were bomb threats in government institutions, trading malls, primary and high schools almost every day, disrupting education and frustrating citizens. The country faces the continued veto of its integration into the European Union, now by another EU member, Bulgaria. The government of Bulgaria will lift its veto, provided that the country amends its Constitution's preamble to include some mention of Bulgarians living in North Macedonia.

Following the poor local election results in 2021, Zoran Zaev, the Prime Minister leading the Social Democratic Union of Macedonia (SDSM), resigned and was replaced by the Prime Minister Dimitar Kovachevski in January of 2022, without fresh elections. The new Prime Minister entered office with 62 votes out of 120, with approximately 27 parties running in the elections as coalition partners, making the task of leading the coalition after elections difficult during challenging times both domestically and internationally and in relation to the EU integration process.

According to Article 93 of the Constitution, a Primer Minister's resignation means a government's dismissal. However, the Constitution is not clear on whether there is a need for fresh elections in such a case, in order to form a new government. Article 84 of the Constitution stipulates in general terms that the mandate to form a new government is determined by the President of the Republic. Article 90 only prescribes the deadline for the President to give the mandate after national elections are held. Any new government then should be selected with an absolute majority of votes, currently 61 votes. Some in the opposition thought that the dismissal of the Zaev Government warranted new elections, and thus questioned the legitimacy of Kovachevski's mandate. His government, elected with only 62 votes out of 120, relied heavily on the votes of the biggest ethnic Albanian party, the Democratic Union for Integration (DUI), and smaller ethnic Albanian parties, who believe their prerogative is to ask for a greater share of the top Governmental positions and other privileges. The proportional election system, with 6 election districts without a threshold, contributes to the fragmented Parliamentary party compositions, which have resulted in fragile governments over the years. The governments have been elected based on the predilection of the DUI to make post-election coalitions to form a government. The DUI has been in power for the past 20 years. As an indispensable party, DUI members now occupy the offices of the Speaker of the Parliament, the Vice-Prime Minister, the Minister of Foreign Affairs, the Minister of Finance, as well as other important positions.

Besides the fragility of the government, corruption among high level officials remains

one of the largest problems facing North Macedonia. The United States Ambassador in North Macedonia, Angela Aggeler, revealed the creation of an American team to investigate high-level corruption in North Macedonia. Such investigations would result in placing suspected officials on the U.S blacklist and imposing economic and travel sanctions. However, efforts to deter corruption and punish responsible parties must be undertaken by the government of North Macedonia. This is particularly challenging, as the Basic Prosecutors' Office for Organized Crime and Corruption not only lacks human and technical resources, but has also suffered a setback due to disciplinary proceedings instigated against the Chief Prosecutor of the office and two more prosecutors in 2022 upon a complaint filed by the chief of the Financial Police, at the time, related to an alleged illegal search of the Financial Police premises by the above prosecutors.

II. Major Constitutional Developments

Since its independence in 1991, North Macedonia has changed its Constitution several times both to support its membership in international organizations, and to deal with the aftermath of the armed conflict related to the ethnic Albanian insurgency in 2001, which was ended by the Ohrid Framework Agreement signed on August 13 of that year. Constitutional changes brought about by the EU integration process have sometimes been viewed as a tool of the neighboring nations of Greece and Bulgaria. Both attempting to fulfill their own interests in exchange for lifting the veto for the country's bid to the EU. To unblock the EU integration process for North Macedonia, and also Albania, French President Emmanuel Macron suggested the so-called "French Proposal," requiring, among other items, inclusion of Bulgarians along with other non-majority communities in the preamble of the Constitution and an action plan for the protection of their rights. The EU has made it clear that without the adoption of the above Constitutional changes, North Macedonia cannot start the negotiations. Public protests were held against the acceptance of this proposal, due to the perception that the proposal favored Bulgaria and endangered Macedonian identity. On July 16th, the Parliament of North Macedonia adopted the Conclusions, instructing the Government to continue negotiations with the EU with the caveat not to negotiate the language, identity, historic, and cultural attributes of the Macedonian people.[1] A qualified majority of 80 MPs is required for these Constitutional amendments. In 2022, no constitutional amendments were prepared and submitted to the competent bodies.

In other developments, in November of 2022, the Parliament of North Macedonia adopted the Law on State Compensation for Victims of Violent Crime (the Law).[2] This law has been a long-running project aiming to compensate victims of human trafficking and gender-based violence by the state. The primary reason behind the adoption of this Law was the inability of victims, especially those affected by human trafficking, to enforce court judgments awarding them compensation from the perpetrators. The Law also incorporates obligations set out in the Convention on Action against Trafficking in Human Beings and the Istanbul Convention on Violence against Women of the Council of Europe, ratified by North Macedonia. According to the drafters, this Law is not based on the state's responsibility to protect victims but instead, on the principle of solidarity enunciated in Article 8 of the Constitution. The maximum amount of compensation is fixed at 5,000 euros. However, this law is not only about providing material assistance to the victims for their reintegration into society but is also about acknowledging that they have suffered an injustice, an outrage to their dignity, and a violation of their human rights. As a result, the law provides for a symbolic amount of money, 500 euros, to be awarded to victims for non-pecuniary damages.

While the adoption of the law is a step forward, it must be properly implemented in order to have the intended impact on resocialization and reintegration of victims. The victims must be well-informed about their rights and provided with legal assistance to be able to receive compensation. The Compensation Commission is being created and should function by 2023. It will include a commissioner from amongst anti-trafficking NGOs, adding value to its transparency and accessibility in line with the human rights principles set out in the Constitution. The Commission is expected to start with its work in May of 2023.

The principle of the rule of law represents one of the fundamental values of the Constitution of North Macedonia. Since its independence from the ex-Federal Socialist Republic of Yugoslavia in 1991, the country implemented many reform plans to both enhance judicial independence and impartiality, as well as to improve the capacities of judges and prosecutors, so that the rule of law has a permanent foundation in the country. Nevertheless, issues regarding the state of the rule of law continue to be highlighted in country's reports by the European Commission and the United States Department of State. In response, North Macedonia has adopted the comprehensive Strategy on the Reform of the Judicial System (2017-2022) and two action plans. The strategic documents aim at enhancing independence, impartiality, quality, accountability, efficiency, and transparency of and access to justice by improving relevant laws by building the capacities of judges and prosecutors as well as allocating more resources for the judiciary. There were proposals to introduce some type of vetting procedure for judges, to remove those who were not fit for the judicial office. No such procedure has yet been introduced, due to the fears of a lack of capacity to implement fair and impartial procedures without politicization and possible abuse. The latest monitoring of the United States and the European Commission, among others, still detects judicial bias and a need for an effective human resources strategy in the judiciary. A September 2022 public poll implemented by the International Republican Institute (IRI) shows a low trust, only 4%, in the judiciary by the citizens.[3] The 2022 Comments of the Blueprint Group for Judicial Reform on the Report of the European Commission note that "the level of compliance remains unchanged from 2019".[4] Although not all envisaged measures in the strategic documents have been implemented, and it may be too early to see the effects of the implemented

measures, the Government needs to step up its judicial reform not only in view of European integration, but also to improve the perception of its citizens regarding the judiciary and, most important of all, to ensure proper judicial protection of the rights of all abiding in its territory. A new 5-year Judicial Reform Strategy should soon be adopted to continue tackling and overcoming the country's rule of law challenges including the selection, training, promotion, and accountability of judges, prosecutors, and judicial and prosecutorial councils.

III. Constitutional Cases

1. *Selection of the Constitutional Court Judges*: delay with no justification

According to the Constitution, the nine Constitutional Court judges are selected by the Parliament from among distinguished lawyers. The authorization to nominate the candidates is shared among the Judicial Council, the President of the Republic, and the Parliament. The nomination procedure is not clearly set out, in only specific legal act on the Court other than its Rules of Procedure. In 2022, similar to the year before, the Constitutional Court did not operate with all nine judges, which is necessary to make up the full Court under the Constitution. Although the Rules of Procedure as to quorums allow the Court to make decisions with only five judges, the Court operated with five judges for nine months in 2022. This resulted in adjournments of over 30 cases when these judges were unavailable. The selection of the remaining judges was blocked by the Parliament, with allegations from the opposition that the candidates were "connected" to political parties, raising doubts for some about their credentials.[5] In May 2022, a smaller opposition party, Levica, supported by another MP submitted a law proposal aimed at clarifying the nomination criteria for the Constitutional Court Judges' Office in order to overcome the alleged politicization of their selection.[6] In July 2022, the Government provided an unfavorable opinion for adoption of such a law, holding that Constitutional articles regulating the selection of the Constitutional Court judges were precise enough and that additional matters were regulated by the Court's Rules of Procedure.

Although, according to the Rules of Procedure, decisions can be made by a majority of 5 judges, the legitimacy of the work done by the Court may be questioned, since the Constitution envisages nine Constitutional Court judges together to decide major issues within cases. The 2022 Court's annual report is clear that operating with a minimal quorum has had an adverse effect on the Court's work and effectiveness.

The Court granted only eight petitions out of 131 finalized cases for review of constitutionality, out of a total of 279 examined cases in 2022. These cases were dismissed on procedural grounds or substantive matters. The same low percentage of petitions granted by the Court had been reported in 2019 and 2021.

In 2022, out of nine individual petitions for protection of Constitutional rights, none were successful. In fact, since 2018, out of 56 individual petitions, petitioners prevailed for protection of their constitutional rights in only three cases. Further research should examine the causes and reasons for such a low number of granted individual petitions. The issue with selection of the Constitutional Court judges and the above statistics are a strong indicator of the need for a thorough reform of the Constitutional Court.

2. *Labor rights protected by the Constitutional Court*: U. Decision Nos. 148/2021-1 and 15/2022-1 of May 13, 2022: Challenge to Article 12 of the Law on Determination of Public Interest and Implementation of the Project for Construction on the Infrastructure of Corridors 8 and 10

In 2021 Parliament adopted a special law on nominating a strategic partner to construct parts of highways in the western part of the country.[7] Article 12, para 1 of the Law on Determination of Public Interest and Nominating the Strategic Partner for the Implementation of the Project for the Construction of the Infrastructure of Corridor 8 and Corridor 10 allows an average of 60 instead of 40 working hours per week during the year prescribed in the Law on Labor Relations. The Court joined two similar petitions for Constitutional review submitted by the Union of Trade Unions, the Construction Workers' Union and the Workers' Association Vocal Textile Worker, alleging that the above provision violated the rights to equal treatment, the rule of law, and the workers' rights to daily, weekly, and annual leave, as specified under Articles 8, 9 and 32 of the Constitution. The impugned provision was also incompatible with the working hours stipulated in the Labor Law, the Collective Bargaining Agreement, and the ILO Labor Clauses (Public Contracts) Convention. Although such extensive working hours could only be introduced upon consent of the construction workers, the petitioners considered that the workers would not be able to decide freely about working overtime.

The Court granted the petition and abrogated Article 12 of the above Law. According to the Court, the Constitution requires that lawmakers place all workers in North Macedonia in an equal position when exercising their rights of payment and rest. The above ILO Convention, which was part of the national legal order, provided an obligation to ensure fair and reasonable working conditions with respect to health, security, and well-being of the workers. The Labor Law and the Collective Bargaining Agreement also regulated working hours differently in protection of worker rights. The Court held that the Law had to guarantee the right to daily and weekly rest. In particular, the right to rest was dramatically shortened, which impaired the essence of the right itself. Moreover, the construction workers worked under all kinds of weather conditions, and according to the Constitution they were not allowed to waive their right to rest. The Court noted that prior written consent by the workers could not remedy the deficiencies in the law and was a further violation of Article 32.4 of the Constitution expressly prohibiting the ability of employees to waive their rights to daily and weekly rest. The right to equal treatment was violated when working conditions under the law were compared to the working conditions of construction workers elsewhere. Furthermore, the impugned article was imprecise, as it allowed for more than 60 hours per week, contrary to the rule of law prin-

ciple and legal certainty, and left room for arbitrariness in its application.

This decision should also be viewed from the perspective of human trafficking involving labor exploitation and forced labor. As in other European countries, North Macedonia lacks sufficient workers and is situated on the migration route towards Western Europe. The country's struggling economy, poverty, and a lack of respect for the rule of law create conditions for labor exploitation. In 2022, there were 43 identified victims of labor exploitation, mostly foreigners, in comparison to two from the previous two years. The Constitutional Court recognized the need to protect citizens and foreigners from labor exploitation by ensuring that international and Constitutional guarantees protect the rights of its workers. However, the implementation of the Constitutional Court's decision may prove challenging in light of a system of weak rule of law and widespread corruption. Resources and coordination are needed to protect workers, and workers themselves, whether domestic or foreign, need to be encouraged to report violations of their rights with the support of trade unions and labor inspectors. Additionally, courts must work to ensure an adequate and effective response to these violations. With no effective protective mechanism in this regard, and without combating impunity, there is heightened risk for labor law violations, forced labor, discrimination in the workplace and trafficking in human beings for labor exploitation to occur.

3. *Adoption and fundamental rights*: Decision No. 136/2021-1 of 9 March: Challenge to the Family Law in the part regulating adoption by persons with physical disabilities, severe chronic diseases, and denied adoption upon a negative opinion by social services.

An attorney, Vasilcho Iliev, requested the Constitutional Court review the constitutionality of the Family Law articles 102.1.e. and 102.1.h which prevented adoption of children by, inter alia, parents with "a severe chronic disease" claiming violations of Constitutional Articles 8.1.1, 8.1.3, 8.1.8, and 8.1.11 referring to the fundamental principles of human rights protection, the rule of law, human dimension or solidarity, and respect for international law; Article 9 protecting equality; Articles 40 and 41 guaranteeing the right to freely decide on having children and the right to parental/foster care. The petitioner also invoked the Convention on the Rights of Persons with Disabilities in order to safeguard the family rights of people with disabilities.

The petitioner argued that equality in rights and freedoms was violated because potential parents with physical disabilities and chronic illness were barred from adopting children, in comparison to other citizens. The law also treated adoptive parents with disabilities differently than biological parents with disabilities in regards to exercising their rights to parenthood.

The Court found no constitutional violations stating that the legal provisions "do not seek an express exclusion of the persons with disabilities from adopting," but rather were ensuring the best interests of children." The best interest of the child was also safeguarded by the European Convention on Adoption of Children and the European Convention on the Rights of the Child. According to the Court, the State is obliged to take care and protect children, which may entail excluding some parents from adoption, if they would endanger children. The Court further argued that "all citizens are subject to the established conditions and criteria for adoption of a child, and those conditions and criteria refer to different situations related to the citizens and not only to the health-related ones."[8] It also noted that no right to adoption existed as such.

Adoption creates a family union for life between the child and the adoptive parent. The primary orientation to decide who is the most suitable to adopt and take care of a child is in the child's best interest and not the interest of the adoptive parents. The Court rightly noted that there was no blanket restriction on the adoption of a child by parents with disabilities, but there were clear criteria set out in the Family Law and other related laws. These criteria made it clear that children should not be burdened by caring for their adoptive parents. In addition, raising adoptive children and children in general is challenging with some of the adopted children having previously suffered from trauma.

IV. Looking Ahead

It remains to be seen if the Constitutional amendments required by the EU following the "French proposal" will be approved by the required parliamentary majority for the application of North Macedonia to join the European Union. In 2024, there will be new national elections, to determine if SDSM will once again gain the trust of the people to lead the country for the next four years. The Government should initiate much needed reform of the Constitutional Court, including the Constitutional complaint for all guaranteed rights and freedoms by the Constitution and should continue efforts to reinvigorate the fight against corruption and organized crime. Building and sustaining an impartial and independent judiciary is another important task for the country, regardless of who wins the next national elections.

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Islamic Republic of Pakistan

Marva Khan, *Assistant Professor, Shaikh Ahmad Hassan School of Law, Lahore University of Management Sciences*

I. Introduction

In 2022, the Supreme Court of Pakistan was governed by the Chief Justice of Pakistan (CJP), Gulzar Ahmad, followed by CJP Umar Ata Bandial. CJP Gulzar's tenure is known for "reimagining" the landscape and infrastructure, particularly in Karachi, from where he belongs. Cases in his tenure range from admonishing the government on the quality of the National Highway,[1] to ordering the demolition of several residential and commercial properties,[2] including allegedly illegally constructed marriage halls.[3]

CJP Bandial's tenure is marked by political controversy, mostly set in addressing issues between Imran Khan's political party Pakistan Tehreek-e-Insaf (PTI) and the coalition of political parties called the Pakistan Democratic Movement (PDM). The judicial politicization has continued from 2022 well into 2023, with the clash of institutions reaching unprecedented heights in 2023. Notable cases from 2022 include a vote of no confidence against the Prime Minister and dissolution of the National Assembly, politically motivated protests, the status of votes cast in assemblies by defecting members, political appointments, and deciding the fate of the election of the Chief Minister of Punjab province.[4]

In addition to politicized constitutional cases, the report also discusses how the Supreme Court affirmed that only the Chief Justice of Pakistan is authorized to take *suo moto* notice under Article 184(3) of the Constitution – its original jurisdiction – a matter that has become extremely controversial in 2023.

This report also covers cases addressing citizens' rights and privileges including the rights of religious minorities to practice their religion, the issue of regional quotas, the effect of inordinate delay in criminal trials, local government, and non-intervention in universities.

II. Major Constitutional Developments

The clash of institutions highlighted in Pakistan's Report of 2021 continued to grow through 2022 and reached unprecedented heights in 2023. Most of 2022 was marred by further politicization of the judiciary, due to the constitutional courts, particularly the Supreme Court ruling on various political controversies. This is evident from the fact that the first *suo moto* case taken up by CJP Umar Ata Bandial[5] pertained to conducting the vote of no confidence against the then Prime Minister Imran Khan. Instead of taking the vote after the resolution was filed in the National Assembly, Imran Khan advised the President to dissolve the National Assembly, which the President did immediately. The Constitution allows the President to dissolve the Assembly on the advice of the Prime Minister only when the Prime Minister does not have an outstanding vote of no confidence resolution pending against him.[6] Seeing this happen on a Sunday, 12 judges met at the CJP's house and decided to take *suo moto* notice of the matter. When the Court opened on Monday, various political parties had also filed petitions against the legality of the dissolution, which were clubbed and heard together.

When Imran Khan realized that the opposition political parties under the PDM banner had garnered significant force and were bringing a motion of no confidence against him, while he initially seemed unfazed, he claimed in a public rally that there was a foreign (United States) backed conspiracy to topple his government,[7] a statement that he subsequently backtracked from.[8] He informed the rally attendees that he had intercepted a "cypher" entailing this conspiracy and only he had access to it. He also waved a piece of paper at the crowd insinuating that the paper was the cypher. However, during the proceedings, when the Supreme Court asked for evidence to support these allegations, the alleged "cypher" carrying this information was not shared. The Court recognized that encrypted information pertaining to foreign relations do not fall within the Court's purview. However, when an alleged matter of national security is used as a pretext for conducting an illegal act (refusal to hold the vote of no confidence, and subsequent illegal dissolution of the National Assembly), then the government needs to substantiate its claims.[9]

On the day that the motion of no confidence was to be voted upon in the National Assembly, the Deputy Speaker made a reference to the same foreign conspiracy and abolished the motion regarding the vote even though there is no law that empowers the Speaker or Deputy Speaker to do so – a no confidence motion can only be resolved by voting - a point which the judgment made abundantly clear. Thus, the Speaker was ordered to conduct the vote of no confidence, which the PDM won with a majority, and consequently, Shahbaz Sharif became the Prime Minister of Pakistan.

In addition to the political drama in Pakistan, a judgment by J. Mansoor Ali Shah of the Supreme Court needs special mention here, which pertains to expanding the rights of religious minorities in Pakistan. Amid all the turmoil, we continue to witness an increase in attacks on religious minorities in Pakistan: attacks against their persons, places of worship and their properties. One of the most (legally) marginalized religious groups in Pakistan is the Ahmadiyya Community. While they deem themselves as a sect within the Islamic faith, the Parliament of Pakistan declared the Ahmadis as a non-Muslim community via the 2nd Constitutional Amendment, 1974, to the Constitution of the Islamic Republic of Pakistan, 1973 (Constitution). Subsequently, the then dictator, General Zia ul Haq, amended the blasphemy laws in the Pakistan Penal Code, 1860, during his Islamization spree. The effect of these amendments was to restrict the Ahmadis' religious practices, and to further ban them from using Islamic epithets, placing them as the most restricted religious community in Pakistan – restrictions upheld in *Zaheerudin v The State* 1993 SCMR 1718. In *Zaheerudin*, the Supreme Court held that treatment of Ahmadis differing from other religious minorities was legally acceptable and not a contravention of the right to equality (Article 25), as the Ahmadis "posed" to be Muslims unlike other religious minorities, and thus this was reasonable classification. They also used trademark law and discussed how Coca-cola has a right to share its recipes with whoever they wish, similarly, a Muslim country has the right to determine who can use Islamic terminology and epithets.

Since then, in addition to formal blasphemy prosecutions, the Ahmadiyya Community has faced a lot of targeted attacks including killings and attacks against their places of worship, with little to no protection offered by the State. In *Tahir Naqash v The State* PLD 2022 SC 385, J. Shah ruled on the freedom of Ahmadis to practice their religion freely in their places of worship. He did this by creating a distinction between public and private space, with the latter allowed in *Zaheerudin*, and expanded the scope of the private practice of religion to include known places of worship of the Community as well.

This is truly a historic and brave judgment, as any public support of the Ahmadiyya Community, and particularly non-sentencing in blasphemy cases, is often met with immediate backlash from right-wing parties and also from terrorist outfits operating in Pakistan. Even the notorious "Human Rights" judgment[10] passed by the then Chief Justice Tassaduq Jillani, when religious minorities faced numerous attacks by terrorist outfits, did not mention the Ahmadis as an affected class of people.

III. Constitutional Cases

1. *PPPP & Others v Federation of Pakistan* PLD 2022 SC 574 (Suo Moto Case 1 of 2022): Vote of No Confidence

This is the first *suo moto* case taken up by Chief Justice Umar Ata Bandial. The opposition parties in the National Assembly filed a resolution seeking a vote of no confidence[11] (VoNC) for the removal of the then Prime Minister Imran Khan. In a public rally, Imran Khan alleged that a secret cipher was intercepted, which showed that the American government wanted to topple his government – an allegation he later retracted.[12] Once the resolution was filed, instead of holding the vote, the Deputy Speaker dismissed the resolution – in violation of Article 95(2) read with Rules 37(8) and 17 of the National Assembly Rules,[13] on account of foreign conspiracy behind the resolution,[14] and the President dissolved the National Assembly on the advice of the Prime Minister,[15] after which this case was taken up by the Supreme Court *suo moto* and several opposition political parties also filed petitions against this. The Court held that the dissolution of the Assembly was in contravention of Article 58 of the Constitution,[16] and restored the Assembly,[17] and ordered the Speaker to conduct the VoNC. While the Court's jurisdiction in hearing this matter was not questioned by either party, the judgment addressed it saying that Articles 2A, 17, 25, and 91 were violated, thus allowing original jurisdiction under Article 184(3).

2. *Islamabad High Court Bar Association v Federation of Pakistan* PLD 2022 SC 511: Political protests and contempt of court

This case is part of the long-standing tussle between Pakistan Tehreek-e-Insaaf (PTI) and the PDM (see case 1 above). PTI workers started protesting Imran Khan's removal as Prime Minister, who directed them to march toward Islamabad (capital). The PDM government sealed the city but was forced to

open it up after the SC ordered them to do so after Imran Khan assured that the protests would be peaceful. Imran Khan backtracked on his assurance, resulting in major disruption and damage, which was met with force (teargas shelling) by the state. Chief Justice Bandial, writing the opinion of the 5-member bench, found that Imran Khan accrued no guilt for the damage caused and that he was not guilty of contempt of court either.

3. *Pervez Ilahi v Deputy Speaker Punjab Assembly and others* Constitutional Petition 22 of 2022: Election of Chief Minister of Punjab

After the change of regime at the federal level, new elections were sought for the Chief Minister of Punjab. However, the coalition between PTI and PML-Q, which had a majority in the Punjab Assembly, created obstructions to the election, after which the Lahore High Court was petitioned, and it announced the date and time for the election. Two members of the Assembly contested the election. Pervez Ilahi received 186 votes, out of which 10 votes of defecting members were excluded by the Deputy Speaker under Article 63A of the Constitution. Consequently, Hamza Shahbaz, who received 179 votes, was declared the Chief Minister. Article 63A states that any member of the legislative assembly who votes against party lines in the Chief Ministers election (amongst other voting categories) will lose their seat in the respective assembly. When challenged in the SC, the SC ruled that full bench decision of *District Bar Association, Rawalpindi vs. Federation of Pakistan*[18] ruling that the "party head" will determine the policy of how members ought to vote was *per incuriam* to the extent of application of Article 63A. All votes cast for Pervez Ilahi were counted and thus he was declared the Chief Minister.

4. *Supreme Court Bar Association v Federation of Pakistan and others* PLD 2022 SC 488: Defection of legislators under Article 63A

The controversy regarding the disqualification under 63A continues in this case. Article 63A states that a member of Parliament or provincial assembly will lose their seat if they resign from the political party, or if they vote against party lines in the elections of Prime Minister and Chief Ministers; a vote of confidence or no confidence; a money bill; and a constitutional amendment bill. The *Pervez Ilahi* judgment (see above) caused a lot of discord, which led to the President filing a reference in the SC, accompanied by various petitions filed in the SC on the same issue. The SC held that the essence of Article 63A is to protect political parties and freedom of association under Article 17 of the Constitution. The Court then detracted from their established practice, by declaring that the votes of defectors will not be counted as well, regardless of whether the party head decides to act against them. Thereby, the Court imposed double jeopardy and an added limitation that is not present within the Constitution, nor within any other legal text in Pakistan. The Court further asked the Parliament to make a law that disqualifies defectors in addition to the already existing penalty of losing their seat, adding that the penalty ought to be robust and not a mere slap on the wrist. The long-order, released later, relied on the Constitution as a living tree metaphor to substantiate this ruling, which has come under a lot of criticism accusing the Court of re-writing the Constitution.

5. *Tahir Naqash v The State* PLD 2022 SC 385: Religious minority rights

The Ahmadiyya (religious minority) community considers themselves as a Muslim sect, but after the 2nd Constitutional Amendment, 1974, they were declared as non-Muslims (Article 260(3) of the Constitution), and subsequently, their religious practices were criminalized for "posing as Muslims" via the amendments in Pakistan's blasphemy laws. These were further upheld in *Zaheeruddin v The State*1993 SCMR 1718. In *Tahir Naqash*, the Supreme Court heard an appeal against the Lahore High Court decision in which criminal blasphemy cases were filed against members of the Ahmadiyya community for having their places of worship look like a mosque, keeping copies of the Quran, and using other Islamic epithets in violation of Sections 298B and 298C of the Pakistan Penal Code. J. Shah clarified that there is no prohibition on Ahmadis privately practicing their faith and expanded the scope of private worship to include places of worship, relying on how all citizens, including non-Muslims, are guaranteed dignity, the right to practice and profess their faith, and equality subject to law. He further clarified that Article 260(3) does not deprive Ahmadis of citizenship rights. While acquitting the accused, J. Shah ruled that penal statutes ought to be interpreted strictly in favor of the accused.

6. *Muhammad Tayyab Bukhari v Dr Aneesur-Rehman* 2022 SCMR 1913: Regional quota in public appointments

The Punjab, Services and General Administration Department issued a notification declaring five divisions of the Punjab province as a "special zone[s]" and allocated 20 percent of governmental seat allocation in appointments as reserved for citizens domiciled in the special zones. A three-member bench of the Supreme Court held this to be ultra vires the Constitution, while admonishing the government for not paying attention to the Article 27 of the Constitution. This provision allowed for a 40-year period for quotas for certain regions, which expired in 2013; and ruled that now the power of allocating such quotas is vested only in the Parliament.

7. *Hadayat Ullah & others v Federation of Pakistan* 2022 SCMR 1691: Political appointments

While in power from 1993 to 1996, the Pakistan People's Party (PPP) made several appointments to various government organizations, which were revoked by the subsequent caretaker government setup. When the PPP was re-elected in 2008, President Asif Ali Zardari passed the Sacked Employees (Reinstatement) Ordinance, 2009, followed by the Parliament passing the Sacked Employees (Reinstatement) Act, 2010 to reinstate these employees and accommodate them for the lost seniority over the years. The Supreme Court's majority opinion ruled that the Act's classification of employees was not reasonable, nor was it based on intelligible differentia as the Parliament was not targeting all possible former employees affected by political victimization. Also, the Act does not limit itself to the employees removed by the caretaker setup. Furthermore, placing these employees on the same or better footing as regular employees violated

Articles 4, 9, and 18 of the Constitution (right to be dealt with in accordance with the law, security of person, and freedom of profession respectively). However, since most of these employees had completed over 10 years of service and were nearing retirement, the Court turned the review petition into a petition under Article 184(3) (original jurisdiction of the Supreme Court), read with Article 187, and employees who had not been dismissed for grounds such as absence, misconduct, and corruption were reinstated and subjected to sit for any relevant exams necessary for their respective posts. Dissenting, J. Shah noted that the majority had failed to follow the *Shabar Raza case*, which held that the original jurisdiction cannot be exercised as a parallel review jurisdiction; the Court, in line with the separation of powers, ought to have read down the statute instead of dismissing it entirely; the Court overstepped its jurisdiction; and there was no violation of Article 25 (right to equality), and the employees addressed in the law did fall within the domain of reasonable classification.

8. *Chairman NAB v Nasar Ullah* PLD 2022 SC 497: Inordinate delay in criminal trial

The National Accountability Bureau (NAB) arrested the accused on the grounds of embezzling money by creating fake employees in 2018. Despite the passage of four years, their trial had not commenced, and the High Court granted them bail. NAB challenged the bail in the Supreme Court, arguing bail was impermissible under the National Accountability Ordinance. However, the Supreme Court admonished NAB for the inordinate delay stating that delay in concluding criminal trials violates the concept of a fair trial, due process, the right to be dealt with in accordance with the law, and rights to life and liberty (Articles 10A, 4, and 9 of the Constitution). They further noted that inordinate delay through no fault of the accused amounts to harassment and abuse of the legal process.

9. *Muhammad Zahid v Government of Sindh* 2022 SCMR 528: Effect of Administrative Orders of the Supreme Court's Administrative Committee

In hearing a case regarding the demolition of illegally constructed marriage halls, the judgment first assesses whether or not a decision of an administrative committee of the Supreme Court had the same effect as a judgement by the Court. It was held that the decision of the Committee was in furtherance of one of the various orders passed under *Naimat ullah Khan and others v Federation of Pakistan* (series of demolition orders passed by CJP Gulzar), and thus, there was no impropriety in getting it enforced, and this was not a breach of the executive branch, and in fact a continuation of the administrative functions of the Supreme Court itself.

10. PLD 2022 SC 306: *Suo moto* powers restricted to Chief Justice of Pakistan

A few journalists and vloggers aired their grievances regarding the intimidation they faced to a Bench of the Supreme Court, which did not include the Chief Justice. The Bench accepted the signed document and enlisted the case as *Suo Moto 4 of 2021*. This judgment, coming from a five-member bench, held that the Bench taking *suo moto* notice of this matter was "conceptually non-viable and constitutionally impermissible",[19] as *suo moto* notices can only be taken by the Chief Justice of Pakistan.[20] Benches are constituted by the Chief Justice, who also allocates cases to each bench, consequently, each bench sits in matters where their respective jurisdiction has been invoked already, and thus cannot invoke the jurisdiction of the Court itself. Benches cannot "self-constitute and self-propagate"[21]. While the Constitution does not grant *suo moto* powers to the Supreme Court, the judgment took Chief Justice's power to take notice as a given.

11. MQM and others v Pakistan and others PLD 2022 SC 439: Local Governments in Sindh

Article 140A of the Constitution, incorporated via the 18th Constitutional Amendment, 2010, imposed the responsibility of creating local governments on provincial governments. The government of Sindh Province passed the Local Governments Act, 2013, sections 74 and 75 allowing the government to create boards, authorities, and corporate bodies that could effectively carry out all tasks deputed to the local governments. The Supreme Court held that this unfettered delegation of power made Article 140A redundant, and the "Constitution does not envisage unstructured, uncontrolled and arbitrary discretion"[22] to any state entity. The Court further noted that local government is the third tier of the government, and directly impacts the citizen's quality of life, dignity, and equality (Articles 9, 14, and 25 of the Constitution). Sections 74 and 75 of the 2013 Act were struck down for being ultra vires Article 140A, and the Sindh government was ordered to allow elections of local governments and allocate necessary funds to them.

12. *Khyber Medical University and others v Aimal Khan and others* PLD 2022 SC 92: Non-intervention in public and private universities

The respondent was disqualified for three years by the University of Khyber's Unfair Means Committee for impersonating a female student and appearing in an exam on her behalf. On appeal, the High Court reduced the penalty to a one-year disqualification. Hearing the appeal at the Supreme Court, J. Mansoor Ali Shah stated that Section 32 of the Khyber Medical University Examination Regulations, 2017, clearly only mentioned a penalty of three years. He added that Courts must sparingly interfere in internal governance and affairs of educational institutions as a protection to universities to safeguard academic freedom and institutional autonomy. He added that the Court does not have the Constitutional mandate to run or manage public and private institutions. Thus, he ruled that the High Court erred in its judgment and set it aside, restoring the penalty imposed by the University's Unfair Means Committee.

IV. Looking Ahead

Pakistan is currently engulfed in major constitutional crises. The clash between the Parliament and Supreme Court is at its peak. With the Supreme Court continuously interjecting in politics by hearing such cases in its original jurisdiction, the Parliament is now seen fighting back by the passage of the Supreme Court (Practice and Procedure) Act, 2023,

which significantly curtails the powers of the Chief Justice of Pakistan. Another point of clash between the two is also the issue of dissolution of the provincial assemblies of Punjab and Khyber Pakhtunkhwa, and the refusal of the government to conduct elections within 90 days as stipulated. The general election is also on the horizon this year, with the National Assembly and the Sindh and Baluchistan assemblies also nearing the end of their five-year terms, but these are presumably to be preceded by delimitation of districts based on the recently conducted population census, which initself is under hot water for miscounting in various districts.

V. Further Reading

LUMS Law Journal (Vol. (9) 2022), https://sahsol.lums.edu.pk/law-journal/volume-9.

Marva Khan, 'The Use of Special Criminal Courts and Tribunals in Pakistan' in Satvinder Juss (1st edn), Pakistan and Human Rights (Lexington Books 2022).

Moeen Cheema, Courting Constitutionalism: The Politics of Public Law and Judicial Review in Pakistan (Cambridge University Press 2021).

Yasser Kureshi, Seeking Supremacy: The Pursuit of Judicial Power in Pakistan (Cambridge University Press 2022).

References

1 2022 SCMR 61 – this is a case which never reached completion.
2 See Naimat ullah Khan and others v Federation of Pakistan, 2022 SCMR 105, 121, 133, 171, 219, 238, 785
3 Muhammad Zahid v Government of Sindh 2022 SCMR 528.
4 Punjab is Pakistan's most populated province.
5 Only the Chief Justice of Pakistan is entitled to initiating a case without a petition being filed. As noted in the judgment, this case was initiated after a discussion of 12 judges at the Chief Justice's house regarding the ongoing discord within the parliament.
6 Article 58 of the Constitution.
7 As an audio leak later reflected, the idea of foreign conspiracy was concocted by Imran Khan himself. See https://www.dawn.com/news/1712733/in-second-cipher-related-leak-imran-and-party-bigwigs-purportedly-strategise-foreign-conspiracy and https://www.dawn.com/news/1712829/second-part-of-cipher-leak-reveals-extent-of-imrans-plan.
8 See https://www.aljazeera.com/news/2022/11/14/imran-khan-u-turn-no-longer-blames-us-for-removal-as-premier.
9 See paragraphs 29-35 of PPPP & Others v Federation of Pakistan PLD 2022 SC 574.
10 Suo Moto 1 of 20214.
11 Article 95 of the Constitution.
12 See https://www.aljazeera.com/news/2022/11/14/imran-khan-u-turn-no-longer-blames-us-for-removal-as-premier.
13 Paragraph 70.
14 Supreme Court held that this measure was not protected action under Article 69 of the Constitution.
15 The advice of the Prime Minister to dissolve the National Assembly was deemed unconstitutional, see paragraph 89.
16 A Prime Minister who has a VoNC pending against him cannot advise the President to dissolve the National Assembly.
17 Short order passed in this judgment.
18 PLD 2015 SC 401. This was a full bench hearing challenges filed against the 21st Constitutional Amendment. The now Chief Justice had also agreed with the stated opinion, but in the current case he deviates from his own earlier position.
19 Para 35.
20 This was amended by the Section 3 read with Section 2 of the Supreme Court (Practice and Procedure) Act, 2023, which is currently sub judice.
21 Para 34.
22 Para 29.



Paraguay

Rodrigo Ayala Miret, *LL.M. Yale Law School, Yale Law Fellow at the Inter-American Commission on Human Rights*
Giovanna Parini, *LL.M. Harvard Law School, SJD Candidate, University of Pennsylvania Carey Law School*

I. Introduction

In 2022, Paraguay celebrated the 30th anniversary of its Constitution, a milestone symbolizing the nation's transition to democracy. The Constitution of 1992, a product of collaborative efforts among diverse political parties and social sectors, holds immense legitimacy and is deeply respected by Paraguayans. The occasion was marked by numerous civic events and celebrations that reflected the country's high regard for its Constitution.

The year 2022 also witnessed significant political events. High-level authorities such as two Ministers of the Superior Court of Electoral Justice and the Attorney General were selected.[1] In the electoral context, primary elections were held, and a coalition was formed for the first time.

Paraguay's narco-politics situation and high-level corruption drew global attention in 2022. The assassination of Marcelo Pecci, a prominent prosecutor targeting powerful drug trafficking mafias, during his honeymoon in Colombia shed light on the interconnectedness of crime across the continent. The incident is now being investigated as a structural problem linked to organized criminality in the region.

Furthermore, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), under the Global Magnitsky Human Rights Accountability Act, imposed sanctions on high-level Paraguayan officials involved in "significant corruption", including former President Horacio Cartes and current Vice President Hugo Velázquez.[2] These designations had domestic political repercussions, leading Vice President Velázquez to withdraw from his presidential candidacy for the upcoming elections.

The report examines three significant aspects of Paraguay's constitutional development concerning the enactment or absence of laws. It analyzes the approval of a law allowing the use of electronic signatures for popular initiatives; the enactment of Law 6715, Paraguay's first administrative procedure law, representing a significant evolution in administrative law; and the absence of legislation regarding personal data protection, leading to legal ambiguity and potential threats to individuals' privacy rights, particularly in the context of non-consenting party affiliations.

Lastly, the report explores two notable cases involving constitutional rights. First, it examines the legal complexities surrounding the judgment of the "Concertación" coalition by the Superior Court of Electoral Justice, and secondly, highlights a missed opportunity by the Supreme Court to address the constitutionality of name changes for transgender people and the binding nature of the standards established in advisory opinions of the Inter-American Court of Human Rights.

II. Major Constitutional Developments

1. Participatory Democracy meets technology: e-signature for popular initiatives.

A significant legal development for participatory democracy is the approval of Law

6983/2022,[3] which allows electronic signatures to support popular initiative projects through an online portal managed by the Superior Court of Electoral Justice. This law is based on Article 123 of the Constitution, which recognizes the right to popular initiative, granting electors the ability to propose bills to Congress for consideration.

However, thirty years after the Constitution's enactment in 1992, no law had been approved through this mechanism until the passage of Law 6983 itself. This lack of exercise was primarily due to the burdensome requirements imposed by the previous regulation, which mandated notarized signatures from 2% of the electors just for Congress to study the proposal. Consequently, contacting legislators directly to introduce a project was much simpler than following the initiative process, restricting in practice this right recognized in the Constitution.

The only law that successfully navigated through the previous initiative process was Law 6983. The group of citizens, who initiated its proposal, invested over five years in collecting more than 80,000 physical signatures required by the previous regulation, to officially present the proposal to Congress.

According to the proponents, Paraguay is the first country in the Americas to implement electronic signatures for supporting popular initiatives.[4] This represents a significant advancement in guaranteeing participatory democracy, established as a central element of government in Paraguay's Constitution.[5] Within a few months of its implementation, citizens have already submitted several projects, which can be found on the Popular Initiatives Online Portal.[6]

Despite this improvement, the new regulation still requires the signature of 1% of the electors, which amounts to 47,829 signatures in 2023. This required number may be controversial since the Constitution only requires 30,000 signatures to submit a constitutional amendment initiative to Congress or request a constitutional reform.[7] In other words, the Constitution establishes a lower requirement for initiatives regarding higher-ranking norms.

Finally, it is worth noting that the new law also allows the use of electronic signatures for municipal-level initiatives to be studied by the City Council, thus promoting participatory democracy in local governments.

2. Paraguay's first Administrative Procedure Law

The first administrative procedure law of Paraguay, Law 6715, came into effect in 2022, marking a milestone in the evolution of administrative law in Paraguay and a significant step towards unifying procedures and establishing general requirements to safeguard Administration's compliance with the law.[8]

This law of general application governs all exercises of the "administrative function", solving the previous regulatory dispersion, which hindered the relationships between the Administration and individuals and the protection of their rights. Previously, each agency had its own administrative procedure, and in some cases, a lack thereof, undermining fundamental principles of efficiency, legal certainty, and administrative transparency.[9]

Moreover, the law goes beyond establishing mere procedural rules and addresses substantive issues, recognizing principles and rights of individuals in relation to the administration, as well as requirements that the administration must observe in exercising its public power. In this regard, it stands out as the first Paraguayan administrative law that explicitly incorporates the recognition of fundamental principles of administrative law, including the fundamental right to good governance (Art. 32) [10].

An important requirement included by law 6715 is that administrative acts and regulations must be reasoned or justified as a validity requirement (Art. 12.E), clarifying that it cannot consist of a generic reference to proposals, opinions, or previous resolutions. Additionally, it establishes that "the greater the discretion exercised in issuing a rule, the greater the requirement to sufficiently justify it," as well as "the greater the *intrusion* on individuals' rights, the more justified the administrative act must be" (Art. 32.M). Thus, this legislation can be a key instrument in combating arbitrariness.

However, although the law recognizes in its rationale "the increasing role of the Administration in the lives of the people, compared to other branches of government, assuming today normative and quasi-judicial functions with ever-increasing scope," it is still pending to establish a transparent, participatory, and more accountable procedure for executive policymaking. To this day, the president and agencies can approve rules with general scope overnight. Law 6715 did not establish specific rules to ensure accountability and public participation during the rulemaking process but only afterward.

3. Non-consenting party affiliations, the lack of personal data protection law, and legal uncertainty

In Paraguay, the lack of comprehensive legislation safeguarding personal data creates significant risk, particularly during electoral campaigns. For instance, it is common for political parties to affiliate voters to their electoral rolls without their consent, ignoring formal requirements for affiliations outlined in the Electoral Code. Non-consensual affiliations may occur to give the impression that political parties have more affiliates or to boost the number of voters in internal party elections. Even if the victim is unaware of their affiliation, someone else may use that affiliation to vote in their name as part of a voter fraud scheme.

The nonconsensual use of personal information, including unauthorized political affiliations, has the potential to infringe upon informational privacy and may even encompass criminal offenses such as identity theft and signature forgery. Despite the gravity of this issue, the State has shown a lack of responsiveness. The Prosecutor's Office fails to initiate investigations into these claims, while the Superior Court of Electoral Justice maintains that the inclusion or exclusion of affiliates falls within the internal jurisdiction of political parties, allowing no intervention until the completion of their internal procedures.

Victims of non-consensual affiliations have limited legal options. Without a clear legal framework to protect data or norms in the Electoral Code addressing this issue, it is uncertain what the legal remedies or consequences are for an illegitimate affiliation, or even the procedure to request for disaffiliation. Some voters have requested disaffiliation from the political party, while others have used the constitutional guarantee of *Habeas Data* enshrined in Article 135 of the Constitution. This article states that: "All persons may access the information and the data about themselves, or about their assets, that is in official or private registries of a public character, as well as to know the use made of them and of their end. All persons may request before the competent magistrate the updating, the rectification, or the destruction of these, if they were wrong or illegitimately affected their rights".

However, despite this explicit constitutional provision, there are no specific legal procedures for Habeas Data and the scope of the protection remains questionable. Additionally, there are no current laws for safeguarding personal information, so citizens fall victim to an array of informational privacy violations, such as this.

A study found that Paraguay's courts provided conflicting interpretations of Habeas Data regarding non-consensual affiliations[11]. Some courts that granted Habeas Data petitions found that the administrative process of exclusion from the electoral roll only applied to voluntary members, not the victims of compulsory affiliations. On the other hand, the courts that rejected Habeas Data petitions stated that the constitutional guarantee was subsidiary and subject to the exhaustion of ordinary remedies. Accordingly, argued that the petitioners did not prove that they had carried out the disaffiliation process or that the defendant had refused their petition for disaffiliation.

The absence of legislation and regulations regarding personal data protection in Paraguay has caused legal uncertainty and inconsistency in the courts, putting citizens' informational and associational privacy rights at risk. While this presents an opportunity for Congress to establish a comprehensive data protection law, there appears to be insufficient motivation for doing so. The confusion in the judicial system that results from this lack of clarity underscores the urgent need for such legislation.

III. Constitutional Cases

1. Judgment No. 08/2022 of the Superior Court of Electoral Justice: The first national coalition and open primary election

The Superior Court of Electoral Justice ("SCEJ"), through Agreement and Judgment No. 08/2022, granted the request for recognition of the first national coalition for the general elections of 2023 and allowed it to use the national electoral register for its primary elections.

The recognition of the "Concertación" was a historic event from a political standpoint, as it was the first time this figure was used nationwide in Paraguay, following successful examples in other countries in the region. However, this aspect was not controversial since Law 3212/07 has recognized the possibility of forming coalitions since 2007.

The controversial issue, in this case, was whether the coalition could use the national electoral register as its register for its internal elections, in which they would select the presidential ticket. So, the question was whether solely electors affiliated with the political parties and movements part of the coalition could vote in their internal elections or if all individuals registered to vote in national elections, including those affiliated with political parties not part of the coalition, could also vote.

This possibility led the Colorado Party, the party in government with the highest number of affiliates in the country, to oppose the use of the national electoral register by the coalition and request the exclusion of its more than 2.6 million affiliates[12] and all individuals who are not members of the parties forming the coalition.

Thus, the SCEJ analyzed this controversial aspect and, with a dissenting vote, argued that Law 3212, which specifically regulates electoral coalitions, does not establish that the register should only consist of the affiliates of the various groups that comprise the coalition. Instead, it allows coalitions to define who may vote in their internal elections at their discretion.

Regarding the inclusion of electors affiliated with other parties without their consent, the SCEJ argued that these individuals are not legally required to vote but have the option to do so. The SCEJ noted that this solves the need for express consent invoked by the representatives of the Colorado Party. Furthermore, the SCEJ stated that the legal obligation to vote does not apply to primary internal elections, and electors have the right to request their exclusion from the coalition electoral register or choose not to participate. Thus, being included in the coalition's register does not cause harm.

Finally, the SCEJ asserted that the judgment seeks to guarantee the broadest political participation of Paraguayans to create the conditions for the highest possible representation, remarking that suffrage is the foundation of the democratic and representative system established in the Constitution.

2. Judgment 817/2022 of the Supreme Court: A missed opportunity to address name changes for transgender persons and the binding nature of the standards developed in the IACtHR's advisory opinions.

The case involves a transgender woman who requested a civil court to change her birth name to Mariana. She argued that her current name did not reflect her identity and personality, and a name change was necessary to affirm her gender identity. She further contended that using her birth name caused her emotional distress and discrimination. The Public Prosecutor's Office opposed her petition by invoking Article 56 of the Registry Law, which stipulates that the civil registration officer should not register names that "mislead as to the sex of a person".

The first instance court granted the transgender woman's petition, citing the consti-

tutional right to identity and personality. The judge invoked an international human rights framework to recognize the right to gender identity, stating that Article 56 only applies to new births. The court also referred to the Inter-American Court of Human Rights's ("IACtHR") advisory opinion OC-24/17 requested by Costa Rica about gender identity.

The Prosecutor's office appealed, and the Fourth Circuit Court of Appeals sent the issue to the Constitutional Chamber of the Supreme Court as a *"consulta constitucional"*. The Appellate Court raised several constitutional questions. First, asked the Supreme Court to study the constitutionality of Article 56 and the conflict between privacy and freedom of expression versus aspects of public order; suggesting that name changes that induce confusion about sex are matters of public order. Secondly, the Court of Appeals questioned whether the jurisprudence of the IACtHR, particularly regarding the control of conventionality, contravenes the supremacy clause outlined in Article 137 of the Paraguayan Constitution, which asserts that international conventions hold a subordinate position in the hierarchy of laws compared to the Constitution.

Lastly, the Appellate Court raised the issue of the binding nature of advisory opinions. The court questioned whether an advisory opinion can be inserted into the legal system without scrutiny, even when it may lead to a modification of the constitutional text. It also argued that the international standards discussed in these opinions require constitutional interpretation because they were not given in the context of a jurisdictional case where the Paraguayan State's international responsibility was being judged. The court further argued that Article 64 of the American Convention does not state that these opinions are binding on all States, and yet the IACtHR's jurisprudence indicates otherwise. In sum, the Appellate Court asked the Supreme Court to judge on the constitutionality of Art. 56 and its conflict with the Constitution, the text of the American Convention, and the binding nature of advisory opinions.

The Supreme Court deemed the consultation inadmissible due to procedural issues. Dr. Victor Rios Ojeda argued that there is no procedural norm allowing judges send constitutional questions to the Supreme Court. The majority's opinion reinterpreted existing procedural norms to reinforce that judges can indeed raise constitutional issues to the Constitutional Chamber of the Supreme Court. Nonetheless, the majority found the consultation inadmissible as they considered that the Appellate Court sought the Constitutional Chamber's opinion on the applicability of the IACtHR's jurisprudence and advisory opinions, and not on the constitutionality of Art 56 of the Registry Law.

Only two Justices recognized in their opinions a constitutional right to gender identity. Justice Martinez Simon found the normative restrictions unconstitutional as they violate Article 25 of the Constitution, which protects freedom of expression of one's personality, creativity, and identity. Although Justice Ramirez, in dicta, found Article 56 unconstitutional, his reasoning stated that judges must resolve conflicts between the Constitution and norms using the hierarchy criterion instead of seeking a declaration of unconstitutionality from the Supreme Court. The consultation was declared inadmissible, and the case was remanded to the Court of Appeals, which will decide on the matter with Article 56 still in force and part of the legal system.

By engaging in discussions surrounding procedural matters and grappling with the intricacies of judicial review in Paraguay, the Supreme Court has, regrettably, overlooked an occasion to interpret and uphold substantive constitutional rights. Firstly, to interpret Article 25 of the Paraguayan Constitution, which affirms that all individuals have the right to freely express their personality and forge their identity and image. The Court could have inquired whether this right implies legal recognition of name changes for transgender persons in Paraguay.
Furthermore, the Court missed the chance to establish a jurisprudence on the principle of equality and non-discrimination, which is guaranteed by Article 46 of the Constitution. This article, which was clearly involved in this case, ensures equal dignity and rights for all, and prohibits all forms of discrimination. The Constitution also mandates the government to remove existing barriers and prevent factors that may promote discrimination. So far, the Supreme Court has not developed a jurisprudence on this principle. Lastly, the Supreme Court failed to analyze the Inter-American jurisprudence about gender identity, the nature of advisory opinions, and ultimately, the control of conventionality.

IV. Looking Ahead

General elections were held in April 2023, implementing for the first time in national elections the preferential voting system, part of an electoral reform aimed to improving political representation. However, this reform heavily favored the dominant Colorado Party, which won the presidency, but also an unprecedented majority -since the return to democracy- in both chambers of Congress.

On another front, following the retirement of Justice Antonio Fretes for reaching the age limit, Gustavo Santander was appointed as a new Supreme Court Justice. Fretes left the judiciary after two decades in office and amid allegations of corruption involving one of his sons. The scandal led the other magistrates of the Supreme Court to ask Fretes to resign, considering that he was damaging the reputation of the judiciary. This request marks an unprecedented episode in the history of the Court.

Finally, the most important pending event in 2023 will be the renegotiation of the agreement with Brazil regarding the Itaipu dam, which will have crucial political and economic consequences for Paraguay and its future.

V. Further Reading

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1 The Council of the Magistracy conducted exams for aspiring candidates, who were required to take questionable multiple-choice exams, sit at desks, and be filmed throughout the process. However, this measure continues to prove ineffective, providing only a superficial sense of transparency and legitimacy to an inherently political process.
2 See: https://py.usembassy.gov/designation-of-former-paraguayan-president-horacio-manuel-cartes-jara-for-involvement-in-significant-corruption/?_ga=2.114736644.2010377707.1679780633-2013320115.1679780633 and https://www.state.gov/designation-of-paraguayan-vice-president-hugo-velazquez-and-yacyreta-bi-national-entity-legal-counsel-juan-carlos-duarte-for-involvement-in-significant-corruption/
3 Law Nº 6983/2022
4 See: https://rb.gy/4wbqg
5 Article 1: "The Republic of Paraguay adopts for its government the representative, participatory and pluralistic democracy, founded on the recognition of human dignity."
6 Popular Initiatives Online Portal: https://iniciativapopular.tsje.gov.py
7 Articles 289 and 290.
8 For further analysis, see: M. A. González & R. Rivero Ortega, '¡Por fin una Ley de procedimientos administrativos en Paraguay!' [2021] La Ley Paraguaya 2941
9 See bill proposal: http://silpy.congreso.gov.py/expediente/117594
10 M. A. González & R. Rivero Ortega, '¡Por fin una Ley de procedimientos administrativos en Paraguay!' [2021] La Ley Paraguaya 2941
11 See:
https://www.tedic.org/wp-content/uploads/2022/10/Habeas-data-y-afiliaciones-fraudulentas-WEB.pdf and
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12 In a country with 5 million registered voters.



Peru

César Landa Arroyo, *Visiting Scholar, University Pompeu Fabra (Spain), Former Minister of Foreign Affairs of Peru, former President, Peruvian Constitutional Court, Professor, Pontificia Universidad Católica del Perú*

Maria Bertel, *Professor, University of Graz*

Luis A. López Zamora, *Research Fellow, Department of International Law and Dispute Resolution, Max Planck Institute Luxembourg for International, European, and Regulatory Procedural Law*

I. Introduction

In 2022, as in previous years, Peru did not enter into a period of calmness. On the contrary, the year was marked by a serious political and constitutional crisis, which can be seen as an ongoing predicament that reached a new peak in December 2022. In Section II, we first describe the crisis and explain its link to structural challenges. Then, Section III discusses cases decided by the Constitutional Court in 2022 that reflect Peru's continuing structural problems.

II. Major Constitutional Developments

The year 2022 continued the way 2021 ended.[1] From the start of his presidency in July 2021, Pedro Castillo did not receive the opportunity to govern properly; reasons can be partly found in the constitutional setting, which does not lead to stable majorities in Congress backing the President. Similar to previous years, instead of major constitutional developments, no development took place, which leads to a cementation of the status quo. The situation escalated in December 2022. President Castillo wanted to forestall a vote on his removal (foreseen for December 7, 2022). He tried to dissolve Congress and install an emergency government, but he failed. Congress thus voted to remove him, and Dina Bolouarte, his former Vice President, became the new President. Since then, Peru has experienced nationwide protests with people calling for early general elections, ahead of the regular elections scheduled for 2026, and the convening of a constituent assembly, which Pedro Castillo had promised.

A state of emergency was declared. Police intervened with severity, which led to the death of more than sixty people, over a thousand arrests, and many homes were raided.

The reasons for the crisis can be found in Peru's constitutional design, where since 2001, the opposition party (not the President's party) had always held a majority in Congress, which led to a form of democratic control of the executive. Yet, in this context, the President depended on the goodwill of the opposition. In 2016, the opposition began employing several techniques to disrupt political life. It has become a regular practice to block the policies of presidents in Congress as well as to interfere in the elections of new magistrates/members of the judiciary, the attorney general, the Constitutional Court or to seek the removal of members of the independent electoral management bodies.[2] This can be illustrated by the election of the new magistrates of the Constitutional Court by Congress in May 2022, which was not in line with transparency requirements and was therefore criticized.[3]

At the same time, presidents have also instrumentalized the systems, e.g., pushing for votes of confidence on executive policies to trigger Article 134 of the Constitution, allowing the President to dissolve the parliament after two cabinet censures or

denials of confidence. This occurred during the 2019 constitutional crisis when President Vizcarra decided to dissolve Congress and call for new parliamentary elections, these acts were declared constitutional by the Constitutional Court.[4]

With citizens making use of their democratic rights to protest, the current crisis transcends the democratic conflict between the government and the parliamentary opposition and crosses into a confrontation with civil society. It is most remarkable that it is the native Indigenous populations from the Andean and Altiplanic territories who are demonstrating in Lima, where power is concentrated.

If reforms prove to be successful, they must not only be technically adequate but also capable of solving the problems and tensions arising from social inequalities in Peruvian society. An important pillar of reforms is, therefore, the recognition of new rights, such as the right to prior consultation for projects that impact Indigenous peoples or their territories; a high-quality education for all; a right to the internet; a right to food, health, and a universal minimum pension; and the outlawing of the precarization of employment. Regarding the distribution of powers and mechanisms of accountability, a true decentralization of power must be implemented, limiting the grounds for presidential impeachment. This must go hand in hand with transparency in public budgeting and autonomy for the organs of the judiciary, including the attorney general, the highest courts, and electoral bodies. Corruption crimes should not be time-barred. Lastly, congressmen should be revocable, and Congress should be renewed on a staggered basis.

Additionally, economic reforms will have to accompany a potential constitutional reform: natural resources as well as the environment must be protected, and sustainability has to be integrated into economic activities and the lives of the local population.

III. Constitutional Cases

It does not come as a surprise that the jurisprudence of the Constitutional Court reflects the difficult political situation in Peru.

1. *Regulation of the Vote of Confidence* - 00032-2021-PI/TC

On February 3, 2022, the Constitutional Court rendered its decision 00032-2021-PI/TC, dealing with the constitutionality of Law 31355, Law Developing the Exercise of the Vote of Confidence. The vote of confidence is a political mechanism that the executive uses to request political support from Parliament. If the latter denies two votes of confidence, the executive can dissolve parliament. This institution is enshrined in the last paragraph of Article 132 and Article 133 of the Constitution. The Constitutional Court declared the claim of unconstitutionality unfounded and therefore declared Law 31355 constitutional. The Constitutional Court did not elaborate on reasons for the decision; however, the individual votes of some of the Court's judges made explicit the legal issues involved. One of the controversies was whether the vote of confidence could be requested on any matter, or whether there were some issues it could not cover. This was especially important in the case of votes of confidence requested by the executive concerning projects of constitutional reform or the exclusive powers of parliament. Law 31355 established that a vote of confidence had to refer to matters within the competence of the Executive directly related to the implementation of its policies; excluding matters of constitutional reforms or those involving the exclusive competencies of parliament. The Constitutional Court concluded that the content of Law 31355, which restricted the matter object of a vote of confidence, was constitutional.
A minority of judges on the Constitutional Court disagreed with this finding and considered that Law 31355 limited the vote of confidence, even when at the constitutional level, that institution was regulated broadly as an attribution of the executive. As a result, the judges considered that the restriction of that institution should have gone through a constitutional reform procedure and not be regulated by the simple issuance of a law.

2. *Restitution of Alberto Fujimori's Pardon on the Grounds of Humanitarian Reasons* - 02010-2020-PHC/TC-ICA

On March 17, 2022, the Constitutional Court rendered its decision, No. 02010-2020-PHC/TC-ICA. The proceeding was started by Gregorio Parco Alarcón who requested the nullity of Resolution No. 10, which was issued by the Supreme Tribunal of Preparatory Investigation – STPI (Juzgado Supremo de Investigación Preparatoria). The STPI declared Alberto Fujimori's pardon without effect, applying to that end a conventionality control. The plaintiff requested the Constitutional Court reinstate Fujimori's pardon and his immediate release. The Constitutional Court agreed with the plaintiff's request based on three elements:

(a) The resolution that annulled Fujimori's pardon was the outcome of a conventionality control. According to the Court, this control took place in the application of Supreme Resolution 281-2017-JU, a norm that granted the possibility only in the context of ongoing trials, not in the context of proceedings for the enforcement of judgments. The Constitutional Court considered that the annulment of the pardon was vitiated for that reason.

(b) The Constitutional Court attempted to invalidate the judiciary's decision that the institution (presidential pardon) was a prerogative without additional constitutional conditions for its application. According to the Constitutional Court, they implied that its exercise could not be subject to infra-constitutional requirements constraining, limiting, or restricting it. The Constitutional Court, however, recognized that the institution could not be arbitrarily exercised. Therefore, to determine the arbitrariness of granting Fujimori's pardon, the Constitutional Court applied to the matter some of the criteria provided by the Inter-American Commission on Human Rights.

(c) Finally, the Constitutional Court concluded that the judiciary's decision had only an apparent motivation, thus violating the right to the due motivation of judicial decisions. The Court considered that the judiciary subjectively construed arguments to argue its determination. According to the Constitutional Court, those arguments were based on alleged irregularities and presumptions not proven in the proceedings and, despite that fact, they were used to annul Fujimori's par-

don. According to the Constitutional Court, the irregularities identified by the judiciary resulted in considering certain elements as requirements for the granting of the pardon, even though those elements were not established as such by the Constitution.

For these reasons, the Constitutional Court declared the nullity of the resolution that annulled the pardon granted to Alberto Fujimori, ordering Fujimori's immediate release from prison.

The judgment under review was controversial, and it was questioned by a set of the Constitutional Court's bench. As a result, judges of that Court (minority) argued that there were flaws in the reasoning of the majority (see the dissenting opinions of Judges Ledesma, Miranda Canales, and Espinoza). The main criticism of the minority was that the proceeding before the Constitutional Court exhibited a biased political intention to re-establish Alberto Fujimori's pardon.

Due to the importance of this case, in March 2022, provisional measures were requested before the Inter-American Court of Human Rights (IACtHR) in favor of the victims of the crimes that led the former President to prison. The Court recalled the nature of Fujimori's crimes and required Peru (pursuant to the Resolution of March 30, 2022) to refrain from executing the Constitutional Court's release order until the IACtHR could decide on the provisional measures requested.

The IACtHR, in its Resolution of April 7, 2022 (precautionary measures in the case of *Barrios Altos and La Cantuta v. Peru*), decided on the above-mentioned request and concluded that the Constitutional Court's decision did not analyze the compatibility of the pardon and the standards established by the IACtHR in its Resolution of May 30, 2018. The IACtHR considered the Constitutional Court to have failed to analyze and demonstrate the imperative need for the release of Fujimori. The IACtHR further noted that the impact of the pardon on the right to access justice for the victims of Fujimori's crimes was not considered by the Constitutional Court in its decision. The IACtHR believed the Constitutional Court should have applied a conventionality control and called on the state to refrain from implementing its ruling.

The Peruvian State has not implemented the judgment of the Constitutional Court.

3. *The right to be forgotten* - 02839-2021-PHD/TC, 03041-2021-PHD/TC

The first decision, No. 03041-2021-PHD/TC, is a so-called *recurso de agravio constitucional* (constitutional complaint). It dates back to 2016, when Miguel Arévalo Ramírez filed a writ of habeas data exclusion against several media companies and Google Perú SRL, seeking to have personal information removed, deleted, and canceled from indexes or indexed pages and links because he was accused of being an international drug trafficker. Arévalo Ramírez argued that since the information was false (which, as the case showed, was not ultimately proven to be true), these companies had violated his right to informational self-determination, in particular the right to be forgotten, as provided for in Article 2(6) of the Peruvian Constitution. Although the proceedings showed that Arévalo Ramírez's argument that the information shared was false and could not be proven and Arévalo Ramírez could not win the case, the decision is interesting because the Constitutional Court clarified its jurisprudence on the right to be forgotten.

The Constitutional Court confirmed that the conditions for bringing an action, including exhaustion of other remedies, had been met. As regards the substance of the case, the Court referred to earlier decisions, such as Exp No 4739-2007- PHD/TC. It recalled that the right to informational self-determination includes the possibility for every individual to exercise control over his or her personal data contained in public and private files, whether or not that data is processed electronically. The right to informational self-determination therefore "protects the holder of the information against possible abuses or risks arising from the use of personal data contained in public or private records" (margin note 9). The Court then goes on to highlight the technological changes of the last decade, which in the eyes of the Court led to a "hyper visualización de data" (margin note 10). This hypervisibilization of data can lead to a violation of the right to data protection, especially in conjunction with other fundamental rights.

The Court then explains the different aspects of the right to be forgotten: According to the Court, it encompasses, amongst others, a guarantee of erasure, suppression, or removal of information relating to personal data that, usually linked to the name of the person concerned, can be found using search engines or computer systems, which have been available to the public for a certain period of time and which, after having been adapted to reality in due course as a result of new factual and/or relevant factual and/or legal circumstances, are no longer accurate or are no longer entirely accurate. The Court points out that in these cases their dissemination, now of inaccurate content, causes damage to the owner of the information, in particular with regard to the content of his fundamental right to honor and good reputation (Article 2(7) of the Peruvian Constitution), with regard to the right to free development of the personality (Article 2(1) of the Peruvian Constitution) or, possibly, with regard to his right to privacy (Article 2(7) of the Peruvian Constitution) (see margin note 11). However, the Court also recognizes that the right to be forgotten is not without limits because the right to be forgotten must be balanced against other fundamental rights, such as freedom of information (Article 2(4) of the Peruvian Constitution), which is the basis of a democratic system. For the application of freedom of information, the Court refers to the jurisprudence of the IACtHR. As explained above, the Court could not find a violation of the right to be forgotten. The significance of the case lies in the Court's explanation of the core of the right to be forgotten.

In the second case, 02839-2021-PHD/TC, the claimant, Sebastián Carlos Aguedo Zúñiga, brought an action for habeas data against the Ministry of Interior to have register 12041435 deleted because it violated his right to personal privacy. The Court repeated its general remarks on the right to be forgotten but further elaborated on its relationship to technological development. It pointed out that one of the aims of the right to be forgotten was that tech-

nological development, in whatever form it may take, was carried out in such a way that it would not imply, through the effects of time, an arbitrary intervention that, as a result of the display or dissemination of personal information through computer systems, would cause lasting damage to the exercise of fundamental rights essential to the development of a life in dignity. In such circumstances, this attribute implied a content of the right to informational self-determination recognized in Article 2(6) of the Constitution, and, as such, it was inescapably protected by the Constitution (see, margin no 11). Yet, the Court also emphasized the duties of the state but also private entities arising from the right to be forgotten. In the case presented, the Court found that if the data registry stored by the *Dirección de Criminalística de la Policía Nacional del Perú* (Criminalistics Directorate of the Peruvian National Police) does not fulfill an objectively justified function, it must be fully encrypted so that it is not used for purposes other than those of the police.

4. *Same-sex marriage* - 02653-2021-PA/TC

The Constitutional Court has had to decide several cases related to the recognition of same-sex marriage. The following case selected was decided in the negative. The request was for a same-sex marriage contracted abroad to be recognized in Peru. In 02653-2021-PA/TC, the Court argued that the definition of marriage according to Peruvian constitutional law, as well as ordinary laws, required a man and a woman. It further referenced public international legal norms, which confirm this view. Since this notion of marriage is a part of the Constitution, it forms a part of international public order (*orden público internacional*), which leads to the conclusion that a marriage concluded in a foreign country cannot be recognized in Peru. Regarding the argument of the claimants that the Inter-American Court of Human Rights had issued a consultative opinion in 2017 on the topic, the Constitutional Court expressed itself in detail: "This advisory opinion of the Inter-American Court, launched urbi el orbi, constituted an excess of the six judges who signed it. Five years after issued, we can see that none of the thirty-four member countries of the Organisation of American States the Organisation of American States […] has followed it […] Peru does not need to feel bound by an advisory opinion that it never requested and which hardly anyone has taken any notice of." (margin no 17).

The Court further sets out that the consultative opinion only demonstrated that the Inter-American Human Rights System had structural defects. It argues that four countries that are members of the Organization of the American States do not fall under the jurisdiction of the San José Court, but those four countries are also participating in the election of judges. The Constitutional Court points to the European Court of Human Rights, where all member states of the European Convention on Human Rights are represented by one judge. It concludes: "By ignoring the relationship of judges and members of the Inter-American Court and the Inter-American Commission to their countries of origin and emphasizing that they are chosen for their "high moral authority", the American Convention paves the way for the ideologization of the Inter-American human rights system" (margin no 19). Finally, the Court concluded that it is not for the Court to decide on the question of the introduction of a form of same-sex marriage, "[i]ntroducing it through the window, by means of a resolution of the Constitutional Court, would mean that we constitutional magistrates would be usufructuring and abuse the position we temporarily occupy. We are not here to replace legislators or constituents, but only to enforce the Constitution of Peru".

IV. Looking Ahead

The constitutional and political crises of the last years will still be marked by the culminating mass protests at the end of 2022. Much will depend on whether or not elections can be held in 2023, which to date (end of April 2023) is still unknown.

V. Further Reading

César Landa, 'The Political Crisis in Peru: Is There a Constitutional Solution?' (IACL-AIDC Blog, 14 March 2023) https://blog-iacl-aidc.org/2023-posts/2023/3/14/the-political-crisis-in-peru-is-there-a-constitutional-solution, accessed 13 May 2023.

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Poland

Agnieszka Bień-Kacała, *Dr hab. Prof. US, University of Szczecin*

Anna Tarnowska, *Dr hab. Prof. UMK, Nicolaus Copernicus University*

Wojciech Włoch, *Dr Nicolaus Copernicus University*

Michał Kołbuc, *mgr, University of Szczecin*

I. Introduction

In 2022, Polish authorities continued the illiberal remodelling of the constitutional system[1]. The system is based on the structure of liberal constitutionalism (constitutional democracy) established on three pillars: democracy, the rule of law, and human rights protection with the constraining ideal of constitutionalism. However, the characteristics of the system are connected to the deterioration of democracy, misuse of human rights, and abuse of the rule of law. The decline is stable with some signs of improvement, e.g. the Democracy Index scored 7.04 in 2022 while achieved 6.80 in 2021, which is still lower than before the illiberal turn in 2015, placing Poland among other flawed democracies. The V-Dem Report of 2023 named Poland an electoral democracy with signs of one of the fastest rises to autocracy among democratic nations. The 2023 Freedom House report scored Poland 81 out of 100, including 34 out of 40 for political rights and 47 out of 60 for civil liberties. Attention was also drawn to the extra constitutional emergency in 2022 concerning the migration crisis on the Belarus-Poland boarder, as the authorities employed pushback on detained migrants. The lowest rating in the report was related to the independent judiciary, meaning that domestic constraints, including constitutional review, are fading away. Only a weak constraint is provided by the EU and international norms and procedures. In 2022, many actions, including judgements of the captured Constitutional Tribunal (CT), were taken to lift the constraining effect of EU and international human rights laws, making the system overall less constitutionalist. At the same time, it is becoming more illiberal, as the actions were focused on the rejection of supranational and international institutions by elevating the sovereigntist approach to the nation-state[2]. The year closed with new legislation on the Supreme Court, enacted to receive support from the EU Recovery Fund, and with the preparation for the parliamentary election scheduled for 2023.

II. Major Constitutional Developments

In 2022, the ruling majority could not amend the Constitution formally. According to Article 235 of the 1997 Constitution, an amendment may be adopted by the Sejm by a majority of at least two-thirds of votes of the statutory number of Deputies, and by the Senate by an absolute majority of votes of the statutory number of Senators[3]. From a theoretical perspective, the 1997 Constitution is relatively "flexible". The adoption of an amendment, also known as a constitutional statute, requires a qualified majority but there is no eternity clause[4]. The amendment power could be called "weak," as the amendment could be passed by Parliament during one term of office[5]. The referendum is not obligatory and may be held in relation to fundamental rules of the constitutional system, human rights, and the constitutional amendment procedure[6]. Thus, the Polish amendment design is of a multi-tier character[7] and, in another classification, exceptional with the multi-track procedure[8]. Even though the 1997 Constitution is relatively "flexible", it requires a qualified, constitutional, majority to be amended, meaning a broad agreement

is needed in the Parliament. The Polish ruling coalition lacks a constitutional majority, and there is no support among opposition parties for constitutional changes. Any such change originating from the ruling majority is perceived as suspicious, as it could potentially advance illiberal constitutionalism.

Since 2015, when illiberal remodeling started, constitutional development has been made by informal means, especially with the support of the CT. In 2022, the most relevant decisions of the CT related to the constraint on public power delivered by supranational and international actions. The most critical cases are analyzed in the following section.

In 2022, an issue regarding the abuse of emergency power had come to fruition. After the exhaustion of the constitutional emergency implemented as a consequence of the Russian aggression on Ukraine[9], the Polish authorities introduced a set of legislative-based measures[10] that exceeded constitutionally extraordinary tools. According to these measures, a temporary ban on staying in the border area may be introduced by governmental regulation to ensure the security or public order in connection with a threat to human life, healthy, and property resulting from crossing the state border contrary to the law, attempting to cross it, or a justified risk of committing other prohibited acts. The Polish authorities used a similar train in relation to fighting the COVID-19 pandemic in 2020, bypassing the 1997 Constitution, and instituting an extra constitutional emergency, a state of an epidemic, to fight the pandemic threat, notwithstanding the appropriate emergency is regulated in the Constitution.

III. Constitutional Cases

In 2022, the CT issued 14 judgments, the fewest since 1998. In the last year before the crisis regarding the unconstitutional appointment of new judges in 2015, the CT issued 63 judgments, its activity has been steadily declining since then. In most cases, the CT delivers decisions on a call of the ruling majority and bodies associated with it (e.g. the Prime Minister, the Prosecutor General or First President of the Supreme Court).

1. *K 7/21*: Judicial system and the primacy of the Constitution

In 2021, the Prosecutor General asked the CT to examine the constitutionality of Article 6 § 1of the Convention for the Protection of Human Rights and Fundamental Freedoms insofar as (1) it "authorises the European Court of Human Rights (ECHR) to create, under national law, a judicially protected subjective right of a judge to occupy an administrative function in the organisational structure of the ordinary judiciary of the Republic of Poland", (2) "the premise 'court established by law' contained in this provision does not take into account, being the basis for the establishment of the court, universally binding provisions of the Constitution and laws, as well as the final and universally binding judgments of the Polish Constitutional Tribunal", (3) "allows for a binding assessment by national or international courts of the conformity with the Constitution and the Convention of laws concerning the organisation of the judiciary, the jurisdiction of courts and the law concerning the National Council of the Judiciary (NCJ), so as to establish the fulfilment of the condition of a 'court established by law'." The CT shared the applicant's reservations and, in its judgement of 10 March 2022, ruled that Article 6(1) of the Convention is incompatible with the Polish Constitution (Articles 8(1), 89(1)(2), and 176(2), 187(1) in conjunction with 187(4) and 190(1), 188(1) and (2) and 190(1)) to the above extent. The subject of the review was Article 6(1) of the Convention as interpreted by the ECtHR in its judgments of 29 June 2021 in Broda and Bojara v. Poland (26691/18, 27367/18), 22 July 2021 in Reczkowicz v. Poland (43447/19), 8 November 2021. Dolińska-Ficek and Ozimek v. Poland (49868/19, 57511/19), 3 February 2022 in Advance Pharma sp. z o.o. v. Poland (1469/20). The CT found that the ECtHR created a legal norm that does not directly derive from Article 6(1) of the Convention and, instead, is a development of the interpretation presented in Guðmundur Andri Ástráðsson v. Iceland (judgement of 12 March 2019, 26374/18), a three-stage test of independence that boils down to three questions. Has there been a clear violation of domestic law? Do the violations of domestic law relate to any fundamental principle in the judicial appointment procedure? And finally, have the violations of the right to a 'lawfully appointed court' found and remedied by the domestic courts? The CT found that in the judgments cited above relating to the Polish judiciary, the ECtHR went beyond the three-stage test. It disregarded applicable Polish law, including the norms of the Constitution, and did not consider the body of the case-law of the CT. In the justification to the judgement K 7/21, the Tribunal states that "there is no constitutional subjective right in the Polish legal system for a judge to occupy an administrative function in the structure of the ordinary judiciary," and in turn, 'the ECtHR or national courts cannot decode the national legal status of a court established by law in an arbitrary manner'. The Polish CT argues that Article 6(1) of the Convention, as interpreted by the ECtHR, "creates a jurisdictional basis for national courts to review the constitutionality of the law and to assess the legality of judgments of the Constitutional Tribunal," which contradicts the constitutional principle of the finality and universally binding character of judgments of the Constitutional Tribunal.

In the Tribunal's view, the ECtHR ascribed itself a new competence to examine the constitutionality of laws concerning the organization of the judiciary, the correctness of the acts of appointment of judges, as well as the ability to independently formulate the criteria of a "court established by law." This would, in the CT`s opinion, constitute a significant modification of the constitutional order of the Republic of Poland. In this interpretation, on the basis of Article 6(1) of the Convention, the ECtHR created new legal norms, and it was these norms that were the subject of the examination of compliance with the Constitution. The effect of the judgment is to remove from the Polish legal order not Article 6(1) of the Convention itself, but the norms interpreted from that article instead. These interpreted norms are not binding on Poland, because "the rulings issued on their basis, i.e. the four judgments of the ECtHR [...] do not have for the Polish State the attribute provided for in Article 46 of the Convention (the obligation of enforceability), as having been issued on a basis lying outside the scope of

the State's legal obligations." This is because the CT considered that the interpretation made by the ECtHR had a law-making character and went beyond the competences of the ECtHR. The judgment K 7/21, in the intention of the CT, sets limits on the interpretation activity of the ECtHR, which is possible only without violating the Polish Constitution and Polish constitutional identity (it seems that the CT recognizes that the judgment in the Guðmundur Andri Ástráðsson case would still fall within it). The Tribunal concludes that any further judgments of the ECtHR concerning judicial reform in Poland should consider the effects of the K 7/21 judgment. Therefore, the judgments in the above-mentioned scope, in the opinion of the CT, lack the attribute of enforceability. In the proceedings before the CT, the Polish Ombudsperson presented a different position, stating that the proceedings should be discontinued due to the lack of competence of the CT to examine acts of law application. The Ombudsperson stressed that the subject of the examination was not Article 6(1) but its interpretation by the ECtHR, and that the CT is not constitutionally authorized to conduct such an examination. In the Ombudsperson's opinion, the Polish Constitution emphasizes the importance of honoring international obligations. A possible departure from this principle can only be justified by the need for 'broader protection of individual rights and freedoms'.

In the justification, the CT raises the issue of the arbitrariness of the ECHR's action, reliance on "ideas" about the state of the judiciary in Poland, or "a complete lack of knowledge of the Polish legal system at the constitutional level." The CT considers that the ECtHR's jurisprudence in complaints relating to the Polish judicial system takes the form of "quasi-legislative political decision-making." In the face of these allegations, the CT emphasized the importance of the stability of the legal system, which could be threatened by uncertainty as to the status of judges and the competence to create laws and to examine their constitutionality.

The second value particularly exposed in the judgment K 7/21 was the sovereignty of the state expressed in the exclusive competence of Parliament to regulate the judicial system and the exclusive competence of the CT to examine the constitutionality of sub-constitutional legal acts. A violation of these values, in the CT's view, would lead to an undermining of the principle of the absolute primacy of the Constitution, something that is essential for Polish constitutionalism. The K/21 ruling is another in a series of rulings (P 7/20, K 3/21) in which the CT emphasizes its role as guardian of sovereignty and Polish constitutional identity. This role is expressed in emphasizing the importance of the principle of the primacy of the Constitution in the Polish legal order and in guarding the limits of competences delegated to supranational and international bodies. This stance is directed 'outwards' (examining the norms of international law binding Poland) rather than 'inwards', as the CT is not an intensely active court in matters of examining the constitutionality of acts generated by Polish law-making bodies in 2022. On the other hand, from the principle of the primacy of the constitution and the importance of the values of Polish constitutional identity, there seems to be a need to consider the internal dimension. This 'internal' aspect raises the issue of the legitimacy of the CT itself, as significant reservations have been raised since 2015 about the independence of the CT from the influence of political power.

2. *P 10/19*: Validity of the judge's appointment

In its judgment P 10/19, the CT answered a preliminary question submitted by the Supreme Court (Chamber of Extraordinary Control and Public Affairs), which concerned the status of judges appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary in the period following the enactment of a constitutionally controversial law regulating the constitution of the NCJ. As a result of informal constitutional change by the statute of 2017, the NCJ became a politicized body participating in the appointment procedure of judges. In the case P 10/19, the CT declared the following provisions unconstitutional: (a) "Article 49 § 1 of the Code of Civil Procedure, insofar as it regards as a premise which may give rise to a well-founded doubt as to the impartiality of a judge in a given case any circumstance relating to the procedure for the appointment of that judge by the President on the proposal of the NCJ to perform his or her duties"; (b) "Article 31 § 1 of the Act on the Supreme Court in conjunction with Article 49 § 1 of the Code of Civil Procedure, insofar as it recognises as a premise for the exclusion of a judge from his or her ruling the fact that the Presidential announcement of vacant judge positions in the Supreme Court, on the basis of which the nomination process of judges is initiated, constitutes an act that requires the signature of the Prime Minister (countersignature) in order to be valid, and the consequence of its absence is doubt as to the impartiality of the judge appointed to perform his or her office in the nomination procedure initiated by such announcement"; (c) "Art. 1 in conjunction with Articles 82(1) and 86-88 of the Supreme Court Act insofar as it provides a normative basis for the Supreme Court to decide on the status of a person appointed to hold office as a judge, including a judge of the Supreme Court, and the resulting powers of such a judge and the effectiveness of a judicial act performed with the participation of such a person in connection with that status". The CT questioned the possibility of challenging the legality of the appointment of a judge by the President on the motion of the NCJ and the possibility of reviewing such an appointment. The CT emphasized that the question of the impartiality of the court arises in a specific individual case, whereas the possibility of reviewing the legality of the appointment of judges is of a systemic nature and could only be carried out on the basis of clear constitutional competence and only the CT has the competence to review the constitutionality of the organization and system of the judiciary. Granting the possibility to examine the legality of judicial appointments to the SC would constitute an 'encroachment into the assessment of the exercise of competences by the constitutional organs of the state', particularly the NCJ and the President.

In regards to the contested presidential announcement, the CT stated that it was informative and did not constitute an official act requiring the countersignature of the Prime

Minister. An official act is an act that creates general-abstract norms or decides in a sovereign manner on an individual matter. An announcement is merely an informative act, which does not set a pattern of behavior, nor does it contain an adjudication. The CT justified the unconstitutionality of the third provision on the basis of the lack of competence of other bodies to challenge the act of appointment of a judge. In the CT's view, this activity constitutes an extra-constitutional assessment of the appointment procedure. The CT also stated that such competence could not be derived either from the Act on the Supreme Court or from EU law shaped by CJEU rulings.

The CT stressed that issues of the judiciary's system belong to the competence of the national legislator and that CJEU judgments do not constitute a source of law within the meaning of the Polish Constitution. The Tribunal emphasized that "through the procedure for the exclusion of a judge the legality of their appointment may be assessed, and this without regard to the acts of public authority benefiting from the presumption of constitutionality, including provisions concerning the system of the judiciary, acts of appointment of members of the NCJ, acts of appointment of judges, and judgments of the Constitutional Tribunal'.

The CT referred to the context in which the judgment was delivered, namely the judgments of the ECtHR (see judgment K 7/21) and the CJEU relating to the Polish judicial system. It argues that going beyond the contradictory standards reconstructed by the ECtHR and allowing the legitimacy of judicial appointments to be challenged could lead to the "paralysis, or even complete decomposition, of the judiciary." The direct effect of the ruling allows the Supreme Court to hear the case in the course of which it has issued a legal question. An indirect effect of the ruling is the protection of the effects of the controversial judicial reform initiated in 2015 and the 2017 amendments to the NCJ Act. The CT has also highlighted its jurisprudence clarifying the constitutionality of this law (K 12/18), the effect of which is to uphold the presumption of constitutionality of the amendment to the NCJ Act, the lack of constitutional-legal grounds for challenging the composition of the NCJ, as well as the acts performed by this body. The values particularly protected in the P 10/19 judgment are the stability of the judiciary and the inviolability of the constitutional competences of the NCJ and the President. In particular, undermining the President's prerogatives by questioning the status of a judge would decrease citizens' confidence in the state and the law applied by the courts.

3. *K 1/22*: conditionality mechanism

The conditionality mechanism associated with the EU resilience and recovery fund was challenged by the Prosecutor General at the end of 2021 and is still pending. The case is a consequence of the reforms within the judiciary that are needed to receive resources from the EU. Poland and the EU agreed upon the essential reforms and referred, among others, to the Supreme Court organization and disciplinary procedure against judges. As a result, the Disciplinary Chamber of the SC was resolved in July 2022, and a new Professional Liability Chamber was established. However, the reforms did not encompass the NCJ and its politicized character.

In December 2022, another bill was submitted providing for the transfer and clarification of disciplinary matters and offences to the jurisdiction of the Supreme Administrative Court (SAC). The bill raised legal controversies related to, among others, the competences and constitutional status of the SAC which is not constitutionally authorized to adjudicate disciplinary cases. In February 2023, the President requested the CT to review the legislation *ex ante*[11]. Consequently, the CT will adjudicate two cases related to the conditionality mechanism.

IV. Looking Ahead

In 2023, the CT rulings associated with the conditionality mechanism are expected, as explained above. The year 2023 is also an election year, meaning that parliamentary elections will be held, while local-government elections are postponed by a year so that the organisation of the two elections would not overlap. Concerns are already being articulated about the legality of the electoral process, *inter alia* in relation to the late amendment of the legislation, as well as the difficulties regarding voting by Polish citizens abroad. The 2023 elections are particularly important given that the ruling coalition has already been in power for two terms. During this time, it has gained a dominant influence in many institutions, including public television.

On December 22, 2022, two days before the Christmas break, a parliamentary bill was published regarding the introduction of solutions aimed at increasing the turnout in elections held in Poland, as well as transparency of the entire electoral process. To avoid the necessity of conducting extensive consultations, as is the case with the draft act submitted by the government, the draft act amending the Electoral Code was submitted by a group of deputies of the ruling coalition. The Sejm enacted the bill on January 26, 2023. The most significant changes included the work of electoral commissions, the working conditions of social election observers and stewards, the rules for creating voting precincts, and the organization of voters' travel to polling stations. The latter considers free transport for voters when there is no public collective transport in a given locality on election day, or the nearest public transport stop is more than 1.5 km from the polling station electoral. This aims at facilitating the exercise of the electoral right by people affected by communication exclusion. Constitutional doubts are raised because free transportation to the polling station applies only to rural and urban-rural communes. The limitation was based on the erroneous idea that only the inhabitants of villages and small towns are affected by the problem of communication exclusion. This is even more evident when the criterion of distance from the polling station is considered, which is often the norm in large cities. However, the ruling majority finds support more often within these privileged communities.

V. Further Reading

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6 The 1997 Constitution was amended twice (2006, 2009) with the support of the opposition but without the involvement of the Polish people.
7 Rosalind Dixon and David Landau, "Tiered Constitutional Design" at https://ssrn.com/abstract=2953755 1, 63.
8 Richard Albert, Constitutional amendments (Oxford University Press, 2019) 265.
9 The state of emergency was introduced on September 2, 2021, for 30 days, then extended for 60 days.
10 Act of 17 November 2021 amending the Act on the protection of the State border and certain other acts (Journal of Laws of 2021, item 2191).
11 Kp 1/23.



Portugal

Marta Vicente, *Professor of Law, Universidade Católica Portuguesa Catarina Santos Botelho, Professor of Law, Universidade Católica Portuguesa*

Ana Teresa Ribeiro, Professor of Law, Universidade Católica Portuguesa Catarina Santos Botelho, *Professor of Law , Porto School of Law, Catholic University of Portugal*

Ana Teresa Ribeiro, *Professor of Law , Porto School of Law, Catholic University of Portugal*

I. Introduction

In 2022 we witnessed a significant change in the Portuguese political landscape, since the parliamentary elections gave absolute majority to the Socialist Party, but also provided the "populist radical right" 'CHEGA'[1] with an unprecedented level of expression.

In the meantime, a constitutional amendment, initiated, precisely by the radical-right CHEGA, is currently underway and, if successful, it will allow a revision of the Constitution (for the first time in almost twenty years) that will affect several domains. While on the streets, tensions ran high, since several workers (mostly of the education, health, and transport sectors) went on strike and participated in demonstrations to show their discontent and to demand an increase in salaries and better working conditions.

Finally, this year was also marked by interesting rulings concerning metadata, the general elections, Covid-19 measures, and security of employment.

II. Major Constitutional Developments

1. General elections and the quality of democracy

In December 2021, and after weeks of strained negotiations, the Parliament rejected the proposal for the 2022 State's budget. The impromptu *geringonça* – a post-electoral alliance, which started in 2015, between the Socialist Party (PS) and its allies, the Communist Party (PCP) and the Left Block (BE) – collapsed. Afterwards, the President of the Republic, Marcelo Rebelo de Sousa, decided to dissolve the Parliament and to schedule general elections.[2] General elections took place on 30 January 2022. In 2019, the Socialist Party (PS) had won the parliamentary elections (108 seats in the 230-seat parliament) and formed a minority government, with the parliamentary support of its left-wing allies. Again, in 2022, the PS won the elections, but this time with an absolute majority (120 seats). This came as a surprise since several opinion polls predicted a tie between the socialists and the social democrats. Turnout rate increased 2.9% (from 48,6% in 2019 to 51,5% in 2022).

Perhaps aiming at stability, the results foretell a smoother application of the EU pandemic recovery funds. However, in his victory speech, the Prime minister António Costa promised that "an absolute majority doesn't mean absolute power". Concerns on the quality of democracy in Portugal are valid. In fact, according to the V-DEM reports on democracy, since 2021, Portugal has been downgraded from a liberal democracy to an electoral democracy. Still and as the report states, the downgrading of Portugal should be "interpreted with caution".[3]

It is important to stress that the parliamentary weight of parties changed. In the left, the Communist Party (PCP) lost 6 seats (from 12 seats in 2019 to 6 seats), the Left Block (BE) lost 14 seats (from 19 seats in 2019 to 5 seats), the People, Animals and Nature Party (PAN) lost 3 seats (from 4 seats in 2019 to just 1 seat) and Livre maintained the one seat. In the right, the social democrats (PDS) lost 2 seats (from 79 in 2019 to 77), the right

popular party (CDS-PP) surprisingly didn't elect a single member of Parliament (went from 18 seats in 2015 and 5 seats in 2019 to 0 seats), the liberals (IL) won 7 seats (from just 1 seat in 2019 to 8 seats) and the "populist radical right" 'CHEGA' won 11 seats (from just 1 seat in 2019 to 12 seats).[4] Populist radical right is no longer an alien reality to Portuguese politics. On the contrary, by 2022, CHEGA's anti-system agenda has reached significant parliamentary representation: it has "emerged as the third most important parliamentary party, sending shock waves through the political system".[5]

2. Constitutional amendment initiative

Seventeen years after the last amendment, in 2005, the constitutional amendment process began its path by the end of 2022. On 12 October, the radical right 'CHEGA' initiated a constitutional amendment procedure. In Portugal, the initiative to amend the Constitution pertains only to the members of Parliament, and once a project of amendment is presented, any other projects must be submitted within the next thirty days.[6] After some hesitation on whether the centre parties should follow the initiative of a radical right party or abort the process, all the parties ended up submitting their own constitutional amendment projects.[7]

In the left, the socialists (PS) proposed to change 20 articles and to add one new article, the Communist Party (PCP) suggested changing 69 articles, revoking 5 articles, and adding 6 new articles, the Left Bloc (BE) recommended changing 41 articles and adding one more article, and the People, Animals and Nature Party (PAN) advised changing 21 articles. In the right, the social democrats (PDS) proposed to change 71 articles, to revoke 5 articles and to add 4 new articles, the liberals (IL) suggested changing 38 articles, revoking 14 articles, and adding 6 new articles, and the radical right 'CHEGA' recommended changing 61 articles and revoking 5.[8]

The most contested articles for discussion are, in a decreasing order, the following: 64 (health), 66 (environment and quality of life), 149 (constituencies), 9 (fundamental tasks of the state), 35 (use of information technology), 59 (workers' rights), 65 (housing and urbanism), 74 (education), 7 (international relations), 33 (deportation, extradition and right of asylum), and 49 (right to vote).[9]

3. Social contestation

During 2022, social contestation against the Government, through strikes and demonstrations, was intensified. The number of strike notices (1087) reported to the Minister of Labor increased 25% since the previous year, and is the highest number since 2013, just before the severe economic and financial crisis.[10] Several professional sectors contested the governmental policies:

Since October 2022 onwards, several unions of *teachers and school staff* complained about low salaries and inflation, deficient career progression, increased bureaucracy, and poor working conditions. Not having achieved their goals, the strikes are intended to continue through 2023.

Health professionals of the public health system argued for better salaries and working conditions, as well as for an improved National Health Service (SNS).

Public transportation (in particular, train workers and tram workers) engaged in strikes against inflation and the cost of living.

Ground handling company employees completed a three-day strike in August at the main airports, which caused severe distress for passengers. The employees complained of low salaries and poor career progression.

III. Constitutional Cases

1. Ruling no. 268/2022 (*Metadata retention*)

The Constitutional Court was asked by the Portuguese *Ombudsman* to rule on the constitutionality of some provisions of Law no. 32/2008, of 17 July, which transposed Directive 2006/24/EC into national law. The provisions obliged providers of electronic communications to retain the metadata of all users for a period of one year. Plus, the law enabled the competent authorities to access the metadata provided when there were reasons to believe the data was essential to investigate, detect, and prosecute serious criminal offences.

A first question concerned the relevance of EU law in abstract constitutional control. Even though Directive 2006/24/EC was declared invalid by the Court of Justice (of the European Union), measures regarding data retention are still within the scope of EU law, particularly under articles 7 and 8 of the Charter of Fundamental Rights of the EU and article 15 of Directive 2002/58/EC. Yet, premised on the assumption that the incompatibility of national law with EU law does not generate unconstitutionality, the Court concluded that EU law might play an *indirect role* in the proceedings. Effectively, constitutional norms related to data protection should be interpreted in a way *consistent* with EU law, including with the proportionality analysis carried out by the Court of Justice in two very important rulings, *Tele2* and *La Quadrature du net*.[11] In an interesting separate opinion, several Justices asserted that the Court perverted the function of the principle of harmonious interpretation and that EU law (and the so-called European standard of proportionality) should apply directly to the case by virtue of the first part of Article 8, no. 4 of the Constitution.

The second point of interest had to do with the constitutional parameters involved. In line with previous case-law (Rulings no. 403/15 and 464/19), the Court restated that retention of metadata, which includes basic data and traffic data, does not amount to a restriction of the right to the inviolability of communications (Article 34 of the Constitution), but rather to a restriction of the right to privacy (Article 26) and the right to informational self-determination (Article 35). Not all Justices agreed with the exclusion of Article 34 from the relevant norms of control.

A straightforward violation of Article 35, no. 1, emerged from the fact that the law did not require the data to be stored in the European Union. As to the proportionality analysis, following closely the Court of Justice's judgments listed above, the conclusions were two-folded. As to the retention of basic data, the Court concluded that the one-year retention period looked indispensable for carrying out complex and time-consuming criminal investigations. As to retention of traffic data, which represents a more serious invasion of

privacy than the conservation of basic data, the Court figured that the restriction did not meet the requirements of proportionality in a strict sense, since it affected people who are under no suspicion of criminal activity.

The General Public Prosecutor sought to obtain the nullity of the Ruling, invoking that the Court should have limited the retroactive effects of the declaration of unconstitutionality. The request was rejected, though, for lack of legitimacy (Ruling no. 382/2022).

2. Ruling no. 133/2022 (*Repetition of general elections*)

At the end of 2021, following the Parliament's refusal to approve the 2022 State's budget, the President dissolved the Parliament and scheduled general elections for 30 January 2022. Portugal has a proportional electoral system, which comprises two electoral districts for emigrants: the district of Europe voters and the district of outside of Europe voters. Together they elect four members of the Parliament. Portuguese living abroad are allowed to vote in presence or by post in the general elections. In the latter case, the Minister for Home Affairs will send them (without charge) the ballot paper as well as two envelopes (one green, another white). In turn, the voter shall place the ballot paper inside the green envelope and both the green envelope, and a copy the voter's identification shall be placed in the white envelope and sent by post before the election day (Article 79-G of the Electoral Law for the Assembly of the Republic, hereinafter "LEAR").

The Constitutional Court, which is the last resort court on electoral matters (Article 223, no. 1, c), of the Constitution), received an appeal by a political party concerning the decision of the General Assembly of the Electoral District of Europe to void the votes of 151 polling stations of the Europe district, given that the envelopes with the ballot papers were not accompanied by a photocopy of the voter's identification document.

The Court was asked to rule on the validity of the General Assembly's decision. The appellant invoked a 2019 deliberation of the National Election Commission (an independent administrative body) on the interpretation of Article 106-I of LEAR, the provision that regulates the procedure to follow once the electoral correspondence arrives to the General Assembly. According to the Commission, the non-inclusion of the voter's identification document in the white envelope does not affect the validity of the vote. Indeed, the votes are discharged (identified on the electoral papers) based solely on the elements available on the back of the envelope, *i.e.*, before opening the white envelope.

The Constitutional Court rejected the argument. It explained that the inclusion of the voter's identification document in the white envelope seeks to ensure the authenticity of the vote, preventing a situation where another person rather than the voter manages to cast a ballot. Hence, the only reasonable interpretation coming out of Article 106-I of LEAR is to say that the discharge of the vote occurs after the opening of the white envelope and after the confirmation of the voter's identity. The argument that the mandatory inclusion of the identification document amounts to *coercion on the voters* was also rejected by the Court. In effect, not only are electors free *not to vote*, but Portuguese living abroad are not required to vote by post, as voting in consulates and embassies is allowed as well.

Finally, since the invalid ballots were put in the ballot box alongside the valid ones, and the number of votes declared void was by large greater that the votes validly casted, the Court declared that the *overall results of the turnout* might have been compromised and ordered the repetition of the electoral acts in the affected polling stations, following Article 119 of LEAR.

3. Ruling no. 466/2022 (*Deprivation of liberty*)

There is now a growing jurisprudence related to the Covid-19 pandemic, addressing the following subjects: distribution of powers between the Parliament and the Government in the definition of criminal offences during the state of emergency and the state of calamity; constitutionality of the provisions that determined a period of compulsory confinement or prophylactic isolation concerning passengers arriving on certain flights; constitutionality of provisions determining a mandatory confinement period for citizens subject to active surveillance by the health authorities; and procedural effects of legal measures adopted within the context of the Covid-19 pandemic.[12]

Amongst several rulings on fundamental rights, we will highlight one that followed a distinct path on a subject concerning fundamental rights theory. In Ruling no. 466/2022, the Constitutional Court was called to decide an appeal filed against a decision handed down by a Criminal Investigation Court which, granting a request for *habeas corpus* presented by the applicant, had refused to apply provisions establishing the mandatory confinement. When compared to previous jurisprudence, this decision can be considered innovative, as the Court went beyond a mere organic review of constitutionality and ruled on the substantive constitutional conformity of the provisions under review.[13] Thus, after deeming mandatory isolation as an encroachment on the personal freedom guaranteed by Article 27, no. 1, of the Constitution, the Court argued that these measures entailed an actual deprivation of liberty and not a mere restriction to that right. The Court then concluded, by majority, that the measures contained in the provisions under review were forms of deprivation of liberty not authorized by Article 27, no. 2 and 3, of the Constitution, and therefore deemed them substantively unconstitutional.[14]

4. Ruling no. 0939/15.9BEPRT 0620/17 (*Security of employment*)

This ruling, delivered by the Supreme Administrative Court (SAC), analysed Article 92, no. 2, of Act no. 59/2009[15], a provision according to which fixed-term employment contracts of civil servants cannot be converted to contracts of indefinite duration – meaning that they will always terminate at the end of their last renewal.

In the case, the appellant had been hired, through a fixed-term employment contract, to work on the municipal pools. This contract had been successively renewed, from November 2000 until November 2013, when the employer decided to prevent any further

renovations and provoked the end of the employment relation. The appellant believed that her contract should have been converted and argued that the aforementioned prohibition is in violation of EU law, since Directive 1999/70/EC forbids an excessive use of fixed-term contracts.

The SAC referred to the Court of Justice (of the EU) for a preliminary ruling, asking whether the national regime was in violation of the Directive. In return, the Court of Justice[16] stated that the Directive should be interpreted as opposing the legislation of a Member State which absolutely forbids, in the public sector, the conversion of successive fixed-term contracts into open-ended contracts, when there are no other effective measures in place to prevent and punish the abusive celebration of successive fixed-term contracts.

Following this ruling, the SAC set out to determine whether, in comparison with the private sector, the legal regime provided an equally effective answer to this kind of situation in the public sector. However, it ascertained that the only consequences, regarding the abusive celebration of successive fixed-term contracts, were the nullity of such agreements and the possible civil, disciplinary, and financial responsibility of the involved organs or services' head officers. Which was deemed to be neither equivalent to the solutions present in the private sector (since, in that context, the Portuguese Labour Code imposes the conversion of such contracts to contracts of indefinite duration), nor effective to prevent this scenario. In fact, not only the responsibility of head officers is triggered regarding the State (and not the affected workers), but also the feebleness of the legal regime is clear, as highlighted not only by this case, but also by other similar situations found in case-law, and by the several processes of integration of precarious workers that have been lately promoted in the public sector. For this reason, the provision under analysis was ruled to be in violation of Directive 1999/70/EC.

Finally, the SAC also debated whether the conversion of these contracts to contracts of indefinite duration was in violation of Article 47 of the Portuguese Constitution, which enshrines the right of all citizens to, equally and freely, access the public sector, usually through the means of an open tender. The Court stated that the equal access to public employment cannot supersede the right to security of employment and that a deviation to the aforementioned rule should occur when imposed by the protection of good faith, protection of trust, and proportionality. In sum, a restriction of Article 47 of the Constitution was deemed adequate (making it unnecessary to invoke the primacy of EU law). Therefore, the appellant's employment contract was considered to have converted to a contract with indefinite duration, and her dismissal was ruled unlawful.

5. Ruling no. 468/2022 (*Private property*)[17]

Once again following the initiative of the Portuguese *Ombusdman*, the Constitutional Court was called to analyse Article 168-A, no. 5, of Act no. 2/2020 (which approved the 2020 State's Budget) in relation to the rights to property and to private economic initiative.

This provision determined that, given the pandemic context and regarding lease agreements for stores in shopping centres, until 31 December 2020, tenants were exempted from paying the minimum part of the rent (in fact, these rents are divided in two segments: a minimum, *i.e.*, fixed part, that relates to the concession of the space and the provision of associated services, and another part, variable, dependent on the shop's business volume).

The Court noted that, unlike the emergency measures directed at housing and general non-housing rental agreements, where tenants were given a moratorium, in this case there was an actual exemption of payment of part of the rent. And since the rights that arise from contracts are part of the creditor's patrimony and, therefore, covered by the constitutional guarantee of ownership, this measure was considered to restrict the right to property.

The Court acknowledged that the State's intervention aimed at aiding the tenants of shopping centres, whose activity was undoubtedly affected by the pandemic, and that it was adequate to that effect. However, it breached the principle of proportionality – since any restriction must be deemed necessary, indispensable to achieve the envisaged goals – given that there were other avenues at the State's disposal to achieve the same purpose (such as credit lines, moratoria, etc.), overburdening shopping centres' proprietors. Furthermore, the principle of proportionality in a strict sense was also affected, since the sacrifice imposed to the owners of shopping centres was considered greater than the benefits afforded to their tenants.

Still, given the provision laudable teleology and the nature of its defect, the Court decided to merely declare a partial unconstitutionality, through a "reductive" decision. In effect, such decisions will be possible when it is clear that the legislator prefers a partial measure to its complete elimination; when the removal of the rule creates a void incompatible with the prohibition of legislative deficit; when the extent of the reduction is provided by a subsequent or contemporary rule, applicable in the same or a similar domain; and, finally, when the avenues to remedy legal gaps are insufficient.

Therefore, inspired by the new legal rule enshrined in the States' budget for 2021, the Court declared that the provision under analysis is unconstitutional only when it exempts the tenants from paying the fixed part of their rent beyond a rent's reduction that is proportional to the reduction of the monthly business volume, up to fifty per cent of its value, when their establishments have a drop in their business volume (considering the volume of the same month of 2019, or, in its absence, the average business volume of the six months previous to the Presidential Decree no. 14-A/2020[18], or of a smaller period, if applicable).

IV. Looking Ahead

At the beginning of 2023, the Constitutional Court issued a judgement upholding the unconstitutionality of the diploma on euthanasia (Ruling no. 5/2023), on the grounds of the lack of precision of its norms. The decree has returned to the Parliament, which

for the second time in a row (see Ruling no. 123/2021) sought to address the faults voiced by the Court. Although the President of the Republic vetoed the renewed decree, the Parliament overrode the veto by an absolute majority and forced the President to sign the legislation. Yet, it is not clear whether the Constitutional Court will have the chance to rule on the constitutionality of the new Act, this time via an *ex post* review.

Lastly, it is yet to be seen whether the constitutional amendments under discussion in the Parliament will manage to solve some of the unconstitutionality detected in Rulings dealing with interference with communications, data retention, and mandatory confinement during the Covid-19 pandemic.

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14 Ibid.
15 This diploma enshrined the legal regime of the employment contract of civil servants and was revoked by Act no. 35/2014 (which contains the new legal regime applicable to civil servants), which kept the same rule in Article 63, no. 2.
16 Process 135/20, of 30 September 2020, JS v Câmara Municipal de Gondomar.
17 This was a controversial ruling, with several dissenting opinions.
18 Which declared the state of emergency due to the pandemic.



Romania

Bianca Selejan-Guțan, *Professor, "Lucian Blaga" University of Sibiu*

Elena-Simina Tănăsescu, *Professor, University of Bucharest*

I. Introduction

The constitutional year 2022 was not so rich, but the few events that happened were quite significant. Firstly, the saga of the changes to the judiciary laws continued. The central issue was, as in 2021, the dismantling of the SICOJ (Special section for investigating criminal offenses within the judiciary), on which the Venice Commission and the GRECO, two specialized bodies of the Council of Europe, issued negative opinions in 2018 and 2019 and the European Court of Justice pronounced a preliminary ruling in 2021. In 2022, two Venice Commission Opinions were released on the subject. The issue was also mentioned in the European Commission's Rule of Law Report 2022 and in the last Cooperation and Verification Mechanism (CVM) report concerning Romania, which was issued in November 2022.

2022 was the year when the relationship between EU law and Romanian domestic law was further discussed by the Court of Justice of the European Union, but also the year when the European Commission seemed to conclude that the supervision mechanism (CVM), established upon Romania's accession in 2007 to the supranational organization, could be lifted. Thus, in November 2022, the Commission issued what it has announced to be its last report within the CVM without officially ending it through a Commission Decision.

Finally, the celebration of 30 years since the creation of the Romanian Constitutional Court (RCC) passed unnoticed against a general background dominated by such celebrations all-across Eastern Europe.

II. Major Constitutional Developments

Political turmoil continued in Romania throughout 2022 even though the governmental coalition formed in November 2021 has a more than comfortable majority in Parliament.In January, the PM in office was accused of plagiarism in his PhD by a journalist who later received death threats that were investigated by the police, and in May, he became the president of the National Liberal Party, one of the three political parties supporting the government. The ex-leader of the National Liberal Party and ex-PM in 2021 resigned from the office of Speaker of the Senate that he had got in exchange for his position as PM, paving the way for an ad-interim at the head of the Senate which lasted all through 2022. Also, in 2022 four ministers resigned under accusations of plagiarism in their respective PhDs or corruption or inadequacy in the context of the ongoing war at the borders of Romania, while another one decided to challenge before courts accusations of plagiarism and an administrative act delivered by his *alma mater* which declared him a plagiarist.

Against this background, it is worth mentioning Decision 364/2022 of the RCC, which dealt with plagiarism in PhDs and ruled that a PhD degree is an individual administrative act that may be nullified exclusively by a court of law after a due process and may not be repealed by the issuing university once it has produced its legal consequences, i.e., once its owner has been acknowledged as a doctor in law or in other sciences by the Ministry of Education, a time limitation that generally occurs 6 months after the public

defense of the thesis. In this context, it has to be mentioned that the general statute of limitation period in Romanian law is 3 years, and this may be calculated differently according to the specifics of each case at hand.

1. Changes to Judiciary Laws

The year 2021 ended with the draft law dismantling the SICOJ being submitted to Parliament. The majority coalition set the deadline for the adoption of the law for 31 March 2022. Meanwhile, on 31 January 2022, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (Committee on the Honoring of the Obligations and Commitments by Member States) requested an opinion of the Venice Commission on the draft law. During the meeting that took place in Bucharest, in February 2022, the Romanian authorities made clear to the delegation of the Venice Commission that the draft law would be adopted before an opinion of the Commission would be issued. Indeed, the draft law passed in a record time through both Chambers of Parliament (14 February-28 February). The opposition parties filed two constitutional complaints against the adopted law, before promulgation, at the Constitutional Court. One was rejected as inadmissible and one was examined on the merits and rejected as ill-founded. Finally, the law was promulgated by the President on 11 March 2022.

The Opinion of the Venice Commission was adopted a week later, on 18-19 March 2022. The main issue at stake was not the dismantlement *per se* of the SICOJ, but the procedure that replaced the special section and especially the fact that the competence to investigate offences within the judiciary was not restored to the specialized prosecutorial anti-corruption unit (DNA), but given to prosecutors belonging to the General Prosecutor's Office attached to the High Court of Cassation and Justice and the Prosecutors' Offices attached to the Courts of Appeal. The Venice Commission was very critical of this new procedure for several reasons, detailed in the Opinion. One of the most important arguments was that a new structure replacing the SICOJ would be "more vulnerable" in terms of functional independence "when it comes to investigating and prosecuting corruption cases which may involve the prosecutor's colleagues and superiors". Furthermore, creating a separate procedure to investigate magistrates is "a misunderstanding of judicial independence", because, as the Commission pointed out, "judicial independence is not a personal prerogative or privilege of a judge (…) Any special treatment of magistrates should be strictly limited to functional immunity for actions carried out in good faith on pursuance of their duties or in the exercise of their functions and should not extend to the commission of crimes". The criticisms of the Commission also related to the selection procedure of the "specialized prosecutors", which is not regulated in clear terms, to the fact that the competence would not be so specialized, as the designated prosecutors could be entrusted with all types of cases besides corruption within the judiciary, to the appointment process in which the role of the Superior Council of Magistracy is problematic. The Venice Commission concluded in a pessimistic tone, regretting "the haste with which this controversial law has passed through parliament and has been promulgated (…) before the Commission has been able to issue its opinion" and pointing out that dismantling the SICOJ should not be an objective in itself. The Commission strongly recommended that the Romanian authorities restore the competencies of the specialized anti-corruption prosecution offices to investigate offences committed by magistrates.

The topic of the new procedure replacing the SICOJ was mentioned again by the Venice Commission in its Urgent Opinion on the Three Laws Concerning the Justice System, requested by the Parliamentary Assembly of the Council of Europe and adopted on 18 November 2022. Again, the Romanian Government, Parliament, and the President chose not to wait for the Commission's opinion before adopting the said laws. Again, the Commission expressed its regret that the Romanian authorities did not request an opinion on the three draft laws. Changes were brought, in the new laws, among other topics, to the appointment procedure of high-ranking prosecutors and to the rules on civil and disciplinary liability of magistrates. Given the urgent status of the opinion, the Commission could not tackle all the changes. Although it noted some positive aspects in the changes, especially regarding the two above-mentioned topics, the Commission reiterated its concern about the new procedure replacing the SICOJ and "remained unconvinced that the solution chosen was appropriate". As the Commission itself pointed out, practice will show if the new procedure will be effective in tackling corruption within the judiciary.

2. Primacy of EU Law

The series of CJEU judgments given in 2021 on the topic of the primacy of the EU law continued in February 2022 with case C-430/21 *RS*, which rapidly became a historic ruling on par with the similarly famous C-11/70 *Internationale Handelsgesellschaft*. The Court acknowledged that the EU law does not impose on the Member States a certain constitutional model for the organization of the judiciary but emphasized that some rules must be observed in order to comply with the rule of law standards. The most important rule is to guarantee the independence of the judiciary from all kinds of pressures. In this line, the ECJ stated that, if binding decisions of constitutional courts could have the effect of denying the right of ordinary courts to assess the conformity of certain provisions of the domestic law with EU law, "this would go against the very nature of the Union" (para. 51). The European Court also pointed out that any such pressure indirectly exercised through the decisions of constitutional courts would compromise the cooperation between the Court of Justice and national courts through the mechanism of preliminary ruling because it could have a chilling effect on ordinary courts exercising their right to address the ECJ, for fear of disciplinary proceedings. Thus, the judgment of the ECJ in the *RS* case is important, not only for the Romanian courts and Constitutional Court, but for the courts in all member states, by sending the message that constitutional courts are not above the Court of Justice in interpreting the EU law and its primacy. It is important to mention that, following the judgment, the law on the status of magistrates was changed later in 2022 and the disciplinary offense of "disregarding a Constitutional Court decision" was removed.

Another major turning point in 2022 was marked by the two reports issued by the European Commission regarding Romania: the Country Chapter on the Rule of Law situation in Romania from the 2022 Rule of Law Report, issued in July 2022 and the CVM Progress Report, issued in November 2022. The first one raised concern about the changes to the laws on the judiciary, especially about the provisions on disciplinary sanctions and highlighted that "it is necessary to prevent the disciplinary regime from being diverted from its legitimate purposes and being used to exert political control over judicial decisions or pressures on judges" (page 7). Another concern was expressed on the extensive powers and lack of accountability of the Chief Judicial Inspector, but also on other issues such as the reduction of the competence of the National Anti-Corruption Directorate on investigating offenses committed by magistrates, the absence of rules on lobbying for parliamentarians, the transparency of political party financing, transparency of media ownership and media freedom. An issue of concern, which can affect the situation of the rule of law in various fields, is the unstable legislation and the frequent use of emergency ordinances without any justification of an emergency. The Country Chapter also raised the question of primacy of the EU law and the concerns "regarding the challenge to this principle by the Constitutional Court".

The second European Commission document was the (allegedly) last CVM report issued under the 16-year-old supervisory mechanism. Without going into details, we shall only point out that the Commission emphasized that a new context was created for the cooperation process between the EU and the member states on the rule of law issue: the new annual Rule of Law report with country chapters. Thus, the Commission implied that further monitoring will be achieved through that mechanism rather than continuing the CVM reporting procedure and concluded that "the progress made by Romania under the CVM is sufficient to meet Romania's commitments made at the time of its accession to the EU".[1] The final decision is awaited, depending on further observations of the Council and the European Parliament.

III. Constitutional Cases

1. The Role of Precedents of the Constitutional Court

In 2018, the Constitutional Court invalidated a fragment of a legal norm pertaining to prosecution in criminal trials for lack of predictability. Article 155(1) of the Criminal Code stated that "The limitation period for criminal liability shall be interrupted by the performance of any procedural act in the case". The last part of this sentence ("*any* procedural act in the case") has been deemed confusing for the suspect or accused persons, as they could not know the conditions under which they may be held criminally liable for the act committed since *any* procedural act accomplished in the respective case would lead to an *ex officio* prolongation of the trial, making impossible the use of a limitation period as cause for the removal of criminal liability. In Decision 297/2018, the Constitutional Court had requested the legislator to be more precise and clear when regulating in the area of criminal law and expressed the view that the limitation period in criminal trials may be interrupted *only* by the performance of procedural acts *which are communicated to the suspect or accused person*. Despite this clear stance of the constitutional judge, the legislature never intervened in this specific matter. Nevertheless, legal practice, in its majority, followed the indications of the Constitutional Court and enforced the interruption of the limitation period for criminal liability *only* based on procedural acts *communicated to the suspect or accused person*. But some courts considered that the legal norm remained amputated of its operative part, reading "The limitation period for criminal liability shall be interrupted by the performance of", which made it impossible to be enforced.

Therefore, the supreme court of the land, namely the High Court of Cassation and Justice, addressed the Constitutional Court with a referral of unconstitutionality asking what is the legal value of Decision 297/2018: Is it a mere interpretation of the relevant legal norm or is it establishing the new legal framework for the interruption of the limitation period for criminal liability?

In Decision 358/2022, the Constitutional Court embraced the opinion of those courts who considered that the amputated legal norm was not clear, and therefore, it did not allow for a predictable behavior of public authorities with regard to suspect or accused persons. But instead of stopping to this clarification of its own precedent decision, the Constitutional Court stepped onto a slippery slope and declared the legal norm unconstitutional for a second time, only this time retroactively, as it stated that the lack of clarity existed since Decision 297/2018 due to the inactivity of the legislature, who had not intervened in order to bring the Criminal Code into line with that specific precedent. Two judges signed a separate opinion considering that Decision 297/2018 was clear enough. This last position was supported by the majority of the legal practice, which had followed the substance of Decision 297/2018 and adapted the norm to the prescription made by the Constitutional Court. However, displeased that the legislature had not changed the substantive matter of the legal norm in line with its own prescription, the Constitutional Court managed to discharge the value of precedent of Decision 297/2018 and to make Decision 358/2022 retroactive, all of these in the name of the Constitution. The Criminal Code was modified and put in line with the RCC Decision by an Emergency Government Ordinance, in May 2022. Nevertheless, as a consequence of the decision, numerous criminal cases were closed by the courts, including many cases of high-level corruption.

2. Quality of the Law, Separation of Powers

Like in previous years, the Constitutional Court maintained its trend to declare the unconstitutionality of laws on formal grounds. In Decision 57/2022, the Court pronounced the unconstitutionality of a law transferring lands from the public property of the state to the public domain of a county. The main reason for the unconstitutionality was the fact that the Parliament exercised its legislative power in an abusive way, "in a discretionary manner, anytime and in any circumstances", by adopting a law in fields that must be governed by intralegal rules, i.e., by administrative decisions. The transfer from

the public property of the state to the public domain of a county of individual goods should be made by an individual administrative act, and not by a law, which, according to the Court, "should be applicable to an indeterminate number of specific cases". By adopting a law for such a specific case, the Parliament was in breach of its own competence established by Article 61(1) of the Constitution as well as of Article 1(4) which entrenched the separation of powers.

3. Equality

Access to justice, seen through the prism of the principle of equality, has been the object of Decision 208/2022. The Court found that Article 434(2) of the Code of Criminal Procedure is in breach of the equality and non-discrimination principle because it drew an unjustified distinction between the criminal trials which start ex officio and the criminal trials which start following a previous complaint of the injured party. Thus, in the latter case, according to the impugned text, the judicial decisions pronounced by the national courts could not be challenged with a further appeal in cassation at the supreme court (*recurs în casație*). The Constitutional Court stated that such a situation "creates an obvious inequality of treatment between persons in similar situations from the point of view of the access to justice, which cannot be objectively and reasonably justified."

The Constitutional Court also applied the principle of equality in a case related to the law protecting public order and safety. Thus, in Decision 368/2022, the article of the said law (Article 2 (27) of the Law 61/1991) which set forth that administrative fines could be applied for actions that trouble public order and tranquility in urban areas – such as private parties and other events organized in the proximity of residential buildings, using music devices at an intensity that harms the tranquility of the inhabitants – was declared unconstitutional on grounds of discrimination between the urban and rural areas. According to the Court, the impugned article creates inequality between persons living in urban and rural areas from the point of view of the protection of their right to private life and to enjoy their homes. This inequality amounts to discrimination because the breaches of public order and tranquility produce the same effects regardless of the environment where they occur and the protection of inhabitants of urban and rural areas against such offenses should be the same.

4. Access to justice

In Decision 369/2022, the Constitutional Court declared unconstitutional an article from a law adopted during the pandemic – Law 136/2020 on measures taken in the field of public health in situations of biological and epidemiological risk. The law established a 5-day delay for challenging in court against the normative administrative acts which instituted the measures in question. The Court found that this limitation goes against the principle of access to justice set forth by the Constitution in Article 21. Moreover, the Court also found two ways in which the law should effectively be applied: "the protection of public health by ensuring a normative stability in the field of measures taken to prevent the spread of contagious diseases (…) can be effectively achieved by prohibiting the suspension of the execution of these normative administrative acts during the proceedings on annulment actions brought against them. However, the Court estimates that the most effective protection consists in ensuring the legality of these acts by their issuing authorities, which guarantees their invulnerability to any judicial review. Blocking the right to challenge in court such normative acts is not and cannot be regarded as a constitutional solution".

5. Privacy and Family Rights

In Decision 175/2022, the Constitutional Court ruled that persons that have developed relations similar to those proper to spouses may not be called to testify as witnesses in trials involving their family relations because this would infringe the principle of equality. Indeed, the Romanian Criminal Code displays a provision forbidding spouses to testify against one another in trials involving the family relations they have developed among themselves because such a testimony will inevitably be altered by the inherent subjectivity of the incumbents. The Court agreed with the defendant that the same should apply also to partners or other persons that have developed interactions similar to those specific to a family. However, the Court expanded its reasoning even further and ruled that the same ban should apply also to persons who have developed relations similar to those between children and parents for the same reasons that underpin the rule in the Criminal Code. In support of this expansion of the prohibition to testify, the Court invoked the right to the respect of family and private life (Article 26 of the Constitution) and no longer the principle of equality.

In Decision 295/2022, the Constitutional Court declared unconstitutional a piece of delegated legislation that attempted to oblige providers of electronic hosting service with IP resources and network or electronic communications service providers to retain data related to their customers in order to make them available to "law enforcement agencies". The Court considered that the delegated legislation was too broadly conceived and did not allow its beneficiaries to fully grasp what would be their legal obligations and how exactly they could fulfill them, thus infringing not only the right to the privacy of customers of electronic communications but also the predictability of legal rules for the providers of electronic communications services.

6. Right to Liberty and Security

The Constitutional Court ruled that the law prescribing the possibility of the policeman to compel a person to the police headquarters in order to check up on them is unconstitutional because it does not provide clear rules under which such an important limitation to the right to liberty can be imposed on citizens. Thus, in Decision 215/2022, the Court declared that, although the law enumerates the cases in which such a restrictive measure can be taken, it does not specify rules of procedures, and, more importantly, it does not mention a limitation in time for this restrictive measure. Observing that Article 23 of the Constitution imposes a maximum duration of pre-trial detention of 24 hours and a pre-trial custody of 30 days, the Constitutional Court declared that a po-

liceman should not withhold a person more than 24 hours while leading them to the police headquarters.

Similarly, psychiatric confinement being a restrictive measure with a tremendous impact on the liberty of the human being, it may not be taken without medical (psychiatric) expertise, and it cannot be governed by different procedural rules according to the procedural phase of the criminal trial when it is decided, i.e., when decided during the prosecution phase psychiatric confinement may not be conditioned by psychiatric expertise, while when decided during the trial psychiatric confinement must be preceded by psychiatric expertise. Therefore, in Decision 357/2022, the Court established that the rule allowing for psychiatric confinement to be imposed differently according to the phase of the criminal trial is unconstitutional because it infringes upon the right to freedom and the clarity and predictability of the law.

7. Social Rights. Right to work and to choose the profession

Like any other professional, magistrates also have to obey disciplinary rules and may be subject to disciplinary sanctions. One of these sanctions is the exclusion from the judiciary of a magistrate who has been found guilty of serious and dangerous misdeeds. However, even this severe sanction should not impede upon the right of the incumbent to choose another legal profession. In Decision 363/2022, the Constitutional Court found that the provision of the law on the statute of magistrates, which established a perpetual ban for magistrates expelled from the judiciary to join the bar is unconstitutional because it does not stipulate a time limitation for such serious legal consequences which amount to a disproportional restriction of the right to work and to choose a profession. The potentially perpetual character of this disciplinary sanction does not reflect the necessary balance which has to exist between the interest of the society to keep away from the magistracy persons proved to have seriously infringed upon disciplinary rules and the interest of the concerned individual, who should be given a chance to exercise their right to work and to freely choose any other profession save the one of magistrate. Therefore, the Court found that even such harsh disciplinary sanctions should be accompanied by a time limitation with regard to their legal consequences.

IV. Looking Ahead

In 2023, the new provisions of the judiciary laws will start to be applied, and it will be interesting to follow the functioning of the new mechanism for investigating offenses committed by magistrates. On the political scene, a constitutional "innovation" is expected to take place, namely a "governmental rotation" between the two main parties that form the governmental coalition. Thus, the acting prime minister (from the liberal party, PNL) is expected to resign by mid-year and be replaced by a prime minister from the Social-Democrat Party (PSD). Alongside the Hungarian Democratic Union (UDMR), this coalition which includes two main parties which, in theory, are situated at opposite ends of the political spectrum, is supposed to govern until the general elections in 2024, with a feeble opposition in Parliament. How this will change the face of democracy in Romania, is still to be seen. As regards the Constitutional Court, a change of heart vis-à-vis the relationship with the CJEU is envisaged for 2023. Also, some courts decided to file a preliminary ruling request at the CJEU, asking if the application of the RCC decision on the statute of limitation must be applied in cases in which the EU financial interests are affected and the answer of the CJEU is awaited in the near future.

V. Further Reading

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Slovakia

Kamil Baraník, Associate Professor, University of Matej Bel

Marek Domin, Associate Professor, Comenius University Bratislava

Tomáš Ľalík, Professor, Comenius University Bratislava

I. Introduction

The year 2022 brought several important constitutional law-related events in Slovakia, likely influencing political and constitutional development in the long term. In this report, we will briefly discuss the most critical of them.

The section on significant constitutional developments will focus on the political crisis caused by several internal and external factors, ultimately leading to a no-confidence vote against the Government in the Parliament and a projected early general election in 2023. The report will explain that these undesirable events, not only during the end of the COVID-19 crisis but especially when the war started to rage in a neighboring country, were not a surprise. We will also pay attention to efforts to achieve a referendum on an early election, which preceded the loss of majority support of the Government in the Parliament.

The Constitutional Court of the Slovak Republic ("SCC") rendered several vital decisions in 2022. We will analyze the most significant ones in a separate section. These decisions discussed numerous issues, from the contentious questions proposed in the referendum; to the SCC's prospect to review constitutional amendments; to the SCC's power to review the coherence of the legislative process against the long-term fiscal sustainability of adopted legislation.

The report will conclude with a short note on future development. It will almost certainly be defined mainly by the results of the early parliamentary election scheduled for September 2023.

II. Major Constitutional Developments

The Slovak political landscape proved to be immensely hot-tempered in 2022. The ruling coalition struggled with numerous external difficulties, most notably the final responses to the COVID-19 pandemic, the costs of energy supplies, the staggering inflation rate, and the war in Ukraine. Nevertheless, the cluster of internal problems formed its most visible public appearance. The internal skirmishes between the respective leaders of the political parties forming the coalition on many, often trivial issues heated the relations and influenced the legislative output of the Parliament.

The leader of the most influential coalition party and an enormously divisive figure, the former PM and, since 2021, the finance minister, permanently threatened the stability of the ruling coalition with his infamous "bombshell" ideas. These shocking, sometimes even outrageous, proposals impacting numerous societal aspects overstepped his ministerial portfolio frequently. Moreover, the finance minister repeatedly proposed his ideas in a reality-show manner without previous consultations with respective experts or his political companions. Such a style, routinely raising significant monetary impacts, generated constant political tensions. The finance minister, incapable of compromise, took any rejections of his proposals personally.

The political situation deteriorated significantly at the beginning of July after the finance minister navigated his "Family Package Legislation" with a colossal financial impact. The Parliament passed this legislation against the major reservations of a junior coalition partner but with the backing of the right-wing populist opposition parties. Subsequently, the displeased coalition partner raised an ultimatum that would end up with either the finance minister stepping down or withdrawing from the ruling coalition. The political tensions in a soap-opera style traumatized society for the entire summer. Ultimately, no one blinked in this game of chicken, and when the ultimatum expired at the beginning of September, the coalition partner withdrew. Consequently, the Government lost its thin majority support in the Parliament. The constitutional consequences of the no-confidence vote were looming. The source of power shifted from the minority Government to the Parliament. The MPs from the coalition and opposition started to forge *ad hoc* alliances to secure the ephemeral majorities for their legislative proposals. The Parliament resembled a medieval bazaar where the "spinless" negotiators got the upper hand. The Government, formally still in charge, could not drive its legislative agenda through Parliament.

This ambiguous political situation gained constitutional consequences when the MPs passed a no-confidence vote at the beginning of December. In such a scenario, Article 115 (1) of the Constitution requires the President to recall the Government. Subsequently, Article 115 (3) instructs the President to temporarily charge the same Government until the new one is appointed. Since 2011, this constitutional provision has limited the powers of the interim Government and has divided them into three categories: (i) those exercised in an unrestricted manner; (ii) those exercised only with the individual prior approval of the President; (iii) and those that are off the limits of the interim Government.

The situation in which the interim Government has only limited powers begs for either a new parliamentary majority or an early election. The temporarily reinstated Prime Minister refused the early election initially and declared his willingness to forge a new parliamentary majority. His ambitions evaporated when the political party that withdrew from the coalition in September, after some hesitancy, refused to rejoin the coalition. Therefore, the interim Prime Minister accepted his powerlessness to form a new Government and ultimately agreed with the Parliament's dissolution.

The Parliament's decision on early polls has not been uncommon in the Slovak constitutional system.[1] Nevertheless, such an *ad hoc* practice has been in legal doubt in the rationale formulated in the newest SCC decisions. Therefore, since 2021, it has been evident that the constitutional amendment had to modify the constitutional text for the legal dissolution of Parliament. Before it was clear that the Parliament would be willing to adopt such a constitutional amendment, the opposition parties sought to achieve this alteration in a referendum. The President received a petition requesting such a referendum in August 2022. Since one of the two proposed questions raised constitutional doubts, under Article 125b of the Constitution, the President initiated a constitutional review of a doubtful question before the SCC. Following the SCC decision, the President declared the referendum with only one question (see "Constitutional Cases"). The referendum took place in January 2023. Ultimately, it was invalid due to the low turnout.[2] Despite its invalidity, the referendum fulfilled the strategic purpose of its initiators, i.e., to energize the electorate for a looming parliamentary election by promoting anti-government sentiment in a nationwide event funded by public money.

The initiative behind this referendum was the second popular attempt of the opposition parties to oust the Government and invoke an early election within just a one-year timeframe. In the case of the referendum request from 2021, the referendum did not even occur since the SCC held the proposed (single) question unconstitutional in PL. ÚS 7/2021.

III. Constitutional Cases

The review of the 2022 constitutional cases begins with a brief introduction to the earlier related case law. In PL. ÚS 21/2014, the SCC linked its position of "*an independent judicial body charged with the protection of constitutionality*" under Article 124 of the Constitution with authority to protect the fundamental constitutional values embodied in the material core of the Constitution.[3] This self-proclaimed power of the ultimate constitutional guardian allowed the SCC to review the products of constitution-making power, i.e., the constitutional amendments (constitutional acts).[4] The SCC held that the material core of the Constitution represented the will of the *pouvoir constituent* that the Parliament, as the *pouvoir constitué* could not disregard, pointing to its power to amend the Constitution. In other words, the constitution-making power of Parliament had its inherent limitations. The material core of the Constitution demarcated these limits. In case of their breach, the SCC would defend them.

Parliament responded to this judicial self-aggrandizement in late 2020 with the Constitutional Amendment no. 422/2020 Coll. Among other things, this amendment modified Article 125 (4) of the Constitution. This alteration explicitly excluded the SCC from reviewing future constitutional amendments (constitutional acts in general). The opposition MPs challenged the amendment before the SCC. In the **PL. ÚS 8/2022**, the SCC dismissed the petition with an explanation that the review of the SCC's powers did not belong to the material core of the Constitution. Nevertheless, the SCC did not budge from its previously pronounced power. It (i) upheld the concept of the material core from PL. ÚS 21/2014; (ii) emphasized that the Parliament *qua pouvoir constitué* is obliged to respect irrevocable constitutional principles; and (iii) declared its respect towards the constitutional legislation with an exception. These grounds preserved the SCC's power to review the constitutional acts against the "violation of the material core of the Constitution that would substantially modify the character of the Slovak Republic as a democratic state based on the rule of law principle". In situations of a gross constitutional violation, the SCC would disregard the principle of legality, expressed in the wording of Article 125 (4) of the Constitution, and would defend the fundamentals of the Slovak constitutional order even against the

constitutional acts. Therefore, the protective function of the material core, even against the constitution-making power of the Parliament, still stands.

Another critical decision of 2022 was the **PL. ÚS 13/2022**. In this decision, the SCC annulled part of the statutory package dealing with considerable child tax benefits ("the Family Package Legislation"). The President challenged this legislation before the SCC for (i) a breach of requirements for a fast-track legislative procedure; (ii) a non-compliance with rules of fiscal responsibility entrenched in Article 55a of the Constitution; and (iii) discrimination of children violating The United Nations Convention on the Rights of the Child.

First, the SCC assessed whether or not adopting this legislation had fulfilled the extraordinary circumstances required for the fast-track procedure. These preconditions, defined by the Parliament's Act on the Rules of Procedure, require either (i) a threat to fundamental human rights;(ii) an endangerment of state security; (iii) significant economic damage; or (iv) a decision of the United Nations Security Council on actions protecting international peace and security issued under Article 41 of the Charter of the United Nations. In this case, the SCC held that the Parliament did not follow any of the mentioned preconditions for the fast-track procedure. However, the SCC required more than disregarding the statutory provisions regulating the legislative process to strike down the challenged legislation on procedural grounds. Such an infringement would require compromising constitutional principles. In other words, the outcome of such a procedural violation must have constitutional relevance. Such a scenario did not happen. Thus, the SCC held this procedural challenge irrelevant.

Second, the SCC assessed a request to review compliance with fiscal responsibility rules entrenched in Article 55a of the Constitution,[5] adopted in late 2020. The SCC held that the politicians had to consider their political decisions' efficacy. However, it could not demand flawlessly effective fiscal decision-making. The SCC argued with a more abstract economic framework, such as general fiscal responsibility, consideration of the opinions of various stakeholders, and long-term financial sustainability. It also underlined the importance of the Council for Budget Responsibility. Then, the SCC connected these considerations with the previously analyzed fast-track procedure. In this case, such a procedure generated time pressure that prevented the Council for Budget Responsibility from presenting its analyses and findings to the MPs. The SCC emphasized the importance of fact-based parliamentary debates dealing with bills that significantly impact long-term financial sustainability. Therefore, the MPs must be able to consider a relevant financial assessment of the bill. In other words, the MPs must comprehend the possible consequences of their vote on the long-term fiscal sustainability of the Slovak Republic. The SCC declared that this legislative procedure did not fulfill mentioned requirements. Therefore, it struck down the challenged legislation.

In the **PL. ÚS 14/2022**, the SCC assessed the constitutionality of "the pandemic provision" in the Act on the Protection of Public Health. The challenged provision required a vaccination certificate, recovery form, or a negative COVID-19 test result to enter the shops, restaurants, and other stores and to participate in mass events. The MPs argued that these measures (i) violated the rules for delegated legislation and (ii) claimed the existence of discriminatory measures against the constitutionally recognized category of "other persons" (i.e., those with an unvaccinated status, those that did not overcome the disease, and those that were untested).

First, the SCC held that the challenged provision sufficiently determined the boundaries of the executive branch as a delegated lawmaker. However, it could not act arbitrarily. In the decision, the arbitrariness was limited in terms of time ("temporary") and substance ("premises and mass events"). Second, the SCC held that the discrimination did not occur because the persons without vaccination, recovery form, or negative COVID-19 tests (i) exercised their choice that triggered the responsibility; (ii) they represented a health threat to other participants, and finally, (iii) they were a threat to their health. However, the SCC did not refer to any medical or empirical evidence in its analyses. In addition, the SCC confused the discrimination test with the proportionality analysis, committing a methodological inaccuracy.

In another important decision, the PL. ÚS 11/2022, the SCC assessed the constitutionality of the referendum question. The popular referendum initiative contained two questions. The President, responsible for declaring the nationwide referendum, considered the first question constitutionally dubious ("Do you agree that the Government of the Slovak Republic should resign without delay?"). The second question dealt with the constitutional amendment allowing the dissolution of the Parliament and triggering an early election via a referendum. The President did not dispute its constitutionality. Therefore, the President turned to the SCC to review the constitutionality of the first referendum question.

Ultimately, the SCC held the disputed question unconstitutional. The declaration was consistent with the expectations of a substantial part of Slovak academia. Consequently, the President declared the referendum with only one question.

In the **PL. ÚS 11/2022**, the SCC followed arguments from PL. ÚS 7/2021[6]. The fundamental rationale of the PL. ÚS 7/2021 was that in a democratic state based on the rule of law principle, the determination of a referendum question has its limits. The SCC emphasized that the constitutionally regulated referendum represented a tool for the exercise of legislative power directly by citizens. In other words, it exemplified a tool for adopting general rules, similar to the legislative process in the Parliament. For the stated reasons, the SCC ruled that a referendum could not shorten the term of office of the specific Parliament. Consequently, in PL. ÚS 11/2022, the SCC declared it had to follow the same reasoning and decided that the result of a referendum could not force the specific Government to resign.

The SCC declared the contested referendum question unconstitutional on two issues. The first reason was the principle of

the generality of law as a part of the rule of law. The SCC previously held that the referendum could establish a generally binding rule. Under this principle, the result of a referendum could not request an individual action of a particular Government. Therefore, the referendum result could not force the Government to resign. Such a demand would disrupt other constitutional rules.

Second, the SCC ruled that the question contradicted the principle of separation of powers. A result of a valid referendum could not interfere with existing constitutional relations between the respective branches of Government, i.e., between the Parliament and the Government. The disputed question would not constitute a general rule allowing a future referendum to force the Government to resign but a one-time breaking of existing constitutional rules. According to the existing constitutional rules, the Government (unwillingly) ends only in the case of a no-confidence vote of the Parliament or after a parliamentary election.

The PL. ÚS 11/2022 was only the third judgment of SCC dedicated to assessing the constitutionality of a referendum question. While in the first case (PL. ÚS 24/2014), the SCC interpreted constitutional provisions extensively (under certain conditions, the SCC allowed a referendum to deal with human rights), in the examined decision, as well as in its direct predecessor (PL. ÚS 7/2021), the SCC narrowed the subject-matter of a referendum.

IV. Looking Ahead

Despite the unsuccessful 2023 referendum, the ongoing political crisis, widespread dissatisfaction with the governance, and incapability to form the parliamentary majority forced the Parliament to adopt the constitutional amendment in January 2023. The amendment unlocked a legal option for the Parliament to hold a vote on its dissolution and subsequently call an early election. The amendment did not allow a recall of the Parliament in a referendum.

Interestingly, this amendment also carried a political bargain that constitutionally entrenched proportional representation and a single electoral constituency[7] as fundamentals of the Slovak parliamentary electoral system. The existence of one electoral constituency for the parliamentary elections, introduced in the 90s, had been criticized as it effectively consolidated the power over the political parties in the hands of their chairmen.[8] Such statutory rules enabled the establishment of national political parties with weak or even without regional political representation. The chairpersons of the political parties became disproportionally powerful actors in the Slovak political system. Their control within the political parties became nearly absolute. Despite the heavy critique of such a system, most MPs quickly rallied around the constitutional entrenchment of mentioned 'fundamentals' of the Slovak election system. The endorsing MPs promoted this entrenchment as a defense of democracy that would prevent future electoral changes that might contribute to democratic backsliding. Their principal rationale remains highly doubtful as they offered no substantive evidence for such constitutional modification.

After adopting the constitutional amendment, the Parliament's resolution on its dissolution quickly followed in January. However, the Parliament, quite strikingly, decided on the early election at the end of September 2023, i.e., more than nine months after the no-confidence vote.[9] A situation in which the Parliament does not support the interim Government and lacks a stable majority begs for complications. First, the interim Government cannot exercise numerous powers under Article 115 (3). Such a functioning should be provisional, leading to the swift formation of a new Government. Several governmental decisions on noteworthy issues have been publicly questioned on their constitutional footing. Second, the Parliament continues functioning in the mentioned 'bazaar style', allowing the MPs to forge *ad hoc* coalitions on often populist and financially irresponsible agendas. This setting has been deteriorating with looming general elections and active political campaigning. This volatile political cocktail could further destabilize Slovak financial sustainability.

V. Further Reading

Marek Domin, 'Can People Ask for Early Elections? Slovak Constitutional Court Says No' (IACL-IADC Blog, 2 September 2021) <https://blog-iacl-aidc.org/2021posts/2021/9/2/can-people-ask-for-early-elections-slovak-constitutional-court-says-no> accessed 23 April 2023.

Marek Domin, 'Removal of the Slovak Government by a Referendum: Act II of the Drama' (IACL-IADC Blog, 1 December 2022) <https://blog-iacl-aidc.org/new-blog-3/2022/12/1/removal-of-the-slovak-government-by-a-referendum-act-ii-of-the-drama> accessed 23 April 2023.

Marian Giba and Vincent Bujňák, 'Referendum on early elections: The case of Slovakia in the European context' [2021] 8 European studies: The review of European law, economics, and politics, 37.

Max Steuer, 'Searching for a Government. Referenda and constitutional changes in Slovakia ahead of early elections' (Verfassungsblog, 25 January 2023) <https://verfassungsblog.de/searching-for-a-government/> accessed 26 April 2023.

References

1 The Parliament voted for its dissolution three times. Early elections took place in 1994, 2006 and 2012.
2 Article 98 (1) of the Constitution stipulates that the referendum results are valid only if more than one-half of eligible voters participated in it and if the decision was endorsed by more than one-half of the participants in the referendum. The Constitution set an enormously demanding threshold for the referendum's validity. Consequently, almost all referendums that took place in Slovakia were invalid. The only legally binding referendum with sufficient voter turnout was the vote on the EU accession of the Slovak Republic in 2003.
3 See 2019 Global Review of Constitutional Law report on Slovakia, p 301.
4 The decision resembled a Slovak version of the famous "basic structure doctrine" generated by the Supreme Court of India in Kesavananda Bharati judgement (1973).
5 "The Slovak Republic protects the long-term sustainability of its economy based on the transparency and efficiency of spending public funds. The constitutional act supports these objectives by regulating the rules of budgetary responsibility, the rules of budgetary transparency, and the powers of the Council for Budgetary Responsibility."
6 See 2021 Global Review of Constitutional Law report on Slovakia, p 315.
7 A proportional representation system with only one constituency is rare in a comparative point of view. It is known from the Netherlands, Israel, Montenegro or Serbia.
8 Marián Leško, 'Najskôr degradácia (strán), potom degenerácia (demokracie)' <https://dennikn.sk/2937929/najskor-degradacia-stran-potom-degeneracia-demokracie/?ref=list> accessed 23 April 2023
9 'Slovakia is waiting for a campaign in the summer. Parliament narrowly approved early elections in September' https://domov.sme.sk/c/23123805/volby-2023-datum-konania-termin-schvalenie.html, accessed 23 April 2023



Slovenia

Samo Bardutzky, *Associate Professor, Faculty of Law, University of Ljubljana*
Mohor Fajdiga, *Assistant, Faculty of Law, University of Ljubljana*
Jaka Kukavica, *Assistant, Faculty of Law, University of Ljubljana*
Ana Samobor, *Assistant, Faculty of Law, University of Ljubljana*

I. Introduction

With the end of the Covid-19 pandemic and the beginning of the Ukraine war, 2022 has been a turbulent and unexpected year for the world at large. Adding on to this already tumultuous political time period, three elections were held in 2022 in Slovenia: parliamentary, local and presidential. In the April election to the National Assembly, the electorate turned away from politics and rhetoric similar to that coming from Warsaw and Budapest and, instead, reaffirmed Slovenian devotion to liberal democracy. While the defeated right-wing government was able to accomplish a successful post-Covid-19 economic recovery, its illiberal tendencies were still rejected by the electorate. The issues that raised the most concern, both domestically and in Europe, were the Government's illegal refusal to finance the Slovenian Press Agency as well as its pressuring of journalists through Government appointees in the governing structures of RTV Slovenia – Slovenia's public broadcaster. Also, without any explanation, the Government refused to appoint new public prosecutors, who had already been selected by the State-Prosecutorial Council and were waiting only for the Government's consent. This further hindered the work of the already understaffed state prosecution services. Only under increased pressure from EU institutions, the Government nominated the two European delegated prosecutors for the newly established European Public Prosecutor's Office (EPPO). To bypass the scrutiny of the electorate, the ruling coalition included politically sensitive solutions that had nothing to do with the Covid-19 pandemic in the emergency legislation packages designed to fight the virus.[1] Such practices damaged Slovenia's international reputation and mobilized the electorate to vote the Government out of power. The erosion of the rule of law was again a central topic in the November presidential election, where the right-wing candidate lost against center-left candidate, who became the first female President of the Republic.

II. Major Constitutional Developments

In a year so rich in constitutional controversy, two developments stood out as more important and consequential than the others. One was the outcome of the parliamentary election in April 2022, and the other was the continuation of the Constitutional Court's effort to decide the many Covid-19 pandemic-related cases that have dominated its docket in the past years. Both shall be discussed in turn.

The April 2022 parliamentary election put in power a center-left coalition Government that holds a strong 53-seat majority in the 90-seat Slovenian National Assembly, the lower house of the Parliament. By falling only seven seats short of the 2/3 qualified majority that the Constitution requires for constitutional reforms to pass, such a parliamentary constellation gives the newly elected coalition Government ample opportunity to address some of the major constitutional reforms that have long been put on the back burner due to the lack of required political support. The Government seized this opportunity soon after the election and announced several potential constitutional reforms that

they might seek to submit to the parliamentary procedure in the next four years, depending on the political support one of the opposition parties with eight parliamentary votes would be willing to offer to surpass the required constitutional majority of 60 votes. One set of constitutional reforms was already submitted to Parliament in 2022 and shall be discussed in the following paragraphs, while the other constitutional reforms that we might potentially see in the future are discussed below in section V.

In September 2022, the first set of proposed constitutional reforms was submitted to the parliamentary procedure. The formal proposal to initiate the procedure for amending the Constitution,[2] co-signed by all 53 MPs who form the governing coalition, envisioned changes to four constitutional provisions, all relating to the constitutional position of the judiciary and its independence. The proposed changes to Article 129 (permanence of judicial office), Article 130 (election of judges), Article 132 (termination of and dismissal from judicial office), and Article 134 (immunity of judges) of the Constitution all aim to diminish the influence of the legislature over the judiciary and thus importantly rearrange the balance of powers between the three branches of government.

To prevent the currently rife politicization of the judicial appointment process and strengthen the independence of the judiciary, the proposal foresees transferring the power to elect judges from the National Assembly and instead granting the President the power to appoint them. According to the proposal, the President would appoint the judges after the Judicial Council, the national council for the judiciary, has selected them.[3] In line with this transfer of power, the proposal also foresees changes to the constitutional provisions regulating the dismissal from judicial office and the immunity of judges. The power to dismiss a judge from office, if they commit a criminal offense through abuse of judicial office, would be transferred from the National Assembly to the President,[4] and the power to waive the immunity of judges in cases of detention and criminal prosecution of judges would be transferred from the National Assembly to the Judicial Council.[5] The proposal would also change the constitutional provision related to the permanence of judicial office, as judicial offices would no longer be permanent from the outset of their appointment, but only after a three-year "probationary" term in office.

The proposal is still in the early stages of the parliamentary procedure. At the time of writing, it has been approved by the Constitutional Commission, an ad-hoc working body of the National Assembly, advised by a group of constitutional law experts.[6] However, since the proposal is still some ways away from passing the entirety of Parliamentary muster, it is highly likely that substantive changes will still be made to the original proposal submitted to the National Assembly in September 2022. The proposed change to Article 129 of the Constitution, the proposal pertaining to the three-year probationary period before the election into permanent judicial office, has already provoked notable pushback and it is particularly likely that this part of the proposal will be reworked and amended in the later stages of the constitutional amendment procedure.

The Constitutional Court was still facing numerous unresolved cases relating to human rights violations caused by governmental measures aimed at preventing the spread of this communicable disease. In most cases, the Constitutional Court found that the disputed measures were inconsistent with the principle of legality due to the lack of legal basis in the Communicable Diseases Act, thus following its reasoning in its decision no. U-I-79/20.[7] The unconstitutionality of the statutory mandate for measures adopted by the Government to prevent or control the spread of an infectious disease resulted in several attempts to amend the Communicable Disease Act in line with the Constitutional Court's decision. The amendment, which remedies the unconstitutionality by laying out strict conditions and safeguards against arbitrary restrictions of human rights and fundamental freedoms by the executive branch, was ultimately adopted in June 2022.[8]

III. Constitutional Cases

1. *Decision U-I-486/20-14, Up-572/18-36, 16 June 2022*: Marriage Equality

Undoubtedly the most publicized and publicly discussed decision of the Slovenian Constitutional Court, not only in Slovenia but abroad as well, was the June declaration of unconstitutionality of the provision of the Family Code pursuant to which a "marriage" was defined as a "domestic community of husband and wife," thereby limiting this legal institution to heterosexual couples. The declaration of unconstitutionality was coupled with an order of the Court to the National Assembly to adopt legislation in conformity with the Constitution within a six-month deadline.

On the same day, in U-I-91/21-19, Up-675/19-32, the Constitutional Court annulled the provision of the Civil Partnership Act that expressly prohibited joint adoption by a same-sex couple that had entered a civil partnership. Subsequently, the National Assembly in October 2022, adopted amendments to the Family Code. The amendments redefined "marriage" as a "domestic community of two persons." The amendments to the Family Code also annulled the entire Civil Partnership Act. The 2022 legislative reform brought an end to a 17-year period of separate legal regimes for heterosexual and same-sex couples that began in 2005 with the enactment of the Same-Sex Civil Partnership Registration Act, a true exercise in bare-bones recognition of the rights of sexual minorities of the then conservative government.

The Court reviewed the contested provision from the aspect of the special equality guarantee in Article 14(1) of the Constitution. In order for a legislative provision to be in breach of the Para 1 equality clause alleged unequal treatment must, first, be on the basis of one of the protected characteristics and, second, must include a link to one of the human rights and fundamental freedoms enshrined in the Constitution. The link in the present case is to Article 53 which contains guarantees for "marriage and family."

The Constitutional Court had to respond to the argument of the Government and National Assembly that the constitutional protection of marriage only protects a domestic community of a man and woman. To do so, it relied on a dynamic interpretation of the Constitution, stressing that the interpretative power of the intention of the constitution-maker inevitably weakens with the passing of time and the changing of society. At this point the Court, in an asymptomatic move, analyzed the trend towards marriage equality in other jurisdictions. In addition, it cited the results of a public opinion poll from 2020, according to which 72% of Slovenians support marriage equality.

The reference to the growing number of legal systems where a same-sex couple can get married and to public opinion polling can be surprising, but it makes sense in the context of the struggle for sexual orientation equality in Slovenia. The Constitutional Court took the first step towards it in its decision U-I-425/06 of 2 July 2009 where it declared unconstitutional the existence of different inheritance rules for members of a same-sex civil partnership in comparison to a married heterosexual couple.

Faced with the necessity to bring legislation in line with the Constitution, the National Assembly opted for an ambitious and progressive move of redefining marriage in 2011. However, a referendum was called, and the law was subsequently rejected. The National Assembly petitioned the Constitutional Court to stop the referendum, but to no avail (see Decision U-II-3/11 of 8 December 2011). In the absence of quorum requirements, approximately 16% of registered voters in Slovenia were able to reject the law in March 2012.

Even after the 2013 Amendments to the Constitution, which expressly prohibited legislative referendums that would prevent the removal of an unconstitutional situation (Art 90(2)(4) of the Constitution), a very similar story ensued in 2015. Yet another attempt of the National Assembly to redefine marriage was followed by a request for a referendum. Next, an attempt of the National Assembly to block the referendum was followed by a Constitutional Court ruling that prioritizes direct democracy over restoring the guarantee of equality (Decision U-II-1/15-20 of 28 September 2015). This time round, approximately 23% of registered voters succeeded in rejecting the law.

In the 2015 decision, the Constitutional Court articulated the condition under which a legislative referendum can be blocked with the argument that a negative result would prevent a legislative attempt from restoring conformity with the Constitution. Such a limitation on direct democracy is only permissible in cases where there had been a prior express finding of an unconstitutional situation by the Constitutional Court or the ECtHR. Therein lies the importance of the 2022 Constitutional Court decision. This time around, it was no longer only the insulated cases of discrimination on the basis of sexual orientation that were found unconstitutional, but rather the general approach of setting up parallel legal regimes. This, in turn, rules out a referendum on the choice of the general approach - as was confirmed by the Constitutional Court in its Decision U-I-398/22-16 of 14 December 2022.

2. *Partial Decision no. U-I-144/19-32, 17 February 2022*: House searches in the presence of ex officio appointed legal representatives

In 2022, the Constitutional Court made important developments in the field of criminal procedure (see also Decision No. U-I-152/17-69 and Decision No. U-I-144/19-46 – both analyzed below). All three cases were brought before the Court by privileged applicants: two by a group of MPs and one by the Human Rights Ombudsperson. In the first case, the Court had to determine the constitutionality of Article 216(1) of the Criminal Procedure Act, which, in the absence of the person whose premises are about to be searched, allows the court to appoint a legal representative from the practicing lawyers. Under Article 36 (3) of the Constitution, "[t]*he person whose home or premises are being searched or his/her representative shall have the right to be present during the search*." The Court emphasized that the authorities must be reasonably diligent in their effort to first, contact the person whose spatial privacy will be interfered with and second, contact his/her personally chosen representative. Such effort must be clearly documented and substantiated in writing. If the authorities are unsuccessful, the judge, not the police or state prosecutor, ultimately establishes that the person is unavailable and appoints a legal representative from the practicing lawyers. Such a representative can be regarded as a representative in terms of Article 36 (3) of the Constitution.

3. *Partial Decision no. U-I-152/17 U-I-144/19-32, 17 November 2022*: Lack of clarity and precision of airline passenger data from the passenger name record (PNR)

Already in 2017, the Human Rights Ombudsperson seized the Constitutional Court with a challenge to the constitutionality of Article 125 (1-31) of the Police Tasks and Powers Act. As noted already in the 2020 Global Review of Constitutional Law, the Constitutional Court stayed the proceedings and referred two preliminary questions to the Court of Justice of the EU (the CJEU). According to the Constitutional Court, headings 8 and 12 of Annex I to Directive 2016/681 (the PNR Directive) lacked sufficient clarity and precision. As a result, Slovenian implementing legislation, Article 125 (1-31) of the Police Tasks and Powers Act, was potentially in conflict with Article 38 of the Constitution (protection of personal data). In C-817/19, *Ligue des droits humains ASBL v Conseil des ministres*, the CJEU clarified the scope of both problematic headings to satisfy the requirements of Articles 7 and 8 of the Charter of Fundamental Rights. The Constitutional Court interpreted the challenged domestic legislation in line with the CJEU's reading of the PNR Directive in C-817/19 and found no violation of Article 38 of the Constitution.

4. *Partial Decision no. U-I-144/19-46, 1 December 2022*: IMSI catcher

A group of MPs challenged a part of Article 150a of the Criminal Procedure Act (the CPA) – the legal basis for the use of the IMSI catcher to identify IMSI and IMEI numbers. The Court first ruled that these numbers relate to an identifiable individual, and thus constitute

personal data within the meaning of Article 38 of the Constitution (protection of personal data). The Court found that the challenged provision served a legitimate aim: effective prosecution of complex crime. However, the Court found that it was not proportionate *stricto sensu*. In the balancing exercise, the Court took into account the following factors: the limited duration of the measure, the fact that the measure could only be employed in relation to serious crimes listed in the CPA, the unselective nature of the device, the fact that the IMSI catcher is a secret measure which actively works to deceive mobile phones and is thus more intrusive than passive measures not involving deceit, and the limited judicial oversight and control of the use of IMSI catcher. The last factor seems to have convinced the Court to find that Article 150a of the CPA was contrary to the Constitution. The CPA lacked provisions that would ensure proper subsequent judicial control. The legislation did require the police to write an official record of the use of the device. However, the record did not contain information about the technical characteristics of the device. The police were not required to include all the numbers caught by the device, and no sanction was prescribed for an incomplete record. The Court concluded that the legislation should have ensured technical traceability of the data processing and should have enabled the judge to compare the scope of data actually gathered with the scope prescribed by the court order. It repealed the challenged part of Article 150a of the CPA.

5. *Decision no. U-I-260/19-21, 5 May 2022*: Election Silence

Slovenian legislation forbids public campaigning on Election Day as well as 24 hours before the opening of the polls. In its 2016 Judgment No. IV Ips 31/2016, the Supreme Court interpreted the election silence provisions. In its reasoning, it narrowed them down to acts of election propaganda: deliberate and systematic actions, aimed at influencing a particular circle or the largest possible group of people. In 2022, the Constitutional Court reviewed the election silence provisions. It did not depart from the Supreme Court's decision but seems to have left space for the legislature to enact stricter electoral silence. It held that election silence interferes with freedom of expression and association, two high-ranking constitutional values. However, the electoral silence enables the free exercise of the right to vote. It ensures that people can think about their choice in peace, without being exposed to new information right before elections. Voters can neither check the credibility of such information nor really consider its content or meaning. The Constitutional Court concluded that electoral silence is necessary to decrease the chance of abuse and manipulation, and is thus compliant with the Constitution.

6. *Decision no. U-I-441/18-23, 6 July 2022*: Participation of the Public in Adopting Environmental Regulations

The Constitutional Court was seized by an NGO working in the field of environmental protection in the public interest to decide on the legality and thereby constitutionality of the Decree on the Limit Values for Environmental Noise Indicators. According to the NGO, the procedure through which the Government had passed the Decree was incompatible with the statutory procedural requirements that implement the provisions of the Aarhus Convention into domestic law. This is because after the initial draft of the Decree had been put up for public consultation, it underwent significant changes before it was eventually passed. Since the public was not consulted on the content of the final, and substantially different, draft of the Decree, the applicant argued the procedure fell short of meeting the requirement of effective participation of the public in the procedure for adopting regulations that can have a significant impact on the environment. The Constitutional Court agreed, ruling that it is unconstitutional "if following the public hearing the draft of the regulation is supplemented by completely new substantial solutions that the public had not […] been acquainted with earlier and thus had not been able to react thereto."[9]

IV. Looking Ahead

The center-left government, elected in April 2022, has announced several potential constitutional reforms they are likely to pursue in the remainder of its 4-year term. In addition to the set of constitutional changes already submitted to the parliamentary procedure in September 2022, the Government also mentioned the possibility of constitutional reforms in five additional areas:[10] (i) the procedure through which the Prime Minister and other Government Ministers are elected (ii) the powers of the Constitutional Court, (iii) the rules governing the publication of municipal regulations in the official gazette, (iv) the electoral system, and lastly (v) the restructuring or the complete abolition of the National Council.[11] These proposals for constitutional reform are listed in the order of the likelihood of being passed. Indeed, the proposal relating to the election of the Prime Minister and the Government Ministers, which would diminish the influence the legislature has over the formation of the Government, was already submitted to the National Assembly in April 2023.[12] It enjoys broad political support, as the proposal was championed by one of the opposition parties and gained the support of all coalition parties. It is therefore highly likely that this proposal for constitutional reform will be successful. It remains to be seen which of the other mentioned proposals for structural constitutional reforms will receive the required political support in 2023 or beyond.

V. Further Reading

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1 See the abstract of the Decision U-I-25/22-15 in English https://www.us-rs.si/decision/?lang=en&q=U-I-25%2F22&df=&dt=&af=&at=&page=1&sort=&order=&id=117927, accessed 26 April 2023.

2 Full text of the proposal is accessible on the National Assembly's official website. See: National Assembly, 'Text of the Proposal to initiate the procedure for amending the Constitution of the Republic of Slovenia' (26 September 2022) https://www.dz-rs.si/wps/portal/Home/zakonodaja/izbran/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8zivSy9Hb283Q0N3E3dLQwCQ7z9g7w8nAwsnMz1w9EUGAWZGgS6GDn5BhsYGwQHG-pHEaPfAAdwNCBOPx4FUfiNL8gNDQ11VFQEAAXcoa4!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?uid=C87544570D6C43AAC12588D2003503C9&db=pre_akt&mandat=IX&tip=doc, accessed 27 March 2023.

3 The Judicial Council is an autonomous and independent body, the purpose of which is to protect the independence of the judiciary. Under the current constitutional setup, the Judicial Council is composed of 11 members, five of whom are elected by the Parliament on the proposal of the President amongst legal experts, and six of whom are elected by judges from among their own number. Some experts and opposition parties have expressed concerns that transferring the power to appoint judges would require a rethinking of the Judicial Council's composition to maintain a suitable balance between the three branches of government. For more on the Councils for the Judiciary in the European legal tradition, please see the overview of the composition and competencies of the national Councils for the Judiciary that has been compiled by the European Network of Councils for the Judiciary (ENCJ). Accessible at: https://www.encj.eu/members.

4 In accordance with the current Article 132 of the Constitution, the National Assembly has the power to dismiss a judge from office (either at the proposal of the Judicial Council or on its own motion) if a judge violates the Constitution or seriously violates the law in the performance of judicial office or if the judge commits a criminal offense through the abuse of judicial office.

5 Under the current Article 134 of the Constitution, if a judge is suspected of having committed a criminal offense in the performance of judicial office, she may not be detained, nor may criminal proceedings be initiated against her without the consent of the National Assembly.

6 For the composition of the Constitutional Commission, see: National Assembly of the Republic Slovenia, 'Constitutional Commission' (2022) https://www.dz-rs.si/wps/portal/Home/pos/dt/izbranDT/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8zinfyCTD293Q0N3IMN3QwCzcPCghzdzQwNAkz1w8EKvCy9Hb3ACoyCTA0CXYycfIMNjA1MnAz0o4jRb4ADOBKpH4-CKPzGF-SGhoY6KioCAMkPKqk!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?idSubjekt=DT030, accessed 27 March 2023.

7 In decision no. U-I-79/2020, adopted in May 2021, the Constitutional Court found that the Communicable Disease Act failed to provide a sufficiently precise legal basis for actions of the executive branch and was thus in violation with the principle of legality set out in Article 120 of the Constitution. For the full analysis of the decision of the Constitutional Court no. U-I-79/20 and its influence on further Constitutional Court's decisions please see: Matej Avbelj and Katarina Vatovec, 'Slovenia' in: Richard Albert, David Landau, Pietro Faraguna, Šimon Drugda and Rocío de Carolis (eds), The 2021 Global Review of Constitutional Law (EUT Edizioni Università di Trieste, 2022).

8 See the content of the amendment to the Communicable Diseases Act: Official Journal of the Republic of Slovenia no. 125/2022, 30 September 2022.

9 See the abstract of the decision U-I-441/18-23 in English <https://www.us-rs.si/decision/?lang=en&q=U-I-441%2F18&order=desc&id=118646> accessed 21 April 2023.

10 See the Government's press release (24 October 2022) https://www.gov.si/novice/2022-10-24-premier-golob-za-dolocene-spremembe-ustave-se-morda-nakazuje-ustrezna-vecina/, accessed 27 March 2023.

11 Please note that the National Council is the upper house of the asymmetrically bicameral Slovenian Parliament.

12 Full text of the proposal is accessible on the National Assembly's official website. See: National Assembly, 'Text of the Proposal to initiate the procedure for amending the Constitution of the Republic of Slovenia' (04 April 2023) https://imss.dz-rs.si/IMiS/ImisAdmin.nsf/ImisnetAgent?OpenAgent&2&DZ-MSS-01/16f4daa1e4df89b884d4aacc739ce7ba09d485a5ce32ddaf9654011d981a18c2, accessed 22 April 2023.



Spain

María Luisa Balaguer, *Judge of the Constitutional Court*

Camino Vidal, *University of Burgos*

Enrique Guillén, *University of Granada*

Argelia Queralt, *University of Barcelona and legal adviser at Constitutional Court*

Fernando Reviriego Picón, *Uned University*

Leonardo Álvarez, *University of Oviedo*

I. Introduction

There is no doubt that 2022 has been marked by controversies over the procedure for renewing the General Council of the Judiciary (the governing body for the judiciary) and the Constitutional Court.

In the latter case, a third of the Court was due to be nominated, according to the Spanish Constitution, by the government and the General Council of the Judiciary. However, a lack of parliamentary agreement over renewing the Council (whose term finished in December 2018) meant that only the Constitutional Court was renewed. And this was only possible through an arduous process that required, among other things, reforming the legislation relating to the judiciary so that the General Council of the Judiciary could nominate their two members of the Constitutional Court after their term had expired (and were therefore in an acting capacity).

After the four Constitutional Court magistrates were appointed, the President of the Court was chosen in January 2023, with Magistrate Conde-Pumpido elected president and Magistrate Montalbán Huertas vice president. Currently, the Court has eleven members after Magistrate Montoya Melgar resigned for health reasons in July 2022.

During 2022, the Court handed down 151 rulings, 35 in cases relating to declarations of unconstitutionality and 116 in cases relating to the protection of fundamental rights. Some of the cases had territorial content, with the community of Catalonia having had the most laws questioned for not respecting the system of distribution of competencies.

II. Major Constitutional Developments

June 2022 saw one of the most controversial decisions in the recent history of the United States Supreme Court: *Dobbs v. Jackson Womens' Health Organization*, related to abortion.

That same month in Spain was the twelfth year in which the Constitutional Court had not ruled (this is not a misprint) on the admission of a request for a ruling of unconstitutionality presented by more than fifty members of the Popular Party in Congress against various articles of Organic Law 2/2010, 3rd March, on sexual and reproductive health and abortion.

This is an almost unimaginable, reprehensible length of time for a resolution, although fortunately, also completely exceptional. It is well known that this law—starting from the basis that the development of sexuality and the capacity for procreation are directly connected to an individual's dignity and free development of personality, and being the object of protection through various rights, particularly those guaranteeing physical and moral integrity and personal and family privacy—established a general system of timelines. These timelines could be extended in certain situations to be able

to freely abort a pregnancy, as opposed to the system of indications in force up to that time which only allowed abortions in cases of rape, fetal malformation, and risk to the pregnant woman's physical or mental health.

In December 2022, the plenary session of the Court deliberated a proposal from one of the magistrates that the request be rejected, supporting the established system of timelines, but also proposing to declare the unconstitutionality of an article related to the procedure offering information (recently modified in light of a law approved in 2023—Organic Law 1/2023, 23 February) to pregnant women who wish to terminate their pregnancies.

The proposal did not find the support of the majority of magistrates, who thought that the request should be entirely rejected, thus supporting the law as a whole. Because the proposer refused to prepare another ruling which also rejected the request on the point related to the information procedure, another magistrate was tasked with preparing the proposal, and we are still waiting for the final decision on the request. The clock is ticking and there is still no decision, although the support for the law seems clear. However, we are still waiting.

Together with the decision in this case, or rather the lack of decision, because it is still pending, it is worth noting the thematic similarities—although here from the perspective of continuing a pregnancy and the method of delivering a baby—with ruling 66/2022, from June, rejecting an appeal for protection of fundamental rights (an *amparo* request) from a woman who had been forced to go to hospital for an induced birth, and had not been allowed to deliver at home as she wished. Although there is ample case law on non-voluntary hospitalization in psychiatric units over the years, this was the first case (and hence the constitutional importance) in which the forced hospitalization was in order to deliver a baby. The life and health of the unborn (via the *nasciturus* doctrine) outweighed the mother's right to decide where to give birth.

The Court found that the end of protecting a constitutionally protected good, the life and health of the unborn, justified the decision taken *inaudita parte* and that there had been no violation of the right to effective legal protection in connection with the pregnant woman's rights to personal liberty, or her and her partner's personal and family privacy.

This was not an uncontroversial decision. Three of the eleven magistrates took the opposing position that they defended in their dissenting opinions. These opinions decried the "objectification of the woman in the judicial debate" by not hearing from the mother-to-be in the legal process. They also noted the absence of a gender perspective in the sentence handed down because the pregnant woman was absent from the historical and judicial narrative along with her rights as a bearer of rights.

It is worth emphasizing that this process did not include a second *amparo* request from the same woman, not about the forced hospitalization, but rather the medical activity she was subject to during her hospital stay which in her mind violated her rights to equality and not being discriminated against because of her sex, her physical and moral integrity, ideological liberty, and family privacy; according to the appellant, it was a case of obstetrical or gynecological violence. The Court also denied this *amparo* request, again with various dissenting opinions which highlighted a coercive factual basis, although the ruling was outside of the time period covered by this report (Ruling 11/2023, 23 February).

A no less important issue when addressing abortion is the fact that most of the cases in Spain are referred to private clinics (around 80% of cases) and that in some autonomous communities, there has been no notification of terminations in the regional public health system in recent years. There are currently pending *amparo* requests in the High Court, one example being from a pregnant woman who requested an abortion following the detection of fatal fetal deformities. She was told this was impossible in the autonomous community she lived in, and she was referred to a clinic in a different region and had to pay the cost of transport and accommodation. These issues have recently been addressed by Organic Law 1/2023, 28 February, which established measures to ensure the provision of public health services, with referral to other clinics being labeled as an exceptional measure.

III. Constitutional Cases

1. *Rulings STC 26/2022, 31/2022, 45/2022, 46/2022, 47/2022, 149/2022*: Catalan independence process

It is worth noting a set of rulings broadly related to the Catalan independence process. In rulings 45, 46, and 47/2022, the Court responded to *amparo* requests raised by Oriol Junqueras and Raül Romeva, Dolors Bassa, and Joaquim Forn, respectively, against the sentences handed down by the Supreme Court for crimes committed in October 2017. The plenary session of the Constitutional Court rejected the alleged violations of fundamental rights. The three rulings had three dissenting opinions from Magistrates Xiol, Balaguer, and Sáez.

Ruling STC 26/2022 was in response to an *amparo* request raised by Carles Puigdemont and Antoni Comín following the Supreme Court's decision to deny the preventative injunction against the Central Electoral Commission's agreement rejecting the validity of taking a written oath to the Constitution rather than doing so in person, following the European Parliament elections in 2019. In the ruling, the plenary session of the Court declared the supervening loss of subject matter in the dispute, owing to the settlement of the claims by the European Parliament decision on the 13th of January 2020 that recognized the appellants as members of the European Parliament in line with the ECJ ruling in Junqueras Vies, 19 December 2019.

Ruling STC 31/2022 was in response to an *amparo* request raised by the Catalan National Assembly (ANC) against the judicial decisions validating the penalties imposed by the Spanish Data Protection Agency for using data about ideology without the express, written consent of the participants in a large survey. The Court concluded that the ANC had harmed the respondents' rights to data protection by not respecting the assurances laid down in Spanish and European law.

Ruling STC 42/2022 was in response to an *amparo* request raised by the Òmnium Cultural Association against a penalty imposed by the Spanish Data Protection Agency after temporarily transferring data for treatment to the USA after the European Court of Justice ruling prohibiting that on the 6th October 2015. The Court rejected the *amparo* request, finding that the administrative and legal decisions had respected the rights and liberties of the association.

Ruling STC 149/2022 examined the appeal raised by Carles Puigdemont and Toni Comín, who had fled from Spain, against the Supreme Court's request for the European Parliament to suspend their parliamentary immunity. The appellants claimed that it had violated, among other rights, their right to the presumption of innocence. The Court rejected that claim, as the request for suspension of parliamentary immunity was, one, supported by sufficient evidence to open a criminal case, and two, did not presuppose guilt.

2. *Rulings STC 50/2022 and 67/2022*: non-discrimination

In ruling STC 50/2022, applying the case law handed down in ruling STC 172/2021, the Court granted *amparo*, concluding that early retirement due to disability should not lead to being excluded from access to permanent disability benefits. Otherwise, that would produce a difference in treatment not allowed by the legislation as it would lack objective, reasonable justification and, therefore, would be a violation of the right of non-discrimination on the grounds of disability. The ruling had a single dissenting opinion.

In ruling STC 67/2022, the person requesting *amparo* argued that they were fired without reason from the firm where they had been working for a trial period. They claimed that they had been discriminated against for their sexual or gender identity, arguing that they had been dismissed because they were transgender and because of how they dressed. The CC rejected the request, considering that there had been no violation of the right to one's own image, or discrimination due to gender identity, indicating that, while "the burden of proof lay on the company," it clearly and sufficiently proved that the dismissal had nothing to do with the appellant's gender identity, and was within the trial period agreed in the contract.

3. *Ruling STC 66/2022*: the life and health of the unborn outweighs the mother's right to decide where to give birth

The *amparo* request was from a woman who, in her forty-second week of pregnancy, was told by the medical service she attended regularly that she should have an induced birth. She refused, as she wished to give birth at home, which led the medical service to take the case to the lower courts, considering the life of the unborn to be at risk. A magistrate's court ordered involuntary hospitalization, and the appellant ultimately gave birth in a public hospital. The Constitutional Court rejected the *amparo* request as there had been no violation of the right to effective legal protection concerning the right to personal and family privacy. The Court declared that the limitation of the mother's right to decide where to give birth had been a proportionate decision, with the aim of safeguarding the life and health of the unborn, as a constitutionally protected right (through the *nasciturus* doctrine). The Constitutional Court found the decision to be constitutional, as the medical reports indicated a serious risk of death for the fetus. The ruling had four dissenting opinions and one concurring opinion.

4. *Rulings STC 12/2022; 13/2022; 34/2022; 53/2022, 122/2022 and 124/2022*: violation of the right to effective legal protection due to insufficient investigation

Ruling STC 53/2022 dealt with a minor who reported having been injured after being hit by a police van during clashes between protesters and police. Despite a request for various aspects of investigation (including identifying and taking statements from the police officers involved and providing video of the event), the courts provisionally dismissed the criminal case without having carried out that investigation. The *amparo* request was granted for violation of the right to effective legal protection, in terms of the right of access to criminal justice. The ruling declared, citing the ECHR ruling 9 March 2021, *López Martínez vs Spain*, that there had not been a sufficient or effective investigation of police conduct that might serve to assess the proportionality of the police's use of force during the clashes in the demonstration when there were available, appropriate means of instruction to clarify the events, such as the declaration of the injured party and the video provided.

Ruling STC 122/2022 concerned an appellant who was remanded in custody on the presumption of drug trafficking. They claimed violation of their rights to physical integrity and the right not to be tortured or subject to inhuman or degrading treatment, as a consequence of an assault that allegedly took place while detained by police. They requested a forensic medical exam to prove their injuries, which did not occur. The Constitutional Court ruled that those rights had been violated, as the courts should have performed a medical exam and opened an independent legal proceeding to investigate the supposed injury.

Ruling STC 124/2022 examined the case of a journalist who was reporting on demonstrations in Barcelona when they were struck in the leg by a rubber bullet fired by the riot police from the autonomous community. The journalist requested an investigation to hold the police liable, providing abundant photographic evidence of the injuries and the police officers present at the protest. The court refused her request, accepting the conclusions of the police report which denied the involvement of the autonomous community police officers in the attack on the journalist. The Constitutional Court found that her right to effective legal protection had been violated because the court had not performed the bulk of the investigation or interrogated the officers involved but, instead, had fully based their decision on the police report.

Other cases which also addressed possible violations of the right to effective legal protection due to insufficient investigation include STC 12/2022, concerning a prisoner's degrading treatment; STC 13/2022, concerning a strip search during police detention; and STC 34/2022, concerning mistreatment in police custody.

5. *Rulings STC 4/2022 and 101/2022*: Equality and education

Rulings STC 4 and 101/2022 responded to appeals raised by a private university against a resolution by the autonomous community of Valencia which would only allow students at public universities to receive assistance established to complement Erasmus + mobility grants. The Court followed previous case law (STC 191/2020) and determined that excluding students at private universities violated the right to equality and the right to create educational establishments. There were two dissenting opinions.

6. *Ruling STC 103/2022*: A detained person's right to legal assistance and habeas corpus

Ruling STC 103/2022 found that a person's right to legal assistance had been violated. The person had been detained as part of the administrative process of returning them to their country of origin, but they had not been assigned a defense lawyer during their detention. The Court also found that their right to habeas corpus had been violated because the judge, who did not grant them a lawyer, did not allow them to personally explain why they thought that deprivation of their liberty was in breach of their rights. The Court's ruling included a stern warning to the ordinary courts, berating them for not following constitutional doctrine in the matter.

7. *Rulings STC 89/2022 and 105/2022*: The right to be forgotten

Ruling STC 105/2022 addressed an appeal on the same subject as STC 89/2022. The appellants, who worked in real estate, had asked for the removal of the association between their names and surnames in Google search results and a URL with links to pages that contained anonymous criticism of their professional performance. The Constitutional Court ruled that this had violated the appellants' right to protection of personal data with regard to the right to be forgotten, given the lack of public importance to their activities and the age of the data (six years between the criticism being posted and the exercise of the right for STC 89/2022 and four years for STC 89/2022). There were two dissenting opinions that gave particular consideration to the appellants' professional activity as currently being of priority general interest to Spanish citizens.

8. *Rulings STC 65/2022; 85/2022; 92/2022; 93/2022; 95/2022; 96/2022; 97/2022, 115/2022*: The right to access public office

The ruling which stands out in this group, referring to casting votes in the Catalan Parliament, is STC 97/2022, which rejected the appeal raised by Carles Puigdemont, whose right to public office had been suspended by a court ruling, following the decision of the Catalan Parliament to not count his delegated vote. The Court ruled that someone who had been deprived of the exercise of a right could not delegate it.

The same jurisprudence can be found in rulings STC, 65, 85, 92, 93, 95, and 96/ 2022. According to these rulings, if the right to vote is improperly exercised, it affects other parliamentarians' rights to vote, who would have less weight in the formation of the will of the deliberative body, they would be "worth less", thus harming the principles of the individuality of the vote and equality in the exercise of their representative functions.

Ruling STC 115/2022 reiterated previous case law (STC 259/2015), which had ruled that the ruling bodies of legislative chambers (in this case, the Catalan parliament) could not accept initiatives that would mean manifestly non-complying with what the Constitutional Court had agreed. This would violate the right to representative functions in relation to citizens' rights to participate in public matters through their representatives.

9. *Ruling STC 120/2022; 121/2022; 131/2022; 139/2022; 140/2022*: Notification of legal rulings and effective legal protection

Various Constitutional Court rulings in 2022 addressed the constitutionality of the notification of legal rulings. Various lower courts attempted to deliver notifications to individual or business addresses to borrowers of bank loans, informing them of the beginning of foreclosure procedures for non-payment. When that was not possible, the individual notifications of legal rulings were replaced by publication on the courts' bulletin boards. The Constitutional Court found that the lower courts had not exhausted all of the possibilities of individual notification and this prevented the borrowers from defending themselves in the legal foreclosure procedure. The same reasons led the Constitutional Court to rule that the first notifications via email to addresses in state records violated the rights of the borrowers.

10. *Rulings STC 123/2022; 141/2022*: Primacy of European Union Law

This case dealt with an appeal to the Constitutional Court against the decision of a lower court to not review the abusive nature of the clauses of a loan contract. Not complying with those clauses led to the beginning of a foreclosure process. The court's decision was based on clauses in the contract having been ruled as not abusive in a previous decision. However, the Constitutional Court found that the court's decision violated the principle of the primacy of European Union law because it did not comply with the case law of the European Union Court of Justice. For that court, if a new contractual clause is alleged to be abusive which has not been analyzed in a prior judgement, it must be examined by the court.

IV. Looking Ahead

2023 sees the start of a new term for the Constitutional Court. There only remains the Senate's replacement of a magistrate who resigned for health reasons. The new chair of the Court has announced the imminent decision about the appeal against the law pertaining to sexual health and reproduction and abortion, which has been pending since 2010, as well as rulings relating to the laws on euthanasia and education (both approved by the current legislature). Both are legally and politically weighty issues. The Court is also expected to rule on the appeal raised by a member of parliament who had to resign following being fined 540 eu-

ros for attacking a public official. The Court will probably rule on these cases with an eye on the timescales so as not to interfere in the elections that will be held in Spain this year (municipal and regional elections in May, general election in December).

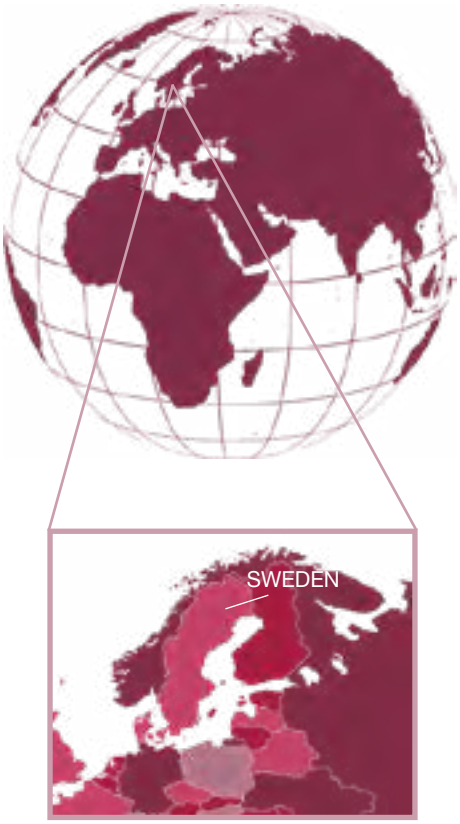
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Sweden

Anni Carlsson, *Doctoral Candidate, Uppsala University*

I. Introduction

2022 was an election year in Sweden with parliamentary, regional, and municipal elections taking place in September. The process of government formation resulted in yet another minority government on the basis of a political agreement between four parties. Only three of the parties, however, are members of the government, while the fourth – the nationalist Sweden Democrats party – has influence over government politics despite lacking formal governmental power. This influence is due to the party's involvement in the agreement.

The changes in the national security landscape after the Russian invasion of Ukraine prompted the Swedish government to apply for NATO membership in May 2022, thus putting an end to the long history of neutrality in Swedish foreign affairs. At the end of the year, the Swedish membership process was still ongoing, pending the approval from NATO member states Turkey and Hungary.

In 2022, a number of constitutional amendments were adopted. The most controversial amendment concerned the criminalization of foreign espionage, which limits the free speech rights laid down in the Swedish constitutional laws focused on protecting freedom of expression and freedom of the press.

In addition, throughout the year, the Swedish supreme courts decided several cases involving constitutional rights. For instance, these cases focused on issues related to online defamation and the headscarf ban in schools. In Strasbourg, the European Court of Human Rights (ECtHR) delivered three judgments, where the applicants alleged that Sweden had violated their rights under Article 8 of the European Convention on Human Rights (ECHR), which protects the right to respect for private and family life.

II. Major Constitutional Developments

In September 2022, elections to the Swedish parliament (*Riksdag*), as well as elections to regional and municipal councils, were carried out. Historically, Sweden has often been ruled by minority governments, and the last two parliamentary elections were followed by complex negotiations between the political parties elected to the parliament. The election year 2022 was no exception. After the elections, the Social Democratic single-party government was replaced by a right-wing coalition government consisting of the Moderate Party, the Christian Democrats, and the Liberals, with the leader of the Moderate Party, Ulf Kristersson, serving as the prime minister. Since these three parties do not control the majority of the seats in the parliament, they entered the so-called "Tidö Agreement" (*Tidöavtalet*) with the nationalist and social conservative Sweden Democrats.[1] The Moderate Party, the Christian Democrats, and the Sweden Democrats have previously set forth joint budget proposals, but this is the first time that the Sweden Democrats gained influence over the Swedish governmental politics.

Although the Sweden Democrats are not formally part of the government, the Tidö

Agreement grants the party the same influence over government politics as the parties forming the government. According to the agreement, the Sweden Democrats have access to a coordination office at the Prime Minister's Office, thus integrating the party with the day-to-day work of the government. The Tidö Agreement consequently bestows the Sweden Democrats concrete power over the way Sweden is governed, while simultaneously keeping the party out of reach of the constitutional control mechanisms, which are designed to hold the government accountable for its actions. The policies included in the Tidö Agreement – above all in the areas of criminal and migration law – have been criticized for risking conflict with constitutional rights and Sweden's international human rights commitments.[2] It remains to be seen how the Swedish legislative process with its system of governmental inquiries and the participation of legal experts in the Law Council (*Lagrådet*) manages to deal with eventual rights-infringing government bills put forth in the future.

Russia's war on Ukraine also made its mark within the framework of Swedish constitutional law. As a consequence of the Russian attack, the Swedish government applied for membership in NATO in May 2022. Considering Sweden's long history of neutrality, the application to join NATO can be regarded as a significant shift in the area of Swedish foreign policy. According to the Instrument of Government (IG, *regeringsformen*) Ch. 10 § 1, it is the Swedish government that concludes agreements with other states and international organizations. The approval of the parliament is required in some cases, i.a. when the international agreement is of major significance (IG Ch. 10 § 3). As joining the North Atlantic Treaty is undoubtedly regarded as having major significance, the parliament's approval is required before the government can decide on the accession to the agreement.[3] Apart from the requirement that the Swedish parliament approves the membership with a simple majority, there are no substantial constitutional hurdles on Sweden's path towards becoming a NATO member.[4]

Instead, there have been more practical obstacles on Sweden's road to NATO membership. In July 2022, the NATO member states signed the Accession Protocol for Sweden. During the rest of the year, all NATO members, except for Turkey and Hungary, approved and ratified the protocol. However, the ratification by these two member states is required for Sweden to be able to proceed to ratifying the North Atlantic Treaty and thus become a NATO member. Turkey has made a number of demands in order to accept the Swedish membership, including extraditing individuals the Turkish government views as terrorists. In December 2022, the Swedish Supreme Court blocked the extradition of a Turkish journalist accused of being involved in the coup attempt in 2016.[5] At the time of writing, Sweden is still waiting for Turkish and Hungarian approval for its membership.

As amending the Swedish Constitution requires decisions by two parliaments with elections in between (IG Ch. 8 § 14), several amendments to the Swedish constitutional documents that were first adopted by the previous parliament were confirmed in the fall of 2022. The most central amendment in IG concerned the possibility to criminalize terrorist organizations.[6] A number of amendments were further passed to the two Swedish fundamental laws regulating freedom of expression: the Freedom of the Press Act (FPA, *tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (FLFE, *yttrandefrihetsgrundlagen*). The most controversial amendment concerned the criminalization of foreign espionage as an offense against the freedom of the press and the freedom of expression within the framework of these two fundamental laws.[7] The amendments also introduced limitations on the freedom to communicate and procure information for the publication in media covered by FPA and FLFE. The law makes an exemption for situations where it is "justifiable" to disclose information in order to protect investigative journalism and opinion-formation. Nonetheless, there were widespread concerns among the media that the legislation will constrain the work of journalists and offer a more limited protection to sources. Ultimately, the practical effect of the law on the exercise of free speech remains to be seen.

III. Constitutional Cases

1. *NJA 2022 s. 1136.* Freedom of Expression (online defamation)

This case concerned a journalist working for a major Swedish newspaper, who had moved to Sweden from Syria in 2015. An online newspaper published an article in which the journalist was described as a "suspected jihadist," and it was insinuated that he had connections to terrorist organizations. The journalist sued the responsible editor of the online newspaper for gross defamation in accordance with the Swedish Fundamental Law on Freedom of Expression. After being convicted by both the district court and the court of appeals, the editor appealed to the Supreme Court.

According to the Swedish criminal law, a person is guilty of defamation if they identify someone else as criminal, as having a reprehensible way of life or otherwise provide information liable to expose them to the contempt of others. Even spreading truthful information can amount to defamation. The person providing information will not be held responsible if there are justifiable reasons for providing the information. The freedom from responsibility further requires that the information was true, or that there were reasonable grounds for it. Gross defamation occurs when the information, particularly with regard to its content, the method or scope of its dissemination, or other factors, is likely to cause serious damage.

The Supreme Court maintained that being described as a "jihadist" and having connections to terrorist organizations was likely to expose the journalist to the contempt of others. The Court also found that publishing the information had been justifiable, as providing information about a journalist at a large newspaper having terrorist sympathies or connections had a considerable public interest. However, according to the Court, it had not been proved that the information was true. Additionally, the Court did not consider that the editor had reasonable grounds for the information. Consequently, the editor was sentenced for gross defamation.

The defamation was considered gross because the information was made available to, and was accessed by, many people. In addition, it was a question of serious claims about terrorist connections, and the journalist had been identified by name and picture.

2. *HFD 2022 ref. 51 I and II*: Freedom of Expression, Freedom of Religion (headscarf ban)

The background to these cases before the Swedish Supreme Administrative Court was the decisions of two Swedish municipalities to ban headscarves and other similar pieces of clothing in municipal kindergartens and elementary schools. A number of residents in both municipalities appealed the decisions, and both the administrative court and the administrative court of appeal found the bans to be unlawful. The municipalities appealed to the Supreme Administrative Court, where the lawfulness of the headscarf bans was at issue.

The Court first determined whether the bans amounted to an unlawful infringement on the freedom of religion or freedom of expression, as protected by the Instrument of Government (IG), which also binds the Swedish municipalities. Freedom of religion is protected in IG Ch. 2 § 1 para. 6, which guarantees everyone the right to exercise their religion alone or together with others. Under IG, the freedom of religion is narrowly defined, and expressions of religious beliefs covered by other freedoms of opinions, such as freedom of expression, are examined under those specific freedoms instead. Thus, the freedom of religion under IG is an absolute right.

Freedom of expression, in turn, entails a freedom for everyone to to impart information and express thoughts, opinions, and feelings in speech, whether it is through writing or another form of expression. (IG Ch. 2 § 1 para. 1). The right to freedom of expression may also cover wearing pieces of clothing that can be regarded as an expression of a cultural or religious custom, as well as forms of expression. The Court maintained that headscarves, burkas, niqabs, and similar pieces of clothing can be worn as expressions of cultural customs, as well as for religious reasons. Wearing these pieces of clothing can accordingly be regarded as an expression for religious affiliation. In such cases, wearing headscarves is protected by the right to freedom of expression and can only be limited in accordance with the specific requirements that apply for such restrictions.

According to IG Ch. 2 § 20 and § 25, freedom of expression can only be restricted in law. The Court upheld that the decisions of the municipalities had such practical effects on the freedom of individuals to express thoughts, opinions, or feelings that they constituted restrictions on freedom of expression. Moreover, the Court concluded that the municipalities had lacked a legal basis for their actions. The Court determined that the provision in the Swedish Education Act (*skollagen*), which established that education in public schools and kindergartens shall be non-confessional, did not constitute a legal basis for restricting clothing worn for religious reasons. Neither was there any other legal basis at hand, which meant that the restriction of freedom of expression had not been made in law. The Supreme Administrative Court, just like the lower courts, consequently found that the ban on headscarves amounted to an unlawful restriction of freedom of expression.

3. *HFD 2022 ref. 11*: Right to liberty (compulsory care)

The case concerned the compatibility of certain provisions in the Swedish compulsory care legislation with the Article 5 of ECHR, which guarantees the right to liberty and security. Article 5 contains an exhaustive list of exceptions when depriving someone of their right to liberty is permissible. Article 5.1(d) allows for the detention of a minor by lawful order for the purpose of educational supervision. The Swedish Care of Young Persons (Special Provisions) Act (*lag med särskilda bestämmelser om vård av unga*) makes it possible to give compulsory care to young persons who are under 18 years old when there is a risk of significant harm to their health or development by the means of substance abuse, criminal activities, or other socially destructive behavior. The Act further opens up for providing compulsory care to individuals who are over 18 but under 20 years old if it is deemed more appropriate than other forms of care and cannot be given with the consent of the young person. The compulsory care can only be carried out until the person turns 21 years old. The issue before the Swedish Supreme Administrative Court was whether Article 5 was violated when compulsory care under the Act was given to a person (A.B), who was 18 years old and deemed to have socially destructive behavior unrelated to substance abuse or criminal activities.

A.B was assigned to a special residential home for young people, and the Court determined that this placement amounted to a deprivation of liberty. The Court maintained that the starting point was that the exceptions to the right to liberty in Article 5 should be given a narrow interpretation. Additionally, the Court found that the care given to A.B was covered by the exception that allowed the deprivation of liberty of a minor for the purposes of educational supervision. The Court then proceeded to determine whether the exception in Article 5.1(d) was applicable when care under the Care of Young Persons Act is given to someone who is 18 years old or older. The Court noted that the ECtHR had not yet determined whether the exception could be applied to young persons who are over 18 years old. The Court acknowledged that different states could have varying interpretations of who counts as "a minor," and when it comes to the Swedish legislation, there was no reason to fear that it would lead to arbitrary deprivations of liberty in conflict with the aim of the ECHR. Consequently, the majority of the Court found that giving compulsory care under the Care of Young Persons Act to a person who is over 18 and has socially destructive behavior did not violate Article 5 ECHR.
One of the justices – a former Swedish judge at the ECtHR – dissented and found a violation of Article 5 to be at hand. According to the justice, the exceptions in Article 5 should be narrowly interpreted because it aims to protect individuals against arbitrary deprivations of liberty. Moreover, she asserted that the concepts in the ECHR must be interpret-

ed autonomously in a way that is independent of the interpretations on the national level. Thus, the dissenting justice concluded that Article 5.1(d) could not be interpreted to encompass young individuals who are the age of majority and are not under anyone's guardianship. Therefore, providing compulsory care in the current case constituted a violation of Article 5.

4. *Case of M.T. and Others v. Sweden (Application no. 22105/18)*: Article 8 (Right to family life), Article 14 (Prohibition of discrimination)

The background to this case before the ECtHR was a Swedish legislation ("Temporary Act"), which entered into force in 2016 and temporarily suspended family reunification for persons with subsidiary protection status for three years. Family reunification was not suspended for those with refugee status. In this case, the applicants were a mother and her two sons. One of the sons had been granted subsidiary protection in Sweden. Under the Temporary Act, the Swedish authorities refused to grant resident permits on the basis of family ties to his mother and brother who were in Syria. The applicants claimed that by suspending their right to family reunification, the law violated Article 8 of the ECHR. The applicants further complained that the difference in treatment with regard to family reunification between persons granted refugee status and persons granted subsidiary protection status amounted to discrimination prohibited by Article 14 in conjunction with Article 8.

Regarding the alleged breach of Article 8, the ECtHR framed the issue as involving an allegation that Sweden failed to comply with its positive obligations under Article 8, when the Swedish authorities refused the applicants' application for family reunion due to the Temporary Act. The central question before the Court was hence whether the Swedish authorities struck a fair balance between the competing interests of the individual and the community as a whole.

The Court asserted that it had no reason to question the rationale of the waiting period of two years for family reunification, as stipulated by the EU Family Reunification Directive. It noted that in the case being considered, the applicants were in practice only covered by the suspension for a period of less than two years. The Temporary Act also contained a "safety valve," which allowed for family reunification in situations where a refusal would contravene Sweden's commitments in an international convention. The Court upheld that there was no indication that it would not have allowed for an individualized assessment of the interests of family unity, in the light of the concrete situation of the individuals involved. Furthermore, the Court found no indication that such an assessment would not have been carried out in the applicants' case. Accordingly, the Court was satisfied that Sweden had struck a fair balance between the applicants' interest in being reunited and the interest of the community as a whole in protecting the economic well-being of the country through immigration regulation and controlling public expenditure. The Court consequently found no breach of Article 8. The Court also did not consider that there had been a violation of Article 14 in conjunction with Article 8.

5. *Case of Thörn v. Sweden (Application no. 24547/18)*: Article 8 (Right to respect for private life)

The applicant had been convicted and imposed a fine of approximately 520 euros for having produced and used cannabis, which is classified as a narcotic in Sweden. While the applicant had manufactured and used cannabis to treat his chronic pain, he had no prescription for it. The applicant claimed that his conviction violated his right to respect for private life under Article 8.

The ECtHR maintained that the matters of healthcare policy fall in principle within the margin of appreciation of national authorities. It recognized that national authorities are in the best position to assess priorities, use of resources and social needs, as well as to appreciate what is in the public interest on social or economic grounds. Accordingly, the Court will generally respect the policy choice made by the legislature, except when it is "manifestly without reasonable foundation." The Court also noted that a right to health or to a specific treatment are not as such protected by the ECHR. However, applications concerning refusals to access specific treatments or medicines had been examined within the framework of "private life" under Article 8, as its interpretation covers notions of personal autonomy and quality of life.

The Court found that the interference was in accordance with the law and pursued the legitimate aims of "prevention of disorder or crime" and the "protection of health or morals." Concerning the necessity of the interference, the Court maintained that its task was to determine whether, viewing the national proceedings as a whole, the Swedish authorities had struck a sufficiently fair balance between the competing interests. The Court concluded that the Swedish authorities had not exceeded their wide margin of appreciation when striking the balance between the applicant's interest in getting access to pain relief and the general interest in enforcing the system of control of narcotics and medicines. As a result, there had been no violation of Article 8.

6. *Case of Roengkasettakorn Eriksson v. Sweden (Application no. 21574/16)*: Article 8 (Right to family life)

In this case, the central issue at hand was whether Sweden had violated the applicant's right to respect for her family life under Article 8 when the custody of one of her children was transferred to the child's foster parents and her contact rights were limited. The child had been the object of child-welfare measures since she was two weeks old and had lived in the foster home since she was eight months old.

The ECtHR found that the proceedings for and the decision of the transfer of custody entailed an interference with the applicant's and her children's right to respect for their family life under Article 8. The Court also maintained that the interference was prescribed by law and pursued the legitimate aim of protecting the child's health and rights. Regarding the question of whether the interference was necessary in a democratic society, the Court noted that the custody proceedings had been

extensive. It also found no indication that they would not have been conducted in a satisfactory manner or accompanied by safeguards corresponding to the gravity of the interferences and the seriousness of the interests at stake. The national court had also carried out an extensive examination of the child's and the applicant's individual circumstances. The Court found that the reasons given by the national court for its decision to transfer custody and limit the contact rights were relevant. It particularly noted that the decision was not intended to entail a severance of the family ties between the child and her mother and sibling. In addition, the Court maintained that the reasons given by the national court showed that it strove to strike a reasonable balance between the competing interest at stake, while also at the same time being guided by the best interests of the child. Therefore, the Court concluded that the reasons advanced by the national court were both relevant and sufficient.

Moreover, the applicant complained that the national authorities had failed in their positive duty to facilitate family reunification during the period when the child-welfare measures were in place. According to the Court, there was no indication that the national authorities, at an early stage of the process, would have abandoned reunification as the ultimate goal. In addition, the Court noted that the authorities had ensured regular contact between the applicant and the child over the years. The Court determined that no shortcomings in the Swedish authorities' duty to facilitate family reunification could be established. Furthermore, there was no basis for the Court to conclude that the authorities would have overstepped their margin of appreciation when letting the child continue living with her foster family in order to take sufficient account of her best interests. In conclusion, the Court held that after assessing the case as a whole, there was no violation of Article 8.

IV. Looking Ahead

2023 will show how the Tidö Agreement that establishes the basis of Swedish government politics holds in practice – both as regards the political cooperation between its parties and the constitutionality of the policies contained in it. Another key issue to pay attention to is the progress of Sweden's NATO membership process. At the time of writing this report, Sweden still lacks the approval of Turkey and Hungary in order to become a NATO member. Above all, the charged relationship between Sweden and Turkey has led to a constitutional-level conflict between freedom of expression and national security following the instances of burning the Quran that attracted attention internationally.

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Switzerland

Johannes Reich, Professor of Public Law, Environmental Law, and Energy Law, University of Zurich

I. Introduction

1.Contested Neutrality amid Russia' Military Attack on Ukraine

1.1. Secluded Neutrality as Part of Switzerland's National Identity

For much of the 20th and 21st centuries, Switzerland cultivated a self-perception of being a detached spectator of the events taking place on a distant world stage. *'Stillesitzen'* – 'sitting still' in German – amid the wars and upheavals beyond its borders has amounted to Switzerland's principle of conduct for centuries. Nothing illustrates this more emblematically than the Swiss federal government's official reaction – or the lack thereof – to the fall of the Berlin Wall. On 10 November 1989, *Lorenzo Schnyder von Wartensee*, a career diplomat and the official spokesperson of the Swiss Federal Department of Foreign Affairs (FDFA), was approached by journalists asking for a statement by his superior, *René Felber.* Mr. *Felber* was the member of the Federal Council, the executive branch of the federal government, heading the FDFA and as such responsible for Switzerland's foreign policy. Still, Mr. *Schnyder von Wartensee* declined the journalists' request, stating that it would be 'impossible for Federal Councilor *René Felber* to comment on each and every political event', as, after all, 'something important' would happen 'almost every day.'[1] This deliberate seclusion from world politics is deeply intertwined with the country's longstanding commitment to permanent and armed neutrality. Over the course of the 20th century, neutrality has evolved into 'a national myth of almost religious consecration'[2]. Between 2012 and 2022, 95 percent of the Swiss were, on average, in favor of maintaining neutrality.[3]

1.2. Instrumental Character Neutrality and its Gradual Erosion

Over the past three centuries, neutrality has played a crucial role for Switzerland as a small multilingual and multi-denominational republic surrounded by hegemonic neighbors routinely waging wars against each other. Neutrality has been instrumental in avoiding internal strife between the German, French, and Italian linguistic communities, in preserving Switzerland's independence amid the conflict between the neighboring great powers, in maintaining vital trade as a small and open economy without natural resources, in contributing to sustaining the balance of power in Europe, and in providing humanitarian aid and good offices (mediation, protecting power mandates, host state) to the international community.[4]

With the end of the Second World War, the value of these five functions has considerably eroded. The end of the Cold War, epitomized by the fall of the Berlin Wall, and European integration, bringing an end to Franco-German enmity (German: *'Erbfeinschaft'*), rendered both the integrating effect of neutrality in domestic politics and Switzerland's contribution to the balance of power in Europe almost obsolete. The proliferation of advanced long-range weapons systems has further reduced Switzerland's capacity to autonomously defend itself. To conduct an entirely independent trade policy, including maintaining the 'courant normal' with parties to an international armed con-

flict, is increasingly associated with often untenable diplomatic costs.

The invasion and occupation of parts of Ukrainian territory by the Russian Federation on 24 February 2022 delivered a further blow to the viability of neutrality. The Federal Council immediately condemned Russia's military attack as 'a serious violation of international law', and, on 28 February 2022, adopted most European Union (EU) sanctions against Russia and Belarus. The Federal Council, at the same time, stressed that Switzerland, in line with its commitment to permanent neutrality under international law, would continue to comprehensively respect all obligations of neutral powers (rf. II/1). It has since proved increasingly challenging for Switzerland not to be mistaken for a free rider but to credibly convey to its partners that it is, owing to its neutrality, uniquely well placed to make a distinctive contribution to peace and security in Europe.

II. Major Constitutional Developments

1. Neutrality under International Law

In the Treaty of Paris of 1815, Switzerland's perpetual neutrality was recognized under international law based on mutual declarations by Switzerland and the 'Great Powers' (Austria, France, Prussia, Russia, United Kingdom). The law of neutrality is primarily governed by the 1907 Hague Conventions V[5] and XIII[6] and international custom. On this basis, a neutral state is under an obligation to refrain from participating in any international armed conflict. It is barred from favoring either party of such conflict, whether with its own troops, by the supply of armaments, or by making its own territory or airspace available to either party. A neutral state must also refrain from entering into any obligation compromising its commitments in the event of an international armed conflict. Joining the 'North Atlantic Treaty Organization' (NATO), a military alliance based on the guarantee of mutual military assistance would therefore be irreconcilable with Switzerland's commitment to neutrality. Neutrality applies exclusively to international armed conflicts between states. It, therefore, does not apply to internal armed conflicts ('civil wars') or measures authorized by the United Nations Security Council under Chapter VII of the UN Charter for the maintenance or restoration of international peace and security, nor does it preclude a neutral State from defending itself against an armed attack by another state, either alone or in cooperation with third states.

2. Neutrality According to the Constitution: a 'Political Directive'

The Swiss Federal Constitution[7] mentions 'neutrality' only twice: It authorizes the Federal Assembly (parliament) and the Federal Council (federal executive branch), respectively, to take measures to safeguard Switzerland's 'external security, independence, and neutrality'[8]. In contrast, neither the article on the 'purpose' of the Swiss Federation nor the clause on Switzerland's foreign policy goals make mention of 'neutrality'.[9] This omission is deliberate. When drafting the first Federal Constitution of 1848, the Diet *('Tagsatzung')*, the congress of the envoys of the cantons, refrained from granting 'neutrality' constitutional status.[10] The majority argued that neutrality was 'currently' an appropriate 'means to an end' (*'Mittel zum Zwecke'*) to 'preserve Switzerland's independence' and should, therefore, remain a mere 'political directive' (*'politische Massregel'*).[11] For similar reasons, neither the Federal Constitution of 1874[12] nor the current Federal Constitution of 1999[13] accord constitutional protection to neutrality. The two constitutional provisions authorizing the legislative and the executive branch each to take measures to safeguard 'neutrality' are thus of a purely *procedural nature*: They grant both authorities the right to take measures to uphold Switzerland's neutrality without committing the country to remain permanently neutral in international armed conflicts.

3. Neutrality – Awaiting a Late Yet Painful Awakening?

The international law of neutrality has its origins in the age of imperialism, when wars of aggression were considered, to allude to *Carl von Clausewitz*'s definition of 'war', a legally sanctioned 'mere continuation of politics by other means'[14]. Consequently, to adhere to the fundamental principle of neutrality under international law – to impartially treat all belligerents in the same manner[15] – was not only legally permissible but, for the most part, also morally defensible. Owing to the United Nations Charter of 1945 prohibiting the use of force and establishing a system of collective security, this assessment no longer holds unreservedly true. Inaction or blockade of the Security Council can place a permanently neutral power in the dilemma of having to treat both belligerents in a war of aggression in the same way. Russia's military aggression in Ukraine made this abundantly clear. However, despite growing international pressure, neither the Federal Assembly nor the Federal Council has shown much inclination to come to a conclusion as to whether or not neutrality remains an appropriate concept for safeguarding Switzerland's national interests. This hesitant, sometimes wavering, approach carries the risk that the country will have to belatedly adjust its position due to untenable external pressure, as illustrated by Switzerland's unilateral abandonment of its banking secrecy law in 2014. This would attest to an observation by *Denis de Rougemont*: 'The Swiss gets up early but wakes up late.'[16]

4. Constitutional Amendments

In 2022, two proposed constitutional amendments were approved at the ballot box – one prohibiting 'any form of advertisement for tobacco products reaching children and young people'[17], another raising the rate of the value-added tax to fund old-age insurance.[18] The higher tax rate was tied to the increase of the retirement age for women from 64 to 65 by 2028, the latter having been approved in a separate referendum. Increased support to 'Frontex', the European Border and Coast Guard Agency, and an opt-out system in the realm of organ donation (i.e., organ donors are those who have not expressed their opposition to donating their organs) were approved in referendums on federal statutes.[19]

III. Constitutional Cases

1. 'Laïcité' – Constitutional Secularism in France and the Swiss Canton of Geneva

On 26 April 2018, Geneva's *'Grand Conseil'*, the Canton of Geneva's parliament, adopted the 'Act on *Laïcité* of the Canton' ('Geneva *Laïcité* Act').[20] On 10 February 2019, the Act was approved in a referendum. The Act commits members of the executive and judicial branches, both while performing official functions and interacting with the public, and members of parliament, when sitting in plenary sessions and during official representations, to 'refrain from indicating their religious affiliation verbally or by visible signs' (by, e.g., wearing a kippah, an Islamic headscarf, a Sikh turban, or a necklace with cross pendant). The Act, furthermore, holds that religious events must be held on private property. Permissions to use the public domain may only be granted 'exceptionally'.

On appeal by a Muslim association, the Geneva Constitutional Court *('Cour de Justice')* set aside the clause committing members of parliament to neutrality on religious matters but upheld the remainder of the 'Geneva *Laïcité* Act'. It was, therefore, on a further appeal for the Swiss Federal Supreme Court to decide on the constitutionality of the other clauses of the Act.

The Geneva Constitution characterizes the Canton of Geneva as being *'laïque'* (loosely translated as 'secular') and commits the latter to 'neutrality in religious matters'.[21] This constitutional obligation is seemingly reminiscent of the French Republic's concept of *'laïcité'* (adjective: *'laïque'*). The neologism, which doesn't lend itself to an accurate translation, refers to a distinctive form of constitutional, at times combative and anti-clerical secularism with traits of a civil religion stemming from a republican notion of civic equality, according to which rights and duties of citizens within the French Republic are determined irrespective of a person's adherence to a particular religious or ethnic group or his or her denominational, ethnic, or private identity.[22] In order to provide for civil equality, the citizen is thus facing 'the Republic' *('la République')* or 'the nation' (*'la nation'*) in the guise of a 'natural person', stripped of all individual or group-specific characteristics such as ethnicity, origin, religious affiliation, or gender identity. Therefore, France's constitutional concept of *'laïcité'* not only prohibits official recognition or support of any religious denominations but precludes religious exemption from duties ascribed in general applicable laws. It is, therefore, legally permissible to both bar students in public schools from wearing symbols 'ostentatiously' demonstrating religious affiliation[23] and to prohibit displaying the Christmas nativity scene within the confines of public buildings, seats of public authorities, or public services.[24]

2. Federalism and Freedom of Religion: Constitutional Architecture to Mitigate Confessional Strife

Firmly banishing religion to the private sphere on account of *'laïcité'* under the umbrella of an 'indivisible, secular, democratic, and social republic'[25] constitutes a distinctively French, and at times, a decidedly combative approach to overcoming religious tensions, particularly with the Roman Catholic Church. In Switzerland, to which Geneva acceded in 1814 after it had been annexed to France in 1798, the confessional strife between Catholics and Protestants formed the dominating cleavage in the political realm from the Protestant Reformation of the 16th century until the late 20th century.[26] In 1847, tensions between liberal-Protestant and conservative-Catholic cantons erupted in a brief civil war in which an alliance of conservative cantons suffered a resounding defeat.[27] The first Swiss Federal Constitution of 12 September 1848 converted the Swiss Confederacy into a federal state while seeking to accommodate the defeated Catholic cantons.[28] The ensuing constitutional architecture has remained in place ever since: freedom of creed and conscience as an individual constitutional right, adequate basic education, both free of charge and religiously neutral, as an enforceable social right, and the relationship between church and state as a matter for each of the 26 cantons to legislate upon (federalism).[29] In most cantons, at least the Reformed Protestant and Roman Catholic congregations still hold a distinctive status under public law, granting them the right to collect church taxes, often from individuals and corporations alike, through the state tax returns.[30] In contrast to this model of *parity* between the Protestant and the Roman Catholic Church, Geneva is one of only two cantons separating church and state.

3. Geneva Constitution: 'Laïcité' of Its Own Kind

Although the Geneva Constitution describes the Canton of Geneva as *'laïque'*, it also states that its coat of arms, which combines a black eagle with a 'golden key on a red background', is surmounted by 'a sun (...) bearing the trigram IHS in Greek letters', and defines the phrase '*post tenebras lux'* (Latin for 'light after darkness') as its official motto.[31] The golden key refers to the former bishopric of Geneva (ca. 400–1569), 'IHS', the most common Christogram in medieval Western Europe, denotes the first three letters of Jesus' name in Greek ('ΙΗΣΟΥΣ'), while '*post tenebras lux*', deriving from the Book of Job, had originally been the motto of Calvinism – the strand of Protestantism associated with Geneva's *Jean Calvin* (1509–64) – and was later adopted as a maxim of the entire Protestant movement.

The religiously saturated symbolism and the commitment to secularism, both enshrined in the same Geneva Constitution of 2012, suggest a different meaning of *'laïcité'* from the French concept. The political debate on secularism during the *'Belle Époque'* (1864–1914) in the Third French Republic (1870–1940), culminating in the 'Act on the separation between Church and State' of 1905, had an often combative undercurrent directed against ultramontane Catholicism.[32] In contrast, the *'Kulturkampf'* gradually ebbed and subsided in Switzerland after 1874.[33] The French controversy on *'laïcité'* with its anti-clerical overtones hence was, despite the proximity in terms of time and geography, 'strangely absent' in the political debates on the role of religion in the Canton of Geneva.[34] The reasons for Geneva to abandon its centuries-long tradition of the Calvinist-Protestant Church as the established church in favor of a separation between church and state in

a referendum held on 30 June 1907 were, therefore, quite different from the anti-clerical rationale dominating the debates in the Third French Republic around the same time. Not only were tensions within the Protestant 'Geneva National Church' mounting, but the municipalities around the city of Geneva, transferred from Sardinia-Piedmont and France to the new Canton of Geneva at the end of the Napoleonic Wars in 1815/6, were, unlike the overwhelming Protestant city, predominantly Roman Catholic. The separation of church and state was thus, in large parts, designed to pacify intra-confessional and inter-confessional strife alike – within the established Protestant Church on the one hand and between the urban and the rural parts of the canton on the other hand that is. Since 1907, religious communities in the Canton of Geneva are, thus, established as organizations under private law. Contrary to the French concept of *'laïcité'*, Geneva, however, did neither sever all ties to religious communities nor does it purport to be 'blind' to their existence. The Canton may, based on the 'Geneva *Laïcité* Act' itself, even grant administrative assistance to communities of faith by collecting 'voluntary religious contributions' from taxpayers on their behalf.[35]

Seen through this lens, the 'Geneva *Laïcité* Act', while preserving the distinctive notion of *'laïcité'* under the Geneva Constitution, drew it closer to the French concept, as it bears some of the latter's characteristics: It is not only skeptical if not outright hostile towards religion but seeks to banish visible expressions and activities of faith firmly to the private sphere.

4. Pitfalls of a Purely Textualist Approach to Constitutional Concepts in Comparative Law

The Federal Supreme Court, when assessing whether the 'Geneva *Laïcité* Act' was in line with the guarantee of freedom of creed and conscience according to the Federal Constitution,[36] glossed over such differences between the French and the Geneva Constitution. Relying exclusively on the text of the Geneva Constitution, the Court claimed that 'the "Geneva approach"' to freedom of religion was 'analogue' (i.e., 'similar' or 'analogous') 'to France' and insisted that Geneva 'attached great importance to the *laïcité* [secularity] of the Canton'. This, the Court stated, would guide its assessment of the 'Geneva *Laïcité* Act'.

Meanwhile, both the Canton's religiously charged symbols (coat of arms and motto) and the administrative assistance offered to communities of faith for the collection of 'voluntary religious contributions', as provided for in the 'Geneva *Laïcité* Act' itself, remained unmentioned in the ruling. Instead, the Court stressed the allegedly 'strict' *('stricte')* or 'very strict' *('très nette')* separation of church and state in the Canton of Geneva no less than five times in its decision. Against this backdrop, the Court argued that *'laïcité'* would, in the Canton of Geneva, constitute a paramount public interest. It was, according to the Court's judgment, therefore, of utmost importance to avoid giving the impression to the public that members of the judiciary or the executive were influenced by their religious beliefs in the performance of their official duties, even though, as the Court conceded, it was 'to some extent inevitable' that officials would base their decisions on 'their philosophical or religious world view', either consciously or 'without being aware of it'. The infringement on the freedom of creed and conscience caused by the prohibition of civil servants to wear any visible sign of their religious beliefs when carrying out their official duties, as provided by the 'Geneva *Laïcité* Act', was considered by the Court to be 'relatively weak' *('relativement faible')*, as the persons concerned were still able to wear their kippahs or crucifix necklaces either at work, when not in contact with the public, or during their leisure time.

For these reasons, the Federal Supreme Court found the provisions of the 'Geneva *Laïcité* Act' in question to be proportionate and, as a consequence, in line with the Federal Constitution, provided that the Geneva authorities refrained from applying them in an 'excessively rigid' manner.

5. Religion as 'Culture' and Courts' Vanishing Religious Literacy

It is not without glaring irony that the very judgement of the Federal Supreme Court, which insisted on the importance of a religiously neutral appearance of officials during public interaction, upheld the previous judgement of the appellate court – the Geneva *Court de Justice* – which, like all official documents of the Canton, bore the coat of arms of Geneva, i.e., both the Christogram 'IHS' and the motto '*post tenebras lux*'. From this point of view, the Court, instead of upholding strict religious neutrality, may have given its constitutional blessing to a peculiar form of secularism that is either blissfully ignorant of its religious roots and their enduring symbols or perceives them as nothing more than 'culture' – historical traditions that have lost their religious significance. The premise that religious precepts and symbols can indeed be stripped of their religious core and transformed into mere ethical 'values' or signs of 'culture' and 'tradition' is itself highly questionable. However, it is one thing to accept a religious symbol such as a crucifix as 'a tradition' in line with the European Court of Human Rights' *Lautsi*-decision[37], but quite another to even fail to discern and legally assess the religious character of official symbols such as the coat of arms of a public body, while at the same time insisting on the importance of the religiously neutral 'appearance' of state officials. Moreover, the Court's insistence on the 'relatively weak' infringement of the prohibition on officials wearing visible signs of their faith, due to its limited duration, overlooks the nature of most religions as comprehensive systems of values, beliefs, and obligations that do not allow for selective exemptions. Wearing a kippah, hijab, or monk's robe is, therefore, often part of a person's identity and not merely a leisure activity.

6. Conclusion: Requisite for Judges in a Secular Democracy to be Literate in 'Religious Grammar'

The case may thus hold two important lessons within the Swiss constitutional realm and beyond. First, assessing and comparing constitutional concepts such as *'laïcité'* on a purely *textual basis* is prone to misleading conclusions. Second, in order to properly adjudicate cases involving freedom of creed and conscience, it is incumbent upon judges to master the 'grammar of religion'. In other

words, in order to assess acts, expressions, and symbols under constitutional law, judges must be adept at discerning their possible religious connotations. The Federal Supreme Court's decision suggests that such religious literacy is waning in increasingly secularized societies, where the formerly dominant religion or denomination is perceived as a mere 'tradition' or 'culture'.

IV. Looking Ahead

Elections for all 246 seats in the Federal Assembly with its two chambers will be held on 22 October 2023. The Federal Assembly will elect the seven members of the Federal Council, the federal executive, at the first sitting of the new parliament in December 2023.

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Taiwan

Jau-Yuan Hwang, *Justice, Constitutional Court, Taiwan*

Ming-Sung Kuo, *Reader in Law, University of Warwick, UK*

Hui-Wen Chen, *Research Assistant, University of Warwick, UK*

I. Introduction

2022 was a momentous year for Taiwan's constitutional landscape. In contrast to 2021 being the year of transition, 2022 marked a significant constitutional moment for Taiwan in three aspects. First, the process of formal constitutional reform eventually progressed after a long hiatus of constitutional revision following the amendment of constitutional amendment procedures in 2005—only to see itself end in a failed referendum. If the development of formal constitutional reform suggested a long-awaited constitutional movement since 2005, the formal constitutional amendment's failure to clear the threshold for ratification by referendum in November served as evidence to the year 2022 being a failed constitutional moment.

Even so, the year 2022 remained constitutionally momentous. As the inaugural year of the new Constitutional Court Procedure Act (CCPA), 2022 was the year in which the Taiwan Constitutional Court (TCC) entered a new era of constitutional review. It is also noteworthy that the year 2022 was a constitutional moment in the Schmittian sense: With Taiwan's existential threat—China's sovereignty claim over Taiwan—brought to the foreground by China's military drills in the wake of Ms. Nancy Pelosi's—the Speaker of the U.S. House of Representatives as of 2022—visit to Taiwan in August, Taiwan saw a tectonic shift on the *nomos* of its geopolitical situation as the meta-constitution,[1] casting a long shadow over Taiwan's constitutional politics with implications to the agenda of constitutional reform.

II. Major Constitutional Developments

1. Constitutional Amendment in a New Geopolitical Landscape[2]

On November 26, 2022, the Taiwanese people had their authentic constitutional voice heard for the first time in history by casting votes in a referendum on a constitutional amendment. This referendum would lower the age of voting from 20 to 18, as well as reducing the age of candidacy from 23 to 18, unless as otherwise provided by the Constitution or legislation. Instead of rewriting the Republic of China Constitution 1947 (hereinafter the Constitution)—the official title of Taiwan's working constitution—by expanding suffrage and political participation, the amendment was not ratified by the referendum. Since it failed to pass the threshold as stipulated by the Constitution, the amendment was unsuccessful. According to the Additional Article 12 of the Constitution, in order for a constitutional amendment passed by the Legislature Yuan to receive popular ratification, it is necessary that an absolute majority of the eligible voters must cast their ballots in favor of the amendment in a referendum. Thus, for the amendment to succeed, approximately 9.2 million ballots must be cast in its favor in the referendum in November. Yet, it only received approximately 5.6 million ballots in favor, although 53% of the voters—with the voter turnout at 59%—casting their ballots supported the amendment. Falling far short to meet the threshold for the ratification of the constitutional amendment, the process of constitutional reform set in motion by Taiwan's unicameral

parliament, the Legislative Yuan, eventually went nowhere.

As suggested above, the referendum is not the only procedural hurdle that a constitutional amendment must overcome to be successful. According to the Additional Article 12 of the Constitution, before a constitutional amendment is put to a referendum for ratification, it must pass the parliamentary phase with the support of at least three-fourths of the Legislators (MPs) present at a session of the Legislative Yuan attended by at least three-fourths of all Legislators. Also, under the same provision, a bill to amend the Constitution (including the Additional Articles of the Constitution) can only be introduced with the support of at least one-fourth of the total membership of the Legislative Yuan. Due to this super-majoritarian requirement, a bill to amend the Constitution that falls short of cross-party support virtually has no chance of getting past the parliamentary phase. Due to the lack of consensus in the face of China's threat to suppress any perceived move by Taiwan towards independence *de jure* through the use of force, the controversial preamble to the Additional Articles of the Constitution, which indicates aspiration to the reunification of China and Taiwan, was left untouched.

In fact, from out of numerous and versatile proposals initiated by individual Legislators and party caucuses as we reported before—ranging from the replacement of the current Five-Power Government system with a better separation of powers design (including the establishment of an independent National Human Rights Commission) and the amendment of constitutional amendment procedures to the recognition of human dignity and animal welfare—emerged only the single-issue bill aimed at expanding suffrage and political participation as a constitutional amendment to be ratified by referendum in November. Apart from the supermajority requirement in the parliamentary phase and the absolute-majority threshold for ratification in the referendum, the Additional Article 12 of the Constitution provides that at least six months must elapse between the parliamentary passage of a constitutional amendment and the ratification referendum. This provision explains why the Legislative Yuan adopted the constitutional amendment on March 25, while the referendum did not take place until late November.

As lowering the age of voting had been widely discussed before it was formally placed on the agenda of constitutional reform, the cross-party support it commanded—as manifested in the tally of the Legislators' votes on the relevant bill that became the constitutional amendment—came as no surprise. Riding on President Ing-Wen Tsai's landslide victory in the general elections of 2020, the societal impetus for constitutional reform—as suggested in the manifold proposals for constitutional reform above—was not lacking.[3] Thus, the failure of such a consensus-based, cross-party constitutional amendment to clear the ratification threshold in the referendum, which was held simultaneously with local elections, has raised questions about the amendability of Taiwan's Constitution,[4] the requirement role of deliberation and referendum in constitutional amendment, and the status of the Taiwanese people's constituent power.[5]

2. Constitutional Review in the Dawning Era of the Constitutional Court Procedure Act[6]

As stated before, the new CCPA that was enacted and then gazetted on January 4, 2019, would come into effect in 2022. As a result, constitutional review in Taiwan entered a new era on January 4, 2022—the commence date of the CCPA. The CCPA comprises 95 articles, providing for, *inter alia*, procedural rules governing the TCC jurisdiction over constitutional interpretation, uniform interpretation, the impeachment of president and vice president, and the dissolution of unconstitutional parties as mandated in the Constitution.

Without repeating what has been reported in the Year in Review series, three core features of the CCPA bear emphasis again to shed light on the new world of constitutional review that the TCC has found itself in. First, the TCC's role in the protection of individual rights is accentuated through the judicialization of its proceedings. Not only is the antiquated Council of Grand Justices removed from the official name of the TCC, but the TCC's Interpretations and Resolutions are reclassified as Judgments and Orders, respectively, under the CCPA. More importantly, while the jurisdiction to issue advisory opinions has been abolished, the CCPA grants the TCC new jurisdiction over constitutional complaints concerning individual final court decisions or legal provisions applied in such court decisions modeled after the German Federal Constitutional Court (GFCC). Paralleling the focus on the protection of individual rights in the reform of the TCC's jurisdiction is the emphasis on procedural transparency. In 2022, the TCC held 11 oral arguments—all live-streamed—compared to the mere 18 oral arguments held against a total of 501 Interpretations from February 1993 to December 2021 under the old Constitutional Court Interpretation Act (CCIA). This indicates a substantial increase in the conduct of oral arguments in open court under the new CCPA.

The CCPA's second feature is the removal of the supermajority requirement in constitutional interpretation. Under the old CCIA, rendering a general interpretation of constitutional principles or deciding on the constitutionality of statutes required a two-thirds majority of the attending Justices, with a quorum of two-thirds of the total membership of the TCC. Under the new CCPA, the voting threshold for constitutional decisions (vis-à-vis the impeachment of president and vice president, and the dissolution of unconstitutional parties) is lowered to a simple majority, with the goal of making the TCC's decision-making more efficient. For the CCPA's inaugural year only, the TCC disposed of a total of 3,241 cases, including 20 Judgments, while receiving 4,371 new petitions. In comparison to the year 2022, the TCC rendered 14 Interpretations per year on average, while receiving approximately 600 new petitions per year, during the period 2017-2021.

Another feature of the CCPA is the adoption of the Anglo-American judicial practice of opinion writing in the place of the continental style of impersonal judicial opinions—

as epitomized in the GFCC—under the old CCIA. Under the CCPA, an individual Justice's opinion that is joined by most Justices in a case becomes the opinion of the court, replacing the collective voice as sounded in the CCIA-governed past practice with the new style of majority opinions. Furthermore, as Justices' signatures are attached to the opinion of the court, the author and the majority in each judgment are no longer kept out of public view, making the TCC even more transparent to the public. However, the TCC's road to the "personalization" of the opinion of the court in the new style of judicial writing as established in the CCPA soon hit a snag. In Judgments 2022-Hsien-Pan-03 and -04, the two authoring/reporting Justices of the respective opinions of the court also issued their own concurring opinions, raising issues about the authenticity of judicial opinions.[7]

Notably, the authenticity question brought up by the personalization of the opinion of the TCC was not the only issue arising from the CCPA's implementation. Less than a year after the CCPA came into effect, the Judicial Yuan introduced a bill of amendment on the CCPA before the Legislative Yuan in August 2022. Among the various issues concerning the TCC's implementation of the CCPA as outlined in the explanatory note accompanying the bill are procedures relating to the review of the constitutionality of laws, the scope of legal representation, the participation of interested persons and *amici curiae* in the proceedings, decisions on the admissibility of constitutional petitions, the consolidation of proceedings, the mandatory contents of the TCC Judgments and petitioners' pleadings, and remedies for laws held unconstitutional and invalidated while unaccompanied by a suspension order.[8]

III. Constitutional Cases

Thanks to the jurisdictional and procedural reform of the CCPA, the TCC received a record-breaking 4,371 new petitions in 2022, as compared to the 747 new cases in 2021 and the 634 in 2020, respectively. Among the 4,371 new petitions, 4,342 (99.37%) were filed by individuals and only 29 by public authorities (25 by the courts and four by other governmental agencies). Out of the 4,371 new petitions and additional 387 pending petitions as of the end of 2021, the TCC disposed of a total of 3,241 cases, which included 20 Judgments (with 16 consolidated petitions), two orders on the merit, 3,154 dismissed, and others (*e.g.*, withdrawal). As of the end of 2022, 1,517 petitions remained pending on the docket of the TCC.[9]

The said 20 Judgments included 33 main holdings. While 18 of these holdings upheld the constitutionality of laws, regulations and/or final court decisions reviewed, 15 of them declared unconstitutional the state actions concerned. Along with the 20 Judgments, individual Justices published a total of 85 concurring or dissenting opinions. Among these separate opinions, 42 were concurring, 39 dissenting (in its entirety or in part), and four opinions that were concurring in part and dissenting in part. On average, each Judgment produced 4.25 pieces of separate opinions, as compared to 5.71 issued per Interpretation in 2021.

The said 20 Judgments involved various constitutional issues. Only one Judgment (Judgment 2022-Hsien-Pan-06) was concerned the disputes between the central and local governments. The remaining 19 Judgments all touched upon issues related to individual rights. Among them, one of the Judgments (Judgment 2022-Hsien-Pan-02) dealt with the freedom of speech, one Judgment (Judgments 2022-Hsien-Pan-08) focused on the parental rights of minor children, two Judgments (Judgment 2022-Hsien-Pan-04 and -17) addressed the rights of indigenous peoples, and three Judgments (Judgments 2022-Hsien-Pan-01, -13 and -16) centered on the right to informational privacy. The remaining 12 other Judgments addressed one or more of the following rights: the right to property, right to public service, due process of law and the right to judicial remedy, and bodily freedom. In the following, we will discuss 6 Judgments, namely Judgments of 2022-Hsien-Pan-06, -02, -04, -17, -16 and -08, in more details.

1. Judgment 2022-Hsien-Pan-06: Disputes between the Central and Local Governments on the Competence to Set the Permissible Tolerance for Imported Food Products

In August 2020, Taiwan government decided to allow the import, from 2021 onwards, of pork and pork products containing Ractopamine residue below a then-newly set permissible tolerance. Following this, the Legislative Yuan approved the administrative regulations that revised the permissible tolerance and allowed the import. In response, several local governments passed or revised their local ordinances, adopting a zero-tolerance standard and prohibiting the sale, transportation, and storage of such pork and even beef products in their respective city or county. The Ministry of Health and Welfare (MOHW) and the Executive Yuan immediately annulled such self-government ordinances. In 2021, four local councils, separately, petitioned to the TCC, arguing their local ordinances fell within their respective local-government powers under the Constitution. The TCC granted review and held an oral argument in February 2022. In March 2022, another local council filed a similar petition, which was also granted review by the TTC.

In Judgment 2022-Hsien-Pan-06, the TCC ruled that the central legislative body wielded the power to set national standards of permissible tolerance for Ractopamine in meat products. The standards established by the local governments may not contradict with the national standards. Therefore, invalidation of the said local ordinances by either the MOHW or the Executive Yuan was deemed constitutional.

In the reasoning, the TCC first held that Taiwan is a unitary state, rather than a federal state. The Constitution does give the central government the exclusive and supreme legislative powers over certain matters such as defense, foreign affairs, judicial system, and so on (Articles 107 and 108 of the Constitution). On the other hand, the Constitution does not grant the local governments any exclusive legislative power to any matter. All matters falling within the legislative powers of the local governments are nevertheless subject to the supervision and framework

regulation of the central legislative powers. The permissive tolerance for imported meat products involves the central government's exclusive power to regulate foreign trade, and its superior power to regulate food safety. Domestic transportation and the sale of such products also raise concerns about the free movement of goods within the national territory as guaranteed by Article 148 of the Constitution. The zero-tolerance standard and its accompanied punishments set by the petitioning local governments will definitely create a direct and substantial impeding effect beyond each local government's own jurisdiction, as well as further obstruct the free movement of goods nationwide. For the reasons mentioned above, the TCC declared that the central government had the constitutional power to maintain a nationwide and consistent standard of permissive tolerance for such meat products. Accordingly, the central government may further annul and invalidate those local standards that contradicted the national regulations.

2. Judgment 2022-Hsien-Pan-02: Constitutionality of Court-Ordered Apology

Article 195 of the Civil Code allows the judges to mandate, by court orders, any appropriate measures in order to restore the reputation of defamed victims in a civil action. In practice, a court-ordered apology has been a frequent option requested by the victims and permitted by the court. Nearly all of such apologies were ordered by the court to be published in the newspapers or other types of mass media. In JY Interpretation No. 656 of 2009, the TCC upheld the constitutionality of Article 195 and publication of such court-ordered apologies through mass media. The TCC provided that such public apologies were allowed if they did not involve self-humiliation or degradation of the defendants' humanity.

In Judgment 2022-Hsien-Pan-02, the TCC overruled JY Interpretation No. 656 and declared unconstitutional the practice of such court-ordered public apology as a means of restoring the reputation of individuals. The TCC considered the court-ordered apology a form of compelled speech, which constituted a content-based restriction on the high-value speech. The TCC applied the standard of strict scrutiny and found that such court orders mandating public apologies, regardless for individuals or corporate entities, violated the freedom of speech and were considered unconstitutional. In addition, the freedom of press was further violated in the case of a press ordered to apologize. When an individual was ordered to make an apology, the TCC held that the freedom of conscience was infringed upon as well. In conclusion, the TCC ruled that while Article 195 of the Civil Code was not unconstitutional on its face, any court-ordered public apology shall no longer be regarded as "appropriate measures" for the restoration of reputation under Article 195.

3. Judgment 2022-Hsien-Pan-04: Indigenous Status of Children of Intermarriage between Indigenous and Non-Indigenous People

Article 4, Paragraph 2 of the Act for the Status of Indigenous Peoples (ASIP) provides that "Children of intermarriages between indigenous peoples and non-indigenous peoples taking the surname of the indigenous father or mother, or using traditional names of the indigenous peoples, shall acquire the status of indigenous people." Three petitioners challenged this provision and other related provisions of the ASIP for infringing their right to name and right to equal protection.

The TCC held the impugned provisions were unconstitutional on the ground that they violated both the right to indigenous identity and the right to racial equality. This TCC decision was the first time where either right was cited to strike down a statute. However, the TCC stopped short of recognizing the right to indigenous identity as a collective right for the various indigenous peoples in Taiwan.

In its reasoning, the TCC first referenced the indigenous people's cultural right recognized by JY Interpretation No. 803 as a precedent for acknowledging new unenumerated rights for the indigenous people under Article 22 of the Constitution. The TCC then went on to recognize the right to indigenous identity as another new constitutional right. Upon this basis, the TCC further found the mandatory requirement of carrying the surname of the indigenous father or mother was definitely not the least restrictive means for fulfillment of the legislative purpose of demonstrating or enhancing the indigenous identity. In fact, the naming cultures and traditions of most indigenous peoples in Taiwan do not include the use of any surname at all. The surnames used by many indigenous people in practice have been borrowed from the Han-Chinese people and even imposed by the various governments through history.

On the issue of racial equality, the TCC ruled that the said provisions created a differential treatment between children carrying their indigenous parent's surname and those carrying the non-indigenous parent's surname, even though children of both categories had the same indigenous blood quantum. The surname requirement as mandated by the ASIP was thus arbitrary and bore no rational relation to the legislative purposes. Such a classification definitely failed the standard of strict scrutiny as applied by the TCC in this case.

While declaring the said provisions unconstitutional, the TCC gave the competent authorities a grace period of two years to amend the laws as appropriate. Should the relevant laws not be amended within two years, the said provisions shall cease to be effective. Consequently, the children of intermarriage between indigenous and non-indigenous people will be entitled to register with the government and acquire the status of indigenous people.

4. Judgment 2022-Hsien-Pan-17: Recognition of New Indigenous Peoples

This was the second TCC Judgment on the ASIP in 2022. This case involved the recognition of new Indigenous Peoples on top of the existing 16 Peoples already recognized by the State. A group of individual members of the not-yet-recognized Siraya People brought lawsuits against the government, demanding State recognition of their individual and collective status as indigenous people.

Article 4, Paragraph 1, Subparagraph 2 of the Additional Articles of the Constitution classified Taiwan's Indigenous Peoples into two groups: Plain-land and Mountain Aborigines for the purpose of congressional elections.

Following this classification, Article 2 of the ASIP outlined the general requirements for acquiring either indigenous status: a pre-1945 household registration in either the Plain-land or Mountain Administrative Zones and an individual or lineal membership in the pre-1945 census records during the Japanese rule era. For the Plain-land Aborigines, Article 2 of the ASIP further required their members to have registered their status in accordance with several administrative regulations issued after 1945. The petitioners claimed they or their ancestors were unlawfully and unconstitutionally excluded from timely registering themselves as Plain-land Aborigines after 1945 and demanded to be recognized by the State as members of Plain-land Aborigines now.

In this Judgment, the TCC declared Article 2 of the ASIP unconstitutional for excluding the petitioners and the Siraya People, to which they belonged, from being recognized as Indigenous People of Taiwan. However, the TCC did not accept the petitioners' arguments that aimed at acquiring the status of Plain-land Aborigines. Instead, the TCC found the classification of Plain-land and Mountain Aborigines arbitrary and unfit for official recognition of other Indigenous Peoples, including the Siraya People, beyond the existing 16 Indigenous Peoples. Building upon the above mentioned Judgment 2022-Heisn-Pan-04, the TCC took a step further and formally recognized the right to indigenous identity as both a collective right and individual right of various Indigenous Peoples in Taiwan. The TCC established a set of three requirements (cultural characteristics, ethnic identity, and historical continuity) for the recognition of a new Indigenous People. The Court also required the competent authorities to amend the ASIP within three years to facilitate the registration of individual members of these new Indigenous Peoples. Furthermore, the TCC also instructed the competent authorities, either by *ex officio* or upon application, to start the process of recognizing new Indigenous Peoples immediately.

5. Judgment 2022-Hsien-Pan-16: Access to the National Health Insurance Database

Since 1995, Taiwan has implemented a National Health Insurance (NHI) system. Over the years, the National Health Insurance Administration (NHIA) of the Ministry of Health and Welfare (MOHW) has accumulated a substantial amount of health-related personal data. The NHIA thus established a National Health Insurance Research Database (hereinafter the "NHI Database"). Since 2000, this Database has been accessible, upon application, by academic researchers and institutions. After exhausting ordinary judicial remedies, several individuals from various NGOs petitioned to the TCC to challenge the constitutionality of Article 6 of the Personal Data Protection Act (PDPA) and other relevant provisions that granted access to external users. The Petitioners also argued for a right to opt out from the NHI database and demanded the NHIA cease to grant the external users any access to their personal health data immediately.

In this complicated case involving several constitutional issues of significance, the TCC handed down a judgment that gave the petitioners a partial victory. On the issue of granting the external users access to the NHI database, the TCC upheld the constitutionality of Article 6 of the PDPA to the extent that the accessed personal data had already been de-identified. Nevertheless, the TCC also mandated the government, within three years after the announcement of this Judgment, set up an independent agency for data protection and amend the laws as appropriate in order to better safeguard the personal data. As for the right to opt out, the TCC also demanded the competent authorities amend the existing laws and regulations, within three years, to provide for a comprehensive regulatory scheme on the subjects, reasons, procedures, and effects of such opt-out. If the government fails to amend or adopt a regulatory scheme within three years, any individual may choose to opt out and their health data will no longer be available for any academic research by external users.

6. Judgment 2022-Hsien-Pan-08: Parental Rights of Minor Children

Prior to 2022, the TCC could only exercise the power of abstract review on the constitutionality of laws and regulations, excluding the court decisions. However, this is the first ever case that the TCC exercised its newly added jurisdiction, *i.e.*, constitutional complaint, to review a final court decision and declare it unconstitutional after the implementation of the CCPA in January 2022.

This case was brought by a mother named Ms. Doe, who challenged the constitutionality of an injunction of the Taipei District Court. The injunction required Ms. Doe to hand over her non-marital child to the father, Mr. Roe. The said injunction was issued against Ms. Doe, while the litigation between Ms. Doe and Mr. Roe over the custody of their child was still pending. After the said injunction became final, Ms. Doe filed a constitutional complaint with the aim of stopping Mr. Roe from bringing the child back to his home country, Italy, as allowed by the said injunction.

Within a week after Ms. Doe filed her petition, the TCC first issued its own injunction, stopping the execution of the aforementioned injunction of the Taipei District Court. The TCC proceeded to rule in favor of Ms. Doe by declaring the original injunction unconstitutional and annulling it. The TCC held the court was obliged to hear a child's oral statement in person, either in the courtroom or at another appropriate venue, regarding a matter affecting the child's own interests. The TCC considered this opportunity to speak about a child's right to due process under the Constitution. In this case, the TCC found the child, upon the issuance of the said injunction of Taipei District Court, was able and willing to speak before the court. Therefore, the TCC declared the said injunction unconstitutional for failing to allow the child to speak in person before the court.

Unsurprisingly, this TCC Judgment aroused strong criticisms from many judges and lawyers, either on its outcome or reasoning. The decision's impact on the standards of the TCC's granting review of a constitutional complaint, as well as its effect on the participation of minor children in the court procedure of child custody cases, remains to be seen.

IV. Looking Ahead

The new geopolitical situation of the Sino-U.S. struggle overshadowing Taiwan will see little fundamental change in the year to come, while the implications of the CCPA to Taiwan's constitutional development will continue to unfold. Leading up to the general elections in January 2024, the year 2023 will testify to the significant influence of Taiwan's geopolitics-shaped *nomos* on constitutional politics. Despite the concerns surrounding the meta-constitution, the TCC's continuing implementation of the CCPA is expected to reshape Taiwan's living constitution.

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Thailand

Khemthong Tonsakulrungruang, *Lecturer, Faculty of Political Science, Chulalongkorn University*

I. Introduction

The year 2022 was marked by speculation about a potential general election in Thailand. However, no major constitutional crisis or change occurred during this time. Any amendment proposal was categorically rejected. After nine years in power, the Prayuth administration was nearing its end. While the government's term was initially set to expire in March 2023, bitter infighting within the government could bring its end sooner. The prospect of a general election and a chance to peacefully oust the junta excited Thais and understandably became a dominant topic of conversation. However, this optimism about an election was unrealistic as Prayuth had no plan to leave politics. He introduced a new electoral rule that would hopefully favor his party. Moreover, beyond Prayuth, the conservative elites still controlled several state mechanisms, notably, the Election Commission (EC) and the Constitutional Court, which could alter the result of an election. Consequently, a general election may not bring as much political change in Thailand as the people expect.

Excitement about an election distracted the public from the worsening situation of rights and liberties in Thailand. By 2022, the government successfully suppressed the youth movement. There were no major street protests but sporadic and symbolic displays of resistance remained prevalent. The government tried to step up its attempt to reduce freedom of expression with the introduction of criminal charges and regulation. The judiciary consistently failed to safeguard the people's freedom of expression. Furthermore, the judiciary seemingly colluded with the government in silencing critics of the establishment.

II. Major Constitutional Developments

Two major developments are discussed below. First, Thailand is preparing for an upcoming election. Preparation includes a new set of rules. However, despite being in power for eight years, Prayuth's administration was not prepared at all for the election, resulting in an unsmooth preparation process. The second development concerns freedom of expression, especially the use of lese majeste and the judiciary's compromised independence.

1. New rules for the 2023 election

While the new electoral rule was introduced in 2021, the EC and the House of Representatives spent the entire year of 2022 struggling to legislate the new organic law that would provide details of the new rule.

The 2017 electoral system was unpopular partly because it produced a fractious House. Using only one ballot to determine seats for both constituencies as well as a national party list, the rule penalized a popular party by deducting a party list seat it had won in a constituency.[1] The design favoured smaller parties and induced an unstable government coalition. The 2021 amendment reintroduced the popular two ballots system with 400 constituency MPs and 100 party list MPs, a system first introduced in 1997.[2] The party list favored a few larger parties, potentially resulting in a less fractious House and a more

stable cabinet. This amendment is the latest development in Thailand's constitutional oscillation between the dream of a diverse, yet weak, House and the need for stable politics and strong leadership.

According to the 2017 Constitution, an amendment needs approval from at least one-third of the opposition.[3] This sets the bar very high as Thai politics has been deeply politicized. However, Pheu Thai (PT), the largest opposition party, voted in favour of the proposal which could benefit PT in the next election. The amendment was passed in 2021; however, in 2022, Prayuth spent time trying to sabotage the Constitution Drafting Committee (CDC), which was responsible for preparing an organic law implementing details of the new electoral rule. In late 2021, as Prayuth's popularity declined, PPRP faced a mutiny when several MPs tried to have the prime minister replaced.[4] Although Prayuth survived the mutiny, it triggered a mass defection to other more promising parties. As a result, the PPRP shrank into a small party with little prospect of winning a constituency contest. The 2021 electoral rule no longer benefitted Prayuth, so he proposed a radical formula for party list MP calculation.

The CDC adopted the parallel counting formula where the constituency and party list MP seats are each calculated independently. This parallel counting formula is simple and had previously been used in the 1997 electoral system. Prayuth proposed that the counting must be based on the total votes, but several party list seats must then be deducted by constituency seats.[5] In other words, Prayuth is pushing the new electoral system back to the unpopular 2017 system through an absurd formula. His proposal was supported by several smaller coalition parties. In response, the PPRP and PT countered such proposals by not attending any House meeting regarding the organic law. As a result, the House was prematurely adjourned at times due to the lack of quorum. Observers were concerned about the delay, because if Prayuth decided to dissolve the House, Thai politics would be caught in constitutional limbo where the constitution had already been amended, but without the proper by-laws needed to implement the amended rule. In the end, the House missed the deadline of 180 days to pass the organic law, so the CDC's draft became effective as the default choice.[6] The Constitutional Court approved the CDC's draft in November 2022.[7]

The amendment and the organic law are two initial steps taken by politicians to reclaim an electoral design from the military. These steps aim to introduce friendlier and more sound rules that could effectively eliminate smaller insignificant parties from the race creating a less fractious and more stable government. But will this be enough to restore democracy? The new voting system may not guarantee a free and fair election. The Election Commission, which is responsible for holding an election and adjudicating electoral disputes, is heavily under the influence of the anti-democratic elites. Ultimately, this influence prevents the Commission from acting as a fair umpire.[8] The Constitutional Court could still dissolve a political party for minor mistakes.[9] While Prayuth may have lost his grip on power, the anti-democratic elites could always find an alternative to maintain their dominance.

2. Lese majeste

The aftershock from the 2019 protest calling for a monarchical reform is the massive outburst of discussion about the monarchy. Consequently, numbers of lese majeste cases dangerously rose to over 200 cases involving more than 225 individuals, the highest record ever, without a sign of abating.[10] In addition to law enforcement officers, right-winged vigilantes, partially endorsed by the state, conducted massive surveillance and witch-hunts. Some cases were strategically planned, where a vigilante intentionally filed a criminal complaint at a remote province. This forced accused individuals to unnecessarily spend a huge sum of money travelling.[11]It is significant to note that many of these accused individuals were minors,[12] and at least in one case, there was a mentally challenged person.[13]

The issue of lese majeste is a minor part of a much more significant problem of declining freedom of expression in general. Lese majeste is often accompanied by the implementation of national security law such as the computer crime act and the emergency decree, which was originally intended to control the COVID-19 pandemic. There are almost 1,200 cases against political dissidents, with 870 cases pending.[14] In the year 2022 alone, 185 additional cases were added. Beyond a criminal case, the police employed extra-legal tactics to intimidate activists such as a house visit, public shaming, and direct intimidation. Some suspects were tricked into confessing and surrendering their mobile phone devices in the presence of attorneys. While theoretically, both the police and the public prosecutor offices set up a screening committee, they rarely dropped a case.

Among 33 cases that the court decided in 2022, more than half resulted in a conviction.[15] However, a closer scrutiny displayed a confusing picture. Some judges correctly reasoned their acquittal that lese majeste did not cover previous kings, e.g., King Bhumibol.[16] However, their compatriots arbitrarily expanded the scope of lese majeste to cover the whole royal institution. This discrepancy showed a pattern, with younger judges displaying more professionalism, while senior judges are inclined to be more heavy-handed, denying bail, ignoring a reasonable doubt in evidence, expanding the reading of the law, and giving harsher sentences. The court of justice seems to struggle with the lack of professionalism and independence. While some judges are guided by personal ideology, others might even be influenced by superiors.

The rise in lese majeste cases sparked a difficult debate among parties. While the people call for change, there are only a few parties that wish to upset the palace.[17] The government blocked attempts to formally debate about the law in the House. Furthermore, anyone who mentions a reform or criticizes the law faces a lese majeste charge themselves, suggesting that lese majeste has reached the status of an eternal clause in the Thai constitutional law.[18]

III. Constitutional Cases

There were fewer mega-political cases in the Constitutional Court as the Court had already

cleared most hurdles for Prayuth over the past four years. Attention shifted to the Court of Justice where political cases were tried.

1. *Constitutional Court Decision 14/2565 (2022)*: The prime minister's term limit

The 2017 Constitution imposes a term limit of 8 years on a prime minister to prevent the possibility of parliamentary dictatorship. According to Section 158, Paragraph 4, the Prime Minister shall not hold office for more than eight years in total, regardless of whether the terms are consecutive or not. This limit is even more stringent compared to the 2007 Constitution. The new term limit mandates that all time serving in the prime ministerial office must be counted towards the total limit. Alternatively, the previous limit only preventing holding office for more than two consecutive terms.

Prayuth staged a coup on May 22nd, 2014. The National Council of Peace and Order (NCPO), as the junta was known, appointed the National Legislative Assembly which voted Prayuth as prime minister in August 2014. Prayuth oversaw the drafting of the new constitution which was later promulgated on April 6th, 2017. The transitional clause recognized the Prayuth administration as a legitimate government even though it came from an unconstitutional origin.[19] Under the 2017 Constitution, the general election took place in March 2019 and after an extended period of negotiation, the Senate and the House voted Prayuth as prime minister on June 9th, 2019.

Thus, Prayuth has been a prime minister under three different circumstances. First, from August 2014 to April 2017, his office was sanctioned by the 2014 Interim Charter. Second, from April 2017 to June 2019, the transitional clause in the 2017 Constitution recognized him as a lawful prime minister despite his unconstitutional origin. Lastly, he was duly appointed as prime minister according to procedures as decreed by the 2017 Constitution. As his term approached August 2022, a question arose regarding whether Prayuth would reach the 8-year term limit. The issue is about which date Prayuth became a prime minister under the 2017 Constitution. While the public speculated that it was August 2014, Prayuth insisted his term began in June 2019.

Prior to the ruling, the Constitutional Court, upon finding that a complaint had a reasonable ground, ordered Prayuth to temporarily suspend his performance as PM. Although the Constitutional Court did not specify any particular reason or evidence to support its ruling, the vote in favor of the decision was 5-4.

However, nearly a month later, in the 6-3 decision, the Constitutional Court found that Prayuth had not exceeded the 8-year term limit.

The main debate in this case focuses on the interpretation of Section 158. The opposition produced a record from the meeting of the Constitution Drafting Committee (CDC) when they were preparing a guideline about the purpose of the constitution. In the 500th meeting held on September 7th, 2021, Meechai Ruechupan, the president of the CDC, asked if a term prior to the promulgation of the 2017 Constitution should be considered along with the term after the promulgation. No CDC member objected to such an interpretation, and the meeting record was adopted. The guideline itself clarifies that the 8-year term does not need to be consecutive. The opposition insists that the purpose of the 2017 Constitution is to prevent a monopoly of political power.

In contrast, Prayuth argued that there were two types of prime ministers: junta prime minister and an elected prime minister. A prime minister under the 2017 Constitution should be understood as referring only to a prime minister who is specifically selected according to the 2017 Constitution's procedure. Hence, his time as the 'prime minister' counts only from June 2019 when he was officially voted into the office. His defence is supported by the CDC president's memorandum to the Constitutional Court. Meechai, the very same individual who earlier included all terms, later confirmed that a rule imposing a limit on people's rights was inapplicable to an act prior to the promulgation of the 2017 Constitution. Therefore, Prayuth's term began on April 6th, 2017, the date of the promulgation. Meechai repudiated the validity of the minute of the CDC meeting that the document was misunderstood and incomplete.

The Constitutional Court, in the 6-3 decision, found that Prayuth had not exceeded the 8-year term limit. First, the majority dismissed the CDC's minute as valid authority because it was prepared almost a year after the promulgation of the 2017 charter. More specifically, the minute was not the voice of the CDC, but rather of the individual Meechai. One person's quote should not constitute a reliable source of constitutional interpretation.

According to the Constitutional Court, a prime minister in the 2017 Constitution refers specifically to an office selected in accordance with the 2017 rules. The term prime minister here is very specific. Therefore, Prayuth's time as a junta prime minister does not count as a prime minister under this purpose. Ultimately, the Constitutional Court rejected the dates claimed by both parties. Prayuth Chan-ocha was a prime minister, according to Section 158 since the promulgation of the law in April 2017. Therefore, he had not yet reached the term limit and had three more years remaining in office, until April 2025.

The three dissenters emphasized the purpose of Section 158. They recognized the danger of a prime minister who stays in office for too long providing an opportunity for forging a network of cronies, eliminating check-and-balance mechanisms, and enriching himself. Such danger would enable dictatorship and jeopardize democratic values in Thailand. Section 158 was written in a clear manner to mitigate such danger of political monopoly from a prime minister either from an election or a coup. Unless the 2017 Constitution explicitly prohibits an application of term limit to an incumbent prime minister, Prayuth was still subject to the same restriction.

The case represents the rare incident in which the Constitutional Court dismisses the CDC's explanation in interpreting the Constitution. Typically, the Constitutional Court considers the CDC to be an authority and always summons the drafting minutes to

help with understanding the purpose of the law. However, in this case, the Constitutional Court argues that the minute does not represent the true voice of the CDC.

2. *The Khon Kaen Provincial Court Decision Or. 1001/2565 (2022)*: Lese majeste[20]

This case highlights the tension between the monarchy and a significant portion of Thais who were demanding a reform of the royal institution. In recent years, the Chakri dynasty was mired in scandals alleging that King Vajiralongkorn had failed to serve the public, including his permanent vacation in Germany and many eccentric behaviors. Despite his status of supposedly being above politics, the king was also accused of meddling in political affairs. In 2020, amidst the tension which led to an outburst of large street protests countrywide, Tiwagorn Withiton wore a T-shirt saying, "we have lost faith in the monarchical institution." He insisted that his act was done in good faith which had no harmful intention to the king. Simply, Tiwagorn was asking for the monarchy to adapt and survive in these times.

Unsurprisingly, Tiwagorn's T-shirt brought him a lot of troubles, including being forced by the Internal Security Operations Command to be admitted into a mental ward for two weeks where he was subjected to psychiatric treatments.[21] Eventually he was released but charged with lese majeste. The law, section 112 of the Penal Code, criminalizes an insult, defamation, or threat to the king, the queen, the heir-apparent, and the regent. With penalties ranging from three to 15 years of imprisonment, it is one of the harshest laws on crime against the monarchy. However, it is worthy to note that the problems with the lese majeste law are more than simply a harsh penalty.

Over the past two decades, as the fervor worship of King Bhumibol soared to the demigod status, the scope of section 112 has been ridiculously expanded beyond the text of law.[22] There is no clear boundary where a fair criticism ends and the crime begins.[23] Even the slightest failure to show unconditional love to the king is deemed lese majeste. Moreover, while the text of Section 112 originally covers only four individuals of certain offices, the law is being extended to cover other members of the royal families, alive as well as deceased, or even a royal pet. A 112 suspect is subject to worse treatment from the justice system, e.g. denial of bail. This blasphemous law draws condemnation from international communities.

In Tiwagorn's case, the major issue is the coverage of the lese majeste law. Section 112 is supposed to protect only an individual king who is at times on the throne. But the trend suggests that the law enforcement attempts to inflate lese majeste.

The Khon Kaen Provincial Court declared that a statement saying that a wearer of the T-shirt had lost faith in the monarchical institution did not instigate the public to hate or degrade the monarchy. Nor did it defame the king. Critically, the court pointed out that the monarchical institution is an abstract body consisting of several individuals. Notably, Tiwagorn did not mention any specific royal individual. As a result, the court acquitted Tiwagorn.

Tiwagorn's case marks the reversal of the concerning trend. The court correctly interprets and applies the law, leading to more acquittals in the future. However, the struggle did not end here. Other courts continued to adhere to the precedent rather than the text, resulting in convictions of people for defaming the king's sister or his late father. Noticeably, all acquittals came from provincial courts where judges tend to be younger and less monitored by their senior superiors. Eventually, this issue would be appealed to the Supreme Court. If the Supreme Court agreed with Tiwagorn's case, that would end the arbitrary use of lese majeste. If not, it is possible that there will be a huge surge in lese majeste cases against any unfavourable mention of any member of the monarchy.

3. *The Appeal Court Division 5*: The Election Commission's Negligence24

Thai politics is characterized by the dominance of the judiciary and watchdog agencies. These supra constitutional bodies are designed to be independent from political oversight and have little or no legal accountability. The result is the rise of these powerful bodies which exercise their power in an arbitrary manner, intervening in politics without recourse. However, this has created much resentment among the public. The EC is the focus, particularly since it has been accused of failing to provide a free and fair election. The EC, appointed by the junta, was biased against the opposition parties.[25]

In 2019, the EC refused to recognize that Surapol Kiatchaiyakorn, a candidate of Pheu Thai Party, had won an election in Chiang Mai Province. The reason was that, on his birthday, Surapol visited a temple where he made 2,000 THB and a clock donation for a merit-making ceremony. According to the Organic Law on Election B.E. 2560 (2017), a candidate shall not offer benefit, in kind or cash, directly or indirectly, to a community, a society, a temple, an educational institute, or any other similar charity. If the EC was notified of such breach in law, it may refuse to recognize the election result, revoke a candidate's political rights for one year, and order a by-election.[26]

Later, the Election Division of the Supreme Court ruled that Surapol did not violate the campaign law. His offering was a personal religious practice which would not gain him votes. Surapol then filed a civil complaint to the court, asking the EC to compensate for damage to his reputation and an opportunity to serve as an MP. The Appeal Court Division 5 agreed, ordering the EC to pay 64.1 million THB for the EC's gross negligence.[27]

It remained unclear how the EC would compensate Surapol, and whether the payment would come from personal accounts or the EC's budget. However, the EC planned to appeal the case to the Supreme Court.

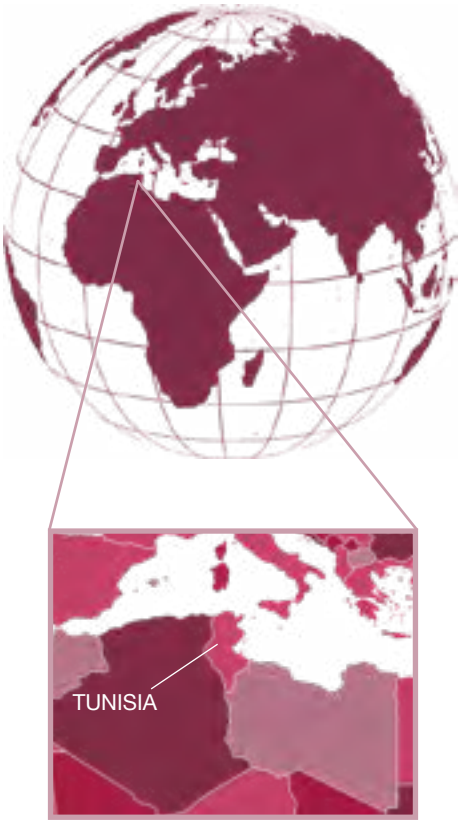
Although the EC is not subject to judicial review, this case demonstrates one of a few channels where the public can hold a watchdog agency accountable. The EC faced both criminal and civil lawsuits.

IV. Looking Ahead

A general election is set on May 14th, 2023. This is when the newly amended rule will be utilized for the first time. The EC will face a stream of questions regarding how to interpret the new rules. Moreover, the EC will have to investigate many complaints which could potentially lead to the disqualification of an individual or, in more extreme cases, the dissolution of a party. However, the EC does not seem prepared for the task. Furthermore, the general election would also determine the state of Thai democracy in the upcoming years. Ultimately, the election might offer a chance to end this quasi-dictatorship or further entrench its power, depending on the outcome.

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Tunisia

Yacine Ben Chaabane Mousli, *Master's student, University Paris Panthéon-Assas*

I. Introduction

Over the past few years, Tunisia has experienced an alarming slide towards autocracy. The year 2021 was marked as the year of "deconstitutionalization" [1] during which President Kais Saied repealed democratic principles derived from the 2011 Revolution and the 2014 Constitution. After blocking the establishment of the Constitutional Court, President Saied carried out an illegal coup d'état by suspending Parliament and dismissing the government. He then embarked on a constitutional legitimation process to create a new republic that aligns better with his populist ideology. In 2022, an authoritarian rule around the presidential figure was consolidated as Kais Saied undertook a campaign to neutralize the institutions under the 2014 Constitution, while installing a commission to draft a new Constitution and conduct a national referendum on the matter. However, despite the referendum which had a very low participation rate of 30.5%, the Constitution of the Third Republic was approved by the Tunisian voters. It places the President in a supreme position, considerably weakens the legislative power, and domesticates the judiciary. As highlighted by the African Court on Human and Peoples' Rights' ruling that condemned Tunisia, this constitutional stage brings Tunisia back into the realm of authoritarian countries. Even a decade after the Revolution, Kais Saied has strengthened his position as the supreme leader of the nation, effectively putting the democratic transition and the rule of law on hold.

II. Major Constitutional Developments

Throughout 2022, Kais Saied continued to dismantle the institutions established by the 2014 Constitution. He banned all civil and institutional resistance and began his long-standing project of transforming the Tunisian Constitution, ignoring the procedural rules of constitutional reform.

Kais Saied initiated the destruction of the judiciary branch by attacking the Superior Council of the Judiciary. In January 2022, he removed the allowances and benefits previously allocated to its members through the Decree-Law. Saied instrumentalized the political assassination of Chokri Belaid in 2013 to accuse the Council of being partial and corrupted. He subsequently announced its dissolution and announced the creation of a Provisional Superior Council of the Judiciary by the Decree-Law n°2022-11 of February 12th, 2022. This new text represents a significant paradigm shift in the judiciary power. Under the 2014 Constitution and especially its Article 102, the judiciary was defined as an "independent power, guaranteeing the establishment of justice, the supremacy of the Constitution, the sovereignty of the law and the protection of rights and freedoms." By contrast, the Provisional Superior Council of the Judiciary, as stated by Article 1 of the Decree-Law n°11, has functional, administrative, and financial autonomy. However, its only task is to supervise judicial, administrative, and financial justice. This new conception of the judiciary suggests suspicious monitoring by the President. Independent specialists such as attorneys are excluded

from the provisional council, allowing only magistrates to join. The President retains significant power to nominate members of the Council, choosing between retired magistrates known for their abilities, integrity, and independence. Additionally, Article 19 of the decree grants the President the power to appoint individuals to high-ranking positions within the three branches of justice: judicial, administrative, and financial. Finally, Article 20 of the Decree-Law allows the President to revoke judges who do not respect their professional obligations based on a report written by the Head of Government or the Minister of Justice. On June 1st, 2022, the President's assault on the judiciary persisted as he strengthened his power to punish magistrates with Decree-Law n°2022-35. This Decree-Law grants him the authority to revoke judges in situations deemed urgent or threatening to public security or the superior interests of the state. The President can dismiss magistrates if their actions are considered detrimental to the judiciary's reputation, independence, or proper functioning. The same day, Kais Saied revoked 57 magistrates from their positions. While the Administrative Court suspended the dismissal of 49 judges, the Ministry of Justice refused to comply with the judgement. This consolidation of power allows the President to control the Council of the Judiciary and monitor magistrates' careers, potentially subjugating justice to serve his political interests. Compared to other North African countries, Tunisia does not respect the fundamental principles of judicial independence.[2]

On March 30th, 2022, President Kais Saied dissolved the Parliament, despite his previous acknowledgment that such an action would contradict Article 80 of the 2014 Constitution. The Parliament had been suspended for a few months already, but when it attempted to hold an online session to discuss nullifying the exceptional measures taken by the President, he used Article 72 of the Constitution to dissolve it instead. Article 72, which is part of Title IV of the 2014 Constitution about the executive branch, describes the President as the "Head of the State, symbol of its unity, he guarantees its independence and its continuity, and he ensures that the Constitution is respected." By ignoring the symbolic nature of this article and interpreting it in a broad and arbitrary manner, the President made a blatant power grab. Article 72 doesn't grant any power to dissolve the Parliament, and the President's decision to use it is perplexing because it's in the part of the Constitution that should be suspended during the state of exception, as established by Decree 117. The President's rhetoric about the People's sovereignty as a supra-constitutional norm is also concerning, as it was previously used during the coup d'État of July 25th, 2021, and is becoming a trademark of his tenure.[3] The presidential method reveals how Kais Saied deploys the law to strengthen his control over the institutions, disregarding constitutional constraints while keeping up appearances of legal validity. Tunisia becomes a striking illustration of autocratic legalism.

In the wake of the Tunisian Revolution in 2011, the Independent High Electoral Body (ISIE) was established to ensure fair and impartial elections. However, President Kais Saied substantially altered the independent body through Decree 2022-22 on April 21st, 2022, in order to prepare for the constitutional referendum and the legislative elections of December 17th, 2022. The President now nominates all seven members and controls the board through the appointment of its Head, as well as the granting or revoking of members' immunity. This move undermines the ISIE's independence, which was previously protected under Article 126 of the 2014 Constitution. When the Venice Commission for Democracy by Law was asked to provide an urgent opinion on the constitutional and legislative framework of the referendum, it issued a warning stating that the current functioning of the ISIE did not meet the impartiality and independence requirements necessary for regulating elections.[4]

Constitutional irregularities transformed the referendum into a real plebiscite. On July 25th, the referendum on a new Constitution saw a mere 30% of Tunisian voters participate, yet there was an approval rate of over 90%. While this led to the establishment of a new Republic, such a skewed result is likely to weaken the legitimacy of the legal order in the long term. Coinciding with the country's Republic Day and exactly one year after Kais Saied's coup d'État, the popular vote was the final step of a year-long process that involved a digital consultation of Tunisians and an expert commission to write the constitutional text. With the new Constitution approved, it paves the way to a Third Tunisian Republic. Despite the low voter turnout, the referendum provided Kais Saied with the legitimacy needed to transform the country's institutions and restore autocracy.[5]

The new political regime is characterized by the dominance of the President,[6] who wields tremendous power with little to non-existent accountability. The President is the Head of State and the leader of the executive branch. According to Article 87, the role of the Government is to only assist the President. The President is the one who appoints the Head of Government without considering the results of legislative elections, while members of the government are responsible before him. Additionally, the President holds reglementary power from Article 104 and the legislative initiative from Article 68. Strikingly, the President also possesses the power to directly propose constitutional reforms for a referendum, bypassing the parliamentary review process, which is a unique feature globally. This feature highlights Kais Saied's populist tendencies as he needs to create a direct link with the Tunisia people.

Another constitutional shift concerns the legislative function, which is now divided into two chambers. The lower chamber is directly elected by the citizens and the National Council of regions and districts is composed of indirectly elected members from lower administrative divisions. This characteristic is based on Kais Saied's bottom-up approach.[7] The mechanism derives national representatives of the Council from locally elected authorities. Citizens directly elect local councils from which some members are selected by sortition to compose the Regional Council. In the process of bottom-up construction, direct elections take place among members of the Regional Council, leading to the composition of the Provincial Council. In the last step of the bottom-up construction, the National Council of Regions and Provinces receives three members elected among

each Regional Council and one member elected among each Provincial Council. Regarding the competencies of the Parliament, its scope of competence is limited by Article 75 of the Constitution. Legislative function seems vulnerable as the President retains the possibility to dissolve one or both Chambers. Moreover, the Constitution brings an original recall procedure, allowing citizens to revoke the mandate of members of the Parliament. This seemingly democratic tool can have devastating effects on the freedom of deputies in an authoritarian context.

The Constitution establishes a Constitutional Court with Articles 125 to Articles 132. The judicial body keeps the traditional power to review legislation before and after the law is promulgated. Nonetheless, the Constitutional Court lost its power to regulate the competencies between the Head of Government and the President. Additionally, it can no longer control if the President violated the Constitution, as the former Constitution provided. One notable aspect of this Court is its composition, as all nine members are appointed by only the President between a pool of the oldest magistrates. Members of the Constitutional Court would serve only until the age of retirement, which is set at 62. This lack of diversity and short serving time, as well as the dependence on the President, are detrimental to a coherent and impartial constitutional justice system.

Regarding the relation between the State and Islam, Kais Saied rejected the former Article 1 of the 2014 Constitution stating that "Tunisia is a free, independent, and sovereign State, its religion is Islam." Instead, in Article 5, Saied introduces the obligation to the State to implement Islamic purposes (*maqasid*) and declares the belonging of Tunisia to the Islamic nation (*Umma*). These Islamic purposes include the preservation of self, honor, wealth, religion, and freedom. The significance of this article is highly controversial as its interpretation can trump the protection of fundamental rights. Indeed, this innovation will probably lead to the application of the Islamic law (*Charia*) in the constitutional interpretation. For example, a hard case in Tunisia is about gender equality in the heritage law, supported by multiple feminist activists and the Commission on Individual Liberties (COLIBE). However, the President already expressed his rejection stating that the *Quran* is sufficiently clear on this matter regarding gender equality. The question arises as to whether the Constitutional Court will grant legal authority to the President's view or if it will oppose it.

III. Constitutional Cases

In 2022, a significant constitutional case was brought before the African Court on Human and Peoples' Rights. A Tunisian citizen challenged the presidential measures taken between July and September 2021, during the state of exception.

1. African Court of Human and Peoples' Rights, *Ibrahim Belguith v. Republic of Tunisia* (Application no° 017/2021): Review of exceptional measures and the importance of a Constitutional Court.

The COVID-19 pandemic intensified institutional dysfunction in Tunisia, resulting in an erosion of trust in the Assembly, which was seen as corrupt and self-interested. Capitalizing on this sentiment, President Kais Saied issued several Decrees that effectively nullified the Parliament's power and dismissed the Government on July 25th, 2021. He extended these exceptional measures on August 24th, 2021, and then, in September, issued the infamous Decree no. 117, which suspended most provisions of the 2014 Constitution. Since Tunisia lacks a Constitutional Court, there was no judicial body able to review the actions of the President. However, a Tunisian attorney challenged the Decrees before the African Court on Human and Peoples' Rights, citing violations of his right to be heard and his right to participate in the conduct of public affairs in his country. Tunisia invoked national sovereignty in its defense, claiming that the African Court lacked jurisdiction to interfere with internal affairs.

On September 22nd, 2022, the African Court ruled in favor of the applicant, finding Tunisia in violation of several articles of the African Charter on Human and Peoples' Rights. The Court ordered the respondent State to repeal the litigious Presidential Decrees and reinstate constitutional democracy. The African Court specifically called for the establishment of an operational Constitutional Court.

The application before the African Court of Human and Peoples' Rights was declared admissible due to the absence of the Constitutional Court, which was supposed to be established by the 2014 Constitution. However, the political class failed to appoint its twelve members for over seven years and two legislatures. In early 2021, the Parliament voted for a law to facilitate the nomination of constitutional judges. However, the President refused to promulgate the law, opposing his veto. According to Article 56 (5) and 50 (2)(e) of the African Charter, all applications before the Court must be filed after the exhaustion of local remedies. In line with its precedents, the international Court found that no local remedy of a judicial nature was available for the applicant. As there is no means to challenge the constitutionality of the Presidential Decrees, neither by the Ordinary Courts nor by the provisional body in charge of determining the constitutionality of draft laws, the application is deemed to have met the requirement of exhaustion of local remedies. This pragmatic approach enables the African Court to substitute itself to the national Court and assume subsidiary constitutional control of the presidential measures, thereby declaring any violations of the rights guaranteed by the Charter.

Subsequently, the International Court proceeded to review the conformity of the Presidential measures with the 2014 Constitution. While the Court acknowledged that the measures were taken during an emergency situation by a democratically elected President, it argued that the promulgated Decrees did not meet the substantive conditions and the procedural requirement outlined in Article 80 of the Constitution. This Article stipulates that the President may take necessary measures to address an imminent danger threatening the nation's institutions, security, or independence. Additionally, the President must consult the Head of the Government and the Speaker of the Assembly of the Peoples' Representatives and inform the President of

the Constitutional Court. However, the African Court found that the imminent danger was not characterized in this situation, as the democratically elected Assembly, despite its dysfunction, could not be perceived as a threat to the country. Moreover, the Court determined that less restrictive measures would have been more appropriate, and thus, the Decrees were disproportionate to the stated goal of reestablishing the normal functioning of the institutions. Consequently, the Court determined that the Decrees were not in accordance with the Constitution and not proportionate, and therefore, it found that the Decrees violated Article 13 (1) of the Charter. The African body upheld the fundamental importance of the right to every citizen, as derived from Article 13 (1), to participate freely in the government of their country. In light of the breach of constitutional legality, the Court concluded that the rights of the applicant had been violated.

Despite the significance of the African Court's ruling in preventing unconstitutional changes of government,[8] its impact on the establishment of a new political regime in Tunisia has been limited. The judgement was delivered a month after Kais Saied's new constitution was promulgated, making it difficult to assess whether the new constitutional order adheres to the principles of constitutional democracy referred to by the Court. Additionally, Tunisia's membership in the African Union is currently a topic of controversy due to President Saied's racist statements directed at sub-Saharan migrants.

IV. Looking Ahead

The implementation of the new Constitution under Kais Saied's government has not resulted in a positive democratic process. The legislative elections held on December 17th, 2022, witnessed a low voter turnout of only 11.5%, indicating a lack of popular support for the new institutions. Although the new Assembly convened for the first time in March 2023, the government must now focus on establishing other essential constitutional institutions, such as the Constitutional Court and the National Assembly of Regions and Districts. However, the Finance Decree-Law of 2023 does not allocate any funding for these institutions, implying a delay in their establishment.

As Kais Saied's five-year tenure is coming to an end, there are considerable disputes regarding the organization of new presidential elections, given that the new Constitution provides no transitional measures for the presidency. It remains unclear when elections will take place or how many more mandates Kais Saied can complete.[9] This political uncertainty undermines economic growth and exacerbates the issues of rising unemployment and poverty. The government's response to social unrest has been heavy-handed, leading to political arrests and arbitrary detentions. Ultimately, it remains to be seen when the situation will improve.

V. Further Reading

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Klibi Salsabil, 'Brèves Observations Sur La Constitution Tunisienne Du 25 Juillet 2022' [2022] JusPoliticum Blog

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Turkey

Serkan Köybaşı, *Assistant Professor, Bahçeşehir University*
Volkan Aslan, *Assistant Professor, Istanbul University*
Ülkü Uykun, *Research Assistant, Istanbul University*
Efe Eroğlu, *Research Assistant, Bahçeşehir University*

I. Introduction

In 2022, the upcoming 2023 elections set not only the political but also the constitutional agenda. The increasing tension between the government and the opposition revealed itself in different constitutional circumstances. In the beginning of 2022, the Council of State (the highest administrative court in Turkey) issued a judgment that found the government's withdrawal from the Istanbul Convention by a presidential order "lawful." Significant changes have been introduced to the election and political party laws because of the upcoming election agenda regarding the conditions for participating in elections, the national election threshold, and the election boards. Just before it made critical decisions, the Grand National Assembly made two appointments to the Turkish Constitutional Court (TCC) that affected its composition. It is possible to evaluate this situation which coincides with the 2023 elections. In July 2022, the European Court of Human Rights (ECHR) released its judgment on the Kavala Case and ruled that Turkey had failed to fulfill its obligations under Article 46 and abide by the Court's final judgment explicitly calling for Kavala's immediate release. The Committee of Ministers will decide what measures to take because Turkey failed to comply with the ECHR ruling. Other critical amendments were made to several laws, such as the Press Law, the Internet Law, and the Turkish Penal Code. With these amendments, individuals who are accused of spreading misinformation could face imprisonment. The new regulations' broad scope of practice has raised concerns due to their threat to freedom of expression. As the end of the year approached, the political moves toward the election came to the fore. While the opposition prepared a proposal to return to the parliamentary system, the government proposed a constitutional amendment regarding the headscarf and marriage status.

In the context of constitutional cases, 2022 saw a significant amount of fluctuation. The TCC made expansive comments on freedom of expression with its decision on public officials' social media posts and its pilot decision on blocking access to websites. In addition, although late, the TCC also ruled that the compulsory religious education course violates the freedom of religion and conscience. Conversely, the TCC ruled that restricting May Day demonstrations in the symbolically important Taksim Square does not violate the freedom of assembly. In another decision, the TCC established that statements of secret witnesses may be used to detain suspects. This report briefly focuses on some of the significant constitutional developments and cases mentioned above.

II. Major Constitutional Developments

1. Withdrawal from the Istanbul Convention

On March 20, 2021, President Erdoğan issued a presidential order[1] officially withdrawing Turkey from the CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence, known as the Istanbul Convention. The withdrawal raised reasonable doubts about whether a presidential order could be the legal basis

for terminating an international agreement. In this regard, the Council of State, Turkey's supreme administrative court, voted three to two to reject the demand for a stay of execution of the presidential order that officially withdrew Turkey from the Istanbul Convention.[2] The Council of State issued a judgment in 2022 and found the presidential order "lawful" by a vote of three to two. The dissenting opinions emphasized that the decree, which serves as the basis of the President's authority to withdraw from the agreements, is considered unconstitutional. They also underscored that the withdrawal order is unlawful according to the Turkish Constitution. In the meantime, it should also be noted that despite the possibility of suspending the case and applying to the Constitutional Court through a concrete norm review procedure to examine the authorizing decree's constitutionality, the Council of State did not choose this way. Ultimately, the decision on the withdrawal became final with the rejection of the appeal request by the Council with the same majority.

2. Amendments to Election Laws

The amendments made in the election and political party laws are among Turkey's most important constitutional developments in 2022. In this context, the nationwide ten percent threshold of parliamentary elections was reduced to seven percent. The changes also envisaged that the votes of all parties and independent candidates, including the parties forming electoral alliances, were calculated separately. The distribution of deputies was arranged accordingly in each electoral constituency. On the contrary, within each electoral constituency, seats were distributed according to the total votes received by the electoral alliances before changes. Thus, the electoral alliances which received fewer votes experienced a further reduction in their prospects. Additionally, the amendments also increased the conditions political parties must meet to participate in the elections. Before the amendments, the political parties had to establish their provincial organizations in at least half of Turkey and hold their major congresses at least six months before the voting day to participate in the elections. With the amendments, it has also been regulated that the parties, which fulfill the requirements to participate in the elections, will lose their eligibility to participate if they do not hold their district, provincial, and general congresses two consecutive times. As a result, newly established political parties' participation in elections has become more difficult. Additionally, further amendments have been made regarding the formation of electoral boards and electoral rolls.

3. The Changing Composition of the Constitutional Court

The Turkish Grand National Assembly appointed two judges to the Constitutional Court to fill vacant seats. The first appointment was chosen from among three candidates nominated by bar associations, including a female candidate for the all-male composition of the Constitutional Court. However, Kenan Yaşar, a former AKP politician, was elected by the AKP majority in the Parliament. It is important to note that the last woman member of the TCC retired in 2014, and since then, no woman has been elected to the Court.

For the second vacant seat, the Parliament elected Muhterem İnce from the Court of Accounts. Mr. İnce was deputy interior minister for four years, and he had been appointed to the Court of Accounts by President Erdoğan in June 2022. Only three months later, he was selected for the TTC. Considering the delicate balance of the Court as witnessed in some controversial judgments, these two appointments might have a considerable effect on the prospective judgments of the Court.

4. Disguised Censorship: A New Disinformation Law

On October 13, 2022, the Turkish Parliament passed new amendments to several laws, including the Press Law, the Internet Law, and the Turkish Penal Code. According to the government, the aim of the new regulations, known as the "disinformation law," is "combating disinformation and false accusations on social media."[3] On the other hand, the opposition claimed that the bill "contains the most censorship ever in Turkey's history"[4] and labeled it as the "censorship law." Article 29 of this bill, which amended Article 217/A of the Turkish Penal Code, stipulates that "those who publicly spread false information about the country's domestic and foreign security, public order and general health with the sole aim of creating anxiety, fear or panic among the public and in a manner that is liable to disturb public peace, shall be punished to one to three years of imprisonment".

The Venice Commission published an urgent joint opinion on this issue.[5] In this opinion, the Commission warned that Article 217/A interferes with the freedom of expression and doesn't meet the "provided for by the law" criteria due to the obscurity of the legal terms used. Additionally, according to the Commission, there is no pressing social need for this legislation, and the aim of combating information disorder could be pursued by legislation already in force. Lastly, the Commission expressed concerns about the potential consequences of this provision, such as the chilling effect and increased self-censorship, especially at the dawn of the 2023 elections.

5. The proposal for the re-establishment of the parliamentary system by the opposition

The Nation Alliance, which consists of six opposition parties, made a joint declaration for a constitutional amendment to establish a "Strengthened Parliamentary System." In this draft, the Alliance claimed that their intention was not a return to the previous parliamentary system, but rather a brand-new governmental system that serves to "establish a liberal democratic state adhering to the rule of law."[6] In the draft, they committed to improving fundamental rights and freedoms by removing some constitutional limitations and adding new constitutional guarantees such as the concept of «human dignity," reconstruction of judicial independence and impartiality, restoration of independent administrative agencies with a meritocratic, accountable, sustainable notion of public administration. The most significant promise of this proposal is to establish a solid system of checks and balances. To this end, firstly, the Alliance vows to restore the essential powers of Parliament, most of which were stripped in constitutional amendments in 2017. In or-

der to overcome the fear of the resurgence of unstable coalitions, as witnessed in the 90s, pumped by the current government, the Alliance proposed a constructive vote of no confidence, which has been successfully applied in many countries such as Germany for years.

6. Amendment Proposals Regarding Headscarves and Marriage Status

One of the leading constitutional developments of 2022 is a proposed amendment that includes changing the definition of the family in the constitution and ensuring guarantees regarding women's dress. In this regard, the amendments envisage amendments to Article 24 of the Constitution, which regulates the freedom of religion and conscience, and to Article 41, which regulates the protection of the family and the rights of the child. In this context, the proposed addition to Article 24 stipulates that the use of fundamental rights and freedoms, as well as the use of goods and services offered by the public or private sector, cannot be made contingent upon whether women's heads are covered or uncovered. The amendment also regulates that women cannot be deprived of rights to be educated, to work, to elect, to be elected, to engage in political activity, to engage in public services, to use any other fundamental right and freedom, or to benefit from goods and services offered by the public or private sector, due to their religious beliefs and clothing. When it comes to the dress required for a service received or provided, the proposed amendment states that the state can only take measures that do not prevent women from covering their heads due to their religious beliefs. The constitutional amendment proposal in Article 41 stipulates that the family can only be established through marriage between a man and a woman. Although Turkish Civil Law currently does not allow same-sex marriage, it is understood that this amendment proposal has been brought to prevent this situation from being changed by ordinary laws in the future. The proposal, which caused intense debates among the public, was on Parliament's agenda at the end of 2022, but Parliament failed to take action before it adjourned ahead of the 2023 elections.

III. Constitutional Cases

1. Pilot decision on blocking access to news websites

The TCC had the chance to evaluate through a pilot decision the Law on the Regulation of Internet Broadcasts and Prevention of Crimes Committed through Such Broadcasts (Internet Law).[7]

Several applications were filed regarding blocking access to online news concerning politicians, public officials, and institutions well known to the public. Individuals mentioned in the news claimed that their personal rights were violated due to statements in the news. According to Article 9 of the Internet Law, the judgeships of peace ordered the URLs containing the news to be blocked without providing sufficient legal grounds. Related website owners challenged the decision of the judgeships of peace but were unsuccessful in their appeals. The news websites then filed applications with the Constitutional Court.

Due to the fact that there was a systematic problem stemming from the law, the TCC merged the applications to deliver a pilot decision. Indeed, the Freedom of Expression Association identified 22,554 instances of blocked news access ordered by 5,136 legal decisions delivered by 468 judgeships of peace in 2020.[8]

The Court decided that there is uncertainty on the severity of the tortious act subject to Article 9 and the nature of the measures implemented (intermediary mechanisms, protective measures/autonomous ways that constitute a definitive provision) in the application of Article 9 of the Internet Law. The Court reiterated its principle that access-blocking measures should only be resorted to in cases of *prima facie* violations. However, none of the decisions of the judgeships of peace included an assessment of whether there was a *prima facie* violation. Therefore, the Court declared that both the freedom of expression and press had been violated, as well as the right to a fair trial. The Constitutional Court also recommended the Turkish Grand National Assembly reformulate the relevant article.

Although it is an essential decision for internet freedom in Turkey, it is one that received criticism. Prof. Yaman Akdeniz points out that none of the merged applications was made against a news access blockage requested by President Erdoğan or his close allies. Additionally, the incumbent Article 9 of the Internet Law has not yet been annulled.[9] Thus, judgeships still have the authority to deliver access-blocking decisions.

2. Decision on detention according to the statement of a secret witness

The Constitutional Court decided that there was a violation of *habeas corpus* in the case of Rıza Barut,[10] who was detained according to the statement of a secret witness without any other evidence. Mr Barut, a member of the municipal assembly of the Eğil district in Diyarbakır, was detained for one month after an unidentified witness stated he was a "member of a terrorist organization." The Court based its decision on the fact that the statement of the secret witness included "abstract assertions" and did not provide any specific data on location, time, individuals, and actions. Thus, it did not provide any chance to be controlled by public authorities.

Nevertheless, the Court affirmed that statements of secret witnesses, containing factual information such as location, time, individuals, and actions, which support other evidence and create reasonable doubt might be used to detain suspects. Critics expressed their concerns that the Court paved the way to allow judges to detain people solely on the basis of statements of secret witnesses.[11]

3. The decision of violation in the case involving the death of Ali İsmail Korkmaz

In 2013, Ali İsmail Korkmaz, 17 years old at the time, was beaten to death in Eskişehir by local shopkeepers and a police officer while protesting the construction of a shopping mall at the site of Gezi Park in Istanbul. After the legal procedure in the High Criminal Court and the appeal process, the accused police officer was sentenced to 7 months and

15 days of imprisonment, and the court suspended the pronouncement of the judgment. Despite applicants objecting this decision, their appeals were unsuccessful.. Relatives of Ali İsmail Korkmaz applied to the Constitutional Court, alleging the violation of the prohibition of ill-treatment.

In its decision,[12] the Court emphasized that the police officer exceeded the limits of his authority, abused his power given by law. The Court further stated that this was also accepted by the first instance courts since he was found guilty. The Constitutional Court found that the suspension of the pronouncement of the judgment for the police officer was contrary to the necessary punishment to be decided for the action of ill-treatment. It pointed out that this situation creates an immunity and does not serve as a much-needed deterrent against similar actions in the future.

4. The Decision on Compulsory Religious Education in Turkey

From the Republic's establishment in 1923 until 1948, religious education in Turkey was excluded from the curriculum. From then until the 1982 Constitution, it was made optional. With the 1982 Constitution, religious education was made compulsory by Article 24 which states, "Religious and moral education and instruction shall be conducted under state supervision and control. Instruction in religious culture and morals shall be one of the compulsory lessons in the curricula of primary and secondary schools." Over time, this course's content and compulsion have been heavily criticized. In its decision given in Hüseyin El and Nazlı El application, the TCC decided that compulsory religious education violates the freedom of religion and conscience, regulated in Article 24 of the Constitution. The Court found that the religion of Islam and a particular interpretation were dominant in the compulsory religion course's curriculum until the 2018-2019 academic year, in which the applicant was also studying. The Court further determined that since no alternative nor exemption is offered for religious education, the right to demand respect for religious and philosophical beliefs was violated.

5. udgment Regarding Freedom of Assembly in Taksim Square

Taksim Square in Istanbul has hosted demonstrations such as Gezi Protests, Pride Parades, and May Day for several years. However, demonstrations in recent years have witnessed obstructions by the government and subsequent police violence and restrictions. According to the law regulating gatherings and demonstrations, the highest administrative authority of the province has the authority to determine the location of gatherings and demonstrations to be held within the provincial borders. Taksim Square has not been declared as a venue for demonstrations by the Istanbul Governor's Office. With its decision on 29.09.2022,[13] the TCC ruled that restricting May Day demonstrations in Taksim Square does not violate the freedom of assembly. Although the decision mentioned that Taksim Square was of symbolic importance for May Day, it emphasized that the Istanbul Governor's Office determined alternative venues to hold the demonstrations. The decision stated that the restrictions were part of the measures for the protection of public order and had a legitimate purpose.

6. Decision Expanding Freedom of Expression of Public Officials

In its decision[14] based on an individual application made by a public official, TCC had an opportunity to expand the scope of freedom of expression for public officials regarding their superiors. In the facts of the case, the applicant, a teacher and a branch secretary in a union, complained that he was subjected to disciplinary proceedings following his social media posts criticizing public officials he worked with. As a result, the applicant claimed his freedom of expression was violated. After its examination, the Court stated that being a public official does not directly mean deprivation of freedom of expression. It ruled that public officials can use their freedom of expression to criticize as long as their impartiality is not compromised in terms of their public duties.

7. Violation of the Prohibition on Ill-Treatment Against Demonstrators

In one of its decisions in 2022,[15] the TCC ruled that police intervention against a demonstrator violated the ban on ill-treatment. The applicant, who participated in a demonstration in Izmir in 2015, claimed that the police began intervening with the demonstrators before the press statement they wanted to make. Stating that she saw the police using violence to detain some protestors, the applicant claimed she protested the detention process by applauding the police. However, during this time, while a police chief tried to take the applicant into custody, other police officers in the venue started assaulting her. After leaving the venue, the applicant went to the hospital, obtained a medical report proving her injuries, and filed a complaint against the police officers. However, the Chief Public Prosecutor's Office issued a decision regarding non-prosecution. After evaluating the application, the TCC ruled that the state has an obligation to identify those responsible for the assault. However, it also declared that the freedom of assembly had not been violated in this specific case.

IV. Looking Ahead

2023 is a crucial election year for Turkey. Six opposition parties formed an alliance known as the "Nation Alliance" nominated Kemal Kılıçdaroğlu as their joint candidate for the presidency. If he wins, which is a distinct probability according to recent polls, he promises to abolish the current presidential system, designed for a one-man rule, namely Erdoğan's, and put into effect an "enhanced parliamentary system" as outlined by the 2017 constitutional amendments. Nation Alliance's policy papers also stipulate that they want to end the authoritarian rule and put Turkey on the track of democracy and the membership of the European Union again.

On the path towards elections, the TCC must decide whether to shut down the HDP, the Kurdish movement's political party. Since the timing of the case coincides with the elections, HDP parliamentary candidates will be listed as the Green-Left Party candidates as a precaution against the party's dissolution. The electoral alliance formed by the Green-Left and some other leftist parties did not present any presidential candidate, which has been interpreted as a tacit support for Kılıçdaroğlu.

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Uganda

Adam Kyomuhendo, *Partner, Public and Comparative Law, Carthage Advocates & Solicitors, Uganda, Fellow, Makerere Institute of Social Research (MISR)*

I. Introduction

The year 2022 was largely eventful and generally progressive for constitutional law in Uganda. It witnessed a myriad of developments from the three arms of government– the executive, judiciary, and legislature, which have far-reaching implications for the growth of the culture of constitutionalism and upholding the rule of law in the country. In 2022, the judiciary witnessed the resurgence of the Constitutional Court. Through exercising its constitutional interpretative mandate, the court assertively checked the overreach of the other two branches of government. Additionally, it innovatively clarified on the domestic application of international legal norms, particularly if they relate to the governance of the cyberspace, digital technology, and judicial independence. Historically, this court has been at the forefront of broadening the frontiers of freedom and affirming constitutional fidelity. It has navigated through a hostile and repressive political environment, except for a few occasions where it erred on the side of caution and exercised restraint, given Uganda's tumultuous constitutional history.

Unlike the Constitutional Court, the High Court has generally, except in a few instances, adopted a reserved and timid attitude, particularly when it comes to the enforcement of fundamental human rights. This has led to criticism from some public observers that argue that the court has been emasculated by the state. These charges laid against this very important court[1] are not without merit and substance especially given the jurisprudential disposition of one or a few judges that preside over the civil division of the court. For the most part, the Supreme Court was not very active on the constitutional front in 2022. So, there is not so much to write home about it, except to observe that it adjudicated individual civil disputes brought before it on appeal from the Court of Appeal, operating within frameworks of constitutional doctrine.

Regarding the executive and legislative branches, these two arms collaborated well to initiate bills and enact legislation(s) which have varying constitutional effect(s), especially in the domain of human rights. The most prominent piece of legislation among these is the Anti-Homosexuality Bill waiting to be assented to by the President.

II. Major Constitutional Developments

1. A Justice of the Supreme Court is Subjected to Vindictive and Embarrassing Investigations

In my considered estimation, the most important and impactful constitutional development in the past year was the much-publicized and concerning mistreatment of Honorable Justice Dr. Esther Kitimbo-Kisaakye, Justice of the Supreme Court. This mistreatment was due to Uganda's Chief Justice and Judicial Service Commission, the constitutional body charged with recruitment and discipline of judicial officers. This case is particularly significant because it bears grave and far-reaching implications on judicial independence and the rule of law; it also directly speaks to a culture that has now become entrenched in the country where it is dangerous to hold opinions that

are perceived to be independent or critical of the ruling party and elite, especially the country's long-serving leader Yoweri Kaguta Museveni.

Dr. Kisaakye's plight arose from *Presidential Petition No. 1 of 2021 Kyagulanyi Ssentamu Robert vs. Yoweri Museveni Tibuhaburwa, Electoral Commission and Attorney General. Bobi Wine* is the now the more popular name for the afrobeat musician-turned politician Kyagulanyi Ssentamu Robert. In 2021, Ugandans went to the polls to elect a new President who would then serve a constitutional five-year term. The candidates in that election included Yoweri Museveni Tibuhaburwa, who sought to extend his 35-year rule, and Kyagulanyi Robert Ssentamu from the side of the opposition. Gen. Museveni was proclaimed as the duly elected candidate by the country's Electoral Commission whose declaration Mr. Kyagulanyi Ssentamu Robert challenged *vide Presidential Petition No. 1 of 2021*.

Justice Kisaakye was empaneled on the Supreme Court bench to hear and determine that petition. In that capacity, she sought to deliver her independent rulings. Chief Justice Alfonse Chigamoy Owiny-Dollo requested for copies of the rulings prior to their delivery, but Dr. Kisaakye declined on constitutional grounds. What follows next can be described as a high constitutional tragedy. Dr. Kisaakye reckons that she was forcefully prevented from delivering her ruling in an open court. Additionally, her files were confiscated by soldiers assigned to the Chief Justice, and the lights and court public address system switched off on the day she was scheduled to give her rulings. Furthermore, the premises of the court were cordoned off by security and made inaccessible to the general public and the media who were waiting outside.

However, matters did not end there. Dr. Kisaakye was denied her due benefits including leave and funds for medical treatment; she was summarily dismissed from her office as Administrator of the Supreme Court. "Secretive" investigations were orchestrated against her by the Chief Justice and the Judicial Service Commission acting as complainant, investigator, prosecutor, and judge all rolled into one. In fact, the Judicial Service Commission has since made a recommendation to the President for the initiation of processes leading to her dismissal. The President has yet to take action. Relatedly, Dr. Kisaakye filed a petition in the Constitutional Court challenging her mistreatment and abuse of power by the Chief Justice. This petition could turn out to be the most essential case on judicial independence in Uganda's history.

What makes Justice Kisaakye's petition unique and sets it particularly apart its glaring exposure of institutional breakdown and corrosive maladministration of constitutional entities. However, unlike previous assaults and threats to judicial independence have come from the direction of the executive and the legislature, in this case, these have been internally orchestrated–speaking to the complex, multidirectional nature of threats posed to judicial independence. The International Commission of Jurists[2] and the UN Special Rapporteur on the independence of judges and lawyers have expressed concern that the proceedings against Dr. Kisaakye could be a retaliation against her for carrying out her judicial functions.[3] Furthermore, these actions could violate the principles of natural justice.

2. The Quest for Constitutional and Electoral Reforms

Throughout the year 2022, there was renewed quest[4] for constitutional reform with some parties advocating for the establishment of a Constitutional Review Commission. The current Uganda Constitution enacted in 1995 and is now 28 years old. At the time of its enactment, it was considered as one of the most progressive constitutions in the world. Indeed, many nations in the throes of constitutional reform sent delegations to benchmark on Uganda and draw inspiration from the country's example, specifically customized to their own unique cultural, social, and political contexts. Objectively speaking, the 1995 Ugandan constitution remains quite a progressive piece of document with its establishment of unique constitutional commissions, procedures of appointment to public office and bill of rights.

However, political brinkmanship, global developments, and the sure passage of time have operated to mitigate the constitution's hitherto admirable effect as the guarantor of democratic governance, the rule of law, and social justice. As Yoweri Museveni's government continues to lose most of the broad political goodwill and democratic legitimacy it once enjoyed circa 1986, it has given way to a political tradition of repression leading it to neglect central constitutional values. Thus, far from being the repository of lessons the nation has taken in its statehood experiment or blueprint of its aspirations, the grand norm has been reduced to a tool for the retention of power. The progressive regime of rights established in the Bill of Rights remains practically elusive to the majority of Ugandans.

The dangerous culture of repression[5] and open ambivalence towards independent views perceived to be critical towards those in power, which Justice Dr. Kisaakye's case is a microcosm of, has deeply permeated Ugandan society. As a result, there are more citizens calling for broad constitutional reforms, with the primary target being the dissolution of what many consider to be an imperial presidency that Uganda is manifestation of a situation where the President possesses too much power, leading to a lack of accountability. This, coupled with the wily manipulation of constitutional processes, has led to a Carl Schmitt-*ian* bind where the President literally or figuratively decides the exception – when to obey law – and, when not to. The German jurist Carl Schmitt[6] advocated for such power.

Not allowed to be left behind on this moving train for constitutional reforms, the government has also come up with its own proposals. Central among those, though not pursued with vigor, is the proposal for the country to move towards a Parliamentary system of government in the place of the subsisting Presidential system. Of course, this proposal has been met with serious backlash and opposition being seen as a ruse to extend the incumbent President's long reign in a manner that is extra-constitutional and markedly contrary to the spirit, letter, and history of the constitution. Additionally, the government

has put forward other proposals to streamline term limits for elected officials.

III. Constitutional Cases

1. *Andrew Karamagi & Robert Shaka v. Attorney General*: Cyberspace Regulation

The distinctiveness of this case lies in the fact that it is the first time that the Constitutional Court has been presented with an occasion to consider and clarify the application of constitutional principles relating to freedom of speech and expression within the cyber domain. In brief, it was the case for the petitioners that Section 25 of the Computer Misuse Act No. 2 of 2011 ran afoul and contravened Article 29 (1) (a) of the Constitution of the Republic of Uganda, 1995 (as amended). The impugned section declared it illegal for any person "to willfully and repeatedly use electronic communication to disturb or attempt to disturb the peace, quiet, or right of privacy of any person with no purpose of legitimate communication." On the other hand, Article 29 (1)(a) provides for the freedom of speech and expression.

The petitioners averred that the impugned provision curtailed their freedom of speech, expression, and conscience – including on digital spaces like Facebook and Twitter, to the extent that it resided unbridled administrative and prosecutorial discretion with the Director of Public Prosecutions to "exercise selective prosecution of internet users based on certain views deemed objectionable by the government or high-ranking politicians and public officers." Among others, they sought orders and declarations from the Constitutional Court that Section 25 of the Computer Misuse Act No. 2 of 2011 "is inconsistent with [and contravenes] Article 29(1)(a) of the Constitution and is null." The state, represented by the Attorney General, objected to the petition and requested for its dismissal.

Two issues were framed for the final determination of court, to wit: (a) whether the petition raised any questions for constitutional interpretation, and (b) whether Section 25 of the Computer Misuse Act No. 2 of 2011 threatens or infringes online/digital freedom of expression, and whether it is consistent with or contravenes Article 29 (1) of the 1995 Constitution of the Republic of Uganda. With regard to the first issue, the court answered it in the affirmative. In doing this, the court took special or particular attention to and was guided by the following constitutional interpretive principles that have become entrenched as an indelible part of Uganda's constitutional fabric over time. The following principles are significant in Uganda's constitutional framework: (a) That in interpreting the Constitution and Acts of Parliament, "the entire constitution must be read as an integrated whole. No single provision should destroy the other (the rule of harmony, completeness, exhaustiveness, and paramountcy of the written constitution): (b) The purpose and the effect of the constitution and particular statutes must always be taken into consideration: (c) provisions relating to fundamental human rights and or freedoms ought to be purposively and generously interpreted in such a manner as encourages maximum enjoyment of the rights and freedoms guaranteed: (d) constitutional values, purposes, and principles ought to always be foregrounded to encourage a tradition that advances rule of law, human rights and the fundamental freedoms enshrined in the Bill of Rights.

Regarding issue 2, the court also answered it in the affirmative. The court criticized the legislature for not being specific enough in defining what constitutes an offense under the challenged section. The court observed that the interpretation section of the Act did not offer any support in this direction. The entire Act failed to outline or make it explicitly clear what the ingredients of the offense created were, in light of the principle of legality that is undergirded by the Article 28 (12). Article 28 of the constitution establishes that no person can be charged of an offense unless that offense is legally provided for in sufficient particularity. Therefore, the court considered that the impugned section challenged by the petitioners was void for *vagueness.* It ruled that the provision did not explicitly and definitely state what conduct could be considered punishable. The court argued that "a statute is void for vagueness if a legislature's delegation of authority to judges and administrators is so extensive that it would lead to arbitrary prosecutions." The court also elucidated the dangers involved in vague laws to include, among others, the effect of harming the innocent by failing to issue a warning about the offense." Furthermore, vague laws were encouraging "arbitrary and discriminatory enforcement because vague laws delegate enforcement and statutory interpretation to individual government officials." These vague laws infringe upon several important values or freedoms. To support its view, the court took fortification in the US Supreme Court case of *Skilling vs. United States.*[7]

Another important component of the decision related to the regime of limitation of rights. The court opined those limitations imposed by laws (such as the one the subject of challenge) on the enjoyment of rights should not be disproportionate. They should be reasonably necessary to achieve a legitimate objective, and laws that infringe upon a basic right violate this imperative. The court expressed that the principle of proportionality required that limitations on enjoyment of human rights in public interest must be demonstrated to be acceptable and justifiable in a free and democratic society, per the edicts of Article 43 (2) (c) of the Constitution of the Republic of Uganda, 1995. The court argued that the primary objective of the Constitution is to protect the guaranteed rights, while the limitation of the enjoyment of human rights is declared the second objective.

In affirming the logic of its interpretative turn and disposition, the court relied on United Nations Human Rights Committee General Comment No. 34 to the extent that any limitation placed upon freedom of expression must not only be absolutely necessary but can only be justified under four situations: (a) child pornography, (b) public incitement to genocide, (c) advocacy of national, racial, religious hatred that constitutes incitement to discrimination, hostility or violence; and, (d) incitement to terrorism. Finding that none of the above limitations applied to the impugned section, the court found that prosecuting people for contents of their communication is a violation. Following this, the court proceeded to declare S. 25

of the Computer Misuse Act No. 1 of 2011 unconstitutional.

2. *Gwogyolonga Swaibu Nsamba, Uganda Law Society & Others*: Still on Cyber Regulation

Still in the digital domain, another notable judgment of the Constitutional Court requires attention. This is the petition of *Gwogyolonga Swaibu Nsamba, Uganda Law Society & Others Consolidated Constitutional Petitions No. 15 of 2017 and No. 01 of 2019*. In this case, the court was approached by the petitioners to annul Sections 14 and 15 of the Computer Misuse Act and Section 179 of the Penal Code Act. The details of S. 25 should by now be clear based on the analysis provided above. For its part, S. 24 of the Computer Misuse Act provides for the offense of cyber harassment which encompasses acts that involve "the making of any request, suggestion or proposal which is obscene, lewd, lascivious or indecent and or threatening to inflict injury or physical harm to the person or property of any person." Additionally, the section also includes the prohibition of "knowingly permitting any electronic communications device to be used for any of the purposes mentioned in this section." [8] As for S. 179 of the Penal Code Act, it provides for the offense of *criminal libel* which connotes the making by print, writing, painting, effigy rather than solely by gestures, spoken words or other sounds, unlawfully publishing any defamatory matter concerning another person. The key averment of the petitioners is that the three sections have the combined serious effect of suppressing freedom of speech and expression, chiefly that of the press. They argue that this is contrary to constitutional or international legal protections of free speech.

The court upheld its earlier finding and decision in *Andrew Karamagi & Robert Shaka v. Attorney General Constitutional Petition No. 5 of 2016,* regarding the effect and constitutionality of S. 25 of the Computer Misuse Act No. 2 of 201. It is important to note that this decision disposed the first of the consolidated cases. The court also adopted the same approach with respect to S. 179 of the Penal Code by reaffirming its earlier decision in *Constitutional Reference No. 1 of 2008 Joachim Buwembo and 3 Others vs. Attorney General,* which maintained the offense of criminal libel on the statute books. This equally disposed of the second component of the tripartite petitions. In Joachim Buwembo, the petitioners were prosecuted for publishing material in the Daily Monitor newspaper that was considered to be prejudicial to the former Inspector General of Government. On this basis, the petitioners sought constitutional interpretation as to the legality of the offense of criminal libel which they averred smothered freedom of speech and the media. In the case of Joachim Buwembo, the court adopted a conservative attitude reasoning that defamatory libel did not fall within the precincts of protected speech. The court believed that defamatory libel contradicted the core values of freedom of expression since it trivialized the magnificence granted by the Constitution in terms of protecting free speech and expression. Ultimately, defamatory libel was inimical to the truth.

Regarding S. 24 of the Computer Misuse Act, the criminalization of "cyber harassment," the court, with a different panel, adopted a cautious and curious attitude which substantially maintained on the statute book an offense that I believe undermines the constitutional and international legal protection of the critical right to free expression. It is significant to emphasize that this right to free expression is the bulwark for a vibrant culture of democratic progress and accountability. Metaphorically speaking, the court in *Gwogyolonga Swaibu* spoke from both sides of its "mouth" to the extent that it did not acknowledge the subjectivity and value-based judgment of what actually connotes the description of the offense according to the act. What is offensive to one person may not be offensive to another. What is lewd, lascivious, or indeed indecent varies with geography or even space such as to permit such a blanket preservation of the offense as a limitation to a central and paramount constitutional right as speech.

One would understand that the court had to delicately balance freedom of speech on the one side, and, on the other, the protection of the rights of others. However, what one would not understand well is how such value-subjective judgment would be demonstrably justifiable/permissible in a free and democratic society. With tremendous respect, how does one reconcile the Solomonic reasoning of the court in *Andrew Karamagi & Robert Shaka viz-a-viz* that in *Gwogyolonga Swaibu* without succumbing to the uncanny feeling that the court granted benefit with one hand – and took it away with the other?

In succinct terms, the court in *Gwogyolonga* found that harassment, whether online or offline, is never justified speech. It acknowledged that cyber harassment prejudices fundamental human rights of others and the public interest by victimizing individuals through menacing, intimidating, indecent, or immoral communication. Therefore, the court ruled that cyber harassment is not demonstrably justifiable in a free and democratic society. This attitude is what was adopted by the legislature and executive concerning the Computer Misuse (Amendment) Act, 2022. This amendment provided clarity about old offenses and introduced new ones, including hate speech, unauthorized sharing of information about children, and the vague misuse of social media.

3. *Dr. Busingye Kabumba & Anor v. Attorney General*: Judicial Independence

The other vastly important constitutional case of the past year was *Dr. Busingye Kabumba & Anor vs. Attorney General Constitutional Petition No. 15 of 2022*. It is a decision of the Constitutional Court which indubitably is of relevant application to the plight of Justice Dr. Esther Kitimbo-Kisaakye and the principle of judicial independence. The case directly bears and clarifies the processes of judicial appointment. Briefly put, the petitioners challenged the constitutionality of the appointment on the acting basis of 16 High Court judges by the President on recommendation of the Judicial Service Commission. They considered that such appointments undermined the notion of security of tenure for judicial officers and contravened Articles 2, 128, 138, 142, 144, and 147 of the Constitution, to the extent that these appointments placed the appointed judges to the subjective control of the appointing authority. As is usually the case,

the Attorney General firmly objected to the petition by considering it vexatious.

In a gem of a judgment, written by the inimitable Justice Monica K. Mugenyi, on behalf of the panel of F. Egonda-Ntende, E. Musoke, C. I Madrama and C. Gashirabahake, JJCC, the Constitutional Court ruled in favor of the petitioners, affirming the permanent tenure of the 16 judges. Additionally, the court applied the doctrine of prospective annulment to render valid the judicial services the 16 had so far offered. In arriving at its judgment, declarations, and orders, the court drew upon international law imperatives, including the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, Treaty for the Establishment of the East African Community, the UN Basic Principles on Independence of the Judiciary, and IBA Minimum Standards of Judicial Independence, *inter alia*. The court importantly clarified and harmonized the various routes for ascendance to judicial office.

IV. Looking Ahead

The year 2023 promises to be an interesting one. In terms of constitutional cases, all eyes are on the Constitutional Court and how it will approach the case involving two prominent judicial titans, Justice Dr. Esther Kitimbo-Kisaakye and Chief Justice Alfonse Chigamoy Owiny-Dollo. On the other hand, it is highly possible that the Anti-Homosexuality Bill No. 3 of 2023, initiated in 2022 and overwhelmingly passed by Parliament in March 2023, (waiting to be passed by the President to become law) will be challenged in the Constitutional Court. Amidst international criticism , particularly from Europe and America, and garnering overwhelming support at home, we wait to see the attitude of the court which, in the past, annulled the bill on procedural grounds rather than on its substance.

On a sad note: Uganda lost Justice Kenneth Kakuru. Justice Kakuru succumbed to cancer. Justice Kakuru – the lead judge in *Andrew Karamagi & Robert Shaka v. Attorney General,* was a very principled justice of the constitutional court who enjoyed wide bi-partisan respect. He is also considered the father of environmental constitutionalism and the climate justice movement in Uganda.

References

1 In Uganda's judicial hierarchy, the High Court is a court of unlimited original jurisdiction. It entertains civil disputes – including those involving human rights violations and enforcement and adjudicates upon them as a court of record. Appeals from High Court decisions are adjudicated upon by the Court of Appeal. Decisions of the Court of Appeal are in turn adjudicated upon by the Supreme Court which is the apex court. However, Uganda's constitutional matrix uniquely provides for the Court of Appeal to sit as the Constitutional Court to resolve disputes relating to interpretation of the Constitution except in Presidential Election disputes where the Supreme Court is a court of first and last instance.

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Ukraine

Oleksandr Marusiak, *Dr. iur., Visiting Scholar at SMU Dedman School of Law (2023-2024), Research Fellow at the Donetsk State University of Internal Affairs, Former Expert at Centre of Policy and Legal Reform (2019-2023)*

Sergiy Panasyuk, *Ph.D. in constitutional law, Lecturer at Charles University (Prague), Professor at European University and Ukrainian-American Concordia University, former academic consultant to the Judge of the Constitutional Court of Ukraine (2017-2022)*

Volodymyr Kochyn, *Ph.D., Senior Researcher, academic consultant of the Judge of the Constitutional Court of Ukraine, Leading Researcher at Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine*

I. Introduction

Annus horribilis is both a straightforward and comprehensive concept to mark the year 2022 for Ukraine: the year of war, death, and suffering. The full-scale Russian invasion on February 24, 2022, was more than a detrimental challenge to Ukraine; the mere existence of an independent nation was at stake. For the first time in Ukraine, martial law was implemented nationally. This extraordinary constitutional regime affected all public administration and policy making areas during the reporting period. On the one hand, the Ukrainian society and government at all levels united and solved many complex wartime problems, which helped to both preserve the state's independence and receive a candidate status for accession to the European Union. On the other hand, any significant and long-term restrictions toward human rights and freedoms during times of war, even in states with developed democracies, significantly devalues the "strength" of the rule of law and establishes the ground for authoritarian-like experiments. Unfortunately, such trends have become increasingly tangible in post-February 24, 2022, Ukraine.

II. Major Constitutional Developments

1. Russia-Ukraine War: Martial Law of 2022

Almost immediately after the full-scale Russian invasion on February 24, President Zelensky declared[1] martial law in Ukraine, which was approved[2] by Parliament. Under the Constitution, if the President of Ukraine declares martial law (Article 106.1.20), the Parliament should hold a meeting within two days (Article 83.3) and approve such President's measures (Article 85.1.31). Using the same constitutional provisions as in declaring martial law, the President can also decide about the general or partial mobilization,[3] which should also be approved by the Parliament. Additionally, as prescribed in Article 64, under the conditions of martial law, specific restrictions on rights and freedoms may be established with the indication of the period of effect for such restrictions, with the exception of Articles 24, 25, 27, 28, 29, 40, 47, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62 and 63. And last but not least, following Article 157.2, the Constitution cannot be amended during times of martial law or states of emergency.

In such a way, the constitutional provisions were protected by drafters in cases of some emergency or war, which Ukraine now faces. In case of possible peace negotiations with Russia, the Ukrainian Constitution is

protected from its violation, for example[4]. Additionally, the Law "On Legal Regime of Martial Law"[5] (Article 19.1.4) bans any national or local elections, as well as referendums during periods of martial law.

Unfortunately, during times of war, there are more risks of law violations from the aggressor state and national authorities, which may result in the Constitutional and legislative provisions being forgotten. However, the most concerning issue is that when individuals are under pressure of war, emotional, economic, social, and other issues, they may choose the wrong way of thinking, that democracy is not as important as a "strong leader" and war winning. Such logic may potentially lead to winning the war but losing democracy.[6] And now, after the year of a full-scale invasion, we can see some constitutional violations by Ukrainian authorities that may be signs of the worst predictions.

According to the Ukrainian Constitutional provisions, every person has the right to freely leave Ukraine, except for restrictions prescribed by law (Article 33.1). Moreover, all government authorities, local government, and their officials shall be obliged to act only on the grounds, within the powers, and manner envisaged by the Constitution and the laws of Ukraine (Art. 19 part 2).

But, violating the Constitutional provisions, the Cabinet of Ministers changed[7] the Ordinance on the statement of Rules for crossing the state border by citizens of Ukraine.[8] It banned the exit from Ukraine for all men from 18 to 60, with some minor exemptions. Thus, the Cabinet violated the constitutional rule that only the Parliament's act (i.e., law) may regulate such issues. Neither the Law "On the order of departure from Ukraine and entrance to Ukraine of citizens of Ukraine"[9] (special law on the border crossing), the Law "On mobilization training and mobilization"[10], and the named Law "On the legal regime of martial law" do not mention any provisions about the ban on crossing the national border by Ukrainian citizens, because of the imposition of martial law.[11]

We should also mention that in the first days or even weeks, such violations probably could be argued by the critical situation in the country and other circumstances, but continuing constitutional violations during the whole year cannot be justified at all.

Another example of constitutional violation was the ban on an online translation of the Ukrainian Parliament meeting during the war, which was enforced firstly without any documented decision, but later was tried to become legalized by the Parliament's resolution.[12] But following the logic of the provision of Article 84.1, the meeting should be held publicly and closed only in isolated, reasoned, and extraordinary cases, rather than being closed for all times of war.

Additionally, we should accent on some legal inequalities, which may cause the violation of constitutional provisions. During wartime, police officers, investigators, and prosecutors are protected by the law and cannot be mobilized, but advocates (barristers), who are the only defenders in courts, can be mobilized. Since nearly 60% of advocates are men, there is a real risk of violating constitutional provisions prescribing the right to legal protection and protection in the courts.[13]

2. The impact of the Russian invasion on the European integration processes in Ukraine

Ukraine's European integration aspirations acquired constitutional content after the Constitution of Ukraine was amended by *Law No. 2680-VIII of 7 February 2019*. This concerned the addition of the Preamble with the words "and confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine," as well as the relevant powers of the Parliament (Article 85.1.5), the role of the President of Ukraine (Article 102.3), and the powers of the Government (Article 116.1-1).

On February 11, 2021, the European Parliament published a report on Ukraine's success in implementing the Association Agreement with the European Union (ratified by *Law No. 1678-VII of 16 September 2014*). In 2021, Ukraine was preparing to formally apply for EU membership in 2024 to join the European Union in the 2030s.

After the beginning of the Russian invasion, the question of accelerated European integration began to be raised. On February 26, 2022, Polish President Andrzej Duda called for Ukraine's accelerated accession to the EU on Twitter. Slovenian Prime Minister Janez Janša, along with Polish Prime Minister Mateusz Morawiecki, proposed a plan for Ukraine's rapid integration into the EU by 2030 in a letter to European Council president Charles Michel.[14] Slovakian Prime Minister Eduard Heger also proposed to the EU to create a new special procedure for Ukrainian accession and to help Ukraine get back on its feet and recover from the war in the future.[15]

On February 28, Ukraine officially submitted a letter of application for membership and requested immediate admission to the European Union under a special procedure. On March 1, the European Parliament recommended that Ukraine be made an official candidate for EU membership and voted on the European Parliament resolution of March 1, 2022, on the Russian aggression against Ukraine (2022/2564(RSP)) (with 637 in favour, 13 against, and 26 abstained). Therefore, it was the beginning of the European official procedure.

On June 17, the European Commission recommended that the European Council grant Ukraine the perspective to become a member of the European Union and candidate status for accession[16]. Simultaneously with the recommendation to approve the candidate status, the Commission listed seven required reforms to be implemented by Ukraine:

- reform the process of appointing judges of the Constitutional Court of Ukraine (see below).
- continuation of judicial reform.
- anti-corruption, including the appointment of the head of the Special Anti-Corruption Prosecutor's Office.
- anti-money laundering reform.
- implementation of the anti-oligarchic law, including recommendations of the Venice Commission.
- harmonization of national audio-visual legislation with the EU law.
- change in legislation on national minorities.

In addition, Ukraine has prepared a "Questionnaire: Information requested by the European Commission to the Government of Ukraine for the preparation of the Opinion on the application of Ukraine for membership of the European Union."

On February 2, 2022, the European Commission published an analytical report on Ukraine's alignment with the EU *acquis*.[17] In general, the European integration vector of Ukraine contributes to the emergence of new scientific research regarding the implementation of constitutional principles in the context of the future adherence to the Treaties of the EU.[18]

3. Appointment of the CCU judges: struggle towards the implementation of the competitive procedure in line with the EU recommendation

One of the European Commission's recommendations for Ukraine of June 17, 2022, was the enactment and implementation of the legislation on a selection procedure for judges of the Constitutional Court of Ukraine (CCU), including a pre-selection process based on the evaluation of their integrity and professional skills, in line with Venice Commission (VC) recommendations.[19]

Contrary to this very recommendation, on July 27, 2022, the Parliament appointed Olha Sovhyria, an MP (a member of the pro-presidential parliamentary faction), as well as a permanent parliamentary representative in the CCU, as a judge of the CCU (resolution No. 2442-IX) in violation of the requirement of the Law "On Constitutional Court of Ukraine" prohibiting an MP with a valid mandate to be appointed as a CCU judge and without de-facto any competitive selection process, required by the Constitution. A newly appointed judge took the oath before the CCU on August 2, 2022. Because of previous political activities and potential conflict of interest, a new judge was subjected multiple times to (self-)recusal in cases under consideration of the CCU.

Then, at least technically, in trying to implement the recommendation mentioned above, on August 12, MPs registered draft law No. 7662 introducing some elements of the competitive selection. One notable example was for the establishment of the Advisory Group of Experts (AGE) with national and international experts to assess the moral qualities and legal competence of candidate judges for the CCU. On September 6, the Parliament adopted draft law No. 7662 in the first reading and on October 10, it was submitted to receive an opinion of the VC.

On November 23, the VC published an urgent opinion (CDL-PI(2022)046), which generally spoke positively about Ukraine's intentions and efforts to improve the competitive selection process of the CCU judges, but included many critical remarks and recommendations. On December 13, the Parliament adopted draft law No. 7662 with many amendments, which distorted some of VC's recommendations, such as *Law No. 2846-IX*. On December 20, the President signed *Law No. 2846-IX*, which came into effect on December 23. Somehow surprised, a day before the President signed *Law No. 2846-IX*, VC published an updated version of its opinion (CDL-AD(2022)054-e), which was adopted at its 133rd Plenary session (December 16-17, 2022), with more critical remarks. Namely, the Commission: (1) stressed that candidates who are judged by the AGE to be "not suitable" [in respect of constitutional requirements regarding high moral qualities and the level of competence in the field of law] should be excluded from further consideration and must not be chosen by the appointing bodies (*Law No. 2846-IX* explicitly reserves such option for relevant appointing bodies); (2) noted that as long as the AGE will be operating with international members, the number of AGE members should be increased to seven to prevent a stalemate in the decisions and the seventh member should be on the international quota (*Law No. 2846-IX* provides for six members for AGE–3 national and 3 international ones). It is worth mentioning that under this law, VC itself shall appoint two members of AGE, and at the end of 2022, a few people anticipated challenges with this matter, which happened in the next year.[20]

A few words on the CCU vacancies and appointments in 2022. A reminder: the CCU comprises 18 judges; the President, the Parliament, and the Congress of Judges appoint 6 judges for the only 9-year term. On May 19, 2022, Oksana Hryshchuk and, on September 21, 2022, Oleksandr Petryshyn (appointed by the President of Ukraine on 26 November 2021) took the oath before the CCU. They became judges instead of Oleksandr Tupytsky and Oleksandr Kasminin, whose 9-year terms expired in May and September 2022. None of the adjudications challenging the President's questionable actions to dismiss Tupytsky and Kasminin before their terms expired were completed during the reporting period.[21] It is worth noting that Tupytsky left Ukraine and was declared wanted by the national authorities.

At the beginning of 2022, one vacancy from the Congress of Judges quota existed in the CCU. In 2022, because of 4 resignations, 5 vacancies emerged: 2 from the Congress of Judges and 3 from the Parliament. The list of judges who resigned in 2022: Oleksandr Lytvynov (April 26, 2022), appointed by the Congress of Judges in 2013; Serhii Sas (December 7, 2022), appointed by Parliament in 2014; Ihor Slidenko (December 7, 2022), appointed by Parliament in 2014; and Iryna Zavhorodnia (December 7, 2022), appointed by Parliament in 2018. To sum up, the CCU entered 2023 with 13 judges and five vacancies. It is also worth mentioning that in 2022, the CCU failed to elect their new President after ex-President Tupytsky's term officially expired. Since December 2020, Serhii Holovaty, the most senior judge by age, has been de facto the Acting President.

III. Constitutional Cases

In 2022, the CCU delivered a total of 13 decisions,[22] The First Senate adopted one decision, the Second Senate had eight decisions, and the Grand Chamber adopted the remaining number of decisions. Despite the pending request from Parliament on March 16, 2021, no opinions on the constitutional amendment draft laws have been delivered.

1. *Decision No. 2-r/2022 (Grand Chamber)*: A Priori Constitutional Review Case

The CCU declared Law on Amendments to Article 80 of the Constitution of Ukraine (regarding the Immunity of People's Deputies of Ukraine) (Law No. 27-IX of September 3, 2019) constitutional. This CCU case is a classic case on the consequent (*a posteriori*) review of the constitutional amendments, which is quite a difficult and ambiguous area of comparative constitutional law. The Acting President of the CCU even requested an *amicus curiae* brief from the Venice Commission on the limits of *a posteriori* review of constitutional amendments in Ukraine. The Commission refused to decide whether the national law of Ukraine indeed allows for *a posteriori* review of constitutional amendments by the CCU; however, it made some theoretical observations on such an issue, analyzing applicable foreign practice and relevant existing case law of the CCU (see Further Reading). Before mentioning the outcome of this case, it is important to point out some background information on *Law No. 27-IX* because it is essential for understanding this case.

On August 29, 2019, President Zelensky registered seven draft laws on constitutional amendments[23] and re-registered a constitutional amendment draft law of ex-President Poroshenko initiated in 2017 (No. 7203). This draft law aimed to abolish the parliamentary immunity of people's deputies (MPs) from January 1, 2020. In 2018, the CCU delivered a positive opinion on draft law No. 7203 (*Opinion No. 2-v/2018*); however, it warned that a decision to abolish parliamentary immunity could affect MPs' independence and the exercise of their constitutional powers.[24] Additionally, draft law No. 7203a was adopted in a hyper-speed manner as *Law No. 27-IX*. The first vote on draft law No. 7203a took place at 00:31 a.m. on August 30, 2019. The meeting of the Parliament that had stated on August 29 continued to the deep night. On September 3, 2019, during the next session of Parliament, the second vote occurred. In fact, such a one-day "session" of the newly elected Parliament was intentionally inserted before the commencement of a regular session on September 3, 2019, to provide a first vote for the draft law required by the Constitution.[25] Such procedural manipulations with the constitutional amendment process caused a new proceeding in the CCU. The CCU was asked about the constitutionality of *Law No. 27-IX* adoption process, not its essence.

By this decision, CCU (1) reaffirmed its previous position on the applicability of *a posteriori* review toward constitutional amendments in effect; (2) saw no solid violation of the constitutional amendment procedure in respect of *Law No. 27-IX*. In a dissenting opinion, Judge Oleh Pervomaisky criticized the Court's approach and argumentation in general, pointing out that the voting process in the case of *Law No. 27-IX* contradicted some constitutional values, the principles of democracy, the rule of law, and the requirement of stability of constitutional and legal regulation. Even in a concurring opinion, Judge Vasyl Lemak also criticized the constitutional amendment process in five days as inconsistent with the goals of the Article 155 of the Constitution.

2. *Decision No. 4-r/2022 (Grand Chamber)*: Statutory Name of Religions Organizations Case

The CCU reviewed a case on the constitutionality of the Law of Ukraine "On Amendments to Article 12 of the Law of Ukraine 'On Freedom of Conscience and Religious Organizations," submitted by 49 MPs, and declared those provisions constitutional.

The question was about the name of religious organizations that are part of the structure of a religious organization, the management center of which the country recognized by law as having carried out military aggression against Ukraine and/or temporarily occupied part of the territory of Ukraine.

MPs considered that Law provisions violate the right of everyone to freedom of worldview and religion guaranteed by the Constitution of Ukraine, the right of citizens of Ukraine to freedom of association in public organizations, as well as the procedure for prohibiting the activity of associations, established by the Constitution of Ukraine.

Reviewing the case, the Court mentioned that the critical aspect, in this case, is the aim of restrictions and that the right to freedom of worldview and religion, guaranteed by the constitutional provisions, is an individual right, which is a generalization of the institutional rights of religious organizations. The state government has the right to apply measures limiting the right to freedom of outlook and belief (religion), particularly for public order or national security guarantee. The court pointed out that the law does not concern the internal aspect of the right to freedom of outlook and belief (religion), and restrictions of this right, about clarifying the name of certain religious organizations (associations) relate exclusively to its external aspect (*forum externum*). Furthermore, the Court considered that the case review took place in the conditions of martial law introduced in Ukraine during the Ukrainian people's struggle against the Russian Federation's aggression, which determined the legitimacy of the authority's measures.

After examining all aspects and arguments, the Court decided that the organization should mention, in its full official name/title, the name of the "mother organization," so the analyzed Ukrainian legislation provisions are constitutional.

3. *Decision No. 9-r(II)/2022 (Second Senate)*: Regarding the Inviolability of Property Rights Case

The CCU reviewed a case regarding a constitutional complaint of the Private Joint Stock Company "Odesteplocomunenergo" (hereinafter – the Complainant). The complaint challenged Constitution of Ukraine (constitutionality) of subparagraph "a" of paragraph 2 of part six of Article 37 of the Law of Ukraine "On State Registration of Corporeal Rights to Real Estate and Their Encumbrances,"[26] and declared this provision unconstitutional.

The Complainant considered that the disputed provision of the Law gives the Ministry of Justice of Ukraine the authority to "deprive a person of the right to ownership by cancelling state registration on the basis of mistakes made by the state registrar of property

rights (that is, on the basis of circumstances that cannot depend on the person whose private property right is subject to registration) <…> thereby violating Article 41.4 of the Constitution of Ukraine, according to which the right to property is inviolable."

The CCU has emphasized that under the current legislation of Ukraine, a person acquires the right to own real estate and is able to fully exercise it, in particular having the ability to dispose of their property, after the state registration of the right to own the real estate (passing a decision on the state registration of the right to own immovable property, entering and further preservation (availability) of the corresponding registration record in the State Register of Property Rights to immovable property). Because making a registration entry on the cancellation of the state registration of the right of ownership in the State Register of Rights, the Complainant had lost the ability to freely and independently dispose of the immovable property, including its alienation.

According to the requirements of the Constitution of Ukraine, in its activities, the state must implement the constitutional principle of its responsibility to the person and the directly related principle of "good governance," which consists of the state's obligation to implement in its activities the fundamental principles of construction, organization, and implementation of state power to establish true democracy, respect for human rights, and the rule of law as pan-European values. When interfering with property, the state must consider the need to ensure a "fair balance" in the protection of the specified public interest and individuals' property rights.

The CCU has determined that the disputed provision of Article 37 of Law No. 1952-IV contradicted the principles of "state responsibility to person" and "good governance." The provision did not establish reasonable means of interference with property rights in cases where the grounds for annulment of the decision on state registration of rights are erroneous decisions and actions of the state registrar. Therefore, the contested provision of Article 37 of Law No. 1952-IV contradicts Article 3.2, Article 8.1, and Article 41.1&4 of Ukraine's Constitution.

IV. Looking Ahead

Undoubtedly, the war and the imposition of martial law will continue to influence the main direction of the country's constitutional system development in 2023. Although Ukrainian society entered 2023 with anticipations of victory and peace, the current events do not leave much room for optimism regarding crucial trends presented in this report.

V. Further Reading

English Summaries of the Constitutional Court of Ukraine Decisions in 2022 (available online), <https://ccu.gov.ua/en/docs/4567> accessed 30 April 2023.

Venice Commission, Amicus Curiae brief on the limits of subsequent (a posteriori) review of constitutional amendments by the Constitutional Court, adopted by the Venice Commission at its 131st Plenary Session (Venice, 17-18 June 2022), CDL-AD(2022)012.

Venice Commission, Joint amicus curiae brief on certain questions related to the election and discipline of the members of the High Council of Justice, adopted by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), CDL-AD(2022)023.

Venice Commission, Urgent joint opinion of the Venice Commission and the OSCE/ODIHR on the draft law on local referendum, issued on 10 February 2022 pursuant to Article 14a of the Venice Commission's Rules of Procedure and endorsed by the Venice Commission at its 132nd Plenary Session (Venice, 21-22 October 2022), CDL-AD(2022)038.

Venice Commission, Opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis", adopted by the Venice Commission at its 133rd Plenary session (Venice, 16-17 December 2022), CDL-AD(2022)054.

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2 Law No. 2102-IX from Feb. 24, 2022.
3 On February 24, the president decided about general mobilization (Decree No. 69/2022 from February 24, 2022)), which was approved by the parliament (Law No. 2105-IX from Mar. 3, 2023), was prolonged many times, and continues now.
4 Sergiy Panasyuk, Could a Political Compromise Be Constitutional? Legal Hurdles for Possible Negotiations with Russia, Washington Law Review Online Blog, Sept. 1, 2022, at: https://washingtonlawreview.org/could-a-political-compromise-be-constitutional-legal-hurdles-for-possible-negotiations-with-russia/
5 Law No. 389-VIII from Mar. 3, 2023
6 See Sergiy Panasyuk, 'Is the Risk of Winning the War in Ukraine but Losing Democracy Real?', IACL-AIDC Blog (11 October 2022), https://blog-iacl-aidc.org/new-blog-3/2022/10/11/is-the-risk-of-winning-the-war-in-ukraine-but-losing-democracy-real
7 The Ordinance was changed many times after the full-scale invasion.
8 Ordinance No. 57 from Jan. 27, 1995, with further changes
9 Law No. 3857-XII from Jan. 21, 1994.
10 Law No. 3543-XII from Oct. 21, 1993.
11 See Sergiy Panasyuk, The war hostages: Does the ban for men to travel abroad violate Ukraine's national law and international obligations?, Int'l J. Const. L. Blog, Aug. 10, 2022, at: http://www.iconnectblog.com/the-war-hostages-does-the-ban-for-men-to-travel-abroad-violate-ukraines-national-law-and-international-obligations/
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15 Slovakia pushes for 'special track' for Ukraine toward joining the EU. POLITICO. February 27, 2022. At: https://bit.ly/441gih9
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18 For more details, see Kochyn, Volodymyr. "Research methodology of legal regulation of economic relations in the conditions of privatization and European integration" in Private Law and Business. 2023. No. 22. P. 158-169, URL: https://doi.org/10.32849/2409-9201.2023.22.20.
19 For more details, see Marusiak, Oleksandr. "Recommendation 1: Enact and implement legislation on a selection procedure for judges of the Constitutional Court of Ukraine, including a pre-selection process based on evaluation of their integrity and professional skills, in line with Venice Commission recommendations" in Entrance exam for Ukraine: what we should do to implement EU recommendations, Reanimation Package of Reforms, pp. 6-12, URL: https://www.researchgate.net/publication/366426738_Entrance_exam_for_Ukraine_what_we_should_do_to_implement_EU_recommendations_Recommendation_1
20 Looking ahead, I would like to add that on 25 January 2023, the President of the Venice Commission sent to the Chairperson of Ukraine's Parliament a follow-up letter to Opinion CDL-AD(2022)054-e. The Commission has decided that the preconditions for the nomination of candidate members of the AGE by the Venice Commission are not fulfilled in Law No. 2846-IX.
21 The 2021 Global Review of Constitutional Law, pp. 362-263.
22 In 2021, the CCU delivered 10 decisions.
23 The 2020 Global Review of Constitutional Law, pp. 320-321.
24 CCU also quoted para. 18 of the Venice Commission's opinion of 2015 on such matters (CDL-AD(2015)013-e): "Fighting corruption is indeed a major justification for restricting parliamentary inviolability. However, in a political system, with a fragile democracy such as in Ukraine, where, as the Venice Commission was informed, judicial corruption is widespread, a complete removal of inviolability can be dangerous for the functioning and the autonomy of Parliament."
25 Article 155 of the Constitution provides the following logic of constitutional amendment process: "A draft law on introducing amendments to the Constitution of Ukraine, except for Chapter I — "General Principles," Chapter III — "Elections. Referendum," and Chapter XIII — "Introducing Amendments to the Constitution of Ukraine," previously adopted by the majority of the constitutional composition of the Verkhovna Rada of Ukraine, is deemed to be adopted, if at the next regular session of the Verkhovna Rada of Ukraine, no less than two-thirds of the constitutional composition of the Verkhovna Rada of Ukraine have voted in favour thereof." Under Article 83.1 of Constitution, "[r]egular sessions of the Verkhovna Rada of Ukraine commence on the first Tuesday of February and on the first Tuesday of September each year".
26 Law No. 1952-IV from Jul. 1, 2004.



United Kingdom of Great Britain and Northern Ireland

Dr Chris Monaghan, *Principal Lecturer in Law, University of Worcester*

I. Introduction

The year 2022 saw significant constitutional developments. After 70 years on the throne, Queen Elizabeth II died and was succeeded as monarch by her son Charles. In terms of the exercise of executive power, the United Kingdom has had three Prime Ministers in 2022, which resulted from the internal Conservative party coup to remove Boris Johnson and the shortest serving British Prime Minister, Liz Truss. What does this mean for constitutional law? Considering these events, 2022 ended with a new Prime Minister Rishi Sunak, who now needs to respond to calls for a second Scottish independence referendum, the Northern Ireland Protocol, and the future of the Human Rights Act 1998.

II. Major Constitutional Developments

1. The Fall of Boris Johnson

In the 2021 I·CONnect Global Review of Constitutional Law for the United Kingdom, it ended with a review about the uncertainty as to what would happen to the then Prime Minister Boris Johnson regarding the fall-out of Partygate (whereby 10 Downing Street was the site of the most significant COVID-19 law-breaking during the pandemic). As soon as 2022 began, additional evidence of law-breaking started to emerge, revealing that the Prime Minister, despite informing the House of Commons in December 2021 that there had been no parties, had known about and attended these events at Downing Street. Furthermore, evidence would surface showing the Prime Minister was also drinking with colleagues at these parties. The Metropolitan Police commenced an investigation into the allegations that laws relating to the COVID-19 restrictions had been violated at 10 Downing Street. This coincided with an early version of the report by Sue Gray, a senior civil servant tasked with investigating whether any laws had been breached, being published and was highly critical of the failure of leadership in Downing Street. Subsequently, after a pause in the police investigation, Johnson became the first serving British Prime Minister to be charged with the commission of a criminal offence. Johnson was issued with a £50 fixed penalty notice by the Metropolitan Police. Moreover, the current Prime Minister Rishi Sunak was also issued with a £50 fixed penalty notice.

In response to allegations that Prime Minister Johnson had misled the House of Commons in 2021, the Commons Select Committee of Privileges issued an interim report that was highly critical of Johnson. The position of Prime Minister not only depends on government enjoying the confidence of the House of Commons but also to command the confidence of their own MPs. This appeared not to be the case for Boris Johnson, even though he achieved a large majority in the House of Commons at the December 2019 general election. Johnson survived a Conservative party MP vote of confidence in June 2022. It is significant to note that this vote of confidence is not the same as a vote of confidence in the House of Commons in which every MP gets to vote. However, it was not until Johnson was seen as mishandling the subsequent allegations of sexual miscon-

duct against Conservative MP Chris Pincher and his prior knowledge of Pincher's past conduct before appointing him to the government that Johnson was ousted as leader of the Conservative party. Considering that many of his senior ministers resigned in protest in July 2022, Johnson had no choice but to resign as Prime Minister as he could not form a government.

So far, the fact that Johnson was accused of misleading the House of Commons was an important constitutional crisis, even if his own party's decision to remove him was driven by internal party politics. However, prior to his resignation as Prime Minister, there was a real concern that Johnson might advise the Queen to use her prerogative power to dissolve Parliament, thereby allowing Johnson to remain in office until the new Parliament met after the general election had been held. This would present a major constitutional crisis, as although Johnson was Prime Minister and his party commanded a strong majority in the House of Commons, Johnson did not have the confidence of his own party. As a constitutional monarch, the Queen was expected to follow the advice of her Prime Minister. To refuse to comply with a request, even if the Prime Minister in question had questionable support within his own party, would lead to a constitutional crisis.

2. The Financial Times had later reported that:

"For the Queen to reject an election request outright would have prompted a full-blown constitutional crisis and put the monarch in the most perilous position of her reign. One senior Whitehall figure said: 'It was a question that couldn't be put to the Queen because the Queen would have to say 'yes.' The PM cannot ask the question to which she ought to say 'no' by the convention…' As Johnson's grip on power became more precarious, one senior Whitehall insider said of the moment: 'If there was an effort to call an election, Tory MPs would have expected Brady to communicate to the palace that we would be holding a vote of confidence in the very near future and that it might make sense for Her Majesty to be unavailable for a day.' Another senior official confirmed it would be politely communicated to Downing Street that Her Majesty 'couldn't come to the phone' had Johnson requested a call with the intention of dissolving parliament. One Johnson ally said he knew it was a fruitless idea too, that 'the palace would have wanted to see if there were others who could command confidence instead of accepting his call.'"[1]

Fortunately, this was never put to the test and the monarch was kept clear of internal party politics. Any observations about the monarch's involvement remains speculative. Nonetheless, it is evidence of the monarch's powers and how a monarch could be forced to make a difficult decision when prompted by their Prime Minister. In the end, Johnson was replaced as Prime Minister by Liz Truss MP in September 2022. Liz Truss was only Prime Minister for 49 days and was succeeded by Rishi Sunak MP, who became the United Kingdom's first non-white Prime Minister.

3. The Death of Elizabeth II and the Accession of Charles III

The United Kingdom is a constitutional monarchy, and the death of Queen Elizabeth II in September 2022 was a significant constitutional moment in the United Kingdom and in the other realms where she served as Queen. Following her death, her eldest son, Prince Charles ascended to the throne as King Charles III. For quite some time, there has been some concern over Charles' ability to conform to the role of a constitutional monarch and a fear that he might push the boundaries of what is now seen as appropriate. Charles had previously made plans to attend the 27th UN Climate Change Conference at Sharm el-Sheikh in Egypt and deliver a speech, which he could do in his capacity as the Prince of Wales. The new Prime Minister Liz Truss was reported in the press as having advised that the King should not now give the speech.[2] The King was reported to be "personally disappointed" and that "[t]he Queen gave an entirely non-political address at the Cop last year … It sounds like he is not being given the choice. That is an error of judgement on the part of the government." The former Labour minister, Lord Andrew Adonis, expressed his criticism on social media by stating, "The breakdown in relations between Truss and Charles - something that never happened between his mother & any of her 16 prime ministers - is of huge constitutional significance. I'm not a supporter of an activist monarchy, but unwise of her to ban him speaking on climate change" (Twitter, 1 October 2022).

The high-profile disgrace of Prince Andrew, the Duke of York, and the decision of Prince Harry, the Duke of Sussex to step back from royal duties, led to public calls for removing the Dukedoms from the two Princes. On November 18th, 2022, there was a proposed amendment by Lord Berkeley to the Counsellors of State Bill to remove Princes Andrew and Harry as Counsellors of State. In accordance with the Regency Act 1937, both Andrew and Harry were among the four members of the royal family authorized to deputize for the King as a Counsellor of State. However, following these public calls for removing the two Princes, King Charles requested that two additional members of his family be created Counsellors of State for their lifetimes (HRH Princess Anne, The Princess Royal, and HRH Prince Edward, The Earl of Wessex). This was achieved by section 1 of the Counsellors of State Act 2022. Commenting on the importance of having available Counsellors of State, Craig Prescott has observed that "This reflects how the monarch, as head of state, remains a central part of the UK's constitutional arrangements. It is pivotal to the machinery of government that the royal authority is always available to grant the final, formal legal approval to a wide range of decisions made by government and parliament."[3]

4. Restoration of the prerogative power to dissolve Parliament

Historically, the monarch had the prerogative power to dissolve Parliament and to bring about a general election. The dissolution of Parliament could, as a matter of constitutional convention, only be exercised upon the request of the Prime Minister. Subject to the statutory requirement that an election took place at least every five years, the Prime Minister had considerable discretion in determining when to advise the mon-

arch to dissolve Parliament and hold a general election. This discretion could allow the Prime Minister to call for an election at a time that favoured their own party. The Fixed-term Parliaments Act 2011 removed the monarch's power to bring about a dissolution of Parliament and created a fixed five-year lifetime for each Parliament. This meant that subject to the exceptions in the Act, there could be no early general election. It was intended to remove the Prime Minister's discretion and safeguard the workability of the then coalition government. Early general elections did take place whilst the Fixed-term Parliaments Act 2011 was law. In 2017, the exception under the Act was used, and the decision to hold an election was voted for by MPs. In 2019, Parliament created specific legislation to hold a general election, thereby avoiding the need to get the super-majority as outlined in the Fixed-term Parliaments Act 2011.

The Fixed-term Parliaments Act 2011 was repealed by the Dissolution and Calling of Parliaments Act 2022. Interestingly, from a constitutional perspective, section 2 of the Act revived the monarch's prerogative power to dissolve Parliament. In light of the litigation surrounding the Prime Minister's advice to Queen Elizabeth II to prorogue Parliament in 2019, section 3 of the Act is clear that this prerogative power is non-justiciable and that "A court or tribunal may not question— (a) the exercise or purported exercise of the powers referred to in section 2, (b) any decision or purported decision relating to those powers, or (c) the limits or extent of those powers." The Act is clear in section 4 that "If it has not been dissolved earlier, a Parliament dissolves at the beginning of the day that is the fifth anniversary of the day on which it first met."

5. Bill of Rights Bill

In June 2022, Dominic Raab MP, the Lord Chancellor, introduced the Bill of Rights Bill to the House of Commons. The Bill has yet to receive its second reading in the House of Commons. The Bill would repeal the Human Rights Act 1998 and has been criticized by academics and former judges.

III. Constitutional Cases

1. *Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 of the Scotland Act 1998* [2022] UKSC 31: Scottish independence referendum

The issue presented to the Supreme Court was whether the Scottish Parliament, created by the Scotland Act 1998, could legislate for the holding of a referendum on Scottish independence. The key question was whether under paragraph 64 of Schedule 6 of the Scotland Act 1998, the Scottish Parliament had this power – i.e., was within the devolved competence of the Scottish Parliament. In 2014, the initial independence referendum that took place had been agreed following the Edinburgh Agreement in October 2012 between the then Prime Minister David Cameron and the then First Minister Alex Salmond. The agreement required the United Kingdom's government to introduce an Order in Council, which needed to be approved by the monarch at a Privy Council meeting. The Order in Council would give the Scottish Parliament the competence to legislate for the 2014 referendum. The Scottish Parliament proposed a Scottish Independence Referendum Bill which would ask the Scottish electorate, "Should Scotland be an independent country?" The Lord Advocate referred the Scottish Independence Referendum Bill to the Supreme Court on the basis that it was a devolution issue and touched upon a reserved matter, which falls under the authority of the United Kingdom Parliament, that of the union between England and Scotland (Act of Union 1706 and 1707). The Supreme Court accepted that the matter was a devolution issue and as it referred to a reserved matter (the union), the Scottish Parliament did not have the legal competence to legislate to hold such a proposed referendum. The Supreme Court was clear that "In this case, the purpose which is apparent on the face of the Bill is also what the Bill is really about. The purpose of the Bill is to hold a lawful referendum on the question whether Scotland should become an independent country. That question evidently encompasses the question whether the Union between Scotland and England should be terminated, and the question whether Scotland should cease to be subject to the sovereignty of the Parliament of the United Kingdom" ([77]). The central issue was even if the proposed referendum was advisory and would not require independence to take place as a matter of law, it had political consequences: "the result of a lawfully held referendum is a matter of importance in the political realm, even if it has no immediate legal consequence" ([79]).

The Supreme Court referred to *R (on the application of Miller) v Secretary of State for Exiting the European Union (Miller No.1)* [2017] UKSC 5, where the Supreme Court had been clear that although "[the Brexit] referendum of 2016 did not change the law in a way which would allow ministers to withdraw the United Kingdom from the European Union without legislation. But that in no way means that it is devoid of effect. It means that, unless and until acted on by Parliament, its force is political rather than legal. It has already shown itself to be of great political significance" ([124]). In the present case, the Supreme Court was clear that, "[a] clear outcome, whichever way the question was answered, would possess the authority, in a constitution and political culture founded upon democracy, of a democratic expression of the view of the Scottish electorate. The clear expression of its wish either to remain within the United Kingdom or to pursue secession would strengthen or weaken the democratic legitimacy of the Union, depending on which view prevailed, and support or undermine the democratic credentials of the independence movement. It would consequently have important political consequences relating to the Union and the United Kingdom Parliament" ([81]). It is important to appreciate that the Scottish government, comprised of the Scottish National Party and the Scottish Greens, both of which supported independence, made the decision to unilaterally achieve a second referendum through the Scottish Parliament without the agreement of the United Kingdom government. This decision was spurred on by the refusal of the United Kingdom government to allow a second referendum to take place.

The Scottish First Minister, Nicola Sturgeon, was clear that the Supreme Court should not be criticized for the outcome (as had been

the case with *Miller (No.1)*). Sturgeon stated that "However, we must be clear today that the Supreme Court does not make the law – it interprets and applies it. If the devolution settlement in the Scotland Act is inconsistent with any reasonable notion of Scottish democracy – as is now confirmed to be the case – that is the fault of Westminster lawmakers, not the justices of the Supreme Court… That is a hard pill for any supporter of independence – and surely indeed for any supporter of democracy – to swallow." Professor Michael Gordon observed, that "The decision, however, also exposes a clash between the UK's constitutional law and the democratic mandate obtained by the Scottish National Party to hold a further vote on Scottish independence. That clash is not of the supreme court's making, but is a central feature of the UK's statutory devolution arrangements."[4] Matthew Psycharis and Alistair Mills were clear that, "The Supreme Court's decision, despite its broader constitutional context and political significance, does not constitute a major development in the devolution jurisprudence. It constitutes an exercise in statutory interpretation, applying established principles, and reaching an unsurprising answer on the merits.'[5]

2. Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32

The Abortion Act 1967 allowed access to abortion services in England, Wales, and Scotland. It did not decriminalize abortion in mainland Britain, but rather made it legal to obtain an abortion within a particular temporal period. The Abortion Act 1967 did not apply to Northern Ireland. There was no scope to obtain abortion legally with Northern Ireland; those seeking access an abortion services would have to travel to mainland United Kingdom. The position in Northern Ireland was challenged before the Supreme Court *In the matter of an application by the Northern Ireland Human Rights Commission for Judicial Review* (Northern Ireland) [2018] UKSC 27. It is important to clarify that the competence to legislate to amend the law regarding abortion was a devolved matter that was for the Northern Ireland Assembly, rather than the United Kingdom Parliament. The Supreme Court ruled that if the applicants had standing (which they did not in the present case), the Supreme Court would have made a declaration of incompatibility under section 4 of the Human Rights Act 1998. This is because the law in Northern Ireland was not compatible with the United Kingdom's obligations under the European Convention on Human Rights. The issue in Northern Ireland was that the Northern Ireland Executive was suspended and that the Secretary of State for Northern Ireland was responsible in the interim. Consequently, no new Northern Irish legislation could be created during the suspension of the Executive. In response, the United Kingdom Parliament legislated for this devolved matter and enacted the Northern Ireland (Executive Formation etc) Act 2019. One of the provisions, section 9, brought the law relating to abortion in line with the rest of the United Kingdom. In *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, the Supreme Court unanimously agreed that legislation enacted by the Northern Ireland Assembly, which was The Abortion (Safe Access Zones) (Northern Ireland) Bill, was within the legislative competence of the Northern Ireland Assembly. Ultimately, the Court determined that the legislation was not in incompatible with the European Convention on Human Rights.

The Bill was intended to protect the rights of women to access abortion services without having to fear intimidation by protesters. Those who opposed the Bill argued that the safe access zones which the Bill would create, amounted to a "violation of any protesters" rights under Article 9 (Thought, Conscience and Religion), Article 10 (Freedom of Expression) and Article 11 (Freedom of Assembly and Association) of the European Convention on Human Rights. In light of the high-profile roll back of abortion rights in the United States, there is a concern about a global push to roll back on these rights within Europe. Lawful access to abortion services was only made possible in Ireland because of a referendum being held, whereby a majority of the electorate supported amending the law. Northern Ireland found itself at odds with the rest of the United Kingdom and Ireland. As a result, the *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32 represented an important legal challenge regarding women's access to abortion without facing intimidation from protestors.

There had been calls to include the right to an abortion within the proposed Bill of Rights (which is intended to repeal the Human Rights Act 1998), and the Lord Chancellor, Dominic Raab, rejected this proposal, informing the House of Commons that the law was "settled in UK law in relation to abortion, it's decided by members across this house. It's a conscience issue, I don't think there's a strong case for change… [and] What I would not want to do, is find ourselves, with the greatest respect, in the US position where this is being relitigated through the courts rather than settled as it is now settled."[6]

3. R (on the application of Coughlan) v Minister for the Cabinet Office [2022] UKSC 11

The decision in *R (on the application of Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11 concerned the introduction of a pilot order to ten local authorities, which required voters in local elections to provide voter identification to cast a ballot. This was not a prior requirement for anyone voting in a local or general election. The pilot orders were made by the Minister for the Cabinet Office using the powers conferred by section 10 of the Representation of the People Act 2000. Section 10 is concerned with Pilot schemes for local elections in England and Wales. Importantly, subsection (1) stated that, "Where— (a) a relevant local authority submit to the Secretary of State proposals for a scheme under this section to apply to particular local government elections held in the authority's area, and (b) those proposals are approved by the Secretary of State, either— (i) without modification, or (ii) with such modifications as, after consulting the authority, he considers appropriate, the Secretary of State shall by order make such provision for and in connection with the implementation

of the scheme in relation to those elections as he considers appropriate (which may include provision modifying or disapplying any enactment).” Whilst subsection (2) stated that ‘A scheme under this section is a scheme which makes, in relation to local government elections in the area of a relevant local authority, provision differing in any respect from that made under or by virtue of the Representation of the People Acts as regards one or more of the following, namely— (a) when, where and how voting at the elections is to take place; (b) how the votes cast at the elections are to be counted; (c) the sending by candidates of election communications free of charge for postage.” The Supreme Court found that the introduction of the requirement for voter identification was not introduced for an unlawful purpose in accordance with subsection (1) or made ultra vires for the purpose in accordance with subsection (2).

Giving judgment on behalf of the Supreme Court, Lord Stephens was clear about the significance of the identification requirement to the appellant, who “believes that voter identification requirements in elections will serve to disenfranchise the poor and vulnerable who already struggle to have their voices heard.” Lord Stephens also observed that “[t]he background material [which had been considered by the Supreme Court] following the RPA 2000 demonstrates growing concerns as to voter fraud which provides the context in which the ten Pilot Orders were proposed by the participating local authorities and were made by the respondent.” This issue of the integrity of the election and the need to prevent possible voter fraud was a reason for introducing the Pilot Orders. Dismissing the argument by the appellant that the need for voter identification would deter people from voting, Lord Stephens observed, “I do not agree with [the appellant’s] second proposition that voter identification requirements necessarily do not encourage some persons to vote. I believe that if persons have confidence in the electoral system by the elimination or reduction in voter fraud then they might be encouraged to vote by virtue of their increased confidence in the electoral process.”
Commenting on the Supreme Court’s decision and the enactment of the Elections Act 2022 which introduced compulsory voter identification, Ben Stanford observed, “Given the scarcity of voter impersonation in UK elections, the necessity of such an expensive reform can be seriously questioned, whilst the potential negative impact on voter turnout and the risk of widespread disenfranchisement, particularly of minority groups, remains a serious concern. Moreover, there is a strong case for prioritising the reform of other areas of electoral law such as voter registration and party funding as a matter of urgency, as well as British democracy and constitutional issues more generally, which have been rocked by recent allegations of sleaze and declining standards” (see B Stanford, ‘R (on the application of Coughlan) v Minister for the Cabinet Office: electoral law - voter identification - pilot schemes - right to vote - Representation of the People Act 2000 - Elections Act 2022’ (2022) 27(1) *Coventry Law Journal* 126).

4. R (on the application of The Project for the Registration of Citizens) v Secretary of State for the Home Department [2022] UKSC 3

In *R (on the application of The Project for the Registration of Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, the Supreme Court was asked about the legality of the registration fee requirement for a British born child to be registered as a British citizen. Such a right was granted by the British Nationality Act 1981.The appellants had argued that this Act “was a constitutional settlement which conferred a statutory entitlement to citizenship.” Additionally, this right “is an important right which gives a person the right to live in the United Kingdom and a right to take part in its political life, including by voting in general elections and other elections” ([21]). The Secretary of State had the power to determine the fee under the Immigration Act 2014. It was argued that the cost of the registration fee was too much and therefore prevented the child from exercising their right to be registered as a British citizen. As Lord Hodge observed, having British citizenship “can contribute to one’s sense of identity and belonging, assisting people, and not least young people in their sensitive teenage years, to feel part of the wider community. It allows a person to participate in the political life of the local community and the country at large” ([21]). The Supreme Court was clear that the matter before the court was one of statutory interpretation, and it also stated that the issue of whether such a fee should be charged was a question for politicians rather than judges: “The appropriateness of imposing the fee on children who apply for British citizenship under section 1(4) of the 1981 Act is a question of policy which is for political determination. It is not a matter for judges for whom the question is the much narrower one of whether Parliament has authorised the Secretary of State to set the impugned fee at the level which it has been set” ([51]). This is an important decision as although Lord Hodge was clear that citizenship was an important right and had clear benefits, the issue of whether there should be a registration fee imposed to require the citizenship that the appellant was entitled to under the British Nationality Act 1981, was not something for the Supreme Court to decide on. It is important to note that the matter was simply one of statutory interpretation. Ultimately, the Court refrained from giving an opinion about the rights and wrongs of the fee as this was something for politicians to determine.

IV. Looking Ahead

2023 promises to be another eventful year for Constitutional Law within the United Kingdom of Great Britain and Northern Ireland. There have been negotiations between the United Kingdom and the European Union on Northern Ireland and a Supreme Court decision about the lawfulness of the Northern Ireland Protocol (*Allister v Secretary of State for Northern Ireland* [2023] UKSC 5 which explored *inter alia* the compatibility of the Protocol with the Acts of Union 1800). Regarding the continuing fall-out from Partygate, former Prime Minister Boris Johnson has recently given evidence to the Committee of Privileges as part of its investigation into whether he misled the House of Commons, and the outcome of the Committee’s investigation is expected soon.

V. Further Reading

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K Szopa, 'Triumph for Abortion Rights, or a Trojan Horse? The Abortion Services (Safe Access Zones) (Northern Ireland) Bill and Proportionality Assessment', U.K. Const. L. Blog (13th February 2023), available at: https://ukconstitutionallaw.org/2023/02/13/karolina-szopa-triumph-for-abortion-rights-or-a-trojan-horse-the-abortion-services-safe-access-zones-northern-ireland-bill-and-proportionality-assessment/.

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5 M Psycharis and A Mills, 'The Scottish Parliament, the Supreme Court, and an Independence Referendum?' (2023) Judicial Review.

6 See: https://www.theguardian.com/politics/2022/jun/29/dominic-raab-says-right-to-abortion-does-not-need-to-be-in-bill-of-rights



Uruguay

Eduardo G. Esteva Gallicchio, *General Director Uruguayan Center for Documentation and Constitutional Studies, Researcher of the Uruguayan National System of Researchers (Level I), Emeritus Professor of Constitutional Law Catholic University of Uruguay and University of Montevideo*

I. Introduction

The year 2022 presented a central theme in constitutional matters regarding the ratification by the body of citizens and non-citizen voters (Article 79, second sentence of the Constitution), of Law 19.889 2020. This law contains a relevant part of the plan proposed by Republic President Luis Lacalle Pou, known as the Law of Urgent Consideration (acronym: LUC). This central theme in constitutional matters emerged after the option that gave rise to the referendum appeal failed to obtain the required support.

In another order, since there was no agreement between the Political Parties with parliamentary representation that would make it possible to acquire two-thirds of the votes of the General Assembly, the oldest Minister of the Courts of Appeals was automatically invested in that capacity, as outlined in Article 236 of the Constitution. Consequently, on February 8, 2022, Minister Doris Morales Martínez became a member of the Supreme Court of Justice. For the first time in the history of the Uruguayan Judiciary Branch, the body began to consist of a majority of female members.[1]

II. Major Constitutional Developments

In Uruguay, the year marked the culmination of the referendum procedure against 135 articles of Act 19.889 2020, which had begun during the previous year, through the presentation of signatures that exceeded the percentage required by Article 79, second paragraph of the Constitution.

On March 27, 2022, with secret and obligatory voting, voters could vote YES (pink ballot) or NO (light blue ballot).

Ultimately, the result was unfavorable for the option promoted by the coalition of political parties and opposition movements identified as Partido Frente Amplio, as well as the PIT-CNT (Plenario Intersindical de Trabajadores / Convención Nacional de Trabajadores). The PIT-CNT brings together unions across various sectors of labor activities in the private and public sectors).

The option to make room for the referendum appeal obtained 48.7% of the pronouncements, falling short of the majority (more than half of the votes was needed).

Consequently, the 135 articles of the law were confirmed.

It should be remembered that the Supreme Court of Justice, by ruling 53/2021, on March 16, had dismissed the challenges of unconstitutionality (for formal or procedural reasons) made against Law 19,889, which was reiterated during the year 2022.[2]

III. Constitutional Cases

1. Definitive judgment of May 10, 286/2022, IUE 542-95/2022, Exception of unconstitutionality. Articles 1, 2 and 3 of Act 18.831 of October 27, 2011[3]

The Supreme Court of Justice rejected the defense of unconstitutionality of the aforementioned articles of the law that restored the State's punitive claim for crimes com-

mitted during the so-called State terrorism until March 1, 1985, and classified them as crimes against humanity.
One of the central points of the debate is whether to configure retroactive application of crimes against humanity.

Over the years, judgments on these provisions have varied. With some integrations, there were declarations of unconstitutionality of Articles 2 and 3[4]; while in other cases, the petitions were dismissed for the arguments that arise from each case.

The Supreme Court of Justice, for example, in ruling 286/2022, ruled by a majority of three votes against two votes.

The peculiarity of this pronouncement is that it reflects the substitution of Justice Luis Tosi Boeri, who ruled in favor of unconstitutionality, along with Justice Doris Morales Martínez.

2. Definitive judgment of March 9, 188/2022, IUE 1-43/2021, Unconstitutionality Action, Article 24 of Act 19.670, of May 11, 2012

In this particular case, the topic of interest is whether it is appropriate to promote a request for a declaration of unconstitutionality against a legal provision expressly or tacitly derogated by a later one.

The traditional position of the Supreme Court was to consider that it is inadmissible.[5]In this important pronouncement (Minvielle redactor), it was considered that the derogation of the legal provision does not necessarily prevent the promotion, in its regard, of an action of unconstitutionality against that provision. But in final judgment Nº 380/2022, of May 10, he returned to the traditional position.[6]

3.Final judgment of July 20 Nº 549/2022, IUE 1-139/ 2019, Action of unconstitutionality. Articles 1, 2, 3, 6, 7, 8 and 10 of Act 19,830 of September 18, 2019[7]

Within the framework of a difference between the Executive Branch, chaired by Tabaré Vázquez, and the majority of the legislators with the Judicial Branch, the President of the Supreme Court of Justice, assisted by a subrogation adviser to the Legal Secretary and the Legal Pro-Secretaries of the Supreme Court of Justice, invoked the representation of the State/Judicial Power and requested the declaration of unconstitutionality.

The case, accepting the legitimacy, was resolved by the Supreme Court of Justice, which consisted entirely of members of the Courts of Appeals, in a unanimous decision declaring the issue's unconstitutionality.

The challenged legal provisions refer to appointments, promotions, and transfers of judges, and in substance, an infringement of the principle of separation of powers was invoked.

4. Final judgment of June 7, Nº 471/2022, IUE 1-165/2019. Exception of unconstitutionality. Articles 2 and 3 of the decree with force of law of the Department of Cerro Largo 34/2011 of July 29, 2011[8]

The Supreme Court considers that in this particular litigation, the discussion about the power of the departmental governments to limit fundamental rights lacks practical relevance. This is because we are not dealing with a hypothesis of original regulation that limits fundamental rights on the part of the Departmental Government.[9]

5. Final judgment of July 21, Nº 550/2022, IUE 1-90/2021. Exception of unconstitutionality. Article 1 of Act 19723, of January 19, 2019

The Corporation dismissed the defense of unconstitutionality, considering the old question of the conflict of rights, as well as applying the proportionality test[10] and evaluating the reasonableness of the case.

6. Sentences pronounced about the temporary effect of the declaration of unconstitutionality[11]

After several years of significant hesitations, during the course of 2022, the criterion invoked by Judge Minvielle seems to be accepted by the majority of the justices: "with effect at the time of the effective injury," surpassing the reference to the date of the lawsuit.[12]

IV. Looking Ahead

Towards the end of the year, the Executive Power sent a bill to the Legislative Power on the reform of the pension system, specifically retirements, passive activities, and pensions. This bill was ultimately approved by the Senate on December 28.[13]
There is a controversy regarding this project between the two great coalitions; the so-called Republican Coalition (governmental: National, Colorado, Cabildo Abierto, Independiente and De la Gente parties) and opposition (Frente Amplio), accompanied by the PIT-CNT.

If the statute is perfected in 2023, members of the Frente Amplio coalition could announce that they will study the possibility of filing a referendum appeal against it. However, many of its articles refer to matters whose initiative is the privative competence of the Executive Branch (Article 79, second paragraph of the Constitution prevents the referendum). On the other hand, the coalition may consider a formal constitutional reform to modify the statute, as outlined in Article 331-A, B (second oration), and C (last oration) of the Constitution.

V. Further Reading

Risso Ferrand M, in collaboration with Rainaldi S and Garat MP, Derechos Humanos / Interpretación y aplicación (Fundación de Cultura Universitaria, 2022).

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1 The Supreme Court of Justice was made up of the titular justices: Doris Morales Martínez, Gregorio Fregoli Sosa Aguirre, Elena Martinez Rosso, Bernadette Josefina Minvielle Sánchez and John Pérez Brignani.
2 See definitive judgments Nº 1015/2022, of October 11 and Nº 1176, of December 8, available at http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSelectiva.seam?cid=508536, accessed 25 April 2023.
3 Ibid.
4 Ibid.
5 Against and in the same sense of judgment 188/2022: Eduardo Esteva Gallicchio, 'La vigencia de la ley en la fecha del caso concreto como requisito de su declaración de inconstitucionalidad' (1974) Revista de Derecho, Jurisprudencia y Administración 74, 147-151.
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9 Eduardo Esteva Gallicchio, 'La jurisprudencia de la Suprema Corte de Justicia sobre los decretos de los Gobiernos Departamentales que tienen fuerza de ley en su jurisdicción y la regulación de derechos consagrados por el art. 7 de la Constitución' (1992) Revista Uruguaya de Derecho Constitucional y Político IX, 49, 79-85.
10 For an updated statement, see: María Paula Garat, 'El principio de proporcionalidad y su contrastación empírica' (UCU, Montevideo, 2015).
11 See definitive judgments 380/2022, of May 10; 626/2022, of August 2 (Minvielle disagrees); 677/2022, of August 2 (Minvielle disagrees); 761/2022, of September 6 (Martínez and Morales disagree) and 769/2022, of September 6 (Martínez and Morales disagree), all at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSelectiva.seam?cid=508536, accessed 25 April 2023.
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Venezuela

Carlos García-Soto, *Professor at Universidad Monteávila Law School*

Daniela Urosa Maggi, *Adjunct Faculty at Boston College Law School, International Allied Professor at Universidad Católica Andrés Bello*

Raúl A. Sánchez Urribarrí, *Senior Lecturer in Crime, Justice, and Legal Studies, Department of Social Inquiry at La Trobe University*

I. Introduction

In 2022, Venezuela's deep political and governance crisis continued without a suitable constitutional and political solution. The situation worsened in some respects, given Maduro's de facto consolidation of power and his ability to maintain control of the state apparatus. Consequently, there is a complex humanitarian emergency driving more than seven million Venezuelan migrants and refugees to seek refuge abroad. Currently, the Venezuelan migrant crisis is the second worst migrant crisis in the world, behind the Syrian migrant crisis. Moreover, despite a decrease in inflation and reports of slightly rising economic growth, the country remains mired in a deep state of corruption, without a reasonable economic plan backed by legal guarantees or a system based on the rule of law. The Maduro Government still faces international economic sanctions, refusing to engage in meaningful efforts to facilitate the return to a democratic constitutional government and continuing to disregard the 1999 Constitutional order. Not surprisingly, in 2022, Venezuela ranked 177/180 in the Corruption Perception Index and obtained the lowest world rank 140/140 in the Global Rule of Law Index.[1]

As we have explained in previous reports, the origin of the ongoing crisis was Nicolás Maduro's ever authoritarian regime, which began in 2013. One particular factor contributing to this crisis was Maduro's insistence on keeping power for a second term following his illegal, unfair, and widely denounced reelection in May 2018. Following months of political tension, in January 2019, the President of the Venezuelan Parliament (National Assembly), Juan Guaidó, assumed the country's interim presidency based on Article 233 of the Venezuelan 1999 Constitution. Both presidencies – Maduro as *de facto* President with internal control of the country and its state institutions, and Guaidó as *de jure* President, with the recognition of dozens of countries but without effective control of Venezuela's institutions – remained until December 2022. Additionally, it is significant to note that Venezuela currently has two parallel Parliaments. After the parliamentary elections in 2020 –which the opposition and international allies denounced as fraudulent due to the persistent lack of guarantees to hold free and fair elections– a majority of opposition members who were in control of the National Assembly elected in 2015 voted to extend their term and claim to continue representing the institution. Thus, in practice and for a third year, Venezuela has had two institutions claiming to represent Venezuelan citizens and exercise legislative prerogatives. Neither of these institutions enjoys uniform international recognition – although the *'oficialista'* legislature controlled by Nicolás Maduro's United Socialist Party (PSUV) has begun to exercise the Parliament's prerogatives, with the rest of the Maduro regime recognizing it as legitimate. Additionally, in 2002, following the ruling party's victory in the legislative elections, the Maduro regime proceeded to shut down the 2017 Constituent Assembly – an authoritarian institution created to ensure that Maduro could illegitimately trump any other authority in the name of constituent power.

However, in December 2022, the National Assembly elected in 2015, controlled by the political opposition, decided to eliminate Guaidó's Interim Presidency that had been internationally recognized as the exclusive legal representative of the Government of Venezuela by a number of countries, including the United States since 2019. Instead, the National Assembly decided to replace it with a sort-of parliamentary government, so the constitutional crisis continues in a different yet potentially more complicated fashion. On the other hand, the human rights situation in Venezuela has reached a critical moment. The leading international and regional human rights protection bodies continue reporting and denouncing gross human rights violations in the country. At the same time, the International Criminal Court (ICC) Prosecutor's Investigation Office continues to investigate alleged crimes against humanity in Venezuela.

This report offers a survey of these developments, focusing on the constitutional dimension of the crisis. It also discusses critical decisions issued by the Venezuelan Supreme Tribunal in the past year – especially the Constitutional Chamber –as part of the country's turn towards autocracy. Similar to our past reports, these developments illustrate the country's constitutional transformations on its path to consolidate Nicolás Maduro's authoritarian regime.

1 Venezuela under scrutiny of International Law for human rights violations

In 2022, the Venezuelan regime continued under the scrutiny of International Law institutions for human rights gross violations, mainly through two mechanisms:

The first was under International Human Rights Law: the UN Human Rights Council (UNHRC) and the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela (IFFMV), which published several relevant resolutions and reports regarding Venezuela's human rights violations and overall conditions. Also, at the regional level, the Inter-American Commission on Human Rights (IACHR) issued several decisions and precautionary measures regarding Venezuela and submitted a few cases against Venezuela before the Inter-American Court of Human Rights (IACTHR). Moreover, Venezuelan government's officials continued under the spotlight of International Criminal Law. In 2022, it advanced an ongoing formal investigation into alleged crimes against humanity in Venezuela, conducted by the International Criminal Court (ICC) Prosecutor's Office.

1.1. 2022 Reports and Resolutions of UN Human Rights bodies unanimously express the concerning situation of gross violation of human rights in Venezuela

In September 2022, the IFFMV submitted a report to the UNHRC with the findings of the Mission on the human rights situation in Venezuela.[2] The report in question concluded: "The human rights situation in the Bolivarian Republic of Venezuela remains grave. The country has endured a decade of spiraling humanitarian, social, economic, and human rights crises, coupled with a breakdown of State institutions, all of this exacerbated by the impact of COVID-19. Stark evidence of this is the more than six million people who have felt compelled to leave the country." The report also stated that "crimes and violations, amounting to crimes against humanity, including extremely grave acts of torture, were committed (...) as part of a plan designed by high-level authorities to repress opponents of the Government." Furthermore, the report in question also concluded that human rights violations and crimes extend over remote regions of the country, including the "Arco Minero" region in the state of Bolívar by the Orinoco River. This particular area is characterized by widespread criminal activity, impunity, and lack of governance.

In October 2022, the UNHRC adopted a Resolution on the *situation of human rights in the Bolivarian Republic of Venezuela.*[3] In that decision, the Council "strongly condemns all violations and abuses of international human rights law in the Bolivarian Republic of Venezuela." Some of these violations, according to the IFFMR, may amount to crimes against humanity. The Council further urged the Venezuelan government to "to implement fully and immediately" the recommendations "and regrets that most of the recommendations made in their previous reports have not been implemented." The report also expressed deep concerns regarding the continued erosion of the rule of law, insecurity of tenure, and lack of judicial independence. The report strongly condemned the widespread targeted repression and persecution on political grounds, including through the excessive use of force, arbitrary detention, torture and other cruel, inhuman, or degrading treatment or punishment, extrajudicial execution, and enforced disappearances by security and intelligence forces. The report also noted sexual and gender-based violence against women and girls in detention. Finally, it also expressed deep apprehension about the human rights and environmental situation in the *Arco Minero del Orinoco* region. The report called upon "parties in the country to engage promptly in free and fair presidential and parliamentary elections and extended the mandate of the IFFMV."

The UN High Commissioner for Human Rights (UNHCHR) updated the Human Rights Council in March 2022 on the ongoing human rights abuses in Venezuela, including challenges to due process, restriction of civic society, and arbitrary detentions. In June, the High Commissioner also called for independent investigations and accountability, reparations for victims and families, strengthening judicial independence, respecting separation of powers, and highlighting the persistent challenges to fully realizing economic, social, and cultural rights.[4]

1.2. Close monitoring of the human rights situation in Venezuela by the IASHR

At the regional level, the IACHR continued to closely monitor Venezuela's ongoing human rights situation through a Special Follow-up Mechanism (MESEVE) created specifically for this purpose in 2019, granting three precautionary measures in different cases related to violations of the rights to life, personal integrity, health and detention conditions.[5] The Commission decided to recognize six merit petitions, concluding that the State of Venezuela had violated sev-

eral human rights and proceeded to send all of these complaints to the IACtHR.[6]

During the year 2022, the unusual situation of Venezuela before the IACTHR jurisdiction persisted, which diminished the human rights protection for the Venezuelan people before the regional Court. In 2012, then President Chaves denounced the American Convention on Human Rights (ACHR), which led to Venezuela's withdrawal from the Inter-American System, and, therefore, out of the jurisdiction of the IACtHR starting in 2013. However, in 2019, the then Interim President Juan Guaido ratified the ACHR again and expressly recognized the jurisdiction of the IACTHR with retroactive effects.[7] Despite the new ratification of an official Government and its deposit by the Secretariat of the Organization of American States, the IACTHR has not expressly accepted its jurisdiction over Venezuela regarding complaints of alleged violations that occurred between 2013-2019. In that sense, a decision is expected to occur in 2023 once the Court decides on the pending complaints related to Venezuela. The limbo situation is important, considering that systematic gross human rights violations have occurred in the country precisely during this period from 2013 to 2022.

1.3. Formal investigation into alleged crimes against humanity by the International Criminal Court

In the 2021 report, we highlighted the remarkable news in terms of International Criminal Law and constitutional democracy in Venezuela that the Prosecutor Office of the International Criminal Court (ICC), Karim Khan, announced the opening of an investigation for crimes against humanity in Venezuela after more than three years of preliminary investigation.[8] Following that announcement, a Memorandum of Understanding was signed between the ICC Prosecutor's Office and the Venezuelan Government of Nicolás Maduro, with the commitment to "collaborate independently and impartially, but with full respect for the principle of complementarity, the search for cooperation and mutual assistance" in the ongoing investigations of gross human rights violations.[9]

Despite the Venezuelan government's commitment to implement substantial reforms to the justice system to improve judicial independence and conduct investigations, under strict due process and impartiality, into the reported crimes against humanity. On November 1, 2022, the Prosecutor Office of the ICC submitted a prosecution request before the Pre-Trial Chamber I of that international Court, seeking to resume the investigation into the situation in the Bolivarian Republic of Venezuela I. This report was triggered due to the "available information which shows that the patterns and policies underlying the contextual elements of crimes against humanity are not being investigated." Additionally, internal proceedings are focused on direct perpetrators, apparently low-level members of state security forces, and primarily about crimes classified as "less" serious, while a substantial part of the relevant crime is not being investigated at all.[10]

Days later, on November 18, 2022, the Chamber issued an order inviting the victims and their representatives to present their opinions and observations on the request of the Prosecutor to resume the investigation into the situation of Venezuela and ordered the Victim's Participation and Reparations Section ("VPRS") to compile the opinions and observations of the victims and transmit them to the Chamber together with a report, no later than March 21, 2023. The Chamber also invited the Venezuelan government to submit observations.

II. Major Constitutional Developments

1. Nicolás Maduro continues in *de facto* control of the national Executive Branch

During 2022, the constitutional crisis in Venezuela continued. On the one hand, Nicolás Maduro maintained *de facto* control over the National Executive Branch. His continuing power has allowed him to make decisions in various areas of national politics, even if his mandate's legitimacy was questioned since the 2018 presidential election. Maduro's continued power has persisted despite opposition from Venezuelan political opposition, a large number of countries, a large part of Venezuela's civil society, and the academic community. Moreover, Maduro remains an unpopular president, given years of social strife, economic and political crisis. As we previously explained, this situation, coupled with the lack of separation of power and judicial independence and an overall diminishment of state capacity, has continued fueling the constitutional and institutional crisis in Venezuela. Thus, Maduro's exercise of presidential prerogatives is best approached as an "authoritarian presidency." In this type of presidency, there are little formal institutional restrictions on the exercise of power, and the other branches of power and state apparatus are largely at the service of the Executive's discretionary use of his authority.

2. Guaidó's Interim Presidency and the opposition-controlled National Assembly

On the other hand, Juan Guaidó continued during most of the year as Interim President, based on Article 233 of the Constitution, with the political support of the main political parties of the opposition, the Government of the United States, and several other countries. While there were questions about Guaidó's leadership due to the lack of success in bringing about a democratic transition in Venezuela and the internal crisis of opposition parties, his claim to the presidency and formal recognition by major Western countries and various other States and regional organizations persisted.

During 2022, the Interim Presidency continued to take political and legal actions to preserve the country's foreign assets through the different public companies and entities under the control of the Interim Presidency. Additionally, Guaidó kept putting pressure on Nicolás Maduro's regime to pursue fair and free elections, but to no avail.

In December 2021, the opposition-controlled National Assembly reformed some aspects of the main legislation ruling the transition: the Statute Governing the Transition to Democracy, to Re-establish the Validity of the Constitution of the Bolivarian Republic of

Venezuela. This statute served as the juridical support of the Interim Government. The reform consisted, among others, of three key aspects: (i) the scope of the functions of the Interim President was reduced; (ii) the acts of the Interim President were submitted to the control of the Delegate Commission of the National Assembly, and (iii) the executive function of coordinating "diplomatic policy" and the establishment "of guidelines of the foreign relations of the Republic."

3. Guaido's Interim Presidency finished

However, in December 2022, the National Assembly decided to reform the Statute Governing the Transition to Democracy to Re-establish the Validity of the Constitution of the Bolivarian Republic of Venezuela, which served as the legal support of the Interim Government. In this reform, references to the Interim President were eliminated. From the institutional point of view, the "constitutional continuity of the National Legislative Power" is reaffirmed indicating that "it will be exercised by the National Assembly elected on December 6, 2015, which may function through the Delegate Commission, up to twelve (12) continuous months from January 5, 2023 (art.7)." What is relevant is that, in this wording, references to the Interim President and the Interim Government were eliminated.

Consequently, this reform meant that the National Assembly suppressed the figure of the Interim President and, therefore, the administrative apparatus of the Interim Government. In fact, in the reform, the National Assembly attributed several powers that were previously recognized to the Delegate Commission pre in the Statute to the Interim President – such as the power to appoint the members of the Board of Directors of various Venezuelan public companies abroad. As a result, the Delegate Commission now functions as some sort of Interim Government.

Thus, the Venezuelan constitutional crisis intensified even more, if possible. With the elimination of the figure of the Interim President, there is even more confusion regarding the legal representative of the Government of Venezuela in governmental and judicial instances abroad.

4. The pro-Maduro Regime legislature (National Assembly) elected in 2020

As we explained in the previous Annual Global Reviews, on July 2, 2020, the National Electoral Council convoked elections of the National Assembly. The election was held between accusations of fraud on December 6, 2020. In response to these allegations, leading opposition parties decided not to participate in the election. The results broadly benefited the PSUV, the official party, which now single-handedly exercises control of this institution without any meaningful opposition within. Once again, in that sense, the Legislature functions as an important institution within the regime's growing authoritarian framework and logic.

During 2022, the 2020 National Assembly continued functioning, issuing several pieces of legislation, including a few with special relevance from a constitutional point of view. Some of the Laws issued in 2022 were: the Reform of the Organic Law of the Supreme Tribunal of Justice, the Reform of the Law for the Protection of Families, Motherhood and Fatherhood, the Reform of the Organic Law of Public Defense, and the Organic Law of Special Economic Zones. Regarding the particular reform of the Organic Law of the Supreme Tribunal of Justice, it was intended to simulate an improvement of the Court's judicial independence, which was a commitment included in the ICC-Venezuela MOU signed in 2021, as explained above. However, the reform did not constitute any significant advance in the necessary conditions for the independence of the Supreme Tribunal of Justice; instead, the reform only addressed formal organizational changes that did not impact on the impartiality of the Court. While additional details about any practical aspects of the reform and their impact on the day-to-day operations of the judicial system will eventually emerge, we do not anticipate any major changes in the judiciary's chronic submission to the regime and its overall lack of capacity to effectively protect the rights of citizens, especially against violations carried out by state officials.

III. Constitutional Cases

The Venezuelan Supreme Tribunal continues to be a bulwark of authoritarianism. Since its creation by the 1999 Venezuelan Constitution, the Constitutional Chamber of the Supreme Tribunal of Justice has tended to support the regime's interests and, over time, fulfilled a significant role in the demise of democracy and the emergence of autocratic rule in Venezuela. As numerous scholarly works have already pointed out in the past few years, the Supreme Tribunal's Constitutional Chamber has used, misused, and abused its power in many matters. This year, the Chamber has continued to support the regime in a variety of crucial ways:

The Chamber approved the constitutionality of several Laws dictated by the National Assembly elected in 2020, such as the *Organic Law of Special Economic Zones* (decision 0508/2022) and the *Reform of the Organic Law of the Supreme Tribunal of Justice* (decision 0083/2022).

The Constitutional Chamber declared an action for constitutional interpretation, filed by some citizens who requested an interpretation of the scope of the constitutional norms on the convocation and operation of the National Constituent Assembly, as inadmissible (decision 1066/2022).

On the other hand, in at least four decisions, the Constitutional Chamber concluded that the acts issued by the National Constituent Assembly between 2017 and 2020 are not subject to a control or declaration of nullity by the Supreme Tribunal of Justice. In this way, the constitutional right to question the validity of the decisions made by that political entity was restricted (decisions 63/2022; 966/2022; 1029/2002, 1030/2022).

IV. Looking Ahead

Venezuela should still be considered (and analyzed as) an authoritarian regime, given its lack of separation of powers, complete disrespect of checks and balances, gross and systematic human rights violations, and overall autocratic governance logic. On the

one hand, Maduro, as *de facto* President, keeps effective control over the Judicial Branch, the Legislative Branch, the Electoral Branch, the Citizens Branch, and the State's bureaucracy. Consequently, there is no independent judicial review system, impartial electoral arbiter, 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. Furthermore, Maduro also enjoys the support of the military and fellow international authoritarian allies, and there are no indications that this will change any time soon.

The human rights situation in Venezuela is severe. The ongoing investigation by the International Criminal Court (ICC) Prosecutor's Office could have a significant impact on the restoration of judicial independence, human rights protection and victims' integral reparation, the rule of law, and constitutional democracy in the country. However, it is a lengthy and slow international judicial process that does not provide a short-term solution to the gross human rights violations that systematically occur in the country and exacerbate its deep humanitarian and migration crisis. Meanwhile, the country's institutions that are supposed to play a role in ensuring accountability have been eviscerated and lack the will and capacity to challenge the regime, including the judiciary.

V. Further Reading

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3 UNHRC, 'Resolution A/HRC/RES/51/29' (7 October 2022) (adopted by a recorded vote of 19 to 5, with 23 abstentions) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/525/07/PDF/G2252507.pdf?OpenElement.

4 Human Rights Watch, 'Venezuela events of 2022' (2023) https://www.hrw.org/world-report/2023/country-chapters/venezuela.

5 The precautionary measures granted can be reviewed on the IACHR webpage.

6 The merit report of these six petitions can be reviewed on the IACHR webpage.

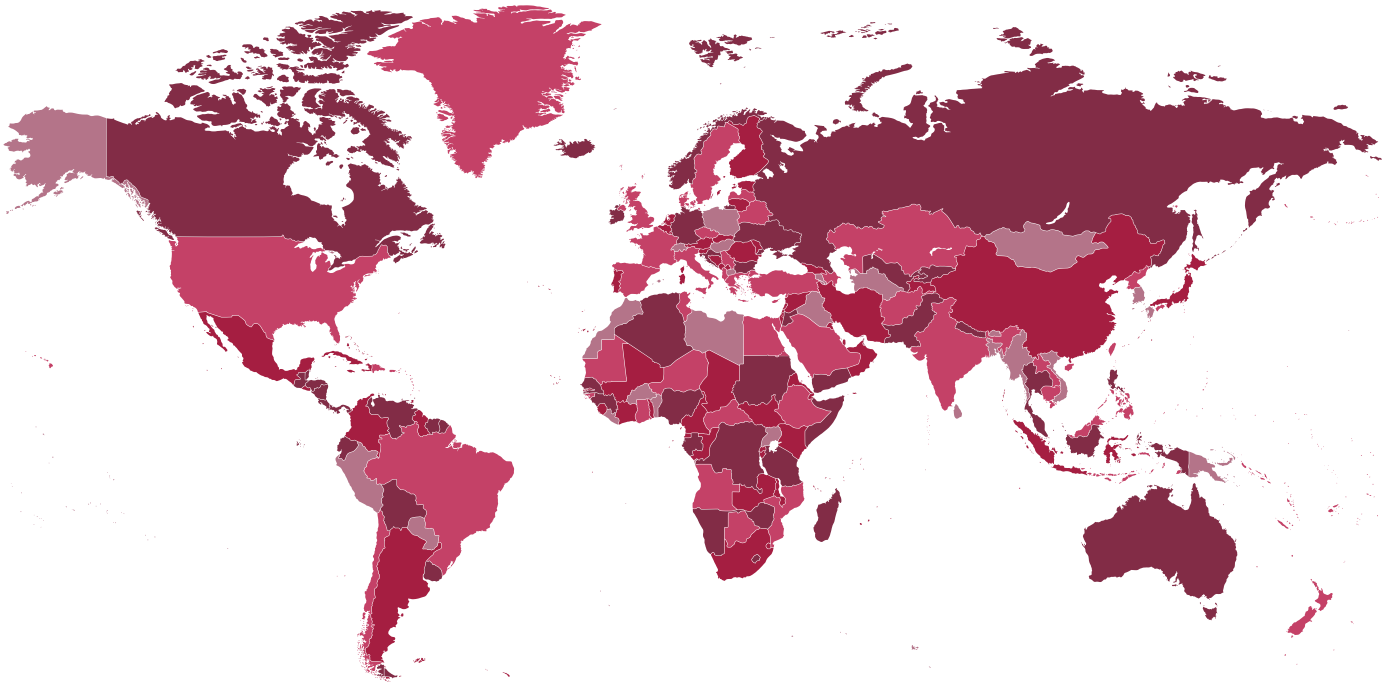
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SUMMARY



Afghanistan

2023 saw the Taliban consolidate its court system. Unlike the previous Western-backed regime, the Taliban provides detailed statistics regarding the court system's working and decisions. The Supreme Court, which sits at the apex of this system, is playing an illiberal transformative role in society by aggressively implementing the Taliban's version of Sharia.

Albania

A constitutional amendment to extend the mandate of vetting organs was approved. Despite two impeachment procedures, the President served his mandate fully, and a new one was elected by parliament with a simple majority because of a lack of political consensus. The Supreme Court and Constitutional Court are fully renewed.

Argentina

In 2022, the Court made significant decisions on various topics, including fundamental rights such as the right to be forgotten, the risk of child abandonment regarding deportation, medical cannabis, and religious celebrations in public schools. Additionally, the Court addressed matters related to the "engine room" such as the composition and

co-participation regime of the Council of the Judiciary. Furthermore, the Court resumed conducting both public and private hearings.

Armenia

Armenia's past constitutional year was marked by a number of key events. As such, the formation and activities of the Constitutional Reform Council and Constitutional Reform Professional Commission should be noted in this context. Additionally, various important decisions of the Constitutional Court were adopted last year.

Australia

The new Labor Government is holding a referendum in 2023, which, if successful, will enshrine an 'Indigenous Voice to Parliament' in the Constitution. The referendum provides a crucial opportunity for much-needed constitutional reform.

Austria

In 2022, the Austrian Constitutional Court still dealt intensely with COVID-19 measures, such as a lockdown for unvaccinated persons or mandatory vaccination, but also with a large number of asylum cases and issues related to parliamentary investigative committees. Despite some piecemeal constitutional amendments, major constitutional reform projects remained unfinished.

Bangladesh

Enacting the Chief Election Commissioner and the Other Election Commissioners Appointment Act, 2022, which ushered in a new era of the Election Commission's functioning in Bangladesh, remains the most important development in the 50th year of the enactment of its Constitution.

Barbados

Preston Devere Parris v. The Attorney General endorsed the interpretation of the right to security of the person found in the Human Rights Committee's General Comment 35 and clarified that this right does not extend to indirect health impact arising out of civil or criminal proceedings.

Belarus

The most important event of 2022 in the Republic of Belarus is the republican referendum held on February 27, 2022, on the issue of amendments and additions to the Constitution. Amendments and additions to the Constitution of the Republic of Belarus entered into force on March 15, 2022.

Belgium

The participatory trajectory 'A country for the future' collected views on the deepening of democratic principles, modernization, and increase of efficiency of the state structure. The output is intended to renew democracy, supplement the provisional list of revisable constitutional articles and serve as input for the next state reform.

Bolivia

Judicial corruption, gender-based violence, and political persecution due to the so-called 2019 coup dominated the political scenario of Bolivia in 2022. Social tension arose in the context of widespread repudiation after the release of femicides and rapists. The constitutional jurisprudence dealt with that subject and issued, for the first time, a judgment that favored the marriage of one same-sex couple.

Bosnia and Herzegovina

Bosnia and Herzegovina faced the aftermath of the biggest political crises since the end of the Bosnian War. Added to that, the Office of the High Representative tightened its grip on the country by imposing changes to the Constitution of the Federation of B&H and the Election Law of B&H.

Brazil

Brazil experienced one of the most divisive presidential elections in its history. Themes related to the elections took center stage in the STF's docket in 2022. Additionally, the Court upheld the constitutionality of a resolution imposing limits on freedom of expression to safeguard the democratic process from disinformation.

Cabo Verde

2022 was marked by general political stability but also by the social and economic effects of the so-called triple-crisis (SarsCov2; severe drought, and the War in Ukraine). Furthermore, the legislative agenda led to the approval of relevant acts, and the CCCV delivered a couple of important opinions.

Chile

Chilean voters rejected the Constitutional Convention's proposal in September, and most political parties agreed on initiating another attempt at replacing the Constitution. Before the referendum, Congress lowered the supermajority threshold to reform the Constitution. Also, new appointments to the Constitutional Court may explain changes in its case law.

China

China in 2022 is featured by contentious politics triggered by the draconian "zero-covid" policy. Meanwhile, the 20th National Congress of the Chinese Communist Party foreshadows authoritarian consolidation, and the National People's Congress Standing Committee continues to carry out a constitutional review of delegated legislation through "record and review."

Colombia

In this report, we discuss the main political events that marked the year 2022 in Colombia. In particular, we focus on the new government of President Petro and his ambitious social reforms. Furthermore, we discuss nine crucial judgments of the Constitutional Court concerning liberties, democracy, po-

litical rights, social rights, and sustainable developmen

Costa Rica

The 2022 elections resulted in a split partisan congress and a political neophyte as president. Much of the constitutional issues have been related to the executive's attempts to govern that touch on issues of freedom of expression and the press and the exercise of state power.

Cuba

The year 2022 marked the beginning of the constitutionality of Cuban law when the National Assembly launched an extensive legislative program aimed at making the entire legal order compatible with the new Constitution as a normative and axiological framework. This text is directed to the analysis of this process.

Democratic Republic of Sao Tome and Principe

In this report, we present political, legislative, jurisprudential, and doctrinal evolution, in this regard, we will bring about the controversial Legislative, Local, and Regional Elections and all judicial implications around it, mainly the need for International Community Intervention. Additionally, the legislative agenda led to the approval of relevant acts and relevant decisions.

Denmark

In 2022, elections were triggered due to a commission report concerning the legality of a government decision. Due to a never before used election law technicality, the government retained its majority. However, the government opted for a different majority, forming Denmark's first majority government across the political blocs.

Ecuador

In Ecuador, attempts to propose constitutional and legal reforms to attack structural issues that overwhelm Ecuadorians should be highlighted. In this matter, the Constitutional Court has taken a decisive role with the objective of guaranteeing respect for the Constitution of the proposed reforms and the freedom of the voters.

Egypt

The Presidential Decree to integrate Egypt's New Capital within the borders of Cairo might initially seem of no significance. However, when juxtaposed with constitutional provisions on the location of the Constitutional Court and Parliament, such a decision was evidently an alternative to amend the Constitution.

El Salvador

In 2022, El Salvador declared an exception regime due to a record-breaking number of homicides. The regime suspends certain rights, including freedom of expression and assembly, which could last up to 30 days with a possible extension. However, El Salvador extended it more than16 times, leading to concerns about human rights violations.

Estonia

Given the generally low number of constitutional decisions in Estonia and taking into account that the country has only approximately 1.3 million inhabitants, 2022, with its nine substantive constitutional rulings, does not stand out in particular. However, the court made a number of socially and legally important decisions.

Ethiopia

In November 2022, the Pretoria peace accords were signed between the Ethiopian government and the TPLF, ending a two-year civil war triggered by postponed elections. It was the most significant development of the year. This could lead to constitutional reform and durable settlement or potential dismemberment.

France

2022 was a year of presidential and parliamentary elections. President Macron was reelected, but only with a relative majority in the National Assembly, leading to possible deadlock. The Constitutional Council has contributed to digital and environmental constitutional law.

Georgia

This report provides a brief introduction to the Georgian constitutional development, including judicial reforms, local elections, abolition of the State Inspector Service, media freedom, EU candidate country status, the election of a public defender, and landmark judgments of the Constitutional Court, developments expected in 2023, and other related issues.

Germany

The German Federal Constitutional Court followed up on its line of jurisprudence on the neutrality duties of government officials and extended it to the office of the Chancellor. Chancellor Merkel was censured for severely criticizing the extreme right-wing party AfD ('Alternative for Germany') in her official capacity.

Greece

The Council of the State case law on the pandemic marked 2022, along with seminal decisions on politically divisive issues. As the country heads toward 2023, constitutional discourse on constitutional controversies has become highly politicized.

Guatemala

In 2022, Guatemala witnessed three themes: controversial appointments and elections in high-level public positions; legislative initiatives concerning human rights and the configuration of public authorities; and the worsening of the situation of criminalization and restrictions on press freedom, in addition to attacks on judicial independence.

Honduras

The most important development in Honduras was the emerging debate around the constitutional control of legislative acts other than legislation and constitutional amendments due to the political crisis that emerged amid the appointment of the authorities of Congress.

Hong Kong SAR, China

China's Standing Committee of the National People's Congress confirmed the extensive role of the Committee for Safeguarding National Security of the Hong Kong SAR in enforcing the Hong Kong National Security Law, which includes the decision of whether an act arising in an adjudication involves national security.

Hungary

In 2022, Hungary continued to function under a special legal order – based on a new cause introduced by an amendment to the FL. The CC delivered decisions in important cases but did not offer effective protection for fundamental rights and did not limit the room for the maneuver of political branches.

India

The Supreme Court held that women, irrespective of their marital status, are entitled to seek an abortion, and any discrimination on marital grounds violates the right to equality. It also observed that the decision to terminate is rooted in a women's right, and forcing her to carry an unwanted pregnancy would violate her dignity.

Indonesia

One of the significant issues in Indonesian constitutional politics in the past year was the term of Constitutional Court Justices, which was extended from five to fifteen years. The politics of the tenure also led to the removal of Justice Aswanto by the Parliament before the end of his term.

Israel

In June 2022, the Knesset dissolved after the diverse unity government formed in 2021 suffered political difficulties. In November 2022, a fifth round of elections was held, in which the right-wing and religious parties' bloc, headed by the Likud party, achieved a majority of 64 out of 120-member Knesset.

Italy

The year 2021 has been characterized by a consolidation of pre-existing trends. In this report, we will summarize these trends of consolidation, focusing on their interaction with other domestic constitutional players, as well as their engagement with supranational and international players.

Japan

The assassination of former Prime Minister Shinzo Abe was an unpredictable event that had a significant impact on the Japanese Constitution. As the criminal's motivation was a close relationship between Abe and the World Christian Unification Church, a religious organization criticized for exploiting its followers, this has led to the ongoing discussion on amending the Religious Corporation Act.

Kenya

The main constitutional development was the general agreement of the Supreme Court with lower court decisions declaring the efforts of then President Kenyatta and Raila Odinga to amend the Constitution using the popular initiative process to amend the Constitution, and its rejection, in that decision, of the basic structure doctrine.

Kosovo

One of the landmark decisions of the Kosovo Constitutional Court in 2022 involved a municipal petition against the decision of the Ministry of Education concerning school reorganization, which the Court declared unconstitutional and incompatible with constitutional guarantees on local autonomy.

Kuwait

Kuwait is still unstable as a result of the constitutional stalemate that requires many reforms, especially concerning the absence of a period in which the government must be formed, the suspension of parliament's work if the government does not attend its sessions, and in the absence of simultaneous oversight on election procedures by the Constitutional Court.

Lithuania

The 2022 Lithuanian report deals with the protection of the national language and the codification of electoral law by adopting a constitutional law. The overview of constitutional jurisprudence presents the developments regarding the principle of judicial independence and the establishment of Intelligence Ombudspersons.

Luxembourg

In Luxembourg, the significant constitutional development was the adoption of four amendment acts. Thus, the amendment procedure launched in 2009 came to a fruitful end. Additionally, the Constitutional Court adjudicated three noteworthy judgments. These judgments focused on the constitutionality of restrictive measures adopted in 2020 to fight the COVID-19 pandemic and the interpretation of the Constitution in light of the ECHR

Malaysia

2022 was highly significant for Malaysia, both constitutionally and politically. Besides several landmark judicial decisions, including the apex court appeal of former Prime Minister Najib Razak, Malaysia also enacted important constitutional amendments restricting party-hopping and established an unprecedented 'unity government' following the general election of November.

Malta

The most significant development in Malta has been the operation of the new gender corrective electoral mechanism, incorporated into the Constitution in 2021. At the 2022 General Election, 12 female candidates were allocated seats in the Maltese Parliament to ensure a more gender-balanced representation.

Mongolia

In 2022, the Constitutional Court resolved two significant cases which rebalanced the political system. Additionally, the government aimed to adopt a new constitutional amendment three years after the previous amendment in 2019. In the last couple of years, the state of liberal democracy in Mongolia has regressed to a level reminiscent of its transitional period in the early 1990s (V-Dem Project 2023).

Morocco

Morocco provides an interesting case for examining how constitutionalism has functioned in a context characterized by a consistent combination of "traditional" forms of political authority with "modern" political institutions. The dualism between "traditional political authority" and the principles of liberal democracy continues to hinder Morocco's democratic progress.

Nepal

In 2022, Nepal witnessed political instability and turmoil, with the Citizenship Amendment Bill pushing heads of the government and leading to disagreements. The President, a mere ceremonial head, refused to give assent to the bill, which sparked protests, and the decision was targeted as unconstitutional, further deepening the constitutional crisis.

Netherlands

Constitutional amendments introduced a general provision in the Constitution, extended the non-discrimination grounds to include disability and sexual orientation, modernized the right to privacy of communications, embedded the right to a fair trial, established an electoral college for the Upper House for non-resident nationals, and 'recalibrated' the constitutional amendment procedure.

New Zealand

The COVID-19 pandemic's shadow continued through an anti-vaccine mandate occupation on New Zealand's Parliament grounds. However, other constitutional concerns began to resurface, such as the New Zealand Bill of Rights (Declarations of Inconsistency) Act 2022 and recognizing indigenous rights in the reform of water infrastructure.

Nigeria

Nigeria's democracy remained stagnant as a hybrid regime with flawed elections, except for the presidential term limit. The electoral contests utilized ethno-religious sentiments, revealing the absence of social coordination by the Constitution. The loss of faith in the electoral process, lack of judicial autonomy, and slow pace of justice administration further intensify Nigeria's social disintegration.

North Macedonia

In 2022, the government did not substantially secure the rule of law or address the country's high-level corruption. North Macedonia's bid for EU integration was vetoed by yet another EU member, Bulgaria.

Pakistan

The Supreme Court's judgment in 'PPPP & others v. Federation of Pakistan' PLD 2022 SC 574 ought to be celebrated for upholding constitutional supremacy. In this decision, the Court overturned the unconstitutional dissolution of the National Assembly and mandated that the vote of no confidence be carried out in a timely manner.

Paraguay

In 2022, Paraguay celebrated the 30th anniversary of its Constitution. Significant political events included the selection of high-level authorities, primary elections, challenges related to narco-politics, and corruption. The report focuses on constitutional developments regarding participatory democracy, administrative law, and personal data protection. Furthermore, it also explores two notable cases involving electoral law and identity rights.

Peru

The political tensions of recent years have led to an intense constitutional and political crisis. This political turmoil has resulted in widespread protests, the declaration of a state of emergency, and police violence. The current crisis is also deeply rooted in the constitutional design of Peru.

Poland

In 2022, Polish authorities continued the illiberal remodeling of the constitutional system. The Constitutional Tribunal adjudicated to lift the constraint emanating from the EU and international law. The year concluded with the legislation regarding the Supreme Court and preparations for the 2023 parliamentary election.

Portugal

2022 was a year marked by changes in the political scene, with an increase of the far-right's influence in Parliament. In addition, there was a process of revising the Constitution and workers' discontent. The Courts have also provided interesting decisions on metadata, elections, COVID-19 measures, and employment security.

Romania

In 2022, new amendments were introduced to the judiciary laws, and the European Commission announced its intention to lift the Cooperation and Verification Mechanism.

Slovakia

The nearly permanent internal political crisis of 2022 culminated in a no-confidence vote

in December. Apart from this, during the same year, the SCC provided significant decisions on its authority to review the constitutional acts, the rules of fiscal stability, and the questions posed in the referendum.

Slovenia

After a 17-year period of parallel legal regimes for heterosexual and same-sex couples, the Constitutional Court found that such an approach violates the constitutional guarantee of equality. Consequently, the Court declared the provisions of the Family Code reserving marriage and joint adoption to heterosexual couples unconstitutional.

Spain

In Spain, ruling 66/2022 supported a decision made by a public health service that denied a woman's request to give birth at home as the birth needed to be induced. The Constitutional Court found that protecting the rights of the unborn took precedence over the protection of the mother's rights.

Sweden

In 2022, parliamentary elections took place in Sweden, leading toleading to a change in the of national government. ThisThe government was formed on the basis ofbased on a political agreement between four parties. However, only three of the parties are members of the government, whilewith the nationalist Sweden Democrats party staying remains formally outside of the government.

Switzerland

Neutrality – a political strategy, not a constitutional requirement – has been vital for Switzerland but put into question amid Russia's military aggression in Ukraine. A Federal Supreme Court decision highlights the challenges of comparative methods and the need for judges to master the 'grammar of religion' in constitutional review.

Taiwan

2022 marks Taiwan's three-fold constitutional moment. First, the constitutional amendment's wagon resumed after a long hiatus. Second, the Constitutional Court Procedure Act's implementation takes constitutional review into a new era. Third, a significant shift in Taiwan's geopolitics influenced its meta-constitution due to a visit from Speaker Nancy Pelosi to Taiwan.

Thailand

The poorly designed 2017 Constitution, combined with Prayuth Chan-ocha's inadequate leadership, resulted in a frequent collapse of the House because of internal conflicts within the coalition. While a good political tactic, this undermines the House's credibility, a long-term threat to Thailand's already fragile parliamentary democracy.

Tunisia

In 2022, President Kais Saied continued his dismantling of constitutional institutions and initiated a constitution-making process, which that resulted in the adoption of the Constitution of the Third Tunisian Republic.

Turkey

In 2022, Turkey experienced further deterioration of the rule of law in Turkey. The Erdoğan government kept disregarding the European Court of Human Rights' decisions on the immediate release of Demirtaş and Kavala while packing the Constitutional Court with its factious men before the 2023 elections.

Uganda

In 2022, the most significant constitutional development was the highly publicized and controversial mistreatment of Honorable Dr. Esther Kitimbo-Kisaakye, Justice of the Supreme Court, by Uganda's Chief Justice Honorable Alfonse Chigamoy Owiny-Dollo and the Judicial Service Commission–the body charged with recruitment and discipline of judicial officers.

Ukraine

In Ukraine, 2022 will be remembered as the year of national martial law following unprovoked Russian aggression against Ukraine since February 24th. This conflict significantly impacted all public administration and constitutional policy-making areas in the country during the reporting period.

United Kingdom

In 2022, the United Kingdom had two monarchs, Elizabeth II and Charles III, and three Prime Ministers. Additionally, former Prime Minister Boris Johnson has been fined by the police for breaching the COVID-19 legislation that he introduced. Due to this violation, Johnson is under investigation by the Committee of Privileges.

Uruguay

The most important constitutional development was the rejection, on March 27th, of the referendum appeal against the Law of Urgent Consideration, popularly known by the acronym LUC. Consequently, this led to the popular confirmation of the main project promoted by the Government and the Republican Coalition, Act 19889 2020.

Venezuela

In 2022, Venezuela's deep political crisis continued to intensify. The country should still be considered an authoritarian regime with due to the absence of no separation of powers and the rule of law. The human rights gross violations had significant attention from human rights international and regional human rights bodies, with particular relevance to the International Criminal Court investigation.

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