

A world map is centered in the background, rendered in a light blue color against a darker blue background. The map shows the outlines of continents and countries. A white horizontal line is positioned below the text 'I·CONnect-Clough Center'.

I·CONnect-Clough Center

2017 Global Review of Constitutional Law

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

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Electronically published by I•CONnect and the Clough Center
for the Study of Constitutional Democracy at Boston College.

www.iconnectblog.com | www.bc.edu/cloughcenter

ISBN: 978-0-692-15916-3

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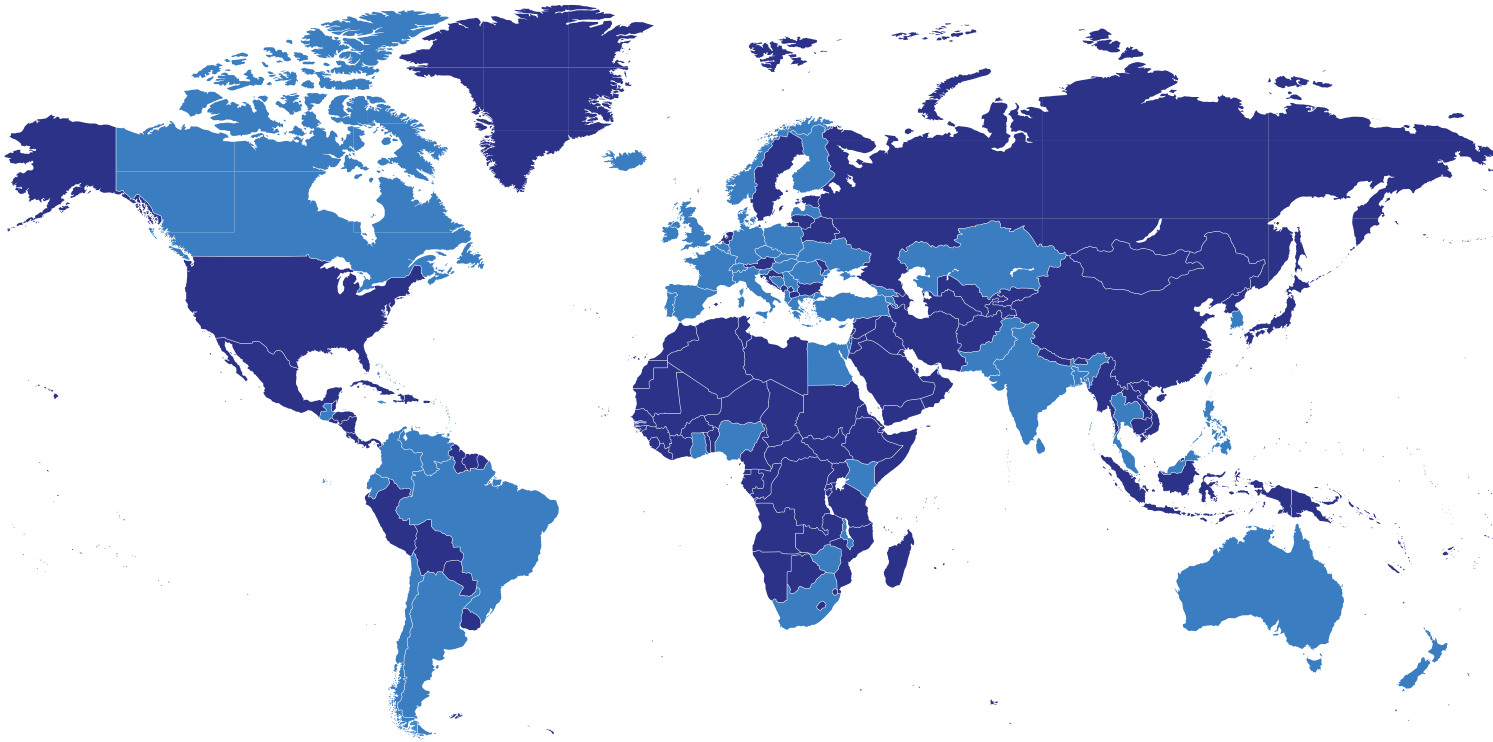
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INTRODUCTION



THE STATE OF PUBLIC LAW IN THE WORLD

Richard Albert, David Landau, Pietro Faraguna and Simon Drugda
I·CONnect Founding Co-Editors

Last year we published the first edition of the I·CONnect-Clough Center Global Review of Constitutional Law. We gathered teams from 44 jurisdictions to prepare relatively brief reports on constitutional developments and cases in their own jurisdiction during the 2016 calendar year. Our inaugural edition attracted readers from every part of the world, and their enthusiasm about the project proved infectious as we have grown to 61 jurisdictions in this second edition.

The purpose of the *Global Review* is the same this year as it was before: to offer readers systemic knowledge that, previously, has been limited mainly to local networks rather than a broader readership. By making this information available to the larger field of public law in an easily digestible format, we aim to increase the base of knowledge upon which scholars and judges can draw.

We have selected a theme for this second edition: The State of Liberal Democracy. Recent developments in the world suggest that liberal democracy is under pressure. We invited each team to reflect on this theme if they wished to do so, recognizing that for many reasons they might choose to prepare a more general report about constitutional developments—equally useful and important to our readers. Where possible, then, jurisdictional teams have prepared their reports in light of our chosen theme.

We thank our distinguished country authors for producing their truly outstanding reports. We thank Gráinne de Búrca and Joseph Weiler, Co-Editors-in-Chief of I·CON, as well as Sergio Verdugo, Associate Editor of I·CON, for publishing a few of these excellent contributions in the journal itself as part of a special issue on Asian public law.

And we express our most sincere thanks to Professor Vlad Perju, Professor of Law and Director of the Clough Center for the Study of Constitutional Democracy at Boston College. Professor Perju's support for this project has been boundless, and we thank him for partnering with us to bring this project to life.

Finally, we express our deep gratitude to the authors of the reports in this edition of the *Global Review*. Their contributions have created an invaluable resource for the study of public law. We intend to continue this *Global Review* every year, and we invite potential authors from as-yet unrepresented jurisdictions to contact us via email at iconnect@gmail.com. We also welcome comments, suggestions, and inquiries from our readers.

A RENEWED PARTNERSHIP IN SUPPORT OF CONSTITUTIONAL DEMOCRACY

Vlad Perju

Director, Clough Center for the Study of Constitutional Democracy

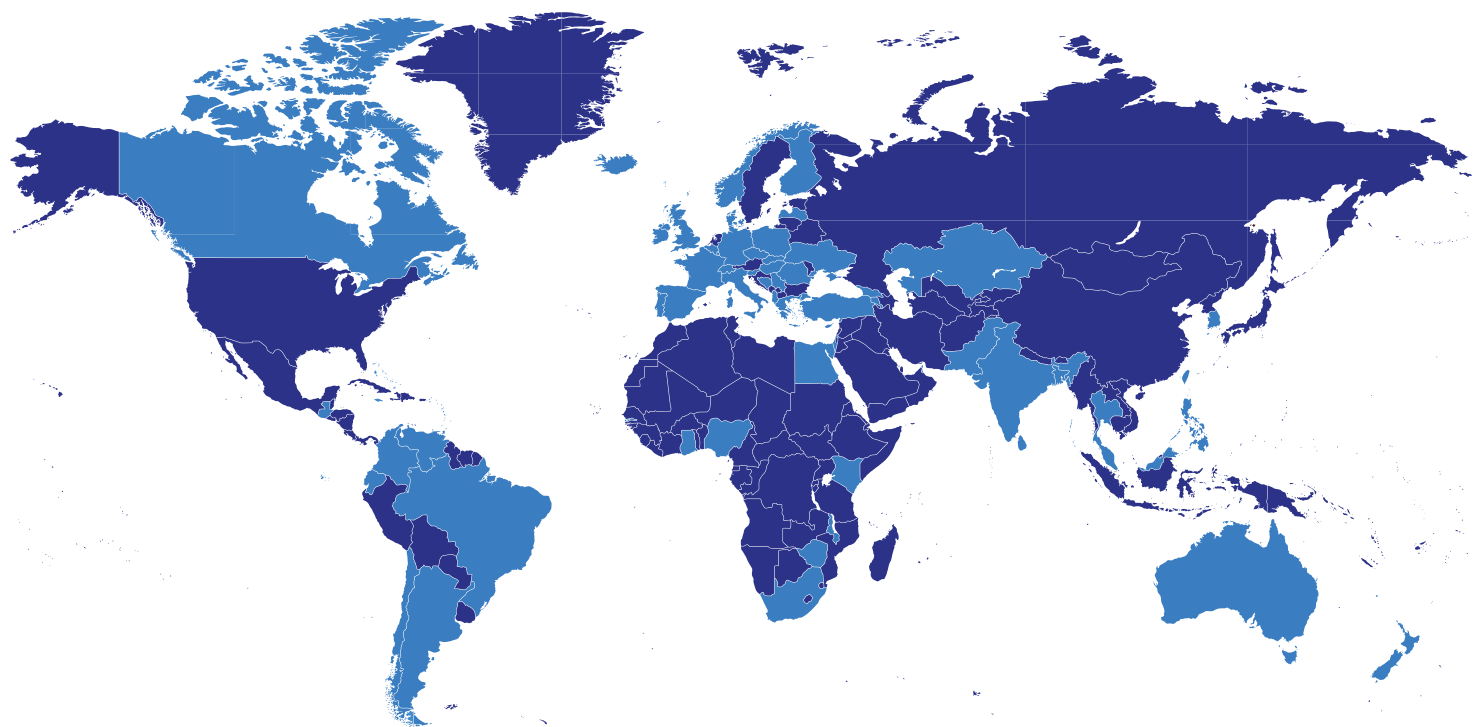
Professor, Boston College Law School

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

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

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

COUNTRY REPORTS



Albania

THE STATE OF LIBERAL DEMOCRACY

Dr. Adea Pirdeni MJur (Oxon), University of Tirana Faculty of Law

I. INTRODUCTION

Looking back at the year 2017, the constitutional developments in Albania were marked to a major extent by the electoral process and ongoing justice reform. The first part of this contribution will focus on the constitutional developments in relation to the electoral process as well as the case law of the Constitutional Court on some of the seminal cases concerning fundamental rights and freedoms, which lie at the core of liberal democracy. The second part will discuss the key developments pertaining to the implementation of reform on the judiciary, which constitutes the main challenge of the constitutional system in Albania. It will aim at detangling the ongoing processes of reform on the judiciary and discuss the initial constitutional implications of its application. Lastly, a few conclusions will be drawn on the developments of the year as well as the way forward.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

The shaky bedrock of the Albanian liberal democracy: The parliamentary elections of 2017

Albania is a parliamentary democracy, where the Assembly exercises legislative power; the Council of Ministers chaired by the Prime Minister constitutes executive power; and the President of the Republic serves as

the head of state. Under the current Constitution, which was adopted in 1998 and amended in the following years, the members of the Assembly are elected for a four-year term through a system of proportional representation on 12 region-wide lists. On December 5, 2016, the President of the Republic called parliamentary elections to be held on 18 June 2017.¹ A tense political climate preceded the elections. In late February 2017, the right-wing opposition party, the Democratic Party, started a parliamentary boycott and a protest by building the so-called “tent of freedom” at the main Boulevard in Tirana facing the Prime Minister’s Office. By that time, the latter was leading a coalition government between the Socialist Party and the Socialist Movement for Integration. The opposition raised allegations that the coalition government had ties with organized crime, and that there was a high probability of manipulation of the elections. It rallied for the establishment of a technocratic government as the only solution for leading the country to free and fair elections. Despite the need for parliamentary continuity, which was also stressed by the EU Commission,² especially at a time where substantial reforms were on the agenda, the opposition persisted with their protest. According to the Electoral Code, the political parties have to register at the Central Electoral Commission within 70 days prior to the upcoming elections.³ Hence April 9 was the final deadline for all the parties to submit lists of candidates for the elections on June 18. However, none of the opposition parties registered within the legal

¹ The Constitution of the Republic of Albania, s 92 (h)

² Johannes Hahn, ‘EU Commissioner for European Neighbourhood Policy and Enlargement Negotiations Statement on recent developments in Albania’, <https://ec.europa.eu/commission/commissioners/2014-2019/hahn/announcements/statement-eu-commissioner-johannes-hahn-recent-developments-albania_en> accessed 15 February 2018

³ Electoral Code of the Republic of Albania (2008), s. 64 (1)



deadline. This was coupled with the warning of one of the parties of the ruling coalition, the Socialist Movement for Integration, that it would not take part in the elections without the participation of the opposition.

While the protest and parliamentary boycott of the opposition were developing, the appointment of the President of the Republic was taking place in the midst of the political turmoil. After three failed rounds to elect a new president with a three-fifths majority, on April 28, 2017, the ruling coalition parties voted to elect the former speaker of the Assembly and leader of the minor coalition party, Ilir Meta, for the office of President of the Republic. The President was voted in with 87 votes out of 140, which would count for more than 3/5 of the total number of votes, even though the Constitution only requires an absolute majority voting for the fourth round.⁴

Following intensive international mediation, the deadlock ended on May 18, 2017, with a political agreement signed between the leaders of the Democratic and the Socialist Parties.⁵ Part of the deal were a set of measures, among which was granting the prerogative to the opposition parties to appoint a vice-prime minister and six ministers, including the Ministers of Justice, Interior, Finance, Health, Education, Welfare and Youth, which are considered instrumental in the process of exploiting possibilities of manipulating the general elections. Moreover, the opposition would chair the Central Electoral Commission, and appoint the new People's Advocate (Ombudsman).⁶ As further stipulated in the deal, high-ranking officials of other public administration bodies were to be removed from office and replaced. The underlying rationale of this deal was to prevent the exploitation of the state's financial and human

resources for political campaign purposes by the ruling coalition. As part of the package deal, the Law on Political Parties, that on Audio-visual Media, and lastly, the Criminal Code were amended to address issues related to campaign advertising, finance, and the introduction of new criminal offenses in relation to strengthening the integrity of the voting process. The agreement foresaw a postponement of the election date from June 18 to June 25, 2017, and the extension of the deadline for registration of the candidates. As a consequence, the President of the Republic issued a second decree which postponed the date of the election. This decree was subject to an unsuccessful challenge in the Constitutional Court. According to the Constitutional Court, the presidential decree was an administrative act of individual nature, and as such, the case can only be adjudicated by the administrative courts.⁷ However, it is argued that the Constitutional Court did not suggest a viable route for this claim. Considering the tight schedule of the electoral process, coupled with the length of the proceedings before the administrative courts, lodging a lawsuit wouldn't count as an effective remedy.

The voting process *per se* was held in a good climate, which enabled the parties to compete freely with no major incidents recorded. The voter turnout was around 46%,⁸ the lowest ever recorded in the history of the pluralist elections after the fall of communism. This result implies a certain level of distrust of the voters towards the competing parties in the election. The election resulted in the Socialist Party gaining 74 seats out of 140, thus being able to form a majority government without the need to enter into a coalition with either of the two other major parties. According to the OSCE/ODIHR Election Observation Mission, the continued

politicization of election-related bodies and institutions, as well as widespread allegations of vote buying and pressure on voters, detracted from public trust in the electoral process.⁹ Despite the depolarization of the election climate, the political agreement was given legal effect at the expense of the rule of law. All amendments were voted on in one day, contrary to the constitutionally prescribed legislative procedure.¹⁰ Likewise, the dismissals and appointments of high-ranking officials in total disregard of the legislation on public service may be considered a breach of the principle of legality.

Following the recommendations of OSCE/ODIHR and the suggestions from the parties participating in the electoral process, the newly elected members of the Assembly established an *ad hoc* Parliamentary Committee on electoral reform, which was vested with the power to draft and submit for approval the legislative amendments governing the electoral process. In addition to other tasks, the committee will consider repealing criminal provisions for defamation by replacing them with civil remedies designed to restore the injured party.

Constitutional case law and liberal democratic values

Throughout the year, the Constitutional Court was seized to deliberate on several issues involving fundamental rights that constitute essential values of liberal democracy, such as the right to vote and the right to property. As to the right to vote and the right to run for public office, the Constitutional Court has ruled on the forfeiture of the right to vote and/or the right to run for office for certain individuals convicted for a selected number of serious crimes, or for those defendants for whom no final judgment has been yet issued. The claimant, the Albanian Helsinki

⁴ The Assembly, Decision (2017) No. 53/2017

⁵ OSCE/ODIHR, Parliamentary Elections 25 June 2017, *Election Observation Mission Final Report* (2017) Warsaw 28 September 2017, pg. 4 <<https://www.osce.org/odihr/elections/albania/346661?download=true>> accessed 05 February 2018

⁶ Assembly, Decision (2017) No. 70/2017

⁷ Constitutional Court, Inadmissibility Decision (2017) No. 150

⁸ Central Electoral Commission, *Press Release of the Chairman of the Commission* (26 June 2017) <<http://www.cec.org.al/sq-al/Njofitime/deklarata-shtypi/ID/765/Njofitim-per-shtyp-27062017>> accessed 05 February 2018

⁹ *Ibid.* 4, pg. 1

¹⁰ *Ibid.* 4, pg. 6

Committee, argued that the implementing provisions of article 45 of the Constitution (the right to vote) by Law no. 138/2015 “For guaranteeing the integrity of the elected, appointed and those persons exercising public functions” failed to set the appropriate and accurate criteria for the group of serious crimes for which this forfeiture was applicable. Through this decision, the Constitutional Court acknowledged the fundamental importance of the right to vote in a democracy. It held that the legislator’s intervention on the criteria of disfranchisement and the right to run for office by excluding certain individuals from public office did not infringe upon the principle of proportionality.¹¹ However, it remains to be seen whether this forfeiture and the rationale of the Constitutional Court will stand the test of the ECtHR on the requirements of case law on Protocol 1, article 10 of the ECHR, especially with relation to the sufficient link between the ban and the circumstances of each case.

With regard to the right to property, the Constitutional Court decided on the constitutionality of specific articles of Law 133/2015 “On the Treatment of Property and the finalization of the process of property compensation,” which regulates the systemic and long-standing issue of compensation of property unjustly expropriated and confiscated during the communist regime. The law was enacted in the framework of a comprehensive action plan for addressing the findings of the pilot judgment of the ECtHR *Manushaqe Puto*¹² and adopting a viable and just compensation scheme. The new methodology differs substantially from those applied by previously enacted legislation, leading on the one hand to possibly lower compensation for the beneficiaries, and on the other hand establishing supposedly a more financially affordable scheme. The applicants alleged that by failing to put in place an evaluation based on enforceable decisions of the property agencies or the Court, the law violates their legitimate expectations, the principle of equality, and the right to property enshrined in Article 1, Protocol No. 1 to the ECHR.

The Constitutional Court, after asking for an *amicus curiae* opinion of the Venice Commission, ruled that from the standpoint of the rule of law, the law infringed acquired rights and the principle of legal certainty and legitimate expectations only with regard to two specific situations relating to the re-evaluation of the property restituted or compensated before the entry into force of this law. The Court did not find a violation of the principle of proportionality on the crucial aspects of the methodology of compensation.

Conclusively, looking back how the political and constitutional events unfolded in the course of last year, it became quite evident that the inherent exigencies of political expediency superseded the application of the core constitutional values of liberal democracy, such as respect for the rule of law and the principle of legitimacy. As to the other anchor of liberal democracy, the protection of fundamental rights, the Constitutional Court cautiously interpreted interference in some of the most important fundamental rights by trying to keep a fair balance between prevailing public interest, the right to vote and the right to property. As was witnessed through the year, it could be argued that the fragility of the application of the principle of the rule of law and other classic liberal democratic values reflect the decline of certain aspects of liberal democracy in Albania.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The endeavors towards establishing a reformed judiciary

Alongside the political developments, the year 2017 was crucial for bringing to fruition justice reform as one of the most important reforms undertaken in Albania since the establishment of the democratic state. In late 2014, the Assembly initiated an analysis to examine the causes of the dysfunctional operation of the judiciary, characterized by a tendency for being subdued on political power, corporatism, and widespread corrup-

tion. These efforts resulted in the unanimous adoption by the Assembly of the constitutional amendments of July 22, 2016. The passing of these amendments was considered a crucial milestone for establishing an independent judiciary in Albania.

These constitutional amendments radically redesigned the institutional set-up of the judiciary. The changes were targeted at granting greater independence by avoiding the grip of politics on appointees to the judiciary, as well as tackling crucial legal aspects of their organization and functioning, subject to previous unsystematic approaches. The constitutional amendments introduced new institutions such as the High Judicial Council, the High Prosecution Council, the High Inspector of Justice, the Judicial Appointments Council, the special courts, the special prosecution, and the special investigation unit for adjudicating and investigating organized crime and corruption. Furthermore, the reform package reinvented the organization and functioning of existing institutions, such as the Constitutional Court, the Supreme Court, the Prosecutor General, and the system of ordinary courts. Following the political agreement of May 18, 2017, a substantial achievement of the reform was the successful enactment of the amendments of the criminal code, the code of criminal procedure, and the code of civil procedure, and the introduction of a juvenile criminal justice code.

Apart from the above, the constitutional amendments established a one-of-a-kind, fully fledged vetting system of judges and prosecutors, consisting of a comprehensive assessment of their assets, background (inappropriate links with organized crime), and professional qualifications. The underlying rationale for this reform was to ensure the functioning of the rule of law and the independence of the judiciary, and to reinstate the trust of the public in the institutions of this system.¹³ The Independent Commission of Qualification performs the process as the first instance, and the Appealing Chamber is entrusted with the responsibility to hear

11 Constitutional Court Decision (2017) No. 43 para. 29

12 *Puto and others v. Albania* App nos 604/07 (ECHR, 31 July 2012)

¹³ The Constitution of the Republic of Albania, s 169/b (1).

appeals. Also, the Public Commissioners represent the public interest and on such ground, may appeal the decisions of the first instance. As a means to enhance the credibility of the process, the Constitution assigns specific monitoring competences to the International Monitoring Operation, an EU Commission-led consortium.¹⁴

These constitutional amendments were further elaborated in the first legislation package of justice reform passed by the Assembly by the end of the year 2016. Consequently, the year 2017 was critical for ensuring the proper implementation of justice reform. Inevitably, the whole process went through a bumpy and winding road. The appointment of the vetting institutions was stalled by the parliamentary boycott due to the requirement for a politically inclusive appointment process and the need for qualified majority voting.¹⁵ The vetting institutions' members were only appointed *en bloc* with a three-fifths majority voting in the Assembly, following the political agreement of May 2017.¹⁶ As to the members of the High Judicial Council and the High Prosecution Council, despite the constitutional amendments and the legislation package setting strict and clear timelines for their appointment,¹⁷ these timelines have not been met. Due to political instability as well as the inability of the designated appointing institutions to propose qualified candidates for these institutions (coming from academia, the bar association, and civil society), they will not be established until the end of December 2017.

Justice reform from the Constitutional Court's perspective

In addition to the repercussions of the electoral process, justice reform was further impacted by the constitutional challenges

brought up to the Constitutional Court on the laws implementing justice reform. The first claim referred to Law 84/2016 "On the Transitional Evaluation of Judges and Prosecutors in Albania," which convinced the Court to suspend the application of the law until the final deliberation. The parliamentary minority group who submitted the claim argued that the provisions of the vetting law which assign particular tasks to institutions, such as the intelligence authorities and those responsible for asset control, were a violation of the principle of separation of powers.¹⁸ The Court has emphasized *inter alia* that the authority to manage, control, evaluate, and decide on each case remains with the vetting institutions. Other institutions only serve the purpose of fulfilling the mission of the former. Moreover, the Constitutional Court held that with regard to the assessment of professional qualification of the officials who are subjects of evaluation, the vetting authorities should only take into consideration blunt, serious, and substantial errors in drafting and delivering decisions or legal opinions. As to the supposed violations of privacy, the Constitutional Court emphasized that the rights of these officials are subject to specific limitations deriving from the constitutional amendments. This interference was deemed necessary, as it aims to contribute to reducing the level of corruption and restore public confidence in the justice system. In the broadest sense, these limitations serve the interests of national security, public safety, and the protection of the rights and freedoms of others.¹⁹ The same law was challenged for a second time before the Constitutional Court, but it was considered *res judicata*, and the Court denied its further consideration.

In other cases scrutinizing the judicial reform legislation package, while acknowledging

the pressing need for reforming the judiciary, the Constitutional Court emphasized the pivotal importance of the essential features of the rule of law in a democratic society, including respect for process rights and legal certainty. In the course of reviewing the Law "On the institutions governing the judiciary," the Constitutional Court repealed the articles on the disciplinary misconduct of the members of the High Judicial Council and the High Prosecution Council by considering them as a threat to the application of legal certainty, as they lacked clarity, and they may be subject to arbitrary application.²⁰ An analogous rationale was employed on the provisions of the Law No. 96/2016 "On the status of judges and prosecutors." The Court concluded that, by way of their formulation, the provisions on the misconduct of magistrates do not comply with the criteria of clarity, consistency, and effectiveness. As a consequence, they undermine the application of the principle of legal certainty.²¹ The Court further touched upon provisions encroaching on constitutionally guaranteed standards of the status of judges and prosecutor, including access to files and time spent outside office hours.

The last controversial event of 2017: The appointment of the Provisional Prosecutor General

The year 2017 was concluded in a disquieting manner due to the controversial appointment of the new provisional Prosecutor General. The five-year term of the Prosecutor General ended in December 2017, and based on the constitutional amendments of 2016, the High Prosecution Council proposes the successor from a list of three eligible candidates. The Assembly appoints the new Prosecutor General by a three-fifths majority.²² Given that the High Prosecution Council was not yet

¹⁴ The Constitution of the Republic of Albania, Annex, s. (B)

¹⁵ The Constitution of the Republic of Albania, s 81 (2)

¹⁶ Assembly, Decision (2017) No. 82/2017

¹⁷ The Constitution of the Republic of Albania, s 170 (5) stipulates that the High Judicial Council shall be established within eight months from the entry into force of the constitutional amendments.

¹⁸ The Constitution of the Republic of Albania, Annex, s D, Dh, and E

¹⁹ Constitutional Court Decision (2017) No. 2 para. 65

²⁰ Constitutional Court Decision (2017) No. 41 para.40

²¹ Constitutional Court Decision (2017) No. 34 para.73-76

²² The Constitution of the Republic of Albania, s. 148/a (1)

established, the Assembly appointed a new Provisional Prosecutor General by a simple majority based on the transitory provisions of the Law 97/2016 “On the organization and functioning of the prosecution in the Republic of Albania.”²³ These provisions enabled the Assembly to elect a provisional Prosecutor General among other prosecutors based on seniority. On 18 December 2017, the new provisional Prosecutor General was sworn in before the Assembly in a tense political climate.²⁴ The opposition claimed that this procedure constituted a major violation of the rule of law, and it was nothing but an effort to exercise political influence on the office of the Prosecutor General by appointing loyalists of the ruling majority. The appointment was based on a literal reading of the sections of prosecution law, which was supported by both EURALIUS (EU-funded technical assistance mission in Albania) and OPDAT (Overseas Prosecutorial Development Assistance and Training, a Department of Justice of the United States program).

Year 2017: A conclusive overview

In retrospect, 2017 was a highly challenging year for the implementation of the constitutional amendments of 2016 and the accompanying legislation on justice reform. Although no major threats to liberal democracy were witnessed, the implementation of justice reform turned out to be quite complicated. The political dispute that shaped the first half of the year disrupted the advancement of reform. Moreover, the Constitutional Court was mostly cautious about stepping into the territory of the newly adopted legislation. In relation to the law on the vetting of judges and prosecutors, the Court asked for an *amicus curiae* opinion from the European Commission for Democracy through Law (Venice Commission), since the Court itself was acting as *iudex in causa sua*, due to the fact that Constitutional Court judges were subject to vetting. However, in other cases, when discussing the laws on the reform of the justice system, the Court would not take a mere rubber-stamping approach. It rather adopted a moderately counter-majoritarian stand in striking down legislation

that infringed upon normative constitutional values.

IV. LOOKING AHEAD TO 2018

After leaving behind a demanding year of constitutional developments, a series of challenges lie ahead for the Albanian constitutional institutions in the course of 2018. Electoral reform should be completed prior to the upcoming parliamentary elections of 2021. As for justice reform, the European Commission has made clear that the accession negotiations with Albania will only open once there is tangible progress with its implementation. Hence, significant advancement is expected on the vetting of judges and prosecutors, in completing the institutional architecture of the justice system by appointing the members of the High Judicial Council and High Prosecution Council as well as in filling in the vacancies at the Constitutional Court and the Supreme Court.

Notwithstanding the enhanced constitutional checks for a better functioning judiciary, the adopted legislation remains very complex. The responsible institutions will have to employ substantial time and resources to process the logic of the new system and ensure its adequate application. Also, as more legislation on justice reform awaits adoption, the legislature will need to replace those provisions quashed by the Constitutional Court and ensure their harmonization with the legislation in force. Considering that the passing of many of these provisions will require qualified majority voting, the prospect of a strong political debate accompanying the process in the Assembly is highly likely.

V. FURTHER READING

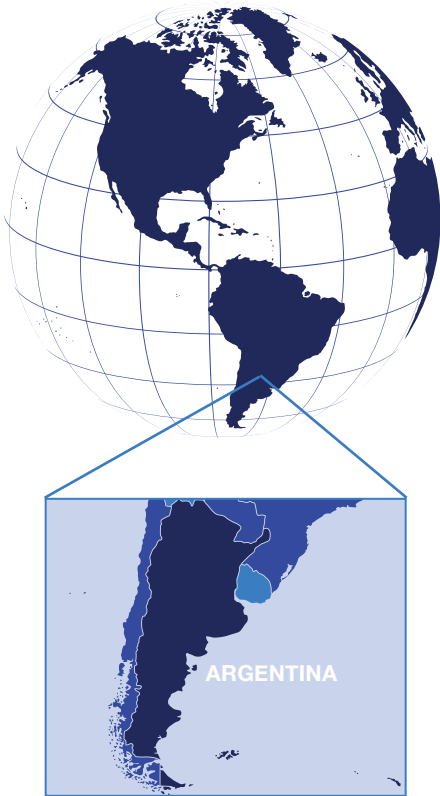
A Pirdeni and D Piqani, ‘The Constitutional Court of the Republic of Albania’ in *Max Planck Encyclopaedia of Comparative Constitutional Law* (OUP- expected)

A Vorpsi and J Bergmann, *The individual Constitutional Complaint: The German ex-*

perience and the Albanian perspective: A practical manual (Maluka, 2017)

²³ Law 97/2016 s. 109 (2)

²⁴ Assembly, Decision (2017) No. 115/2017



Argentina

THE STATE OF LIBERAL DEMOCRACY

Juan F. González-Bertomeu

Ramiro Álvarez-Ugarte

I. INTRODUCTION

In this short contribution, we will address the issue of the state of liberal democracy in the country by studying a selection of cases announced by the Supreme Court during 2017 and the politics surrounding them. Two reasons explain this focus. First, the last constitutional amendment in Argentina—to the 1853 Constitution, still in force—took place in 1994 and a new one is not expected soon. The Court has a very important role in constitutional argument or dialogue in the country. Second, the Court has recently undergone a change in personnel in the context of broader political change. This event provides an exceptional opportunity to explore possible jurisprudential shifts in the making.¹ Though it is still early to provide a conclusive judgment, the new members of the Court seem willing to revise the commitment to international human rights law (which is part of the domestic constitutional system) expressed in previous years.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Since the collapse of the last military dictatorship (1976-1983), Argentina's democratic rule has consolidated. Elections are the

only accepted means of gaining power and ruling parties lose elections as well as win them. The military lost all capacity to influence politics. Rights are recognized, and mechanisms for enforcing them are available, if imperfectly. Serious problems exist, however: inequality and poverty affect the well-being of vast sectors of the population and, together with corruption and lack of accountability, they compromise the vitality of democratic institutions.

In this contribution, we will review the state of liberal democracy in the country by focusing on the Supreme Court's case law during 2017. A brief discussion of the Court's role in the last decades may benefit the exposition. During the 1980s, the Court was part of a broader narrative of recovering liberal-republican values within the context of a transition to democracy. Populated by prestigious lawyers and former judges representing a diverse array of political affiliations, the Court made an early contribution by showing a commitment to civil rights and some political liberties.²

In 1990-1991, the Court was packed. It went from a five- to nine-member court, and President C. Menem was able to fill the new seats plus additional vacancies. During the 1990s, the new justices at the Supreme Court – which in many key cases voted together to

¹ Jeffrey Allan Segal, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1993); Gretchen Helmke, 'The Logic of Strategic Defection' (2002) 96 *The American Political Science Review* 291; Gretchen Helmke and Julio Rios-Figueroa (eds.), *Courts in Latin America* (Cambridge University Press 2011).

² For example, the Court decided that the prohibition to remarry faced by divorced individuals was unconstitutional (*Sejean*), struck down a statute punishing the possession of small personal doses of drugs (*Bazterrica*), and announced a fairly liberal view concerning protections to criminal defendants (*Fiorentino*). See also Juan F. González-Bertomeu, Lucia Dalla Pellegrina, and Nuno Garoupa, 'Estimating Judicial Ideal Points in Latin America: The Case of Argentina' (2016) 13 *Review of Law & Economics* 1.

form a majority – were widely seen as more conservative and partisan than the early appointees had been.³ Their close allegiance to the executive made a dent in the Court’s legitimacy. Amidst the general collapse of the economy in 2001, the Court began to unravel under the weight of popular demonstrations against its decisions concerning the freezing of bank accounts.⁴

Late in 2002, a renewal process was kick-started with a (failed) attempt at impeaching the Court’s nine justices. Upon President N. Kirchner’s taking office in 2003, a more nuanced effort resulted in the resignation of two justices and the removal of another two. As a result, prestigious lawyers, former judges, and scholars entered the Court, including, for the first time under democracy, two women. Building legitimacy after a decade of disrepute was a major challenge. The Court somewhat delivered through a robust human-rights agenda that reclaimed the importance of civil liberties but also showed concern about the gross violations committed by the military dictatorship, and endeavored to take social and economic rights seriously. The Court also intervened in a few cases with a structural dimension, as the one involving the clean-up of the Riachuelo River basin. In general terms, the Court came to be perceived as independent from the executive.

In 2015, a new center-right party took the executive. The new President, M. Macri, was promptly able to fill two vacancies (Justices H. Rosatti, a lawyer and former Minister of Justice, and C. Rosenkrantz, a lawyer and scholar, both “liberal” in the European sense) in the now five-member Court. These changes have generated a degree of anxiety among Supreme Court observers. Will this (partially) “new” Court reconfigure the constitutional landscape?

Will the Court’s contribution strengthen Argentina’s liberal democracy or, on the contrary, will it represent a setback? These questions cannot be answered without a view of what that contribution may be. There are four areas of constitutional adjudication that one may relate to the health of Argentina’s liberal democracy, potentially in some tension with one another: (1) the oversight of the political process, (2) civil and political rights, (3) socioeconomic rights, (4) the fight against impunity concerning the dictatorship.

What can one expect from this Court? At this point, we can only speculate. Both for political and institutional reasons dealing with its design, the Court’s role regarding (1) has been relatively modest (though non-negligible) throughout, and this probably will not change soon. On the other hand, given the profile of the new justices, it is likely that the Court’s decisions will keep advancing a fairly robust view concerning (2), though probably less so concerning (3) and (4) as compared with previous periods. Although in a five-member court each justice can have considerable weight, much will depend on how majorities are arranged.

Since the reconfigured Court has only taken its first steps, it is too early to tell whether the previous conjecture fits the actual decisions. More modestly, we chose to highlight a handful of rulings on some of those areas, since they might suggest trends underway that merit future attention. Most of the selected rulings feature a crucial aspect that cuts across the previous subject matters: the role of international law, especially human rights law, in Argentina’s legal system. In the previous two decades or so, and with fluctuations, the Court constructed a view on the proper balance between the law that

comes from international treaties and purely domestic law. As part of a renewed commitment to human rights in 1994, a constitutional amendment gave several treaties the same standing as the rest of the Constitution. International human rights law has played a major role in adjudication, chiefly to dismantle the structures of impunity regarding human rights abuses committed under the dictatorship.⁵ In particular, the decisions of the Inter-American Court of Human Rights (hereinafter IACHR), the body in charge of enforcing and interpreting the American Convention on Human Rights, have been central. In 1995, the Supreme Court manifested its willingness to defer to that court’s interpretations of the convention.

Judging from the few indications available, however, the reconfigured Court might be willing to reopen the discussion of the domestic status of international law or, at least, the deference due to international bodies.

Bignone

On May 9, 2017, a crowd of hundreds of thousands took to the streets to protest a decision announced by the Supreme Court days earlier. At the center of the discussion was a technical issue with strong political and practical undertones: how to count the prison term of one Luis Muiña. Muiña had been convicted in 2011 of kidnapping and torturing five people during the dictatorship and sentenced to 13 years in prison. The Court, however, agreed with a lower court that Muiña, already on parole, could have his prison term considered fully served.

Muiña asserted his right to walk free due to the operation of the so-called “two for one” statute. Passed in 1994 to regulate the American Convention’s right to be prosecuted within a reasonable timeframe and to address the excessive use of pretrial detention,

³ Bertomeu et al., 22-24. For example, the Court during the 1990s decided for the executive on politically charged cases (*Dromi*), it reversed its decision on drugs (*Montalvo*), and it ruled against the incorporation of an LGTB rights association (*CHA*).

⁴ Diana Kapiszewski, ‘La Corte Suprema y la política constitucional en la Argentina post-Menem’ (2006) 7 *Revista Jurídica de la Universidad de Palermo* 5.

⁵ In the 1980s, after the famed Junta trial and a rise in military pressure, the Alfonsín administration had statutes passed to give investigations closure and conclusively presume that lower-rank officials had followed orders. Later, the Menem administration pardoned both convicted and indicted alike. These obstacles to investigation eventually were removed. First it was the so-called “truth trials,” initiated with the purpose of knowing the destination of *desaparecidos* even though those responsible could not be punished. Then there were the trials against the military and police personnel who had taken the babies of kidnapped women who were pregnant. The crime was so heinous that it was outside the scope of the amnesty laws. In the early 2000s, lower courts began to consider that these laws were unconstitutional, and, eventually, the Supreme Court agreed. The main argument relied on case law of the Inter-American Court of Human Rights.

the statute established that, after two years spent in detention, each extra day would count as two served if convicted. While the statute was repealed in 2001, before Muiña was arrested, he invoked the Criminal Code's "most favorable to the defendant" rule, which establishes (Section 2) that "if the law in force at the time of the offense is different from that which exists at the time of the judgment or in the intermediate time, the more favorable law will always be of application" (emphasis added).

By a 3-2 vote in *Bignone*,⁶ the Court sided with Muiña. Mostly sticking to textual interpretation, it said that the "most favorable" rule did not limit its scope to changes in perceptions regarding the criminality or seriousness of an action but applied to any legal change that might benefit a defendant (the adverb "always" was a further indication of this). Also, the "two for one" statute did not distinguish between common crimes and serious human rights abuses. Concluding otherwise, said the majority, would be tantamount to violating the principle of legality. The majority also said that the IACHR had not expressed a view on how to calculate a prison term after conviction. While it was aware that the case involved heinous crimes, the majority asserted that the best response a society committed to the rule of law could give was precisely to show respect for the rule of law.

The newly appointed members, Justices Rosenkrantz and Rosatti, voted with the majority, the latter with a concurrent opinion. The former was joined by Justice Highton, who had been in the majority in the landmark *Simón*, from 2005.⁷ In *Simón*, the Court had struck down the amnesty laws passed in the late 1980s. A majority then said that the decision to reopen criminal investigations did

not violate the Constitution as expanded in 1994, since international human rights law not only tolerated it but required it. Amnesties blocked the state's duty to effectively investigate and duly punish those responsible for human rights abuses that the IACHR had articulated (in such cases as *Barrios Altos*)⁸ as flowing from the American Convention. The decision was supported by most of the public and the political establishment.

Justices Lorenzetti, the Court President, and Maqueda each filed dissents in *Bignone*. Both justices argued that Muiña's crime was a continuing crime since one of the defendant's victims was still disappeared. For this reason, the case did not involve a succession of regulations in time but the coexistence of regulations, so the "most favorable" rule did not apply. Also, Muiña had been arrested long after the law had been repealed, so it could not directly apply to him.

The social and political backlash to the Court's decision was quick and unequivocal across the political spectrum. Citizens took to the streets in a way usually reserved for actions by the two other branches of government. To prevent the Court's criterion from spilling over to other cases, a unanimous Congress rushed to pass a so-called interpretative statute, saying that the "two for one" statute had never been meant to apply to cases dealing with human rights abusers. (The Court will have to analyze this statute's validity.)

The *Bignone* decision was the most impactful of the 2017 term, and it showed a majority either unaware or unconcerned about the effects of its decision and, simultaneously, standing on principle, even if a poorly articulated one. We believe that the Court should have taken *Simón* and its progeny much

more seriously. As noted in *Simón*, the Court had said that legal obstacles to the effective investigation of, and, if appropriate, duly punishment for serious human rights abuses must be removed. In principle, the "two for one" statute appeared to be one such obstacle. Since Muiña already had been convicted, the majority may have considered that the case fell outside the scope of that duty. Arguably, however, the duty to duly punish extended to the way in which the penalty was executed, as Justice Maqueda concluded. Thus, the majority should have carefully explained how its decision stood alongside *Simón*.

Ministerio de Relaciones Exteriores

It is difficult to understand the previous case, and the ensuing reactions, in isolation from others from the period and the broader political context within which the latest personnel changes at the Court occurred. The *Ministerio* decision, announced in February 2017,⁹ was one such decision.

The case concerned the government's response to the decision against Argentina at the IACHR in the *Fontevecchia* case.¹⁰ A magazine published a piece involving the allegedly unacknowledged son of former president Menem, and the latter filed a civil lawsuit. After the Supreme Court, in 2001,¹¹ partially upheld a judgment holding the magazine liable, the IACHR heard the case and concluded that such decision violated the American Convention's protection of the right to freedom of expression. The IACHR ordered Argentina (a) to "set aside" its liability decision, (b) to order the reimbursement of what was paid as damages, and (c) to publish a summary of the decision in a national newspaper. While compliance with (b) and (c) was under the executive's purview, point (a) pertained to the Court itself.¹²

⁶ *Bignone*, Reynaldo Benito 340 Fallos 549 [2017].

⁷ *Simón*, Julio Héctor y otros 328 Fallos 2056 [2005]. Later, in *Mazzeo*, the Court went on to strike down Menem's pardons. *Mazzeo*, Julio y otros 330 Fallos 3248 [2007].

⁸ *Barrios Altos v Peru*, IACHR [1999].

⁹ *Ministerio de Relaciones Exteriores y Cultos s/ informe de sentencia dictada en el caso 'Fontevecchia y D'Amico vs Argentina'* por la corte IDH 340 Fallos 47 [2017] (hereinafter, *Ministerio de Relaciones Exteriores*).

¹⁰ *Caso Fontevecchia y D'Amico vs Argentina* IACHR (Merits, Reparations, and Costs) [2011].

¹¹ *Menem Carlos* 324 Fallos 2895 [2001].

¹² *Ministerio de Relaciones Exteriores* [2017], c. 6.

The Court interpreted that “to set aside” (the phrase in Spanish is “dejar sin efecto”) was synonymous with “to revoke” or “overturn,” a point supported by the fact that “revoke” was the word used in the English version of the IACHR decision.¹³ The Court said that the IACHR had overstepped its remedial functions, since the latter did not constitute a “fourth instance” which could review, and eventually overturn, decisions by national courts.¹⁴ Complying with the order, it said, would deny its nature as “supreme.”¹⁵ This departed from what the Court had said under its previous configuration; on a number of occasions, it had overturned its decisions to comply with the IACHR.¹⁶ *Ministerio*, therefore, implied a return to an old criterion.

In a supervisory judgment announced in October 2017, the IACHR held that the “revoke” interpretation made by the Court had been deficient.¹⁷ It said that faced with similar orders, other countries had undertaken steps that were acceptable short of revoking a decision. e.g., taking the decision down from its servers or keeping it published but with an addendum explaining the situation. Eventually, the Court decided to publish the IACHR decision along with its previous decision, something it considered to be “compatible with the Constitution.”¹⁸

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

As with the case of *Bignone*, the decision in

Ministerio was read by many as a change in some of the building blocks of Argentina’s democracy – a change partly undertaken as a result of an ideological shift at the Court.¹⁹ According to Abramovich, the decision seems to adhere to a dualistic position according to which international law can only apply if it does not contradict basic principles of domestic law (Section 27 of Argentina’s original Constitution establishes something similar).²⁰ Yet, that is a position the Supreme Court abandoned, first timidly and then more clearly, years earlier, with gestures reaching back even before human rights treaties were placed alongside the Constitution.²¹

For example, in *González Castillo*,²² the Court overruled a lower court decision that had considered that the loss of paternal rights following a criminal conviction (a measure authorized by a Criminal Code’s rule) was unconstitutional. The appellate decision said that this measure constituted “cruel and unusual punishment” under national and international law. A unanimous Supreme Court disagreed, arguing that there were not sound reasons to strike down the rule and that Congress had recently ratified the rule via the adoption of a new Civil and Commercial Code that referred to it. Curiously, however, Justices Rosenkrantz and Rosatti filed a concurring opinion in which they reproduced the plurality opinion while leaving out a paragraph that highlighted that one of the “primary goals” of that new Code was to “bring private law in line with constitution-

al principles and, in particular, human rights treaties.”²³

Other cases from 2017 present a more complex picture. The *Castillo* decision²⁴ concerned the separation between church and state: a group of parents suing the provincial government of Salta for the inclusion of religion as a subject in the curriculum of public elementary schools. The Court sided with them. It found lacking the government’s defense that children were able to opt out of religion classes, since this discriminated against non-Catholic children, who would have to stand up and leave the classroom. The decision built upon principles of non-discrimination and personal autonomy, which included the right not to be forced to reveal one’s religious convictions. While the majority widely cited Inter-American case law,²⁵ it should be noted that Justice Rosenkrantz did not vote because he was part of the board of directors of the NGO which litigated the case, and Justice Rosatti filed a dissenting opinion saying that religion as a subject was within the “provincial margin of appreciation” within the federal system.²⁶

International human rights law seemed relevant in other cases. In *Sindicato*, for example, a union of provincial police officers considered that a local ban on unionizing faced by the security forces – and established by a decree – was unconstitutional. One of the new Justices (Rosenkrantz) joined the majority to say that the prohibition was a legit-

¹³ We thank Alberto Puppo for this information.

¹⁴ *Ministerio de Relaciones Exteriores*, c. 9-11.

¹⁵ *Ibid*, c. 17.

¹⁶ *Derecho René* 334 *Fallos* 1504 [2011]; *Mohamed* resolución 477/2015 [2015]. ‘Lo que la CIDH dice, la Corte no lo desdice’ (2015) *Diario Judicial*, at <<http://www.diariojudicial.com/nota/72266>>.

¹⁷ *Caso Fontevecchia y D’Amico vs Argentina* (Supervisión de cumplimiento) par. 16 [2017].

¹⁸ *Ibid*.

¹⁹ Víctor Abramovich, ‘Comentarios Sobre El “Caso Fontevecchia”’ *CJDHUNLa* (17 February 2017)

²⁰ *Ibid*.

²¹ The leading case was *Ekmekdjian c. Sofovich* 315 *Fallos* 1492, a 1992 decision establishing that international treaties were to be regarded as superior to purely domestic statutes.

²² *González Castillo, Cristián Maximiliano* 340 *Fallos* 669 [2017], par. 6-8.

²³ *Ibid*, par. 9.

²⁴ *Castillo, Viviana c Provincia de Salta* 001870/2014/CS001 [2017], par. 32.

²⁵ *Ibid*, par. 19-20.

²⁶ *Ibid*, Justice Rosatti (dissent), par. 17.

imate exception to the general constitutional right to form unions and that human rights law allowed for restrictions to that right in the case of police officers. Justices Maqueda and Rosatti each filed a dissent, in which international human rights law was used to argue *against* the constitutionality of the prohibition – the restriction could only be introduced by a statute that was missing in this case.

Lastly, we cite the *Schiffrin* decision,²⁷ in which the Court overruled its previous criterion concerning constitutional amendment powers. Both cases involved the same issue. In *Fayt*,²⁸ a case from 1999 initiated by a Supreme Court justice, the Court had decided that the Constitutional Convention of 1994 had overstepped its jurisdiction by establishing that justices need a second confirmation by the Senate when they reach 75. For the Court, the tenure of justices had not been part of the statute which, in pursuance of Section 30 of the Constitution, had declared the “need” to reform the Constitution. Now, in *Schiffrin*, a majority at the Court concluded otherwise. It considered that *Fayt* had held an unduly restrictive view on the powers of the Constitutional Convention since the latter “represents the sovereign will of the people...with the highest degree of representativeness.”²⁹ *Fayt*, the majority concluded, was an anomaly, and in *Schiffrin* it set itself out to correct it.

In his dissent, Justice Rosenkrantz held a strong position in favor of respecting precedents, but also criticized the majority’s view on the Convention’s powers. The fact that the Convention is called upon by a statute restricting the issues it will address, said Rosenkrantz, does not restrict people’s sovereignty but reinforces it.³⁰

IV. LOOKING AHEAD TO 2018

Although it would hardly be surprising if the Court’s change of personnel results in substantial changes in its case law, our admittedly narrow analysis suggests possible directions. First, in a handful of cases in which basic principles or prerogatives were at stake, the Court expressed an apparent will to distance itself from the commands of international courts. Overall, we believe that this can be problematic. However, there remains a majority that employs human rights law as grounds for argumentation – though signs of hesitation appear on the new justices’ approaches. Second, there are hints of “minimalism” at the Court, especially, again, in those justices’ opinions.³¹ This may limit the Court’s already-timid engagement with issues involving socioeconomic rights and structural reform.

Lastly, a classic civil liberties agenda may find room in this Court. Under its best possible light, the *Bignone* decision may suggest the Court’s willingness to take defendants’ rights seriously, something that has yet to manifest when “ordinary” defendants are involved. If this intuition holds true, the Court will continue to make an important contribution to Argentina’s liberal democracy. It is supposed to do much more, but that is at least substantial.

V. FURTHER READING

Abramovich V, ‘Comentarios sobre el “caso Fontevecchia”. La autoridad de las sentencias de la Corte Interamericana y los principios de derecho público argentino.’ (Centro de Justicia y Derechos Humanos, UNLA 2017) <<http://ijdh.unla.edu.ar/advf/documentos/2017/02/58ab010a10d4c.pdf>> accessed 28 February 2018

Gil Domínguez A, ‘La Corte Suprema de

Justicia y un inexplicable retroceso en materia de derechos humanos’ (*Under Constitucional*, 14 February 2017) <<http://underconstitucional.blogspot.com.ar/2017/02/la-corte-suprema-de-justicia-y-un.html>> accessed 22 February 2018

Gullco H, ‘Corte Suprema vs. Corte Interamericana: ¿Quién debe tener la última Palabra?’ (2017) 79 *La Ley* 63-80

Krsticevic V, ‘Midiendo El Impacto de La Decisión de La Corte Suprema Argentina En El Caso “Fontevecchia” y otros fallos de la Corte IDH’ (*CEJIL*, 18 August 2017) <<https://cejil.org/es/midiendo-impacto-decision-corte-suprema-argentina-caso-fontevecchia-y-otros-fallos-corte-idh>> accessed 8 January 2018

Salvidia-Menajovsky L, ‘La crítica luego del alivio... el caso sobre educación religiosa en escuelas públicas de Salta’ (*Dínamo de Ideas*, 13 December 2017) <<https://dinamodeideas.com/la-critica-luego-del-alivio-la-decision-la-corte-caso-salta-educacion-religiosa-escuelas-publicas/>> accessed 28 February 2018

²⁷ *Schiffrin*, Leopoldo 340 Fallos 257 [2017], par. 10.

²⁸ *Fayt*, Carlos S. 322 Fallos 1609 [1999].

²⁹ *Schiffrin*, *ibid.*

³⁰ *Ibid.*, Justice Rosenkrantz (dissent), par. 7.

³¹ This stems from the cases we reviewed and others.

Armenia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 was instrumental in the implementation of the transition from (semi) presidential to parliamentary government in Armenia, the core *raison d'être* of the constitutional reform endorsed in a popular referendum in December 2015. Further reforms were designed and adopted that shaped the recently inaugurated institutions of parliamentary democracy and defined the scope of functions and responsibilities within the newly established power structures. In April, milestone parliamentary elections were held that determined a post-transition configuration of powers and tested the ambitious new electoral system, which itself was part and parcel of the recent constitutional reform.

These developments instructed the work of the Constitutional Court, which reviewed a challenge against election results and heard seminal cases concerning, *inter alia*, the constitutionality of the new electoral law.

In November, Armenia signed a landmark partnership agreement with the EU that promises to become a catalyst in the country's political and economic development and affect its policies, both domestic and foreign. This agreement is also notable for its global policy implications as it lays an unprecedented platform for a political as well as constitutional dialogue between the EU and the Russia-led integration bloc, the Eurasian Economic Union.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constitutional reforms and transition to parliamentary form of government

According to the country's leadership, the main objective of the constitutional reform passed in a popular referendum in December 2015 was to put the country on a path of long-term democratization, primarily by means of transition to a parliamentary form of government. For many, indeed, the departure from a somewhat discredited post-Soviet incarnation of semi-presidentialism – which almost everywhere in this region, Armenia not being an exception, was reduced to a banal super-presidentialism – would by itself mean a rise in democracy.¹ Surprisingly, not only were the fragmented local opposition elites trapped by the delusion of this trivial constitutional stereotype about the democratic superiority of the parliamentary form of government over the (semi)presidential one; in fact, those tricked by the pro-democratic potential of this reform included such influential expert groups as the Venice Commission of the Council of Europe, which supported the reform and unequivocally endorsed the transition to a parliamentary constitution as a pro-democratic development.²

The effect of the constitutional reform on democratic development was far from being crystal clear then, nor is it now. Together with a number of potential improvements, which the new rules of the game may create,

¹ On superpresidentialism, see Timothy Colton "Superpresidentialism and Russia's backward state." *Post-Soviet Affairs* 11.2 (1995): 144-148; Steven Fish. "The pitfalls of Russian superpresidentialism." *Current History* 96 (1997): 326; Alexander Markarov, "Semi-presidentialism in Armenia." *Semi-Presidentialism in the Caucasus and Central Asia*. Palgrave Macmillan, London, 2016. 61-90.

² See the Venice Commission's ultimate Opinion on draft constitutional amendments: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2015\)038-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)038-e). See also 'Venice Commission President: Parliamentary system of government could strengthen Armenian democracy,' March 2015, < <https://www.panorama.am/en/news/2015/03/07/buquicchio/98427.>>



including a better climate for consolidation of the political party system and of the parties themselves, the change of the government system is evidently associated with eroded inter-institutional accountability and weaker checks and balances. Elimination of presidential elections and the extension of the term of elected self-government bodies, as provided by the new constitution, can undermine democratic participation and mobilization. What experts fear most, though, is that the change of the government system is a shameful instance of constitutional tampering, allowing a reproduction of the incumbent elites. Most notoriously, the reform can be a simple cover for the current President, Serzh Sargsyan, to get around the presidential term limit and stay in power as prime minister after his second presidential term expires at the beginning of 2018. Even if Sargsyan does not become prime minister, he may well cling to power by simply retaining his position as the head of the ruling party, reviving a Soviet-style “partocratic” governance model by fusion of the party and the state.³

It was in this context that the parliamentary elections were held in April 2017. Prior to the polls, the outgoing Parliament, dominated by Sargsyan’s Republican Party, passed a swiping electoral reform which introduced an unprecedented and complex electoral system that can secure an unrestrained and stable rule for the majority party. Flagged as a proportional system, the electoral formula introduced hybrid arrangements, including first-pass-the-post elements in the regional component of the elections, a majority bonus for the winning party, and the possibility of a second round. Inspired by Italy’s famous electoral law, the *Italicum*, Armenia’s new electoral system was hence especially designed to prevent government instability and power-sharing, which are among the typical characteristics of a conventional proportion-

al system, and in general, create a winner-take-all system that would enable the dominant party’s unrestrained rule.

In the April 2017 election results, the Republican Party obtained 58 out of 105 seats in the National Assembly. Following the announcement of results, the Republican Party entered in a formal coalition with the Armenian Revolutionary Federation, a left-wing nationalist party that had obtained seven seats. Under the new Constitution, the strength of this coalition is sufficient for forming a government and for passing both regular laws, which require a qualified majority of votes, and organic laws, including the laws regulating political parties, as well as the conduct of elections and the structure of the judiciary, which should be passed by three-fifths of the total number of Parliament members.

The polls were marred by allegations of vote-buying and abuse of public resources by the ruling party. International observers from the Organization for Security and Cooperation in Europe (OSCE) concluded that the elections were well administered and fundamental freedoms were generally respected, but that they were “tainted by credible information about vote-buying, and pressure on civil servants and employees of private companies.”⁴

Review of 2017 election results by the Constitutional Court

The election results were challenged by an opposition party before the Constitutional Court of Armenia, which is designated by the Constitution as an ultimate arbiter in election disputes. This ancillary, yet notoriously political function had previously involved the Court in the review of election disputes after each national election in the country, starting from 1996, when the Constitutional Court was inaugurated.⁵ In all these cases, the

Court had rejected the claims, endorsing the incumbent political group despite the highly contested nature of each election, often at the cost of its own reputation and public disapproval.

The 2017 review of election results by the Constitutional Court was no exception. This time, the opposition party’s lawsuit was rejected for invalidity of evidence on alleged irregularities, in line with the Court’s earlier-made doctrine according to which any facts of election violations have to be verified in a *court of facts*; that is, a regular court, before they can reach the Constitutional Court as a *court of law* and the ultimate arbiter on election-related disputes. This controversial doctrine has effectively authorized the Court to excuse itself from a substantive review of election disputes, hence making the power of election dispute resolution granted by the Constitution largely meaningless.

What this case confirms is that the Constitutional Court of Armenia still lacks confidence and independence as far as decisions vital to the interests of the incumbent leadership of the country are concerned. To make justice, it should be said that this tribunal, chaired by Gagik Harutyunyan, a former high-standing politician who served as Vice President and Prime Minister and was later appointed as chair of the newly established Constitutional Court, has previously not hesitated in making bold decisions, very often political if not politicized, somewhat defying the best expectations of the ruling elite in the country. In 2004, for example, the Court had decided that the authorities might call for a “referendum of confidence,” offering a clearly extra-constitutional solution to the political crisis caused by contested presidential elections. This decision had then earned the Court, and personally Mr Harutyunyan, a reputation of judicial activists, and has been regarded as a landmark case of judicializa-

³ Artak Galyan, ‘Gearing towards Consensualism or Unrestrained Majoritarianism? Constitutional Reform in Armenia and its Comparative Implications’ (ConstitutionNET 2015), <http://www.constitutionnet.org/news/gearing-towards-consensualism-or-unrestrained-majoritarianism-constitutional-reform-armenia>; Apella Institute for Policy Analysis and Dialogue, *Opinion on Constitutional Reforms in Armenia: What Are the Main Changes and How They will Affect Political Institutions and Democratic Development?* (2015), <<http://apella-institute.org/wp-content/uploads/2015/11/Opinion-on-Constitutional-Reforms-Apella-Institute-English.pdf>>

⁴ <http://www.osce.org/office-for-democratic-institutions-and-human-rights/elections/armenia/309156?download=true>.

⁵ Tom Ginsburg and Zachary Elkins. “Ancillary powers of constitutional courts.” *Tex. L. Rev.* 87 (2008): 1431.

tion of politics in the post-Soviet region.⁶

Ever since, the Court has made a series of other decisions against the government, plainly breaking with the image of a humble puppet in the hands of the executive, as the popular view of the Court was in light of its decisions in core political controversies. In 2014, the Court famously held the government's major pension reform unconstitutional, forcing the Cabinet to resign in response. In October 2017, the Constitutional Court decided against the ruling Republican Party in a local self-government controversy in the third largest city, Vanadzor, one of the few regions where the Republicans had failed to obtain a majority in the local elections. Finally, in December 2017 the Constitutional Court ruled that the provisions of the newly adopted electoral law, which limited media presence in a polling station, were unconstitutional.

But in this, as well as in all other cases when the Court's rulings seemed to run against the will of the government, it was scrupulously calculated not to be critically harmful to the interests of the dominant political group, or were harmful to only some peripheral interests, or were otherwise smartly devised to fall within the authority's margin of tolerance. In these respects, the behavior of Armenia's Constitutional Court, including that during 2017, is perfectly in line with the expectations that, except for the situations of highly turbulent political crisis, higher courts are necessarily a part of the dominant political group and that any decision falling outside of the dominant group's expectations are more likely than not tailored to be toler-

ated by them.⁷

The EU-Armenia Comprehensive and Enhanced Partnership Agreement

In November 2017, Armenia and the EU signed a Comprehensive and Enhanced Partnership Agreement (CEPA) in Brussels, a milestone development that may affect the country's political status and have major policy implications, both domestic and global.

For a politically hesitant post-communist country, the closer prospect of European integration means, as it did elsewhere, an opportunity for democratic development, among other things.⁸ Although not employed with effective conditionality clauses, CEPA includes a substantial amount of legally binding provisions from the EU *acquis* that can potentially lead the country towards institutional improvement in many areas, including those related to rule of law, good governance, and justice.⁹ But for Armenia, and for its democratic and human development, the conclusion of the closer partnership agreement has political implications that are as important as the institutional ones. CEPA's political promise, in fact, is that it is supposed to increase the EU's influence exactly at the expense of Russia's, as by the time of the agreement Armenia seemed to be totally absorbed into Russia's and its Eurasian integration projects' institutional structure as much as it was in their political value system.

Back in 2013, only months before the expected conclusion of an even closer partnership with the EU, Armenia's President announced that his country would withdraw from talks

for the conclusion of the Association Agreement with the EU and instead seek membership in the Russia-sponsored Eurasian Economic Union (EAEU). This surprise change in attitude towards the European following three years of negotiation was viewed to be the result of Russia's tormenting pressure not to join what has been seen there as a rival integration project.¹⁰ Since then, Armenia has widely been believed to be solely immersed into the sphere of Russian dominance, and not only from geopolitical and geoeconomic perspectives; for many, Russia's augmenting presence also meant a bleaker promise of democratic governance, strongly associated with the European neighborhood, and a closer prospect, instead, of a consolidation of autocratic or quasi-autocratic governance associated with the Eurasian neighborhood.¹¹

In this context, the conclusion of the new partnership agreement between Armenia and the EU may well represent a shift in global policy, hinting at a possibility, albeit *petite*, of an emerging compromise between seemingly irreconcilable integration projects and the political ideals behind them. Only three years ago, when Armenia was torn between the EU and Russia, facing an "either/or" quandary regarding its regional integration plans, and especially since Russia's intolerance of its former satellites' European aspirations had culminated in an aggression against Ukraine, such compromise would seem unthinkable. Now, CEPA stands as a stark, yet single case of a concurrent integration within different and somewhat rival regional projects that remarkably transcends the borders of a modern-day cold war.

⁶ Mazmanyan, Armen. "Judicialization of politics: The post-Soviet way." *International Journal of Constitutional Law* 13.1 (2015): 200-218.

⁷ See, respectively, Robert Dahl, "Decision-making in a democracy: The Supreme Court as a national policy-maker." *J. Pub. L.* 6 (1957): 279 and Lee Epstein, Jack Knight, and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *35 Law and Society Review* 164 (2001).

⁸ Leonardo Morlino and Wojciech Sadurski, eds. *Democratization and the European Union: comparing central and eastern European post-communist countries*. (Routledge, 2010).

⁹ Hrant Kostanyan and Richard Giragosian. "EU-Armenian Relations: Charting a fresh course" (CEPS Research Report No. 2017-14, 2017); Hrant Kostanyan and Richard Giragosian, 'EU-Armenia Relations: Seizing the Second Chance' (CEPS Commentary 2016), <https://www.ceps.eu/system/files/EU-Armenian%20Relations%20Kostanyan%20Giragosian.pdf>.

¹⁰ For one, see Georgi Gotev, EU Loses Armenia to Russia's Customs Union, September 2013, <<https://www.euractiv.com/section/armenia/news/eu-loses-armenia-to-russia-s-customs-union/>>. See also Statement by the European People's Party: 'Russian Pressure exerted on the Eastern Partnership countries', September 2013, <<http://www.epp.eu/files/uploads/2015/11/Russian-pressure-exerted-on-the-Eastern-Partnership-countries.pdf>>.

¹¹ Back then, the Eurasian Customs Union, the predecessor of the EAEU, included Russia, Belarus, and Kazakhstan, all of them ranked by the Freedom House as not free countries. As of now, Armenia and Kyrgyzstan, which joined the bloc later, are the only member-states of the EAEU having a ranking of *partly free* countries.

From the legal standpoint, then, CEPA stands for a similarly fascinating pattern of constitutional pluralism – a rare East-West platform for a constitutional dialogue – as it represents the first EU agreement of its kind that was concluded with a member of the EAEU.

III. (LIBERAL) DEMOCRACY ON RISE OR DECLINE? CONCLUSIONS

With the above-mentioned developments in politics and constitutional law taken as a measure, Armenia's democracy record is rather mixed.

In the reporting year, the National Assembly passed important reforms erecting formal institutions of parliamentary democracy and dismantling those remaining from the older Constitution. However, it largely remains to be seen if the transition to a parliamentary Constitution will help consolidate democracy or not. Where the transplanting of parliamentary democracy means a bold, albeit largely symbolic step away from a discredited post-Soviet version of a semi-presidential government, it also means an even more centralized government system and weaker mechanisms for either vertical or horizontal, inter-institutional accountability.

The April 2017 parliamentary elections did not change power, nor did they result in power sharing, a meaningful coalition, or a stronger opposition. In a country where political power has never changed hands as the result of elections, such consistency is more of a peril than an opportunity. The quality of the election itself points to similarly mixed, or rather uncertain, dynamics. According to international observers, these elections witnessed a stop to a long-standing practice of widespread polling-day fraud and manipulation and were generally held in an atmosphere of respect towards fundamental freedoms. At the same time, the record of pervasive use of public resources by the ruling party, bad-

ly tailored and weakly enforced campaign finance provisions of the election law, and the common practice of vote-buying raise a question on whether a level playing field has been guaranteed and overall undermine the integrity of the electoral process.

The results of the parliamentary elections were challenged in the Constitutional Court, which held them to be in line with the basic law, endorsing the reproduction of the ruling Republican Party. Later during the year, the Constitutional Court ruled against the Republican Party in a local self-government controversy, and held a provision of the electoral law to be unconstitutional. The Constitutional Court's jurisprudence confirmed that the Court is fairly independent and progressive to the extent that it acts upon cases which are not vital, or are peripheral to the interests of the ruling elite, but that it is still powerless in cases concerning the existential interests of the dominant political group.

Ultimately, the year 2017 witnessed Armenia's further integration with Eurasian economic and political unions, including Russia, Belarus, Kazakhstan and Kyrgyzstan. At the same time, Armenia successfully negotiated and signed a new partnership agreement with the EU. With this, Armenia is the only country which has managed to forge an alignment with the European Union while in membership in the Eurasian Economic Union. Although with such a record of global influences Armenia's political prospect still remains ambivalent, balancing Russia's influence with that of the EU is definitely positive news for democracy.

Overall, 2017 confirms the country's hybrid status of an entity in between democracy and autocracy that remarkably continues to exhibit patterns akin to either one or the other while receiving external patronages distractive and favorable to democracy at the same time.¹² Considering the country's communist and authoritarian background, this trajectory may well constitute a rise in democracy, albeit slow and thorny. However, it looks more

like this *neither/nor* status, both in terms of the political regime and geopolitical orientation, is the current leadership's optimal condition – an interim end-point – that reconciles the incumbents' rational interests with domestic as well as external constraints and risks that they face.

IV. LOOKING AHEAD TO 2018

2018 will mark a historic moment in Armenia's constitutional development: with the expiry of the term of the current President in April, the country will embark on the path of parliamentary governance, dismantling its 27-year-old structure of tight (semi)presidential rule.

The year will finally expose whether the recent constitutional reforms pursued a banal political manipulation or a step towards long-term democratization. The answer will depend on the candidate choice for the chief executive position, the Prime Minister; and for the nominal head of state, the President. The most intriguing question in this context is definitely if now-President Sargsyan is going to stay in power as Prime Minister. Whether he does not, the degree to which a fusion of the state and the ruling party takes place will be of utmost interest.

Another intriguing question, albeit of a lesser public interest, is who replaces Gagik Harutyunyan as the Chair of the Constitutional Court after his retirement in March. The new Chair may matter for the standing of the Court, for which Harutyunyan earned it a reputation as one of the most progressive constitutional tribunals in the post-Soviet region.

In a way, the appointment of the Chief Judge will be another signal of whether the ruling majority, controlling the composition of the Court, plans to retain power or abandon or share power within the six-year tenure of the Court's Chair: where the appointment of a loyal candidate will likely signal the current

¹² The Economist's Democracy Index for 2017 ranks Armenia as a hybrid regime. See <http://www.eiu.com/topic/democracy-index>.

politicians' intention to stay, selection of an independent, neutral judge may well be a sign of a premeditated political change.¹³

V. FURTHER READING

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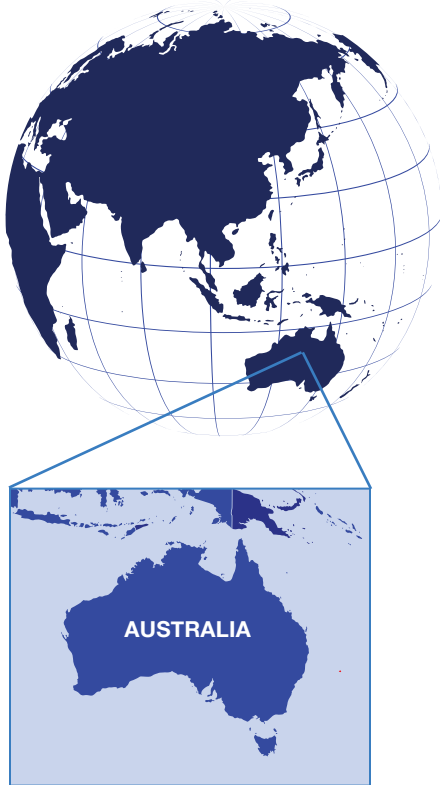
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Anahit Shirinyan, 'What Armenia's New Agreement with the EU Means' (EU Observer 2017), <<https://euobserver.com/opinion/140017>>

¹³ In line with the "insurance theory" of judicial independence, incumbent politicians may want more independent courts when they expect to lose office; see William M. Landes and Richard A. Posner, "The Independent Judiciary in Interest Group Perspective," *The Journal of Law and Economics* 18(3):875-901 (1975) and Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. Cambridge, UK: Cambridge University Press (2003).



Australia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Looking back at the year 2017, the constitutional developments in Albania have been marked to a major extent by the electoral process and the ongoing justice reform. The first part of this contribution will focus on the constitutional developments in relation to the electoral process, as well as the case-law of the Constitutional Court on some of the seminal cases concerning fundamental rights and freedoms, which lie at the core of liberal democracy. The second part will discuss the key developments pertaining to the implementation of the reform on the judiciary, which constitutes the main challenge of the constitutional system in Albania. This part will aim at detangling the ongoing processes of the reform on the judiciary and discuss on the initial constitutional implications of its application. Lastly, a few conclusions will be drawn on the developments of the year, as well as the way forward.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Australia's Constitution establishes a federation and provides for a parliamentary system of government. Representative democracy at the national and state levels is supported by regular elections, and a stable constitutional system overseen by a High Court that commands respect and legitimacy. By global standards, Australia is a secure liberal democracy. However, events of 2017 exposed several fault lines in Australian constitution-

alism and democratic politics.

1. *The constitutional text shows its age*

Australia's Constitution was written in the last decade of the nineteenth century and formally adopted in 1901. Since then it has been amended only eight times, as the bar for constitutional amendment is very high.¹ One consequence is political reticence to invest in proposals for constitutional change.

Australian constitutionalism is characterized by slow evolution. The High Court has, on the whole, adopted a legalistic but pragmatic approach to constitutional interpretation. This conservative approach provides constitutional stability but also has its limitations. These limitations were illustrated by the 'citizenship saga', which dominated political and constitutional debate in 2017. Section 44(i) of the Australian Constitution disqualifies a person who 'is a subject or a citizen of a foreign power' from being a member of the Australian Parliament. Section 44 was drafted at a time when Australia was a dominion of the British Empire, but the text remained unchanged following formal independence from the UK and later changes to Australian citizenship laws.² A high proportion of Australian citizens today were born overseas and/or have foreign ancestry. In 2017, this dissonance between an outdated constitutional provision and the realities of modern Australian society resulted in nine MPs being found ineligible to sit in Parliament and doubts cast over the eligibility of many more.

Significant constitutional shortcomings have

¹ *Constitution* s 128 requires amendments receive the support of a majority of voters nationally as well as a majority of voters in a majority of states at a referendum.

² Cheryl Saunders, 'Looking beyond the current dual citizenship crisis' *Australian Financial Review*, 15 November 2017 <http://www.afr.com/news/politics/national/looking-beyond-the-current-dual-citizenship-crisis-20171115-gzloq6>.

also arisen in relation to Indigenous peoples. Australian nationhood has been built on the forcible dispossession of land, the disruption and decimation of Indigenous populations, and the exclusion of Indigenous peoples from political participation.³ In contrast to other settler-states, Australia has no treaties with Indigenous peoples and the Constitution includes no reference to Indigenous peoples.⁴ In 2017 the First Nations Constitutional Convention gave rise to the extraordinary ‘Uluru Statement from the Heart’. Despite being rejected by the government, this proposal for meaningful constitutional recognition is gaining public support.

2. A Constitution without a bill of rights

A distinctive feature of Australian constitutional law is the lack of a bill of rights. The Constitution contains few express rights, with most rights instead protected by the constitutional separation of powers, the common law, and the democratic legislative process. This means that protections for the liberty and wellbeing of people within Australia’s jurisdiction are often narrower than would be the case under a bill of rights. For example, the Australian government’s policies in relation to the offshore processing of asylum seekers have consistently been challenged on human rights grounds, but vulnerable asylum seekers and refugees are almost entirely reliant on administrative law to seek redress. Similarly, the lack of a constitutional guarantee of equality for Australia meant the road to marriage equality took a majoritarian, rather than rights, path. The 2017 postal survey on same-sex marriage – which ultimately returned a ‘yes’ outcome and resulted in legislation ensuring marriage equality – was criticized for ‘outsourcing’ minority rights to the opinion of the majority and exposing members of the LGBTI community to discrimination and harm.

3. Democratic disillusionment

The state of liberal democracy in Australia was also affected by a sense of disillusionment with politics and the traditional po-

litical parties. This was exacerbated by the constitutional issues of the year, which left members of the public cynical about politicians and frustrated about the ways in which politics played out before rights. As in other countries, voters in Australia have shown renewed support for minor political parties, including some with right-wing, anti-immigration platforms. The result is that minor parties, which hold the balance of power in the Senate, have come to exert significant political influence. Liberal democracy, while reasonably secure on the surface, is under increasing pressure as issues of minority rights, Indigenous recognition, and democratic disillusionment remain unresolved.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. The ‘Citizenship Saga’: Section 44 of the Constitution

Section 44(i) of the Constitution disqualifies a person who is ‘under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power’ from being a Member of Parliament.

The ‘citizenship saga’ began in July 2017 when a Greens Senator announced that, although he was a naturalized Australian citizen, he still held New Zealand citizenship. This led other MPs to check their family histories and citizenship status, and six further MPs identified possible dual citizenship. Two Senators resigned immediately, but five other MPs chose to await the outcome of consideration of their cases by the High Court, two of whom were Cabinet Ministers. While one resigned his ministry while the High Court determined the issue, Barnaby Joyce retained his position as Deputy Prime Minister despite concerns that decisions he took as a Minister might be affected.

In August, Parliament referred the seven MPs to the High Court, sitting as the Court of Disputed Returns.⁵ Before the Court, the government argued that s 44(i) should be read to impliedly contain a mental element, such that a person must know or reasonably suspect that he or she has foreign citizenship. The Court unanimously rejected this approach, citing conceptual difficulties about the nature of the knowledge required, how a candidate’s state of mind might be objectively ascertained, the risk posed to the stability of representative government, and concerns about a test that would distinguish between naturalized and natural-born Australian citizens.⁶

Consistent with its previous decisions, the Court instead preferred a reading tied to the text of s 44(i). It reiterated that the purpose of s 44(i) is to ensure that MPs do not have split allegiance. The first part of s 44(i) disqualifies a person who, by his or her conduct, is under any acknowledgment of allegiance, obedience, or adherence to a foreign power. The second part of s 44(i) is concerned only with a candidate’s status under foreign law, and operates to disqualify a citizen of a foreign power regardless of his or her conduct, knowledge, or feelings of allegiance. The only implied qualification is that a candidate who has taken all reasonable steps to renounce his or her foreign citizenship will not be ineligible. Applying this test, the Court held that five of the MPs were ineligible. Two survived, one on the basis that the evidence as to his Italian citizenship was not clear; and the other because he held a form of British overseas citizenship which did not entitle him to the substantive rights or privileges of full citizenship.

Following the High Court’s decision, the issue of citizenship continued to plague the Australian Parliament. Four further MPs resigned on the grounds they held dual citizenship, and in December the major parties agreed to a process whereby each MP must provide a citizenship statement containing relevant evidence. This cast doubt over nine

³ Noel Pearson, ‘A Rightful Place’ in Shireen Morris (ed) *A Rightful Place: A Road Map to Recognition* (Melbourne: Black Inc Books, 2017).

⁴ Discriminatory constitutional provisions relating to ‘aboriginal people’ were amended in 1967.

⁵ *Commonwealth Electoral Act 1918* (Cth) s 376.

⁶ *Re Canavan and others* [2017] HCA 45.

further MPs, two of whom have been referred to the High Court. In December 2017, two government Members of the House of Representatives who were ineligible by reason of s 44(i) both won by-elections, preserving the government's slim majority. Senators who were found ineligible were replaced by the next candidates on the party list at the July 2016 election. This was not always a straightforward process, as demonstrated by the case of *Re Nash* (No 2).⁷ In this case, the High Court considered the position of a candidate who, after being unsuccessful in the 2016 election, became a member of the Administrative Appeals Tribunal. The High Court held that the election process only ends when a person is declared elected, and so taking up an office for profit rendered the candidate ineligible.⁸ Section 44, as explained in Part II, has failed to keep pace with changing notions of Australian citizenship, the multicultural demographics of the Australian population, and the realities of globalization. While there are reasonable grounds to amend s 44, the current political climate means that these reforms are unlikely to be pursued, at least in the short term.

2. Indigenous recognition: *The Uluru Statement from the Heart*

There is a long history of advocacy for constitutional change in Australia to recognize Indigenous peoples and protect their rights. The current process for constitutional change began in 2010 with a range of processes to examine the issue, including an Expert Panel which reported in 2012,⁹ a Parliamentary Select Committee in 2015,¹⁰ and a Referendum

Council established in 2015 to lead national consultations. Two possible approaches to constitutional recognition emerged. The first is largely symbolic. It would insert references to Indigenous peoples and their culture and history in the preamble to the Constitution (which is not legally binding), repeal defunct provisions, and reword the 'races' power in s 51(xxvi). The second approach seeks to supplement symbolic constitutional statements with substantive rights, procedures, and institutions, and to recognise the continuing authority of Indigenous peoples over their own affairs.

In 2017, the Referendum Council conducted 12 regional dialogues, at which Indigenous participants considered the meaning and form of constitutional recognition. This culminated in the First Nations National Constitutional Convention at Uluru in May 2017, which produced the landmark 'Uluru Statement from the Heart'.¹¹ The structural reforms endorsed by Indigenous delegates at Uluru were a First Nations Voice to advise Parliament on Indigenous matters and a Makarrata Commission to supervise agreement-making between governments and First Nations and truth-telling about Indigenous Australian histories.¹² The Report of the Referendum Council recommended that a referendum be held to amend the Constitution to provide for a representative body to give Indigenous people a voice in Parliament.¹³ The regional dialogues and constitutional convention, which navigated a course between understandings of Indigenous sovereignty and recognition in the Australian

Constitution, were a remarkable achievement in deliberative constitution-building and negotiation by First Nations peoples.¹⁴

The government rejected the Uluru proposals, mischaracterising the representative body as a 'third chamber of Parliament' and the proposals as too 'radical' to meet the high threshold for a referendum.¹⁵ The government has proposed no alternative model and demonstrated little political will to engage with the issues, meaning that it will be difficult to move forward on a proposal for meaningful constitutional recognition. The opposition, however, has pledged its support for a voice in Parliament. It appears that, as with the same-sex marriage debate, it will be up to the people to press the Parliament to pursue change.

3. *Offshore processing of asylum seekers*

Since August 2012, asylum seekers arriving in Australia by boat without a valid visa have been subject to 'offshore processing' in Nauru and Manus Island in Papua New Guinea (PNG). Since July 2013, most of these asylum seekers have also been permanently barred from settling in Australia, even if they are found to be refugees, and are instead settled overseas pursuant to arrangements between Australia and third countries.¹⁶ Thousands of asylum seekers, including children, have been transferred from Australia to Nauru and Manus Island, where they are detained in facilities paid for by Australia, often for lengthy periods, and in conditions which expose them to abuse and neglect.¹⁷ Australia's offshore processing policies have

⁷ [2017] HCA 52.

⁸ Section 44(iv) of the *Constitution* provides that a person who 'holds any office of profit under the Crown' is incapable of being elected to the parliament.

⁹ Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel*, January 2012.

¹⁰ Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report*, June 2015.

¹¹ Uluru Statement from the Heart, 26 May 2017, https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF.

¹² Makarrata is a word in the language of the Yolgnu Peoples, describing a process of conflict resolution, peacemaking, and justice.

¹³ Referendum Council, *Final Report of the Referendum Council*, 30 June 2017, <https://www.referendumcouncil.org.au/final-report>.

¹⁴ Megan Davis, 'Self-Determination and the Right to be Heard' in Shireen Morris (ed) *A Rightful Place: A Road Map to Recognition* (Black Inc Books, 2017).

¹⁵ Media release, 'Response to Referendum Council's report on Constitutional Recognition' 26 October 2017, <https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition>.

¹⁶ *Recent Changes in Australian Refugee Policy* (8 June 2017) Refugee Council of Australia <<https://www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/>>.

¹⁷ Madeline Gleeson, *Offshore Processing: An overview* (9 May 2017) Andrew and Renata Kaldor Centre for International Refugee Law, <<http://www>>.

been subject to constitutional challenge in both PNG and Australia. In April 2016 the Supreme Court of PNG unanimously ruled that the detention of men at the Manus Island facility was ‘contrary to their Constitutional right of personal liberty’, and ordered the PNG and Australian governments to take all steps necessary to end the continued detention of asylum seekers at the center.¹⁸

The decision of the PNG Supreme Court sparked a new challenge to offshore processing before the Australian High Court. In *Plaintiff S195/2016 v Minister for Immigration and Border Protection*, the High Court considered the lawfulness of the Australian government’s exercise of its powers to establish, maintain, and assist in the administration of the Manus Island detention centre in light of the PNG Court’s finding that the detention was unconstitutional. The plaintiff argued that the government was constitutionally denied any legislative or executive power to authorise or participate in activity in another country that is unlawful under the domestic law of that country. The High Court unanimously dismissed this ‘novel and sweeping’ argument, holding that the legislative and executive powers of the Australian government are not ‘constitutionally limited by any need to conform to international law’. It held that the legislation was drafted in such a way as to allow the Australian government to act independently of the lawfulness under PNG law.¹⁹ The case continues the trend in which the High Court has repeatedly upheld the constitutionality of offshore processing and detention on the basis that it is supported by valid legislation²⁰ or as an exercise of non-statutory executive power.²¹

On 31 October 2017, after lengthy delays and amid significant protests by the detainees, the Manus Island centre was officially closed. These events highlighted the lack of legal and political accountability surrounding Australia’s treatment of asylum seekers. As the formalities of processing and detention are governed by the laws of the ‘host’ state, the Australian government’s actions are shielded from visibility and accountability. Both Nauru and PNG are small states, dependent on aid and financial assistance from Australia. In November 2017, the Australian government ‘rejected’ an offer by New Zealand to resettle 150 refugees on Manus Island in New Zealand, notwithstanding that it had no legal basis to do so and its assertion that PNG is solely responsible for the asylum seekers and refugees on Manus Island.²²

4. Marriage equality and the justiciability of ministerial advances of funds

One of the most significant legislative reforms of 2017 was the legalization of same-sex marriage by effectively reversing amendments made in 2004 to the *Marriage Act*, which defined marriage as the ‘union of a man and a woman to the exclusion of all others, voluntarily entered into for life’.²³

The path to marriage equality was not, however, straightforward. Conservative politicians pushed for a plebiscite on the issue, but a bill to conduct a plebiscite²⁴ was twice rejected by the Senate on the basis that a question of equal rights for a minority should not be subject to a majority vote and that it may cause harm to the LGBTI community. As a result, in August 2017 the government directed the Australian Bureau of Statistics (ABS) to conduct a voluntary postal survey

to collect information on Australians’ views on whether the law should be changed to allow same-sex couples to marry. The government claimed authority to do this under the *Census and Statistics Act 1905*. In addition, the Minister for Finance made a determination under the *Appropriation Act* to provide the ABS with \$122 million to conduct the survey.

The government’s actions, which effectively circumvented Parliament, were challenged in the High Court.²⁵ The main issue of constitutional interest was the advance made by the Minister of Finance. The *Appropriation Act* is part of the annual budget and relates to the appropriation of moneys for the ordinary annual services of the government. Section 10 allows the Minister to provide additional funds if he is satisfied that there is ‘urgent need for expenditure’ that was ‘unforeseen’. The plaintiffs first argued that s 10 was an impermissible delegation of Parliament’s power of appropriation and, second, that there was no urgent and unforeseen need for the expenditure. The High Court dismissed both arguments. According to the Court, s 10 did not give the Minister a power of appropriation, but rather authorized the allocation of money that had already been appropriated by Parliament. The Court also held that, while the Minister must consider the urgency and need for a particular expenditure ‘reasonably and on a correct understanding of the law’, he is not obligated to act ‘apolitically or quasi-judicially’.²⁶ Even though the challenge was not upheld, this case is significant for ruling that advances to the Minister of Finance under the *Appropriation Act* are justiciable.

kaldorcentre.unsw.edu.au/publication/offshore-processing-overview>.

¹⁸ *Namah v Pato* [2016] PJSC 13.

¹⁹ *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31, [19]-[20], [27].

²⁰ *Plaintiff S156/2013 v Minister for Immigration and Border Protection* [2014] HCA 22; *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

²¹ *Plaintiff S195/2016 v Minister for Immigration and Border Protection* [2017] HCA 31.

²² Jane McAdam, *Stop the doublespeak on Manus policy* (7 November 2017) Andrew and Renata Kaldor Centre for International Refugee Law, <<http://www.kaldorcentre.unsw.edu.au/publication/stop-doublespeak-manus-policy>>.

²³ *Marriage Act 1961* (Cth) s 5(1).

²⁴ Plebiscite (Same-Sex Marriage) Bill 2016 (Cth).

²⁵ *Wilkie v Commonwealth* [2017] HCA 40.

²⁶ *Ibid* [88]-[92]; [109].

In spite of the legal challenges and political controversy, the postal survey was conducted with 62% of participating Australians voting ‘yes’ to marriage equality. The legislative amendments to allow same sex marriage were passed in December 2017, with some qualifications aimed at protecting religious freedoms.²⁷

5. Proportionality Review: *Brown v Tasmania*

In recent years, the High Court has found itself in the midst of a doctrinal debate about the place of structured proportionality reasoning in Australian constitutional law. Although the Australian Constitution lacks a formal bill of rights, there are a number of implied constitutional rights, including an implied freedom of political communication. In this context, the Court has for some time accepted that some form of proportionality reasoning applies.²⁸ The High Court has, however, traditionally framed its tests of constitutional validity in the language of ‘reasonably appropriate and adapted’ rather than ‘proportionality’. The dominant view has been that these two expressions are simply alternative ways of expressing the same test.²⁹ More recently, though, divisions have emerged within the Court over the place—if any—of structured proportionality reasoning in the Australian constitutional context.

2015 marked a turning point in the Court’s jurisprudence when, in *McCloy v New South Wales*, four of the seven justices of the High Court endorsed a structured three-part test of proportionality to determine limitations on the implied freedom of political communication. The reformulated test included the three familiar elements of ‘suitability’, ‘necessity’, and ‘adequate...balance’.³⁰ However, less than a year later, six members of

the Court rejected a structured approach to proportionality in the context of a challenge to electoral legislation.³¹ That decision, along with changes to the composition of the Court, cast doubt over the future of proportionality reasoning. In 2017 the issue came directly before the Court in the case of *Brown v Tasmania*, which involved a challenge to the State of Tasmania’s anti-protest laws.³² The plaintiffs contended that the laws, which were designed to protect business premises and activities from protesters, infringed the implied freedom to communicate about government and political matters. A majority of the Court held that the laws infringed the implied freedom of political communication and four justices endorsed the approach to structured proportionality that was developed in *McCloy*.³³ Although the test was still framed in terms of whether the law was ‘appropriate and adapted’ to advancing a legitimate objective, the majority justices signaled support for a structured proportionality test.³⁴ In contrast, Justices Gageler and Gordon remained unconvinced that a ‘pre-determined all-encompassing algorithm’ of proportionality was appropriate in the Australian constitutional setting.³⁵

While *Brown v Tasmania* confirms that proportionality has emerged as a distinct tool of analysis, the Court remains cautious about proportionality testing and a number of aspects of the new test remain to be resolved.

IV. LOOKING AHEAD TO 2018

Three of the key political and constitutional issues of 2017 will continue to have ramifications in 2018 and beyond. Most significantly, the fallout from the citizenship saga

is likely to continue as the High Court hears further cases and a Parliamentary Committee set up to inquire into the operation of s 44 of the Constitution reports in March 2018. In addition, debate about constitutional recognition will continue, building on the momentum of the Uluru Statement of the Heart. Finally, it is possible that the religious exemptions, which permit some celebrants to refuse to perform same-sex marriage ceremonies, included in the 2017 marriage equality legislation will be the subject of future legal challenge.

V. FURTHER READING

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Shireen Morris (ed), *A Rightful Place: A Road Map to Recognition* (Black Inc Books, 2017)

²⁷ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

²⁸ Such reasoning has generally been accepted in relation to (1) the characterization of laws with respect to certain heads of Commonwealth legislative power, and (2) determining the limits of express and implied constitutional guarantees: Jeremy Kirk, ‘Constitutional Guarantees, Characterisation and the Concept of Proportionality’ (1997) 21 *Melbourne University Law Review* 1.

²⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 n 272.

³⁰ *McCloy v New South Wales* (2015) 257 CLR 178, [2] (French CJ, Kiefel, Bell and Keane JJ).

³¹ *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027.

³² *Brown v Tasmania* (2017) 91 ALJR 1089.

³³ Joint reasons delivered by Kiefel CJ, Bell and Keane JJ, and Nettle J (in separate reasons) also endorsed a test of structured proportionality.

³⁴ *Brown v Tasmania* (2017) 91 ALJR 1089, [123] (Kiefel CJ, Bell and Keane JJ), [278] (Nettle J).

³⁵ *Ibid* [161] (Gageler J).



Bangladesh

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 was another significant year of constitutional developments, controversies, and judicial activity. The year started and remained occupied with tensions arising from the invalidation by the Supreme Court’s Appellate Division of the 16th Amendment of the Constitution, confirming the High Court Division’s 2016 decision. Attendant to this decision were developments concerning the resignation of the Chief Justice and acting Chief Justice, the appointment of a new Chief Justice, and the filing of an application for the review of the 16th Amendment judgment after the prescribed time. Also, tensions between the executive and the Supreme Court AD remained throughout the year over the issue of enacting and notifying a set of service rules for the members of the junior judiciary.

Immediately following this section, we begin with a brief introduction to the Bangladeshi Constitution vis-à-vis democracy and the Supreme Court, which is widely held to be the guardian of the Constitution. We then take up certain specific issues to show the developments or regressions with regard to liberal democracy in Bangladesh. We then proceed towards a discussion of major constitutional developments, with particular reference to some select constitutional decisions.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

The Constitution, democracy, and the Court
The Constitution of the People’s Republic of Bangladesh (‘the Constitution’), adopted on 4 November 1972 by the Constituent Assem-

bly, originally provided for a parliamentary form of government based on the principle of collective responsibility. After a long period of military and autocratic regimes from 1975 to 1990, Bangladesh transited to democracy in 1991. In 2007-2008, however, the country witnessed a two-year-long emergency when a military-backed caretaker government was in power. General elections in 2014 were non-participatory, with the major political parties boycotting that election as the neutral caretaker government system was unilaterally abolished (*see below*).

The Constitution establishes a representative and liberal democracy. The principles of separation of powers, constitutional supremacy, and the independence of the judiciary are entrenched. The Constitution emphatically proclaims that the State’s fundamental aim shall be to establish the rule of law; social, economic, and political justice; and a society free of exploitation. Moreover, constitutional amendment rules are quite rigid and based on political participation and consensus, which require a two-thirds majority of votes in the unicameral Parliament. The Constitution has till now gone through 16 Amendments, of which six Amendments (5th to 10th) were enacted by Parliaments constituted during military regimes through sham or engineered elections. Of them, two Amendments (5th and 7th) categorically legitimated many extra-constitutional amendments of the Constitution that were effected by the military rulers through proclamations and martial law orders. The Supreme Court has so far declared five Amendments (5th, 7th, 8th, 13th & 16th) unconstitutional. Its decision on the 16th Amendment nullification, however, is currently under a final review.

Secularism, nationalism, democracy, and socialism are the four “fundamental” principles on which the Constitution is based. These principles, called “high ideals,” were amended several times during the two military regimes (1975-1990). They have been restored to their original, 1972 position via the 15th Amendment in 2011. Curiously, however, along with the principle of secularism, the principle of Islam as State Religion, which was first introduced by the second military ruler, has been retained (see art. 2A).

The Constitution entrenches a judicially enforceable bill of rights (civil and political rights) but considers social and economic rights as judicially non-justiciable “fundamental principles of state policy” (art. 8). By this, the Constitution divides the basic rights into “principles” and “entitlements.” Fundamental Principles of State Policy are nevertheless fundamental to the governance of the State, lawmaking, and interpretation of the law and the Constitution (art. 8).

The Supreme Court of Bangladesh, comprised of the High Court Division (HCD) and the Appellate Division (SCAD), enjoys a strong form of judicial review extending over even constitutional amendments. Courts can invalidate a constitutional amendment if found to be violative of “basic structures” of the Constitution. The Chief Justice and other justices are appointed by the President (in consultation with the Prime Minister). When appointing associate justices, the President has a constitutional obligation to consult the Chief Justice. The Chief Justice enjoys a wide range of power in the judicial administration. Being the constitutional court of the country, the Supreme Court and the Chief Justice have high political significance.

State of liberal democracy

As noted above in passing, the independence Constitution (1972) provided for liberal democracy. In practice, Bangladesh’s democracy is unstable, in a seamless transition since 1991, and is increasingly showing trends of illiberal democracy. Following a severe po-

litical crisis over the mode of election-time government in 2006, then a state of emergency in 2007-08, the elections of the 10th Parliament were virtually a one-party election, without any true opposition in Parliament to challenge the government. Although the government officially appointed an opposition party, that party accepted few positions in the present cabinet, along with a few other less prominent political parties. As a result, there is an absence of checks on an already strong and majority government of an absolute nature. As such, it remains a challenge for the government to return to multi-party elections and constitutional democracy as opposed to merely electoral democracy.

As regards participation in governance and democratic lawmaking, there was no major constitutional development in 2017. By contrast, the government refused to repeal a draconian law that in effect blocks freedom of expression (s. 57 of the Information and Communication Technology Act) while every single election held for local government in 2017 was reportedly affected by forgery, unfairness, and party monopoly.

Below, referencing a 2017 Supreme Court case, we show a problem of democracy in Bangladesh – the executive’s tendency to breach the limits of the law. After this, we also discuss a case which sought to enforce the principle of separation of powers by annulling an Act of Parliament.

On 17 March 2017, the SCAD handed down a significant judgment in *Bangladesh Bank v East West Property Developments (Pvt.) Limited*¹ that upholds the principle of due process of law. First, several individuals and corporate litigants in late 2009 and early 2010 petitioned the HCD claiming that the 2007-2008 Emergency Government unlawfully extracted their monies, which they wanted back. To understand this decision better, a factual background is necessary. On 11 January 2007, the then-President imposed a state of emergency, following which a military-backed Caretaker Government was installed for two years instead of the

constitutional term of 90 days. The system of caretaker government, introduced into the Constitution in 1996 and abolished in 2011, was a non-party interim government of 10 advisers and the Chief Adviser. Its principal function was to hold a free and fair election. At the end of 2006, there arose a deadly political crisis regarding the formation of a caretaker government, and the President invoked a constitutional clause to name himself Chief Adviser, allegedly without exhausting all routes to a solution. Then, the Army intervened informally and compelled the President-cum-Chief Adviser to impose a state of emergency. Naturally, for the next two years, major decisions were in fact taken at the behest of the Army. A controversial activity of that government was to arrest politicians and businessmen on the charge of corruption.

As the petitioners alleged, DGFI,² an intelligence agency, arrested the owners and employees of their companies and compelled them, through torture, to make to the government huge payments which the DGFI said were taxes evaded by the companies. Eventually, East-West Property Development Ltd. deposited to the central bank the amount of 2,560 million taka. When the emergency was withdrawn, the petitioners challenged the unlawful extraction of money. The HCD termed the whole process of extra-legal collection of money as “extortion” and held that no “agencies” were authorized to impose and collect taxes except by the law. In the Court’s own words, “[i]f a person evades tax and duty, there is clear provision not only to recover [it] but [also] to impose a penalty.” Duty or tax can be adjusted in advance, but the same has to be done “in accordance with law” and within “the limits set out in article 83 of the Constitution” (per Justice Naima Haider Chowdhury).

On appeal, the SCAD confirmed the HCD’s decision and ordered the Bangladesh Bank to return the monies so extracted. Speaking for the Court, Chief Justice Sinha placed heavy reliance on the Constitution’s protection against unlawful and arbitrary imposi-

¹ Civil Appeal Nos. 340-342 of 2015 (17 March 2017).

² Directorate General of Forces Intelligence.

tion of taxes (art. 83). Thus, both divisions of the Supreme Court in effect re-enforced the principle of due process of law. Although the SCAD did not question the legality of the long-running emergency and the caretaker government, it indicated that the government at the time was committing legal breaches.

Next, we take up a controversial and politically consequential decision of the SCAD in the *16th Amendment Case*,³ which can be criticized for judicially negating the concept of separation of powers. Unfortunately, this decision triggered political retaliation that ended up in an indirect yet real interference with the independence of the judiciary. In this decision, the SCAD endorsed the 2016 decision of the HCD nullifying the 16th Amendment, thereby invalidating in effect an original provision of the 1972 Constitution. Article 96 of Bangladesh's original Constitution provided for the removal of Supreme Court judges by the President pursuant to a parliamentary resolution passed by a two-thirds majority on the ground only of proved misbehavior or incapacity of the concerned judge. This provision was altogether removed first by a democratic government in 1975. The system was replaced during the first military regime with a removal mechanism based on a recommendation by the Supreme Judicial Council, composed of the three most senior judges, including the Chief Justice. The 16th Amendment restored the original scheme of art. 96 by reinstating the parliamentary removal process for judges.

Following the 16th Amendment decision, the government began reacting furiously. Writing the lead opinion of a 799-page judgment (electronic version), Chief Justice Sinha made several observations relating to democracy, the rule of law, parliamentary sovereignty, constitutional supremacy, and what not. CJ Sinha remarked that “[n]o nation [or] no country is made of or by one person.” The government took this statement as being directed to the father of the nation, Bangabandhu Sheikh Mujibur Rahman. Pro-government lawyers commenced a movement against the Chief Justice. Two in-

fluential ministers and the Prime Minister's foreign affairs adviser met the Chief Justice at his residence. It was widely believed that the design of these visits was to obtain the Chief Justice's resignation. In the meantime, the Chief Justice remarked in Court that nothing happened in Pakistan in a comparatively graver situation, where the Supreme Court disqualified the PM. Following this, Prime Minister Sheikh Hasina counter-remarked that the Chief Justice ought to have resigned before comparing Bangladesh with Pakistan.

At one stage, the Chief Justice took leave and went to Australia. Speculations grew that his taking of leave was involuntary and there were multifarious pressures on him. Eventually, the Chief Justice resigned from his post in November 2017 while in Singapore and en route to Canada. The government appointed the next senior justice, Mr. Justice Abdul Wahhab Mia, as the acting Chief Justice. Mr. Justice Mia performed the functions of the Chief Justice for an unusually long time but was not ultimately appointed the Chief Justice. Instead, Mr. Justice Syed Mahmud Hossain was appointed the 22nd Chief Justice of Bangladesh on 3 February 2018. Mr. Justice Mia, the most senior judge, having been superseded, also resigned the same day. Judicial appointments have always been subject to political calculations and negotiations. This time, however, the above key appointments probably reveal the dark side of over-majoritarian democracy.”

*Enforcing separation of powers: Kamruzzaman v Bangladesh*⁴

In this case, the HCD declared unconstitutional the system of executive-run mobile courts for the breach of “two important basic features of the Constitution” – separation of powers and the independence of the judiciary. The Mobile Courts Act 2009 allowed the summary trial of certain offenses (now over 100) in mobile courts of executive magistrates. Following a historic decision by the SCAD, magistrates' courts in Bangladesh, which were run by government officials,

were separated from the executive in 2007. This led to the creation of two types of magistrates, judicial and executive. The executive magistrates were initially tasked to perform certain executive functions tied to criminal cases but were eventually empowered to hold summary criminal trials.

In deciding several constitutional challenges by the petitioners who were convicted by mobile courts, Justice Moyeenul Islam Chowdhury held that the Act not only breached the principle of separation of powers, it was also a clear negation of the Supreme Court's judgment on the “separation of the judiciary” from the executive. As his Lordship also reasoned, the Act breached the constitutional protection of equality (art. 27) and the right of any accused person to be tried by an “independent and impartial court” (art. 35[3]).

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year 2017 witnessed a few notable constitutional developments and court decisions. One decision built on the constitutional principle of due process and involved the right to property. Interestingly, the Court granted constitutional remedies in claims of general tort law character while in another controversial decision a life sentence was held to be a sentence of imprisonment for the rest of the life of the convict.

A notable development that retained a growing tension between the executive and the judiciary was the promulgation of Presidential Rules governing discipline and conduct of lower court judges. Judges' service conditions continued to be governed by the same service rules that applied to civil officials. In the famous *Masdar Hossain Case*, the SCAD in 1999 ordered the government to enact a separate set of service rules for the members of the judicial service. The Court has since kept the matter alive as a rolling review, but there were seemingly irreconcilable differences of opinion in this regard

³ *Bangladesh v Asaduzzaman Siddiqui* (Civ. Appeal No. 6 of 2017, 3 July 2017).

⁴ WP No. 8437 of 2011 (along with WP Nos. 1042 of 2011 and 4878 of 2012) (11 May 2017).

between it and the government. The Court generously granted the government time (reportedly 12 extensions) to implement its old directive. After many years of reluctance and in the context of senior officials facing contempt-of-court notices, the government on 11 December 2017 finally published in the official Gazette the *Bangladesh Judicial Service (Discipline) Rules 2017*.

Whole-life sentence

The case of *Ataur Mridha v. The State*⁵ brought a new controversy when the Court held that the sentence of “imprisonment for life” means imprisonment for the whole of the life of the convict. Chief Justice Sinha, on behalf of a unanimous court, commuted the appellants’ death penalty to an “imprisonment for the rest of [their] life” and asked the government to “tak[e] steps in respect of [all] life sentence prisoners.”⁶ Until this decision, “imprisonment for life” used not to mean imprisonment for the rest of the convict’s life. The Penal Code 1860 (s. 57) provides that “in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to rigorous imprisonment for thirty years.” The Court held that s. 57 does not mean that a life sentence spans only 30 years.

Not that a life sentence cannot be imprisonment until the end of natural life, but for this to be the case there has to be a clear law with necessary safeguards being provided to check abuse of law. Relevantly, the creation of a whole-life sentence needs to be weighed and balanced against the practice of the death penalty in Bangladesh.

In support of his opinion, Sinha CJ referred to several similar Indian decisions, which were decided in the context of a 1978 amendment of their relevant law. In those Indian cases, the meaning of “life imprisonment” was a concrete issue before the courts. By contrast, the proper meaning of “imprisonment for life” was not an issue at all before

the *Ataur Mridha* court. Worse, this decision would retrospectively increase the term of all old life convicts. Further, this decision created two different types of ‘imprisonment for life,’ one originally awarded by the trial courts and the other awarded by either division of the Supreme Court after commuting the death penalty, which the Court said would be immune from remission by the government.

The decision in *Ataur Mridha* seems to be a case of judicial adventurism and will operate as an infringement of several cardinal constitutional principles such as separation of powers, the rule of law, prohibition of retrospective criminal law, legal equality, and non-discrimination. This decision also shows an unacceptable form of criminal law-making by the judiciary, imposing a toll on the constitutional right to life.

Due process of law

Begum Sitara Chowdhury v. RAJUK (11 December 2017)⁷ is a significant constitutional decision that is based on the premise of the constitutional principle of due process. It is somewhat akin to the SCAD’s decision on due process of law noted above. *Begum Sitara Chowdhury*, however, is a rare instance in which the Court explained the nature of the right to property and its connectivity with the notion of due process. In this case, a development authority, RAJUK (the capital city development authority, literally), imposed “fees” for the conversion of residential plots for commercial purposes. The petitioners inherited a plot of land (leasehold) in Gulshan in Dhaka. Initially meant to be a purely residential area, the use of plots in that zone for commercial purposes on a limited scale was first reportedly sanctioned in 1995 subject to payment of exorbitant “conversion fees.” No statute authorized the imposition of the kind of conversion fees as are challenged in this judicial review.

Justice Syed Refaat Ahmed of the HCD held the imposition of “fees” for the conversion of use of the petitioners’ property in the absence of any statutory backing to be unconstitutional. Piercing the veil of a fine distinction between fees and taxes and given that the agency was not providing any service in exchange for fees, Justice Ahmed held that the conversion fees charged by RAJUK to enable the use of a residential plot for commercial purposes were in effect taxes in disguise. “That [an] element of mutual benefit [*quid pro quo*] is found absent in this case leads one to infer that the facts present a scenario of imposition of a tax compulsorily payable, thereby, edging out the other competing notion of a fee charged in return for a specific service rendered,” the judge reasoned.

The Court also invoked constitutional protection from arbitrary and unlawful taxes in art. 83, and found that the imposition of conversion fees, though based on several resolutions of RAJUK, lacked any categorical authorization of the law in the sense of art. 83. Thus, the Court neatly placed due weight on the concepts of fairness and “due process” under Bangladesh’s constitutional and administrative law schemes that were found to be breached by the decisions of RAJUK. An insightful Court finally held that the impugned decisions were not only deficient in fairness, they were also violative of the petitioners’ constitutional right to property.

Constitutional remedies for claims of common law tort nature

In 2017, Bangladesh witnessed major development in what can be called constitutional law tort cases. In the absence of any specific tort legislation and in the context of a dearth of common law tort litigations, many ordinary tort claims have found their way to the HCD. Under its writ jurisdiction (art. 102[1]), the HCD may issue compensatory remedy to enforce constitutional rights that

⁵ Criminal Appeal Nos. 15-16 of 2010 (Appellate Division). (Summarily pronounced on 14 February 2017, a full judgment was released on 24 April 2017 and is available on the court’s website).

⁶ *Ibid.*, at 92.

⁷ Writ Petition No. 9911 of 2016 (unreported).

remained uncertain until recently. In a 2015 decision, the SCAD confirmed this jurisdiction of the HCD but held that compensation can only be awarded in case of “gross” violation of constitutional rights.⁸ Despite this decision, however, the HCD on several occasions entertained ordinary tort claims in the guise of public interest litigation (PIL).

In *Children Charity Bangladesh Foundation v. Bangladesh*,⁹ the HCD awarded monetary compensation of 2 million Bangladeshi taka in favor of the family of a four-year-old boy (Jihad) who met a tragic death in December 2014 in Dhaka when he fell into an abandoned deep tube-well shaft belonging to a government department. The civil defense department conducted an unsuccessful rescue. In this PIL, the petitioner claimed that there was a gross violation of the right to life of the little boy. The Court held two public agencies liable for constitutional law damages but did not explain how a gross violation of human rights occurred due to negligence or inefficiency of government agencies. Interestingly, the Court’s reasoning followed common law tort principles such as the principle of strict liability.

The unguided practice of issuing constitutional law remedy in typical tort cases is apparent in the order of the Appellate Division in *Md. Rustom Ali v. State*,¹⁰ where the Court ordered the city of Dhaka to pay 5 million taka to “the bereaved family of victim Sano Mia,” who died falling into “an open manhole” in Dhaka. Damages claim was not at all an issue before the Court, which was in fact approached for a stay on the HCD’s order directing the prosecution of the concerned officers for criminal negligence. Interestingly, the HCD initiated a constitutional proceeding on their own motion (*suo motu*) after having read the news of Sano’s accidental death. To come to the Appellate Division, the petitioners got the relief they asked for, but, surprisingly, the city was asked to pay damages. It was a one-sentence order for monetary damages, and the affect-

ed party was not heard. Nor did the Appellate Division mention a word about negligence or constitutional failures of the city.

In another case initiated by the HCD *suo motu*, the HCD in an interim order of 13 December 2017 awarded compensation of 0.9 million taka in favor of a woman who, after a cesarean section surgery for her delivery, was found to be carrying gauze inside her abdomen. The surgeon and the concerned clinic were ordered to share the burden equally.

IV. LOOKING AHEAD TO 2018

For constitutional law and politics, 2018 will undoubtedly be a contested and challenging year. General elections are due in December 2018, and conducting a fair, free, and multi-party election might prove a daunting challenge. This will be so because the major political party, BNP (Bangladesh Nationalist Party), which boycotted the last (2014) elections, is demanding polls under a politics-neutral government, a system that the current government de-constitutionalized in 2011.

For the judiciary, the challenge is to show its institutional capacity and independence to overcome internal weaknesses and external pressures that were apparent in 2017. Most of 2018 will likely remain heated over the fate of the 16th Amendment as the Appellate Division is due to hear a petition for the review of its 2017 decision annulling the Amendment. Regarding judicial appointments, further controversies are looming large. Currently, the Appellate Division has only four judges on the court when it should have 11. The government is mulling appointments to the Appellate Division soon. If past behavior of the government is an indicator in making the impending appointments, senior judges of the HCD might be superseded. Appointments will also be made to the HCD before general elections, where again the government will more likely than not import political calculations.

V. FURTHER READING

Ridwanul Hoque, ‘Inclusive Constitutionalism and the indigenous people of the Chittagong Hill Tracts in Bangladesh’ in *The Indian Yearbook of Comparative Law 2016* (OUP New Delhi 2017) 217-248

Ridwanul Hoque, ‘Inclusivity role of the judiciary in Bangladesh’ in Nizam Ahmed (ed.), *Inclusive Governance in South Asia: Parliament, Judiciary, and Civil Service* (Springer 2017) 99-122

Ridwanul Hoque, ‘Constitutional Positioning of the Supreme Court of Bangladesh’ in *The Supreme Court of Bangladesh: Commemorating the Supreme Court Day 2017* (Dhaka: Supreme Court of Bangladesh 2017) 284-298

⁸ *Bangladesh v. Nurul Amin* (2015) 3 CLR (AD) 410.

⁹ WP No. 12388 of 2014 (18 February 2016; full judgment on 9 October 2017).

¹⁰ (2017) 5 CLR (AD) 154 (31 March 2017).



Belgium

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

This overview first discusses the state of liberal democracy in Belgium, which remained quite stable in 2017. Nevertheless, several challenges are mentioned that put pressure on the social welfare state, fundamental rights and freedoms and the traditional functioning of the liberal democratic system. Moreover, the article gives an overview of the main cases decided by the Belgian Constitutional Court in the past year that may be of interest to an international audience. These cases are divided into the following categories: access to justice, judicial independence and impartiality, criminal procedure, social security, family law, trade union freedom and minimum service. Finally, the overview looks ahead to upcoming vacancies in the Constitutional Court, a number of interesting pending cases and the upcoming electoral period.

In 2017, the Belgian Constitutional Court delivered 151 judgments and handled 235 cases in total. Regarding the nature of the complaints, conflicts of competencies between the federated entities and the federal state only represent 4% of the judgments in 2017. The majority of cases concerned infringements of fundamental rights. In 2017, the principle of equality and non-discrimination was still the most invoked principle

before the Court (53%), followed by review of compliance with the socioeconomic rights of Article 23 of the Constitution (9%), the guarantees in taxation matters of Articles 170 and 172 (7%), the freedom and equality in education of Article 24 (5%), the property rights of Article 16 (4%), the jurisdictional warranties of Article 13 (4%) and the right to private and family life of Article 22 (4%). References were made to the jurisprudence of the ECtHR in 36 cases. Moreover, the jurisprudence of the CJEU is also regularly reflected in the judgments of the Constitutional Court, with references to this case law in 15 cases. For the first time, the Constitutional Court made a reference to the jurisprudence of the International Court of Justice. References to other sources of international law can be found in 26 cases.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Last year, the state of liberal democracy remained quite stable in Belgium. According to the WJP Rule of Law Index 2017-2018, Belgium's overall score declined by 0.02 points and the country dropped two spots to 15th place.¹ The report indicates (only) a statistically significant decline in the field of order and security, measured by the absence of crime, violent redress and civil conflict.

¹ <https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition_0.pdf> accessed 15 February 2018.

The greatest decline was reported regarding the absence of civil conflict.

Despite our observation that there was no significant decline of liberal democracy in Belgium, several ‘challenges’ or ‘crises’ can be observed that put pressure on the social welfare state, fundamental rights and freedoms and the traditional functioning of the liberal democratic system. Those are asylum and migration, terrorism, the consequences of the financial crisis, climate change, the search for renewable energy and the nuclear power exit, the aging of the population and the so-called political ‘culture of greed’ (*graaicultuur* in Dutch). The latter ‘crisis’ was caused by public outcry due to several political scandals regarding the accumulation of mandates by politicians (cf. the Samusocial, Publifin and Publipart scandals). Moreover, Belgium is not immune to the rise of populist political trends.

The Local Government Decree of 21 December 2017, *inter alia*, pursues a political and administrative (but not a legal) integration of the Public Centers for Social Assistance into the municipalities, reforms and simplifies administrative supervision and makes the rules on inter-municipal partnerships and their underlying structures stricter, including a limit on mandates and stricter limits on attendance fees. As a result, 925 political mandates in the Social Assistance Councils will disappear, as well as approximately 1000 mandates in the boards of directors of inter-municipal partnerships. On the federal level, a working group on political ethics finished its activities and published a report which was unanimously approved by the Committee of Internal Affairs on 18 July 2017, after which legislative initiatives have been taken. In Wallonia and Brussels, measures have also been taken in this regard.

With regard to climate change, a Belgian case, very similar to the famous Dutch Ur-

genda Climate Case, was introduced in April 2015 (the *Klimaatzaak* in Dutch), albeit in a different institutional context as climate change policies are a mixed competence of the federal government and the three Belgian regions. In this regard, four governments have been summoned before the French-speaking Court of First Instance in Brussels while the official language of one of them, the Flemish Government, is Dutch. As there is disagreement over which language should be used in the case, a preliminary issue is now pending before the Supreme Court (*Cour de cassation*).

In the fight against terrorism, several legislative actions were taken, e.g., the Act of 30 March 2017 on Special Methods used by Intelligence and Security Services, which makes it easier to use special investigation methods such as phone taps, and the Act of 17 May 2017, Strengthening the Fight Against Terrorism. Moreover, after intense political debate, Article 12, section 3 of the Constitution has been amended (as well as the Act of 20 July 1990 on Provisional Detention) to prolong the detention period at the start of a criminal investigation from 24 to 48 hours. As of 29 November 2017, suspects of all crimes can be detained up to 48 hours without judicial approval.

In the topic The separation of Powers and the Refugee ‘Crisis’ from the year in review of 2016, a controversy was discussed that started when a Syrian family asked for a humanitarian visa via the Belgian embassy in Beirut. They applied for a short stay in Belgium to seek asylum. In another case, the Council for Alien Law Litigation (CALL) referred a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) regarding the request for a humanitarian visa via an embassy.² On 7 March 2017, the CJEU (Grand Chamber) held that there is no obligation to issue a vis, because an application for a visa with limited territorial validi-

ty made on humanitarian grounds by a third country national (on the basis of article 25 of the Community Code on Visas³) to the representation of the Member State of destination situated within the territory of a third country (with a view to lodging, immediately upon the arrival in that Member State, an application for international protection and, thereafter, to staying there for more than 90 days in a 180-day period) does not fall within the scope of that code, but concerns national law only.⁴ As a result, the Federal Government welcomed the decision by CALL that there was no obligation to issue a visa nor a penalty payment to be made.⁵ It is clear that also in 2017, migration and asylum resulted in heated political and public debates. Most controversies revolved around repatriations to Sudan, a Sudanese governmental identification mission in Brussels and the risk of torture upon return to Sudan in light of the principle of non-refoulement under Article 3 ECHR, eventually resulting in a report of 9 February 2018 of the Commissioner General for Refugees and Stateless Persons.⁶

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Access to justice

In three cases, the Constitutional Court marked significant limits to the financial thresholds on access to justice. On 9 February 2017, the Court decided on a provision reforming the general court fee system (case no. 2017-013). It reiterated that the right of access to a court is not absolute but may be subject to financial limitations, as far as these limitations do not impair the very essence of the right. Furthermore, there has to be a reasonable relationship of proportionality between the limitations and the aims that they achieve. The Court struck down the reform because the challenged provision fixed

² CALL, decision no. 179.108, Dec. 8, 2016 (Belg.).

³ Regulation 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas of the European Parliament and of the Council, O.J. (L 243) at 1.

⁴ C-638/16 PPU X and X v. État belge, Mar. 7, 2017, ECLI:EU:C:2017:173.

⁵ CALL, decision nos. 184.326 and 184.325, March 24, 2016 (Belg.).

⁶ <<http://www.cgvs.be/nl/actueel/soedan-rapport>> accessed 15 February 2018.

the court fees in relation to the amount of the claims, which is incompatible with the aim of the legislator that the fees should reflect the cost of each particular case. As a matter of fact, small claims often turn out to be complicated and thus create more judicial costs than higher but less complicated claims.

On 23 February 2017, the Constitutional Court ruled on the provision submitting lawyers' services to 21% value-added-tax (case no. [2017-027](#)). The Court noted that the impugned provision is a direct follow-up to Directive 2006/112/CE, which the Court of Justice, in a preliminary ruling (Judgment C-543/14) did not consider incompatible with Article 47 of the Charter of Fundamental Rights of the European Union. The Constitutional Court nevertheless noted that the legislator should take account of the increased financial burden relating to the exercise of an effective remedy and the principle of the equality of arms when it takes other measures likely to increase the cost of judicial proceedings. It should ensure that the right of access to courts is not restricted for certain individuals in such a way that the very essence of the said right is violated. It must also take account of the relative inequality of arms resulting from the impugned provision and, where necessary, adapt the rules on legal aid so that there is no violation of the right to legal counsel of persons who do not have sufficient resources to have access to justice by being represented by a lawyer, in view of the real costs of legal proceedings.

A few months later, on 15 June 2017, the Court was called upon to decide on a budgetary measure precisely concerning the legal aid scheme (case no. [2017-071](#)). The Court reiterated that Article 23 of the Constitution guarantees, amongst others, the right to legal assistance. The standstill obligation, implicitly involved in that Article, prevents the legislator from significantly reducing the level of protection afforded by applicable law if there are no public interest grounds for doing so. The Court concluded, however, that the limitation of the budgetary means in the case at hand did not impair the very essence of the right to legal assistance.

B. Judicial independence and impartiality

On 23 February 2017 (case no. [29/2017](#)), in a remarkable decision, the Constitutional Court assessed two related matters concerning the liability of the Belgian State for a (allegedly) wrongful decision by a judicial authority. Under civil procedure law, an appeal in cassation is available as a remedy against the decisions of civil courts concerning the liability of the State for wrongful judicial decisions. The Court of Cassation, being the apex court of the judiciary, may ultimately be asked to review the wrongfulness of its own previous decisions. That raises questions of independence and impartiality. Interestingly, the Constitutional Court found no discrimination between a trial party who may be confronted with a judicial body (the Court of Cassation), which can appreciate state liability for its own (allegedly) wrongful judicial decision, and a trial party appearing before courts outside the ordinary judiciary, who will never take part in this appreciation (for example, the Constitutional Court or the Council of State). According to the Constitutional Court, it is inherent in a legal system that a judgment originating in the ordinary judiciary can be quashed after an appeal in cassation. The latter does not jeopardize the independence and impartiality of the judge taking this decision. Obviously, this approach implies that prior decisions by the Court of Cassation will hardly ever give cause to state liability afterward, changes of circumstances (such as new case law by, e.g., international courts or the Constitutional Court) notwithstanding.

In principle, the profession of a practicing attorney is incompatible with the profession of a judge. Exceptionally, the Belgian legislator allows a cumulation. For example, under the Law of 4 May 2016 on internment and various provisions on justice, the possibility exists to designate, as an *ultimum remedium*, an attorney to replace an assessor who is unforeseeably prevented to attend a session of a sentencing court and when the hearing of the case cannot be postponed. On 11 May 2017 (case no. [2017-053](#)), the Constitutional Court held that such a cumulation, considering the importance of a quick decision by the sentencing court, ensures a fair balance

between the right to a final judgment within a reasonable period and the principles of judicial independence and impartiality.

On 12 October 2017 (case no. [2017-113](#)), the Constitutional Court examined the constitutionality of a measure providing for increased (functional) mobility of judges. This was done in light of a modification of the Judicial Code on the request of the German-speaking Community, one of Belgium's federal entities, to maintain the geographic area of Eupen as a separate judicial district. The Court found that this measure violated the principles of equality and non-discrimination as provided in the Articles 10 and 11 of the Constitution. Essentially, the measure concerned a transitional regime of mobility for appointed judges who meet certain conditions relating to knowledge of the German language. It established a new appointment *in a main (current) position* but linked to an appointment in *a subsidiary position* in two other courts of the judicial district of Eupen. The Court did not accept that a judge must be re-appointed *in their main position*, which they already held, and be appointed to *a subsidiary position* for which they did not apply.

C. Criminal procedure

The Federal Government is currently undertaking a comprehensive reform of Belgian civil and criminal law. However, in anticipation thereof, the Minister of Justice decided to launch several so-called 'Potpourri' Acts, which hold multiple smaller initiatives to improve the pace and efficiency of justice. The second of these Acts – Potpourri II – introduced a number of changes to the criminal procedure. Two of these changes were heavily debated, i.e., the extensive reduction of the competence of the court of assize and the exclusion of detainees without residence permits from almost all modalities that are ordinarily available for the execution of prison sentences.

According to Article 150 of the Constitution, all criminal cases (i.e., the most serious offenses) are brought before the court of assize, which is the only Belgian court that includes a jury. It is the subject of much debate. On

the basis of Potpourri II, *all* criminal cases became open to so-called ‘correctionalisation’ on the basis of mitigating circumstances, i.e., the referral of criminal cases to the correctional tribunal, which is only composed of professional judges and may not impose life sentences. As a complementary measure, the maximum prison sentence for the correctional tribunal was raised to 40 years. The Constitutional Court (case no. [2017-148](#)) found the general correctionalisation measure incompatible with Article 150 of the Constitution. Although the legislator has some discretion in the matter, the use of mitigating circumstances may not lead to a change of the division of competences between the court of assize and the other tribunals as laid down in the Constitution.

On the basis of Potpourri II, all detainees without residence permits were *a priori* and without any individual assessment excluded from almost all modalities regarding the execution of their sentences, such as electronic home detention or probation. The Constitutional Court considered this automatic exclusion on the sole basis of their residence status disproportionate. According to the Court, allowing execution modalities would not lead to the impossibility to remove the person concerned from the territory, which was a concern for the government.

D. Social security

To establish the career length required for anticipated retirement, public sector (and publicly funded school) personnel under ‘appointment’ employment previously benefited from an arrangement taking into account their years of study in higher education necessary for the degree giving access to their position. No such bonus existed for the private sector, or for public sector personnel under the labor contract. A 2015 Act, although providing transitional measures, eliminated that bonus for all retirements from 2030.

Reviewing the measure, the Constitutional Court in its decision (case no. [2017-104](#)) found that the legislature had a wide margin to determine the necessity to cut expenses and stimulate retirements at a higher age. The burden of State-funded pensions should

be modifiable when budgetary constraints so require, and policies can be changed in view of changing circumstances, like demography. Any remaining differences between public servants under ‘appointment’ and those under labor contract did not exclude a partial harmonization as realized by the 2015 Act. The transitional measures, moreover, softened its impact.

Concerning these transitional measures, the Court found that the only alternatives would have been to abolish the bonus for new public servants only, or for all of them at once, both having undesirable consequences. Testing the 2015 Act against the right to fair terms of employment, fair remuneration and social security under Article 23 of the Constitution did not lead to a different outcome.

Another 2015 Act raised the legal retirement age (to 66 years in 2025 and 67 years in 2030), the age limits to anticipate retirement, and the minimum age for a survivor’s pension (to 50 years in 2025 and to 55 years in 2030). This Act too was challenged as a possible violation of Article 23.

Again, the Court in its decision (case no. [2017-135](#)) found that the budgetary impact of future pensions, given the demographic and labor market conditions, could justify the reforms, taking into account solidarity considerations and some transitional measures. The new policy would become impossible if any existing situation could no longer be modified later. An argument of indirect discrimination of women was raised, given that women tend to work part time in greater numbers. The Court found that the difference in the numbers of women and men eligible for anticipated retirement was not considerable enough to justify differential treatment.

The Court did find a violation, however, with regard to the treatment of last surviving spouses who would in certain hypotheses not immediately receive a survivor’s pension, but only a transitional allowance. Given that the survivor’s pension shields last surviving spouses from financial hardship, including those who are not or barely active on the labor market, this measure would have had disproportionate effects.

E. Family Law

In its decision (case no. [2017-095](#)), the Constitutional Court answered a preliminary question raised by a family judge. Under the Civil Code, adoption was only possible by a candidate living together with the child’s parent and between whom no marriage impediments existed, or at least one that could be dispensed with by the government. Adoption was not possible for a close relative, living together with the child’s parent, between whom an indispensable marriage impediment existed. The question was whether this absolute impossibility was in violation of the interests of the child, as protected under Article 22*bis* of the Constitution.

Indispensable marriage impediments between relatives aim at avoiding incestuous relationships. An absolute prohibition of adoption excludes any possibility to formalize an existing and sustainable relationship between a candidate adoptive parent and the child, however. Answering the question affirmatively, the Court concluded that there were no reasons to assume that that would not, under any circumstance, be in the child’s interest.

F. Trade union freedom and minimum service

By reserving strike notice and consultation procedures in the framework of industrial disputes with the Belgian Railways for representative and recognized trade unions, the legislator introduced a restriction which, according to the Constitutional Court in its Judgment of 26 July 2017 (case no. [2017-101](#)), is not compatible with the freedom of association and the right to collective bargaining, including the right to take collective action. By reserving the possibility of participating in union elections for the trade unions mentioned above, the legislator violated the right to participate in a democratic process enabling the workers concerned to elect their representatives in conformity with trade union pluralism. Therefore, the Court annulled the provision, challenged by *The Independent Union of Rail Workers*, which has the status of ‘authorized trade union organization’ but is not a representative or recognized trade union organization. A few

months earlier, on 18 May 2017 (case no. [2017-064](#)), the Court had already provisionally suspended the provision for the same reasons.

In November 2017, the federal Parliament adopted a law that aims to guarantee a minimum service in case of a railroad strike (Act of 29, November 2017). Trade unions have already expressed their intention to challenge that act.

IV. LOOKING AHEAD TO 2018

There are two vacancies in the Constitutional Court in 2018. The Dutch-speaking president,⁷ Etienne De Groot, retired at the mandatory retiring age of 70 on 17 February 2018. As President, he was replaced by Justice André Alen. As Justice, being a former Member of Parliament, De Groot must be replaced by a former member of the Federal or a Regional Parliament.⁸ The French-speaking President Jean Spreutels has decided to retire before the mandatory retirement age, at the age of 67, on 1 September 2018. Justice François Daoût has been elected by his peers to replace him as President of that group. As Justice, he must be replaced by a law professor, a member of the supreme judiciary or a legal secretary of the Court. The new Justices will be appointed from a list of two candidates for each vacancy. The Organic Act of the Constitutional Court requires as of 2014 that at least one-third of the Justices should be of each gender.⁹ Due to transitional arrangements, however, there is no legal obligation in this respect for the two vacancies in 2018. Former Federal and Flemish Minister Fientje Moerman was appointed to replace Justice De Groot. There has been some debate in the press and public opinion about the requirement that half of the Justices should be former MPs and the parliamentary procedure (i.e., no hearing of [former] MPs and superficial hearing of candidates from the legal profession by the Senate).

There are a number of interesting cases pending before the Court that will be judged in 2018. To mention just a few: the annulment appeal of the Act of 12 July 2015 to combat the activities of the so-called ‘Vulture Funds’; the Act of 30 March 2017 on Special Methods used by Intelligence and Security Services; the Act of 17 May 2017, Strengthening the Fight Against Terrorism; the Walloon Decree of 18 May 2017 and the Flemish Decree of 7 July 2017, both prohibiting ritual slaughtering of animals; and the Transgender Act of 25 June 2017.

2018 also marks the start of an electoral period, starting with local elections (municipalities and provinces) on 14 October. As many federal and regional politicians will also be running in these elections, they may already provide an indication of the scene for the elections of the European, Federal and Regional Parliaments in 2019.

⁷ The Court is composed of six Dutch-speaking and six French-speaking Justices, each linguistic group electing their own President.

⁸ The Court is composed of six former Members of Parliament and six Justices with a background in the legal or academic profession.

⁹ At the end of 2017, there were only two female justices out of a total of twelve, being one-sixth.



Bosnia and Herzegovina

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 witnessed several constitutional tournaments in Bosnia and Herzegovina (later in the text referred to as BaH). These events mainly refer to the participation of all citizens of BaH in its system of government under non-discriminatory conditions as opposed to the status of the constituent peoples that remains an integral and very important element of heterogeneous legal and political order of BaH. To that end, the main focus was on its Election Law. This was closely connected to the unsuccessful debate over amending the Constitution of BaH. In addition, the country was in turmoil over several issues that involved the work of the Constitutional Court. As a result of that, the Constitutional Court, among others, heard cases concerning the constitutionality of all laws adopted by the Parliament of the Federation of BaH, state property, right to vote, and national holidays.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Overall, even though under (mild) pressure from external stakeholders¹ the constitutional architecture of BaH remains untouched since 1995 as the political representatives show no progress in introducing constitutional amendments that would make the

constitutional system (more) responsive. Conversely, potential internal intermediaries, such as the Office of the High Representative in BaH, remain mere bystanders. Importantly, during 2017, ethnicity continued to play an important role in the country's constitutional reality. There is still a lot of support to ethnic strongholds, which became and remain a fundamental factor in the system of government. Linked to this, there are several key aspects that allow exploring the ways in which the interests of three constituent peoples oversaturate the current state of liberal democracy in BaH.

To begin with, the Parliamentary Assembly of BaH still has not taken steps in harmonizing constitutional and legal norms with several decisions of the European Court for Human Rights. In 2009, the European Court, deciding in the case of *Sejdić and Finci v. BaH*,² established that the constitutional provisions which render the applicants (in this case the persons who do not identify themselves as one of the constituent peoples) ineligible for election to the presidency of BaH discriminatory. Later on, in 2014, in the case of *Zornić v. BaH*,³ the European Court reinforced the previous decision. Finally, in 2016, in the case of *Pilav v. BaH*,⁴ the European Court again looked into the provisions of the Constitution, this time from a different angle. In particular, the presidency of BaH consists of one Bosniac and one Croat, each directly elected from the Federation of BaH,

¹ Lately, the European Union officials are the most vocal about the activities associated with the governance of Bosnia and Herzegovina, especially about the debate among parties in power. Also, foreign diplomatic missions such as the United States of America, the United Kingdom, Switzerland, and Turkey kept showing their interest to influence the political situation in the country.

² *Sejdić and Finci v. Bosnia and Herzegovina*, App no 27996/06 and 34836/06 (ECtHR, 22 December 2009).

³ *Zornić v. Bosnia and Herzegovina*, App no 681/06 (ECtHR, 15 July 2014).

⁴ *Pilav v. Bosnia and Herzegovina*, App no 41939/07 (ECtHR, 9 June 2016).

and one Serb directly elected from the Republic of Srpska. The European Court held that the applicant (in this case a Bosniac living in the Republic of Srpska) is prevented from being entitled to stand for the election to the Presidency and therefore the Court found it to be a discriminatory feature of the constitutional system. Although the decisions of the European Court highlighted a need to amend the Constitution, the political actors did not take necessary steps to address the issue.

Secondly, in 2016 the Constitutional Court of BaH, by its decision U-23/14, established that certain provisions of the Election Law of BaH⁵ are not in conformity with the country's Constitution. These include the provision that "each of the constituent peoples shall be allocated one seat in every canton" as well as the provisions that stipulate the number and ethnic belonging of the delegates in the House of Peoples in the Parliament of the Federation of BaH based on the census from 1991. The Constitutional Court ordered the Parliamentary Assembly of BaH to harmonize the provisions with the Constitution no later than six months from the day of delivery of the decision. However, in July 2017 the Constitutional Court established that the Parliamentary Assembly has failed to enforce the decision of the Constitutional Court within a given time limit, and, by its decision 54/17, rendered the provisions ineffective the following day from the day of the ruling being published in the *Official Gazette of Bosnia and Herzegovina*.

Linked to the second point, in the meantime, there has been an attempt to amend the Election Law of BaH. However, the process was marked by constant agitation and protraction. In May 2017, five Croat delegates of the House of Peoples of the Parliamentary Assembly of BaH requested a review of the Election Law under urgent procedure. The proposal, *inter alia*, tackled the election of the members to the presidency of BaH, the election of delegates to the House of Peoples

in the Federation of BaH, and the longtime stumbling block, the elections in the City of Mostar. Nevertheless, the proposal created a vehement situation, followed by increased media coverage. As an outcome, the Chairman of the House of Peoples submitted a request for determination of the constitutional grounds for declaring the proposal detrimental to the vital interest of the Bosniac people. By referring to the cases of *Sejdić and Finci v. BaH* and *Pilav v. BaH*, the applicant argued that the discriminatory provisions on the candidates running for the presidency of BaH are not removed by the proposal as the solution creates even more disadvantages with regards to the European Convention on Human Rights. Also, preventing Bosniacs from certain cantons from being elected to the House of Peoples of the Parliament of the Federation of BaH would constitute discrimination against the Bosniacs and such matter was already judged in the judgment of the European Court of Human Rights. Finally, applicants pointed out that the proposed number of delegates per canton is based on the last census from 2013, unlike the census indicated in the Election Law, the one from 1991. The application of the 2013 census was seen as highly problematic as it depicts discrepancies in the ethnic composition of certain territorial units compared to the ethnic composition in the last census dating from 1991. This would and will necessarily reflect on the composition of institutions at all levels in BaH. Deciding in this case,⁶ the Constitutional Court of BaH has established that the vital national interest of the Bosniac people in BaH is not violated by the proposal and that the procedure of passing the Law to Amend the Election Law of BaH shall be carried out to comply with the terms of the procedure under the Constitution. The Court upheld that the proposal is based on the same principles provided for in the Constitution and the Election Law as the current solution. Furthermore, the Court held that the proposal was not submitted with the aim of implementing the previous decisions of the European Court but it rather relates to the issues of the electoral procedure pro-

vided for in the present Election Law. This clearly follows from the proposal, wherein the proponents indicate the enforcement of the decision U-23/14 and compliance with the general principle of democracy, namely that one people does not elect the representative of the other one, as the reason for its adoption. Finally, the Court reasoned that the implementation of the previous decisions of the European Court cannot constitute only the interest of members of the Bosniac people. In the outturn, the House of Representatives has opened the discussion on these changes, but only in December 2017. Nonetheless, the session that was then started was repeatedly interrupted and continued, so it ended with a vote against in January 2018. In the meantime, as the elections in October 2018 are approaching, more political parties are coming forward with proposals to amend the Election Law.

The current state of affairs in BaH indicates a consistency in neglecting the participation of those who do not identify as one of the constituent peoples in its system of government. The same applies for those who do choose to identify themselves as one of the constituent peoples but reside in a "wrong" territorial area. Two things seem to be indicative. First, unlike at the State level, even though the non-constituents are guaranteed certain rights in the Federation of BaH and the Republic of Srpska, their position is still, without exaggeration, formally and legally on the verge of exclusivism. Second, taking into account persisting and never-ending political rhetoric, be it of ruling parties or the opposition, and the lack of ambition to promote the implementation of judgments of the European Court, it is almost clear that the provision of the equal position of all citizens in the system of government in BaH is virtually impossible. A first thing that strikes is the proportion of constituent features and preference for parity of constituent peoples taken as the measure of power at all levels of government. A second thing that stands out is the notion of ethnic balance, perceived as the crucial element for the stability of

⁵ Official Gazette of Bosnia and Herzegovina, 23/01, 7/02, 9/02, 20/02, 25/02, 4/04, 20/04, 25/05, 52/05, 65/05, 77/05, 11/06, 24/06, 32/07, 33/08, 37/08, 32/10, 18/13, 7/14 and 31/16.

⁶ Case no. U-3/17.

the entire system. Constitutional safeguards granted to the constituent peoples in terms of collectivity along territorial lines and their participation in the system of government are indeed legitimate, but they capriciously suffocate the rights of the rest of the citizens to participate in the system of government. At the same time, this reasoning denies mandatory participation in government, contrary to the constitutional and legal solutions, which were ultimately confirmed by the judicial authority in Strasbourg.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The core activity of the Constitutional Court of BaH in 2017 involved a large number of appeals with regard to the right to a fair trial, notably with regard to the failure to make a decision within the reasonable time. To that end, in a number of cases, the Constitutional Court has ordered the authorities in breach to pay a compensation to the appellants. Also, the Court has ordered to the High Judicial and Prosecutorial Council of BaH, the presidents of the regular courts, and other competent authorities to take measures to remove the violations and inform the Constitutional Court about the taken measures.

Apart from this, the Constitutional Court reviewed the constitutionality of the provisions of several important laws and established non-conformity with the Constitution, namely in cases of the Criminal Procedure Code of BaH,⁷ the Law on Police Officials,⁸ and the Law on the Intelligence-Security Agency of BaH.⁹ In all of the cases, the Court established the violation of the rule of law.

Finally, the focus of this report is on several decisions that raised constitutional issues linked to the principle of constituent peoples.

State property, Case No. AP-548/17

This case concerned, *inter alia*, the verdicts of the Court of BaH which ordered the Republic of Srpska to register the ownership rights over real properties in the name of BaH and to erase the previous registration of all rights of the Republic of Srpska. The appellant (the Republic of Srpska represented by the Public Attorney's Office), among others, argued that the court should not have re-allocated real properties, since only the previously established commission made up of the representatives of all levels of the government could do it on the basis of the agreement on distribution of state property in the territory of BaH. The appellant stated that the High Representative addressed the Public Attorney's Office and warned them to stop registering the property of the former Yugoslavia in the name of BaH, as that violates the provisions of the Law on Prohibition of Disposal of Property. Moreover, the appellant stated the property stipulated under the Dayton Agreement is being taken away.

The Constitutional Court held that there was nothing to indicate that the Court of BaH acted arbitrarily when it established the right of ownership and ordered the registration of that right in the name of BaH. The Court considered this was not in violation of the Dayton Agreement as that does not seize the portion of the territory from the appellant. The registration of the respective real properties, which are located in the territory that was allocated to the appellant under the Dayton Agreement, cannot constitute the seizure of the territory from the appellant, as in that case any registration of the real property in the name of a titleholder other than the appellant would constitute the seizure of the territory from the appellant. Moreover, the appellant is the Entity, an integral part of an internationally recognized state composed of two Entities, the appellant and the Federation of BaH, and the Brčko District as

a local self-government. They all share the appellants' territory in proportions agreed upon under the Dayton Agreement and that territory is located within the internationally recognized borders of the appellant, which is the titleholder of, *inter alia*, the property acquired through succession from the former Yugoslavia in its entire territory, including the property located in the territory of the appellant and the Federation of BaH.

Right to vote, Case No. U-6/17

In this case, the appellant (a group of representatives from the House of Representatives of the Parliament of the Federation of BaH) requested a review of the constitutionality of Article 3.5 of the Election Law. The applicants' arguments were based on the fact that the Central Election Commission requested from the citizens of BaH who are temporarily residing abroad or hold the status of a refugee from the country to re-register themselves by a given deadline for the local elections in BaH to be held in 2016. By referring to positive legal norms in BaH, the appellants concluded that every citizen residing abroad has an equal right to be registered in the Central Voter Register and that those registered in accordance with the law have a permanent right to participate in election processes in BaH under the same conditions as other citizens. The applicants argued that there must be no restrictions or additional obligations with regards to registration and expression of the will of voters as well as no differential treatment of citizens of BaH depending on whether they live in the country or abroad.

Deciding in this case, the Constitutional Court dismissed the request as it established that the article was in conformity with the Constitution, the European Convention, the International Covenant on Civil and Political Rights, Protocol No. 1 and Protocol No. 12 to the European Convention, and the International Convention on the Elimination of

⁷ Case no. U-5/16, Articles 84 (2), (3), (4), Article 117(d), Article 118 (3), Article 225 (2), and Article 226 (1), the Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, and 72/13).

⁸ Case no. U-6/16, Article 114(3) of the Law on Police Officials of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 27/04, 63/04, 5/06, 33/06, 58/06, 15/08, 35/09, and 7/12).

⁹ Case no. U-21/16, Article 78(3), (4) and (5) of the Law on the Intelligence-Security Agency of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, 12/04, 20/04, 56/06, 32/07, 50/08, and 12/09).

All Forms of Racial Discrimination. Based on the applicant's allegations, the Court held that the challenged provision does not bring into question the right of the citizens of BaH abroad to vote. By calling upon the practice of the European Court, the Constitutional Court recalled that the right to vote and to be elected are not absolute rights and the State is granted a wide margin of appreciation regarding the manner in which to regulate this issue as well as the issue of organizing and conducting the election process. The Court further held that the Venice Commission recommended that member States facilitate the exercise of expatriates' voting rights, but it did not consider that they were obliged to do so. Rather, it viewed such a move as a possibility to be considered by the legislature in each country, which had to balance the principle of universal suffrage on the one hand against the need for security of the ballot and considerations of a practical nature on the other.

National holidays, Cases No. U-18/16 and U-22/16

In these two cases, the appellant (30 representatives of the National Assembly of the Republic of Srpska) filed applications to the Constitutional Court to review the constitutionality of the Law Declaring March 1 as Independence Day of the Republic of BaH and the Law on Proclamation of November 25 as Statehood Day of the Republic of BaH.

In the first case, the applicants held that the Law is in contradiction with the 10th paragraph of the Constitution's Preamble. The reasoning for the foregoing extended to the fact that the referendum on the independence of BaH, which had been held on 29 February and 1 March 1992, was supported mainly by Bosniacs and Croats while Serbs boycotted it, which placed the Serb people in a subordinated and discriminatory position. Deciding in this case, the Constitutional Court reviewed the events and relevant legal provisions before and little after BaH declared its independence. The Court also referred to the results of the referendum and international recognition of BaH and concluded that the referendum can be seen in no other way but as a part of legal continuation, which resulted in international recognition.

The Court also emphasized that all citizens of BaH, without distinction on the ground of national or ethnic affiliation, were called to vote at the referendum. Therefore, the Court upheld that the Law is consistent with part of the Preamble reading "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of BaH hereby determine the Constitution of BaH."

In the second case, the applicants claimed that contrary to their constituent status proclaimed under the Preamble of the Constitution, the Serb people in BaH are discriminated against. Their reasoning was based on the fact that the national holiday was established in 1995 at the time of tragic conflict in BaH, and that nowadays Statehood Day has been celebrated only in one part of the territory of BaH, i.e., the Federation. In the applicants' view, it clearly follows that the intention behind the determination of November 25 as Statehood Day of BaH was to exclude one constituent people, i.e., the Serb people. When deciding in this case, the Constitutional Court dismissed the request as ill-founded. The Court referred to its previous landmark decisions and considered the historical context of November 25 in the light of the 1943 First State Anti-Fascist Council of the People's Liberation of BaH meeting ("ZAVNOBIH"), held in Mrkonjić Grad on 25 and 26 November 1943. It established that in the former Socialist Republic of BaH, this date used to be observed as a national holiday, and as of this date a Decision on Constituting BaH as an equal federal unit within the Yugoslav Federation was passed. Finally, the Court held that the practice of the observation of a holiday in principle could not result in discrimination in exercising one's individual rights and obligations.

IV. LOOKING AHEAD TO 2018

Setting aside cases based on a tendency to preserve individual interests of each constituent people along territorial lines in BaH, in 2018 the Constitutional Court will most likely continue to be overburdened with appellations requesting it to examine whether the constitutional rights (the right to a fair trial,

the right of access to court, the right to an effective legal remedy, etc.) have been violated or disregarded, and whether the application of the law was, possibly, arbitrary or discriminatory.

In addition, the elections scheduled in October 2018 are already intensifying relations in political life in BaH. On one side, the pressure is on the Parliamentary Assembly to amend the Election Law before the elections. This pressure comes from different sources. One of them is the Parliamentary Assembly of the Council of Europe, which recently adopted the Resolution on Bosnia and Herzegovina in which political actors are invited to adopt changes of the Election Law at least six months before the elections in 2018. Another pressure comes from the Head of the Delegation of the European Union to Bosnia and Herzegovina and the European Union Special Representative in Bosnia and Herzegovina, who acted on her own initiative and suggested several possible solutions. Anyhow, these pressures encourage political parties to come up with their own proposals. On the other side, if the Parliamentary Assembly fails to adopt the modifications, the question is how the elections will be organized. Finally, the point at issue is what role the Constitutional Court will play in that case.

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Brazil



THE STATE OF LIBERAL DEMOCRACY

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We thank Amy Volz for language editing.

I. INTRODUCTION

The year 2017 revealed a serious challenge for Brazilian institutions. Following the removal of President Dilma Rousseff after a very divisive impeachment process and massive criminal investigations implicating several politicians, 2017 can be depicted as the year of political backlash: the political class made major strides towards shielding itself from any action that could affect its long-standing interests, practices, and privileges. Unlike the previous year, when the main battle took place between Congress and the Executive branch, in 2017 there was direct confrontation between the Judiciary on the one hand, and Congress and the Executive branch on the other, now unified in their main goals. Instead of exerting the typical role of constitutional courts, the Brazilian Supreme Federal Court (STF) saw its most impactful workload devoted to examining the criminal offenses of high-ranking authorities.

This report demonstrates how such political backlash has had a profound impact on the core of Brazilian democracy. Additionally, it shows that, despite that backlash, some important developments that occurred throughout the year indicate that Brazilian democracy is more resilient than the context may suggest. The main constitutional cases

reveal that, as a rising power in Brazilian democracy, the Supreme Court is currently challenging – and being challenged in – its role as guardian of the Constitution, especially in sensitive political matters. In this regard, the developments in Brazilian constitutional law are themselves a rich source for constitutional lawyers who are mainly dealing with the judicialization of politics. This report also presents some of the STF’s relevant decisions on fundamental rights and the prospects for 2018, when Brazil will hold national elections.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

The political crisis that triggered the impeachment of then-President Dilma Rousseff in August 2016 continued into 2017. During and in the aftermath of the impeachment, the increasing social and institutional polarization, which was already visible in the 2014 presidential elections, became more intense. Signs of “democratic decay”¹ gained magnitude in 2017, when the three branches of power challenged one another amid a crisis of legitimacy: President Michel Temer, who took office after the impeachment, has since been the most unpopular president in recent Brazilian history;² the National Congress, with approval ratings below 5%,³ has vis-

¹ See Tom Gerald Daly, *Public Law and the Puzzle of Democratic Decay in Brazil*. *Law and Society Association*, 2017.

² See *Governo Temer é reprovado por 70%*, Datafolha, January 31, 2018, at: <http://datafolha.folha.uol.com.br/opiniaopublica/2018/01/1954759-governo-temer-e-reprovado-por-70.shtml>

³ See *Ranier Bragon, Rejeição ao trabalho do Congresso atinge recorde*, Folha de S. Paulo, Decem-

ibly worked to keep its interests and privileges untouched while a massive corruption probe has reached many of its members; and the Supreme Federal Court, faced with long-standing dysfunctions such as an overwhelming docket,⁴ the extensive powers of individual justices,⁵ and outdated procedural laws, has been thrust into the crisis.⁶

President Michel Temer's "reform agenda,"⁷ characterized by a stringent fiscal policy, privatization, and some constitutional and legal reforms (particularly of the labor code and the pension system) gained momentum in 2017. While pushing for such reforms, nonetheless he was in the center of a major corruption scandal which seriously threatened his government. In May, one of the most prominent businessmen in Brazil taped a conversation with President Temer which allegedly implicated him in bribery, and presented the recordings to the Prosecutor-General in connection with a plea bargain agreement.⁸ In the following months, the political system operated to defend itself from criminal charges by using some constitutional provisions to hamper prosecution against

political actors, such as the "privileged jurisdiction" (*foro privilegiado*), which determines that some high-ranking authorities are tried directly by the STF, or the need for prior congressional approval to prosecute the President or to arrest a congressman for common criminal offenses. President Temer himself was later indicted twice for racketeering and obstruction of justice.⁹ Both complaints, however, were blocked by the vast majority of Deputies. President Temer then accused the Prosecutor-General of conspiracy to remove him from office.¹⁰ Politicians of all stripes have also reacted as investigations have spread out and reached many of them.¹¹

The year was also marked by attempts to change the electoral system, especially as a response to the STF's decision in 2015 prohibiting corporate donations for electoral campaigns.¹² Though the political system urgently needs to be redesigned amid a growing crisis of representation, excessive party fragmentation, and dependence on unstable coalitions often forged in exchange for patronage and corruption,¹³ Congress

strategically named as "political reform" some changes aimed, in reality, at promoting and shielding its members' interests. Proposals such as overhauling the system of government from presidentialism to parliamentarism, which would grant even greater powers to Congress,¹⁴ or radically changing the electoral system from proportional to majoritarian representation, which would favor the reelection of those already in power, were either publicly advocated by the government¹⁵ or subject to serious debate in Congress,¹⁶ though not approved in the end. Yet, as corporate donations for electoral campaigns became illegal, Congress passed a public campaign finance bill,¹⁷ the design of which will likely bestow even more powers on traditional party leaderships.¹⁸ The so-called political reform was therefore not an overhaul of a currently broken political system but rather "an echo that threw open the detachment of the political class with the citizenry."¹⁹

Therefore, a sequence of events boosted the already visible pattern of political self-preservation of the previous turbulent year. In

ber 6, 2017, at: <http://www1.folha.uol.com.br/poder/2017/12/1940936-rejeicao-ao-trabalho-do-congresso-atinge-recorde.shtml>

⁴ The Supreme Court currently has 45.458 cases awaiting decision. See <http://portal.stf.jus.br/textos/verTexto.asp?servico=estatistica&pagina=acervoatual>

⁵ See Diego Werneck Arguelles & Ivar A. Hartmann, "Timing Control Without Docket Control." *Journal of Law and Courts* 5.1 (2017): 105-40.

⁶ See Juliano Zaiden Benvindo & Fernando José Gonçalves Acunha, *Brazilian Democratic Decay and the Fear of the People*, Int'l J. Const. L. Blog, June 24, 2017, at: <http://www.iconnectblog.com/2017/06/brazilian-democratic-decay-and-the-fear-of-the-people/>

⁷ See Daniel Gallas, *Michel Temer's Reform Agenda in Brazil: A Rundown*, *Americas Quarterly*, September 7, 2016, at: <http://www.americasquarterly.org/content/michel-temers-reform-agenda-brazil-rundown>

⁸ See Jonathan Watts, *Brazil: explosive recordings implicate President Michel Temer in bribery*, *The Guardian*, May 18, 2017, at: <https://www.theguardian.com/world/2017/may/18/brazil-explosive-recordings-implicate-president-michel-temer-in-bribery>

⁹ See *Brazil President Michel Temer faces more criminal charges*, BBC, September 15, 2017, at: <http://www.bbc.com/news/world-latin-america-41275822>

¹⁰ See Marina Dias, Daniel Carvalho, *In a Letter to Politicians, Temer Claims to be the 'Victim' of 'Conspiracy'*, *Folha de S. Paulo*, October 17, 2017, at: <http://www1.folha.uol.com.br/internacional/en/brazil/2017/10/1927703-in-a-letter-to-politicians-temer-claims-to-be-the-victim-of-a-conspiracy.shtml>

¹¹ See Andres Schipani, *Brazil graft probe at risk of sabotage*, *Financial Times*, November 26, 2017, at: <https://www.ft.com/content/da7fcc7a-cef6-11e7-b781-794ce08b24dc>

¹² STF, ADI 4650, Rel. Min. Luiz Fux, DJe nº 192, 24/09/2015.

¹³ See Paulo Sérgio Pinheiro, *Brazil's Broken Political Leadership*, *The New York Times*, June 4, 2017, at: <https://www.nytimes.com/2017/06/04/opinion/brazil-president-temer-corruption.html>

¹⁴ See Juliano Zaiden Benvindo, *Parliamentarism in Brazil: Stability for Whom?* Int'l J. Const. L. Blog, Aug. 27, 2017, at: <http://www.iconnectblog.com/2017/08/parliamentarism-in-brazil-stability-for-whom/>

¹⁵ See Ricardo Mendonça, *Temer volta a defender parlamentarismo no Brasil*, *Valor Econômico*, August 8, 2017, at: <http://www.valor.com.br/politica/5072184/temer-volta-defender-parlamentarismo-no-brasil>

¹⁶ See *Comissão da reforma política aprova "distritão" para eleições de 2018 e 2020*, *Câmara Notícias*, August 10, 2017, at: <http://www2.camara.leg.br/camaranoticias/noticias/POLITICA/538868-COMISSAO-DA-REFORMA-POLITICA-APROVA-DISTRITAO-PARA-ELEICOES-DE-2018-E-2020.html>

¹⁷ See Lei Ordinária n. 13.487, de 5 de Outubro de 2017, DOU, 06/10/2017.

¹⁸ See *Reformas políticas irão manter caciques e políticos influentes no poder*, *Jornal GGN*, October 30, 2017, at: <https://jornalggn.com.br/noticia/reformas-politicas-irao-manter-caciques-e-politicos-influentes-no-poder>

¹⁹ Vinícius Sousa, *Nunca foi reforma política*, *Congresso em Foco*, October 18, 2017, at: <http://congressoemfoco.uol.com.br/noticias/nunca-foi-reforma-politica/>

2017, the political class made great strides towards shielding itself from corruption investigations and took advantage of constitutional and legal loopholes to forward its agenda. Though some of those strategies became less concealed amid some social reaction and media monitoring, they have since proved quite successful. By micromanaging changes in the investigations' apparatus seemingly intended to reduce their grip and challenging the judicial system as it encroaches upon their interests, it is no wonder that signs of attack on democratic values are underway.

The numbers are revealing. According to *The Economist Intelligence Unit's Democracy Index*, the Brazilian democracy score, on a scale of 0 (more authoritarian) to 10 (more democratic), dropped from 7.38 in 2014 to 6.86 in 2017.²⁰ Moreover, although 62% of Brazilians still say that democracy is the best model of political organization, only 13% are satisfied with how it has been exerted, the lowest score in Latin America.²¹ Noticeably, since the growing political polarization during and after President Dilma Rousseff's election, Brazil has endured serious challenges to preserve some of its hard-earned democratic breakthroughs.

Yet Brazilian democracy may reveal itself to be rather resilient. Crises have long been a feature of Brazilian history, but this one in particular has come out of a far-reaching corruption probe that has struck the core of a traditional political system used to sidetracking any action that could harm its entrenched interests. It is quite startling that some influential politicians and successful businessmen have already been convicted and are serving prison sentences. Furthermore, there has been a movement to foster greater transparency among institutions, including the judiciary, which has long been reluctant to any disclosure of its privileges and practices. Political backlash was thus the main development of 2017, as the result of widespread corruption investigations. Yet it may also signal that, beneath the crisis, some important and positive developments are un-

derway, as the next section will discuss.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2017, the STF's docket was dominated by challenges closely related to the exercise of original jurisdiction in criminal proceedings. This atypical function, popularly known as "privileged jurisdiction," gives the Court great visibility and a leading role in the fight against corruption, but it also increases the risks of undue politicization, selectivity, and excessive intervention in the political arena. It was not by accident that this improper role became more prominent than the typical tasks of constitutional jurisdiction, that is, to interpret and enforce the Constitution. The recent and grave corruption schemes, mostly uncovered by the "Car Wash" probe, have caused a sharp increase in the volume of investigations and criminal prosecutions before the STF. Early in the year, the plea bargain deal entered into by executives of the construction giant Odebrecht named 415 politicians of 26 political parties, including former Presidents and current speakers of the Chamber of Deputies and the Senate. In May, the executives of meatpacker JBS also signed a plea bargain in which they admitted the company paid kickbacks to 1,829 politicians from 28 parties, including the current President and dozens of congressmen.

Throughout the year, the "Car Wash" probe and the negative reactions of the political actors to its unfolding dictated not only the agenda of the Court but the development of constitutional law in Brazil, as the decisions selected below demonstrate. However, what was unprecedented in the year 2017 was not the fact that the criminal cases consumed so much of the STF's time and energy. This had already occurred, even more intensely, in the so-called Mensalão trial, which was concluded in 2014 after nearly 70 plenary sessions. As the previous section contended, the uncommon feature was rather the level of tension between the Supreme Court and

the other two branches. On balance, 2017 brought more uncertainties and setbacks than advances both for the fight against corruption and for the Court's institutional capital and credibility.

Next, the STF's most relevant rulings in the 2017 term are briefly analyzed. The selected cases were organized into two groups according to their main subject – the efforts related to the criminal jurisdiction and the current context of political crisis, on the one hand, and the affirmation and implementation of fundamental rights, on the other.

III. 1) The Brazilian Supreme Court, criminal law, and political crisis

1. The need to submit, to the decision of the Legislative House, the application of preventive measures to members of Congress by the Supreme Court (ADI 5526, decided 10/11/2017)

The plea bargain agreement signed by the executives of JBS, which included the handling of tapes and other critical evidence of the payment of bribes to more than 1,800 politicians, allowed the prosecutor's office to open investigations against several congressmen, including Senator Aécio Neves, a former presidential candidate. In one of the recordings, Senator Neves was caught openly requesting \$2 million Brazilian reais from the JBS chairman. Following this exchange, the delivery of the funds was confirmed within the scope of a controlled operation conducted by the Federal Police. The recordings also indicate the Senator's attempt to hinder the "Car Wash" investigation.

Brazil's Prosecutor-General presented charges against Neves for corruption and obstruction of justice and requested the STF to order his pre-trial detention. In May, the original rapporteur of the case, Justice Edson Fachin, issued a preliminary order applying preventive measures, including suspension from his parliamentary functions, a prohibition on contacting other defendants, and the seizure of his passport. Justice Fachin re-

²⁰ See *The Economist Intelligence Unit's Democracy Index 2017*, The Economist, at: <https://infographics.economist.com/2017/DemocracyIndex/>

²¹ See *Informe 2017*, Corporación Latinobarómetro, at: <http://www.latinobarometro.org/latNewsShow.jsp>

frained, however, from ordering the pre-trial detention, since the Court had not yet pronounced on the scope of parliamentary immunity. Subsequently, due to the lack of connection of the investigation to the “Car Wash” probe, the case was reassigned by lot to Justice Marco Aurélio, who unilaterally revoked Justice Fachin’s decision, thus enabling Senator Neves to return to his position in the Senate. Next, on September 26, the First Panel of the Court, by a 3-2 vote, not only reinstated the provisional measures applied to Senator Aécio Neves, including the suspension of his mandate, but also additionally imposed a curfew that required him to remain at home at night.

The decision provoked negative reactions from congressmen, who claimed that it violated parliamentary immunity from arrest and threatened to obstruct and ignore the Court’s ruling. Brazil’s 1988 Constitution provides that “[f]rom the date of their investiture, members of the National Congress may not be arrested, except in flagrante delicto for a non-bailable crime. In this case, the police record shall be sent within twenty-four hours to the respective Chamber, which, by a majority vote of its members, shall decide as to imprisonment” (article 53, § 2º). Facing threats of non-compliance, the Court decided to hear the direct action of unconstitutionality (ADI 5526, which discussed the question of whether the application to congressmen of preventive measures, as an alternative to custody, shall be subjected to the vote of the respective House, even though article 53, § 2º of the Constitution only allows Congress the last word in the case of imprisonment of its members.

On October 11, the Court, on a 6-5 decision, in which Chief Justice Cármen Lúcia cast the tie-breaking vote, set the following holding: the Judiciary has the power to order various preventive measures, as an alternative to prison, against members of Parliament as long as they do not interfere with parliamentary duties. If, however, a preventive measure directly or indirectly interferes with the free exercise of the mandate, it shall be submitted to the respective House for deliberation. The minority opposed an extensive interpretation of the privilege for cases oth-

er than imprisonment on the grounds that it would impair the independence of the Judiciary and violate the republican principle of allowing congressmen to shield themselves from the Court’s orders.

In the week following the Court’s decision, the Senate, by a 44-26 vote, decided to revoke the preventive measures imposed on Senator Aécio Neves by the First Panel.

2. *Limiting “privileged jurisdiction” (“foro privilegiado”) to offenses committed by officials in the course of their duty and while in office (AP 937 QO, judgement not yet concluded)*

Originally designed to safeguard the free exercise of mandates and public offices by avoiding political manipulation in criminal lawsuits, “privileged jurisdiction” in Brazil, whereby high courts have original jurisdiction to try more than 30,000 authorities, has become a major source of dysfunctionalities. In the case of the STF, it not only distances the Court from its main role of constitutional jurisdiction but it also contributes to the inefficiency of the criminal justice system. Judges and courts of first instance are better equipped than the Supreme Court to conduct criminal proceedings at an appropriate speed. Considering its already bloated workload, the STF has not been able to judge adequately and expeditiously the criminal cases covered by privileged jurisdiction, which today amount to over 500 proceedings. Privileged jurisdiction, in its present scale, contributes to the congestion of courts and to making the convictions of politicians rarer and impunity the rule.

In light of this situation, at the criminal trial of a former federal deputy accused of electoral corruption while he was the mayor of a small town, which began on May 31, Justice Luís Roberto Barroso, the rapporteur, proposed to interpret the Constitution to narrow the scope of privileged jurisdiction. He argued for its restrictive interpretation in order to make it applicable only to offenses committed by officials in the course of their duties and while in office. According to his opinion, this proposed interpretation would better harmonize the prerogative of original

jurisdiction with the constitutional principles of equality, republic, probity, and administrative morality, and was in line with the Court’s precedents.

Although the trial has not yet been concluded due to Justice Dias Toffoli’s request for the case records for further examination, after the session of November 23, seven Justices have joined Justice Barroso’s opinion. Therefore, there is already an absolute majority in the Court favoring the proposed restriction of privileged jurisdiction. The impact of this decision upon the Court’s docket will be far-reaching: it is estimated that less than 10% of criminal proceedings before the STF deal with offenses committed by officials in the course of their duties and while in office.

3. *Requirement of prior authorization of the state legislatures to indict state governors (ADI 5540, decided 05/03/2017; ADI 4797, decided 05/04/2017)*

Brazil’s 1988 Constitution provides that “[t]he Chamber of Deputies has exclusive power... to authorize, by two-thirds of its members, the institution of legal charges against the President and Vice-President of the Republic and the Ministers of the Federal Government” (article 51, I). Several state constitutions reproduced the same rule with respect to state governors. As a result of these provisions, however, of the 52 requests for authorization to file legal charges against governors since 12/20/2003, only one has been granted by state legislatures.

In view of this reality, in May, the STF struck down as unconstitutional the provisions of state constitutions which conditioned the initiation of legal proceedings against governors upon the prior consent of the respective legislative assembly, overruling its prior case law which allowed the states to reproduce such norms of the federal Constitution. The majority held that this “privileged” regime, which requires a political judgement by the legislature to allow for the formal prosecution of a sitting President, cannot be extended to other authorities without an express provision in the federal Constitution. Such an extension represents a violation of equality and

the republican notion that all public officials shall be responsible for their actions, as well as the separation of powers, since it prevents the Judiciary from exercising its jurisdiction until the authorization is granted.

4. *Impossibility of review of the terms of plea bargain deals by the Judiciary (Pet 7074 QO, decided 06/29/2017)*

On May 22, Justice Edson Fachin, the Supreme Court Justice overseeing the “Car Wash” probe, ratified the plea bargain agreement entered into by the executives of meatpacker JBS with the Federal Public Prosecutor’s Office. The agreement, which granted the executives immunity from prosecution, generated heated controversy over the discretionary power of prosecutors to define the clauses of plea bargains and the possibility of courts reviewing the content of the deal. In June, at the end of a four-day trial, the majority of the STF held that (i) a judge rapporteur has the power to single-handedly ratify plea bargain agreements that have been entered into regularly and voluntarily; and (ii) the Court cannot review the benefits granted by a plea bargain agreement, except in the case of non-compliance with its clauses or of a defect that would render it null and void.

Months later, evidence that the JBS executives omitted relevant information in their plea bargain testimony prompted Justice Edson Fachin to suspend the effectiveness of the agreement and to order the pre-trial detention of the CEO and the chief executive of the company (AC 4352).

5. *The Supreme Court must send indictments against the President to the Chamber of Deputies (Inq 4483, decided 09/21/2017)*

In June, the recordings and other evidence which came out of the plea bargain deal entered into by executives of meatpacking conglomerate JBS allowed the Federal Public Prosecutor’s Office to present two charges against President Michel Temer on the counts of corruption and obstruction of justice. The Brazilian Constitution provides, however, that the Chamber of Deputies must authorize the institution of legal charges against the President. To delay the deliber-

ation, the President’s lawyers requested the Supreme Court to suspend the referral of the indictment to Congress for deliberation until investigations into the alleged omission of information by JBS executives in the negotiation of the plea bargain agreement were completed. The STF, by a 10-1 vote, held that it can only rule on motions related to criminal complaints against the President after two-thirds of the Chamber of Deputies accept the accusation. Nevertheless, the majority of lawmakers voted to refuse to authorize either complaint against President Michel Temer, suspending the charges until he leaves office.

III. 2) *The Brazilian Supreme Court and Fundamental Rights*

1. *Affirmative action for blacks in the civil service (ADC 41, decided 06/08/2017)*

On June 8, the Plenary of the Supreme Court concluded the trial by which it unanimously upheld the constitutionality of a law setting forth a system of ethno-racial quotas for all federal civil service careers, including diplomats, judges, and prosecutors. According to Law 12,990/2014, 20% of public-sector positions – which in Brazil are filled through public examinations – shall be reserved for black candidates. The Court found that the affirmative action policy favoring historically discriminated social groups does not violate – but rather, honors – the principle of equality. The rapporteur of the case, Justice Luís Roberto Barroso, emphasized the need to dismantle institutional/structural racism in Brazilian society. His opinion also found that ensuring a “representative bureaucracy” can contribute to increasing the efficiency and effectiveness of public services and state decisions, thus favoring the entire population.

2. *The constitutionality of the confessional approach to religious education in public elementary schools (ADI 4439, decided 09/27/2017)*

On September 27, by a close vote of 6-5, the STF ruled that confessional religious education in public schools does not violate the Constitution. The 1988 Constitution, while setting forth that “[r]eligious education shall

be an optional course during normal school hours in public elementary schools,” explicitly adopted secularism as a constitutional principle, making it illegal for the state to “*establish religions or churches, subsidize them, hinder their functioning, or maintain dependent relations or alliances with them or their representatives.*”

Brazil’s Federal Prosecutor’s Office filed a direct action aimed at discussing the validity of: (i) the first paragraph of article 11 of the Agreement between Brazil and the State of Vatican City, later ratified by Congress, according to which Brazilian public schools should offer “religious teaching, Catholic or based on other religious doctrines”; and (ii) article 33 of Law 9,394/1996 (National Education Guidelines), which also imposed a confessional (or inter-confessional) approach to religious teaching in public schools. The direct action argued that, in light of the constitutional principle of secularism, religious education shall not be religious indoctrination, and the State should be prohibited from hiring representatives of religions as teachers.

The rapporteur of the case, Justice Luís Roberto Barroso, considered that a non-confessional education on religions (i.e., teaching *about* religions) is the only way to reconcile religious education in public schools with the requirements of formal separation between the State and the Churches, neutrality towards all religions, and religious freedom. According to the Justice’s opinion, denominational religious instruction in Brazil amounts to favoritism of dominant religions and the discrediting of minority religions, since not all religions are able to offer classes due to constraints on time and resources. Moreover, he maintained that confessional religious education, even if it is optional, produces religious intolerance and the discrimination of students who profess minority religions, especially considering that children and adolescents are particularly influenced by their teachers and colleagues and may not actually feel free to opt out of the course.

However, the majority of the Court dissented. The majority opinion, by Justice Alexan-

dre de Moraes, dismissed the ADI, holding that since confessional religious education is merely an optional course for students, there is no violation of secularism or of religious freedom. The Court also allowed priests and other representatives of the religions to provide religious education of their specific religions using the public school's classrooms and resources.

3. Equal inheritance rights to spouses and partners, including LGBT couples (RE 878694 and RE 646721, decided 05/10/2017)

On May 10, the STF declared unconstitutional the law conferring couples in civil unions, including same-sex couples, inheritance rights different from those enjoyed by married couples. The Court held that the Constitution does not allow for any hierarchy between forms of family formation, and that the principles of equality and human dignity require that civil partners have the same rights as spouses.

Other relevant cases related to the affirmation and implementation of fundamental rights

In addition to these decisions, there are other relevant cases in the STF related to the protection of fundamental rights that were initiated in 2017 but have not yet been concluded, such as: (i) the right of transgender people to change their name and gender marker on their official documents without undergoing gender reassignment surgery (RE 670422 and ADI 4275); and (ii) the constitutionality of regulations restricting blood donations by gay men (ADI 5543).

IV. LOOKING AHEAD TO 2018

In October 2018, Brazilians will go to the polls to elect not only their new President but also members of Congress, Governors, and state legislative assemblies. Yet the general elections to be held in October are fraught with uncertainties. After the divisive impeachment of President Dilma Rousseff and the "Car Wash" probe implicating the country's most prominent politicians, the

outcome is unpredictable. In the presidential run, the top polling candidate is still former President Luís Inácio Lula da Silva. Recently, however, an appellate court upheld Lula's corruption conviction, which, although strongly disputed by his lawyers, makes him ineligible for the presidency according to Brazilian election laws, unless he manages to reverse the conviction by appealing to the Superior Court of Justice or the STF. The other potential candidates are Jair Bolsonaro, a far-right-wing former military officer; Geraldo Alckmin, the Governor of the State of São Paulo; Ciro Gomes, former Governor of the State of Ceará; and Marina Silva, a former presidential candidate who finished in third place in the 2015 elections. Moreover, the 2018 elections will be the first to be held without corporate money following a 2015 Supreme Court decision banning corporate contributions to political campaigns. Since the Court failed to impose limits as to the amounts that candidates can contribute to their own campaigns, wealthy candidates are expected to benefit from the new scheme if crowdfunding remains an underutilized tool.

V. FURTHER READING

Diego Werneck Arguelhes and Ivar Hartmann, 'Timing Control without Docket Control: How Individual Justices Shape the Brazilian Supreme Court's Agenda' [2017] 5 *Journal of Law and Courts*, 105, 140

Juliano Zaiden Benvindo, "'Constitutional Dismemberment' and Political Crisis in Brazil: Populism in Sight?" *Int'l J. Const. L. Blog*, May 6, 2017, at: <<http://www.iconnectblog.com/2017/05/constitutional-dismemberment-and-political-crisis-in-brazil-populism-in-sight/>>

Luís Roberto Barroso, *A Judicialização da Vida e o Papel do Supremo Tribunal Federal* (Forum 2017)

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Canada

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Canada is a federation with a parliamentary system of government. By international measures, it is a stellar liberal democracy. The Economist's 2017 Democracy Index ranks Canada sixth in the world,¹ and the Freedom House Index places Canada fourth.² Transparency International's Corruption Index consistently lists Canada as one of the world's least corrupt countries.³

Despite this success, Canada's celebration in 2017 of the 150th anniversary of its confederation was low-key. One reason for muted festivities was the continuing refusal by the legislature of Quebec, the predominantly French-speaking province, to formally endorse major constitutional amendments enacted in 1982.⁴ Another was the incomplete project of reconciliation with Indigenous peoples. For many Canadians, exalting the 150th anniversary would have disrespected, if not exacerbated, these tensions. In any event, a low-key celebration may have simply reflected constitutional culture. Canadians do not worship a genesis story – a mythological creation by idolized founders – and rarely display feverish patriotism. Canada's

constitutional history is not revolutionary but evolutionary.⁵

In the 2015 federal election, the Liberal Party won the majority of seats, and its leader, Justin Trudeau, became Prime Minister. He successfully campaigned on progressive values, including multiculturalism and gender equality, in contrast to the exclusionary right-wing populism infecting Canada's neighbor, the United States.⁶ The previous Conservative government led by Stephen Harper, while not pervasively populist, was increasingly autocratic and had eroded some democratic practices and institutions. The Liberals promised to repair the erosions and enhance democratic institutions. Accordingly, this report on Canada's liberal democracy in 2017 is conducted against the backdrop of Harper's erosions and Trudeau's promises.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Since taking office in 2015 with a diverse and gender-balanced cabinet (a Canadian first), the Trudeau government has repaired

¹ http://www.eiu.com/Handlers/WhitepaperHandler.ashx?fi=Democracy_Index_2017.pdf&mode=wp&campaignid=DemocracyIndex2017.

² <https://freedomhouse.org/report/freedom-world/freedom-world-2018>.

³ <https://www.transparency.org/>.

⁴ The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11.

⁵ The Constitution Act, 1867 (UK) 30 & 31 Victoria, c. 3, was not the first constitutional document, nor the last. See Peter Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (University of Toronto Press 2017).

⁶ Michael Adams, *Could it Happen Here? Canada in the Age of Trump and Brexit* (Simon and Schuster 2017).

some of Harper's damage to the democratic fabric.⁷ It immediately stopped Harper's "war on data."⁸ It lifted restrictions on public officials, notably government climate scientists, to speak to media. It also reinstated the mandatory long-form census conducted by Statistics Canada, the non-partisan research agency, and bolstered the agency's independence.⁹ As discussed below, it has taken other actions to strengthen liberal democracy. While not every pertinent promise has been kept, one can say with confidence that liberal democracy is on the rise.

The Electoral System

Two of Trudeau's promises involved the electoral system. First, he promised to restore and expand the powers of Elections Canada, the non-partisan agency that conducts federal elections; to that end, a bill has been introduced in Parliament.¹⁰ Second, and more significantly, he promised to change the federal electoral system from 'single member plurality' (SMP), which often permits parties to form majority governments with significantly less than majority support, to a form of proportional representation (PR). Accordingly, a House of Commons Special Committee was established to consider electoral reform. Its report in December 2016 contained 13 recommendations, including ones on adopting a form of PR.¹¹ In February 2017, in breach of its campaign promise,

the government rejected the recommendations about PR, announcing that it would no longer pursue changing the SMP system because of the absence of a clear preference for a new electoral system.

The decision to retain the status quo is, rather ironically, an important development. It is a cautious action but one with unpredictable consequences. In the short term, the Liberal party may suffer a backlash in the next federal election for reneging on a campaign promise. In the long term, retaining the status quo may dampen enthusiasm for electoral reform or spark louder demands for change. Prediction is difficult in part because the substantive issue is complex and contentious.¹² However, while federal electoral reform is on hold, one province, British Columbia, will vote in 2018 on whether to adopt PR.¹³ A favorable vote could boost support for PR federally and in other provinces.

With respect to the Special Committee's other recommendations, the government accepted two that keep the status quo: no online voting and no mandatory voting. Two recommendations were already contained in the proposed changes to the Elections Act: empowering Elections Canada to encourage voting by all citizens, and creating a national registry of future voters in a special effort to persuade young people to vote.¹⁴ Surprisingly, however, for a party and Prime Minister

who promote gender equality, the government did not adopt the Special Committee's recommendation to advance gender equality by enacting a system of financial incentives for all parties to run female candidates. Rather, the government said that it would consider innovative approaches to increasing women's participation.

The Executive Branch

One major weakness of Canadian democracy is the escalating power of the executive branch at the expense of Parliament, and, relatedly, the gargantuan power in the hands of the Prime Minister at the expense of the rest of the executive. For some time, many Parliamentarians from every political party have pressed for reforms to reinvigorate Parliament and limit Prime Ministerial power.¹⁵ During the 2015 campaign, the Liberals promised to improve several key features of the House of Commons, such as Question Period and committee rules. In March 2017 it released a discussion paper,¹⁶ but resistance by opposition parties resulted in only a few changes to the Standing Orders.¹⁷ Two notable ones, both responses to abuses by the Harper government, require governments to give reasons to the House of Commons for prorogation and empower the Speaker to divide omnibus bills.¹⁸

One example of Prime Ministerial power is

⁷ For details of Harper's damage, see David Schneiderman, *Red, White and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture* (University of Toronto Press 2015).

⁸ The phrase is from Canada's most popular English-language weekly: Anne Kingston, "Vanishing Canada: Why We are All Losers in Ottawa's War on Data," *Maclean's*, September 18, 2015.

⁹ An Act to Amend the Statistics Act SC 2017 c. 31. Harper's axing of the long-form census is discussed in Adams, *supra* note 6, pp 43-45.

¹⁰ An Act to amend the Canada Elections Act and to make consequential amendments to other acts. HC Bill (2015-12-3-present) [33]. The Harper government's Orwellian-titled Fair Elections Act, SC 2014, c. 12, had constricted the agency's powers.

¹¹ Special Committee on Electoral Reform, *Strengthening Democracy in Canada: Principles, Process and Public Engagement for Electoral Reform* (December 2016): <http://www.ourcommons.ca/DocumentViewer/en/42-1/ERRE/report-3/>

¹² For one thing, PR does not necessarily promote liberal democracy. For discussion, see Andrew Potter et al. (eds.), *Should We Change How We Vote? Evaluating Canada's Electoral System* (McGill-Queens University Press 2017).

¹³ British Columbia has already voted twice, in 2005 and 2009, to keep SMP.

¹⁴ HC Bill C-33, *supra* note 10.

¹⁵ For recent proposals, see Michael Chong et al. (eds.), *Turning Parliament Inside Out: Practical Ideas for Reforming Canada's Democracy* (Douglas and McIntyre 2017).

¹⁶ *Reforming the Standing Orders of the House of Commons*. <https://www.canada.ca/en/leader-government-house-commons/services/reform-standing-orders-house-commons/2017/march.html>.

¹⁷ HC Vote No. 341, June 20, 2017.

¹⁸ HC Standing Orders, s. 32 (7) and 69.1.

Senate appointments. The authority to appoint persons to the Senate rests with the Governor General,¹⁹ but by constitutional convention, the Prime Minister decides on Senate appointments. This method of selection has been roundly criticized since the Confederation's early days, but changes need a constitutional amendment. Canada has, arguably, the world's most restrictive formulas for constitutional amendment. Not since 1983 has an amendment passed that required consent of two or more provinces. Since a constitutional amendment to change the method of selecting Senators would require agreement between Parliament and at least seven provinces with more than 50% of the population,²⁰ the likelihood of such amendments is nil.

In light of this constitutional rigidity, Trudeau promised, and has made, non-constitutional changes. In each Senate region, an Independent Advisory Board now prepares a non-binding list of names for his consideration. Thus far, he has voluntarily restricted his discretion by appointing Senators only from these lists. Whether the new process improves Parliament remains to be seen. Senators have flexed their legal muscles to delay or amend bills proposed by elected members. The conflict between an elected Commons and an appointed Senate is potentially explosive.

The Judicial Branch

On December 15, 2017, Chief Justice Beverly McLachlin retired from the Supreme Court. The longest-serving and first female Chief in Canadian history, she was a brilliant jurist who ably guided the Court for 17 years. As her replacement, Trudeau promoted Justice Richard Wagner, a highly respected Quebec

jurist first appointed to the Court in 2012. By doing so, Trudeau followed a practice – some experts would say a constitutional convention – of alternating the position of Chief Justice between civilian jurists from Quebec and common law jurists from the rest of Canada. Since McLachlin hailed from British Columbia, Chief Justice Wagner's appointment continues this tradition.

To fill the vacancy created by McLachlin's retirement, Trudeau followed new procedures for Supreme Court appointments that his government created and first used for the appointment of Justice Malcolm Rowe in 2016. The Constitution gives the Governor-General, which by constitutional convention is the Prime Minister, almost unrestricted discretion (as in the case of the appointment of Senators) to appoint judges.²¹ Under the new process, an independent and non-partisan Advisory Committee vets candidates, who must complete written applications, and submits a shortlist to the Minister of Justice. After consultations with, inter alia, the House of Commons Committee on Justice and Human Rights, the Minister then recommends a nominee from the shortlist to the Prime Minister. The new process's limitation on prime ministerial discretion, although modest and voluntary, is a welcome step forward.²²

In fulfillment of another campaign promise, Trudeau requires new appointments to be functionally fluent in both of Canada's official languages, French and English. To that end, the Advisory Committee recommends only bilingual candidates. Time will tell whether the requirement of bilingualism will continue, and if so, whether it will solidify into a constitutional convention.²³

Using the new process, Trudeau promot-

ed Justice Sheilah Martin from the Alberta Court of Appeal. A prominent feminist law professor and practitioner before her first judicial appointment in 2005, Martin is fluently bilingual. With her appointment, women continue to hold four of the nine positions on the Court. By appointing a judge from western Canada, Trudeau also respected the long-standing practice – perhaps also a constitutional convention – of regional representation on the Court.

With respect to lower court appointments, the Trudeau government revamped an existing system of advisory committees to review applications and recommend appointments. Using this new process, it has now appointed over 120 judges to trial and appellate courts.²⁴ Consistent with its commitment to gender equality, over half of the appointments have been women. Furthermore, the diversity of appointments has apparently increased dramatically.²⁵

Human Rights

One hallmark of a healthy democracy is its willingness to examine the past with honesty and humility, acknowledge mistakes and commit to doing better. In that regard, in November 2017, Trudeau delivered in Parliament a historic and unprecedented apology to the LBGTQ2 community for state-sponsored discrimination within the federal public service from the 1950s to the early 1990s. In what is now known as the “gay purge,” thousands of people were investigated and forced from government positions on the unfounded basis that their sexuality posed a security risk. Many were prosecuted criminally. In addition to the apology, and in settlement of litigation relating to the discriminatory policy, the government will compensate victims

¹⁹ Constitution Act, 1867, *supra* note 5, s. 24

²⁰ Constitution Act, 1982, *supra* note 4, ss. 38-48. See *Reference Re Senate Reform*, 2014 SCC 32, paras 50-70.

²¹ Constitution Act 1867, *supra* note 5, s. 96.

²² Prime Minister Harper did not publicize if, or how, shortlists were generated for his consideration. His appointment of Justice Russell Brown during the 2015 election campaign breached the caretaker convention. See Michael Plaxton, “The Caretaker Convention and Supreme Court Appointments” (2016) 72 SCLR (2d) 449.

²³ Several recent bills to require new Supreme Court judges to be bilingual have not passed the House of Commons.

²⁴ The Office of the Commissioner for Federal Judicial Affairs Canada is now mandated to keep statistics on gender, diversity and language fluency of judges: <http://www.fja-cmf.gc.ca/appointments-nominations/StatisticsCandidate-StatistiquesCandidat-eng.html>.

²⁵ We say ‘apparently’ because the Harper government did not keep (or did not make public) statistics about diversity on the bench.

of the purge. It also introduced legislation to expunge all convictions for consensual sexual activity between same-sex partners.²⁶

2017 was also the 35th anniversary of the Canadian Charter of Rights and Freedoms and the 40th anniversary of the Canadian Human Rights Act (CHRA). Fittingly, a number of laws expanded human rights. They included amendments to the CHRA to add gender identity, gender expression and genetic characteristics as prohibited grounds of discrimination.²⁷ A new law bans mandatory genetic testing.²⁸ Parliament also repealed laws enacted in 2015 by the Harper government that had created two categories of Canadian citizens²⁹ and undermined the work of trade unions.³⁰

Two policy developments relating to human rights are noteworthy. First, the government re-established and expanded the Court Challenges Program, which funds test cases regarding official languages and Charter rights. The Harper government had axed the program in 2006, making litigation to enforce constitutional rights more onerous. Second, in December 2017, for the first time since 1988, the Minister of Justice met with provincial and territorial officials to discuss human rights, indicating a higher priority for these issues.

In another example of redressing past wrongs, the government settled a lawsuit brought by Omar Khadr. A Canadian citizen, Khadr was a child when he was captured in 2002 by American forces in Afghanistan. Imprisoned at Guantanamo Bay, his treatment by American officials, which included torture, was

reprehensible. The Canadian government did not seek his repatriation and indeed concluded in his mistreatment. After eight years of confinement without trial, he pled guilty to dubious charges before an American military commission in exchange for repatriation to Canada. He was finally repatriated in 2012 and released from a Canadian prison in 2015. The multiple court actions involving Khadr's confinement spanned 13 years and included two Supreme Court rulings that his detention and treatment were unconstitutional.³¹ The Trudeau government, acknowledging the violations of Khadr's rights as a Canadian citizen, paid him compensation and gave him an apology.

Indigenous Peoples

The rights of Indigenous peoples are receiving more recognition by the Trudeau government, but progress seems slow. In 2008, in settlement of litigation, the Harper government apologized for the government-funded, church-run system of residential schools. The system, which began in 1883 and was not completely shuttered until 1996, was an instrument, in the words of Chief Justice McLachlin, of "cultural genocide."³² All Indigenous people suffered, and many children suffered severe abuse, including sexual abuse. The 2008 settlement, in addition to the apology, established the Truth and Reconciliation Commission with a broad mandate to investigate the system and its aftermath. In December 2015, immediately after the federal election, the Commission released its final report with 94 Calls to Action.³³ In early 2017, partly to implement the Calls, the government organized a Work-

ing Group of Ministers to review laws and policies affecting Indigenous peoples. Later in 2017, to hasten progress, the responsible ministry was split into two departments: the Ministry of Crown-Indigenous Relations and Northern Affairs; and the Ministry of Indigenous Services. Early reports indicate that two ministries are proceeding more expeditiously than one.

In related matters, Trudeau apologized in November 2017 to Indigenous survivors of church-run residential schools in Newfoundland and Labrador, a group that had been omitted from the 2008 apology. Also in November, the government announced that it would settle lawsuits brought by survivors of the "Sixties Scoop," a now-defunct program of assimilation in which tens of thousands of Indigenous children were taken from their parents and placed in foster homes or adopted by non-Indigenous families. More redress is expected for this historical wrong.

Steps have also been taken to rectify past discrimination against Indigenous women and their descendants with respect to registration under the federal Indian Act. In 2017, Parliament enacted an act to amend the Indian Act in response to the Superior Court of Quebec decision in *Descheneaux c. Canada (Procureur général)*.³⁴ As the law's title indicates, it responds to a lower court ruling that the denial of Indian status to descendants of Indigenous women who had lost their Indian status for marrying non-Indian men was a constitutional violation. Under the now-repealed provision, the children of Indian men who married non-Indian women received Indian status, but the children of Indian wom-

²⁶ Expungement of Historically Unjust Convictions Act, HC Bill (2015-12-03) [66]

²⁷ An Act to Amend the Canadian Human Rights Act and the Criminal Code, SC 2017, c.13; The Genetic Non-Discrimination Act, SC 2017, c.3.

²⁸ The Genetic Non-Discrimination Act, *ibid*.

²⁹ An Act to Amend the Citizenship Act and to Make Consequential Amendments to Another Act, SC 2017, c. 14 (repealing a provision that permitted revocation of citizenship and deportation of dual citizens).

³⁰ An Act to Amend the Canada Labour Code, the Parliamentary Employment and Staff Relations Act, the Public Service Labour Relations Act and the Income Tax Act, SC 2017, c. 12 (repealing financial disclosure and activity reporting requirements imposed on unions but not employers; and repealing onerous procedures for union certification).

³¹ *Canada (Justice) v Khadr* 2008 SCC 28; *Canada (Prime Minister) v Khadr* 2010 SCC 3.

³² The Rt. Hon. B. McLachlin, CJC, "Reconciling Unity and Diversity in the Modern Era: Tolerance and Intolerance," Pluralism Lecture of Global Centre for Pluralism, Toronto, May 28, 2015.

³³ The multi-volume report has an executive summary: "Truth and Reconciliation Commission of Canada," *Honoring the Truth, Reconciling for the Future: Summary of the Final Report of the TRC of Canada*, December 15, 2015.

³⁴ SC 2017, c. 25.

en who married non-Indian men did not. Included in the first Indian Act in 1876 with the aim of promoting assimilation, the sexist provision was only repealed in 1985. Various measures have mitigated, but not eliminated, the continuing effects of this sexism. The 2017 Act is another mitigation. It creates a two-stage process: Indigenous people denied status after 1951 because of sex discrimination can register as status Indians immediately; however, Indigenous people denied status from 1869-1951 will need to wait until the relevant ministry consults with Indigenous peoples about issues of registration and band membership.

In 2016, again in fulfillment of a campaign promise, the government established the independent Commission on Murdered and Missing Indigenous Women and Girls. Its mandate is to examine and report on systemic causes of violence experienced by Indigenous women and girls and recommend actions to remove the causes of violence and commemorate and honor victims. In 2017, the Commission was beset with controversy, with one Commissioner resigning. Some Indigenous leaders have called for a reconstituted commission. Thus far, the government has stood behind the remaining commissioners.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Most 2017 developments have been included in the previous section's assessment of liberal democracy. This section notes two other areas: federalism and judicial decisions.

Federalism

The Quebec legislature continues to reject the constitutional amendments enacted in 1982. Efforts throughout the 1980s and 1990s to negotiate new federal arrangements with Quebec failed for various reasons. After the defeat of a package of amendments in a national referendum in 1992 and the razor-thin federalist victory in the Quebec referendum in 1995, federal politicians have shied away from constitutional reform. In 2017, the Quebec government, in an effort to generate more attention on the unresolved status of Quebec in the Federation, released a policy paper about federal-provincial relations.³⁵ But Trudeau quickly announced that he would not re-open constitutional talks. The stalemate continues.

Judicial Decisions

For some years, an important part of the Supreme Court's docket has been appeals concerning the government's constitutional duty to consult Indigenous peoples about actions that may affect Aboriginal and treaty rights.³⁶ 2017 was no exception. Since the duty to consult is contextual, i.e., fact-specific, each case involves reviewing the particular consultations. In two companion cases, the Court held that the government may rely on consultation conducted by a regulatory agency in partial or complete satisfaction of its duty to consult.³⁷

One 'duty to consult' case also involved a claim of religious freedom by an Indigenous people. The Ktunaxa Nation sought to block development of a ski resort on the grounds that the resort's proposed location was home

to a central spiritual figure, Grizzly Bear Spirit, who would leave if the ski resort were built. In a split decision, the Court ruled against the claim. The majority interpreted freedom of religion narrowly, holding that it protects the freedom to hold and manifest religious beliefs, but not objects of worship, such as the presence of Grizzly Bear Spirit. The dissent argued for a broader interpretation of freedom of religion, one that would recognize that Indigenous spiritual beliefs are inextricably linked to the physical world.³⁸

With respect to other constitutional rights, the Court issued important decisions for criminal law enforcement. First, it expanded privacy rights in the context of police seizures of electronic communications. Senders of electronic messages can claim, in some circumstances, privacy rights in recipients' cell phones, not only their own phones, and in text messages stored by service providers.³⁹ Second, in an effort to ensure that constitutional rights are consistent across Canada, the Court articulated principles to guide judges in granting bail before trial.⁴⁰

IV. LOOKING AHEAD TO 2018

The government is expected to move forward with several bills to improve democratic practices.⁴¹ It is also planning an overhaul of criminal justice administration to return the system to evidence-based policies.⁴²

The Supreme Court will hear an appeal from a Quebec opinion declaring unconstitutional a proposal for a federal securities regulator.⁴³ It will likely render its decision on whether

³⁵ Government of Quebec, *Quebecers: Our Way of Being Canadian* (2017).

³⁶ Constitution Act, 1982, *supra* note 4, s. 35.

³⁷ *Chippewas of the Thames First Nations v Enbridge Pipelines Inc.*, 2017 SCC 41 (duty to consult was satisfied); and *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 (duty to consult was not satisfied).

³⁸ *Ktunaxa Nation v BC* 2017 SCC 54.

³⁹ *R. v Marakah* 2017 SCC 59; *R. v. Jones* 2017 SCC 60.

⁴⁰ *R. v Antic* 2017 SCC.

⁴¹ Examples include Bill C-33, *supra* note 10; An Act to Amend the Canada Elections Act HC Bill (2015-12-3-present) [50] (restrictions on political fundraising); An Act to Amend the Criminal Code and the Department of Justice Act and to make consequential amendments to other acts HC Bill (2015-12-3-present) [51] (requiring, *inter alia*, tabling in Parliament a statement of every bill's potential impact on constitutional rights and freedoms).

⁴² The Harper government's 'tough on crime' agenda included many changes to the criminal justice system that contradicted evidence and expert opinion.

⁴³ *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières* 2017 QCCA 756. Notice of appeal filed on June 9, 2017.

the government's duty to consult Indigenous peoples applies before a bill is introduced in Parliament.⁴⁴ In Quebec, constitutional challenges will continue to a controversial provincial law that requires people to show their faces while receiving or giving public services, on the ground that the law violates freedom of religion.⁴⁵

Ontario and Quebec, the two largest provinces, will hold elections in 2018. Both currently have Liberal governments. Any change in provincial governments usually affects intergovernmental relations. Victory by a separatist party in Quebec – a highly unlikely outcome according to public opinion polls – would put constitutional change back on the federal agenda.

V. FURTHER READING

Bérard, F., *Charte canadienne et droits linguistiques: pour en finir avec les mythes* (Presses Université de Montréal 2017)

Borrows, J. and Coyle, M., (eds.), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press 2017)

Krikorian, J. et al., (eds.), *Roads to Confederation: The Making of Canada 1867* (2 vols, University of Toronto Press 2017)

Oliver, P., et al., (eds.), *The Oxford Handbook of the Canadian Constitution* (OUP 2017)

Smith, D.E., *The Constitution in a Hall of Mirrors: Canada at 150* (University of Toronto Press 2017)

⁴⁴ *Canada v Mikisew First Nation* 2016 FCA 311. Leave to appeal granted May 18, 2017.

⁴⁵ <https://www.theguardian.com/world/2017/dec/02/judge-suspends-part-of-quebecs-face-covering-ban>



Chile

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

In this report, we show examples that illustrate how the Chilean Constitutional Court (*Tribunal Constitucional de Chile*, hereinafter the “CC”) is increasingly becoming a consequential court that limits the power of legislators when it considers that new legislation violates the Constitution. Three judicial decisions of 2017 declared the unconstitutionality of parts of legislative bills and prevented the President from promulgating those parts. Those three decisions used the ex-ante review mechanism included in the 1980 Constitution. Because in Chile the President has the power to strongly influence the Congress’s legislative agenda, the ex-ante judicial review power is typically exercised against bills sponsored by the President. In this report, we will give special attention to this mechanism. We believe that our report might be interesting for comparative constitutional law scholars because the Chilean Constitution is one of the few constitutions that include an ex-ante judicial review power of this type.¹

In selecting the cases, we gave preference to decisions that declared the unconstitutionality of a legislative provision and ignored the decisions that merely upheld a legal norm. Because of our selection method, we give little attention to the CC’s ordinary activity, which consists of the *recurso de inaplicabi-*

lidad, a concrete judicial review mechanism that produces limited effects. We only selected two decisions that resulted from the *inaplicabilidad*, and mostly focus on the ex-ante review decisions. Although there are no published official statistics yet, a total of 224 decisions were released during the year 2017. 192 of those decisions correspond to the *inaplicabilidad*, and 18 are ex-ante review rulings.² Because we need to be brief, we ignore dissenting opinions and concurrences.

II. THE STATE OF CHILEAN DEMOCRACY AND THE CC’S EX-ANTE JUDICIAL REVIEW POWER

Many events of the year 2017 were significant for Chilean constitutional democracy: First, the 2017 parliamentary election inaugurated a new electoral system, which introduced a proportional D’Hondt method that replaced the binominal system that operated in Chile since 1990. Second, a new President was elected in December and will start his administration in March of 2018. The country’s incumbent coalition was defeated by the President-elect, Sebastián Piñera. Since 1990, alternation in power has been peaceful. Third, the constitution-making process that President Bachelet promoted during her administration triggered a debate that

¹ This power was first introduced by the French constitutional system and exercised by the *Conseil Constitutionnel*. The most famous work written in English about this power is the one by Alec Stone, *The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective* (Oxford University Press 1992). Among other works that explore the ex-ante judicial review power in Chile, see Sergio Verdugo, ‘Control Preventivo Obligatorio. Auge y Caída de La Toma de Razón Al Legislador’ (2010) Año 8, No 1 Estudios Constitucionales 201; Felipe Meléndez Ávila, *El Control Preventivo En La Constitución Actual: El Temor Al Desborde En La Función Legislativa* (Editorial Jurídica de Chile 2017).

² See <http://www.tribunalconstitucional.cl/sentencias/busqueda-avanzada> [accessed 2/7/2018].

influenced the presidential platforms of the 2017 electoral campaign. Those platforms included many proposals for constitutional reforms, including ideas for modifying the CC. Among the candidates that got more than 5% of the votes in the first round of the election, four candidates (out of six) mentioned the CC in their presidential platforms, two proposed to reduce its powers, and two suggested modifications to the appointment mechanisms of the CC justices.³ During these debates, the CC continued to exercise its judicial review powers against legislative bills.

Because Chile's hyper-presidential system allows the President to control the legislative agenda (e.g., the President has the exclusive legislative initiative in many key matters, and the power to oblige the Congress to vote the legislative bills that the President picks), the opposition has little influence in legislative matters. To balance the presidential powers, the Constitution includes several mechanisms to check the power of the President and moderate their political action. Among these mechanisms, the Constitution includes the CC's ex-ante judicial review power. This judicial review power operates in two cases: First, when the legislative bill regulates a matter considered to be an "organic law." In this first type of the ex-ante review mechanism, it is necessary to determine which subject matter of the legislation is "organic" because the CC can only evaluate the constitutionality of organic legisla-

tive provisions. The Constitution provides a list of organic matters that are associated with the regulation of key constitutional institutions, such as the Congress and the powers of the judiciary. The second type of the ex-ante review power operates when either of the chambers of the Congress, a fourth of the members of the House or the Senate, or the President submits a petition to the CC asking it to declare the unconstitutionality of a legislative bill before it is promulgated. After the promulgation of the new law, those institutions lose standing, and the ex-ante review mechanism cannot be activated.

Both the organic law's majority requirement (which is 4/7ths of the Congress to create or modify organic laws) and the CC's ex-ante judicial review power are important checks to the legislative majorities.⁴ Although the majority requirement has triggered an academic debate – which should be encouraged⁵ – and many politicians argue that it gives veto power to the parliamentary minority, most elected administrations have deepened the existence of these kinds of statutes.⁶ It could be argued that the organic law's majority requirement is, at least regarding some specific subject matters, justified because it develops key constitutional rules.⁷ Commenting on this particular issue, Andrew Arato argues that the Chilean organic laws (or at least some of them), could be considered "materially constitutional," such as happens with the law that regulates the powers and organization of the CC: "Should such a

law be a matter of simple majority, giving the power to political majorities to strongly diminish the power and independence of the constitutional court? [...] More generally, it would be interesting to see how many of the twenty-one LOC [the organic laws] areas in Chile are commonly parts of constitutions elsewhere, especially among countries with highly detailed constitutions, such as Brazil and India."⁸

The ex-ante judicial review mechanism serves to moderate the effects of the Chilean hyper-presidential system on the legislative procedure because, as typically happens with controverted legislative bills, the parliamentary opposition can challenge a legislative bill sponsored by the President. The purpose of the mechanism is to bring the constitutional question to the CC, which will be required to evaluate whether the challenged legislative provision violates the Constitution or not. The ex-ante judicial review mechanism can be justified by the need to moderate the otherwise unbalanced legislative power of the Chilean President.

Considering the current institutional design of Chile's presidential system, and despite the practical problems that part of the literature has identified,⁹ the ex-ante judicial review mechanism is one of the crucial elements of Chile's liberal democracy. In the next section, we summarize the most significant decisions of 2017 regarding this power.

³ All the presidential platforms are available at the electoral agency (*Servicio Electoral*) website: <https://www.servel.cl/programas-de-candidaturas-a-presidente-de-la-republica/> [accessed 1/11/2018].

⁴ One of us has argued that this special majority requirement is partly aimed to moderate Chile's hyper-presidentialism. See Sergio Verdugo, 'Las Leyes Orgánicas Constitucionales En El Régimen Presidencial' (2014) 30 *Actualidad Jurídica* 273.

⁵ Lucas Sierra, 'La Supramayoría En La Potestad Legislativa Chilena Como Anomalía Democrática' in Lucas Sierra and Lucas Mac-Clure, *Frente a la Mayoría. Leyes Supramayoritarias y Tribunal Constitucional en Chile* (CEP-PNUD 2011); Sergio Verdugo, 'Las Justificaciones de La Regla de Quórum Supra-Mayoritaria de Las Leyes Orgánicas Constitucionales' (2012) 39 *Revista de Derecho* (Valparaíso) 395; Guillermo Jiménez, Pablo Marshall, and Fernando Muñoz, 'La Debilidad de Las Súper-Mayorías' (2013) 41 *Revista de Derecho* (Valparaíso) 359; Sergio Verdugo, 'Las Debilidades de La Crítica a Las Súper-Mayorías' (2014) 42 *Revista de Derecho* (Valparaíso) 355.

⁶ The Constitution after 1990 includes 57 provisions that mention matters that should be regulated by organic laws. Also, many constitutional reforms have broadened the scope of organic law regulations, even including new matters. For example, see the following constitutional reforms: 19,097, 19,519, 19,526, 19,541, 19,643, 20,050, 20,245, 20,337, 20,346, 20,390, 20,414, 20,644, 20,725, 20,748, 20,860, 20,870, 20,990.

⁷ Sergio Verdugo, 'How to Identify Quasi-Constitutional Legislation? An Example from Chile' in Richard Albert and Joel Colón-Ríos (eds.), *Quasi-Constitutionality and Constitutional Statutes: Forms, Functions, and Applications* (Routledge 2018).

⁸ Andrew Arato, 'Beyond the Alternative Reform or Revolution: Postsovereign Constitution-Making and Latin America' (2015) 50 *Wake Forest Law Review* 891, 908.

⁹ See, e.g., Emilio Pfeffer, 'Algunos Problemas Que Se Derivan Del Control Obligatorio de Constitucionalidad Que Ejerce El Tribunal Constitucional Sobre Las Leyes Orgánicas Constitucionales' (1998) 4 *Ius Et Praxis* 259; Andrés Bordini, 'Análisis Crítico Del Control Preventivo y Represivo de Constitucionalidad de Las Normas Jurídicas Por Los Tribunales Constitucionales' in Humberto Nogueira (ed.), *Jurisdicción Constitucional en Chile y América Latina: Presente y Prospectiva* (Universidad de Talca - Lexis Nexis 2005); Verdugo, 'Control Preventivo Obligatorio. Auge y Caída de La Toma de Razón Al Legislador' (n 1).

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

1. The DGA case, and the need to obtain previous judicial authorization (STC 3958)

The CC reviewed parts of a legislative bill that aimed to strengthen the powers of the *Dirección General de Aguas* (DGA). The DGA is a Chilean governmental agency that reports to the Secretary of Public Works, and its role is to enforce and implement water regulations regarding water distribution, water rights, water use planning, and water monitoring, among others. Because parts of the bill included organic law matters, the CC was required to evaluate their constitutionality before the President could promulgate the bill. The legislative bill was originally initiated during President Piñera's first administration (2010-2014), but President Bachelet modified many of its provisions in 2017 before the bill was approved by the Congress.

The CC declared the unconstitutionality of the parts of the bill that allowed the DGA to give direct orders to the police to help to enforce its administrative rulings without needing to obtain previous judicial authorization. Because judicial power is the primary check on the power of the administrative state, the current law forces the DGA to get judicial approval to take these kinds of measures, and the CC understood that the Constitution protects this check on the power of the administrative state. Similarly, the CC also declared that the bill authorizing the DGA's director to directly enforce the fines that are established by the DGA without requiring judicial approval violated the Constitution. The CC argued that both rules violated the right to due process of law (Article 19, N° 3, par. 6, of the Constitution), which under the CC's constitutional doctrine includes the right to access the courts of law if an administrative agency is imposing an unfavorable decision against a private party.¹⁰ Moreover,

the CC held that the Constitution guarantees the right to challenge all administrative actions (Article 38 of the Constitution), which is part of the Court's jurisdiction (Article 77 of the Constitution). The legislator is not constitutionally allowed to transfer judicial power from the judiciary to the administrative agency.

This CC ruling confirms its prior jurisprudence regarding the way the Chilean separation of powers scheme should be constitutionally organized, and its inclination to protect the judiciary's power against unconstitutional reductions of its jurisdiction. It also confirms the CC's doctrine to restrict the power of the administrative agencies to penalize private parties.¹¹

2. The Budget Law case (STC 4118)

Every year, the President proposes the budget through a special legislative bill (the *Ley de Presupuesto*, or "Budget Law") submitted to the Congress. The Congress is then required to vote on the country's general budget for the next year. The purpose of the 2017 Budget Law was to approve the revenue estimation and to authorize state expenditures for 2018. Although the Budget Law typically does not require the mandatory ex-ante judicial approval of the CC because it is not an organic law, the Congress submitted parts of this Budget Law to the CC because this particular law seemed to include specific provisions that dealt with organic law matters. Therefore, these parts of the Budget Law bill required the CC's ex-ante authorization. The CC also decided to evaluate an additional rule included in the Budget Law because some legislators questioned its constitutionality through a *reserva de constitucionalidad*. The *reserva de constitucionalidad* is a declaration made by some legislators who question the constitutionality of a legislative bill, aimed to flag a possible constitutional violation.

The CC held that the Constitution obliges

the Budget Law to have a specific purpose (which is to authorize the income calculus and financing costs only for the next year) and, because of that particular aim, Article 67 of the Constitution required that the Budget Law should follow a special legislative procedure that differs from the one of ordinary legislative decision making. For example, the Congress has a particular deadline to vote on the Budget Law, and legislators are not allowed to modify the estimation of the revenue proposed by the President, but only to reduce the expenses. For this reason, the CC held, the Budget Law should not regulate matters that deviate from its goal: those matters should be approved by the appropriate legislative decision-making procedure (either the ordinary one or the one that the organic laws should follow), and therefore they should not be included in the Budget Law.

Following the above approach, the CC declared that some provisions of the Budget Law concerning the year 2018 violated the Constitution. One provision introduced a permanent rule regarding the Agency for the Quality of Education, a governmental institution that is regulated by an ordinary legislative statute. Also, since the provisions of the Budget Law should only operate for the next year, establishing permanent budget rules is unconstitutional. The CC also declared the unconstitutionality of another provision included in the Budget Law, which was aimed to modify part of the Comptroller General's power by explicitly replacing a permanent rule established by another legislative statute. The CC argued that, because of the Budget Law's unique nature, specific purpose, and procedure of approval, it should not "replace" a permanent statutory provision.

The CC also reviewed another provision included in the Budget Law: Article 24 of the bill. The Article aimed to define the amount of fees charged by non-public employees who exercise a professional service for the

¹⁰ About the Administrative Law requirement of getting a previous judicial authorization as part of the due process of law, see Enteiche Rosales, Nicolás, 'Autorización Judicial Previa E Impugnación Supuesta De La Actuación Administrativa: Nuevos Elementos Del Debido Proceso En La Jurisprudencia Del Tribunal Constitucional,' *Ius et Praxis*, Talca, v. 18, n. 1, p. 427-438, 2012.

¹¹ We explore parts of this case law in our report of 2016. Iván Aróstica, Sergio Verdugo, and Nicolás Enteiche, 'Developments in Chilean Constitutional Law' in Richard Albert and others (eds.), *2016 Global Review of Constitutional Law* (I-CONnect-Clough Center 2017).

state in case the state hires that person as a permanent public worker. Some legislators modified the original proposed Article, included in President Bachelet's bill, by replacing the way the calculus was made. The CC declared that the change was unconstitutional because, according to Articles 65 and 67 of the Constitution, only the President can propose this type of rule. The role of the Congress is limited to accept, reduce, or reject these kinds of payments, and it should not modify a rule proposed by the President if the Constitution assigns to the President the exclusive authority to initiate the corresponding law in this kind of subject.

This CC's decision is important because it gives certainty on the distribution of the legislative competences of the President and the Congress regarding one of the most important laws of the Chilean political system: the Budget Law. It also protects the powers of the President and makes sure that the legislation's subject matters will be regulated following the corresponding legislative procedures. Moreover, the decision affirms that the only way in which the legislative provisions examined above can change, is through a different legislative procedure. In this way, the CC's decision confirms how Constitution makers have solved a historical problem of the Chilean legislative process. Until the 1960s and 1970s, Chilean legislators didn't have limits on logrolling and typically introduced multiple modifications to legislative bills that were not related to the bill's subject matter, creating a sort of Omnibus bill. This phenomenon, called *leyes miscelaneas*, gave legislators an enhanced power to condition their support to specific presidential bills. The Chilean conventional view criticizes this type of logrolling because it triggered a chaotic legislative procedure that reduced the quality of the legislative debate, made laws less comprehensible,¹² diminished the President's capacity to organize public finances, and created laws that undermined the state's fiscal order. Both the constitutional reform

of 1970 and the 1980 Constitution incorporated provisions aimed to do away with these problems.¹³ The CC's ruling on the Budget Law follows that constitutional tradition, as it interpreted the contemporary constitutional Articles as empowering the President and recognized that the President is the primary administrator of public finances.

3. *The Abortion Law case (STC 3729, 3751)*

In 2015, President Bachelet submitted a bill to the Congress that intended to eliminate the criminal prosecution of abortion when the woman decides to terminate her pregnancy in any of the following three situations: when the woman's life is at risk, when the life of the unborn as an independent creature is unfeasible, and when the pregnancy was produced by rape. The bill was approved by a majority of the Congress in 2017, and two groups of legislators from the opposition (one from the Senate and one from the House of Representatives) asked the CC to declare its unconstitutionality. The primary constitutional issue to be discussed, among others, was whether the bill violated the rule of Article 19, N° 1, of the Constitution, which states: "The law protects the life of the unborn."¹⁴

Because of the importance of this case and the number of organizations that asked the CC to be heard during the ex-ante judicial review process, the CC allowed more than 100 organizations to present their comments publicly. The CC listened to these public presentations for nearly two days, and the corresponding recorded versions are available on the CC's YouTube channel (*Tribunal Constitucional de Chile*).

Finally, the CC decided to reject the claim of unconstitutionality and declared that the bill was constitutional. However, the CC also declared that the Constitution protects the conscientious objection right to the ones that do not want to participate in the execution

of the abortion. According to the CC, this right can be invoked not only by individuals but also by institutions. Thus, any person or institution (e.g., a hospital belonging to a religious organization) could refuse to practice the abortion. For the CC, the right of the conscientious objector is justified by the Constitution's dignity clause (Article 1 of the Constitution), the liberty of religion (Article 19, N° 6 of the Constitution), and the freedom of association (Article 19, N° 15 of the Constitution).

The decision has many relevant legal and moral implications that we cannot examine in this brief report. Among them, it should be noted that the decision changed the approach taken by the court in the *Morning-After Pill* case, when the CC considered that the contraceptive pill was unconstitutional because it could kill the unborn, who was considered to have the constitutional status of a "person" (STC 740).

IV. OTHER RELEVANT CONSTITUTIONAL DEVELOPMENTS

In this section, we summarize two crucial CC *inaplicabilidad* decisions. It should be noted that the *inaplicabilidad* ruling has limited legal effects. If the CC accepts a claim of *inaplicabilidad*, it declares that a specific legal provision should not be used in a particular judicial procedure because the application of the rule could produce an unconstitutional result. However, the *inaplicabilidad* decision is not binding for other cases, even if they have a similar legal issue. Even though the *inaplicabilidad* rulings do not produce a formal *stare decisis* effect, sometimes they create consistent jurisprudence that shapes the law in significant ways. The following two cases are probably good examples of these types of decisions.

¹² See, for example, an early explanation of this problem in Jorge A Tapia Valdés, *La Técnica Legislativa* (Editorial Jurídica de Chile 1960) 41-46.

¹³ Arturo Fermandois and José García, 'Origen Del Presidencialismo Chileno: Reforma Constitucional de 1970. Ideas Matrices e Iniciativa Legislativa Exclusiva' (2009) 36 *Revista Chilena de Derecho* 281.

¹⁴ We use the translation provided by the Constitute Project. See https://www.constituteproject.org/constitution/Chile_2015?lang=en [accessed 2/7/2018].

1. The “Weapons” cases (STC 3095, among many)¹⁵

The “Weapons” cases confirmed the CC’s judicial doctrine created under the *Emilia* case that we discussed in our 2016 report.¹⁶ In the 2016 *Emilia* decision, the CC declared the inapplicability of the norms that postponed the application of the benefits or alternative punishments to an impaired driver (under the influence of alcohol) who crashed and killed a person, on the grounds of inequality and disproportionality. The 2017 *Weapons Law* case (Ley 18,216) involved a similar issue. The Weapons Law was modified in 2015, and made the punishment of people who possess weapons and/or ammunition without appropriate legal authorization, particularly severe. The modification did not allow the offender to use general benefits that the law gives to everyone, such as the possibility of obtaining a conditional release from prison.

The CC declared the *inaplicabilidad* of this modification in 16 cases on March 27 of 2017, and allowed the judges of the corresponding criminal procedures to implement the benefits that the legal system established. The CC invoked the following arguments: the dignity clause, the due process of law, the equal protection clause, and the constitutional requirement for punishments to be proportional to the illegal action.

These cases are important not only because they confirm that the Emilia case doctrine can be applicable to other cases than the ones of impaired drivers but also because they have triggered a debate on the limits of the state’s standing to punish and the goals of the criminal convictions.

2. The “Tax Legal Notification” case (STC 3107)

A rule of the Tax Code (Article 171, par. 4) establishes that the legal action to enforce tax payments initiated by the *Servicio de Im-*

puestos Internos (“SII,” which is the Chilean version of the American Internal Revenue Service) against a taxpayer could be legally notified to the taxpayer in a terrain not corresponding to the taxpayer’s residence, even though that empty terrain could belong to the taxpayer. The problem with this rule is that it created the possibility that the taxpayer might not be aware that he or she is being sued by the State. The case was brought to the CC by a taxpayer who did not know that the State was seeking legal action against him and, as a result, did not have the chance to defend himself and oppose the State’s action of selling the terrain in a public auction. The CC considered that the Tax Code rule violated the constitutional due process clause and declared its inapplicability.

This decision is relevant because it uses the CC’s due process of law doctrine in a tax case: the legislator should respect the fair and rational guarantees of the due process of law when regulating tax administrative procedures. Among them, the taxpayer has the right to know that an action has been taken against him or her, because otherwise the constitutional right to have a legal defense (the right to counsel) would be compromised. The decision’s approach modified the CC’s previous jurisprudence included in two 2013 decisions (STC 2259 and STC 2204) and a 2017 decision (STC 3013). In these prior decisions, the CC considered that the challenged Tax Code rule did not violate the Constitution.

V. LOOKING AHEAD TO 2018

In this report, we showed three key cases that exemplify how the ex-ante judicial review power has been used in salient cases. Then, we summarized two judicial decisions that are part of the CC’s concrete judicial review power. The cases suggest that the CC is increasingly becoming a consequential court that is not afraid to constrain legislative ma-

majorities when it considers that constitutional rights are threatened by new legislation. We also observed this trend during the year 2016,¹⁷ and there is no reason to think that it will not continue during the year 2018.

It should be noted, however, that since the constitutional agenda of the newly elected President is not yet completely settled, it is hard to predict the future of the Constitution-making debate and how this debate will affect the CC’s powers and appointment mechanisms.

¹⁵ STCs 3187, 3185, 3174, 3173, 3172, 3135, 3134, 3127, 3120, 3109, 3177, 3053, 2995, and 3062.

¹⁶ The *Emilia* case discussed the constitutionality of a law that severely punished with jail all impaired drivers (under the influence of alcohol) who, as a result of a car crash, killed or injured a person. The severity of the Emilia Law triggered due process and proportionality allegations that were accepted by the CC in a landmark ruling (STC 2983). See Aróstica, Verdugo, and Enteiche (n 13) 50.

¹⁷ Aróstica, Verdugo, and Enteiche (n 13).



Colombia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Colombian Liberal Democracy, as enshrined in the 1991 Constitution, navigated 2017 through its tensions with the implementation of the Peace Agreement signed at the end of 2016 between the Government and the FARC Guerrillas. The signature of the Peace Agreement is a milestone in the transitional justice process that began with Constitutional Amendment 1/2012. That process has been facilitating the end of a more than half-century-long internal armed conflict, preventing impunity for serious war-related crimes, and providing guaranties of justice, truth, reparations, and non-repetition. The demobilization of FARC has already strengthened liberal democracy. Notwithstanding, some contents of the Peace Agreement, and certain features of its implementation process, created tensions with essential constitutional principles. Those tensions gave rise to a dilemma: either favoring the implementation of the Peace Agreement by infringing upon the principles or enforcing them against the terms of the Peace Agreement and risking the success of the transition.

The Congress and the Constitutional Court faced that dilemma in various decisions in an environment of polarized political forces supporting and opposing the Peace Agreement. The so-called Plebiscite for Peace, celebrated on 2 October 2016, catalyzed that polarization, as approximately 50.21% of the voters rejected the Peace Agreement. In Judgment C-379/2016, issued prior to the plebiscite, the Constitutional Court ruled that if voters rejected the Peace Agreement,

the Government would not be constitutionally permitted to implement it as a public policy, but rather it should negotiate a new agreement and re-seek popular ratification. After consulting with opposition parties, the Government and FARC drafted a second (slightly modified) version of the Peace Agreement. By means of a political motion, the Congress, in the name of the people, ratified it, and in Judgment C-699/2016 the Constitutional Court upheld the validity of the congressional ratification. According to Constitutional Amendment 1/2016, the Congress and the President were then empowered to implement the ratified Agreement by means of fast-track normative procedures, and the Court was authorized to review the constitutionality of the respective constitutional amendments, laws, and decrees. The exercise of those powers took place in the final year of President Santos’s term, in which his ability to govern the Congress weakened, and the nomination and election of four new justices of the Constitutional Court took place.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Within this context, the Constitutional Court faced a controversial task, namely, analyzing the constitutionality of the special fast-track procedure for implementing the Peace Agreement. Essential features of that procedure included: the Government monopoly of the power to introduce bills for constitutional amendments and laws; halving the

* We thank Rebecca Pendleton for valuable suggestions concerning English-style matters.

number of debates required for approval of constitutional amendments (four instead of eight debates) and laws (two instead of four debates); changes to bills introduced by Congress were not valid without governmental approval; and a requirement for bills to be voted on in their entirety, thereby prohibiting the practice of voting on isolated provisions. Members of the main opposition party challenged the constitutionality of the last two features. Appealing to the doctrine of unconstitutional constitutional amendments, they contested that provisions of Constitutional Amendment 1/2016 arguing those features partially replaced an essential constitutional principle, namely, the separation of powers. Government approval of modifications and the voting as a whole excessively empowered the executive branch to the detriment of congressional competences.

In Judgment C-332/17, the Constitutional Court applied its constitutional replacement doctrine and declared these two features of the fast track procedure unconstitutional. Certainly, the Court acknowledged that the constitutionality of transitional justice instruments ought to be analyzed using more flexible standards. However, it also held that, even from this viewpoint, Government approval and the voting as a whole were disproportionate limitations to the separation of powers and deliberative democracy. A full-fledged legislative deliberation, one that guarantees political pluralism and the political rights of minorities, was infeasible under those conditions. Moreover, under the Colombian Constitution, if Congress approved modifications to fast track bills with the potential to endanger the implementation of the Peace Agreement, the President could always object to them on grounds related to unconstitutionality or inconvenience. The possibility to raise those objections is equally suitable for achieving the goals of the transition while it is a less restrictive limitation to the principles of separation of powers and deliberative democracy.

This judgment elicited political and legal criticism. The Government and FARC feared delays in the implementation of the Peace Agreement and unjustified changes in the legal specification of its terms. Some politi-

cians and scholars accused the Court of putting the peace process at serious risk for not allocating enough weight to peace, as a constitutional value, when balancing it against deliberative democracy and the separation of powers, and for analyzing transitional justice mechanisms with strict scrutiny. Other commentators praised the decision for preserving the core of Colombia's constitutional democracy at a crucial time. Despite the judgment, FARC surrendered their arms, demobilized, and transformed themselves into a political party. The Government led a coalition in the Congress to implement the core instruments of the Peace Agreement. At the same time, opposition parties introduced their counterarguments. Some of them were approved after thorough deliberations. The judgment allowed all political parties to present their propositions and to deliberate about each provision of every bill. This re-empowered the Congress and increased legitimacy in the laws and constitutional amendments that implemented the Agreement. Once again, the Court proved to be an independent institution, immune to the pressures of executive power and public opinion.

Since the enactment of Constitutional Amendment 1/2016, 21 bills have been introduced through the fast-track procedure: seven constitutional amendments and 14 laws. Among other topics, they relate to the creation of a Special Jurisdiction for Peace, the clarification of the legal status of the Peace Agreement, the reintegration of FARC members, the prohibition of future paramilitary groups, and the regulation of amnesty and the rights of the opposition.

The two pivotal constitutional amendments that were passed were 1/2017, which regulates the integral system for truth, justice, reparation, and non-repetition; and 2/2017, which seeks to grant constitutional status to the Peace Agreement. The former aims at creating a set of judicial and non-judicial institutions for both protecting victims' rights and holding accountable former rebels and state agents for international crimes perpetrated in the framework of the internal armed conflict. The latter intends to confer constitutional force to the Peace Agreement, preventing possible political backlashes against it in forthcoming administrations. The Con-

stitutional Court examined both constitutional amendments, upholding them under the constitutional replacement doctrine.

On the one hand, the system created by means of Constitutional Amendment 1/2017 includes the Truth Commission, the Search Unit for Disappeared Persons, and the Special Jurisdiction for Peace. The Tribunal for Peace heads this jurisdiction and has the competence of investigating, prosecuting, and punishing international crimes committed by the parties. Constitutional Amendment 1/2017 specifies the mandates, procedures, and composition of these three institutions. It also empowers Congress to approve amnesty laws and special penal treatments for state agents. Furthermore, it regulates command criminal responsibility and empowers former rebels to participate in politics.

The Constitutional Court examined Constitutional Amendment 1/2017. In Judgment C-674/2017, the Court upheld the constitutionality of the special criminal benefits granted to the former rebels only if they met the following conditions: disarmament, reincorporation into civilian life, contribution to truth and reparation of victims, and commitment to non-repetition and to releasing child soldiers. Moreover, the Court upheld the ad hoc Special Jurisdiction for Peace, taking into account three considerations: first, the agreement on the political transition was set up on the basis of the creation of this jurisdiction; second, this jurisdiction does not violate the due process of former combatants and protects the rights of the victims; and third, former combatants can decide whether to subject themselves to the special jurisdiction or to the ordinary one. Notwithstanding, the Court held that a provision subjecting civilians who were not combatants to the jurisdiction of the Special Jurisdiction for Peace without their consent partially replaced the right to due process and was unconstitutional.

On the other hand, Constitutional Amendment 2/2017 prescribes that the Peace Agreement provisions related to International Humanitarian Law and constitutional rights would both serve as criteria for interpretation and referents of legal validity for the domestic legal system. It also requires

state institutions and authorities to fulfill the Peace Agreement. Finally, it states that the Peace Agreement is binding for the next 12 years (the next three presidential terms).

The Constitutional Court upheld the constitutionality of this Constitutional Amendment in Judgment C-630/2017. This case was particularly controversial both inside and outside the courtroom. The controversy was about the very nature of the Peace Agreement. Some commentators consider it a political document; others defend its constitutional status. According to the Court, the Peace Agreement has no constitutional status. It contains political rather than legal obligations. Furthermore, the Court highlighted that Colombian authorities ought to fulfill the Agreement, although they have broad discretion to decide the means by which to carry it out. Moreover, the Court clarified that the Peace Agreement does not alter the mandates and competences of public authorities. Finally, the Court upheld that, for the purpose of creating trust in the political transition, Constitutional Amendment 2/2017 grants stability to the Peace Agreement for the next 12 years. The decision by the Court was unanimous. It succeeded to harmonize the preeminent political value of the Peace Agreement as an instrument for transition, on one side, with the supremacy of the Constitution and its principles on the other.

III. OTHER MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2017, the Colombian Constitutional Court handed down three major judgments balancing protection of the environment with rights linked to economic development. This constitutional issue is in sync with the Colombian economic and political context and the 2016 Court's case law. The current government declared mining – especially, coal, nickel, and gold exploitation – as an activity of public interest and the object of a key policy for economic development. This, in addition to the decline in oil prices, led to an increasing influx of mining projects throughout the country, which became known as the “mining locomotive.”

Conversely, in 2016 the constitutional jurisprudence stressed the importance of environmental protection. Regarding this issue, the Court decided two major cases that paved the way for 2017's jurisprudence. First, in Judgment C-035/2016, the Court declared the unconstitutionality of a law enabling mining, among other productive activities, in areas delimited as wetland ecosystems. One of the reasons given by the Court was that wetlands are areas of special ecological importance. Second, in Judgment T-622/2016, the Court declared that more than 30 Colombian authorities violated the rights to life, health, and water; the state's food sovereignty; and ethnic communities' rights to a healthy environment around the Atrato River basin. For the Court, those authorities did not provide an effective and coordinated action in response to the negative consequences and impacts of illegal mining in and around the river. Also, controversially, the Court acknowledged the Atrato River itself as having the status of legal person.

In 2017, the constitutional jurisprudence followed this trend, and incorporated into the debate the right to public participation in environmental policy decisions. In Judgment SU-133/2017, the Court examined the constitutionality of the concession of mining titles for gold exploitation in the town of Marmato from local miners to a transnational company, which later closed the mines. The petitioners claimed that Marmato had been the home to artisanal mining activities for over 200 years and many Afro-Colombian and indigenous communities were artisanal miners. Hence, the concession ought to have incorporated the prior participation of artisanal miners and consultation with members of ethnic communities. The Court considered that a concession of a mining title was an administrative measure directly affecting ethnic communities and local artisanal miners. Hence, the rights to participation and prior consultation ought to be respected above the environmental licensing procedure. The violation of those rights led to an unconstitutional monopoly of mining titles being held by only one corporation.

Concerning Judgment T-361/2017, in 2014 the Ministry of Environment and Sustain-

able Development delimited the Santurban wetlands in order to delineate the area within which mining activities would be prohibited. In 2015, petitioners defied the constitutionality of this delimitation. The petitioners considered that the Ministry disavowed the right to participation, the right to due process, the right to information, and to a healthy environment, among others. They pointed out that the wetlands served as a vital source of fresh water for a major metropolitan area in Colombia. In contrast, the environmental authorities defended the validity of the delimitation act. For them, the delimitation required a specific technical knowledge that rendered public participation as a moot issue. In this instance, the Court considered that the right to public participation in environmental decision-making was a fundamental right that should be granted by national authorities whenever they enact any environmental measure that may impact the people. Thereby, the Court decided that environmental authorities violated not only this fundamental guarantee but also the right to due process and information. Thus, the Court annulled the delimitation act and determined that the new delimitation process should acquire the “free, informed and prior consent” of the community to be affected by any investment or development.

The case decided in Judgment SU-698/2017 presented a different issue for the Constitutional Court. The petitioners were members of the indigenous Wayúu community in the Colombian department of Guajira. They argued their right to prior consultation was violated by the National Environmental Licensing Authority (ANLA, in Spanish) and Cerrejón, one of the largest strip coal mines in the world. According to the petitioners, they had to be consulted prior to any licensing and authorization to deviate the Bruno Stream, the only water body in mid-to-upper Guajira. The ANLA and Cerrejón countered that this project was indispensable to maintain the level of coal production for future years and, consequently, the royalties the country were to receive.

Given the complexity of this issue, the Court conducted a judicial inspection and received several technical documents from different

Colombian authorities and universities. After analyzing each of them, the Court found that the project did not assess some important and highly possible environmental impacts to aquifers, underground bodies of water, and to the tropical dry forest in Guajira. Even though the case was presented as one related to the right of prior consultation, the Court decided that the rights to life, water, food, and health of the indigenous communities whose livelihood and well-being depended on the Bruno Stream's vitality could be potentially harmed by its deviation. Hence, it ordered the suspension of every activity that implied a human intervention on the natural riverbed of the stream until a technical board, comprised of local and national authorities, the affected communities, and Cerrejón, could reach an agreement on determining the real impacts the deviation project would have on the aquifers and the tropical dry forest and how to prevent or mitigate these impacts.

In conclusion, 2017 presented some interesting highlights for Colombian Constitutional Court case law. It saw a trend of enhancing the value of environmental protection and of giving more weight to public participation than economic development through mining activities. Unfortunately, this jurisprudence has brought some undesirable effects. For example, some mining companies have initiated requests for costly international arbitration demanding an award for damages caused by the annulment of their mining titles; in particular, those located within areas that were delimited as wetlands after the title had been granted.

IV. LOOKING AHEAD TO 2018

Relevant issues concerning both constitutional politics and constitutional law are at stake in 2018. On the one hand, presidential and legislative elections are taking place during the first semester of the year. These elections come about in a highly polarized political environment, flooded by radical views on the Peace Agreement essentials: some candidates support them; others reject them in their entirety. Regardless of the elec-

tion outcome, the Constitutional Court will play a crucial role either protecting the separation of powers or preventing serious regressions in political transition.

On the other hand, the Constitutional Court agenda is ripe with complicated matters. They include migration and data protection. The huge migration of impoverished Venezuelans to Colombia and their massive requests for inclusion into social programs (such as health care, education, and housing) pose complex queries on the scope of well-known judicial enforcement of economic and social rights. In addition, the Court will decide cases on data protection from public security regulations and big data handling as well as cases on the right to privacy and human dignity against the exercise of freedom of expression and freedom of the press. These cases may challenge or require adjustments of some of the Court's long-established doctrines concerning those matters.

V. FURTHER READING

Antonio Barreto-Rozo & Jorge González-Jácome, The Colombian Constitutional Court at the Crossroads of Peace, *Int'l J. Const. L. Blog*, Aug. 25, 2017, at: <http://www.iconnectblog.com/2017/08/the-colombian-constitutional-court-at-the-crossroads-of-peace/>

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Sabrina Ragone, The Colombian Constitutional Court and the Peace Process: Slowing down the "Fast-Track"?, *Focus Human Rights*, n. 3, 2017, at: <http://www.federalismi.it/AppOpenFilePDF.cfm?artid=35474&dpath=document&dfile=28122017142403.pdf&content=The+Colombian+Constitutional+Court+and+the+Peace+Process+-+stato+-+dottrina+-+>

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Commonwealth Caribbean

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 saw a number of constitutional developments in the Commonwealth Caribbean. These include the first video-link hearing by the Judicial Committee of the Privy Council (JCPC);¹ the first successful horizontal application of the Jamaican Charter of Fundamental Rights and Freedoms ('the Charter');² the recognition of an implied right of members of the St Kitts National Assembly to move a vote of no-confidence; and the reinstatement of election petitions brought by members of the opposition in St Vincent and the Grenadines which, if successful, could reverse the result of the 2015 elections. However, 2017 also witnessed a missed opportunity for the Caribbean Court of Justice (CCJ) to tackle head-on a constitutional issue that could have a profound impact on reform of the region's constitutions; namely, the applicability of the basic structure doctrine to so-called unconstitutional constitutional amendments. 2017 was also the year that the Government of Antigua postponed its promise to hold a referendum on whether or not to abolish the right of appeal to the JCPC and to replace it with a right of appeal to the CCJ while St Lucia has still to enact promised legislation to ratify the appellate jurisdiction of the CCJ.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Upon independence, all of the countries in the region adopted constitutions based on the so-called 'Westminster model' of government, underpinned by the principles of liberal democracy: free and fair elections, the separation of powers, the rule of law, judicial independence and the protection of fundamental rights and freedoms. In the intervening years, however, these principles have been severely tested by a combination of the small size of the majority of countries that make up the region and the tendency of the Westminster model to concentrate power in the executive, in particular in the office of the Prime Minister. Three cases determined in 2017 help to illustrate some of the challenges that liberal democracy faces in the region.

The first case, *Brantley v Martin*,³ on appeal to the Eastern Caribbean Supreme Court (ECSC) from St Kitts and Nevis, represented the culmination of the efforts of members of the opposition to force the Speaker of the National Assembly to table for hearing a motion of no-confidence in the government of the St Kitts and Nevis Labour Party (SKNLP), led by Denzil Douglas. The leader of the opposition had lodged the first motion of no-confidence in December 2012, but despite repeated requests, the Speaker failed to table the motion for hearing. In the meantime, two members of the SKNLP resigned from the government and formed a new political party, the Peoples Labour Party, which joined forces with the two existing opposition parties to launch a coalition group called

¹ *Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment (Trinidad and Tobago)* [2017] UKPC 37.

² *Brendan Courtney Bain v The University of the West Indies* [2017] JMFC FULL 3. Unreported but available at <<http://supremecourt.gov.jm/sites/default/files/judgments/Bain%20v%20Courtney%20Brendan%20v%20The%20University%20of%20the%20West%20Indies.pdf>>. Last accessed 21 December 2018.

³ Claim No. SKBHCV2013/0090 and Claim No. SKBHCV2014/0231. Unreported but available from <www.eccourts.org/category/judgments/>. Last accessed 21 December 2018.

Team Unity. These new developments meant that if the motion of no-confidence was scheduled and debated it would have carried since there were only 11 elected representatives in the National Assembly and six of them had indicated an intention to vote in favor of the motion. On 1 March 2013, Team Unity sent a letter to the Governor General calling upon him to advise the Prime Minister to respect the rule of law and insist that the motion be tabled for hearing. At the same time, members of civil society and the Bar Association became involved, calling upon both the Prime Minister and the Speaker to table the motion, but to no avail. As a result of the Speaker's continued refusal to table the motion, Team Unity commenced court proceedings on 3 April 2013, seeking, *inter alia*, declarations that as members of the National Assembly they were entitled to the right to bring a motion of no-confidence in the government pursuant to s.52(6) of the Constitution and that the motion of no-confidence must be scheduled for debate in the National Assembly as a matter of urgency.

Upon the Attorney General's unsuccessful attempt to strike out these proceedings, which was followed by a further unsuccessful attempt to appeal against the refusal to strike out, Team Unity's claim was returned to the High Court for hearing. The High Court's judgment, which was delivered in November 2017, is notable on at least two counts. First, the willingness of the Court to look beneath the surface of the text of the Constitution to find an implied right of members of the National Assembly to lodge a motion of no-confidence and to have it debated.⁴ Second, the willingness of the Court, in declaring that the Speaker was obliged to table the motion of no-confidence without undue delay, to encroach upon parliament's control over its own procedures, which has traditionally been regarded as immune from judicial review in accordance with the prin-

ciple that parliament enjoys exclusive cognizance of its proceedings. In affirming the right of the Court to intrude in this matter, it drew support from the following extra-curial comments of Justice Saunders of the CCJ:

The Court must ensure that a claim of privilege does not immunize from the ordinary law the consequence of conduct by parliament or its officers (which includes the Speaker)...that exceed the necessary scope of the category of privilege or that violates fundamental rights.⁵

It is to be hoped that in affirming the accountability of the executive to parliament the judgment will have a beneficial impact on the conduct of parliamentary proceedings and representative democracy in the region. It must be noted, however, that coming two years after general elections had been held in St Kitts in 2015, in which the SKNLP lost its majority, the recognition of the opposition's right to table a motion of no-confidence came far too late to be of any practical relevance. Thus, as a matter of *realpolitik*, the refusal of the Speaker to table the motion achieved the Prime Minister's immediate objective of remaining in power until the general elections scheduled for 2015, which he hoped to win.

The second case, *Exeter v Gaymes and Baptiste v Davis*,⁶ on appeal to the Eastern Caribbean Supreme Court from St Vincent and the Grenadines, concerned a decision of the High Court to strike out the election petitions of two members of the opposition New Democratic Party, who had been unsuccessful in contesting their constituencies in the 2015 elections. The petitioners alleged that there had been serious irregularities in the polls which invalidated the outcome and sought orders that the election of the members of the United Labour Party (ULP) in these two constituencies were, accordingly, void. The

respondents, who included the two winning ULP candidates, election officials and the Attorney General, had sought by way of interlocutory application to have the election petitions struck out on the grounds that the petitioners had not provided adequate security for costs, pursuant to s.58 of the Representation of the People Act and s.9 of the House of Assembly (Election Petition) Rules 2014.

The judge who heard the interlocutory application refused to strike out the petitions on the grounds that the application was premature and that the Court had no jurisdiction to entertain it by means of an interlocutory hearing in Chambers. He went on, however, to indicate that, 'having had the benefit of full arguments I am of the view that such an application if made at the beginning of the hearing of the petition, is bound to succeed.'⁷ The respondents immediately filed a notice of motion to be heard in open court raising the same objections contained in the interlocutory application. The motion came before the same judge who had heard the interlocutory application and who, unsurprisingly, ruled in favor of the respondents, striking out the election petitions.

On appeal, the ECSC held, applying the test for apparent bias proposed by the House of Lords in *Porter v Magill*,⁸ that the statement made by the judge on the interlocutory application went far beyond permissible limits. The judge had expressed himself in such clear and conclusionary terms that a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased. The ECSC further held that public interest in the determination of election petitions was such that the petitioners could not be deemed to have waived their right to allege bias.

The petitions were, accordingly, returned to

⁴ [54].

⁵ Third Annual Lloyd Barnet Lecture to the Council of Legal Education, 4 September 2008, p18. Available at < <http://www.clecaribbean.com/download.php?cmd=view&id=181>>. Last accessed 21st December 2018.

⁶ SVHGCVAP2016/0021 and SVHGCVAP2016/0022. Unreported but available from < www.eccourts.org/category/judgments/>. Last accessed 21 December 2018.

⁷ *Ibid.*

⁸ [2001] UKHL 67.

the High Court for hearing. As of the date of this writing they are still pending, but if they are successful they would have the effect of reversing the result of the 2015 elections, which the ULP won with a majority of one. This no doubt explains the vigor with which the respondents sought to have these election petitions struck out. It cannot, however, be good for the cause of representative democracy in St Vincent that almost two years after the general election there is still such uncertainty concerning its outcome.

The third case, *Bar Association v Attorney General Belize*,⁹ on appeal to the CCJ, was also concerned with judicial independence, but on this occasion at the institutional rather than the personal level. In this case, the Appellants sought to challenge the Constitution (Sixth Amendment) Act 2008, which amended sections 101(1) and 102(1) of the Constitution. The amendments sought to deal with the issue of indefinite judicial appointments by providing that where an existing or future instrument of appointment of a Justice of Appeal did not specify a period of appointment, the judge's term of office should be one year from the date of commencement of the Sixth Amendment or one year from the date of issue of the future instrument of appointment, at the expiration of which the office would become vacant. The appellants were concerned that one-year appointments to the Court of Appeal undermined the security of tenure of such judges, politicized appointments and eroded public confidence in the impartiality and independence of the Court of Appeal. Accordingly, they argued that the Sixth Amendment was unconstitutional because it violated the rule of law, the separation of powers and the basic structure of the Constitution.

In dismissing the first two grounds of appeal,

the CCJ emphasized the flexibility of the concept of judicial independence, referring to a study of 48 Commonwealth jurisdictions, which revealed a variety of approaches towards judicial appointments.¹⁰ The CCJ was also very sensitive to the predicament of small states such as Belize in finding suitably qualified candidates, noting that since independence, short-term appointments to the Court of Appeal Bench in Belize had dominated, with most of the judges being non-resident Caribbean retired Justices of Appeal or members of the inner bar of a Caribbean country: 'persons for whom all ambition was spent, save that of retiring with the highest judicial reputation.'¹¹ The case acutely illustrates the difficulties faced not just by Belize but also the many other small states in the Caribbean in finding suitably qualified candidates with the legal skills and experience required at the appellate level. In these small states, the government often has no alternative but to appoint judges who are non-nationals willing to accept a part-time traveling post for a limited period. As a consequence, the law in these places is being authoritatively determined and developed by judges who often have no commitment to the state over which they are exercising jurisdiction and whose own interests in the development of the law by way of precedent may be limited by the short-term nature of their appointment.

Also, of interest from a wider constitutional perspective is the CCJ's rejection of the argument that the Sixth Amendment was unconstitutional because it altered the basic structure of the Constitution. In the CCJ's view, even if the basic structure doctrine was part of the law of Belize, which the CCJ refused to affirm or deny, nothing in the Sixth Amendment could be construed as 'alter[ing] the Constitution in such a way as to limit or

destroy' any of the 'unwritten principles that represent the ethos' of Belizean society.¹² While that much is clear, the CCJ's refusal to engage with the applicability of the basic structure doctrine in Belize, even though it had been held by the Belize Court of Appeal in *Attorney General of Belize v The British Caribbean Bank Limited* and *Attorney General v Dean Boyce*¹³ not to be applicable in Belize, means that the issue will continue to remain alive unless and until the CCJ finally settles it.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Though at first blush it may not appear to be a major constitutional development, the decision of the JCPC in *Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment*¹⁴ to conduct the hearing of the appeal from Trinidad and Tobago by means of a video-link could yet have far-reaching consequences for the appellate jurisdiction of the CCJ. While it has been open for business since 2006, to date only four out of the 12 independent countries in the region have ratified the CCJ's appellate jurisdiction – Barbados, Guyana, Belize and Dominica. Significantly, the two most populous countries in the region – Jamaica and Trinidad and Tobago – continue to send appeals to the JCPC. One of the principal arguments for establishing the CCJ was to improve access to justice for litigants in the region by avoiding the inconvenience and cost of appealing to the JCPC, located 4000 miles away in London. However, in its decision in *Fishermen and Friends of the Sea*, the JCPC made it clear that it was now inviting, indeed encouraging, parties to future appeals to consider doing so by way of video-link to save time and expense. If this

⁹ [2017] CCH 4 (AJ). Unreported but available from < <http://www.ccj.org/judgments-proceedings/appellate-jurisdiction-judgments>>. Last accessed 21 December 2018.

¹⁰ J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Report of Research Undertaken by Bingham Centre for the Rule of Law). Available at < <https://binghamcentre.biicl.org/projects/commonwealthcompendium>>. Last accessed 21 December 2012.

¹¹ Citing *Misick and others v The Queen* [2015] UKPC 31 at para 2.

¹² *Bar Association Belize* [46].

¹³ [2017] UKPC 37.

¹⁴ [2017] UKPC 37.

becomes a regular feature, then one of the principal arguments for abolishing the right of appeal to the JCPC will carry much less weight. This must be of concern to the CCJ, which was intended to be the final appellate court for all of the countries in the region.

A constitutional development of more immediate significance was the decision of the Full Court of the Supreme Court of Jamaica, in *Brendan Courtney Bain v The University of the West Indies*,¹⁵ to uphold a claim against the University of the West Indies (UWI) for violating the Charter rights of the claimant, who served as the director of the Regional Co-ordinating Unit of the Caribbean HIV/AIDS Regional Training Initiative (CHART) at the Mona Campus of UWI. In this case, the claimant's contract with UWI had been terminated as a result of a report he had prepared as an expert witness in the case of *Caleb Orozco v Attorney General of Belize*.¹⁶ The report in that case had been prepared at the request of a group of churches in Belize that were an interested party in the matter and opposed a challenge to the constitutionality of s.53 of the Belize Criminal Code, which made sexual intercourse between males a criminal offense liable to 10 years' imprisonment.

The claimant's authorship of this report had proven to be extremely controversial because of his position as director of CHART. The Caribbean Vulnerable Communities Coalition (CVC), in particular, expressed concern that the claimant's involvement in the Orozco case was in conflict with his leadership of CHART, an organization which champions human rights and opposes discrimination of all persons. Following protracted correspondence between the CVC and the Vice Chancellor (VC) of UWI and between the latter and the claimant, the latter wrote to the claimant on 20 May 2014, terminating his

fixed-term contract with UWI by triggering the three-month notice period provided for in his contract. In that letter, the VC explained that the claimant's continued leadership had the potential to threaten the credibility of CHART and to undermine UWI's representation in vitally important groups such as the Pan Caribbean Partnership against HIV and AIDS and Justice for All, which campaign on behalf of vulnerable communities.

The claimant alleged that as a *juristic* person, UWI was bound by s.13(5) of the Charter to respect and uphold the rights recognized by the Charter, including the right to freedom of expression, 'to the extent that it is applicable taking account of the nature of the right and the nature of any duty imposed by the right.' Since the defendants conceded that UWI was a juristic person for the purposes of s.13(5), the Court was required to determine the following constitutional issues.

First, whether the right to freedom of expression applies to juristic persons considering the nature of the right and the nature of any duty imposed by the right. In the Court's view, the claimant's report and his subsequent testimony before the Belize Supreme Court fell squarely within the sphere of conduct protected by the guarantee of freedom of expression. Second, whether the defendant was bound to uphold this right 'vis a vis the claimant'. In holding that the right does have a horizontal application, the Court relied on its previous decision in *Maurice Tomlinson v Television Jamaica Ltd and Others*,¹⁷ in which Sykes J had proclaimed that:

'horizontal application is now part of Jamaican Constitutional law. The position was arrived at by the legislature after full and careful consideration. *There is no doubt that this Charter, in time, will prove to be the most fun-*

damental change to our legal system since 1655 (emphasis added).'

Third, having held that the termination of the claimant's contract infringed his right to freedom of expression, whether the infringement could be considered demonstrably justified in a free and democratic society, pursuant to s.13(2) of the Constitution which permits limitations of the rights guaranteed by the Charter. In answering this question, two of the three judges adopted different approaches (the third simply concurred with the other two!).

In Justice Paulette Williams's view, the traditional proportionality test as outlined by the Canadian Supreme Court in *R v Oakes*,¹⁸ with regard to an identical provision to s.13(2) in the Canadian Charter of Rights and Freedoms, was more difficult to apply where, as here, the Charter was being applied horizontally. Instead, the appropriate test in a case like this was to 'balance' the rights of both parties against each other.¹⁹ Since the defendant had not expressly pleaded which of its rights under the Charter it was relying upon and since the defendant had been unable to demonstrate that the termination of the claimant's contract was necessary 'to achieve the objective of the effective administration' of CHART, its actions were not demonstrably justified. Justice Frank Williams, while agreeing that the claimant's right to freedom of expression had been breached, took a different approach to the question of whether the breach was demonstrably justified. In his view, the appropriate test was the proportionality test as outlined in *Oakes*. Applying the *Oakes*' three-limbed test, he concluded that the defendants had been unable to show: first, that the termination of the contract was 'carefully designed' to achieve the defendant's objective; second, that it had impaired the claimant's freedom of ex-

¹⁵ n2 above.

¹⁶ In the Supreme Court of Belize Claim No.668 of 2010. Unreported but available at <http://cnslibrary.com/wp-content/uploads/Belize-Court-of-Appeal-Judgment-Caleb-Orozco-v-AG-et-al.pdf>. Last accessed 5 January 2018.

¹⁷ No. 2012 HCV 05676 at [202]. Unreported but available at <<http://www.supremecourt.gov.jm/sites/default/files/judgments/Tomlinson%2C%20Maurice%20Arnold%20v%20Television%20Jamaica%20Ltd.%2C%20CVM%20Television%20Ltd%20and%20the%20Public%20Broadcasting%20Corporation%20of%20Jamaica.pdf>>. Last accessed 21 December 2017.

¹⁸ 1 SCR 103.

¹⁹ Citing an article by Hugh Collins.

pression as little as possible; and third, that it struck the right balance between securing its objective and its deleterious effects on the claimant.

s.13(5) of the Charter had been inspired by a similar provision in the South African Constitution, ‘a country with significant inequality between social groups,’²⁰ and like that provision was presumably intended to address inequality in Jamaica.²¹ Whether or not the decision in *Bain v UWI* significantly advances the cause of equality in Jamaica, it certainly extends the reach of the Charter to include private parties to a contract. Henceforth, in every such contract there is an implied term that the parties to the contract cannot exercise their rights under the contract if to do so would violate the other party’s Charter rights. It is disappointing, however, that the Court was unable to outline a more coherent approach to determining the question of whether interference with Charter rights in such circumstances is demonstrably justified. As Hugh Collins has observed, where fundamental rights are being applied horizontally there are likely to be both rights and policy considerations on both sides of the argument. This means that the traditional proportionality test, as applied by Justice Frank Williams, cannot function to provide a procedure by which all the different relevant considerations are measured against each other.²² The normal test of proportionality in public law provides the wrong framework in this context because it assumes that only one party to the dispute has rights. However, the alternative ‘balancing test’ favored by Justice Paulette Williams is also, according to Hugh Collins, unsatisfactory.²³ Because there are competing interests, rights and policies on both sides of the argument in a private dispute, he argues that the correct approach is a double proportionality test, with

the rights of each party being assessed separately according to a test of proportionality. But this too is problematic where the rights of each party, as in this case, are incommensurable: the right of the claimant to freedom of expression and the right of UWI to protect its reputation and the integrity of its CHART programme.

These are early days for the Charter, but it is hoped that as the volume of cases under s.13(5) increases, the courts in Jamaica will be provided with plentiful opportunities to formulate and refine an approach that takes due account of the rights and interests of both parties when the Charter is being applied horizontally.

IV. LOOKING AHEAD TO 2018

There are some potentially interesting constitutional developments scheduled for the year ahead.

Provided the Senate approves the Constitution (Amendment) Bill, the Bahamas will have its first-ever independent Office of the Director of Public Prosecutions (DPP). The DPP will assume the powers previously vested in the Attorney General relating to criminal prosecutions, which it was alleged had been abused by the former Attorney General by discontinuing criminal prosecutions, including the prosecution of one of his former clients, with little or no explanation.²⁴ The establishment of a Constitutional Reform Commission in Guyana is also awaiting enactment of the necessary legislation. It is hoped that this will be a first step towards repairing the deep hostility between the Afro-Caribbean and Indo-Caribbean communities that has bedeviled politics in Guyana ever since the split between Cheddi Jagan

and Forbes Burnham back in the 1950s.

2018 may also be the year that Antigua holds its long-awaited referendum on whether to abolish the right of appeal to the JCPC and replace it with a right of appeal to the CCJ. St Lucia too may ratify the appellate jurisdiction of the CCJ, having announced its intention to do so as long ago as 2015.

Finally, there are two significant human rights cases scheduled for appeal in 2018. The first is the hearing of the appeal by the churches in the *Orozco* case (discussed above), scheduled for March 2018, in which the churches will argue for the reinstatement of a statutory provision which criminalizes acts of homosexuality. The second is the hearing by the CCJ of an appeal from the decision of the Court of Appeal of Guyana in the case of *McEwan et al v AG Guyana*, dismissing a challenge to the constitutionality of a colonial vagrancy law found in the Summary Jurisdiction (Offences) Act, which makes it an offence for a man or a woman to cross-dress in public ‘for any improper purposes.’ The appeal has been brought on the ground that the law is discriminatory and violates the multiple equality provisions in the Guyanese Constitution.²⁵

V. FURTHER READING

Tracy Robinson and Arif Bulkan, ‘Constitutional Comparisons by a Supranational Court in Flux: The Privy Council and Caribbean Bill of Rights’ (2017) 80(3) MLR 379

Derek O’Brien, ‘Small States, Colonial Rule and Democracy’ in Petra Butler and Caroline Morris (eds.), *Small States in a Legal World* (Springer International Publishing 2017)

²⁰ See comments of Justice Sykes in *Tomlinson* at [191].

²¹ *Ibid.*

²² H Collins ‘On the (in)compatibility of Human Rights Discourse and Private Law, LSE Law, Society and Economic Working Papers 7/2012. Available at <<http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2012-07-Collins.pdf>>. Last accessed 21 December 2017.

²³ *Ibid* p31.

²⁴ *The Bahamas Journal*, ‘House Passes Constitution (Amendment) Bill,’ 3 November 2017. Available at <onesbahamas.com/house-passes-constitution-amendment-bill/>. Last accessed 21 December 2017.

²⁵ See further URAP Press Release: *McEwan et al v Attorney General Guyana Court of Appeal Decision*. Available at <<http://www.u-rap.org/web2/index.php/component/k2/item/64-press-release-mcewan-et-al-v-attorney-general-of-guyana-court-of-appeal-decision>>.



Cyprus

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Cypriot constitutional law¹ has evolved since 1964 by the application of the law of necessity that formed the State's response to an unprecedented constitutional anomaly that had a paralyzing effect.² As has been explained³ in the report for the previous year, that idiosyncrasy of the Cypriot system must be read in conjunction with the strong commitment to the Rule of Law and the ideal of liberal democracy.⁴ Therefore, the law of necessity is always present in constitutional discourse yet continuously coupled with the counterbalancing effect of principles that ensure that the State is governed under the principle of separation of powers and with adherence to constitutionalism as well as with a persistent and effective guarantee of fundamental rights.

2017 has followed the same pattern. Specifically, the year was characterized by a clash between the legislature and the executive that came to be resolved before the Supreme Court in 16 references under Article 140 of the Constitution. That provision enables the President⁵ to refer to the Supreme Court issues of unconstitutionality of laws enact-

ed by the legislature and which have yet to come into force. It is, in effect, a procedure of preventive review of constitutionality and forms the main way in which the separation of powers is ensured.⁶ The number of references under Article 140 for 2017 was unprecedented and can be explained by the fact that the legislature enacted the laws in question as a result of bills introduced by members of the legislature and not by Ministers – an expression of the executive's initiative.⁷ The issues covered a range of matters, including fundamental rights and the right to privacy in specific, the principle of positive discrimination and separation of powers in relation to judicial independence. The Supreme Court found unconstitutionality, total or partial, in all the references, which is once again unprecedented. These are the matters analyzed *infra*.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Liberal democracy as an expression of the commitment of a constitutional system to the principle of separation of powers, to

¹ A. Loizou, *The Constitution of the Republic of Cyprus* (Nicosia, Cyprus, 2001); C. Kombos, *The Doctrine of Necessity in Constitutional Law* (Sakkoulas, 2015); C. Tornaritis, *Cyprus and Its Constitutional and Other Problems* (Nicosia, 2nd ed., 1980); S. Papasavvas, *La justice constitutionnelle à Chypre* (Economica, 1998); C. Paraskeva, *Cypriot Constitutional Law: Fundamental Rights and Freedoms* (Nomiki Vivliothiki, 2015).

² P. Polyviou, *Cyprus on the Edge. A Study in Constitutional Survival* (Nicosia, 2013), pp. 5-26.

³ C. Kombos, "Developments in Cypriot Constitutional Law-The Year 2016 in Review", in A. Richard et al., *The I-CONnect-Clough Center 2016 Global Review of Constitutional Law* (August 3, 2017). *The I-CONnect-Clough Center 2016 Global Review of Constitutional Law*. ISBN: 9780692925164. Published by the Clough Center for the Study of Constitutional Democracy.

⁴ See Kombos, *supra* n.1, pp. 216-228.

⁵ After 1964, exclusively by the President on the basis of the law of necessity given that Article 140 requires a joint reference by the President and the Vice-President. Since the latter post is vacant since the withdrawal of Turkish-Cypriots, the provision remains unaltered in the Constitution but its application is enabled via the law of necessity.

⁶ Article 139 Constitution is the other main basis and relates to encroachment of competences.

⁷ Article 80 Constitution.

the safeguarding of fundamental rights and a State functioning under the Rule of Law remained on the rise in the Cypriot context. The number of references by the President to the Supreme Court and the subsequent endorsement of the argumentation regarding the unconstitutionality of the laws enacted by the legislature were both founded on the essential need to safeguard the constitutional protection afforded to fundamental rights. That was the case despite the fact that the majority of the contested laws attempted to introduce transparency through the declaration and publication of the private wealth of public officials and members of their immediate families. The Supreme Court illustrated great willingness to scrutinize the relevant measures with a high degree of intensity in favor of the fundamental rights of the affected parties, thus relying on the principle of proportionality. It is also important to note that Article 33 of the Constitution imposes a duty on the judiciary to construe the restrictions to fundamental rights strictly and narrowly and prohibits the introduction of restrictions not expressly provided for in the Constitution (Part II regarding fundamental rights). Accordingly, the Supreme Court examined those restrictions based on the principle of proportionality and under the clear direction of Article 33. The outcome of unconstitutionality in all the references strengthens the argument that the Court gave priority to the adherence of safeguarding fundamental rights as the Constitution provides. Nonetheless, the approach can also be characterized as formalistic at least as regards the positive discrimination case.

Specifically, the rise of liberal democracy can be documented through the judgment of the Supreme Court in *Reference 6/2016*⁸ that concerned judicial independence. The President of the Republic referred the Courts (Amending) Law of 2016 to the Supreme Court for a review to see whether the said

amending law was contrary, among other constitutional provisions,⁹ to Article 15 (right to private life) and 152, 169 and 179 of the Constitution as well as the principle of separation of powers and the principle of judicial independence. The amending law introduced Article 8A to the basic law, which provided for the issuance of a procedural order by the Supreme Court that would regulate the submission by judges of statements of property assets and any changes to them to the Supreme Judicial Council. The law further provided that the statements should also include the assets of the judges' spouses and children. The petitioner (President) claimed that the legislature, through the amending law, endeavored to regulate the way in which the judiciary would exercise its exclusive competence, thus violating the principle of separation of powers. The Supreme Court held that new Article 8A essentially imposed on the Supreme Court the specific method on how to regulate a matter by conferring authority which, according to constitutional provisions, falls within the exclusive competence of the Supreme Court. As a result, the amending law under scrutiny was found contrary to the principle of separation of powers and was therefore unconstitutional. In effect, the law provided that the Supreme Court may issue a regulation governing the process for submitting the required information for purposes of transparency and also that if that competence were to be exercised, then the Court would be obliged to follow the procedure set out in the law. In other words, the legislature on the one hand recognized the discretion of the Court to self-regulate and then fettered that discretion as to the manner of its exercise. This was held to be in violation of the principle of separation of powers and of the exclusive competence of the Supreme Court to regulate such issues. The Court did not examine the issue of the right to privacy as unconstitutionality was already established.

In *Reference 10/2016*¹⁰ and *Reference 13/2016*,¹¹ the Supreme Court issued on the same day two Opinions on similar matters. Both referrals were made by the President over two different laws passed by the House of Representatives with the aim of promoting transparency in the financial dealings of government officials. *Reference 10/2016* dealt with the compatibility of the Law concerning the President, Ministers and Members of the House of Representatives of the Republic (Disclosure and Assets Check) (Amending Law) of 2016 with Article 15 of the Constitution (right to private life) and with the principle of proportionality. Similarly, *Reference 13/2016* concerned the compatibility of the Certain Officials of the Republic (Disclosure and Assets Check) (Amending) Law of 2016 with Articles 15, 35, 122, 123, 124, 125, 169 and 179 of the Constitution. Both amending laws modified Article 8 of their respective basic laws, which provided for the publication of capital statements of government officials' spouses and children. According to the petitioner, these provisions constitute an infringement of Article 15 of the Constitution, which provides for the right to privacy.¹²

Both referred laws were deemed unconstitutional as they provided for the publication of the capital statements of government officials' spouses and children. The Supreme Court provided an analysis for the unconstitutionality of the amending law in *Reference 10/2016* and again in *Reference 13/2016*. It simply adopted and reiterated its findings without stating anything new on the issue.

In *Reference 10/2016*, the Supreme Court stressed that the disclosure and publication of property statements of spouses and underage children is manifestly contrary to Article 15(2) since it does not fall within the necessary measures that could be tak-

⁸ *Reference 6/2016, President v. House of Representatives*, 2 May 2017.

⁹ Articles 35, 152, 169 and 179 of the Constitution as well as the principle of separation of powers and the principle of judicial independence.

¹⁰ *Reference 10/2016, President v. House of Representatives*, 29 May 2017.

¹¹ *Reference 13/2016, President v. House of Representatives*, 29 May 2017.

¹² Article 15 Constitution: "1. Every person has the right to respect for his private and family life. 2. There shall be no interference with the exercise of this right except such as is in accordance with the law and is necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person, or in the interests of transparency in public life or for the purpose of taking measures against corruption in public life".

en against corruption in public life. Consequently, such disclosure in no way can, or is, justified. Moreover, the Court found that spouses and underage children are not politically exposed people, to be subjected to the obligation of such public scrutiny. Only those who have assumed public office are considered politically exposed people, in the sense that they have consented to a broader scrutiny of their private and financial lives; thus, the limitation to their rights due to the exercise of public power, with the requisite and legitimate need to inform the public, is justified. However, this is not the case for their spouses, who have their own independence and individuality, and, certainly, the right to personal property, independent of that of politically exposed people. Finally, the Supreme Court indicated that the capital statements for spouses and children of government officials could be submitted to the relevant parliamentary committee for scrutiny; however, making them public, as per the amending law, would be a violation of their constitutional rights. Therefore, the Court balanced transparency with the right to privacy and achieved an equilibrium by allowing the submission of such information and by prohibiting their publication.

Similar has been the approach in *References 11,12,14,16/2017*,¹³ where the publication issue was at the center of the references but this time concerning a class of officials other than the judiciary.¹⁴ The Supreme Court issued one decision on all five references, as it decided that the contested issues were identical, in the sense that they all focused on the scope of Article 15(2) of the Constitution, as amended by the Law concerning the Ninth Amendment of the Constitution. All five references submitted by the President argued that the respective laws were in breach of Articles 11, 15, 28, 35, 80, 169 and 179 of the Constitution, as they introduced

obligations on certain state officials and civil servants to disclose their assets and source of funds as well as those of their spouses and children. In addition, the statements that they would submit would become available to the public. The petitioner (President) argued that the protection of personal data is directly related to the fundamental right to respect private and family life (Article 15 of the Constitution) and, as a result, the disclosure of information as per the aforementioned laws constituted an interference with the right. The Court noted that the assets are part of a person's private life. The disclosure and check of the assets constitute an interference with the exercise of the right. The rights enshrined in the Constitution are vested to the person; kinship does not provide a basis for interfering with the right to privacy nor restricts its limits. Consequently, the Supreme Court held that the laws imposed a limitation to the right protected under Article 15(1) of the Constitution. Subsequently, the Court examined whether such limitation can be justified under Article 15(2), which provides that a limitation may be imposed by law "in the interests of transparency in public life or to take measures against corruption in public life," in the light of the principle of proportionality. The Supreme Court unanimously found the referred laws unconstitutional. The interference to the privacy of certain state officials and civil servants and their families was particularly drastic, without sufficient reasoning and justification as to the need sought and without adhering to the proportionality principle. It is important to note that in these references, the Court did not seem to distinguish between the obligation to submit the statements and their publication, thus finding unconstitutional the whole system for lack of clear justification.

In summary, the Supreme Court relied on the priority of the right to privacy in rela-

tion to the need for transparency and applied the principle of proportionality in order to conclude that the exclusion of publication about family members of public officials would constitute an adequate restriction of the right. That approach was not, however, applied uniformly since it was reserved for only specific categories of officials, primarily elected or appointed, while for the broader civil service the approach was stricter.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

In relation to other issues of constitutional importance in 2017, the Supreme Court in its Opinion for *Reference 2/2016*¹⁵ examined the matter of positive discrimination. The President referred, under Article 140 of the Constitution, to the Supreme Court for its opinion on the question of whether the Certain Legal Entities of Public Law (Appointment of the Board of Directors) (Amendment) Law of 2016 was inconsistent with the provisions of Articles 28 and 35 of the Constitution as well as with the principle of separation of powers. The amending law under scrutiny endeavored to ensure the representation of at least 30% of persons of either sex on the board of directors of legal entities of public law. The petitioner argued that the referred law violated the principle of separation of powers, as in this way the House of Representatives would interfere with the appointment of a member of the board of directors of legal entities of public law, a power which is vested to the executive. He further argued that the introduction of positive measures in favor of the under-represented sex was contrary to Article 28 of the Constitution (right to equality and non-discrimination), which does not explicitly recognize positive discrimination. The respondent submitted that the law was compatible with Article 28, as it did not dis-

¹³ *References 11,12,14,16/2016, President v. House of Representatives*, 16 March 2017.

¹⁴ The Public Education Office (Amending) Law of 2016, which introduced new Articles 53A and 53B (Reference No. 11/2016), created such obligations on certain educational officers, their spouses and children; the Public Service (Amending) Law of 2016, which introduced new Articles 66A and 66B (Reference No. 12/2016), created such obligations on certain civil servants, their spouses and children; the Army of the Republic (Amending) Law of 2016, which introduced new Article 63A and 63B (Reference No. 14/2016), created such obligations on certain members of the Army of the Republic of Cyprus, their spouses and children; the Law concerning Legal Entities of Public Law (Disclosure and Assets Check) of 2016, and in particular Articles 3 and 4 (Reference No. 15/2016), created such obligations on certain officials of legal entities of public law, their spouses and children; the Police (Amending) (No.2) Law of 2016, which introduced new Articles 23A and 23B (Reference No. 16/2016), created such obligations on certain police officials, their spouses and children.

¹⁵ *Reference 2/2016, President v. House of Representatives*, 05 July 2017.

criminate between equals but introduced a reasonable and non-arbitrary differentiation in the name of public interest. The Court, in a rather vague decision, held that the amending law *sub judice* was in breach of Article 28 of the Constitution and the prohibition of arbitrary discrimination. According to the Court, the respondent failed to justify the reasonableness of the introduced distinction between the two sexes. In any case, the referred law ignored any meritocratic and other objective criteria; therefore, the referred law was unconstitutional and void. The Court also noted that Article 157(4) of the TFEU and Article 23 of the Charter of Fundamental Rights of the EU, which provide for the adoption of positive measures in favor of the under-represented sex, were not applicable, as there was no EU-dimension in the case. The Court relied on the argument that applicants for such posts were to express their interest by submitting a detailed résumé, thus introducing in the process an element of selection on the basis of merit. Positive discrimination would, therefore, amount to an infringement of the principle of meritocracy. Nonetheless, the Court did not discuss the fact that such appointments come within the exclusive competence of the executive and constitute an act of government (*acte de gouvernement*), and as such not judicially reviewable. Moreover, the expression of interest in practice has never had any meaningful role since such appointments are purely political in nature and have traditionally acquired a character that is partly political. Therefore, the reliance on the principle of equality as being violated through the sidelining of meritocracy is unstable given the real and legal nature of the process. In this instance, the Court opted for a formalistic approach that on first sight seems to strengthen the protection of fundamental rights but on closer inspection tends to solidify inequality between the sexes.

IV. LOOKING AHEAD TO 2018

In 2018 there seem to be two main issues so far. First, there is the issue relating the function of the Ministry of Education that was established on the basis of the law of necessity and the scope of its competences. The matter in question was highly political, and the Court's Opinion is of special interest. Second, there is the matter of the privatization process and the constitutionality of the abolition by the legislature of the body created for carrying out that process. Other matters of importance can be expected to rise given the lack of majority by the party supporting the President in the legislature.

In conclusion, in 2017 constitutional adjudication in Cyprus seems to have returned to normality with the Court having to examine constitutional matters that were primarily concerned with the general application of the Constitution and the separation of powers. This return to 'normality' is, however, subject to the qualification that Cypriot constitutional law remains either directly or indirectly a product of a constitutionally abnormal context that remains functional due to the doctrine of necessity. What remains significant is the adherence to the Rule of Law and the strict interpretation of the conditions governing the application of the law of necessity.

V. FURTHER READING

Nothing new to report except:

Emilianides, A., *An Introduction to the Bibliography of Cypriot Law* (2017) (English language edition and Greek language edition)

Kombos, C., *Cypriot Constitutional Law* (Sakkoulas, 2018 forthcoming)

Emilianides, A. et al., *The Republic of Cyprus and the Doctrine of Necessity* (Athens-Thessaloniki: Sakkoulas, 2016) (in Greek)



Czech Republic

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

From the perspective of constitutional law, the year 2017 in the Czech Republic can be interpreted as a slow manifestation of illiberal tendencies in the Czech constitutional system. Symptoms of such tendencies were visible in several areas – unconventional acts of top constitutional officers requiring very creative interpretation of the Czech Constitution, controversial statements of high-ranking politicians relativizing foundations of democracy and rule of law, destabilization of the political system, limitation of public participation through legislation and even a limitation of right to information by a decision of the Czech Constitutional Court. The new approach to relations between the president, government and parliament indicate a possible shift in the basic paradigm of the Czech constitutional system – the parliamentary form of government.

The Czech Constitutional Court did not have the opportunity to contribute significantly to the interpretation of the Czech Constitution regarding the system of separation of powers and check and balances. It rather focused on fundamental rights, which is traditionally the vast majority of its caseload, in the form of individual constitutional complaints. In many decisions, an internal division between progressive and conservative judges was visible. One of the main topics addressed in the Constitutional Court's case law was children's rights and promotion of the best inter-

ests of children, as required by the Convention on the Rights of the Child. It should also be noted that the interpretation of relations among top constitutional bodies was mainly carried out by political representatives, who often used creative constitutional interpretation to further their political goals.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Unlike other countries of the Visegrad group (especially Hungary and Poland, and to some extent also Slovakia), the Czech Republic so far has not experienced democratic backsliding or other developments threatening the quality of liberal democracy. There were some occasional problems, such as conflict of interests of Andrej Babiš, leader of movement ANO 2011, which now dominates the political competition. Andrej Babiš controls one of the biggest companies in the Czech Republic (Agrofert) and served as a minister of finance. Besides Agrofert, Andrej Babiš also controls several newspapers and radio stations. Independent analysis has shown that these newspapers cover Andrej Babiš and his political party more favorably than his political rivals.¹

However, the courts and especially the Constitutional Court, independent media, traditional political parties and civil society were able to protect the fundamental values and principles of liberal democracy. In the

¹ Vilém Besser, *Jak se MFD a LN změnilo po Babišově vstupu do Mafry (How MFD and LN changed after Babiš acquired Mafra)*, available at forum24.cz, published on 9 January 2015, accessed on 25 February 2018, <http://forum24.cz/analyza-jak-se-mfd-a-ln-zmenily-po-babisove-vstupu-do-mafry-zasadne/>

year 2017 this was still true, but some warning signs could be observed indicating that liberal democracy may be at risk.

There were growing verbal attacks on basic principles of democracy and the rule of law – prominent politicians relativized the Roma holocaust, glorified racial violence, denied their accountability or described Islam as a fascist ideology. Even worse, such statements were not universally condemned in public debate. Often they led to relativizing historical truths and inspired many followers.

Another serious shift was the decreasing sensitivity to the criminal behavior of politicians. The current Prime Minister, Andrej Babiš, was criminally prosecuted for subsidy fraud related to use of European funding to build the so-called Stork-Nest-Farm. The scandal was also investigated by the European Anti-Fraud Office, which concluded that the rules for funding were breached and recommended exclusions of that particular subsidy from EU funding. However, this did not prevent Andrej Babiš from winning the election and becoming Prime Minister. We also observed significant changes in the political arena, which can be summarized as the enormous success of populist parties, a decline of traditional parties and deepening division of society. In the election to the Chamber of Deputies held in October 2017, the populist (ANO 2011) and extremist parties (Communist Party of Bohemia and Moravia and movement Freedom and Direct Democracy) acquired 115 out of 200 seats in the Chamber of Deputies, which is just under the 3/5 qualified majority required to adopt constitutional statutes.

Although unlikely, there is now a possibility to create a government composed of the three parties mentioned above. Even without creating a coalition government, these parties cooperate in other ways, for example when electing their members to different committees or offices. By joining their votes, they elected Zdeněk Ondráček as a chair of the parliamentary committee which oversees the General Inspection of Security Forces. He is a former member of the

police force during the communist regime who suppressed peaceful assemblies of citizens in 1989, and is the current deputy of the Communist Party. The public strongly opposed his election, which led to demonstrations and happenings in several big cities. Three days later, Zdeněk Ondráček resigned.

The success of populist politicians continued, when the serving President and supporter of Andrej Babiš, Miloš Zeman, won the presidential election, which took place in January 2018. The anti-immigration rhetoric of fear and strong conflicts within seriously divided Czech society and dominated both electoral campaigns, even though the Czech Republic only accepted 12 Syrian refugees in 2017.

Significant developments were connected with the evolution of the interpretation of the Czech Constitution regarding the creation of the government and its accountability. In the first attempt to create a government after the parliamentary election in October 2017, the traditional parties refused to cooperate with Andrej Babiš, designated by president Zeman to lead negotiations on creating a new government. To expedite the process and to quickly replace the previous government, Andrej Babiš chose to establish a minority single-party government without engaging in complicated negotiations with other political parties. In this situation, it was clear to everyone including Babiš that his government would not acquire the confidence of the Chamber of Deputies.

After an unsuccessful confidence vote, Andrej Babiš resigned, as required by the Constitution. However, President Zeman authorized him to lead the second round of negotiations to establish another government, without any time limitations or requirements of acquiring at least preliminary support of parliamentary parties. This means that the outgoing government will be ruling without parliamentary support for several months at least. Moreover, the actions of Andrej Babiš and Miloš Zeman disregard the fundamental principle of the

parliamentary form of government – the requirement for the government to have the support of the Chamber of Deputies – and pave the road for the transformation of the Czech constitutional system towards a semi-presidential form of government.

Finally, even if the second attempt also fails, Andrej Babiš will most likely lead the third attempt as well because in the third attempt the Prime Minister is nominated on the recommendation of the president of the Chamber of Deputies, who is Radek Vondráček from Babiš's movement ANO. This means we can expect a government not based on the parliamentary majority to govern the Czech Republic for most of 2018.

Considering the extent in which the populist parties are represented in the Chamber of Deputies, it comes as no surprise that debate already started over the bill of the Constitutional Statute introducing general referendum. There are many possibilities on the table, especially regarding the requirements for the popular initiative, the extent of the binding force of referendum and most significantly enumeration of issues that cannot be subject to referendum. A very serious problem that has not been addressed so far is the existence of an eternity clause in the Czech Constitution, which clearly cannot be bypassed even by a referendum. Since the definition of the protected constitutional provision is very vague (essential requisites of democracy and the rule of law), there will hardly be any other option than to submit all questions to approval by the Constitutional Court.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2017, besides already mentioned developments deriving from constitutional practice, constitutional interpretation evolved mainly through decisions of the Czech Constitutional Court. However, there was one notable legislative initiative: the Ministry of Interior prepared a proposal to amend the Constitutional Statute on Security of the Czech Republic by embedding the right

to bear arms as a fundamental right. This proposal was a reaction to stricter regulation of owning and bearing guns debated by institutions of the European Union, creating more leverage for the Czech Republic to keep its current liberal regulations. The bill was passed by the required 3/5 majority in the Chamber of Deputies, but it was rejected decisively in the Senate, mainly because it would not prevent the requirement to implement the EU legislation in this area and would only make it more complicated.

The case law of the Czech Constitutional Court offered several decisions, which are interesting in comparative perspective. Some of them demonstrate an overall positive trend of emphasizing the importance of the best interest of the child for decision-making in various contexts. When reviewing the constitutionality of legislation allowing inspections of heating equipment in homes of individuals, the Czech Constitutional Court balanced the right to privacy and the right to a healthy environment. However, the Court also adopted an interpretation of the right to information, which reduces the so-far achieved level of its protection and limits the control of citizens over public authorities.

Overall, the 2017 case law of the Czech Constitutional Court demonstrated the internal division within the Constitutional Court between the progressive and more conservative judges, which can be observed in many other countries as well. The internal organization of the Court into Plenum, which decides mainly on the constitutionality of legislation, and Senates, which decide mainly on individual constitutional complaints, create an interesting dynamic: in the Plenum, composed of all judges, the conservative majority usually prevails while in some Senates composed of three judges there is a majority of progressive judges. This leads to progressive interpretation and developments in the area of individual rights, but a rather conservative approach to abolishing legislation, with the clashes materializing in the form of dissenting opinions.

The best interest of the child in the 2017 case law of the Czech Constitutional Court

The Czech Republic is a long-standing signatory of the 1989 Convention on the Rights of the Child, which, among others, requires in its Art. 3 para. 1 that the best interests of the child shall be a primary consideration in all decision-making concerning children. In many situations, however, the administrative authorities and even courts fail to do so.

In case No. I. ÚS 3226/16 of 29 June 2017, the Constitutional Court annulled the decision of the Supreme Court, which dismissed the petition of a same-sex couple (of whom one was a citizen of the Czech Republic) to recognize the judgment of a California court declaring them to be parents of a child born to a surrogate mother. In the view of the Constitutional Court, the Supreme Court failed to consider the best interest of the child, which should have been the primary concern in this case, even though the child was not directly participating in the proceeding. If the judgment of the California court was not recognized, it would disrupt the existing family relations and create a risk of the child being separated from its family.

In case No. II. ÚS 2027/17 of 7 August 2017, the Constitutional Court decided on a case of a family tragedy. An otherwise excellent father made a very bad decision one morning in March 2016. After drinking lots of alcohol the previous evening, he decided to drive his wife and two children to puppet theatre. Even though he felt fit to drive, he did not handle the car well and crashed it into a tree next to the road. His wife and older son died in the accident. Later, the driver was convicted of drunk driving and sentenced to four years of imprisonment. Going to prison would essentially destroy the current very strong bond between father and son, who, after the death of his mother and brother, was in fact fixated on his father, and prolonged separation would cause serious emotional trauma. The Constitutional Court concluded that the courts did not properly consider the best interest of the child in this case, which should prevail over the interest on punishing the per-

petrator. Even though the committed crime was serious, the circumstances suggest that applying other types of sentences, such as house arrest or suspended jail time, would be sufficient and at the same time allow to preserve the best interests of the child.

In case No. Pl. ÚS 9/15, the Czech Constitutional Court repealed a provision of law on communal fees, which imposed financial obligations on children without providing the possibility of avoiding them in certain situations. In that particular case, the complainant was required to pay fees for disposal of communal waste, which were imposed on her at the age of 11 years. Due to the inactivity of her parents, she was unable to defend herself in any legal proceedings. After she became an adult, she was subjected to a debt enforcement procedure resulting in a serious negative effect on her economic situation, because over the years the debt increased to a significant amount. The Constitutional Court concluded that it is against the best interest of the child when public authorities impose obligations on children that they are unable to fulfill, resulting in serious limitations of their future life path as adults.

In several judgments from a different context, the Constitutional Court emphasized the requirement to involve children in the proceedings related to their situation, be it custody proceedings (judgment file no. II. ÚS 1931/17) or proceedings regarding financial claims against the child (judgment file no. I. ÚS 3038/16). The involvement should consist not only in informing the child about the proceeding but also hearing the opinion or testimony of the child, where appropriate, regardless of the fact that parents or other representatives may represent the child.

Judgment File no. Pl. ÚS 2/17 of 18 July 2017

A group of deputies requested the Court to annul several provisions of the Act on Air Protection, which allows relevant administrative authorities to inspect one's home if they repeatedly suspect that one violates the Act on Air Protection in heating it. The deputies argued that allowing such inspection

amounts to a disproportionate interference with everyone's right to respect for private life and home under Art. 12 of the Charter. The Court found no violation of the mentioned provision. In the view of the Court's plenum, allowing the inspection of what homeowners use to heat pursued legitimate aims of protecting the environment and health of others. In assessing necessity, it relied on the opinion of the Ministry of the Environment and the expert public that there are no equally effective means which would be less restrictive to the right to respect one's home. In this regard, the Court additionally referred to comparable and similar foreign legislation.

In consideration of proportionality *stricto sensu*, the Court emphasized that the inspection is the last resort in pursuing the environmental and health legitimate aims. It can be carried out only after one gives rise to repeated suspicion of violating the Act on Air Pollution after they have been warned that they seem to be heating unlawfully. The Court added that all homeowners may seek protection with the administrative judiciary if they find the inspection to contradict the law. Besides, the inspection is not as intrusive as a home search in criminal proceedings. Unlike a criminal home search, homeowners can reject the entry of their home. They may face a fine in such a case, but if they do not want the authorities to inspect their home, the inspection – in contrast to the criminal proceedings – will not take place.

For these reasons, the Court found the contested provisions of the Act on Air Pollution proportionate. It observed that the right to respect one's home is not a one-way street. It also implies obligations of homeowners to the outside world. Not polluting the environment or endangering the health of others is one such obligation.

Judgment file no. IV. ÚS 1378/16 of 17 October 2017

This judgment is one of the most controversial of 2017. It concerned a conflict between the right to information and right to privacy. The applicants were public servants who

did not want their salaries to be disclosed to an NGO, which requested them under the Freedom of Information Act. Back in 2014, the Grand Chamber of the Supreme Administrative Court ruled that salaries of public servants should, in principle, be disclosed if one requests their disclosure under the Freedom of Information Act. It noted that the higher a position a particular public servant occupies, the stronger interest exists in disclosing his salary. But it also specified that in the case of lower-position public servants, concrete circumstances of a particular case may outweigh the right to information and lead to rejection of disclosure.

The Court's judgment is noteworthy both for procedural and substantive reasons. The applicants turned to the Court directly after the relevant administrative authority decided not to disclose their salaries. The usual course of action would be to file an administrative complaint with administrative courts. Such constitutional complaint directly to the Court is, principally, inadmissible for non-exhaustion of available remedies. Nevertheless, the Court found that this particular case exceeds the personal interests of the applicants, as it might have general ramifications for every public servant. For that reason, the Court found the application admissible.

We do agree that this case was of wide general interest to other public servants. However, there were no reasons for not allowing the administrative judiciary to have their say on it. In the particular circumstances of the case, we reckon that they might even rule in favor of the applicants (see below). At least, if the Court found the application admissible, it should have asked the Supreme Administrative Court for its observations. It did not. In this aspect, we believe that the Court did not respect the appropriate level of judicial courtesy one would expect.

Besides, the Court accepted an *amicus curiae* brief by a law professor who happens to also be an attorney of public servants in similar cases where they requested non-disclosure of their salaries. He was in a blatant conflict of interest. The Court cited his observations verbatim, only adding that it

agrees with him. Such "outsourcing" of the Court's reasoning cannot be regarded as a model legal writing technique.

When it comes to the merits of the case, the Court made two errors in our opinion. First, it tackled a non-existent problem. It could have been written better, but it stemmed from the aforementioned judgment of the Supreme Administrative Court's Grand Chamber that administrative authorities deciding on requests for information should engage in proportionality assessment between the right to information and right to privacy of public servants. As mentioned above, administrative courts might rule in favor of some of the applicants even under the Supreme Administrative Court's case law. Nevertheless, the Court did not think so and felt the need to state the importance of proportionality more clearly. That would not be such a problem if the Court did not make the second error.

The Court applied the Magyar Helsinki Bizottság v. Hungary judgment of the European Court of Human Rights. That would be OK if Czech constitutional law did not provide a much higher standard of protection of the right to information than Article 10 of the European Convention on Human Rights. The Court wholly overlooked the complicated development of information rights case law on Article 10. It did not realize that unlike other human rights documents, including our national Charter, Article 10 does not expressly provide the classic right to access of information. There is no freedom to seek information in the text of Article 10. The case law of the Strasbourg court varied on this issue, and therefore its Grand Chamber had to make it all clear and stated that such a right is guaranteed. However, the European Court of Human Rights had to be very reserved in the absence of clear text and cautious developments towards classic information rights. That is why it held itself back in defining the extent of positive obligations stemming from this right, and why it said in the judgment (§ 156) that "The right to receive information cannot be construed as imposing on a state positive obligations to collect and disseminate information of its own motion." More-

over, it came with a test consisting of four “threshold criteria” to better define the circumstances under which denial of access to information constitutes an interference with Article 10 rights in a given case.²

However, Czech constitutional law has a very specific provision in the Charter to the contrary. The first sentence of Article 17 (5) states: “State bodies and self-governing territorial bodies are obliged, in an appropriate manner, to provide information on their activities.” The magical aspect of the right to access to information in our constitution is that everyone is entitled to it. Everyone has a chance to control the activities of state bodies using an information request. As the Supreme Administrative Court mentioned in its now obsolete judgment, because of the right to information, there is no “us vs. them.” Everyone can participate in controlling the state; no one may be excluded.

But the Court “transplanted” the Magyar Helsinki Bizottság test, which does exclude certain individuals from receiving information. Having to prove the purpose of the information requested and the role of the applicant decreases the standard of information rights that Czech law has previously reached. Not only does this consequence contradict previous case law of the Court, which is why the relevant chamber should have relinquished its jurisdiction to the Plenum of the Court, but it may be even regarded as dangerous at a time when liberal democracy seems to be standing on clay legs, as one Czech saying goes. We only hope that there will be another case that will allow the Plenum to overrule this procedural and substantive excess. Members of the Czech government noted that they intend to amend the Freedom of Information Act in accordance with the findings of this judgment. That would amount to nothing less than emptying the substance of the right to access of information.

IV. LOOKING AHEAD TO 2018

In 2018, there will be several issues of interest and great importance for the future shape of the Czech constitutional system. The current composition of the Chamber of Deputies strongly supports the idea of introducing the general referendum in the Czech Republic. The parliamentary debate over the Constitutional Statute introducing it already started at the beginning of 2018 and focuses on quorum, eligible questions, the role of the Constitutional Court and the extent of binding consequences of the referendum.

One of the most important cases pending in the Czech Constitutional Court is a constitutional review of the amendment of the law on construction and law on protection of nature and landscape, which significantly reduced public participation in proceedings related to these areas. A group of senators challenged this amendment, claiming that it limits procedural rights and political rights, but also violates international obligations stemming from the Aarhus Treaty.

It will also be interesting to observe further developments in the process of establishing the government and criminal prosecution of Prime Minister Andrej Babiš. Based on developments so far, we may expect erosion of the basic principle of the parliamentary form of government – the requirement for the government to obtain the confidence of the Chamber of Deputies.

V. FURTHER READING

Marek Antoš, ‘*Současné ústavní soudnictví: nepravý dědic Hanse Kelsena?*’ [2017] 5(2) Jurisprudence 36-41

David Kosař, *Judicializace justiční politiky Evropským soudem pro lidská práva* (Wolters Kluwer 2017)

David Kosař, ‘*Politics of Judicial Independence and Judicial Accountability in Czechia: Bargaining in the Shadow of the Law between Court Presidents and the Ministry of Justice*’ [2017] 13(1) European Constitutional Law Review 96-123

Jan Kysela, ‘*Poznámky ke stavu oboru ústavního práva a státovědy*’ [2017] 25(3) Časopis pro právní vědu a praxi 375-390

Tereza Papoušková and Jan Papoušek, ‘*Ústavní soudci v kvantitativní perspektivě*’ [2017] 25(1) Časopis pro právní vědu a praxi 73-92

² The criteria are: a. The purpose of the information requested: contribution to a public debate, b. The nature of the information sought: public interest nature, c. The role of the applicant: social watchdogs and alike, d. Whether the information is ready and available to the public authorities.



Ecuador

THE STATE OF LIBERAL DEMOCRACY*

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I. INTRODUCTION

The year 2017 was dominated by the presidential election and by the ensuing change in political leadership of the country. In 2007, Rafael Correa had ascended into power after a decade of aggravated instability. President Correa was the leader of the left-wing Alianza, and after two and a half terms, he decided not to run in the 2017 elections. This raised the stakes for both the governing party and the opposition, and it posed a question about whether Ecuador would follow the region’s recent swing towards right-leaning governments.

After the election, the main topics to look at were the fight against corruption and abuse of the popular referendum as well as issues on freedom of speech, independence of the judiciary and mass deportations of immigrants. Looking ahead to next year, uncertainty dominates the horizon. On the one hand, Correa’s authoritarian ruling style has given way to Moreno’s call for dialogue, but Ecuadorians are still expectant to its fruits. On the other hand, there is a great deal of apprehension about the outcome of a highly controversial referendum on indefinite reelection of the President, “civil death for the corrupt,” among other topics.

The year 2017 did not mark a major change in the country’s level of liberal democracy. Earlier, Ecuador’s constitutional regime had been characterized as “abusive constitutionalism”¹ and as “plebiscitary presidency.”² This year’s events still demonstrate the lack of both strong institutions and of a culture of rule of law. Nevertheless, there seems to be slight changes³ in areas such as freedom of the media, investigation of corruption and less political intervention over the judiciary.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

1. *The Constitution and the Constitutional Court*

The current Ecuadorian Constitution⁴ was adopted in 2008. The call for a constituent assembly required a series of political moves by President Correa over the Supreme Electoral Tribunal, Congress and the Constitutional Tribunal (CT).⁵ The constitution-making procedure started with a presidential decree in 2007 that called for a plebiscite on the formation of a Constituent Assembly. The institution of a Constituent Assembly

¹ David Landau, ‘Abusive Constitutionalism’ (2013) 47 UC Davis Law Review 189, 207.

² Catherine M. Conaghan, ‘Ecuador. Correa’s Plebiscitary Presidency’ [2008] J. Democracy 47-48

³ Freedom in the World, Annual Report of Freedom House [2018].

⁴ Constitution of the Republic of Ecuador. Official Registry No. 449. October 20, 2008.

⁵ Augustin Grijalva, ‘Courts and Political Parties: The Politics of Constitutional Review in Ecuador’ (unpublished PhD dissertation, University of Pittsburg) 151-158.

* We are thankful for the members of the Constitutional Reasoning Research Group and for the academic community of the Law School of the University of San Francisco de Quito for their help and for their useful comments; however, the responsibility regarding the final text is only ours.

was unknown for the previous Constitution of 1998 and that was the reason why the Supreme Electoral Tribunal and the Congress hesitated to approve the call for the plebiscite. In February 2007, as a result of strong political pressure by the President, the call for a plebiscite was approved. Nevertheless, the political crisis continued, and by April 2007 the members of the CT and almost all the opposition members from Congress had been removed from office.

The Ecuadorian people were called to vote two times during the process of enacting the 2008 Constitution. First, Ecuadorians had to elect the members of the Constituent Assembly in April 2007, then they had to adopt or reject the entire text of the new Constitution via referendum in September 2008. One of the distinctive features of the new Constitution is that it was born through – and now ensures – enhanced forms of popular participation. The new Constitution also purports to develop a distinctive Andean constitutional ideology through the Quechua notion of *sumak kawsay* (good living).⁶ In that vein, supporters of the new Constitution argue that it introduced a change of paradigms and “overcame” what they consider as an outdated liberal constitutional model.⁷ Nevertheless, the extent to which this is true is often the subject of heated debate.⁸ A number of Ecuadorian legal scholars have pointed out that the 2008 Constitution was doomed not to live up to the “naïve” expectations of its promoters.⁹ Instead, it is asserted that the

constitutional changes weakened traditional principles of the rule of law and accountability. It crippled the legislature by assigning its powers to the Council for Public Participation and Social Control and thus the new Constitution set the stage for the authoritarian government by President Correa and his political movement, *Alianza País*.

With regard to the institutional design, the 2008 Constitution added two additional branches of government (i.e., the branch of Transparency and Social Control as well as the Electoral branch). The Constitution also replaced the CT with a Constitutional Court (ECC) that has nine justices appointed with non-renewable terms. The ECC is in charge of the judicial review and other unprecedented forms of constitutional control¹⁰ – including the declaration of unconstitutional omissions – that the extinct CT did not have. An important part of those powers is related to hearing a myriad of judicial remedies that are of crucial importance in the new constitutional scheme and its extended catalogue of rights. The ECC is also the final arbiter on conflicts of competences, and it is called to rule a priori on the constitutionality of different courses of action that other branches of government may adopt (e.g., ratification of treaties, the dissolution of the National Assembly by the President, the impeachment and resignation of the President, constitutional reforms, draft legislation and calls for popular referendums).¹¹ In practice, the ECC invests most of its time¹² hearing

judicial remedies of extraordinary protection that concern allegations of constitutional rights violations within ordinary judicial processes. It is also noteworthy that the new Constitution assigned to the ECC the role of final interpreter of the Constitution,¹³ which used to be the prerogative of the legislature.¹⁴

Alas, the legitimacy of the ECC was manhandled from the beginning. When the 2008 Constitution entered into force, it provided for a transitional regime, which allotted temporary powers to institutions that underwent significant changes in the new Constitution. This regime did not allot any transitional powers to the CT, which created a serious void in the basis of its legality. In spite of this, the members of the CT assumed the full powers granted to the new ECC.¹⁵ It is also important to recall that in 2007 the members of the CT had been questionably removed and replaced by appointees that were obsequious to the regime. Even when the ECC left this initial turmoil behind, the ECC could not build up its legitimacy mainly because of its unreserved deference to the executive power and the lack of coherent legal reasoning.

2. Elections

Every four years, Ecuadorians elect the President and Vice-President as well as legislators and representatives to the Andean Parliament.¹⁶ It is obligatory to exercise the right to vote for every Ecuadorian older than

⁶ See Roberto Viciano Pastor and Rubén Martínez Dalmau, ‘Fundamentos teóricos y prácticos del nuevo constitucionalismo latinoamericano’ (2011) 48 *Gaceta Constitucional* 307, 313.

⁷ See Ramiro Ávila, Santamaría, *El constitucionalismo transformador. El estado y el derecho en la Constitución de 2008* (OTROS UASB Abya-Yala 2011).

⁸ David Landau, ‘Abusive Constitutionalism’ (2013) 47 *UC Davis Law Review* 189, 207.

⁹ See, for example, Juan Pablo Aguilar Andrade, ‘Neoconstitucionalismo en el Ecuador una Mirada al Jurista Ingenuo’ (2013) 15 *Iuris Dictio* 59.; Rodrigo Uprimmy, ‘The Recent Transformations of Constitutional Law in Latin America. Trends and Challenges’ (2011) 89 *Texas Law Review* 1587; Roberto Gargarella, ‘Old Wine in New Skins’ in Armin von Bogdandy, et al (eds), *Transformative Constitutionalism in Latin America, The Emergence of a New Ius Commune* (OUP 2017).

¹⁰ Constitution, Art. 429 and 436.

¹¹ Constitution, Art. 436.

¹² The ECC has decided around 3000 cases so far, out of which 1942 were actions of extraordinary protection. <http://portal.corteconstitucional.gob.ec:8494/Grafos.aspx?opcion=relatoria&provincia=&anio=0>

¹³ Constitution, Art. 429.

¹⁴ Constitution of 1998, Art. 284.

¹⁵ In order to resolve the constitutional void, the ECC emitted a resolution (No. 451, October 22, 2008), in which they proclaimed themselves as justices of the ECC and decided to enforce the rights and guarantees contained in the new Constitution. The “Transitional Period” of the ECC ended in 2012, when all the members of the ECC were formally reelected by the Congress.

¹⁶ Organic Law on Elections [Ley Orgánica Electoral], Art. 89 and Constitution, Art. 143.

18 years old. In order to be elected in a single round, a presidential candidate must receive at least 40% of the valid votes and mark 10 percentage points from second place. Otherwise there shall be a second round between the candidates who received the two highest numbers of votes. The second round is decided by absolute majority.¹⁷

In the case of presidential election of Ecuador on February 19, 2017, Lenin Moreno, former vice president of Rafael Correa and candidate of the governing party, won the first round (with 39.4 percent), but it was not enough to decide the election in a single round. Moreno and the runner-up, Guillermo Lasso (28.1 percent), the center-right opposition candidate, went to a second round amidst strong allegations of electoral fraud due to the lack of efficiency and transparency of the authorities of the Electoral branch of government.

The allegations of electoral fraud extended over the results of the second round, and they aggravated the already heated electoral climate. Candidates of the opposition often rejected the unbalanced conditions in which they had to run against the candidates of the ruling party, *Alianza País*. The constitutionality and fairness of the Organic Law on Elections had often been questioned, but in all cases the ECC ruled in favor of the law as it was defended by the government.¹⁸ The main concerns that arose from the law were in regard to its deference to *Alianza País* through the organization of electoral districts, the method for allocating seats in collegiate organs, including the National Assembly, the control over expenditures during electoral campaigns, the obstacles it poses for registering candidacies and new political movements and the limitations on the freedom of the media during electoral campaigns.

The second round of the presidential elections was held on 2 April 2017, according to which Moreno won with 51.11 percent of the votes, while Lasso got 48.89 percent of the valid votes. Protests against the election's outcome continued to stir up public discourse throughout April. *Alianza País* started a criminal procedure against Ángel Polibio Córdova, CEO of the Ecuadorian polling company CEDATOS, whose data was the main evidence for the opposition to contest the official results. Lenin Moreno took the oath of office on 24 May 2017.

Although general elections were held and results finally proclaimed and accepted, this episode rather weakened the level of liberal democracy than strengthened it. On the one hand, the lack of transparency and reasoned decisions in the electoral procedures reflected the imminent failure of the constitutional design of the Electoral branch of government. On the other hand, constitutional analysis (by the judiciary and academia) played an almost non-existent role throughout the events, in spite of the grave accusations against the legal framework for the elections.

3. Corruption

The debate on the best institutional design for anticorruption institutions has been a prevalent topic since at least 1997.¹⁹ Every political crisis and ousting of Presidents in recent history has involved corruption scandals. In terms of constitutional design, the debate has focused on whether there shall be an institution to oversee all anticorruption efforts, or if that would undermine the powers of classical authorities of control such as the Office of the Attorney General, the Comptroller General, the Ombudsman and the courts.

Since March 1997, the first thesis has prevailed. First, a presidential decree created the Commission for the Civic Control of Corruption (CCCC),²⁰ which was then incorporated into the 1998 Constitution.²¹ The CCCC was suppressed in 2008, but it gave way to the creation of the fifth branch of government in the 2008 Constitution.²²

During the government of President Correa, the anticorruption work of the Transparency and Social Control branch of government was almost unnoticeable. In 2016, the former members of the CCCC gathered again as a civil society organization and issued a report with compromising information about the General Comptroller, who in turn filed a lawsuit for libel against the members of the CCCC. In April 2017, a court decided in favor of the plaintiff and sentenced the members of the CCCC to prison (most of them are over 70 years old). Due to the general outrage caused by the sentencing, President Correa intervened and requested to remove the criminal charges.

Once in office, Lenin Moreno had to remedy the decade-long inactivity of the Transparency and Social Control branch of government – even more so in the midst of the corruption scandal of the Brazilian construction company Odebrecht that swept through Latin America and brought charges against many governmental officials in the region. In Ecuador, there were corruption charges against the uncle of the Vice-President, against the Vice-President himself and the Comptroller General, to name some examples. Some of these charges had been first brought up – with plenty of evidence – years ago by journalists who had to flee the country in order to avoid criminal charges of libel.

In order to respond more systematically to

¹⁷ Constitution, Art. 143.

¹⁸ For example, Sentence No. 019-15-SIN-CC, ECC (on the unconstitutionality of the method for allocating seats in collegiate organs), and Sentence No. 028-12-SJN-CC, ECC (on several unconstitutional allegations, including one on the amendment to article 203 of the law regarding restriction on the freedom of the media during general elections).

¹⁹ Juan Pablo Aguilar, 'Compromiso político y organismos de control' (2007) FORO No.7. UASB-CEN <<http://repositorio.uasb.edu.ec/bitstream/10644/1670/1/RF-07-TC-Aguilar.pdf>> accessed 1 March 2018.

²⁰ Executive Decree 107-A, Official Diary [Registro Oficial, R.O.] 19, March 10, 1997.

²¹ Constitution of 1998, Art. 220 et seq.

²² Constitution, Art. 204 et seq.

political and social unrest caused by the number of corruption accusations, President Moreno created the Front for Transparency and Fight against Corruption via a presidential decree. By the end of 2017, the highest-ranking government official to be convicted was the former Ecuadorian Vice-President, Jorge Glas Espinel. The former Comptroller General fled to Miami in order to avoid criminal prosecution. According to the charges, Vice-President Glas received \$13.5m in bribes by Odebrecht. In the course of the criminal investigation, the National Assembly kept postponing the vote on impeachment; meanwhile, President Moreno withdrew any official assignment from Vice-President Glas²³ and thus put pressure on him to waive his immunity. Once Glas was convicted, the National Assembly never held the impeachment hearing, but appointed to the Office of the Vice-President María Alejandra Vicuña, former minister for Urban Development and Housing, in October.

The Anti-Corruption Front did not have investigatory powers, but it did have the competence to propose strategies and preventive mechanisms, and urge concrete action if needed. By the end of 2017, the Anti-Corruption Front did not make public any report or recommendation. Yet, its existence was a clear statement on the ineffectiveness of the Transparency and Social Control branch of government and of the lack of independence of the judiciary during the government of Correa.

4. Referendum on indefinite reelection of the President and Council for Public Participation and Social Control

The political struggle between the former President and the actual President has set the background for the forthcoming plebiscite and a referendum to amend the Constitution. After President Moreno submitted the questions of the referendum, the ECC had 20 days²⁴ to rule on questions of admissibility.²⁵

In case the ECC does not issue a resolution within the deadline, the questions shall be deemed approved. Only two of the seven questions bear direct relevance to the rise or decline of liberal democracy in Ecuador, namely the questions on indefinite reelection and on the restructuring of the Council of Citizens' Participation and Social Control.

Originally, the 2008 Constitution provided for one reelection for the President. In 2015, Rafael Correa sponsored a referendum to amend the Constitution and allow indefinite reelection for the President. The ECC ruled that the referendum was admissible, and that indefinite reelection may enhance the right to vote by broadening the options of the electorate. President Moreno's referendum seeks to return to the original rule and outlaw indefinite reelection for any office. The ECC shied away from the uncomfortable question that might have put it at odds with its previous decision or decide against the ruling President of *Alianza País*. In the end, the ECC ducked the decision by letting the 20-day deadline pass. The referendum was set out for February 4, 2018 without a word on its substantial or formal constitutionality.

The question on the Council of Citizens' Participation and Social Control seeks to remove from office its present members, supposedly for political reasons such as its extensive powers to oversee, remove and appoint officers in key public positions. Whether the new members will be independent and fulfill their constitutional mandate, or if they will serve as political tools for the persecution of political opponents remains to be seen in 2018. In any case, this question is not about strengthening liberal institutions but about a change of political agenda.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Communication and freedom of expression

The topic of freedom of expression and media has been a neuralgic point in Ecuadorian constitutional developments for years. In 2013, the National Assembly adopted the Organic Law on Communication and created the Council of Regulation and Development of Information and Communication (CORDICOM). CORDICOM's task was to tackle violent, explicitly sexual or discriminatory messages and to hold the press and the media accountable as well as regulate and protect the rights of communication recognized in the Constitution.²⁶ Concrete cases show, however, that the safeguards and guarantees declared in the law on communication have been ignored.

In 2016, the Organic Law on Communication was reformed, and it added a new power to CORDICOM (i.e. to issue binding reports regarding the adjudication or concession of radio frequencies). Later on, in 2017, this was the source of public discontent and protests, as its decisions on frequency assignments were inconsistent and biased towards the interest of President Correa and his allies. Fundamedios, a nongovernmental organization, reported that there were nearly 500 cases related to the violation of freedom of expression in 2016, including frivolous charges against journalists, censure and retaliation.

It is widely known for lawyers that courts receive direct orders from the executive power, and that disobedient judges are removed by the Council of Judiciary, especially in cases that touch upon the interest of the government. President Correa had a reputation before international human rights bodies for keeping media under pressure. For instance, in the Bonil case, a caricature that denounced the abuse of power of the government was censored by the newly created Superintendence of Information and Communication. In other cases, journalists were sentenced to

²³ Presidential decree No. 100 (August 3, 2017). In order to justify this decision, the President refers to his power to "assign duties to the Vice President," and regarding public policy and public administration.

²⁴ Ley orgánica de garantías jurisdiccionales y control constitucional [Organic Law on Judicial Remedies and Constitutional Control], Art. 105.

²⁵ Constitution, Art. 104.

²⁶ Constitution, Art. 66 para. 6.

years of prison for slander, although some were granted presidential pardon. This strategy for chilling down the press and the political opposition seemed to have slackened a bit since Moreno was sworn into office. The case of Martin Pallares, a journalist of one of the main opposition news portals, represents this slight change. He was sued by President Rafael Correa in 2016 for an article where Pallares described Correa as a thief – in a reference to the corruption scandal of Odebrecht. The charge against Pallares was slander. His trial took place in 2017, when Correa was no longer in office, and Pallares was acquitted in the first and second instance.

Nevertheless, years of distorted case law on freedom of expression threatens to affect other facets of social and political life. When the National Assembly was debating a bill on prevention and eradication of violence against women, large demonstrations were organized simultaneously in more than 20 cities against what was perceived as an unconstitutional intrusion into the freedom of parents to decide on the moral education of their children. The bill included provisions that would mandate that public and private schools alike teach sexual education on the basis of gender theory. The marches were organized by Catholic and Evangelical activists and were supported by the Ecuadorian Conference of Bishops and by Evangelical Pastors. LGBTQ activists and civil organizations sued the Bishops and Pastors, asking for the protest to be censored and claiming that the demonstration had called forth hatred against the LGBTQ community and had incited discrimination and violence. The plaintiffs' petition was dismissed in the first instance,²⁷ not because it was at odds with freedom of expression but because of the lack of evidence of the threat or damage and a link between the hateful posts and the Bishops and Pastors.

2. *Personal identity*

The ECC ruled in favor of a transsexual person who filed a constitutional action against an ordinary court's decision alleging the right to change her sex in file at the Civil Registry.²⁸ The ECC also decided in favor of an adolescent who filed a petition because he was not allowed to change his family name. The ECC declared that the right to personal identity was violated by demanding proof of a family relationship for the name change and obliged the Civil Registry to register the new family name without asking for further documentation.²⁹

3. *Vulnerable groups*

The text of the 2008 Constitution lays special attention to the protection of vulnerable groups.³⁰ In 2017, the ECC decided cases in favor of people with disabilities in cases regarding tax exemptions³¹ and in favor of patients suffering from terminal illnesses, whose medications were withdrawn from the list of medical treatments guaranteed by social security.

4. *Discrimination*

The ECC decided in favor of a man who was fired from the Ecuadorian military forces because he had a child out of wedlock. The ECC declared that the right to human dignity, the right to work and the principle of equality had been violated by the armed forces.³²

5. *Refugee rights*

The Constitution of 2008 declares the principle of universal citizenship.³³ Nevertheless, Ecuador has a contradictory record of violations of refugee rights. In 2016, Ecuador received many Cuban refugees, the majority

of whom were victims of mass expulsions. As far as civil organizations reported it, there were serious violations in due procedure and to the principle of non-refoulement. This pattern continued in 2017 against Venezuelan refugees.

IV. LOOKING AHEAD TO 2018

Political instability and further investigation of corruption continue to be among the top concerns in public discourse and in everyday politics. On the level of constitutional developments, the results of the referendum may change the Constitution for the third time in less than 10 years.

Furthermore, Ecuador could face international legal consequences because of possible violation of the American Convention on Human Rights by removing members of the Council of Citizens' Participation and Social Control.

For years, the ECC has dragged in its docket highly divisive but urgent cases on the definition of marriage, on the limitations of freedom of association, child support and child custody. In 2017, the ECC has signaled its willingness to put into practice the lengthy catalogue of constitutional rights, but it still looked reluctant to take independent decisions against the priorities of the government. It remains to be seen if in 2018 the ECC starts living up to its constitutional design and start deciding sensitive cases independently, in a timely fashion and with a coherent jurisprudence.

V. FURTHER READING

María Inés Arévalo Jaramillo and Santiago

²⁷ Sentencia 17240-2017-00009, Tribunal Penal del Complejo Judicial de Quitumbe.

²⁸ Sentence No. 133-17-SEP-CC, ECC.

²⁹ Sentence No. 341-17-SEP-CC, ECC.

³⁰ Constitution, Art. 35.

³¹ Sentence No. 019-17-SIN-CC, ECC.

³² Sentence No. 057-17-SEP-CC, ECC.

³³ Constitution, Art. 416 "It advocates the principle of universal citizenship, the free movement of all inhabitants of the planet, and the progressive extinction of the status of alien or foreigner as an element to transform the unequal relations between countries, especially those between North and South."

Basabe-Serrano, 'La democracia en Ecuador: déficit institucional y conservadurismo social (1979-2016)' in Godofredo Vidal e la Rosa (ed.), *Política latinoamericana contemporánea* (Ciudad de México: Universidad Autónoma Metropolitana, 2017) 391-417

Claudia Storini, *Constitucionalismo y nuevos saberes jurídicos: Construcciones desde las diversidades* (UASB 2017) 488

Paúl Córdova Vinueza, *Justicia dialógica para la última palabra. Por una argumentación deliberativa entre los jueces, la ciudadanía y las Cortes* (Corporación de Estudios y Publicaciones, 2017)



Egypt

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 was a hot year in Egypt concerning liberal democracy. While many controversial developments had a negative impact on the determinants of the rule of law and the application of the constitution, some other events brought hope for the future, which 2018 will have a great deal defining. These developments relate to the superiority of the constitution, separation between powers, judicial independence, the president's powers, state of emergency and gender equality. The significant developments in these different aspects will be discussed in different parts of the report. However, it shall be noted that due to space limits, there are details beyond the scope of this report. These details are, however, available by the author upon request.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

On top of constitutional politics come the calls to amend the current constitution of 2014. These calls were launched by a number of parliament members in August 2017, including the head of the parliament.¹ The

articles that should be amended according to these calls varied. The most prominent proposed amendment among them² was the extension of the presidential term from four years, according to article (140) of the 2014 constitution, to six years.³ The proposed amendment raised debates and negative feedback by the politicians and constitutional lawyers in Egypt.⁴ The reason is that limiting the term of the presidency was one of the most important demands of the Egyptian revolution, and is seen as one of the cornerstones of the constitutional democracy. The members who called for the amendments defended their initiative, claiming that the 2014 constitution was drafted under unstable circumstances that led to provisions that are not responsive to current challenges and needs.⁵ Calls for the extension to the term of the presidency came during the last months of president El Sisi's first term, before the new presidential election expected in March 2018. Although the addressed parliament members affirmed that at least six articles were to be presented to the parliament in October 2017 for amendment,⁶ there were no further formal developments as of March 2018.⁷

Away from amending the constitution itself, the judiciary had the most significant share

¹ Christine Bell, 'Foreword: Special Issue: Constitution-Making and Political Settlements in Times of Transition' (2017) 6 *Global Constitutionalism* 12

² The other proposed amendments will be referred to under Part III of this report.

³ Salah Eisa, 'مويلا يرصد ل'روتسدلا ليدعت يثالث' (مويلا يرصد ل) (2017) <<http://www.almasyalyoum.com/news/details/1175509>> accessed 27 February 2018.

⁴ Hagar El Desouky, 'مويلا يرصد ل'روتسدلا ليدعت يثالث' (مويلا يرصد ل) (2017) <<https://al-ain.com/article/argument-egypt-parliament-constitution>> accessed 26 February 2018; Mohamed Salem, 'جارتقا' (2017) <<http://gate.ahram.org.eg/News/1563380.aspx>> accessed 26 February 2018; Eisa.

⁵ The Associated Press, 'Egypt's Moussa Rejects Calls to Extend Presidential Terms' (ABC News, 2017) <<http://abcnews.go.com/amp/International/wireStory/egypts-moussa-rejects-calls-extend-presidential-terms-49178793>> accessed 26 February 2018; Eisa; El Desouky.

⁶ Eisa; Salem; El Desouky.

⁷ Salem; El Desouky.

of constitutional debates in 2017.

Starting with the amendments of the judicial authorities' laws by a bill first introduced by the Egyptian parliament in December 2016.⁸ The amendments included changes to the mechanism of selecting the heads of the judicial authorities in Egypt. These judicial authorities, according to the third, fourth and fifth chapter of the Egyptian constitution of 2014, include the following: First, the general judiciary headed by the chief justice of the court of cassation, who is also the chief of the supreme judicial council. Second, the administrative judiciary (or the state council), which is headed by the chief justice of the supreme administrative court. Third, the state lawsuits authority. Fourth, the administrative prosecution. Fifth, the supreme constitutional court. Among these authorities, only the supreme constitutional court and the general prosecution have detailed mechanisms for selecting their heads in the articles (193) and (189) of the 2014 constitution.⁹ The selection of the heads of the other judicial authorities is left to the relevant laws. However, the 2014 constitution affirmed the independence of all the judicial authorities in articles (186), (190), (191), (196) and (197). The law number (46) of 1972 of the judicial authority (the general judiciary and prosecution) stated in article (44) that the appointment of judges is made upon a decision by the president. The same article stipulates that the chief justice of the court of cassation is to be appointed among the vice chiefs after consulting the supreme judicial council. Article (83) of the law number (47) of the year 1972 of the state council states that the chief of the state council is to be ap-

pointed by a decision of the president among the vice chiefs of the council after consulting a special general assembly formed within the council itself. Articles (16) of the law number (75) of year 1963 of the state lawsuits authority and (35) of law number (117) of year 1958 of the administrative prosecution authority also regulate the appointment of their heads in a similar manner. The only changes are in the names of relevant judicial inter-authorities. It has been a tradition since the start of the work of the judicial authorities in Egypt that appointments and promotions be made on a mere seniority basis as the only neutral mechanism that can avoid any fragmentations or competitions between judges or interference from outsiders.¹⁰ It has also been part of tradition that the approval of the president on the nomination sent to him by the relevant judicial authorities is just a matter of formality required by the constitution and the law.¹¹

However, law number (13) of the year 2017 issued by the Egyptian parliament on April 27, 2017, modified the articles above changing the mechanism of the appointment of the heads of the judicial authorities, except for the supreme constitutional court and the public prosecution, for obvious reasons. The new mechanism is the same for all four authorities with the only differences in the titles of the different inter-authorities and positions. According to this new mechanism, the head of the relevant judicial authority is to be selected and appointed by the president among three nominations sent to him/her by the relevant supreme council of each judicial authority. These nominations have to be among the most senior seven vice chiefs of

the judicial authority. In case the relevant judicial authority did not send its nominations within the term mentioned in the law, or in case it sent less than three nominations, or the nominations were not according to the aforementioned conditions, the president shall appoint the chief of the judicial authority among the most seven senior vice chiefs of this authority.

These new amendments raised many concerns and objections before and after their issuance for many reasons.¹² First, the new law gives the president more discretionary power in selecting the heads of the judicial authorities which threatens the internal stability and independence of these authorities. Second, the procedures which were taken in discussing and delivering the new law were suspicious. The law was issued despite all the objections from different politicians, judicial authorities, NGOs and constitutional lawyers.¹³ According to article (185) of the 2014 constitution, the relevant judicial authorities should be consulted before delivering laws that regulate their affairs, which did not happen.¹⁴ Article (190) of the constitution also requires consulting the state council on bills, and the council explicitly rejected the bill.¹⁵ Article (158) of law number (1) of year 2016 of the internal regulation of the house of representatives affirms these principles as well. Third, the timing of the amendments was just before the expected time of appointing the new chief justice of the state council, who should have been Justice El Dakroury, the same judge who delivered a decision against the government in the well-known case of the borderlines between Egypt and Saudi Arabia.¹⁶ In May 2017, the

⁸ The Egyptian Parliament, 'أولاً يغير شرط لصفاء، بـأونـالـ سلـجم قـرـن' (2017) 70; The Egyptian Parliament, 'أولاً يغير شرط لصفاء، بـأونـالـ سلـجم قـرـن' (2017) 71; The Egyptian Parliament, 'أولاً يغير شرط لصفاء، بـأونـالـ سلـجم قـرـن' (2017) 66.

⁹ According to the same article the general prosecution is part of the judiciary.

¹⁰ Yussef Auf, 'The Battle Over Appointing Judges in Egypt' (د. sada, 2018) <<http://carnegieendowment.org/sada/75274>> accessed 27 February 2018.

¹¹ *ibid.*

¹² PRESSTV, 'Egypt's President Endorses New Legislation Granting Him More Powers' <<http://www.presstv.com/Detail/2017/04/28/519753/Egypt-Sisi-legislation-judicial-appointments>> accessed 27 February 2018.

¹³ Auf.

¹⁴ *ibid.*; PRESSTV; ahramonline, 'Egypt's State Council Presents Parliament with Report Rejecting Judicial Councils Law' (2017) <<http://english.ahram.org.eg/NewsContent/1/64/263059/Egypt/Politics-/Egypt-States-Council-presents-parliament-with-repo.aspx>> accessed 27 February 2018.

¹⁵ Auf, '«الودلى يضيف»' (2017) <<https://manshurat.org/node/21964>> accessed 27 February 2018.

¹⁶ Auf.

state council sent the name of El Dakroury to the president as a single nomination to be the chief of the council. This nomination was overridden by a subsequent decision of El Sisi appointing the fourth senior vice chief of the supreme administrative court, which raised assumptions of issuing these amendments only for excluding El Dakroury from heading the state council.¹⁷ The battle over the new law is still going. Both El Dakroury, and Counselor Mohamed Madi, who was supposed to be the new chief of the authority of state lawsuits according to the old law, challenged the president's decision.¹⁸ They also challenged law number (13) of 2017 before the supreme constitutional court,¹⁹ which is expected to decide the case in 2018. It is to be noted that according to article (121) of the constitution, the laws regulating the judicial authorities are considered constitutional complementary laws.

The second battle between the government, the parliament and the judiciary over constitutional politics was on the international treaty that the Egyptian government signed back in 2016 with Saudi Arabia to remark the maritime borders between the two states, moving the sovereignty over the Red Sea islands Tiran and Sanafeer to Saudi Arabia. The Egyptian government alleged that the two strategic islands were always Saudi despite Egyptian guardianship.²⁰ The treaty incited confusion, anger and protests throughout Egypt.²¹ Afterward, a case was

filed against the government before the state council, which decided that signing the treaty was null and void because it was made by an incompetent authority. This decree was affirmed by a final decree from the supreme administrative court. The government represented by the state lawsuits authority challenged the decree before an incompetent court of urgent matters in Cairo, which caused the cease of the administrative court decree execution. The state lawsuits authority also filed a case before the Supreme Constitutional Court to challenge the decrees of the state council on the basis that it did not have the competence to decide an international treaty. The supreme constitutional court ceased the execution of all the contradictory decrees and is expected to deliver its decision regarding the competence of the courts to decide the matter.²² Later, the Egyptian parliament voted with agreement over the international treaty, which raised many concerns among politicians and constitutional lawyers, who criticized the vote.²³ Shortly after, president El Sisi finally ratified the treaty.²⁴ Article (151) of the 2014 constitution requires that any treaty which relates to sovereignty rights should be approved through a referendum after parliament approval to be considered as a valid law. Moreover, the same article forbids any treaty that contradicts the constitution, or that results in the concession of state territories. Article (1) of the constitution states that: "The Arab Republic of Egypt is a sovereign state, united

and indivisible, where nothing is dispensable, and its system is a democratic republic based on citizenship and the rule of law."

Finally, from the battle over appointing the heads of the judiciary to the battle over appointing female judges, Egyptian women kept fighting during 2017 to obtain their right to be appointed as judges in the state council. The different divisions of the Egyptian judiciary all have female judges except for the general prosecution and the state council.²⁵ None of the laws regulating judicial authorities forbids the appointment of females.²⁶ Moreover, the 2014 constitution explicitly stipulates in article (11) that the state shall guarantee equality between men and women in all rights according to the constitution and that the state shall also guarantee for women the right to be appointed in the judicial authorities with no discrimination. However, since 2014, Omnia Gadallah, an Egyptian female lawyer who has an excellent academic record and all the legal requirements, has been fighting in the courtrooms of the state council to make these texts a reality.²⁷ The council denied Omnia and her female colleagues the right to apply for the job of assistant delegate in the council, which is the entry position for judges in the state council. Omnia, subsequently, challenged this passive decision before the administrative courts of the council itself.²⁸ Among the petitions that Omnia made are challenging the decision of the supreme administrative court on two bas-

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ "قضية القضاء لتأجيله لـ"أسوأ" نوناق يلع نعطلاب حرصت ايلع لداق ايرادلل" (2017, نوناق تاروشنم) <<https://manshurat.org/node/21991>> accessed 27 February 2018.

²⁰ "قضية القضاء لتأجيله لـ"أسوأ" نوناق يلع نعطلاب حرصت ايلع لداق ايرادلل" (2017, نوناق تاروشنم) <<https://manshurat.org/node/22375>> accessed 27 February 2018.

²¹ ahramonline, 'The Egyptian Association to Protect the Constitution Calls on Parliament to "Reconsider" Debate on Red Sea Islands Deal' (2017) <<http://english.ahram.org/NewsPrint/270709.aspx>> accessed 26 February 2018.

²² "قضية القضاء لتأجيله لـ"أسوأ" نوناق يلع نعطلاب حرصت ايلع لداق ايرادلل" (2017, نوناق تاروشنم) <<https://manshurat.org/node/20234>> accessed 26 February 2018.

²³ ahramonline, 'The Egyptian Association to Protect the Constitution Calls on Parliament to "Reconsider" Debate on Red Sea Islands Deal'; "سيسي" (2017, نوناق تاروشنم) <<https://manshurat.org/node/20243>> accessed 26 February 2018.

²⁴ ahramonline, 'The Egyptian Association to Protect the Constitution Calls on Parliament to "Reconsider" Debate on Red Sea Islands Deal'; 'Parliamentary Legislative Committee Approves Red Sea Islands Deal with Saudi Arabia' (*Egypt Independent*, 2017)

²⁵ Ahmed Aboulenein, 'Egypt's Sisi Ratifies Deal Ceding Red Sea Islands to Saudi Arabia' (*Reuters*, 2017) <<https://www.reuters.com/article/us-egypt-saudi-islands/egypts-sisi-ratifies-deal-ceding-red-sea-islands-to-saudi-arabia-idUSKBN19F0KE>> accessed 28 February 2018.

²⁶ See the laws of the judicial authorities referred to earlier.

²⁷ Sonia Farid, 'Is There a Place for Women within Egypt's Judiciary?' (*Saudi Gazette*, 2018) <<http://www.saudigazette.com.sa/article/528994/World/Mena/Is-there-a-place-for-women-within-Egypt-s-judiciary>> accessed 31 March 2018; Sherine Hassan, 'Egyptian Judiciary: Is There Room for Women?' (22 فبراير 2018) <<https://raseef22.com/en/life/2018/02/02/egyptian-judiciary-room-women/>> accessed 31 March 2018.

²⁸ Mona Ezzat, 'رصدت نسو-مواقف-لازت-ال-لل-داق-نوم' (New Woman Foundation, 2018) <<http://nwrcegypt.org/>> accessed 31 March 2018.

es. First, she claimed that the court deprived her of her legal and constitutional right to pleading before it. Second, she challenged the constitutionality of article (186) of the state council regulation which forbids any contradiction to the decisions of the general assembly of the council, and the decision of the general assembly of the state council delivered on February 15, 2010, which deprived females of their right to appointment in the council. Moreover, she challenged the constitutionality of article (73) of the state council law and article (186) of the state council regulation for not explicitly stipulating the right of females to be appointed in the council. This opened the door to deviate the constitution's principles. These challenges of unconstitutionality will be either accepted by the court, and accordingly referred to the supreme constitutional court, or rejected. In November 2017, the supreme administrative court delivered its decision of postponing the case to the session of February 24, 2018.²⁹ The decision on this will be delivered in a session on May 26, 2018,³⁰ which holds many developments of this constitutional debate.

Finally, after two bloody attacks on churches in April, president El Sisi declared an emergency status for three months,³¹ which was renewed several times afterward.³² The constitution of 2014 in article (154) gives the president the right to declare the emergency status, which provides the state with a wide range of authority over civilian rights and freedoms. Although the article above limits this right with the subsequent approval of the parliament and caps the term of the status to

three renewable months, it sets no limits on the times it can be renewed, which can open the door for a permanent state of emergency.

On the other hand, just after emergency status was declared in April, president El Sisi endorsed a bill approved by the parliament amending the law number (162) of year 1958 of emergency status amended by law (37) of year 1972 of "Amending Some Texts Related to Guarantees of Citizens' Rights in the Holding Laws".³³ The new law number (12) of year 2017 tried to avoid the unconstitutionality considerations raised by the supreme constitutional court back in 2013, which led to declaring its article (3) null and void because it gave the president and the minister of the interior the authority to order an arrest, detain and search persons and places without observing the rules of criminal procedure law and due process.³⁴ The new amendments required notification to the public prosecutor within 24 hours of the detention of the persons or the materials related to committing a felony or a delict. Moreover, they require the permission of the public prosecutor to extend the detention to seven days until completion of the evidence-collecting process under the condition that the hearing starts within these seven days. This development could be considered as positive progress.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Back to the other changes proposed by the parliament to the 2014 constitution, some

of the leading amendments also included: (1) Giving more powers to the president in terminating ministers more than the current ones in article (147) of the current constitution;³⁵ and (2) Cancellation of the exclusive authority of the state council "to issue opinions on the legal issues of bodies to be determined by law, review and draft bills and resolutions of a legislative character, and review draft contracts to which the state or any public entity is a party," stipulated in article (190) of the constitution, to open the door for other authorities to participate.³⁶ Other amendments included the cancellation of depriving dual citizens of the right to run for the presidency according to article (141) of the constitution, and the restoration of the upper chamber of the parliament (El Shura Council), which was excluded in the 2014 constitution.³⁷

On a different note, the application of Sharia Law witnessed many controversial debates during 2017. Article (2) of the 2014 Egyptian constitution states that Islam is the principal source of the legislation. Article (3) gives Christian and Jewish Egyptians the right to resort to their religious laws in matters related to family law, religious affairs and selection of spiritual leaders. Article (7) states that Al Azhar, which is one of the leading religious establishments in the world, is the central authority in Islamic affairs and religious sciences. In these terms, Egypt and Al Azhar had a busy year debating over legal complications related to Islamic Sharia. One of the leading debates emerged after the statements of Tunisian president El Sisi, who asserted that it is time to reconsider the

²⁹ 'طقف لاجرلل-ةلودل-س لجم' <<http://nwrcegypt.org/>> accessed 31 March 2018.

³⁰ 'رياربف ٢٤ ل.ةلودل س لجم بةيضاق ةارملا نيبيحت عنم نالطب نعط ليجأت' <<https://manshurat.org/node/21822>> accessed 26 February 2018.

³¹ 'ةصنم لاولي-ه-اضق لاول-ةارملا' (New Woman Foundation) <<http://nwrcegypt.org/>> accessed 31 March 2018.

³² Makarios Nassar, Omar Medhat and Molly Hennessy-Fiske, 'Egypt Plunged into State of Emergency as Palm Sunday Church Bombings Kill at Least 44' (Los Angeles Times, 2017) <<http://www.latimes.com/world/la-fg-cairo-church-bombing-20170409-story.html>> accessed 26 February 2018.

³³ Nathan J Brown and Mai El-Sadany, 'How a State of Emergency Became Egypt's New Normal' (The Washington Post, 2017) <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/30/how-a-state-of-emergency-became-egypts-new-normal/?utm_term=.0adf1bf8f32> accessed 28 February 2018; 'رياربف ٢٤ ل.ةلودل س لجم بةيضاق ةارملا نيبيحت عنم نالطب نعط ليجأت' <<https://manshurat.org/node/22423>> accessed 26 February 2018.

³⁴ Case number (17) of judicial (constitutional) year number (15).

³⁵ Al Masry Al Youm, 'Egypt Parliament Amends Emergency Law' (Egypt Independent, 2017) <<http://www.egyptindependent.com/egypt-parliament-amends-emergency-law/>> accessed 28 February 2018; Al Masry Al Youm, 'Parliamentary Speaker Calls for Amendment of 2014 Constitution despite Having Drafted It' (Egypt Independent, 2017) <<http://www.egyptindependent.com/parliamentary-speaker-amendment-2014-constitution/>> accessed 26 February 2018.

³⁶ Salem.

³⁷ Youm, 'Parliamentary Speaker Calls for Amendment of 2014 Constitution Despite Having Drafted It'.

rules governing inheritance and marriage to non-Muslims to achieve gender equality in these two matters. The deputy of Al Azhar, Abbas Shoman, later rejected these statements and recommendations because “they contradict with Sharia law”.³⁸

However, the situation of women in inheritance issues had positive developments during 2017. It’s known that in some areas of Egypt – especially in Upper Egypt – women are deprived of their right of inheritance because of cultural traditions that allocate the economic resources of the family only to men.³⁹ The new law number (219) of the year 2017 was issued by president El Sisi amending the law number (77) of the year 1943 of inheritance to penalize any acts that prevent the inheritors from maintaining their shares in inheritance. The explanatory memo of the law indicated that this law was delivered to combat long-lasting discrimination against women specifically regarding their legal shares in inheritance.⁴⁰

IV. LOOKING AHEAD TO 2018

2018 is expected to conclude many constitutional debates.

First, as mentioned earlier, some constitutional cases are expected to be decided during the upcoming year. Among them are the case of appointing female judges in the state council, the case of competent jurisdiction in determining the validity of the international treaty of Tiran and Sanafir and the case of the judges who were excluded by the new judicial authorities law.

Besides the awaited judicial decisions, there

are the awaited law drafts. Two critical current drafts before the parliament are the new family law and the law of appointment of female judges. The latter bill was presented by a number of parliament members in January 2018. It aims to apply article (11) of the constitution in all judicial authorities,⁴¹ and was referred to the legislative and constitutional committee in the parliament.⁴²

Finally, in March 2018, presidential elections will take place. Should president El Sisi win the elections, which is strongly expected,⁴³ questions about amending the constitution, or finding an alternative to him, may arise again.

V. FURTHER READING

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³⁸ Associated Press, ‘After Marriage Laws, Tunisia Now Tackles Women’s Inheritance Rights’ (*The National*, 2017) <<https://www.thenational.ae/world/mena/after-marriage-laws-tunisia-now-tackles-women-s-inheritance-rights-1.629020>> accessed 28 February 2018.

³⁹ ‘م ل س م ل ا ري غب ج اوزلا و ثرالدا يف ةاواسملا’ (BBC Arabic, 2017) <http://www.bbc.com/arabic/40934666?ocid=socialflow_facebook> accessed 28 February 2018.

⁴⁰ ‘Egyptian Parliament Finally Awards Women Inheritance Rights by Law’ (*Gender Concerns International*, 2017) <<http://www.genderconcerns.org/news/egyptian-parliament-finally-awards-women-inheritance-rights-by-law>> accessed 28 February 2018; ‘م ل س م ل ا ري غب ج اوزلا و ثرالدا يف ةاواسملا’ (BBC Arabic, 2017) <<https://manshurat.org/node/22420>> accessed 26 February 2018.

⁴¹ Farid.

⁴² Mohamed Abdel Kader, ‘ةيروتسدلا نوناقلا نيب يرسقلا ةيقيبطت قسارد، ةنراقملا ةيروتسدلا مظنلا’ (مويلا يرسقلا، 2018) <<http://www.almasyalyoum.com/news/details/1242263>> accessed 31 March 2018.

⁴³ Reuters Staff, ‘Egyptian Politician Emerges as Sole Election Challenger to Sisi’ (*REUTERS*, 2018) <<https://www.reuters.com/article/us-egypt-politics/egyptian-politician-emerges-as-sole-election-challenger-to-sisi-idUSKBN1F11BB>> accessed 31 March 2018.



Finland

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Constitutional turbulence in Finland continued in 2017. The major developments of the year 2016 – immigration and the consequent flood of asylum applications, the country's economic problems as well as problems related to lawmaking – were still present in 2017.¹

However, new significant constitutional developments also occurred as the Government was finalizing legislative proposals regarding civil and military intelligence before their submission to Parliament. One significant dimension of this venture was a proposal for a constitutional amendment, since the current Section 10 of the Constitution on the right to privacy and confidentiality of communications is interpreted to not allow the enactment of such civil and military intelligence that the Government is proposing.

Another central development related to an in-depth reform of the healthcare and social services system, including regional administration. In March 2017, the Government submitted to Parliament legislative proposals that healthcare and social services should be run by larger entities (social and healthcare regions) instead of municipalities that are currently responsible for providing those services. In addition, the

Government wanted to boost significantly competition between public and private providers by opening up more opportunities for the private sector to provide healthcare and social services. However, as with earlier attempts to reform the healthcare and social service system since the beginning of the 2010s, this newest venture also failed due to some serious constitutional problems found in June 2017 by the Constitutional Law Committee of Parliament (see more details below).

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

In 2017, the prime authority of constitutional interpretation and review in Finland, the Constitutional Law Committee of Parliament, issued 61 Opinions on legislative proposals or other matters, including proposals for EU measures, for their compatibility with the Constitution and international human rights obligations binding on Finland.²

Overall, 2017 was marked by developments suggesting that liberal democracy is both on the rise *and* decline. While 2016 was characterised by public debate over appropriate constitutional limits, particularly those originating in fundamental rights, to the power of the legislature by a majority rule, some members of the political and economic elite

¹ See previous report concerning Finland, Laura Kirvesniemi, Milka Sormunen and Tuomas Ojanen, 'Developments in Finnish Constitutional Law: The Year 2016 in Review', in Richard Albert, David Landau, Pietro Faraguna and Šimon Drugda (eds.), *The I-CONnect Clough Center 2016 Global Review of Constitutional Law* (Clough Center for the Study of Constitutional Democracy 2017)

² The unique role of the Constitutional Law Committee of Parliament in the Finnish system of constitutional review of legislation was discussed in more detail in the 2016 report on Finland, *supra* note 1. Here it suffices to say that the Committee is the supreme authority of constitutional interpretation and *ex ante* constitutional review of legislative proposals and other matters pending before Parliament in Finland.

continued this debate in 2017. Criticism levelled against rights-based constitutionalism, together with ongoing populist and nationalist “anti-immigration” and “anti-integration” trends, can be seen as generating the tendency towards the weakening of liberal democracy. Yet, there were simultaneously legal-political developments that coalesced to show that liberal democracy was still predominating Finnish constitutionalism and political life. The following developments in 2017 are worthy of further elaboration.

First citizens’ initiative to change a law: equal marriage

On 1 March 2017, the amendments to the Marriage Act (234/1929) allowing for same-sex marriage entered into force. The Marriage Act is the first act that has been amended because of a citizens’ initiative, a tool for direct democracy enabling a minimum of 50 000 Finnish citizens of voting age to submit an initiative to the Parliament to enact an act. After a massive campaign, the citizens’ initiative for equal marriage was signed by 166 851 citizens and approved by the Parliament in 2014.

The Citizens’ Initiative Act (12/2012) entered into force in 2012 after an amendment to the Constitution allowing citizens’ initiatives to be submitted to Parliament. The aim of the citizens’ initiative procedure is to complement traditional representative democracy and strengthen civil society. After a citizens’ initiative has been submitted to the Parliament, the Parliament has an obligation to consider it, but is not bound to it: the Parliament can approve or reject the initiative and/or require changes.

In early 2017, the Constitutional Law Committee gave its Opinion³ on the so-called “genuine marriage” citizens’ initiative, the aim of which was to repeal the Equal Marriage Act. The Committee assessed the ini-

tiative both from the perspective of the right to make an anti-initiative and from the perspective of equality safeguarded in section 6 of the Constitution. In February 2017, the initiative was rejected by the Parliament, and the Equal Marriage Act entered into force in March 2017. The amendments to the Act on Legal Recognition of the Gender of Transsexuals (563/2002, Trans Act) entered into force at the same time, removing the marriage requirement and making marriage gender neutral.

Rights of persons with disabilities

Finland ratified the UN Convention on the Rights of Persons with Disabilities in June 2016. As a consequence, the overall number of cases related to persons with disabilities has been increasing, and the National Non-Discrimination and Equality Tribunal has established discrimination against persons with disabilities on several occasions.⁴ For example, in its decision 152/2016, the Tribunal found indirect discriminatory conduct having taken place when a municipality had failed to provide transport-related information on its website in a format that was accessible to a vision-impaired person.⁵

District court banned the Nordic Resistance Movement in Finland

In November 2017, a district court banned the Finnish branch of the Nordic Resistance Movement, a Neo-Nazi organisation that has been linked to racist and violent activities. According to the court, the group flagrantly violated the principles of good practice. The court took the view that the Nordic Resistance Movement is an ideologically driven association that agitates its members to violence and spreads hate speech. The association – because it violates fundamental and human rights of others – is not protected by freedom of speech provisions, because that would be against the prohibition of abuse of rights guaranteed by Article 17 of the Euro-

pean Convention on Human Rights.⁶ The district court judgment is not final, because the association has complained about the judgment to the court of appeal.

Suggestion to criminalise hiding of asylum-seekers

Even though several important amendments weakening asylum-seekers’ status were conducted in 2016, the anti-immigration political climate continued.⁷ In 2017, the Government announced plans to review the Criminal Code in order to criminalise the hiding of asylum-seekers who have received a legally binding negative decision. Political opposition parties and civil society organisations consequently raised serious concerns about how this criminalisation could be done in practice without preventing people from helping those in need. The Government later specified that offering help would not constitute a crime.

Immigration matters in the Supreme Administrative Court

In 2016, the number of immigration cases adjudicated in the Supreme Administrative Court was exceptionally high. The overall number of incoming cases in the Supreme Administrative Court in 2017 was 6409, out of which 3219 (50,2%) were immigration matters.

In several of its decisions on immigration matters, the Court interpreted the domestic Aliens Act in light of Finland’s international human rights obligations. In the case of 2017:81, an Iraqi man and his minor son had applied for international protection. The Finnish Immigration Service had rejected the application and decided the case without hearing the 14-year-old child. According to the Aliens Act, before a decision is made concerning a child who is at least 12 years old, the child shall be heard unless such hearing is manifestly unnecessary. The

³ Constitutional Law Committee Opinion 1/2017

⁴ National Non-Discrimination and Equality Tribunal of Finland, News, available at yvtltk.fi/fi/index.html

⁵ National Non-Discrimination and Equality Tribunal of Finland (2017), Decision no. 152/2016, 20.4.2017, available at http://yvtltk.fi/fi/index/materiaalit/tapausselosteet_3/tapausselosteet2017_1.html

⁶ https://yle.fi/uutiset/osasto/news/finnish_court_bans_neo-nazi_movement/9956449

⁷ See Finland’s previous report regarding the increased number of asylum applications and the Government’s tightened immigration policy in 2016, *supra* note 1.

Supreme Administrative Court held that in interpreting the Aliens Act, the UN Convention on the Rights of the Child must be taken into account, along with the views and recommendations of the Committee on the Rights of the Child. The Court also referred to Article 24(1) of the EU Charter of Fundamental Rights as well as to the constitutional provisions on children's right to equal treatment and their right to influence matters pertaining to themselves to a degree corresponding to their level of development. The Court concluded that the child's views had not been examined or taken into account in accordance with his age and level of development, and therefore the decision of the Immigration Service had not been made in the proper order.

Lack of resources on the field of social security

European Committee of Social Rights found in its decision on 5 May 2017 that the social assistance scheme in Finland, consisting of the labour market subsidy paid to persons in need who have exhausted their eligibility for unemployment allowance, is in violation of article 13 § 1 of the European Social Charter. The Committee noted that recipients of the labour market subsidy may apply for housing allowance and also for social assistance to cover housing costs in excess of the housing allowance. However, the Committee held that since the housing allowance is limited by the various objective criteria, the beneficiaries of the labour market subsidy are not automatically entitled to allowance to cover housing costs.⁸ The Committee has previously, in 2014, held that the labour market subsidy in Finland fell below the level required by the Charter.⁹ The Government of Finland stated in a press release¹⁰ regarding the Committee's decision that the Committee has not taken into account the Finnish social security system as a whole, including basic social assistance and possible supplementary components, when examining the sufficiency of minimum protection.

On Universal Children's Day, 20 November 2017, over 1000 social workers and social work students signed a petition to address problems that insufficient resourcing in child care services cause to the welfare of children and implementation of rights of the child. According to the petition, child care services of several municipalities in Finland suffer from a chronic lack of resources. Consequently, one social worker can often have responsibility over 60, even 80 children, which naturally weakens the quality of social work and possibilities to effectively promote the best interest of the child.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Legislation on intelligence under preparation

At the moment, Finland does not have legislation on intelligence. In 2017, the Government finalized legislative proposals that seek to give intelligence powers, including gathering network traffic intelligence, to the Finnish Security Intelligence Service as well as to the Finnish Defence Forces. The changes would be extensive compared to the current situation. A prerequisite for the new intelligence legislation is an amendment to the Constitution because the current provision on the right to privacy and confidentiality of communication (section 10) does not allow for the intelligence legislation proposed. Several experts in constitutional law and human rights law have expressed their constitutional concerns about amending the Constitution and suggested that a prohibition of mass surveillance be added to it in case the provision on right to privacy is amended, otherwise there is a risk of future developments that might severely restrict fundamental and human rights.

Another concern related to the possible amendment of the Constitution is that the Government is suggesting the use of urgent

procedure for constitutional enactment. Usually a proposal on the enactment, amendment or repeal of the Constitution is left in abeyance by a majority of the votes cast until the first parliamentary session following the next elections. The proposal can then be adopted in a plenary session by a decision supported by at least two-thirds of the votes cast. Additionally, a proposal may be declared urgent by a decision that has been supported by five-sixths of the parliamentarians, in which case the proposal can be adopted at once by a decision supported by at least two-thirds of the votes cast. The urgent procedure has never been used during the current Constitution, and the Constitutional Law Committee has taken the stance that the urgent procedure should not be used unless there is a very pressing and urgent need for its application. The legislative package on civilian and military intelligence legislation and their legal and parliamentary oversight, including the proposal for constitutional amendment, were submitted to Parliament on 25 January 2018.

Regional government, health and social services reform

Major reform to healthcare and social services has been underway since the early 2010s in Finland. Up until now, successive governments have failed to accomplish significant changes to the organisation of the services. Social and healthcare services in Finland have traditionally been the responsibility of municipalities, but there has been concern for a long time about the accessibility, equality, efficiency and sustainability of these services. The reform is thus necessitated by inequalities of the current healthcare system as well as rising expenses due to population aging.

In spring 2017, the latest attempt to reform the healthcare and social service system was made when legislative proposals for reform were submitted to the Parliament. The proposed reform sought to introduce regional governments as a new level of public administration, and social and healthcare duties were to be transferred from local municipal-

⁸ European Committee of Social Rights, decision on 5 May 2017 (*Finnish Society of Social Rights v. Finland*), Complaint No. 108/2014

⁹ European Committee of Social Rights, decision on 9 September 2014 (*Finnish Society of Social Rights v. Finland*), Complaint No. 88/2012

¹⁰ Ministry of Social Affairs and Health and Ministry for Foreign Affairs press release 10 May 2017, available at http://stm.fi/artikkeli/-/asset_publisher/sosiaalisten-oikeuksien-komitealta-ratkaisu-suomen-sosiaaliturvan-vahimmaisturvan-tasosta?_101_INSTANCE_yr7QpNmJmSj_languageId=en_US

ities to regional governments.

One of the most significant, yet also most contested, elements in this reform package was the so-called freedom-of-choice principle, according to which the individual chooses their preferred provider of health and social services but pays the same fees regardless of the service provider chosen. Moreover, the Government's view was that freedom of choice would necessitate the corporatisation of public social and healthcare services. This significantly contrasts with the current situation, where public authorities are responsible for providing these services and where private service providers, although subsidised, are more expensive than public ones. Public services, meanwhile, are often under-resourced and heavily congested.

In June 2017, the Constitutional Law Committee gave its Opinion¹¹ on this major regional government health and social services reform. The Committee's Opinion was a huge blow to the Government's proposal since the Committee found the proposed reform to include a number of serious constitutional problems. While the Committee was of the view that reform was necessary in order to guarantee sufficient services in accordance with the Constitution, it found some serious constitutional problems concerning the role of private providers in the proposed plan. Once simplified, the biggest constitutional problems were related to the freedom-of-choice model proposed by the Government. According to the Committee, this model failed to guarantee adequate social and health services equally for everyone in accordance with the Constitution, and also resulted in the unconstitutionality of the obligation of counties to corporatize social and health services. Another major problem identified by the Committee was the unrealistically tight schedule of the reform, which could in itself lead to a crisis of the whole system.

The legislative proposals on healthcare and social service reform are currently amended in accordance with the Opinion issued by the Constitutional Law Committee, and the Government is scheduled to resubmit its new legislative proposals to the Parliament in March 2018.

As with some other Opinions by the Committee, its Opinion on the reform received sharp criticism by factions of economic and political elites that had strongly flagged for the increased privatization of the Finnish healthcare system. In addition, the Opinion fostered ongoing criticism about the quality of lawmaking since the constitutional and other problems relating to the Government's plans had already been subject to public discussion well before the Government submitted its proposals to the Parliament. In essence, the Government's lawmaking has been criticised as hurried and careless, and constitutional or other concerns have usually been addressed at best with minimal changes.

New National Action Plan on Fundamental and Human Rights

In 2017, the second National Action Plan on Fundamental and Human Rights was adopted by the Government.¹² The action plan covers years 2017–2019. The aim of the Action Plan is to implement the public authorities' obligation to guarantee the observance of basic rights and liberties and human rights protected by the Constitution. The Action Plan has four thematic focus areas: fundamental and human rights education, equality, right to self-determination and fundamental rights and digitalisation. In 2017, the Constitutional Law Committee gave an Opinion on the Action Plan.¹³ The Committee considered it important that the measures identified in it are aimed especially at the realisation of the rights of the elderly, children, minorities and other vulnerable groups. The Committee also highlighted the importance of making an assessment of how well the Action Plan has been implemented in practice.

IV. LOOKING AHEAD TO 2018

The intelligence legislation package, including the proposal on a constitutional amendment, will certainly be one of the most important themes on the Finnish scene of constitutional and political life in 2018. Another pressing topic will be, once again, the reform of the Finnish healthcare and social welfare system. Aside from their constitutional significance, the political importance of these two topics must be emphasized, not least because the Government was already close to collapsing over healthcare reform in 2015. Given also looming parliamentary elections and European Parliament elections in the spring of 2019, 2018 is likely to be "hot" in Finnish constitutionalism and politics.

V. FURTHER READING

Tuomas Ojanen, 'The Charter of Fundamental Rights as apprehended by Judges in Europe: FINLAND' in Laurence Burgogme-Larsen (ed.), *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of Fundamental Rights as apprehended by Judges in Europe* (Editions A. Pedone 2017)

Tuomas Ojanen, 'Rights-Based Review of Electronic Surveillance after Digital Rights Ireland and Schrems in the European Union' in David Cole, Federico Fabbrini and Stephen Schulhofer (eds.), *Surveillance, Privacy and Transatlantic Relations* (Hart Publishing 2017)

Tuomas Ojanen, 'Human rights in Nordic constitutions and impact of international obligations' in Helle Krunke and Björg Thoraarsen (eds.), *The Nordic Constitutions – A Comparative and Contextual Study* (Hart Publishing 2018)

¹¹ Constitutional Law Committee Opinion 26/2017

¹² National Action Plan on Fundamental and Human Rights 2017–2019 Government network of contact persons for fundamental and human rights Ministry of Justice, Memorandums and Statements, Ministry of Justice, Finland 3 May 2017, available at https://julkaisut.valtioneuvosto.fi/bit-stream/handle/-10024/79849/OMML_25_2017.pdf?sequence=1

¹³ Constitutional Law Committee Opinion 56/2017



France

THE STATE OF LIBERAL DEMOCRACY AS ILLUSTRATED BY THE DECISIONS OF THE CONSTITUTIONAL COUNCIL

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I. INTRODUCTION

In 2017, presidential elections, elections to the National Assembly and elections to the Senate (half of its seats) took place in the same year for the first time. This had several consequences on the Constitutional Council. From an organic viewpoint, one of its members, Professor Belloubet, resigned because she was appointed Minister of Justice after the legislative elections. The Speaker of the Senate, Gérard Larcher, had therefore to appoint a new member to the Council. In July, he chose then-Senator Michel Mercier, who was also a former Minister of Justice. However, judicial suspicions regarding a possible embezzlement of public funds were raised at that time. The Council pointed out that its members are under “a general obligation to refrain from any behaviour that might imperil the independence and dignity of their functions”. This led Senator Mercier to renounce his new position. Senator Larcher was re-elected Speaker of the upper house after the elections in September. He appointed Dominique Lottin, who was head of a Court of appeal. From a functional viewpoint, the Council devoted much of its time and energy to elections-related issues – it advised the government on the organisation of the elections, monitored the voting operations, announced the results and dealt

with election-related litigation.¹ Regarding constitutional review, the Council examined some of the last texts the former legislature had adopted. Two of its decisions relating to terrorism resulted in a difficult dialogue with Parliament. In the new political landscape that emerged after President Macron’s election, it began reviewing the first texts adopted by the new majority. Two statutes intending to reinforce confidence in politics deserve special attention. Indeed, together with other rulings worth considering, they created controversies that cast light on the current state of liberal democracy in France.

II. LIBERAL DEMOCRACY IN FRANCE ON THE RISE OR DECLINE?

It would be very difficult indeed to question the fact that France is a liberal democracy.² Two major controversies of the past year illustrate the current state of liberal democracy in the country.

The first controversy stemmed from two QPC rulings. It highlighted the conditions of the dialogue that takes place between the political majority and the constitutional court. On December 7, 2016, the Criminal chamber of the Cassation Court transmit-

¹ See President Laurent Fabius’s New Year Wishes, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/publications/contributions-et-discours/2018/voeux-au-president-de-la-republique.150501.html> (last accessed on 01/11/2018). See also Jean-Pierre Camby, *Le Conseil constitutionnel, juge électoral* (7th ed., Dalloz 2017).

² See, for example, the democracy indexes offered by Freedom House (<https://freedomhouse.org/report/freedom-world/freedom-world-2017> (last accessed on 01/11/2018)) and (for a more nuanced position) The Economist Intelligence Unit (<https://infographics.economist.com/2017/DemocracyIndex/> (last accessed on 01/11/2018)).

ted to the Constitutional Council a Priority Preliminary ruling on the issue of constitutionality regarding Article 421-2-5-2 of the Penal Code, as derived from Act n° 2016-731 of June 3, 2016. Pursuant to this provision, “The act of habitually accessing online public communication services that exhibit messages, images or representations that directly encourage the commission of terrorist acts, or defend these acts, when this service has the purpose of showing images or representations of these acts that consist of voluntary harm to life is punishable by two years of imprisonment and a fine of €30,000. This Article is not applicable when they are accessed in good faith from normal professional activity that has the objective of informing the public, conducting scientific research or for use as evidence in court”. The applicant claimed that this text violated freedom of communication and freedom of opinion because it punished mere access to online public communication services without requiring any evidence that it was motivated by illegal intentions. Because of the imprecise terms used, these provisions also contravened both the principle that offences and penalties must be defined by law and the objective of accessibility and comprehensibility of the law. Furthermore, the principle of equality was doubly infringed upon. Indeed, only certain individuals were authorised to access these contents. Moreover, accessing content encouraging the commission of terrorist acts was only punishable if the content was accessed via the Internet, and not via other media. Finally, the contested provisions violated the principle of the presumption of innocence since the person who merely accessed this material was presumed to have the desire to commit terrorist acts. The Constitutional Council ruled for the applicant and quashed the contested provision. After mentioning how important freedom of expression and communication is, because it belongs to the conditions of a democratic State and guarantees other rights and freedoms, the Council considered that French legislation already contained many devices designed to prevent terrorist acts and indoc-

trination: the Penal Code establishes several other offences related to terrorist activities and glorification of terrorism; magistrates and investigators enjoy broad powers to intercept electronic mail, to gather data on connections, to record communications, etc.; a specific law of criminal procedure applies in cases of terrorism; and administrative authorities also enjoy extended powers in this respect. Moreover, by disregarding the intention of the person who accesses the online services and by refraining from making explicit what the precise content of a “bona fide” access is, the legislator infringed on the exercise of the freedom of communication “in a way that is not appropriate, suitable and proportional”.

Immediately after the provision was struck down by the 2016-611 QPC ruling of February 10, 2017, the legislator adopted a new version of it. It was promulgated in Act n° 2017-258 of February 28, 2017. The two major changes were (a) the mention of access “without any legitimate reason” instead of “in good faith” and the more detailed illustration of what such a motive can be (normal professional activity that has the objective of informing the public, scientific research or use as evidence in court, when this access is accompanied by a report of the contents of this service to the competent authorities), and (b) the requirement of an additional “expression of adherence to ideology”. This new provision was referred to the Council by the Cassation Court. The applicant, who was the same as in the first case, claimed that the new text being substantially identical to the previous one, it was similarly unconstitutional.

The Council adopted a reasoning that was similar to that of the preceding ruling. It insisted on the importance of freedom of communication and opinion. It mentioned the various legislative provisions that address the issue of terrorism and radicalisation and give administrative and judicial authorities important means in this respect. All those raised doubts as to the necessity of the new

provision. With respect to the appropriateness and proportionality of the limitations of fundamental rights, the Council once again considered that: “The impugned provisions do not require that the author of the usual access to the relevant online public communication services be willing to commit terrorist acts. Even though the legislator added to access, as a constitutive element of the offence, the expression of adherence to the ideology presented on these services, this access and this expression are not likely to establish the existence of an intention to commit terrorist acts”. Even if the legislature has excluded the criminalisation of access when it is carried out for a “legitimate reason”, the scope of this exemption cannot be precisely determined. Therefore, the contested provisions raise uncertainty as to the lawfulness of the access to certain online public communication services and, consequently, of the use of the Internet when one is looking for information. That is why “the contested provisions infringe on the exercise of the freedom of communication in a way that is not appropriate, suitable and proportional”. Once again, what is known as the offence of “habitually accessing terrorist websites” was quashed by the constitutional court, in spite of the insistence of the legislator that it be enshrined in the Penal Code. To what extent this reveals the current state of liberal democracy is open to debate. On the one hand, one may consider that this example of interinstitutional “dialogue” regarding the enforcement of basic constitutional values somehow confirms the common view that in front of political majorities that are prone to overreact because of electoral pressure, and sometimes to disregard their own responsibilities as guarantors of rights and freedoms, the counter-majoritarian intervention of constitutional judges is an important safeguard.³ On the other hand, one will note that Parliament cannot be said to have totally abdicated its responsibility. Indeed, when the offence was created in 2016, doubts about its constitutionality were expressed by the rapporteur of the bill.⁴ When the offence was introduced again in 2017, similar criticisms were made

³ For a more moderate view, see Guillaume Tusseau, “Parlement et droits fondamentaux”, in *Traité d'études parlementaires*, Olivier Rozenberg & Eric Thiers (eds.) (Larcier 2018, forthcoming).

⁴ See speech of Deputy Pascal Popelin, May 19, 2016, available at <http://www.assemblee-nationale.fr/14/pdf/cr/2015-2016/20160192.pdf> (last accessed

by several MPs.⁵ That is why one first needs to refrain from studying living constitutional law only through the case law of constitutional courts. Secondly, even for the analysis of court decisions, the broader institutional context and the way non-judicial institutions also interpret and enforce the Constitution need to be taken into account.⁶

The second major constitutional controversy was related to the *ex ante* review of an institutional act, which as such was automatically referred to the Council (2017-753 DC ruling), and an ordinary statute, referred to the Council by more than 60 deputies or 60 senators (2017-752 DC ruling). The fact that these two texts, which were dedicated to “faith in political life”, were the first ones to be adopted by the new Parliament testifies to the general feeling that there was a need for the revival of democratic life in France.

Since the end of the '80s, France has adopted a whole set of laws designed to reinforce the moral standards of political life. Their main aims have been to regulate the financing of political parties and political campaigns, to prevent the personal enrichment of politicians through patrimony control at the beginning and the end of each term and to avoid conflicts of interests between political functions and private interests.

During the presidential campaign, allegations were made that one of the candidates had declared that his wife and children worked as his assistants when he was an MP, and were therefore paid accordingly by Parliament, though in fact they appeared not to have worked for him in that capacity. Following this controversy, the new statutes prohibited “family jobs”. They forbade MPs, Ministers or Elected Representatives of Territorial Units to employ their wives or husbands, children or parents. The employment of other relatives had to be declared to an independent authority – the High Authority for Transparency of Public Life (HATPL), which was supposed to check if the recruitment was

legitimate and to order that it be ended if it resulted in a conflict of interests. The Constitutional Council ruled that this measure did not undermine the principle of separation of powers, since the choice of their assistants by members of the Government or Parliament was only affected in a limited way. For the same reason, it excluded the violation of the principle of equality or of free access to public jobs. Nevertheless, it censured the power given to the HATPL to order a member of the Government to put an end to the employment of one of her relatives, considering that such a prerogative, given to an independent authority, was prejudicial to the principle of separation of powers.

The second important measure was the suppression of the so-called “parliamentary reserve”, a practice consisting of MPs helping to finance projects in favor of Territorial Units or associations through amendments to the Finance Bill which they press the Government to table. This practice had been criticised for a long time as arbitrary and electioneering. Its suppression was validated first of all because the suppression of a simple practice, which is not supported by any written rule, could not be considered to be contrary to the Constitution. The Council also stressed that the Government could not automatically follow the financing proposals of MPs, and thus abdicate its competence in budget execution, without violating the principle of separation of powers. However, the Council added the reservation that the provision which forbade the Government amendments taking into account the MPs’ proposals should not be interpreted as limiting the right of the Government to table any other amendment to the Finance Bill. Moreover, the Council struck down another provision, which had been introduced through a parliamentary amendment, and which suppressed, as a form of retaliation for the suppression of the “parliamentary reserve”, the right for the Government to freely grant subsidies to Territorial Units or associations. This provision violated the separation of powers and con-

tradicted Article 20 of the Constitution pursuant to which “The Government shall determine and conduct the policy of the Nation”.

During the presidential campaign, presidential candidate Macron had announced measures to avoid new scandals related to the integrity of politicians, such as those which occurred a few years before, when two Ministers and former MPs were convicted of tax evasion. According to the new statutes, during the first month following her election, an MP must obtain a tax clearance certificate from the tax department and transmit it to the Bureau of the National Assembly or the Senate. In case of irregularity and if she does not comply with the recommendation she receives, her situation can be referred to the Constitutional Council which may deprive her of her mandate. The Constitutional Council validated this provision considering that such a sanction was proportionate to the seriousness of such an offence committed by a public officer. The Council also approved the fact that the President of the Republic may require, from the tax department, information on the tax situation of someone he intends to appoint Minister. It did not take into account the fact that such a measure could be considered as a violation of the right to privacy because it pursues a general interest purpose – the integrity of public officers – which is directly related to the object of the law.

For the same purpose, pursuant to a new provision, the punishment of certain offences should also imply that the offender would be sentenced to ineligibility. Nevertheless, in order to avoid automatic sanctions that conflict with the principle of personalisation of judicial rulings, the judge could exclude such a sentence taking into account the circumstances of the offence and the personality of the offender. The Council validated most of this measure. But it censured the possibility to impose ineligibility for offences such as libel because it could be considered as violating freedom of speech, which is especially

on 01/11/2018).

⁵ See Report n° 4466 (Assemblée nationale – XIVE législature) and n° 399 (Sénat – 2016-2017) by Senator François Grosdidier and Deputy Yves Goasdoué, February 13, 2017, pp. 14-15.

⁶ Guillaume Tusseau, “Enfrentar el panjudicialismo epistémico: la escotomización de formas políticas de control de constitucionalidad”, 18 *Parlamento y constitución* (2017).

protected in the context of political debate.

The Constitutional Council also validated different provisions of the law prohibiting some form of consulting activity for MPs, since it was not a general prohibition, considering that the provisions were proportionate to the need to protect their independence and avoid conflicts of interest. One will see in the future whether this wide array of measures contributes to reinforcing liberal democracy in France.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Other major constitutional developments in French constitutional law in 2017 relate first to the State of Emergency, anti-terrorist law and public safety. In Decision 2017-677 QPC, the Constitutional Council declared the contested provisions unconstitutional. First, the Council underlined that in areas where a state of emergency has been declared, the prefect may, provided she justifies her decision, authorise judicial police services to carry out identity checks, visual inspection and searching of bags as well as inspections of vehicles being driven, stopped or parked on public streets or in areas accessible to the public. However, by establishing that these operations may be authorised in any area where a state of emergency applies, the legislature allowed them to be carried out without necessarily being justified by the special circumstances upon which a risk of attack on public safety would be founded. Therefore, the legislature did not ensure the balance between, on the one hand, the constitutional objective of safeguarding against attacks on public safety, and, on the other, the freedom to come and go and the right to respect for private life. Similarly, in Decision 2017-635 QPC, the Council found that the balance between the objectives stated hereinbefore was not ensured and thus cancelled the disputed provisions of the Law of April 3, 1955. More precisely, by establishing that a refusal of entry and stay may be decided against any person seeking to obstruct public policy, the legislature allowed such a measure to be enacted without it being necessarily justi-

fied by the objective of the prevention of an attack on public safety and did not demand sufficient guarantees for this refusal of entry and stay, the scope of which could include the residence or workplace of the person in question.

In Decision 2017-674 QPC, the Constitutional Council declared that even if the legislature doesn't establish a maximum time frame for house arrests in order to allow the administrative authority to exercise control over a foreigner given the threat to public safety, it is the responsibility of the latter to establish the conditions and location of the house arrest, taking into account the time spent under that measure and the family and personal relationships of the individual in question. Subject to this reservation of interpretation, neither the indefinite term of the house arrest measure nor the powers of the administrative authority to establish the location of the house arrest anywhere on French territory disproportionately infringe upon the freedom to come and go and upon the right to respect for private and family life.

In Decision 2017-624 QPC, the Constitutional Council found that the contested provisions infringed upon the principle of impartiality and the right to an effective legal remedy. When the judge of the Council of State sitting for urgent matters is asked to grant or refuse a house arrest and to decide on its extension, his authority is restricted to decisions on provisional measures and not on the merits of a case. Regarding the claim of infringement on the freedom to come and go, the time frame of a house arrest measure cannot, in principle, exceed 12 months, be they consecutive or not. Beyond this term, such a measure can only be renewed for time periods of three months. Furthermore, beyond 12 months, a house arrest measure cannot, without excessively infringing on the liberty to come and go, be renewed unless the behaviour of the individual in question constitutes a particularly serious threat to security and public order, and unless new or complementary elements are produced by the administrative authority. In addition, when examining the situation of the individual in question, the total length of time of his/her placement under house arrest, the condi-

tions of this placement and the complementary obligations under which this measure is issued are to be taken into account. Subject to these restrictions, the contested provisions were declared constitutional.

In Decision 2017-625 QPC, the Constitutional Council, in line with its previous decisions, declared that the notion of an individual undertaking the goal of seriously disturbing public order by intimidation or terror is described in sufficiently precise terms and therefore does not violate the principle that offences and penalties must be defined by law. Secondly, the material facts that characterise a preparatory act are also defined with sufficient precision so that criminal behaviors are clearly identifiable. However, as to the claim of infringement upon the principle of the necessity of offences and penalties and of the proportionality of penalties, the Council partially cancelled the contested provisions based on the following three considerations: first, the punished offence may only have occurred if several material facts took place; second, these facts must characterise the preparation of an offence of a terrorist nature; and third, the material facts must corroborate this intent. "By including [in the contested provisions] the material facts that constitute a preparatory act of 'searching for...objects or substances that create a danger to others', without defining the acts that constitute such a search within the framework of an individual terrorist undertaking, the legislature allowed punishment for actions that have not materialised in" the intent to commit an offence.

Secondly, other noticeable rulings dealt with the issue of *habeas data*. In Decision 2017-648 QPC, the Constitutional Council admitted the constitutionality of the contested provisions of the Code of Internal Security authorising a public administration to collect personal data (*données de connexion*) from individuals that might have been previously linked to a terrorist threat in order to prevent terrorism. On the other hand, the Council found these provisions unconstitutional when applied to the entourage of such a person, since they enable wide collection of personal data without a specific link to an actual terrorist threat being previously estab-

lished. In Decision 2017-646/647 QPC, the Constitutional Council declared the provisions of the Monetary and Financial Code which authorise the French Financial Markets Authority (AMF) to collect personal data from telecommunication providers unconstitutional. The Council considered that no proper guarantees were provided for by the legislator so as to ensure a balance between the right to respect for private life and public order.

Thirdly, Decision 2017-749 DC dealt with the constitutionality review of international agreements pursuant to Article 54 of the Constitution. The Constitutional Council confirmed the constitutionality of the Comprehensive Economic and Trade Agreement signed between Canada, the European Union and its Member States. The judge highlighted the rules relating to the control it exercises over international treaties, holding that if the stipulations of an international agreement fall within the exclusive competence of the European Union, the Council can only verify that the agreement does not question a rule or principle inherent in the constitutional identity of France. For provisions falling within a competence shared between the EU and the Member States or the exclusive competence of the Member States, the Council must determine if they contain a clause contrary to the national Constitution or undermine the conditions essential to the exercise of sovereignty. It accepted the validity of the creation of a special court having jurisdiction over disputes related to investments. Regarding environment law, the Council ensured that the precautionary principle would not be imperiled.

IV. LOOKING AHEAD TO 2018

President Macron wants the Constitution to be amended. Among other things, the number of MPs as well as the number of their terms may be reduced. The parliamentary procedure might be modernised in order to allow for the faster adoption of statutes and for the improvement of Parliament's functions of control and assessment of public policies. The powers of the High Council

of the Judiciary might be increased in order for judicial independence to be more effectively secured, especially regarding prosecutors, whose submission to the authority of the Minister of Justice was validated by the Council in spite of doubts as to its compatibility with judicial independence and the separation of powers (2017-680 QPC). Finally, regarding the Constitutional Council itself, the constitutional amendment may put an end to the membership of former Presidents of the Republic. This unusual situation has indeed become problematic after ex post review became possible in 2008, because former Presidents may review statutes which they have promulgated. As is immediately evident, 2018, like 2017, will be a special year for the French polity, not least because it will be the 60th anniversary of the Constitution.

V. FURTHER READING

Denis Baranger, *Le droit constitutionnel* (7th ed., Presses universitaires de France 2017)



Gambia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 witnessed unprecedented political events in The Gambia that resulted in a transition from a dictatorship to a democratic state. Yahya Jammeh's 22 years of dominance ended abruptly after the December 2016 presidential elections when he lost to opposition coalition candidate Adama Barrow. Initially, Jammeh accepted the results on 2 December 2017, only to reverse his position a week later rejecting the election results as fraudulent. His refusal to step down plunged the country into a political stalemate. The about-turn generated widespread local and international condemnation.

In response to the recalcitrant position of Jammeh, the Economic Community of West African States (ECOWAS) mobilised troops with the mandate to enter the country and forcefully oust him in case diplomatic efforts failed.¹ Consequently, Barrow was sworn in as President of The Gambia on 19 January 2017 at the Gambian Embassy in Dakar, Senegal. Two days later, Jammeh succumbed to diplomatic pressure and left the country for exile in Equatorial Guinea. On 26 January 2017, The Gambia's new President returned to the country amidst widespread celebrations.

The new democratic dispensation has led to several amendments to the 1997 Constitution,² promulgation of new laws, establishment of a Commission of Inquiry, and *Gambianisation* of the judiciary system. While these positive strides are encouraging, some

of the questionable constitutional amendments (in terms of procedure and motivation) and the immensely unpopular decision of the Supreme Court on the freedom of assembly are seen as regressive steps underscoring the need for vigilance. The new government has a critical opportunity to reengage with constitutional protections and see through its numerous campaign commitments.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

1. *Political impasse: Inability of the Supreme Court to sit and declaration of a state of emergency*

On 13 December 2016, Jammeh instituted an election petition to contest the validity of the presidential election results, subsequently triggering new elections. He further filed an injunction to prevent the chief justice from swearing Barrow into office. The Gambian Supreme Court, the only court competent to deal with this matter, could not hear the case due to a lack of a quorum.³ The inability to have a full bench (five judges) to hear the petition arose because Jammeh on 24 June 2015 sacked two Gambian Supreme Court judges. This followed the resignation of Chief Justice Chohan after the government expressed displeasure over a Supreme Court decision to acquit former Chief of Navy Staff Commodore Sarjo Fofana, who was serving a life sentence.

¹ The United Nations Security Council expressed support for ECOWAS and African Union Peace and Security Council efforts to negotiate the transition of the presidency without endorsing military action. See Resolution 2337, S/RES/2337 (19 January 2017).

² Act No. 1 of 1997.

³ See secs 49 & 125 of the Constitution. The Chief Justice had to recuse himself as a result of the injunction.

Although judges from Nigeria and Sierra Leone were earmarked for appointment to the Court, they never assumed office. With the case on the roll in December 2016, and again on 10 January 2017, it was further postponed to May 2017 to ensure a full bench.

Although judges from Nigeria and Sierra Leone were earmarked for appointment to the Court, they never assumed office. With the case on the roll in December 2016, and again on 10 January 2017, it was further postponed to May 2017 to ensure a full bench.

Having failed to constitute a court of his liking, the former President, with his lawyer's assistance, found a loophole which is only possible where the National Assembly is effectively under the President's control – as was the case in The Gambia. The loophole was in the following constitutional route: Section 34 provides that the President of The Gambia “may... declare that a state of public emergency exists in the whole or any part of The Gambia.” When the President has declared a state of emergency, the National Assembly *may* adopt a resolution to prolong its own term for a period up to three months.⁴ Upon the adoption of this resolution, the term of office of the President is then prolonged for the same period. In line with these provisions, the Alliance for Patriotic Reorientation and Constitution (APRC)-dominated National Assembly⁵ approved a state of emergency declared by the President on 16 January 2017 and extended its term and that of the presidency by 90 days. On 24 January 2017, after Jammeh's exit, the National Assembly ended the state of emergency in the country and rescinded the extension of executive power that had been granted to former President Jammeh. A National Assembly election has since been held in April 2017 with the United Democratic Party (the then main opposition party) having a landslide victory.

Following the end of 22 years of dictatorship and political tension after former President

Jammeh lost the elections and refused to step down, 2017 served as a transition for the new government under whom the following constitutional developments were noted.

2. Electoral reform

Section 26 of the Constitution guarantees citizens the right to make political choices, providing for free, fair, and regular elections, and permitting qualified citizens to vote and stand for public office. In line with the spirit of this provision, on 28 February 2017, the National Assembly passed the Elections (Amendment) Act 2017 “to encourage the widespread participation of the ordinary citizenry in the new democratization dispensation.” The President assented to the Act on 8 March 2017. The amendment was a response to the major shrinkage of political space during Jammeh's era. The Elections (Amendment) Act was passed on 7 July 2015 and signed by Jammeh on 20 July 2015. Candidates for President were required to pay D 500,000 (approximately USD 12,500), raised from D 10,000 (approximately USD 250); the fee for candidates for the National Assembly was increased from D 5,000 (approximately USD 125) to D 50,000 (approximately USD 1,000), and candidates for local council office were to pay D 10,000 (about USD 200). Opposition political parties not only regarded the increases as unreasonably high but also as a ploy by the government to drastically limit the participation of the opposition in elections.

The matter was further taken to the ECOWAS Community Court of Justice, in which the plaintiffs alleged that the above-mentioned amendments were a violation of article 13 (1)(2) of the African Charter on Human and Peoples' Rights (ACHPR) on the right to freely participate in one's government.⁶ The Court declared that it was not competent to deal with the electoral matter as it borders on internal affairs of The Gambia and not an issue of human rights violation as envisaged under the Charter. Despite the Court's very progressive jurisprudence, this judgment

took a very restricted view on the right to political participation. However, the exorbitant fees were reverted back to their initial amounts by the Elections (Amendment) Act of 2017.

3. Change of retirement age and removal of upper age limit for holding office as President

Despite the demand for a new constitution, the Barrow government has instead amended it. On 28 February 2017, the National Assembly passed the Constitution (Amendment) Bill 2017. The Bill amended section 141(2) (b) of the Constitution in extending the age at which a Supreme Court judge should vacate his or her office from 70 to 75 years. In addition, the amendment also removed the upper age limit of 65 for holding office as President provided under section 62(1)(b).

However, the initial process of amendment by government was erroneous as it didn't follow the proper procedures. In a televised statement, the Minister for Justice and Attorney General Tambadou advised President Barrow not to sign the two amended constitutional provisions because the procedures for amendment were misconceived. The proposed amendments to sections 62(1)(b) and 141(2)(b) which are not entrenched provisions, fall within the ambit of section 226(2), whose procedures were not followed. Section 226 (2) provides:

- a) *before the first reading of the Bill in the National Assembly, the Bill is published in at least two issues of the Gazette, the latest publication being not less than three months after the first, and the Bill is introduced into the National Assembly not earlier than ten days after the latest publication;*
- b) *the Bill is supported on the second and third readings by the votes of not less than three quarters of all the members of the National Assembly.*

This sort of unconstitutional amendment has a history in The Gambia. In several cases,

⁴ Sec 99 (2) of the Constitution.

⁵ 43 members of the APRC were elected in the 2012 National Assembly Election and an additional five members were nominated by the President.

⁶ *Omar Jallow & Amadou Scattered v Republic of The Gambia*, ECW/CCJ/JUD/06/17.

such as *Independent Electoral Commission v Attorney General*⁷ and *Jammeh v Attorney General*,⁸ the Supreme Court per Jallow JSC (as he then was) held that:⁹

[g]iven the supremacy of the Constitution over all other laws and acts or omissions of public authorities, it is important for those involved in the exercise of legislative authority of the state to exercise due care and caution to ensure that such legislation is consistent with the provisions of the Constitution and that it is enacted with regard to the requirements and procedures of the Constitution.

The Minister took full responsibility for the error and promised to take actions to remedy the situation as well as avoid such occurrence in the future. He further underscored the urgent need to do a comprehensive review of the Constitution. This public apology and acceptance of responsibility showed the government's responsiveness to the concerns of citizens who lamented on the non-adherence to constitutional procedures in passing the amendments.

However, the constitutional debate erupting from this was not only in the procedures but the motivation underlying the removal of the upper age limit. People saw the removal of the upper age limit as an amendment for the benefit of one person. The controversies surrounding this came about after the news of the appointment of Mrs Fatoumatta Jallow Tambajang as the Vice President as of 23 January 2017. The public discussion that ensued focused on whether Mrs. Tambajang was qualified to be appointed Vice President as it was deemed that she was above the constitutional age of 65 years at the time. Subsequently, a press statement from the spokesperson of the

President responded to the outcry stating that the attention of the President had been drawn to the constitutional provisions and that although he thought Mrs. Tambajang was well suited for the job, the provisions of the Constitution will be respected.

Interestingly, the Barrow government never appointed a vice president because it was widely believed that he still intended to appoint her, and so she was appointed overseer of the office in March 2017. With the eventual passing of the Constitutional (Amendment) Act on 25 July 2017 and assented to by the President on 27 July 2017, Mrs. Tambajang was sworn in as Vice President on 9 November 2017.

Although we acknowledge that Barrow inherited the monumental task of repairing the damage accumulated from 22 years of dictatorship, such a contrary action calls into question the commitment of the government to democratic system change. The new government needs to manifest its acceptance and commitment to democracy and constitutionalism both in theory and everyday practice, including relinquishing any attempt that gives any semblance to actions undertaken by the previous dictatorship.

4. The Constitutional Review Commission Act

On 11 December 2017, 11 months after the new government took office, Minister of Justice Tambadou finally presented the Constitutional Review Commission Bill before the National Assembly. The passing of the Constitutional Review Commission (CRC) Act, 2017¹⁰ for the establishment of a commission to draft and guide the process of promulgating a new constitution for The Gambia is a great step in addressing the deficiencies of the 1997 Constitution. The 1997

Constitution lacks legitimacy, with Gambians seeing it as an artifact of the Jammeh government. Not only was the former regime notorious for the disregard of the rule of law, but Jammeh further distinguished himself by a number of amendments to the Constitution with largely anti-human rights and undemocratic provisions, such as absence of the two-term limit, expansion of the powers and benefits of the presidency, and sweeping reforms to electoral and media provisions and subsequent laws.

In addition, some amendments did not follow the procedure laid out in the Constitution. For instance, in the case of *Hon. Kemesseng Jammeh v. the Attorney General*,¹¹ the Supreme Court invalidated a substantial part of the Constitution Amendment Act,¹² which aimed at amending several provisions of the Constitution. The procedural requirements for amending the Constitution as provided in section 226 (7) were not followed. Nevertheless, one change stayed in the face of the Supreme Court judgment finding it unconstitutional. This was the insertion of the word "secular" in section 1 of the Constitution which states "The Gambia is a Sovereign Secular Republic." There were also amendments by implication. For example, section 24 (an entrenched clause that can only be amended through a referendum) provides that an accused can elect to be tried by jury. But this section was changed silently to the jurisdiction of the high court to state that it shall be constituted by a single judge when it presides over cases.

5. The "Freedom of Assembly" Case¹³

The case was brought by Ousainou Darboe, current Foreign Affairs Minister (and the leader of the former opposition party UDP), against the state and dealt with the right to assembly and expression. The

⁷ Gambia Law Reports [1997-2001] GR 630.

⁸ (2002) AHRLR 72 (GaSC 2001)

⁹ As above, para 32.

¹⁰ This was assented to on 11 January 2018 by President Barrow. Members of the Commission are yet to be appointed.

¹¹ Hon. Kemesseng Jammeh v. the Attorney General (2001) Supreme Court, Civil Case No 4.

¹² Act No. 6 of 2001.

¹³ *Ousainou Darboe v 19 Others IGP & Inspector General of Police, Director General of National Intelligence Agency & the Attorney General*, CML SUIT NO: SC 003/2016

plaintiffs invoked the original jurisdiction of the Supreme Court seeking declarations that section 5 of the Public Order Act¹⁴ was unconstitutional as it violated section 25 of the Constitution which guarantees freedom to assemble and demonstrate peaceably and without harm. They further claimed that the requirement levied on a person to apply for a police permit before holding any public gathering is illegal, unconstitutional, and made in excess of legislative authority.

On 23 November 2017, the Supreme Court unanimously held that the restrictions on the grounds set out in Section 25 (4) of the Constitution and section 5 of the Public Order Act were reasonably justifiable in any democratic society. The Supreme Court stated that:¹⁵

The right to assembly, as with other individual or collective rights, is usually exercised within the public space. As a result its exercise by one may conflict with the exercise of the same right by others or with the exercise or enjoyment of other rights by other persons or with the needs for the maintenance of public order and security. Hence the need for some regulation or restrictions on the exercise of the right ... The requirement of a licence from the Inspector General of police for the holding of a public procession ... to prevent a breach of the peace are reasonable limitations on the right to assembly and to free expression.

With the new democratic dispensation, this Supreme Court judgment is a major setback as it is contrary to international and regional human rights standards. For instance, Rule 71 of the recently adopted African Commission on Human and Peoples' Rights (African Commission) Guidelines on Freedom of Association and Assembly in Africa provides that:

participating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the state. A system of prior notification may be put in place to allow states to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens.

Although, the Constitution permits the imposition of restrictions on the exercise of fundamental rights under specified circumstances, the unconstitutionality and undemocratic nature of section 5 of the Act lies in the discretionary or arbitrary nature of the decision of the IGP to grant or deny a permit. The Coalition Government's 2016 manifesto described the Public Order Act as a law that "gives too much power to the Inspector General of Police and does fetter freedom of association and assembly."¹⁶ Thus, the continuous presence of this law has led to the same repressive response by the Barrow government. Some of these incidents in 2017 included: the protest demanding the removal of a heavy security presence in Foni, which turned deadly; the arrest of sports journalist Baboucarr Sey for holding a protest and press conference over a disputed soccer field claimed by real estate company Global Properties; and the denial of a permit for an "Occupy Westfield" protest against Gambia's energy company, the National Water and Electricity Company (NAWEC), for security reasons.

The coalition government should uphold its promise of repealing any provision in the "[p]ublic Order Act that is not reasonable and justifiable in a democratic society such as those that hinder peaceful procession to highlight public grievances, which is the main tool for exercising civil society oversight over the governance process."

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. "Gambianisation" of the judiciary

Although the 1997 Constitution provides for independence of the judiciary, the Gambian judiciary under the former regime was subject to various forms of interference. Consequently, there was limited public confidence in the judiciary. Since the new government came into power, there have been considerable efforts on their part in appointing Gambians at all levels of the judiciary. Departing from the style of the former regime of foreign appointments to the position of chief justice, President Barrow appointed a Gambian, Hassan Jallow, former prosecutor of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. Following this, numerous appointments took place including at the level of the Supreme Court. In 2017, 16 superior court judges were appointed, including 14 Gambians in 2017. April saw the appointment of six Gambians (two Gambians each were appointed to the Supreme Court, Court of Appeal, and High Court, respectively) and in November, eight were appointed (two to the Supreme Court, four to the Court of Appeal, and two to the High Court).

On the backdrop of allegations that during Jammeh's era foreign judges were doing the bidding of the former dictator, the Gambia Bar Association (GBA) filed a petition with the High Court against a bid to renew the contract of four Nigerian Justices in April 2017. GBA requested for leave to apply for an order of *certiorari* against the Judicial Service Commission (JSC)¹⁷ (first respondent) and the Attorney General (second respondent) to quash the appointments of four Justices who had their contracts renewed by the JSC. The GBA argued that their appointments were contrary to provisions of the Constitution such as sections 138, 145, and

¹⁴ This Act came into force on 31 October 1961. It has since been amended by the Amendment Act 2009 and 2010.

¹⁵ *Darboe case* (n 13 above) pp. 7- 8.

¹⁶ Barrow heads the coalition government.

¹⁷ *Rachel Y. Mendy, Combey Gaye & Abdul Aziz Bensouda (as trustees of the Gambia Bar Association) v Judicial Service Commission (1st Respondent) and Attorney General (2nd respondent) in the matter of appointment by the Judicial Service Commission of Edward E. Ogar, Mathias O. Agboola, Simeon Abi and Martins O. Okoi as justices of the High Court of The Gambia and in the matter of sections 138, 145, and 229 of the 1997 Constitution of The Gambia*, Misc App. No: HC/092/17/MF/0333/A.

229. This argument was that the JSC did not follow proper procedures, as section 138(2), for instance, provides that all appointments except judges of the Special Criminal Court shall be appointed by the President on the recommendation of the first respondent. JSC did not have the power to appoint (including renewal) judges for superior courts. The presiding High Court Judge declared that the reliefs sought required an interpretation and enforcement of the Constitution and as a result, referred the matter to the Supreme Court for determination.

2. *Commission of inquiry*

The *Commission of Inquiry into the Financial Activities of Public Bodies, Enterprises and Offices as Regards Their Dealings with Former President Yahya A.J.J Jammeh and Connected Matters* was launched on 13 July 2017.¹⁸ The Commission was established to investigate allegations of abuse of office, mismanagement of public funds, and willful violations of the Constitution by former President Jammeh. The Commission was established to last for three months, but its mandate has been extended for an additional six months, which will continue until May 2018. The reason for the extension was the emergence of new evidence, which made it mandatory to call for more witnesses to testify before the Commission. The issue involved direct or indirect withdrawal of substantial funds – on instructions received from the Office of the President during his tenure in office – from public bodies, including the Central Bank. It has also been discovered that Jammeh accumulated at least 131 known properties and operated 89 private bank accounts, and family members hold shares in 14 companies. The Commission has also made several interim orders freezing assets of Jammeh's associates.

3. *The Truth, Reconciliation and Reparations Commission (TRRC) Act*

As a direct result of 22 years of authoritarian rule, human rights violations were widespread. In most cases, there was no effective investigation and perpetrators have not been brought to justice. On 13 December 2017,

the Truth, Reconciliation and Reparations Commission Act was adopted by the National Assembly and assented to by the President on 13 January 2018. The TRRC Act provides for the establishment of the historical record of the nature, causes, and extent of violations and abuses of human rights committed during the period July 1994 to January 2017 and to consider the granting of reparation to victims. The Commission's mandate includes initiating and coordinating investigations into violations and abuses of human rights; the identity of persons or institutions involved in such violations; identifying the victims; and determining what evidence might have been destroyed to conceal such violations.¹⁹ The Commission will comprise 11 members, who are yet to be appointed.

4. *National Human Rights Commission (NHRC) Act*

On 13 December 2017, the National Assembly passed the National Human Rights Commission Act and the President assented to it on 13 January 2018. The NHRC Act establishes a Commission for the promotion and protection of human rights in The Gambia. The NHRC is authorized to investigate and consider complaints of human rights violations in The Gambia, including violations by private persons and entities. The members of the Commission are yet to be appointed.

IV. LOOKING AHEAD TO 2018

With the enactment of the Constitution Review Commission Act, the drafting of a new Constitution will be an instrumental constitutional development feature in 2018. There is high public expectation for a new Constitution given how deeply the Gambian state was effectively personalised by the former President. As a result, the new Constitution must not only address complex issues such as term limits but also must contain a comprehensive bill of rights that complies with international and regional human rights standards. The new Constitution must also address the need of the Gambian judiciary to look at international human rights law and

foreign law in developing an indigenous jurisprudence after a dictatorship.

In the pursuit of transitional justice, the focus should not only be on the formation of a commission but on the establishment of accountable institutions and restoring confidence in them. As the country currently has a plethora of laws (including decrees) and practices from the former regime that severely limit and violate human rights and human dignity, harmonisation is very critical. The new democratic government of The Gambia must prioritise the reform of laws and institutions including the police, judiciary, military, and national intelligence.

IV. FURTHER READING

BG Galleh, *Defying Dictatorship: Essays on Gambian Politics, 2012 – 2017* (CENMEDRA 2017)

S Nabaneh 'The Gambia: Commentary' in R Wolfrum, R Grote & C Fombad (eds.) *Constitutions of the World* (OUP, 2017)

¹⁸ Per sec 200(1) of the Constitution and the Commission of Inquiry Act (CAP. 30:01).

¹⁹ Sec 14 of the TRRC Act, 2017.



Georgia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 was an important year for Georgian constitutional law. This report initially provides a brief introduction to the Georgian constitutional system, with a particular emphasis on the system of constitutional reform in Georgia that replaced the country's semi-presidential system with a parliamentary one. The report provides an overview of landmark judgments adopted by the Georgian Constitutional Court in 2017 and main directions of electoral reforms. Section III suggests major constitutional developments in 2017 related to the court system and local self-government reforms in Georgia. The final section examines developments expected in 2018 related to the presidential elections, constitutional court cases, and other related events.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

The Georgian Constitution was adopted by the Parliament of Georgia on August 24,

1995, based on the fundamental principles of the first Constitution of Georgia (adopted on February 21, 1921).¹ In 2017, Georgia began implementing democratic institutions, and today it is a “Partially Free Country” according to Freedom House.² World Bank gives it 9th place in Doing Business world ranking³; Corruption Perceptions Index⁴ has it correspondingly 44th in world ranking and 1st in region; and the WJP Rule of Law Index has it 38th out of 113 countries worldwide.⁵ Georgia achieved an Association Agreement⁶ and free visa travel to EU,⁷ although it still has challenges towards democratic development.

Constitutional Reform in Georgia

In 2017, Georgia faced a third major constitutional revision. Prior to the 2012 election, the ruling Georgian Dream coalition promised to amend the Constitution and move to a parliamentary system. Not all parties in the coalition shared this opinion at the time and Parliament was not able to adopt the constitutional amendments. In the 2016 election, Georgian Dream participated independently, winning 48.67% of

¹ Constitution of the Democratic Republic of Georgia, February 21, 1921 <<http://www.constcourt.ge/ge/publications/books/the-1921-constitution-of-the-democratic-republic-of-georgia.page>> accessed 28 February 2018

² Freedom in the World 2017 <<https://freedomhouse.org/report/freedom-world/2017/georgia>> accessed 28 February 2018

³ Doing Business 2018, October 31, 2017 <<http://www.worldbank.org/en/news/press-release/2017/10/31/doing-business-2018-georgia-ranked-highest-in-europe-and-central-asia-region>> accessed 28 February 2018

⁴ Corruption Perceptions Index (CPI) 2017 <<https://www.transparency.org/country/GEO>> accessed 28 February 2018

⁵ WJP Rule of Law Index 2017–2018 <<https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017-2018>> accessed 28 February 2018

⁶ ‘European Parliament ratifies EU-Georgia association deal’ (*Agenda.ge*, 18 Dec 2014) <<http://agenda.ge/news/26692/eng>> accessed 28 February 2018

⁷ ‘Jubilant Georgians Ring In Visa-Free Travel To EU’ (*Radio Liberty*, 2017-03-28) <<https://www.rferl.org/a/georgia-eu-visa-free-travel-/28395173.html>> accessed 28 February 2018

the proportional votes and 44 seats in the legislature, and 70 out of 73 seats in the majoritarian constituencies. On December 15, 2016, the Parliament created the State Constitutional Commission to revise the Constitution.⁸ The main goal of the Commission was to draw up a draft law on the revision of the Constitution of Georgia.⁹ On April 22, 2017, the State Constitutional Commission adopted the Draft of Revision of the Constitution.¹⁰

The State Constitutional Commission was comprised of 72 members, including representatives of both the parliamentary majority and the minority, constitutional bodies, experts, NGOs, and representatives of political parties which received at least 3% of the votes in the last parliamentary elections. The ruling party held a majority in the Commission. The presidential administration refused to collaborate with the Commission, stating that the procedure for setting it up lacked political legitimacy and was not based on a general consensus.¹¹ Two days before the vote on the constitutional draft, the opposition parties left the Commission. Fifteen opposition parties declared that the ruling majority had not considered any of their proposals and accused the ruling party of amending the Constitution to suit themselves. The Commission's work was criticized and was not supported by the Public Defender's Office and representatives of leading NGOs. It should also be noted that these fundamental constitutional amendments were worked out in just three months. No international experts were invited to join the amendment drafting process. During his visit to Georgia in 2013, the president of the Venice Commission, Gianni Buquicchio, said that a good Constitution should be based on the widest consensus

possible between all the political parties and society.¹²

As noted above, the main goal of the reform was to introduce a parliamentary republic. According to the draft, the President of Georgia will be elected for a five-year term by an electoral board without any debate. The Electoral Board will be comprised of 300 members, including all Members of the Parliament and all Members of the Supreme Councils of the Autonomous Republics of Abkhazia and Adjara. The other members will be named by political parties from representatives of local councils. It must be noted that the ruling party has a majority in the Supreme Council of the Autonomous Republic of Adjara and in local government. These two authorities do not have independent financial and economic sources and are totally dependent on government support. Georgia does not have a decentralised territorial state structure, and the country still operates like the Soviet system. Governors in the regions are appointed by the executive and are the executive's representatives.¹³ Thus, they are loyal to the parliamentary majority.

The majority of citizens and political parties did not favour the cancellation of direct presidential elections. Significant parts of society consider the direct election of the President as a way of exercising their voice and the only mechanism for balancing the executive.¹⁴ According to the adopted constitutional amendments, the President's powers are also restricted. The President will carry out a number of authorities in consent with the government or at the government's proposal. The ruling party believes the President should not be an active, charismatic leader but rather an experienced academic

person. The President shall not be a member of a party and the candidate's minimum age will be increased from 35 to 40. The National Security Council will be abolished and a Council of Defense will be formed, which will operate only during martial law. The National Security Council used to be a subject of controversy between the presidency and the government after the 2012 parliamentary elections. According to the draft constitution, the President of Georgia will remain the Commander-in-Chief of the Armed Forces, but he shall appoint and dismiss the Head of the Military Forces upon government recommendation.

The Parliament adopted the constitutional amendments at its second reading during an extraordinary session on June 23. The amendments were supported only by the Georgian Dream party. The President, the opposition, and the NGO sector called on the ruling party to resume the dialogue on constitutional change, sending their remarks to the Venice Commission. On September 26, 2017, the Parliament approved the amendments to the Constitution at the third reading, supported by 117 votes, while 2 MPs voted against. Georgian President Giorgi Margvelashvili vetoed the constitutional amendments and the Parliament of Georgia overturned it on October 13, 2017.

The draft also changed the constitutional amendment rules. Any new amendments shall be adopted by a two-thirds rather than a three-quarters majority of the Parliament, though the amendments shall be submitted to the President after their adoption by the Parliament. If the amendments are supported by three-quarters of the total number of MPs, the President shall not have the right to veto.

⁸ Resolution of the Parliament of Georgia, #810-Il, 10/05/2017 <<https://matsne.gov.ge/ka/document/view/3472813>> accessed 28 February 2018

⁹ The Charter of the State Constitutional Commission, #810-Il, 10/05/2017 <<http://constitution.parliament.ge/en-52>> accessed 28 February 2018

¹⁰ The State Constitutional Commission Supported the Draft of Revision of the Constitution, <<http://constitution.parliament.ge/en-88>> accessed 28 February 2018

¹¹ President's Administration Boycotts Planned Constitutional Reform Commission (*Civil Georgia*, 12 Dec. 2016) <<http://civil.ge/eng/article.php?id=29687>> accessed 28 February 2018

¹² Gianni Buquicchio – Constitution Should Not Be the Result of Consensus between the Party or Current Majority (*Interpressnews*, 30 January 2013), <<http://www.interpressnews.ge/en/politicss/44180-gianni-buquicchio-constitution-should-not-be-the-result-of-consensus-between-the-party-or-current-majority.html?ar=A>> accessed 28 February 2018

¹³ Constitution of Georgia, 24 August 1995 <<https://matsne.gov.ge/en/document/view/30346>> accessed 28 February 2018

¹⁴ Political Ratings and Public Attitudes in IRI-commissioned Poll (*Civil Georgia*, 5 April 2017), <<http://www.civil.ge/eng/article.php?id=29995>> accessed 28 February 2018.

According to the Georgian Constitution and legislation, the Constitutional Court of Georgia is not entitled to revise the constitutional-ity of constitutional amendments.

In conclusion, it should be noted that there are some positive aspects in the draft Constitution, specifically government formation and accountability, human rights and freedoms, and other technical changes, but the most important aspects are the mechanisms for the democratic functioning of power. Without a democratic political system, any improvement is a fiction. The constitutional reform confirmed the perils of a single party holding supermajority power. The unilateral adoption of such important amendments is a threat to the long-term democratic development of the country. No matter how good some of them might be, an acknowledgement of the Georgian context is very important. Most likely, the draft will establish a one-party majority without the necessary checks and balances.¹⁵

Challenges towards Electoral System

Electoral reform in Georgia was active before every election. According to the Constitution of Georgia, the composition of the Parliament of Georgia was determined by 77 members elected by proportional system and 73 MPs elected by majoritarian system.¹⁶ The coalition of the Georgian Dream, who came to power in 2012, announced reformation of the electoral system on their top list.¹⁷

Most of the parties within the Georgian Dream coalition demanded the abolition of the majoritarian system while they were in opposition,¹⁸ but after coming to power they did not support this initiative for the 2016 parliamentary elections.

An electoral system has become a source of disagreement among the ruling party, the opposition, and the President of Georgia during the constitutional reform in 2017. The opposition demanded¹⁹ a fully proportional parliamentary election. At the beginning, the ruling party supported this proposal, but later proposed a 5% threshold with undistributed votes below the threshold being allocated to the winning party. At the same time, the draft banned electoral blocs. The amendments were strongly criticized by international organizations, Georgian NGOs²⁰ and the Venice Commission.²¹

Keeping the mixed system for the 2020 parliamentary election could be considered a strategic goal of the ruling party in its attempt to maintain power. Allowing party blocks and reducing the election threshold to 3% was a last-minute change in the face of strong criticism by the international and domestic communities. Nonetheless, the Venice Commission noted that the postponement of the adoption of a proportional election system to October 2024 is both highly regrettable and a major obstacle to reaching consensus.²² The amendments will come into force after the 2018 presidential election. The proportional

electoral system will be launched in 2024 while the 2020 elections will still be held under the existing mixed electoral system and with a one-time 3% election barrier. Thus, the reform process ended with the rejection of a fully proportional electoral system for the 2020 parliamentary elections, which was the main demand by the political parties in opposition.

The Constitutional Court of Georgia and Its Major Decisions in 2017

One of the most important institutions founded by Georgia on the basis of the 1995 Constitution is the Georgian Constitutional Court. The Constitutional Court of Georgia was formed in 1996 shortly after adoption of the Constitution of Georgia. The Constitutional Court of Georgia shall be the judicial body of constitutional review, which shall guarantee the supremacy of the Constitution of Georgia, constitutional legality, and the protection of constitutional rights and freedoms of individuals.²³ It should be noted that 1171 constitutional claims and 78 constitutional submissions have been submitted to the Constitutional Court of Georgia since 1996. The majority of these cases belong to individuals and those dealing with human rights issues.²⁴

2017 was significant with changes in the composition of the Constitutional Court. Two new judges were elected to the Constitutional Court of Georgia in 2017. One of

¹⁵ Malkhaz Nakashidze, Georgia – Constitutional Reform: From Semi-Presidentialism to Parliamentarism, October 3, 2017, <<https://presidential-power.com/?p=7010>> accessed 28 February 2018

¹⁶ Constitutional Law of Georgia on the Draft Revised Constitution of Georgia, December 27, 2011 №5630–rs, <<https://matsne.gov.ge/ka/document/view/1556256>> accessed 28 February 2018

¹⁷ Declaration of Political Coalition: “Georgian Dream,” February 21, 2012, <<http://www.ivote.ge/images/doc/pdfs/ocnebis%20saarchevno%20programa.pdf>> accessed 28 February 2018

¹⁸ Opposition Lays Out Election Reform Proposal (*Civil Georgia*, 4 October 2010), <<http://www.civil.ge/eng/article.php?id=22725>>

¹⁹ Opposition Parties Reject Constitution Changes, Boycott Commission, (*Civil Georgia*, 22 April 2017), <<http://civil.ge/eng/article.php?id=30041>> accessed 28 February 2018

²⁰ Statement Members of the National Platform of the Eastern Partnership Civil Society Forum to the Parliament of Georgia May 8, 2017, <https://idfi.ge/ge/statemend_onparliament> accessed 28 February 2018

²¹ Opinion on the Draft of Constitutional Law, Venice Commission, (CDL-AD(2017)013-e Georgia – June 19, 2017), <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)013-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)013-e)> accessed 28 February 2018

²² Draft Opinion on the Draft Constitution of Georgia (Opinion 876, CDL-PI(2017)006, 22 September 2017), <[http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI\(2017\)006-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI(2017)006-e)> accessed 28 February 2018

²³ Organic Law of Georgia on the Constitutional Court of Georgia, (*The Legislative Herald of Georgia - an official gazette of Georgia*, 31/01/1996, 001, 27/02/1996), <<https://matsne.gov.ge/en/document/view/32944>> accessed 28 February 2018

²⁴ Official statistics on the decisions of the Constitutional Court of Georgia (1996-2017), <<http://www.constcourt.ge/en/legal-acts/statistics>> accessed 28 February 2018

them was a former chairman of the ruling party and vice-speaker of the Parliament, and the other a former candidate for judgeship to the ECHR in Strasbourg but rejected by a special committee of the Council of Europe's Parliamentary Assembly.²⁵ These appointments were highly criticized by the opposition²⁶ and NGO sector.²⁷

In this part of the report, we briefly discuss four major cases of the Court. We chose these judgments as we consider them to be the most interesting cases in 2017 constitutional development. Discussion of the selected cases is followed in chronological order.

Citizen of Georgia Oleg Latsabidze V. The Parliament of Georgia
(Judgment №3/5/626, October 17, 2017)

The dispute of the case centered on norms of the “Local Self-Governance Code.” This code defined that a new *gamgebeli* (mayor) coming to office after election was the basis for termination of the authority heads of structural units of the *gamgeoba* (city hall). A claimant, who was appointed to the position of head of Municipality Gamgeoba Service through a merit-based competition, was dismissed from his position by order of the newly elected *gamgebeli* of the municipality. The claimant believed that the head of a structural unit is appointed to the position upon professional, moral, and physical skills and, due to its authority, the unit has no possibility of carrying out an independent policy, so the disputed norm should be transferred from the category of professional public official to the category of a political one. The respondent pointed out that the legitimate aim of the disputed norm was to ensure effective implementation of local self-governance and the disputed restriction served the purpose of replacement of staff in public ser-

vice, access to public service being an essential component of democratic governance. The Constitutional Court decided that the contested provision determining termination of authority without examination/assessment of the officer's qualification, experience, and other skills but on the basis of a new *gamgebeli* coming to office should be considered as an unsuitable method for effective local government functioning and controverted to the Constitution, Article 29, paragraph 2.²⁸

Citizen of Georgia Omar Jorbenadze V. The Parliament of Georgia
(Judgment №3/1/ 659, February 15, 2017)

The subject of the dispute was a provision of the Organic Law of Georgia on “Common Courts,” which envisaged the appointment of judges for three-year probationary period. The claimer was a judge of the Tbilisi Court of Appeals with 20 years of experience, who after expiration of his term would have to be re-appointed for a three-year probation period. The claimant stated that Article 14 of the Constitution declared equality, and all judges should be appointed on the same starting conditions; that applicants might have different writing skills or academic achievements in scientific activity but they still should be treated equally. The Court decided that the controversial norm did not meet rational differentiation tests and contradicted to the right of equality recognized by Article 14 of the Constitution of Georgia.²⁹

Citizen of Georgia Givi Shanidze V. The Parliament of Georgia
(Judgment №1/13/732, November 30, 2017)

The subject of the dispute was the constitutionality of the normative content of Article 273 of the Criminal Code of Georgia, “Illegally consumed without the doctor's pres-

cription,” which provides for the responsibility of drug use for marijuana. According to the claimant, marijuana can be used for medical and recreational purposes and a person shall have a right to his own body, health, physical development as well as form of relaxation and means of protection from internal interference to the right to free personality. A person has the right to define the activities or actions that are good for him. According to the respondent, the disputed norm is to protect human health as a prevention to the general threats caused by individuals as well as narcotic drugs to the entire population. Marijuana harms human health, especially for juveniles. The Constitutional Court of Georgia has decided, “The impugned provision is unconstitutional. It does not make any exceptions to the criminal responsibility for reducing and maternity for repeated use of marijuana, regardless of whether this act creates a threat to public order, health of other people, or other legal good. Consequently, the use of marijuana consumption in the form of entertainment and recreational means is punishable in criminal manner against the right to free personality development. The regulation envisaged by the disputed norms is disproportionate interference in the protection of personal autonomy and, therefore, contradicts to Article 16 of the Constitution of Georgia.”³⁰ This decision is a significant step towards decriminalization of marijuana in Georgia and within the whole region.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Judicial reform is one of the significant developments in the constitutional law of Georgia. On December 29, 2017, the Parliament adopted a package of well-known leg-

²⁵ Progress report, (Doc. 14231 Addendum 3, 25 January 2017), <<http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23380&lang=en>> accessed 28 February 2018

²⁶ MP Kobakhidze Slated for the Constitutional Court, (*Civil Georgia*, February 6, 2017), <<http://civil.ge/eng/article.php?id=29837>> accessed 28 February 2018

²⁷ GDDG's Constitutional Court Nomination Sparks CSO, (*Civil Georgia*, November 29, 2017), <<http://civil.ge/eng/article.php?id=30678>> accessed 28 February 2018

²⁸ Latsabidze V. The Parliament of Georgia [2017], №3/5/626, <<https://matsne.gov.ge/ka/document/view/3834299>> accessed 28 February 2018

²⁹ Omar Jorbenadze V. The Parliament of Georgia [2017], №3/1/659, <<https://matsne.gov.ge/ka/document/view/3584518>> accessed 28 February 2018

³⁰ Georgia Givi Shanidze V. The Parliament of Georgia [2017], №1/13/732, <<https://matsne.gov.ge/ka/document/view/3875278>> accessed 28 February 2018

islative amendments under the “Third Wave” of Court Reform, which along with other issues, defined fully implementing rules for electronic distribution of cases in courts from 2018, the three-year probationary period before a permanent appointment, and appointment of the High Council of Justice for a term of five years by chairmen of appellate and city courts. The number of judges to the Supreme Court was defined to be at least 16 members; however, in case of necessity the Supreme Court’s plenum would be able to increase this number.³¹ These issues were a matter of dispute between the ruling party, NGOs, and the opposition. The President vetoed the law, but the Parliament overthrew it on February 8, 2017, and the President finally signed it.³²

Free media is one of the significant factors of democratic development of Georgia. Last year was known for disputes over the ownership of the private broadcasting company “Rustavi 2,” known by its loyalty to the former ruling party “United National Movement,” and often the subject of criticism by government officials. Kibar Khalvashi, one of the former owners of the TV company, who is currently a supporter of the government, initiated a court dispute to regain the company. The Supreme Court of Georgia made a decision on March 2, 2017 in favor of the former owner of Rustavi 2 TV and granted him ownership rights. The decision got serious criticism both within the country and internationally. Strasbourg

Human Rights Court made a rare decision on the basis of the TV company’s complaint and suspended the execution of the Supreme Court decision on “Rustavi 2” before the final hearing. Based on that, the company continues to broadcast.³³

On June 30, 2017, the Parliament of Georgia, despite wide public protest, supported the abolition of seven self-governing city and municipality statuses. On July 21, the President vetoed the draft law and returned it to the Parliament of Georgia with motivated remarks. The President noted that legislative amendments “cannot guarantee confidence in the election administration and political pluralism in the process of election management” and the new rule for determining the number of majoritarian MPs in the municipal council cannot provide “fair representation” of the towns within the municipality and “even more inequality with regard to the equality of votes.”³⁴ The problem was highlighted in the European Commission for Democracy through Law (Venice Commission) and Office for Democratic Institutions and Human Rights (OSCE/ODIHR) Joint Opinion, which recommends revising the electoral system for the local self-government elections to ensure equality of the vote.³⁵

The ruling party, Georgian Dream, overturned the President’s veto.³⁶ Only five cities have maintained the status of self-governing city. These changes were criticized by Georgian observer organizations.³⁷ On October

21, 2017, elections were held for the municipality representative body Sakrebulo and mayors of self-governing cities and communities. According to the results, Georgian Dream won the majority of Sakrebulo and mayoral elections. The results of the elections were protested by 13 non-parliamentary opposition parties whose leaders united in “Leadership Council.”³⁸

IV. LOOKING AHEAD TO 2018

One of the most important challenges for Georgia is the presidential election in 2018. This election is particularly important because of the constitutional amendments. It is the last election in which citizens will elect the President via direct elections. At the same time, the President is elected for a term of six years instead of five, and in 2024 the newly elected Parliament will elect the President. In 2018, the Parliament of Georgia shall approve the Constitution of the Autonomous Republic of Adjara. The Supreme Council of Adjara A.R. is currently working on the draft. Election of a new chairman of the Constitutional Court of Georgia and decisions on many important cases are expected in 2018. For instance, “Citizen of Georgia Revaz Lortkipanidze V. Parliament of Georgia,”³⁹ where the Court shall determine whether punishment in the Criminal Code for being a “Thief in Law” is constitutional;⁴⁰ “Supreme Orthodox Division of Muslims of Georgia V. Government of Georgia,” related to com-

³¹ Legislative Amendments on Judicial Reform Approved (*Civil Georgia*, 29 December 2016) <<http://civil.ge/eng/article.php?id=29733>> accessed 28 February 2018

³² Website of the President of Georgia, February 13, 2017, <<https://www.president.gov.ge/ka-GE/administraciis-siakhleebi-aq/saqartvelos-prezidentma-kheli-moacera-saerto-sasa.aspx>> accessed 28 February 2018

³³ (*Georgian Journal*, 04 March, 2017), <https://www.georgianjournal.ge/society/33370-strasbourg-court-suspends-the-enforcement-of-the-supreme-court-decision-on-rustavi-2-case.html> accessed 28 February 2018

³⁴ Website of the President of Georgia, July 21, 2017, <<https://www.president.gov.ge/ka-GE/sajaro-informacia/samartlebrivi-aqtebi/saqartvelos-prezidentma-kanonproeqtebi-motivirebul.aspx>> accessed 28 February 2018

³⁵ Joint Opinion on the Draft Election Code of Georgia (Venice Commission OSCE/ODIHR, 19 December, 2011), -8

³⁶ Parliament of Georgia rejected motivated remarks of President, July 26, 2017, <http://www.parliament.ge/ge/saparlamento-saqmianoba/plenaruli-sx-domebi/plenaruli-sxdomebi_news/parlamentma-prezidentis-motivirebuli-shenishvnebi-ar-gaiziara.page> accessed 28 February 2018

³⁷ The International Society for Fair Elections and Democracy (ISFED), August 18, 2017, <<http://www.isfed.ge/main/1265/eng/>> accessed 28 February 2018

³⁸ Leader’s Council: Government planned 2017 elections results, (*Netgazeti*, October 22, 2017) <<http://netgazeti.ge/news/227827/>> accessed 28 February 2018

³⁹ Revaz Lortkipanidze V. the Parliament of Georgia [2017], №2/1/728, <<https://matsne.gov.ge/ka/document/view/3578552>> accessed 28 February 2018

⁴⁰ The European Court of Human Rights in the case “Ashlarba v. Georgia” has already established that the legislation adopted by Georgia in 2005 on organized crime and racketeering by which the lawful theft has been punished does not violate the European Convention on Human Rights. *Ashlarba V. Georgia*, Appl. no. 45554/08, (ECHR, 15 July 2014), [https://hudoc.echr.coe.int/eng#{"itemid":\["001-145572"\]}](https://hudoc.echr.coe.int/eng#{) accessed 28 February 2018

pensation for the damage caused during the Soviet totalitarian regime;⁴¹ and “Georgian National Committee of Blue Shield and Georgian citizens V. Parliament of Georgia,” on the protection of cultural heritage,⁴² etc.

IV. FURTHER READING

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Georgia – Constitutional Reform: From Semi-Presidentialism to Parliamentarism, October 3, 2017, Presidential Power, <<https://presidential-power.com/?p=7010>>

⁴¹ Supreme Orthodox Division of Muslims of Georgia V. Government of Georgia [2017], №2/5/750, <<https://matsne.gov.ge/ka/document/view/3629285>> accessed 28 February 2018

⁴² “Georgian National Committee of Blue Shield” and Georgian Citizens V. Parliament of Georgia” [2017], №2/17/1216, <<https://matsne.gov.ge/ka/document/view/3983258>> accessed 28 February 2018



Germany

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 was again a special year in German constitutional politics. It brought some very important decisions of the Constitutional Court, some interesting constitutional amendments and the advent of the far-right *Alternative für Deutschland* (AfD) in the German Federal Parliament. Like in many other liberal democracies around the world, the feeling of institutional stability, which constitutional law is normally an epitome of, vanished towards a relatively unknown degree of anxiety. As national and international institutional politics are especially intertwined in the EU, events like the erosion of an independent judiciary in Poland and the Brexit negotiations also made a strong impression in the national German constitutional context.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

1. General Parliamentary Election and its aftermath

The parliamentary election of 24 September 2017 will be deemed an important event in German constitutional history for several reasons. For the first time, a far-right party, the AfD, took the 5% threshold and is now the strongest opposition party in the German Bundestag. The AfD belongs to the global nationalist surge, and it is a contested question as to how far the party is loyal to the core values of the German Basic Law. It is now up to the parliamentarians to define and defend these values in open debate. This is quite an

unusual task in the traditionally very consensual German political landscape. Moreover, it took an unprecedented five months to build a new government after the election. The lengthy negotiations disclosed deeper problems in the German parliamentary system. Out of six parties in parliament, only two are unambiguously ready to govern, two define themselves as more or less fundamentally in opposition, and two are extremely hesitant to take on political responsibility – one of them being the now governing Social Democratic Party. The result of the negotiations, a new grand coalition (“grand,” but with only 53% of the vote), illustrates the difficulty of creating meaningful political change after a federal election. This crisis of coalition building is also a crisis of legitimate opposition. While almost all political parties are in government, at least on the state level, the line between political opposition and opposition to the core system becomes difficult to draw. Extremists like the AfD, therefore, claim to be the only political alternative.

With regard to constitutional jurisprudence, one fault line is already visible: in parliament, the ongoing dispute between the traditional parties and the AfD over the rights of parliamentary groups will at some point of time inevitably end up at the FCC.

2. Militant Democracy: BVerfG, Judgment of 17 January 2017 – 2 BvB 1/13 (NPD-Verbot) and the following constitutional amendment

This is the first substantial decision in a party prohibition case in 60 years, when the court prohibited the Communist Party (KPD). This time, the prohibition of the Nazi Party, NPD,

failed on the merits but invited the Court, in its longest judgment to date, to extensively deliberate the constitutional core values, which political parties have to respect.

This procedure stood somewhat in the shadow of a failed attempt to have the same party prohibited in 2003. Back then, the Court aborted the procedure before coming to any verdict because of misinformation by the intelligence services with regard to the use of undercover agents. The new procedure was a challenge to the services because they had to document that they did not control the party and that any form of surveillance had not compromised the defense rights of the party. The plaintiff in the procedure was the Bundesrat, the representation of the state governments on the federal level. While the NPD was an unimportant and irrelevant force on the federal level, it was more politically relevant in some of the states, especially in the east of Germany. When the procedure was instigated at the end of 2003, the party was represented in two state parliaments and many municipalities. During the three years in which the case was pending, the party, however, lost much of its relevance. The rightist AfD more or less absorbed its electorate (above, 1.) and its decline seems to continue.

The constitutional argument to prohibit a political party is twofold. The ideology of the party has to violate the principles of the *freiheitliche-demokratische Grundordnung* (“FGDO,” the free and democratic basic order), which is the normative core of the unalterable principles of the Constitution. And the party has to pursue the termination of the constitutional system actively. The first question was relatively easy to answer, yet the court seized the opportunity to freshen up the standards. Parties that endorse an ethnic concept of the German people, that want to abolish the multi-party system and the institution of parliament, and that address other Germans as well as non-citizens in racist terms are not grounded in the FDGO. All

this applied easily to the NPD. More difficult to answer was the question of whether the party was sufficiently politically active to be prohibited. The standard of review for this question has been contested since the beginning. According to the wording of the constitutional text and the early jurisprudence of the Court, a mere intention to abolish the order of the Basic Law on the part of the party is enough. Standards of proportionality do not apply. A “clear and present” danger test would render the instrument useless because any prohibition would come too late. But on the other hand, such a grave intrusion into the political process seems to call for additional moderating criteria. And, in any case, the Court had to integrate the relatively rich jurisprudence of the European Court of Human Rights that calls for some form of proportionality, though it is less clear if it applies to racist and anti-democratic parties like the NPD. In the end, the Court declared the ideology of the NPD to be unconstitutional but denied the prohibition of the party by introducing an explicitly new criterion, called “potentiality,” into the review. To prohibit a party, the concerned party must at least have a theoretical chance to wield relevant political power. The Court did not see this to be the case with the NPD.

Political parties in Germany are co-financed by the state. To mitigate the public irritation created by the decision that a party with a now formally unconstitutional ideology is still entitled to taxpayer money, the Court alluded in its decision to the possibility of a constitutional amendment that could exclude such parties from public financial support even if they cannot be outright prohibited. The political process accepted this idea (somewhat hastily) and amended the Basic Law. The withdrawal of public funding will, however, require a new procedure in the Constitutional Court. Another chapter in the long NPD saga is underway.

(English translation of the judgment available [here](#))

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Decision of 8 May 2017, 2 BvR 157/17 – Deportation to Greece & Decision of 24 July, 2017, 2 BvR 1487/17 – Deportation of a “Dangerous Suspect”

The European “refugee crisis” not only changed political discourse in Germany but it also presented numerous legal challenges. The number of migrants whose application for asylum or refugee status is rejected and who seek legal protection has skyrocketed since 2015. Most of these cases concern the interpretation and implementation of statutory law. However, the new laws, which are enacted to speed up administrative procedures and to facilitate deportations, also raise constitutional questions. While the “right to asylum,” which the Basic Law grants in Article 16a, protects only a very small subset of migrants,¹ other constitutional rights, in particular the right to a fair hearing or the prohibition of torture, must be taken into account when designing administrative and judicial procedures. They also prohibit the deportation into countries in which the rights of migrants might be violated. The FCC has reminded the legislator of these simple truths in two decisions of 2017. The first decision concerned deportations to Greece and heavily relied on the M.S.S. judgment of the ECtHR.² It obliged the administrative courts to investigate all the relevant facts of a case if there are indications of a risk of inhuman and degrading treatment in the third country. The second decision addressed the politically highly sensitive treatment of “dangerous suspects,” for which the legislature had created an expedited deportation scheme. The details of these judgments are less important here than the fact that the Court, despite the common rhetoric of a constitutional crisis – the “reign of unlawfulness” in terms of the leader of the Bavarian conservative party – insisted on the supremacy of the Constitution and the primacy of constitutional rights, even if this incurred fiscal and bureaucratic costs.

¹ In its current version, Article 16a is the product of the so-called “asylum compromise” from 1993, which replaced the original unconditional fundamental right of asylum with a more complex provision that restricts the right and connects the domestic constitutional right with the common European asylum system.

² ECtHR, Judgment of 21 January 2011, 30696/09 – M.S.S. v. Greece and Belgium.

(English abstracts available [here](#) (for 2 BvR 157/17) and [here](#) (for 2 BvR 1487/17).

2. Decision of 10 October 2017, 1 BvR 2019/16 – Third Option

On October 10, 2017, the First Senate of the FCC broke new territory in constitutional law by paving the way for the legal recognition of a “third option” for a gender entry. As in most legal systems, German law has generally used a binary code for sex and gender and has divided its citizens into men and women. So far, only a few jurisdictions, including some U.S. and Canadian states, have allowed individuals to opt out from being categorized as either “male” or “female,” although many studies show that the obligation to choose one of the two options can be a considerable burden for persons who do not identify as either male or female.

Acting upon a recommendation of the Committee on the Elimination of Discrimination against Women from 2009, which had requested Germany “to enter into dialogue with non-governmental organizations of intersexual and transsexual people in order to better understand their claims and to take effective action to protect their human rights,”³ the German legislature modified its Civil Status Act in 2013, but only half-heartedly. While the decision to add a third gender category “inter/diverse” to the register was discussed, the *Bundestag* ultimately decided against such an amendment because of the “complex problems” it would create. The new law then provided that a child would be assigned either the female or the male gender in the birth register, but added the option that no gender entry would be made for a person who permanently identified with neither the male nor the female gender.

The complainant, who has an atypical chromosomal condition known as Turner syndrome, was registered as “female” in the birth register. Because the complainant identified as neither female nor male, they filed

a request with the competent authority to replace the gender entry “female” with “inter/diverse.” In line with the 2013 law, this request was denied by the competent authorities. The case ended up with the FCC, which decided that the 2013 law was incompatible with the Constitution.

The Court based its decision on two constitutional grounds: Firstly, the non-recognition of a third option in the Civil Status Act violates the general “right of personality” of Article 1(1) and 2(1) of the Basic Law. It has long been settled by the Court in its decisions on the *Transsexuellengesetz* (“Transsexual law”) that the “right of personality” also protects gender identity.⁴ In its new ruling, the Court specified that this right encompasses not only the choice to be identified as either man or woman but also the right of “inter/diverse” persons to be recognized in their own particular identity. Hence, a mere “no gender entry” ignores the self-conception of “inter/diverse” persons as positively possessing a gender identity, which is beyond the male/female dichotomy. It suggests that they are somehow sex- or genderless and thus affirms the gender binary. The Court additionally points to Article 3(3), first sentence, of the Basic Law, which prohibits any discrimination based on sex. Traditionally, the norm was understood to protect men and women against discrimination on the grounds of their gender. The Court now ruled that Article 3(3), which seeks to protect members of structurally vulnerable groups from discrimination, also includes “inter/divers” persons. Because neither the mere regulatory interests of the state nor the bureaucratic or financial costs which the recognition of a third gender option might produce are sufficient to justify the infringement, the Court held that the 2013 law violates the constitutional right of personality.

The Court has ordered the legislature to change the law by the end of 2018. Parliament can now pursue different paths: In principle, it could abandon gender as a legal

category altogether, although this would create many follow-up problems, for example, in anti-discrimination law. It could also leave it entirely to the individuals concerned to decide which gender they feel they belong to. Alternatively, it could create a “comprehensive” third gender option as the complainant in the FCC case had requested.

(English summary available [here](#))

3. Legal Recognition of Same-Sex Marriage

In another major victory for civil rights activists, however, the FCC was only a bystander. On 30 June 2017, shortly before the general election, the German Bundestag voted to allow same-sex couples to marry. Since 2001, homosexual couples could enter registered life partnerships, but they were not allowed to marry. And while the FCC had decided that registered partnerships and traditional marriages needed to be treated equally, it had refrained from opening the institution of marriage itself for homosexual couples. According to the Court, Article 6 of the Basic Law, which protects the institutions of marriage and family, refers to the union between husband and wife. Only the equality guarantee of Article 3 of the Basic Law calls for equal treatment of hetero- and homosexual partnerships. Over the past years, the ruling Grand Coalition had refused time and again to amend Article 6 of the Basic Law. And while several reform proposals had been discussed in parliament, they were never put to a formal vote. The Green Party, one of the main proponents of marriage equality, even asked the FCC to compel the Bundestag to vote on its proposal for a bill. The request was rejected by the Court in a short decision of 14 June 2017 because there is no obligation in German constitutional law for the Bundestag to reach a final decision on all legislative proposals.⁵

A few weeks before the general elections, however, the Social Democrats decided to push through the reform without or even

³ CEDAW/C/DEU/CO/6 para. 62.

⁴ Judgment of 6 December 2015, 1 BvL 3/03 – Transsexual Law III; Judgment of 27 May 2008, 1 BvL 10/05 – Transsexual Law V; Decision of 11 January 2011, 1 BvR 3295/07 – Registered Partnership for Transsexuals.

⁵ Decision of 14 June 2017, 2 BvQ 29/17.

against their conservative partners in the Grand Coalition. But because they lacked the necessary majority for a constitutional amendment, the “marriage for all” (*Ehe für alle*) was introduced by changing the definition of marriage in statutory law.⁶ The relevant provision in the Civil Code (*Bürgerliches Gesetzbuch*) now reads: “Marriage shall be entered into by two persons of a different or the same sex for life.” With the opening of marriage to same-sex couples, it is no longer possible to enter registered partnerships. Couples who have already registered a partnership can convert it into a marriage.

Initially, some conservatives announced that they might ask the FCC to quash the new law. However, such a complaint would lack reasonable prospects of success. The future will show whether the legislature was well advised from a political point of view to leave Article 6 of the Basic Law unamended. At the moment, however, the large majority of Germans supports same-sex marriages.

4. *Decision of 18 July 2017, 2 BvR 859/15 et al. – Reference for a preliminary ruling on the PSP Programme of the ECB & Decision of 10 October 2017, 2 BvR 859/15 et al.*

Another chapter was added to the ongoing dialogue between the FCC and the Court of Justice of the European Union (CJEU) when the FCC referred several questions concerning the legal grounds for the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) – one component of its “quantitative easing” strategy – to the CJEU. A quick reminder: In 2014, the FCC had already referred a case on the ECB’s Outright Monetary Transactions (OMT) programme to the CJEU.⁷ While the CJEU largely confirmed the legality of the ECB’s actions, the Court derived from Article 123 of the Treaty on the Functioning of the Eu-

ropean Union (TFEU) several criteria, which ECB programs have to meet.⁸ In its new referral, the FCC now asks the CJEU to assess whether the PSPP violates the prohibition of monetary financing and exceeds the monetary policy mandate of the ECB as defined by the CJEU in its OMT decision. Again, the constitutional core of the case is the right to “democratic self-determination,” which the FCC since its Lisbon decision derives from Article 38(1), first sentence, of the Basic Law.⁹ According to the Court, this right is violated if EU organs “evidently” exceed their competences, or if their actions touch upon the inalienable part of the constitutional identity. So far, the CJEU has only (negatively) decided on the request of the FCC for an expedited procedure pursuant to Art. 105 of the Rules of Procedure of the Court.¹⁰

(English press release available [here](#))

5. *Constitutional Reform of Fiscal Federalism*

Beyond these constitutional judgments of the Court, the most important formal constitutional development concerned the amendment of a whole complex of articles of the Basic Law that will deeply alter the structure of German fiscal federalism. The topic is extremely complex and can only be presented roughly. In the traditional structure, there was a system of horizontal solidarity in operation through which states with more tax income had to support states with less tax income, the so-called *Länderfinanzausgleich* (state finance adjustment). The system had been economically and politically contested for decades, and there had been a long reform debate before the current debate as well as pending cases in which “rich” states asked the Constitutional Court to overthrow this system. Despite the length and depth of the political and academic debate, the amendment itself was scarcely deliberated

and came to almost everybody as a surprise. It completely abolished the system of horizontal fiscal solidarity. Now, fiscally weak states can only be supported at the federal level. This solution seemed too centralistic even to the federal minister of finance. But the states pushed for the reform because it promised them a net win. Nobody knows how this very complicated reform will play out, but it seems clear that the new system will weaken the political independence of the states and invite the federal government to informally control the lower level of government by means of financial support.

IV. LOOKING AHEAD TO 2018

Among the major cases that the FCC will decide in 2018 is the general prohibition for German civil servants to go on strike, which will result out of an interesting judicial conversation with the ECHR.¹¹ Also, depending on the CJEU’s decision on the referral in the new ECB case, the dialogue between the two courts might enter into yet another phase. The lack of stable leadership negatively affects politics both domestically and at the European level. So far, Germany has not developed a clear position towards the French plans for a reform of the European Union.

V. FURTHER READING

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Dieter Grimm: “Ich bin ein Freund der Verfassung.” *Wissenschaftsbiographisches Interview von Oliver Lepsius, Christian Waldhoff und Matthias Roßbach mit Dieter*

⁶ Deutscher Bundestag, Legislative Proposal of 11 November 2015, BT-Drs. 18/6665 – Entwurf eines Gesetzes zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts.

⁷ FCC, Referral of 14 January 2014, 2 BvR 2728/13.

⁸ CJEU (Grand Chamber), Judgment of 16 June 2015, C-62/14 – Peter Gauweiler and Others v Deutscher Bundestag. For the reaction of the FCC see the FCC, Judgment of 21 June 2016 – 2 BvR 2728/13.

⁹ FCC, Judgment of 30 June 2009, 2 BvE 2/08 et al. – Lisbon.

¹⁰ CJEU, Order of the President of 18 October 2017, C-493/17.

¹¹ For a detailed list of the cases the FCC intends to decide in 2018, see its Annual Preview.

Grimm (Mohr Siebeck 2017)

Anna-Bettina Kaiser: “It isn’t true that England is the moon.” Comparative constitutional law as a means of constitutional interpretation by the courts? *German Law Journal* 18 (2017), pp. 293–308

Andreas Voßkuhle: “European Integration Through Law.” The Contribution of the Federal Constitutional Court, *European Journal of Sociology* 58 (2017), pp. 145–168



Ghana

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 was by and large kind to the liberal democracy that Ghana has been working at building since 1992. This year, the Supreme Court's efforts at limiting executive authority to its proper scope have created jurisprudence that will no doubt strengthen the principles of separation of powers in Ghana. The Court also continued to live up to its role as protector of constitutionally guaranteed rights and expatiated on how and when rights can be curtailed without falling foul of the constitution. These welcome guidelines will certainly find their way onto the reading lists of law schools across the country. Finally, it reiterated its independence from the executive in firm tones. These developments inure to the continued growth of liberal democracy in Ghana and are sure to influence the experience of citizens for the better.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Looking back on the constitutional events of 2017, it would be fair to say that the democracy in Ghana is both growing stronger and getting more liberal, and this is in spite of the year's ignoble start on the constitutionalism front. In April, only months into the new gov-

ernment's tenure, party foot soldiers stormed a court and freed 13 of their members being tried for vandalising the office of the regional security coordinator, whom they accused of making anti-government utterances.¹ The incident left much of the populace shaken and worried about what appeared to be the dawn of lawlessness.² The fact that those arrested and charged with the court invasion incident were discharged on account of the state entering a *nolle prosequi* only heightened concerns, notwithstanding the state attorney's explanation that the arrests had been reactionary and that the police were unable to identify who the invaders were and as such had no evidence on which the case could be prosecuted.³ Fortunately, that incident did not prove a harbinger of a general turn of events. When Party youth in Savelugu refused to allow the President's appointed District Chief Commissioner to take office, insisting that he appoint one of their choosing, the President was compelled to take a stance against his loyal supporters and take charge of his government.⁴ By the middle of the year, the political front had settled down and the constitutional and legal arrangements of the 1992 Constitution were back in control of Ghana's public life. It was no accident then that all the important constitutional events discussed in this report happened after May, when the political threats to constitutionalist values in Ghana were reined in.

¹ Josephine Nettey, 'NPP Delta Force Storms Kumasi Court' (*Herald*, 2017) <<http://theheraldghana.com/npp-delta-force-storms-kumasi-court/>> accessed 27 February 2018.

² Godwin Allotey, 'Lenient' Delta Force Sentence To Breed Lawlessness – CDD Ghana - Ghana News' (*Ghana News*, 2017) <<http://citifononline.com/2017/10/24/lenient-delta-force-sentence-to-breed-lawlessness-cdd-ghana/>> accessed 27 February 2018.

³ 'Release Of Delta 8: Minority Says It's Threat To Justice, Govt Calls For Investigation' (*Graphic.com.gh*, 2017) <<https://www.graphic.com.gh/news/general-news/minority-says-it-s-threat-to-justice-govt-calls-for-investigation.html>> accessed 27 February 2018.

⁴ Samuel Duodu, 'Savelugu NPP Youth Clash With Police Over MCE's Appointment' (*Graphic.com.gh*, 2017) <<https://www.graphic.com.gh/news/politics/savelugu-npp-youth-clash-with-police-over-mce-s-appointment.html>> accessed 27 February 2018.

The centre of liberal democratic growth in 2017 has been the Supreme Court. The country's highest court made a number of important decisions that are worth noting and also underwent some historic changes in composition that will certainly impact its work in 2018. 14 June 2017 was a busy day at the constitutional court. The Supreme Court was asked to pronounce on the constitutionality of civil and local government service regulations that prohibited a member of either service from publicly associating with a political party or serving as an elected officer of a district assembly.⁵ The Court, stating emphatically that the clawback clauses in Chapter 5 mean that there are no absolute rights in the 1992 Constitution,⁶ nevertheless held that any restrictions to such rights had to be both necessary and proportional. It defined necessary as being required to secure the public interest or the rights of others and proportional as the limitation being the least onerous means of optimally securing the desired good. The court identified the objective of the offending provisions as being to ensure neutrality, impartiality and integrity in public officials. It concluded that, in light of how polarised the country's political discourse had become and of the considerable extent to which neutrality is central to its work, the restrictions on the members of the service were both necessary and proportional. While it ruled that these public officers could stand for local government elections, it held that immediately upon actually attaining such an office they were to resign from the services. The Court foresaw a significant possibility of conflict of interest and abuse of power if the elected officials meant to check the appointed officials were united in the same persons. The scenario the court drew brings to mind Montesquieu's description of the city-state of Venice in his *Spirit of Laws*.⁷ This decision

is particularly important because it is one of those unusual cases where the Supreme Court has turned down an invitation to expand the scope of some constitutional right. The long oppressive history of Ghana has meant that most right-based challenges of legislation have been well founded. The trend could well lead to the misconception that any restriction of a right is invariably unconstitutional under the 1992 constitution. This case is a very useful roadmap from the court in understanding when and why an otherwise basic right should be limited.

That same day, the Supreme Court was called on by Occupy Ghana to compel the auditor-general to exercise his discontinuance and surcharge powers under the Constitution and act to recover all the sums his reports had, over the years, identified as lost to the state through negligence of state officers.⁸ The Court relied on the Modern Purposive Approach (MOPA) to read the 'may' in article 187(7) as a 'shall' in order to hold that having once identified irregularities in the application of public funds, the Auditor-General has no discretion in the matter of whether he would act to recover such funds. The result of the case is undoubtedly welcome, but the methodology is worrying. The danger with judicial activism is not that it is not always right; it is that it is as capable of maliciously destroying the Constitution as it is of nobly filling in its gaps. It is submitted that the resort to MOPA and consequent willful misreading of the text of the Constitution were not necessary. The Court could well have accepted the Auditor-General's argument that the power was discretionary and then it could have held the Auditor-General bound under article 296(c), even before issuing its first report, to publish regulations detailing when, and under what circumstances, his

discontinuance and surcharge powers would be exercised. The conclusion by this route would have been to oblige the Auditor-General to lay out for public scrutiny his views of his role in the management of public finances and importantly, the Auditor-General would have been obligated to follow his own regulations, thereby compelling him/her to act in nearly every instance where discontinuance is required.

The next week, Ghana welcomed a new Chief Justice. On 19 June, Justice Akuffo became Ghana's 13th and second female Chief Justice.⁹ She took over from Justice Georgina Wood, who was the country's first female and longest-serving Chief Justice. The Lady Chief Justice will not have a long tenure, for she reaches compulsory retirement age in December 2019. She has publicly declared her intention to reform the institutional systems of the judicial service while in office.¹⁰ We, of course, hope she is successful. Meanwhile, Justice Sophia Adinyira also turned 70 and is now serving the six-month transition period in which a retiring Superior Court Justice must conclude all matters she has started.

Also in June 2017, the Court upheld a consolidated suit by two private citizens challenging a Presidential Act.¹¹ In 2016, former President Mahama, on what he termed 'humanitarian grounds and helping America in its time of need', executed an agreement under which two Guantanamo Bay prisoners were transported to Ghana and granted a stay under state surveillance for two years. The agreement was not ratified by Parliament as required by article 75 of all Ghana's international agreements and the two citizens sought a number of declarations and orders. The Court granted the declarations of unconstitutionality, rejecting the state's defence that the

⁵ Samuel Alesu-Dordz, 'Ghana's Supreme Court Pronounces On Political Rights Of Civil Servants' (*Ghanalawhub.com*, 2017) <<http://ghanalawhub.com/ghanas-supreme-court-pronounces-on-political-rights-of-civil-servants/>> accessed 27 February 2018.

⁶ *Civil and Local Government Staff Association of Ghana v. the Attorney-General & 2 Others*, Writ No. J1/16/2016.

⁷ Charles de Secondat Montesquieu, *The Spirit Of Laws Book XI*.

⁸ Fred Djabor, 'Retrieve "Looted" State Cash – Supreme Court Orders Auditor General - Ghana News' (*Ghana News*, 2017) <<http://citifmonline.com/2017/06/14/retrieve-looted-state-cash-supreme-court-orders-auditor-general/>> accessed 27 February 2018.

⁹ Jonas Nyabor, 'Akufo-Addo Swears In Sophia Akuffo As Chief Justice [Photos] - Ghana News' (*Ghana News*, 2017) <<http://citifmonline.com/2017/06/19/akufo-addo-swears-in-sophia-akuffo-as-chief-justice/>> accessed 27 February 2018.

¹⁰ 'My Mission Is To Build A First Class Judiciary - CJ' (*Judicial.gov.gh*, 2018) <<https://judicial.gov.gh/index.php/publications/news-publications/js-latest-news/item/348-my-mission-is-to-build-a-first-class-judiciary-cj>> accessed 27 February 2018.

¹¹ *Banful and Another v Attorney General and Another* (J1/7/2016)[2017] GHASC 21.

agreement was done by note verbale, not by treaty, and was therefore not covered by article 75. The Court, with a unanimous voice, ruled that the substance of an agreement rather than the executive's designation of it determines whether article 75 is triggered or not. The Court, however, neither granted nor denied the declaration that the President had by his act breached his presidential oath. It is not hard to see why. Acceding to the request would have prompted impeachment proceedings. The Court may have felt that, save where the President has flouted an order it has directed to him pursuant to its constitutional enforcement powers in articles 2 and 3, the impeachment of the executive head is a matter that Parliament alone should decide, initiate and control.¹² On the other hand, expressly pronouncing such conduct in consonance with the presidential oath would set a very unhealthy precedent. The Court therefore simply omitted making any reference to it at all. The plaintiffs amended their original request and instead of asking the Court to order the removal of the aliens, asked that the President be directed to place the agreement before Parliament for ratification. This the Court granted. Again, this is a commendable use of judicial discretion to respect the constitutional separation of powers and stay within its own bounds, leaving Parliament and the Executive to work out theirs.

In the last constitutional decision of June,¹³ a private citizen challenged the findings of a Commission of Inquiry set up under executive order by former President John Mahama.¹⁴ Heeding the public outrage at the Woyome decisions of the previous year where the Court found that a ruling party financier had received huge payments from the state under contracts that did not exist, the President had set up a commission of inquiry whose terms of reference were to ascertain the frequency and reasons for such payments since the 1992 constitution came

into force and to make recommendations to government how it can avoid unnecessary loss and liability in doing business with private citizens. The sole commissioner had in the process of his work made findings about the competence of the trial judge who first awarded the debt to Woyome. The plaintiff asserted that the commission's findings and the government's subsequent white paper acceptance of them amounted to executive interference in judicial work and invited the Court to hold them unconstitutional. The Court, accepting that invitation, noted that the effect of the findings and white paper, if held valid, would be to subject the judiciary to executive supervision. An additional consequence of such a situation which the Court did not mention concerns article 280, which makes adverse findings by a Commission of Inquiry equivalent to a High Court judgment. In accepting that the President could lawfully look into judicial work by a Commission of Inquiry, the Court would have made possible a situation where the Supreme Court's work was supervised by the High Court.

In November, the Supreme Court upheld almost entirely a case brought by the Ghana Independent Broadcasters Association (GIBA) against the National Media Commission (NMC).¹⁵ The NMC is a constitutionally created body with regulatory but not supervisory authority over mass media organisations. Its 2015-issued regulations included a list (i.e., regulations 1-12) which set up a content authorisation regime to approve what a broadcaster or media house could broadcast and when. The regulations imposed criminal sanctions for non-compliance with the pre-screening that even the Attorney-General had to concede were too harsh. The Court rightly found the impugned regulations to amount to censorship and struck them down. The plaintiff had requested the penal provisions be struck down for their harshness. The Court, while

conceding them draconian, pointed out that its judicial review powers did not extend to the rightness of legislative content, only the constitutionality thereof. In the end, it struck them down anyway, but not on the requested basis. Instead, it examined the constitutional and statutory provisions empowering the NMC and found creating penal sanctions to be *ultra vires* the Commission.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year began with a national first. On 7 January, when Nana Akuffo-Addo was sworn in as President, John Mahama became Ghana's only ex-President to actually be voted out of office. This event had two important constitutional upshots.¹⁶ The first was that it broke a pattern that was beginning to acquire the pervasiveness of a myth: that once voted in, a Ghanaian President was entitled to be re-elected. The second is that it will definitely make the electoral contest between the incumbent and opposition candidates a more real one in future elections.

In November, Ghana's Supreme Court, in an unprecedented show of confidence, refused to abide by an order from the African Court of Human and Peoples' Rights (ACHPR) instructing it to halt proceedings to retrieve over 51 million Ghana Cedis (over US \$11MM) from Mr. Alfred Woyome following an appeal and claim of human rights violations on the part of Ghana before the ACHPR by Woyome. After a long and convoluted legal history, which began in 2012 with court action by then Attorney-General Martin Amidu to retrieve this sum, the Supreme Court authorised the new Attorney-General to execute their judgment of 2014 ordering that the sum which had been wrongfully paid to Woyome as a judgment debt be repaid. The ACHPR had granted Mr.

¹² Article 69(10), Constitution of The Republic of Ghana (1992).

¹³ *Oppon v Attorney General and Another* (J1/11/2016)[2017] GHASC 19.

¹⁴ Office of the President of the Republic of Ghana, 'White Paper On The Report Of The Commission Of Inquiry Into Payments From Public Funds Arising From Judgment Debts & Akin Matters (C.I. 79/2012)' (Government of Ghana 2015).

¹⁵ *Ghana Independent Broadcasters Association v Attorney General and Another* (J1/4/2016)[2017] GHASC 10.

¹⁶ Emmanuel Dogbevi, 'John Mahama Becomes First One-Term President Since 1992 - Ghana Business News' (*Ghana Business News*, 2016) <<https://www.ghanabusinessnews.com/2016/12/09/john-mahama-becomes-first-one-term-president-since-1992/>> accessed 27 February 2018.

Woyome an order of a stay of proceedings until it determined the merits of his appeal. But the Supreme Court unanimously rejected the order, holding that it did not share its constitutional mandate with any other court and would defer to none. Without examining the merits of the ACHPR decision, it is still possible to endorse the Ghanaian Supreme Court's ruling. While a regional court may find fault with a state for its treatment of a citizen and order it to pay compensation, it must surely be beyond its powers to directly order the highest court of a sovereign state to halt its proceedings. The Supreme Court's compliance would have set a dangerous precedent in which the ACHPR could directly issue instructions to constitutional agencies and public institutions. If the Executive of Ghana cannot interfere in the work of her judiciary, there is no reason why the regional court should. There may yet be instances of power play between Ghana and the AU as a result of the Supreme Court's stance. Nevertheless, the constitutional crises that would have ensued from the Supreme Court acceding to the ACHPR's request would have far outweighed the present friction between the country and the AU.

Also of great constitutional interest is the creation of the new office of Special Prosecutor in November 2017.¹⁷ President Akufo-Addo and the New Patriotic Party-dominated Parliament have, in fulfilment of a 2016 manifesto promise, established this office to prosecute corruption and related offences, recover proceeds from such offences and prevent corruption.¹⁸ Though a statutory creation, the powers and operations of this officer are such that it will necessarily have an impact on the scope of some constitutional provisions; in particular, Chapter 5 Human Rights and the use of discretionary powers in article 296(c). The Special Prosecutor has extremely wide powers: police powers, right

to *ex parte* search warrants, power to demand the production of documents (though the statute uses 'request', there is nothing voluntary about compliance), seize suspected 'tainted property' without warrant for up to seven days, conduct body searches, freeze properties for up to 14 days without a court order, request a court to issue an order for disclosure of assets, etc. These very wide powers are daunting. Efforts to rein them in somewhat are visible in the requirement of search warrants in all but urgent cases and court supervision of freezing order powers. But that supervision will be ineffectual with a wicked Special Prosecutor who can easily evade the court by resort to labelling every instance of exercise as urgent. Furthermore, *ex parte* Braimah should have taught us court supervision can discharge a freezing or any other order made under designation of urgency,¹⁹ but it cannot prevent immediate and repeated reissue of that order. Again, even if the Court is able to restrain the Special Prosecutor after the specified periods, 14 days of having one's property seized or frozen is not only embarrassing, it is potentially ruinous. So also the power to 'request' documents can be a tool of harassment. Body searches can be employed to undermine a person's dignity at the Special Prosecutor's (or his agent's) whim. The scope of the rights to own property (article 18), dignity (article 15), information (article 21(1)(f)) and fair and candid treatment from administrative bodies (article 23) could be very easily whittled down by the operations of this office. This office has popular support now because of the perceived corruption of the past government. In particular, the presidential nomination and subsequent approval of Martin Amidu – the Attorney-General who first began the campaign to recover state funds illegally paid to private persons by his own government and who was fired for it – as the first Special Prosecutor has won it much public

goodwill and backing. But once the fervour dies and the current 'villains' rounded up, the dangers of this office will become evident. It is not clear that this office is necessary in a country with a constitutionally created judiciary, Police Service, Attorney-General, and a Commission on Human Rights and Administrative Justice. But it is clear that it is dangerous. In the coming months, it will be interesting to see how Mr. Amidu's office navigates these waters and whether constitutional litigation will ensue in his wake.

IV. LOOKING AHEAD TO 2018

2018 has begun on an eventful note. The choice of Mr. Martin Amidu as first Special Prosecutor raised the public ratings of President Akufo-Addo. First, because following his public-spirited campaign in the Woyome and other matters, which he pursued even more zealously after his termination as Attorney-General, he has acquired a public reputation for incorruptibility and patriotism. The choice has been seen as witness to the President's commitment to the anti-corruption cause. Again, because they belong to different political parties, the President has been able to garner brownie points for inclusiveness.²⁰

The first evidence of the Chief Justice's declared intention to use her short tenure to address systemic flaws in the judiciary toward reducing the opportunities for corruption among judges and judicial service staff appears to have come in. The Judicial Service commenced in March, an e-filing system that, according to Chief Justice Akufo, is designed to reduce the opacity and number of points of human influence over judicial processes and thereby close some corruption-facilitating loopholes.²¹ We will be keeping a

¹⁷ 'Parliament Passes Office Of Special Prosecutor Bill, 2017 - Government Of Ghana' (*Ghana.gov.gh*, 2018) <<http://www.ghana.gov.gh/index.php/media-center/news/4184-parliament-passes-office-of-special-prosecutor-bill-2017>> accessed 27 February 2018.

¹⁸ Ebenezer Afanyi-Dadzie, 'Special Prosecutor Office Will Surely Be Created – Nana Addo - Ghana News' (*Ghana News*, 2017) <<http://citifmonline.com/2017/08/26/special-prosecutor-office-will-surely-be-created-nana-addo/>> accessed 27 February 2018.

¹⁹ Judgement of Akufo-Addo C.J., *State v. General Officer Commanding The Ghana Army; Ex Parte Braimah* [1967] GLR 192-202.

²⁰ Delali Adogla-Bessa, 'Amidu Sworn In As Ghana's First Special Prosecutor - Ghana News' (*Ghana News*, 2018) <<https://citifmonline.com/2018/02/23/amidu-sworn-in-as-ghanas-first-special-prosecutor/>> accessed 27 February 2018.

²¹ Seth Bokpe, 'Courts Go Digital As Filings To Be Done Online' <<https://www.graphic.com.gh/news/general-news/courts-go-digital-as-filings-to-be-done-online.html>> accessed 27 February 2018.

keen eye on its functioning as the year proceeds to see if it lives up to this expectation. The Guantanamo Bay detainees saga continues. The public is resolutely set against them being allowed to remain now that their ratified stay period has expired. The new government, noted for its vociferous stance against their presence in Ghana while in opposition, says their hands are tied, as the two were apparently secretly granted refugee status under the previous government, which now in opposition is adamant that refugee status can be rescinded with enough political will and is calling on the government to stand by their previous opposition and remove the two detainees.²² It will be interesting to see how the matter is resolved in the coming months.

Justice Atuguba will be retiring in July of this year. There has been no news yet of any possible nominees for the vacant seats. There is no constitutional cap on the number of Supreme Court justices, and as these retirements do not take the Court below the constitutional minimum, they may well not be replaced.²³

V. FURTHER READING

1. Maame AS Mensah-Bonsu, Reaping the whirlwind we have sown: thoughts on the recent Anas judicial scandal in Ghana. 2017 3 Lancaster University Ghana Law Journal 75
2. Justice Srem-Sai, Of A Single Justice Of The Supreme Court, The Attorney-General, Amidu And Woyome: Qui Tam? 2017 3 Lancaster University Ghana Law Journal 96

²² 'NDC Must Tell Us How To Repatriate Gitmo 2 - Kyei Mensah-Bonsu' (*Ghanaweb.com*, 2018) <<https://www.ghanaweb.com/GhanaHomePage/NewsArchive/NDC-must-tell-us-how-to-repatriate-Gitmo-2-Kyei-Mensah-Bonsu-623111>> accessed 27 February 2018.

²³ Article 128(1), The Constitution of the Republic of Ghana (1992)



Greece

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Greece is a liberal democracy challenged by the impact of the financial crisis, the refugee crisis, and the rise of populism. The crucial constitutional events that allow mapping out the situation in Greece during 2017 were seminal court decisions, a slow-moving deliberation process to revise the Constitution and landmark legislation on human rights, specifically legal gender recognition and rendering Sharia Law optional for the Muslim minority. Perhaps the most striking feature of the year was the strong tension between the executive and the judiciary. Characteristic of this unprecedented clash was that top Justices accused the government of intervening in the work of justice¹ while the Prime Minister characterised Court decisions that found legislation unconstitutional as “institutional obstacles” that have to be overcome.²

The Constitution provides for a decentralized system of judicial review of the constitutionality of laws (art 93 para 4 Gr Const) concentrated in practice to a great extent through jurisdictional mechanisms to the three supreme courts (Court of Cassation, Supreme Administrative Court, Chamber of Accounts). In recent years, focus was placed on the “financial crisis case law” triggered by challenges against austerity measures. Such litigation still unfolds, but was over-

shadowed in 2017 by a seminal decision on TV licensing (by the Supreme Administrative Court: Council of the State), a decision of the same Court on the constitutionality of laws that successively extend the statute of limitations for tax assessment and Court of Cassation (Areios Pagos) decisions turning down the extradition request by Turkey for eight Turkish officers, concluding that fair trial and the protection of fundamental human rights cannot be guaranteed in Turkey. A unique feature of 2017 was the continuance of the trial of the Neo-Nazi party Golden Dawn, which was accused of being a criminal organization.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Liberal democracy at the end of 2017 appeared vulnerable but resilient in the face of continuous challenges.³ The year was not marked by landmark constitutional events, such as the Brexit referendum, elections or a constitutional amendment. Thus, any evaluation of the state of liberal democracy has to rely on more subtle indices. To pin down signs of subtle erosion and monitor how safeguards against slow backslide work, the parameters set forth by Ginsburg and Huc are helpful: elections, rights of political speech and rule of law guarantees.⁴ A distinct criterion is also the direction towards which leg-

¹ <<http://www.ekathimerini.com/224055/article/ekathimerini/news/top-judge-accuses-govt-of-intervention>> accessed on 17 February 2018.

² <<http://www.ekathimerini.com/219719/article/ekathimerini/news/pm-backs-minister-on-criticism-of-audit-ruling>> accessed on 17 February 2018.

³ See Xenophon Contiades and Alkmene Fotiadou, ‘On Resilience of Constitutions: What Makes Constitutions Resistant to External Shocks?’ (2015) 9(1) *ICL Journal* 3.

⁴ Aziz Z Huq and Tom Ginsburg, ‘How to Lose a Constitutional Democracy’ (2017) 65 *UCLA Law Review*, (forthcoming) Available at SSRN:< <https://ssrn.com/abstract=2901776> > accessed on 18 February 2018.

islation and jurisprudence are headed; that is, whether the protection of fundamental liberties is enhanced or curtailed.

1. *Jurisprudence*

In Greece, the year 2017 can be characterized as the year of adjudicative rule of law. Constitutional litigation addressed issues closely related to institutional guarantees of the rule of law, where rulings of unconstitutionality would set serious obstacles to governmental policy. The executive created a context of pressure prior to seminal rulings and responded after they were issued, exerting severe criticism.

The TV licencing decision⁵ halted the attempt of the government to regulate the chaotic landscape of the operation of TV channels in Greece through a law that conferred on the executive branch the power to control the media. Private TV channels have been operating with temporary licenses issued in 1989 and extended ever since then either by legislation or by ministerial decisions. Decision 95/2017 found that the law enacted in 2015 aimed at regulating the auction for television licenses violates the Constitution. The main question concerned the constitutionality of transferring competencies conferred by the Constitution on the National Council for Radio and Television, an independent authority, to the minister responsible for the media, due to a political impasse in appointing the Members of the Council.

In accordance to art 15, para 2, Gr Const 'Radio and television shall be under the immediate control of the State and shall aim at the objective transmission, on equal terms, of information and news reports as well as works of literature and art; the qualitative level of programs shall be assured in consideration of their social mission and the cultural development of the country'. The crucial constitutional issue was if the organ competent to decide licencing was exclusively the National Council for Radio and Television. The contested law limited the number of TV licences to four, which had triggered a po-

litical and academic controversy with regard to whether this would limit media pluralism. The EU Commission had also expressed concerns with regard to the compatibility of this law with EU law since it granted the Minister for Infrastructures, Transport and Networks control of an operator as well as regulatory tasks in the same sector. Nonetheless, the government applied the law and auctioned the licences, raising €246 million. The auction process itself was odd and turned into a public spectacle as bidders had to remain within a confined environment for its duration, which was three days. This auction was in practice cancelled by the Council of State decision.

According to the Court's ruling, the involvement of the National Council for Radio and Television in the procedure for licencing could not be overridden. The Court stated that the 'broadcast media must be organized in a way that ensures objectivity, impartiality and pluralism, and prevent government and any unilateral influence that could affect the conditions of political antagonism to control the formation of public opinion'. This should be ensured also during 'the step of administering licenses, a process which determines which broadcasters will operate in the future'. The Court explained that from the fact that the constitutional legislator did not provide for an alternative mechanism for the selection of members of independent authorities in case of an impasse, it cannot be derived that the Constitution allows the competences, which according to it must be exercised by an independent authority whose members enjoy personal and operational independence, to be transferred by the legislator to other organs of executive power, in case the necessary majority for the formation of the independent authority cannot be achieved.

After the ruling was issued, the government spokeswoman stated that the Court took a decision with marginal majority that will temporarily prevent putting an end to 27 years of unaccountability in the television landscape. She attacked the Court, stressing

that this was the same Court that upheld the constitutionality of the bailout agreements that tore Greece apart. She added that the return of down payments for the licenses would have serious consequences, such as causing 15.000 children to lose their place in kindergarten and hindering the hire of 4.000 people in public hospitals. The associations of justices responded promptly with very harsh statements. Beyond the unprecedented tension between the judiciary and the executive this case triggered by putting a serious obstacle to governmental plans, it produced tangible evidence of the will of the executive to manipulate the judiciary.

The competence to select candidates, according to the constitutional procedure for the election of the President and Vice Presidents of the three Supreme Courts, belongs to the Council of Ministers, which decides upon the recommendation of the Minister of Justice. The list of candidates is drawn up by the Minister of Justice. Exercising this competence, the Minister did not include in this list any of the Justices that found the TV licencing law unconstitutional. Not including a big number of competent Justices in the list is not illegal, yet it defied a long-standing practice and was interpreted by many (including the former Head of the Court)⁶ as an attack against the independence of the judiciary.

The TV licencing controversy on the transfer of competence from an independent authority to the executive and its potential to erode the system of checks and balances has to be placed in the context of the overall landscape of free speech guarantees. Greece has a problematic jurisprudence with regard to freedom of expression. Although the constitutional protection of freedom of expression (Art. 14, Gr Const) is detailed, its application by the Courts is volatile and not always in line with the principles laid down by the European Court of Human Rights. This allows unpredictability with regard to free speech cases that eventually find their way to Strasbourg, where Greece is often convicted. The most recent example of a case that should

⁵ (Council of State decision 95/2017).

⁶ <<http://www.kathimerini.gr/928001/article/epikairothta/ellada/h-apopeira-apa3iwshs-toy-ste> (in Greek) >, accessed on 20 February 2018.

not be a hard case in a liberal democracy is the conviction of a top literary magazine by the Greek courts (*Areios Pagos*, 697/2017) for defamation of the Minister of Foreign Affairs.⁷ A reader's letter to the editor published in the *Athens Review of Books* had characterized the Minister, Mr. Kotzias, as 'the most extreme, fanatical, cruel and relentless communist of our generation, a true *gauleiter* of Stalinism'. According to the Court, 'Although it was proven that the plaintiff was a founding member of the Greek Communist Party', 'nonetheless, his texts, which were cited and submitted by the parties, do not prove his admiration for the absolutist regime in question or promotion of it'. Following this decision, the Minister froze the bank accounts of the publisher.⁸ The Court failed to analyse the case in terms of public figures criticism and distinguish between fact and opinion, conveying thus a very bleak image of the free speech landscape in Greece, enhanced by the fact that the public figure is an active Minister.

A decision⁹ halting retroactive tax audits hindering taxation policy is characteristic of the issues that mark the phase of maturity of crisis jurisprudence. The decision, on the indefinite extension of the limitation of tax statutes, found a severe violation of legal certainty. This put an end to tax authorities imposing taxes for fiscal years with limitation periods that would otherwise have lapsed. The Court reviewed legislation, which provided that the statute of limitations for the State to assess taxes is extended successively shortly before the expiry of either the original limitation period or the previous extension. According to the Court, this rendered the rule put forth by the Income Tax Code as a five-year statute of limitation no longer applicable to tax liabilities arising in the years to which the above-mentioned accounts relate. Adversely, it was impossible to predict when they will expire, which under-

mines the credibility of the State in general, and the conscientiousness of the people with regard to fulfilling their tax obligations.

In accordance to the ruling, the limitation period was extended on several occasions and, since the extension of the limitation period depended on whether various authorities took action, the limitation period for tax claims of the same year might differ from taxpayer to taxpayer while it may not have even been possible to even foresee when the limitation period is completed.

The Court ruled that the principle of legal certainty, stemming from the principle of the rule of law enshrined in the Constitution (Art. 25, para 1.a), dictates clarity and foreseeability in the application of legal rules and must be respected with particular rigor in the case of provisions which are likely to have serious economic repercussions on the parties concerned, such as taxes, levies and sanctions for breach of such provisions. The Court stressed that legal certainty, which serves the general interest, dictates that individuals must be certain with regard to their compliance with such rules, which cannot thus be called into question indefinitely. Consequently, for the imposition of charges in the form of taxes, fees, levies and penalties, it is crucial to include a statute of limitation which complies with the principle of proportionality.

In two very important decisions¹⁰ for handling the refugee crisis, the Council of State ruled that Turkey is a 'safe third country'. These decisions are closely connected to the EU Turkey statement of 18 March 2016.¹¹ The Court responded to actions of annulment of Ministerial Decisions regulating the Independent Appeals Committees as second-instance asylum authorities and a decision of an Independent Appeals Committee upholding the rejection by the Regional Asy-

lum Office of Lesbos Island of an application for asylum of a Syrian national on the basis that Turkey was a 'safe third country'. The Council of State found that there is no threat to the applicant's life or freedom for reasons related to his Syrian origin. The Court rejected that Turkey does not respect the principle of non-refoulement and stated that the concept of 'protection in accordance with the Geneva Convention' (as established in the definition of a 'safe third country' under Article 38(1) of the recast APD) does not require a third country to have ratified the Geneva Convention or to have adopted it without geographical limitations. It is sufficient, in the opinion of the Council of State, to provide protection of certain fundamental rights of refugees such as the right to health care and employment. The Council of State, by a narrow majority, decided not to submit a preliminary reference to the CJEU with regard to the interpretation of the 'safe third country' concept.¹² Although reasons for granting asylum continue to be judged on an individual basis in accordance with the particularities of each case, the Council of State decisions mean that the return of refugees to Turkey would not be halted following the attempted coup in July 2016.

2. Legislation

Two pieces of legislation made positive yet hesitant and incomplete steps in the realm of rights protection. A landmark law changed the landscape of trans rights in Greece. Law 4491/2017 passed with 171 votes to 114 by the Greek Parliament, allowing change of the gender displayed on official documents – without the prerequisite of surgery. According to the new law, a person has the right to recognition of gender identity as an element of his or her personality and the right to respect for personality on the basis of gender characteristics. Gender identity is defined as "the personal way in which a person ex-

⁷ < <https://www.ft.com/content/b1e23838-779a-11e7-90c0-90a9d1bc9691> >, accessed on 23 February 2018.

⁸ < <http://athensreviewofbooks.com/?p=2964> >, accessed on 22 February 2018.

⁹ Decision 1738/2017 of the Council of State.

¹⁰ Decisions 2347 and 2348/2017.

¹¹ < <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> >, accessed on 20 February 2018.

¹² See < <http://www.asylumlawdatabase.eu/en/content/greece-council-state-turkey-safe-third-country-and-aspects-greek-asylum-procedure> >, <<http://www.asylumineurope.org/news/04-10-2017/greece-ruling-council-state-asylum-procedure-post-eu-turkey-deal>>, accessed on 20 February 2018.

periences his or her sex, irrespective of the sex registered on their birth certificate on the basis of their biological characteristics, including the personal perception of the body, as well as the social and external expression of gender, which corresponds to the will of the person.” It is also stated that the personal perception of the body may also be associated with changes resulting from medical treatment or other freely chosen medical interventions.

This law was greeted by the LGBTI+ as a major step towards the protection of trans rights. Indeed, visibility and the realization of trans rights as fundamental human rights were achieved through the major publicity attracted by the passage of the bill. Two issues have to be stressed: a) prior to passage of the bill, very progressive lower court decisions were issued in 2016 and mostly 2017, and b) the law has some serious flaws, which take a step back from the 2017 jurisprudence. The new procedure is only open to children above the age of 15. Minors between 15 and 16 are subject to a different procedure, which involves assessment (including psychological assessment) by a medical commission, and minors between 17 and 18 can follow the procedure with parental consent. This is clearly a backslide with regard to the rights of children, who are excluded from the procedure, whereas in the past they could seek legal recognition of their gender with the support of their parents. The procedure is not available to married people, who are faced with the dilemma of getting divorced or not having their legal documents altered.

The law thus followed the steps of important jurisprudence that was achieving subtle change through the work of activist lawyers.¹³ The subtlety of change can be explained by the fact that the legal recognition of gender identity fell within the jurisdiction of Magistrates of the Peace. Following Decision No. 1572/2016 issued by the Athens Justice of the Peace Court, which was the first decision to include a definition of gender identity without demanding surgery,

several decisions in that direction followed. Decision No. 572/2017 of the Athens Justice of the Peace Court was the first decision that recognized the legal gender of a trans woman who had not undergone any surgery, just hormonal therapy. A wave of decisions followed. It is noteworthy that Decision No. 1708/2017 of the Athens Justice of the Peace Court took as granted that sterilization is not a prerequisite for legal recognition without any reference to precedent. Such jurisprudence cannot create constitutional moments in the same way supreme courts can, nonetheless it was efficiently effecting change. Still, such case law could not address in a holistic way the variety of legal gender recognition issues nor serve the goal of visibility. This explains why the law, despite its serious shortcomings, was greeted by the LGBTI+ community as a landmark moment.

Brought to Parliament in 2017, Law 4511/2018 changed the previous regime’s mandatory application of Sharia law in Thrace regulated by Law N. 1920/1991. According to this law, in conjunction with the 1920 Treaty of Sèvres and the 1923 Treaty of Lausanne, which provided for Islamic customs and Islamic religious law, the Muslim minority in Thrace was subject to Sharia law with regard to marriage, divorce, custody of minors and inheritance. *Areios Pagos* ruled¹⁴ that all such matters are subject to Islamic law and to the jurisdiction of the mufti rather than to the provisions of the Greek Civil Code. It is noteworthy that the legislative change came in expectation of the ruling on the issue of *The Grand Chamber of the European Court of Human Rights*, to which the case *Molla Sali v. Greece* (application no. 20452/14) has been allocated. The application of Sharia law is highly problematic from the aspect of constitutionality (Art. 4, equality, Art. 5, free development of personality, Art. 13, freedom of religion) while it also infringes on the European Convention on Human Rights (Art. 14, equality; 1st Protocol, Art. 1, property). Although it is possible that the long application of Sharia law has given rise to legitimate expectation of property

rights that would be upset by the application of Greek civil law, it is highly unlikely that the ECHR will not find Greece in violation of the Convention. Rendering the application of Sharia law optional is far from sufficient to remedy the violation of the Constitution. What remains to be seen is if this positive change is a step towards the abolition of Sharia law.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major constitutional development during 2017 should have been deliberation on the forthcoming constitutional reform. Nonetheless it was not. Most striking about this process is that so far it has not achieved occupying a central position in the political dialogue. Announced in the summer of 2016, the participatory process was organized by a ‘dialogue committee on the constitutional reform’, which organized an electronic consultation process involving two phases of electronic deliberation that took place throughout 2017. Citizens were invited to complete multiple choice questionnaires and/or make their own amendment proposals. Civil society organizations were also invited to take part in the deliberation. A report summing up the findings was to be drafted by the committee by September 2017 but it has not yet been released. It has to be mentioned that a constitutional revision has not been officially initiated so this is a novel pro-revision process and it is not yet clear which way it could impact constitutional reform.

Constitutional revision in Greece is subject to very strict procedural limits set by Art. 110 para 2-6 of the Greek Constitution. Constitutional revision takes place in two phases, between which general elections are held. The amending process has no influence over the timing of general elections. During the first phase, the need for constitutional revision is ascertained by resolution of Parliament, adopted following the proposal of at least 1/6 of its members either by a three-fifths major-

¹³ See Vassilis Sotiropoulos, ‘Gender identity in the Greek Courts’ (*e-lawyer*, 27 September 2017) <<http://elawyer.blogspot.gr/2017/09/h.html>> accessed on 14 February 2018 (in Greek).

¹⁴ Decision 1862/2013.

ity or by an absolute majority of its members in two ballots, held at least one month apart. This resolution defines specifically the provisions subject to revision. During the second phase, the next Parliament amends the provisions that are to be revised. In case a proposal for amendment of the Constitution receives the absolute majority of the votes of the total number of members but not the three-fifths majority, the next Parliament shall proceed with the revision of the proposed provisions by a three-fifths majority of the total number of its members, and vice versa. Revision of the Constitution is not permitted before the lapse of five years from the completion of a previous revision.¹⁵ Numerous material limits are also in place excluding from revision (among others) the provisions defining the form of Government. It is clear that the deliberative process is not part of the prescribed formula. Although deliberation per se is not strictly in violation of the formula, any attempt to render it binding upon Parliament would be problematic; more so in case a referendum on any issue concerning a future constitutional amendment is to be proclaimed. The possibility of such a referendum has not been ruled out by the government, in which case the possibility of a violation of the procedural limits appears as a possibility. Although during 2017 the two phases of deliberation were completed dialogue on reform failed to engage citizens.

The second major constitutional story that slowly unfolds is the Golden Dawn trial.¹⁶ This criminal trial shall decide whether the neo-Nazi party Golden Dawn falls within the definition of a criminal organization (Article 187, par. 1 of the Greek Criminal Code). Other criminal offenses before the Court include the murder of an anti-fascist rapper, the assassination attempt on an Egyptian worker and assassination attempts on members of the Greek Communist Party. Among the 69 defendants are 18 members of the Greek Parliament. It is noteworthy that two years after the assassination of the rapper Pavlos Fyssas, the leader of the party accepted polit-

ical responsibility for this murder. The Greek Constitution (Art. 29) protects the participation of political parties whose 'organization and activities must serve the free functioning of the democratic political system'. Banning a political party due to its ideology, even if it does not encompass the principles of liberal democracy, is out of the question. Thus, the only way Golden Dawn can be legally banned is following a judgment according to which it is a criminal organization. The ruling of the trial after lengthy proceedings will thus trigger constitutional developments.

IV. LOOKING AHEAD TO 2018

In 2018, the constitutional revision process will most probably be initiated as the results of the deliberation process are expected. Multiple scenarios are open though. Despite the fact that since the outbreak of the financial crisis discussions about constitutional reform have been ongoing and all major political parties have recognized the need for amendments, it is doubtful that the degree of consent dictated by the amending formula exists. Furthermore, the possibility of a referendum on amendment issues has not been ruled out, although this is not provided for by formal amendment rules and thus would result in an unconstitutional constitutional amendment. Political polarization does not facilitate constitutional reforms.

Characteristic of the political context is that the Parliament has voted that a Special Parliamentary Committee shall investigate allegations of bribery by the pharma company Novartis against former ministers including two former prime ministers, the country's EU commissioner and the governor of the Central Bank. The investigation, which will unfold throughout 2018, is bound to pose numerous constitutional issues with regard to the applicable procedure.

What also remains open is how the tension between the executive and the judiciary shall

be played out, as the implementation of the Memoranda continues and so does litigation against governmental measures.

V. FURTHER READING

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Apostolos Vlachogiannis, 'From submission to reaction: The Greek Courts' stance on the financial crisis', in Zoltán Sente and Fruzsina Gárdos-Orosz (eds.), *New Challenges to Constitutional Adjudication in Europe. A Comparative Perspective* (Routledge 2018)

¹⁵ See Alkmene Fotiadou and Xenophon Contiades 'Models of Constitutional Change', in Xenophon Contiades (ed.), *Engineering Constitutional Change. A Comparative Perspective on Europe, Canada and the USA* (Routledge, 2012) 417.

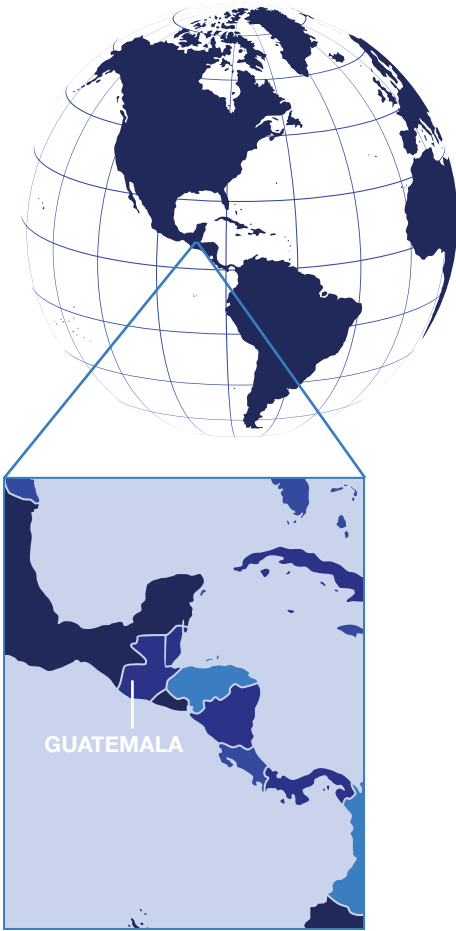
¹⁶ Dimitris Christopoulos, 'The Golden Dawn trial: a major event for democracy in Greece and beyond' (*Open Democracy*, 26 January 2018) <<https://www.opendemocracy.net/dimitris-christopoulos/he-golden-dawn-trial-major-event-for-democracy-in-greece-and-beyond>>, accessed on 20 February 2018.



Guatemala

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

This report focuses on the state of liberal democracy in Guatemala. It reveals how Guatemala is currently in crisis and at a crossroads. By way of background, this report details how Guatemala made progress in developing its liberal democracy after adopting a new Constitution in 1986 and signing a series of Peace Accords in 1996, closing a civil conflict that spanned 36 years. Yet the report also shows that Guatemala has not been able to make headway in confronting the challenges at the root of this same conflict: social inequality and elite rule. To explain the crossroads moment that Guatemala currently finds itself in, this report is divided as follows: Part II highlights the 36-year domestic conflict that Guatemala suffered, ending in a Peace Process and unsuccessful constitutional reforms to introduce the Peace Accords. It shows that the legacy of the conflict still lingers, yet in this early post-conflict stage institutions were robust enough to avoid democratic step-back. Part II also shows how Guatemala has engaged with the international community to face its challenges, namely corruption. It highlights the creation of the International Commission Against Impunity (CICIG) and the impact it has had since 2015, when its investigations led to the resignation and later prosecution of the President and Vice President in office. Lastly, it shows that the feud between the current President and the CICIG has resulted in the abandonment of a new constitutional reform process. Part III focuses on recent

constitutional developments. It examines the transplant of the ‘structured judgments’ doctrine and its implementation in securing indigenous peoples’ rights, and judicial abolition of the death penalty in Guatemala. Finally, Part IV provides a heads-up for future events in Guatemala, such as the election of a new National Criminal-Prosecutor, the Belize referendum and the Jerusalem *amparos* at the Constitutional Court.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

This part of the report details why Guatemala finds itself in crisis and at a crossroads in consolidating its liberal democracy in 2017. Although Guatemala has been successful in moving ahead from its civil conflict and military repression days, its democratic and post-conflict transition has not been entirely successful, revealing major stubborn legacies and lasting challenges. These are: high inequality and poverty levels, elite rule and corruption in many institutions and an overburdened judicial framework on the verge of collapse.

Guatemala’s democratic transition started in 1986. In this year, Guatemala promulgated a new Constitution. This new Constitution established a series of new institutions, such as an Austrian-style Constitutional Court¹ with broad legal powers of review,² a Human Rights Ombudsman and provisions making international human rights treaties superior

¹ Constitución Política de la República de Guatemala 1986, Chapter IV.

² Decreto 1-86, Ley de Amparo, Exhibición Personal y de Constitucionalidad, 1986.

to domestic law.³ A first challenge to this new institutional design came in 1991, when the President at the time attempted a self-coup through exceptional powers. The new Constitutional Court was robust enough to declare this action unconstitutional and rally support from the population and army.⁴ This event, plus the previous acceptance of the jurisdiction of the Inter-American Court of Human Rights in 1987, showed initial Guatemalan determination to leave its conflicted past behind.⁵ In a further step to leave behind and close once-and-for-all its 36-year-old domestic civil conflict, Guatemala started negotiation with the guerrilla forces in 1994. The result came on 29 December 1996, with the signature of 14 Peace Accords.⁶ These accords presented a new series of steps to be taken by the Guatemalan government to transition itself into a robust democracy. Specifically, the Human Rights Accord prescribed an initial role for the United Nations (UN) in aiding Guatema-

la through its post-conflict and democratic transition.⁷ This started a new relationship between the UN and Guatemala, which led to the creation of the CICIG a decade later.⁸ Another peace accord, the Constitutional Judiciary Reform accord, is still pending, and has now been taken up under the leadership of the CICIG.⁹ In 1999, Guatemala held a plebiscite to include the objectives of the peace accords within the Constitution. However, the addition of certain peace accords to the Constitution was rejected by a majority of voters.¹⁰

In the early 1990s, Guatemala entered a privatization and liberalization stage.¹¹ Through it, the country has experienced continued economic growth. Despite this, today Guatemala shows alarming rates of poverty and one of the highest inequality rates in the Latin American region.¹² This lasting inequality and poverty, and the post-conflict transition scenario, led to a record high spike in Gua-

temala's rate of violence.¹³ The country, together with El Salvador and Honduras, is part of one of the most violent regions in the world.¹⁴ Guatemala has also entered a mining boom, yet mining has provoked a series of social conflicts with indigenous groups.¹⁵ Today, because of mining, Guatemala is the subject of suits under the Inter-American System for human rights violations, such as contamination of waters and failure to obtain prior consent for these projects from vulnerable indigenous groups.¹⁶ Consequently, Guatemala's development model has not provided relief from poverty. International actors have expressed their concern at this situation. The Inter-American Commission on Human Rights has called on Guatemalan authorities to tackle the issues of poverty and violence. The Commission stated that Guatemala displays the same conditions as it had before its civil conflict, over 50 years ago.¹⁷ In late 2017, the UN Human Rights Commissioner, after his visit to Guatemala,

³ Constitution of Guatemala, Articles 46, 273-275.

⁴ Elena Martínez Barahona, 'Central American (High) Courts' in Diego Sánchez-Ancochea and Salvador Martí Puig (eds.), *Handbook of Central American Governance* (Routledge 2014) 173.

⁵ Carlos Arturo Villagrán Sandoval, 'Una Reflexión Sobre El "Dualismo Dentro Del Dualismo" en La Interacción Del Derecho Internacional con el Derecho Doméstico En Guatemala,' in De Anacronismos y Vaticinios. *Diagnóstico sobre las Relaciones entre el Derecho Internacional y el Derecho Interno en Latinoamérica*, ed. Juan Inés Acosta López et al (Publicaciones de la Universidad Externado de Colombia, 2017) 96.

⁶ Carlos Arturo Villagrán Sandoval, 'Soberanía y Legitimidad de Los Actores Internacionales En La Reforma Constitucional de Guatemala: El Rol de CICIG' (2016) 1 *Política Internacional* 36, 40.

⁷ Rajeev Pillay, 'Evaluation of UNDP Assistance to Conflict-Affected Countries: Case Study Guatemala' (United Nations Development Programme: Evaluation Office 2006) 15-22; Amy Ross, 'United Nations Verification Mission in Guatemala (MINUGUA)' in Joachim A Koops and others (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford University Press 2015) 556.

⁸ On the CICIG, see: Washington Office on Latin America, 'THE CICIG: An Innovative Instrument for Fighting Criminal Organizations and Strengthening the Rule of Law' (Washington Office on Latin America 2015) Report 6/2015; International Crisis Group, 'Crutch to Catalyst? The International Commission Against Impunity in Guatemala' (International Crisis Group 2016) Latin America Report No.56; Open Society Justice Initiative, 'Against the Odds: CICIG in Guatemala' (Open Society Foundation 2016).

⁹ Villagrán Sandoval (n 7) 49.

¹⁰ Rachel Sieder, 'Legal Cultures in the (Un)Rule of Law: Indigenous Rights and Juridification in Guatemala' in Javier A Couso, Alexandra Huneeus and Rachel Sieder (eds.), *Cultures of Legality. Judicialization and Political Activism in Latin America* (Cambridge University Press 2010) 165.

¹¹ Aaron Schneider, 'The Great Transformation in Central America. Transnational Accumulation and the Evolution of Capital' in Diego Sánchez-Ancochea and Salvador Martí Puig (eds.), *Handbook of Central American Governance* (Routledge 2014) 29.

¹² Besides Haiti, Guatemala has one of the highest poverty and inequality rates in the Americas, see United Nations Development Programme, Human Development Report, Table 3: Inequality-Adjusted Human Development Index <http://hdr.undp.org/en/composite/IHDI>; see also TH Gindling and Juan Diego Trejos, 'The Distribution of Income in Central America' in Diego Sánchez-Ancochea and Salvador Martí Puig (eds.), *Handbook of Central American Governance* (Routledge 2014) 75.

¹³ United Nations Office on Drugs and Crime Research and Trend Analysis Branch, 'Global Study on Homicide. Trends, Contexts, Data' (United Nations Office on Drugs and Crime 2014) 12.

¹⁴ Cristina Eguizábal and others, 'Crime and Violence in Central America's Northern Triangle. How U.S. Policy Responses Are Helping, Hurting, and Can Be Improved' (Woodrow Wilson International Center for Scholars: Latin American Program 2015) 34 20.

¹⁵ Comisión Interamericana de Derechos Humanos, Informe No. 20/14 Peticion 1566-07 Informe de Admisibilidad, last accessed 16 January 2018.

¹⁶ Mario Roberto Morales, *Breve Historia Intercultural de Guatemala* [Brief Intercultural History of Guatemala] (Editorial Cultura 2014) 111-113.

¹⁷ Comisión Interamericana de Derechos Humanos, Observaciones Preliminares de la Visita *in loco* de la CIDH en Guatemala, 4 August 2017, <http://www.oas.org/es/cidh/prensa/comunicados/2017/114A.asp> last accessed 16 January 2018.

expressed that the country is in the same dire conditions as detailed in the visit of the previous commissioner in 2012.¹⁸

Authors agree that the root of this neglect has been the failure to counterbalance the power and influence of elites in Guatemala.¹⁹ Since colonial times, influential elites have dominated the political landscape. This can be observed through the entrenchment of these groups in decision-making processes and their influence in drafting the 1986 Constitution, other constitutional rank laws and the negotiation of the Peace Accords.²⁰ To give an example of this influence, the Guatemalan electoral statute contains few and weak accountability and representation processes. It has very few sanctions and gave very weak powers to the Electoral Tribunal to oversee the funding of political parties.²¹ Also, Guatemalan electoral schemes have very limited representation. The electoral ballots are closed lists that do not contain the names of the members to be elected.²² This legal framework gives the political parties the power to decide who gets a seat in Congress. This in turn has allowed them to create a custom of positioning in Congress people with direct affinity to the parties' donors. Nonetheless, in a series of reforms, powers were given to criminal prosecutors to investigate the illegal funding of political parties.²³ In August 2017, this led the CICIG,

along with the Prosecutor's Office, to bring claims against the current President for the use of illicit sources to fund his presidential campaign. This investigation led Congress to pass and enact a new bill in September 2017 which provided an amnesty for all felonies related to electoral issues. This sparked backlash among the public and civil society, with protests in the streets for several days, which ultimately caused Congress to retract the bill.²⁴

Due to this entrenched influence of elites in policy-making and the obscured use of public funds in Guatemala, in 2003 the Human Rights Ombudsman pushed for UN involvement in the fight against corruption. The led to a series of attempts by part of the Ministry of Foreign Affairs and the UN to install a new special body capable of tackling Guatemala's corruption. The result was the CICIG in 2007.²⁵ This novel type of international body, which is not part of either the UN or the Guatemalan state, has a mission to aid the National Prosecutor's Office and the Judiciary in their fight against corruption.²⁶ It has the capability to investigate and bring suits, together with the Prosecutor's Office, against individuals involved in corrupt activities. The CICIG was established in 2007 but did not show much activity and was ready to be shut down in 2015.²⁷ It was not until the arrival of its third commissioner, Iván

Velásquez from Colombia, who in his native country led criminal investigations against the Cartel of Medellín and exposed ties between the Colombian government and paramilitary and drug-trafficking groups in 2015, that the CICIG revealed a series of investigations that demonstrated the illicit conduct of both the Vice President and President.²⁸ After weeks of protest, both dignitaries resigned and were later arrested. After these investigations, a new President was elected in 2015, with the promise of keeping the CICIG's mandate up to 2020.

With a newly elected President, the CICIG launched a campaign to reform and strengthen the judiciary. At this time, the Guatemalan judiciary is at a crisis point. The magistrates of the Supreme Court and many Courts of Appeal are elected by Congress for periods of five years.²⁹ This means that there is no prospect of job stability for these judicial officers, making their election and renewal highly politicized. The same can be said for the Constitutional Court. The Constitutional Court is composed of members elected from Congress, the Executive, the Supreme Court, the College of Lawyers and the Universities.³⁰ The procedure for election of the Constitutional Court has shown the depths of political influence in the election of its magistrates.³¹ Besides composition issues, courts in Guatemala are overburdened with

¹⁸ United Nations Human Rights, Office of the High Commissioner, Statement by UN High Commissioner for Human Rights Zeid Ra'ad Al Hussein at the end of his mission to Guatemala, 19 November 2017, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22415&LangID=E> last accessed 16 January 2018.

¹⁹ Salvador Martí Puig and Diego Sánchez-Ancochea, 'Central America's Triple Transition and the Persistent Power of the Elite' in Salvador Martí Puig and Diego Sánchez-Ancochea (eds.), *Handbook of Central American Governance* (Routledge 2014) 5; Morales (n 16) 114-115.

²⁰ Roddy Brett and Antonio Delgado, 'The Role of Constitution-Building Processes in Democratization: Case Study Guatemala' (International Institute for Democracy and Electoral Assistance: Democracy-Building & Conflict Management 2005) 11.

²¹ Decreto 1-85, Ley Electoral y de Partidos Políticos, Articles 21, 88-96.

²² *Ibid.*, Article 20.

²³ Decreto Número 26-2016 del Congreso de la República del 25-05-2016, Articles 22-23.

²⁴ *New York Times*, 'Protests Erupt in Guatemala Over Laws to Dilute Antigraft Campaign', <https://www.nytimes.com/2017/09/15/world/americas/guatemala-corruption-morales.html>, accessed 30 January 2017.

²⁵ Édgar Gutiérrez, 'La CICIG: Un Diseño Nacional y Una Aplicación Internacional' (2016) 1 *Política Internacional* 26, 31

²⁶ Preamble of Agreement between the United Nations Organisation and the Government of Guatemala Relating to the Establishment of an International Commission against Impunity in Guatemala] Ratified 12 December 2006.

²⁷ Gutiérrez (n 24) 31-33; Villagrán Sandoval (n 7) 47-48.

²⁸ Gutiérrez (n 24) 32-33; Villagrán Sandoval (n 7) 48-49.

²⁹ Constitution of Guatemala, Article 208.

³⁰ Constitution of Guatemala, Article 269.

³¹ Rachel E Bowen, *The Achilles Heel of Democracy. Judicial Autonomy and the Rule of Law in Central America* (Cambridge University Press 2017) 154-159.

cases and face endemic delay. Courts cannot keep track of their caseload.³² Due to this, the judiciary suffers from a legitimacy crisis. Yet this crisis is not solely attributable to the judiciary, as malicious practices by litigants are also a contributing factor.³³ Many use constitutional injunctions, or *amparos*, which are designed specifically for human rights and constitutional violations, to delay trials.³⁴ This customary mal-praxis is a cause of delay and the overload of cases in the courts.³⁵ Because of this malpractice and the corruption issues within the judiciary, the CICIG has been stridently promoting judicial reform since 2015. This move was strongly supported by the newly elected President and Congress throughout 2016.³⁶ Nevertheless, Executive support was swiftly withdrawn from the judicial reform process in early 2017.³⁷ This change came after a series of investigations and criminal suits that were presented by the CICIG and Prosecutor's Office against the President's son and brother.³⁸ As the CICIG started to bring more claims against the President's inner circle, the President's attitude towards the CICIG changed. On 26 August 2017, the President travelled to the UN Headquarters in New York to discuss reforming the CICIG's mandate.³⁹ On that same day, the CICIG brought claims against the President for the use of illicit sources to fund his presidential campaign.

The following day, 27 August 2017, the President declared 'non-grata' the CICIG's Commissioner, ordering his expulsion from

the country.⁴⁰ However, a few hours later the Human Rights Ombudsman's Office presented a series of writs of *amparo*, which later led to the Constitutional Court declaring the presidential decision as unconstitutional on 29 August 2017.⁴¹ The Constitutional Court decision was based on a finding that the presidential action lacked necessary constitutional formalities and it breached the treaty which created CICIG (which was signed by Guatemala).⁴² However, at the UN General Assembly Summit on 29 September 2017, the Guatemalan President made public his decision to revise the CICIG's creation treaty in order to stop, in his words, 'selective prosecution and the politicization of justice'.⁴³

The preceding discussion has shown that Guatemala is at a crossroads. Its social development has been stagnant. The influence of elites and long-standing corruption has led to the maintenance of a development model that has not produced results for those most in need, even during a period of continued economic gains. In 2015, in metaphorical terms, the CICIG served as a defibrillation device to keep its patient, Guatemala, from further failure. This shock sparked civil society to become more active. This is seen through the protests that led to the resignation of the then-President and Vice President in 2015 and withdrawal by Congress of its amnesty bill on electoral and graft crimes in 2017. Yet the CICIG has become the victim of its success, and is now the subject of backlash from the Guatemalan President. Guate-

mala now has to make a choice if it wishes to continue with its constitutional reform and consolidate a new judicial and development model, thus making its democracy more robust. Alternatively, Guatemala can continue on its current track and reform the CICIG and maintain the development model of economic progress with no social improvement. To consolidate democracy, Guatemala still has a long and hard road ahead. Some additional issues involve the need for parity in female and indigenous representation in Congress and other high-ranking offices. Another necessary reform is the creation of strong competition laws for consumer protection.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Guatemala has one of the largest indigenous populations in Latin America. Nevertheless, as noted in the previous part of this report, Guatemala's development model has neglected the indigenous population and the rights afforded to them by international human rights instruments.⁴⁴ Yet on 22 May 2017, the Guatemalan Constitutional Court delivered a ground-breaking judgment halting a mining project due to the Government's failure to fulfill international human rights standards for the protection of indigenous groups.

This judgment was structured as follows:

³² Human Rights Watch, 'Running Out the Clock. How Guatemala's Courts Could Doom the Fights Against Impunity' (Human Rights Watch 2017) 11-12.

³³ *Ibid* 22-23.

³⁴ *Ibid* 13-14.

³⁵ Bowen (n 30) 180.

³⁶ Villagrán Sandoval (n 7) 49.

³⁷ Carlos Arturo Villagrán Sandoval, *A Constitutional Crisis in Guatemala?*, Int'l J. Const. L. Blog, Sept. 8, 2017, at: <http://www.iconnectblog.com/2017/09/a-constitutional-crisis-in-guatemala> accessed 16 January 2017.

³⁸ *Ibid*.

³⁹ *Ibid*.

⁴⁰ *Ibid*.

⁴¹ Corte de Constitucionalidad, Expediente 4182-2017, Sentencia en Única Instancia, 29 de agosto de 2017.

⁴² *Ibid*. 3-4.

⁴³ UN News Centre, At UN, Guatemalan President pledges government's full commitment to fight corruption, 19 September 2017 <http://www.un.org/apps/news/story.asp?NewsID=57579#.Wl1-gq6WaUk> accessed 16 January 2017.

⁴⁴ For a more detailed account of the recognition of indigenous rights in Guatemala, see: Sieder (n 11); Miguel González, Vivian Jiménez Estrada and Víctor Manuel del Cid, 'Indigenous and Afro-Descendant Social Movements in Central America' in Diego Sánchez-Ancochea and Salvador Martí Puig (eds), *Handbook of Central American Governance* (Routledge 2014) 289-290.

first, it reiterated the ‘conventionality control’ doctrine, which in the present case refers to the direct application of international human rights treaties such as ILO’s Convention 169, the American Convention on Human Rights, the UN Universal Declaration on the Rights of Indigenous Peoples, as well as many other human rights treaties, and the obligation to interpret each of these instruments in accordance with the interpretation given to them by specialist and jurisdictional bodies, such as the Inter-American Court on Human Rights, the ILO’s Commission of Experts as well as other UN bodies.⁴⁵ Second, this interpretation given to these international instruments gains constitutional status due to the fact that they become part of the Guatemalan ‘constitutional block’ as a result of article 46 of the Guatemalan Constitution.⁴⁶ This article states that any international human rights instrument ratified by Guatemala shall prevail over any other ‘domestic’ law or statute. Third, as a result of this previous interpretation, the Constitutional Court recognized Guatemala’s obligation to engage in ‘prior and informed’ consultation as a justiciable and fundamental right of indigenous groups.⁴⁷ Fourth, the ground-breaking aspect of the judgment was a finding that, because Guatemalan legislation does not set out the mechanisms for a ‘correct’ manner to fulfill the prior and informed consultation obligation of the Guatemalan state, the Guatemalan Constitutional Court used comparative study of the doctrine of ‘structured judgments’, reviewing many

constitutional scholars and the experiences of the Costa Rican Constitutional Chamber and Colombian Constitutional Court,⁴⁸ and adopted a legislative function and delivered a series of guidelines and principles for the implementation of the state’s obligation of prior and informed consultation.⁴⁹ In *obiter*, the Constitutional Court recalled and used as precedent the jurisprudence of the Inter-American Human Rights Court and other specialized bodies to define the principles by which prior consultation should take place, including priority,⁵⁰ informed by adequate cultural standards⁵¹ and good faith.⁵² Lastly, and as a first in the Guatemalan context, the Constitutional Court imposed a series of positive obligations on the Guatemalan state, including taking measures to enact legislation to regulate prior and informed consultations that adhered with the Court’s standards; repeating prior and informed consultations in some of the mining projects; and completing other measures within the time frame of one year and informing the Supreme Court of their results.

A second major judicial development came on 24 October 2017. On this date, the Constitutional Court ‘judicially’ abolished the legal requirements for the application of the death penalty in Guatemala.⁵³ Using again as reference and precedent judgments of the Inter-American Court of Human Rights and the doctrines of the ‘constitutional block’ and ‘conventionality control’ to incorporate such judgments in constitutional standards of re-

view, the Constitutional Court declared unconstitutional provisions of the Guatemalan Criminal Code referring to the application of the death penalty.⁵⁴ In particular, the Constitutional Court found unconstitutional the provisions relating to those situations where the death penalty was applicable in convictions resulting from subjective determinations of the ‘dangerousness’ of individuals.⁵⁵ The Court found that subjective appreciation of ‘dangerousness’, or *peligrosidad*, is an ‘aged’ concept which saw the death penalty as a solution to a delinquency issue.⁵⁶ Therefore, subjective appreciation of dangerousness constitutes an open door for the potential disproportionate use of the death penalty by judges.⁵⁷ Additionally, taking a temporal *ratio*, the Constitutional Court noted that this criminal provision was introduced in 1992.⁵⁸ As such, this insertion violated the earlier 1983 Inter-American Court of Human Rights opinion on reservations on the death penalty. This opinion of the Inter-American Court states that such reservations do not allow member states to extend the application of the death penalty beyond what it already had before the reservation.⁵⁹

IV. LOOKING AHEAD TO 2018

As mentioned previously in the report, Guatemala is at a crossroads. Consequently, the scheduled election of a new National Criminal Prosecutor in 2018 becomes paramount. In recent years, the National Criminal Pros-

⁴⁵ Corte de Constitucionalidad, Expedientes Acumulados 90-2017, 91-2017 y 92-2017, Sentencia en Apelación de Amparo, 26 de mayo 2017 pp. 42-46.

⁴⁶ *Ibid.*, pp.46.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, pp.76-80.

⁴⁹ *Ibid.*, pp. 80.

⁵⁰ *Ibid.*, pp.85-86.

⁵¹ *Ibid.*, pp.86-89.

⁵² *Ibid.*, pp.89-90.

⁵³ Erick Joaquín Palma y Palma, Inconstitucionalidad de normas que establecen la pena de muerte en el Código Penal y la Ley Contra la Narcoactividad. Sentencia de 24 de octubre de 2017 (expediente 5986-2017) (2017) 7 *El Boletín de la CC*, 11.

⁵⁴ *Ibid.*, 11.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, 13.

⁵⁷ *Ibid.*, 14.

⁵⁸ *Ibid.* 14-15.

⁵⁹ *Ibid.*

ecutor has been a key player and partner of the CICI, as well as an advocate for constitutional reforms. Yet, the decision to elect the new prosecutor lies ultimately at the hands of the Guatemalan President. Connected to this, the UN still needs to provide an answer to the Guatemalan government as to whether it will agree to review the CICIG's mandate.

Another relevant event for Guatemala is its Belize referendum. Guatemala is involved in a territorial dispute with Belize. In April 2018, the country will hold a referendum on whether to take this dispute to the International Court of Justice. Lastly, on 24 December 2017 the President announced his decision to transfer the Guatemalan embassy back to Jerusalem after initially moving it to Tel Aviv after the UN Security Council called on member states to remove their embassies from Jerusalem. After the President's decision of 24 December 2017, a series of *amparos* were filed to halt such a move. These motions are still pending before the Constitutional Court.

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Hungary

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Since 2010 in Hungary, a constitutional counter-revolution can be identified, which has several elements, such as populist government policies or the spotlight on the counter-majoritarian difficulty in the constitutional adjudication. The judicial versus political constitutionalism, constitutional democracy versus majoritarian democracy debates are quite intensive in the political reality that led in several steps to the weakening of the Constitutional Court (CC). Restricting the review power of the Constitutional Court, the new Fundamental Law has pulled out the public finance legislation from constitutional control. Since then, there have not been any constitutional hurdles to the Government's economic, finance, and tax policies. Hungary has been deeply affected by the migration influx to Europe as well, although most of the migrants moved on to Austria and Germany. The Constitutional Court was involved in the fight against 'illegal migration' in 2016 [22/2016. (XII. 5.) CC decision, we have reported on in 2016] and was silent in 2017. Although the constitutional adjudication carried out by the Constitutional Court was traditionally a fair balance of the majority will in Hungary, the changes of the past years in the constitutional politics made the Constitutional Court a less relevant actor on the political scene, which also means that the constitutional legal control of Government policy became less significant. The constitutional complaint procedure became the most relevant competence of the Constitutional Court where the Court examines mostly the activity of the judiciary

instead of the legislative or regulatory bodies. We explain in our report that although there were undoubtedly important Constitutional Court decisions in politically less sensitive cases (mostly in human rights matters) in 2017, the Constitutional Court's position has weakened. By using soft instruments, by being hesitant in taking decisions, by becoming the advisory body of the Government, and by turning towards the control of the judiciary via constitutional complaint procedures, the Constitutional Court has lost its former role in the Hungarian constitutional democracy.

II. FURTHER DECLINE OF THE RULE OF LAW AND DEMOCRACY IN HUNGARY IN 2017

The jurisprudence of the Constitutional Court has significantly changed since 2010 and further in 2017, which is far from being attributed to the changed constitutional text. The change in the competence of the CC has also influenced greatly its jurisprudence and there are unprecedented judicial innovations as well such as the interpretation of constitutional identity [22/2016. (XII. 5.) CC decision] from 2016, or the high deference shown towards Government policies. The try for legal identification of national sovereignty or the development of a non-activist constitutional jurisprudence are important deliveries for the present Government. Concurrence with the political argumentation of the governing coalition, which, e.g., insistently emphasizes the

importance of the protection of national sovereignty from the influence of ‘Brussels’ as a symbol of the European Union, is significant in the constitutional jurisprudence in 2017 as well. While the negative effects and the risks of the world economic crisis, mass migration, or the terrorist threat have been frequently referred to in political communications in 2017, in the year before the general parliamentary elections, these circumstances did not play an important role in constitutional adjudication. The Constitutional Court has dealt mostly with politically less sensitive cases and avoided contradicting the Government.

Exploiting an overwhelming majority, Government parties got their own political will through the Parliament, and usually voted without the consent or even the cooperation of opposition parties. The adoption of the Fundamental Law of 2011 was followed by intensive law-making activity, which significantly transformed almost all branches of law and legal areas. This continued in 2017, although with lower intensity than, e.g., in Poland. In Hungary, as compared to Poland, constitutional change is rather slow and systematic. Both the Constitution-making process and the following legislative activity led, however, not only to fierce debates in the country but also caused a stir on an international level. The reason for this attention and heavy criticism was that the measures of the two consecutive Orbán Governments after 2010 systematically dismantled the principles of the separation of powers and the rule of law.¹ As a part of this constitutional development, the Constitutional Court and constitutional adjudication as such became less significant

than before in managing the constitutional democracy. The new constitution as a basis of the political challenge to build an illiberal democracy and the following legislative acts have fundamentally affected also the constitutional interpretation and attitude of the Court, not only by the newly introduced, constitutionally binding interpretive principles but also because they have reduced the level of general rights protection in certain fields. For example, the Fundamental Law enables the legislature to make differences between religious communities, regulates hate speech against the previous constitutional doctrine, and restricts political advertisements.

Since the Constitutional Court had been from its very beginnings, from 1989’s democratic transition, a powerful counterbalance of executive power, it is not surprising that the body was not intact by constitutional changes. By 2016, many new judges of the Constitutional Court were elected for 12 years instead of the former 9-year term, and all of them are consented to if not appointed by the ruling majority. This fact also influenced their operations in 2017. The background political idea could be that a strong and independent constitutional review cannot be compatible with parliamentary supremacy.²

The Constitutional Court, in its new composition, also in 2017, did not disappoint those who had designed and accomplished the changes in the institutional setting. Both the available qualitative³ and quantitative⁴ research has shown that in controversial political issues the Court usually makes a decision favorable to the Government.

Most changes of constitutional jurisprudence have been brought about by the unquestionable authoritarian tendencies building up a so-called ‘illiberal democracy’, declining all institutional counterbalances against executive power.⁵

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Despite all the above difficulties, Hungary still has an operating Constitutional Court that is not as focused on politically sensitive issues as on constitutional complaint procedures and gives constitutional guidance to the ordinary judiciary in questions of individual rights protection. We must emphasize that in many cases where the traditional conceptions of constitutional democracy and human rights adjudication are enforced in Hungary, there is no overwhelming majority behind the decisions, which means that the balancing mechanisms provided by the Constitutional Court are operating but are fragile and quite instable.

Important cases and diverging judicial reactivity

It is quite usual in the constitutional jurisprudence of Hungary that when there is an important case, the Constitutional Court adopts a minimalist, non-activist approach to solve it. A good example is the case of the Act on the Administrative Procedure, where the Government had the intention to establish a Supreme Administrative Court. The Constitutional Court declared in its decision that it is not possible to introduce a new juridical organ into the Hungarian court

¹ For a more detailed description of this process, see Kovács, Kriszta and Tóth, Gábor Attila, ‘Hungary’s Constitutional Transformation’ (2011). 7 *European Constitutional Law Review* 2, 183–203; Bánkuti, Miklós, Halmai, Gábor and Scheppele, Kim Lane, ‘From Separation of Powers to a Government Without Checks: Hungary’s Old and New Constitutions’, in Gábor Attila Tóth (ed.), *Constitution for a Disunited Nation. On Hungary’s 2011 Fundamental Law* (Central University Press 2012) 237–268.

On an international level, the European Parliament and the Venice Commission of the Council of Europe have adopted a number of resolutions and opinions criticizing the backsliding of the rule of law in Hungary. See in detail Szente, Zoltán, ‘Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them’, in András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values. Ensuring Member States’ Compliance* (Oxford University Press 2017).

² Sólyom, László, ‘The Rise and Decline of Constitutional Culture of Hungary’, in Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crises in the European Constitutional Area. Theory, Law and Politics in Hungary and Romania* (Hart 2015). 22.

³ Halmai, Gábor, ‘In memoriam magyar alkotmánybíráskodás. A pártos alkotmánybíráskodás első éve’ (2014). 18 *Fundamentum* 1–2, 36–64.

⁴ Szente, Zoltán, ‘The Political Orientation of Constitutional Judges in Hungary’, 1 *Constitutional Studies* 123–149.

⁵ In more detail, Zoltán Szente and Fruzsina Gárdos-Orosz: *Judicial deference or political loyalty?: The Hungarian Constitutional Court’s role in tackling crisis situations*. In: Zoltán Szente and Fruzsina Gárdos-Orosz (eds.): *New challenges to constitutional adjudication in Europe* (Routledge 2018) 111–134.

system without amending the cardinal law on the judiciary with two-thirds majority of the Parliament. Although the Constitutional Court could have examined the idea itself on its merits, it refrained from doing so and founded its decision on procedural inadequacy, which is a safe way not to contradict the Government in important matters and express the new non-activist, deferential approach to constitutional adjudication [1/2017. (I. 17.) CC decision].

Two important decisions were made last year by the Constitutional Court that fit into the line of decisions that focus on human dignity in free speech cases; both were, however, quite favorable to the freedom of expression. As emphasized by the Constitutional Court: the freedom of expression enjoys extraordinary protection in the scope of debating public affairs, as it is a requirement of the formation of democratic public opinion that all citizens of the society should be able to express their thoughts freely. Accordingly, the expression of opinions about public affairs can only be restricted in a limited scope if it violates the unrestrictable essence of human dignity that determines the human status, i.e., if it is aimed at humiliating the human core of the other person. The freedom of expression shall not be applicable to such communications [3001/2018 (I. 10.) CC decision].

In another decision, the Constitutional Court declared that no rumor-spreading shall be established when a report is published in the press on a press conference about public affairs of public figures if the reporting gives an accurate account of what has been presented there, without its own assessment, by clearly indicating the sources of information, and by providing an opportunity to publish the reply or the rebuttal of the person affected by the statements of facts that may infringe one's reputation. The Court annulled the judgement that had reached a conclusion to the contrary. Reporting about a press conference of public figures shall be regarded as an exemption when journalists do not have an obligation to verify the truthfulness of the facts published [34/2017.

(XII. 11.) CC decision].

Both decisions were taken with an 8 to 7 majority in constitutional complaint procedures, therefore this sensitive area of jurisprudence can change very easily from one case to the other.

The Constitutional Court declared unconstitutional the decree of the local government of Ásotthalom, which contained serious limitations on the freedom of religion and the freedom of expression. The decree in question was the subject of intensive public debates as it prohibited the activity of the muezzin and wearing of burkas, hijabs, chadors, and burkinis in public spaces within the territory of the town as well as public activities ('propaganda') which contradict the notions of marriage (based on the relation between man and woman) and family (based on the relation between parents and children) specified in the Fundamental Law. One can add that Ásotthalom is located near the southern border of the country, which was previously affected by the migration waves – however, no asylum-seekers or Muslim people are residents in the particular town. The Commissioner for Fundamental Rights (the ombudsman) turned to the Constitutional Court in this case. Despite the ombudsman's substantive arguments related to the obvious limitation of the freedom of religion and the freedom of expression, the Constitutional Court decided the case only on formal grounds. It stated that because the Fundamental Law prescribes that rules on fundamental rights shall be laid down in an act, the content of the regulation is not acceptable in a decree of a local government [7/2017. (IV. 18.) CC decision].

In another decision related to the freedom of religion, the Constitutional Court declared the omission of the legislature. The case was based on a constitutional complaint of a taxpayer who was not able to offer 1% of her personal income tax to the religious community she belonged to because that organization was not a 'recognized church'. The background of the legal dispute is the

restrictive regulation of the Fundamental Law, which prescribes that only those religious communities recognized by the National Assembly have the status of 'churches', and tax laws refer exclusively to these. The Constitutional Court declared that the tax regulation discriminates between taxpayers based on the type of religious community they belong to [17/2017. (VII. 18.) CC decision].

In sum, when the constitutional violations were very visible and simple, the Constitutional Court did not hesitate to react, but on the other hand, when the case was complicated and politically sensitive, the Court was uncertain about taking a strong decision and rather limited the scope of its decision.

New approaches to constitutional adjudication – soft instruments and silence

The Court uses several methods to postpone decision-making on politically sensitive questions or avoid confrontation with the legislature. The first method is that instead of declaring a law unconstitutional and annulling it, the Court can declare an omission of the lawmaker [CC Act Section 46 (1)-(2)]. The Court sometimes expressively states that its aim is to 'spare the current legislation' [e.g., 13/2017. (VI. 19.) CC decision, point (76)]. This decision obliges the Parliament to adopt a regulation to solve the unconstitutional situation. However, as the Court has no power to execute it, in most of the cases no steps are taken by the Parliament.⁶

The second method is that the Court does not declare a provision unconstitutional and annul it but sets a so-called 'constitutional requirement': it gives an obligatory interpretation of the constitutional text connected to the examined statutory provision [CC Act Section 46 (3)]. While some of the justices criticize the use of this legal consequence because they are afraid of an extended activism [e.g., 2/2017. (II. 10.) CC decision, joint concurring opinion of Justice Szívós and four other judges], others

⁶ See the list of the non-executed decisions on the webpage of the Parliament: <http://www.parliament.hu/az-orszagguyeles-donteseire-vonatkozo-alkotmany-birosagi-hatarozatok>.

argue that it is not a sufficient mean to restore the constitutional situation [e.g., 8/2017. (IV. 18.) CC decision, concurring opinion of Justice Czine] or to restore the fundamental right of the claimant [e.g., 10/2017. (V. 5.) CC decision, concurring opinion of Justice Salamon].

Finally, the third method is not to decide at all. With only two exceptions (ex ante review and reviews initiated in a concrete procedure by a judge), there are no deadlines in the procedure of the Court. This gives an opportunity for maneuvering with respect to decision-making in politically sensitive cases.

Among the 243 cases that were started but not finished in 2017, there are three particularly sensitive ones. According to the Act on the Transparency of Organizations Receiving Support from Abroad, associations and foundations annually receiving money or other assets from abroad reaching twice the amount of 7.2 million forints (around 24 000 euros) have the obligation to register with the Regional Court as ‘organizations receiving support from abroad’ and label themselves as such on their websites as well as on any press products and other publications. The Act also regulates the procedure of registration and provides sanctions for those organizations which do not fulfill the obligations. The Venice Commission criticized several points of the regulation because while on paper certain provisions requiring transparency of foreign funding may appear to be in line with the European standards, the context surrounding the adoption of the relevant law and specifically a virulent campaign by some state authorities against civil society organizations receiving foreign funding, portraying them as acting against the interests of society, may render such provisions problematic.⁷ Three

constitutional complaints (submitted by concerned civil society organizations) and an ex post constitutional review initiative submitted by more than one-fourth of the MPs have been pending before the Court for months.

The Amendment of the National Tertiary Education Act has given rise to much criticism, both in Hungary (including demonstrations in Budapest) and internationally, including the Council of Europe Parliamentary Assembly⁸ and the Venice Commission.⁹

The Act, adopted in one week, introduced new conditions for the operation of universities accredited outside the EEA in Hungary and is applicable also to existing higher education institutions, including Central European University.

The constitutional complaint of the CEU and the *ex-post* review initiated by one-fourth of the MPs has been before the Court for months. In this case, the Court also applied (otherwise very rare) procedural tools to postpone the decision: it created an ad hoc committee consisting of the law clerks at the Court to ‘prepare the decision-making procedure’ of the case. On the proposal of the committee, the Court asked further clarification from the claimants and from several state institutions.

In the summer of 2017, the amendment to the Act on political parties was on the agenda of the National Assembly.¹⁰ The proposal intended to prescribe new requirements related to the publication of political advertisements on billboards outside campaign periods, stipulating limitations on political parties and companies providing communication services as well. The amendment did not pass in the National

Assembly the first time: it required the support of a two-thirds majority of the MPs present because the Act on political parties is a cardinal act. Later, the content of the proposed regulation was included in an amendment to a different law,¹¹ which from the formal point of view did not require two-thirds majority, and it passed. It is important to emphasize that in the Hungarian legal order, the qualified majority requirement is related to topics stipulated in the Fundamental Law. Accordingly, every provision on the activity and financial issues of political parties requires a regulation in a cardinal act. Therefore, the enactment of the rules in question in an ordinary act was an obvious infringement of the procedural rules of the Constitution.

Right after the enactment of the law, one-fourth of MPs initiated the ex-post review of the regulation in question. Until now, the Constitutional Court showed no signs of delivering a decision in this simple case. This is even more problematic taking into consideration that the challenged provisions limited the possibilities of political parties to advertise before the official campaign period of the 2018 parliamentary elections.

New competence: The role of the constitutional complaint

According to the new self-interpretation of the role of the Constitutional Court, Tamás Sulyok, president of the Constitutional Court, emphasized in one of his speeches that the constitutional complaint is a protective shield safeguarding the rule of law and the people’s constitutional rights. Although the Constitutional Court has lost its significance in constitutional-political matters, the loss is interpreted to be compensated by a new competence: the competence to review judicial decisions. The figures, according

⁷ Hungary – Opinion on the Draft Law on the Transparency of Organisations receiving support from abroad. [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)015-e).

⁸ Resolution 2162 (2017) of the Parliamentary Assembly of the Council of Europe – Alarming developments in Hungary: Draft NGO law restricting civil society and possible closure of the European Central University, and related Report by Committee on Political Affairs and Democracy of the Parliamentary Assembly of the Council of Europe. <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23666&lang=en>.

⁹ Hungary – Opinion on Act XXV of 4 April 2017 on the Amendment of Act CCIV of 2011 on National Tertiary Education. [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2017\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)022-e).

¹⁰ Act XXXIII. of 1989. on the Functioning and Economic Activity of Political Parties.

¹¹ Act XXXVI. of 2013. on the Protection of the Outlook of Towns.

to Sulyok, justify the success of the new institution: in the last five years, the number of constitutional complaints submitted to the Court has been increasing steadily; the volume of complaints has doubled between the years 2013 and 2016.

Sulyok noted that between 2012 and the first half of 2017, as much as 9500 affected individuals or organizations turned to the Constitutional Court. In this period there were 452 judicial motions, the Commissioner for Fundamental Rights initiated 59 procedures, and one-quarter of the MPs filed petitions on 19 occasions. Since 2012, the average processing time of the cases has been around six months; in cases of constitutional complaints it has been 200 days. In sum, in 2017 there were 461 cases submitted, and among these 404 cases were constitutional complaints. Out of these, 330 procedures started in the German-type constitutional complaint procedure, which is about the review of the judicial decision itself without the examination of the law or other legal instrument applied in the lawsuit.

It should be underlined that the Constitutional Court in principle examines only whether the courts that had acted in the original case had realized the fundamental rights' aspects of the case and whether the challenged decision had any deficiency of consideration that might have resulted in violation of the Fundamental Law. Although this competence is very important and precious in the practice of the Hungarian Constitutional Court, this cannot be regarded as a substitute to the original task of the constitutional adjudication, namely the constitutional control of legislative and governing powers.

IV. LOOKING AHEAD TO 2018

As no vacancies are foreseen for 2018, we could make estimates on the future activity of the Court based on its past case law.

2018 is the year of upcoming parliamentary

elections. Voters and candidates can bring their cases to the Court in a constitutional complaint procedure that has a priority on the docket. This could be a very important tool to ensure voting rights, especially considering the debated character of the electoral legislation.¹² However, in practice, the significance of this competence is quite low. During the last elections, the Court rejected 95% of complaints on formal grounds.¹³

In 2018, the Court has to decide on pending cases, including the three above-mentioned politically sensitive ones. It will most probably deal with these issues only after the parliamentary elections that are scheduled for 8 April. We are unable to predict the results of these cases.

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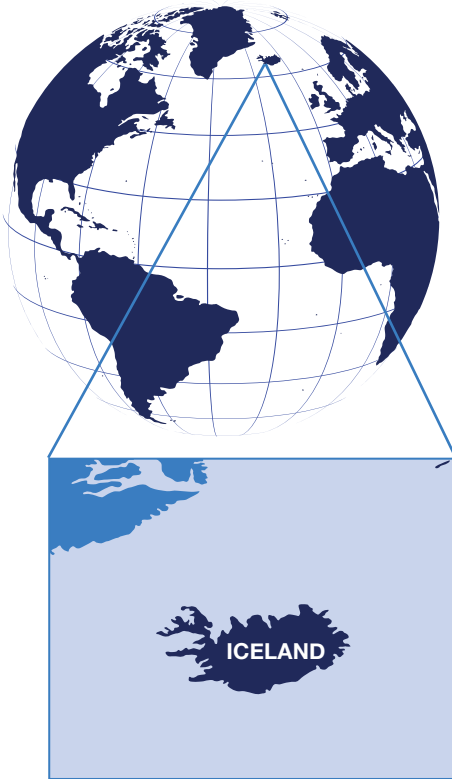
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¹² The last parliamentary elections in 2014 were declared 'free but not fair' by the OSCE/ODIHR electoral observer mission. Hungary Parliamentary Elections 6 April 2014, OSCE/ODIHR Limited Election Observation Mission Final Report. <http://www.osce.org/odihr/elections/hungary/121098?download=true>.

¹³ Bodnár Eszter and Mécs János: *Az alkotmányjogi panasz szerepe a választójog védelmében*. MTA Working Papers, 2018/3.



Iceland

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The year 2017 was a tumultuous one in Icelandic constitutional matters. A new government was formed in January, two and a half months after the parliamentary elections of 2016. The three-party coalition broke in September 2017 when one party left the coalition after what seemed like a cover-up of a political scandal by a minister of the prime minister's party. New elections took place in October in the shadow of a broad injunction on reporting about links between politics and finance, related to one of the Icelandic banks, which nearly bankrupted the country in 2008. A new government – the third in less than 18 months – was formed in November.

The main constitutional events of the year were thus parliamentary elections, the formation of two governments and the fall of one, and preparations for the establishment of a completely new Appeals Court, which started its work in January 2018. The main contentions over constitutional issues concerned the injunction mentioned above on press coverage before the elections and the appointment of the Appeals Court. Both are described below, as well as other interesting developments in constitutional jurisprudence.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Iceland has from its independence been viewed as a relatively stable liberal democracy,¹ with a good record of accomplishment

on human rights² and great social cohesion.

The year 2017 was, however, not a particularly good year for liberal democracy. It may even be said that especially with regard to the separation of powers (in particular the independence of the judiciary) and free speech, the country slid a bit backward, as discussed further below. However, the status of the protection of individual rights continued to be good even though judicial review of economic, social and cultural rights granted by the legislature is very limited. On a positive note, the President of the Republic discussed constitutional amendments and his own role in the speech opening Parliament, emphasizing that the constitutional provision concerning his role should be clarified and the ancient provision stating that he “may not be held accountable for executive acts” abolished.³

Regarding the separation of powers and the independence of the judiciary, a new court of appeals started its work in Iceland on 1 January 2018, replacing the former two tiers with a three-tier system. Due to the establishment of this court, *Landsréttur*, which will be a mid-tier court handling cases between the District Courts and the Supreme Court of Iceland, considerable preparatory work took place within the judicial system in 2017. Part of it was the appointment of 15 judges at the new court, which led to a major dispute.

The background of the dispute is that Act no. 50/2016, as amended by Act no. 10/2017, provided that a special selection commit-

¹ See, <http://country.eiu.com/iceland> (21.2.2018).

² See, e.g., the reports of Iceland to the UN and the discussion thereof: www.stjornarradid.is/media/innanrikisraduneyti-media/media/Skyrslur/CCPR-5th-periodic-report-Iceland.pdf.

³ See http://www.forseti.is/media/2641/2017_09_12_thingsetning.pdf (28.2.2018).

tee should assess candidates' qualifications and provide the Minister with a review of applicants, as is true for all other judicial appointments.⁴ According to the Act, the Minister could not appoint a judge whom the committee had not ranked highest among the applicants, either alone or along with others. However, the Act provided that the committee's opinion could be deviated from if Parliament approved a proposal from the Minister for authorization to appoint another applicant who, in the opinion of the committee, met all conditions for appointment to the office, but Parliament was in any case to approve each appointee. The selection committee ranked 15 of the 33 total applicants highest for the 15 positions, but the Minister compiled her own ranking of the applicants, which differed from the committee's. Parliament then approved the judges from her list. Two of the applicants who were rejected by the Minister after having been ranked highest by the committee sued the state for compensation and damages. In its judgment of 19 December 2017 (no. 591/2017), the Supreme Court concluded that the Minister's decision had been contrary to the Act on Administrative Procedures, as the Minister had not compared the applicants she submitted to Parliament to those suggested by the committee and thus not investigated the matter to the extent required by law. It held that the rejected applicants had rights to compensation, but no damages were awarded in this case as it was considered unclear whether they had suffered any financial loss. At the time of writing, other similarly situated applicants have sued the State, and it is likely that those will be able to demonstrate financial damages. These events led to discussions about the separation of powers (due to Althingi's participation in the decision) and raised questions regarding the Minister's influence over the judiciary. However, the Appeals Court answered the question of whether the judges chosen by the Minister can decide cases

concerning the State in the affirmative on February 22, 2018 (no. 6/2018).

In September, new parliamentary elections were called, since the government coalition party Björt framtíð (Bright Future, BF) decided to leave the coalition, which had been in power since January. The prelude to the decision was that in the summer of 2017, two convicted pedophiles had their "honor restored" but Icelandic criminal law provides for this recourse five years after the end of jail terms. Legally this "restoring of honor" entails the convicted person regaining certain civil rights, including the right to run for Althingi, by applying for such a pardon and submitting letters of recommendation. In these cases, however, the victims and their families were openly critical of the process and had been effectively stonewalled by the Ministry of Interior when asking for information – something that the relevant Committee of Parliament held to be in violation of relevant laws. When it became clear that the Ministry of Interior (held by the Independence Party [IP]) had restored the honor of one of the pedophiles on the recommendation of the father of IP chairman and Prime Minister Bjarni Benediktsson, and that Minister Sigríður Á Andersen had (as the scandal grew) discussed this with him but not with other ministers, coalition party BF decided that this was a cover-up that it could not be party to and left the coalition.⁵ This sequence of events left many voters disillusioned and afraid of corruption while others were critical of what they saw as a populist reaction to the matter.

BF's decision left the two other parties in the coalition without a majority, and the Prime Minister suggested calling an election in November, which was seconded by the President. The calling of new elections midterm, or as in this case, within a year from the last one, is relatively rare in Iceland, and

the President, who in such cases has a formal as well as a facilitating role, made clear that he had independently verified whether there was any possibility for another coalition, thus avoiding new elections, but that a majority in Parliament had desired elections.⁶ He also noted that the ministers in the government, which had lost its majority, should only act as caretakers, not policymakers. Such a provision on the status of ministers in a government that has resigned is found in the Danish constitution but not the Icelandic one, and while it might make sense for ministers without parliamentary support to be careful in policy-making, this has historically not been the case in Iceland.⁷

The new elections were called on September 18, 2017, and took place on October 28, 2017. In October, the newspaper *Stundin* along with media company *Reykjavik Media* and British newspaper *The Guardian*, had published a number of news items on business dealings within Glitnir Bank (one of the Icelandic banks who failed in 2008), with some of the most prominent describing how then-Prime Minister Bjarni Benediktsson (who was MP in 2008) had saved a substantial amount of money (500 thousand USD) by certain actions the day before the Icelandic government stepped in by passing emergency legislation in October 2008. On October 13, an injunction was issued by the District Commissioner in Reykjavik, prohibiting further reporting in *Stundin* and *Reykjavik Media* based on documents from Glitnir. The OSCE expressed concern right away, as did most legal academics in Iceland, not least because this was not only a prior restraint on free speech but also directly affected political discourse shortly before a parliamentary election.⁸ However, Glitnir filed suit to keep the injunction in force. The District Court of Reykjavik refused in its judgment of February 2, 2018 (no. E-3434/2017) but the injunction remains in force pending appeal.

⁴ Full disclosure: One author (RH) sits in this committee, elected by Parliament. However, she had to recuse herself from this particular case, and took no part in it.

⁵ See, e.g., https://www.washingtonpost.com/news/worldviews/wp/2017/09/16/how-a-convicted-pedophile-brought-down-icelands-government/?utm_term=.a38532521ce8 (24.2.2018).

⁶ See, e.g., https://www.mbl.is/frettir/innlent/2017/09/18/gudni_fellst_a_tillogu_um_thingrof/ (24.2.2018).

⁷ See Ragnhildur Helgadóttir, 'Framkvæmd þingræðis' in *Þingræði á Íslandi – samtíð og saga* (Forlagið 2011) 206-208.

⁸ See <https://www.osce.org/fom/350501> (24.2.2018).

The District Court found that the published articles did not go further in discussing private matters than was necessary concerning a matter of public importance in a democratic society and that there were, therefore, sufficient grounds for publishing. Neither the way in which the documents had reached *Stundin* nor whether the information therein was covered by banking secrecy could affect this conclusion.

In the opinion of these authors, it is disturbing that an injunction could be upheld for four months even though no judicial official has upheld it and the injunction prevented the discussion of public matters concerning top politicians. These events also cast a pall over the elections of 2017 and the subsequent forming of the government; not because of what was said in the articles but because the voters were not given the option of forming their own opinion on what mattered with regard to business dealings of top politicians and what did not.

These events have increased mistrust in the Icelandic political system. Perhaps more importantly from a legal point of view, the courts (and the supervisory committee of Parliament) have repeatedly handed down decisions slapping down overreaching by the executive branch concerning such fundamental matters as the appointing of a new court and parliamentary elections.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The Supreme Court handed down a considerable number of interesting judgments concerning fundamental rights. Of these, the following deserve special mentioning.

Judgment of 16 March 2017 (no. 345/2016): Inhuman or degrading treatment

The plaintiff demanded compensation from the State for coercive measures against him in relation to a police investigation of narcotics imports. After a suspicious phone call made by the plaintiff and because a suitcase similar to the one that had been used for the

import was found in his storage unit, he was arrested. He spent 10 days in a prison cell at a police station but was released after that since there was no cause to further investigate his part in the case.

The Supreme Court found that the police had overreached their authority by arresting the plaintiff and caused him to suffer excessive discomfort in the sense of Act no. 88/2008 on Criminal Procedure. It also held that the conditions in the prison cell, where he was kept in isolation, had been unsatisfactory and that it had been indefensible to keep him there for more than four days. The way in which he was treated was found to have been degrading in the sense of Article 68 of the Icelandic Constitution, which states that “no one may be subjected to torture or any other inhuman or degrading treatment or punishment.” He was therefore awarded damages to the amount of ISK 2,000,000. This is the first case ever in which the Supreme Court resolved a case on the basis of Article 68 of the Constitution concerning inhuman or degrading treatment.

Judgment of 30 March 2017 (no. 367/2016): Surrogacy and validity of foreign decisions

A and B requested that the boy C, born to a surrogate mother in the United States, be registered in Registers Iceland and that they be registered as his parents in accordance with his birth certificate issued in the State of California under the local family law and the so-called surrogacy birth plan. This request was denied by Registers Iceland and the Ministry of the Interior on the grounds that as the boy had been born in the United States to a surrogate mother, the provisions of Icelandic law regarding father- and motherhood could not apply and that a right to Icelandic citizenship did therefore not automatically exist according to laws on Icelandic citizenship.

A and B instituted proceedings against the State and demanded that these decisions be ruled null and void. In support of their demands, they stated among other things that Icelandic authorities should abide by the ruling of the court in the United States, which stated that A and B were the lawful parents of the child and that denying the registration

of A and B as his parents was a violation of his right to an identity and to have a family relationship with A and B in accordance with Article 71 of the Icelandic Constitution, which addresses the right to privacy and the comparable provision of Article 8 of the European Convention on Human Rights.

The Supreme Court judgment included a reference to the judgment of the European Court of Human Rights in the case of *Paradiso and Campanelli v. Italy* of 24 January 2017, where it was stated that when there is no biological connection between a child born of a surrogate mother and a couple whom that child is living with, no family relationship is established in the sense of Article 8 of the European Convention. It was also stated that the wording of Article 8 of the United Nations Convention on the Rights of the Child, that parties shall undertake to respect the right of the child to preserve his or her identity, including family relations as recognized by law, could not be understood otherwise than referring to the laws of the relevant state that is party to the Convention. The Supreme Court noted that it had to consider that a family relationship in the sense of Article 71 of the Icelandic Constitution meant a relationship that was created lawfully. As neither A nor B had been pregnant with and given birth to the boy, nor had the biological connection required under Icelandic law been established, the authorities were within their rights to deny the application from A and B. The Icelandic State was therefore acquitted.

This judgment is interesting concerning the establishment of family relationships in the sense of the provisions of Article 71 of the Icelandic Constitution and Article 8 of the European Convention on Human Rights regarding privacy. However, its main interest lies in the statement in the judgment that the decisions of authorities in foreign countries regarding the establishment of family relationships, such as that between a parent and child, will not be acknowledged in Iceland to the extent that they contradict Icelandic laws.

Judgment of 2 February 2017 (no. 250/2016): Freedom of association

The plaintiff in the case, the pig farmer S hf., demanded repayment of agricultural levies which he paid in the years 2010-2014 as required by Act no. 84/1997 on Agricultural Levies. He based his claims among other things on the fact that the levies were earmarked for private associations related to agriculture and were thus in fact membership fees collected by Treasury collectors for the associations without consideration of whether payers desired to be members. He, therefore, argued that they constituted a violation of the provision regarding freedom of association in Article 74 of the Icelandic Constitution and Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the judgment, it was stated among other things that the role of the previously mentioned parties as demanded by law had very little to do with producers of pork products like S hf. and there was no indication that the levies were used for supporting the industry or to safeguard the interests of pig farmers. In addition, the contribution from S hf. to the associations was mostly for spending at their own free choice. It was therefore not established that obliging S hf. to pay the levies was necessary with regard to public interest or the rights of others to the extent of justifying departing from the principle according to Article 74 of the Icelandic Constitution that people have a right not to be members of associations. The Icelandic State was therefore ordered to repay to S hf. nearly ISK 40 million plus interest.

*Judgment of 15 February 2017 (no. 15/2017):
Limitations on standing to file suit*

A, the father of B, demanded a revision of the decision of a Child Protection Committee that B should live with C and D until the age of 18. As A had never had custody of the child, only the child's mother had been party to the decision. At the District Court, his case was dismissed for the reason, among other things, that the provisions of the relevant Article of the Child Protection Act no. 80/2002, on the revision of arrangements for children to live elsewhere than in their home, only applied to the parent that had agreed to

the arrangement; i.e., only the mother in this case. The Supreme Court stated that according to Paragraph 1 of Article 70 of the Icelandic Constitution, everyone has a right to a settlement of their rights and obligations by fair trial before an independent and impartial court of law. The same could be construed from Paragraph 1 of Article 6 of the European Convention on Human Rights. The aforesaid provision of the Child Protection Act constituted, according to the Supreme Court, a hindrance to A seeking settlement of whether the decisions regarding his child should be revised and no arguments had been submitted to justify that discrimination. The Court also referred to the principle of equality in Article 65 of the Icelandic Constitution and the United Nations Convention on the Rights of the Child in this regard. It was therefore considered that the restrictions regarding standing in such a case provided by the Child Protection Act could not prevent the father from having his demands materially settled before a court of law and the case was referred to new District Court proceedings.

This judgment is particularly interesting in the regard that the clear wording of general laws is ignored to the extent that it limits the rights of individuals under the Icelandic Constitution and the European Convention on Human Rights. In Supreme Court judgment 419/2000 of 18 December 2000, a legal provision that prevented a man from bringing a case to court to seek acknowledgment that he was the father of a certain child was held to be in violation of Article 70 of the Icelandic Constitution. This case continues that line of thought.

*Judgment of 9 February 2017 (no. 223/2016):
Social and economic rights*

The plaintiff in this case, D, received disability benefits from the Social Insurance Administration based on the Social Security Act no. 100/2007. She instituted proceedings against the Icelandic State and argued amongst other things that her monthly payments from Social Security had to reach a certain amount in order for her to be able to

live a "decent life" in the sense of Paragraph 1 of Article 76 of the Icelandic Constitution, which states among other things that this requires that everyone by law is guaranteed necessary assistance in case of sickness and infirmity. She sued for a certain monetary amount, equal to the difference between what she had been receiving and the living standard defined in a report issued by the Ministry of Welfare regarding subsistence cost of living for individuals.

The Supreme Court stated that the legislature had met its obligations under the Constitution by passing the Social Security Act no. 100/2007, which provided for disability benefits. By her demands, D was therefore in fact seeking a Court decision regarding the amount of the assistance which she believed she was entitled to from the Icelandic State due to her disability, which also constituted that the courts had the task of deciding an issue that came under the scope of the legislative powers according to Articles 41 and 42 of the Icelandic Constitution (wherein it is stated that Parliament shall decide the budget and that no payment may be made unless authorized therein). The Court found this in violation of Article 2 of the Constitution on the separation of government powers and therefore dismissed her claim.

This judgment suggests that even though people have a certain right to payments due to illness and infirmity according to the Icelandic Constitution, the courts will not review a decision of the legislative power in this regard or assess if the legislator's establishment of laws sufficiently guarantees that right according to which such payments shall be made. This judgment has been criticized because of this, and it has been maintained that if the courts do not review decisions of the legislative power regarding disbursement according to Articles 41 and 42 of the Icelandic Constitution, the last provisions do in fact take precedence over the aforesaid Paragraph 1 of Article 76 guaranteeing social and economic rights.⁹ In this regard, the Supreme Court judgment on November 2017 (no. 464/2017) is also interesting. There, the Court confirmed a District Court judgment

⁹ See Kári Hólmur Ragnarsson: "Falsvönir öryrkjabandalagsdómsins? – Nýleg dómaframkvæmd um félagsleg réttindi" 70 *Útlifjótur* 1 (2017), 41.

where it was stated that it was not contrary to Paragraph 1 of Article 76 to deny a blind person a government interpreter to assist her in summer camp outside of Iceland and consistent with rules thereof taking into account the amount of funding the Parliament had assigned to the field according to its power under the aforementioned Articles 41 and 42.

In addition to the judgments discussed above, the Supreme Court of Iceland held, in two judgments on 14 December 2017 (no. 415/2017 and 577/2017), that harsh comments about gays amounted to hate speech, which could constitutionally be limited. It was also stated that sexuality and people's right to privacy concerning such issues were protected by Article 71 of the Icelandic Constitution regarding privacy.

IV. LOOKING AHEAD TO 2018

The courts have already decided the issues concerning the establishment of the Court of Appeals in 2018. A Supreme Court judgment on the injunction discussed above is also expected in the first half of the year.

At the time of this writing, the main constitutional questions of 2018 are likely to be the continuation of the process of writing a new or revising the Constitution. The "crowd-sourcing" project started in 2009 is still under discussion, and the coalition agreement of the current government states that it wants to continue the project of "complete revision" of the Constitution, in a non-partisan manner and with broad public participation.¹⁰ This will be interesting to follow and further developments are expected in 2018.

V. FURTHER READING

Kári Hólmar Ragnarsson, 'Falsvonir öryrkjabandalagsdómsins? – Nýleg dómafrankvæmd um félagsleg réttindi' (2017) *Úlfjótur* 70, 41. See <http://rettur.is/wp-content/uploads/2017/05/Grein-KHR.pdf>. (in Icelandic)

Ragnhildur Helgadóttir, 'Human Dignity in Iceland' in Becchi & Mathis (eds.), *Handbook of Human Dignity in Europe* (Springer 2017)

10 See <https://www.stjornarradid.is/rikisstjorn/stefnuyfirlýsing/>



India

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

When framing the Indian Constitution, one of the drafters justified its length and detail on the grounds that it was necessary to encode the values and structures for the ‘diffusion of constitutional morality’ in the new Indian state.¹ Within this, the Indian Supreme Court was envisioned as the custodian of the Constitution, with the power to hear appeals, exercise judicial review, protect constitutionally encoded fundamental rights, and resolve disputes arising within India’s federal framework of union and states. Although the Court has judicially insulated the ‘basic structure’ from alterations, the Constitution has seen 101 amendments. In addition to these functions, the Indian Supreme Court often exercises judicial review over matters of ‘public interest,’ involving itself in questions of governance, policy, and finance.

In 2017, the Indian Constitution was the site of deep contestation between the parliament, executive, and judiciary. Although the Court took the strong step of affirming a fundamental right to privacy, multiple policy measures by the executive indicated attempts to encroach upon the liberty of individual citizens, particularly through India’s new biometric identification program. The Supreme Court frequently exercised judicial review to direct a series of policy reforms, but was hesitant to issue pronouncements in significant constitutional questions that arose. Tremendous conflicts between judges about how the Court manages its hearings revealed internal disagreements, bringing into doubt the credibility of the Court’s processes. As

parliamentary sessions proved to be increasingly unproductive, the executive increasingly sought ways to implement policies without resorting to legislation; consequent interventions by the Court to preserve legislative processes brought all three institutions into active conflict. This review outlines key developments in 2017.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

In 2017, liberal democracy in India faced a number of threats. Increasing encroachment on personal liberties was addressed by the Supreme Court in a number of cases. Additionally, the legislature, executive, and courts engaged in tremendous conflicts that brought to light constitutional concerns on the separation of powers and the role of the judiciary. Despite some significant positive developments, concerns about the Court’s ability to resist state action that threatens individual rights remain.

The Indian Supreme Court in 2017 took a tremendous step towards the protection of civil liberties by actively affirming the individual right to privacy in *Justice KS Puttaswamy v Union of India*.² Although the right to privacy does not exist as a fundamental right within the constitutional text, the Court read it into the bill of rights contained in Part III of the Constitution. *Puttaswamy* arises in the context of litigation around Aadhar: a biometric identification system launched by the Government of India in 2009 with the aim of enrolling and identifying 1.3 billion Indian

¹ B.R. Ambedkar, Speech (4 November 1948) *Official Reports of the Constituent Assembly Debates* vol VII (Lok Sabha Secretariat, 5th reprint, 2009) 38

² W.P.(C) 494/2012, 24 August 2017 (Supreme Court) < http://supremecourtindia.nic.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf > accessed 28 February 2017

citizens,³ raising concerns, *inter alia*, about privacy and surveillance. Multiple legal challenges have been raised against government orders making Aadhar enrollment mandatory for accessing public services, and are currently still being litigated at the Supreme Court. Within this litigation, the Government of India had taken the stance, in 2015, that there existed no fundamental right to privacy under Indian constitutional law. As precedent was unclear, the question of whether the right to privacy was constitutionally protected was referred to a bench of nine judges for an authoritative pronouncement.

In *Puttaswamy*, nine judges overruled previous decisions to hold that the right to privacy was ‘protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution.’⁴ Although the operative part of the order is limited to this, the Court in six separate opinions provided detailed but divergent reasons to support its stance. Consequently, *Puttaswamy* settled a long-held debate about the legal status of the right to privacy, but also opened the door to extensive future litigation and debate on the scope and nature of the right. The bench in *Puttaswamy* attributed the right to privacy, variously, to claims of dignity and autonomy held to inhere in the Constitution;⁵ to individual self-development as the heart of democracy;⁶ and as necessary for the exercise of constitutionally protected liberties.⁷ Some judges in *Puttaswamy*, additionally, made the case for a strong proportionality

standard in evaluating claims concerning violations of privacy.⁸ Significantly, *Puttaswamy* not only overruled prior decisions that limited or denied the right to privacy but also the Supreme Court’s widely criticised 1976 decision in *ADM Jabalpur v Shivakant Shukla*.⁹ *Jabalpur*, decided during a period of constitutional Emergency, approved the suspension of the right to *habeas corpus*. In overruling *Jabalpur*, the Supreme Court affirmed that rights are not created by the constitutional texts but are recognised by it,¹⁰ a holding that redefines not only the approach to interpreting constitutional rights, but also constitutionalism in the Indian context. While *Puttaswamy*’s decision is worth celebrating for its wide, affirmative endorsement of individual choice and liberty as the core of privacy, it was determined on the referral of a question concerning the legal status of the right. Its impact will therefore have to be measured by how Indian courts apply the right to privacy in specific cases hereafter.

Apart from the holding in *Puttaswamy*, 2017 presented mixed results in cases concerning individual liberties of the citizen. In *Shayara Bano v Union of India*¹¹ the Supreme Court, by a narrow majority, granted a plea by the petitioners to declare the practice of *talaq-ul-biddat* (instant, unilateral, and uncontested divorce by a Muslim husband) to be unconstitutional. Although *Shayara Bano* presents a tremendous victory for women’s rights as equal participants in a marriage, the Court did not address the major question of whether uncodified personal laws are subject

to the Constitution, instead relying upon a finding that *talaq-ul-biddat* is not an essential, protected part of customary Islamic personal law. In doing so, the Court chose not to reconsider a previous ruling by a High Court that personal laws are not subject to judicial review for violations of fundamental rights.¹² Although the outcome is laudable, *Shayara Bano* raises but does not answer questions about the relationship between the individual, religion, and the Constitution.

On a similar note, the Supreme Court took a progressive step in *Independent Thought v. Union of India*,¹³ effectively criminalizing sexual assault by a man against his minor wife aged 15 to 18 years. The Indian Penal Code criminalizes rape and defines the age of consent as 18 years, but provides an exception that explicitly allows for marital rape, provided that the wife is above the age of 15.¹⁴ *Independent Thought*, a non-governmental organization, challenged this provision, arguing that it was contrary to several other legislations as well as to constitutional rights guaranteeing equality and protection from discrimination.¹⁵ They were opposed by the Union of India, which sought to justify the inclusion of the exception on various grounds, including ‘traditions.’¹⁶ The Supreme Court found the exception to be contrary to constitutional guarantees of equality as well as to the right to life under art 21 of the Constitution. However, the Court refrained from finding the exception to be unconstitutional, and instead of striking it down, chose to read the provision ‘harmo-

³ Unique Identification Authority of India, Government of India <<https://uidai.gov.in/>> accessed 28 February 2017

⁴ *Puttaswamy* (n 2) ‘Order of the Court’ [2 (iii)]

⁵ *Puttaswamy* (n 2) [12] (S.A. Bobde J)

⁶ *Puttaswamy* (n 2) [85] (R.F. Nariman J)

⁷ *Puttaswamy* (n 2) [169] (J. Chelameswar J)

⁸ *Puttaswamy* (n 2) [70] (S. K. Kaul J); [168] (J. Chelameswar J); [Conclusion H] (D.Y. Chandrachud J, for himself, JS Khehar CJ, RK Agrawal J, and S.A. Nazeer J)

⁹ A.I.R. 1976 S.C. 1207 (Supreme Court)

¹⁰ *Puttaswamy* (n 2) [119] (D.Y. Chandrachud J, for himself, JS Khehar CJ, RK Agrawal J, and S.A. Nazeer J)

¹¹ (2017) 9 S.C.C. 1 (Supreme Court)

¹² *State of Bombay v Narasu Appa Mali* A.I.R. 1952 Bom 84 (Bombay High Court)

¹³ (2017) 10 S.C.C. 800 (Supreme Court)

¹⁴ Indian Penal Code 1890, s 375

¹⁵ Constitution of India 1950, art 14, 15

¹⁶ *Independent Thought* (n 13) [81]

niously¹⁷ with the age of consent requirement to disallow rape of a minor wife aged between 15 to 18 years. Although the Court affirmed the individual right to bodily autonomy as fundamental to art 21,¹⁸ it chose not to address the question of marital rape of an adult woman, which continues to be sanctioned by law.

Along positive affirmations on individual autonomy and liberty in *Shayara Bano*, *Puttaswamy*, and *Independent Thought*, a different note was struck in the ongoing case of *Shafin Jahan v Ashokan KM*.¹⁹ The case concerned a 24-year-old woman, Hadiya, who converted to Islam on her marriage to Shafin Jahan, a Muslim man. The marriage was challenged by her father, who alleged a criminal plot to radicalize his daughter by forcing her to convert to Islam. In an astonishing move, the Kerala High Court, in the absence of legal reasoning or statute, accepted his plea, issued an order annulling the marriage, and granted custody of the adult Hadiya to her father.²⁰ On appeal to the Supreme Court by her husband, the Court issued an order keeping her in parental custody, further directing the National Investigation Agency to investigate the alleged criminal plot.²¹ Although the case is ongoing, following wide criticism, the Court has allowed Hadiya to leave her parental home and continue her medical education.²² The case has nonetheless raised unanswered questions about the Court's powers to direct such investigations as well as conflicts in the jurisprudence on

personal autonomy and freedom of speech and expression.

Shafin Jahan raised a public debate about the scope of the Court's judicial authority; this was again at stake in *Shyam Narain Chouksey v Union of India*.²³ In *Chouksey*, a 2016 order of the Supreme Court accepted the plea of a 'public-spirited individual' and passed a series of interim directions concerning the national anthem, including an order that it must be played in all cinema halls before feature films are screened, and that all persons must stand up 'to show respect to the National Anthem.'²⁴ Objections on the grounds of constitutional rights as well as separation of powers were immediately raised. Through 2017, the Supreme Court continued to pass a series of orders addressing such challenges: The Court was forced to clarify that its order did not apply to screenings of newsreels or documentaries, but did not provide reasoning for this.²⁵ It was also forced to clarify that its orders did not apply to persons who were unable to stand for reasons of physical disabilities.²⁶ The Supreme Court finally retrenched, holding that the playing of the anthem in cinema halls was optional and not mandatory, after accepting pleas from the Union Government, which promised to bring about legislation to address this issue.²⁷ Prior decisions of the Supreme Court have upheld the right to not sing the national anthem on religious grounds, basing this holding in constitutional rights to freedom of speech; these arguments unfortu-

nately were not given judicial consideration in *Chouksey's* case.²⁸ *Chouksey* appears to have been decided entirely on grounds other than legal; the lack of reasoning combined with the Court's wavering on the issues involved have set worrying precedents.

Cases like *Chouksey* and *Shafin Jahan*, although they concern individual freedoms, have also raised broader concerns about the separation of powers in India, and the extent of judicial review. Although the Indian Constitution does not explicitly provide for separation of powers, the principle is considered to be established through judicial interpretation of the Constitution.²⁹ The Indian Constitution envisions a limited parliamentary democracy, subjecting all legislation to judicial scrutiny against the bill of rights contained in Part III of the Constitution.³⁰ Nonetheless, it is widely accepted that the Indian central legislature is increasingly politically dysfunctional, failing to fulfill its objectives of passing or adequately considering legislation.³¹ The executive has accordingly exercised a number of strategies to enact legislation while circumventing parliamentary processes, particularly through the use of ordinances. The Constitution allows state and central governments to enact such ordinances when legislatures are not in session to address emergent situations; ordinances, accordingly, survive only for a period of six months, during which they have the force of law.³² On lapsing, ordinances must be ratified by legislation or lose force;

¹⁷ *Independent Thought* (n 13) [81]

¹⁸ *Independent Thought* (n 13) [90]

¹⁹ S.L.P. (Cr.) 5777/2017 (Supreme Court)

²⁰ *MS Ashokan v Superintendent of Police* (2017) SCCOnline Ker 5085 (Kerala High Court)

²¹ *Shafin Jahan v Ashokan* (n 19), 16 August 2017 < http://supremecourtindia.nic.in/supremecourt/2017/19702/19702_2017_Order_16-Aug-2017.pdf>

²² *Shafin Jahan v Ashokan* (n 19), 27 November 2017 < http://supremecourtindia.nic.in/supremecourt/2017/19702/19702_2017_Order_27-Nov-2017.pdf>

²³ *Shyam Narain Chouksey v Union of India* W.P. (C) 855/2016 (Supreme Court)

(2016) SCCOnline SC 1411 (Supreme Court)

²⁴ *Shyam Narain Chouksey* (n 23) 14 February 2017 < <http://supremecourtindia.nic.in/jonew/bosir/orderpdf/2863944.pdf>>

²⁵ *Shyam Narain Chouksey* (n 23) 18 April 2017 < <http://supremecourtindia.nic.in/jonew/bosir/orderpdf/2893364.pdf>>

²⁶ *Shyam Narain Chouksey v Union of India* (2018) SCCOnline SC 11 (Supreme Court)

²⁷ See *Bijoe Emmanuel v Union of India* (1986) 3 SCC 615 (Supreme Court)

²⁸ Madhav Khosla, *The Indian Constitution: A Very Short Introduction* (OUP 2012) 1-43

²⁹ Constitution of India 1950, art 32, art 226

³⁰ Arun Agrawal, 'The Indian Parliament' in Devesh Kapur and Pratap Bhanu Mehta (eds.), *Public Institutions in India: Performance and Design* (OUP 2005)

³¹ Constitution of India 1950, art 123, 213.

historically, the executive has circumvented this requirement by allowing ordinances to lapse and then ‘re-promulgating’ them, thus side-stepping legislative scrutiny.³³

In 2017, the Supreme Court heard a challenge to this practice of ‘re-promulgation’ and found categorically that it was a ‘fraud on the constitutional power.’³⁴ In *Krishna Kumar v State of Bihar*, teachers moved the courts for relief after the private schools that they taught in had been taken over by the state by means of ordinances. The ordinances were repeatedly re-issued and then allowed to lapse, effectively discharging the teachers from service.³⁵ The Court, in a majority of five to two judges, held that it was mandatory to lay ordinances before the legislature for ratification, failing which the ordinance would have no legally binding consequences.³⁶ By categorically placing ordinances under judicial review, the Supreme Court extended its reach over executive action but within limits; the Court was not to enter into questions about the sufficiency of the material on which the ordinance was issued, but would only interfere in cases of fraud or abuse of power.³⁷ The Court held that the enduring legal effects of an ordinance were to be determined in each case on the basis of ‘public interest.’³⁸ *Krishna Kumar*, therefore, reaffirms the democratic function of the legislature in framing law, but also tips the scales further towards judicial scrutiny. ‘Public interest’ as determined by courts is by no means a clear standard; subsequent rulings will have to address this issue.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Even though the Supreme Court put a damper on the use of ordinances as a means of by-passing parliament, 2017 stood witness to a second substantial challenge to constitutional conventions in this context. The Indian Constitution provides for ‘financial bills’ and ‘money bills’ – particular forms of legislation used to authorize government expenditure.³⁹ These have a lower standard of parliamentary scrutiny, and unlike ordinary legislation are not subject to substantial review by the upper house of parliament. Once certified by the Speaker of the Lower House, such customarily cannot be challenged by parliament, the executive, or the courts.

In 2017, the executive sought to implement a series of widespread reforms using money bills and finance bills. For instance, in its bill for annual expenditure, the executive undertook a massive reform of 27 of India’s administrative tribunals; sought to make enrollment in India’s biometric identification system mandatory for filing tax returns; and, significantly, aimed to protect political parties from disclosing details certain financial contributions provided to them.⁴⁰ In doing so, the executive followed a pattern of implementing legislative reform by subverting legislative processes; in 2015, this method was used to implement changes to India’s insolvency and banking laws, establishing an insolvency regulator,⁴¹ and to give legal backing to Aadhar, India’s biometric iden-

tification program.⁴² The use, or misuse, of money bills in this manner has naturally drawn opposition, primarily based on arguments that the executive is seeking to subvert democratic processes by avoiding opposition and legislative scrutiny over reforms that require statutory grounding. Consequently, in 2017 the Supreme Court heard arguments in a case filed by a member of the opposition challenging this use of money bills, with particular reference to Aadhar.⁴³ The increasing irrelevance of the upper house through this new parliamentary practice threatens the integrity of legislative processes; a traditional judicial deference to legislative procedures may further limit the ability of the Court to address this issue.

Amidst concerns about how the legislature is functioning, as well as the introduction of measures that threaten the transparency of political financing, the Supreme Court’s ruling in *Abhiram Singh v CD Commachen*⁴⁴ attempts, but does not succeed, to settle a controversial point on electoral reform. The Indian Representation of People Act 1951 prohibits appeals to vote for persons on the grounds of ‘religion, race, caste, community, or language,’ classing these appeals as ‘corrupt’ election practices.⁴⁵ A complex jurisprudence has evolved to define the scope of this prohibition; the majority, in *Abhiram Singh*, provided a clarification that it was not only appeals to the identity of the candidate that were prohibited but also appeals that rested on the identity of the voters.⁴⁶ The majority’s interpretation rested on the constitutional affirmation of secularism; the

³³ Shubhankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinances* (CUP 2014) 66ff

³⁴ *Krishna Kumar v State of Bihar* (2017) 3 S.C.C. 1 [100, 104] (Supreme Court)

³⁵ *Krishna Kumar v State of Bihar* (n 34)

³⁶ *Krishna Kumar* (n 34) [99-100]

³⁷ *Krishna Kumar* (n 34) [105.13]

³⁸ *Krishna Kumar* (n 34) [94]

³⁹ Constitution of India 1950, art 110, 122

⁴⁰ Finance Act 2017 (India)

⁴¹ The Insolvency and Bankruptcy Code 2016 (India)

⁴² The Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act, 2016 (India)

⁴³ *Jairam Ramesh v Union of India and Others*, W.P.(C) 231/2016 (Supreme Court)

⁴⁴ (2017) 2 SCC 629 (Supreme Court)

⁴⁵ Representation of People Act 1951 (India), s 123(3)

⁴⁶ *Abhiram Singh v Commachen* (n 44) [59-60]

dissenting opinion pointed out, however, that this judgment might have the effect of constraining mobilization by social groups. Justice Chandrachud's dissent rests on the argument that the Constitution recognizes and protects social groups that have suffered such systemic and historical disadvantages, protecting affirmative action, speech, and movements by such groups.⁴⁷ Both the majority opinions and the dissent claim to employ purposive interpretations of the Constitution and statute; and advance radically different ideas of citizenship. While the majority is binding precedent, the dissent has gained attention from scholars focusing on issues of diversity and identity.

The Court in 2017 also continued to intervene in a number of policy matters in accordance with its traditional support of 'public interest' litigation. In *Rajive Raturi v Union of India*,⁴⁸ the Supreme Court issued a set of directions calling upon the government to improve accessibility for differently abled persons in public places, basing this on a broad reading of article 21 and the right to life. In *Dr. S. Rajasekaran v Union of India*,⁴⁹ the Court issued a wide set of directives intended to secure road safety by setting up road-safety cells, calling on states to frame road-safety policies and set up funds for implementing its recommendations. While such public interest litigation is often praised in comparative contexts, within Indian scholarship there are growing concerns about judicial overreach as well as judicial capacity to undertake such reforms.

Finally, concerns about judicial capacity

also arise amidst a long-standing conflict on internal functioning at the Indian Supreme Court. The Court is largely self-regulating; it controls judicial appointments internally, and the Chief Justice is traditionally chosen by a rule of seniority. As a consequence, the processes of the Court are usually not transparent, and power rests heavily with the Chief Justice, who heads appointment committees, determines allocation of cases, and controls court administration. In 2017, a series of events revealed the cracks in this system, triggering a constitutional crisis. A medical college that had lost its license to operate came under scrutiny after the Central Bureau of Investigation arrested a retired High Court judge who claimed that he had accepted money from the college in order to facilitate a beneficial Supreme Court for them.⁵⁰ Amidst these allegations, a public interest petition was filed in 2017 by a civil society organisation, seeking Court monitoring of this ongoing investigation into alleged judicial corruption. The order was granted, taking note of the plea that the bench hearing this case should exclude three judges who had previously heard cases concerning the same medical college.⁵¹ These judges were presently on the Supreme Court, and included the sitting Chief Justice. Following this order, the Chief Justice rapidly transferred the entire case to his own court, reconstituting a new bench to hear the case.⁵² The new bench specifically included the Chief Justice and the two judges who had previously heard the matter. In response, four of the next senior-most judges at the Supreme Court took the unprecedented step of holding a public press conference, in which they decried the

Chief Justice's practices concerning the assignment of cases, and raised concerns about the independence and integrity of the judges.⁵³ After acrimonious hearings, the question was ultimately resolved in early 2018, when the Chief Justice's bench dismissed the petition, imposing heavy costs on the petitioners and describing the petition as 'frivolous...contemptuous, unwarranted, aimed at scandalising the highest judicial system of the country...'⁵⁴ In establishing the Chief Justice firmly as the 'master of the roster' despite allegations of bias, the Supreme Court has effectively avoided addressing questions of procedural propriety in case allocation. The incident gives impetus to long-standing arguments for reforming India's judicial appointment process. India's Supreme Court has often justified its lack of transparency and external accountability as a symptom of its independence; whether it will cede some of this independence in response to calls for reforms is now a pressing issue.

IV. LOOKING AHEAD TO 2018

Puttaswamy, the Supreme Court's affirmative ruling on the right to privacy, will have tremendous impact on a number of ongoing litigations. The Court has already agreed to reconsider a prior ruling upholding a statutory prohibition on carnal intercourse 'against the order of nature,' taking into consideration new arguments based on the right to privacy.⁵⁵ Additionally, ongoing privacy challenges to Aadhar, India's biometric identification program, will now be decided in the light of the holding in *Puttaswamy*; ar-

⁴⁷ *Abhiram Singh v Commachen* (n 44) [120] (Chandrachud J)

⁴⁸ W.P.(C) 243 of 2005, 15 December 2017 <http://supremecourtindia.nic.in/supremecourt/2005/9321/9321_2005_Judgement_15-Dec-2017.pdf> accessed 28 February 2017

⁴⁹ W.P.(C) 295 of 2012, 30 November 2017 <http://supremecourtindia.nic.in/supremecourt/2012/20376/20376_2012_Judgement_30-Nov-2017.pdf> accessed 28 February 2017

⁵⁰ Sruthi Radhakrishnan, 'The tumult in the Supreme Court over corruption: the story so far' *The Hindu* (Delhi, 14 November 2017) <<http://www.thehindu.com/news/national/the-tumult-in-supreme-court-over-corruption-the-story-so-far/article20443159.ece>> accessed 28 February 2017

⁵¹ *Kamini Jaiswal v Union of India* (2017) SCCOnline SC 1300 (Supreme Court)

⁵² 'Tussle in Judiciary: CJI Bench annuls J Chelameswar's order' *Indian Express* (Delhi, 10 November 2017) <<http://indianexpress.com/article/india/tussle-in-judiciary-cji-bench-annuls-j-chelameswars-order-prashant-bhushan-courtroom-dipak-misra-corruption-case-fir-4931809/>> accessed 28 February 2017

⁵³ Michael Safi, 'India's top judges issue unprecedented warning over integrity of supreme court' (Delhi, 12 January 2018) <<https://www.theguardian.com/world/2018/jan/12/india-supreme-court-judges-integrity-dipak-misra>> accessed 28 February 2017

⁵⁴ *Kamini Jaiswal v Union of India* (2018) 1 S.C.C. 589 [8] (Supreme Court, India)

⁵⁵ *Navtej Singh Johar & Others v Union of India & Others*, W.P. (CrI.) 76/2016, 8 January 2018 (Supreme Court) <http://supremecourtindia.nic.in/supremecourt/2016/14961/14961_2016_Order_08-Jan-2018.pdf> accessed 28 February 2017

guments were heard through 2017 on these matters. The outcome of *Shafin Jahan* will be significant in determining issues of personal liberty, particularly for women. The Supreme Court is also hearing a controversial case concerning the autonomy of the government in the National Capital Territory of Delhi; a ruling will have implications not only for the capital's government but for also for federalism. Finally, the Supreme Court's current practice of deferring decisions on politically controversial questions implies that the questions that the Court does not decide are as significant as the questions that it does decide in the future.

V. FURTHER READING

Anuj Bhunia, *Courting the People: Public Interest Litigation in Post-Emergency India* (CUP 2017)

Chintan Chandrachud, *Balanced Constitutionalism: Courts and Legislatures in the United Kingdom* (OUP 2017)

Gautam Bhatia, 'Equal Moral Membership: Naz Foundation and the Refashioning of Equality under a Transformative Constitution' (2017) 1(2) ILR 115



Ireland

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Meet the new year, same as the old year. Just as it was for the 2016 Report, the dominant themes in Irish constitutional politics in 2017 were abortion and judicial appointments. And, just as it was for the 2016 Report, the story of 2017 was of significant, sometimes surprising, but inconclusive developments.

On abortion, 2017 began with the current constitutional position being reviewed by a 100-member “Citizens’ Assembly”, chaired by a Supreme Court judge. The Assembly delivered its recommendations for both constitutional and legislative change in April. These favoured a significant liberalization of Irish law in this area, the degree of which caused some surprise in political circles.¹ Nonetheless, when the matter moved on for consideration by a joint parliamentary committee, the majority decision of that committee was also somewhat more liberal than might have been anticipated prior to the Assembly’s recommendations. 2017 concluded with the question of whether to proceed with a proposal for constitutional reform under consideration by the Government, but with the likelihood that a referendum on the issue will be held at some stage in 2018.

The controversy over judicial appointments also continued with the publication of the Judicial Appointments Commission Bill 2017. This prompted an unprecedented letter to the Government from senior judges expressing serious concern about the Bill. This is another matter that continues into 2018 as the Bill moves through the Oireachtas.

The major development in constitutional law

was probably the Supreme Court’s surprise experiment with suspended declarations of invalidity. Here too though, events later in the year left considerable uncertainty about how this issue will develop in 2018.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Leaving to one side the question of how liberal democracy ought to be defined, any assessment of the state of constitutional democracy in Ireland must first take into account Ireland’s long tradition of political stability (or conservatism). The state has been dominated since its foundation by two centrist political parties (Fianna Fáil and Fine Gael). While a proportional representation voting system and tendency to coalition government have allowed smaller parties and independents periodic access to executive office, these two parties have remained governmentally and electorally dominant. In 2007, for example, the parties took nearly 70% of votes between them.

However, by the 2011 election, Fianna Fáil (then in government) had seen its support plummet from 41.5% to 17.4%. Fine Gael led the next government but its popularity then went into decline so that the 2016 election saw their combined vote share fall below 50%. This coincided with a rise in support for independents and – especially on the left – parties traditionally on the fringes of Irish politics. Ireland had, of course, experienced a serious economic crisis during this time. It was speculated that this could signal the end of Ireland’s two-party system and the emergence of a more fractured political landscape.

¹ Kevin Doyle, ‘Assembly’s giant leap on abortion may have created challenge too great for Dáil’ *The Irish Times*, (Dublin, 25 April 2017).

However, by comparison with some of the other European states that suffered substantial economic damage in the period, what is arguably striking about Ireland is that the traditional parties retained the support of almost 1 in 2 voters. That is underlined by more recent polling suggesting that their combined support is now approaching 60%.

This provides necessary political context for any assessment of trends in Irish constitutional democracy. Most obviously, it means that Irish political discourse (and media coverage of it) continues to be conducted in largely centrist terms. The Irish political landscape has thus not seen the emergence of the kind of extreme right-wing, nationalist, or authoritarian voices that have attracted support elsewhere since the economic crisis. This, in turn, means that there has been little evidence in Ireland to this point of the kind of existential challenges to constitutional democracy that have arisen in some other European states.

Arguably, however, this background makes the major controversy of 2017 stand out all the more as an unusual departure from the relative centrism of Ireland's political and constitutional traditions. The publication of the Judicial Appointments Commission Bill 2017 provided specific details of the proposed changes to judicial appointments that have been under discussion since the 2016 election. The impetus for the proposals appears to be the strong personal view of an independent TD (member of parliament), Shane Ross, upon whose support the minority Government is dependent. Mr. Ross is a former newspaper columnist who has regularly criticized the appointment system for alleged cronyism. It was a condition of the formation of the Government that the judicial appointment system be changed. Indeed, Mr. Ross was reported at one point to have refused to allow the appointment of any replacement judges until the changes were introduced.

One of the most significant points of controversy was the proposal in the Bill for the establishment of a Judicial Appointments Commission with a lay majority, a lay chair, and only three judges amongst its 13 members. In addition to the Attorney General, six of the other members would be appointed by the relevant Government Minister.

Following its publication, the Chief Justice, Ms. Justice Denham, together with the Presidents of each of the other courts in Ireland, wrote a joint letter to the Taoiseach (Prime Minister) expressing concern about the Bill's "serious implications for the administration of justice".²

The Association of Judges in Ireland also released a statement which pointed out that the judiciary had made a submission in 2014 calling for changes to the system but which criticised the Bill produced as "seriously flawed".³

Relations between the political and legal branches were not assisted by a political controversy in the same period about the circumstances in which the incumbent Attorney General was appointed by the Government as a judge of the Court of Appeal. This led to clashes in Parliament in which the opposition leader compared her unfavourably with other named senior judges – something which prompted the Chief Justice to make public comments emphasising the importance of the separation of powers.⁴

That the Taoiseach followed this a few days later with a comment that the separation of powers "has to apply in both directions and ... judges and politicians need to respect [it]"⁵ was widely reported as a rebuke to the judiciary and as a sign of the levels of tension and distrust between the political and legal branches of government.

A former Attorney General has warned

that the "mischaracterization" and "politicization" of the appointments issue is "in and of itself ... damaging to judicial independence", arguing that there are common themes between developments in Ireland and the more extreme challenges to rule of law that have arisen in Hungary, Poland, Turkey, the UK, and elsewhere.⁶

At the very least, this level of public discord between the branches is unprecedented in an Irish context and would have been unthinkable only a few years ago. Much may depend on how matters progress over the next 12-18 months. Shane Ross has insisted that the judiciary's objections will not be addressed and that the Bill will be enacted in the near future. However, there have also been reports of opposition to the Bill in parts of the Department of Justice and main government party. How that affects the content of the Bill, and its progress through the Oireachtas remains to be seen – especially with expectations in some political quarters that a snap general election may be called before the end of 2018.

Finally, it should also be pointed out that a Judicial Council Bill 2017 was published on the same day as the Judicial Appointments Bill. The Irish judiciary have long called for the establishment of a judicial council to deal with judicial training, discipline, and representation but successive governments had failed to prioritise the issue. Whether the passage of this Bill will be linked with the Judicial Appointments Bill is currently unknown. However, the creation of the Council could be a significant development for the long-term state of the separation of powers in Ireland. As events this year have demonstrated, Ireland's current reliance on ad hoc and unstructured engagement between the branches is unsatisfactory and potentially damaging for all sides.

² Niamh Lyons, 'Chief Justice Susan Denham writes to Leo Varadkar in protest at legal reforms' *The Times* (London, 27 June 2017).

³ <https://aji.ie/press-release-26-june-2017/>

⁴ Conor Gallagher et al, 'Chief Justice rebukes Varadkar and Martin over Whelan row' *The Irish Times* (Dublin, 22 June 2017).

⁵ Patsy McGarry, 'Taoiseach warns judges to respect separation of powers' *The Irish Times* (Dublin, 25 June 2017).

⁶ Paul Gallagher, 'Challenges to the rule of law in 21st century Ireland' in Eoin Carolan (ed.), *Judicial power in Ireland* (Institute of Public Administration 2018 [in press]).

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major issue in Irish constitutional politics in 2017 continued to be the question of whether to amend Ireland's constitutional regime on abortion. The year opened with the current constitutional position under review by the "Citizens Assembly".

To briefly recap from last year's report, Article 40. 3. 3 of the Constitution recognizes the right to life of the unborn as equal to the right to the life of the mother. The provision was inserted into the Constitution by a referendum in 1983. This was interpreted by the Supreme Court in *AG v X*⁷ as permitting abortion in situations where there is a real and serious risk to the life, as distinct from the health, of the mother.

The Assembly delivered its recommendations for both constitutional and legislative change in April. In terms of the constitutional text, the majority favoured replacing Article 40. 3. 3 with a constitutional provision explicitly acknowledging the entitlement of the Oireachtas (parliament) to legislate on issues concerning abortion. The logic of their position appeared to be that the simple repeal of Article 40. 3. 3 from the Constitution (an option the Assembly considered but did not favour) would leave scope for uncertainty over the constitutional position. This followed from the fact that judicial dicta in a number of cases prior to 1983 had suggested that at least some of the rights protected by the Constitution might apply before birth; and that this imposed limits on the powers of the Oireachtas or courts in this area. For example, Walsh J. expressed the view in 1980 that "a child ... has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth".⁸ An express acknowledgment of the right of the Oireachtas to legislate, as recommended by the Assembly, would limit the scope for abortion-related legislation to be challenged

by reference to these pre-1983 dicta.

The Assembly also made a series of recommendations on both the situations and the stages of a pregnancy when a termination should be lawful. While much of the pre-Assembly media debate had focused on abortion in specific situations (such as rape or medical conditions likely to lead to death before or shortly after birth), 64% of members recommended that termination should be lawful without any restriction as to reason up to certain points of the pregnancy. Of these 64%, 8% recommended no restriction as to gestational age; 44% recommended termination with no restriction to be lawful up to 22 weeks, and 48% recommended it be lawful up to 12 weeks.⁹

The Assembly's recommendations for a significant liberalisation of Irish law in this area were generally greeted with surprise by political parties and media commentators alike. However, many of them were ultimately adopted by the Joint Oireachtas Committee on the Eighth Amendment when it came to examine the issue later in the year.

On the specific question of what form a constitutional amendment should take, the Committee favoured repeal of Article 40. 3. 3 rather than the Assembly's recommendation that it be replaced with an acknowledgment of the entitlement of the Oireachtas to legislate. This was based on the Committee's concern that the Assembly's recommendation intended to allow the Oireachtas to legislate "unconstrained by potential judicial intervention".

The disagreement between these bodies leaves some uncertainty over what form any referendum proposal might ultimately take. It is probably fair to say that they both reflect an abundance of caution. However, it is difficult to imagine an Irish court at present preferring a construction of the Assembly recommendation as an ouster clause when

it could – and in line with previous amendments would – be interpreted as an enabling provision. On the other hand, while it might reasonably be doubted whether the current judiciary would be inclined to adopt and develop the pre-1983 *dicta* of Walsh J and others, the fact that they are judicial statements – albeit *dicta* – means that the argument that abortion-related legislation could be constitutionally impermissible in the event of a simple repeal is at least stateable – or at least sufficiently stateable to ensure that any legislation introduced would be subject to challenge and potentially stayed for a number of years thereafter. If the decision is made to hold a referendum, practical considerations might encourage the Government towards the Assembly recommendation rather than that of the Committee.

On the question of what form any subsequent legislation might take, the Committee recommended that termination be lawful where there is a risk to the life or health of the woman, where the unborn child has a condition likely to result in death before or shortly after birth, and without any requirement as to reasons up to a gestational limit of 12 weeks.

The report was issued in late 2017. The next stage was for the Government to consider the issue with a decision on whether or not to seek an amendment to the Constitution expected in the first part of 2018. If the Government does (as expected) decide to proceed with an amendment proposal, Articles 46 and 47 of the Constitution require that a bill containing the proposal be initiated and passed by the Oireachtas, and then voted on by the people in a referendum. The referendum is not subject to any turnout or super-majority requirements, being deemed passed if a majority of the votes cast on the day are in favour of the proposal.

From a constitutional law perspective, the Supreme Court delivered a number of judg-

⁷ [1992] 1 IR 1.

⁸ *G v An Bord Uchtála* [1980] IR 32 at 69.

⁹ The full results can be accessed at: <https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/>

ments during 2017 that have important implications for practitioners in Ireland. In *People (DPP) v Doyle*,¹⁰ the Court rejected the claim that the Constitution confers an entitlement on an accused to have a solicitor physically present during questioning. In *Gilchrist & Rogers v Commissioner of An Garda Síochána*,¹¹ the Court delivered a decision which defends the principle of open justice in strong terms, but which may prove in practice to allow for the more frequent imposition of reporting restrictions on publicity around court proceedings.

Of more general interest may be one of the Court's first considerations of the 2015 marriage equality amendment to the Constitution. It held in *HAH v SAA*¹² that the constitutional conception of marriage is now one based on a voluntary, mutual, and equal commitment between two persons, and that this excludes the recognition under Irish law of an actually polygamous marriage.

Another decision which attracted considerable attention during the year was the recognition by the High Court in *Merriman v Fingal County Council*¹³ of a personal right to an environment that is consistent with human dignity and civic well-being. Since the 1960s, Irish constitutional law has been regarded as permitting the recognition of unenumerated rights as falling within the Article 40. 3 guarantee to protect and vindicate "the personal rights of the citizen". However, the courts approach to this power has in recent decades been conspicuously cautious. There is accordingly considerable scepticism in Irish legal circles about whether the right identified in *Merriman* will be endorsed by the Supreme Court in the near future.

Arguably the most significant development

in 2017 was a decision by the Supreme Court in *NHV v Minister for Justice & Equality*¹⁴ to do nothing at all. More precisely, the Court there concluded that an absolute prohibition on the employment of applicants for refugee status was a breach of their constitutional right to earn a livelihood – but then adjourned the proceedings for six months to consider the case "in light of the circumstances then obtaining".

This was immediately recognised by leading commentators as a significant "dialogue-oriented departure in Irish constitutional law"¹⁵ that resembled in many respects a suspended declaration of invalidity. On the grounds of its radical novelty alone, the introduction of a suspended declaration remedy would be a major change in Irish constitutional law and practice. More fundamentally, however, this kind of remedial innovation may also bring about profound changes in the courts' interpretation of their role. On the one hand, the staying of a strike-down power can be seen as a weakening of judicial authority and/or of their constitutional role. This is especially so where it is justified on the basis of perceived problems of capacity or legitimacy that can be said to apply in all cases. On the other hand, judges may in practice be less discouraged from finding unconstitutionality if they feel that this can be done without necessarily bringing about the practical or separation of powers problem that sometimes follows from the immediate invalidation of a law – a point arguably proved by the Supreme Court's willingness to take the same approach just over a month later in *PC v Minister for Social Protection*.¹⁶

The brevity of the decision left open a number of questions about the rationale, scope, and future availability of this remedy. The

decision was also notably unclear on the important question of what was expected to occur when the matter returned before the Court. It was fairly clear from the decision that the Court expected *something* to happen in the interim. It was also fairly clear from the decision that the Court felt that there were various ways in which the situation could be remedied. But the fact that the Court invited submissions to be made on the situation at that point did raise the possibility of it taking a more direct role in the post-decision process than would traditionally be the case in Ireland.

This contrasted with the more conventional approach adopted by the Court in the decision it gave a few weeks prior to *NHV* in *Persona Digital Telephony v Minister for Public Enterprise*.¹⁷ There the Court considered whether the doctrine of champerty continued to apply in Ireland or should be modified in light of the constitutional right of access to the courts to allow third-party funding of litigation. The majority ruled that champerty remained part of Irish law and precluded third-party funding. However, several of the judges expressed concerns that costs present a real barrier to justice in Ireland, which required steps to be taken to vindicate the constitutional right of access to courts. The judges noted that it was for the other branches to take those steps in the first instance. But Clarke J. warned that:

[W]here, after a definitive finding that there had been a breach of constitutional rights but no action having been taken by either the legislature or the government to alleviate the situation, the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be

¹⁰ [2017] IESC 1.

¹¹ [2017] IESC 17.

¹² [2017] IESC 40.

¹³ [2017] IEHC 695.

¹⁴ [2017] IESC 35.

¹⁵ Tom Hickey, 'Direct Provision ruling signals new "dialogue" between Dáil and the Judiciary' *The Irish Times* (Dublin, 8 June 2017).

¹⁶ [2017] IESC 63.

¹⁷ [2017] IESC 27.

justified.¹⁸

While the underlying logic of Clarke J.'s position is similar to that used to explain the decision made in *NHV*, there is an important practical difference in that he clearly envisaged a sequence of discrete legal proceedings: something approximating to first-look and second-look cases.¹⁹ By contrast, one possible reading of *NHV* was that it allowed for some degree of dialogue to occur within the proceedings themselves.

It was striking, therefore, that when the matter came back before the Court in November of 2017, Mr. Justice Clarke – by then Chief Justice – delivered an *ex tempore* ruling²⁰ that disavowed some of the more radical interpretations of its earlier approach. At the hearing, it was reported that the State identified the steps it was proposing to take and asked for more time to do so. In response, the Chief Justice emphasized that the Court “has no role” in approving or discussing the merits of any of the choices which the State indicated. He also stated that “[t]he Court does not want to become involved in the question of monitoring even the speed of progress of those measures because the Court does not consider that to be its function under the Constitution”. Furthermore, he expressly referred on several occasions to the exceptional nature of the approach adopted, noting that:

While the Court has not as yet had the opportunity to consider in any detail the parameters of any exceptional circumstances which might allow the Court to depart from th[e] general proposition [that on finding a measure of legislation to be unconstitutional, the Court should immediately declare it to be so and thereby render it inoperative] nonetheless it

must be made clear that the circumstances in which it would be appropriate for the Court not to follow the general rule must necessarily be exceptional.

It is clearly too early to judge whether this may indicate second thoughts on the part of the Court about the approach it had adopted earlier in the year. There is certainly a much stronger emphasis in the *ex tempore* ruling on the “exceptional circumstances” of its earlier decision. The *ex tempore* ruling also makes it less likely that this approach will be adopted by the lower courts, at least until the Supreme Court has had the opportunity to consider this issue in more detail.

What *PC*, *Persona*, and *NHV* do suggest, however, is that the Court has remedial creativity – and both its potential benefits and drawbacks – on its mind. Now that an exception has been recognized, it seems unlikely that Irish law on constitutional remedies can be returned to its pre-*NHV* position, even if (which there is no evidence of) the Court was so minded. The Canadian experience of the suspended remedy being “transform[ed] from exception to norm”²¹ so that it is now almost routine²² lends some support to the suggestion that the “exceptional” step taken in *NHV* may, in the long term, prove highly significant.

IV. LOOKING AHEAD TO 2018

Abortion will remain high on the agenda for 2018. A decision on whether to hold a referendum on abortion is expected in early 2018. It is also possible that the Supreme Court may hear arguments in *IRM v Minister for Justice* (discussed in last year's report) on the question of whether the unborn enjoyed

constitutional rights before the 1983 referendum – and could continue to do so if Article 40. 3. 3 was amended.

On judicial appointments, the intensity of attention and controversy may depend on the progress of the legislation, any amendments made – and whether the current government remains in place until it is passed.

In constitutional law, the Court is expected to hear arguments during the year in two cases concerning the scope of parliamentary privilege. In *Kerins v McGuinness*²³ and *O'Brien v Clerk of Dáil Eireann*,²⁴ complaints are made about the treatment of individuals by Oireachtas members and committees with. The cases are expected to be heard together and the Court's decision on what is a complex area of Irish law²⁵ is much anticipated.

V. FURTHER READING

For a more detailed discussion of the matters considered in the report, see:

For the constitutional background:

1. Proceedings of the Citizens Assembly, available at <<https://www.citizensassembly.ie/en/The-Eighth-Amendment-of-the-Constitution/>> (accessed 8 Jan 2018)

And the case being made for reform:

2. Fiona de Londras & Mairead Enright, *Reforming Irish Abortion Law* (Policy 2018 [(in press)])

On judicial appointments (and more):

3. Laura Cahillane, James Gallen, Tom Hickey (eds), *Judges, Politics and the Irish Constitution* (Manchester University Press 2017)

¹⁸ [2017] IESC 27, at para 4. 1.

¹⁹ Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue and Deference* (2009) 47 (2) *Osgoode Hall Law Journal* 235.

²⁰ [2017] IESC 82.

²¹ Robert Leckey, 'Enforcing laws that infringe rights' [2016] *Public Law* 206, 211.

²² Sujit Choudhry and Kent Roach, 'Putting the Past behind Us? Prospective Judicial and Legislative Constitutional Remedies' (2003) 21 *Supreme Court Law Review* 205, 228.

²³ [2017] IEHC 34.

²⁴ [2017] IEHC 179.

²⁵ See, for example, *Maguire v Ardagh* [2002] 1 IR 385; *Callely v Moylan* [2014] 4 IR 112.

On NHV:

4. Eoin Carolan, 'A "Dialogue-Oriented Departure" in Constitutional Remedies? The Implications of *NHV v Minister for Justice* for Inter-Branch Roles and Relationships' (2017) 40 (1) Dublin University Law Journal

And for historical insight into one of the key figures in Irish constitutional law:

5. Gerard Hogan, 'Mr. Justice Brian Walsh: The Legacy of Experiment and the Triumph of Judicial Imagination' (2017) 57 (1) The Irish Jurist



Israel

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

This review presents key developments in the jurisprudence of the Israeli High Court of Justice (HCJ) in 2017. These developments reflect part of the multifaceted long-standing role of the HCJ in constitutional challenges of the State of Israel, which involve an ongoing constitution-making process in stages and complicated dilemmas concerning minorities, emergency laws, prolonged belligerent occupation and recurring armed conflicts, executive dominance, unique rules of citizenship, and the complex relation between religion and state.

This year, a central theme within the jurisprudence of the HCJ concerned the principle of separation of powers which, legally speaking, was at the midst of political and constitutional challenges, as elaborated in the next section.¹

2017 also marked personnel replacement at the Supreme Court as four judges of the 15 members of the Supreme Court retired. First, in September, President Miriam Naor retired upon turning 70. Israel's Judicial Appointments Committee unanimously appointed Justice Esther Hayut, who has served in the Supreme Court since 2003, as the 12th President of the Supreme Court, replacing President Naor. In June, Justice Elyakim Ruben-

stein, the Vice President of the Supreme Court as of 2015 retired, having served on the Court since 2004. Justice Rubenstein was replaced by Justice Salim Joubran, the first Arab to be appointed as a full-time judge, who served as Vice President until his own retirement in August. Justice Hanan Melcer was thereafter appointed Vice President of the Supreme Court. In addition to Justices Naor, Rubinstein and Joubran, Justice Zvi Zilbertal stepped down in April, five years before reaching the mandatory retirement age. The retired Justices were replaced by Justices David Mintz, Yael Willner, Yosef Elron and George Kara.

II. SEPARATION OF POWERS

Invalidation of legislation on legislative-procedural grounds

HCJ 10042/16 Kventinsky v. Knesset (August 6, 2017)

In an important judgment from August 2017, the HCJ struck down a law taxing owners of three or more homes on legislative-procedural grounds. This was the first time the Knesset's legislation was invalidated on legislative-procedural grounds. In a majority opinion written by Justice Noam Sohlberg, the HCJ held that the law passed in a rushed

¹ See Yaniv Roznai, 'The Israeli Supreme Court as Guardian of the Knesset' (forthcoming 2018-2019) *Verfassung und Recht in Übersee*. For a comparative analysis, see Yaniv Roznai and Pietro Faraguna, *Constitutional Paternalism: A Comparative Perspective on Courts as Guardians of Parliaments* (in process).

process, close to midnight, with Knesset Members from both the coalition and opposition claiming they did not have time to properly examine the bill. In these circumstances, there was a flaw that goes to the very root of the legislative process. The HCJ thus returned the proposed law to the Knesset Finance Committee to be prepared anew for second and third readings.²

With this decision, the HCJ puts itself in the role of protector of the democratic process and guardian of the Knesset, and ensures that it acts with minimal due process and is not overrun by the government. According to the Court's conception, by this interference with the legislative process, it vindicates – not violates – separation of powers.

Judicial review of Basic Laws

HCJ 8260/16 Ramat Gan Academic Center of Law and Business v. Knesset (September 6, 2017)

The second important decision centered the state budget. According to the established constitutional rule, the government must ordinarily submit an annual budget for the approval of the Knesset.³ This is a central mechanism for the Knesset to supervise the government.⁴ As of 2009, however, a temporary Basic Law established a biennial budget, thereby circumventing the annual budget rule.⁵ Whereas this was meant to be a one-time amendment due to the global economic crisis, it has since been prolonged to the years 2011-2012, 2013-2014, 2015-2016 and, most recently 2017-2018.⁶ This

constitutional change limits the Knesset's oversight capacity.

Previously, in response to a challenge concerning the biennial budget for the years 2011-2012, the HCJ ruled that while the use of temporary ordinances to establish the biennial budget is indeed problematic, it would not intervene because the government was justified in experimenting with the unconventional biennial budget before deciding whether to adopt it as a permanent arrangement. While the Court reasoned that biennial budgets do not constitute a serious danger to democracy, it did harshly criticize the use of temporary Basic Laws, declaring that such instruments detract from the status of the Basic Laws and should accordingly be used sparingly.⁷

In the recent case of September 2017, an expanded seven-judge panel of the HCJ faced another challenge to the biennial budget, in light of the fact that since the first biennial budget was submitted by the government in 2009, it was since prolonged by means of temporary ordinances. Justice Elyakim Rubenstein, writing the majority opinion, opened the judgment with the following statement: “[T]he case before us raises two worrying trends within Israeli parliamentary democracy, which are intertwined: one, the decreasing importance of the Knesset as a body responsible for supervising the government actions. The second, the undermining of the basic laws status, constitutional texts, which finds its expression both in various temporary orders which seek to temporarily amend the basic laws and without a due pub-

lic debate, as if it was a regular law rather than a constitutional document, and – on a broader context – by not completely constituting the state constitution in accordance with the Harrari decision of 1950.”⁸

Justice Rubinstein accepted the petition's claim that the Knesset misused its constituent authority in approving the amendment, holding that the Knesset had undermined its responsibility to supervise government activities and the authority of the Basic Law by repeatedly “temporarily” amending it.⁹ Notwithstanding Justice Rubinstein's discontent with the manner by which the government circumvents Knesset oversight, and the holding that there was no more justification to use temporary ordinances for the biennial budget, the HCJ refrained from invalidating the Basic Law but rather issued a nullification notice – a warning that would not allow temporary amendments to the Basic Law for a budget that extends beyond a single year.¹⁰

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Rights of detainees and prisoners

HCJ 4386/16 Madio v. The Israel Prison Service (June 13, 2017)

This petition challenged the conditions of imprisonment in “Holot” Detention Center, a facility established to detain African infiltrators from Eritrea and Northern Sudan, as the government faced difficulties in deporting them.¹¹ Specifically, the petition concerned

² HCJ 10042/16 Kventinsky v. Knesset (August 6, 2017) (Isr.). See Ittai Bar-Siman-Tov, ‘In Wake of Controversial Enactment Process of Trump's Tax Bill, Israeli SC Offers a Novel Approach to Regulating Omnibus Legislation’ (December 13, 2017) Int'l J. Const. L. Blog.

³ Basic Law: The State Economy, sec. 3(a)(2), §5735-1975, SH No. 777 p. 206 (Isr.).

⁴ See, generally, Rick Stapenhurst et al (ed.), *Legislative Oversight and Budgeting: A World Perspective* (World Bank Publications, 2008).

⁵ Basic Law: The State Budget for the Years 2009 and 2010 (special provisions, temporary order), Hebrew version.

⁶ See the recent Basic Law: The State Budget for the Years 2017 and 2018 (special provisions, temporary provision). On the increasing tendency of the Israeli legislature to use temporary legislation, see Ittai Bar-Siman-Tov, ‘Temporary Legislation, Better Regulation and Experimentalist Governance: An Empirical Study’, *Regulation and Governance* (forthcoming 2018).

⁷ HCJ 4908/10 Bar-on, MK v. Knesset 64(3) PD 275 (2011).

⁸ HCJ 8260/16 Ramat Gan Academic Center of Law and Business v. Knesset (September 6, 2017) (Isr.) (as translated by the authors).

⁹ *Ibid.*, para. 63.

¹⁰ *Ibid.* See Yaniv Roznai, ‘Misuse of Basic Laws’ in Justice Elyakim Rubinstein Book (Miriam Marcowitz-Bitton and Ori Shloma (eds.), forthcoming 2018) [Hebrew].

¹¹ See, generally, Hadas Yaron Mesgena and Oran Ramati, ‘Where Time Stands Still: Holot Detention Facility and the Israeli Anti-Infiltration Law’ (2017) 7 *Hagira Journal* 67-83.

the maximum capacity of infiltrators that each cell can lawfully accommodate. According to the National Outline Plan (NOP) 41, the maximum capacity of each room is six persons.

The HCJ held that the state's responsibility to uphold the rights of detainees is not negated by the mere fact they are not classified as prisoners. This is because the state's basic obligation to protect an infiltrator's dignity and privacy derives from the fact that they are being held in custody. Under present circumstances, it was therefore decided that the existence of 10 people living in each cell was inconsistent with the NOP 41. The inconsistency is apparent in light of a purposive interpretation of this rule, given that NOP 41 seeks to minimize, as much as possible, violations of the rights of the detainees in the "Holot" Detention Center. The HCJ gave the administrative authority a period of nine months to reduce the number of detainees in each room to six persons.

HCJ 1892/14 The Association for Civil Rights v. the Minister of Public Security (June 13, 2017)

The average living space allotted to each prisoner in Israel for the last 25 years was about three square meters. The petitioners argued that the living space provided to most prisoners and detainees violated their constitutional rights under Israeli law in that it harmed their right to protection of dignity, liberty, privacy and well-being to a degree beyond what was necessary and without express lawful authorization. Also, the small average space currently allotted to prisoners also violated international law.

The HCJ thus accepted the petitions and ordered the state to increase the personal living space allotted to every prisoner in the country within the next nine months to a minimum of three square meters; this stan-

dard is to be increased to 4.5 square meters to each prisoner, including toilet and shower, or 4 square meters not including toilet and shower, within 18 months from the day of the judgment.¹²

According to Justice Rubinstein, the prisoner's right to living space is connected to the essence of the right to dignity. Moreover, prison overcrowding has broad implications for prisoners' lives, including the possibilities of increasing the spread of disease and making it difficult to maintain proper hygiene.¹³ Surely, implementation of appropriate living space for prisoners requires funding and depends on the government's economic priorities, yet basic rights should not retreat based on budget considerations.¹⁴

Deportation of African infiltrators

AA 8101/15 Tsegeta v. Minister of the Interior (August 28, 2017)

This appeal relates to Israel's new deportation policy, according to which African infiltrators (who have not been granted the right of asylum) will be deported to a hosting third country, and objectors will be brought into custody.¹⁵ The Court partially accepted the appeal.

The Court held that for the purposes of assessing whether it is safe for an infiltrator to be deported to a third country, the following criteria must be met: Firstly, the hosting country's conditions must demonstrate that it is a safe place for the deportee. Essential safety indicators would include, *inter alia*, whether the state will admit the deportee and provide him with effective state protection. Secondly, the deportee must have access to fair and efficient procedures for the determination of his protection claim. Thirdly, it is necessary to establish effective mechanisms to supervise deportation procedures to ensure that the deportee has indeed received appropriate treatment and effective protec-

tion. The Court determined that the third country in question was not proven to be unsafe, that all the required procedural conditions were fulfilled and that the established mechanisms for monitoring and supervising the deportation procedure and the treatment of the deportees in the hosting country were satisfactory now.

However, the Court accepted the arguments on appeal in relation to the custodial detention of deportees who did not consent to being deported to the third state. The Court held that in light of the specific arrangement of deportation, a consent is necessary in order to deport to the third country (due to the agreements signed by Israel with the third country). In these specific circumstances – and these circumstances only – the infiltrator's refusal to being deported to a third country could not be viewed as a lack of cooperation with deportation, the latter of which would allow the state to hold the deportee in custody for more than 60 days.

Homeland Security

HCJ 7803/06 Abu Arfa et al. v. Minister of the Interior (September 13, 2017)

The Minister of Internal Affairs revoked the permanent residency of a serving Minister in the Palestinian Government and three other elected Palestinian Parliament Members on the ground of disloyalty due to their identification with Hamas and its ideology. The HCJ invalidated the decision on the ground that the Entry Into Israeli Law, which was used for this action, does not encompass the authority to revoke a permanent residency of an East Jerusalem resident for "disloyalty". This law was meant to deal with people entering into Israel and not with permanent residents that were born in Israel and already live here for a long period. Revoking the residency would lead to a disproportional harm to the right of dignity, freedom and family life. Executing such an administrative act re-

¹² See Hillel Sommer and Guy I. Seidman, 'Courts, Prisons, Budgets and Human Dignity: An Israeli Perspective' (2017) 8 Law Journal for Social Justice 135, 163-171.

¹³ Justice Rubinstein's Judgment, paras. 39-40.

¹⁴ *Ibid*, para. 47.

¹⁵ See, e.g., Reuven (Ruvi) Ziegler, 'Between "Voluntary" Departure to an Undisclosed Third State and Indefinite Detention' (December 9, 2015) Oxford Border Criminologies Blog.

quires an explicit primary legislation of the Knesset. The HCJ suspended the validation of the decision for six months to allow the Knesset to legislate accordingly.

H CJ 4466/16 Mohammed Allian et al. v. The Commander of IDF Forces in the West Bank (December 14, 2017)

The discussion revolved around the question whether Israeli law authorizes the military commander to order the temporary burial of bodies of terrorists in order to hold them for future negotiations. The HCJ accepted the petitions, ruling that the decision of the homeland security Cabinet to hold the bodies was determined as a general policy and that its implementation was imposed on the military commander in accordance with the authority vested in him. However, executing policy that infringes human rights must be qualified and anchored in specific and explicit primary legislation.

The HCJ held that Israeli law does not provide the military commander authority to hold terrorists' bodies for negotiation by way of a temporary burial or any other way. The mandatory defense regulation, which authorizes the military commander to order the burial of bodies, cannot be considered specific and explicit authorization. The conclusion is reinforced when placed alongside the ruling in the context of holding detainees alive for bargaining purposes as well as international humanitarian law dealing with the laws of armed conflict and international human rights law. As for a reciprocity claim, the fact that Hamas holds Israeli prisoners and missing person, may possibly be a moral justification for such a practice; however, it does not replace the obligation to do so under the authority of law. Therefore, the act of the military commander is cancelled with a suspension of six months to allow appropriate legislation.

In February 2018, the HCJ decided that it would hold an additional hearing on the is-

sue of returning the bodies of terrorists to the Palestinian Authority (PA).

Law, family and religion

H CJ 781/15 Itai Arad-Pinkas v. The Committee for the Approval of Agreements for Carriage of Fetuses (August 3, 2017)

The petition sought to broaden the availability of surrogacy arrangements in Israel to allow both same-sex couples and single men/women to enter into surrogacy procedures. Moreover, the petition sought to eliminate the requirement for genetic connection between the intended parents and the newborn in order for the surrogacy to proceed.

The Court decided to suspend the petition for six months pending an outcome of a new surrogacy bill that is currently in the legislative process. The rationale for the adjournment was to respect the democratic sovereignty of the legislature and to enable the Knesset to complete the legislative process, since the new law is expected to change the arrangement regarding single men/women.

Nonetheless, the Court emphasized in an *obiter*, the constitutional difficulties in the current arrangement, which does not allow same-sex couples and single men and women to enter into surrogacy agreements. Ostensibly, this is a discriminatory arrangement that is inconsistent with the principle of equality and the constitutional value of human dignity. However, the Court unanimously rejected the petitioners' request to cancel the requirement for genetic connection between the intended parents and the newborn. It was held that while this requirement may infringe the constitutional right to become a parent, this infringement is constitutional in light of the limitations clause's tests, established in the Basic Law: Human Dignity and Liberty.

H CJ 5185/13 John Doe v. The Rabbinical Court of Jerusalem (February 28, 2017)

In Israel, there is a widespread phenomenon

known as divorce refusal.¹⁶ Divorce refusal stems from the fact that all couples must divorce in the Rabbinical Court. When a man refuses to grant his wife a divorce, she is limited in her ability to remarry, and often will be blackmailed by her husband not to carry through with the divorce. The ruling dealt with the question of the authority of the Rabbinical Court to adopt or recommend "Harhakot de-Rabenu Tam" sanctions, intended to exclude divorce refusers from community life and to shame them in public.

According to the majority opinion of the Court, "Harhakot de-Rabenu Tam" sanctions are within the framework of recommendations and are not binding. The Rabbinical Court was therefore entitled to recommend them given the behavior of the petitioners at hand and their refusal to respect the wife's intention to divorce, in spite of judicial decisions obligating them to do so.

H CJ 7339/15 The Association for the Protection of Individual Rights v. The Ministry of the Interior (August 31, 2017)

This petition challenged the Rabbinical Courts (Marriage and Divorce) Law, regarding the prohibition of same-sex marriage, as there is no option of civil marriage in Israel.

The Court rejected the petition, mainly due to s.10 of Basic Law: Human Dignity and Liberty, that preserves the validity of laws enacted prior to 1992.¹⁷ In fact, the Petitioners were asking the HCJ to create a new status through judicial-ruling, while in fact it is up to the legislator to determine on this manner. It is worth mentioning, however, that Justice Baron, in an *obiter*, stated that "it is not inconceivable that the time will come when the power of s.10 of the Basic Law will no longer be able to block constitutional processes, especially the examination of the compatibility of matrimonial law with contemporary reality and the socio-cultural-religious mosaic that composes it" (para. 3).

¹⁶ See generally, Shulamith Walfisch, 'Men Who Refuse to Grant a Religious Divorce: Characteristics, Motivation and Ways of Contending with the Issue' (2009) 18 *Nashim: A Journal of Jewish Women's Studies & Gender Issues* 187.

¹⁷ On saving clauses, more generally, see Rivka Weill, 'Bills of Rights with Strings Attached: Protecting Death Penalty, Slavery, Discriminatory Religious Practices and the Past from Judicial Review' in *Constitutional Dialogue: Rights, Democracy, Institutions* (Rosalind Dixon, Geoffrey Sigalet and Grégoire Webber (eds.), Cambridge University Press, forthcoming), <https://ssrn.com/abstract=3050656>

H CJ 1877/14 The Movement for Quality Government v. The Knesset (September 12, 2017)

According to the *Torato Umanutu* (Torah studies as vocation) arrangement, Haredi yeshiva students are allowed to postpone their military service (which is compulsory in Israel) until completion of Torah studies. The vast majority of yeshiva, over 60,000, are completely exempt from military service. This petition concerned the new recruitment arrangement passed by the Knesset in November 2015.

The new recruitment arrangement provides a transition from a personal to collective model for assessing the postponement of compulsory military service. Within the framework of the collective model, the government has the authority to set recruitment targets for the entire Haredi public. Meeting recruitment goals should enable those who are not recruited to the military to continue their studies at the yeshiva and postpone their service. Thus, the postponement of recruitment is ostensibly subject to the Haredi public's adherence to recruitment quotas.

The Court decided that the new arrangement severely violates equality, which derives from the constitutional right to human dignity. The arrangement specifically failed the first hurdle of the proportionality test, namely the test of a rational connection between the statute and its intended purpose. The new arrangement fails to fulfill its main purpose: to achieve a significant reduction in inequality regarding the distribution of the burden of military service between sectors of the population. The main flaws in the new arrangement are as followed: First, in the first six years of its operation, the arrangement is completely voluntary and there are no sanctions. Second, the arrangement is supposed to expire in 2023, and no successive arrangement has been set. The Court decided to nullify the arrangement in light of the continuing and deep violation of equality, the ineffectiveness of the new recruitment arrangement and the lessons and insights that have accumulated over the years. However, it was determined that the invalidation of the arrangement shall enter into force only one year from the date of the judgment.

FHH CJ 5026/16 Gini vs. The Rabbinate (September 12, 2017)

An additional hearing in the judgment of this Court, which related to an interpretation of section 3(a) of the Prohibition of Deception in Kashrut Law, dealt with the granting of a Kashrut certificate to a dining house.

The examination of the subjective and objective purpose of the law led the Court to the conclusion that its purpose was a secular-consumer one; namely, the prevention of deception regarding the kashrut of food. This is because there are fears that consumers will be mistaken for thinking that the food they consume is kosher, when it is in fact not the case.

According to the interpretation adopted by the majority opinion, it was determined that a dining house that does not hold a Kashrut certificate is forbidden to display any Kashrut representations. However, the dining house is allowed to present a true disclaimer regarding the kosher standards it keeps and the supervision process as long as the disclaimer states clearly that the house does not hold a Kashrut certificate.

IV. LOOKING AHEAD TO 2018

As mentioned above, 2017 exhibited personnel replacement at the Supreme Court. Also, in February 2018, two new judges were elected to the Supreme Court: Alex Stein and Ofer Groskopf. The two will replace Justices Yoram Danziger, who retired in February 2018, and Uri Shoham, who will step down later this year. As for constitutional structure and constitutional legislation, there are two significant proposed bills: Basic Law: Israel as the Nation State of the Jewish People and Basic Law: Legislation. It is yet unknown whether and how these bills will be advanced in 2018. Finally, in 2018, the H CJ is likely to continue to face varied complicated issues concerning state and religion relations, belligerent occupation and the settlements, the legislative branch and the executive branch, among others.

V. FURTHER READING

Tamar Hostovsky Brandes, 'The Declining Status of International Law in the Decisions of the Israeli Supreme Court Concerning the Occupied Territories' (July 15, 2017), <https://ssrn.com/abstract=3076843>

Barak Medina, Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Conventions in Israel (2017) 50(3) Israel Law Review 331-388

Nadiv Mordechay and Yaniv Roznai, 'A Jewish and (Declining) Democratic State? Constitutional Retrogression in Israel' (2017) 77(1) Maryland Law Review 101-127

Shimon Shetreet, Walter Homolka, Jewish and Israeli Law - An Introduction (Walter de Gruyter GmbH & Co KG, 2017)

Gila Stopler, Introduction to I-CONnect/ICON-S-IL Symposium: Constitutional Capture in Israel?, Int'l J. Const. L. Blog, Aug. 20, 2017, at: <http://www.icconnectblog.com/2017/08/introduction-to-i-connecti-con-s-il-symposium-constitutional-capture-in-israel>

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Italy

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Since the beginning of its functioning, the Italian Constitutional Court (ICC) has put significant effort into combining its role as guardian of the Constitution with effective relations with other constitutional actors. The ICC's relation-building capacity was not limited to the domestic – horizontal – level but also to the supranational – vertical – one, as specifically reported in last year's report. As for 2017, the most characterizing dimension of this relationality has been the “horizontal” relationality with political bodies. In fact, the ICC was called to decide on many issues that required it to simultaneously assert its own constitutional duties by fine-tuning its own mission and to keep a collaborative relationship with political actors. The balance between these two goals characterizes the stance the ICC has taken both in the delicate and crucial matter of constitutional scrutiny of electoral legislation (Part II) and in other significant matters (Part III).

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

For the first three or four decades after the entry into force of the Constitution in 1948, the state of liberal democracy in Italy was largely dependent on the institutional capacity of implementing “new” constitutional principles after the experience of the totalitarian regime. The ICC played an important role in this process, such that 70 years later

it may be described as a “successful story”.¹ In particular, since the very first decision n. 1 of 1956, the ICC has step by step “cleaned up” the legal order from all illiberal pieces of legislation originated in the fascist era. In the last three or four decades, the state of liberal democracy in Italy has been increasingly connected with the unsteady state of the party system. In fact, the biggest threats for liberal democratic values increasingly came from the instability of the political system that inaugurated a complicated process of transition that is still ongoing.

National electoral legislation certainly represents one of the most tumultuous grounds where this process took place. The year 2017 was no exception to this recent trend: in less than 12 months, the ICC struck down essential parts of the electoral law approved in 2015 for the lower house as unconstitutional and a new electoral legislation for both houses was approved by the Parliament.

Until 2014, national electoral legislation was overwhelmingly considered to be *de facto* outside the jurisdiction of the ICC, both because it was considered a “political question” and for procedural difficulties in bringing a case before the Court. The absence of any individual claim and *actio popularis* in the Italian system of constitutional justice, combined with the provision of Article 66 of the Constitution, were long held to be insurmountable obstacles to the judicial review of electoral legislation, putting national elections off-limits to constitutional justice. In fact, Article 66 designates the houses of Par-

¹ Marta Cartabia, ‘Of Bridges and Walls: The “Italian Style” of Constitutional Adjudication’ (2016) 8 The Italian Journal of Public Law 37, 37.

liament as the sole judge of their own election, thus making it impossible to initiate any court proceedings in which constitutionality could be raised as a preliminary issue.

However, for a long time this constitutional justice “free zone” did not generate serious issues. In fact, from 1948 to 1993, national electoral law was based on proportional representation (PR). In 1993, a meaningful amendment of the electoral legislation followed the crisis of the party system that ruled Italy in the first four decades of its republican history. A new electoral system was approved by the Parliament under the push of a referendum consisting of a mixed system that entailed the election of 75 percent of the members of each chamber by a single-member simple plurality method and the remaining 25 percent by PR.

In 2005 the electoral legislation was once more amended in its very core. Only formally did the 2005 electoral law revert to PR. Concretely, it was characterised by a very robust mechanism that favoured the stability of the executive by allocating an automatic majority bonus to the coalition with the most votes nationally.

The 2005 electoral reform was immediately suspected of serious constitutional violations. Nonetheless, the 2005 electoral legislation was applied in three general elections (2006, 2008 and 2013), as none of the political and legal attempts to challenge this law succeeded.² Until then, the ICC limited itself to addressing non-binding alerts to the Parliament by warning political actors of the problematic aspects of unconstitutionality of electoral legislation in some *obiter dicta*.³

General elections in 2013 generated an extremely fragmented and politically fragile Parliament. It was the last time the 2005 electoral law was applied, as a few months later the ICC abruptly abandoned its traditional reluctance to get involved in matters of electoral legislation and declared the electoral system partly unconstitutional.⁴ The ICC surprisingly declared a referral on the constitutionality of the electoral law admissible. The referral originated from an unprecedented civil proceeding, initiated in 2009, where a group of citizens claimed a violation of their right to vote and sought a declaratory relief. The ICC struck down as unconstitutional two key features of the electoral system: the allocation of the majority bonus regardless of the achievement of any minimum threshold of votes; and the norms providing for long and locked candidate lists so that essentially, elected candidates were chosen more by parties, than by voters. After the Court’s decision, the remaining electoral legislation maintained a PR system, with slightly different thresholds for each of the two houses of Parliament. The majority bonus was simply removed from electoral law, and the lists were opened up to preferential voting.

A few months after the Court issued this judgment, a new Government launched an ambitious program of institutional reforms that consisted of both overarching constitutional and electoral reform. Regarding constitutional reform, the Government introduced a bill aimed at overturning the symmetrical bicameral system. Regarding electoral reform, the Government proposed, and the Parliament eventually approved in 2015, a new electoral law which would apply to the lower

house only, given that the ongoing constitutional reform aimed to turn the upper house into an indirectly elected body.⁵ The 2015 law envisaged an electoral system based on a proportional formula significantly stabilised through the assignment of a majority bonus. As opposed to the electoral system declared unconstitutional in 2014 that referred to coalitions in addition to lists, a 55 percent majority was awarded to the list that won with a majority of at least 40 percent of votes at the first round of voting, or failing that, the list that won a runoff to be held between the two most voted-for lists from the first round. Additionally, the system for allocating seats was amended through the establishment of 100 multi-member constituencies of reduced dimensions. In each constituency, only one candidate was a fixed candidate while for the other candidates voters might express up to two preferences.

Shortly after the approval, and before any concrete application of it, the 2015 electoral law was challenged before the ICC. In the beginning of 2017, the Court struck down once again the electoral legislation as partly unconstitutional. In the Court’s view, the runoff rule excessively compromised the constitutional requirements already weighed in its 2014 judgment: it did not consist of a new vote, but it was rather “the continuation of the first round of voting”.⁶ This mechanism provided a too-robust majoritarian injection into an electoral system that was based on a proportional formula. It aimed at creating (and not merely favouring) a governing political majority within the lower house. The Court found this mechanism to be in violation of Article 48(2) of the Constitution, which establishes the principle of

² Repeated attempts were made to repeal the law by popular referendum, which failed either because votes cast against the repeal prevailed or because the proposal was declared inadmissible by the ICC on the grounds that the Constitution did not allow a total repeal of parliamentary electoral law. In brief, the ICC held that workable electoral legislation should always exist and rejected the idea that the total repeal of an electoral law would cause whichever system was previously in effect to automatically be restored.

³ Corte costituzionale, judgments of 30 January 2008, Nos. 15 and 16. In its official website, the ICC provides some summaries and full-text translations of its decisions in English: <http://www.cortecostituzionale.it/actionJudgment.do>.

⁴ Corte costituzionale, judgment of 15 January 2014, No. 1.

⁵ This political gamble tightly intertwined constitutional and electoral reforms. The negative outcome of the December 2016 referendum on constitutional reform fatally dramatized this tight link, as the constitutional architecture maintained its symmetrical bicameral system, where both houses held a confidence relationship with the Government. Nonetheless, the 2015 electoral law (Italicum) was designed to guarantee a single-list majority only in the lower house. In the upper house, the 2005 electoral law remained in force, with the changes operated by ICC judgment No. 1/2014: a basic PR system, that gave no guarantee of a majority aligned to the one created in the lower house by the *Italicum*.

⁶ Corte costituzionale, judgment of 25 January 2017, No. 42, para. 9.2.

one person, one vote and the principle of the representative nature of the elected assembly in a parliamentary form of government. The Court says that general elections are required to pursue a double aim: on the one hand they should generate a representative Parliament; on the other they should generate a Parliament capable of expressing a stable political majority. The electoral legislation under scrutiny was considered to be unbalanced, since the representative principle was unduly impaired. Even though it was not the runoff mechanism *per se* to be held unconstitutional, the Court struck it down as a whole. In fact, the Court could not repair the mechanism by adding corrective mechanisms or new conditions of assignment of the majority bonus. In the Court's view, this task fell under the broad discretion of the legislature.

Additionally, the Court struck down part of the legislation allowing for parallel multi-candidacy of the same candidate, followed by selection of the constituency in which to be elected. In the Court's view, this system violated the principle of equality and the personal nature of the vote, as guaranteed in Articles 3 and 48 of the Constitution, inasmuch as the opportunistic decision of candidates elected in more than one constituency would arbitrarily affect the election of other candidates. However, the ICC did not strike down the parallel multi-candidacy system *per se*, but only the possibility to freely opt for the constituency of election after the vote. In place of the free option, the ICC generalised a previously residual measure provided for by the electoral law itself: drawing lots. Therefore, lots would always be drawn to decide which constituency the multi-elected candidate would ultimately represent. In this way, the ICC was able to amend the system using one of its original elements without inventing anything *ex novo*.

Finally, in one of the very last paragraphs of its ruling, the ICC *obiter* affirmed that even

though “the Constitution does not oblige the legislature to introduce identical electoral systems”⁷ in the two houses of the Parliament, it requires that the system adopted does “not impede, upon the outcome of elections, the formation of homogeneous parliamentary majorities”.⁸ In a few words, the Court seemed to recommend some degree of homogeneity of the electoral laws for the two houses, in line with some statements issued by the President of the Republic in December 2016.

This recommendation was seemingly taken up by the Parliament that approved a new electoral legislation at the end of 2017.⁹ The new law applies to both houses and envisages a mixed system, where one-third of the seats in each house will be allocated via the first-past-the-post system and two-thirds percent via PR with short blocked lists. Differently from most mixed systems, voters may not split their vote: a vote for a first-past-the-post candidate is a vote for the party or coalition they are aligned with. Furthermore, the law reintroduces the possibility of electoral coalitions among parties and harmonizes entry thresholds between the two houses. Candidacies in multiple constituencies are allowed with some limits (up to five parallel candidacies are admitted) but, remarkably, the district of election may not be chosen freely and is determined following objective criteria established by law.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

(a) *Judicial review of criminal legislation*

Until recently, the architecture of criminal offenses and the dosage of sanctions were also largely considered an exclusive province of the legislator, with very few exceptions related to cases of obvious irrational-

ity. Lately, and most notably in 2016¹⁰ and 2017, the ICC extended its review towards this area, albeit with caution: it entered the merits of the relevant questions, or touched upon them, but preferred to warn the Parliament, instead of immediately correcting existing legislation. It is important to consider that, after a warning has been issued, if no amendment is made and the constitutional issue is raised again, the ICC often feels less inclined to self-restraint and acts with greater creativity.

In a judgment on major offenses involving hard drugs,¹¹ the question concerned the minimum sentence (eight years of incarceration plus a fine), which was significantly higher than the maximum sentence for minor offenses (for drugs of every kind: four years plus a fine). The referring judge considered the difference between the two classes of crimes too thin to account for such a disproportion. The ICC reviewed its own doctrine on the scrutiny of laws on sentencing. The Court may intervene when such laws are manifestly arbitrary or unreasonable, including with regard to proportionality of punishments; however, it may not craft an entirely new punishment by its own discretion: defects may be judicially amended only when the offense can be univocally connected with another, pre-existing punishment, drawn from within the relevant, specific legal framework. In the examined case, this was not possible. The Court retraced the legislative and judicial history of the questioned provisions; found that the two offenses differed significantly but not to the point of justifying a four-year gap in sentencing; and ultimately held that this was a serious issue of constitutional significance, but one open to a variety of constitutionally acceptable solutions, and that it was for the Parliament to choose amongst them. The questions of constitutionality were declared inadmissible and the Parliament was urged to remedy the split rapidly.

⁷ Ivi, para. 15.2.

⁸ Ibid.

⁹ Some unusual constitutional conflicts, raised by citizens purportedly acting as State powers under Article 134 of the Italian Constitution, were dismissed as inadmissible by Corte cost 20 December 2017, No. 277 (unpublished) and 21 December 2017, No. 280 (unpublished).

¹⁰ Corte cost 23 March 2016, n. 56, Foro it. 2016, I, 3058 (It.); 10 November 2016, n. 236, Foro it. 2017, I, 97 (It.).

¹¹ Corte cost 10 November 2017, n. 179, Foro it. 2017, I, 3237 (It.).

Similarly, in other judgments the ICC confirmed that parliamentary discretion is broad in this field (and also in the field of decriminalization), but nevertheless carefully considered the merits of the questions raised, if only to dismiss them. One case concerned the allegedly excessive rigidity of proportional pecuniary punishments for human trafficking (15.000 or 25.000 euros per illegal immigrant).¹² The other concerned the punishment of insulting acts and utterances among military personnel when unrelated with service or discipline (the parallel offense outside military law had been decriminalized).¹³

(b) Adjudicating on general norms vs. protecting individual rights

In two cases, the ICC dismissed questions on norms whose application had led to judgments against Italy by the European Court of Human Rights (ECtHR). The cases highlight the difference between ruling on concrete cases, even when they are influenced by problematic norms, and directly reviewing such norms; furthermore, these cases emphasize the difference in scope – and the need of cooperation – between judicial and legislative interventions for the correction of defects in the legal system.

One case¹⁴ concerned the lack of provisions allowing the revision of a final administrative judgment after the ECtHR had found it incompatible with Article 6 of the European Convention on Human Rights (ECHR).¹⁵ The questions were dismissed as unfounded: although States must comply with Strasbourg judgments, in non-criminal matters the obligation may be discharged in various ways, and *restitutio in integrum* need not necessarily be guaranteed by reopening

a closed trial. The reopening would also affect the legitimate expectations and reliance on legal certainty of non-State parties of the proceedings (who, in their turn, cannot normally appear before the ECtHR). Striking a fair balance between the competing interests, and possibly introducing certain instances of revision, is a decision reserved to the legislator. Meanwhile, the parties injured in their Article 6 rights may still be afforded just satisfaction by the ECtHR.

The other case is an episode of the so-called “Swiss pensions” series.¹⁶ According to a statutory interpretation of legislation governing the calculation of pensions, the entitlements of certain Italian workers, who had worked and paid social security contributions in Switzerland, had been significantly reduced, as contributions were much lower there than in Italy. In a recent judgment,¹⁷ the ECtHR, after considering several circumstances related to individual applicants and their pensions, held that those specific reductions had been so severe that they were in breach of both Article 6 ECHR and Article 1 of Protocol No. 1 to the Convention. Nevertheless, the ICC dismissed as inadmissible the questions raised on the statutory interpretation: the ECtHR had not fixed a general threshold below which the reductions would be considered excessive; the ICC could not autonomously establish this threshold; therefore, the task falls to the legislature, which, again, has been warned that a prolonged inertia will not be tolerated.

(c) “Hard” political choices and the economic crisis

The cost of social rights was also the background of yet another case on pensions. A previous judgment had struck down the

freezing on the annual automatic increases, which were intended to preserve the purchasing power of individual pensions against inflation: the freezing was considered too rigid and severe; the underlying financial reasons had not been illustrated in detail. Immediately after this judgment, decree law No. 65 of 2015 retroactively enacted a new version of the freezing, which in its turn was scrutinized in 2017. This time,¹⁸ the ICC found no violation of the principles of reasonableness as well as adequacy and proportionality of pensions. Objective data illustrated the financial requirements justifying a partial and temporary sacrifice of pensioners’ interests. The block impacted only middle- and high-income pensions with a progressive increase. As the adequacy of pensions must be considered in terms of their overall value, even a total freezing on the increase for middle and high pensions does not automatically infringe the principle of adequacy. Therefore, the constitutional questions were unfounded: the provisions were a legitimate expression of legislative discretion, unlike those struck down in 2015.¹⁹

(d) Language as a cultural right and principle

Two decisions stressed the importance of language as an element of individual and collective identity, a vehicle for the transmission of culture, and an expression of human personality in its relational dimension.

In one case,²⁰ the ICC held that legislation may not allow a university (the Polytechnic of Milan) to teach its (post-graduate) courses entirely in English: in the ICC’s view, Italian language is crucial for the continuing transmission of the historical heritage and identity of the Republic in the age of globalization

¹² Corte cost 21 June 2017, n. 142, Foro it. 2017, I, 3580 (It.).

¹³ Corte cost 12 October 2017, n. 215, (unpublished).

¹⁴ Corte cost 26 May 2017, n. 123, Foro it. 2017, I, 2180 (It.).

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, in force Nov. 3, 1953. 213 U.N.T.S. 222.

¹⁶ See also Corte cost 23 May 2008, n. 172, Giur. cost. 2008, 2076 (It.); 28 November 2012, n. 264, Foro it. 2013, I, 22 (It.).

¹⁷ Stefanetti and others v. Italy, App. Nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10, Eur. Ct. H. R., Apr. 15, 2014.

¹⁸ Corte cost., 1 December 2017, n. 250, (unpublished).

¹⁹ On this precedent, see Pietro Faraguna, Michele Massa, Diletta Tega and Marta Cartabia, Developments in Italian Constitutional Law: The Year 2015 in Review, Int’l J. Const. L. Blog, Mar. 4, 2016, at: <http://www.iconnectblog.com/2016/02/developments-in-italian-constitutional-law-the-year-2015-in-review>.

²⁰ Corte cost 24 February 2017, n. 42, Foro it. 2017, I, 1125 (It.).

and may not be indiscriminately excluded from university teaching in entire branches of learning. This would unfairly prejudice students lacking the knowledge of foreign languages and violate academic freedom in the choice of teaching languages.

In the other case,²¹ the ICC struck down the provision of a regional law which, in disciplining the building of places for religious worship, allowed Municipalities to require the use of Italian language for all the activities carried out in those places not strictly connected with ritual worship.

(e) Deciding on the best interests of the child

An Italian couple had gone to India, where the man fertilized the egg of an anonymous donor and the embryo was implanted in a surrogate mother. The baby was registered in Italy as child of the couple, but the motherhood of the Italian woman was subsequently challenged by the competent judicial authorities. The question in ruling on this case was whether what mattered was only the lack of biological links between the woman and the child or also the best interests of the latter. The ICC²² emphasized that biological and genetic truth are not absolute values and may be balanced against the concrete interests of the child. Sometimes the balance is made directly by law: e.g., the consent to heterologous fertilization may never be revoked; surrogacy is punished as a criminal offense. When the law is silent, it is for the judge to decide, considering circumstances more complex than the mere “true or false” alternative. This is the case in general for adjudication on motherhood status; yet in this specific instance, the radical prohibition of surrogacy should prevail. The woman may still adopt the baby as her spouse’s child.

f) Two courts and two charters

Although only *obiter*,²³ the ICC addressed the possibility that a national law infring-

es both the Italian Constitution and the EU Charter of fundamental rights.²⁴ According to the ICC, the constitutional question should be raised first. At a later point, a preliminary reference may still be made to the Court of Justice of the European Union (CJEU), also by the ICC; and the law, if not already struck down, may still be non-applied if it contrasts with the Charter. This important conflict rule apparently acts as a derogation of the general rule traditionally adopted by the ICC. In fact, in cases of so-called “dual preliminary” (i.e., concrete cases where doubts of constitutionality and problems of interpretation of European law are simultaneously pending), the ICC usually asks referring judges first to solve all problems of interpretation of European law and then to answer the question of constitutionality. Now, the ICC reverses the procedural order when the protection of fundamental rights is at stake. The *obiter* apparently aims at preventing ordinary courts to enforce fundamental rights without addressing the ICC as well as at keeping the latter in a pivotal position to dialogue with the CJEU on fundamental rights. However, one should take into account the fact that the province of the Charter largely overlaps with the scope of the Constitution, and that the protection of fundamental rights in Europe does not require the same level of uniformity as the other provision of European law: in fact, pluralism is implied in the final clauses of the Charter.

IV. LOOKING AHEAD TO 2018

Many issues of previous years remain on the table, e.g. concerning electoral law (the new system for the election of the Parliament; the postal voting of Italians abroad; thresholds in the election of Italian members of the European Parliament) and criminal law (*ne bis in idem* and clarity of criminal legislation). Current criminal issues often require dialogue with the ECtHR (as in the exam-

ples above) or the CJEU (as in the follow-up to the M.A.S. judgment,²⁵ concerning – as other cases pending before the ICC – the principle of legality and limitation periods). Furthermore, brand new questions are on the horizon. They are in part variations on classic themes, e.g., the degree of protection afforded by recent laws against illegitimate termination of employment (supra-national sources on social rights have also been invoked). Other issues are unprecedented, at least for Italian constitutional justice, e.g., a question on assisted suicide by severely ill persons.

V. FURTHER READING

Pietro Faraguna, “‘Do You Ever Have One of Those Days When Everything Seems Unconstitutional?’: The Italian Constitutional Court Strikes Down the Electoral Law Once Again: Italian Constitutional Court Judgment of 9 February 2017 No. 35 (2017) 13 European Constitutional Law Review 778

Davide Paris, ‘Carrot and Stick. The Italian Constitutional Court’s Preliminary Reference in the Case Taricco’ (2017) 37 Questions of International Law, Zoom-in 5

Daniel Sarmiento, ‘Adults in the (Deliberation) Room. A comment on M.A.S.’ 2018 Quaderni costituzionali 228

Diletta Tega, ‘The Italian Way: A Blend of Cooperation and Hubris’ (2017) 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 685

Diletta Tega, ‘Narrowing the Dialogue: The Italian Constitutional Court and the Court of Justice on the Prosecution of VAT Frauds’ (2017) Int’l J. Const. L. Blog, Feb. 14, 2017, at: <http://www.icconnectblog.com/2017/02/narrowing-the-dialogue-the-italian-constitutional-court-and-the-court-of-justice-on-the-prosecution-of-vat-frauds>

²¹ Corte cost 7 April 2017, n. 67, Foro it. 2017, I, 1450 (It.).

²² Corte cost 18 December 2017, n. 272 (unpublished).

²³ Corte cost 14 December 2017, n. 269 (unpublished).

²⁴ Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02.

²⁵ Case C-42/17 M.A.S. and M.B. [2017] EU:C:2017:936.



Kazakhstan

THE STATE OF NON-DEMOCRACY

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I. INTRODUCTION

In March 2017, Kazakhstan adopted a set of constitutional amendments that the Venice Commission had hailed as steps towards democracy.¹ These changes to 25 articles of the 1995 Constitution had to be made in order to bring constitutional text in compliance with the previously adopted legislation that had implemented some of President Nazarbayev's "100 Steps" program – a plan for joining the world's 30 most competitive economies.² Some labeled this constitutional reform a decoration set, while others viewed it as a gradual transition to the post-Nazarbayev system of rule. Unlike previous constitutional amendments that had expanded presidential powers, this set of amendments abolished or transferred 34 presidential powers to the government and the Parliament, made the government more accountable to the Parliament, removed some vestiges from the law-enforcement system, declared President Nazarbayev's constitutional status of the "Leader of the Nation" unchangeable, and, in anticipation of the exodus of ISIS fighters from Syria and Iraq, allowed for stripping the citizenship of those convicted of terrorism and of "causing harm to the vitally important interests of the Republic of Kazakhstan." The initially proposed amendment to expand property rights to "everyone" was eventually not adopted

due to the public outcry over the possible threat of land sale to Chinese investors. In July 2017, the amendments to the law on the presidency barred those without at least five years' work experience in government from running in the presidential elections.³ In December 2017, amendments to the media law required journalists to receive permission from persons mentioned in their articles before publishing "personal, family, medical, banking, commercial [information] and other legally protected secrets" and prohibited anonymous commenting on news websites.⁴ Ordinary people, however, hotly debated the headscarf ban in secondary schools and the switch from a Cyrillic- to a Latin-based alphabet. Yet these debates did not become constitutional controversies.

II. AUTHORITARIAN CONSTITUTIONAL ORDER ON THE RISE OR DECLINE?

Since the break up of the Soviet Union at the end of 1991, Kazakhstan, a country that has yet to hold free and fair elections in line with liberal democratic standards, has experimented with actual democratic governance for about a year – between April 1994 and March 1995. The first Constitution of post-Soviet Kazakhstan was adopted by the Soviet-era legislature in January 1993, several months before President Yeltsin vi-

¹ Carna Pistan, "2017 Constitutional Reform in Kazakhstan: Increasing Democracy without Political Pluralism?" ConstitutionNet, 28 March 2017, <<http://www.constitutionnet.org/news/2017-constitutional-reform-kazakhstan-increasing-democracy-without-political-pluralism>> accessed 13 March 2018.

² Charles J. Sullivan, "State-Building in the Steppe: Challenges to Kazakhstan's Modernizing Aspirations." Strategic Analysis (2017) 41(3): 273-284.

³ "Kazakhstan president signs controversial laws on presidency, deprivation of citizenship" Times of Central Asia, 12 July 2017, <<https://www.timesca.com/index.php/news/18326-kazakhstan-president-signs-controversial-laws-on-presidency-deprivation-of-citizenship>> accessed 13 March 2018.

⁴ Catherine Putz, "With Media Law Amendments, Kazakhstan Deals a Blow to Press Freedom," Diplomat, 3 January 2018, <<https://thediplomat.com/2018/01/with-media-law-amendments-kazakhstan-deals-a-blow-to-press-freedom/>> , accessed 13 March 2018.

olently dissolved the Russian Parliament in Moscow.⁵ Although adopted without meaningful public input, the Kazakhstani Constitution aimed at achieving a presidential republic with Western-style separation of powers, including a standalone Constitutional Court. The March 1994 parliamentary elections were neither free nor fair – a quarter of 177 seats were virtually picked by President Nazarbayev combined with the a fraudulent vote count, according to the CSCE Parliamentary Assembly observers.⁶ Still, these elections were competitive and produced a legislature in which a pro-presidential bloc held only a third of seats. Very quickly, the Parliament become a main brake on President Nazarbayev’s powers by passing a no-confidence vote in the Prime Minister, a long-time associate of Nazarbayev; by overriding Nazarbayev’s veto of key pieces of legislation; by resisting Nazarbayev’s attempt to introduce a bicameral legislature without amending the Constitution; and by not approving Nazarbayev’s pick for the post of Speaker of the Parliament.⁷ At the same time, non-government media were proliferating and expanding public debate in the context of a severe economic downturn, politicization of ethnic Kazakh-Russian relations, spontaneous privatization of former Soviet state property, and waning popularity of President Nazarbayev.

This brief experiment with democratic politics ended in March 1995 when Nazarbayev dissolved the Parliament. By that time, he faced a recalcitrant legislature that began to cultivate potential rivals in the upcoming 1996 presidential elections. He also wit-

nessed the West’s tacit approval of Boris Yeltsin’s emasculation of the Russian Parliament and Constitutional Court in 1993. Using the March 1995 Constitutional Court finding of constitutional violation of voting in one district of the capital city, President Nazarbayev told the Parliament that it was improperly assembled and therefore dissolved, that all of its laws and decisions had no legal force, that all perks and benefits of MPs were taken away, that the Parliament building was to be closed for remodeling, and that the country would be under direct presidential rule until new parliamentary elections in December 1995.⁸ While some MPs resisted in vain this presidential takeover of power, the West and Russia supported it, as Nazarbayev expected.⁹ A small group of government lawyers working together with Western experts and Kazakhstani law professors used this opportunity to draft the new super-presidentialist Constitution and numerous laws needed for the transition to a market economy and from the Soviet-style welfare state. Meanwhile, Nazarbayev’s presidential term was extended until 2000 in the nationwide referendum, held in April 1995, prior to the adoption of the new Constitution and without the need to compete in the full-blown elections.

Kazakhstan’s second Constitution was adopted in the nationwide referendum that was held on the basis of presidential decree on August 30, 1995: 89% of voters from a 90% turnout supported it. As a result, August 30 has been declared a state holiday, a feature of constitutional order that ordinary citizens actually experience every year. Having combined constitutional templates from the Fifth

French Republic and Yeltsin’s Russia, the Constitution looks democratic on paper, yet stops further democratization by concentrating political power in the hands of the President.¹⁰ Yet it is not a sham constitution.¹¹ Instead of limiting government, the 1995 Constitution maps out the structure of government and the ways in which government exercises its powers. The 1995 Constitution gave the President the right to rule by decree and to appoint and dismiss the Prime Minister and other governmental figures. It created a new bicameral Parliament comprised of the indirectly elected 47-member Senate (the upper house) and the directly elected 67-member Majilis (the lower house) with limited powers of checking the executive branch.¹² The President has the power to appoint seven members of the Senate and dissolve Parliament more or less at will. Indeed, since 1995, President Nazarbayev has dissolved each convocation of the Parliament before the expiration of its constitutional five-year term. The 1995 Constitution also replaced the Constitutional Court with an advisory and inaccessible to ordinary citizens Constitutional Council. Constitutional amendments of 1998, 2007, and 2011 extended and codified presidential powers. They also allowed the incumbent President to run in presidential elections for an unlimited number of terms, which paved the way for Nazarbayev to become de facto President for life.¹³ This is another reason why Kazakhstan’s Constitution is not a façade-only document. It strengthened – through multiple personified presidential prerogatives – the expectation among elites and the public that a highly popular Nazarbayev was going

⁵ The Constitution of the Republic of Kazakhstan, 1993, *Constitutions of the Countries of the World*, 1994-07, Oceana Publications, Inc., Dobbs Ferry, New York, pp. 1-42

⁶ <https://www.oscepa.org/documents/all-documents/election-observation/election-observation-statements/kazakhstan/statements-13/1422-1994-parliamentary-1/file>

⁷ Martha Brill Olcott, “Democratization and the Growth of Political Participation in Kazakhstan.” In Karen Dawisha and Bruce Parrott (eds.) *Conflict, Cleavage, and Change in Central Asia and the Caucasus* (1997): 201-241., 222-226.

⁸ *Ibid.*, 227.

⁹ Barnabas Johnson, “The Role of the United States in the Erosion and Collapse of Constitutional Governance in Kazakhstan,” *Central Asia Monitor* 6 (1995), pp. 14-19.

¹⁰ Olcott, “Democratization and the Growth of Political Participation in Kazakhstan” 233.

¹¹ Scott Newton, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (Oxford: Hart 2017).

¹² Timur Kanapyanov, “Role and Place of the Parliament of Kazakhstan in the System of Checks and Balances.” *Communist and Post-Communist Studies* (2018) 51(1): 81-87.

¹³ Pistan, “2017 Constitutional Reform in Kazakhstan: Increasing Democracy without Political Pluralism?”

to stay in power for a long time.¹⁴

To be sure, he amassed and skillfully manipulated informal levers of power through control of key industries, cooptation, and coercion. As he told business leaders at the beginning of the 2000s: “I can bring by hand anyone of you to court and have you convicted.” He became the leader of the ruling Nur Otan party, which won an embarrassing 100% of seats in the tightly controlled 2007 elections and increasingly resembled the Communist Party of the Soviet Union. In 2010, the Parliament declared Nazarbayev the legal status of “Leader of the Nation,” which granted him eternal immunity from criminal investigation and the eternal right to veto any public policy.¹⁵

One area in which the 1995 Constitution could be considered a sham is its civil and political rights guarantees. Despite having experienced two decades of rule-of-law support projects sponsored by the USA and the European Union, Kazakhstani judges, police, and prosecutors very rarely cite these guarantees or refer to the UN human rights instruments when lawyers and human rights activists allege violations of constitutional rights in courts.¹⁶ Even though Kazakhstan joined the Venice Commission in 2012 and the Kazakhstani Constitutional Council became an observer to the Conference of European Constitutional Courts in 2015, the country’s judicial elite has yet to internalize the constitutional requirement that “human rights and freedoms shall...be the essence of application of laws and regulations” (Article 12.2 of the 1995 Constitution). Kazakhstan hosts the UN Special Rapporteurs on human rights and its officials accept their critique on human rights in the country. Yet

government officials respond by prioritizing economic over political liberalization. They increasingly realize that empty promises of human rights damage the trust in the regime and deny them a possibility of securing the extradition of the regime’s opponents from abroad due to the risk of torture and unfair trial. As a result, many observers characterize Kazakhstan’s political regime as soft authoritarianism that relies more on the “means of persuasion than on the means of coercion, although coercion remains a part of the ruling elite’s arsenal.”¹⁷

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

In March 2017, following the nationwide discussion of constitutional amendments proposed by President Nazarbayev and the approval of the Constitutional Council, the Kazakhstani Parliament unanimously adopted all but one of them. In contrast to previous constitutional amendments, this constitutional reform actually reduced presidential prerogatives. These changes to 25 articles of the 1995 Constitution had to be made in order to bring constitutional text in compliance with the previously adopted legislation that had implemented some of President Nazarbayev’s “100 Steps” program announced in 2015. This program, which consisted of proposals solicited from various government agencies, was presented to the public as a plan for joining the world’s 30 most competitive economies.

The Venice Commission hailed these amendments as steps towards democracy because they somewhat improved the sys-

tem of checks and balances and narrowed the powers of the President.¹⁸ Indeed, the amendments expanded the powers of the Constitutional Council. This body can now review – but only at the request of the President – the constitutionality of laws in force. They also strengthened the Parliament’s supervisory powers over the activities of the Government and abolished or transferred 34 presidential powers to the Government and the Parliament. However, inside Kazakhstan, some labeled this constitutional reform a decoration set because it failed to make the President more accountable either to the people or to other branches of government.¹⁹ Meanwhile, others viewed constitutional changes as a step in the gradual transition to the post-Nazarbayev system of rule, something that makes both the public and the ruling elite anxious.²⁰ In fact, these constitutional amendments provided for the lifelong immunity of Nazarbayev and declared that his status of the Leader of the Nation could not be changed. A further step in this controlled transition occurred in July 2017. At that time, the Parliament barred those without at least five years’ work experience in government from running in the presidential elections. In December 2017, amendments to the media law required journalists to receive permission from persons mentioned in their articles before publishing “personal, family, medical, banking, commercial [information] and other legally protected secrets” and prohibited anonymous commenting on news websites.

The 2017 amendments also abolished several vestiges of the Soviet law-enforcement system: the Supreme Court’s supervisory review of judicial decisions and the Procurator’s power of general supervision of legal-

¹⁴ Henry Hale, *Patronal Politics: Eurasian Regime Dynamics in Comparative Perspective* (CUP 2014).

¹⁵ *Ibid.*, 249.

¹⁶ Alexei Trochev, “Between Convictions and Reconciliations: Processing Criminal Cases in Kazakhstani Courts.” *Cornell Int’l LJ* 50 (2017): 107, 124.

¹⁷ Edward Schatz, “The Soft Authoritarian Tool Kit: Agenda-Setting Power in Kazakhstan and Kyrgyzstan,” *Comparative Politics* 41, no. 2 (2009): 203. Natalie Koch, “Sport and Soft Authoritarian Nation-Building.” *Political Geography* 32 (2013): 42-51. Anna Matveeva, “Legitimising Central Asian Authoritarianism: Political Manipulation and Symbolic Power.” *Europe-Asia Studies* 61, no. 7 (2009): 1095-1121. Mariya Y. Omelicheva, *Democracy in Central Asia: Competing Perspectives and Alternative Strategies*. University Press of Kentucky, 2015.

¹⁸ Opinion 882/2017, 14 March 2017, <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)010-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)010-e)> accessed 13 March 2018.

¹⁹ “A Redistribution of Resources, But Not of Decision-Making Powers” *Kazakhstan 2.0*, 7 February 2017, <<http://kz.expert/archives/1416>> accessed 13 March 2018.

²⁰ BBC News, 6 March 2017, <<http://www.bbc.com/news/world-asia-39177708>> accessed 13 March 2018.

ity. Both of these powers greatly burdened both agencies yet they ran against the public expectation of a capable state in charge of law and order. At the same time, constitutional amendments brought back a Soviet-era punishment – deprivation of citizenship – to those convicted of terrorism and of the vaguely defined crime of “causing harm to the vitally important interests of the Republic of Kazakhstan.” Some human rights activists warned that this amendment ran against Kazakhstan’s international commitment of reducing statelessness.

Finally, the 1995 Constitution was also changed to formalize the creation of the special legal regime in the capital city of Astana. This was necessary for hosting the Astana International Finance Center, with its own arbitration tribunal modeled after the Dubai International Financial Center and staffed by five distinguished English jurists applying English law in handling investment disputes. Despite the objections of many civil law professors, Kazakhstani authorities allowed application of English common law on the territory of Kazakhstan in order to bypass Kazakhstan’s judicial system.²¹ They also argued that this legal transplant would reduce the flight of major domestic and foreign investors to the jurisdiction of well-established arbitration tribunals in London, Stockholm, and New York City.

The only initially proposed constitutional amendment that actually animated public discussion was about expanding the right to property from “citizen” to “everyone.” In the wake of the street protests and the findings of the government-sponsored Land Commission, this amendment was eventually

dropped due to public outcry over the possible threat of land sale to Chinese investors.²² The opponents of the amendment argued that prior to allowing land sale to foreigners, the government had to fulfill its decade-old promise of giving away land plots to Kazakhstani citizens. Moreover, to allay public fears, President Nazarbayev extended the moratorium on land sale to foreign owners.

Two other issues that would elevate to the level of constitutional controversy in liberal democracies but have not in Kazakhstan dominated public discourse: a headscarf ban in schools and the switch of Kazakh language script from Cyrillic to Latin. Both the ban and the switch have been defined by the executive branch, yet the attitude of government towards the debate in each case was different. After prolonged debates within the government, society, and religious circles over the meaning of being a Muslim, the Education Minister ordered secondary schools to have uniforms and banned religious attributes in schoolchildren’s clothing, in effect reproducing Soviet-era restrictions.²³ As expected, thousands of Muslim parents protested and sent their daughters with heads covered to schools. Some school principals allowed them in while others did not. Yet others negotiated with parents and convinced some of them to have schoolgirls take off headscarves inside the school building. Still, some parents resisted by insisting that Kazakh girls had their heads covered before the arrival of the Bolsheviks, and that schools had to accommodate and provide education, to which children have a constitutional right. All local courts, which handled these disputes, found the Education Minister’s order lawful, with some judges imposing fines on

parents for failing to perform their parental duties.²⁴ It was clear that the authorities, both government and religious, did not want this debate to be on the central stage.

A presidential decree that had initiated the switch of the Kazakh language to the Latin alphabet, to be completed by 2025, sparked another nationwide debate.²⁵ In a surprising move, the government allowed a highly contentious and polarized debate on the merits of the switch to proceed over the course of several months.²⁶ The proponents of the switch insisted that Latin script would help build the Kazakh nation and make it easier to surf the Internet. The opponents countered that the cultural heritage of Kazakhs would be lost and that people who do not speak Kazakh – 1 out of 3 – would become illiterate overnight. Public opinion polls, which are publicly available, also revealed a high degree of discontent with the switch among ethnic Kazakhs. President Nazarbayev also had to pacify non-Kazakh speakers by insisting that the switch would be gradual and that the Russian language would retain both its official status and Cyrillic script. A few lawyers argued that the switch had to be approved by the Parliament, not by the Chief Executive. When in October 2017 Nazarbayev finally approved the new Latin script by decree, it generated such a massive wave of criticism and ridicule that top government officials immediately announced that the script was going to change. Indeed, this criticism made a difference. Nazarbayev simplified the Latin script, as critics demanded, in January 2018.²⁷

None of these debates reached the Constitutional Council. In fact, in 2017, this tribunal

²¹ Zhenis Kembayev, “Recent Constitutional Reforms in Kazakhstan: A Move towards Democratic Transition?” *Review of Central and East European Law* 42, no. 4 (2017): 294-324.

²² Kadyrzhan Smagulov and Gulnar Nasimova, “Analysis of the Protest Mood in the Western Region of Kazakhstan.” *Central Asia and the Caucasus* 17, no. 3 (2016): 38-47.

²³ “Hijab Vs. Education: Kazakh Schoolgirls Face Dilemma Over Head-Scarf Ban,” RFERL News, 19 November 2017, <https://www.rferl.org/a/kazakhstan-schools-head-scarf-ban/28862676.html> accessed 13 March 2018.

²⁴ “Headscarf as a symbol of faith in Kazakhstan,” *Ferghana News*, 29 November 2017, <<http://enews.ferghananews.com/articles/3067>> accessed 13 March 2018.

²⁵ “Kazakhstan to Switch from Cyrillic to Latin Alphabet,” *Al-Jazeera*, October 28, 2017, <<http://www.aljazeera.com/news/2017/10/kazakhstan-switch-cyrillic-latin-alphabet-171028013156380.html>> accessed 13 March 2018.

²⁶ Naubet Bisenov, “Kazakhstan: Plans to Adopt Latin-Based Alphabet Sparks Backlash,” *Equal Times*, 23 January 2018, <<https://www.equaltimes.org/kazakhstan-plans-to-adopt-latin?lang=en>> accessed 13 March 2018.

²⁷ *New York Times*, 15 January 2018.

did not issue a single decision on the merits of a constitutional controversy. It issued only one such decision – on the violation of freedom of movement – in 2016. Instead, the Constitutional Council approved the 2017 constitutional amendments and revised its own decisions in order to match them with the newly amended Constitution. As in the past, in order to remind the authorities about its existence, the Council published its annual statement on constitutional legality in the country. In its 2017 statement, the Council approved the President’s course of action, proposed to study constitutional patriotism and to define indicators of “effective and comprehensive constitutional monitoring,” and complained that the government failed to carry out the Council’s only 2016 decision and the Council’s 2012 recommendation on defining the right to privacy.

IV. LOOKING AHEAD TO 2018

While President Nazarbayev shows no signs of leaving office, both ruling elites and the public are increasingly anxious about what would happen in the wake of his departure. The Kazakhstani Parliament is working on transforming the National Security Council from an advisory body to the full-blown executive body that Nazarbayev has a right to chair for life.²⁸ Islam is becoming more popular, and, as a result, one would expect more public debates about religion in public life, including stronger resistance against the headscarf ban in schools. The Minister for Religious Affairs has already proposed a law banning “external attributes” such as beards, ankle-length pants, and niqabs of Salafi Muslims, and single-sex schools, in which girls would be allowed to wear headscarves.²⁹ Meanwhile, law enforcement officials warned that some 50 Kazakhstani nationals – ISIS fighters – have been sentenced to prison terms and their citizenship would be revoked. They have also warned that anyone who comments or reposts tweets or online statements of banned extremist orga-

nizations, including the political opposition group Democratic Choice of Kazakhstan, would face criminal punishment.

V. FURTHER READING

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Scott Newton, *The Constitutional Systems of the Independent Central Asian States: A Contextual Analysis* (Oxford: Hart 2017)

Dmitry Nurumov and Vasil Vashchanka, “Constitutional Development of Independent Kazakhstan.” In Robert Elgie and Sophia Moestrup (eds.), *Semi-Presidentialism in the Caucasus and Central Asia* (Palgrave Macmillan 2016)

Zhenis Kembayev, “Recent Constitutional Reforms in Kazakhstan: A Move towards Democratic Transition?.” (2017) *Review of Central and East European Law* 42 (4): 294-324

²⁸ Anna Gusarova, “Kazakhstan Moves to Expand, Strengthen National Security Council,” *Eurasia Daily Monitor* 15(22), 13 February 2018, <<https://jamestown.org/program/kazakhstan-moves-expand-strengthen-national-security-council/>> accessed 13 March 2018.

²⁹ Arman Kaliyev, “Kazakhstan eyes new law targeting ‘destructive religious movements,’” *Caravanserai*, 26 February 2018, <http://central.asia-news.com/en_GB/articles/cnmi_ca/features/2018/02/26/feature-02> accessed 13 March 2018.



Kenya

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The year 2017 was tumultuous in Kenya from a political perspective. It was the year when the second general elections were held under its Constitution, enacted in 2010. The country was thus pre-occupied almost the entire year with politicking. It was also the year that the 2010 Constitution demonstrated resilience – or at least was exposed to real threats that it survived. This contribution on the state of liberal democracy – and other constitutional and political developments – documents some notable happenings in the year. It revolves chiefly around the 2017 general elections and concerns the actions of political actors and institutions – inclusive of the reaction of the judiciary on them – and their implications for Kenya’s commitment to liberal democracy. As shall be shown, courts were thrust to the center of political controversies, and the tale of liberal democracy in Kenya would have been very different were it not for their involvement. In summary, 2017 was a year of little triumphs and increasing disappointments for liberal democracy in Kenya under a progressive though seemingly highly aspirational Constitution.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Before discussing the state of liberal democracy in Kenya, it is important to first comment on a reservation that has often been

formulated against liberal democracy and its viability in Africa: the claim that liberal democracy is unsuitable for Africa. Critics of human rights have objected that human rights are incompatible with the ‘communitarian’ nature of African societies, as human rights focus on the individual.¹ Regarding democracy, it has been said that the diverse (multi-ethnic) nature of African societies – coupled with the morally and legally questionable manner in which African states were created – makes liberal democracy of the kind practiced in the Western world unsuitable for Africa.²

While there may be some accuracy in these sentiments, they largely appear to be spurious justifications offered by those who seek to defend corrupt and authoritarian regimes against those who use liberal democracy as the basis for assessing government performance on the continent. In any case, the solution offered by adversaries of liberal democracy has often centered on the type of democratic government to be adopted, but they have not rejected the idea of self-rule, which is at the core of democracy.³ In particular, support has been drummed up by critics of liberal democracy for the form that Arend Lijphart has advocated: consociational democracy.⁴ Also, a culturally differing conception about the place of an individual in society cannot surely be a justification for states to violate and disregard human rights. No wonder that the quest for liberal and democratic governance on the continent continues to be a pursuit of virtually all so-

¹ P Ikuenobe, *The Prospects of Western Liberal Democracy in Africa* (2016) *The Critique*, available at <http://www.thecritique.com/articles/the-prospects-of-western-liberal-democracy-in-africa/> accessed on 13 January 2018.

² *Ibid.*

³ *Ibid.*

⁴ A Lijphart, *Patterns of Democracy* (1999: New Haven: Yale University Press).

cieties. Having made this note, I now report the state of liberal democracy in Kenya and start by supplying a historic-legal context.

In 1991, Kenya repealed section 2A of the Constitution in force at that time that had converted it into a *de jure* single-party state since 1982.⁵ Since then, Kenya has claimed to embrace democratic ‘multi-party’ politics. Periodic general elections have also been conducted every five years. The efforts achieved in 1991 did not, however, seem sufficient to convert Kenya into a full-blown liberal and democratic state. The general elections that were held in 1992 and 1997 have been described as not being free and fair, even by official state reports.⁶ The Kenya African National Union ruled continuously until 2002, when it lost to a coalition of political parties called the National Rainbow Coalition (NARC-Kenya). For the first time in Kenyan history, the dawn of actual democracy had seemingly arisen.⁷

Yet, this outburst turned out to be a short stint in Kenya’s political history. In 2007, Kenya plunged into violence courtesy of disputed elections.⁸ The then-incumbent, Mwai Kibaki, lost to opposition leader Raila Odinga but declined to concede defeat, instead proclaiming himself the winner.⁹ He was subsequently hastily sworn in as President. This despite the fact that Odinga had a clear lead of over a million votes at a time when it was felt that a substantial amount of votes cast had already been counted. Odinga declined to contest Kibaki’s ‘victory’ in court, leading to an escalation of tensions

and a partial breakdown of legal order.¹⁰ Efforts by the state to restore law and order led to extra-judicial killings orchestrated by the state and political actors from both sides of the political divide.

The events of late 2007 and early 2008 resulted in the prosecution of a number of key political players and government officials at the International Criminal Court. In the end, the quest and need for free, fair and credible elections and respect for human rights and democratic guarantees took center stage. This quest was satisfied in formal terms through the enactment of the Constitution of Kenya 2010, which contains ample provisions aiming to secure democracy and democracy-supporting rights from its pathologies, and establishes a robust institution of judicial review.

Against this context, liberal democracy was (mainly) on the decline in 2017 in Kenya because the year was characterized by a return to the country’s pre-2010 authoritarian past. This was first reflected at the nominations stage of the elections that took place in early 2017. During the nominations, it was apparent that party leaders wielded enormous control of political parties. Though elections were conducted by political parties in formal compliance with the Constitution and electoral statutes, they were largely mere formalities.¹¹ Party leaders were accused of imposing their preferred candidates. This track downwards started in 2013, and was reflected in both the ruling party, the Jubilee Party, and the main opposition parties, the Orange

Democratic Movement (ODM), New Ford Kenya, Wiper Democratic Movement and Amani National Congress (ANC).¹²

This also explains why there was a surge of nomination disputes at the Political Parties Dispute Tribunal, an institution that is tasked with the role of determining disputes arising between members of political parties and the parties themselves. In an interview with the *Daily Nation*, the registrar of the Tribunal disclosed that a total of 316 cases had been filed there, 305 of which resulted from political parties’ primaries.¹³ While the involvement of the Tribunal reassured a commitment to democracy by political parties, it was swamped with disputes yet had very few members. Thus, the prospect of efficiently countering authoritarianism within political parties was dealt a blow. Considering the enormous influence that political parties have on geographical locations (where leaders hail from), the Liberal Democratic Party was besmirched in the first instance at the nomination stage.

Authoritarian tendencies were then witnessed during the elections themselves. The general elections were conducted on 8 August 2017. These elections were in respect of presidential, gubernatorial, parliamentary and county assembly seats, and unlike other years, violence was largely not witnessed. The election results were disputed by the leading coalition of political parties, the National Super Alliance (NASA) even before their counting was completed.¹⁴ On this occasion, the elections were conducted using

⁵ J A Widener, *The Rise of a Party-State in Kenya: From ‘Harambee!’ To ‘Nyayo!’* 130-154(1991).

⁶ Government of Kenya, *Report of the Independent Review Commission*, 2009.

⁷ E Kramon, *Vote Buying and Turnout in Kenya’s 2002 Elections* (2009) available at http://cega.berkeley.edu/assets/miscellaneous_files/wgape/17_Kramon.pdf accessed on 3 March 2018.

⁸ Human Rights Watch, *Kenya’s Unfinished Democracy* available at <https://www.hrw.org/reports/2002/kenya2/Kenya1202-01.htm> accessed on 3 February 2018.

⁹ BBC News, *Kibaki named victor in Kenya vote 30 December 2007* available at <http://news.bbc.co.uk/2/hi/africa/7164890.stm> accessed on 3 March 2018.

¹⁰ Karuti Kanyinga and James D. Long, *The Political Economy of Reforms in Kenya: The Post-2007 Election Violence and a New Constitution*, 55 (1) 35, *AFR. ST. REV.* (2012).

¹¹ K Kabatesi, *Sham nominations spew phony leaders 20 April 2017*, *the Star*, available at https://www.the-star.co.ke/news/2017/04/20/sham-nominations-spew-phony-leaders_c1546022 accessed on 3 March 2018.

¹² Nation Team, *Jubilee cancels primaries in all counties 21 April 2017*, available at <https://www.nation.co.ke/news/politics/Jubilee-postpones-primaries-in-10-counties/1064-3898604-d5qm1tz/> accessed on 27 February 2018.

¹³ E Kwamboka, *We did our best with the tight deadlines, disputes team says 2 July 2017*, *Standard Digital* available at <https://www.standardmedia.co.ke/article/2001245750/we-did-our-best-with-the-tight-deadlines-disputes-team-says> accessed on 3 March 2018.

¹⁴ F Olick, *IEBC trashes Raila’s transmission system hacking claims 9 August 2017*, *The Star*, available at <https://www.the-star.co.ke/news/2017/08/09/>

electronic means, and a major complaint was aired through a press conference by NASA's presidential candidate, Raila Odinga, on the transmission of results.¹⁵ His claim was that the results that were transmitted were different from those that had been cast and declared. In the end, the incumbent, Uhuru Kenyatta was declared the President-elect.

The elections of 8 August 2017 were given a clean bill of health by observers, including the European Union.¹⁶ Yet they were described by NASA as a 'sham.'¹⁷ The opposition had at first declined to challenge the validity of the elections before the Supreme Court, citing lack of confidence in the courts. The government also deregistered two influential NGOs operating in Kenya, the Kenya Human Rights Commission (KHRC) and the African Centre for Open Governance (AFRICOG), which had expressed intentions of challenging the elections.¹⁸ Citing their deregistration, NASA then filed its petition at the Supreme Court.¹⁹

The Supreme Court heard NASA's petition and nullified the presidential election, terming it null and void, in the case *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others*.²⁰ In invalidating the election, the Supreme Court, by a majority of 4:2, held that the elections were not conducted in accordance with the Constitution and applicable law.²¹ This decision departed from a precedent

issued in 2013, when the Court ruled on a petition on the first presidential election held under the Constitution of 2010.²² In particular, the court re-engaged with the reasoning in the English case of *Simpson v Morgan* on the circumstances under which a court can annul an election. The Court now clarified that an election can be invalidated not only if it is shown that irregularities/illegals affected the final outcome but also:

'if the election was conducted so badly that it was not substantially in accordance with the law as to elections... irrespective of whether the result was affected.'²³

This decision of the Supreme Court was truly historic. It signaled victory for liberal democracy. For the first time in Kenya's history, a presidential election had been annulled. A fresh election was ordered to be conducted within 60 days. As expected, this decision brought consternation from both sides of the political aisle. It meant that the courts were prepared to counter threats to democracy and that politicians had to be careful about how they went about acquiring power. It also meant that the courts were prepared to defend the Constitution.

Yet the decision of the Supreme Court was not received with excitement by both sides of the political divide. The reaction by the ruling party, Jubilee, demonstrated its lack

of support for democracy. Jubilee, whose 'victory' the Court had nullified, launched a series of political attacks towards the Supreme Court in particular and the judiciary in general. President Kenyatta accepted to go back to the ballot but promised to 'revisit' the Supreme Court.²⁴ This act of threatening the judiciary on the basis of a distorted understanding of the scope of the duty of the Court significantly exposed the Court's institutional insecurity and showed that the ruling party was not prepared to support democracy if that support would threaten its ruling position. Essentially, as Ginsburg and Moustafa have observed elsewhere, Jubilee was reminding the Court to play the role that courts play in authoritarian regimes.²⁵

Besides attacks on the judiciary, Jubilee also initiated several amendments to the election laws via the *Election Laws (Amendment) Bill 2017*. Among other reactive reforms to the decision of the Supreme Court, the bill sought to reduce the decision-making threshold of the electoral body, to vest the powers of the Chairperson of the Commission to the Vice-Chair and to clarify that failure to transmit election results from the polling stations to the national tallying center would not be a basis for invalidating an election. These amendments were proposed just before the repeat elections, and since Jubilee had a parliamentary majority, they would as a matter of course be passed into law. These developments concerned the competition not only

iebc-trashes-railas-transmission-system-hacking-claims_c1613758 accessed on 2 March 2018.

¹⁵ *Ibid.*

¹⁶ M Wairimu, Kenya election was fair, no sign of manipulation - EAC, EU observers 10 August 2017, *The Star*, available on https://www.the-star.co.ke/news/2017/08/10/kenya-election-was-fair-no-sign-of-manipulation-eac-eu-observers_c1614022 accessed on 10 March 2018.

¹⁷ Nation Team, Raila Odinga disputes preliminary results, 9 August 2017, <https://www.nation.co.ke/news/politics/Raila-Odinga-reject-preliminary-results/1064-4050768-lhhnykz/index.html> accessed on 1 March 2018.

¹⁸ S Cheron and D Mwere, NGOs: We were shut over plan to contest poll result in court, 16 August 2017 *Daily Nation*, available at <https://www.nation.co.ke/news/NGOs--We-were-shut-over-plan-to-contest-poll-result-in-court-/1056-4059114-jc5pvc/index.html> accessed on 3 March 2018.

¹⁹ eKLR 2017.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR.

²³ Raila Odinga (n. 19 above).

²⁴ Al Jazeera, Uhuru Kenyatta to court: 'We shall revisit this' 2 September 2017 available at <https://www.aljazeera.com/news/2017/09/uhuru-kenyatta-court-revisit-170902130212736.html> accessed on 2 March 2018.

²⁵ T Ginsburg and T Moustafa, 'Introduction: The Function of Courts in Authoritarian Politics' in T Ginsburg and T Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008: Cambridge University Press) 1.

over the ‘game’ but also over the rules of the game, an attribute not of democracies but of ‘competitive authoritarian’ regimes.²⁶

As a result of this, NASA withdrew from the repeat presidential elections.²⁷ One of the commissioners of the electoral body also resigned, explaining that the Commission was incapable of conducting a free and fair repeat election.²⁸

The Supreme Court was presented with a petition that sought to stop new elections, but the judges did not turn up; hence the Court did not have quorum to hear the request to stop the repeat election. So repeat elections were held on 26 October 2017, and President Kenyatta ‘won’ by a huge margin. Several petitions were filed by individuals and civil society organizations, but they were dismissed. The opposition maintained that there was no election at all and persisted with their claim for electoral justice. It announced that it had converted itself into a resistance movement, pursuing electoral justice.

During this period, civil and political rights were violated by state agencies, let alone protected. After the Supreme Court nullified the elections in the first instance, opposition leader Raila Odinga left the country to deliver a talk in the United Kingdom. Upon his return, several of his supporters sought to welcome him. The government clamped down

on them and several individuals were shot dead.²⁹ On the repeat election date itself, state security officers killed several individuals in the opposition stronghold.³⁰ This period was also characterized by a crackdown and intimidation of opposition politicians. Security personnel and guns assigned to several opposition politicians were withdrawn.³¹

In summary, though the 2010 Constitution of Kenya sets in place norms and institutions aimed at pushing Kenya towards liberalism, liberal democracy has been on the decline if the events of 2017 are anything to go by. With the exception of the judiciary, most institutions that are meant to protect democracy were captured by the ruling party. State violence once again confirmed that liberal democracy in Kenya is from being realized.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

As observed in the introductory paragraph, 2017 was a tense year and it seemed doubtful whether the Constitution could endure amidst what seemed to be an ever-looming political crisis. It began when the NASA withdrew from the elections, insisting that it could not participate in elections it considered a charade. NASA’s Raila Odinga had garnered about 6.7 million votes according to the elections that he declared null and

void.³² This figure shows that Odinga indeed had huge political support and, when he declared that there were not going to be elections on 26 October 2017, no single vote was cast in some counties, inclusive of Homa Bay County, which has a total of 476,875 registered voters.³³ Odinga declined to contest the repeat elections in the Supreme Court.³⁴ This was accompanied by NASA-triggered economic sabotage measures directed at leading private companies that were believed to have been involved in the nullified elections and launched a crusade for civil disobedience.³⁵ NASA also established an extra-constitutional institution, the ‘People’s Assembly,’ as a forum for constitutional reform.³⁶ The assemblies were to discuss matters affecting Kenya, especially the question of electoral justice, and make proposals for constitutional review. At this stage, though the 2010 Constitution was an item of political rhetoric, it is fair to infer that its neglect or change seemed impending.

It can be argued that part of what ‘saved’ the 2010 Constitution was the reaction to the crisis of the institutions it had established. These institutions are the High Court and more importantly the Supreme Court. It has been argued elsewhere that the very decision to annul the presidential election was ‘settling for a lesser evil’ because had it upheld the elections of 8 August 2017, Kenya would most likely have plunged into a full-blown

²⁶ Steven Levitsky and Lucan Way, *The Rise of Competitive Authoritarianism* (2002) 12 (2) *Journal of Democracy* pp. 51-65.

²⁷ R Odinga, Raila Odinga quits: NASA’s full statement 10 October 2017, *Daily Nation*, available at <https://www.nation.co.ke/news/Raila-Odinga-quits-repeat-presidential-election-Kenya-Nasa/1056-4133616-tr6we4z/index.html> accessed on 2 March 2018.

²⁸ J Ngirachu, Roselyn Akombe resigns from poll agency, 18 October 2017, *Daily Nation*, <https://www.nation.co.ke/news/IEBC-commissioner-Roselyn-Akombe-resigns/1056-4144480-7lyoqhz/index.html> accessed on 1 March 2018.

²⁹ Nation Reporter, Five die as police battle NASA supporters welcoming Raila, *Daily Nation*, 17 November <https://www.nation.co.ke/news/politics/5-dead-Nairobi-chaos-Raila-returns/1064-4191684-dxorky/index.html> accessed on 2 March 2018.

³⁰ J Muraya, Police, gangs accused of killing 37 during repeat poll Capital News, 26 February 2017, available at <https://www.capitalfm.co.ke/news/2018/02/police-gangs-accused-killing-37-repeat-poll/> accessed on 3 March 2018.

³¹ M Kakah, MP sues over withdrawal of Raila Odinga, Kalonzo Musyoka security details, *Daily Nation* 26 October 2017, available at <https://www.nation.co.ke/news/politics/MP-sues-Raila-Kalonzo-security-withdrawal/1064-4148410-f5rqf8/index.html> accessed on 3 March 2018.

³² IEBC Registered Voters per Constituency and per County 2017, available at <https://softkenya.com/kenya/iebc-registered-voters/> accessed on 5 March 2018.

³³ G Bwisa, Odinga demands new poll in 90 days, *Daily Nation*, 30 October 2017 <https://www.nation.co.ke/news/politics/Raila-Odinga-demands-new-election-in-90-days/1064-4161358-y8ul1i/index.html> accessed on 4 March 2018.

³⁴ S Owino, Nasa announces boycott of some goods and services, *Daily Nation*, 3 November 2017, available at <https://www.nation.co.ke/news/Nasa-announces-boycott-of-some-products-/1056-4171976-36bpmz/index.html>.

³⁵ *Ibid.*

³⁶ D Odongo, NASA’s People Assembly Motion ready to be moved to counties, <https://www.capitalfm.co.ke/news/2017/11/nasas-people-assembly-motion-ready-to-be-moved-to-counties/> accessed on 3 March 2018.

political crisis with the potential for a breakdown of legal order.³⁷ The opposition had in any case given the Supreme Court a last chance to redeem itself from what it considered as the Court's mistakes of 2013.³⁸ Nullification was reassuring to NASA supporters that all was not lost and that the Constitution was responsive to their grievances.³⁹ This provided an incentive particularly for the opposition to support the constitutional order and the courts. Yet after it announced that it was not going to participate in the elections, the High Court ordered the electoral body to include the names of other contestants in case they filed, and it became possible for an election to be conducted.⁴⁰ It was then that the Supreme Court brought the matter to rest when it determined that the withdrawal of Raila from the elections was not valid and upheld the election of 26 October 2017.⁴¹ The decision of the Supreme Court then invited support for the Jubilee regime by the international community and formed a basis for dissuading NASA from engaging in activities that threatened the constitutional order. On the other hand, when the government started reacting to opposition politicians by withdrawing their firearm licenses, security details or other intimidation tactics like proscribing protests, the High Court countered the state by declaring that what the government was doing was unconstitutional.⁴² Slowly, the threat to the Constitution shriveled and normalcy began to resume.

Though related to liberal democracy, freedom of expression received a boost in 2017 when the High Court declared that criminal

defamation was unconstitutional. The African Union Special Rapporteur on the Freedom of Expression, Pansy Tlakula, had on several occasions called upon African states to repeal legislation that criminalized freedom of expression.⁴³ Her call had not been acted upon by the government of Kenya, like many others. In 2017, Justice Mativo in *Jacqueline Okuta & another v Attorney General & 2 others*⁴⁴ determined that 'criminal defamation is not reasonably justifiable in a democratic society' and continued to 'declare section 194 of the Penal Code as being unconstitutional to the extent that it went outside the purview of the permissible limitation of the freedom of expression in the Constitution of Kenya 2010.'⁴⁵ This decision has significantly expounded the scope of freedom of expression.

The other significant constitutional development besides politics surrounded the thorny issue of the death penalty. Kenya, like many other countries in Africa, has not ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Nonetheless, since 1987 there have not been any executions in Kenya. Kenya has thus retained the death penalty in its statute books and courts have continued to condemn criminals to death, yet none has been executed. There have been several cases filed challenging its constitutionality but none of them has thus far displaced it from the statute books.⁴⁶ The Supreme Court in *Francis Karioko Muruatetu & another v Republic*⁴⁷ was again presented with the issue 'whether

or not the mandatory death penalty is unconstitutional.' The Court found for the petitioners, holding that 'the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is...declared unconstitutional.' The Court did clarify though that its order did not 'disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.' Though the Court did not purge the sentence from the statute books, this decision was seen as an important step towards abolition of the death penalty in Kenya.

There is also wide consensus that the Constitution of Kenya needs to be amended. Previously there have been several amendments that have been tabled in Parliament. There has also been a popular initiative to amend the Constitution. These initiatives have all been unsuccessful. 2018 will hence be a year to wait and see whether any amendments are likely to be successful. Already, a bill has been presented to Parliament seeking to change Kenya's system of government from presidential to parliamentary.

IV. LOOKING AHEAD TO 2018

2018 is not expected to be as tumultuous as 2017, but there are many important developments on the horizon that need to be observed. Mr. Odinga was sworn in as the 'People's President' but has subsequently met Mr. Kenyatta to discuss 'common issues' affecting the country.⁴⁸ It is not known what this means to the grievances that have hither-

³⁷ D M Okubasu, (Ethno-political) Strategic Components of the Supreme Court of Kenya's Presidential Election Decision: Settling for the lesser evil? *Constitution Making and Change Blog*. September 4, 2017.

³⁸ D Okubasu, *The Dilemma Facing Kenya's Supreme Court: An Electoral Dispute in an Ethnically Divided Society*, Int'l J. Const. L. Blog, 27 August 2017.

³⁹ Okubasu (n 37 above).

⁴⁰ *Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others* [2017] eKLR.

⁴¹ *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

⁴² See, e.g., *Hassan Ali Joho v Inspector General of Police & 3 others* [2017] eKLR.

⁴³ Inter-Session Activity Report, Of Advocate. Pansy Tlakula Chairperson & Special Rapporteur on Freedom of Expression and Access to Information in Africa (November 2015–April 2016). Presented during the 58th Ordinary Session of the African Commission on Human and Peoples' Rights.

⁴⁴ [2017] eKLR.

⁴⁵ *Ibid.*

⁴⁶ See, e.g., *Godfrey Ngotho Mutiso v R*, Cr. App No. 17 of 2008.

⁴⁷ [2017] eKLR.

⁴⁸ See R Odinga, Raila Odinga's full statement after meeting President Kenyatta 9 March 2018, Daily Nations <https://www.nation.co.ke/news/Raila-full-statement-meeting-Uhuru/1056-4334956-vossrqz/index.html> accessed on 13 March 2017.

to been formulated by NASA and Odinga relating to ethnic exclusion and electoral fraud and authoritarianism. Immediately after this meeting, the ‘People’s Assembly’ was suspended.⁴⁹

V. FURTHER READING

Yash Ghai, et al., ‘Constitutional Reforms and Judicial Appointments in Kenya,’ in Hugh Corder and Jan van Zyl Smit (eds.), *Securing Judicial Independence: The Role of Commissions in Selecting Judges in the Commonwealth* (2017: Siber Ink, Cape Town) 85-114

Elizabeth A O’Loughlin, Kenya’s Constitution in a global context (2017) 15 (3) *International Journal of Constitutional Law*, 839-848

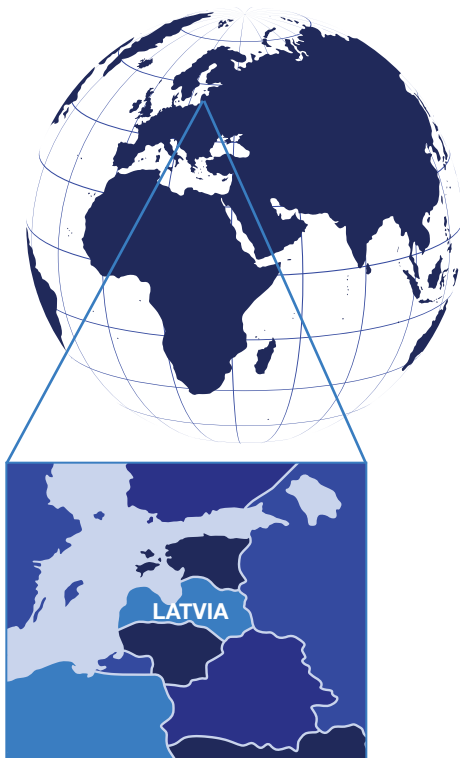
⁴⁹ Constitution of Kenya (Amendments) Bill of 2018.



Latvia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

There are two main avenues for the development of constitutional law in Latvia. First, the case law of the Constitutional Court (hereinafter also CC, the Court). Second, the legal scholarship.¹ At times there are important legislative developments which, however, was not the case in 2017.

The applications submitted to CC in 2017 point to legal issues of different levels of complexity. Significant progress was made in the understanding of what a state governed by the rule of law should be like.

In 2017, the quality of legislative process gradually emerged as the key issue for the further development of a legal system. Not only did a number of cases reviewed by CC in 2017 point to the relevance of the quality of legislative process² but also other activities held in this year: discussions, conferences and the involvement of the President of the State in the legislative process by returning for re-examination laws adopted by the *Saeima* (the Parliament) on six occasions in 2017.

Regular changes in its composition

characterize the Constitutional Court. Predictable and gradual replacement of the Justices of CC is essential for ensuring its effective functioning. In 2017, the composition of CC was partially changed (two out of seven Justices), and the new leadership of the Court was elected – since 8 May 2017, CC has been headed by the President, Prof., Ph.D. Ineta Ziemele, whereas Prof., Dr. iur. Sanita Osipova became the Vice President of the Court.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

In a democratic state, the level (degree) of liberalism is demonstrated by the regulatory enactments that are drafted and adopted and by the understanding of application thereof, compliance with legal principles, activities by constitutional institutions that exercise state power, relationships between them and the possibility for a person to exercise one’s rights.

In a state governed by the rule of law, all these processes proceed within limits set in the Constitution and are subject to judicial

¹ The following should be mentioned as the most important contribution: Commentaries on Chapter III (The President of the State) and Chapter IV (The Cabinet of Ministers) of the Satversme: Ringolds Balodis (red), “Latvijas Republikas Satversmes komentāri. III nodaļa. Valsts prezidents. IV nodaļa. Ministru kabinets” (Rīga: Latvijas Vēstnesis 2017); monograph “Nepārtrauktības doktrīna Latvijas vēstures kontekstā” (Rīga: LZA Baltijas stratēģisko pētījumu centrs 2017), which is an edition jointly created by several historians, lawyers and political scientists focusing on state continuity as the legal basis for restoring Latvia. By using an interdisciplinary approach, the researchers have analysed facts and advanced arguments that provide detailed substantiation of the legal continuity of the State of Latvia also during its occupation.

² For example, the seminar organized by the Commission for Legal Environment Improvement, established by the President, on the possibilities for improving the process of legislation (10.09.2016) <https://www.president.lv/storage/items/PDF/20160912_VestuleSaeimai.pdf> accessed 10 February 2018

review.

Hence, the content of liberal democracy is defined by the Constitution and it is revealed in political decisions and legal regulation. The extent, to which democracy is liberal in real life, in turn, is reflected in the case law of the CC, since CC, as the body that ensures supremacy of the Constitution, by legal means within the limits of its jurisdiction deals with both issues of law and politics, thus becoming an important tool of democratisation in the state.

This report outlines the possible and the current state of liberal democracy in Latvia, i.e., the extent to which the State intervenes in an individual's liberties and the limits of the State's discretion in this regard.

The point of reference for the report is liberal democracy that is rooted in Western culture, i.e., *the Western model of liberal democracy*.³ It ensures not only free elections, property rights and the majority rights (basically, these are political rights) but protects civil rights of minorities; i.e., it ensures an extensive catalog of rights and prevents discrimination as well as equal treatment.

In such liberal democracy the values of liberalism – freedom, tolerance, privacy, constitutionalism and the rule of law – are ensured within the institutional framework existing in a democratic state governed by the rule of law.⁴

Democracy provides the best conditions for the effective exercise of human rights and freedoms.⁵ The close connection of liberal democracy to fundamental rights means that the state, instead of restricting fundamental rights, “wherever possible, should guarantee them in the most extensive scope, accordingly using the available methods of interpretation in such a way as to ensure sufficiently broad application of the content of a legal norm.”⁶

CC has defined in some areas a higher level of human rights protections in the *Satversme* (the Constitution of the Republic of Latvia) compared to international documents, *inter alia*, the European Convention for the Protection of Human Rights and Fundamental Freedoms. For example, the guarantees in the *Satversme* concerning the right to a fair trial are broader and more favorable to a private person than the guarantees of the Convention.⁷ CC has found that the right to a healthy environment, similar to other fundamental rights included in Chapter 8 of the *Satversme*, must be applied directly and immediately.⁸ The principle of equality, included in a norm of the *Satversme*, is assessed as a right that functions directly.⁹

In cases in 2003 and 2005,¹⁰ it was recognized that a related person could be denied the right to access the Court with regards to access to state secrets. Whereas in 2017¹¹ it was found that the social reality and the context of legal relationships had changed and that a general prohibition of an independent

review regarding matters pertaining to official secrets no longer complied with the procedural justice protected by the first sentence of Article 92 of the *Satversme*.

In the judgment regarding the obligation to fly the national flag on residential buildings, the Court examined the scope of negative freedom of expression, in particular, the obligation of a state to refrain from arbitrary interference with this freedom. In this case, the Court noted that a flag as the symbol of the State was an integral element of the constitutional and international identity of the State of Latvia and that flying the flag on residential buildings owned by natural persons facilitated the protection of the democratic state order. The Court recognised that the obligation to fly the national flag on residential buildings consolidated this notion and, thus, also the democratic Republic of Latvia, where fundamental rights could be effectively exercised; however, envisaging a penalty to ensure that an obligation of a civic nature was complied with should be recognised as proportionate only in exceptional cases. Sanctioning a person for holding an opinion was impermissible in a democratic society. The Court noted that in a democratic state, preconditions should be created for a voluntary performance of civic obligations that is not based on a fear of punishment. If the existing legal order in the state ensures that an individual is not punished for expressing one's opinion or for refraining from doing so in a legal way,

³ Sharun W. Mukand, Dani Rodrik, “The Political Economy of Liberal Democracy” (2017)

<file:///C:/Users/WinUser/Documents/Global_Review_of_Constitutional_Law_2017/SSRN-id2973082_labs_2.pdf> accessed 10 February 2018

⁴ Liberal democracy in the broader meaning is understood as a democratic order, where an individual's inalienable rights, which are enshrined in the national constitution, are respected and, thus, determine the relationship between the power structures and an individual.

⁵ CCRL 02.07.2015, 2015-01-01 [15.1]

Note: Unless indicated otherwise, all Judgements and Decisions referred to in the footnotes are by the Constitutional Court of the Republic of Latvia (CCRL). The full texts in English are available here <<http://www.satv.tiesas.gov.lv/en/cases/>>

⁶ Ineta Ziemele, *Cilvēktiesību īstenošana Latvijā: tiesa un administratīvais process* (Rīga: Latvijas Universitātes Cilvēktiesību institūts 1998)

⁷ Article 92 of the *Satversme* imposes upon the State the obligation to ensure the right to a fair trial in all cases where the dispute concerns a person's individual rights that follow from external legal norms and lawful interests, including relationships that follow from performance of public administration functions as well as constitutional matters. Article 92 of the *Satversme* envisages a broader scope of the right to appeal compared to the Convention. Article 92 of the *Satversme* does not limit the right to legal proceedings only to definite fields or branches of law. It pertains not only to “criminal cases” and “civil cases” but to any “rights and lawful interests” of a person.

⁸ CCRL 08.02.2007, 2006-09-03 [11]

⁹ CCRL 22.02.2002, 2001-06-03 [3]

¹⁰ CCRL 23.04.2003, 2002-20-0103; 17.10.2005, 2005-07-01

¹¹ CCRL 10.02.2017, 2016-06-01

then the optimum legal environment for an individual's self-expression is ensured.¹²

Over the years of constitutional development, two principles have emerged that can be seen as the outer limit of liberalism. First, the CC recognized that Latvia may need to resort to the notion of self-defensive democracy. Second, both the doctrine and the CC developed a concept of constitutional identity. This is why all elements that characterize liberalism must be examined in the framework of first, a self-defensive democracy and second, the principle of constitutional identity.

Given the fact that full democracy is impossible outside a state, the existence of the state itself is one of the values in a democratic state. If the society has accepted the principle of liberal democracy, then it cannot abolish it democratically, i.e., through the means provided by liberal democracy. The liberal democracy is a self-defensive democracy, and it has an obligation to ensure, by all legal means, its existence and prevent threats to its existence. Hence, the scope of liberal values is, first of all, influenced by the requirements of a self-defensive democracy.

Article 116 of the *Satversme* defines the clause on restricting fundamental rights envisaging protection of the democratic state order as one of the legitimate aims of restricting a person's rights. In this framework, the CC has examined the restrictions of human rights set in law for supporters and representatives of the totalitarian regime to act in democratic institutions¹³ and to be in the civil service¹⁴ as well as the restrictions on election rights of the persons who have actively attempted to undermine the democratic state order.¹⁵

The CC in its case law has adhered to the finding that the exercise of human rights may not be turned against the democracy as such.¹⁶ In one of its most recent judgments, in which loyalty to the Republic of Latvia and its *Satversme* was examined, CC noted: “[a]lthough since the restoration of independence, democratic values and civil society have been consolidated in Latvia, the State, in view of the historical experience, must continue providing special care to protect the values of democracy and enshrine these in the field of education.”¹⁷

The second essential element that influences the scope of liberal values is constitutional identity. Latvia's constitutional identity is founded on the basic norm and the principles derived from it are included in the *Satversme*.

In Latvian legal science, serious discussions about the concept of “constitutional identity” were initiated by the Constitutional Law Commission convened by the President of Latvia, which in 2012 elaborated the opinion “On the Constitutional Foundations and Inviolable Core of the State of Latvia.”¹⁸

Although many elements of constitutional identity already have been enshrined in the *Satversme* since its adoption and others were introduced later (for example, Latvian as the only official language was defined in Article 4 of the *Satversme* in 1998), amendments to the *Satversme* of 2014, adding to it an elaborated text of the Preamble, are to be considered a contribution to clarifying important constitutional identity. The text includes turning points in the history of the Latvian nation as well as most important constitutional values.

Before the Preamble to the *Satversme*

was adopted, CC had been searching the constitutional values and principles in the norms of fundamental rights and Article 1 of the *Satversme*: “Latvia is an independent democratic republic.”

Thus far, the CC has not yet defined a clear concept of the constitutional identity but, by analyzing various elements of the constitutional identity, has started applying the amended Preamble to the *Satversme*.

CC has defined elements of constitutional identity: i.e., the State of Latvia is based on such fundamental values that comprise fundamental rights and freedoms, democracy, the sovereignty of the state and the people, separation of powers and the rule of law.¹⁹ CC examines liberal values and reviews restrictions on human rights within this framework defined by the constitutional identity.

The openness to international law, including international human rights standards, must also be examined in view of constitutional identity.

At the same time, this first principle has certain limits because openness may not undermine Latvia's constitutional identity. An example of such a core constitutional value is the Latvian language as the State's only official language. CC has noted *expressis verbis* that “the Latvian language as the official language is an integral part of the constitutional identity of the State of Latvia.”²⁰

The official language is an element of constitutional identity that has been most often examined in the case law of CC; thus, protection of the Latvian language as

¹² CCRL 02.07.2015, 2015-01-01

¹³ CCRL 22.03.2005, 2004-13-0106 [13.1]

¹⁴ CCRL 11.04.2006, 2005-24-01

¹⁵ CCRL 30.08.2000, 2000-03-01; 15.06.2006, 2005-13-0106

¹⁶ *Ibid.*

¹⁷ CCRL 21.12.2017, 2017-03-01 [19.2]

¹⁸ Konstitucionālo tiesību komisija viedoklis, „Par Latvijas valsts konstitucionālajiem pamatiem un neaizskaramo *Satversmes* kodolu” (17 September, 2012) <http://www.president.lv/images/modules/items/PDF/17092012_Viedoklis_2.pdf> accessed 10 February 2018]

¹⁹ CCRL 07.04.2009, 2008-35-01 [17]

²⁰ CCRL 17.11.2017, 2017-01-01 [16]

a constitutional value is part of the concept of self-defensive democracy and it has influenced examination of the proportionality of the restrictions on various human rights: the inviolability of private life;²¹ equal treatment;²² the right of minorities to safeguard and develop their language, ethnic and cultural specificity;²³ and the right to freedom of speech.²⁴ These belong to the content of liberal democracy.

CC has pointed out that the State is required to perform positive obligations and to intensify protection of the official language use.²⁵ The principle of the nation-state now part of the amended Preamble not only imposes a negative obligation on the State to refrain from doing anything that could weaken the identity of Latvia but also, and in particular, positive obligations to strengthen it in all possible ways. The State has an obligation to use all measures to ensure that the Latvian language will, indeed, fulfill its functions of the official language – the common language of communication for the society and the language of democratic participation.²⁶

The CC has introduced a strict test with respect to absolute restrictions on human rights. This step can be considered as liberal in terms of protection of human rights.

CC recognized already in 2006²⁷ that inflexible restrictions on fundamental rights established in legal norms as absolute prohibitions could seldom be recognized as the most lenient measure since it was difficult for the party applying the legal norm to apply the respective norm reasonably in the particular circumstances. In 2017, in turn, CC examined a case in which an absolute prohibition to

work as a teacher for any person who had been punished for deliberately committing a serious or a particularly serious crime was examined. This prohibition of a human right was recognised as being disproportionate and it was found²⁸ that the legislator, in establishing an absolute prohibition, had an obligation to examine and to substantiate that the absolute prohibition was the only possible way for reaching the legitimate aim of the restriction on fundamental rights established in a legal norm.

The development of CC's case law has been similar also with respect to issues of the right to a fair trial in cases related to official secrets (see above).

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

An overview of the whole case law of CC in 2017 can be found in the Report on CC's work in 2017,²⁹ which, to a certain extent, can be considered as being "the barometer of the rule of law" in the State. In this report, only some issues are examined.

Article 267 of the Treaty on the Functioning of the European Union envisages a dialogue between the Court of Justice of the European Union and the national courts within the framework of the procedure of preliminary ruling. In 2017, CC for the first time became involved in this formal dialogue by forwarding a question to the Court in Luxembourg. Whereas Protocol 16 to the European Convention for the Protection of Human Rights and Fundamental Freedoms,

which, regrettably, has not been ratified in Latvia yet, envisages a new mechanism of formal dialogue within the system of protection of human rights included in the Convention – the possibility for the national supreme courts to request an advisory opinion from the European Court of Human Rights. Currently, the dialogue between CC and ECHR proceeds informally – as discussions within the frameworks of particular cases. A brief insight into the dialogue between CC and ECHR concerning restrictions on voting rights is provided in the next section of the report.

In 2017, CC dealt with issues pertaining to relationships between constitutional institutions. In the fifth case before it,³⁰ CC examined the system of judges' remuneration and the principles of its functioning. In this case, CC consistently applied Article 83 of the *Satversme*, which provides: "Judges shall be independent and subject only to the law," to define those principles that the judges' remuneration system should comply with. In addition to that, the content of the principle of separation of power was explained as well as the need for a proper dialogue between the constitutional institutions. It is important that the Council for the Judiciary submitted the application in this case, exercising this right for the first time.

CC has often examined the issues of the state budget in conjunction with regulation on taxes because taxes predominantly fulfill a fiscal function, ensuring revenue of the state budget and the budgets of local governments.

CC has examined compliance of regulations on various taxes with the *Satversme*:

²¹ CCRL 21.12.2001, 2001-04-0103

²² CCRL 14.09.2005, 2005-02-0106

²³ CCRL 13.05.2005, 2004-18-0106

²⁴ CCRL 05.06.2003, 2003-02-0106

²⁵ CCRL 14.09.2005, 2005-02-0106 [15.3]

²⁶ CCRL 17.11.2017, 2017-01-01 [16]

²⁷ CCRL 23.11.2006, 2006-03-0106

²⁸ CCRL 24.11.2017, 2017-07-01

²⁹ Annual Report 2017 is available here <<http://www.satv.tiesa.gov.lv/en/2018/03/01/annual-report-2017/>>

³⁰ CCRL 26.10.2017, 2016-31-01

establishing the obligation to pay a new tax³¹ as well as revoking previously established tax exemptions.³²

CC has noted in its rulings that establishment of taxes is an exclusive competence of the legislator.³³ The Saeima, in defining and implementing its tax policy, enjoys broad discretion. It comprises the right to choose tax rates and categories of persons to whom these apply as well as to define the details of the respective regulations. However, tax regulations should be substantiated by objective and reasonable considerations.³⁴

It has been recognized in the case law of CC that the obligation to pay a tax always means restrictions on the property right and could also be linked to other restrictions established by law, which should be proportionate to the legitimate aim – protecting values of constitutional importance.³⁵ Thus, CC predominantly examined whether the tax payment was not an incommensurate burden for the addressee and whether the legal regulation on taxes complied with general legal principles.³⁶

In 2017, CC examined in two cases³⁷ compliance of the tax regulation with the *Satversme*, i.e., the constitutionality of the solidarity tax (a special income tax for high-income persons). The judgment in case No. 2016-14-01 comprises a new approach in relation to the legislator's constitutional obligation in the field of tax policy. The CC has underscored the importance of the concept of a sustainable economy in a democratic state governed by the rule of law in defining the principles that the legislator must comply with in the field of tax policy.

CC has clearly defined that, in the field of tax law, the legislator must abide by the principles of effectiveness, justice, solidarity and timeliness. The State's obligation to implement fair, solidarity-based, effective and timely taxation policy to ensure public welfare follows from the principle of a socially responsible state.

Also, the content of the solidarity principle is specified for the first time in this judgment. This judgment can be considered as being a turning point in CC's case law in the field of tax law since a tax rate was found to be incompatible with legal norms of higher legal force for the first time.

IV. LOOKING AHEAD TO 2018

CC will have to examine whether restrictions on passive election rights for the supporters and representatives of the totalitarian regime established in a law comply with the *Satversme*.³⁸ In fact, this case will continue the dialogue of ECHR and CC regarding proportionality of the restriction on passive election rights defined in the *Saeima* Election Law.

CC examined this restriction for the first time in 2000, recognizing this norm as being compatible with the *Satversme* and the Convention, substantiating this by the need to protect the democratic order, at the same time pointing out to the legislator that a term for such a restriction should be set. The European Court of Human Rights,³⁹ however, decided that the Convention had been violated. ECHR did not discern a threat to the State of Latvia, its national security

or the democratic state order. The Grand Chamber of ECHR, in turn, analyzing, *inter alia*, CC's judgment, decided⁴⁰ that the Convention had not been violated. CC repeatedly reviewed this norm in 2006⁴¹ and again recognized this norm as being compatible with the *Satversme* and the Convention and underscored the need to review its necessity within as short a time as possible.

In 2018, the *Saeima* must implement CC's judgment in the case regarding judges' remuneration by developing a new system of judges' remuneration that would ensure a system of checks and balances between the branches of power and the principle of judges' independence.

³¹ CCRL 03.07.2015, 2014-12-01

³² CCRL 25.03.2015, 2014-11-0103; 13.12.2011, 2011-15-01

³³ CCRL 06.12.2010, 2010-25-01 [10]

³⁴ CCRL 20.05.2011, 2010-70-01 [9]

³⁵ CCRL 11.04.2007, 2006-28-01 [19.1]

³⁶ CCRL 08.06.2007, 2007-01-01 [24]

³⁷ CCRL 19.10.2017, 2016-14-01; 16.11.2017, 2016-16-01

³⁸ CCRL 2017-25-01

³⁹ *Ždanoka v Latvia* App no 58278/00 (ECHR 17 June 2004)

⁴⁰ *Ždanoka v Latvia* App no 58278/00 (ECHR, 16 March 2006)

⁴¹ CCRL 15.06.2006, 2005-13-0106



Lichtenstein

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I. INTRODUCTION

Liechtenstein, which is considered in this review for the first time, is a fascinating jurisdiction: it is a microstate and a very traditional monarchy in the heart of Europe; it is a jurisdiction owing partly to the Swiss and partly to the Austrian legal system that were transplanted into a yet “autochthonous”¹ context. Legal comparison plays a large role in constitutional case law, which also has to take the ECHR, the law of the European Economic Area (EEA) and other pieces of international law into account. While Liechtenstein, being still one of the wealthiest countries of the world, is a significant international financial center, it is also inhabited by down-to-earth citizens whose traditions include strong instruments of direct democracy as well as a monarch who, in constitutional terms,² even today “shares” sovereignty with the people. A tiny but solid rock in a disturbing world, Liechtenstein and its Constitution, which dates back to 1921, by and large remained unchanged in 2017. Nevertheless, the parliamentary elections that took place entailed some, though not decisive shifts between the parties and invoked debate on the representation of women in political bodies. While the new government program did not set out any dramatic proposals for reform, constitutional case law dealt with, *inter alia*, a number of procedural rights based on an overall rather dynamic and Europe-friendly interpretation.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

1) General remarks

2017 did not bring major changes to liberal democracy in Liechtenstein. Neither constitutional reforms nor noteworthy political reform plans appeared on the agenda. Some important constitutional cases were, however, dealt with by the State Court (*Staatsgerichtshof*), which, since 1921, has exercised judicial review in Liechtenstein (cf. Art. 104 Constitution). Historically, the State Court was the third specialized constitutional court empowered to judicial review worldwide, next to the constitutional courts of Austria and Czechoslovakia. The legal position of the State Court differs, however, from that of the Austrian Constitutional Court and rather approaches that of the German Constitutional Court inasmuch as individual complaints³ against decisions of the Liechtenstein supreme courts (the Supreme Court regarding civil and criminal matters and the Administrative Court regarding administrative matters) may be lodged with the State Court.

Liechtenstein supreme courts (the Supreme Court regarding civil and criminal matters and the Administrative Court regarding administrative matters) may be lodged with the State Court.

¹ Cf. Anna Gamper, ‘Autochthoner versus europäischer Konstitutionalismus? Ein Streifzug durch die liechtensteinische Verfassung’ in Hubertus Schumacher and Wigbert Zimmermann (eds.), *90 Jahre Fürstlicher Oberster Gerichtshof. Festschrift für Gert Delle Karth* (Jan Sramek Verlag 2013) p. 263 et seq.

² Art. 2 Constitution.

³ Art. 15 State Court Act.

According to Art. 105 Constitution, the State Court consists of five judges and five substitute judges. The President of the State Court and the majority of judges must be citizens of Liechtenstein.

Traditionally, the panel of judges has been composed of three citizens of Liechtenstein, one Swiss and one Austrian.⁴ The possibility of foreign lawyers to become judges of the State Court was commended as “both bold and exemplary” by Peter Häberle.⁵

2) The “access to law” on the test bench

In 2017, the State Court’s case law mainly dealt with the consequences of the refugee crisis. In 2015 and 2016, even Liechtenstein as a microstate was affected by a considerably increased number of refugees, which also had impact on the duration of asylum procedures. With a view to accelerate the procedure, the lawmaker amended § 65 Civil Procedure Act,⁶ which is also applicable to procedures before administrative authorities and courts⁷ as well as before the State Court.⁸ The amendment specified that the application for legal aid could not be made prior to the writ introducing the procedure. The amended Art. 83 para. 1a Asylum Act⁹ specifically provided that the application for legal aid could earliest be made together with the introductory writ (i.e., the application for asylum) or the complaint (against a negative decision), respectively, and that the application for legal aid would be treated when the decision on the principal cause was made.

These amendments entered into force on 1 January 2017. Both their aim and the ensuing fundamental rights problems were evident: in complaint procedures, the requirement to lodge the application for legal aid only with the complaint against the negative decision on asylum, and not prior to it, prevented the possibility to decide firstly on the question of legal aid and only afterwards on the principal question. Even though this measure serves the purpose of accelerating the procedure, it puts asylum seekers at risk to find, in a microstate and within the time limit granted for lodging a remedy against a negative decision, solicitors willing to undertake their defense while it is uncertain that their clients receive legal aid.

In its decision StGH 2017/33, rec. 2.3, the State Court expressed concerns on this matter. This case, however, was to be decided on the basis of the previous legal situation. The amended law did not apply in this case, which induced the State Court to state only that it did not have occasion to deal with the constitutionality of Art. 83 para. 1a Asylum Act. The decision StGH 2017/45, however, was based on a case in which an asylum seeker had herself formulated a writ in Albanian, which was rejected by the Administrative Court. In this decision, the State Court held that the asylum seeker was violated in her right to an effective remedy (Art. 43 Constitution) inasmuch as the Administrative Court, instead of asking her to improve the writ, had simply rejected it. The question whether Art. 83 para. 1a Asylum Act (and, possibly, also § 65 Civil Procedure Act) was constitutional was not

dealt with in this decision. This question will, however, soon be resolved: on 4 December 2017, the State Court¹⁰ decided to examine the constitutionality of Art. 83 para. 1a Asylum Act and to ask the Government for a statement on this provision. The State Court asked the Government explicitly how a complainant who was not assisted by a lawyer could be expected to lodge a complaint in line with the necessary legal requirements when the remedy could only be expected to be effective, according to Art. 43 Constitution, if it was given sufficient legal aid. The State Court’s final decision on this question is to be expected in spring 2018.

“Access to law” was also a main theme in the State Court’s decisions StGH 2016/113 and StGH 2017/44, which dealt with the claims of legal persons to be granted legal aid. Already in its decision StGH 2014/61, the State Court had held that a general exclusion of legal persons from claims for legal aid had not been compatible with the right of access to law as guaranteed by, *inter alia*, Art. 6 ECHR.¹¹ It was, however, not easy for the lawmaker to revise the relevant provisions in §§ 63 *et seq.* Civil Procedure Act accordingly. The significance of the financial sector in Liechtenstein – in particular, trusts – entails a large number of legal persons. These sometimes lose their means as soon as the invested money is spent. As a consequence, the state may face considerable financial obligations due to claims for legal aid made by such legal persons. § 63 para. 2 Civil Procedure Act¹² provides that a legal person, amongst other criteria applicable also to physical persons, should only receive legal

⁴ Cf. Peter Bussjäger, ‘Eigenständige Verfassungsdogmatik am Alpenrhein? Der Einfluss österreichischer und schweizerischer Staatsrechtslehre am Beispiel des Staatsgerichtshofes’ in Sebastian Wolf (ed.), *State Size Matters. Politik und Recht im Kontext von Kleinstaatlichkeit und Monarchie* (Springer 2016) p. 15, p. 17 *et seq.*

⁵ Peter Häberle, ‘Der Kleinstaat als Variante des Verfassungsstaates. Eine rechts- und kulturwissenschaftliche Skizze’ in Arno Waschkuhn (ed.), *Kleinstaat. Grundsätzliche und aktuelle Probleme* (Verlag der Liechtensteinischen Akademischen Gesellschaft 1993) p.121, p. 163. See also Hilmar Hoch, ‘Staatsgerichtshof und Oberster Gerichtshof in Liechtenstein’ in Hubertus Schumacher and Wigbert Zimmermann (eds.), *90 Jahre Fürstlicher Oberster Gerichtshof. Festschrift für Gert Delle Karth* (Jan Sramek Verlag 2013) p. 415.

⁶ LGBl. (Law Gazette) 2016 No. 405.

⁷ Art. 43 Management of Administration Act, LGBl. 1922 No. 24.

⁸ Art. 38 para. 2 und Art. 103 State Court Act, LGBl. 2004 No. 32.

⁹ LGBl. 2016 No. 411.

¹⁰ StGH 2017/82 and 83.

¹¹ See, with more detail, Maximilian Maier, ‘Zur Verfassungskonformität des liechtensteinischen Verfahrenshilferechts juristischer Personen’ (2017) 2 Liechtensteinische Juristen-Zeitung p. 31 *et seq.*

¹² LGBl. 2015 No. 368.

aid if “the omission of legal proceedings or legal defense would adversely affect general interests”. In decisions StGH 2016/113 and StGH 2017/44, the State Court examined whether the rather vague wording “general interests” was constitutional. The State Court held, however, that it was possible to interpret the provision in a manner consistent with the Constitution.¹³ Thus, the individual interest of a legal person to have access to law ought to be considered when the question of whether the omission of legal proceedings or legal defense adversely affects general interests was treated. The State Court ordered the courts and administrative authorities to provide a balancing of interests in which different aspects should be weighed. These should include macroeconomic disadvantages or the social impact of omitted legal proceedings, but also other public interests such as the clarification of a legal question of general relevance or a consideration of Liechtenstein’s need to be a trustworthy country both regarding finances and the judicial system.¹⁴

A final case on “access to law” demonstrates the significance of legal comparison for Liechtenstein as a microstate: large parts of the legal system of Liechtenstein are transplants from Austrian and Swiss law. The State Court holds in its standing

case law that, when transplanted law is interpreted, the doctrine and case law of the original legal system must be considered; deviations must be based on reasonable justification.¹⁵ The State Court’s decision StGH 2017/52 confirmed the standing case law: in this case, the question was raised if the non-appealability of a judicial decision on the value of a claim¹⁶ violated the right to an effective remedy. The State Court considered it relevant that Austrian law¹⁷ provided for an identical restriction of remedies which had already been criticized by Austrian doctrine with regard to Art. 6 ECHR (due to the absence of a right to be heard, for which no appeal was provided, but also because a wrong assessment of the value in dispute could prevent access to law).¹⁸ Finally, however, the State Court held that the provision was within the lawmaker’s political margin of appreciation and was no disproportional limitation of the right to an effective remedy (Art. 43 Constitution).¹⁹ The State Court explicitly referred to the Austrian Constitutional Court that, in a recent decision,²⁰ had also found the identical Austrian provision to be constitutional.²¹

3) State Court and EFTA Court

Liechtenstein is, together with Switzerland,

Iceland and Norway, a member of the EFTA, but also Party to the Agreement on the European Economic Area (EEA), which was ratified by the EU member states as well as Iceland and Norway.²² According to case law and doctrine, the law contained in this agreement, its annexes and protocols takes precedence over the constitutional law of Liechtenstein since it had the effect of “substantive” constitutional amendment.²³ Domestic law that is contrary to EEA law was repealed by the State Court as “contrary to the EEA law and the Constitution, respectively”.²⁴

Due to its intergovernmental nature,²⁵ the EEA agreement has a “two-pillar structure”.²⁶ The first pillar consists of the EU institutions; the second pillar those of the EFTA. Law enforcement is carried out by the EFTA Surveillance Agency and the EFTA Court.

According to Art. 34 para. 1 Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice,²⁷ the EFTA Court delivers expert opinions on the interpretation of the EEA agreement. If such a question is raised before the court of an EFTA member state and if this court needs a preliminary opinion in order to reach its own decision, it may submit the question to the EFTA

¹³ On consistent interpretation see below II.4.

¹⁴ StGH 2016/113, rec. 4.3; StGH 2017/44, rec. 3.3.

¹⁵ See StGH 2010/78, rec. 2.4.2; StGH 2009/50, rec. 2.6, according to which deviations from doctrine and case law of the original legal system should only be allowed if strong justification was made. Accordingly, the State Court does not demand sophisticated reasons as long as a court adheres to the transplanted law. Special justification is needed, however, if a deviation is deemed to be necessary (see StGH 2010/78, rec. 2.4.2; StGH 2009/200, rec. 3.4.1 referring to StGH 2006/24, rec. 3.5).

¹⁶ Art. 8 para. 4 sent. 3 Act on Solicitors’ and Legal Agents’ Fees of 16 December 1987, LGBl. 1988 No. 9.

¹⁷ § 7 Act on Solicitors’ and Legal Agents’ Fees.

¹⁸ See StGH 2017/52, rec. 5.6.1 and 5.6.3.

¹⁹ StGH 2017/52, rec. 5.8.8.

²⁰ VfGH 15 March 2017, G 219-220/2016-19.

²¹ StGH 2017/52, rec. 5.8.8.

²² Previously, Switzerland, as the fourth EFTA state, should also have acceded to the EEA, but failed to do so on account of the referendum of 6 December 1992, in which a very narrow majority of 50,3% voted against membership of Switzerland in the EEA.

²³ Cf. Peter Bussjäger and Christian Frommelt, ‘Europäische Regulierung und nationale Souveränität. Praxisfragen zur Übernahme europäischen Rechts ausserhalb der EU’ (2017) 2 Liechtensteinische Juristen-Zeitung p. 40.

²⁴ See StGH 2006/94 regarding the only case to date in which the State Court formally repealed a domestic law because it was contrary to EEA law.

²⁵ See Bussjäger and Frommelt (n 23) p. 40.

²⁶ With more detail, Carl Baudenbacher, ‘Grundfreiheiten und Grundrechte im EWR-Recht’ in Andreas Kley and Klaus A. Vallender (eds.), *Grundrechtspraxis in Liechtenstein* (2012) p. 775, p. 780.

²⁷ LGBl. 1995 No. 72.

Court in accordance with Art. 34 para. 2. There is, however, no legal obligation to submit the question, and neither is the EFTA Court's opinion automatically binding.²⁸ Doctrine on EEA law has, however, held for some time that courts were not at liberty to decide whether to ask the EFTA Court for an opinion or not.²⁹

The State Court has severally submitted questions to the EFTA Court.³⁰ In its decision StGH 2017/50, the State Court had to answer the question whether the Administrative Court's omission to ask the EFTA Court for an opinion on a matter which concerned the interpretation of the EU Environmental Impact Assessment Directive was a violation of the right to a lawful judge.³¹

Still, the State Court held in its decision StGH 2017/50, rec. 2.3 that a violation of the right to a lawful judge had not taken place, since an explicit obligation to submit such questions had not been agreed upon by the Parties. The State Court, however, referred to its decision StGH 2013/172, rec. 2.1, according to which a complainant's request to submit the question and to interrupt the individual complaint procedure would have to be accepted under two conditions, namely uncertainty of the relevant law and relevance of the legal question for the decision. Liechtenstein's courts would, therefore, need to submit questions to the EFTA Court whenever they had to interpret unclear EEA law that was relevant to the decision. In this case, they would also have to consider the EFTA Court's opinion. Non-submission could violate the prohibition of arbitrary actions which, according to the State Court's

standing case law, constitutes an unwritten fundamental right. This was also supported by the argument that a national court of last instance that refuses to submit without reasonable justification violates the loyalty principle under Art. 3 EEA agreement which is also binding for national courts. In the concrete case, the State Court denied a violation of the prohibition of arbitrary actions since the Administrative Court had based its decisions on reasonable arguments so that there was no uncertainty regarding the applicable EEA law.

4) *Constitutional substitution of legal lacunae by the State Court?*

Like other constitutional courts, constitutional interpretation plays a significant role in the State Court's case law. In its decision StGH 2016/144, the State Court dealt with § 235 Criminal Procedure Act according to which every custodial sentence of more than one year could be appealed at the Supreme Court (as third instance) while an appeal was not admitted against the unlimited institutionalisation of dangerous criminals, since, in traditional criminal law, this was not understood as a custodial sentence, but a preventive detention. The State Court held this to be an unconstitutional violation of the equality principle.³²

§ 235 Criminal Procedure Act was, however, not repealed, as the State Court examined whether consistent interpretation was possible.³³ In principle, the State Court held that consistent interpretation was not allowed if the clear wording and the lawmaker's intentions were contrary to

the Constitution.³⁴ In the respective case, however, consistent interpretation was deemed to be possible since the term "custodial sentence" could be construed in a manner which included every deprivation of liberty imposed by a court. Moreover, the State Court held³⁵ that the same would have applied if consistent interpretation had been impossible in the concrete case, since it was contrary to the wording and the alleged lawmaker's intentions. In this hypothetical case, the State Court would have supposed this to be an unconstitutional qualified silence of the lawmaker and applied the following formula: since the State Court could repeal unconstitutional "positive" law, it must also be allowed to overrule the lawmaker's unconstitutional qualified silence and to substitute the lacuna in a constitutional manner.³⁶

This decision, which is in line with the standing case law of the State Court, is worth mentioning because the doubtful constitutionality of the "consistent substitution of lacunae" vis-à-vis the separation of powers even became the object of a so-called "minor interpellation" in the Parliament of Liechtenstein.³⁷ In his answer of 10 November 2017, Prime Minister Adrian Hasler confirmed that the question, whether the State Court might act as a remedial "positive" legislator (and not just a "negative" legislator) was legitimate. According to the Government, the separation of powers obliged the State Court to exercise the widest possible self-constraint in this regard.

The discussion has, as yet, not been

²⁸ Baudenbacher (n 26) p. 785 et seq.; see also Tobias Michael Wille, *Liechtensteinisches Verfassungsprozessrecht* (Verlag der Liechtensteinischen Akademischen Gesellschaft 2007) p. 632 and StGH 2013/172, rec. 2.1.

²⁹ Cf. Baudenbacher (n 26) p. 786 et seq.

³⁰ Cf. the cases related to StGH 2013/44 and StGH 2014/57.

³¹ According to the standing case law of the Austrian Constitutional Court (see already VfSlg 14.607/1996), the right to a lawful judge will be violated if the ECJ is not asked for a preliminary ruling on a question demanding such a ruling.

³² StGH 2016/144, rec. 2.4.

³³ On the practice of consistent interpretation, see above II.2.

³⁴ Rec. 2.5 referring to StGH 2012/176, rec. 9.2.

³⁵ Rec. 2.6.

³⁶ The State Court referred to StGH 2013/02, Rec. 2.3; StGH 2010/69, rec. 3.2; StGH 2009/168, rec. 2.3.2.

³⁷ "Kleine Anfrage Normenkontrollkompetenz des Staatsgerichtshofs des Landtagsabgeordneten Johannes Hasler" of 8 November 2017. More concretely, the question referred to another decision of the State Court (StGH 2016/5).

continued. It is remarkable, however, that the Parliament as well as the Government critically view the State Court's approach to change the wording of norms through consistent interpretation. Viewed against the balance of powers, this critique is legitimate. The Parliament may, however, at any time react and revise an interpretation adopted by the State Court, if deemed to be wrong, through a respective legal amendment.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The election to the Parliament of Liechtenstein (*Landtag*) of 5 February 2017 brought a major loss (4.8%) for the Progressive Party of Citizens (*Fortschrittliche Bürgerpartei*), even though it is still the strongest party, holding nine mandates (out of just 25) and also providing the Prime Minister. The Patriotic Union (*Vaterländische Union*), with a surplus of 0.2%, holds its previous eight mandates and the Independent (*Die Unabhängigen*) achieved a surplus of 3.1%, and five mandates. The second opposition party, called the Free List (*Freie Liste*), with a surplus of 1.5%, keeps its three mandates.

More surprising, however, was the failure of female candidates. The traditionally low female quota of just five female members of Parliament (20%) was reduced to three mandates, which entailed a fervent discussion on how the representation of women in political bodies could be increased. One reason is seen in the fact that very few women volunteer for political

functions; one should be aware, however, that in Liechtenstein women were granted suffrage only in 1984 (after a referendum), which was most unusual for a Western European country. Another reason is seen in the strongly personalized election law based on networks in which women participate much less than men. Voters in Liechtenstein were concerned by a ranking of national parliaments worldwide regarding the quota of female parliamentarians, in which Liechtenstein was ranked only at 149 and, compared to other European states, kept the penultimate place. While a nonpartisan citizen movement³⁸ has recently been established that demands better political representation of women and has already presented a petition to Parliament, which was forwarded to the Government, the new Government program³⁹ does not treat the issue.

According to a survey after the elections,⁴⁰ 64% of the population (50% after the previous elections of 2013) assessed the work of the Government as "quite good"; 14% (2013: 6%) as "very good". Only 1% assessed it as "very bad" (2013: 8%), and 21% (2013: 36%) as "rather bad".⁴¹ In 2013, however, due to the financial and economic crisis, Liechtenstein was, for the first time in decades, confronted with a considerable budget deficit. Regarding democracy, 62% of the consulted expressed themselves as "contented"; 29% as "deeply contented".⁴² More than a third of the consulted expressed their "very high" or "high" confidence in the Government.⁴³

Considering the strong constitutional position

of the Prince, whose assent (sanction) is required for every law according to Art. 9 Constitution, the survey shows interesting answers to the question of who the dominant political power is believed to be. According to the survey, 32% (2013: 36%) believe that the Prince has the most say, 19% mention the Parliament (2013: 11%), 15% (2013: 16%) the Government and 9% (2013: 14%) the people. A similar number of consulted attached this quality to the "economy" or certain "families".^{44,45}

This high degree of acceptance enjoyed by both Government and democracy in Liechtenstein are probably the reason why the recent Government program includes hardly any constitutional novelty. The planned amendment to the Police Act seems to be worth mentioning from a fundamental rights perspective since it is expected to, *inter alia*, "optimize the legal framework of cross-border crime fighting".⁴⁶ Parliament has, moreover, already discussed a reform of data retention within the context of the planned Communication Act and amendments to the Criminal Procedure Act.⁴⁷

IV. LOOKING AHEAD TO 2018

2018 promises no big constitutional challenges for Liechtenstein, but it is to be expected that the ongoing discussion on female representation in political bodies will continue. The State Court will not only have to deal with a number of interesting cases pertaining to, *inter alia*, procedural rights but is also confronted by a (so far unofficial) proposal of the Government to abolish the

³⁸ <www.hoiquote.li> accessed 14 February 2018.

³⁹ Regierung des Fürstentums Liechtenstein, 'Regierungsprogramm 2017-2021' <www.regierung.li/media/attachments/Regierungsprogramm_2017%E2%80%932021_www.pdf> accessed 14 February 2018.

⁴⁰ Wilfried Marxer, 'Landtagswahlen vom 5. Februar 2017. Ergebnisse einer Umfrage' in Liechtenstein-Institut (ed.), LI Aktuell (No. 1, 2017).

⁴¹ Marxer (n 40) p. 21.

⁴² Marxer (n 40) p. 26.

⁴³ Marxer (n 40) p. 27.

⁴⁴ Within the microstate environment, several families have been extremely successful in business and play an important role also in the social and political life of Liechtenstein.

⁴⁵ Marxer (n 40) p. 23.

⁴⁶ Regierung des Fürstentums Liechtenstein (n 39) p. 11.

⁴⁷ <http://www.landtag.li/protokolle/default.aspx?lpid=620&id=8679&typ=eintrag&backurl=mode%3dsuche%26krit%3d1%26txt%3dVerfassung&txt=Verfassung>.

rotation principle when substitute judges of the State Court or Administrative Court are called in. Finally, the new online commentary on the Liechtenstein Constitution⁴⁸ – which for the first time ever offers an in-depth analysis of each article – will be expanded with a view to finalize the remaining work in the not too distant future.

V. FURTHER READING

Bussjäger P, ‘Eigenständige Verfassungsdogmatik am Alpenrhein? Der Einfluss österreichischer und schweizerischer Staatsrechtslehre am Beispiel des Staatsgerichtshofes’ in Wolf S (ed.), *State Size Matters. Politik und Recht im Kontext von Kleinstaatlichkeit und Monarchie* (Springer 2016) p. 15

Bussjäger P and Frommelt C, ‘Europäische Regulierung und nationale Souveränität. Praxisfragen zur Übernahme europäischen Rechts ausserhalb der EU’ (2017) 2 Liechtensteinische Juristen-Zeitung p. 40

Liechtenstein-Institut (ed.), Kommentar zur Liechtensteinischen Verfassung. Online-Kommentar, www.verfassung.li (notes on single Articles by Peter Bußjäger, Patricia M. Schiess Rütimann and Anna Gamper)

⁴⁸ <www.verfassung.li> accessed 14 February 2018



Luxembourg

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

In the last two decades, constitutional law in the Grand Duchy of Luxembourg has been subject to profound and far-reaching changes. One of these is an in-depth transformation of the Constitution from a somewhat forgotten and almost neglected one into a ‘new and living’ one whose provisions become increasingly important in law and politics.

In the first part of this report, we reflect upon these general constitutional developments in the Grand Duchy. In particular, we will focus on three elements which are widely recognized to warrant a ‘liberal democracy’: the balance of powers, the rule of law and the protection of rights and liberties. In the second part of this report, we highlight two constitutional controversies of 2017, which were, unsurprisingly, shaped by the pending constitutional change: the discussion about the proposal of the Ministry of Justice to replace the existing special Constitutional Court by a Supreme Court and the attitude of constitutional judges towards international law.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

As the emphasis of this year’s *Global Review of Constitutional Law* is placed on the concept of ‘liberal democracy’, this report discusses whether liberal democracy is on the rise or decline or somewhere in between in the jurisdiction of Luxembourg. It seems obvious that an answer to this question depends on a prior assessment of the concept of ‘liberal democracy’ in Luxembourgish legal history. Indeed, political systems or constitutions, in which liberal democracy is not or only partly realized, might present a ‘rise’ of liberal and democratic ideas without being necessarily labelled as ‘liberal democracy’. Similarly, the extent of liberal democracy might still be considerably high, even though certain institutional and legal changes indicate a concrete risk of its decay.

In Luxembourg, the need for historic contextualization is patent. In fact, the Constitution of the Grand Duchy is one of the oldest constitutional documents in Europe. Despite numerous constitutional amendments, the current Constitution still resembles widely the original text of 1868, which had been marked by Belgian liberal democracy of the nineteenth century.¹

Therefore, the Constitution of the Grand Duchy is not only considered to be an ‘old

¹ Until recently, the Constitution was generally considered to date from 1868, therefore being the fourth genuinely Luxembourgish Constitution. However, the constitutional text of 1868 was adopted *in compliance* with the procedure of constitutional revision as prescribed by the Constitution of 1856. Thus, from a formal point of view, differentiating constituent power and constituted power, the Constitution of the Grand Duchy dates back to 1856. From a substantial perspective, most of the provisions of the 1868 constitutional text even dates back to 1848, being carried over from the liberal Constitution of that time, which itself is an almost faithful copy of the Belgian Constitution of 1831. See Luc Heuschling, ‘Les origines au XIXe siècle du rang supra-constitutionnel des traités en droit luxembourgeois: l’enjeu de la monarchie’, in Isabelle Riassetto, Luc Heuschling, Georges Ravarani (eds.), *Mélanges en l’honneur de Rusen Ergéc* (2017) Luxembourg Pasicrisie, 182; Georges Ravarani, ‘La Constitution luxembourgeoise au fil du temps’, *Annales du droit luxembourgeois*, nos. 17-18 (2007-2008), 66.

lady’² or ‘an old vessel lost in tempest’,³ it also shows deficiencies as to the implementation of the concept of liberal democracy, albeit labelled at the time a liberal and democratic constitution. Moreover, the fractional constitutional amendments in the past 150 years have undermined the consistency and transparency of the Constitution.⁴ From today’s perspective, the constitutional catalogue of fundamental rights and liberties is strikingly incomplete, lacking for instance explicit provisions about the right to life, the interdiction of torture and inhuman or degrading treatment and the right to a fair trial.⁵ Like several other European democracies, Luxembourg is a constitutional monarchy and a parliamentary democracy. This fact does not in itself preclude liberal democracy. However, the Constitution is silent about the separation of powers. Although various constitutional amendments strengthened parliamentary democracy, the role, functions and responsibilities of the grand duke as the head of state and of ‘his government’ (see Article 76 of the Constitution) remain partially ambiguous and unsettled. Moreover, political reality and the functioning of institutions and their interactions do not always comply with the constitutional text. Nonetheless, two major developments in recent constitutional law undoubtedly stand for the rise of liberal democracy in Luxembourg.

First, in 1996/1997, the Constitutional Court was created and empowered to review domestic laws *a posteriori* as to their ‘conformity’ with the Constitution.⁶

This amendment put an end to a curious paradox in Luxembourgish law. Although the Constitution does not clarify the legal status of international law, one of the most original elements of the Luxembourgish legal system is the recognition of the rule of primacy of international and European law over domestic law, including the Constitution.⁷ Since the nineteenth century, general courts have the authority to review laws in the light of treaties and to declare inapplicable domestic law which is in contradiction with international provisions. At the same time, these courts’ refusal to examine the constitutionality of laws, albeit the superiority of constitutional provisions over statute law and, *a fortiori*, over regulatory acts is also widely recognized. Yet remaining faithful to French and Belgian legal doctrine of the nineteenth century, courts have considered ordinary statute law as the only expression of sovereignty, shielding therefore legislative acts from any allegation of unconstitutionality.

Without any doubt, the establishment of the Constitutional Court is to be seen as an important step towards realization of the rule of law and the separation of powers. By the end of 2017, the Constitutional Court delivered 131 judgements. More than two thirds of these dealt with the principle of equality before the law. Paradigmatically, in its first decision, the constitutional judges had to deal with the executive regulatory powers of the grand duke and the government.⁸ At that time, the Constitution entrusted only the grand duke to adopt

measures in order to execute laws. However, in line with well-established and somewhat pragmatic political practice, some laws specify that their implementation acts shall be adopted by members of the government, as so-called ‘ministerial regulatory acts’. By the first decision of the Constitutional Court, one such law was declared to be inconsistent with the Constitution.⁹

Nevertheless, the powers of this special court are considerably limited. Its sole function is to control ordinary statute law. Laws approving international treaties are explicitly excluded. The competence to control regulatory, non-legislative acts as to their compatibility with ‘higher law’ (laws, treaties and the Constitution) remain exclusively with general courts. Moreover, the Constitutional Court only decides upon a preliminary ruling request which has to be initiated by a general court within a concrete dispute. In principle, every court is required to bring questions about the constitutionality of laws before the Constitutional Court, unless it ‘deems’¹⁰ either the referral of the question not necessary to the solution of the dispute, the question manifestly unfounded or the Constitutional Court has already ruled on it. Recently, some courts have been reluctant to go before the Constitutional Court, preferring to solve such questions in the light of international law, which they can apply by themselves, or trying to circumvent the questioning of the constitutionality of a law. Neither individuals nor other constitutional institutions have access to the Constitutional Court. Hence, the refusal to

² Alex Bonn, ‘Une vieille dame’, *Les cahiers luxembourgeois* 1989/1, 59, and *idem*, ‘La Constitution oubliée’, 1968.

³ Luc Heuschling, ‘Un vieux bateau pris dans la tempête: la Constitution luxembourgeoise’, *d’Lëtzebuurger Land* (2013), available at www.land.lu/page/article/564/6564/FRE/index.html.

⁴ Jörg Gerkrath, ‘Some Remarks on the Pending Constitutional Change in the Grand Duchy of Luxembourg’, *European Public Law* 19, no. 3 (2013), 449.

⁵ See Dean Spielmann, ‘Quels droits fondamentaux pour la Constitution luxembourgeoise? Au sujet d’une réforme rassurante mais peu ambitieuse’, in Jörg Gerkrath (ed), *La refonte de la Constitution luxembourgeoise en débat*, (2010) Larquier, 29 and 37.

⁶ In 1996, the judicial review of constitutionality of laws by a constitutional court was introduced by constitutional amendment (article 95^{ter} of the Constitution). Only in 1997, this special court was established by law (Loi du 27.7.1997 portant organisation de la Cour constitutionnelle) and became operational in November of that year. The Court issued its first decision in March 1998.

⁷ See Luc Heuschling, ‘Les origines au XIXe siècle du rang supra-constitutionnel des traités en droit luxembourgeois...’, 157.

⁸ Constitutional Court, decision no. 1/98 of 6.3.1998. All constitutional decisions are available at <http://www.justice.public.lu/fr/organisation-justice/cour-constitutionnelle/>.

⁹ In consequence of this judgement, confirmed by further constitutional jurisprudence, the Constitution was amended in 2004. By virtue of article 76(2), the grand duke may now constitutionally delegate the power to issue execution measures to members of the government.

¹⁰ Article 6 of the Law of 1997 (obligation to refer a preliminary question) uses the French word *estimer* and seems therefore to indicate a considerable margin of appreciation of the general court whether to refer a constitutional question to the Constitutional Court or to refuse it.

submit a preliminary question by the *Cour de cassation* or the *Cour administrative*, respectively the highest courts in civil and administrative law, is definitive.

Furthermore, recent research reveals considerable self-restraint in constitutional jurisprudence.¹¹ In particular, constitutional judges do not (yet) examine challenged laws systematically in the light of the entire Constitution. Instead, they limit their control to the constitutional provisions explicitly indicated by the referring court. In other words, the referring ‘ordinary’ judge may (intentionally) limit the scope of constitutional review. Finally, the effects of the Constitutional Court’s decisions are limited to the dispute which gave rise to the preliminary procedure. As other courts may refrain from introducing a constitutional question in similar cases, these decisions enjoy relative authority. The law remains in force and the legislature has full discretion whether to annul or to amend such an unconstitutional law. In fact, several laws which have been declared inconsistent with the Constitution are still in force. Considering that pragmatism is a leading principle of Luxembourgish law and politics, it is not surprising that the legislator decided twice to amend the Constitution instead of those pieces of legislation that had been found violating constitutional provisions. In a first case, a constitutional amendment introduced the possibility for the grand duke to delegate regulatory powers to members of the government, rendering thus this previously unconstitutional political practice compatible with the Constitution.

In a second case, a constitutional amendment procedure, officially initiated in 2009 by

the Chamber of Deputies, strongly affected Luxembourgish constitutional law.¹² As the procedure is still in progress, its definite impact is difficult to assess. The amendment proposal¹³ implies a general overhaul of the Constitution, aiming at modernizing outdated terminology, clarifying and balancing powers and strengthening the rule of law and the protection of rights and liberties. Although the ‘new Constitution’ will not completely break with the spirit of the original document: Luxembourg will remain a constitutional monarchy with a parliamentary system.

The suggested constitutional amendments clearly aim at strengthening liberal democracy. Indeed, the amended constitutional catalogue of fundamental rights would include all rights protected by international conventions, such as the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union. Separation of powers and rule of law are to be explicitly mentioned in the Constitution as fundamental principles for the governance of the state of Luxembourg. The constitutional role and function of the grand duke would not only be clarified, but some of his remaining competencies would be limited whilst powers of the Chamber of Deputies and parliamentary principle would again be strengthened. Membership of Luxembourg in the European Union (EU) would be constitutionalized. Given the limited format of this country report, these amendments cannot be reported and discussed in detail here, yet, the overarching objectives of the constitutional amendment procedure are clearly to reinforce the authority of the Constitution and to bring Luxembourgish

constitutional law in line with European constitutional standards.

In light of these constitutional developments and the still-existing deficits in the fields of separation of powers, rule of law and fundamental rights and liberties, liberal democracy in the Grand Duchy is probably ‘somewhere in between’, yet also undoubtedly on the rise.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The year 2017 was a remarkable one from the perspective of constitutional law because of two major constitutional developments. First, the long-lasting discussion about the re-organization of the judicial system and the replacement of the existing Constitutional Court by a Supreme Court has come to an end, at least for now. In 2011, in the course of the current constitutional amendment procedure, the government suggested to replace the existing Constitutional Court by a Supreme Court and to introduce a ‘National Council of Justice’.¹⁴ The creation of the latter institution was immediately and generally welcomed, as its main function would have been to assure independence and impartiality of judges. However, the government’s proposal to introduce a diffuse constitutional review exercised by all courts and ultimately by a Supreme Court, having final appellate jurisdiction, has been vigorously discussed,¹⁵ particularly in 2017, when the relatively young Constitutional Court celebrated its 20th anniversary. Although the existing system of constitutional review had been repeatedly and

¹¹ Carola Sauer Rappe, ‘Le contrôle juridictionnel de conventionnalité et de constitutionnalité des lois au Grand-Duché de Luxembourg’, doctoral thesis, Luxembourg 2018 (forthcoming).

¹² See ‘Proposition de révision portant modification et nouvel ordonnancement de la Constitution’ of 21st April 2009, renamed in 2015 ‘Proposition de révision portant instauration d’une nouvelle Constitution’, doc. parl. no. 6030, available at www.chd.lu.

¹³ Following numerous opinions by the State’s Council, Venice Commission, Government, Judiciary and several advisory organs such as the Advisory Commission on Human Rights (non-exhaustive list), the original proposal has been largely and profoundly modified, completed and extended to all actual constitutional provisions.

¹⁴ See ‘Prise de position du Gouvernement’, doc. parl. no. 6030/5, 44. In 2013, this proposal was further specified by the Ministry of Justice in a pre-law proposal. See ‘Dossier de presse’, 27.2.2013, available at www.mj.public.lu/actualites/2013/02/Cour_supreme/Dossier_de_presse_reforme_Justice.pdf.

¹⁵ See P. Kinsch, ‘Plaidoyer pour le maintien d’une *Cour Constitutionnelle* réformée’, Jörg Gerkrath (ed.), *Les 20 ans de la Cour Constitutionnelle: trop jeune pour mourir?* (Pasicrisie Luxembourg 2018, forthcoming); State’s Council, ‘Deuxième avis complémentaire sur la proposition de révision portant instauration d’une nouvelle Constitution’ of 15.12.2017, doc. parl. no. 6030/21, 5; id., ‘Avis sur la proposition de révision portant modification et nouvel ordonnancement de la Constitution’ of 6.6.2012, doc. parl. no. 6030/6, 101.

severely criticized because of its limitations and certain organizational difficulties, the establishment of the Constitutional Court and constitutional jurisprudence were generally seen as a success story. Some months ago, the parliamentary Committee on Institutions and Constitutional Affairs, which is composed of 12 deputies following the proportional representation of political groups in the Chamber of Deputies and which prepares the new constitutional text to be read by the Chamber of Deputies, finally rejected the proposal to create a Supreme Court. Main reasons for the maintenance of the Constitutional Court rest on the traditional distinction between the branches of ‘ordinary’ and administrative law, the role and functioning of courts whose jurisprudence is not predetermined by the principle of precedent and, last but not least, the influence of European constitutionalism. Indeed, according to Kelsen’s theory on constitutional review, the existence of a specialized Constitutional Court strengthens visibility and authority of the Constitution. This hypothesis appears particularly to be valid with respect to the Luxembourgish Constitution, which, for a long time, only had symbolic and declaratory, non-normative force and whose provisions can be overruled by international law.

Second, the Constitutional Court clarified its position towards international law. As mentioned before, the most original element of Luxembourgish law is the general recognition of the rule of primacy of provisions of international law. Like in the Netherlands, an international rule which has come into force in Luxembourgish law (respecting certain constitutional conditions) overrules all other national provisions, including constitutional ones.

The singularity of the Luxembourgish legal system results from the combination of this rare primacy rule and the existence of an institutionalized constitutional review. Indeed, while Constitutional Court examines the constitutionality of parliamentary laws, general courts separately control the conventionality of these laws. To our knowledge, there is no other country in which both kinds of judicial review are ‘equally’ guaranteed. This situation gives rise to the urgent need to clarify the Constitutional Court’s attitude towards international law. In a first moment, the Court clearly privileged a minimalistic and formalistic approach, interpreting the Constitution provisions literally and without taking into consideration any other provisions of higher law (international law or the Constitution) other than those explicitly indicated by the referring general courts.¹⁶ Since 2008, constitutional jurisprudence evolved gradually in the fields of the protection of constitutional rights as constitutional judges started to reference *obiter dictum* to international provisions, though without basing the Court’s motivation on them.¹⁷ This somewhat distant attitude towards international law changed in 2017.

In June, the Constitutional Court had to decide on the compatibility of a law transposing faithfully an EU directive into Luxembourgish law with the right to property protected by Article 16 of the Constitution. On the grounds of the national legislation, the Minister with responsibility for Sustainable Development and Infrastructure had required a company to surrender, without compensation, unused gas emission allowances acquired within the EU’s greenhouse gas emissions allowance trading scheme.¹⁸ According to the *Tribunal*

administratif (administrative court referring the constitutional question), surrender without compensation of the allowances in dispute was effectively tantamount to an illegal expropriation. Inasmuch as the Constitutional Court suspected the national provision to be contrary to the logic of the scheme established by the EU’s directive, it decided in 2015, for the first time, to refer a question for preliminary ruling to the Court of Justice of the European Union (CJEU), pointing out that this referral was necessary in order to issue a ‘useful’ constitutional judgement with regard to the concrete dispute.¹⁹ The CJEU analyzed the compatibility of the EU’s directive with the EU’s Charter of Fundamental Rights, which protects the right to property in Article 17, and stated that the EU’s directive must be interpreted as not precluding a Luxembourgish legislation, which allows requiring the disputed surrender, without compensation, as a result of the failure by the company to comply with the obligation to inform the competent authority in due time of the cessation of the operation of an installation. Following the CJEU’s judgement, the Constitutional Court held that the contested national legislation also complies with the Luxembourgish Constitution, as the constitutional right to property ‘corresponds essentially, in its substance, to the guarantees of Article 17 of the EU’s Charter’.²⁰ Therefore, both provisions have to be qualified as ‘equivalent’ and to be interpreted in ‘consistent wording’.²¹ The Constitutional Court suggested that constitutional provisions and international provisions are to be interpreted harmoniously under the condition that they protect *equivalent* rights.

In December, the constitutional judges further

¹⁶ Mark Cole, ‘Der Schutz der Grundrechte’, in Jörg Gerkrath (ed.), *La jurisprudence de la Cour constitutionnelle du Luxembourg 1997–2007*, Pasricrisie luxembourgeoise (2008), 70. See also Marc Thewes, ‘Dix ans de justice constitutionnelle au Grand-Duché de Luxembourg’, in *En hommage à Francis Delpérée: itinéraires d’un constitutionnaliste*, LGDJ (2007), 1504.

¹⁷ See Carola Sauer Rappe, *op.cit.*

¹⁸ See the judgement of the administrative court referring the constitutional question: Tribunal administratif, judgement of 17.12.2014, no. 33558, available at www.justice.lu.

¹⁹ Constitutional Court, decision no. 119/15 of 19.6.2015.

²⁰ Constitutional Court, decision no. 119/17 of 16.6.2017, 3: “Considérant que les garanties relatives au droit de propriété prévues à l’article 16 de la Constitution correspondent essentiellement, quant à leur substance, à celles prévues par l’article 17 de la Charte, de sorte que ces dispositions sont à qualifier d’équivalentes et que leur interprétation est à effectuer en des termes concordants.” (Emphasis added.)

²¹ *Ibid.*

specified that constitutional provisions have to be interpreted “in light of” international provisions.²² In Luxembourg, municipalities have to make an additional contribution to the national Employment Fund within the State’s revenue sharing scheme if their municipal business tax income is ‘proportionally higher, in substantive manner, than the national average’.²³ The legislation remains rather vague on the details of this additional contribution, defining neither what to understand by ‘proportionally’, nor by ‘substantive manner’, nor how to calculate the national average. Yet, the relevant constitutional provision protecting self-government of municipalities does not require that regulations in this field be made by law. From a purely constitutional perspective, the vagueness of the national legislation therefore does not violate the Constitution. However, the constitutional judges held that Article 107 of the Constitution has to be read in conjunction with the European Charter of Local Self-Government, which states that limitation of local self-government has to be determined by law. As a result, all conditions and modalities of an additional contribution to be paid by some municipalities within a national revenue sharing scheme have to be set out by law in a clear and precise manner. Hence, the Constitutional Court declared the disputed legislation inconsistent with Article 107 of the Constitution, which protects local financial autonomy.

These two decisions of the Constitutional Court not only indicate that the Constitution shall be interpreted in the light of equivalent international rules but that its deficient provisions may even be complemented by international ones. This jurisprudence reflects a fundamental opening of the Constitutional Court towards international law. This opening could as well help to guarantee the modernization of the still rather symbolic Constitution, in so far as its provisions can now develop concurrently with international law. The Constitution would then, in reality, appear like a living instrument.

IV. LOOKING AHEAD TO 2018

With regard to the constitutional amendment procedure, no precise timetable has been made public. The debates within the parliamentary committee do not show a solid consensus between the political parties. In particular, the conservative Christian Social Party (CSV) firmly rejects adopting any definite constitutional amendment text before the elections, which will take place in October 2018. Despite the fact that the CSV obtained relative majority in the last elections in 2014, a coalition government (liberals, socialists and green party) got the mandate. Most likely, CSV will win this year’s elections. Debates on the Constitution are expected to be re-opened. Notably, the question whether to submit the new Constitution to a referendum is highly controversial. In 2015, a referendum on three constitutional questions was held. The object of the referendum concerned proposals aimed at granting the right to vote in general elections to foreigners under certain circumstances, at lowering the voting age to 16 years and at limiting continuous ministerial function to 10 years. Although almost all parties strongly supported these constitutional amendments, the referendum outcome was negative in all three cases. Indeed, a positive outcome of the referendum on the new constitutional text could guarantee a high level of constitutional legitimation. However, it seems that such referendum rather gives rise to a general expression of popular discontent than generating approval. Concluding on the foregoing, the new Constitution will probably not be voted on before 2019.

V. FURTHER READING

Luc Heuschling, ‘Une cour constitutionnelle différente des autres. Étendue, raisons & avenir de l’originalité de la Cour constitutionnelle luxembourgeoise’, in Jörg Gerkrath (ed.), *Les 20 ans de la Cour Constitutionnelle: trop jeune pour mourir?*

(Pasicrisie Luxembourg 2018, forthcoming)

Carola Sauer Rappe, ‘Le contrôle juridictionnel de conventionnalité et de constitutionnalité des lois au Grand-Duché de Luxembourg’, doctoral thesis, Luxembourg 2018 (forthcoming)

Jörg Gerkrath, Jean Thill, ‘The Grand Duchy of Luxembourg’ in Leonard Besselink, Paul Bovend’Eert, Hansko Broeksteeg, Roel de Lange, Wim Voermans (eds.), *Constitutional Law of the EU Member States* (Kluwer 2014), 1085-1145

Francis Delpérée, ‘Le chantier constitutionnel luxembourgeois’, *Journal des tribunaux Luxembourg* 51(2017), 69-72

Conseil d’État, *Le Conseil d’État, gardien de la Constitution et des droits et libertés fondamentaux*, 2006 (updated in 2009)

²² Constitutional Court, decision no. 131/17 of 8.12.2017.

²³ Article 8(3) of the amended Act of 30.6.1976 on the establishment of an Employment Fund.



Malawi

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The Constitution of the Republic of Malawi (the Constitution) was, provisionally, adopted on 18 May 1994 and entered into definite operation on 18 May 1995. The Constitution is founded on the following underlying principles, among others: supremacy of the Constitution, separation of powers, judicial independence, rule of law, transparency and accountability.¹ The Supreme Court of Appeal is the highest appellate court, and it has jurisdiction to hear appeals from the High Court and such other courts and tribunals as may be prescribed by Act of parliament.² The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings.³ Under section 103(3) of the Constitution, no court of concurrent or superior jurisdiction to the Supreme Court of Appeal or the High Court may be established in Malawi.

The Constitution has been hailed as among the most liberal of constitutions in the world.⁴ It provides for a comprehensive Bill of Rights, and it also knits a delicate web for implementing key liberal democratic principles such as the separation of powers, the rule of law, checks and balances and judicial independence. Although criticized by others as lacking autochthony, the liberal democratic constitutional framework has generated a

high level of acceptance among many stakeholders as the basis for political organization in the country.⁵ At the time of this writing, the Constitution has been in force for 24 years. While it has had an eventful life, this brief chapter will dwell on developments having a bearing on the implementation of the Constitution that occurred in the year 2017. Reference to any events before 2017 will only be for purposes of clarifying the events that occurred in during the year.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Since the re-introduction of multiparty politics in 1994, Malawi has held regular general elections that have also resulted in transfers of power. Changes in the governing coterie, however, have largely been as a result of rifts among the ruling elites rather than as a result of genuine competition between distinct political parties.⁶ The state of Malawi's democracy, since 1994, has been variously described by scholars and commentators. For example, Chinsinga has labeled Malawi's democracy as being 'defective.'⁷ A defective democracy is one where the regime has moved away from autocracy by, for example, establishing a framework for electoral competition along

¹ See, for example, section 12 of the Constitution.

² Section 104 of the Constitution.

³ Section 108 of the Constitution.

⁴ Fidelis Kanyongolo 'The limits of liberal democratic constitutionalism in Malawi' in Kings Phiri and Kenneth Ross (eds.), *Democratisation in Malawi: A Stocktaking* (CLAIM 1998) 353.

⁵ Blessings Chinsinga 'Malawi's democracy project at a crossroads' in KAF *Towards the Consolidation of Malawi's Democracy: Essays in Honour of the Work of Albert Gissy* Occasional Paper No. 11 www.kas.de/wf/doc/kas_13979-544-2-30.pdf (accessed 14 February 2018).

⁶ Freedom House, 'Malawi' <https://freedomhouse.org/report/freedom-world/2017/malawi> (accessed 14 February 2018).

⁷ Blessings Chinsinga (n 5) 9-11.

democratic lines but where the consolidation of democracy is ongoing. According to Chinsinga, defective democracies like Malawi arise due to a failure to implement the norms of good governance. Malawi fits this description because since the transition to multiparty democracy, a constitution establishing liberal democratic ideals was duly adopted together with supporting the legislation, but in practice very little has been done to establish and consolidate liberal democracy.

As of the end of 2017, it is fair to say that liberal democracy in Malawi has stagnated. While the basic guarantees for a liberal democratic regime remain in place, implementation of the guarantees remains very fickle and inconsistent. The promises heralded by the adoption of the Constitution have yet to be realized. The examples discussed below will help illustrate the stagnation of liberal democracy in Malawi.

The failure to implement electoral reforms

Malawi has held five general elections since the re-introduction of multiparty politics. Each electoral cycle, however, has revealed significant deficiencies in the electoral law framework. The electoral law framework in Malawi comprises the following laws: the Constitution, the Parliamentary and Presidential Elections Act (PPEA), the Local Government Elections Act (LGEA), the Electoral Commission Act and the Political Parties (Registration and Regulation) Act. Deficiencies with the framework have resulted in contested electoral outcomes and sometimes outright violence among supporters of the various political parties.⁸ The first calls to reform the electoral law framework were made in the immediate aftermath of the 1994 general elections and persisted over the years. Finally, in 2016, a Special Law Commission was impanelled

with the mandate of reviewing all electoral laws in the country. The general expectation was that the Special Law Commission would complete its work and all processes towards the enactment of new or amended electoral laws in time for the 2019 general elections. As it turned out, the Special Law Commission submitted its recommendations to the Minister of Justice and Constitutional Affairs in March 2017, but the Minister only took some of the recommendations to the National Assembly in December 2017.⁹ In the ensuing parliamentary deliberations, the National Assembly rejected some of the bills that had been introduced by the Minister.¹⁰ Overall, and especially bearing in mind the time remaining before the next general elections, it is clear that Malawi will hold its next general elections under the same legal framework that it has been using since 1994.

A quick reprise of some of the problems that the proposed electoral reforms were meant to address will serve to highlight why the failure to implement the reforms remains a missed opportunity. To begin with, electoral laws in Malawi, though essentially dealing with the same subject matter, are spread over several statutes. This creates problems for accessibility of the law by users – one must look for several statutes before they can have the entire framework under consideration. Second, because the various laws within the framework were passed at different points in time, internal consistency within it is also lacking. The result is that there are inconsistencies, and in some places, obvious contradictions within the framework. To address these two problems, the Special Law Commission proposed consolidation of electoral laws in Malawi. In line with the Special Law Commission's proposals, the PPEA and the LGEA ought to be consolidated into one law. Additionally, the Special Law Commission proposed harmonization of all electoral laws

in Malawi so that all contradictions and inconsistencies could be eliminated. Further, the Special Law Commission proposed the adoption of new laws to govern some of the matters that currently are not adequately covered by the electoral laws of Malawi. For example, while the Constitution gives the President the power to proclaim referenda and plebiscites,¹¹ there is currently no law regulating the holding of referenda in Malawi. Lastly, due to the fact that the management of the transition, especially with regard to the presidency, has caused a lot of angst, the Special Law Commission also proposed the adoption of legislation regulating the management of transition after a general election.

A critical look at the manner in which the Executive handled the proposed reforms suggests most strongly that the recommendations of the Special Law Commission were given short shrift because the current regime has not taken kindly to some of them. The most 'controversial' of the proposals, seemingly, is the one suggesting that the electoral system should be changed from a first-past-the-post system to a 50 + 1 enhanced majority system. While opposition parties and the bulk of civil society favor a change of the electoral system to the 50 +1 system, the governing Democratic Progressive Party (DPP) has been reluctant to support the proposal.¹² Without support from the governing party, the proposal for a change in the electoral system is practically dead.

Against the above background, it must be recalled that elections are an important component of any liberal democracy. It must also be noted that the holding of elections that are both free and fair, to an extent, relies on a conducive legal regime. Given that there has been broad consensus on the deficiencies of the current electoral law framework, it is rather surprising that

⁸ *Gwanda Chakuamba et al v Attorney General et al* Civil Cause No. 1B of 1999 (heard on appeal as *Chakuamba et al v Attorney General et al*, MSCA Civil Appeal No. 20 of 2000.

⁹ Malawi Law Commission *Report of the Special Law Commission on the Review of all Electoral Laws* (Government Print 2017).

¹⁰ Suzgo Khunga 'Rejected: Two reform bills' <http://mwntation.com/rejected-2-reforms-bills/> (accessed 14 February 2018).

¹¹ See section 89(1)(i) of the Constitution.

¹² Arne Tostensen 'Malawi: A political economy analysis' https://brage.bibsys.no/xmlui/bitstream/handle/11250/2461122/NUPI_rapport_Malawi_Tostensen.pdf?sequence=1&isAllowed=y (accessed 14 February 2018).

the recommendations of the Special Law Commission seem to have been ignored. It is not farfetched, therefore, to anticipate that the general elections in 2019 are likely to be mired in legal challenges.

Attempts at meddling with remuneration of judicial officers

In December 2017, the Executive proposed an amendment to section 114 of the Constitution which would have resulted in changing the scheme for regulating the remuneration of judicial officers in Malawi. It is important to highlight that two key principles emerge from section 114 in relation to the remuneration of judicial officers: first, the remuneration of the Chief Justice and all holders of judicial office is determined by the National Assembly. In practice, the National Assembly works with the Judicial Service Commission – established under section 116 of the Constitution – when determining the remuneration of judicial officers. Second, the remuneration of a judicial officer cannot be reduced without the consent of the concerned officer.

The proposal by the Executive was to establish a National Remuneration Commission (NRC), which would have the primary duty of determining the remuneration for all public officers. However, considering that the Constitution already provides for the manner in which remuneration for judicial officers must be dealt with, the Government further proposed to amend section 114 of the Constitution so that the National Assembly could only determine the remuneration of judicial officers by working with the NRC. Unsurprisingly, these proposals caused some consternation among various stakeholders. For example, the Chief Justice wrote to the Speaker of the National Assembly protesting the attempt to debate and pass the bill.¹³

The Malawi Law Society also issued a statement protesting against the proposed legislation.¹⁴ Subsequently, a member of Parliament obtained a court order restraining the National Assembly from deliberating the bill.

Although the proposed amendments have currently stalled, it is important to reflect on the possible implications and ramifications of the proposals. To start with, section 114 of the Constitution is part of the entrenched provisions of it.¹⁵ Under section 196 of the Constitution, several procedures have to be complied with before an entrenched provision can be amended.¹⁶ There are principally two ways in which an entrenched provision of the Constitution can be amended. Under the first avenue, the provision to be amended must be put to a referendum of the people of Malawi, and the majority of the voters must support the amendment. If the Speaker of the National Assembly certifies the result of the referendum, then the National Assembly can pass a bill proposing an amendment to an entrenched provision without having to wait for a referendum if the amendment would not affect the substance or effect of the Constitution, but the Speaker must first issue a certificate confirming this. Under the second avenue, however, the bill proposing the constitutional amendment must be supported by a majority of at least two-thirds of the total number of members of the National Assembly entitled to vote.

Keeping in mind the above, it was highly anomalous for the Government to attempt to proceed with an amendment to an entrenched provision without first having to comply with the requirements of section 196 of the Constitution. Again, considering that the

Constitution already establishes the manner in which remuneration for judicial officers must be managed, it was also irregular for the Government to attempt to modify the remuneration scheme without consulting the officers concerned.¹⁷ Most important of all was the probable effect of the proposed amendments on judicial independence in the country. It is generally accepted that control over remuneration can influence judicial independence. In the case of the proposed amendment, control over remuneration of judicial officers, which normally resides with the National Assembly and the Judicial Service Commission, would have an additional interloper in the form of the NRC. Considering that the proposed NRC was to be dominated by persons appointed by the President, it is not farfetched that the overall result of the proposed scheme was to subject remuneration of judicial officers to the Executive branch of government. It is also not insignificant that the NRC, in its proposed form, did not make a distinction between judicial officers and other public officers, which, arguably, also offended the principle of separation of powers.

Delays with implementation of the Access to Information Act

The Constitution, in section 37, guarantees every person the right to access all information held by the State or any of its organs at any level of Government insofar as such information is required for the exercise of rights. Although the Constitution has explicit access to information guarantee, for a long time Malawi did not have any legislation that provided details as to how access to information was to be realized. Long-drawn-out efforts for the country to pass a statute governing access to information culminated in the adoption of the Access to Information Act in December 2016.¹⁸ Subsequently, in

¹³ Suzgo Khunga 'Chief Justice protests perks bill' <http://mwnation.com/chief-justice-protests-perks-bill/> (accessed 14 February 2018).

¹⁴ Suzgo Khunga 'Hands off judges' perks – Law Society' <http://mwnation.com/hands-off-judges-perks-law-society/> (accessed 14 February 2018).

¹⁵ See, Schedule to the Constitution of the Republic of Malawi.

¹⁶ Section 196 of the Constitution.

¹⁷ One of the points raised by the Chief Justice in his letter to the Speaker of the National Assembly was the Executive's failure to consult the judiciary on this matter before presenting the bill to Parliament.

¹⁸ Mwayi Mkandawire 'Finally, Malawi Parliament Passed Access to Information Law' <https://malawi24.com/2016/12/15/finally-malawi-parliament-passes-access-to-information-law/> (accessed 14 February 2018). As to the journey preceding the passing of the Access to Information Act, see, Mandala

February 2017, presidential assent to the Access to Information Act was granted.¹⁹

While the passing of the Access to Information Act should, ordinarily, have marked a happy ending, this has not been the case. Under the Act, the Malawi Human Rights Commission (MHRC) has been entrusted with the responsibility of overseeing its implementation. This seemingly innocuous arrangement has caused problems. The MHRC, which runs on Government subventions, has indicated that it requires additional funding to carry out its duties under the Act.²⁰ As matters stand, unless the Government makes the funding allocation to the MHRC, the Access to Information Act will remain an ornamental piece of legislation.²¹ The overall result is that, on paper, Malawi now has a law on access to information. In practice, however, its citizens are yet to be given a framework that they can practically rely on to demand their right to access information.

The passing of the Political Parties Bill

A glimmer of hope in the consolidation of Malawi's democracy was offered by the passing of the new Political Parties Bill.²² In December 2017, and after much procrastination, the National Assembly passed the Political Parties Bill to replace the Political Parties (Registration and Regulation) Act. The significance of the new law regulating political parties must be appreciated against a background where political parties in Malawi have been lightly regulated since the reintroduction of multiparty democracy. In a country where for the 30 years preceding 1994 it was illegal to form political parties, it is rather strange

that once the formation of political parties was made legal, the law only provided, in a brief piece of legislation, for registration and de-registration. As many commentators consistently pointed out, key activities that political parties routinely carry out were omitted from regulation under the Political Parties (Registration and Regulation) Act. This raised serious doubts as to whether political parties, in such a context, were truly contributing to the consolidation of democracy or simply undermining it.

By way of example, a sticking issue with regard to the regulation of political parties in Malawi has been the absence of a law compelling them to disclose their sources of funding. Under the new law, political parties will be compelled to disclose the source of all donations/funding beyond MK1 000 000 where the same has been received from an individual and MK2 000 000 where the funding/donation has been received from a company. Another example of a matter that was glaringly omitted from the Political Parties (Registration and Regulation) Act is the position of handouts in politics. Countless complaints have been raised over the years that political parties routinely engage in handouts to influence the outcome of elections. Under the new law, political parties are banned from engaging in handouts.

Although the Political Parties Bill has been passed, there is still need for presidential assent before it can become enforceable law. Once the law is in force, it will be interesting to observe how serious the Registrar of Political Parties and other Government structures will be in implementing the law. As matters stand, the political terrain in Malawi

remains littered with numerous small and arguably irrelevant political parties that are lightly regulated.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

In this section, we briefly chronicle some of the major constitutional developments that occurred in 2017.

The invalidation of anti-vagrancy laws

The decision of the High Court of Malawi, sitting as a constitutional court, in *Mayeso Gwanda v The State*²³ is arguably the high-water mark in terms of constitutional developments for the year 2017. The applicant in this case was arrested by the police while walking to his place of trade in the early hours of the morning. When asked by the police what he was doing on the road at that early hour, he duly informed them that he was walking to his place of business. The police nevertheless proceeded to arrest him, and he was detained for three days before being released on bail. The applicant was charged under section 184(1)(c) of the Penal Code with the offense of being a rogue and vagabond. Subsequently, the applicant brought an application challenging the constitutionality of section 184(1)(c) of the Penal Code. The applicant's case was that it was unconstitutional because it violated several constitutional guarantees. Among the constitutional guarantees that the applicant alleged were violated by the section were: section 19(1) – protection of human dignity and personal freedoms; section 20(1) – protection of equality and prevention of discrimination; section 21 – protection of

Mambulasa 'Access to information in Malawi: The journey today and a quick survey of the ATI Bill of 2016' <https://southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Mambulasa.pdf> (accessed 14 February 2018).

¹⁹ Owen Khamula 'Mutharika signs access to information bill into law: New dawn for transparency in Malawi' <https://www.nyasatimes.com/mutharika-signs-access-information-bill-law-new-dawn-transparency-malawi/> (accessed 23 March 2018).

²⁰ Owen Khamula 'Malawi Human Rights Commission presses for speedy implementation of Access to Information Act' <https://www.nyasatimes.com/malawi-human-rights-commission-presses-speedy-implementation-access-information-act/> (accessed 14 February 2018).

²¹ 'Delay in access to information implementation: Government needs to live the promise on the law' <http://www.malawifreedomnetworks.com/delay-in-access-to-information-law-implementation-government-needs-to-live-the-promise-on-the-law/> (accessed 14 February 2018).

²² Suzgo Khunga 'House passes Political Parties Bill' <http://mw-nation.com/house-passes-political-parties-bill/> (accessed 15 February 2018) and Wanga Gwede 'Malawi Parliament passes Political Parties Bill: Law prohibits handouts to entice voters' <https://www.nyasatimes.com/malawi-parliament-passes-political-parties-bill-law-prohibits-handouts-entice-voters/> (accessed 15 February 2018).

²³ Constitutional Case No. 5 of 2015.

privacy; and section 39(1) – the right to the freedom of movement and residence.

In a unanimous decision, the Court held that section 184(1)(c) was unconstitutional. The Court reasoned that section 184(1)(c), by permitting police officers to randomly stop, search and arrest people like the applicant, amounted to an infringement of the constitutional right to dignity and also to the right to be presumed innocent at all times. The Court also found that the act of being arrested and detained for three days on unsubstantiated grounds was demeaning and humiliating. Further, the Court also opined that the enforcement of section 184(1)(c), in practice, meant that invariably and disproportionately, people without means were the ones being targeted. The implementation of section 184(1)(c), therefore, resulted in violations of the right to equality and equal protection of the law. The Court also found that while section 44 of the Constitution permits rights to be limited in appropriate circumstances, section 184(1)(c) was overly broad in its provisions, imprecise, not necessary in an open and democratic society and not supported by an international human rights standard. As a result, the Court held section 184(1)(c) could not be saved under the limitation clause of the Constitution. This decision was a vindication of the supremacy of the Constitution and remains proof that all laws that are inconsistent with the Constitution are, to the extent of the inconsistency, invalid.²⁴

The amendment of the Constitution on the age of childhood

Under section 23 of the Constitution, as originally adopted, one was deemed to be a child if he/she was below the age of 16 years.²⁵ Further, under section 22(7) of the Constitution, it was provided that persons between the ages of 15 and 18 could enter into marriage as long as it was done with

the consent of their parents or guardians. Perhaps as a measure of the confusion surrounding childhood and marriage under the Constitution, in section 22(8) it was provided that the State should actively discourage marriage between persons where either of them is under the age of 15 years. As often argued by many commentators, the lack of clarity in the Constitution about the age of childhood exposed children to various risks. In the case of female children, it was argued, the fact that they could legally be married from the age of 15 meant that girls could be married even before completing their primary education.²⁶

Under Act No. 15 of 2017, the National Assembly repealed subsections 7 and 8 of section 22, meaning that children below 18 but above 15 can no longer enter into marriage irrespective of consent from their parents or guardians. Additionally, Parliament also deleted the original subsection 6 of section 23 of the Constitution and replaced it with a clause which stipulates that a child is a person under 18 years. Effectively, therefore, the Constitution now stipulates that 18 years is the age of majority in Malawi. These amendments, it has been contended, align Malawi's laws on the age of childhood with international and regional standards.²⁷

IV. LOOKING AHEAD TO 2018

The developments in 2017, in this author's view, strongly suggest a stagnation of liberal democracy in Malawi. However, to properly understand the perils of this stagnation one must realize that Malawi's democracy, in its current state, has been variously described as 'defective' or 'choiceless.' A democracy that is yet to mature is stagnating, which in principle means that it is retrogressing. While there may have been gains in some spheres, the overall outlook remains bleak and uncertain. It also looks more likely than

not that the failure to implement meaningful electoral reforms is likely to come back to haunt the country during the next general elections in 2019.

²⁴ See, Section 5 of the Constitution.

²⁵ Section 23(6) of the Constitution.

²⁶ 'The fight for girls' education in Malawi' <https://borgenproject.org/girls-education-in-malawi/> (accessed 16 February 2018).

²⁷ United Nations Malawi 'Adoption of constitutional amendments to minimum age of marriage and definition of a child' <http://www.mw.one.un.org/state-ment-age-of-child/> (accessed 16 February 2018).



Malaysia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Malaysia approaches its 14th General Election, which must be held by 24 August 2018 at the latest. This election will determine whether the ruling National Front (Barisan Nasional [BN]) coalition returns to power despite the 1Malaysia Development Berhad (1MDB) corruption scandal, outlined in the 2016 update, and recaptures the two-thirds majority in the Federal Parliament, which will enable it to amend the Federal Constitution. No party has enjoyed such a majority since 2008; hence no constitutional amendment has taken place since then. Against this backdrop, the constituency-redelineation exercise of the Election Commission of Malaysia (EC), which started in September 2016, has been particularly contentious. Opposition parties and their supporters have alleged, claiming extensive gerrymandering, that this redelineation gives further advantages to the ruling coalition (which the EC strenuously denies), and the exercise itself has been held up by extensive litigation across the country stretching throughout 2017.

Legal and political developments with a religious aspect continued to be particularly emotive in this country where Islam is constitutionally enshrined as ‘the religion of the Federation’¹ but which is also home to a sizeable non-Muslim minority of around 39% of the population.² These de-

velopments continue to test the dividing line between the two legal systems that co-exist in Malaysia’s pluralist legal sphere – one centred around the regular or ‘civil’ courts and the other around the religious or *Syariah* courts which exercise jurisdiction over Muslims in Malaysia. As exemplified by the ‘bin Abdullah’ case discussed further below, also at issue is the extent to which Islamic religious precepts and institutions can influence secular administrative bodies wielding governmental power in Malaysia.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Liberal democracy could be said to remain in a relatively precarious position in Malaysia. While opposition politicians, civil society leaders, and the alternative media have generally been able to continue highlighting scandals such as that of state investment vehicle 1MDB, and to organize public rallies such as the ‘Love Malaysia, End Kleptocracy’ event on 14 October, criminal charges have been pressed against several prominent opposition leaders that could disqualify them from politics. This year, a Committee of the Inter-Parliamentary Union adopted a Decision expressing concern over the use of criminal investigations and legal action against 19 opposition parliamentarians in Malaysia.³

¹ FED. CONST. MALAYSIA, art. 3(1).

² *The World Factbook*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/resources/the-world-factbook/geos/my.html> (last visited 13 January 2018).

³ *Decision adopted by the Committee on the Human Rights of Parliamentarians at its 152nd ses-*

The abolition of the mandatory death penalty for drug trafficking, passed by Parliament in December, represents a tentative step forward for the cause of liberal democracy. Amendments to the Dangerous Drugs Act 1952 now enable courts to impose a sentence of life imprisonment plus whipping for that offence in lieu of the mandatory death penalty if it finds that the accused ‘has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.’⁴

It is encouraging that the government, in response to public pressure, removed a provision in the original bill that would have given Malaysia’s Attorney General, as the Public Prosecutor, the sole discretion to certify whether or not the accused person had rendered such assistance to an enforcement agency. In the amendment’s final version, that discretion now rests with the courts. Thus the reform – originally modelled on Singapore’s 2013 amendment to its penalty for drug trafficking – has gone one step further and achieved an even more complete separation of powers by giving to the judicial branch, rather than the Public Prosecutor, full control over the decision whether a death sentence should be imposed.⁵ This reform enhances the content and significance of the constitutional guarantee in Article 5(1) that no person shall be deprived of life or personal liberty, save in accordance with law.

On the other hand, speech and activity with religious aspects have come under increasing control and suppression in Malaysia. Many publications touching upon Islam have been banned on the basis that they could cause ‘confusion,’ ‘anxiety,’ ‘anger,’ or even ‘division’ among the Muslim community, which the government considers to be public order concerns.⁶ When faced with challenges to

such bans, the courts have tended to adopt a deferential approach, affirming the government’s decisions.

Furthermore, religious freedom – especially for Muslims – continues to be highly restricted in Malaysia. In several cases that came up for consideration in 2017, the courts affirmed existing doctrine that the question of whether a person was a Muslim or not is a matter under the exclusive jurisdiction of the *Syariah* court. This means that even where a person had publicly renounced Islam (e.g., by way of a statutory declaration), they are still bound by Islamic law, particularly its rules on conversion out of Islam. They can only convert out of Islam if the *Syariah* courts ‘certify’ their conversion, which in the current constitutional context remains highly unlikely.⁷

These developments could be seen as lack of due regard for the freedom of speech as well as freedom of religion, which are enshrined in Articles 10(1) and 11 of the Federal Constitution, respectively.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Constituency Boundaries Litigation

The Malaysian courts continued to be the main avenue for opposition parties and concerned citizens to mount challenges against the Election Commission’s (EC) redelineation exercise. In September 2016, the EC had published notice of its proposed recommendations for the redelineation of Federal and State constituencies in Peninsular Malaysia, as is mandated every eight years or more under Article 113(2) of the Federal Constitu-

tion. These recommendations are thereafter to be reported to the Prime Minister, who then tables it before the House of Representatives (the lower house of Parliament) alongside a draft order giving effect to the recommendations, with or without modifications. Upon the draft order being approved by not less than one-half of the total members of the House, it is submitted to the Yang di-Pertuan Agong (the King), who makes an Order in terms of the draft, completing the redelineation. However, at the notice stage, any state government or local authority whose area is affected by the recommendation, or any body of 100 or more persons in an affected constituency, may object, whereupon the EC shall hold local enquiries in respect of these constituencies and may modify its recommendations if necessary.

The Selangor State Government – controlled by political parties in opposition at the federal level – sought judicial review against the EC recommendations in Selangor, highlighting that they resulted in malapportioned, gerrymandered constituencies, were based on incomplete and defective electoral rolls, and lacked particulars necessary for voters to make meaningful representations in response.⁸ After a prolonged hearing, the High Court declined to intervene on the basis that the EC’s recommendations and its discretion to take into account the principles governing redelineation as provided for in the Thirteenth Schedule of the Federal Constitution were non-justiciable since the final decision on the redelineation is reserved for Parliament. The State Government nonetheless secured a stay, pending an appeal, preventing the EC proceeding further with the redelineation; but the Court of Appeal swiftly overturned that stay. Other court challenges to various EC recommendations were also mounted, unsuccessfully, by groups of vot-

sion (Geneva, 23 January to 3 February 2017), INTER-PARLIAMENTARY UNION, available at <http://archive.ipu.org/hr-e/comm152/mal21.pdf> (last visited 28 December 2017).

⁴ Dangerous Drugs (Amendment) Act 2017, §2. The Act was passed by both Houses of Parliament on 14 December 2017.

⁵ *Singapore: Executions continue in flawed attempt to tackle drug crime, despite limited reforms*, AMNESTY INTERNATIONAL (October 11, 2017), <http://www.amnesty.org/en/latest/news/2017/10/singapore-executions-continue-in-flawed-attempt-to-tackle-drug-crime/>.

⁶ See e.g., *Mohd Faizal bin Musa v. Minister of Home Affairs*, 11 M. L. J. 397 (2017).

⁷ *Jenny bt Peter @ Nur Muzdhalifah Abdullah v. Director of Jabatan Agama Islam Sarawak & Ors and other appeals*, 1 M. L. J. 340 (2017); *Mardina Tiara bt Abdullah Emat @ Margaret ak Emat v. Director of Jabatan Agama Islam Sarawak & Ors*, 9 M. L. J. 293 (2017); *Syarifah Nooraffyza Wan Hosen v. Director of Jabatan Agama Islam Sarawak & Ors*, No. Q-01(A)-45-02/2015 (Court of Appeal July 7, 2017).

⁸ *Kerajaan Negeri Selangor v. Suruhanjaya Pilihan Raya & Others*, M. L. J. UNREPORTED 1902 (2017).

ers in other states. The deluge of litigation, however, appears to have significantly delayed the completion of the redelineation exercise which, under Article 113(2)(iii) of the Federal Constitution, must conclude by September 2018.

The redelineation exercise is a serious matter due to the persistent problem of electoral malapportionment and gerrymandering in Malaysia. Coupled with Malaysia's first-past-the-post electoral system, the absence of concrete rules and ratios governing the apportionment of electors to constituencies in Part I of the Thirteenth Schedule (which sets out the so-called 'Principles Relating to the Delimitation of Constituencies') has already produced a situation where, in the previous general election, the ruling coalition polled 47% of the votes in an essentially two-party contest, yet secured 60% of the parliamentary seats.⁹ The latest redelineation exercise will allegedly exacerbate the problem even further; to cite but one example, one of the new constituencies it would produce will contain approximately 10 times more electors than another.¹⁰ There are also serious allegations of ethnic discrimination in the redrawing of constituency boundaries.¹¹ Since the exercise directly affects not only the question of who forms the government post-election but also whether a government emerges with the two-thirds majority needed to amend the Federal Constitution, this is a debate of momentous significance.

Two Landmark Cases on Separation of Powers

In *Semenyih Jaya Sdn Bhd v. Pentadbir*

Tanah Daerah Hulu Langat & Anor,¹² the Federal Court re-examined a 1988 constitutional amendment that deleted 'the judicial power of the Federation' from the provision in the Federal Constitution establishing the courts of first instance [Article 121(1)]. Departing from precedents interpreting this amendment as having drastically curbed the jurisdiction and powers of the Malaysian courts vis-à-vis Parliament,¹³ the Federal Court stridently affirmed that judicial power, judicial independence, and the separation of powers 'are as critical as they are sacrosanct in our constitutional framework.'¹⁴ Therefore, Article 121(1) was interpreted as continuing to enshrine the separation of powers and the independence of the judiciary as basic features of the Federal Constitution.¹⁵ Judicial power to adjudicate matters brought to court is vested only in the courts, and 'any alterations made in the judicial functions would be tantamount to a grave and deliberate incursion into the judicial sphere.'¹⁶ Thus, the Federal Court struck down a statutory provision restricting the courts' ability to determine whether owners of land compulsorily acquired by the government had been adequately compensated in accordance with the rights to property protected under Article 13 of the Federal Constitution. This reassertion of judicial power augurs well for the role of the courts in safeguarding the supremacy of the Federal Constitution and the rule of law.

Semenyih Jaya also revived discussion of the 'basic structure doctrine,' under which a legislature cannot amend the written constitution in ways that would destroy its basic structure, even if the stipulated amendment

procedure is followed. The Federal Court's explicit assertion that Parliament does not have the power to amend the Federal Constitution to the effect of undermining the separation of powers and the independence of the judiciary enshrined therein¹⁷ is a landmark development that departs significantly from previous rulings on the issue and brings Malaysia in line with some other Commonwealth jurisdictions.

In *Teng Chang Khim* (appealing as Speaker of Selangor State Legislative Assembly) *v. Badrul Hisham bin Abdullah & Anor*,¹⁸ the Federal Court clarified the limits of judicial intervention into legislative proceedings, given the concept of parliamentary privilege. The Speaker's act of declaring a member of the State Legislative Assembly's seat vacant upon the latter's prolonged absence without leave – as the Speaker is empowered to do under the Selangor State Constitution – was held to be 'inevitably connected with the essential business of the Legislative Assembly,' such that it was protected by parliamentary privilege under Article 72(1) of the Federal Constitution, even though the declaration itself was made at a press conference and not in formal Assembly proceedings. The Federal Court clarified that the court could only intervene if the Legislative Assembly, or a committee or officer thereof, was acting *ultra vires* its legal powers. Otherwise, it would be non-justiciable due to parliamentary privilege.

Religion and Administrative Power

In *A Child & Others v. Jabatan Pendaftaran*

⁹ *What's Malay for Gerrymandering?*, THE ECONOMIST (August 9, 2014), available at <http://www.economist.com/news/asia/21611139-years-delineation-electoral-boundaries-will-determine-future-malaysian-politics-whats>.

¹⁰ Kenneth Tee, *Selangor voters cite massive size discrepancies in objections to EC's redelineation*, MALAY MAIL ONLINE (January 3, 2018), <http://www.themalaymailonline.com/malaysia/article/selangor-voters-cite-massive-size-discrepancies-in-objections-to-ecs-redeli#mcKXzzPe1XfLxgEw.97>.

¹¹ Melati A. Jalil & Chan Kok Leong, *EC's Redelineation Clearly Biased, Critics Tell PM's Aide*, THE MALAYSIAN INSIGHT (December 19, 2017), <http://www.themalaysianinsight.com/s/28456/>.

¹² 3 M. L. J. 561 (2017).

¹³ See *Public Prosecutor v. Kok Wah Kuan*, 1 M. L. J. 1 (2008); *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd*, 2 M. L. J. 257 (2004).

¹⁴ *Semenyih Jaya*, *supra* note 13 at 593.

¹⁵ *Id.* at 590.

¹⁶ *Id.* at [67], [84].

¹⁷ *Id.* at [76].

¹⁸ 5 M. L. J. 567 (2017).

Negara & Others,¹⁹ the Court of Appeal examined the proper exercise of administrative power in matters implicating religious identification. In this case, a child was born out of wedlock under *Syariah* law to Muslim parents. When the National Registration Department (NRD) issued the birth certificate, the child's name bore the patronymic surname 'bin Abdullah' instead of his father's name. This was done against the wishes of the parents, who proceeded to make an application to correct the surname to reflect the name of the father. The NRD rejected the application and justified the decision on religious grounds, asserting that under *Syariah* law – which governs Muslims in Malaysia – an illegitimate Muslim child could not bear the name of his father, but must be ascribed with the surname 'bin Abdullah.' The Director-General of the NRD relied on two *fatwas* from the National *Fatwa* Committee in 1981 and 2003 in preference to the statutory provisions governing his exercise of power, i.e., the Births and Deaths Registration Act 1957 (BDRA).

The Court of Appeal judgment, in favour of the appellants, is significant for three reasons. The first concerns the reach of religious authorities and injunctions in civil or 'secular' matters. Unlike the High Court decision that approved the NRD's reliance on Islamic law in deciding an illegitimate child's surname, the Court of Appeal insisted that this issue is governed only by the BDRA. From this perspective, the NRD had acted irrationally and exceeded the scope of its power, as it only needed to consider whether the appellant had met the statutory registration requirements. The Court stressed that the BDRA does not sanction the application of Islamic law or principles in the registration process²⁰ and that *fatwas* are irrelevant to the exercise of statutory duties

under the BDRA.²¹

Second, the Court's reasoning has implications for the country's federal arrangement in matters involving Islam. National registration is a 'civil' matter under the federal list of powers and any attempt to allow *fatwas* – which do not have binding or legislative force in this particular instance – to dictate the administration of civil law would be unconstitutional. The case also raises a question about a federal body encroaching on state authority in Islamic law matters. The *fatwas* in question, having been issued by the federal-level National *Fatwa* Committee, could not have applied to the appellants, who were residents of the state of Johor. By deciding the way it did, the Court of Appeal keeps intact the constitutionally demarcated federal and state division of powers – powers that have recently been increasingly blurred by fervent exercises of power by federal-level religious bodies.

Finally, the judgment displayed great sensitivity to extra-legal considerations, i.e., as the Court aptly expressed, 'whether an innocent child should be subjected to humiliation, embarrassment and public scorn for the rest of his life.'²² This of course does not dilute the significance of the legal reasoning offered by the Court, but when considered together with the astute legal analysis, overall the decision is a welcome approach to deciding important questions involving religion and constitutional law.

Religion and Freedom of Expression

One of the most prominent cases this year was the ban on a book by a Canadian lesbian author titled *Allah, Liberty & Love: The Courage to Reconcile Faith and Freedom* and its translated Malay version. The

stated ground for the ban was that the book was prejudicial to morality and public order. Following the ban, the enforcement division of the Selangor State Religious Department raided the offices of the publisher of the translated book and sought to charge the director of the publishing house before the *Syariah* Court under the *Syariah* Criminal Offences (Selangor) Enactment 1995. Under section 16 of the Enactment, a person who publishes or has in his possession religious publications contrary to Islamic law is liable on conviction to a fine not exceeding RM3,000 and/or imprisonment not exceeding two years. The publisher and the director challenged the provision in the Enactment and the actions of the religious department officers on constitutional and administrative law grounds. The High Court dismissed the application on a preliminary objection,²³ but on appeal, the Court of Appeal held that the dismissal was erroneous and remitted the matter to the High Court for a substantive hearing of the judicial review application.²⁴

Another case to monitor concerns the constitutionality of a *fatwa* by the Selangor *Fatwa* Committee against a prominent women's rights group, Sisters In Islam, designating the group as 'deviant.' The group's challenge was also initially dismissed by the High Court on the basis that only *Syariah* courts have the power to deal with a religious decree. However, the Court of Appeal reversed the ruling and remitted the case back to the Kuala Lumpur High Court.²⁵ This will be another important case as it implicates the scope of a religious *fatwa* committee's powers and the extent to which it is subject to the Federal Constitution's guarantees of fundamental liberties, which include the freedom of association and assembly as enshrined in Article 10.

¹⁹ 4 M. L. J. 440 (2017).

²⁰ *Id.* at 455.

²¹ *Id.* at 453.

²² *Id.* at 445.

²³ *ZI Publications Sdn Bhd & Anor v. Jabatan Agama Islam Selangor & Ors* [2017] 1 LNS 1816.

²⁴ *ZI Publications Sdn Bhd & Anor v. Jabatan Agama Islam Selangor & Ors*, No. W-01(A)-383-10/2016 (Court of Appeal July 17, 2017).

²⁵ *Zurairi AR, SIS allowed to continue judicial review against 'deviant' fatwa*, MALAY MAIL ONLINE (March 2, 2017), <http://www.themalaymailonline.com/malaysia/article/sis-allowed-to-continue-judicial-review-against-deviant-fatwa#i11RD6BiAg4YzWCS.99>.

Child Conversions and Law Reform (Marriage and Divorce) Act 1976

In November 2016, a bill was tabled in Parliament to amend the Law Reform (Marriage and Divorce) Act 1976, which included provisions in section 88A requiring both parents in a civil marriage to consent to a minor's conversion into Islam and providing that a child will remain in the religion of his/her parents at the time the marriage was registered.²⁶ This offered the best hope for an end to lingering problems brought about, in part, by civil-*Syariah* jurisdictional battles in matters concerning conversions.²⁷ However, when Parliament passed the bill in August 2017, section 88A, which would have invalidated unilateral conversions of children, was conspicuously missing. The government claimed that it withdrew the provision, as it would conflict with existing Federal Court decisions on the unilateral conversion of children.²⁸

Even though the final amendment contained positive developments—for instance, it cemented the position that disputes relating to custody, maintenance, and matrimonial assets that arise from the dissolution of a civil marriage must be resolved in the civil courts rather than the *Syariah* courts (despite the conversion of one spouse to Islam), as well as inserting a provision that both the converted and non-converting spouse could petition for divorce before the civil courts—critics argue that the main objective behind efforts to amend the law had always been the issue of unilateral conversion. The fact that section 88A fell through demonstrates how the government and the political process could

cave in to majoritarian pressures surrounding the question of conversion. The passing of the bill may well have ended any legislative initiative to resolve the long-standing controversy surrounding unilateral conversions of underage children.²⁹ It also raises a crucial question – if the judicial and political processes do not protect fundamental rights and minorities, what recourse would citizens then have?

Controversial Extension of Chief Justice's Tenure

In July, the government announced that Tun Raus Sharif's term as Chief Justice of the Federal Court (CJ, the highest judicial appointment in Malaysia) would be extended for three years from 4 August while Tan Sri Zulkifli Ahmad Makinudin would continue as President of the Court of Appeal (PCA) for two years from 28 September. Both senior judges were to have retired on these dates upon reaching the constitutional age limit for judges of the Federal Court. This unprecedented extension of the CJ's and PCA's tenure beyond retirement age was purportedly done under Article 122(1A) of the Federal Constitution, which allows the appointment of 'additional judges' of the Federal Court beyond the age limit. However, it remains highly questionable whether that provision allows for a judge's tenure *qua* CJ and PCA (as opposed to an ordinary membership of the Federal Court) to be extended in that manner.

Several parties subsequently attempted to challenge these appointments by way of judicial review. In November, former Prime

Minister Tun Dr Mahathir Mohamad's application for judicial review was dismissed by the High Court on the basis that there could be no statutory duty for the Prime Minister to advise the King to revoke the allegedly unconstitutional appointments.³⁰ In December, another application for judicial review, by opposition party Amanah, was also dismissed due to lack of *locus standi*.³¹

The Malaysian Bar took a strong stand on the matter, convening an Extraordinary General Meeting on 3 August at which it resolved that these extensions were 'unconstitutional, null and void.'³² The Bar also resolved that it would 'no longer have confidence' in these two judges continuing to hold office as CJ and PCA, and mandated the Bar Council to institute legal proceedings challenging the constitutionality of the extensions. This duly took place and on 19 December, the Bar was granted leave by the High Court to refer six questions regarding the constitutionality of these appointments for determination by the Federal Court in 2018. A singular difficulty arising in this litigation is how the case will be heard and disposed of, given that the persons who are the subject of the challenge are currently occupying the top two positions in the very same court hearing the case.

IV. LOOKING AHEAD TO 2018

The main event in 2018 is undoubtedly the upcoming 14th general election, in which all seats in the Lower House of the federal Parliament, as well as every state legislature except Sarawak's, will be up for election. This election will test whether the incumbent BN

²⁶ Law Reform (Marriage and Divorce) (Amendment) Bill 2016, § 88A.

²⁷ See e.g., Jaclyn Neo, *Competing Imperatives: Conflicts and Convergences in State and Islam in Pluralist Malaysia*, 4 OXFORD J. L. & REL. 1 (2015).

²⁸ In *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray and Other Appeals*, 2 M. L. J. 147 (2008), the Federal Court held that the conversion of a child by either parent is valid, i.e., it does not require the consent of both parents. This decision was affirmed in *Pathmanathan Krishnan v. Indira Gandhi Mutho and Other Appeals*, 1 Current Law Journal 911 (2016). See Dian A. H. Shah, *Religion, conversions and custody: battles in the Malaysian appellate courts*, in LAW AND SOCIETY IN MALAYSIA: PLURALISM, RELIGION, AND ETHNICITY 145-162 (Andrew Harding & Dian A. H. Shah eds., 2018) 145, 150-152

²⁹ See generally Shah, *supra* note 29.

³⁰ *Dr Mahathir Loses Bid to Challenge Appointment of Two Judges*, NEW STRAITS TIMES (November 6, 2017), available at <http://www.nst.com.my/news/nation/2017/11/299989/dr-mahathir-loses-bid-challenge-appointment-two-judges>.

³¹ Ram Anand, *Amanah fails in judicial review bid against CJ's appointment*, MALAY MAIL ONLINE (December 19, 2017), <http://www.themalaymailonline.com/malaysia/article/amanah-fails-in-judicial-review-bid-against-cjs-appointment#kTUFY0YRc4pV3e9q.97>.

³² *Resolution Adopted at The Extraordinary General Meeting of the Malaysian Bar Held at KL and Selangor Chinese Assembly Hall* (Thursday, 3 Aug 2017), THE MALAYSIAN BAR (August 3, 2017), http://www.malaysianbar.org.my/malaysian_bar_s_resolutions/resolution_adopted_at_the_extraordinary_general_meeting_of_the_malaysian_bar_held_at_kl_and_selangor_chinese_assembly_hall_thursday_3_aug_2017.html.

can head off the main opposition ‘Coalition of Hope’ (PH) and even possibly recapture a two-thirds majority in Parliament, which would enable it to amend the Federal Constitution at will once again.

If 93-year-old former Prime Minister Mahathir Mohamad – the one-time strongman of Malaysia turned government arch-critic – remains at the helm of PH, this election will demonstrate how far he can sway popular support against scandal-hit incumbent Prime Minister Najib Razak, particularly among the latter’s core constituency of Malay and indigenous voters. This election will also determine – at least for the duration of the next Parliament – the ability of the Islamic Party of Malaysia (PAS) to continue pushing its Islamist agenda for Malaysia since PAS has chosen to align itself with neither the BN nor PH.³³

The Malaysian Bar’s challenge to the constitutionality of the reappointment of the Chief Justice and the President of the Court of Appeal – presently before the Federal Court – is a case to watch in 2018. This scenario, unprecedented in Malaysian constitutional history, will test the ability of the apex court to deliver a convincing and well-reasoned resolution capable of sustaining current efforts to rebuild public confidence in the Malaysian judiciary.

Cases on religious issues, as highlighted above, will also, as ever, be notable in 2018. Three such cases – the government’s appeal against the *A Child & Others* decision at the Federal Court, and the substantive judicial review applications involving Canadian author Irshad Manji and Sisters in Islam – will be particularly important to watch.

V. FURTHER READING

HP LEE, *CONSTITUTIONAL CONFLICTS IN CONTEMPORARY MALAYSIA*, (2nd ed, 2017)

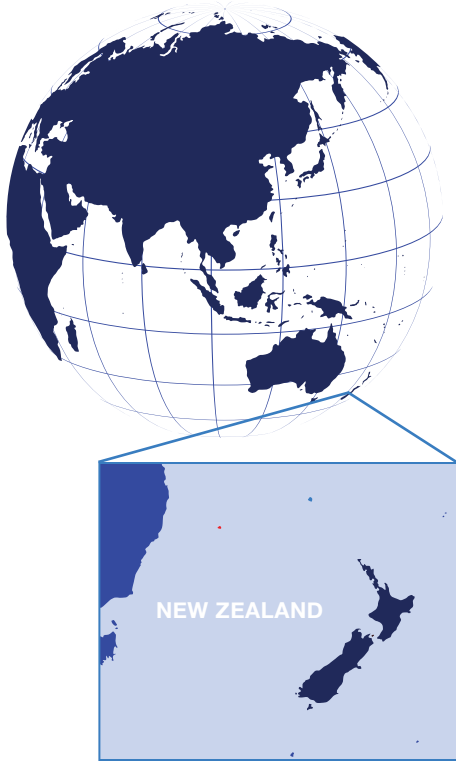
ANDREW HARDING & DIAN A. H. SHAH, *LAW AND SOCIETY IN MALAY-*

SIA: PLURALISM, RELIGION AND ETHNICITY (2017)

Andrew Harding, *Devolution of Powers in Sarawak: A Dynamic Process of Redesigning Territorial Governance in a Federal System*, 12(2) *ASIAN J. COMP. L.* 257 (2017)

Gopal Sri Ram, *The Dynamics of Constitutional Interpretation*, 4 *M. L. J.* i (2017)

³³ Yang Razali Kassim, *Is a New PAS Emerging?*, STRAITS TIMES (May 5, 2017), available at <http://www.straitstimes.com/opinion/is-a-new-pas-emerging>.



New Zealand

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

New Zealand is one of the world's oldest and most stable liberal democracies. It has held regular triennial elections to its national Parliament since 1855, resulting in repeated peaceful transfers of power between governments. Such elections have special significance in New Zealand's constitutional arrangements due to the nation's lack of any written constitution and ongoing commitment to parliamentary sovereignty. Because Parliament may in theory enact any legislation it wishes and the courts have no constitutional power to invalidate such enactments, the electorate's regular selection or rejection of aspiring members of Parliament (MPs) remains the critical constraint on lawmaking power. New Zealand therefore retains a form of liberal democracy in which popular political control exercised through the electoral process generally is preferred to judicially policed constraints on legislative power.

Within this constitutional framework, a general parliamentary election in September 2017 saw the previously governing National Party replaced by a three-way governing coalition consisting of the Labour, NZ First and Green Parties. This change was enabled by the operation of New Zealand's Mixed-Member Proportional (MMP) voting system. Despite the National Party retaining a substantial plurality of the vote, the Labour, NZ First and Green Parties' combined support provided them with the overall parliamentary majority necessary to govern. Consequently, the new governing coalition does not contain the largest political party in

the Parliament, but instead brings together three smaller parties. This arrangement is a somewhat novel development for New Zealand, requiring adjustment to government processes. However, it delivers on MMP's original promise – that parties would be prepared to compromise their policy positions during negotiations to enable majority agreement on who will run the country.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

New Zealand's constitutional commitment to liberal democracy is long standing and deeply held. Elections to a national Parliament first were held only 15 years after the country became a British colony and generally have been accepted as free and fair in practice. Although voting originally was restricted to property-owning males, the franchise progressively was extended to cover all Maori men in 1867,¹ all other men in 1879² and all women in 1893.³ A system of guaranteed parliamentary representation for Māori also has existed since 1868. More recently, in the early 1990s the country decided by referendum to move from a first-past-the-post electoral system to the strongly proportional MMP method of voting. This reform took place only a few years after the rejection of a proposal to replace the doctrine of parliamentary sovereignty with a higher law written constitution permitting judicial enforcement of individual rights guarantees.

Given this history, it is difficult to see how representative democracy could become

¹ Maori Representation Act 1867. Māori are the indigenous people of Aotearoa New Zealand.

² Qualification of Electors Act 1879.

³ Electoral Act 1893.

even *more* embedded in New Zealand's constitutional culture.⁴ However, the country has not experienced the sorts of dramatic challenges to liberal democratic principles or practices recently observed elsewhere. While electoral participation has fallen from its mid-twentieth century heights, 79.1% of enrolled voters still cast a ballot at the 2017 general election (representing a 2.3% increase on the previous election). Parliament as an institution continues to command significant respect amongst the general populace: 39% of New Zealanders have "high" or "very high" trust in it, while 29% have "low" trust.⁵ None of the parties contesting the 2017 election could be described as extremist or anti-democratic in nature, despite New Zealand imposing minimal legal restrictions on the types of parties that can form or the policies they may espouse. There is thus little evidence of a general loss of faith in liberal democracy as a means of collective governance for New Zealand.

2017 instead involved some minor reordering of New Zealand's version of liberal democracy along two vectors. First, the general election outcome resulted in a novel inter-party arrangement that reordered both governing practices and the electorate's expectations. This development marks the MMP era's coming of age, as three smaller parties with somewhat disparate policy programmes were able to negotiate to form a government that excluded Parliament's largest political party. Second, a decision of New Zealand's full Court of Appeal directly considered Parliament's legislative treatment of prisoners' right to vote and formally declared it to be inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA). While this declaration could not affect the ongoing validity of the relevant enactment, it raises questions about the future relationship between the legislature and the judiciary on matters of individual rights. Each of these matters is considered in turn.

Under New Zealand's Westminster system, MPs from the largest party in Parliament

have governed the country since party government first developed in the late nineteenth century. When the country's original first-past-the-post voting system was in operation, this largest party virtually always commanded a parliamentary majority in its own right. Since MMP's introduction in 1996, the largest party still was able to attract the necessary support from other parliamentary parties to govern in some form of multi-party arrangement. It appeared likely this tradition would continue following the 2017 election, as the governing National Party won 44.4% of the party votes (which ultimately determine the overall share of parliamentary seats under MMP). However, following a month-long period of post-election negotiations, the NZ First Party (with 7%) instead agreed to form a coalition arrangement with the Labour Party (with 37%), supported by the Green Party (with 6%).

This outcome is constitutionally significant for two reasons. First, it disproved assertions regarding a general public expectation that the largest party *should* have some role in the country's government. Any such expectation did not reflect formal constitutional convention, which simply requires that a government have majority support in Parliament without saying how that must be achieved. Instead, it was claimed to manifest a mixture of assumption ("this is just what always has happened before") and general notions of fairness ("the most popular ought to get to run things"). The new governing arrangement thus demonstrates an evolution in voters' views as to what form of government is legitimate, with the public generally accepting that a combination of smaller parties able to command a parliamentary majority can govern over the top of a larger party. Such acceptance reveals that, after eight elections under the MMP voting system, the public has grown comfortable with the idea that multi-party compromises on policy matters are a necessary and legitimate part of the government formation process.

Second, the new governing arrangement in-

volves a subtly different structure to previous MMP-era governments. The preferred model has been for one of the major parties (National or Labour) to form a minority government on its own while entering into so-called "enhanced confidence and supply agreements" with a range of other support parties. These enhanced agreements involve the support parties putting their votes behind the governing party (or parties) on key matters of confidence and supply, thereby providing the parliamentary majority needed for the government to enter and remain in office. They also commit to supporting central parts of that government's legislative agenda while the governing party in turn agrees to advance some of the support parties' policies. However, MPs from the support parties do not formally join the government, do not sit in cabinet, and retain the right to oppose and criticise the government on any policy issues that they have not expressly committed to support. Further complicating matters, the leader or leaders of the support parties also receive a ministerial role, thereby gaining some control over executive government decision making in a particular policy field and the enhanced public profile that ministerial office confers.

Following the 2017 election, however, the Labour and NZ First Parties chose to enter into a formal governing coalition, with ministers from each party sitting together in cabinet. The Green Party then entered into an enhanced confidence and supply agreement with this coalition, being granted some ministerial roles in return. Therefore, in formal constitutional terms, the Labour-NZ first government is a minority one, able to hold office with the Green Party's guaranteed support. In practical terms, however, the three parties must manage their respective ministerial portfolios collectively, meaning that the Green Party is a functional part of the governing arrangements. Each party's different formal role is thus more a matter of political positioning; NZ First in particular wishes to be viewed as the dominant partner in government with Labour, and also wants

⁴ See Matthew Palmer, 'New Zealand Constitutional Culture' (2007) 22 NZ U L Rev 565, 580-82.

⁵ Statistics New Zealand, 'Kiwis perceive high political trust but low influence' (January 29, 2108) < <https://www.stats.govt.nz/news/kiwis-perceive-high-political-trust-but-low-influence> > accessed 30 January 2018.

to be able to deny it is “in government” with the Greens (with which it has significant ideological differences).

2017’s other major constitutional development regarding New Zealand’s liberal democratic processes was the Court of Appeal’s decision in *Attorney General v Taylor*.⁶ This case involved the issuance of a declaration of inconsistency under the NZBORA in relation to legislation that removed the right to vote from all sentenced prisoners. It was significant for two reasons. First, the Court’s unanimous judgment from a full bench of five judges delved deeply into the constitutional relationship between the judicial and legislative branches of New Zealand’s government. Second, the Court’s decision to uphold the grant of a declaration of inconsistency focuses attention on the respective roles of each institution when it comes to defining and protecting individual rights.

The NZBORA guarantees a range of civil and political rights, including the right to vote,⁷ against “unjustified limits” by the state.⁸ However, in a deliberate affirmation of parliamentary sovereignty, it also prohibits courts from invalidating or refusing to apply any other parliamentary enactment that imposes an unjustified rights limit.⁹ It then remained unclear whether in such cases the courts still could issue a formal declaration that an inconsistency exists between the NZBORA and the other enactment. While such a declaration could not affect the other enactment’s ongoing application as valid law, it might nevertheless serve to encourage the

legislative branch to revisit and amend it.

The matter came to a head through the action of a convicted prisoner, Mr Taylor, who challenged a 2010 statute that removed the right to enroll to vote from all sentenced prisoners whilst imprisoned. Remarkably, the Crown conceded that this measure imposes an unjustified limit on the NZBORA guaranteed right to vote. Nevertheless, it argued that the courts had no remedial role to play as the statutory prohibition on enrollment was clear and so must be applied, while the NZBORA contains no specific declaration-making power. At first instance, the High Court disagreed and granted a declaration to mark the voting ban’s rights-inconsistent nature.¹⁰ The Crown appealed on the ground that the High Court was wrong to find any jurisdiction to grant that remedy.

The Court of Appeal thus had to decide whether, in the absence of any specific authorisation in the NZBORA, a court had the power to grant a formal judicial declaration of inconsistency. In doing so it “rehearse[d] some elementary principles about the relationship between the political and judicial branches of government and the role of the higher courts under New Zealand’s constitution.”¹¹ While continuing to recognise that Parliament enjoys sovereign law-making status in terms of “mak[ing] or unmak[ing] any law it wishes, unconstrained by any entrenched or codified constitution,”¹² the Court also emphasised the judiciary’s independent role in declaring the law (including whether legislation is “enacted law” to

which obedience is due).¹³ Adopting Philip Joseph’s phrase, the Court described its role in this “collaborative enterprise”¹⁴ of governance as “extend[ing] to answering questions of law, and as a general proposition [this] does not require express legislative authority. Inconsistency between statutes is a question of interpretation, and hence of law, and it lies within the province of the courts.”¹⁵

After finding that a formal declaration of inconsistency is an available judicial remedy, the Court upheld the High Court’s decision to grant one. In doing so, the Court expressly cast its actions in terms of fostering a “dialogue” with the political branches of government over the appropriate limits that should apply to individual rights.¹⁶ A declaration of inconsistency, in the Court’s view, carries with it “the reasonable expectation that other branches of government, respecting the judicial function, will respond by reappraising the legislation and making any changes that are thought appropriate.”¹⁷ This invocation of “constitutional dialogue” then opens up the issue of the proper role for the judicial and legislative branches of government in relation to defining and protecting individual rights in a liberal democracy. Historically, this has been very much the province of New Zealand’s Parliament, with rights issues treated as simply another matter of policy for popularly elected representatives to resolve. However, recently there have been calls for greater judicial involvement in considering such matters.¹⁸ Those calls reflect concerns that MPs may fail to properly understand the

⁶ [2017] NZCA 215, [2017] 3 NZLR 24.

⁷ New Zealand Bill of Rights Act 1990, s 12(a).

⁸ *Ibid.*, s 5.

⁹ *Ibid.*, s 4.

¹⁰ *Taylor v Attorney-General* [2015] NZHC 1706, [2015] 3 NZLR 791.

¹¹ *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [43].

¹² *Ibid.*, at [44].

¹³ *Ibid.*, at [55].

¹⁴ Philip A Joseph, ‘Parliament, the Courts and the Collaborative Enterprise’ (2004) 15 KCLJ 321.

¹⁵ *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [62].

¹⁶ *Ibid.*, at [149]-[150].

¹⁷ *Ibid.*, at [151].

¹⁸ Tom Hickman, ‘Bill of Rights Reform and the Case for Going Beyond the Declaration of Incompatibility Model’ [2015] NZ L Rev 35; Claudia Geiringer, ‘Inaugural Lecture: Mr Bulwark and the Protection of Human Rights’ [2014] 45 VUW L Rev 367; Geoffrey Palmer & Andrew Butler, *A Constitution for Aotearoa*

rights implications of legislation they consider and vote on as well as fears that they will systemically undervalue the rights of particularly unpopular social groups. Simply put, the elected lawmaking institution in New Zealand's liberal democratic constitutional framework may not be fully trustworthy when it comes to deciding how the rights of individuals should be understood.

The ultimate impact of the Court of Appeal's declaration is yet to be seen. The Crown has been granted leave to appeal the decision to the New Zealand Supreme Court,¹⁹ although the strength and unanimous nature of the full Court of Appeal's decision make it unlikely to succeed. The previous National Government, which had enacted the ban on prisoner voting, showed no interest in revisiting the matter in the wake of the Court's declaration while it received scant attention in a parliamentary report on the 2014 general election.²⁰ However, the new Labour-NZ First-Green Government may be more receptive to the judicial message that a complete ban on prisoner voting represents an unjustifiable limit on the right to vote: two of these parties voted against the legislation when first enacted.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Two further constitutional developments – both relating to Māori but involving very different issues – are worthy of note. The first is the continuance of a trend that sees the giving legal personhood to a natural geographic and/or environmental feature as part of redress from Crown to Māori for the former's historical breaches of the Treaty of Waitangi.

New Zealand blazed this trail in 2014 when, as part of the settlement with the Tūhoe iwi (tribe) for its historical breaches of the Treaty of Waitangi, the Crown recognised the former Te Urewera national park as being a legal entity with “all the rights, powers, duties, and liabilities of a legal person.”²¹ The 2017 settlement between the Crown and Whanganui iwi went a step further: legislation declared the Whanganui River and its tributaries (collectively known as Te Awa Tupua) to be a legal *person* with “all the rights, powers, duties, and liabilities of a legal person.”²² The legislation then establishes a new office – Te Pou Tupua – to act and speak for and on behalf of Te Awa Tupua.²³ It comprises two people, one nominated by iwi and one by the Crown.

Such a development was proposed seven years ago by Morris and Ruru as an alternative model to simple legislative recognition of the importance of a river to local iwi.²⁴ They described the advantage of legal personhood as “tak[ing] a western legal precedent and giv[ing] life to a river that better aligns with a Māori worldview that has always regarded rivers as containing their own distinct life forces,”²⁵ thereby putting the health and well-being of the river at the forefront of decision-making.²⁶ Furthermore, the trend is set to continue, with the Crown and Taranaki iwi in December signing “Te Anga Pūtakerongo” – a record of understanding – that Mount Taranaki will also soon gain recognition as a legal, living entity.²⁷ These developments are not only constitutionally significant for New Zealand but gained international attention²⁸ as a “disruptive union” of a Western concept with a Māori worldview.²⁹

The second major constitutional development was the Supreme Court's decision in *Proprietors of Wakatu v Attorney-General*.³⁰ A 4:1 majority held the Crown could owe a fiduciary duty to the collective descendants of the original customary title-holders to land, and in doing so struck “a very different pathway for dealing with Māori claims of historical land loss than the systematised

New Zealand (VUW Press, 2016).

¹⁹ *Attorney General v Taylor* [2017] NZSC 131.

²⁰ Justice and Electoral Committee, ‘Inquiry Into the 2014 General Election’ (2016) AJHR I.7A 28.

²¹ Te Urewera Act 2014, s 11.

²² Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14.

²³ *Ibid.*, ss 18-19.

²⁴ James D K Morris and Jacinta Ruru, ‘Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples’ Relationships to Water?’ (2010) 14 AILR 49.

²⁵ *Ibid.*, at p 58.

²⁶ *Ibid.*, at p 57.

²⁷ Te Anga Pūtakerongo mō Ngā Maunga o Taranaki, Pouakāi me Kaitake / Record of Understanding for Mount Taranaki, Pouakai and the Kaitake Ranges’ (20 December 2017) <<https://www.govt.nz/dmsdocument/7265.pdf>> accessed 30 January 2018.

²⁸ See, for example, Eleanor Ange Roy, ‘New Zealand river granted same legal rights as human being’ *The Guardian* (16 March 2017) <<https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>> accessed 30 January 2018; Bryan Rousseau, ‘In New Zealand, Lands and Rivers Can Be People (Legally Speaking)’ *The New York Times* (13 July 2016) <<https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html>> accessed 30 January 2018.

²⁹ Simon Day, ‘If the hills could sue: Jacinta Ruru on legal personality and a Māori worldview’ *The Spinoff*, (27 November 2017) <<https://thespinoff.co.nz/atea/atea-otago/27-11-2017/if-the-hills-could-sue-jacinta-ruru-on-legal-personality-and-a-maori-worldview/>> accessed 30 January 2018.

³⁰ [2017] NZSC 17, [2017] 1 NZLR 423.

and politically negotiated settlements that have predominated since the mid-1990s.”³¹ That shift in approach made it “one of the most important decisions from a New Zealand court in the last 25 years.”³²

The case was based on the nineteenth century New Zealand Company’s approach to purchasing land from Māori as part of its colonisation scheme. That approach saw a tenth of the land being purchased set aside for Māori in addition to any existing land occupied by Māori, which was exempted from the sale. In 1839 the New Zealand Company purchased 151,000 acres of land in the upper South Island from three iwi, meaning 15,100 acres should have been reserved for Māori. After the signing of the Treaty of Waitangi between the Crown and Māori in February 1840, the Crown alone assumed the power to purchase land from Māori, and all pre-1840 sales were reviewed to ensure they were equitable. The sale in question was reviewed and confirmed in 1845 with the land first vesting in the Crown. The Crown would then grant the land to the New Zealand Company on the condition that the 15,100 acres were reserved and held on trust and no areas occupied by Māori were part of the sale.

However, the Crown failed to ensure these conditions were met: only 5,100 acres were reserved and the sale included areas occupied by Māori. Those 5,100 acres were further diminished, so that by the time they were released to the descendants of the original landowners in 1977, only 1,626 acres remained. The claim before the Court was that the Crown held a fiduciary duty to the landowners (and their descendants) to ensure the conditions of the original sale were fulfilled and breached that duty by failing to do so. At both the High Court and Court of Appeal, the Crown successfully resisted the plaintiffs’ – the descendants of the original landowners – claim on the basis that as it

acted in a governmental capacity, it did not (and could not) incur fiduciary duties. The Supreme Court overturned those decisions and held that the Crown owed fiduciary duties to reserve 15,100 acres for the benefit of the landowners.

This was a significant departure from the orthodox approach of categorising the Crown’s actions as a breach of Treaty of Waitangi obligations and thus a public rather than private law matter. To this extent, it is worth noting that both O’Regan and Arnold JJ held that the relationship between Crown and Māori landowners was not necessarily a “true” or “pure” trust relationship. They instead adopted the Canadian precedent of *Guerin v The Queen*,³³ holding that the Crown’s breach of a fiduciary duty would have the same effect as if a trust relationship existed.³⁴ Regardless, however, the obstacles surmounted by the plaintiffs – issues of standing and limitations to name but a few – made the result remarkable. Although the Court remitted to the High Court the final determination of the extent of the breach of the fiduciary duty and the remedies owed (if any), the decision has significant consequences. While Māori/Crown relationships continue to be fundamentally constitutional in nature, the nature of that relationship will inevitably be altered by the recognition of the kinds of ongoing private law duties found to exist in *Wakatū*.

IV. LOOKING AHEAD TO 2018

The issue of prisoner voting will continue to resonate in 2018. Not only will the Supreme Court decide whether to uphold the Court of Appeal’s declaration of inconsistency but it also will hear an appeal that claims the legislation was not enacted consistently with a provision in the *Electoral Act 1993* requiring a 75% majority vote to alter certain aspects of the country’s voting rules.³⁵ Should the

Court decide the prisoner voting ban was not so enacted then it may declare the legislation invalid.³⁶ There also is the matter of whether the government will revisit the issue in light of the judiciary’s clear message about the existing law’s rights implications. In addition, stalled Māori/Crown negotiations over rights to fresh water may see the Supreme Court asked to rule on whether customary rights of ownership of that resource still exist.

V. FURTHER READING

Margaret Bedggood, Kris Gledhill & Ian McIntosh (eds.), *International Human Rights in Aotearoa New Zealand* (Thomson Reuters, 2017)

Andrew Geddis, “Declarations of Inconsistency” under the New Zealand Bill of Rights Act 1990’ (U.K. Const. L. Blog, 19 June 2017) <<https://ukconstitutionallaw.org/>> accessed 12 December 2017

Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (VUW Press, 2016)

Matthew Palmer, ‘Lecture: Constitutional Dialogue and the Rule of Law’ (2017) 47 HKLJ 505

Alison Quentin Baxter & Janet McLean, *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown* (AUP, 2017)

³¹ Carwyn Jones, ‘Analysis: Proprietors of Wakatū and Others v Attorney-General [2017] NZSC 17’ *Blog of the IAACL, AIDC* (13 May 2017) <<https://iacl-aidc-blog.org/2017/05/13/analysis-proprietors-of-wakatu-and-others-v-attorney-general-2017-nzsc-17/>> accessed 30 January 2018.

³² *Ibid.*

³³ *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321 (SCC).

³⁴ *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, [2017] 1 NZLR 423 at [726].

³⁵ See *Ngaronoa v Attorney General* [2017] NZCA 351, [2017] 3 NZLR 643.

³⁶ Andrew Geddis, ‘Judicial Enforcement of New Zealand’s Reserved Provisions’ (2017) 28 Pub L Rev 277.



Nigeria

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

With a population of 186 million, Nigeria is the most populous country and the oldest federation in Africa, comprising 36 states and a federal capital territory. Its initial experience with liberal democracy in the half decade immediately following independence from the United Kingdom in 1960 was interrupted by prolonged military dictatorship. Since 1999, however, the country has been continuously under democratic rule. Constitutionalism has been consolidated by regular and increasingly transparent elections, seamless transition of power between political parties, a constitutional bill of rights, and judicial independence. For nearly a decade there has been a violent insurgency in the Northeast region by the radical Islamist armed group *Boko Haram*, which has caused a massive population displacement and a significant humanitarian crisis. Security operations have resulted in extensive human rights violations.

The Freedom House *Freedom in the World 2018* report ranks Nigeria as “partly free” in 2017 with a “freedom rating” of 4/7 (7 = least free), or an aggregate score of 50/100, the same as 2016,¹ based on an average score for implementation of political rights (3/7) and civil liberties (5/7) respectively. Although the detailed country report has not yet been published, the methodology of the survey provides a hint of the specific findings that justify the rating assigned Nigeria. As it is an assessment of “real world rights and freedoms enjoyed by individuals” rather than mere legal guarantees, the partly free

status reflects violations of political rights and civil liberties by both state and non-state actors (especially insurgency and terrorist attacks in the Northeast).

In what follows we provide a short account of rising liberal democracy in Nigeria and its challenges in light of developments in 2017. That account is elaborated on with a review of certain important constitutional developments during the period. We conclude by highlighting the most critical developments expected in 2018.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

There are many aspects to the notion of liberal democracy, including representative government chosen by regular, free and competitive elections; accountability; impersonal rule; constitutionalism and the legal protection of civil liberties; and the separation of State from civil society.² The primary legal framework of liberal democracy in Nigeria is the Constitution of 1999. It vests executive powers in the President; legislative powers in a 469-member bicameral National Assembly; and judicial powers in the judiciary. The Constitution replicates the same structure for each of the 36 states (Governor; a unicameral House of Assembly; and the judiciary). The primary challenge of this separation of powers is that, given a legacy of authoritarian and personal rule, the President (and Governors) often seeks to minimize the role of the legislature. That the prospects of liberal

¹ ‘Nigeria Profile’ <<https://freedomhouse.org/report/freedom-world/2018/nigeria>> accessed 6 February 2018.

² See David Held, *Models of Democracy*. (2nd edn, Stanford University Press 1996) chap. 3.

democracy depend significantly on the institutionalization of the legislative branch is borne out by a positive correlation between increasing assertiveness and the growing independence of the National Assembly. This has kept the presidency from slipping deep into personal rule.

But friction has persisted in the interaction of the two organs, particularly in the system of checks and balances. For example, in addition to certain presidential appointments (ministers, ambassadors, senior judges, and so on) that are required by the Constitution to be confirmed by the Senate, dozens of statutes stipulate the same requirement for several statutory offices. A disagreement between the President and the Senate in March 2017 with respect to one such office has since resulted in the Senate indefinitely suspending further consideration of confirmation of presidential appointments. This has left several executive offices vacant. Thus the Central Bank of Nigeria's Monetary Policy Committee, responsible for setting monetary and credit policy, was unable to hold its January 2018 meeting due to inability to form a quorum, as five members and a Deputy Governor of the Bank appointed by the President in October 2017 are yet to be confirmed by the Senate, forcing the bank to maintain key monetary variables.³ The origin of this constitutional crisis was the rejection by the Senate of the appointment of the Chairman of the Economic and Financial Crimes Commission (EFCC), Mr. Ibrahim Magu. Rather than appointing a replacement, the President asked him to remain in office in acting capacity. In addition, the government contested the constitutionality of the requirement of Senate confirmation for this appointment under the EFCC Act. It claimed that the provision is contrary to section 171 of the Constitution, which vests the power of appointment and removal with respect to certain offices exclusively in the President, including a "Head of any Extra-Ministerial Department of the Government of the Federation." The constitutionality question therefore turns on

whether the EFCC is an extra-ministerial department. Even if the government's reading of the Constitution was correct, it does not affect appointments statutorily requiring Senate confirmation other than those exempted by section 171. What is remarkable about this crisis is the marked reluctance of both the President and the Senate to seek judicial interpretation of the contentious provision, especially as the Supreme Court has original jurisdiction in a dispute between the President and the National Assembly involving any question on which the existence or extent of a legal right depends.⁴

In other areas constitutional mechanisms have worked as well as designed. An example is section 145 (modelled on section 3 of the 25th Amendment to the U.S. Constitution) requiring a temporary transmission of the entire presidential powers to the Vice-President, as Acting President when the President sends a written declaration to the President of the Senate and the Speaker of the House of Representatives that he is proceeding on vacation or is otherwise temporarily unable to discharge the functions of his office (for example, because of illness). Following the communication of this self-declaration by the President, power is automatically transferred to the Vice-President for the duration of his absence. There was a seamless transition of power, in accordance with this provision, to the Vice-President when the President was abroad for medical purposes for several weeks on two occasions in 2017 (January-March and May-August). In contrast, in 2009, when a previous President was ill abroad, he failed to make the necessary declaration, and the country was practically without a leader until the National Assembly intervened by recognizing the Vice-President as Acting President.

Electoral transparency is key to liberal democracy. The conduct of elections is improving in Nigeria, with the March-April 2015 general elections widely acclaimed as a success. Transparency has increased while

elections-related violence has decreased significantly. The only major election conducted in 2017, for a state governor in southeastern Nigeria, was also considered transparent. The next general elections will be in 2019. Because the incumbent President is constitutionally eligible to run for a second, and final, term, there is considerable anxiety that the transparency of the elections may be compromised. However, the Independent National Electoral Commission (INEC) is confident that this will not be the case. Yet, despite the progress it is hard to say that elections in Nigeria fulfill liberal democracy's aspiration of reflecting the will of voters and ensuring equitable representation. If peaceful polls producing authentic results are increasingly the norm, election outcomes may still not necessarily reflect the will of the voters, as vote-buying remains not only widespread but brazen. Election financing regulations have no impact whatsoever in practice. And although polling offences are rampant, almost the norm, prosecution is minuscule. A decade-old recommendation by a high-powered electoral reform committee, headed by a former chief justice, for the creation of an electoral offences commission to facilitate speedy prosecution of polling offences has never been implemented. Election outcomes fall far short of equitable representation. Nigeria remains one of the most gender unequal countries today, and this reflects in elections. The UNDP's *Human Development Report 2016* ranks Nigeria 152nd on its Gender Inequality Index. This is confirmed by the number of women elected to the National Assembly, which is only 7 percent of the members.

Until the 1990s, there was widespread cynicism about liberal democracy in Africa. During the earlier period, Robert Fatton observed, "The African commitment to liberal democracy was shaky, hesitant, and ultimately short-lived."⁵ Unfortunately, in spite of the spread of liberal democracy throughout the continent during the past two decades, the persistence of neo-patrimonial

³ "Why the CBN's January Monetary Policy Meeting was Cancelled – Emefiele" <<http://dailypost.ng/2018/01/22/cbns-january-monetary-policy-meeting-cancelled-emefiele/>> accessed 19 February 2018.

⁴ Supreme Court (Additional Jurisdiction) Act 2002, s. 1(1).

⁵ Robert Fatton, 'Liberal Democracy in Africa' (1990) 105 *Political Science Quarterly* 455, 457.

politics has ensured that personal rule uneasily co-exists with the formal rational-legal state structure, undermining institutional constraints and democratic accountability. Personal rule uses clientelism and corruption to secure loyalty. This is most evident with those exercising executive power, notably the President and Governors. But it is a malaise that infects the entire political system including the legislature and political parties. Peter Lewis observed that the National Assembly “is a little more than a trading floor in which political elites bid on the distribution of spoils such as allowances, developmental allocations, government appointments and opportunities for private business.”⁶ This is the primary incentive for floor crossing (party defection) by legislators (discussed in the next section). Another manifestation of a tendency toward personal rule is habitual disobedience of court orders, especially by principals and agencies of the executive branch. Two egregious instances in 2017 are discussed in the next section.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

1. Judicial Independence

Judicial independence was significantly enhanced by a surprising decision of Nigeria’s intermediate appellate court that effectively created immunity from criminal prosecution for judges for any offence bordering on professional misconduct unless and until after the National Judicial Council (NJC) has exercised its disciplinary jurisdiction thereto, and presumably only if the outcome of that process is averse to the judge. *Hon. Justice Hyeladzira Nganjiwa v. Federal Republic of Nigeria* (2017) LPELR-43391 (CA) was decided by a regular three-judge panel of the Court of Appeal instead of a five-judge panel required for constitutional interpretation. What is likely to count more against this de-

cision, however, is that it is barely anchored in the constitutional text. Essentially, the Court considers that since section 158 vests exclusive disciplinary control of judges in the NJC, that process has priority over criminal jurisdiction, and only after it establishes misconduct that, according to the Court, “the relevant law enforcement Agent or Agency is at liberty to make the said judicial officer face the wrath of the law.”

Although the structural constitutional interpretation deployed by the Court is attractive, it is far from compelling. The distinction drawn by the Court between a crime bordering on professional misconduct, prosecution of which must be deferred until the NJC has sanctioned the judge affected, and other crimes (such as “theft, fraud, murder or manslaughter, arson and the like,” according to the Court) is tenuous. Take the example of a judge accused of being drunk and disorderly in public at a street party. An affray charge resulting seems to fall within the category of “other crimes.” But who can doubt that this is a conduct (“unprofessional conduct”) that will incur the wrath of the NJC. Secondly, the Court was simply being evasive by denying that the decision is tantamount to a de facto temporal immunity from criminal prosecution for judges. Immunity of any kind is anathema to the rule of law, and requires special justification. Third, and perhaps most importantly, it trenches upon the plenary control over criminal prosecution by the Attorney General expressly vested by the Constitution. As this case arose from the trial of a serving judge for corrupt enrichment, it will be hard for an independent observer to avoid suspecting that this may be the judiciary fighting back against the ongoing aggressive campaign against judicial corruption by the government.

2. Floor Crossing

Switching party affiliation is endemic in Ni-

gerian politics. However, to the extent that the Constitution protects the freedom of association, it is not clear that there can be a constitutionally sustainable regulation of this fluidity of party membership, or whether it is even desirable to have one. But party defection by legislators is a problem which, if unregulated, threatens not merely to undermine the consolidation of the party system but also the institutionalization of the legislature. It is precisely because of the unpleasant experience during Nigeria’s initial experiment with democratic rule (1960-1965) that an anti-defection clause has been included in Nigerian constitutions since the Constitution of 1979.⁷ Consequently, the Supreme Court of Nigeria removed a member of the National Assembly from office for changing party affiliation during a legislative term,⁸ and has condemned the behaviour on other occasions.⁹

The constitutional prohibition is not categorical; it permits party switching in the event of a merger of parties (which may result in a party assimilating one or more other parties, or the creation of a new party), or, conversely, where a party splits into factions. The unfortunate result is that party defection by legislators has continued practically unchecked, and is mostly justified by farcical claims of a party split. Ahead of the 2015 general election, in January 2014, as many as 11 senators, or one-tenth of the 7th Senate, switched from the ruling party to the main opposition on the same day. In the two years of the present 8th Senate, the majority party All Progressives Congress (APC) increased its number with 5 defectors from opposition parties. By October 2017, 6 members of the House of Representatives elected on the platform of the opposition Peoples Democratic Party had switched to the ruling APC.

The presence of a strong opposition party or opposition coalition is not only beneficial to the sustenance of democracy; but also a major factor responsible for legislative in-

⁶ Peter M. Lewis, ‘Rules and Rents in Nigeria’s National Assembly’ in Joel D. Barkan (ed), *Legislative Power in Emerging African Democracies* (Lynne Renner 2009) 177, 179.

⁷ Now Section 68(1)(g) of the Constitution of 1999.

⁸ *Ifedayo Sunday Abegunde v Ondo State House of Assembly* [2015] 8 NWLR (pt. 1461) 314.

⁹ *Attorney General of the Federation v Abubakar* [2007] 6 MJSC 1; *Dapianlong v Dariye* [2007] 8 MJSC 140.

stitutionalization.¹⁰ The Constitution has clearly failed to check the practice of party defection by legislators. In *Abegunde v Ondo State House of Assembly*, a member of the House of Representatives elected on the platform of the Labour Party (LP) in May 2011 defected to the Action Congress of Nigeria (ACN) within a year. He justified his decision to cross the floor on the division in his State chapter of the LP, where there were two parallel chairmen and executives. The Federal High Court, Court of Appeal, and the Supreme Court came to the same conclusion that the division envisaged by the Constitution is at the level of the national party, not the state organs. The Court therefore held that by switching parties he had automatically lost his seat. Unfortunately, any hope that this monumental decision will close the gate against party defection by legislators now seems clearly misplaced.

3. Civil Liberties

Freedom House's *Freedom in the World 2018* report places civil liberties status in Nigeria in 2017 at the lower margin of the "partly free" category, the same as the previous year. The government's intolerance of dissent and its outright refusal to obey inconvenient court orders have pushed civil liberties into precariousness. The following egregious cases in 2017 are pointers to a worsening status of civil liberties.

A. Counter-Terrorism Laws

The recent enforcement of the Terrorism (Prevention) Act 2011 and the Terrorism (Prevention) (Amendment) Act 2013 has thrown into sharp relief the dangerous overbreadth of some of their provisions. For the first time, a proscription order against an organization for participating in or promoting

acts of terrorism was obtained against an entity that was not actively engaged in insurgency or terrorist attacks. The only previous occasion of a proscription order made under the statute was against *Boko Haram and Ansaru*, entities involved in insurgency and terrorist attacks mostly in northeastern Nigeria. On 20 September 2017, Justice Kafarati of the Federal High Court, on the application of the Attorney General, granted a proscription order under section 2(2) of the Terrorist (Prevention) Act 2011 against the Indigenous Peoples Organization of Biafra (IPOB),¹¹ an entity engaged in relatively peaceful separatist agitations in southeastern Nigeria, soon after a military clampdown on its activities.

The relative ease of the process of obtaining a proscription order – a unilateral (*ex parte*) application (with the consent of the President) to a judge in chambers by the Attorney General, the National Security Adviser, or the Inspector General of Police – effectively ensures total secrecy, without any opportunity for the affected organization to be heard. In addition, the basis of culpability ("acts of terrorism") is given an overinclusive definition by the statute.

Also in 2017, an unprecedented secret mass trial under section 34 of the Terrorism (Prevention)(Amendment) Act 2013 of thousands of persons detained for participation in the insurgency and terrorism in the northeast commenced. The offences charged carry severe sentences including the death penalty. Some sentences have been announced. It is probably safe to assume that the defendants would not enjoy constitutional standards of fair trial.

B. Unlawful Detention

Mr. Sambo Dasuki

The immediate past National Security Adviser, Mr. Sambo Dasuki, was in 2015 charged by the Economic and Financial Crimes Commission (EFCC) with offences involving mismanaging public funds meant for the purchase of firearms and with unlawful possession of firearms. Although he was granted judicial bail, rather than release him the government brought fresh charges in order to keep him in detention. From the government's perspective, the court order granting bail was complied with by the release and immediate rearrest of Mr. Dasuki on the new charges, even though these were not materially different from the previous charges. The presumption of innocence guaranteed in the Constitution (Section 36(5)) should imply that a citizen who is granted bail for a set of offences charged by one government agency should not be rearrested and charged with similar offences by another government agency just for the purpose of ensuring incarceration. However, on 15 June 2016, the Court of Appeal validated Dasuki's re-arrest.

The Supreme Court will on 2 March 2018 rule on Mr. Dasuki's appeal. Meanwhile on 4 October 2016, a regional court, the Economic Community of Western African States Court of Justice, declared Mr. Dasuki's continued detention illegal, ordered his release, and awarded fifteen million naira (about 41,000 U.S. dollars) damages for the violation of his fundamental rights.¹² Although the Attorney General of the Federation gave assurances that the government will respect the Community Court of Justice ruling,¹³ a presidential aide was subsequently quoted as saying the ruling was not binding on the government.¹⁴ The government is yet to comply with this ruling.

Ibrahim El Zakzaky

¹⁰ Samuel C. Patterson, 'Party Opposition in the Legislature: The Ecology of Legislative Institutionalization' (1972) 4 *Polity* 344. Hence it is a problem encountered generally by nascent democracies. Scott W. Desposato, 'Parties for Rent? Ambition, Ideology, and Party Switching in Brazil's Chamber of Deputies' (2006) 50 *American Journal of Political Science* 62-80.

¹¹ The proscription of IPOB was published in the Federal Republic of Nigeria Official Gazette No. 99 dated 20th September 2017, Vol. 104 as Terrorism (Prevention) (Proscription Order) Notice, 2017.

¹² See <http://www.courtecawas.org/site2012/index.php?option=com_content&view=article&id=344:ecowas-court-orders-nigerian-government-to-release-former-national-security-adviser-pay-n15m-in-damages-for-the-violation-of-his-human-rights> accessed 10 February 2018.

¹³ Nuruddeen M. Abdallah & Adelanwa Bamgboye, 'We'll Comply with ECOWAS Ruling on Dasuki – FG' 7 October 2016 <<https://www.dailytrust.com.ng/news/general/we-ll-comply-with-ecowas-court-ruling-on-dasuki-fg/165662.html>> accessed 10 February 2018.

¹⁴ See Hassan Adebayo, 'Nigeria not Duty-Bound to Obey ECOWAS Ruling on Dasuki – Buhari's Aide' 15 October 2016 <<https://www.premiumtimesng.com/news/headlines/212838-nigeria-not-duty-bound-obey-ecowas-ruling-dasuki-buharis-aide.html>> accessed 10 February 2018.

The leader of a Shia religious minority group, the Islamic Movement of Nigeria (IMN), Ibrahim El Zakzaky, was arrested in mid-December 2015 after his followers clashed with military personnel in Kaduna State. This resulted from a blockade of a public highway in the city of Zaria in north central Nigeria by Zakzaky's followers that prevented the movement of the Chief of Army Staff and other top military officers. The military forcefully cleared the road, leading to a bloody clash with members of the IMN on 12 December 2015. The home of the leader of IMN was invaded by security personnel, who arrested him along with his wife, Malama Zeatudden. They are both kept in a detention facility of the secret police, Directorate of State Services (DSS). The Federal High Court (Justice Kolawole) on 2 December 2016 ordered their release from the custody of the DSS. The judge also awarded each of them the sum of twenty-five million naira (about 70,000 U.S. dollars) as compensation as well as the provision of a new accommodation for them in Zaria by the federal government. These orders are yet to be obeyed,¹⁵ nor has the government charged Mr. Zakzaky before a court on any charge.

IV. LOOKING AHEAD TO 2018

Floor crossing and violation of human rights are mechanisms for consolidating power. With the official schedule of the 2019 general elections already published, that event is likely to shape developments in 2018 more than any other factor. In 2018, there will be elections for Governor in two states, both in the Southwest. The trend of the governorship elections since 2015 has been increased transparency. The most important expected development is almost certainly the outcome of the ongoing amendment of the Electoral Act, especially as the bill passed by the National Assembly may be vetoed by the President. What is unknown is whether the National Assembly can muster the supermajority required to override the veto. Perhaps equal in importance, and certainly having longer term political consequences, is con-

stitutional amendment. The ongoing process, comprising sundry amendments to the Constitution, is nearing conclusion. More politically charged, and gaining traction by the day, however, is the demand for a fundamental revision of the Constitution. With the governing APC party lately buying into it, it now seems feasible that Nigeria's federal system may be tweaked to achieve greater decentralization, including at least a redistribution of powers and revenue in favour of the states, creation of local police, and so on. More drastic changes or a wholesale adoption of a new constitution is unlikely in the short term.

Among the critical decisions expected from the Supreme Court in 2018 are the outcome of the appeals against the decisions of the Court of Appeal suspending criminal prosecution of judges until after the conclusion of disciplinary processes and affirming the detention of Mr. Dasuki, respectively. On the other hand, there was no change in the composition of the Supreme Court in 2017 (although two Justices were suspended from participating in any cases by the Chief Justice pending investigation of corruption charges), and only a minor change is expected in 2018. There is one retirement from the Court due in February 2018. As this is one of the female judges, the current record-setting number of women Justices in the Court (four, or roughly a third of the bench) will end in 2018. The next vacancies will be in 2020.

V. FURTHER READING

Arishe, G.O. *Developing Effective Legislature: The Country Specific Approach to Assessing Legislative Power* (Paclerd Press 2017)

_____, "Proscription of Floor Crossing in Nigeria: The Limits of the Constitution and the Supreme Court" (2017) *African Journal of Comparative Constitutional Law* 126

¹⁵ See Gbenro Adeoye, 'Illegal Detention: No respite for El Zakzaky, Dasuki Yet' June 3, 2017: <<http://punchng.com/illegal-detention-no-respite-for-el-zakzaky-dasuki-yet>> accessed 10 February 2018.



Norway

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The development of constitutional law in 2017 in Norway could be summed up as *status quo*.¹ Parliamentary elections have been held, the courts have handed down several important judgments and constitutional issues have been discussed in public. While all in their own capacity these goings-on represent important small-step developments, the general constitutional trend is one of continuity and stability.

This report highlights some important developments of 2017. Part II provides a closer description of the 2017 general election and analyzes relevant case law. It also addresses some recent debates on the issue of judicialization of politics, in particular as pertain to human rights law. Additionally, it briefly comments on the lack of discussion about proposals for constitutional amendments.

Part III highlights constitutional developments not linked to the state of liberal democracy and presents some legal and institutional reforms, constitutional controversies and judgments regarding Norway from the European Court of Human Rights.

Part IV briefly points out what is likely to become the most important constitutional issues for 2018.

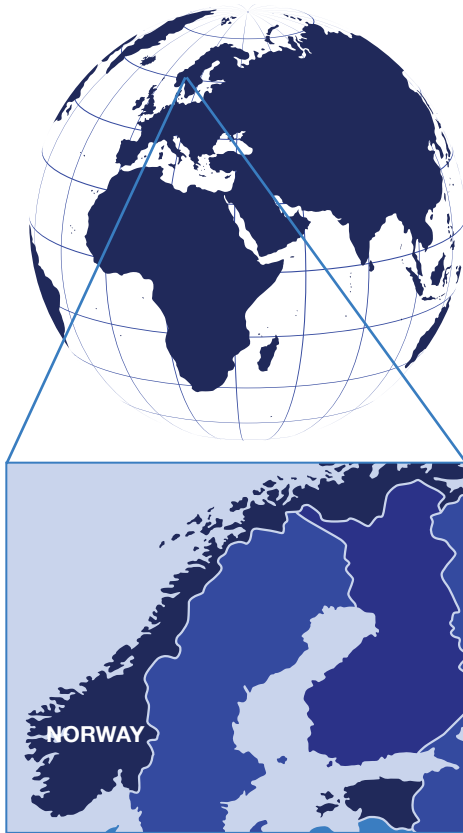
II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Norway is a comparatively well-functioning constitutional democracy, with strong, liberal institutions, a prosperous economy and a fair distribution of wealth. The country was ranked as number two on the World Justice Project global Rule of Law Index 2017.² Liberal democracy is not in decline, but fundamentals of this legal-political arrangement are possibly questioned more openly in public and political debates than they were some years ago.

Looking at important *institutional* developments in 2017, the parliamentary election was the most significant event. The centre-right bloc lost eight seats to the centre-left, but kept its majority position in Parliament. The minority Government formed by the Conservative Party and the Progress Party, led by Prime Minister Erna Solberg (Conservative), stayed in office, and in January 2018, the Liberal Party joined the coalition. There are 20 ministers in the Solberg Government, of which 10 are women. Even comprising these three parties, the Government is still a minority coalition, and must cooperate with the Christian Democratic Party or other parties in Parliament to pass new legislation and the National Budget. Voter turnout in the elections was about 78%, the same as in 2013. Of

¹ For the review of constitutional developments in Norway in 2016, which contains a general introduction to the Norwegian political and legal system, see Anine Kierulf, 'Developments in Norwegian Constitutional Law: The Year 2016 in Review', in Richard Albert, Šimon Drugda, Pietro Faraguna, David Landau, *The I-CONnect-Clough Center 2016 Global Review of Constitutional Law* (August 3, 2017). The I-CONnect-Clough Center 2016 Global Review of Constitutional Law, available at SSRN: <https://ssrn.com/abstract=3014378> and at *I-CONnect* (19 November 2017) <<http://www.iconnectblog.com/2017/11/developments-in-norwegian-constitutional-law-the-year-2016-in-review/>> accessed 9 February 2018.

² The World Justice Project, 'Rule of Law Index 2017-2018', <https://worldjusticeproject.org/sites/default/files/documents/WJP_ROLI_2017-18_Online-Edition.pdf> accessed 9 February 2018.



the new MPs, 41,4% are women. This makes the current Parliament the most gender equal in Norwegian history.³

Another important institution in the Norwegian political and constitutional system is the Supreme Court. Norwegian courts have, with a few exceptions, general jurisdiction, and are organized in a three-level hierarchy with the Supreme Court on top. The main function of the Court is to ensure clarity and development of the law.⁴ In 2017, it decided 122 cases, of which approximately 15% concerned different human rights issues.⁵

The state of liberal democracy depends not only on institutional factors but also on *social* attitudes and the more general constitutional culture. Over the last years, the issue of judicialization of politics has been on the agenda now and then in Norway. As Norwegian law has been heavily influenced by EU law⁶ and case law from the European Court of Human Rights (ECtHR) since the 1990s, discussions about the relationship between law and politics has been a recurring topic. Further on, the amendment of the Constitution on the occasion of its bicentenary in 2014 – where a number of new human rights provisions were included – and the Supreme Court’s adjustment to the reform have sparked more debate.

In the summer of 2017, a noteworthy debate began through a series of opinion articles in the daily paper *Dagens Næringsliv*, kicked off by a law professor who claimed that human rights law represents a challenge to democracy. A total number of 14 opinion articles were published by lawyers and political scientists, bringing to the fore quite different perspectives. Additionally, a central case concerning climate litigation (summed

up below) reached the headlines, with some politicians, newspaper editors and the Attorney General of Civil Affairs warning against an “Americanisation” of Norwegian law. These claims were refuted by a number of different commentators. Such debates do not represent any illiberal trend towards hostility against human rights and judicial review, but instead an open public discourse with diverse opinions.

More concerning was a statement by Sylvi Listhaug (Progress Party), then Minister of Migration and Integration, now Minister of Justice, where she stated that Norway should “challenge” international human rights conventions. Listhaug claimed that in particular, the ECHR “is challenging for the possibilities each state has to protect its own citizens”, pointing to several jihadi terror attacks in Europe over the last years.⁷ The statement was heavily criticized by several commentators.

Another trend of some concern, at least in the long run, is perhaps the lack of public debates on important constitutional issues. In this respect, the parliamentary election is illustrative. In the previous parliamentary period, 45 proposals for constitutional amendments were made. The Norwegian Constitution requires an intermediate election before proposals may be enacted, embodying the ideal of the Constitution as a social contract and giving the people an opportunity to elect a *pouvoir constituant dérivé*.⁸ From this perspective, and taking into consideration that the proposals include fundamental issues such as whether Norway should change its form of government from monarchy to republic, whether nuclear weapons should be banned on Norwegian territory and whether it should be possible to hold referenda in

order to set aside new legislation or accession to international treaties on demand from 100.000 citizens, one could maybe expect that these questions were brought up in the electoral campaigns. Quite to the contrary, the proposals were – disappointingly, but not surprisingly – barely mentioned.

Returning to courts, no significant new tendencies have developed in judicial decision making. Some decisions have clarified and developed different fields of human rights law, including two lower instance judgments:

[Solitary confinement of a convicted terrorist \(HR-2017-1127-U\)](#)⁹

A decision from the Supreme Court Appeals Selection Committee that attracted some attention in 2017 was the *Breivik* case. Anders Behring Breivik is the right-wing extremist who committed the July 2011 terror attacks in Norway, where he killed in total 77 people by blowing up the Government quarter with a car bomb and shooting young people at a youth camp on an island outside Oslo. Breivik was sentenced to preventive detention with a time frame of 21 years. In 2015, he filed a lawsuit against the State, claiming that his confinement conditions, particularly the isolation from other prisoners, violated both Article 3 and Article 8 of the European Convention on Human Rights (ECHR). While the District Court found for Breivik, the Court of Appeal found no violation of his human rights.

The Supreme Court Appeals Selection Committee agreed with the Court of Appeals’ application of the law, and refused leave to appeal. The Committee noted that Breivik had been isolated from other prisoners for an extraordinarily long time – almost six years

³ Up from 39,6% in the previous period.

⁴ The Court’s report on its own business in 2017 is available in English here: <<https://indd.adobe.com/view/1bc9c6b9-75c2-4d3d-8af2-c950e08fff40>> accessed 15 February 2018.

⁵ 2017 Annual Report of the Norwegian National Human Rights Institution.

⁶ Norway is a member of the European Economic Area through the EEA Agreement.

⁷ Hans-Olav Rise and Tormod Strand, ‘Listhaug vil setje menneskerettane til side’ (*NRK*, 24 August 2017) <<https://www.nrk.no/norge/listhaug-vil-setje-menneskerettane-til-side-1.13656673>> accessed 15 February 2018.

⁸ Cf. Article 121 of the Constitution. In addition, a 2/3 majority is required to pass constitutional amendments. Since the Constitution was enacted in 1814, it has been amended over 300 times.

⁹ The decision is available in English here: <<https://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/decisions/decisions-20171/breiviks-appeal-turned-down/>> accessed 8 February 2018.

– and that it takes a lot to justify such solitary confinement under Article 3 of the ECHR. The isolation was justified, however, first and foremost because Breivik represents a considerable security risk for his immediate surroundings and society in general, and that less invasive measures would not achieve a satisfactory level of security. The Committee also emphasized that the necessity of the isolation had been reviewed regularly, and that a good physical environment and contact with prison personnel and a prison visitor were moderating elements.¹⁰

[Preventive detention of a juvenile offender \(HR-2017-290-A\)](#)

A girl convicted for a murder she had committed at the age of 15 was sentenced to preventive detention with a time frame of nine years. The age of criminal responsibility in Norway is 15 years, and pursuant to the Penal Code, exceptional circumstances are required to impose preventive detention on juvenile offenders. The Supreme Court found that the gravity of the offence, the fact that the convicted had committed a number of serious acts of violence both prior to and following the murder, her mental state and the need to protect society amounted to exceptional circumstances. This is the first time a juvenile offender has been sentenced to preventive detention in Norway.

[Issuance of travel documents for refugees \(HR-2017-2078-A\)](#)¹¹

Three refugees were denied travel documents by the immigration authorities because of uncertainty regarding their identities. The refugees claimed that the decisions violated Article 28 of the Refugee Convention. Pursuant to Article 28, the authorities shall issue to refugees lawfully staying in their territory travel documents for the purpose of trav-

el outside their territory, unless compelling reasons of national security or public order are otherwise required. The Supreme Court interpreted the exception clause such that when there is doubt regarding the identity of a refugee – i.e., when it is more likely that the identity is false than not – the authorities may refuse to grant travel documents. The Court particularly emphasized the need for passport security. In its assessment of the facts, the Court found that for one of the refugees, sufficient degree of doubt was not established to reject the application.

[Sami rights \(HR-2017-2247-A and HR-2017-2428-A\)](#)

Sami Rights was on the agenda for the Supreme Court on two occasions in 2017. In *HR-2017-2247-A*, a reindeer herding district claimed that a compulsory purchase order violated their minority rights under Article 27 of the International Covenant on Civil and Political Rights (ICCPR). The Supreme Court analysed relevant case law from the UN Human Rights Committee and noted that interferences must be of a certain seriousness before minorities are “denied” the right to enjoy their own culture pursuant to Article 27. The Court concluded that the compulsory purchase order had a limited impact on reindeer husbandry and hence it did not violate the ICCPR.

In *HR-2017-2428-A*, a reindeer herder had been ordered to reduce his herd from 116 to 75 reindeer.¹² A reduction of the total amount of reindeer in the area was considered necessary in order to ensure a sustainable development of natural resources, and the cull order was given after the local herder community had failed to agree on internal burden sharing. The herder claimed that since it was impossible to earn a profit with such a small herd, his minority rights under

Article 27 were violated.

The Supreme Court approached the assessment by underlining that it did not concern a traditional interest conflict between the minority and society in general. Conversely, the cull order was given to avoid overgrazing, which was in the interest of the Sami community as a whole. Once again, case law from the Human Rights Committee served as an important legal source, and based on statements by the Committee, the Court formulated the following “test”: each case must be assessed separately based on the effect the measure has on the individual. In a case like the one at hand, it must be considered whether the measure is in the interest of the minority as a whole, and whether it is reasonably and objectively motivated towards the individual. Some of the statements from the Committee may suggest that the measure must be necessary out of concern for the minority as a whole. Finally, a requirement for effective participation from the minority community in the decision-making process is included in the assessment, but in a case concerning internal conflicts of interest in the minority community, there is no requirement that the minority has actually influenced the decision.¹³

When applying these principles to the facts, the Court noted that the cull order would have a large impact on the herder. On the other side, his herd was hardly profitable before the cull order anyway, reducing the impact of the decision. Further on, the reduction of herds would affect all the herders, making the regulation both objective and reasonable. Finally, the Sami community was consulted and given the opportunity to influence the legislative process. In sum, these considerations implied that Article 27 was not violated.¹⁴

¹⁰ Breivik has later lodged a complaint with the European Court of Human Rights.

¹¹ The judgment is available in English here: <<https://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/decisions/decisions-20171/issuance-of-travel-document-for-refugees-can-be-denied/>> accessed 8 February 2018.

¹² The judgment is available in English here: <<https://www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2428-a.pdf>> accessed 8 February 2018.

¹³ Para. 76, see also para. 75.

¹⁴ The herder also claimed that the order violated the protection of property pursuant to Article P-1-1 of the ECHR, but this argument as well was rejected by the Supreme Court.

[Detention of immigrant family with children \(LB-2016-8370\)](#)

This case, which was decided by the Borgarting Court of Appeal, concerned the detention¹⁵ of an immigrant family with children for a period of 20 days prior to deportation. The Court of Appeal concluded that the detention was neither absolutely necessary nor proportionate, and thus unlawful. Further on, it found that the detention violated Article 3 of the ECHR. The conditions at the immigration detention centre, coupled with the long period of internment, were suited to create a feeling of anxiety for the children, the Court reasoned, with reference to recent case law from the ECtHR.¹⁶

[Oil drilling and environmental rights \(TOS-LO-2016-166674\)](#)¹⁷

In 2016, the Norwegian Government awarded 10 production licences to private petroleum companies. The licences granted the right to search for and produce petroleum in the Barents Sea. Two environmentalist organizations filed a lawsuit against the state, claiming that the decision violated the right to an environment that is conducive to health, as enshrined in Article 112 of the Constitution. Hearings were held in 2017, and in early January 2018, Oslo District Court found for the state. The Court agreed with the organizations that Article 112 should be interpreted as a provision conferring legal rights, and not only as a non-binding guideline for policy making. However, the court showed

particular leniency in its review, arguing that this was primarily a policy matter, and not a legal issue. In addition, it argued – somehow surprisingly – that emissions taking place outside of Norway, i.e., when the petroleum is burnt, was irrelevant for the legal impact assessment. The organizations have appealed the judgment directly to the Supreme Court.¹⁸

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

An important legislative reform from 2017 is the enactment of a new Equality and Anti-Discrimination Act.¹⁹ Several anti-discrimination acts were merged into one general act, and a structural reform transferred the task of reviewing individual complaints from the Equality and Anti-Discrimination Ombudsman to the Anti-Discrimination Tribunal. Some have raised their concern with this structural reform, worrying that the enforcement bodies will be weakened.²⁰ Another development in the area of women's rights was the Norwegian ratification of the Istanbul Convention in July 2017.

Another decision taken by Parliament was not to accede to the individual complaints mechanism under the UN Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities and the Convention on Economic, Social and Cultural Rights. The majority feared that the consequence of an accession could be a lim-

ited scope for national political action, emphasizing an alleged uncertainty regarding the UN Committees' interpretive style.

At the institutional level, the accreditation of the Norwegian National Human Rights Institution (NHRI) with A-status by the Global Alliance for National Human Rights Institutions (GANHRI) should be mentioned.²¹ A-status accreditation is given to national institutions who fully comply with the Paris Principles.²²

With regard to the separation of powers, two important issues were on the agenda in 2017. First, there was some controversy over Parliament's competence to instruct the Government in concrete cases about its performance of executive tasks. In April, Parliament instructed the Government to change its decision on quotas in the licensed hunt of wolves, and in October, it instructed the Government to reconsider asylum applications made by unaccompanied asylum-seeking minors from Afghanistan. Second, a potential accession to the third energy package under the EU internal energy market, where the Agency for the Cooperation of Energy Regulators (ACER) will be given authority to make binding decisions for national regulation authorities, has raised a debate regarding constitutional procedural requirements for transferring power to international organizations. One key issue is whether ACER's decisions²³ will "only" confer international legal obligations on the Norwegian state or whether they will have direct effect in Norwegian law. If the latter is the case, Parlia-

¹⁵ The judgment is final, as the State chose not to appeal it.

¹⁶ *A.B. and others v. France* App no 11593/12 (ECHR, 12 July 2016), *R.K. and others v. France* App no 68264/14 (ECHR, 12 July 2016), *R.M. and others v. France* App no 33201/11 (ECHR, 12 July 2016), *R.C. and V.C. v. France* App no 76491/14 (ECHR, 12 July 2016) and *A.M. and others v. France* App no 24587/12 (ECHR, 12 July 2016).

¹⁷ The judgment is available in English here: <<https://secured-static.greenpeace.org/norway/Global/norway/Arktis/Dokumenter/2018/Judgement%20-%204.%20jan%202017%20-%20Oslo%20District%20Court%20stamped%20version.pdf>> accessed 9 February 2018.

¹⁸ For some remarks on the judgment, see Esmeralda Colombo, 'The Quest for Cosmopolitan Justice in Climate Matters', [2017 no 2] *Nordic Environmental Law Journal* 25, 35–36.

¹⁹ Act 2017-06-16-51.

²⁰ See for example the concluding observations made by the UN Committee on the Elimination of Discrimination against Women in the ninth periodic report of Norway (CEDAW/C/NOR/CO/9 para. 19).

²¹ The previous Norwegian NHRI, the Norwegian Centre for Human Rights, was downgraded to B-status in 2012. The new National Human Rights Institution was established in 2015 by Parliament, pursuant to the Act relating to the Norwegian National Human Rights Institution (Act 2017-2015-05-22-33).

²² For more information, see GANHRI's webpages: <<https://nhri.ohchr.org/EN/Pages/default.aspx>>.

²³ Formally it will be the EFTA Surveillance Authority (ESA) that makes decisions in the EFTA pillar. ESA will copy the decisions made by ACER. This construction is created to satisfy Norwegian constitutional requirements, as pursuant to Article 115, that power can only be transferred to international organizations which Norway belongs to.

ment has to make its decision pursuant to Article 115 of the Constitution, which requires a ¾ majority. The Government's Legislation Department has concluded that a decision under Article 115 is not required, and that a simple majority is sufficient. Constitutional law experts have criticized this conclusion, describing the legal analysis as "creative" and calling for a new assessment.²⁴

Turning to the international scene, the European Court of Human Rights decided three cases concerning Norway in 2017. Two of these pertained to child welfare services; in none of these did the Court find any violation of the right to family life under Article 8 of the ECHR.²⁵ In a case regarding protection of journalistic sources, the Court found a violation of Article 10.²⁶ The Court concluded that even though a journalist's source had come forward, the authorities were not justified in ordering the journalist to testify about information gathered from that source, nor to disclose its identity. This decision confirms with a tendency towards stronger source protection in Norway in the later years – particularly due to the clarification of this issue in ECtHR case law.

IV. LOOKING AHEAD TO 2018

A central, controversial issue to be followed in 2018 is the work towards a white paper on a potential extension of the Special Measures Act, under which the executive branch (the Government) can assume legislative power in "extraordinary situations". Following WWII, Norway opened for such special measures in the event of war,²⁷ but the mandate of the Special Measures Committee (appointed in February 2018) is to

assess whether the Government can assume such legislative authority also in times of peace.²⁸ The committee is also asked to assess an act mandating temporary suspension of individual rights in situations where a lack of resources "and the like" make it very difficult to protect such rights. The example of an "extraordinary situation" used by the Minister of Justice when presenting to the committee was how the immigration situation in 2015 made it difficult to ensure children's right to education from the day they entered Norway, as mandated by the Education Act (the situation was solved by altering the Education Act). The threshold for special measures should be lower than that for a constitutional state of emergency, and lower than the derogation requirements of international conventions. A consequence of this is that measures authorized cannot run counter to the Constitution or to international human rights conventions. The committee will present its paper in March 2019.

As mentioned in Part II, the Supreme Court handed down two judgments concerning Sami rights in 2017. The case concerning the cull order attracted some public attention, and the President of the Sami Parliament has criticized the judgment.²⁹ As the Supreme Court started 2018 by hearing in plenary session a case concerning property rights for a local community in Finnmark county, it might be that this year will see some further debates on Sami rights.

Another important question for 2018 will be the election of a new Norwegian judge to the European Court of Human Rights, as the current judge is stepping down in August. The Government will submit a list of three candidates,³⁰ and then the Assembly of the

Council of Europe will decide.

In politics, the entry into the Government by the Liberal Party is likely to affect the parliamentary situation to some extent. There are internal controversies in the Government on issues such as climate and immigration politics, and the Liberals have already signaled they will dissent on an announced proposal for a highly controversial bulk digital surveillance scheme (*Digitalt grenseforsvar*).

V. FURTHER READING

Arnfinn Bårdsen, 'The Norwegian Supreme Court as the Guardian of Constitutional Rights and Freedoms', speech given at the seminar «Norway in Europe», Oslo 18 September 2017. Available at <<https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/supreme-court---constitutional-rights---bardsen18092017.pdf>>

Andreas Føllesdal, Morten Ruud and Geir Ulfstein (eds), *Menneskerettighetene og Norge: rettsutvikling, rettsliggjøring og demokrati* (Universitetsforlaget 2017)

Adele Matheson Mestad and Anine Kierulf, 'Realitet og representativitet i debatten om menneskerettsjusen' [10/2017] *Lov og Rett* 627. DOI: <http://dx.doi.org/10.18261/issn.1504-3061-2017-10-05>

Morten Nadim, *Precedents in the 21st Century. The Evolution of Case Law in the Norwegian Supreme Court 1970–2016*, thesis for the degree of philosophiae doctor (PhD), University of Bergen, Norway, 2017

Jørn Øyrehagen Sunde, 'From Courts of

²⁴ Eirik Holmøyvik and Halvard Haukeland Fredriksen, 'Grunnlovsstridig tilknytning til EUs energibyrå?' (*Rettt24*, 10 January 2018) <<http://rett24.no/articles/grunnlovsstridig-tilknytning-til-eus-energi-byra>> accessed 15 February 2018.

²⁵ *M.L. v. Norway* App no 43701/14 (ECHR, 7 September 2017) and *Strand Lobben and Others v. Norway* App no 37283/13 (ECHR, 30 November 2017). In this case, the Court was sharply divided. The Court is currently handling seven other cases regarding Norwegian child welfare services practice.

²⁶ *Becker v. Norway* App no 21272/12 (ECHR, 5 October 2017).

²⁷ Act no. 7 of 15 December 1950 relating to special measures in time of war, threat of war and similar circumstances.

²⁸ Mandate to be found here: <https://www.regjeringen.no/no/dep/jd/org/styre-rad-og-utval/tidsbegrensede-styrer-rad-og-utvalg/utvalg-som-skal-vurdere-endoringer-i-beredskapslovgivningen/id2589266/> (accessed 28 February 2018).

²⁹ Eskil Wie Furunes et al., 'Sametingspresidenten er bekymret for rettssikkerheten i Høyesterett', (*NRK*, 3 January 2018) <<https://www.nrk.no/finnmark/sametingspresidenten-er-bekymret-for-rettssikkerheten-i-hoyesterett-1.13847419>> accessed 11 February 2018.

³⁰ As suggested by a national evaluation panel of seven members, where five are suggested by the Supreme Court, the Norwegian Centre of Human Rights, the General Attorney for Civil Affairs, the Bar Association and the Norwegian National Human Rights Institution.

Appeal to Courts of Precedent – Access to the Highest Courts in the Nordic Countries’ in Cornelis Hendrik van Rhee and Yulin Fu (eds), *Supreme Courts in Transition in China and the West* (Springer 2017). DOI: http://dx.doi.org/10.1007/978-3-319-52344-6_4



Pakistan

IN THE SHADOW OF THE PANAMA CASE

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INTRODUCTION

2017 was the year of the *Panama Case*.¹ That one case overshadowed all the business in the apex court and has shaped public perception of its role. Just as in the previous electoral cycle, the Supreme Court disqualified and dismissed a prime minister from office in the year leading up to the messy business of elections, and, just as during the tenure of former Chief Justice Chaudhry, the Court has ended up in an overt tussle with a government that is determined to present itself as a victim of a “judicial coup” in an attempt to shape the narrative of a political court acting in collusion with the country’s powerful military, which is intent on destabilizing the transitional democratic system.

The *Panama Case* also marks the Court’s return to the centre of the political stage after a brief hiatus,² a position it seems likely to occupy in the foreseeable future. The Supreme Court’s political role is not a recent development. Over the last three decades, the Supreme Court has evolved from a peripheral state institution to a key player mediating the balance of powers in a deeply divided and politically fragmented polity. Evaluating this history of expanding judicial power, one may claim that despite the glorious language of constitutionalism and rule of law that the Court’s public law decisions are invariably

wrapped in, the predominant structural effect of this progressive expansion of judicial review has been a self-referential (if not self-serving) increase in judicial power. Furthermore, the Court’s exercise of its judicial review jurisdiction appears to be “promiscuous” rather than principled.³ Despite the larger claims, superior courts have become “institutions of governance” and judicial review the mode of a “delicate and political process of balancing competing values and political aspirations” ... providing “a workable *modus vivendi*,” which in turn enables the courts to claim a seat at the table of high politics.⁴

I. THE POLITICAL CONTEXT

Pakistan’s current government at the federal level was formed by the Pakistan Muslim League (PML-N) of the deposed Prime Minister Nawaz Sharif in 2013 for a five-year parliamentary term. This was Nawaz Sharif’s third term as Prime Minister and the *Panama Case* was the third instance of his premature dismissal. The Sharif family has been in the business of politics and in power either in the centre or in Punjab, Pakistan’s largest province, for much of the last three decades. During this period they have amassed enormous wealth in Pakistan as well as globally, including high profile

¹ Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan (2016), Constitution Petition No. 29 of 2016.

² See Moeen Cheema, *Developments in Pakistani Constitutional Law*, in 2016 GLOBAL REVIEW OF CONSTITUTIONAL LAW (Richard Albert, David Landau, Pietro Faraguna and Simon Drugda, eds., 2016).

³ For a comparison with the Indian Supreme Court, see Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA (Mark Tushnet and Madhav Khosla, eds., 2015).

⁴ See Pratap Bhanu Mehta, *The Rise of Judicial Sovereignty*, 18:2 JOURNAL OF DEMOCRACY 70 (2007), at 73-75.

properties in the UK and UAE.

The allegations in the *Panama Case* stem from Nawaz Sharif's two terms as Prime Minister in the 1990s. There have been allegations of corruption, money laundering and tax evasion during every term that Nawaz and his younger brother Shahbaz Sharif served in elected office. However, the Sharifs and their party have managed to avoid both political fallout and judicial scrutiny on charges of corruption, unlike the Pakistan People's Party (PPP), historically their main opposition until the emergence of Imran Khan's PTI in the run-up to the last elections. In contrast to the PML-N, the PPP's last term in power from 2008 to 2013 was dogged by high-profile corruption scandals and intense judicial review by the Chief Justice Chaudhry-led Court. The PML-N provided unwavering and visible public support to the Court's accountability drive, including the decision to disqualify Prime Minister Gilani for failure to institute corruption charges against President Zardari, also dating back to the 1990s, in the so-called *Swiss Case*.⁵

Unlike the PPP's judicial ordeal, the corruption and money laundering allegations against the Sharifs appeared to have become past and closed transactions, a matter of history, until the global release of the documents held by a Panamanian law firm by the International Consortium of Investigative Journalists, which opened a window to the offshore holdings of the global elite in international tax havens. The so-called Panama Papers revealed several offshore companies owned by Nawaz Sharif's two sons, based in London, and proved their ownership of expensive properties in Park Lane that were at the centre of corruption scandals in the 1990s. Under immense pressure from the main opposition parties, especially the PTI, led by cricketer-turned-politician Imran Khan, Nawaz Sharif made speeches on the floor of the Parliament and on national TV offering vague explanations and promising to make public the complete financial account of his family's holdings.

In August 2016, Imran Khan, who has adopted an anti-corruption platform as the main charter of his party, decided to take the matter to the Supreme Court. In addition to filing a petition under Article 184(3) of the Constitution, which provides for the "Original Jurisdiction" of the Court, Imran Khan also launched a campaign of public agitation against the government, calling for the resignation of the Prime Minister until the charges against him had been independently investigated. Facing yet another call for protests on Constitution Avenue of the capital, on which the Supreme Court building sits between Parliament house and the Prime Minister's secretariat, the Court decided to take up the matter for expedited hearing. Curiously, however, before reaching a decision, the bench disbanded in early December on account of court holidays and the incumbent Chief Justice's imminent retirement at the end of the year.

II. FIRST STAGE OF THE PANAMA CASE: A SPLIT BENCH

Hearings in the *Panama Case* began afresh before a new five-member bench presided over by Justice Khosa, the senior puisne judge who, as per the seniority and retirement rules, will be the next Chief Justice of Pakistan in 2019. After regular hearings, the bench issued its much-awaited judgment on April 20, 2017. All five members of the bench appeared to agree that the Prime Minister and his family had failed to satisfy the Court regarding the source of their immense wealth or to provide a satisfactory account of when and how the properties in London were purchased. The respondents' explanations seemed evasive and had shifted dramatically over the course of the proceedings. The most incredulous claim involved Qatari royalty – that the Prime Minister's father had entrusted funds to a member of the royal family for investment in property more than two decades ago and without any documentary record, and these investments had yielded the funds used to purchase the London properties. There was no proof of any bank

transactions and the only evidence furnished in support of this latest explanation was a letter from the Qatari prince.

Nonetheless, the case raised challenging issues regarding the interpretation of Article 62(1)(f) pursuant to which the disqualification of the Prime Minister was sought. Article 62(1)(f) states that a person "shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless ... (f) he is sagacious, righteous, non-profligate, honest and *ameen* [having financial integrity], there being no declaration to the contrary by a court of law." The question before the Court was whether it could issue such a declaration under its Original Jurisdiction and disqualify the Prime Minister in the same proceedings based on the material on the record. The respondents argued that the Court could only disqualify a member of Parliament if there had been a prior conviction or judgment by a court of competent jurisdiction for tax evasion, money-laundering, or possession of wealth beyond known means; or a judicially proven mis-declaration of assets in the nomination forms filled as a candidate at the time of the elections.

It is on this last point that the bench split with only two judges – Justices Khosa and Gulzar Ahmed – holding that Nawaz Sharif was disqualified from being a member of Parliament and hence the Prime Minister for lack of integrity and financial probity. Justice Khosa wrote a lengthy and scathing opinion opening with a reference to the famous Mafia film *The Godfather* and quoting Honoré de Balzac that the "secret of a great success for which you are at a loss to account is a crime that has never been found out, because it was properly executed." According to Justice Khosa, the petitioners had produced *prima facie* evidence of corrupt practices by the Prime Minister, and since the Prime Minister and his family were the only people who held complete knowledge of the transactions, the onus was on the respondents to provide such a "money trail." Justice Khosa analysed the speeches made by the Prime Minister and other information provided to

⁵ Criminal Original Petition No. 06 of 2012, in *Suo Motu Case No. 04 of 2010* (2012) PLD (SC) 553; and *Muhammad Azhar Siddique v. Fed'n of Pakistan* (2012) PLD (SC) 660.

the Court by the respondents in considerable detail and pointed out glaring contradictions in the stances adopted by the Prime Minister and other members of his family regarding when and how they came into the ownership of the properties.

Justice Khosa took great pains to distinguish the present case from an earlier judgment in which he had adverted to the high level of abstraction and ambiguity in the morally charged terms used in Article 62(1)(f) to the point that it was virtually impractical to apply the provision⁶. Justice Khosa argued that where it could be established that a member of Parliament was not honest, sagacious and *ameen* based on objective criteria – such as on charges of corruption and money laundering – the Court had little choice but to disqualify him/her pursuant to Article 62(1)(f). Justice Khosa held that there was credible circumstantial evidence to conclude that the Prime Minister had been guilty of corrupt practices, money laundering and tax evasion and thus for the Supreme Court to issue a declaration of dishonesty and disqualify the respondent in the same proceedings. Justice Ahmed went a step further, arguing that the Prime Minister’s refusal to be forthright before the court when important questions of public importance had been raised constituted dishonest conduct by itself.

The majority took a different stance on the issue of jurisdiction under Article 184(3). Justice Ijaz Ul Ahsan, for example, while also noting the glaring gaps in the Sharif family’s explanation of their financial dealings nonetheless argued that the court could not disqualify a member of Parliament in the absence of “admitted facts or indisputable documentary evidence.” Justice Azmat Saeed also noted that never before had a member of Parliament been held to be disqualified pursuant to Article 62(1)(f) “in the absence of an established and proved breach of a legal obligation or violation of a law.” Justice Ejaz Afzal Khan adopted the most restrictive position and interpreted the term “court of law” in Article 62(1)(f) to mean a court of plenary jurisdiction with the power to record evidence as opposed to a court

exercising judicial review powers. This appeared to rule out the possibility of a disqualification by the Supreme Court in the absence of a conviction or adverse judgment by a court or tribunal which had attained finality. Nonetheless, all three judges directed the creation of a Joint Investigation Team (JIT) that would investigate the allegations against the respondents and produce a report within 60 days, after which the Supreme Court may again take up the matter of the Prime Minister’s disqualification.

III. SECOND STAGE: JIT PROCEEDINGS AND THE FINAL DECISION

While the government initially expressed joyous relief at the Supreme Court’s interim order, the composition and the conduct of the JIT caused anxiety amongst ministerial ranks. The JIT not only included senior officials from a range of civilian agencies chosen by the Court – including the National Accountability Bureau (NAB), the Securities and Exchange Commission (SECP) and the Federal Investigation Agency (FIA) – but also representatives of the military’s intelligence services. The inclusion of military intelligence and the seemingly tough mode of questioning faced by the respondents, including the Prime Minister, his daughter, both sons and the Finance Minister (another relative of Nawaz Sharif), gave rise to claims of collusion between the JIT and the military establishment. While the respondents and various ministers who turned up to Supreme Court hearings could not openly criticize the Court for fear of contempt proceedings, they expressed unreserved anger at the JIT members and hence indirectly at the Supreme Court and the military.

On July 10, 2017, the JIT presented a voluminous report to the “Implementation Bench” comprising the three judges who had directed the formation of the JIT and who were subsequently tasked by the Chief Justice with the supervision of the JIT’s proceedings. The JIT’s report unveiled exten-

sive offshore holdings and businesses of the Sharif family well beyond what had surfaced in the Panama Papers. While these businesses were owned by Nawaz Sharif’s two sons, the Prime Minister periodically received large sums classified as gifts, strengthening the suspicion that he was the real or part owner. The JIT report also provided considerable evidence that the stance of the respondents on several issues and some of the documents furnished by them to the Court were patently false and fabricated. One particularly embarrassing example was that of a document furnished by the Prime Minister’s daughter, which was purportedly dated 2006 but the Calibri font the document was typed in had not become commercially available until 2007.

On July 28, the *Panama Case* bench announced its final decision. Interestingly, the bench announcing the decision included all five judges even though the two judges who had been in the minority in the first stage of the proceedings had not been a part of the implementation bench. The three judges who had directed the formation of the JIT and supervised its proceedings issued a joint judgment disqualifying the Prime Minister from holding elected office and directed the NAB to initiate corruption charges for possessing wealth beyond known means of income against the respondents. As such, the five-member bench reached a unanimous decision, but there remained a notable difference between the majority and minority positions. The majority reiterated its stance that corruption charges could not form the basis of a disqualification under Article 62(1)(f) unless they resulted in a conviction by an accountability court. In contrast, they held that proof of mis-declaration of assets in the nomination papers filed with the Election Commission of Pakistan (ECP) could result in a declaration of disqualification in proceedings under the court’s Original Jurisdiction.

The majority focussed exclusively on one piece of information produced by the JIT which was admitted by the disqualified Prime Minister. Nawaz Sharif had remained

⁶ Ishaq Khan Khakwani v. Mian Muhammad Nawaz Sharif (2015) PLD (SC) 275.

the chairman of the board of a UAE company named Capital FZE for six and a half years leading up to the 2013 elections. This position was used to obtain a work permit, and as per the UAE's immigration and labour laws, Nawaz Sharif was required to be paid a salary. Nawaz Sharif's lawyer admitted before the implementation bench that the salary had accrued to the respondent as chairman of the board but he had not withdrawn it at any stage until the company was dissolved in early 2013. The majority used this admission and dictionary definitions to hold that accrued receivables were assets which were required to be declared under Section 12 of the Representation of the People Act, 1976 by a candidate for election. Since the Prime Minister had failed to disclose this asset in his nomination papers at the time of the 2013 elections, he was disqualified from being a member of Parliament.

IV. RATIONALIZING THE DISQUALIFICATION CASES

Of the plethora of material included in the JIT report, the accrued but unwithdrawn salary from Capital FZE was arguably amongst the weakest evidence of financial impropriety against the disqualified Prime Minister. There is no right of appeal against the Court's decisions under its Original Jurisdiction. There is only a limited opportunity to seek a review of the Court's decisions on the basis of error(s) of law, but such a review petition must be heard, as far as practicable, by "the same Bench that delivered the judgment or order sought to be reviewed."⁷ The review petition filed by the deposed Prime Minister focussed on the arguments against the Court's definition of assets and was duly disposed by a bench in which four judges reaffirmed the obligation to disclose all assets in the nomination papers and the characterization of accrued receivables as an asset.⁸ Justice Khosa merely referred to his original decision in the first phase of the case.

The Supreme Court had a further opportunity to clarify its interpretation of Article 62(1)(f) in petitions filed by a PML-N legislator against leaders of the PTI. On December 15, 2017, a three-member bench headed by the Chief Justice dismissed the personal allegations against Imran Khan that he had committed money laundering in the purchase of his estate on the outskirts of Islamabad and had failed to declare an offshore company in his nomination papers filed with the ECP.⁹ The Court found that although Imran Khan remained the beneficiary of an offshore company incorporated in Jersey, he was under no obligation to disclose it in his nomination papers as it was a mere shell company that held no assets or income. Likewise, the Court found that a detailed accounting of the respondent's other financial dealings had been provided by him with the result that there was no reasonable suspicion of money laundering and fraud against him. The Chief Justice also undertook a direct comparison between Nawaz Sharif and Imran Khan's cases, noting that whereas in the former's case there were "robust allegations of corruption," in the present case there was no allegation of "abuse of public office and authority, corruption or breach of fiduciary duty."

In a parallel petition against Jahangir Tareen, the secretary-general of the PTI, the same bench affirmed that the term "dishonesty" in Article 62(1)(f) has a "direct and close nexus to corruption."¹⁰ The Court brushed aside allegations of dishonesty against the respondent, which arose out of charges of insider trading which he settled with the SECP without admission of wrongdoing and which, therefore, did not lead to a successful prosecution. However, the Court pressed the respondent to disclose the details of an offshore trust company which owned expensive property in the UK. Similar to the stance adopted by Justice Khosa in Nawaz Sharif's case, the Chief Justice argued that the onus was on the respondent to prove facts especially within his knowledge and found him to be evasive and less than forthcoming in

producing the relevant information. The Court found that Jahangir Tareen was the actual beneficiary of the trust, and the real owner of the property for all practical purposes. The Court disqualified him for failure to disclose the UK property as his asset in the nomination papers as well as for falsely claiming that he was not a beneficiary of the trust in his concise statement before the Court.

Through the recent disqualification cases, a narrower interpretation of Article 62(1)(f) appears to have crystallized. Except for the two judges forming the minority in stage one of the *Panama Case*, the six other judges who have had an opportunity to address the issue have held that allegations of corruption, tax evasion, money laundering or other forms of financial wrongdoing – even if egregious and supported by strong circumstantial evidence – will not by themselves form the basis of disqualification from holding elected office unless a court of plenary jurisdiction has validated the relevant facts or they are admitted by the respondent. However, a deliberate and material mis-declaration of assets in the nomination papers in violation of the Representation of the People Act, 1976 and/or an established mis-statement to the court during the proceedings will lead the Supreme Court to issue a declaration of dishonesty and disqualification in exercise of its Original Jurisdiction. The failure of a respondent to be forthcoming with their financial records required by the court and credible allegations of corruption will be factors in determining whether the mis-declaration of assets or mis-statement before the court was deliberate and material.

CONCLUSION: JUDICIAL REVIEW IN AN ELECTION YEAR

As Pakistan enters an election year, the Supreme Court's decision in the *Panama Case* and its aftermath have opened the door for judicial review on a broad range of issues on

⁷ Rule 8, Order XXVI, Supreme Court Rules, 1980.

⁸ Mian Muhammad Nawaz Sharif v. Imran Ahmad Khan Niazi (2017) Civil Review Petition No. 297 of 2017 in Constitution Petition No. 29 of 2016.

⁹ Muhammad Hanif Abbasi v. Imran Khan Niazi (2017) Constitution Petition No. 35 of 2016.

¹⁰ Muhammad Hanif Abbasi v. Jahangir Khan Tareen (2017) Constitution Petition No. 36 of 2016.

electoral matters. Just as at the time of the last elections in 2013, the incumbent government is determined and able to politicize such judicial review. Unlike the lead-up to the last elections, however, the Court appears unable to speak in one voice on such politically charged questions at a time when it will be subjected to heightened media and public scrutiny. In order to reduce the perception of political bias, confusion and misreporting of the Court's decisions in such an environment – as well as the longer term rationalization of the court's judicial review powers under its Original Jurisdiction – the Supreme Court needs to institute certain measures enabling it to speak through a clearer and more coherent jurisprudence.

First, the judges need to ensure that the number and length of judgments is minimized. In the first stage of the *Panama Case*, all five judges wrote detailed separate opinions despite their basic agreement on the facts and the presence of clear dividing lines between the majority and the minority of the bench, thus providing plenty of material and loosely worded statements for a news-hungry media to speculate on. In comparison, the two agreed judgments in the PTI disqualification cases were shorter, more precise and articulated the reasoning in a much clearer fashion, thereby enabling greater media and public access. Second, the Supreme Court needs to seriously reconsider the nature and purpose of its review processes in cases decided under its Original Jurisdiction. Given that the Court sometimes decides cases of immense political import in the first instance, the forum of the review petition must provide a meaningful opportunity to reconsider the jurisprudence and address any outstanding issues. One option is to amend the Supreme Court Rules to provide for an opportunity of review in such cases before a different bench comprising the Chief Justice and the senior-most puisne judges, enabling them to lead and harmonize the jurisprudence on deeply contested and politically charged issues.



Philippines

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Liberal democracy is in peril in the Philippines. The administration of Rodrigo Duterte continues to undermine the constitutional order in various ways: by eroding checks and balances, by the imposition of martial law, and by continuously threatening to establish a revolutionary government (simply put, throwing out the Constitution and ruling by whim). Duterte and his supporters have attacked possible checks on his government by initiating or supporting impeachments against the Chief Justice, the Ombudsman, and the Vice-President.

A vast majority of the members of Congress migrated to the President’s party and now acquiesces to his every act. Duterte, for example, had clashed with the Commission on Human Rights, and to show its support for the President, the House of Representatives gave the Commission on Human Rights a \$20 budget. It restored the budget only after public outrage became clear and unrelenting. The Supreme Court, for its part, contributed to the erosion of liberal democracy by sanctioning the elimination of a minority voice in the House of Representatives and eliminating constitutional safeguards against the imposition of martial law.

In another peculiar and shocking development, members of the Supreme Court have been queuing in the House of Representatives’ committee hearings to shore up a weak

impeachment case against Chief Justice Lourdes Sereno. The Justices have raised personal and some administrative issues but nothing remotely constituting an impeachable offense. A case has been filed to nullify her appointment to the Supreme Court, which is designed to skirt impeachment and trial at the Senate.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Philippine politics took a violently illiberal turn after Duterte’s election in 2016.¹ He is an illiberal populist who mobilized a mass constituency through social media with the use of radical rhetoric portraying the elite as a corrupt faction that coddles drug dealers and addicts. He changed the prevailing liberal reformist political order into an illiberal one through a new law-and-order governing script and the quick removal of remaining liberal constraints (particularly in Congress and the Supreme Court).² Last year, he said he wanted Chief Justice Maria Lourdes Sereno and the Ombudsman impeached and accused them of allowing themselves to be used to discredit his administration.³

Duterte hit the ground running. Thousands of Filipinos have died in his tough anti-drug war. Duterte considers drug addicts “beyond redemption” because “once you’re addicted to [crystal meth], rehabilitation is no longer a viable option.” In Duterte’s “war on drugs,”

¹ Mark R. Thompson, ‘Bloodied Democracy: Duterte and the Death of Liberal Reformism’ (2016) 3 JOURNAL OF CURRENT SOUTHEAST ASIAN AFFAIRS 39, 40.

² Mark R. Thompson, ‘Bloodied Democracy: Duterte and the Death of Liberal Reformism’ (2016) 3 JOURNAL OF CURRENT SOUTHEAST ASIAN AFFAIRS 39, 42.

³ The Associated Press, ‘Philippines’ Chief Justice Expects Impeachment, Taking Leave’ (The New York Times, 27 February 2018) <<https://mobile.nytimes.com/aponline/2018/02/27/world/asia/ap-as-philippines-chief-justice.html?referer=http%3A%2F%2Fm.facebook.com>>.

suspects die in “encounters” with police, are shot by motorcycle-riding vigilante gunmen, or are killed by trained and unofficial police death squads. The guilt of victims is assumed – never proven, investigated, or questioned. The thousands of extrajudicial killings during Duterte’s first few months in office and his denunciations of the United Nations, Western countries, and human rights groups, both international and domestic, that dared to criticise his violent drug crackdown signaled “a more virulent form of populism.”⁴

The world is now witnessing “Dutertismo.” The sociologist Randy David pointed out that during the campaign for the presidency, Duterte ducked details and promised just one thing: the will and leadership to do what needs to be done – to the point of killing and putting one’s own life on the line.⁵ David writes:

This is pure theater – a sensual experience rather than the rational application of ideas to society’s problems. Observing the same phenomenon in Europe in the 1920s, the Marxist critic Walter Benjamin interpreted the events that saw the rise of Hitler and Mussolini as the transformation of politics into aesthetics. In Germany, this phenomenon came to be known as Nazism; in Italy, it was called Fascism.

Duterte used illegal drug use as the most significant issue, unlike mainstream narratives that painted a near-rosy picture of the economy that only needed to be tended with reform.⁶ His foul language is an integral part of the populist appeal. Invoking the discourse of crisis requires a new language characterized by frankness and sensational language.⁷

His language and coarse demeanor allow him to come across – to his admirers – “as an endearing rogue who articulates without fear their own resentments and fantasies.”⁸ David also defines “Dutertismo” as the Filipino incarnation of a style of governance enabled by the public’s faith in the capacity of a tough-talking, willful, and unorthodox leader to carry out drastic actions to solve the nation’s persistent problems. Trusting almost exclusively in the instinctive wisdom of the leader to determine what needs to be done, the public is concerned less with the rationality of policy decisions than with the leader’s manifest readiness to take full responsibility for all his decisions.⁹

To remove any doubt regarding Duterte’s views on governance, he was recently quoted as saying, “This is democracy and that is the reason why we are pretty hard up. It is not easy to run [a country] where a citizen has so many rights.”¹⁰

Ironically, Duterte is not alone in the assault against liberal democracy. Liberal democracy is eroding in the Philippines in another way. Constitutional checks and balances are barely evident in Philippine politics. The Supreme Court is leading the way by ruling consistently in favor of Duterte, defying logic and the constitutional text. Three cases are discussed here.

a. Baguilat, Jr. v. Alvarez, G.R. No. 227757, July 25, 2017

The issue in this case was whether respondents may be compelled via a writ of *mandamus* to recognize Representative Teddy Brawner Baguilat as the Minority Leader of the House of Representatives. Baguilat

failed in his bid to become Speaker of the House.

Petitioners hoped that as a “long-standing tradition” of the House – where the candidate who garnered the second-highest number of votes for speakership automatically becomes the Minority Leader – Baguilat would be declared and recognized as the Minority Leader. However, Baguilat was never recognized as such. Instead, there was a motion to recognize Representative Suarez as the Minority Leader. Representative Lagman opposed this motion on the ground that Suarez was a member of the Majority as he voted for Speaker Alvarez. However, the opposition was overruled, and consequently, Suarez was officially recognized as the House Minority Leader.

The case was elevated to the Supreme Court, but the Court declined to intervene, saying it was hard-pressed to find any grave abuse of discretion which would warrant its intrusion in this case. According to the Court, the case “concerns an internal matter of a coequal, political branch of government which, absent any showing of grave abuse of discretion, cannot be judicially interfered with. To rule otherwise would not only embroil this Court in the realm of politics but also lead to its own breach of the separation of powers doctrine.”

b. Lagman v. Medialdea, G.R. No. 231658, July 4, 2017

On May 23, 2017, and for a period not exceeding 60 days, President Duterte issued Proclamation No. 216, declaring a state of martial law and suspending the privilege of the writ of *habeas corpus* in the whole of

⁴ Mark R. Thompson, ‘Bloodied Democracy: Duterte and the Death of Liberal Reformism’ (2016) 3 JOURNAL OF CURRENT SOUTHEAST ASIAN AFFAIRS 39, 50.

⁵ Randy David, ‘Dutertismo’ (*Philippine Daily Inquirer*, 1 May 2016) <<http://opinion.inquirer.net/94530/dutertismo>>.

⁶ Nicole Curato, ‘Flirting with Authoritarian Fantasies?: Rodrigo Duterte and the New Terms of Philippine Populism’ (2016) 47 JOURNAL OF CONTEMPORARY ASIA 142.

⁷ *Id.*

⁸ Randy David, ‘The Political Outsider’ (*Philippine Daily Inquirer*, 24 April 2016) <<http://opinion.inquirer.net/94430/the-political-outsider>>.

⁹ Randy David, ‘Where is “Dutertismo” headed?’ (*Philippine Daily Inquirer*, 17 December 2017) <<http://opinion.inquirer.net/109531/where-is-dutertismo-headed#ixzz51I9QqN00>>.

¹⁰ Mick Basa, ‘Duterte: Running a Democratic Country Not an Easy Task’ (*Rappler*, 1 March 2018) <https://www.rappler.com/nation/197210-duterte-running-democratic-country-not-easy?utm_source=The+Daily+wRap&utm_campaign=be0716b0df-EMAIL_CAMPAIGN_2018_03_02&utm_medium=email&utm_term=0_b3868977d4-be0716b0df-95998533&mc_cid=be0716b0df&mc_eid=4a386e7224>.

Mindanao. As required by Section 18, Article VII of the Constitution, the President submitted to Congress on May 25, 2017, a written Report on the factual basis of Proclamation No. 216. The Report pointed out that for decades, Mindanao has been plagued with rebellion and lawless violence, which only escalated and worsened with the passing of time. It added:

Mindanao has been the hotbed of violent extremism and a brewing rebellion for decades. In more recent years, we have witnessed the perpetration of numerous acts of violence challenging the authority of the duly constituted authorities, *i.e.*, the Zamboanga siege, the Davao bombing, the Mamasapano carnage, and the bombings in Cotabato, Sultan Kudarat, Sulu, and Basilan, among others. Two armed groups have figured prominently in all these, namely, the Abu Sayaff Group (ASG) and the ISIS-backed Maute Group.

The President went on to explain that on May 23, 2017, a government operation to capture the high-ranking officers of the Abu Sayyaf Group and the Maute Group was conducted. These groups, which have been unleashing havoc in Mindanao, confronted the government operation by intensifying their efforts at sowing violence aimed not only against the government authorities and its facilities but likewise against civilians and their properties. As narrated in the President's Report:

On 23 May 2017, a government operation to capture Isnilon Hapilon, a senior leader of the ASG, and Maute Group operational leaders Abdullah and Omar Khayyam Maute was confronted with armed resistance which escalated into open hostility against the government. Through these groups' armed siege and acts of violence directed towards civilians and government authorities, institutions, and establishments, they were able to take control of major social, economic, and political foundations of Marawi City, which led to its paralysis. This sudden taking of control was intended to lay the groundwork for the eventual establishment of a DAESH

wilayat or province in Mindanao.

The President's actions were challenged before the Supreme Court, principally on the ground that there was neither an invasion or rebellion that would justify martial law. The Petition also claimed that the declaration of martial law has no sufficient factual basis because the President's Report contained "false, inaccurate, contrived and hyperbolic accounts."

The Court took a moment to distinguish judicial and congressional powers of review: It held that the Court may strike down the presidential proclamation in an appropriate proceeding filed by any citizen on the ground of lack of sufficient factual basis. On the other hand, Congress may revoke the proclamation or suspension, and such revocation shall not be set aside by the President.

Significantly, however, the Court diminished its power in the following paragraph, saying that in reviewing the sufficiency of the factual basis of the proclamation or suspension, the Court considers only the information and data available to the President prior to or at the time of the declaration; it is not allowed to "undertake an independent investigation beyond the pleadings."

It went on to say that Congress may take into consideration not only data available prior to, but likewise events supervening the declaration. Unlike the Court, which does not look into the absolute correctness of the factual basis as will be discussed below, Congress could probe deeper and further; it can delve into the accuracy of the facts presented before it.

The Court added that its review power is passive and is initiated by the filing of a petition "in an appropriate proceeding" by a citizen. Congress's review mechanism is automatic in the sense that Congress itself may activate it at any time after the proclamation or suspension was made.

Thus, the power to review by the Court and the power to revoke by Congress are not only different but likewise independent from each other, although concededly they have

the same trajectory, which is the nullification of the presidential proclamation. Needless to say, the power of the Court to review can be exercised independently from the power of revocation of Congress.

The Court then reversed an earlier ruling, saying that it can simultaneously exercise its power to review with, but independently from, the power to revoke by Congress. Currently, any perceived inaction or default on the part of Congress does not deprive or deny the Court of its power to review.

Considering that the proclamation of martial law or suspension of the privilege of the writ of *habeas corpus* is currently anchored on actual invasion or rebellion, and when public safety requires it, and is no longer under threat or in imminent danger thereof, there is a necessity and urgency for the President to act quickly to protect the country. The Court, as Congress does, must thus accord the President leeway by not wading into the realm that is reserved exclusively by the Constitution to the Executive Department. To remove doubt regarding the judicial docility, I quote from the decision:

As Commander-in-Chief, the President has the sole discretion to declare martial law and/or to suspend the privilege of the writ of *habeas corpus*, subject to the revocation of Congress and the review of this Court. Since the exercise of these powers is a judgment call of the President, the determination of this Court as to whether there is sufficient factual basis for the exercise of such must be based only on facts or information known by or available to the President at the time he made the declaration or suspension, which facts or information are found in the proclamation as well as the written Report submitted by him to Congress. These may be based on the situation existing at the time the declaration was made or past events. As to how far the past events should be from the present depends on the President. Past events may be considered as justifications for the declaration and/or suspension as long as these are connected or related to the current

situation existing at the time of the declaration.

As to what facts must be stated in the proclamation and the written Report is up to the President. As Commander-in-Chief, he has sole discretion to determine what to include and what not to include in the proclamation and the written Report taking into account the urgency of the situation as well as national security. He cannot be forced to divulge intelligence reports and confidential information that may prejudice the operations and the safety of the military.

Similarly, events that happened after the issuance of the proclamation, which are included in the written Report, cannot be considered in determining the sufficiency of the factual basis of the declaration of martial law and/or the suspension of the privilege of the writ of habeas corpus since these happened after the President had already issued the proclamation. If at all, they may be used only as tools, guides, or reference in the Court's determination of the sufficiency of factual basis, but not as part or component of the portfolio of the factual basis itself.

In determining the sufficiency of the factual basis of the declaration and/or the suspension, the Court should look into the full complement or totality of the factual basis, and not piecemeal or individually. Neither should the Court expect absolute correctness of the facts stated in the proclamation and in the written Report as the President could not be expected to verify the accuracy and veracity of all facts reported to him due to the urgency of the situation. To require precision in the President's appreciation of facts would unduly burden him and therefore impede the process of his decision-making. Such a requirement will practically necessitate the President to be on the ground to confirm the correctness of the reports submitted to him within a period that only the circumstances obtaining

would be able to dictate. Such a scenario, of course, would not only place the President in peril but would also defeat the very purpose of the grant of emergency powers upon him, that is... to "immediately put an end to the root cause of the emergency." Possibly, by the time the President is satisfied with the correctness of the facts in his possession, it would be too late in the day as the invasion or rebellion could have already escalated to a level that is hard, if not impossible, to curtail.

In short, the Court's standard for judicial review of the presidential declaration of martial law is whatever the President determines is relevant no matter how faulty or incomplete that report may be.

c. Padilla v. Congress of the Philippines, G.R. No. 231671, July 25, 2017

In *Padilla*, Petitioners assailed the failure and/or refusal of the Congress of the Philippines to convene in joint session and deliberate on Proclamation No. 216.

The Court ruled that Congress is not constitutionally mandated to convene in joint session except to vote jointly to revoke the President's declaration or suspension.

The Court was asked to determine the meaning of the provision: "The Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, may revoke such proclamation or suspension, which revocation shall not be set aside by the President." The Court in its ruling held:

The provision in question is clear, plain, and unambiguous. In its literal and ordinary meaning, the provision grants the Congress the power to revoke the President's proclamation of martial law or the suspension of the privilege of the writ of *habeas corpus* and prescribes how the Congress may exercise such power, i.e., by a vote of at least a majority of all its Members, voting jointly, in a regular or special

session. The use of the word "may" in the provision – such that "[t]he Congress x x x may revoke such proclamation or suspension x x x" – is to be construed as permissive and operating to confer discretion on the Congress on whether or not to revoke, but in order to revoke, the same provision sets the requirement that at least a majority of the Members of the Congress, voting jointly, favor revocation.

It is worthy to stress that the provision does not actually refer to a "joint session." While it may be conceded, subject to the discussions below, that the phrase "voting jointly" shall already be understood to mean that the joint voting will be done "in joint session," notwithstanding the absence of clear language in the Constitution, still, the requirement that "[t]he Congress, voting jointly, by a vote of at least a majority of all its Members in regular or special session, x x x" explicitly applies only to the situation when the Congress revokes the President's proclamation of martial law and/or suspension of the privilege of the writ of *habeas corpus*. Simply put, the provision only requires Congress to vote jointly on the revocation of the President's proclamation and/or suspension.

Hence, the plain language of the subject constitutional provision does not support the petitioners' argument that it is obligatory for the Congress to convene in joint session following the President's proclamation of martial law and/or suspension of the privilege of the writ of *habeas corpus*, under all circumstances.

The Court added that:

The provision in Article VII, Section 18 of the 1987 Constitution requiring the Congress to vote jointly in a joint session is specifically for the purpose of revocation of the President's proclamation of martial law and/or suspension of the privilege of the writ of *habeas corpus*. In the petitions at bar, the

Senate and House of Representatives already separately adopted resolutions expressing support for President Duterte's Proclamation No. 216. Given the express support of both Houses of the Congress for Proclamation No. 216, and their already evident lack of intent to revoke the same, the provision in Article VII, Section 18 of the 1987 Constitution on revocation did not even come into operation and, therefore, there is no obligation on the part of the Congress to convene in joint session. Practice and logic dictate that a collegial body will first hold a meeting among its own members to get a sense of the opinions of its individual members and, if possible and necessary, reach an official stance, before convening with another collegial body. This is exactly what the two Houses of the Congress did in these cases.

The two Houses of the Congress, the Senate and the House of Representatives, immediately took separate actions on President Duterte's proclamation of martial law and suspension of the privilege of the writ of *habeas corpus* in Mindanao through Proclamation No. 216, in accordance with their respective rules of procedure.

The Court reiterated that the two Houses of the Congress decided "to no longer hold a joint session only after deliberations among their Members and putting the same to the vote, in accordance with their respective rules of procedure." As such, there was no grave abuse of discretion to speak of and no reason for the Court to intervene.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Judicial docility surfaced in a more disturbing fashion. An impeachment complaint was filed against Chief Justice Ma. Lourdes Sereno, but it quickly became evident that the complaint was weak and founded mostly on falsehoods and hearsay. Instead of dismiss-

ing the complaint, the House of Representatives has been conducting public hearings to beef it up. Among those who attended the hearings are several Associate Justices of the Supreme Court who raised issues regarding her management style, but none have been able to state categorically that she committed impeachable offenses. This is in stark contrast with the impeachment of the Chief Justice in 2012, when a majority of the Justices built defenses for the embattled Chief through case law.¹¹

The Justices, however, seem unaware of the implications of their participation in the House hearings. Queuing to denounce the head of the Court served to weaken the Court as an institution.

IV. LOOKING AHEAD TO 2018

These trends show no signs of abating. The Supreme Court has already upheld the President's decision to extend martial law in the entire island of Mindanao for the whole year (Lagman v. Pimentel III, G.R. No. 235935, February 6, 2018).

The fate of liberal democracy remains ominous as Duterte is set to appoint 11 of the Court's 15 members before his term ends in 2022. He may appoint 12 if they succeed in removing the Chief Justice.

All these developments are happening under a campaign to amend the Constitution for the first time since it was adopted after Ferdinand Marcos was deposed in 1986. There are fears, as is always the case in the Philippines, that constitutional change is being used as a vehicle to perpetuate incumbents in office.

Amidst these attempts to undermine liberal democracy, amidst the thousands of deaths conducted under the "drug war," Duterte remains ever popular.

V. FURTHER READINGS

Nicole Curato, *A Duterte Reader: Critical*

Essays on Rodrigo Duterte's Early Presidency (Ateneo de Manila University Press 2017)

Dante Gatmaytan, 'Constitutional Deconsecration: Enforcing an Imposed Constitution in Duterte's Philippines' (2017) 62 ATE-NEO L.J. 311

Dante Gatmaytan, *More Equal than Others: Constitutional Law and Politics* (University of the Philippines 2017)

Richard Heydarian, *The Rise of Duterte: A Populist Revolt Against Elite Democracy* (Palgrave Macmillan 2017)

¹¹ See Dante B. Gatmaytan, *More Equal than Others: Constitutional Law and Politics* (University of the Philippines 2017).



Poland

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The ruthlessness with which the Polish Constitutional Court (hereinafter referred to as “the Court”) has been emasculated by the majority, and the persistence with which it has been thwarting the unconstitutional attempts to pack it and disable it, paints a disturbing story of democracy and an institution in distress.¹ 2016 went down in history as fundamental in the institutional history of Polish constitutionalism. What started as “court-packing” soon transformed into an all-out attack on judicial review and checks and balances, and ended with a full-blown constitutional *coup d’etat* and destruction of independent constitutional review in Poland.² This attack was unprecedented in scope, efficiency and intensity. It was never premised on a dissatisfaction with the overall performance, or particular acts of the Court, but rather struck at its very *existence*. The Court, once a proud institution and an effective check on the will of the majority, entered 2017 as a shell of its former self with constitutional scars, which affect not only the legitimacy of the institution but also the very constitutionality of the “decisions” rendered by the new Court in 2017.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Five lasting scars transformed the institutional identity of the Court in 2017. First, the Court is composed of judges that have been elected unconstitutionally and rushed on the bench by the parliamentary majority *per fas et nefas*. At least three of the current judges should have never been sworn in by the President since there was no vacancy on the bench at the time of their appointment. Sheer and blunt political power prevailed over law. These are “irregular judges” (one of them became Vice-President of the Court since then). Second, despite the unconstitutionality of their mandate, they not only sat on cases heard by the Court in 2017 (see *infra*) but they also validated now *ex post facto* their own selection to the Court. Third, the President of the Court, Judge J. Przyłębska, was elected and sworn in by the President of the Republic in clear violation of applicable rules.³ Fourth, the statutory scheme of intricate legislative provisions adopted by the new majority in 2016 brought the Court to heel and paralysed its day-to-day functioning.⁴ Cases were decided in camera, and the assignment of cases to individual judges was opaque and depended on the whim and ca-

¹ T.T. Koncewicz, *Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in cases K 34/15, K 35/15 and beyond*, (2016) 53 Common Market Law Review 1753.

² A. Śledzińska-Simon, *The Polish Revolution 2015-2017*, at <http://www.icconnectblog.com/2017/07/the-polish-revolution-2015-2017/>

³ For the unconstitutional scheme to rush J. Przyłębska in as the President of the Court see T. T. Koncewicz, *Constitutional Capture in Poland 2016 and Beyond: What is Next?* at <https://verfassungsblog.de/constitutional-capture-in-poland-2016-and-beyond-what-is-next/>

⁴ W. Sadurski, *What is going on in Poland is an attack against democracy?* available at <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>; *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Research Paper 18/01 at <http://ssrn.com/abstract=3103491>; T. T. Koncewicz, *Farewell to the Polish Constitu-*

price of the unconstitutionally elected President. She tailors the composition of the bench to the political importance of cases. The more important the case from the perspective of political majority, the more likely it will be heard exclusively by judges selected by the new Parliament. The Court decides less and less cases, as the cloud of unconstitutionality hangs over its decisions. These judges repeatedly showed over the course of 2017 that they see themselves as an extension of the will of the Parliament. And finally, unwanted judgments of the “pre-2017 Court” were removed from the Court’s website.⁵

What was once unthinkable happened, and became the new normal.⁶ All this must have an impact on our analysis. We must not pretend that judicial review in Poland is still in place, and proceed to legalistic analysis of Court judgments rendered in 2017 as if nothing had happened.⁷ There is a quality difference between 2015/2016 and 2017 that bears on our selection of cases and their treatment. 2015/2016 was constitutionally important, with the Court thwarting off political assault and building important “existential jurisprudence” centered around the rule of law, independence of the judiciary and separation of powers. 2017 saw a new face of constitutional review. When the Court was finally taken over by the ruling party, Polish politics of resentment entered into a new phase,

consolidating its grip on the captured state: media, ordinary courts, Supreme Court and National Court of the Judiciary. The list goes on. The Court’s composition was tailored to fulfill a crucial role in the process. Looking back on 2017, one can see how capturing the referees, and having them firmly on the government’s side,⁸ entailed three interconnected processes: i) *weaponizing* judicial review and using it against the opposition; ii) *instrumentalizing* constitutional review in the process of implementing the political agenda; and finally iii) judicial *rubber-stamping* of all unconstitutional schemes placed before it by the ruling majority. As a result, the “*existential*” and “*symbolic jurisprudence*”⁹ of 2015-2016 was transformed into “*subversive jurisprudence*” focused on sanctioning the destruction of the last remaining elements of the rule of law in Poland.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Prior control of the amendment of the Law on Assemblies was initiated by the President of the Republic of Poland with respect to a provision on the so-called periodical assemblies¹⁰ (*Kp 1/17*). “Incidentally”, monthly commemorations of the tragic crash of the presidential plane in Smolensk with 89

members of the official delegation and 7 crew members on 10 April 2010 fell within the scope of this very precise definition.¹¹ They are co-hosted by Jarosław Kaczyński, brother of the late President and head of the ruling party, and used to mobilize his supporters. According to the new provision, the president of the local government (*wojewoda*) may issue consents for three consecutive years for exclusive organization of such gatherings in a given place or on a given route, on predetermined dates. The privileging of such assemblies in relation to other public gatherings lies in the fact that the organizers enjoy priority in choosing the time and venue, even in relation to assemblies previously notified. In addition, local authorities are required to issue a decision prohibiting another meeting to take place even if it does not violate the law or threaten the life or health of people or large-sized property. Once the *wojewoda* consents to hold cyclical assemblies, local authority is obliged to prohibit, within 24 hours of receiving this information, the organization of meetings previously notified, planned at the same time and place. If such a decision is not taken, the *wojewoda* immediately prohibits coinciding gatherings.

The Court gave short shrift to all the constitutional concerns raised by the President (no appeal against the decision of the *wojewoda* retroactively). The Court approvingly

tional Court, at <http://verfassungsblog.de/farewell-to-the-polish-constitutional-court/>

⁵ D. Kochenov, L. Pech, K. L. Scheppele, *The European Commission’s Activation of Article 7: Better Late than Never?* at <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/>

⁶ It must be remembered that after months of procrastination, on December, 20, 2017, the European Commission finally decided to trigger the preventive mechanism of article 7 TEU by proposing to the Council to adopt a decision under article 7(1) TEU. Restoring the independence and legitimacy of the Constitutional Court by ensuring that its judges, President and Vice-President are lawfully elected and by ensuring that all the judgments of the Court are published and fully implemented figure prominently in the Commission’s proposal.

⁷ However, we acknowledge the following “routine” cases. In case Case SK 13/15 the Court (in correct composition) ruled (judgment on 12 December 2017) that subjecting the applicants (spouses, one of whom is an entrepreneur) to property tax at the rate provided for land associated with running a business, although the land they had acquired was never used for business purposes, is unconstitutional. The judgment is beneficial not only to co-owners but also to entrepreneurs who do not use their real estate for business purposes. The higher rate will be applied only when the real estate is related to economic activity. In another highly technical case (SK 48/15), the Court (again seating in the constitutional composition) acknowledged that in tax cases doubts should be interpreted in favour of taxpayers.

⁸ For various practices, see S. Levitsky, D. Ziblat, *How Democracies Die* (Crown, New York, 2018), at pp. 78-81.

⁹ We agree with T. Ginsburg’s argument that: “Only when there is agreement on what constitutes a violation and mutual expectations that citizens will in fact enforce the rules will democracy emerge and be sustained [...] in some limited conditions, court decisions can survive as focal points in helping citizens coordinate, and force the autocracy to liberalize [...] a court decision can provide clarity as to what constitutes a violation of the rules by the government. [...]”; *The Politics of Courts in Democratization. Four Junctures in Asia*, in D. Kapiszewski, G. Silverstein, R. A. Kagan (eds.), *Consequential Courts. Judicial Roles in Global Perspective* (Cambridge University Press, 2013), at p. 48.

¹⁰ The term covers “events organized by the same organizer in the same place or on the same route at least four times a year according to the schedule or at least once a year on national and international holidays, if such events have been taking place in the last 3 years, even if not in the form of assemblies, and were intended in particular to celebrate the momentous and important occasions in the history of the Republic of Poland”.

¹¹ It looks like a new emerging legislative pattern: law is written to cover precise events. We have seen this already when new rules on the election of the President of the Constitutional Court have been drafted in such a way that only one candidate, J. Przyłębska, could fulfill the requisite conditions.

spoke of the legislator's correct response to "new social circumstances", which required addressing, ordering and classifying "new facts" in the context of the need to ascertain "safety to persons and entities as well as an order". While the judgment lacks logic and force, the most important constitutional take-away is that it changes in a dramatic fashion the relationship between the individual and the state that prevailed in the judgments of the Court until 2015. The new interpretation starts from the subordination of the individual to the state, and accepts a radical limitation of an individual's autonomy against encroachments by the majority. The dignitary concept of rights takes a backseat to the communal reading of rights. Community comes first, individual rights second.¹²

The avowed objective of the government to capture the ordinary courts and the Supreme Court (SC) provides a background for the case decided on October 24, 2017 (case *K 3/17*). The Constitutional Court passed a majority decision in which it stated that the resolution on the regulations for the selection of candidates for the post of First President of the SC modifies the law on the SC and the Constitution of the Republic of Poland in an unacceptable manner. It pointed out that the Chairman of the General Assembly of Supreme Court Judges was the appointing authority and not – as required by the Constitution – the General Assembly of SC Judges. The Court found unconstitutional part of the provisions governing the procedure. Despite considering the applicant's allegations, it did not state that legal acts adopted on the basis of unconstitutional regulations are ineffective. The decision in turn opened the door to "reforming" the allegedly defective SC.¹³ Another case, *K 5/17*, merits special attention as an example of a sophisticated scheme to bring down the National Council

of the Judiciary (NCJ) under the pretense of legality. Instrumentalization and rubber-stamping reigned supreme again.¹⁴ The Constitution stipulates that the term of office lasts four years. The Minister of Justice (and President Duda before him) questioned the selection procedure as regards appointees to the Council. They are elected by judicial self-government from among the "elected representatives". According to the Ministry of Justice, this violated the principle of equality and limited the powers of ordinary judges in elections. He also challenged the possibility of the term of office of NCJ judges to begin on a date different from that of parliamentarians elected to the Council. The Court ruled that the members of the Council are to be elected as a body, and the four-year term applies to the institution as such, rather than to individual members of the NCJ. The Court also found that the judges' right to vote for their representatives on the NCJ has been violated as well, as they cannot vote directly on the members of the NCJ. This is an absurd ruling. First, all judges do have a right to choose their candidates. Every judge has the power to select the electors, and they in turn will choose from their midst the candidates to the Council. Second, as for the NCJ's term of office, the reasoning is highly questionable: the Constitution nowhere stipulates that the term of office applies to the Council as a body. However, the logic and legal arguments were of the least concern to the judges. Read between the lines, the case lodged at the Court with the sole purpose of providing "a justification" for a political capture of the NCJ. The political plan was to use the courtroom to rubber-stamp the Minister's claims that NCJ is unconstitutional and, as such, needs reform. As a result, the Ministry of Justice, now emboldened by the fabricated unconstitutionality, followed through on its promise and the new Council

was appointed exclusively by the political branch, which itself flies in the face of the Constitution. The Court was used in a legislative scheme to bring down another Constitution body – the Council. And it delivered.¹⁵

The credibility of constitutional review in Poland has been dealt a deadly blow, and the Constitution reduced to a mere fig leaf. Any future decisions taken by the unconstitutional court with the unconstitutional judges sitting on the cases will be marred by invalidity. The ordinary judges will have a valid claim not to follow these rulings. Should they decide to follow decisions made with the participation of, or by, "fake" judges, their own proceedings will be vitiated by invalidity. The Minister of Justice did not waste time and threatened that ordinary judges who refuse to follow the rulings of the "new" Constitutional Court staffed by judges loyal to the ruling party will be prosecuted.

These are all dramatic consequences entailed by the change in constitutional narrative in Poland. What Poland needs today is the constitutional jurisprudence of ordinary courts that counter the unconstitutional activities and existence of the fake constitutional court. Such "emergency constitutional review" would not simply respond to legal change or to tension between the branches; it would stave off systemic revolution brought about by the unconstitutional capture of institutions and concepts.¹⁶ When constitutional review faces systemic and permanent dysfunction for whatever reasons, emergency review by ordinary judges must be resorted to. Such review is defined by complementarity *vis-a-vis* the Court's power of review. It accompanies, and runs in parallel with, the Court's constitutional review, and does not replace it. Such review is instrumental to securing respect for the Constitution's status as

¹² The case was decided with the unconstitutional judges sitting on the case. The doubts as to the composition of the Court were again raised in Case *K 32/16* on the reform of the ordinary courts (proceedings were discontinued as a result of the National Council of the Judiciary withdrawing its application for review).

¹³ Again, irregular judges sat on this case.

¹⁴ All judges deciding the case were carefully handpicked by J. Przyłębska from the judges elected by the new Parliament. Among the judges sitting on the cases were two unconstitutional judges.

¹⁵ Also on October 24, 2017, "the court" decided that three unconstitutional judges were ... constitutional after all. Of course, the fake judges were sitting, and thus deciding "in their own case". In this way the capture of the Court has now been officially sanctioned and completed.

¹⁶ For analysis see T. T. Konciewicz, *Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux* (2018) Review of Central and East European Law (forthcoming).

the supreme law of the land. Constitutional defiance by the parliamentary majority must be countered by intra-constitutional resilience and trigger self-defending mechanisms from within the constitutional text. It is important to make clear here that our call for “emergency constitutional review” by the ordinary courts does not question the Court’s monopoly of constitutional review but rather aims at shielding the constitutional order from being further weakened and disassembled. Emergency judicial review plays an important mobilizing role. It can act as a catalyst function for pro-democracy initiatives, bringing a sense of vindication and recognition to those who oppose the mainstream anti-democratic politics and who demand a return to respecting democratic values. “Calling a spade a spade” by the judiciary would provide a crucial focal point of societal resistance. Judicial pronouncement in defense of the constitutional order would transform into a symbolic point of reference as a source of loyalty to the oppressed constitutional values. Clarity about the constitutional state of play and constitutional interpretation would focalize the resistance, and move it forward.

The fascinating problem of judicial resistance has been in vogue recently.¹⁷ Yet resistance by judges takes on a special meaning when the discussion turns not simply on laws that are unjust but rather on laws that strike at the very core of a democratic state governed by the rule of law. These are laws whose very democratic pedigree could be questioned. Such laws are “wicked”¹⁸ in a systemic sense. A question must be asked, then, what happens to judges faced with laws that undermine the democratic credentials of the state? Here, we agree with A. Barak: “[...] when the criticism is transformed into

an unbridled attack public confidence in the courts may be harmed, and the checks and balances that characterize the separation of powers may be undermined. When such attacks affect the composition or jurisdiction of the court, the crisis point is reached. This condition may signal the beginning of the end of democracy. What should judges do when they find themselves in this tension? Not much. They must remain faithful to their judicial approach; they should realize their outlook on the judicial role. They must be aware of this tension but not give in to it. Indeed, every judge learns, over the years, to live with this tension”.¹⁹ As a result, the relevant question today is no longer whether emergency review is warranted but rather whether ordinary judges would be willing to accept their new role. The judges are faced with the most dramatic choice and dilemma here: either to fall in line, and bury their heads in the sand by applying the rulings of the “new court” that are vitiating by unconstitutionality, or face up to their own mandate of being bound only “by the statute and the Constitution”, and apply directly the Constitution (not the suspicious decisions of “the new court”) instead. What about the cases in which a decision was taken by the unconstitutional judges, but is in favor of an individual?²⁰ Should an ordinary judge follow such a decision and protect individual rights? Framing its decision in terms of the Constitution could, at least, create an impression that a judge follows the Constitution, not the decision itself. At times, it might be difficult to discern where the Constitution starts and the invalid decision stops, and *vice versa*. These concerns and challenges go beyond the normative, though. They raise fundamental questions of judicial ethos, and there is no ready-to-use abstract formula here. Each judge in his own consciousness will have to

decide how to decide, and be ready to face the consequences.

IV. LOOKING AHEAD TO 2018

The next installment in constitutional developments in Poland might well be devoted exclusively to the *emergency constitutional review* exercised by the ordinary courts or ... (let’s hope not) their *abdication* in the face of constitutional emergency. There is one more possibility here. By the time this goes to print, the entire Polish judiciary might have been captured.²¹ If this happens, there will be nothing left to write about in 2018, except for new episodes in the constitutional debacle and the unconstitutional court’s shameful role in the process. Time can only tell.

V. FURTHER READING

T. T. Konciewicz, *Capture of the Polish Constitutional Tribunal and Beyond: Of institution(s), Fidelities and the Rule of Law in Flux* (2018) Review of Central and East European Law (forth-coming)

T. T. Konciewicz, *The Politics of Resentment and the Constitutional Capture: Learning from the Constitutional Debacles and Thinking Counter Strategies and Narratives* (LAPA paper available at <http://lapa.princeton.edu/content/politics-resentment-and-constitutional-capture-learning-constitutional-debacles-and-thinking>)

W. Sadurski, *What Is Going on in Poland Is an Attack against Democracy* available at <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>

¹⁷ See Douglas E. Edlin, *Judges and Unjust laws. Common Law Constitutionalism and the Foundations of Judicial Review* (University of Michigan Press, Ann Arbor, 2010).

¹⁸ T. R. S. Allan, *Justice and Integrity: The Paradox of Wicked Laws*, 29 (2009) *Oxford Journal of Legal Studies* 705.

¹⁹ A. Barak, *The Judge in a Democracy* (Princeton University Press, Princeton, 2006), at pp. 216-217.

²⁰ For one such example, see case 37/15 decided by the Court on December 20, 2017. Even though the Court’s decision is in favour of the constitutional right to a fair trial and access to court, the case was decided with the participation of “irregular” judges. The administrative judges will thus now face a choice: follow the judgment, knowing that it might risk the validity of their own proceedings, or, follow constitutional principles and derive protection for the entrepreneurs directly from the text of the Constitution, rather than from a constitutionally doubtful judgment.

²¹ The European Commission has finally decided to act. The Commission recognized that the Polish authorities have adopted over a period of two years no less than 13 laws affecting the entire structure of the country’s justice system. See the Commission’s press release of December 20, 2017 at http://europa.eu/rapid/press-release_IP-17-5367_en.htm

W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Research Paper 18/01 at <http://ssrn.com/abstract=3103491>

A. Śledzińska-Simon, *The Polish Revolution 2015-2017* at <http://www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017/>



Portugal

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

On 25 April 2017, Portugal celebrated 43 years of democracy and the 41st anniversary of the Constitution (1976). Still, even though the regime's democratic consistency has evolved over the last decades, by 2012 Portugal had one of the highest public debts in the European Union (EU) and struggled to comply with the EU's fiscal rules. In 2016, Portugal was able to meet the EU Stability and Growth Pact deficit rules (3%) and, in June 2017, left the excessive deficit procedure.

Notwithstanding that Portugal, as other states, escaped severe forms of populism, there is an undeniable disenchantment with representative democracy as a form of legitimization of power.¹ Liberal democracies are struggling with the political apathy of the electorate, which is visible in the high rates of abstention in electoral acts.

Subsequent to the presentation of the current constitutional and economic framework, we address some of the most relevant constitutional developments of 2017, such as the municipal elections, the economic sustainability of the traditional press and mass media in general, the law regarding the financing of political parties, the failings of civil protection services in the deadly fires of last June and October, intelligence services' access to metadata, and relevant labour law changes.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

On 25 April 1974, and after almost five decades of the right-wing authoritarian dictatorship of Salazar and Marcello Caetano, a bloodless military coup marked the beginning of the Portuguese revolutionary transition towards democracy. Empirical studies confirm "unquestionable societal improvements" on the matters of health, education, housing and standards of living in the last decades.² Yet, because GDP growth was around zero from 2000 to 2008 and then negative in 2012 and 2013, Portugal struggled to comply with EU's fiscal rules.

Portugal's three-year EUR 78-billion international bailout consisted in a *Memorandum of Understanding* agreed to between the International Monetary Fund, the European Commission and the European Central Bank (known as "Troika"). The agreement with Troika was signed by both Government parties (centre-right and conservatives) and the socialist opposition (centre-left). Between 2011 and 2014, Portuguese legislators adhered to a very strict austerity programme, which predictably led to unpopular public policies and stressed Portugal's social fabric.³

After the Troika's intervention and the centre-right Government's (2011-15) action, the public budget balance deficit declined from 11.2% in 2010 to 4.4% in 2015 (3.2%

¹ Catarina Santos Botelho, 'Populismos e a (in)completude democrática' (Observador 2017) < <http://observador.pt/opiniao/populismos-e-a-incompletude-democratica/> > accessed February 2018.

² Marina Costa Lobo, António Costa Pinto and Pedro C. Magalhães, 'Portuguese Democratisation 40 Years on: Its Meaning and Enduring Legacies' (2016) 21 SESP 163, 175.

³ Catarina Santos Botelho, Os direitos sociais em tempos de crise (Almedina 2015) 435.

* I am grateful to Ana Teresa Ribeiro (Universidade Católica Portuguesa), Gonçalo Almeida Ribeiro (Portuguese Constitutional Court) and Nuno Garoupa (Texas A&M) for the helpful suggestions. The usual disclaimers apply.

excluding one-off operations, which do not account for EU excessive deficit procedures). In 2016, with a socialist minority government (with parliamentary support of the other left-wing parties), the country had a deficit of 2% and was able to meet the EU Stability and Growth Pact deficit rules (3%). In June 2017, Portugal left the excessive deficit procedure.⁴

Although Portugal has moved away from the prospect of a second bailout on the grounds of a stronger economy and lower unemployment rates, a primary deficit surplus and low national debt interest rates, the continuous cut in public investment and the absence of structural reforms still worry several experts. For the upcoming years, several challenges arise such as growth potential, which remains low (1.5% of GDP according to Fitch), public debt decrease sustainability in terms of GDP ratio and the risk of bailouts to the banking system, all of which may affect economic growth.

Notwithstanding the financial and economic crisis, which clearly impacted the balance of power amongst the mainstream parties (centre-left, centre-right and conservatives), *populist movements* did not flourish in the Portuguese societal and political arena. The crisis had negative effects on the economic sustainability of the traditional press and mass media in general. This situation can jeopardise both pluralism of opinion and information quality. An eventual absence of stable and independent mass media might have pernicious effects on liberal democracy pillars.

Empirical studies demonstrate that we must be wary of quickly concluding that such crises and scarcity are the only variables responsible for the decline in institutional trust. There are some indicators that the per-

ception of corruption is definitely a determinant factor.⁵

From a global perspective, the available indicators do not confirm the worsening of the Portuguese justice system. As several other civil law systems, it may lack efficiency due to the complexity of law procedures and the consequent high congestion rate. Nonetheless, the Portuguese Public Prosecution Service has allowed corruption scandals involving high-level politicians and business elites abusing public funds to be fully investigated, even though many are still pending.

Disenchantment with politics is a reality of today's liberal democracies.⁶ In this sense, many citizens feel alienated from the political sphere and do not believe that traditional partisan structures are the answer to exercise their voting rights. As far as Portugal is concerned, the country's turnout metrics are quite disturbing: 2014 EU Parliament elections, 33.67%; 2015 parliamentary elections, 55.84%; 2016 presidential elections, 48.70%; and 2017 local elections, 55%.⁷ There is a controversy over these numbers since it is estimated that about 1 million people are not residents in the electoral districts. If so, we should add about 15% to these percentages to get the actual turnout, and thus they are more aligned with European standards.

In sum, the lack of participation in day-to-day deliberations raises scepticism towards a representative democracy that does not incorporate strong participatory and deliberative mechanisms.

On 1 October 2017, Portugal held local elections, which were perceived as a clarification of the political arena. The downfall of the former right-wing Government was interpreted by some supporters as a breach in

the constitutional praxis of the last decades. Portugal has a semi-presidential government system in which a directly elected President exists alongside a Government, the latter being politically responsible vis-à-vis the President and the Parliament.⁸

Article 187/1 of the Constitution states that the President appoints the Prime Minister "in the light of the electoral results". In the 2015 legislative elections, the colligation PàF (Portugal à Frente), which gathered the centre-right party PSD (Social Democratic Party) and the conservative CDS-PP (Popular Party), won by 39%.

However, after being nominated by President Cavaco Silva as Government, the colligation PàF was not able to pass its programme within the Parliament. A motion of rejection of the Government's programme was approved by 123 votes, determining its fall (articles 194/4 and 195/1/d) of the Constitution). For that reason, this Government was the shortest one in the history of the Portuguese constitutional democracy, governing only for 28 days.

According to the Constitution, the President was doubly limited. In fact, due to him being in the last semester of his term of office, and to the Parliament being in the first semester since its election (article 172/1), he was not able to dissolve the Parliament and call an early general election.

This constitutional impasse led to a political crisis and the President only had three viable options: (a) maintain a caretaker Government, which was not the best solution, since the Government would have to "limit itself to undertaking the acts that are strictly necessary in order to ensure the management of public affairs" (article 185/6 of the Con-

⁴ Decision of the Council of the European Union 2017/1225, of June 2017 < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.174.01.0019.01.ENG > accessed February 2018.

⁵ Mariano Torcal, 'The Decline of Political Trust in Spain and Portugal: Economic Performance or Political Responsiveness?' (2014) 58 ABS 1542, 1561.

⁶ Catarina Santos Botelho, 'O voto é um direito ou um dever?' (Observador 2017), < <http://observador.pt/opiniao/o-voto-e-um-direito-ou-um-dever/> > accessed February 2018.

⁷ <https://www.idea.int/data-tools/country-view/247/40> Aina Gallego, *Unequal Political Participation Worldwide* (CUP 2014), João Cancela and Benny Geys, 'Explaining voter turnout: A meta-analysis of national and subnational elections' (2016) 42 ES, 264.

⁸ Gianluca Passarelli, 'The government in two semi-presidential systems: France and Portugal in a comparative perspective' (2010) 8 FP 40, and O. Amorim Neto and Marina Costa Lobo, 'Portugal's semi-presidentialism (re)considered: An assessment of the President's role in the policy process, 1976-2006', in *Portugal in the Twenty-First Century: Politics, Society and Economics* (2012) 49.

stitution) and therefore, with a low political legitimacy, could not underplay innovative legislative acts; (b) nominate a government of presidential initiative, in a broader-based firm, with members of the three political parties that had signed the Memorandum of Understanding with Troika. Nevertheless, due to the distressing political crisis, such composition would almost certainly fail again when submitting its programme to the Parliament; and (c) nominate a Government of the Socialist Party (which was the second most voted party), after two other left-wing parties – the Communists (PCP) and the Left Bloc (BE) – clarified that they would bestow their parliamentary support. The President opted for this last alternative, believing it could guarantee stability. For the first time since the establishment of democracy, PCP and BE supported the party in government.

Even if the nomination of the current Government was consistent with the Portuguese Constitution, it generated some criticism amongst the PSD and CDS-PP, the elections' winning parties.⁹ In my opinion, behind this political distress was the fact that there was a kind of “gentlemen’s agreement” according to which the political alliances in the Parliament would be made known to the electorate *a priori* and not *a posteriori*. However, while the assertion that the party/colligation with the highest percentage of votes wins the elections is correct, it does not mean that it is entitled to form a government. It is one thing to win the legislative elections, another to form a government.

As one could easily wonder, these uncomfortable political tensions raised a lot of expectation as to the results of the municipal elections. The Socialist Party (PS) raised its

number of mayors from 149 to 159, whereas the PSD obtained its worst result ever at local elections. In Lisbon, the Portuguese capital, the PSD candidate only earned 11.2% of the votes. CDS-PP had a positive result in Lisbon, but was defeated in the rest of the country with about 3% of the national vote. As for BE, the result was positive. On the contrary, the Communist Party vote share diminished from 11.1% to 9.5%.

On 21 December 2017, the Parliament approved, by a large majority, changes to the organic law regarding the financing of political parties.¹⁰ Only CDS-PP and PAN (People-Animals-Nature Party) voted against it. In the previous year, Justice Manuel Costa Andrade, President of the Portuguese Constitutional Court (PCC), had requested the Parliament to alter the oversight model for party financing and suggested the creation of an independent entity to control political accounts and financing. The PCC’s competence to control the financing of political parties already received criticism amongst constitutionalists.¹¹

Some argued that the President of the PCC should not make legislative suggestions, since constitutional courts are not policy-makers.¹² In my point of view, though, the separation of powers does not mean total imperviousness, especially when considering the Constitution. Additionally, and more importantly, these recommendations were given in a non-binding, informal and cooperative way.

If it is true that the reign of politics should not dethrone the reign of law, it is also true that, as the fundamental law of a political community, the Constitution is a *political*

norm: a norm about the production of other norms. Since the post-War period, constitutional texts have become more politicised, breeding “constitutional expectations” that might breach constitutional constancy.¹³ Although we firmly agree that constitutional courts are not co-legislators, we also read elsewhere that “nothing positive comes from exorcising the Constitution and constitutionalism itself from politics, as if both were impenetrable domains. There is no Constitution without politics. And maybe that assertion should suffice”.¹⁴

However, the extent of the changes to the law in question went far beyond the PCC recommendations. The breach of the tradition of public funding and the opening of the door to private donations prompted an outcry in Portuguese social media.

The main alterations are the following: a) creation of an Entity for Political Accounts and Financing (ECFP), which would investigate irregularities and illegalities of politicians and electoral campaigns’ accounts and apply the respective fines. The ECFP’s decisions could be appealed to the Portuguese Constitutional Court; b) abolition of the fund-raising ceiling; c) extension of VAT exemption to political parties (it previously encompassed goods and services obtained to spread the political message or their own identities, and would now be also applied to all purchases of goods and services respecting parties’ activities); and d) a transitory norm casts doubts on whether these changes would be applicable retroactively. In that scenario, this law could be applicable to pending cases, allowing political parties to recover VAT from previous years.

Given the political relevance of organic laws,

⁹ See Francisca Almeida, ‘Da (in)admissibilidade constitucional de um Governo de esquerda’ (Expresso 2015) < http://expresso.sapo.pt/blogues/blogue_olado_a_lado_b/2015-10-18-Da--in-admissibilidade-constitucional-de-um-Governo-de-esquerda > accessed February 2018.

¹⁰ Law no. 19/2003, 20 June 2003.

¹¹ More broadly and concerning the competences of the PCC, see Maria Lúcia Amaral and Ravi Afonso Pereira, ‘Um tribunal como os outros. Justiça constitucional e interpretação da constituição’ in *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos* (Almedina 2016) 435.

¹² Nuno Garoupa, ‘Da forma à substância na lei dos partidos’ (Diário de Notícias 2018) < <https://www.dn.pt/opiniao/opiniao-dn/nuno-garoupa/interior/da-forma-a-substancia-da-lei-dos-partidos-9050460.html> > accessed February 2018.

¹³ Catarina Santos Botelho, ‘Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?’ (2017) 3 (4) CALQ 62, Michel Rosenfeld, ‘Constitutional adjudication in Europe and the United States: Paradoxes and contrasts’ in *European and US Constitutionalism* (CUP 2005) 197, 205 and Rupert Scholz, ‘Konstitutionalisierte Politik oder politisierte Konstitution?’ in *Realitätsprägung durch Verfassungsrecht* (Duncker & Humblot 2008) 9, 12.

¹⁴ Catarina Santos Botelho, ‘O lugar do Tribunal Constitucional no século XXI: os limites funcionais da justiça constitucional na relação com os demais tribunais e com o legislador’ (2018) 34 *Julg.*

the Prime Minister and one-fifth of all the Members of the Assembly of the Republic could ask the Constitutional Court to undertake the prior consideration of constitutionality on these diplomas (article 278/4 of the Constitution), but they decided not to. On 3 January 2018, President Marcelo Rebelo de Sousa, vetoed this law given “the absence of grounds concerning the changes in the way political parties are financed which can undergo public scrutiny”. The bill was returned to the Parliament, which could “validate it by a majority that is at least equal to two-thirds of all Members present and is greater than an absolute majority of all the Members in full exercise of their office” (article 136/3 of the Constitution). However, most parties acknowledged that the law might need further reflection and a deeper public scrutiny.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

2017 was a tragic year due to the lethal nature of the fires registered in June and October. Around 100 people died and over 500,000 hectares of forests were burned in what was considered *Portugal’s deadliest year on record for wildfires*. The Portuguese Government was heavily criticised for the failings of the civil protection services and its lack of efficiency in forestry management policies. CDS-PP put to the vote a motion of no confidence against the Government, which was rejected (by 122 to 105) thanks to the parliamentary support given by the left-wing parties.

Marcelo Rebelo de Sousa, in a speech addressing this situation, hinted he could use his presidential powers to dissolve the Government or even the Parliament unless “forestry reform and fire prevention were made top priorities”. The assertiveness of the President and the social turmoil that followed such tragedies had several consequences: (a) the Portuguese Internal Affairs Minister

Constança Urbano de Sousa resigned; (b) right after the first wave of fires in June, a commission of independent technical experts was nominated and its report pointed out malfunctions on fire prevention and monitoring, civil protection response and emergency communications. This commission was given the task of analysing the second wave of fires in October as well; (c) several policy measures were announced by the Government in order to maintain forests and prevent fires; and (d) given the fact that the State’s responsibility was at stake for failing to protect its citizens, the Government agreed to an extrajudicial agreement, mediated by the Ombudsman, stipulating monetary compensation to the families and heirs of people killed in the fires and also to those seriously injured therein.

It is relevant to mention that, on 20 October 2017, Maria Lúcia Amaral, former Justice (2007-2016) and Vice-President of the Constitutional Court was elected by the Parliament as Ombudsman and took office on 2 November of that same year. Since 1999, the Portuguese Ombudsman has been credited an “A” status by the United Nations, in full compliance with the Paris Principles.

The Portuguese Data Protection Authority (CNPd), presided since 2012 by Filipa Calvão, is an independent body which supervises and monitors compliance with the laws and regulations in the area of personal data protection. Its previous consultation on legal provisions relating to the processing of personal data is mandatory. In October 2015, the CNPD pronounced itself against parliamentary legislation (Decree no. 426/XII) that allowed intelligence officers from the Security Information Service (SIS) and the Strategic and Defence Information Service (SIED) to access traffic, localisation and other electronic communications-related data for purposes of prevention of phenomena such as terrorism, espionage, sabotage and highly organised crime as long as certain

conditions (necessity, appropriateness and proportionality) were respected.¹⁵

The legislative goal was not to access content of communications (written or voice) but to obtain authorisation to demand the *metadata* (data about data) from the entities that treat data, concurring the conditions under which communications took place (location and traffic).

Two months later, and following the request of prior control from the President of the Republic Aníbal Cavaco Silva, the Portuguese Constitutional Court (PCC) took the view that the legislation was in breach of article 34/4 of the Portuguese Constitution, which prohibits public authorities from engaging in any form of intrusion into communications other than in the cases provided for in criminal procedural law.¹⁶ The intent of this provision is to protect the privacy of individuals and the right to communicational self-determination.¹⁷

In August 2017, Organic Law 4/2017 was published, regulating the access of SIS and SIED to telecommunications and Internet data outside criminal proceedings. The novelty in this legislative reformulation is judicial supervision and prior authorisation for the access to telecommunication and Internet data, carried out by a group of judges from the Supreme Court of Justice.

The CNPD, which had already decided against the previous legislation proposal, reaffirmed that, since the access to data is carried out within the scope of criminal prevention, and therefore outside the constitutional scope of criminal proceedings by the SIS and SIED, both non-criminal investigation bodies, this act is still in violation of the aforementioned constitutional rules and principles.¹⁸ Even acknowledging that it is a “high-level judicial control”, the CNPD problematises its operability because the absence of “a clear and standardised procedure

¹⁵ Opinion 51/2015 < https://www.cnpd.pt/bin/decisooes/Par/40_51_2015.pdf > accessed February 2018.

¹⁶ Ruling no. 403/15, 27th of December, 2015 < <http://w3b.tribunalconstitucional.pt/tc/en/acordaos/20150403s.html> > accessed February 2018.

¹⁷ Catarina Santos Botelho, ‘Novo ou velho direito? – O direito ao esquecimento e o princípio da proporcionalidade no constitucionalismo global’ (2018) 7 AB INSTANTIA 49.

¹⁸ Opinion no. 38/2017, 30th of May, 2017 < https://www.cnpd.pt/bin/decisooes/Par/40_38_2017.pdf > accessed February 2018.

(...) constitutes a very considerable obstacle to the legality and constitutionality of the remedy”. More specifically, the legislation “infringes the prohibition of intrusion in the electronic communications provided for in the Constitution of the Portuguese Republic, as well as the rules of the Constitution, the Charter of the Fundamental Rights of the European Union and the European Convention on Human Rights”.

On 14 August, the President of the Republic Marcelo Rebelo de Sousa promulgated the diploma, invoking the “broad consensus [was] reached in order to overcome the doubts that had given rise to the previous request for preventive constitutional review” as well as “the relevance of the regime in question for the defence of the Democratic Rule of Law, in particular for the protection of fundamental rights”. PCP and BE requested successive control of constitutionality to the Portuguese Constitutional Court (articles 281 and 282).

In Portuguese Labour Law, a collective agreement is not immediately binding to all employees in an undertaking, since it only covers employees affiliated with the trade union that entered into it with their employer (or the employers’ association the latter belongs to). However, this extension can be achieved through courts or the Government. In the first case, several judicial decisions have demanded the extension of salary clauses based on the constitutional principle equal payment for equal work (article 59/1/a) of the Constitution). The Government can also intervene by extending collective agreements through administrative regulation.¹⁹

IV. LOOKING AHEAD TO 2018

In 2018 the Portuguese Constitutional Court will most likely decide on recent legislation (or legislative projects) regarding the following issues: (a) legislation on medically assisted reproduction; (b) access to metadata by information services of the Portuguese Republic; (c) legalisation of euthanasia and

assisted suicide; (d) legalisation of cannabis; (e) legalisation of prostitution.

On 4 October 2018, the Estoril Institute for Global Dialogue will present its first Portugal Talks with the theme “voter turnout”. The Scientific Committee is presided by Nuno Garoupa, who is joined by Marina Costa Lobo, Pedro Magalhães and Catarina Santos Botelho. A working group will be established with the task of producing a final report with proposals aimed at reducing electoral abstention and improving the quality of democracy.

V. FURTHER READING

Carlos Blanco de Morais, *O Sistema Político no Contexto da Erosão da Democracia Representativa* (Almedina 2017)

Jorge Miranda, *Direitos Fundamentais* (Almedina 2017)

Jorge Pereira da Silva and Gonçalo Almeida Ribeiro (eds), *Justiça Entre Gerações: Perspetivas Interdisciplinares* (Universidade Católica Editora 2017)

Manuel Afonso Vaz, Catarina Santos Botelho, Luís Terrinha and Pedro Coutinho (eds), *Jornadas nos Quarenta Anos da Constituição da República Portuguesa – Impacto e Evolução* (Universidade Católica Editora 2017)

Susana Coroado, Nuno Garoupa and Pedro Magalhães, ‘Judicial Behavior under Austerity: An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002–2016’ (2017) JLC 289

¹⁹ Ana Teresa Ribeiro, ‘The Extension of Collective Agreements by State Intervention: The Portuguese Regime and the Protection It May Offer to SMEs’ in *Employment Relations and Transformations of the Enterprise in the Global Economy* (G. Giappichelli Editore 2016) 247.



Romania

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The 2017 constitutional year in Romania contrasted with developments in 2016 and was highly interesting, despite the lack of constitutional amendments and electoral changes. It confirmed trends towards a democratic decline in Central and Eastern Europe in the context of the already troubling situation in Poland and Hungary. In 2017, the Romanian Constitutional Court issued a surprising ruling concerning dissenting opinions. At the same time, the Court became more involved in political battles, being called to solve numerous constitutional conflicts between authorities. The year ended with a vivid debate on the changes brought by the political majority to a package of three laws concerning the judiciary, and the Constitutional Court became the constitutional actor with the most awaited intervention in order to assess if the next move will be the rise or decline of liberal democracy in Romania.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Liberal democracy has been under pressure in the last seven years, especially in Central and East European countries, due to several factors: rise of nationalistic extremist parties, rise of the discourse of national identity, challenges of the migration phenomenon and the economic crisis, among others. Until 2016, Romania was not affected by such challenges, although it underwent two

attempts at constitutional reform¹ and one important electoral reform.² The resignation of the social-democrat Government in November 2015 and the appointment of a technocratic executive one year before general elections seemed a smart move meant to bring some balance in the political life until the major change of government. After the elections of December 2016, won by a clear majority but with the lowest turnout since 1990 by the Social-Democrats (PSD), things took a different turn.

The year 2017 started and continued under the sign of important constitutional and political challenges, especially related to justice reforms and the fight against corruption. In January and February, the anti-corruption commitments of the country came into the spotlight, as important changes to anti-corruption criminal legislation were brought forward by the new power through delegated legislation adopted under an emergency procedure. As a first attempt, in January 2017, two emergency ordinances were adopted in order to decriminalize some corruption offences and, on the other hand, to grant pardon to, *inter alia*, persons already convicted for corruption. They were thwarted by President Klaus Iohannis, who exercised his right to participate in a Government meeting and warned the new power against potential threats to the commitments undertaken by Romania under the CVM. In Romania, Emergency Ordinances are acts of delegated legislation, which can be adopted by the Government without prior approval of the

¹ Simina-Elena Tănăsescu, Bianca Selejan-Guțan, 'Developments in Romanian Constitutional Law: The Year 2016 in Review' (I-Connect, 2 December 2017) <http://www.iconnectblog.com/2017/12/developments-in-romanian-constitutional-law-the-year-2016-in-review/>.

² Simina-Elena Tănăsescu, Bianca Selejan-Guțan, 'Developments in Romanian Constitutional Law: The Year 2015 in Review' (I-Connect, 27 July 2016) <http://www.iconnectblog.com/2016/07/developments-in-romanian-constitutional-law-the-year-2015-in-review/>.

Parliament, directly by virtue of Article 115 of the Constitution,³ but only in “exceptional cases, the regulation of which cannot be postponed”. In the explanatory notes that were published by the Ministry of Justice, the drafters invoked, on the one hand, the “overcrowding” in Romanian prisons and a resultant supposed “fine” of 80 million euros imposed in an imminent pilot-judgment by the European Court of Human Rights (although, obviously, in pilot-judgments the ECtHR imposes no pecuniary damages but suspends all similar complaints against the state-party concerned until the latter takes general measures to redress the violations in a delay established by the Court). On the other hand, as regards the changes to the criminal code, the drafters invoked the necessity to apply some Constitutional Court decisions from 2016, which declared unconstitutional some texts of the code but which did not relate to the actual contested changes. Therefore, the two ordinances were allegedly not a matter of utter emergency. Following the opening of public debate, several professional bodies and authorities advised against the ordinances: the Superior Council of Magistracy (CSM⁴), the president of the High Court of Cassation and Justice, the National Anti-Corruption Directorate (DNA), the National Penitentiary Authority, the Association of Magistrates, the General Prosecutor’s Office and the Prosecutor’s Office Against Organized Crime (DIICOT). Moreover, street protests started on 18 January, culminating on 22 and 29 January with a massive demonstration in Bucharest and in the main cities (Cluj, Timisoara, Sibiu, Iasi). Several NGOs⁵ also expressed their views against the measures as well as representatives of the opposition political parties (PNL and USR).

However, a few days after this first attempt, during the night of 31 January 2017, a new

emergency ordinance was adopted by the Government and immediately published in the Official Journal. The Government meeting was not publicly announced. Its official agenda included debates on the draft annual budget law. The adopted ordinance regarded a “hidden amnesty”, i.e., the partial decriminalization of abuse of office (i.e., of any such facts that would cause damages less than 100,000 lei, or about 20,000 euros) and the reduction of the punishment to less than half. The ordinance also provided the decriminalization of the offence of “favouring the suspect” if committed by a family member or [emphasis added] “*in the case of issuing, approving or adopting normative acts*”.⁶ All these changes could have a major impact on many ongoing investigations and already decided cases of corruption, including those that involved the leader of the ruling party. The ordinance stated that the dispositions regarding the changes of the Criminal Code will enter into force ten days after publication.

The adoption of this Emergency Government Ordinance no 13/2017 (hereinafter EGO 13) generated massive popular movements against arbitrariness, legal insecurity and the attempt to mitigate corruption. The intention to surreptitiously pass legislation changing the Criminal Codes, invoking the application of older decisions of the Constitutional Court in order to justify the “emergency”, rapidly became the reason for a popular uprising all over the country, which culminated on 4 and 5 February with over 500,000 participants demonstrating against the Ordinance and its promoters. Several authorities took a stand against the governmental actions: the Superior Council of Magistracy addressed the Constitutional Court with a request to solve a ‘legal constitutional conflict’ between the Government and the Parliament, stating

that only the Parliament should have been allowed to pass legislation in the sensitive field of corruption as reflected in criminal offences. A similar request was made by the President of Romania. The Prosecutor General challenged the ordinance before the administrative courts, seeking its suspension. Finally, the Ombudsman, after declaring on 1 February that he will not challenge the Ordinance before the Constitutional Court, decided a few days later to address the Court with an unconstitutionality referral.⁷

Following all these criticisms and also those of the foreign partners of Romania (European Commission, embassies of the main democratic powers such as the US, France and the UK), the Government decided to repeal EGO 13 through another Emergency Ordinance, no. 14 of 5 February 2017.

The Constitutional Court’s approach to all these developments was an ambiguous one. In a first decision, notified by the Superior Council of Magistracy and the President of Romania, the Court acknowledged the importance of the principle of separation of powers and of the mutual respect of the competences of the main constitutional authorities, but refused to acknowledge the existence of a conflict of competence because Parliament did not contest the Government’s power to adopt the emergency ordinance in question. The Court assimilated this request to solve a constitutional conflict with a “third way to examine the constitutionality of certain normative acts”⁸ and stated that “the Government exercised a power given by the Constitution”.⁹ No statement was made about the lack of urgency and the disregard of the Superior Council of Magistracy’s advisory competence, which were the main arguments of the authors of the complaints.

³ See also Bianca Selejan-Guțan, *The Constitution of Romania. A Contextual Analysis* (Oxford, Hart Publishing, 2016) 131-133.

⁴ *Ibidem* 193-197.

⁵ Expert Forum, Institute for Public Policies (IPP), Freedom House – Romania, Group for Social Dialogue (GDS) a.s.o.

⁶ Article I.3. of the Emergency Government Ordinance no. 13/2017 (published in Official Journal no. 92 of 1 February 2017).

⁷ The Ombudsman is the only authority that can challenge an ordinance directly before the Constitutional Court; other subjects can only challenge ordinances via the ordinary courts.

⁸ RCC, Decision no. 63/8 February 2017 §99.

⁹ *Ibidem*, §97.

The second decision of the Constitutional Court¹⁰ in this chain of events regarded the referral of unconstitutionality raised by the Ombudsman on the actual form and contents of EGO 13. The Court rejected the referral as inadmissible on the ground that its object had been abrogated in the meantime. Here as well, the Court did not make any value judgment either on the lack of the emergency required by the Constitution, or on the other constitutionality arguments invoked by the author.

A third decision¹¹ regarded another constitutional conflict between public authorities, raised by the President of the Senate, who argued that investigations led by the General Prosecutor's Office of the circumstances in which the Government adopted EGO 13, especially for suspicions of "presenting fake data to the Parliament or the President of Romania, in order to hide facts capable of damage to the interests of the state", were a criminal offence provided by the law on ministerial responsibility that encroach upon legislative prerogatives. This time, the Court admitted the existence of a constitutional conflict of competencies and basically stated that no authority can investigate members of Government for acts related to the adoption of ordinances.¹² The Court also made extensive value judgments on the criminal investigation itself before concluding that the actions of the General Prosecutor's Office constituted a "serious breach of the separation of powers"¹³ and recommending that the Public Ministry should "abstain from any action that would produce the substitution into the competencies of another public authority".¹⁴

Another major debate that has shaken Romanian society regarded the laws of the judiciary and took place in the second half of 2017, after a first change of Government due to a motion of censure initiated by the parliamentary majority. The Minister of Justice announced his intention to change the "laws of the judiciary", namely the law on judicial

organization, the law on the status of magistrates and the law of the Superior Council of Magistracy (SCM) and presented the proposed changes. The most important and at the same time controversial ones were the change of the regime of the Judicial Inspection and the appointment procedure of chief prosecutors of the DNA and DIICOT and of the Prosecutor General. Thus, the draft provided the transfer of Judicial Inspection from the authority of the SCM to the Ministry of Justice. Second, the chief and general prosecutors would be appointed by the Minister of Justice upon proposal of the SCM instead of the current procedure that involves the Minister, the SCM and the President of Romania. Other proposed changes regarded, *inter alia*, the "separation" and access to magistrates' careers, new disciplinary offences and more precise dispositions on the magistrates' accountability for material damages produced by judicial errors. These proposed changes generated a strong reaction from the civil society, political parties and associations of magistrates, alongside other political actors, internal and external (the President of Romania, the European Commission and several embassies expressed their concern about the way in which the proposals may affect the independence of justice in Romania). The main concerns expressed in the public space regarded the way in which the transfer of the Judicial Inspection under the authority of the Ministry of Justice would affect the independence of judges and of the judiciary in general, being perceived as an attempt at politicizing disciplinary actions against "uncomfortable" magistrates and also implying an unacceptable involvement of the Minister of Justice in the magistrates' careers. The removal of the President of Romania and the introduction of the Minister of Justice – an equally political actor only from within the Government and with no direct legitimacy – in the appointment procedure of chief prosecutors was also seen as an enhancement of the political factor, although the proposal provided the right of the SCM to a one-time

motivated rejection of a candidacy proposed by the Minister.

These proposals have not been taken on board by the Government and were significantly modified when three new bills were initiated in by MPs. In Parliament, the proposals did not follow the regular legislative procedure. First, a special committee was created to analyze and adopt amendments only on these initiatives. Second, the proposals were adopted in an emergency legislative procedure during the last three weeks of December 2017. Among the most controversial changes that remained in the adopted laws (not yet in force, they are currently subject to constitutional review by the Constitutional Court prior to promulgation) are: the separation of the careers of judges and prosecutors, respectively, with important consequences on the structure and powers of the Superior Council of Magistracy; the limitation of the President of Romania's right to appoint leading positions at the High Court of Cassation and Justice and at the General Prosecutor's Office and specialized directions; the creation of a new Section of the General Prosecutor's Office, specialized in investigating magistrates; the prohibition of judges and prosecutors to "manifest or express defamatorily against the other state powers – legislative and executive"; and the reinforced liability of judges for "judicial errors made in bad faith or due to gross negligence", without precisely defining the concepts. All these and other provisions which allegedly lack clarity and predictability, are seen by the professional and academic milieu as indirect threats to the independence of the judiciary and hence to the rule of law and liberal democracy in Romania. In 2018, the Constitutional Court is expected to decide on several unconstitutionality complaints regarding these laws prior to their promulgation.

¹⁰ RCC, Decision no. 64/9 February 2017.

¹¹ RCC, Decision no. 68/27 February 2017.

¹² *Idem*, §79, §90.

¹³ *Idem*, §120.

¹⁴ *Idem*, §125.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

§1. *The Issue of Dissenting and Concurring Opinions to the Constitutional Court's Decisions*

An interesting development regards an internal matter of the Constitutional Court: dissenting and concurring opinions. After a series of decisions followed by separate opinions made by the same constitutional judge that strongly criticized the majority's opinion and arguments, especially in matters presented above (part II), the Plenum of the Court adopted an Internal Ruling¹⁵ meant to regulate once and for all the way in which the constitutional judges express their separate opinions. The Plenum motivated its initiative, in the explanatory note, by the need to draw "the limits in which a constitutional judge may exercise his/her legal right to write a dissenting or concurring opinion" and by the existence of a "duty of self-restraint" that the judge must comply with when expressing his/her opinions that "deny the compulsory character of the Constitutional Court's decisions". The majority also referred to the "reverence that any legal subject must prove as regards the fundamental institution, a duty that belongs especially to Constitutional Court judges". In this context in which it is obvious that the freedom of expression of constitutional judges is seriously questioned, the actual body of the ruling basically bans any opinions that comprise "sententious (*sic!*), ostentatious, provocative or political remarks, as well as those that lead to such an outcome". Moreover, the dissenting opinions "may not transgress beyond the judge's opinion by transforming them into a criticism on certain points of the Constitutional Court's decision and it may not be a biased examination or an obvious criticism of the decision". Finally, the dissenting opinion "may not, directly or indirectly, affect the general compulsory character of the Consti-

tutional Court's decisions". The sole authority that can control the compliance with these requirements is the president of the Court, who can also impose, in a first tempo, the rewriting of the opinion. If the judge does not duly comply, the president of the Court can decide that the dissenting opinion will not be published alongside the decision in the Official Journal, on the website of the Court, and will not be attached to the file of the case in the Court's archive.

This ruling was strongly criticized on the one hand for being an "attack against the rule of law" and against the constitutional judges' freedom of expression.¹⁶ The ruling expressly referred to two Decisions issued earlier in 2017, but published after its own publication (i.e., in July 2017),¹⁷ in which one of the judges expressed strong dissenting opinions against the majority. The decisions that were mentioned in the explanatory part of the ruling were published, as a consequence, without the impugned dissenting opinions. The whole process thus seemed like a rushed measure to reduce to silence a too-vocal judge by simply censoring her dissenting opinions. The ruling presents the Constitutional Court's decisions (including the reasoning) as intangible and infallible statements of wisdom that cannot be challenged by any "subject of law", including its own judges, even with theoretical and practical arguments. The ruling even introduces a new obligation of the judges: "duty to self-restraint towards the jurisdictional act of the Constitutional Court", mentioned in Article 1(3) as the organic law of the Court, which mentions only the duty to abstain from any activity or manifestation that may affect their independence and impartiality. Nevertheless, expressing a dissenting or concurring opinion is a matter that pertains to the jurisdictional activity of the judge and is permitted by the law, therefore it could not, by itself, "affect" the judge's independence or impartiality. With right reasons, this ruling

has been qualified as an attempt "to fortify the Court's decisions by sterilizing individual opinions and by protecting, alongside the reasoning, also the pseudo-reasonings of the Court".¹⁸ Such an approach is surely at odds with the requirements of a liberal democracy and will need further analysis to prove its consequences.

§2. *Other Constitutional Developments*

The activity of the Constitutional Court in 2017 had some recurring themes in line with its previous jurisprudence on access to justice, equality of arms, clarity and predictability of legislation. In *Decision no. 2/2017*, the Court declared unconstitutional, as contrary to the principles of access to justice and of equality, an article of the Code of Criminal Procedure which did not allow civil parties in a criminal trial (i.e., the party that claims only a civil damage caused by the accused) to ask for a revision of the judgment in the case new facts are discovered that prove the judgment ill-founded.

Access to justice and the principle of non-discrimination were also infringed, according to the *Decision no. 321/2017* by an article of the Law on judicial organisation that prevented appeals against the decisions of higher courts regarding the rejection of unconstitutionality referrals, because there was no "superior court" to be addressed in such cases as the Law required. Therefore, the Constitutional Court decided that "persons in this situation benefit of no procedural remedy capable to lead to reestablishing legality and they are submitted to a different treatment only because the referral of unconstitutionality was raised in the last degree of jurisdiction".

Clarity and predictability of legislation was very frequently used by the Constitutional Court as a reason for unconstitutionality decisions. One example is *Decision no. 225/2017*, in which the Court stated that the

¹⁵ Ruling no. 1/2017, published in the M.Of. no. 477/23 June 2017.

¹⁶ Vlad Perju, *De ce contează opiniile individuale ale judecătorilor Curții Constituționale?*, available at <http://www.contributors.ro/editorial/de-ce-conteaza-opiniile-individuale-ale-judecatorilor-cur%C8%9Bii-constitu%C8%9Bionale/>.

¹⁷ Decision 304/4 May 2017, published in M.Of. 520/5 July 2017; Decision 392/6 June 2017, published in M.Of. 504/30 June 2017.

¹⁸ Valentin Constantin, *Sterilizarea opiniilor dizidente și concurente la Curtea Constituțională a României*, available at <https://juridice.ro/essentials/1666/sterilizarea-opiniilor-dizidente-si-concurente-la-curtea-constitucionala-a-romaniei>.

expression “of such a nature as affecting the prestige of the profession [of lawyer]” which qualified the offences that justified the disbarment of a lawyer for being “unworthy”, according to the Law on professional organisation of lawyers, was unconstitutional for lack of clarity and predictability: “the criticised legal provisions do not stipulate which are the offences that make a lawyer unworthy to the profession, which means that an essential aspect that could influence the severity of the applied disciplinary sanctions is not provided by a law but let at the subjective evaluation of the professional structures”. It is worth mentioning that this principle is not expressly provided by the Romanian Constitution, but it was the result of the Court’s interpretation of Article 1(5), which sets forth that “In Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory”.

The retroactive effects of *interpretation and interpretative laws* were developed in *Decision no. 619/2016*, where the Court declared unconstitutional, before promulgation, a change of the Law on the status of deputies and senators, which, under the appearance of “interpreting” some dispositions related to civil responsibility, actually aimed to have retroactive effects upon the decriminalisation of the conflict of interests of the parliamentarians regarding the hiring of members of family as cabinet staff. The Court also invoked the lack of transparency and clarity of the law, and decided that a law regarding the civil status of MPs could not have disguised effect upon criminal offences and was, therefore, unconstitutional.

The quality of the law and the principle of legal certainty were invoked in *Decision 61/2017*, where the Court declared unconstitutional the Law on interpreting normative acts on grounds of lack of clarity and predictability. Among the numerous reasons of unconstitutionality, the Court decided, for instance, that the attempt to limit the prerogative of the President of Romania to request the reexamination of a law before promulgation if that request refers to an interpretative

provision of the law: “the President cannot replace the Parliament from a decision-making point of view, but he cannot be forbidden to address the Parliament when he/she notices a lack of correlation between the interpreted text and the interpretative one”, therefore the limitation is contrary to Art. 77 (2) of the Constitution.

IV. LOOKING AHEAD TO 2018

The year 2017 ended with the adoption by Parliament of major changes to laws on the judiciary. These changes took place in a controversial context, being discussed and amended by a special committee rather than the permanent parliamentary legal committee and adopted according to an emergency procedure, thus leaving the opposition with only two days for challenging their constitutionality. The decisions of the Constitutional Court are awaited early in 2018. After the Constitutional Court’s decisions, the Parliament must correct only the provisions found unconstitutional and resend the laws to the President of Romania for promulgation. The President has not exercised his right to challenge the constitutionality of these laws, but is expected to do so.

Another potential development in 2018 is the pursuit of the constitutional amendment procedure that started in 2016 (see our report on 2016¹⁹). However, this does not seem to be a priority for the governing coalition. 2018 will not, on the other hand, be an electoral year or one in which Court vacancies should be filled. It will be, however, a turning point towards the Romanian presidency of the European Union in 2019 and the coming presidential elections towards the end of the same year. Therefore, the developments that follow the 2017 turmoil will be essential for the future of the country as a liberal democracy and rule-of-law-based state.

V. FURTHER READING

Elena-Simina Tănăsescu, ‘Criminal Policy or Criminal Politics?’ (IACL-AIDC Blog, 16 February 2017) < <https://iacl-aidc-blog.org/2017/02/16/analysis-criminal-policy-or-criminal-politics/> >

Bianca Selejan-Gutan, “‘We Don’t Need No Constitution” – On a Sad EU Membership Anniversary in Romania’ (Verfassungsblog, 1 February 2017) < <http://verfassungsblog.de/we-dont-need-no-constitution-on-a-sad-eu-membership-anniversary-in-romania/> >

Bianca Selejan-Gutan, ‘The Constitutional Court and Others in Romanian Constitutionalism – 25 Years After’, in *Vienna Journal of International Constitutional Law*, 11(4): 565-584

¹⁹ Bianca Selejan-Guțan, Elena-Simina Tănăsescu, Romania, in Richard Albert, David Landau, Pietro Faraguna, Simon Drugda (eds.), *2016 Global Review of Constitutional Law* (I-Connect and the Clough Center, 2017) 170-174.



Serbia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

As was the case from the time of major political changes the country had undergone from October 2000 to spring 2003, in the year 2017 Serbia has kept its proclamatory EU-membership-oriented policy. During 2017, six negotiation chapters with the EU have been opened (chapter 6, company law; 7, intellectual property law; 20, enterprise and industrial policy; 26, education and culture; 29, customs union; and 30, external relations) while the Ministry of Justice, in the second half of the year, started the first preparatory activities aimed at amending the Constitution in order to comply with EU requirements related to improving the independence of the judiciary (negotiation, chapter 23). Globally, all critical remarks addressed to the state of the judiciary by the European Commission in its Serbia 2016 Report¹ remain fully relevant while the absence of substantial national political debate on major political and legal issues – as well as the fact that, according to the Reporters Without Borders’ World Press Freedom Index 2017,² the country has fallen seven positions regarding media freedom – allows the conclusion that liberal democracy was certainly not on the rise. There is no doubt that constitutional reform will remain the main

issue in 2018.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

As one of the federal units of the former socialist Yugoslavia, Serbia gradually started to adapt to democracy and the rule of law in the early nineties. Like in the other states of Eastern and Central Europe, “courts were not independent, and often they enforced measures (e.g., censorship, imprisonment for public dissent) that were not compatible with democratic governance” while the judges, “rather than having independent powers (...) were expected to fall into line with the demands of the communist authorities”.³ However, unlike all the other ex-communist European states, the former Yugoslavia “had a relatively liberal political and legal system, allowing certain forms of individual economic initiatives and providing certain guarantees of private property”.⁴ A good example is the Yugoslav Law on Obligations adopted in 1978, “which showed a high editorial quality and established very modern contractual relations (...); amended several times, (it) is still in force in Serbia, while the substance of its legislative solutions is globally maintained in all national legal systems of the countries of the former Yugo-

¹ Commission staff working document Serbia 2016 Report, accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, <https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf>, accessed 2 February 2018. Due to the new reporting methodology of the European Commission, there was no progress report during 2017.

² Reporters Without Borders, World Press Freedom Index 2017, <<https://rsf.org/en/serbia>>, accessed 5 February 2018.

³ Paul Kubicek, *European Politics* (Routledge 2017) 221.

⁴ Uroš Čemalović, *Membership in the European Union and Prevention of Nationalistic Discourse – the Case of the Western Balkans*, paper presented in Academia Europea – Wrocław Knowledge Hub seminar ‘New Nationalisms: Sources, Agendas, Languages’ Wrocław, Poland, 25-27 September 2017 (prepared for publication in *European Review* in late 2019/early 2020).



slavia”.⁵ After 1990, when all other Eastern and Central European states slowly started to radically reform their political institutions and judiciary, Serbia had a semi-authoritarian political regime, and steps towards a substantial liberal democracy were hesitant, scarce and highly influenced by the overall political instability in the Western Balkans. Consequently, the country’s effective steps towards an independent and efficient judiciary were only started to be taken after the major political changes in 2000.

In spite of a globally satisfactory normative framework and the country’s formal progress related to the opening of six EU-negotiation chapters, in 2017 there was no significant improvement⁶ in the functioning of the judiciary, given that there was no progress in several important fields: 1) the legal framework is still “leaving scope for political influence in the recruitment and appointment of judges and prosecutors”⁷; 2) “public comments on investigations and ongoing cases, even at the highest political levels, continue to hamper judges’ independence”⁸; 3) “administration of justice remains slow”⁹; and 4) in spite of various initiatives, the country has still not adopted a new law on free legal aid. Moreover, there was no progress regarding freedom of expression, since there were very few convictions for intimidation of journalists and open attacks on their physical integrity and property while state funding of media and co-financing of (mainly local) media content most often remained non-transparent. Notwithstanding the fact that the national Constitution and legislation (a set of me-

dia laws adopted in 2014) comprise a set of advanced normative solutions, “this does not seem to have any impact on improvement of media freedoms”.¹⁰ The combined impact of two factors makes it additionally more difficult: on the one hand, “journalists are not sufficiently exercising their right to request information of public importance while on the other hand, state bodies are rather non-transparent and there are a large number of complaints filed to the Commissioner for Information of Public Importance and Protection of Personal Data”.¹¹ Consequently, the state of liberal democracy in Serbia in 2017 leaves little room for optimism.

It is also worth examining the situation in Serbia from a comparative perspective, using both the data on the state of liberal democracy in other countries of Eastern and Central Europe and the differences within the country itself over last five years. When compared with the other European non-EU member states, Serbia’s ranking on the Economist Intelligence Unit’s Democracy Index (EIU DI) for 2017 can be estimated as excellent given that, with the overall score 6.41, the country is the leader among all EU membership candidates and potential candidates, being the only state within this category that is globally ranked as a “flawed democracy”.¹² However, Serbia has a worse ranking than even those of EU member states with the lowest overall score (Romania, 6.44; Croatia, 6.63; Hungary, 6.64; and Poland 6.67) while attaining the status of a country with “full democracy” still seems to be a very distant and uncertain perspective. Even if EIU DI can

be criticized for both its methodology (in some aspects, its overly economy-oriented approach and the relevance of the set of 60 questions taken as indicators) and sources (the use of experts’ assessments and, “where available, public-opinion surveys – mainly the World Values Survey”¹³), it provides a globally reliable, sufficiently comprehensive and scientifically justified insight in the following five matters crucial for the state of liberal democracy: 1) electoral process and pluralism; 2) functioning of government; 3) political participation; 4) democratic political culture; and 5) civil liberties.

Finally, Serbia’s score and global ranking on the EIU DI also deteriorated when compared with the country’s score during the last four years (the country’s score was 6.57 in 2016, 6.71 in 2015 and 2014 and 6.67 in 2013), mainly due to the “unsatisfactory system of checks and balances, a low level of participation in politics, including in elections, and a media that are financially constrained, insufficiently robust, heavily controlled by the government and prone to self-censorship”.¹⁴ The presidential elections,¹⁵ as well as a series of local elections for municipal legislative bodies held in 2017, have not contributed to the improvement of pluralism of the political scene.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

As was the case with many other states that have recently (from 2004 to 2013) joined the EU, in the final phase of the EU-ac-

⁵ Ibid.

⁶ In early February 2018, Prime Minister Ana Brnabić declared that, ‘without any doubt,’ Serbia is late with the necessary reforms in the field of judiciary and fundamental rights, <<https://www.danas.rs/politika/brnabic-srbija-zasluzila-da-bude-sledeca-clanica-eu/>>, accessed 6 February 2018.

⁷ Commission staff working document Serbia 2016 Report, 12.

⁸ Ibid, 12-13.

⁹ Ibid, 13.

¹⁰ Serbia - Indicators on the level of media freedom and journalists’ safety 2017 (author Marija Vukasović), <<http://seenpm.org/wp-content/uploads/Indicators-on-the-level-of-media-freedom-and-journalists-safety-2017-Serbia.pdf>>, 9, accessed 8 February 2018.

¹¹ Ibid.

¹² Democracy Index 2017 - Free speech under attack, A report by The Economist Intelligence Unit, <http://pages.eiu.com/rs/753-RIQ-438/images/Democracy_Index_2017.pdf>, accessed 11 February 2018.

¹³ Ibid, 65.

¹⁴ Democracy Index 2017 - Free speech under attack, 30.

¹⁵ According to the EIU DI, ‘The Serbian Progressive Party dominates the legislative and executive branches and controls the judiciary. Alleged electoral violations in the 2017 presidential election caused mass protests’, *ibid*.

cession process, Serbia will have to amend its Constitution. Consequently, the major constitutional developments in 2017 (and it will remain the case in 2018 and, most probably, further on) concerned almost exclusively this particular issue. There is no doubt in theory that “the accession to the European Union allowed the EU institutions to exert a significant influence on the constitutional development of the candidate countries”.¹⁶ But, “the direct involvement of the EU in the interior *stricto sensu* political developments within both its member states and candidates for membership would not be in line with the basic legal and political principles on which the Union is founded”.¹⁷ In any case, every candidate country is obliged to integrate into its constitutional system the principle of primacy of EU law over the entire national legislation. However, the case of Serbia is more complex, given that – on top of the issue of Kosovo¹⁸ – the major problem that remains to be solved is the insufficient independence of the judiciary. As stated in the latest European Commission’s report, “judicial independence is not assured in practice”¹⁹ and, consequently, it is strongly suggested that “Serbia should (...) amend the constitutional provisions related to the system for recruitment and career management in line with European standards related to the independence of the justice system”.²⁰ The most controversial is the provision of Article 147, paragraph 1 of the Constitution, according to which “on proposal of the High Judicial Council, the National Assembly shall elect as a judge the person who is elected to the post of judge for the first time”²¹ while,

according to paragraph 4 of the same article, “the High Judicial Council shall decide on election of judges who hold the post of permanent judges”.²² No less controversial is the composition of the High Judicial Council itself, given that, according to Article 153, paragraph 3, it “shall be constituted of the President of the Supreme Court of Cassation, the Minister responsible for justice and the President of the authorised committee of the National Assembly as members *ex officio* and eight electoral members elected by the National Assembly”.²³ Therefore, from the point of view of the independence of the judiciary, two major concerns are: a) the direct influence of the legislative branch of power and thus, of the political parties) in the process of the appointment of judges²⁴ (Art. 147, para. 1), and b) the composition of the High Judicial Council, which includes representatives of the executive (Minister of Justice) and legislative (President of the parliamentary Committee on the Judiciary, Public Administration and Local Self-Government) branches of power (Art. 153, para. 3).

In the second half of 2017, the Serbian Ministry of Justice started the first preparatory activities aimed at amending the Constitution in order to adapt the aforementioned provisions to the requirements related to the improvement of the independence of the judiciary. Even if up to now (20 February 2018) the official initiative to amend the Constitution still has not been submitted, the first-draft version of constitutional amendments has already been published by the Ministry of Justice.²⁵ The most significant changes

brought by the draft version of constitutional amendments concern the composition of the High Judicial Council, which, according to Amendment IX, will be composed of five judges (elected by other judges) and five “distinguished lawyers” appointed by the National Assembly. The central issue is to know whether – and to what extent – this change would improve the independence of the judiciary. Taking into consideration the actual state of drafted constitutional amendments, there are far more reasons for concern than for optimism. *Primo*, the criteria for “a distinguished lawyer” are inexistent and leave considerable room for interpretation, potentially leading to purely political appointments, a situation that, in the first place, was one of the main motives of the intended constitutional changes. *Secundo*, according to Amendment XI, a member of the High Judicial Council elected among the judges cannot be the president of this body. In spite of those of its provisions considered contrary to the principle of the separation of powers (presence of the representatives of the other two branches), Article 153 of the present Constitution does not know such a limitation, allowing each member of this collective body to be elected for its president. However, what is most preoccupying is that – given the even number of members (10) – in case of equally distributed votes, the President of the Council has a decisive vote. Consequently, the five “distinguished lawyers” appointed by the National Assembly could, theoretically, adopt – alone and undisturbed by the potential opposition of the other five members – all the decisions

¹⁶ Anna Fruhstorfer and Michael Hein (eds), *Constitutional Politics in Central and Eastern Europe – From Post-Socialist Transition to the Reform of Political Systems* (Springer 2016) 571.

¹⁷ Čemalović (n 4) 5.

¹⁸ The complex issue of the legal and political status of Kosovo – as well as the consequences it can have on Serbia’s EU accession process – are outside the scope of this article, given that they predominantly fall under international public law; for more, see Siniša Rodin and Tamara Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer 2015).

¹⁹ Commission staff working document Serbia 2016 Report (n 1) 12.

²⁰ *Ibid* 13.

²¹ Constitution of the Republic of Serbia (translation into English), web page of the Constitutional Court, < <http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution>>, accessed 13 February 2018.

²² *Ibid*.

²³ See n. 21.

²⁴ Due to limited space, this contribution will not address the status of public prosecutors and High Prosecutorial Council as well as the content of drafted constitutional amendments treating the status of prosecutors.

²⁵ <<https://www.mpravde.gov.rs/files/amandmani%20za%20objavljivanje1.pdf>>, accessed 17 February 2018, translated by U.Ć.

falling under the competence of the Council. *Tertio*, for the above-mentioned and numerous other reasons,²⁶ the draft constitutional amendments were the object of almost unanimous criticism of judiciary and legal experts, including the unanimous disapproval of the general chamber of the Supreme Court of Cassation, according to which the “solutions proposed in a working version of draft amendments considerably diminish the existing level of guaranties for the independence of judiciary (...) on detriment of the protection of rights of the citizens of Serbia”.²⁷ Such an open, unambiguous and harsh criticism from the country’s supreme jurisdiction represent the exact opposite of what each rational constitutional change should bring about – a large consensus on strategic normative solutions. The path before initiated constitutional change in Serbia is still long and unpredictable.

IV. LOOKING AHEAD TO 2018

The most important issues during the forthcoming months in Serbia will remain the potential adoption of constitutional amendments (see Chapter III) and further reforms of the judiciary in the context of the EU membership negotiation process (Chapter 23 of the EU acquis, see Chapter II). In the European Commission’s Communication on “enlargement perspective for and enhanced EU engagement with the Western Balkans”,²⁸ published on 6 February 2018, it is mentioned that Serbia needs a “continued, irreversible progress on the reform agenda”,²⁹ including “a credible and sustainable track record of reform implementation, notably on the rule of law”.³⁰ Given the modest scope of reforms of the judiciary in the past 18 months, it is very likely that the focus of both EU and national authorities will remain on a)

substantial reforms to improve the independence of the judiciary; b) solving the problem of the slow administration of justice and c) adoption of a new law on free legal aid.

V. FURTHER READING

1. Sabrina P. Ramet, Christine M. Hassensab and Ola Listhaugh (eds), *Building Democracy in the Yugoslav Successor States: Accomplishments, Setbacks, Challenges since 1990* (Cambridge University Press 2017)
2. Paul Kubicek, *European Politics* (Routledge 2017)
3. Anna Fruhstorfer and Michael Hein (eds), *Constitutional Politics in Central and Eastern Europe – From Post-Socialist Transition to the Reform of Political Systems* (Springer 2016)
4. Uroš Čemalović, ‘Framework for the Approximation of National Legal Systems with the European Union’s Acquis: From a Vague Definition to Jurisprudential Implementation’ (2015) *Croatian Yearbook of European Law and Policy* 241

²⁶ One of the most criticised is the provision of Amendment IV, para. 2, requiring, for the first appointment of a judge, a completion of ‘a special instruction in the institution specialised for judicial training’. According to many, including the Supreme Court of Cassation (see n. 25), this provision introduces ‘the discrimination in the access to the judicial profession’.

²⁷ Statement of the general chamber of the Supreme Court of Cassation of 12 February 2018, < <http://www.vk.sud.rs/sr-lat/saop%C5%A1tenje-op%C5%A1te-sednice-vrhovnog-kasacionog-suda-0>>, accessed 17 February 2018, translated by U.Ć..

²⁸ European Commission, Communication COM (2018) 65 final, <https://ec.europa.eu/commission/sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf>, accessed 18 February 2018.

²⁹ European Commission Communication (n. 28), 9.

³⁰ *Ibid.*



Singapore

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The year 2017 was dominated by the Elected Presidency, which is a uniquely Singaporean constitutional innovation. Having previously a largely ceremonial role, the office was changed in 1991 to a custodial one with additional discretionary powers. The office was also changed from a selected/nominated one to an elected office on the basis that it was important that the President have a direct democratic mandate from the people to exercise his newly endowed discretionary powers.

Since its inception, the scope of the President’s discretionary powers has been subject to significant refinements. The latest amendments in 2016 may be the most extensive, raising important constitutional questions concerning constitutional amendment powers and the role of unelected officials as well as the right/access to political participation.

These developments and others critically impact constitutionalism, broadly understood as the doctrine of limited government. The analysis below employs constitutionalism, rather than liberal democracy, as the framework for the evaluation of constitutional progress in 2017. Liberal democracy, as an ideological category that emphasizes individual autonomy over other public goods, is a problematic

category that has itself been challenged in recent times. Mark Tushnet’s proposed category of authoritarian constitutionalism is a hybrid of (liberal) constitutionalism and authoritarianism, of which Singapore is his archetypal example where “liberal freedoms are protected at an intermediate level, and elections are reasonably free and fair.”¹ Nonetheless, as Kevin Tan has argued, it is not clear what function such a label would serve in understanding how the people of Singapore have to deal with their own realities of living in a multi-ethnic, multi-religious society.²

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

The Administration of Justice (Protection) Act, which was passed in 2016, came into force on 1 October 2017. The Act consolidates the common law of contempt of court, including the offense of scandalizing the court. Prior to this, contempt of court was the only criminal offense that was not codified, and there were no upper limits to the punishment that courts could impose for such an offense. The statute was to clarify the content and procedures relating to the law and impose upper limits to the punishments available for the offense. For the most part, the statute consolidates the law on contempt. However, it purports to change the common law in one respect – in lowering

¹ Mark Tushnet, ‘Authoritarian Constitutionalism’, 100 Cornell Law Review 391, at 396 (2015).

² Kevin YL Tan, ‘Is Singapore a Constitutional Authoritarian Regime? So What If It Is?’ in Weitseng Chen and Hualing Fu (eds.), *Authoritarian Legality in Asia: Formation, Development and Transition* (Cambridge University Press, 2019, forthcoming).

the standard for the offense of scandalizing the court. This is defined as “imput[ing] improper motives to or impugn[ing] the integrity, propriety or impartiality of any court” and “pos[ing] a risk that public confidence in the administration of justice would be undermined.”³ While the courts have adopted the standard of “real risk” in recent cases, the statute lowers the standard to a mere “risk.” It is not clear if and how this would significantly change the law and adversely impact freedom of speech.⁴

The Internal Security Act (ISA) continued to be used to detain persons suspected of radicalization preventively. At least six Singaporeans were detained under the ISA in 2017 for taking steps to join the Islamic State in Iraq and Syria (ISIS) or being a member of a regional extremist Islamic group (the Jamaah Islamiyah).⁵ The ISA empowers the Minister of Home Affairs to detain persons without trial on the ground that the person is acting in a manner prejudicial to the security of Singapore. Detention can be for periods of up to two years and extended with the review. Several detainees who were assessed as no longer posing threats to national security were released in 2017.

Extensive changes to the office of the Presidency dominated the constitutional landscape in 2017. Constitutional amendments passed in 2016 came into force in 2017, bringing about broad-ranging changes in four areas. First, the eligibility criteria were made more stringent, particularly for candidates

from the private sector.⁶ Candidates from the private sector now have to show experience as the most senior executive (however named) of a company with shareholder equity of at least \$500 million. This is an upward revision from the previous criteria of having been the chairman or chief executive officer of a company with a paid-up capital of at least \$100 million. The stricter eligibility criteria tighten access to the office and may reduce the pool of candidates available to contest in presidential elections. The impact of this change on political participation and equal protection, as well as the basic structure of the Constitution, was examined in the case of *Ravi s/o Madasamy v Attorney-General and other matters* (“*Ravi s/o Madasamy*”),⁷ discussed below.

Second, the amendments changed the framework of power whereby the President is now required to consult the Council for Presidential Advisors (CPA) in exercising his custodial functions over the financial reserves and civil service appointments. This significantly enhances the role of the CPA, which comprises unelected members. While the CPA does not have the power to block the President’s decisions, it plays a significant role in the balance between the President and the government when they disagree on certain matters. Where the President withholds assent against the advice of the CPA in relation to any fiscal or civil service appointment decision, Parliament may override the President’s decision by way of a resolution with a two-thirds majority. However, neither

the requirement to consult the CPA nor the possibility of parliamentary override exists in relation to the President’s protective powers.⁸

Third, a new hiatus-triggered mechanism or reserved election mechanism was introduced under which an election would be reserved for a particular racial community if that racial community had not been represented in Presidential office for five terms (“hiatus period”). Since each presidential term is six years, this translates into a 30-year period. The constitutional amendment delegated power to Parliament to statutorily determine when to start counting the hiatus period. The counting of the hiatus period was subject to another constitutional challenge, discussed below.

The reserved elections posed concerns of politicising race as a criterion for candidacy and undermining the principle of meritocracy in Singapore. While community, particularly minority, representation is important in a multiracial society like Singapore, making ethnic identity an aspect of political access and choice raises the question of how to protect racial representation without over-emphasizing and indeed reifying difference.⁹ The government argues that there is a need to re-emphasize the President’s ceremonial and symbolic function as the Head of State as well as to ensure that the office is accessible, and seen to be accessible, to persons from all the major racial communities in Singapore. The reserved elections model was

³ Administration of Justice (Protection) Act 2016, s 3(1).

⁴ In introducing the Bill, the Minister for Law emphasized that it was necessary to enact this change because Singapore’s ‘Judiciary is of fundamental importance’: Second Reading Speech by Minister for Law, Mr K Shanmugam, on the Administration of Justice (Protection) Bill (15 Aug 2016). See further David Tan, ‘Any Risk Will Do – The New Law on Scandalising Contempt in Singapore’ (September 2016) *The Law Gazette* 29 <[https://law.nus.edu.sg/about_us/news/2016/AnyRiskWillDo\(SepSLG\).pdf](https://law.nus.edu.sg/about_us/news/2016/AnyRiskWillDo(SepSLG).pdf)> accessed 5 March 2018.

⁵ See ‘Detention of a Radicalised Singaporean under the Internal Security Act’ (Ministry of Home Affairs, 12 June 2017), <<https://www.mha.gov.sg/newsroom/press-releases/Pages/Detention-of-a-Radicalised-Singaporean-under-the-Internal-Security-Act.aspx>> accessed 5 March 2018; ‘Update on Terrorism-Related Arrests Under The Internal Security Act (ISA)’ (Ministry of Home Affairs, 7 September 2017), <<https://www.mha.gov.sg/newsroom/press-releases/Pages/UPDATE-ON-TERRORISM-RELATED-ARRESTS-UNDER-THE-INTERNAL-SECURITY-ACT.aspx>> accessed 5 March 2018; ‘Update on Terrorism-Related Arrests Under The Internal Security Act (ISA)’ (Ministry of Home Affairs, 9 November 2017) <<https://www.mha.gov.sg/newsroom/press-releases/Pages/Update-on-Terrorism-Related-Arrests-Under-The-Internal-Security-Act-09112017.aspx>> accessed 5 March 2018.

⁶ Constitution of the Republic of Singapore (Amendment) Act 2016, s 7(b).

⁷ [2017] SGHC 163.

⁸ These powers pertain to the President’s protective functions, which include withholding concurrence for the preventive detention or continued preventive detention of a person under the Internal Security Act when the Advisory Board has recommended the person’s release.

⁹ Jaclyn L Neo, ‘Constitutional Change in Singapore’s Elected Presidency: Navigating Questions of Ethnic Identity and Representation’ (*IACL Blog*, 30 November 2017) <<https://iacl-aidc-blog.org/2017/11/30/constitutional-change-in-singapores-elected-presidency-navigating-questions-of-ethnic-identity-and-representation/>> (accessed 25 February 2018).

justified as the most appropriate because it entailed the lowest degree of intrusiveness, did not pose operational complexities associated with other models, and was race-neutral by not singling out any ethnic group for consideration. In addition, the model had a “natural sunset” because a reserved election will cease to be triggered if free and unregulated elections can produce Presidents from a varied distribution of ethnicities.¹⁰ The reserved elections may well be necessary to ensure that the Presidency retains vitality as a symbol of Singapore’s unity and multiracialism until the day Singapore becomes a post-racial society. That the mechanism is not designed to be permanent, and that the same eligibility criteria apply even during a reserved election are important safeguards.

Whether the mechanism strikes a proportionate balance between political access, political choice, and meritocracy on the one hand and multiracialism and minority protection on the other will have to be continually assessed in future elections. In the meantime, the question of who a Malay is was one of the major flashpoints in the lead-up to the 2017 presidential election, which was declared to be reserved for Malay candidates. President Halimah Yacob, the former Speaker of Parliament, was the only candidate assessed to be eligible. She became Singapore’s first elected Malay President and its first ever female President in 2017.

Finally, a new framework was created to entrench the constitutional provisions that establish the elected Presidency and its core custodial powers. The entrenched provisions are categorized into two tiers. The first tier contains provisions fundamental to the existence of the elected Presidency and the entrenchment framework itself. Any bill proposing to amend these provisions cannot be introduced in Parliament unless the President concurs or, if the President does not concur, if the CPA had recommended his concurrence. This draws a questionable

equivalence between the President’s assent and the CPA’s recommendations, although it reduces the risk of a constitutional stalemate between the President and Parliament. Alternatively, if the bill does not have the President’s concurrence or the CPA’s recommendation, it can only be introduced in Parliament after it has received a simple majority support in a national referendum. The second-tier comprises provisions that relate to the more operational aspects of the elected Presidency and its custodial powers. Like in the first-tier amendment framework, any bill amending provisions that fall within the second tier may be introduced in Parliament if it receives the President’s concurrence or the CPA’s recommendations, after which it can be passed with a two-thirds majority. However, there is no mandatory referendum requirement under the second-tier framework. A bill can still be introduced in Parliament without the President’s or the CPA’s support and without a national referendum, but it must be passed with a three-quarters majority.

These new provisions contrast with a previous entrenchment framework, which was removed without having been brought into force. The former framework was much simpler as it applied the same referendum requirement to all entrenched provisions and imposed a two-thirds majority requirement on a referendum. In addition, the CPA’s views had no legal weight within the entrenchment framework. The reasons for diminishing the referendum requirement within this new entrenchment framework are that referendums are blunt tools that should be used with circumspection and a two-thirds majority requirement in a referendum should be reserved only for decisions of the highest gravity, such as the surrender of Singapore’s sovereignty and relinquishment of her Police and Armed Forces.¹¹

The ease with which wide-ranging changes to the office of the Presidency were made

raises questions concerning the efficacy of the current constitutional amendment threshold of a two-thirds majority, which is easily met by the current government that holds 93% of seats in Parliament (i.e., 83 out of 89 seats). Insofar as constitutionalism entails a limited government, the malleability of the Constitution in a political context dominated by one political party means that constitutional rights may well depend more on political, rather than legal, constitutionalism.¹² The removal of Part IV of the Constitution, which guarantees fundamental liberties, from the entrenchment framework may also be of concern. Notably, the new entrenchment provisions have not been brought into force, which means that they can still be removed with a bill amending the Constitution passed with a two-thirds majority.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

A. Challenges to Constitutional Amendments to the Elected Presidency

The changes to the Presidency prompted two constitutional challenges before the courts. *Tan Cheng Bock v Attorney-General*¹³ (“*Tan Cheng Bock*”) focused on Parliament’s power to determine when the reserved election framework took effect under Art 19B, which introduced the reserved election framework, and Art 164, a transitional provision requiring Parliament to specify by subsequent legislation the first term of office of the President from which the hiatus period would be counted (the “first term”). The applicant challenged Parliament’s legislative specification that the first term was the last presidential term before the first popular presidential elections were held in 1993. The then-existing President, who had been elected by Parliament, was the first President to be endowed with the new custodial powers of the Elected Presidency introduced by the 1991 constitutional amendments. The

¹⁰ Report of the Constitutional Commission 1966, para 5.36.

¹¹ Singapore Parliamentary Report (7 November 2016).

¹² Michael W. Dowdle and Kevin YL Tan, ‘Is Singapore’s Constitution best considered a legal constitution or a political constitution?’ in Jaclyn L. Neo, *Constitutional Interpretation in Singapore: Theory and Practice* 363 (Routledge, 2017).

¹³ [2017] 2 SLR 850.

crux of the challenge was that under the latest constitutional amendments, Parliament could only designate as a first term one of the terms of office of a President who was elected to office by the *citizens of Singapore* rather than by Parliament. Accordingly, the argument was that provisions of the legislation specifying the first term were inconsistent with Arts 19B and 164 of the Constitution, and therefore void.

The applicant in *Tan Cheng Bock* was a former presidential candidate who lost by a narrow margin in the 2011 presidential election. There were no standing issues since the applicant had declared his intention to stand as a candidate in the 2017 election and, but for the constitutional amendments, would have been eligible under the previous eligibility criteria. However, the Court of Appeal dismissed the substantive challenge. It held that the Constitution did not limit Parliament's discretion in specifying the first term. Art 19B(1) did not make any distinction as to the method by which the Presidents holding the office during the hiatus period were elected. This conclusion was reinforced by parliamentary debates disclosing the purpose of Art 164. The debates addressing the specific issues of *when* the reserved election model was to take effect and *what was the extent* of Parliament's power to specify the first term showed that Parliament clearly intended to allow itself the discretion to specify the last term of the *President elected by Parliament* to be the first term.

Tan Cheng Bock could be viewed as an illustration of the anomalous manner in which the Constitution operates as a check on power in a state governed by a dominant political party but committed to the rule of law. In this instance, the Parliament that enacted the constitutional amendments to the Presidency was the same Parliament that later enacted the transitional legislation that brought them into effect. Naturally, barring infelicities in the drafting process, the specification of the first term in the transitional legislation fell within the intention of Parliament as regards

the constitutional amendments. Nonetheless, the Court undertook a rigorous analysis of the text, context, and purpose of the constitutional provisions governing the exercise of legislative power, demonstrating its normative commitment to the constraining power of the Constitution.

Ravi s/o Madasamy dealt with a second constitutional challenge where the applicant argued, first, that the eligibility criteria for pre-qualification for the office of the President in Art 19 of the Constitution were incompatible with the right to equal protection under Art 12(1) of the Constitution because they deprived citizens of the equal right to stand for the public office of the President; second, that the reserved election framework in Art 19B breached the freedom from discrimination under Art 12(2) of the Constitution because it discriminated on the grounds of race; and third, that either or both Arts 19 and 19B offended the basic structure of the Constitution by abrogating its constituent right to stand for public office.

The High Court dismissed the challenge on the preliminary ground that the applicant lacked standing. In any event, the Court found no merit in the substantive challenge. First, on equal protection, the applicant did not establish that the equality entailed ensuring that all citizens had an equal right to stand for public office. Even if such a right existed, the presidential eligibility criteria did not violate the provision for equal protection because the criteria were intelligible and bore a rational relation to the purpose of ensuring that presidential candidates were qualified to serve as President. As for the reserved election framework, the Court noted that the freedom from discrimination on the ground of race under Art 12(2) did not require race-neutrality. On the contrary, the Court was of the view that the hiatus mechanism did not advantage or disadvantage any community *vis-à-vis* the other communities and was intended to foster multiracialism rather than discrimination.

Second, the High Court critically reviewed the status of the basic structure doctrine in Singapore. This doctrine, first articulated by the Indian Supreme Court,¹⁴ invalidates constitutional amendments that, despite being procedurally proper, violate the “basic structure” of the Constitution. It has been recognized in several cases that the Singapore Constitution has a basic structure, comprising features that are fundamental and essential to Singapore's political system. However, it has not been clarified whether the courts have the power to invalidate constitutional amendments that violate this basic structure. The Court in *Ravi s/o Madasamy* observed that “any ostensible support for the basic structure doctrine was rather more minimalist and related to a ‘thin’ conception of the same.” This ‘thin’ conception would protect only a narrow set of inviolable overarching principles of governance such as the separation of powers or the rule of law. Alternatively, these basic features could operate as an interpretive principle, informing the interpretation of the Constitution. Without definitively ruling on whether the basic structure doctrine was part of Singapore law, the Court dismissed the challenge because the right to stand for public office would not form part of the basic structure, even if the doctrine were recognized.

The basic structure doctrine, if recognized, would commit Singapore to at least fundamental principles such as representative government, the separation of powers, and the rule of law. If the doctrine is embraced, it remains to be clarified what qualifies as a basic feature. Importantly, it must be asked whether the basic structure encompasses not only structural features but also fundamental liberties. Further, if the doctrine encompasses substantive limitations on the power to amend the Constitution, the courts will have to clarify what standard of review would be adopted to determine the compatibility of an amendment with the basic structure, and when legitimate institutional changes or refinements to the basic structure should be allowed.¹⁵

¹⁴ *Kesavananda Bharati v State of Kerala* [1973] AIR 1461.

¹⁵ For further discussion, see Chan Sek Keong, *Basic Structure and Supremacy of the Singapore Constitution* (2017) 29 SAcLJ 618; and Jaclyn L Neo, ‘Towards a “Thin” Basic Structure Doctrine in Singapore’ (I-CONNECT, 17 January 2018) <<http://www.iconnectblog.com/2018/01/towards-a-thin-basic-structure/>>

B. Constitutional Interpretation

Besides the substantive challenge, *Tan Cheng Bock* is noteworthy for the Court of Appeal's comprehensive guidance on its method of constitutional interpretation. For the first time, the Court clarified that the Constitution must be interpreted using a purposive approach as articulated under the Interpretation Act (IA). While the IA is a statute, it is given constitutional imprimatur via Article 2(9) of the Constitution. Prior to this, the courts had employed varying methods of textualism, originalism, historical analysis, and purposive construction, among others.¹⁶ The purposive approach as formulated and explained in *Tan Cheng Bock* integrates textualism with intent. The first step is for the Court to ascertain the possible meanings of the constitutional provision in question by reading it in its ordinary and grammatical sense and its entire context. Following this, the Court is to ascertain the object of the specific provision and the part of the Constitution in which the provision is situated. An interpretation which furthers the legislative purpose is to be preferred to an interpretation which does not. Interestingly, in determining the purpose of the provision, the *text* is to be the primary source. Material beyond the constitutional text may be considered only to confirm the meaning of a clear provision or to ascertain the meaning of a provision which is ambiguous, obscure or manifestly absurd or unreasonable. Even if extraneous material is referred to, such material is strictly only capable of assistance where it is directed to the very point of constitutional interpretation in dispute or discloses the intention underlying the statutory provision in dispute.

The interpretative principles set out in *Tan Cheng Bock* were an expansion of a minority judgment in *Ting Choon Meng v At-*

torney-General.¹⁷ This case concerned the interpretation of a provision under the Protection from Harassment Act.¹⁸ Specifically, the question before the Court was whether the government or only natural persons could obtain relief in relation to false statements of facts about such persons. The majority of the Court of Appeal was of the view that the Act was ambiguous, but held that, construed in the light of the relevant parliamentary debates, it applied only to natural persons and did not extend to the government. Chief Justice Sundaresh Menon, in the minority, held that the Act clearly provided for relief for persons including the government. Menon CJ further held that the Act did not constitute an interference with freedom of speech, as false speech is of limited societal value. Accordingly, a person remains free to speak, but the Court would require him to draw attention to the falsehood contained in his speech if it finds it just and equitable to do so.

IV. LOOKING AHEAD TO 2018

The impact of the constitutional amendments to the Elected Presidency will continue to reverberate in 2018 in at least one respect. There is a constitutional challenge pending as to whether the government is constitutionally obligated to fill the seat vacated by President Halimah Yacob when she resigned from Parliament to contest the presidential elections. The High Court is expected to issue its judgment in *Wong Souk Yee v Attorney-General* in 2018. Furthermore, the government has indicated its intention to make several legislative changes, which will raise freedom of speech concerns. In September 2017, the Law Minister announced the Maintenance of Religious Harmony Act would be strengthened. A December 2017 consultation on proposed changes to the

Films Act drew strong criticisms.¹⁹ In January 2018, the government published a green paper, *Deliberate Online Falsehoods: Challenges and Implications*,²⁰ following which a parliamentary select committee was convened to consider, *inter alia*, whether a legislative response to “fake news” is warranted. Public hearings will be held in March 2018.

V. FURTHER READING

Jaclyn L. Neo (ed.), *Constitutional Interpretation in Singapore: Theory and Practice* (London & New York, Routledge, 2017)

Chan Sek Keong, ‘Basic Structure and Supremacy of the Singapore Constitution’ (2017) 29 *Sing Acad LJ* 619

Alec Stone Sweet and Jud Mathews, ‘Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan – whither Singapore?’ (2017) 29 *Sing Acad LJ* 774

Swati Jhaveri, ‘Advancing Constitutional Justice in Singapore: Enhancing Access and Standing in Judicial Review Cases’ [2017] *Sing J Legal Studies* 53

Kevin Tan Y L, ‘The Singapore Judiciary,’ in HP Lee & Marilyn Pittard (eds.), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge, Cambridge University Press, 2017) 284-304

ture-doctrine-in-singapore-i-connect-column/> accessed 28 February 2018.

¹⁶ See Yap Po Jen, ‘Uncovering Originalism and Textualism in Singapore’ in Jaclyn L. Neo, *Constitutional Interpretation in Singapore: Theory and Practice* 117 (Routledge, 2017).

¹⁷ [2017] 1 SLR 373.

¹⁸ Cap 256A, 2015 Rev Ed.

¹⁹ See further: Kevin YL Tan and Ang Peng Hwa, ‘Amendments to the Films Act: Problems and Concerns’ (Singapore Public Law, 29 December 2017) <<https://singaporepubliclawyers.files.wordpress.com/2017/12/tan-ang-representationonamdtstofilmsact-20171229.pdf>> accessed 28 February 2018.

²⁰ Ministry of Communications and Information and Ministry of Law, *Deliberate Online Falsehoods: Challenges and Implications* (Misc 10 of 2018) (5 January 2018) <<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annexe%20A%20-%20Green%20Paper%20on%20Deliberate%20Online%20Falsehoods.pdf>> accessed 28 February 2018.



Slovakia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The year 2017 was replete with interesting developments to Slovak constitutional law. The master-text Constitution changed thrice in close succession: in February (15th amendment), March (16th), and May (17th) of the same year.¹ The first amendment constituted a one-off extension of the term of office for assemblies and chief executives of higher territorial units (regions). Their mandates were extended by a year to synchronize the regional and communal elections in 2022. The second amendment vested a new power in the National Council (NaCo) to abolish a presidential amnesty or individual pardon that had been granted contrary to the principles of the rule of law and democracy. The last amendment entrenched the “protection of land” in the Constitution as an extension to the right to a healthy environment.²

The first two amendments will be introduced in more detail in the third section of this report along with case law on the right to vote and electoral disputes and the monumental decision of the Constitutional Court (CC) that upheld the abolition of the so-called “Mečiar’s amnesties.”³ This contribution further reports on the decision I. ÚS 575/2016 in the *Constitutional Court Appointments Case*, which finally led to the

resolution of a drawn-out conflict between the President, the CC, and the NaCo over the appointments of constitutional judges. The CC, therefore, celebrated the end of 2017 in full composition for the first time in a long while. But even incomplete, the CC decided seven out of 17 judicial review cases on merits this year and struck down two statutes in part. The Court also found a violation of the fundamental right to a hearing without undue delay and the right to a fair trial within a reasonable time in 289 constitutional complaint cases.

The next section starts with a review of the state of liberal democracy in Slovakia measured by the aggregate results in several democracy indices. We opt for this approach because these indices provide a useful, ready-made tool to assess the levels of democracy in a jurisdiction based on empirical data.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Slovakia does not have a deep, long-running tradition of liberal democracy to tap into for the comfort of our collective conscience. The country experienced almost a decade of autocratic rule (“illiberal democracy” per-

¹ Constitutional Acts No.: 44/2017, 71/2017, 137/2017 of the Collection of Laws. For a survey of direct constitutional amendments between 2008-2016 see Tomáš Lalík, ‘Tracing Constitutional Changes in Slovakia Since 2008’ (2017) 58 *Hungarian Journal of Legal Studies* 2

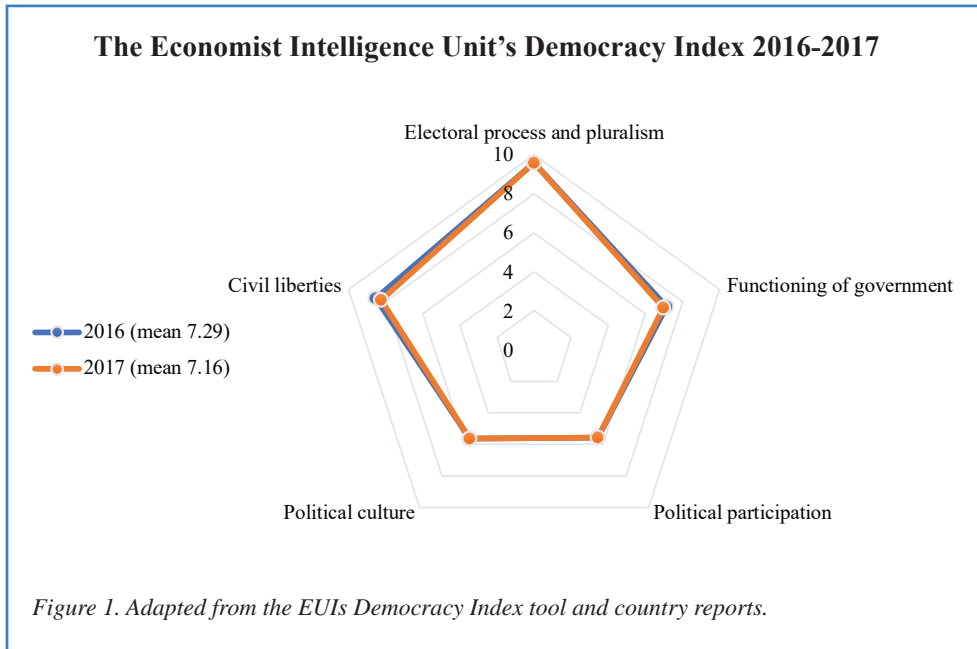
² One more, but indirect, constitutional amendment was adopted in 2017: The Constitutional Act No. 84/2017 Coll. on the approval of changes in the state border between the Slovak Republic and Hungary (based on a bilateral treaty between the two states from January 2016). The Constitution (Art 3.2) requires that changes to the state border must have a form of a constitutional amendment.

³ Marek Domin, ‘Slovak Parliament Has Abolished Presidential Amnesties: A Brief Outline of the Story. Is There a Happy Ending?’ (*Blog of the IACL, AIDC*, 10 September 2017) <<https://iacl-aidc-blog.org/2017/09/10/slovak-parliament-has-abolished-presidential-amnesties-a-brief-outline-of-the-story-is-there-a-happy-ending/>> accessed 21 February 2018

haps)⁴ right after the fall of Communism in 1989, and the dissolution of the short-lived Czech and Slovak Federative Republic on 1 January 1993. The political climate under the leadership of the PM Vladimír Mečiar was stifling the active exercise of civil rights. The populist-national government coalition harassed the opposition, minorities (namely the Hungarian minority), and private media.⁵ The difference between liberal constitutionalism and the bare, contentless concept of democracy as a procedure to choose the elected representatives gradually began to show. Even though Mečiar won the next election in 1988, he was unable to assemble a majority in the NaCo, and a broad coalition of opposition parties swept to power.

i) A Mosaic from Democracy Indices

The next year, Slovakia's political rights rating in the Democracy Index (FHdi) compiled by Freedom House changed from "from 2 to 1 due to the new government enacting a previously suppressed law on direct presidential elections."⁶ Slovakia's mean score for that year was 1.5 based on the protection of civil liberties (remained 2) and political rights (newly 1). The republic finally emerged from international isolation under the former PM, and the new administration made a concerted effort to accede to the European Union.⁷ The next time that Slovakia jumped up the ranking ladder in the FHdi was in 2004. Slovakia's civil liberties rating improved from 2 to 1 due to the "deepening of EU integration," and the concomitant greater conformity with EU human rights



standards.⁸ Slovakia had kept a high FHdi rating of 1/1 (political rights/civil liberties) since the accession to the EU without significant fluctuation until 2017.

To complicate the picture slightly, the UK-based Economist Intelligence Unit, which compiles The Democracy Index (EIUdi) recorded a decrease in the quality of Slovak democracy for the year 2016. The average EIUdi rating of Slovakia for the 10 prior years was 7.32 (with the lowest score of 7.29 in 2014-15). In 2016, however, Slovakia received a weighted average of 7.16 (Figure 1). With a score above seven, Slovakia remains a "flawed democracy." The designation pertains to a jurisdiction with problems "in governance, an underdeveloped political culture and low levels of political participation."⁹

The score for political culture (5.63) and political participation (5.56) recorded particularly low. The other three categories that comprise the EIUdi are the electoral process and pluralism (9.58), functioning of government (6.97), and civil liberties (8.24).¹⁰

The dive in ratings most likely reflected the election results in 2016, when a far-right party led by the neo-Nazi Marián Kotleba entered the NaCo with eight percent of the vote. The election outcome was interpreted to indicate worrying attitudes of the majority ethnic against the Romany minority, and "growing political hostility toward potential migrants and refugees who could augment Slovakia's tiny Muslim population."¹¹ Therefore, the test for Slovak liberal democracy in the year 2017 was to contain the

⁴ Samuel Abrahám, '1998 Election: End of Illiberal Democracy in Slovakia' (2001) II Slovak Foreign Policy Affairs 85

⁵ Erik Láštík, 'Get the Balance Right: Institutional Change in Slovakia during EU Accession and Membership' (2006) 38 Slovak Sociological Review 6, 534

⁶ The first Slovak popularly elected President was inaugurated in June 1999. Freedom in the World – Country Report Slovakia (1999) Freedom House <<https://freedomhouse.org/report/freedom-world/1999/slovakia>> accessed 21 February 2018

⁷ Mečiar seemingly supported the Slovak membership in both NATO and the European Union. His administration submitted applications to both organizations (the EU application on 27 June 1995). But Slovakia was later criticized in a series of demarches by the European Commission for not implementing the Copenhagen accession criteria. Heather Smith-Cannoy, *Insincere Commitments: Human Rights Treaties, Abusive States, and Citizen Activism* (Georgetown University Press 2012) 102

⁸ Democracy indices are calculated for the preceding year. We refer to this year in the text, rather than the year of publication. For example, the FHdi country scores for the year 2017 will be published in 2018. Freedom in the World – Slovakia (2005) Freedom House <<https://freedomhouse.org/report/freedom-world/2005/slovakia>> accessed 21 February 2018

⁹ The Economist Intelligence Unit 'Democracy Index 2017: Free Speech Under Attack' (2017) p64 <http://pages.eiu.com/rs/753-RIQ-438/images/Democracy_Index_2017.pdf> accessed 21 February 2018

¹⁰ The following is a key to the regime types based on the weighted average EIUdi across the five categories: full democracy $8 \leq x \leq 10$; flawed democracy $6 \leq x < 8$; hybrid regime $4 \leq x < 6$; and authoritarian regime $0 \leq x < 4$.

¹¹ Freedom in the World – Slovakia (2017) Freedom House <<https://freedomhouse.org/report/freedom-world/2017/slovakia>> accessed 21 February 2018

right-wing party.

ii) Measuring the Extreme Right Populists' Impact

The Kotleba (People's Party Our Slovakia) occupies 14 seats in the NaCo. Since taking up their seats, the 14 MPs initiated 25 proposals for a statutory amendment, one new statute, and nine amendments to the Constitution. Some of the constitutional amendments were duplicitous, but most successfully brought attention to Kotleba. The People's Party tried unsuccessfully several times to pass an amendment reducing the size of the NaCo from 150 to 100 MPs. The chief argument of the Party was that the reduction would unburden the state budget. The Party also repeatedly tried to add the constitutional protection of wood as a "strategic resource of national importance" to the protection of water (Art 4.2) and land (Art 44.5), which are already in the Constitution. Finally, the People's Party campaigned to delete from Art. 7.2 of the Constitution the second sentence, which reads: "The legally binding acts of the European Communities and the European Union shall prevail over the laws of the Slovak Republic."¹²

The formal amendment rule, which requires an absolute three-fifths majority of MPs for a constitutional change, worked effectively against the People's Party initiatives. The average vote for all eight proposals was 20 MPs pro amendment. Most of the MPs from other parties either abstained from the vote or voted against the People's Party amendment proposals. The far-right party, therefore, does not have a direct effect on constitutional law. However, their use of the amendment procedure as a PR tool to communicate with its target audience is an interesting development that requires further investigation.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Among the more salient changes to the Constitution was a one-off extension of the terms

of office for assemblies and the chief executive of higher territorial units (HTU) by a direct amendment. Their mandates were extended to five years to synchronize the regional and communal elections in 2022. The Constitution (Art. 69) prescribes the same four-year term for all bodies of local self-government. However, the election cycle for HTUs and communal representative bodies misaligned by a year, so that communal elections since 2002 arrived at the heels of HTU elections the year before. This odd arrangement burdened the public purse.

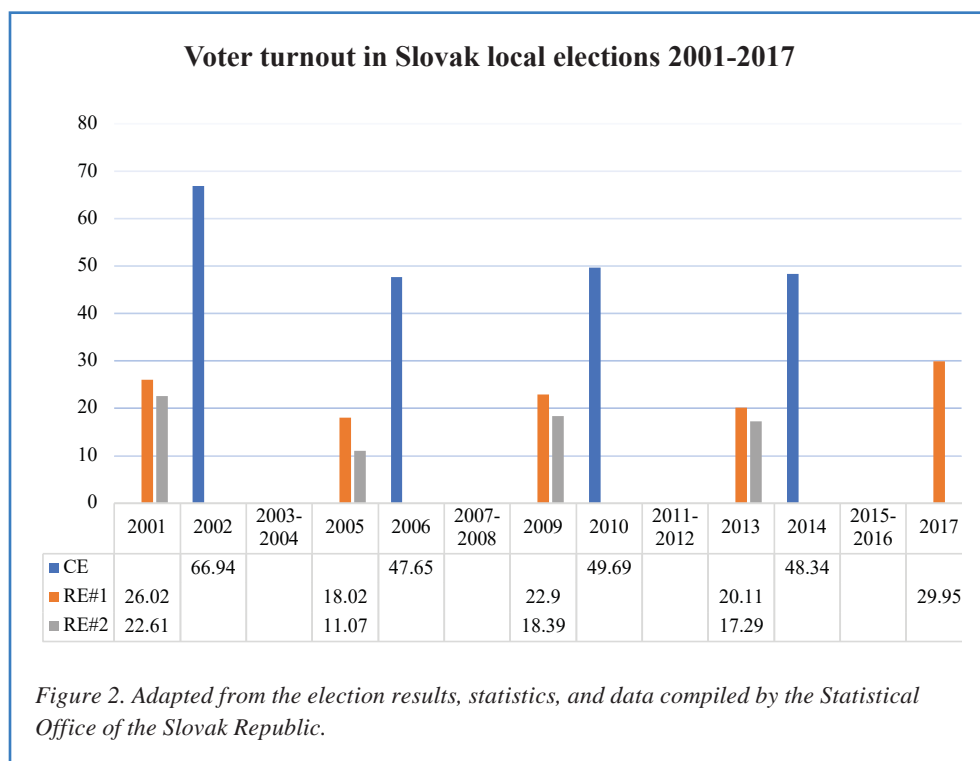
An additional argument for the change was the lacklustre voter turnout in HTU elections when contrasted to the turnout in communal elections (Figure 2). To remedy this flaw, the statutory design of HTU elections changed to a one-round, first-past-the-post system from a second ballot voting method for the chief executive (2.4 million EUR estimated savings).¹³

The change, however, seems to disregard the possible danger of fleeting populist majorities gaining their foothold in the regions and was adopted despite a presidential veto. The real impact of this change on election

results is difficult to estimate, mainly due to poor participation in HTU elections in the past. The turnout in the first election since the change records a clear increase (Figure 2). Moreover, the far-right People's Party Our Slovakia suffered a major defeat in all electoral districts across Slovakia. Out of its 335 candidates (for 416 available seats in regional assemblies), only two got elected. The Party failed to secure the position of the chief executive in all eight HTUs.

i) Ban on Hazard

Among the constitutional cases that came up before the CC and reflect on the state of the democratic self-governance in Slovakia was a challenge to the Act on Gambling 171/2005 Coll. The contested provision of the Act stipulated that municipalities may introduce a local ban on gambling games only on a petition of at least 30% of residents over 18 years who claim a violation of the public order by an undertaking. The petitioners argued that such a condition violates the right of local municipalities to self-determination, limits the powers of local councils, and violates the right to petition. The CC, in a decision PL. ÚS 4/2016 from May 10,



¹² Such an amendment would not have a real effect on the primacy of EU law.

¹³ Per the explanatory report to the legislative bill.

2017, upheld the regulation. To majority of the Court provided the following reasoning for their conclusion: municipalities do not need an authorization from other public institutions for the introduction of a ban gambling games, and the petition, while being a form of direct democracy, is an inherent part of local self-government (powers of local councils and will of residents ought not to be juxtaposed). To require a petition strengthens the exercise of power of local self-government and creates a participatory element in its realization. Moreover, in the CC's opinion, the provision in question enhances the legitimacy of limitations on the rights of operators of gambling games as well.

ii) *Passive and Active Suffrage*

On March 22, the CC handed down two important decisions in a single day, having to do with restrictions on constitutional rights that are intimately connected: the right to vote and to be elected. In the two separate review cases, the CC considered the constitutionality of statutory constraints on the exercise of *active* and *passive* suffrage as well as the conformity of the limitation with various international covenants, most importantly the European Convention on Human Rights (ECHR). The Court eventually struck down the statutory limitations of Voting Act no 180/2014 Coll in both instances.

In the first decision, PL. ÚS 2/2016, the CC found unconstitutional provisions of the Voting Act restricting the right to vote of prisoners sentenced for committing serious crimes, because the NaCo failed to identify a legitimate aim that would justify the restriction of this fundamental right. The NaCo only indicated that whoever committed a serious crime, for which the criminal justice system already awards severe punishments, does not deserve the right to elect representatives of the people. The CC reminded the Parliament that it had previously declared on several occasions unacceptable a blanket exclusion of an entire group of citizens as well as a restriction of any citizen's individual right to vote without appropriate justification. To limit a fundamental right, there must be either an adequate reason of general impor-

tance or a threat to another important public interest. This rationale has been followed in various international covenants, including the ECHR and case law of the ECtHR (e.g., *Hirst v. the UK*, 2005). Moreover, the CC opined that the limitation of the right to vote unlikely to prevent further crimes. Quite to the contrary, the restriction can have a negative impact on an incarcerated individual and can make her reintegration after imprisonment more challenging. Furthermore, the limitation of the right to vote was effective directly from the statutory provision, taking no other particularities of the individual case into consideration. Therefore, the CC could not see any meaningful link between the limitation of the right to vote and reformation of a serious crime offender, one of the main tenets of criminal law. The CC declared this additional statutory sanction to an already severe penalty of incarceration for serious crimes as completely arbitrary.

The CC had considered possible violations of the right to vote in its previous decisions (e.g., PL. ÚS 6/08), in which it had stated that there were no relevant reasons to limit the right to vote for all incarcerated persons. According to this decision, there had existed no formal, nor procedural problems with the exercise of the right to vote in prisons, and no other important public interests had been at stake.

In the second part of the very same decision, the CC declared that another statutory provision of the Voting Act unconstitutionally restricted the right to vote of all legally incapacitated persons, no matter of the severity of their incapacitation. The restriction was again blanket, effective directly from the statutory provision and involved all persons without consideration of their individual situation and capacity to understand the importance, relevance, or effects of election. The CC took into consideration the relevant case law of the ECtHR, most notably *Alajos Kiss v. Hungary*, in which the possibility of restriction of the right to vote of incapacitated persons was permitted, but only in those cases in which relevant persons were not able to understand implications of the election process.

The CC followed the ECtHR's reasoning and declared that the only body that can restrict the right of incapacitated persons to vote are courts in a special type of proceedings, in which all mental capacities of respective persons were being taken into appropriate consideration.

The second CC decision, PL. ÚS 18/2014, dealt with the restriction of the right to be elected. The amendment to the Voting Act introduced a mandatory prerequisite of a complete high school education for any candidate running for the position of a mayor in municipal elections. The CC decision had been preceded by the suspension of the pertinent statutory provision so that this educational prerequisite would not apply for then-upcoming election, as their possible unconstitutionality could create a high degree of legal uncertainty.

In the decision, rendered after a long two years and half after the initiation of proceedings, the CC refused to accept formal educational prerequisites for a directly elected office and held them unconstitutional. In the reasoning, the CC relied on its previous decisions as well as on international covenants adopted by the Slovak Republic (most notably on International Covenant on Civil and Political Rights). This time, however, the CC could not ground its decision on the ECHR, as the Convention, according to the case law of the ECtHR, does not cover municipal elections.

The CC declared that any limitations on the fundamental right to be elected must be justified and based on objective and reasonable criteria. The most important part of the Court reasoning involved the legitimate aim of legislation. The aim of challenged statute, according to the intent of legislators, was to solve "a long-term public discussion considering the prerequisites for the exercise of public duties by the mayor. The persons allowed to run for this office should be guarantors of the appropriate and law-abiding exercise of respective public duties." These virtues, according to the legislators, should be attained by educational background.

The CC held that limitation of the right to vote, or right to be elected must be based on a legitimate aim rooted in significant public importance. Moreover, any such limitation must be proportionate to be constitutionally permissible. Following the ECtHR and other comparative case law, the CC has continuously applied the proportionality analysis to this genus of controversies, balancing the conflicting rights in every case. The CC quickly ascertained that the adopted legislative measure did not fulfil the proportionality tests. Additionally, the legislator did not prove that the prerequisite of a completed high school education could in any sense form a guarantee of the appropriate and law-abiding exercise of mayoral duties.

The CC thus declared that the disputed educational prerequisite was not necessary, and that the aim of the statute could be attained by different and less pervasive means than by a blanket statutory ban of a constitutional right.

iii) Appointment of Constitutional Court Judges

The decision I. ÚS 575/2016 in the *Constitutional Court Appointments Case* may prove to be the most consequential 2017 development in the long run. The *Appointments Case* revolved around the appointment of constitutional judges by the President, and its resolution will affect the selection process in 2019 when nine judges leave the Court. Here we consider only the main line of reasoning employed by the I. Senate in the decision that finally settled the conflict.¹⁴

The Senate ruled that the President had breached the right of access to the public office of five candidates, who filed constitutional complaints with the Court.¹⁵ The Senate followed earlier decisions in the saga (III. ÚS 571/2014, PL. ÚS 45/2015) and ruled that the President must choose from the candidates elected by the Parliament. The President failed to assess the candidates ob-

jectively and without discrimination because he rejected them in excess of his competencies. The Senate went on to emphasize the alarming situation to the Court, noting chiefly that three judges (out of 13) were missing for more than three years, which caused the length of proceedings to extend considerably. Perhaps, the most interesting part of the judgment concerned the exact number of candidates from which the President is obliged to appoint. The Senate applied substantive reading of legal provisions governing the process of constitutional adjudication in favour of the objective constitutional law, stressed the extraordinary nature of the situation, blamed the President for causing it, preferred restitutio in integrum at the expense of individual will to take a case before the SSC, and returned events back to 2014. This argumentation led to the conclusion that the two other rejected candidates, who did not challenge the President's decision, remained qualified candidates. The President, after few days and heavy criticism of the Court, accepted the judgment and appointed the three missing judges.

The approach that the Senate adapted intimates a concern not dissimilar to the speculation spelled out by Mark Tushnet that sticking to the rule of law on the level of immediate application may upset the same principle on the systemic level (the appeal to the "objective law").¹⁶ The Senate certainly ventured beyond the scope of its competencies to remedy the breach by the President, but in so doing arguably stabilized the order.

iv) Abolition of Amnesties

The *Amnesty Abolition Case* resolved a controversy that has "irritated" Slovak constitutional politics since 1998. The case concerned the so-called Mečiar's amnesties. We wrote about the history of this controversy and the particular constitutional solution that was opted for to finally settle it at some length in our 2016 report on the Develop-

ments in Slovak Constitutional Law. Let us consider here only a part of this complex case.

The NaCo repeatedly tried to abolish the controversial amnesties without success. The 2017 constitutional amendment (No. 71/2017 Coll. of Laws) finally made headway in this long-standing effort, designing a unique mechanism that empowers the NaCo to abolish a presidential amnesty or an individual pardon by a 3/5 majority if it violates the principles of the rule of law and democracy. Such a resolution is *ex constitutionae* sent to the CC for a review within 60 calendar days of the publication of the resolution in the Collection of Laws. If the Court does not decide by this time, the NaCo resolution is constitutional by default. This mechanism is now a part of the Constitution and can theoretically be used again in the future, unless it falls into desuetude, which may very well be the case because the resort of presidents to amnesty or pardons powers decreased considerably in the last decade (Figure 3).

Late in May 2017, the Court found the NaCo resolution to abolish Mečiar's amnesties constitutional (PL. ÚS 7/2017). The CC found that both the amnestied conduct and amnesties violated principles of democracy and the rule of law. The Court then balanced these breaches against the possible violation of democracy and the rule of law by the NaCo annulment of the amnesty. The contents of the reviewed NaCo resolution were three relatively separate amnesty decisions of the PM Vladimir Mečiar and a presidential pardon. The CC did test the balance for each situation individually and against an enumerated, but not exhaustive, set of constitutional principles which together form the material core of the Constitution.

The majority opinion meant, in practical terms, that the investigation and prosecution of suspected criminal conduct by members of the Secret Service and high-ranking gov-

¹⁴ For a fuller understanding of the decision, see contributions of the authors in an online symposium dedicated to the case: 'Introduction to I-CONnect Symposium: The Slovak Constitutional Court Appointments Case' (*I-CONnect*, 23 January 2018) <<http://www.iconnectblog.com/2018/01/symposium-slovak-appointments-case-introduction/>> accessed 20 February 2018

¹⁵ Art. 30 (4) of the Constitution: "All citizens shall have equal access to elected or public offices."

¹⁶ Mark Tushnet, 'Law as a Crisis for the Rule of Law: A Speculative Essay' (2017) Harvard Public Law Working Paper No. 17-45 <<https://ssrn.com/abstract=3029340>> accessed 25 February 2018

ernment officials that was suspended since 1998 would resume. Although, the CC faced some backlash in the run-up to the decision, the final ruling relieved the pressure of the Court.

IV. LOOKING AHEAD TO 2018

Predicting future development, unlike the review of events that have passed, is a thankless job. At the time of the submission of this report, PM Robert Fico just resigned. Although members of the government are responsible individually, the Constitution prescribes that in the event of the PM's resignation, the whole government resigns *en masse* (Art 116.5). A new government, with a hand-picked replacement premier from the largest party, will soon present itself to the NaCo and submit to them a government program (Art 113). The ensuing vote doubles as a vote of confidence in the program and in the members of the government to hold their portfolio. The next few months, therefore, will either lead to a new government or snap election. Whatever the case may be, it is safe to suggest that the process of selection of new CC judges, which should begin at the end of 2018 and their subsequent appointment in early 2019, should proceed without much controversy after the resolution of the *Constitutional Court Appointments Case*.

V. FURTHER READING

Lucia Berdisová, 'International Human Rights Law before Constitutional Court of the Slovak Republic' (2017) 100 *Právny obzor*, 11-27

Tomáš Lalík, 'Human Dignity in Slovakia,' in Paolo Becchi, Klaus Mathis (eds.) *Handbook of Human Dignity in Europe* (Springer 2017) 97-115

Ján Mazák and Ladislav Orosz, 'Quashing the Decisions on Amnesty in the Constitutional System of the Slovak Republic: Opening or Closing Pandora's box?' 8 *The Lawyer Quarterly* (2018) 1-21

Presidential Grants of Amnesty or Pardon 1993-2017

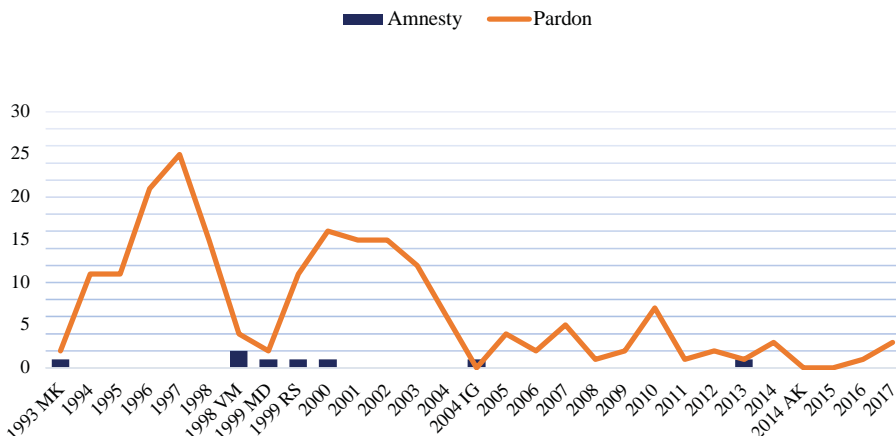


Figure 3. Adapted from the data compiled by the Office of the President. Ordered chronology of Slovak Presidents: Michal Kováč, 1993-98; Rudolf Schuster, 1999-2004; Ivan Gašparovič, 2004-14; Andrej Kiska, 2014-present. PMs Vladimír Mečiar in 1998 and Mikuláš Dzurinda in 1999 exercised presidential pardon powers in the interim.

Marián Sekerák, 'Same-Sex Marriages (or Civil Unions/Registered Partnerships) in Slovak Constitutional Law: Challenges and possibilities,' (2017) 13 *Utrecht Law Review* 1, 34-59



Slovenia

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The year 2017 in the Slovenian constitutional milieu can be assessed through important and precedential decisions of the Constitutional Court protecting human rights and fundamental freedoms and the constitutional order. In 2017, the Constitutional Court received 1134 constitutional complaints and 198 requests and petitions for a review of the constitutionality and legality of regulations.¹ A large number of the received cases indicate the continuing importance of the role of the Constitutional Court. A substantive decision was adopted in 88 constitutional complaint proceedings and in 19 proceedings for a review of constitutionality and legality. A smaller number of the resolved cases compared to previous years could be explained by a considerable change of the Constitutional Court's composition. Two-thirds of newly appointed judges in a little less than six months cannot but affect institutional efficiency. The influence of this composition on the existing jurisprudence, however, still remains to be seen. Some indication of the Court's future functioning can be offered by the cases contained in this report. However, as will be argued, the state of liberal democracy in Slovenia cannot only be detected in the importance of the Constitutional Court and its work and in the analysis of its decisions. The report alludes to some

other constitutionally related topics and debates arising in 2017 that show a departure from constitutional practice, a disrespect for Constitutional Court decisions and a gap between theory and practice, hence revealing a gloomier image of the state of liberal democracy.

A compelling pronouncement on the state of a liberal democracy in any country cannot be derived from a mere focus on Constitutional Court judgments, constitutional amendments, electoral reform and other institutional formal events. While it is true that constitutional scholarship, in particular in the West, has traditionally focused on the formal functioning of the institutions of a liberal democracy, this focus alone cannot contribute to a genuine and comprehensive understanding of the actual status of a liberal democracy. As Martin Krygier argued a long time ago with regard to the rule of law,² it is necessary to adopt a more sociological approach to the liberal constitutional democracy. Having done so in the case of Slovenia, a discrepancy between the formal and the actually practiced liberal democracy can be identified.³

While often portrayed as 'a poster child of the New Europe', Slovenia should be better described, in the words of Bugarič and Kuhelj, as a diminished form of democracy.⁴

¹ Detailed statistical data and graphic representations are presented in The Constitutional Court of the Republic of Slovenia – An Overview of the Work for 2017 (The Constitutional Court of the Republic of Slovenia 2018) <<http://www.us-rs.si/en/>>.

² Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella and Neil Walker (eds.), *Re-locating the Rule of Law* (Hart Publishers 2008), 45–70.

³ The next paragraph draws on Matej Avbelj, 'The Sociology of (Slovenian) Constitutional Democracy' (2017) 9 *Hague J Rule Law* 3, 1–23.

⁴ Bojan Bugarič, Alenka Kuhelj, 'Slovenia in Crisis: A Tale of Unfinished Democratization in East-Central Europe' (2015) 48 *Communist and Post-Communist Studies* 4, 274.



This is a country in which, probably much more than in any other CEE state,⁵ it has been consciously attempted to preserve as much as possible from the former communist/socialist system.⁶ In practice, all the newspeak of the 1990s served the interests of the ruling elite. This remains, as sociological studies carried out by Adam and Tomšič demonstrated in the early 1990s, essentially unaltered.⁷ Consequently, contemporary Slovenia has been described as a ‘neo-corporatist’ democracy, a pervasively captured state⁸ or as a ‘classical kleptocracy’.⁹

It is against this *de facto* background that the formal and institutional developments in a Slovenian version of a liberal constitutional democracy must be understood. The country is characterized by a low degree of tolerance to differences and diversity. The ruling political left and some institutions were thus irritated by the blessing of a renovated local school by a Catholic priest upon the invitation of the local community.¹⁰ They called for sanctions, which were eventually unimplemented due to the absence of a legal basis. On the other hand, the parties of the political right were more concerned with (illegal) immigrants and even launched an impeachment procedure against the Prime Minister for his alleged unlawful interference in the judicially confirmed return to Croatia of a Syrian applicant for international protection. The impeachment failed to win the support of any other political party and was hence stalled already at the first procedural stage.

The appointment of the new President of the Supreme Court disclosed a continuing trend of institutionally undermining the judiciary, which ought to serve as the main pillar of the Slovenian liberal constitutional democracy. The highest court in the Slovenian legal sys-

tem has had great difficulties in filling the position of its President in the past. The last appointment yet again showed the institutional weaknesses of the entire appointing process, mainly its non-transparent manner, with no argumentation given in favour or against the candidates by the Judicial Council, thus creating an impression of arbitrariness.¹¹

In 2017, the presidential elections and elections of the National Council took place. The President, who represents the Republic of Slovenia and is the commander-in-chief of its armed forces, is elected in a direct, general and secret ballot based on universal and equal suffrage for a period of five years. The presidential elections have raised democratic concerns because of historically low turnouts in the first round of votes, but were constitutionally unobjectionable. This has not been the case with the elections of the National Council. This is the representative body for social, economic, professional and local interests, composed of 40 members that may, *inter alia*, propose to the National Assembly the passing of laws and require the National Assembly to decide again on a given law prior to its promulgation. In contrast to the presidential elections, the members of the National Council are elected indirectly within interest organisations or local communities by electoral bodies (electors). By Decision No. Up-1033/17, dated 30 November 2017, the Constitutional Court reviewed the constitutional complaint of the interest organization in the field of culture. It alleged that the Supreme Court violated its constitutional rights by rejecting its appeal against the decisions of the State Election Commission confirming lists of electors of interest organizations in the field of sport, which together with electors of cultural organizations constitute a joint electoral body. The

Constitutional Court found that the exact number of members of those who were professionally engaged in sport activities was not explicitly shown during the procedure. The position of the Supreme Court, which completely shifted the burden of allegation and proof of irregularities in determining the number of electors of other professional organizations to the interest organization in the field of culture (*i. a.*, a complainant), made it disproportionately difficult to prove these irregularities. The Constitutional Court thus established a violation of the complainant’s constitutional rights and abrogated the challenged judgment of the Supreme Court, annulled the challenged decisions of the State Election Commission and remanded the case to the State Election Commission for new adjudication. The State Election Commission must verify that the number of elected representatives of a particular professional organization is determined in accordance with the law and set a new date for the election.

Also in 2017, the National Assembly called a legislative referendum on the entry into force of the Construction, Management and Governance of the Second Railway Track of the Divača–Koper Railway Line Act. The referendum campaign demonstrated that the construction of the second track was a highly political issue. The main initiator of the referendum and the organizer of the referendum campaign filed several constitutional complaints and lodged a number of petitions before the Constitutional Court prior to the referendum arguing that there were irregularities in the referendum procedure regarding the collection of signatures in support of the request for calling a legislative referendum, an inadmissible shortening of the referendum campaign and a violation of the rules of the referendum campaign and its financing.¹²

⁵ The reasons for that have been historical, political and economic. See Bugarič and Kuhelj 2015.

⁶ Ibid.

⁷ Adam and Tomšič 2000, 38.

⁸ Bugarič and Kuhelj 2015, 275.

⁹ Matej Avbelj, ‘Slovenija je kleptokracija’ (Finance, 3 February 2018) <<https://www.finance.si/8864135/Slovenija-je-kleptokracija>> accessed 23 February 2018.

¹⁰ Matej Avbelj, ‘Prešeren, Varuhinja in slovo od argumentov’ (IUS-INFO, 11 September 2017) <<http://www.edusinfo.si/DnevneVsebine/Kolumna.aspx?id=203355>> accessed 23 February 2018.

¹¹ Matej Avbelj, ‘Contextual Analysis of Judicial Governance in Slovenia’ in David Kosar (ed.), forthcoming 2018.

¹² See Orders No. U-I-93/17, dated 13 June 2017; No. U-I-108/17, dated 13 June 2017; No. U-I-131/17, dated 27 September 2017; No. U-I-130/17, Up-

By Decision No. U-I-191/17, adopted at the request of the Supreme Court in a referendum dispute (the decision was adopted on 25 January 2018), the Constitutional Court found the Referendum and Popular Initiative Act to be inconsistent with the Constitution because the referendum dispute before the Supreme Court was not clearly regulated and meaningfully identifiable. Several provisions of the Elections and Referendum Campaign Act are also inconsistent with the Constitution as they enable the Government to run and finance a referendum campaign in the same manner as other organizers; e.g., taking sides in a political campaign, rather than being devoted to the impartial dissemination of information to as many citizens as possible. The Constitutional Court, however, did not decide on the validity of this referendum. This will be decided by the Supreme Court in referendum dispute proceedings against the final referendum results.

Disrespect for the Constitutional Court's decisions is also indicative of the state of liberal constitutional democracy. When a competent issuing authority fails to respond to the Constitutional Court declaratory decision within the specified time limit by remedying the established unconstitutionality or illegality, several constitutional principles (such as the rule of law and the separation of powers) are seriously violated. Besides various unimplemented decisions, the financing of private primary schools sparked off a debate within legal and public circles in 2017, questioning the appropriateness of several proposals responding to the established unconstitutionality. By Decision No. U-I-269/12, dated 4 December 2014, the Constitutional Court found that the regulation of the financing of private primary schools is unconstitutional as schooling of pupils that attend compulsory state-approved primary education programmes is free of charge, irrespective of whether it is carried out by a public law or a private law entity. The Constitutional Court ordered the legislature to remedy the established unconstitutionality within the specific

time limit. The ruling centre-left coalition and other parties of the political left, in their essentially ideological disagreement with the decision of the Constitutional Court, moved on with a constitutional amendment to void and replace the contested ruling. This hit at the unprecedented protests of constitutional lawyers who argued that a constitutional amendment adopted for the exclusive reason of bypassing the decision of the Constitutional Court and to hurt the insular minority of pupils who attend non-public primary schools (0.2% of all pupils) amounts to the abuse of the constitutional amendment, which is consequently unconstitutional.¹³ The ruling coalition and the Prime Minister dismissed the protests, arguing that no constitutional amendment adopted by a sufficient majority in the Parliament can be ruled unconstitutional. The ruling coalition further decided to implement the contested decision of the Constitutional Court in such a manner that the petitioners would receive even less funding than before their petition had been lodged. Eventually, upon renewed warnings by academia,¹⁴ this statutory proposal also failed to be adopted. The harm was hence not done, but the decision of the Constitutional Court remains unimplemented even more than two years on. This particular event is noteworthy for it demonstrates how a particular political majority, when strong enough to win the constitutional majority, can move to amend the Constitution as it sees fit irrespective of the constraints of the system of a liberal constitutional democracy. Slovenia thus continues the trend of constitutional and liberal democracy backsliding and has ample work ahead to build a trustworthy practice of an actually existing constitutional and liberal democracy.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Cases contained in this report have been included for their importance complying with the following criteria in particular: a deci-

sion of the Constitutional Court entailing the resolution of an important constitutional issue; a change of its previously established case law; a direction to courts and other state authorities or a limitation on the exercise of their power. It is worth adding that only important parts of these decisions are mentioned and referred for further reading.

Decision No. U-I-64/14 of 12 October 2017: Right to Respect for Home; Illegal Constructions; Roma Community

In Decision No. U-I-64/14, the Constitutional Court decided on the constitutionality of several provisions of the Construction Act. The challenged provisions, *inter alia*, regulate inspection measures for illegal construction. Such a construction may be demolished although it represents home for Roma families. The Constitutional Court reviewed the challenged provisions from the perspective of the right to respect for home. The Slovenian Constitution does not contain an explicit provision determining this right. Nevertheless, as the Constitutional Court emphasized, this does not mean that in Slovenia this right is not ensured directly on the basis of the Constitution. Building upon the arguments and the established case law of the European Court of Human Rights (e.g., *Connors v UK* (2004) App no 66746/01, *Chapman v UK* (2001) App no 27238/95 and *Yordanova and others v Bulgaria* (2012) App no 25446/06), the Constitutional Court found the protection of the right to respect for home in the first paragraph of Article 36 of the Constitution, which regulates the right to the inviolability of dwellings. Individuals who find themselves in an inspection procedure due to an illegal construction thus have the right to respect for home, which ensures that their homes will not be removed as long as there exist circumstances that entail a disproportional interference with the right to respect for home. In assessing the proportionality in concrete proceedings, the courts must also consider whether a person is a member of a particularly vulnerable group, for example

732/17, dated 28 September 2017.

¹³ Matej Avbelj, Andraž Teršek, Jurij Toplak, 'Ostre kritike zaradi nameravane spremembe ustave o financiranju šolstva' (IUS-INFO, 23 November 2017) <<http://www.iusinfo.si/DnevneVsebine/Novice.aspx?id=208547>> accessed 23 February 2018.

¹⁴ Matej Avbelj et al. 'Javna izjava skupine pravnikov: Kršitev ustavnosti in teptanje ustavne demokracije v DZ.' (IUS-INFO, 29 November 2017) <<http://www.iusinfo.si/DnevneVsebine/Novice.aspx?id=208921>> accessed 23 February 2018.

a member of the Roma community. In the event of illegal construction by members of the Roma community, the Court must take into account whether they have been ensured an effective exercise of the special right of the Roma community in the area of spatial planning. The removal of an object which constitutes a home is permissible only if it is based on a prior court order.

Orders No. U-I-95/14, Up-320/14, U-I-5/17 of 12 January 2017; No. Up-814/14 of 21 September 2017; and No. Up-776/14 of 22 June 2017: Change of the Established Case Law of the Constitutional Court; Position of Subsidiary Prosecutor, Private Prosecutor and Injured Party in Criminal Proceedings

According to the established case law of the Constitutional Court, the purpose of criminal proceedings is to establish the existence of a criminal offence and the criminal liability of a perpetrator and not to decide upon the rights of an injured party, regardless of her or his acting as a subsidiary prosecutor, private prosecutor or merely an injured party (see Orders No. Up-285/97 and No. Up-168/98, both dated 10 May 2001; No. Up-131/98, dated 15 February 2002). The Court thus adopted a position that the injured parties have no active standing to file a constitutional complaint against a final judgment by which the criminal proceedings were concluded. However, criminal proceedings may also affect the legal position of the injured party. The injured party is the one whose personal or property rights have been violated or threatened by a criminal offence, giving rise to various civil claims. By Orders No. U-I-95/14, Up-320/14, U-I-5/17, dated 12 January 2017; No. Up-814/14, dated 21 September 2017, Up-776/14, dated 22 June 2017, the Constitutional Court changed its previous position based on the existing case law of the European Court of Human Rights (e.g., *Helmers v Sweden* (1991) App no 11826/85, *Perez v France* (2004) App no. 47287/99 and *Gorou v Greece* (no. 2) (2009) App no 12686/03) and decided that an injured party, private prosecutor and subsidiary prosecutor are persons entitled to file a constitutional complaint against a final judgment that concluded criminal proceedings. By this changed position, the injured

person is given access to the Constitutional Court and the possibility of a substantive assessment of the filed constitutional complaint and can thus invoke the constitutional protection of her or his procedural rights in criminal proceedings.

Decision No. Up-530/14 of 2 March 2017; Decision No. Up-515/14 of 12 October 2017: Protection of Honour and Reputation; Freedom of Expression; Political Party

Two cases worth mentioning dealt with constitutional complaints filed by a political party, arguing that courts violated its constitutional rights. The Constitutional Court had not yet addressed the questions of whether political parties enjoy the constitutional protection of their honour, reputation and image, and freedom of expression. In Decision No. Up-530/14 of 2 March 2017, the Constitutional Court adopted the position that a legal entity, as an artificial form within the legal order and with no feelings, cannot enjoy the right to human dignity and its protection, which the Constitution ensures to natural persons. However, the right to reputation of a political party enjoys constitutional protection (Article 35 of the Constitution), albeit the weight of the reputation of the political party is relatively insignificant when in collision with the freedom of expression. By Decision No. Up-515/14 of 12 October 2017, the Constitutional Court elaborated on its previous case law (for example, Decision No. U-I-40/12, dated 11 April 2013) and defined a political party as an organized association of individuals who strive to achieve political goals. Its basic function is to persuade the public to adopt its goals and ideas. The freedom of expression is thus essential for the normal functioning of a political party. Therefore, political parties also enjoy constitutional protection of the right to freedom of expression under the first paragraph of Article 39 of the Constitution.

Decision No. Up-563/15 of 19 October 2017: Right to Personal Liberty; Constitutional Complaint Submitted by the Ombudsman

In the Slovenian legal order, a complainant (an individual or a legal entity) may file a constitutional complaint due to a violation of her or his human rights or fundamental free-

doms. The Ombudsman occasionally submits requests to initiate a procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority if she or he deems that the challenged act inadmissibly interferes with human rights and fundamental freedoms. However, the Ombudsman may, under certain conditions, also file a constitutional complaint (the second paragraph of Article 50 of the Constitutional Court Act). This can be done only with the consent of the person whose human rights or fundamental freedoms the Ombudsman is protecting in the individual case (the second paragraph of Article 52 of the Constitutional Court Act). It occurs extremely rarely, but it did happen in 2017. By Decision No. Up-563/15 of 19 October 2017, the Constitutional Court decided on a constitutional complaint filed against a court decision by the Ombudsman on behalf of a person treated in a ward under the special supervision of a psychiatric hospital on the basis of the Mental Health Act. The Constitutional Court underlined the importance of an independent judicial review, in which the court assesses whether all prescribed conditions are met in order to admit a person to a psychiatric hospital to be treated under special supervision without consent. Only by such a review can the protection of the rights of the person concerned be ensured and arbitrary interference with her or his constitutional right to personal liberty be prevented. In the case at issue, the patient was treated as an object in the non-litigious civil procedure rather than its subject. The Constitutional Court therefore decided that the contested courts' decisions violated the patient's rights to personal liberty and to protection of human personality and dignity.

IV. LOOKING AHEAD TO 2018

There are two major elections forthcoming in 2018: parliamentary and local. The Slovenian political spectrum is extremely fragmented and it remains to be seen how many parties, including those more politically radical, will enter the parliament. Due to the proportionality-based electoral voting system, the country might see, again, a pro-

longed phase of political instability. It cannot be excluded that the elections will trigger cases of the judicial protection of the right to vote and the right to be elected.

Much awaited are decisions in several important cases pending before the Constitutional Court. The constitutionality of domestically and internationally highly debated proposed legislative amendments to the Slovenian Aliens Act is challenged before the Constitutional Court. There is a request lodged by the Bank of Slovenia that questions the respect of the constitutional principle of the central bank's independence. A constitutional complaint by the European Central Bank claiming a violation of its constitutional rights and the applicable law of the European Union on privileges and immunities is raising interesting legal issues. Similarly, a decision awaits the case regarding the police entering the National Assembly and conducting a criminal investigation on its premises in the offices of its deputies.

V. FURTHER READING

Matej Avbelj, 'The Sociology of (Slovenian) Constitutional Democracy' (2017) 9 *Hague J Rule Law* 3, 1–23

Matej Avbelj, 'The European Central Bank in national criminal proceedings' (2017) 42 *European Law Review* 4, 474–490

Matej Avbelj, 'How to reform the rule of law in Slovenia?' in Frane Adam (ed.), *Slovenia: social, economic and environmental issues* (European political, economic, and security issues). (New York, 2017), 71–84

Alenka Kuhelj and Bojan Bugarič, 'Slovenia in crisis: from a success story to a failed state?' in Frane Adam (ed.), *Slovenia: social, economic and environmental issues* (European political, economic, and security issues). (Nova Science 2017), 55–69



South Africa

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

In terms of the direction in which South African constitutional democracy was developing, 2017 was a particularly challenging *annus horribilis*, but also reassuring due to vibrant Constitution-based responses to the abuse of political power. The challenges took the form of the culmination of a range of executive and legislative actions being adjudicated upon against the background of incremental exposure of corruption and maladministration. The impugned conduct occurred under the notoriously manipulative guidance of a disreputable president supported by an elected majority whose self-understanding continues to be that of a revolutionary liberation movement, despite having acquired government responsibility through the ballot box more than two decades ago.

The encouraging aspect of the year’s constitutional developments was the relentless resistance of opposition political parties, NGOs, the communications media, civil society and the judiciary to the obviously misguided conduct of the government, extensively using the available constitutional instruments.

Being the first annual report on this jurisdiction, Part II opens with a very brief account of the founding constitutional principles underpinning South African law, followed by the essentials of key judgments of the Constitutional Court and High Court handed down during the year, reflecting resistance to the erosion of those principles. A reassuring picture of the power and value of constitutionalism rooted in a sound constitutional text largely founded upon the tenets of late twentieth century liberal democracy emerges

from the review.

The subject matter of the cases ranges from a controversial cabinet reshuffle, dubious presidential appointments to the National Prosecuting Authority (NPA) and defiance of remedial action duly ordered by the Public Protector (PP), to parliamentary failure to comply with the constitutional requirements of holding the executive to account amidst instances of blatant ministerial disregard for the applicable constitutional constraints.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

When South Africa transitioned from apartheid to constitutional democracy in 1994, the emergence from darkness into a bright democratic future under the leadership of the iconic figure of Nelson Mandela was widely perceived to be a ‘miracle.’ The Constitution-writing process occurred in two phases. The first (transitional) Constitution of 1993 contained binding principles to be complied with when a ‘final’ constitution was adopted. Certification by the Constitutional Court that the constitutional text finally adopted in 1996 conformed to those principles was required. The Court summarized the gist of those principles to include: a constitutional democracy based on the supremacy of the Constitution protected by an independent judiciary; a democratic system of government founded on openness, accountability and equality, with universal adult suffrage and regular elections; a separation of powers between the legislature, executive and judiciary with appropriate checks and balances to ensure accountability, responsiveness and openness; the need for other appropriate

checks on governmental power; enjoyment of all universally accepted fundamental rights, freedoms and civil liberties protected by justiciable provisions; representative government embracing multi-party democracy, a common voters' roll and, in general, proportional representation; and a non-partisan public service broadly representative of the South African community, serving all the members of the public in a fair, unbiased and impartial manner.¹ Although discernible elements of social democracy were built into the final version of the Constitution, such as the elevation of socioeconomic rights to the level of enforceable fundamental rights,² the drafters drew heavily on the examples of Canada and Germany for the Constitution as a whole.

Unfortunately, the reality of ideologized political majority domination by the African National Congress (ANC) over more than two decades did not allow for the realization of the 1993 ideals for South African constitutionalism. The accumulation of political, administrative and legislative challenges to the tenets of liberal democracy manifested itself in the constitutional jurisprudence of the year 2017. Much of this was centered on the controversial conduct of President Jacob Zuma. Widespread aversion to endemic executive misconduct may, however, have induced sufficient resistance to inspire a constructive return to constitutional ideals.

In May, Zuma announced a radical cabinet reshuffle primarily effecting the dismissal of the minister and deputy minister of finance. Apart from the public outrage that followed, particularly because these ministers were perceived to have honorably kept guard against the raiding of the public purse, the immediate result was a severely detrimental downgrade of South Africa's creditworthi-

ness by two international rating agencies to 'junk' status. The main parliamentary opposition party, the Democratic Alliance (DA), approached the Gauteng Division of the High Court in Pretoria urgently and obtained an order against the President to reveal the records relating to the decisions leading to the dismissal of the ministers and the reasons for those decisions.³ Zuma avoided compliance with the order by lodging an appeal, but the matter gave rise to the tabling of a motion of no-confidence in him, leading to further litigation (discussed below).

In October, a saga beginning as far back as 2001 concerning avoidance of prosecution by Zuma for a number of criminal charges relating to racketeering, corruption, money-laundering and fraud came to a head in the Supreme Court of Appeal.⁴ At the core of this matter was a controversial decision by an acting national director of public prosecutions (NDPP) taken in 2009 not to prosecute Zuma on what the Court described as 'egregious' grounds amounting to an abuse of process. The credibility of the acting director of the NPA was seriously impugned, and the decision not to prosecute was found to be irrational, given that the merits for the prosecution were good, and that 'heightened public interest' existed due to the breadth and nature of the charges. The Court found the NPA and Zuma to have made common cause in an appeal without any prospects of success and issued stringent cost orders against them. This left Zuma exposed to the reinstatement of the delayed prosecution, which became even more topical when his presidency of the ANC came to an end in December.

The enduring perception that Zuma had been abusing his constitutional power to appoint the NDPP to avoid prosecution came to a head in another judgment of the

Gauteng Division of the High Court.⁵ The judgment concerned the validity of a 'golden handshake' agreement between Zuma and the previous NDPP, the constitutionality of two provisions of the parliamentary statute regulating the NPA, the validity of the appointment of the current NDPP and Zuma's competence to make a new appointment. The Court declared the termination of the appointment and settlement agreement with the previous NDPP unconstitutional, the appointment of his replacement invalid, and that Zuma was incompetent to make further appointments due to him being 'conflicted' and the Deputy President was made responsible for decisions relating to the appointment, suspension or removal of the NDPP. The Court furthermore declared the provisions of the National Prosecuting Authority Act to be unconstitutional to the extent that it permitted the President to suspend the NDPP unilaterally, indefinitely and without pay. The Court's findings and orders contain various debatable elements, and Zuma promptly announced his intention to appeal to the Constitutional Court.

Demands to deal with the phenomenon of corruption and 'state capture' that became a major theme of public life in recent years received close judicial attention in 2017.⁶ The PP released a report in November 2016 titled *The State of Capture* aimed at Zuma. The PP acted in pursuance of its constitutional mandate to take remedial action by appointing a commission of inquiry headed by a judge selected by the Chief Justice. That commission was to investigate the influence of a family of business people on the President and his conduct in the office. Questions raised in the report included whether Zuma had breached the code of ethics to which he was bound by allowing the Gupta family to influence him in replacing members of the cabinet and di-

¹ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) [45].

² E.g., rights to access to adequate housing, health care, food, water and social security provided for in sections 26 and 27 of the Constitution of the Republic of South Africa, 1996.

³ *Democratic Alliance v President of the Republic of South Africa* 2017 (4) SA 253 (GP).

⁴ The history of this matter was set out exhaustively in the judgment of the court in *Zuma v Democratic Alliance* 2018 (1) SACR 123 (SCA).

⁵ *Corruption Watch v President of the Republic of South Africa; Council for the Advancement of the South African Constitution v President of the Republic of South Africa* (62470/2015) [2017] ZAGPPHC 743 (handed down on 8 December 2017).

⁶ For a discussion of the unfolding of the 'Nkandla scandal' involving corrupt use of public funds for the improvement of President Zuma's private residence, see F Venter, 'Economic Freedom Fighters and Others v Speaker of the National Assembly and Others Cases (S Afr)' (*Max Planck Encyclopedia of Comparative Constitutional Law*, 2017) <<http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e759>> accessed 23 February 2018.

rectors on the boards of state-owned enterprises, whether he exposed himself to the risk of conflict of interest between his official duties and private interests and whether some of his ministers corruptly secured preferential treatment for the Guptas by interfering with independent regulatory bodies.

Zuma took the PP's report on review, causing the remedial action to be stayed pending the outcome of the review. A failed attempt was made in March to prevent the stay.⁷ The eventual effect was a year-long delay of the remedial action. When the Gauteng Division of the High Court delivered its judgment in December 2017, it found that the remedial action was binding on the President, who was ordered to comply forthwith *inter alia* by appointing a commission of inquiry headed by a judge selected not by him, but solely by the Chief Justice.⁸ Furthermore, on finding in a separate but simultaneous judgment that the President was guilty of objectionable conduct amounting to a clear abuse of the judicial process, the Court ordered Zuma to pay the costs of the application in his personal capacity.⁹

When the non-renewable term of office of the PP responsible for the reports of 2014 and 2016 requiring remedial action ended in 2016, she was controversially replaced by a person whose attitude and commitment to the rule of law was obviously different from that of her predecessor. In June, the new PP issued a report on alleged misappropriation of public funds by the Reserve Bank in the 1980s when it forwarded a loan to a private bank in the interest of the stabilization of the banking sector. She directed a reopening of the investigation of the matter, instructed Parliament to take steps to amend the Constitution to alter the mandate of the Reserve Bank by changing its primary objective from

'the protection of the value of the national currency in the interest of balanced and sustainable economic growth,' to 'the promotion of economic growth, while ensuring that the socioeconomic well-being of the citizens is protected.' The report immediately caused serious economic damage and further threats of credit rating downgrading. The Reserve Bank, supported by the Speaker of Parliament and ABSA Bank, urgently made an application in the Gauteng Division of the High Court to review and set aside the remedial action. The PP reluctantly conceded that her 'instruction' to Parliament to amend the Constitution was unlawful and consented to the sought relief. The Court pointed out that the manner in which the PP dealt with this matter exposed her to a charge of hypocrisy and incompetence,¹⁰ which was in strong contrast to the accolades that her predecessor had received.

The Constitution contains two distinct mechanisms for the removal from office of a president. The first is sometimes referred to as 'impeachment,' although section 89(1) does not employ the concept. On the grounds of a president seriously violating the Constitution or the law, engaging in other 'serious misconduct' or being unable to perform the functions of the office, the National Assembly (NA) may, by a two-thirds majority, vote to remove the incumbent. Second, section 102(2) provides for the possibility of the NA adopting a vote of no-confidence in the President, in which event the incumbent President and all cabinet ministers and deputy ministers must resign.

Since taking office, Zuma had been the subject of five draft resolutions of no-confidence, three of which were voted on without obtaining the required majority due to the support of the ANC's parliamentary majori-

ty. In 2017, the opposition parties requested, on the expectation that some of the ANC parliamentarians might support such a motion founded upon Zuma's unexpected cabinet re-shuffle in May (discussed above), that the voting be conducted by secret ballot. The Speaker (a senior ANC functionary) argued that she did not have the authority to allow a secret ballot, but the Constitutional Court set aside her ruling and declared that she did have such constitutional power.¹¹

When the opposition parties again approached the Constitutional Court on the basis that the NA had failed in its obligation to hold the President accountable (as required by section 55(2) of the Constitution) for failure to implement the remedial action taken by the PP in the Nkandla matter,¹² the Court declared that the failure by the NA to make rules regulating the removal of a president in terms of section 89(1) constituted a violation of that provision, and that the NA must make such rules without delay. The Court further ruled that the failure by the NA to determine whether the President had conducted himself in an impeachable manner was inconsistent with its constitutional obligation to scrutinize and oversee executive action and that the NA must comply without delay.¹³

The justices of the Constitutional Court were at odds among themselves on whether the NA should be compelled by the judiciary to perform its oversight and rule-making functions. In his dissenting opinion, the Chief Justice made some unprecedented and unusually acerbic comments about the majority decision, charging them with 'judicial overreach.' At issue were different understandings of, or approaches to the doctrine of the separation of powers. That there were strong differences of opinion among the justices regarding the range of its jurisdiction over

⁷ *Democratic Alliance v Zuma* North Gauteng High Court, Case No: 21029/2017 (handed down on 29 September 2017).

⁸ *President of the Republic of South Africa v The Office of the Public Protector* North Gauteng High Court, Case No 91139/2016 (handed down on 13 December 2017).

⁹ *President of the Republic of South Africa v The Office of the Public Protector* North Gauteng High Court, Case No 79808/16 (handed down on 13 December 2017).

¹⁰ *South African Reserve Bank v Public Protector* 2017 (6) SA 198 (GP) [59].

¹¹ *United Democratic Movement v Speaker, National Assembly* 2017 (5) SA 300 (CC).

¹² See note 6 above.

¹³ *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47 (handed down on 29 December 2017).

executive and legislative matters already became clear in a split judgment in June in a matter concerning prevarication by successive ministers of communications over policy-making regarding the encryption of digital television transmissions.¹⁴

During the year, the Zuma administration's attitude of indifference towards constitutionalism was revealed in various other cases not directly related to him. One of these concerned the government's notice of withdrawal from the Rome Statute of the International Criminal Court, signed by the Minister of International Relations and Cooperation in October 2016. When the DA challenged the constitutionality of this step, the North Gauteng High Court found, again against the back-ground of the doctrine of the separation of powers, that the executive was required by the Constitution to consult Parliament before withdrawing from an international agreement to which the Republic is bound, and ordered the Minister to revoke the notice of withdrawal.¹⁵

In a case concerning the provision of social security services, the courts did not shirk from sharply criticising the executive. In 2014, the contract awarded to a private company to provide services for the payment of social grants was declared invalid, with its invalidity suspended pending a proper procurement process to be completed by March 2017. When the time came to finalize the arrangements, it became clear that the minister and the responsible state agency (SASSA) had not taken the necessary remedial steps, thereby endangering the whole system of social grants on which around seventeen million impoverished people depended.¹⁶ In June, the Constitutional Court ordered an investigation into the relevant Minister's responsibility for the social grants crisis.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Given South Africa's political and constitutional circumstances, the country should be understood to be a developing state measured against the standards of twenty-first century democracy. Although South Africa has a prominent profile on the African continent due to the size of its economy, its infrastructure and development potential, it is no exception when it comes to the difficulties that accompany the reception of the foundational precepts of constitutionalism, despite the solidity of its constitutional text.¹⁷

2017 saw the 23rd celebration of the establishment of South African constitutionalism in the sense of a multi-party democracy functioning under a comprehensive constitutional document which has superior legal force. Being a constitutional dispensation established relatively recently, South African constitutionalism required, and continues to require, much conceptual and foundational development. Although a great deal has been achieved over two decades of constitutional governance (and legislation, sometimes of dubious quality), and of commendable adjudication and scholarship produced in this developing democracy, the events of 2017 underline the reality that the national internalisation of key constitutional principles such as the separation of powers, constitutional accountability and government responsibility for social security and international stability, still needs much effort.

That the attempts to circumvent or undermine the demands of the Constitution described above were largely delayed or thwarted may to a large extent be ascribed to the vigor of the Constitution itself. Between 1997 and 2012, the text was amended 17 times, but none of those amendments were concerned with the core characteristics of the Constitu-

tion or its key foundational provisions. Much has been written on the constitutional propriety of the conduct of those in authority, especially in judgments of the courts and academic publications dealing with the notions of reasonableness, rationality and procedural fairness.¹⁸ These interpretative instruments serve the expansion of solid constitutional doctrine well, despite the impossibility of their precise definition.

In contrast to the failure of Parliament to hold Zuma accountable, Parliament's constitutional oversight functions flourished in work rendered by some parliamentary committees. These committees energetically investigated and exposed shortcomings in the activities of important components of the state structure. The legislative output of Parliament, which amounted to mere routine procedures, paled against the prominence and impact of some of these inquiries.

Additional resources were provided by Parliament at the request of these committees, particularly to involve expert non-member 'evidence leaders' to advise them and to interview and question witnesses during sittings. The authority of these committees did not go unchallenged, for instance when a Minister who was closely questioned about her role in questionable activities accused the committee of conducting a 'kangaroo court.' After obtaining senior counsel opinion, Parliament, however, legitimized the use of evidence leaders. The work of these multi-party committees was often performed in public and broadcast live on television, quite frequently causing considerable turbulence as evidence emerged of ostensible wrongdoing by cabinet members and high-level officials, and corrupt activities of some other state functionaries.

An ad hoc committee that started its work in 2016 conducted an inquiry into the fitness of the board of the public South African Broad-

¹⁴ *Electronic Media Network Limited v e.tv* 2017 (9) BCLR 1108 (CC) [1].

¹⁵ *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP).

¹⁶ *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC).

¹⁷ See, e.g., Fombad C (ed.), *Separation of Powers in African Constitutionalism* (OUP 2016).

¹⁸ A case in point is the dispute between the Public Protector on the one hand and the Reserve Bank and Speaker of the National Assembly on the other, reflected in the case referred to in note 10 above.

casting Corporation (SABC) to discharge its duties as prescribed in legislation and reported to the NA in February. Its terms of reference included consideration of a report of the PP published in 2014, which revealed serious shortcomings in the governance of the SABC. The public proceedings and report highlighted grave abuses and misguided governance and managerial decision-making and resulted in the replacement of the board, and the initiation of a process of substitution of the executive management of the broadcaster.

Misgivings about the affairs of the state-owned power utility, ESKOM, arose early in the Zuma presidency in 2009 and escalated in the following years.¹⁹ The PP's *State of Capture* report of 2016 revealed cogent evidence of systemic corruption in ESKOM. A wide range of institutions of civil society rallied to bring the responsible politicians, business interests, governing body and managers to book. The parliamentary Portfolio Committee on Public Enterprises initiated an inquiry into the governance failures at ESKOM and other state-owned enterprises such as the rail transport (Transnet) and arms manufacturing (Denel) agencies. The Portfolio Committee began its inquiry into the affairs of ESKOM in July 2017, collecting evidence, partly assisted by evidence leaders. The ensuing revelations caused public anger. This resulted in a complete replacement of the ESKOM board in December as a first remedial step taken by Cyril Ramaphosa shortly after he re-placed Jacob Zuma as president of the ANC.

Also seized with various investigations related to corruption in, for instance, the SA Police Service, SASSA and Transnet, was the parliamentary Standing Committee on Public Accounts (SCOPA).

Towards the end of the year, the internal political processes of the ANC resulted in a meaningful change of leadership. No doubt the disconcerting judgments of the courts and the revelations by civil society institutions, the media and academia of wrongdoing combined to generate sufficient pressure

on a small majority of the membership of the ANC to bring an end to an era of kleptocracy, possibly saving the country from the brink of constitutional collapse.

IV. LOOKING AHEAD TO 2018

Constitutional jurisprudence and the political developments in 2017 revealed the need for fundamental adjustments of government conduct and the reaffirmation of constitutionalism. However, the challenges left behind after a decade of degeneration are immense. These include the damaged economy; insufficient competence in the civil service at all levels of government; enormous inequalities in wealth distribution and educational levels; the disjuncture between the quasi-revolutionary ideology of the political majority on the one hand and constitutionalism on the other, hampering rational governance; and the need to restore social stability and the confidence of the international financial and political community.

The Constitution requires the next general election to occur in the course of 2019. It is to be expected that much of the remedial conduct of the government in 2018 will be animated by the wish to retain, or even improve, the electoral majority, and that the opposition parties will attempt to present themselves to the electorate as viable alternatives at the ballot box. Put differently, democratic contestation promises to be pronounced, but there is the potential for the contest no longer being characterized by mere accusations and refutations of corruption but of dealing with substantive issues concerning the dire need for good governance.

V. FURTHER READING

Joanna Botha, 'Towards a South African free-speech model' [2017] SALJ 778

Eric Kibet and Charles Fombad, 'Transformative constitutionalism and the adjudica-

tion of constitutional rights in Africa' [2017] AHRLJ 340

Abraham Klaasen, 'The Duty of the State to act fairly in Litigation' [2017] SALJ 616

AJ van der Walt, 'Property Law in the Constitutional Democracy' [2017] StellLR 8

Jeannie Van Wyk, 'Compensation for Land Reform Expropriation' [2017] TSAR 21

¹⁹ For an authoritative narrative of the ESKOM, see Anton Eberhard and Catrina Godinho, 'ESKOM Inquiry Reference Book' (University of Cape Town's Graduate School of Business, August 2017) <<http://www.gsb.uct.ac.za/files/Eskom%20Enquiry%20Booklet%20Sept%202017.pdf>> accessed 23 February 2018.



South Korea

DEVELOPMENTS IN SOUTH KOREAN CONSTITUTIONAL LAW

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I. INTRODUCTION

The year 2017 was a tumultuous one in the history of Korean constitutional law. It began with the political scandal that involved Soon-sil Choi, a longtime friend of former President Geun-hye Park. After Choi was exposed for interfering with state affairs in the fall of 2016, the Korean public held huge demonstrations and demanded the resignation of President Park. In these circumstances, the National Assembly passed the motion for President Park's impeachment in December 2016. On March 10, 2017, the Constitutional Court reached a unanimous decision to impeach her.

After the impeachment, a presidential election was held in May, and Jae-in Moon was selected as the new President. Thus, the conservative government that had ruled since Myung-bak Lee in 2008 finally ended, with leadership now helmed by liberals. This report introduces the political trend and major cases decided by the Constitutional Court in the year 2017.

II. LIBERAL DEMOCRACY: ON THE RISE OR IN DECLINE?

(1) The Impeachment of Former President Geun-hye Park¹

Although the Korean Constitutional Court

has been dedicated to the democratization and improvement of human rights since its establishment, the decision to impeach President Park gave the Korean people the opportunity to reconsider the relationship between constitutionalism and democracy.

The Constitutional Court reviewed five different reasons for impeaching Park: the violation of popular sovereignty owing to the interference with state affairs by Choi, abuse of her rights as president, bribery, violation of her duty to protect the people's right to life in the Sewol Ferry Disaster, and violation of freedom of the press.² Given these five points, the Court unanimously concluded that Park violated popular sovereignty by allowing Choi to interfere in state affairs.³

The Court's decision on Park's impeachment seems to demonstrate the judicial branch's dedication to the dynamic change of Korean society. However, the Constitutional Court's active decision may set the stage for constitutionalism, in which national rule must be based on the constitution, and democracy, in which the people decide how to control the nation, to collide. In other words, this move raises the question of whether or not it is appropriate for the Justices of the Constitutional Court, who were not elected by the people, to make a decision on the impeachment of the President, who was duly selected by the people via election.

¹ I have commented previously on President Park's impeachment on the personal website of Professor Asaho Mizushima of Waseda University. This section is a summary of my comments there. The original text by Leo Mizushima, "Presidential Impeachment Tribunal by the Korean Constitutional Court – A Conflict between Constitutionalism and Democracy," can be found at <http://www.asaho.com/jpn/bkno/2017/0313.html> (in Japanese), retrieved February 16, 2018.

² "The Constitutional Court Started the Trial of President Park's Impeachment. Rearranged to Five Points of Issues," KBS World Radio, December 23, 2016. http://world.kbs.co.kr/japanese/news/news_Po_detail.htm?No=61908 (in Japanese), retrieved March 11, 2017.

³ "Soon-sil Choi's Influence Peddling – The Core Basis of Park's Impeachment from 5 Points at Issue," SBS CNBC, March 10, 2017. <http://sbscnbc.sbs.co.kr/read.jsp?pmArticleId=10000850613> (in Korean), retrieved February 21, 2018.

To maintain a system of checks and balances, the Justices of the Constitutional Court are nominated by the National Assembly, the Supreme Court, and the President, with each branch nominating three Justices. There is no opportunity for the people to evaluate the Justices of the Constitutional Court. Therefore, the Constitutional Court seems to have made efforts to grasp the “will of the people” and sought to maintain harmony between constitutionalism and democracy. According to the website of the Constitutional Court, Jin-sung Lee, President of the Court, indicated that the Court is always on the people’s side.⁴ Further, experts have noted the paucity of discussion on constitutionalism and democracy, which is attributed to the recent emergence of both concepts at the same time as the achievement of democratization in the 1980s.⁵

However, this attitude of paying attention to the will of the people by the Constitutional Court carries the risk of populism, in which constitutionalism can be forgotten and the rights of minorities ignored. It is time to reconsider whether the Constitutional Court’s decision to impeach Park was dedicated to “democracy,” acknowledging the overwhelming public desire for the retirement of Park, or merely a compromise with populism.

(2) The Beginning of the Jae-in Moon Administration

In the presidential election of May 2017, Jae-in Moon emerged the winner. Moon’s administration started the next day. In Korea’s procedures for appointing heads of Executive Ministries, the candidates should be approved by the National Assembly formally, although this is not legally required. Therefore, the President can appoint heads of Executive Ministries even without the approval of the National Assembly.

The most prominent case in 2017 was President Moon’s nomination of Kyung-wha Kang, former diplomat and professor, as Minister of Foreign Affairs. Kang faced strong objection from the National Assembly because of her daughter’s renunciation of her Korean nationality after obtaining dual citizenship with the United States, as well as address fraud.

Meanwhile, Kyung-hwan Ahn, emeritus professor at Seoul National University and former chairperson of the National Human Rights Commission, was nominated as the candidate for Minister of Justice, but he declined the nomination because the National Assembly criticized his past behavior, such as being sued by a woman for registering their marriage without her consent in the 1970s.

Unlike the United States, it is possible in Korea for a member of the National Assembly to be appointed and serve concurrently as a Minister. This situation has been noted to render such a member of the National Assembly the President’s “subordinate,” thereby causing the legislative branch to be regarded as lower than the executive branch.⁶ Therefore, it is necessary to reconsider the present structure in order to ensure that the system of checks and balances remains functional and to maintain equilibrium between the legislative and executive branches.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

(1) Unconstitutionality of the Road Traffic Act (2016 Hun-Ga 6, May 25, 2017)

On May 25, 2017, the Constitutional Court decided on Article 93 (1)-12 of the Road Traffic Act. According to the Article, a person who steals or robs another person’s vehicle will have his/her driver’s license revoked

or suspended for up to one year. In 2015’s Nu 50780, the case that led to Article 93 (1)-12, the Article was applied to the plaintiff and his driver’s license was revoked, including his large-sized motor vehicle license. The plaintiff insisted that the Article violates the principle of proportionality, and that his driver’s license should remain valid. The Constitutional Court admitted that the Article violates the principle of proportionality, which dictates that the law must not be overly punitive with respect to the criminal’s behavior, and therefore also violated the plaintiff’s freedom of occupation and general right to freedom of conduct.

(2) Unconstitutionality of Enforcement Decree of the Special Act on Remedies and Support of the April 16 Sewol Ferry Disaster (2015 Hun-Ma 654, June 29, 2017)⁷

On June 29, 2017, the Constitutional Court decided on Article 15 of the Special Act on Remedies and Support of the April 16 Sewol Ferry Disaster. According to this Article, persons who apply for compensation for damages and loss of life are required to submit a consent form for not claiming any more rights in this disaster. Further, Article 15 of Enforcement Decree of the Act provides the consent form. Applicants had to sign the form, which decrees that the applicants swear they will never raise an objection once they have received compensation.

The Constitutional Court decided that the Article of the Enforcement Decree was unconstitutional because it violates the principle of reservation of law and the general right to freedom of conduct as well.

(3) Unconstitutionality of the Addenda of Criminal Act (2015 Hun-Ba 239, 2016 Hun-Ba 177 [consolidated], October 26, 2017)

In Korea, politicians and executives of large companies, when sentenced to pay a large

⁴ “Greeting,” Constitutional Court of Korea. <https://www.ccourt.go.kr/cckhome/kor/ccourt/greeting/greeting.do> (in Korean), retrieved March 11, 2017. Note that there is no such phrase in the English version of the page.

⁵ Noriko Kokubun, “Democracy and Constitutionalism in the Korean Constitutional Law,” *Constitutional Law Review*, Vol. 11 (2000), pp. 90–91 (in Japanese).

⁶ Jung-sup Chong, “Structural Principles and Reality of Presidential System in Korea,” *A Study of Constitutional Law*, Volume 3 Second Edition, Seoul: Pakyong Publishing, 2004. pp. 197–198 (in Korean).

⁷ As the English version of the Act is not available on the Korea Legislation Research Institute’s (KLRI) website, I have translated this title into English myself.

fine, often claim to be unable to pay the fine and plead to render services instead, a situation that is considered a social problem. These people choose to render services because the period is relatively short; thus, their punishment is much lighter than paying a large fine. This behavior by politicians and executives is called *hwangje noyeok* in Korean, which translates as “rendering services without any hardships, like an emperor.”

To address this unfair practice, Article 70(2) was newly added in the Criminal Act, and the terms of service imposed as an alternative to large fines were prolonged.⁸ Further, Article 2(1) of the Addenda of the Criminal Act decreed that the amended Act shall apply to all persons who are prosecuted after the enforcement of the Article. In this circumstance, criminals must be punished according to the amended article even if their illegal acts were committed prior to the amendment of the Criminal Act. Therefore, plaintiffs insisted that the Addenda violated their personal liberty because Article 70(2) had not yet been established when they committed their crimes.

On October 26, 2017, the Constitutional Court decided that Article 2(2) of the Addenda was unconstitutional because it violates the principle of *ex post facto*.

(4) Constitutionality of the Addenda of the National Bar Examination Act (2016 Hun-Ma 1152, 2017 Hun-Ma 15 (consolidated), December 28, 2017)

On December 28, 2017, the Constitutional

Court decided that Article 2 of the Addenda of the National Bar Examination Act is constitutional. In 2009, Korea introduced the Law School System, and announced the scheduled abolition of the previous bar exam system after transitional measures. The plaintiffs, bar examinees who had prepared for the exam according to the previous system, insisted that the Addenda took away their opportunity to take the exam, violating their freedom of occupation and right of equality.

The Constitutional Court dismissed the case of the plaintiffs, decreeing that the Addenda do not violate the plaintiffs’ rights. However, in this case, four out of nine Justices considered that the current system violated the right of equality for failing to provide those who cannot afford to attend law schools with the opportunity to be a lawyer.

(5) The Suicide of Professor Kwang-soo Ma and Reassessment of His Challenges to Freedom of Expression

In September 2017, Professor Kwang-soo Ma, a renowned icon of freedom of expression and obscenity in Korea, committed suicide. Ma, a novelist as well as a professor at Yonsei University, was arrested following the release of his novel *Happy Sara*, which was deemed obscene in 1992. The Supreme Court decided the novel was obscene and sentenced Ma guilty of manufacturing and distributing an obscene novel.⁹ In the 1990s, Korean society was so strict with regard to sexual expressions that the Constitutional Court considered expressions deemed

obscene as not protected by the right to freedom of expression stated in the Constitution.¹⁰ Under these circumstances, Ma’s novel was banned and remained unpublished until 2017.

During the 2000s, the spread of the Internet stimulated a rapid change in conventional wisdom in Korea. In 2008, the Supreme Court decided that the Court will no longer regard sexual expressions as obscene and will withhold punishment if the content is artistic.¹¹ The Constitutional Court also retracted the precedent by recognizing that obscene expressions can be secured by freedom of expression in the Constitution, with restrictions according to the needs of public welfare.¹²

After Ma’s death, Korean media began to reassess his life and achievements. Conventional wisdom in Korea today has changed significantly since the 1990s. Ma’s death reminded people that the old society was extremely strict. From today’s point of view, incriminating Ma for publishing a sexual novel was excessively heavy-handed; Ma is now regarded as a man ahead of his time.¹³

IV. LOOKING AHEAD TO 2018

(1) Discussion of Legalizing Abortion

In Korea, abortion is normally prohibited by Articles 269 and 270 of the Criminal Act.¹⁴ However, according to a government survey in 2010, the number of abortions performed was estimated at 169,000, although only

⁸ Criminal Act Article 70(2): A substitute term of lockup of at least 300 days shall be specified for a fine imposed by a sentence, if the fine is not less than 100 million won but less than 500 million won; a substitute term of lockup of at least 500 days, if the fine is not less than 500 million won but less than five billion won; or a substitute term of lockup of at least 1,000 days, if the fine is not less than five billion won. (KLRI, http://elaw.klri.re.kr/kor_service/lawView.do?hseq=40950&lang=ENG, retrieved February 18, 2018. The English versions of Korean Acts are available at the website of the KLRI, https://elaw.klri.re.kr/eng_service/main.do).

⁹ Supreme Court 94 Do 2413, June 16, 1995.

¹⁰ Constitutional Court 95 Hon-Ga 16, April 30, 1998.

¹¹ Supreme Court 2006 Do 3558, March 13, 2008.

¹² Constitutional Court 2006 Hun-Ba 109, 2007 Hun-Ba 49•57•83•129 (consolidated), May 28, 2009.

¹³ “Ⓢ Socially Harmful, Ⓢ Attracting Only Sexual Interest – Criterion of Obscenity,” Weekly Donga, November 28, 2017, <http://news.donga.com/WEEKLY/rss/3/home/13/1139326/1> (in Korean), retrieved December 7, 2017.

¹⁴ Criminal Act Article 269(1): A woman who procures her own miscarriage through the use of drugs or other means shall be punished by imprisonment for not more than one year or by a fine not exceeding two million won.

Article 270(1): A doctor, herb doctor, midwife, pharmacist, or druggist who procures the miscarriage of a woman upon her request or with her consent shall be punished by imprisonment for not more than two years. (KLRI, http://elaw.klri.re.kr/kor_service/lawView.do?hseq=40950&lang=ENG, retrieved February 6, 2018).

6 percent of these were legal procedures.¹⁵ The Article was deemed dead letter because only around 10 abortion cases were prosecuted.¹⁶

Meanwhile, a people's petition to legalize abortion garnered 200,000 signatures, and Kuk Cho, Senior Presidential Secretary for Civil Affairs, promised to conduct a survey on abortion in aid of legislation.¹⁷ According to Cho, he aimed to introduce other procedures, except punishment, in acknowledgment of the ill effects of the current illegal status of abortion, such as illegal surgery, forcing women to have abortions overseas, and males' irresponsibility.¹⁸ The Constitutional Court is currently reviewing the Article of the Criminal Act that bans abortions.¹⁹

(2) Exculpation of Conscientious Objection

In Korea, it is mandatory for males to complete the required years of military service. According to Article 88(1) of the Military Service Act, a person who does not enlist in military service within three days of the scheduled date shall be punished by imprisonment with labor for not more than three

years.²⁰

The Supreme Court had never found conscientious objectors innocent;²¹ those who refused military service enlistment for religious reasons had always been convicted and punished accordingly. The Constitutional Court reviewed this issue in 2004 and 2011, but the Court never recognized freedom of conscience for conscientious objectors as well.²²

From 2017 to 2018, the Jeju District Court handed down decisions on four different conscientious objection cases; in three of these cases the defendant was found innocent.²³ The Constitutional Court is currently discussing conscientious objection. The public awaits the Court's decision.²⁴

(3) Japan-Korea Relations on the "Comfort Women" Agreement

In December 2015, the "Comfort Women" Agreement was reached between the governments of Japan and Korea. Fumio Kishida, Japanese Minister of Foreign Affairs, and his counterpart, Byung-se Yun, held a

joint press conference in Seoul.²⁵ Kishida announced first that Prime Minister Shinzo Abe expressed his most sincere apologies to the former comfort women, second that the Japanese government would allocate funds for the Korean government to establish a foundation to support former comfort women, and third that the Japanese government considered the issue resolved finally and irreversibly, and that both Japan and Korea will refrain from raising complaints on this issue in the future.²⁶ In response, Korean Foreign Minister Yun declared first that the Korean government values the Japanese government's efforts and confirmed that the issue is resolved finally and irreversibly, second, that the Korean government would strive to solve the issue regarding the statue built in front of the Japanese Embassy in Korea, and third, that both Korea and Japan will refrain from raising complaints on this issue in the future.²⁷

However, after the suspension of President Park in December 2016, the Korean government could no longer fulfill the Agreement, and another "comfort women" statue was installed in front of the Japanese Con-

¹⁵ "Blue House responds to petition for abortion rights with launch of fact-finding study," Hankyoreh, November 27, 2017, http://english.hani.co.kr/arti/english_edition/e_national/820904.html, retrieved February 18, 2018.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Military Service Act Article 88(1): Any person who has received a notice of enlistment for active duty service or a notice of call (including a notice of enlistment through recruitment) and fails to enlist in the military or to comply with the call, even after the expiration of the following report period from the date of enlistment or call without justifiable grounds, shall be punished by imprisonment with labor for not more than three years: *Provided*, That where a person who has received a notice of check-up to provide a call for wartime labor under Article 53(2) is absent from the check-up at the designated date and time without justifiable grounds, he shall be punished by imprisonment with labor for not more than six months or by a fine not exceeding five million won, or by misdemeanor imprisonment:

1. Three days for enlistment for active duty service;
 2. Three days for a call-up to social work personnel service;
 3. Three days for a call for military education;
 4. Two days for a call for military force mobilization and a call for wartime labor.
- (KLRI, http://elaw.klri.re.kr/kor_service/lawView.do?hseq=39201&lang=ENG, retrieved February 27, 2018).

²¹ "Jeju District Court Sentenced Innocent for the Objectors for Religious Reasons," Pressian, February 9, 2018, <http://www.pressian.com/news/article.html?no=185800> (in Korean), retrieved February 2, 2018.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ "Announcement by Foreign Ministers of Japan and the Republic of Korea at the Joint Press Occasion," Ministry of Foreign Affairs of Japan, December 28, 2015, http://www.mofa.go.jp/a_o/na/kr/page4e_000364.html, retrieved February 19, 2018.

²⁶ Ibid.

²⁷ Ibid.

sulate-General in Busan. Japanese-Korean relations deteriorated significantly. As the Agreement had been reached during the Park administration, candidates in the 2017 presidential election ran on a platform of reviewing the Agreement. Moon, upon assuming office, decided not to renegotiate with Japan over the Agreement, instead demanding a direct apology for former comfort women from the Japanese government.

At present, many Japanese people are accusing Korea of failing to uphold the third item of the Agreement and to fully execute the terms of the second (the removal of the statue) while many Korean people continue to blame Japan for not apologizing satisfactorily (from the perspective of Korea) for its colonization of Korea. From a legal perspective, these miscommunications between Japan and Korea must be derived from the structural difference in the legal system of each country, especially recognition of international law.

According to Article 98 of the Japanese Constitution, “the treaties concluded by Japan and established laws of nations shall be faithfully observed.”²⁸ In the legal system in Japan, international laws are regarded as being higher than domestic laws, except for the Constitution.

Meanwhile, Article 6(2) of the Korean Constitution decrees that “treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.”²⁹ Thus, international laws can be recognized as being on the same level as domestic laws at most, but cannot be regarded as superseding domestic laws. For instance, Nak-In Sung, professor of Korean constitutional law, explained that treaties approved by the

National Assembly have the same effect as domestic laws.³⁰ Moreover, in contradictions between international and domestic laws, either the newer law or the law equivalent to special law will take priority over the other.³¹ Indeed, 82 percent of international treaties concluded by the Korean government are not approved by the National Assembly.³² As the “Comfort Women” Agreement was not even documented officially, the binding force of the Agreement must be weak with respect to the structure of the Korean legal system.

Unfortunately, as Japan and Korea are geographic neighbors, those unfamiliar with both countries tend to misunderstand the two as sharing the same culture and mentalities. To revive Japanese-Korean relations and strengthen their bond, and if discussions on diplomatic issues, such as historical issues, are to be meaningful and fruitful, it is inevitable and essential to recognize the fact that the two countries have significantly different legal structures and systems.

V. FURTHER READING

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Sung, Nak-In. *Constitutional Law*, Paju: Bobmun Sa, 2015 (in Korean)

²⁸ The English version of the Japanese Constitution is available on the website of the Prime Minister of Japan and His Cabinet, https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html, retrieved February 18, 2018.

²⁹ The English version of the Korean Constitution is available at *The Constitution and the Constitutional Court Act*, Seoul: The Constitutional Court of Korea, 2006.

³⁰ Nak-In Sung, *Constitutional Law*, Paju: Bobmun Sa, 2015, p. 318. (in Korean)

³¹ *Ibid.*

³² “Government Concluded 82% International Treaties without Ratification of National Assembly,” Hankyoreh, April 11, 2011, http://www.hani.co.kr/arti/politics/politics_general/472331.html (in Korean), retrieved February 21, 2018.



Spain

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

In 2017, the constitutional court was subject to its 12th renewal since its creation in 1981. The four judges chosen by the senate were renewed and the plenary constitutional court selected a new president and vice president for the coming three years. Maintaining a gender balance, the presidency of the court has fallen to Juan José González Rivas, and the vice presidency to Encarnación Roca Trías, who also coordinates this report.

This report covers the three significant questions that have formed the focus of the constitutional court’s work in 2017. First, there are the numerous judgements linked, once again, to the Catalan independence process, and specifically to the calling of the self-determination referendum on 1 October 2017. The report also covers the various constitutional court processes imposing fines on various administrative authorities in order to ensure execution of judgements declaring the unconstitutionality of acts in preparation for the independence referendum. In relation to that, the end of the report also includes some thoughts about the application of state mechanisms of coercion to the Autonomous Community of Catalonia.

Second, this report covers constitutional court decisions which are still being handed down about the extraordinary spending cuts approved by the government in 2012. In particular, it examines judgements related to

the controversial tax amnesty for previously undeclared income, and to refusing access to the public health system to unlawful residents in Spain. These two measures received different judgements from the constitutional court. Finally, the report covers the state of case law about fundamental rights and its development in relation to past case law.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

It would be a difficult and complex piece of work to evaluate the state of liberal democracy in Spain.¹ For reasons of space and the particular objectives of this article, we will limit ourselves to those matters involving constitutional jurisprudence as the guardian of the complex equilibrium between the state of law and democracy.

The constitutional court has been one of the principal actors in defence of the constitution against the sustained, continuous attack triggered by the institutions of the Autonomous Community of Catalonia. During 2017 there was an intensification in the offensive against the basic rules of law by the Catalan parliament, the Catalan government, and the president of the community. These attacks were markedly different from those conflicts we see in more established democracies, which usually centre on differences in interpretation of what the constitution permits or protects. The cases presented to the

¹ Of great interest, and very current: M. PRESNO LINERA “Algunos apuntes sobre la calidad de la democracia española”, *Revista de Derecho constitucional europeo*, núm. 28, 2017. Disponible en http://www.ugr.es/~redce/REDCE28/articulos/11_PRESNO.htm

court were not of this type. They are evident, conscious contradictions of the constitution, which are only justified by not admitting the supreme judicial rule of the constitution, and by similarly rejecting the capacity of the constitutional court to nullify rules from unconstitutional laws. Thus, we witness an attempt to construct a new legitimacy outside that represented by the constitution, a confrontation between a revamped form of identity democracy and liberal democracy; a conflict between a decisionist form of democracy – based on the most fantastical understanding of principles such as sovereignty and concepts such as constituent power, people, or referendum – and a constitutional democracy based on deliberation and respect for the minority.

The conflict between the institutions of the Autonomous Community of Catalonia and the state, which has been simmering away since 2012, entered a new phase when, on the 6th of September, the Catalan parliament passed law 19/2017 so-called “on a referendum of self-determination”, a law which was suspended by the constitutional court the following day, applying powers under articles 161.2 CE (Spanish Constitution) and 30 LOTC (Organic Law of the Constitutional Court). Despite the complete lack of legal cover, the Generalitat of Catalonia continued with the referendum, which was held on the 1 October 2017, during which there were violent clashes between members of state security forces and groups that claimed a right to vote that the constitutional court had not recognised. That day marked a turning point, because according to the aforementioned law 19/2017, the result of the referendum would be legally binding; it specified that in the event of a majority in favour of independence, parliament would unilaterally declare the community’s independence. However, in the parliamentary session called for that purpose (10 October 2017), the president of the autonomous community called on parliament to approve independence, and at the same time, for the suspension of

any of its effects. This state of confusion continued for some days during which attention was almost exclusively on President Puigdemont as the person who, according to the Statutes of Autonomy, had jurisdiction over calling elections for the autonomous community parliament, the only democratic way of resolving the conflict. Finally, he decided against calling an election, and at that time the procedure set out in article 155 of the constitution was activated. This is an exceptional mechanism, to be used in cases where an autonomous community fails to meet its constitutional obligations or acts in a way which is contrary to Spain’s general interest. The measures passed by an absolute majority in the senate included the dismissal of the president and members of the government of the autonomous² community, and an immediate call for elections for the Catalan parliament for 21 December 2017.³ Both the electoral process as well as the circumstances surrounding the investiture of a new president have given rise to multiple conflicts which have been, or will be, addressed by various courts (from the lower courts to the constitutional court, and including the European Court of Human Rights).

The constitutional court has not been able to avoid this chain of events in 2017. Its constitutional position has placed it front and centre of the judicial response to the challenge of independence. As the guardian of constitutional regulation against any law that would weaken it, as the protector of jurisdictional balance, and as the ultimate guardian of fundamental rights, it has had to intervene when requested (usually by the state). It is, therefore, not at all strange to see the number of judgements this year that were linked to independence. Some were addressing substantive issues and others were aimed at confirming the executability of measures taken (the new powers granted by the Organic Law on the Constitutional Court revised by Organic Law 15/2015 have been extremely important).

Any approach to constitutional case law in 2017 with regard to the secessionist process had to address various factors: first, how, and to what extent the questions before the court are dealt with. Even in those cases in which the institutions responsible for the actions or rules being challenged are clearly and deliberately unconstitutional (for example, the so-called “self-determination referendum” law 19/2017), the court (see, for example, judgement STC 114/2017) did not limit itself to settling the matter by noting the evident contradictions with the constitution (and similarly the contradictions with the Catalan Statute of Autonomy) but rather it attempted discussion to find an understanding in law. The Spanish constitutional judiciary acted in a way that makes it fully aware of its position in a deliberative democracy. Second, it is significant that both the judgements and the resolutions in all of the cases were unanimously agreed by the judges. Third, it had to make clear the common lines of argument in this case law: the defence of the state of law and democracy as well as affirming the supremacy of constitutional rules, not as *lex perpetua* but rather as an agreement that is open to reform as long as the proper procedures are followed.

As already indicated, the secessionists made the so-called referendum the key part of their strategy in 2017 (continuing down the path signposted by Catalan Parliamentary resolution 1/XI, 9 November 2015, which was declared unconstitutional and invalid by judgement STC 259/2015). Achieving that goal needed the explicit and coordinated application of the Catalan government and parliament along with a number of social movements which were unexpected allies. The first attempt to give legal cover to a referendum on self-determination dates back almost a decade: Catalan parliament Law 4/2010, 17 March, on popular consultation by referendum. The constitutional court passed judgement on an appeal of unconstitutionality, raised by the president of the government, in judgement STC 51/2017, in

² Royal Decree 944/2017, 27th October, which designates those bodies and authorities charged with carrying out measures directed by the government and the administration of the Generalitat de Catalonia, authorised by the agreement of the Senate on the 27th of October 2017, which approves the measures requested by the government under the auspices of article 155 of the constitution.

³ Royal Decree 946/2017, 27 October, calling for the dissolution of the Parliament of Catalonia and new elections.

which it declared the part of the law referring to the referendum in the autonomous region unconstitutional and invalid. The main argument linking this judgement to previous decisions is that it is not possible to use a popular consultation in the autonomous regions – referenda or otherwise – to settle fundamental issues that had been resolved in the constitutional process, as that would be removing the decision from the constituted authorities [STC 51/2017, FJ 5 c) y d].

Despite all of that, the insistence of the Catalan institutions to hold a referendum was clear. That was the goal of Catalan Law 4/2017, 28 March, on the Generalitat budget for 2017, which included various budget items referring to “electoral and popular consultation processes”. The constitutional court responded to the appeal lodged by the president of the government in judgement STC 90/2017, declaring the sections aimed at financing the referendum process unconstitutional and invalid.

A new episode opened when the Catalan parliament passed law 19/2017. That law was directly aimed at violating constitutional rules by calling a referendum on self-determination for 1 October 2017. In judgement STC 114/2017, the court declared the entire law unconstitutional and invalid for a manifest lack of competence, for reasons of material order (flagrant violation of articles 1.1, 1.2, 2, 9.1 and 168), and for the failure to follow rules guaranteeing the participation of minorities in parliamentary procedure. In short, the constitutional court stated that: “The Parliament of Catalonia has purported, by means of Law 19/2017, to cancel de facto, within the territory of Catalonia and to Catalan people as a whole, the validity of the Constitution, of the Statute of Autonomy and any rules of law that would not fit or adapt to the dictates of its invalid will” (FJ 5).

It is surely this judgement which is the most representative of the past year, given the magnitude of the challenge posed by the invalidated law. It also explains the need for a whole raft of resolutions aimed at ensuring the judgement’s effectiveness. See, for example, judgement STC 120/2017, which established the invalidity of a parliamentary

resolution nominating members of bodies to control the electoral process; or 121/2017, declaring the invalidity of regulations regarding holding the self-determination referendum; and 122/2017, which annulled the decree calling the referendum. Judicial decrees have been especially interesting and significant, such as Order 126/2017, which imposed fines on members of electoral panels. In the court’s judgement, coercive fines were appropriate and necessary to reestablish constitutional order.

The final judgement we concern ourselves with is the decision on the second key piece of the secessionist process, which would have culminated in founding the Republic of Catalonia. This is Catalan parliament law 20/2017, so-called “of Juridical Transition and founding of the Republic”, the object of which was to shape a juridical transition to the new Catalan state that would exist after the unilateral declaration of independence. The constitutional court declared that law invalid in judgement STC 124/2017, reiterating the majority of the arguments given in 114/2017. Once again, the court has spoken in the defence of law, without which no democracy is possible.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

There were few rulings handed down from the constitutional court in 2017 which responded to requests for *amparo* (protection of fundamental rights and freedoms). This is because, following the reforms in Organic Law 6/2007, 24 May, the court only accepted those cases with “particular constitutional significance” in the court’s assessment [article 50.1 b) of the Organic Law of the Constitutional Court], which is ever more strict when evaluating against this requirement.

Because of the need to justify addressing requests with particular constitutional significance, most of the court’s judgements have been aimed at clarifying or expanding constitutional doctrine related to fundamental rights. Notable decisions include the following:

Judgement STC 2/2017, 16 January, in which the right not to be discriminated against for reason of sex was violated in the case of a worker who was prevented from exercising her preferential right to change her working conditions, as recognised by a collective labour agreement, following maternity leave. On the other hand, in judgement STC 105/2017, 18 September, the right to not be discriminated against because of birth was not recognised for a woman born out of wedlock before the effective date of the 1978 constitution. The petitioner’s inheritance rights were not recognised as she had never been acknowledged by her father; however, the court did not approve *amparo*, understanding that the hereditary succession occurred before the effective date of the constitution and was a case of strict ordinary legality under the application of the transitional provisions of the 1981 civil code. This was a controversial decision, with one dissenting opinion.

In relation to the rights of foreigners, judgement STC 14/2017, 30 January, approved *amparo* for a foreign citizen and declared that his right to effective legal protection had been violated. The court considered that the administrative and legal decisions which stipulated his expulsion from Spanish territory did not take into account his personal and family circumstances. Similarly, judgement STC 29/2017, 27 February, approved *amparo* for violation of the right to legal protection, with the court reasoning that the legal decisions that stipulated substituting a prison sentence with expulsion from the country did not take into account the existence of family ties.

Judgement STC 8/2017, 19 January, applied the doctrine handed down by the European Court of Human Rights in the ECHR rulings of the 25 April 2006 (*Puig Panella v. Spain*); 13 July 2010 (*Tendam v. Spain*), and 16 February (*Vlieeland Boddy & Marcelo Lanni v. Spain*), recognising the petitioners’ rights to compensation from the state, with support in the right to the presumption of innocence, after having been subject to preventive prison detention and finally found not guilty.

In judgement STC 39/2017, 24 April, the

constitutional court declared that the right to effective legal protection had been violated due to insufficient investigation of a complaint of torture and it insisted on the need to apply stronger investigative rules when dealing with complaints of torture or mistreatment by state security agents. The court added that an effective investigation must be carried out more rigorously when the claimant is detained incommunicado (ECHR judgements from 7 October 2014, *Ataun Rojo v. Spain*; 7 October 2014, *Etxebarria Caballero v. Spain*; 5 May 2015, *Arratibel Garciandia v. Spain*, and 31 May 2016, *Beortegui Martínez v. Spain*).

In cases of appeals of unconstitutionality, it is worth highlighting in this period the various resolutions in which plenary sessions of the court established that the state has exclusive competence over determining who receives medical services, and consequently, that autonomous communities do not have the competence to extend healthcare coverage to foreign nationals in Spain unlawfully (given that state law excludes them), except in cases of urgent medical need (STC 134/2017, 16 November, among others).

With regard to participation of citizens in public matters, in judgement STC 123/2017, 2 November, the court declared the unconstitutionality of a Valencian autonomous community law and underlined the fact that senators from autonomous communities occupy the same constitutional position, and are subject to the same common legal framework, as the other members of parliament. These senators represent all Spanish people as a whole and are not subject to a binding mandate except that they may be subject to oversight or control from the autonomous community that nominated them. In addition, the court stated that there was no jurisdictional framework that allowed the autonomous community to impose an obligation on those senators, or revoke their nomination, as that would be interfering with state institutions.

Finally, judgements STC 86, 87, 88 and 89/2017 refer to the language regime in Catalonia, as there are two official languages (Catalan and Spanish) which coexist in this autonomous community, and state and au-

tonomous community legislation must guarantee the principle of parity between them. In the four judgements above, the court has tended towards an interpretation in accordance with the precepts of the challenged autonomous community rules. So, for example, the court found it constitutional for Catalan to be the common language for policies of fostering and integration of immigrants in Catalonia (STC 87/2017). On the other hand, the court appreciates that the right to receive certain documents and information in Catalan must be understood within the requirement for consumers to receive information in Spanish (STC 88/2017).

In recent years, the constitutional court has had to rule on the constitutionality of various measures passed by the state in response to the serious economic crisis. For 2017 there are three significant judgements to highlight. The first is linked to tax amnesty, the others to limits imposed on autonomous communities in terms of healthcare provision to people in Spain illegally.

In judgement STC 73/2017, 8 June, the constitutional court responded to the question of whether a decree-law – envisaged in the Spanish constitution 1) in cases of extraordinary and urgent need, and 2) which may not affect the regulation of the rights, duties and liberties contained in Title I of the constitution – could be used to regulate a tax amnesty. Decree-law 12/2012, passed by the government, would allow taxpayers to regularise undeclared income, paying a fixed amount of 10%. Payment would mean non-application of fines, interest or surcharges.

The constitutional court accepted that the decree-law passed by the government responded to a case of extraordinary and urgent need (reducing the effects of the economic crisis), but understood that the decree-law affected the regulation of the rights, duties and liberties contained in Title I of the constitution. In particular, the core obligation of contributing to sustain public expenditure in proportion to one's financial means. The constitutional court deemed that the tax amnesty affected the core of that obligation because it affected 1) all tax contributors, and 2) all of the elements of tax liability (tax rate, interest on ar-

rears, surcharges and punishment). Because of that, the constitutional court deemed decree-law 12/2012 unconstitutional.

The constitutional court also had to rule in judgements STC 134/2017, 16 November, and STC 145/2017, 14 December, on whether the autonomous communities could continue to offer healthcare to foreigners in Spain illegally, after the state had denied their right to said publicly funded healthcare via decree-law 16/2012. The state believed that the decision of the autonomous communities to continue to offer healthcare to those foreigners who were in Spain illegally did not fall under the protection of autonomous community competence over the development and execution of basic state regulation of health matters. The state believed that the communities' decision had violated their exclusive competence over regulating the rules and general coordination of health matters.

The constitutional court found that the definition of who may receive treatment from the healthcare system must be considered basic regulation of health matters. Therefore, the decision by the autonomous communities to continue offering healthcare to foreigners in Spain illegally was unconstitutional. These decisions from the constitutional court had a number of dissenting opinions.

IV. LOOKING AHEAD TO 2018

After almost 40 years of the 1978 Spanish constitution being in effect, in 2017 the Spanish government, for the first time, invoked the full application of the extraordinary mechanism of state coercion against an autonomous community, outlined in article 155 of the constitution. The serious and continued failure to comply with the court's multiple resolutions declaring the regulations and laws related to the 1 October self-determination referendum as unconstitutional led the state to adopt different measures to ensure compliance with the constitution. They included the dismissal of members of the Catalan government, the dissolution of the Catalan parliament and the calling of new elections.

The application of article 155 has been contested in the constitutional court by the Podemos parliamentary group in the national parliament and by the Catalan parliament. 2018 may see, for the first time, a substantial decision about the content of article 155, and in particular, whether it allows the dismissal and dissolution of autonomous community bodies, something which has been the subject of serious academic discussion. In 2018, the constitutional court will also have to respond to the challenge of Carles Puigdemont's candidacy for the presidency of Catalonia and his intention to be remotely sworn in from Brussels. The absence of a president in the Generalitat and the controversial candidates being proposed in place of Puigdemont threaten to extend the application of article 155 in 2018.

V. FURTHER READING

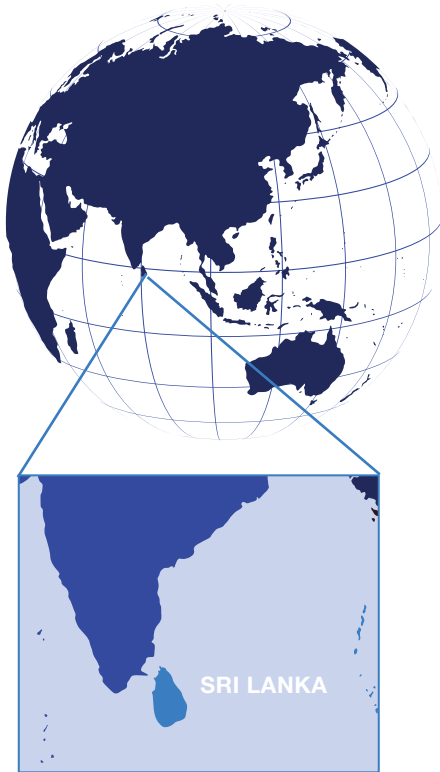
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Sri Lanka

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

A mixed set of developments characterised the state of liberal democracy in Sri Lanka in 2017. On the one hand, a number of Supreme Court decisions yielded outcomes that advanced liberal democracy, in particular one judgment that recognises an implicit right of internal self-determination for the minority Tamil people. In the same vein, after a long period of stagnation, the constitutional reform process launched in 2015 reached a significant milestone with the publication of the Interim Report of the Steering Committee of the Constitutional Assembly. This report, which sets out the broad parameters for the drafting of a new constitution, represented progress on a number of substantive issues. It included proposals for the abolition of semi-presidentialism and a return to parliamentary government, for the further devolution of power, the introduction of a second chamber and a new electoral system, and an attempt to rearticulate the nature of the state in a more accommodating way for minorities.

On the other hand, none of these developments may ultimately represent any meaningful progress. The judicial decisions, including the landmark judgment on self-determination, rest on weak and ambiguous reasoning which would not bind or even guide a future court to any consequential extent. The constitutional politics is even more precarious. By the time the Interim Report was published in September, the process, which had begun with high hopes for reforms, had

become stale to the point of irrelevance in democratic discourse. Public apathy and lack of knowledge had been engendered by the government's poor communications and ill-discipline with regard to process time-lines. The success of constitutional reform in any case depended on the maintenance of the government of national unity elected in 2015. By the end of 2017 and early 2018, this unity had fractured beyond repair, and with it the prospect of further reform has disappeared for the foreseeable future.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

A number of Supreme Court decisions in 2017 appeared to signify a liberal turn in the court's attitude to both individual and group rights as well as to upholding the rule of law. From a constitutional development point of view, potentially the most momentous was the decision recognising a right of internal self-determination for minority Tamils, although it is unclear the extent to which the court's observations were merely *obiter*. In the context of the highly centralised conception of the unitary state in Sri Lankan constitutional law and politics, and indeed the tradition of extreme judicial caution in relation to matters of minority rights, the radical *potential* of this decision cannot be overstated.¹ It does not follow, however, that the judgment would have any influence in transforming constitutional politics in a liberal direction. The other cases represent liberal

¹ Asanga Welikala, 'The Sri Lankan Conception of the Unitary State: Theory, Practice, and History' (2016) CPA Working Papers on Constitutional Reform No.1 <<http://constitutionalreforms.org/wp-content/uploads/2016/06/CPA-Working-Paper-1.pdf>> accessed 14 March 2018.

outcomes, which are not insignificant in an illiberal social and political context. However, as judgments mostly concerned with questions of fact and the straightforward application of existing law, they cannot be described as profound examples of the judicial development of the substantive content of rights.

In *Coleman v. Attorney General*,² the court found a violation of a British national's fundamental rights to freedom from torture and degrading treatment, and the freedom from arbitrary arrest and detention. The petitioner, a tourist, had been subject to serious harassment and extortion on account of a tattoo on her arm depicting the Buddha, leading to an illegal arrest and detention by the police as well as an illegal deportation order by a magistrate. These violations of fundamental rights were established on the facts without difficulty, which the court described as 'horrific and scandalous'.³ However, the perceived disrespect for Buddhist images and idols by Western tourists has been a sensitive issue in the recent past. In upholding fundamental rights guaranteed to non-nationals by the Constitution, therefore, the court was treading on potentially explosive social sensitivities.

In *Buwaneka Lalitha v. Kumarasinghe*,⁴ the court upheld a decision of the Court of Appeal in nullifying the election of a Member of Parliament. The case turned on the issue of fact whether the appellant had been disqualified from standing as a candidate in the general election of August 2015 by not having effectively renounced her dual citizenship of Switzerland on the date of election.⁵ The court found that the necessary renunciation had not been made absolute on either the date of election or on the date at which she

took her oaths as a Member of Parliament. This was politically significant in upholding the rule of law against the appellant, who had been conspicuously economical with the truth in relation to her legal disqualification. More importantly, the court extended the application of the writ of *quo warranto* to legal challenges to the election of MPs.⁶ This expands the possibility for citizens to challenge the election of MPs. Up until this judgment, it was unclear whether a citizen had such a cause of action; only other candidates at the election were permitted to challenge the legality of an MP's election through an election petition.⁷

By far, however, the most significant constitutional decision in both legal and political terms was in *Chandrasoma v. Senathiraja*.⁸ The case was triggered by a petitioner who sought a declaration that the Federal Party had secession as one of its aims, and consequently for its proscription as required by the Sixth Amendment to the Constitution. The Federal Party is the main vehicle of minority Tamil nationalists who seek federal autonomy in the northeast of the island. The Sixth Amendment prohibits the advocacy of secession in any form, and imposes major criminal penalties and civic disabilities on those found in violation of the bar, upon a declaration to that effect by the Supreme Court. Dep CJ was persuaded, with the other two judges agreeing, that the Federal Party's claims to shared sovereignty and federal autonomy within the framework of a united and undivided Sri Lanka were legitimate political claims which did not amount to an advocacy of secession. The application was accordingly dismissed without costs.

The court acknowledged that the old constitutional classification as between unitary

states and federations is now increasingly blurred and unstable. In recognising that forms of federalism can, in fact, exist within formally unitary states through processes of devolution and multilevel governance, it implicitly acknowledged the well-known distinction between 'federalism' and 'federation'. But it is a completely novel proposition in Sri Lankan constitutional discourse, which has remained stubbornly wedded to the older formalist categories.

The petitioner's argument with regard to the Federal Party's claim of a Tamil right to self-determination was that this necessarily includes an implicit assertion of a right to secession at will, even if that option is not for the time being exercised, because if a people are to fully control their political status, self-determination must necessarily include the right to form an independent state. This is the traditional view of self-determination as expressed in common article 1 of the two human rights Covenants. In response, the Federal Party asserted that the Tamils were a people for the purposes of the international law principle of self-determination, including the right in the form expressed in the Covenants. However, they qualified this by reference to the internal/external distinction in the exercise of the right recognised by the International Court of Justice in the *Kosovo Advisory Opinion* and by the framework established by the Canadian Supreme Court in the *Quebec Secession Reference* by which there would be no unilateral right to external self-determination unless conditions were such that the internal exercise of the right was systematically prevented or violated.

The Supreme Court agreed with the Federal Party's contentions in holding that '...it is clear that the right to self-determination has

² *Coleman v. Attorney General* SC (FR) App. No. 136/2014 (LKSC, 15 November 2017). <http://www.supremecourt.lk/images/documents/sc_fr_136_2014.pdf> accessed 14 March 2018.

³ *Ibid*, per Gooneratne J at 14.

⁴ *Buwaneka Lalitha v. Kumarasinghe* SC Appeal 99/2017 (LKSC, 2 November 2017). <http://www.supremecourt.lk/images/documents/sc_appeal_99_2017.pdf> accessed 14 March 2018.

⁵ Constitution of Sri Lanka (1978): Article 91(1)(d)(xiii).

⁶ *Buwaneka Lalitha v. Kumarasinghe*, supra n.4, per de Abrew J at 20.

⁷ Parliamentary Elections Act, No.1 of 1981: s.95.

⁸ *Chandrasoma v. Senathiraja* SC SPL No. 03/2014 (LKSC, 4 August 2017). <http://www.supremecourt.lk/images/documents/sc_spl_03_2014.pdf> accessed 14 March 2018.

an internal dimension, in that it could be exercised within the country to the benefit of a “people” inside the country. Thus, the invocation of self-determination does not amount to a demand for a separate State, as the right is sometimes to be used internally within the territory of an existing State’.⁹

While of course the principle of self-determination so understood bars a unilateral right to secession, the necessary implication of this conclusion is that Sri Lanka seems now to have been judicially recognised as a multi-*demoi* polity, with the Tamils having an entitlement to some form of constitutional accommodation of their claim to internal self-government. It follows, further, from this pluralistic understanding of the societal foundations of the Sri Lankan state that the monistic concept of sovereignty underpinning the current constitutional order would have to be reconsidered.

These cases and especially *Chandrasoma v. Senathiraja* would seem to signal a strengthening of liberal values within the constitutional system. However, the Sri Lankan Supreme Court, while often the authoritative arbiter of disputed issues of constitutional law, is not a dominant player in constitutional politics in comparison to its regional counterparts. Thus, *Chandrasoma* passed almost without comment. The government, engaged in a major constitutional reform process in 2017 (see below), including on questions of further devolution to address Tamil demands for autonomy, and to which therefore the decision was of central relevance, did not seem to notice its importance, or deliberately chose to ignore it given its radical implications. Even more inexplicably, Sinhala-Buddhist majoritarian nationalists in the opposition, implacably opposed to even the current level

of limited devolution and normally needing no excuse for loud denunciations of judicial liberalism, also studiously ignored it. Whatever the reasons might be for this equitable political response, it demonstrates the relative marginality of the Supreme Court in major questions of constitutional politics. The liberal democratic potential of judicial decisions therefore must be assessed with a commensurate degree of modesty.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The most important constitutional development in 2017 was the publication of the Interim Report of the Steering Committee of the Constitutional Assembly, after a long period of stasis in the constitutional reform process. The presidential and parliamentary elections of 2015 brought to power a government of national unity promising major constitutional reforms. The first phase of reform was completed with the enactment of the Nineteenth Amendment to the Constitution in April 2015.¹⁰ This amendment was a significant recalibration of the institutional balance of power in the state by transforming the 1978 Constitution from a ‘president-parliamentary’ to a ‘premier-presidential’ model of semi-presidentialism.¹¹

In March 2016, Parliament passed a resolution by which it would simultaneously sit as a Constitutional Assembly to deliberate on a new constitution.¹² Its Steering Committee, chaired by the Prime Minister and comprising parliamentary party leaders and other senior Members of Parliament, was tasked with producing an Interim Report which would set out an agreed basis on which the

new constitution would be drafted.

The Interim Report as eventually published in September 2017 was by no means technically perfect,¹³ but it did outline a package of fairly significant reforms, taken together with the recommendations of the sub-committees of the Constitutional Assembly that reported in 2016.¹⁴ In addition to the proposals regarding the national executive and devolution discussed below, there would also be a new bill of fundamental rights, possibly including socioeconomic rights. Some attempt would be made to render constitutional symbols more inclusive of minority sensitivities, and in this respect, the principle of the unitary state, together with strong anti-secession safeguards, would be recast as primarily an expression of the territorial indivisibility of the state, rather than a conceptual tool of excessive centralisation. A second chamber, with delaying rather than revisionary powers, would be partly elected by the Provincial Councils to ensure provincial representation at the centre. Those elected by Parliament would be chosen to infuse technical expertise into the legislative process. A mixed member proportional (MMP) electoral system would also be introduced for elections to the Lower House of fixed membership, with 60% of members elected by first-past-the-post and 40% by proportional representation. The Interim Report also held out the possibility of a new Constitutional Court (or at least a special Constitutional Bench of the Supreme Court) at the apex of the judicial system with comprehensive powers of judicial review.

The two most important – and controversial – elements in this package are those concerning the form of the national executive if the current form of semi-presidentialism is to be abolished, and the proposals for further

⁹ Ibid, per Dep CJ at 16-17.

¹⁰ Asanga Welikala (ed), *The Nineteenth Amendment to the Constitution: Content and Context* (CPA 2016) <<http://constitutionalreforms.org/the-nineteenth-amendment-to-the-constitution-content-and-context/>> accessed 14 March 2018.

¹¹ Artak Galyan, ‘The Nineteenth Amendment in Comparative Context: Classifying the New Regime-Type’ in *ibid*, Ch.12 <<http://constitutionalreforms.org/2016/05/10/chapter-12-the-nineteenth-amendment-in-comparative-context-classifying-the-new-regime-type/>> accessed 14 March 2018.

¹² Parliament of Sri Lanka, Resolution for the appointment of the Constitutional Assembly (2016) <<http://english.constitutionalassembly.lk/images/pdf/motion-en.pdf>> accessed 14 March 2018.

¹³ Constitutional Assembly of Sri Lanka, *The Interim Report of the Steering Committee* (21 September 2017) <<http://english.constitutionalassembly.lk/images/pdf/interim-report/ReportE%20CRR.pdf>> accessed 14 March 2018.

¹⁴ Constitutional Assembly of Sri Lanka, Reports of the Sub-Committees (2016) <<http://english.constitutionalassembly.lk/sub-committees>> accessed 14 March 2018.

devolution. The rejection of territorial power-sharing as a means of accommodating Tamil aspirations to autonomy, which lay at the heart of the long ethnic conflict, was reproduced with possibly greater force once the secessionist militants had been militarily defeated. But some form of constitutional redress for this root cause of conflict has always been central to the long-term stability of the Sri Lankan state, which was why the unity government sought and obtained an electoral mandate in 2015 to devolve further powers whilst preserving the formally unitary character of the state.

The Interim Report states that there was ‘general consensus’ that the executive presidency in the current form should be abolished. The future President is to be conferred with specified powers by the Constitution, and will be elected by Parliament for a fixed term. Within this framework, the report states that three options were considered for the election of the Prime Minister: a traditional Westminster model, direct election, or pre-nomination. The report elaborates only the third, whereby prior to a parliamentary election, parties pre-nominate their candidate for Prime Minister. Candidates for election to the Lower House are deemed to pre-commit their support to the prime ministerial candidate of their political parties. At the end of the election, the prime ministerial candidate obtaining the majority of pre-commitments of all elected MPs is elected Prime Minister.

The stability of the executive is further reinforced by three key principles. First, Parliament cannot be dissolved within the first four and a half years of its five-year term unless by a resolution of a two-thirds majority in the Lower House, or if the government is unable to get the annual budget passed twice. Second, the Prime Minister and the government can only be dismissed in the first two years of their term by a no-confidence motion with a two-thirds majority, or if the government fails to secure passage of the budget thrice. After two years, a no-confidence motion by simple majority suffices to dismiss the government. Third, in any of these scenarios, not only is the government dismissed but the Lower House also stands dissolved, which

again is a provision intended to strengthen the stability of the executive.

On devolution, while the report presupposes the current framework of devolution under the Thirteenth Amendment to the 1978 Constitution, there are a number of significant proposals in respect of a new devolution settlement in giving effect to the principle of ‘maximum devolution within the unitary state’. The first is the affirmation of the principle of subsidiarity as the guiding principle in the allocation of competences between multiple levels of government. Such a devolutionary logic has never before been applied to power-sharing between the centre and the Provinces in Sri Lanka, and as such represents a potentially radical new direction. The second important proposal is that the new constitution would reflect a three-tier structure of government – national, provincial, and local – which gives constitutional standing to the local government level.

Third, the report appears to propose a two-list division of powers between the centre and the Provinces (the National or Reserved List, and the Provincial List). The two-list division has been supported by many who see this as a solution to the abuse by the central government of the Concurrent List of powers – as essentially an extension of central government powers – in the existing framework of devolution. However, the report seems to acknowledge the practical difficulties of attempting to devise such exclusive and exhaustive lists when it reserves the possibility of retaining an area of concurrent competence.

Fourth, an important clarification in light of the experience of devolution under the Thirteenth Amendment, is about the concepts of ‘national policy’, ‘national standards’, and ‘framework legislation’. This is important because the power of setting national policy under the Reserved List of the Thirteenth Amendment has often been used by the central government to encroach upon the devolved competences of the Provincial Councils in the past. The Interim Report makes a distinction between national standards and framework legislation, which are central legislative powers, and national policy, which

is a central executive power. Accordingly, national standards may be set by national legislation in such areas as health, education, and the environment, but only where it is necessary to ensure ‘reasonable minimum standards’ of living for citizens, for state service delivery throughout the country, and for environmental protection. Framework legislation is again to be used only for restricted purposes, such as the regulation of local government and Provincial Council elections. The setting of national policy is to be an executive power of the national Cabinet of Ministers, and this shall be established in a separate substantive provision of the new constitution and will not be included in the list of national legislative powers. It is envisaged that in setting national policy in areas of devolved competence, the central government will adopt a process that involves the Provincial Councils. National policies are to be adopted only where individual Provinces cannot deal with the matter effectively or where it is necessary to do so to maintain an equivalence of living standards beyond the territory of a Province. Significantly, it is established that the setting of national policy in a devolved area does not remove the executive powers of the Province to implement the policy, and that national policy would not override provincial legislation.

Finally, there are a whole series of adjustments to the current framework of devolution which would address institutional anomalies in favour of devolution rather than the centralisation of the past. These include clarifications to the role of the provincial Governor, judicial review of legislation, the provincial civil services, and the institutionalisation of the Chief Ministers’ Conference (comprising the Prime Minister and all provincial Chief Ministers), as the principal political body for the co-ordination of inter-governmental relations. The report also contains a relatively elaborate chapter on how the centre and Provinces shall share state land, and to the extent this reflects a constitutional consensus, then it is a very significant step in resolving a matter that has bedevilled devolution under the Thirteenth Amendment (and ethnic relations well before that).

Aside from the publication of the Interim

Report, there was some activity on electoral reform in 2017. The government introduced a Twentieth Amendment to the Constitution bill to Parliament in August. The bill sought to postpone elections for a majority of Provincial Councils and to advance the elections for a few Provincial Councils, ostensibly to regularise the electoral calendar. However, the underlying objective was to avoid a series of Provincial Council elections that the government was concerned it might lose. This was a blatant abuse of constitutional amendment procedures for partisan purposes. Several individuals and civil society organisations therefore petitioned the Supreme Court, stating that the bill would require approval by the people at a referendum in addition to being passed in Parliament with a two-thirds majority.¹⁵ The petitioners' main argument was that the bill violated the franchise, which is defined as a component of the 'sovereignty of the people' as described in the Constitution.¹⁶ In its determination, the Supreme Court held that a delay in holding elections would violate the sovereignty of the people, and stated that as such the bill required approval at a referendum, thus forestalling it.¹⁷

Consequent to the Supreme Court's determination, the government used another bill (which was not a constitutional amendment) which was further along in the legislative process to indefinitely postpone elections to Provincial Councils. This was achieved by adding a large number of committee stage amendments to the original Bill, which resulted in introducing an entirely new electoral system for Provincial Councils. The new electoral system so introduced was based on MMP principles and required demarcation of new territorial constituencies which would take a considerable period of time to complete. The original Bill was only to provide for a quota of 30% for female candidates on the nomination papers submitted at Provincial Council elections. However, the Act that was passed, in addition to changing the

electoral system, also provides for a quota of 25% for women to be elected to each Provincial Council.

This disreputable episode highlights two aspects of Sri Lanka's culture of constitutional practice. First, the ineffectiveness of Parliament in ensuring the political accountability of government. Being wholly driven by party dynamics, it is incapable of performing its constitutional role. Second, the absence of constitutional review creates a legal accountability loophole for governments to exploit. The Constitution only allows for a limited period of seven days after a bill has been placed on the Order Paper of Parliament for pre-enactment judicial review. This example highlights the deficiency of this framework, precluding the right of citizens to have a bill in its final form examined by the Supreme Court. If the Bill could have been challenged, it is clear on the basis of the determination on the Twentieth Amendment Bill that the Supreme Court would not have permitted it to proceed without a referendum.

IV. LOOKING AHEAD TO 2018

With political momentum for reform petering out, crisis hit the government in late 2017 (and early 2018). The prospects for making a success out of the mandate for constitutional and governance reforms depended on the maintenance of the government of national unity elected in 2015. However, this unity fell apart at the seams when traditional party rivalries were revived with the two main parties of the President and Prime Minister contesting against each other in the local government elections of February 2018. This allowed the new party formed by former President Rajapaksa to represent the platform of anti-reform nationalism to win a landslide of local government seats. While legally this has no bearing on government at the national level, politically it was devastating, with a badly divided and dysfunc-

tional government losing the initiative even on matters of day-to-day administration let alone constitutional reform. These weaknesses were embarrassingly exposed when ethnic violence broke out in early March, with organised Sinhala-Buddhist mobs attacking Muslim homes and businesses. The government was not able to enforce law and order immediately and had to declare a peacetime state of emergency for the first time since the end of the war in 2009. Crisis therefore defines politics for the foreseeable future, and denotes the end of further reform.

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2. Asanga Welikala (ed.), *CPA Working Papers on Constitutional Reform* (CPA 2016-2017) <<http://constitutionalreforms.org/cpa-working-papers-on-constitutional-reform/>>
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¹⁵ Constitution of Sri Lanka (1978): Article 120(a) read with Article 83.

¹⁶ Constitution of Sri Lanka (1978): Article 4(e) read with Article 3.

¹⁷ Twentieth Amendment to the Constitution Bill: Determination of the Supreme Court, Parliamentary Debates (Official Report), Eighth Parliament, First Session (Parliament of Sri Lanka, 19 September 2017): Col.3 et seq. <<http://www.parliament.lk/uploads/documents/hansard/1506319057095754.pdf>> accessed 14 March 2018.



Switzerland

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Roughly every second referendum held worldwide at the national level takes place in Switzerland,¹ turning voting into nothing short of “a way of life.”² All amendments to the Federal Constitution of the Swiss Confederation (Fed Const)³ are subject to a referendum. Constitutional law is therefore as least as much shaped by “the People” as it is by courts, Parliament, or the executive branch. This is all the more true in view of the Federal Constitution identifying Federal *Parliament* rather than the courts as “the supreme authority”⁴ of Switzerland as a federal republic, being a “confederation” in all but its official name. Courts and administrative agencies are consequently bound to apply both federal statutes and international treaties, both enacted by Federal Parliament, even when such provisions conflict with the Federal Constitution.⁵ As a result of both frequent referenda and weak judicial review, federal constitutional law has for all its existence since 1848 been deeply embedded in politics. Rather than being “an anchor” or “a rock to hold on to,”⁶ the Federal Constitution forms not only an object of constant public discourse but also of the politics of the day. To this effect, the Federal Constitution of the Swiss Confederation may be aptly characterised as a “popular constitution” em-

bodiment elements not only of liberal but also of “radical democracy.” One would probably expect that such a “popular constitution” would readily fall prey to the wave of populism that caught some liberal democracies in recent years. Yet, developments in Swiss constitutional law, tracing back to 1848 and beyond, paint a more nuanced and richer picture. They point to the fact that the equilibrium between popular sovereignty and individual liberty demands, within certain limits, constant deliberation and re-balancing. Swiss constitutional law thus attests to the French proverb according to which it is only the temporary arrangements that last (*Il n’y a que le provisoire qui dure*).

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Liberal and Radical Democracy

“Liberal democracy” is a concept aiming to reconcile the “rule by the people” (“democracy”) with individual liberty through constitutional institutions such as limited government, separation of powers, and the rule of law. Individual freedom in a liberal democracy is primarily conceived of as negative freedom, i.e., freedom from government intervention. Alluding to Abraham Lincoln’s Gettysburg Address, liberal democracy thus

¹ Uwe Serdült, ‘Referendums in Switzerland’ in Matt Qvortrup (ed), *Referendums Around the World: The Continued Growth of Direct Democracy* (Palgrave Macmillan 2014) 65–121, 68.

² ‘Voting as a way of life’, *The Economist* (London, 12 February 2004) 6.

³ Federal Constitution of the Swiss Confederation of 18 April 1999 [unofficial English translation available at <www.admin.ch/opc/en/classified-compilation/19995395/index.html> accessed 28 February 2018].

⁴ Fed Const, art 148 cl 1.

⁵ Fed Const, art 190.

⁶ Justice Antonin Scalia (referring to the United States Constitution), in an interview conducted by Dan Izenberg, ‘Clinging to the Constitution’ *Jerusalem Post* (Jerusalem, 19 February 1990) 5.

tends to emphasise government “for” rather than “of” or “by” the people.⁷ The modern idea of liberal democracy is rooted in the writings of philosophers such as John Locke, Montesquieu, or Immanuel Kant. A liberal democracy particularly emphasising safeguards against oppressing majority rule is, with reference to James Madison’s remarks in *The Federalist No 10*, sometimes called a “Madisonian Democracy.”⁸ Liberal democracy is distinguishable from “radical democracy.” This rather elusive term captures an understanding of democracy aiming at the highest possible degree of equal, direct, and broad participation of the citizens of a polity by way of constitutional arrangements such as extended electoral rights, referenda, and popular initiatives (direct democracy). Radical democracy hence emphasises self-rule – in short, government “of” and “by” the people. The notion of “radical democracy”⁹ is most notably associated with the ideas of the Geneva-born Jean-Jacques Rousseau.

The Federal Court Policing the Democratic Process at the Canton Level

The Swiss Federal Constitution combines elements of both liberal and radical democracy. The bill of rights enshrined in the Constitution and the separation of powers between the bicameral Federal Parliament (“Federal Assembly”; legislative branch); the multi-party collegiate Federal Council consisting of seven members with equal rights and responsibilities elected by parliament for a term of four years (executive branch); and the Federal Court,¹⁰ being the highest judicial authority of the Federation, all rank among the constitutional compo-

nents of liberal democracy. The Federal Court in fact constitutes the federal *supreme* court but owes its modest and slightly misleading name to the fact that it formed the only federal court at the time of its establishment as a permanent court in 1874. The Federal Court is not a special constitutional court operating separately from the ordinary courts, but decides cases and controversies pertaining to civil, criminal, administrative, and constitutional law. Its authority is, as noted above, severely limited with regard to both federal and international law, but not to the laws and regulations of the *Cantons*, the component states of Switzerland. One of the Federal Court’s core functions, therefore, extends to “policing” the democratic process in the Cantons by applying what, alluding to John Hart Ely, may be called a “participation-oriented” and “representation-reinforcing” approach to judicial review.¹¹

In its judgments either published or decided in 2017, the Federal Court applied this approach in a rather bold fashion as its case law regarding voting systems at the Canton level illustrates. Whereas Switzerland’s 26 Cantons are all bound to elect their parliaments directly by the people, the Federal Constitution fails to explicitly specify whether such elections are to be held on the basis of proportional representation or majority voting. Rather, the Federal Constitution provides that it is for each Canton to decide how the political rights within the respective polity are being exercised.¹² Still, the Federal Court has severely limited the Canton’s autonomy in this regard on the ground of the Federal Constitution’s guarantee to each citizen to equal treatment in a string of decisions since

2014. This case law sheds light on the fact that, under the condition of majority voting, a considerable portion of votes fails to exert any influence on the outcome of an election at all. Votes cast either for the losing candidate or for the winning candidate beyond the required threshold (“excess votes”) are virtually “wasted.” When proportional representation applies, in contrast, many more votes carry weight with regard to the actual outcome of an election. On these grounds, the Federal Court, in a decision published in 2017, reinforced its position that a Canton is under a constitutional obligation to provide compelling reasons, such as limited relevance of political parties within a polity or a comparatively low number of voters residing in a given voting district, to constitutionally cling to a majority voting or a mixed voting system.¹³ Intervention by officials in referendum campaigns provide yet another example of said “participation-oriented” and “representation-reinforcing” approaches to judicial review as applied by the Federal Court. Reaffirming a statement having formed part of its case law since at least eight decades, according to which “no result of a vote may be approved failing to reflect the free and unbiased will of the voters,”¹⁴ authorities may, according to the Court’s judgment published 2017, provide the voters with their own assessment of a proposal put to vote in a Canton or municipality different from the respective authority as long as such a statement is not only drafted in an objective and unbiased manner but the polity, of which said authority forms part, is “affected” by the outcome of the vote in question.¹⁵

Consociational Democracy and Its Moder-

⁷ See Abraham Lincoln, ‘Address Delivered at the Dedication of the Cemetery at Gettysburg’ (19 November 1863) in: Roy P. Basler (ed), *Collected Works of Abraham Lincoln* (New Brunswick 1953) 17–23.

⁸ Robert Dahl, *A Preface to Democratic Theory* (University of Chicago Press 1956) 4–33.

⁹ For a contrasting juxtaposition of liberal and radical democracy see, e.g., Marc Bühlmann, Adrian Vatter, Oliver Dlabac, and Hans-Peter Schaub, ‘Liberal and Radical Democracies: The Swiss Cantons Compared’ (2014) 10 *World Political Science Review* 385, 391–396.

¹⁰ All opinions of the Federal Court are available free of charge in their respective original language (German, French, Italian, Romansch) at <www.bger.ch> accessed 28 February 2018.

¹¹ The above cited were famously coined in the context of United States Constitutional Law by John Hart Ely, *Democracy and Distrust* (Harvard University Press 1980) 73, 88.

¹² See Fed Const, art 39 cl 1.

¹³ BGE 143 I 92 para. 6.4 (decided on 12 October 2016; published in 2017).

¹⁴ See, e.g., BGE 75 I 244.

¹⁵ BGE 143 I 78 (decided on 14 December 2016; published in 2017).

Democracy as founded on the Swiss Federal Constitution is, however, a far cry from a “Madisonian Democracy.” Rather, the ideals of radical democracy have left their lasting marks on federal constitutional law of which the popular initiative is the prime example. Said instrument allows a committee of 7 to 27 citizens to put a proposal of a constitutional amendment in unaltered form to a popular vote, provided that 100,000 citizens, whose signatures must be collected within 18 months, are backing said draft. Popular initiatives may therefore pursue radical and rather utopian objectives such as the abolition of the Swiss Army in 1989 and 2001 or, more recently in 2016, the introduction of a nation-wide universal basic income. The Federal Constitution fails to erect any barrier as to the content of such a proposal other than the “peremptory norms of international law” (*ius cogens*) consisting of such basic norms as the prohibition of genocide, torture, slavery or inhuman and degrading treatment.¹⁶ As all popular initiatives are channelled through the system of representative democracy, providing both the Federal Council (executive branch) and the Federal Assembly (legislative branch) with an opportunity not only to recommend the voters to either back or reject the proposal but to initiate a counter-proposal diminishing the chances for the popular initiative to be successful at the ballot box, almost all proposals severely restricting minority rights have been rejected since popular initiatives were introduced at the federal level in 1891.¹⁷ Just as all other amendments to the Federal Constitution,

popular initiatives require a cumulative majority of both the voters and the 26 Cantons in order to be approved. The result of the popular vote in each Canton determines its respective vote. Of all the 238 popular initiatives put to a popular vote between 1891 and 1999, a mere 12 (or 5 percent) were successful;¹⁸ the very first popular initiative ever put to a federal vote on 20 August 1893 – the ban of kosher butchering, largely motivated by anti-Semitic prejudice – being the only popular initiative approved by both the voters and the Cantons, unambiguously infringing on minority rights during this era.¹⁹

The very low success rate of popular initiatives over more than a century was largely due to a process of political decision-making called “consociational democracy,” which has been of crucial importance for Switzerland as a multilingual and multidenominational country with a permanent resident population of whom 29.1 percent are foreign born.²⁰ Consociational democracy consists of elements such as consensual power sharing, broad participation of minority groups, elite cooperation, and gradual inclusion of opposition parties into the executive branch.²¹ Said composition of the executive branch (Federal Council) is the prime example of consociational democracy. The Federal Council is composed of seven members with equal rights and responsibilities, who since 1943 have belonged to five different parties and currently originate from the German, French, and Italian-speaking regions of Switzerland. The moderating effect of consociational democracy on radical democracy has been in sharp decline since the

early 1990s, however, due to increased polarization of the political landscape. Key political issues such as immigration and Switzerland’s relation to the European Union (EU) spurred divergence among political parties to levels barely known since the end of the Second World War, from which the country was spared. Whereas Switzerland is, unlike all of its neighbouring states, neither a member of the EU nor the European Economic Area, it is closely connected with the EU by a densely knit network of bilateral treaties. The demise of consociational democracy and its moderating effect on radical democracy is underscored by the fact that around 20 percent of the popular initiatives put to a popular vote between 2004 and 2013 were approved.²² Among these constitutional amendments passed were a ban on the construction of minarets, a constitutional amendment limiting “mass immigration,” and, in 2010, a requirement to readily expel foreign criminals.²³ Still, a popular initiative aimed at an enforcement mechanism for the last-mentioned obligation without judicial review was rejected in a popular vote in 2016.

In contrast to the federal level, similar proposals equally infringing minority rights but launched in the Cantons are appealable with the Federal Court. The Federal Court’s invalidation of such a sub-federal popular initiative seeking to frustrate the formation of a theological education institution for imams at the University of Fribourg, a state run university with a Roman-Catholic faculty of theology, on account of the Federal Constitution’s prohibition of discrimination on the

¹⁶ For a more detailed assessment see the English summary of Johannes Reich, ‘Direkte Demokratie und völkerrechtliche Verpflichtungen im Konflikt [Direct Democracy and Obligations Stemming from Public International Law in Conflict]’ [2008] *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [Heidelberg Journal of International Law] 979, 1024–25.

¹⁷ Johannes Reich, ‘An Interactional Model of Direct Democracy: Lessons from the Swiss Experience’ (SSRN, 23 July 2008) <<http://dx.doi.org/10.2139/ssrn.1154019>> accessed 23 February 2018.

¹⁸ Bernhard Degen, ‘Initiative populaire’ (*Dictionnaire historique de la Suisse*, 18 July 2016) <<http://www.hls-dhs-dss.ch/textes/f/F10386.php>> accessed 23 February 2018.

¹⁹ See Friedrich Külling, ‘L’abattage rituel’ (*Dictionnaire historique de la Suisse*, 2 September 2008) <<http://www.hls-dhs-dss.ch/textes/f/F11380.php>> accessed 23 February 2018.

²⁰ Organisation for Economic Co-operation and Development, *International Migration Outlook 2017* (41st edn, OECD Publishing 2017) 297 (referring to 2015) <http://dx.doi.org/10.1787/migr_outlook-2017-en> accessed 28 February 2018.

²¹ The theory of consociational democracy was first and foremost developed by Arend Lijphart; for an overview see Rudy B. Andeweg, ‘Consociational democracy’ (2000) 3 *Annual Review of Political Science* 509.

²² See Adrian Vatter, *Das politische System der Schweiz* (2nd edn, Nomos 2016) 351–2.

²³ See on the first and the third of the above-mentioned initiatives Daniel Moeckli, ‘Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights’ (2011) 11(4) *Human Rights Law Review* 774.

grounds of religion in 2017,²⁴ illustrates the different regimes in place at the various levels of governance.

The European Convention of Human Rights as a Contested Additional Constitutional Layer

Still, in a controversial *obiter dictum* of 12 October 2012, the Federal Court, given the constitutional obligation committing all courts to adhere to international law even when the latter conflicts with the Constitution,²⁵ foreshadowed the possibility of what could be coined “concrete (para-)constitutional review” of provisions of the Federal Constitution on the basis of the European Convention on Human Rights (ECHR), ratified by Switzerland in 1974. As the European Court of Human Rights (ECtHR) monitors Switzerland’s compliance with the ECHR unhinged by a clause limiting the scope of its review similar to article 190 Fed Const, the Federal Court has taken the view since 1999 that both the ECHR and other international human rights treaties take precedent over Federal Statutes.²⁶ In the aforementioned controversial *obiter dictum* of 2012, the Court, or rather its second public law division, went a step further and declared that the ECHR would even precede norms of the Federal Constitution itself.²⁷ Such a move would effectively transform the ECHR into an additional (supra-)constitutional layer above the actual domestic constitution.

Said *obiter dictum* produced a considerable political backlash culminating in the filing of yet another popular initiative referred to as “Swiss Law instead of Foreign Judges (Self-determination Initiative)” with the Federal Chancellery in 2016, seeking to enact a constitutional amendment according to

which the Federal Constitution, at least in principal, takes precedent over any other law with the exception of peremptory norms of international law (*ius cogens*). The respective popular vote is unlikely to take place before 2019. The Federal Council, on 5 July 2017, formally recommended rejecting said “Self-determination Initiative.” Federal Parliament is expected to decide on its recommendation in the course of 2018.

Frail Legitimacy of Switzerland’s “Cooperative democracy”

Consociational democracy has for about a century provided not only for equilibrium between two competing concepts of democracies but also for considerable protection for those minority groups who actively participate in the bargaining process of political decision-making. The demise of consociational democracy since the 1990s and the lack of reliable enforceable protection against an overreaching majority provided by the Constitution cast a light on the fragile legitimacy of Switzerland’s democracy with regard to its “cooperative,” club-like trait. These characteristics trace back to the governance of some late-medieval free farmer societies and towns in many of today’s Cantons that bore some resemblance to today’s cooperatives,²⁸ i.e., entities established according to the principles of self-government and self-administration whose members join together in order to promote and safeguard common interests by way of collective self-help.²⁹ Many municipalities still take their decisions on citizenship applications of foreign residents seeking Swiss citizenship at town hall meetings after a deliberation by a show of hands. Any cooperation, however, inevitably rests on a distinction between members and non-members. This raises difficult moral

questions as soon as some of the decisions taken by members extend to non-members, as Swiss democracy illustrates. 24.6 percent of the country’s permanent residents are, after all, non-Swiss citizens.³⁰ Political rights at the federal level are, however, restricted to Swiss citizens over the age of 18. Judged against the normative premise according to which equality forms the bedrock of democracy,³¹ the cooperative trait of Swiss democracy raises increasingly difficult questions as to its legitimacy.

Conclusion: In Search of New Equilibrium between Liberal and Radical Democracy

The ongoing debate on the scope of judicial review and the status of international law bring the tensions between liberal and radical democracy inherent in the Federal Constitution to light. The system of consociational democracy providing for equilibrium between liberal and radical democracy has been in demise for almost two decades. The fragile legitimacy of Swiss democracy with regard to its considerable foreign population has become more visible as a result. In view of both the demand of the EU to put the close mutual relations on the more solid legal footing of a “framework agreement” and popular initiatives such as the “Self-determination Initiative,” the remaining years of the second decade of the current century are likely to mark a critical juncture for whether liberal or radical democracy prevails.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

Amendments to the Swiss Federal Constitution

²⁴ BGE 143 I 129 (decided on 14 December 2016; published in 2017).

²⁵ Fed Const, art 190.

²⁶ See the respective leading case BGE 125 II 417 para 4 (26 July 1999).

²⁷ BGE 139 I 16 para 5 (12 October 2012).

²⁸ See Robert Dahl, *Polyarchy* (Yale University Press 1971) 53.

²⁹ See Swiss Code of Obligations (Schweizerisches Obligationenrecht), art. 828 sect. 1.

³⁰ Federal Statistical Office, ‘Statistical Data on Switzerland 2017’ (Federal Statistical Office 2017) 7 <<https://www.bfs.admin.ch/bfsstatic/dam/assets/2040009/master>> accessed on 28 February 2018.

³¹ Dahl (n 29) 202-7; Robert Dahl, *Democracy and Its Critics* (Yale University Press 1989) 233.

In 2017, Swiss citizens were called upon to decide on four constitutional amendments.³² Two amendments were endorsed on 12 February 2017, one facilitating the naturalization of third-generation immigrants, the other reforming the funding-scheme of transport infrastructure. A largely symbolic constitutional amendment on nutrition security found a majority in the popular vote on 24 September 2017, whereas a constitutional provision raising the VAT rate for the benefit of the old-age pension insurance was rejected.

Federal Court

The “chilling effect” doctrine as originally developed by the U.S. Supreme Court with regard to free speech provides for a recurrent topic in comparative constitutional law. Against this backdrop and by way of abstract constitutional review, the Federal Court held a newly enacted statute of a Canton in conformity with both freedom of expression and freedom of assembly as guaranteed by the Federal Constitution. Said statute holds that both promoters and violent participants of political rallies causing violence or damage to property would be liable up to an amount of CHF 30,000 (ca USD 30,000; EUR 26,000) in the event that the rally in question was either conducted unauthorized or the promoters deliberately failed to comply with the terms of the permission granted by the local authorities. The Court in its majority was of the opinion that the “chilling effects” of the provision was limited as promoters and participants of political rallies could take precautionary measures in order to avoid any liability at all.³³

In many of Switzerland’s Cantons, judges of ordinary courts of first instance are often elected by the people with a limited term of office (usually four or six years). Periodic re-elections of judges raise questions of judicial independence. Balancing sovereignty of the people and judicial independence, the Federal Court held a provision of a Canton, according to which new candidates may only stand for election as president of a court of first instance at the first ballot in the event of the incumbent president stepping down, to be constitutional.³⁴

Constitutional guarantees of human dignity are often perceived as protecting against blatant infringements of individual liberty only. Contrasting such conceptions, the Federal Court held that calling a person by his or her first (instead of his last) name during a stop-and-search procedure by a police officer degrades the person in question to ‘a mere object of the procedure’ and may therefore, based on the concrete circumstances, amount to an infringement of said person’s human dignity.³⁵ According to the Federal Court, it is therefore not the quantity but the quality of an infringement that matters when a violation of human dignity is to be assessed. Whether or not it is sensible to equate a mere lack of respect between decent human beings – with a violation of human dignity the most basic human right there is – seems open to question, however.

European Court of Human Rights

Whereas 29.1 percent of Switzerland’s permanent resident population is foreign born,³⁶ more than 93 percent of all students attend

state-run institutions in order to fulfill their compulsory schooling years.³⁷ As Swiss constitutional law requires state schools to be neutral in matters of religion, accommodating students’ religious beliefs and practices has been a focal point of constitutional law for more than a decade.³⁸ The ECtHR in its judgment in the case of *Osmanoğlu and Kocabaş v Switzerland*, dated 10 January 2017, held that the school authorities of the Canton Basel-City acted in conformity with freedom of thought, conscience, and religion of two parents of Turkish origin and Muslim faith when fining the latter CHF 700 (about USD 620 at the time) each for refusing their two daughters (7 and 11 years of age, respectively) to attend mandatory mixed-gender swimming instruction as part of the regular curriculum at their local state school on account of their religious beliefs.³⁹ The Court therewith confirmed the assessment of the case by the Federal Court.⁴⁰

IV. LOOKING AHEAD TO 2018

The Swiss Federal Constitution currently limits the powers of the Federation to levy direct federal tax and VAT until 2020. A constitutional amendment prolonging this time limit until 2035 will be put to a popular vote on 4 March 2018. On the same date, Swiss citizens will be called upon to decide on a popular initiative seeking to completely privatize public service broadcasting by rendering federal subsidies in favour of TV and radio stations unconstitutional. On 10 June 2018, a popular vote will be held on a highly technical but radical constitutional amend-

³² See Chancellerie fédérale [Federal Chancellery], ‘Répertoire chronologique 2011-2018’ (1st February 2018) <https://www.bk.admin.ch/ch/f/pore/vab/vab_2_2_4_1_2011_2020.html> accessed 28 February 2018.

³³ BGE 143 I 147 para 5.4 (18 January 2017).

³⁴ BGE 143 I 211 (30 March 2017).

³⁵ Federal Court, Judgement 1B_176/2016 para 8.2 (11 April 2017).

³⁶ Organisation for Economic Co-operation and Development, *International Migration Outlook 2017* (41st edn, OECD Publishing 2017) 297 (referring to 2015) [<http://dx.doi.org/10.1787/migr_outlook-2017-en>].

³⁷ Federal Statistical Office, ‘Lernende: Basistabelle 2015/16’ (Federal Statistical Office 2017) <<https://www.bfs.admin.ch/bfsstatic/dam/assets/2242887/master>> accessed 28 February 2018.

³⁸ See Johannes Reich, ‘Switzerland: Freedom of Creed and Conscience, Immigration and Public Schools in the Postsecular State: Compulsory Coeducational Swimming Instruction Revisited’ (2009) 7 *International Journal of Constitutional Law* 754–767.

³⁹ *Osmanoğlu and Kocabaş v Switzerland* ECHR 2017/*Osmanoğlu and Kocabaş v Switzerland* App no 29086/12 (ECtHR, 10 January 2017). [EGMR, *Osmanoğlu et Kocabaş c. Suisse*, Requête no 29086/12, 10 janvier 2017].

⁴⁰ BGE 135 I 79 (25 October 2008); the leading case being BGE 135 I 79 (25 October 2008).

ment seeking to fundamentally modify Switzerland's monetary policy and its financial market. The "Sovereign Money Initiative" aims at limiting money creation to Switzerland's independent central bank, the Swiss National Bank. In the current financial system, not only central banks but private banks create money, in particular by granting loans, which, according to the committee promoting said popular initiative, undermines the stability of the financial market by provoking "bank runs." Further popular votes at the federal level are planned to be held on 23 September and 25 November 2018. The Federal Council will determine, four months prior to the respective polling days at the latest, which matters will be submitted to a vote.

V. FURTHER READING

Clive H. Church and Adrian Vatter, 'Shadows in the Swiss Paradise?' (2017) 27 *Journal of Democracy* 166



Taiwan*

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I. INTRODUCTION

2017 was a sequel to 2016 in Taiwan’s constitutional chronology. Carried by the tailwind set in motion by the historic elections of 2016, the ruling Democratic Progressive Party (DPP) set sail for a series of structural reforms in 2017, a year free of elections. Comprehensive reforms on the pension of civil servants and schoolteachers have been pushed through the Legislative Yuan, although the question of constitutionality remains to be answered. In response to ceaseless calls for judicial reform, a presidential roundtable has put forward a wide-ranging proposal for revamping the judicial system, including the introduction of lay participation in criminal trials and the alteration of constitutional review. Despite the unsettled constitutional issues surrounding transitional justice, more fuel has been added to the quest for it with a series of formal investigations into the massive assets of the past behemoth, the Nationalist Party (Kuomintang [KMT]), and the general legislation on transitional justice. Finally, the clouds gathered around the question of same-sex marriage were blown away with the landmark Interpretation No. 748, by which the Taiwan Constitutional Court (TCC) paved the way for the legalization of same-sex marriage. In addition, the TCC revisited its own jurisprudence, breaking new ground in prisoners’ rights and freedom of speech.

Looking beyond the domestic constitutional

landscape, Taiwan steered clear of the global wave of antidemocratic populism in 2017. Yet, it does not mean that popular democracy finds no place in Taiwan. With the lowering of legal thresholds for referenda, it remains to be seen whether the frequency of referenda would deepen democracy or set the stage for ambitious populist politicians. Following this constitutional sketch, we proceed to tell Taiwan’s constitutional story of 2017.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Compared to other new democracies, Taiwan’s transition to democracy is a textbook case of incrementalism.¹ Despite isolated examples of populist politicians through its transition, Taiwan has been saved from the authoritarian disease of populism with the state of liberal democracy continuing to march forward instead of backsliding. Yet, the continuing quest for transitional justice and deepening democracy in 2017 will have long-term implications to liberal democracy in Taiwan.

As was reported in *The Year 2016 in Review*,² how to deal with the assets that the KMT had accumulated under the KMT-controlled party-state regime was brought to the fore in 2016. Although the initial constitutional challenge to the Settlement of the Ill-Got-

¹ Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart Publishing 2016) 36-48.
² Jau-Yuan Hwang, Ming-Sung Kuo and Hui-Wen Chen, “The Clouds Are Gathering”: Developments in Taiwanese Constitutional Law – The Year 2016 in Review’ (2017) 15 I•CON 753.

* This Review does not represent any official position of any Taiwanese authorities concerned. All of the arguments and comments are purely the authors’ personal opinions in their individual capacity unless otherwise specified.

ten Assets of Political Parties and Their Affiliates Act (the Assets Act) brought by the KMT parliamentary caucus was dismissed by the TCC on procedural grounds, its constitutionality remains unsettled. Even so, the Ill-Gotten Party Assets Settlement Committee (the Committee), which was inaugurated in August 2016, has wasted no time freezing the assets belonging to the KMT and its affiliates in a series of high-profile investigations.

Under the Assets Act, party assets that any party or its affiliates acquired through means incompatible with party politics or contradictory to the principles of democracy and the rule of law since the KMT-controlled Chinese government took over the administration of Taiwan from Japan on August 15, 1945, are considered ill-gotten, or, rather, illicit. Despite the ostensibly neutral phraseology, the KMT is indisputably the only party that falls within the proscription of the Assets Act. More controversial is the sanction on the so-called party affiliates, which are defined as distinct legal entities under the effective control of the party concerned. Under the party-state regime, there was hardly a clear line between the ruling party and the state. Nor was the distinction unambiguous between the KMT affiliates and other nominally autonomous associations. What has made the issue of ill-gotten party assets even more complicated is the KMT's longevity. Tracing its roots back to a secret Chinese revolutionary society in the late nineteenth century, the KMT had accumulated a trove of diverse assets in its long life. All its assets are intertwined, making it intractable to determine what items were acquired before August 15, 1945, and exempt from the Assets Act.

For these reasons, the Committee's designation of Central Investment Corporation and Hsinyutai Corporation, both of which are owned and controlled by the KMT, and the accompanying freezing of their assets triggered a series of legal challenges before the High Administrative Court in 2017. Another high-profile incident in the government's attempt to retrieve the ill-gotten party assets concerned the National Women's League

(the League). Notably, the League's founding director was the then-First Lady, Madame Chiang Kai-shek. Owing to Madame Chiang's outsize influence, the League was once granted a legal privilege to receive a special levy for decades and has accumulated wealth worth billions of dollars since its founding in 1950. The Committee launched proceedings against the League in April 2017. Yet, considering the League's unique history and the intricacies of its charitable activities, the government was once leaning towards settlement through a negotiated solution to the League-affiliated assets while leaving the relationship between the KMT and the League undetermined. With the negotiation stalled, the Committee sped up its investigation in late 2017, leading to the designation of the League as the KMT's affiliate later.

As noted above, the constitutionality of the Assets Act remains unsettled. Yet, as none of the litigations arising from the above incidents has run its course in the process of administrative litigation, the TCC has not yet been seized by any individual constitutional petition concerning the issue of the ill-gotten party assets. Even so, it does not mean that the TCC has stayed out of the controversy. Rather, the Control Yuan, one of the highest constitutional powers under Taiwan's quintipartite separation of powers system, made a referral to the TCC regarding the constitutionality of the Assets Act in March 2017. That case is currently pending in the TCC, though.

It goes without saying that the KMT's illicit assets and those of its affiliates are only one of the complex issues on the grand agenda of transitional justice in Taiwan. On December 27, 2017, the President promulgated the Act on the Facilitation of Transitional Justice (Transitional Justice Act) as the framework legislation to address all the issues regarding transitional justice. It is noteworthy that for the first time, the duration of the "authoritarian rule" is clearly defined in the law. Corresponding to the Assets Act, the Transitional Justice Act sets the starting date on August 15, 1945 and the end date on November 6, 1992, when martial law was eventually lifted

in Quemoy (Kinmen), Matsu, and other islets off the coast of China as well as those in the South China Sea controlled by Taiwan.³ Another notable provision of the Transitional Justice Act is the establishment of the Facilitation of Transitional Justice Committee, which is yet to be commissioned.

As regards the further deepening of democracy, the focus is on the referendum institution, which was first provided for in the Referendum Act of 2003 and first invoked in March 2004. Due to its implications of national self-determination, the 2003 legislation provided for a high threshold for a referendum to be legally binding. In addition to the requirement for elector signatures required for the two-stage proposal that would formally trigger a referendum, it stipulated that a referendum vote would be binding provided that the question submitted for a referendum received a positive answer from an absolute majority of the ballots cast with the elector turnout over 50%. As indicated by the six referendum votes ever held since 2004, the 50% threshold for elector turnout gave opponents an advantage by boycotting the vote. Because of the boycott strategy of those disaffected, none of the past referendum votes was legally binding, although all of them received more ayes than nays. The 2003 legislation was thus ridiculed as the "Birdcage Referendum Act," while "uncaging" the referendum institution has been the rallying call for the reform-minded civil society.

The Legislative Yuan passed the amendment of the Referendum Act on December 12, 2017. In addition to substantially loosening the requirement for elector signatures in triggering a referendum, the voting age for a referendum was lowered to 18 as opposed to the constitutional voting age for elections, 20. Moreover, the Act further provides that a referendum shall be legally binding when the referendum question receives a positive answer from a simple majority of the ballots cast provided that the ballots cast in favor are over 25% of all the eligible referendum voters. Had the past six referenda been held according to the amendment, four would have been binding. Notably, under the new rules,

³ As regards Taiwan proper and the adjacent Pescadores (Penhu), martial law had already been lifted on July 15, 1987.

it takes about 1,800 signatures to initiate a referendum proposal and then about 280,000 signatures to get it on a ballot. Whether the ease with triggering a referendum will deepen democracy or open the floodgate for populist ideas remains to be seen.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

In 2017, the TCC received 497 new petitions and rendered 16 Interpretations, with 44 consolidated petitions.⁴ Only two out of 16 Interpretations are on non-constitutional issues. Among those 14 constitutional interpretations, seven (Nos. 744, 747, 748, 749, 752, 755, and 757) declared either legislation or regulation in dispute unconstitutional, and four (Nos. 750, 751, 753, and 754) upheld the constitutionality of challenged laws. The remaining three Interpretations (Nos. 745, 746, and 756) gave mixed declarations of both constitutionality and unconstitutionality. In terms of decision outcomes, the TCC has taken a somewhat more active stance in the exercise of its judicial review power.

The TCC's activism is also illustrated in its docket management. Petitions for the 14 constitutional interpretations were filed at least one year before their respective decision date, with the earliest submitted more than five years ago. Considering the remedy deadlines for individual petitioners,⁵ the TCC managed to select and decide several cases of significance on their merits or in response to social demands. As compared to the seven constitutional interpretations decided in 2016, these 14 constitutional interpretations certainly touch on a wider variety of more important and sensitive issues,⁶ and will definitely have a far-reaching impact in the future.

[Same-Sex Marriage: Interpretation No. 748⁷](#)

Interpretation No. 748 on same-sex marriage stands out as the Decision of the Year. On the procedural side, the TCC finally decided to grant its review of individual petition on the issue of same-sex marriage⁸ long after the first similar petition by the same petitioner, Chia-Wei Chi, was denied in May 2001. This reversal of attitude is obviously attributed to the appointment of seven new Justices, including the Chief Justice, by President Tsai in November 2016. During the parliamentary confirmation process, the issue of same-sex marriage was among the most frequent questions asked by Legislators. Soon after being sworn into office, these seven new Justices, in cooperation with some of their colleagues, immediately formed a new majority to take on this thorny case. The timing of the TCC's selecting this case was also a delicate response to the impasse in the Legislative Yuan. With the ruling DPP controlling the legislative majority after its 2016 electoral victory, the Legislative Yuan had been hotly debating whether and how to revise Taiwan's Civil Code to legalize same-sex marriage, but in vain until the end of 2016. Against that legislative deadlock, the newly reconstituted TCC promptly gave a green light to the above petitions and set March 24, 2017, as the date of oral arguments, which were broadcast live online via streaming video technology. Two months later, on May 24, the TCC released its groundbreaking Interpretation No. 748.

Holdings of Interpretation No. 748 can be summarized in three parts. First, it declares unconstitutional the Marriage Chapter of Taiwan's Civil Code for its lack of provisions allowing same-sex couples "to create a permanent union of intimate and exclusive nature for the purpose of living a common

life." Secondly, the TCC mandates the authorities to amend or enact the laws as appropriate within two years while recognizing "the discretion of the authorities concerned to determine the formality for achieving the equal protection of the freedom of marriage." Lastly, the TCC demands that any same-sex couple be allowed to have their marriage registration effectuated at the competent authorities, if the authorities concerned fail to amend or enact the laws as appropriate within the said two years.

Although not expressly adopting the phrase of "same-sex marriage," the TCC emphasizes that "two persons of the same sex to create a *permanent union of intimate and exclusive nature for the purpose of living a common life*" is, and shall be, a fundamental right protected by the freedom of marriage under Article 22 of the Constitution and by the right to equality under Article 7 thereof. In paragraph 13 of its Reasoning, Interpretation No. 748 holds:

"...the freedom of marriage for two persons of the same sex, once legally recognized, will constitute the bedrock of a stable society, together with opposite-sex marriage. The need, capability, willingness and longing, in both physical and psychological senses, for creating such permanent unions of intimate and exclusive nature are equally essential to homosexuals and heterosexuals, given the importance of the freedom of marriage to the sound development of personality and safeguarding of human dignity. Both types of union shall be protected by the freedom of marriage..."

In its analysis of equal protection, Interpretation No. 748 considers a legal provision based on sexual orientation a quasi-suspect

⁴ Statistics of the new and decided cases before the TCC in 2017 < <http://www.judicial.gov.tw/constitutionalcourt/p05.asp> > accessed February 24, 2018.

⁵ According to Interpretation No. 209, no application for retrial may be filed after five years since a civil or administrative court decision becomes final and binding, even if the governing laws of such decisions are declared unconstitutional by the TCC.

⁶ There are four (Nos. 745, 746, 754, and 757) interpretations on taxation, three (Nos. 747, 751, and 753) on property and welfare rights, two (Nos. 744 and 756) on free speech, two (Nos. 752 and 755) on the right to judicial remedy, two (Nos. 749 and 750) on the right to work, and one (No. 748) on same-sex marriage.

⁷ Jau-Yuan Hwang did not participate in the writing of the part of this Report concerning Interpretation No. 748.

⁸ Taipei City Government also filed a petition challenging the constitutionality of not issuing marriage registrations to same-sex couples. This petition was granted review in November 2016. The TCC granted review of Mr. Chi's petition in January 2017, and then consolidated both cases to produce Interpretation No. 748.

classification, subject to intermediate scrutiny. On purpose scrutiny, the TCC holds that reproduction is obviously not an essential element to marriage and does not qualify as an important public interest that could justify the classification excluding homosexuals from marriage. While recognizing safeguarding of the basic ethical orders as a legitimate purpose of marriage, the TCC holds that those orders “will remain unaffected, even if two persons of the same sex are allowed to enter into a legally-recognized marriage,” subject to similar requirements. Accordingly, the TCC holds that “disallowing the marriage of two persons of the same sex, for the sake of safeguarding basic ethical orders, is a different treatment, also having no apparent rational basis,” and violates the right to equality.

While the TCC repeatedly stipulates that two persons of the same sex are entitled to equal protection of their freedom of marriage under the Constitution, it falls short of expressly naming “same-sex marriage” as the only remedial solution. In the second part of its holdings, the TCC not only gives the authorities concerned two years to revise the laws as appropriate but also leaves them with the discretion “to determine the formality for achieving the equal protection of the freedom of marriage.” For about a year before the decision of Interpretation No. 748, Taiwan’s legislature and society were somehow divided on two related issues: (1) the choice between “same-sex marriage” and “non-marriage civil union” as the solution (the substantive issue), and (2) the choice on the modality of legislation, i.e., the direct revision of the Civil Code or the adoption of a special statute (the formality issue). Against this backdrop, Interpretation No. 748 chose to leave the legislature the discretion to determine the formality issue by elaborating possible examples of formality in Paragraph 17 of its Reasoning:

“It is within the discretion of the authorities concerned to determine the formality (for example, amendment of the Marriage Chapter, enactment of a special Chapter in Part IV on Family of the Civil Code, enactment of a special law, or other formality) for achieving the equal protection of the freedom

of marriage for two persons of the same sex ...” (Emphasis added)

The ambiguity of legislative discretion on formality in the second part of Interpretation No. 748’s holdings may be further clarified by the more straightforward instruction issued in the third part of its holdings: same-sex couples shall be allowed to register their marriage with the government as late as May 24, 2019 (i.e., two years after the announcement of Interpretation No. 748), even if the authorities concerned fail to amend or enact the laws as appropriate. After careful examination of the above, a fair and logical reading of Interpretation No. 748 reveals that the TCC does recognize the same-sex couple’s constitutional right to marriage. What it left for the legislature to decide is the formality of legislation. However, out of prudential concerns based on judicial minimalism, the TCC chose to remain silent on related issues such as the same-sex couple’s right to adopt children. It remains to be seen who will initiate another constitutional challenge on such issues, and when.

Not surprisingly, Interpretation No. 748 does stir widespread repercussions, domestically and abroad. Internationally, the TCC has been hailed as the first constitutional court in Asia to constitutionalize same-sex marriage. Thanks to Interpretation No. 748, Taiwan may become the first Asian country to legalize same-sex marriage. Domestically, reactions to Interpretation No. 748 have been as diverse as the real life of Taiwanese society could be: joy v. anger, excitement v. resentment, celebration of new life v. curse of judicial tyranny.... As of the end of 2017, Taiwan’s legislature was still deadlocked in producing the necessary legislation to facilitate same-sex marriage as mandated by Interpretation No. 748. Notably, opponents of same-sex marriage have submitted an initiative proposal to the Central Election Commission (CEC) to call for a referendum in late 2018, aimed at upholding the traditional definition of opposite-sex marriage under the newly amended Referendum Act. It is unclear whether the CEC will wield the power to dismiss a referendum proposal so apparently unconstitutional for being against a recent decision of the TCC. And if the CEC

has no other choice but to hold such a referendum, what would the consequences of such referendum, if turning out successful, on the legitimacy of Interpretation No. 748 be?

[*Free Speech: Interpretation Nos. 744 & 756*](#)

Besides Interpretation No. 748, the TCC also issued two decisions on free speech. In Interpretation No. 744, the TCC revisited the constitutionality of prior restraint on free speech and finds the censorship on cosmetics advertising unconstitutional. In Interpretation No. 756, the TCC holds inmate mail censorship unconstitutional in part.

In 1996, the TCC once upheld the constitutionality of the censorship of drug commercials in Interpretation No. 414, applying the standard of intermediate scrutiny. In Interpretation No. 744, the TCC strikes down the censorship law on cosmetics advertising, applying the standard of strict scrutiny. This is the first time that the TCC ever invalidated such censorship regulations on commercial speech. Although the TCC takes a careful approach of distinguishing Interpretation No. 744 (cosmetics advertising) from Interpretation No. 414 (drug commercials), it is believed that the holding of the latter is very likely to be overturned if the TCC has a chance to reconsider this issue.

Application of strict scrutiny in Interpretation No. 744 might have greater implications to the free speech jurisprudence. The strict scrutiny standard as applied by Interpretation No. 744 is by far the most searching and fatal standard of review that has ever been applied by the TCC. In light of the jurisprudence of the US Supreme Court, the TCC shows no hesitation in examining whether there is any compelling government interest and whether the employed means is the least restrictive one, narrowly tailored to achieve the purpose. To combat the evils of censorship, the TCC further required that a prompt judicial remedy be provided for the claimant. In response, the competent authorities (Ministry of Health and Welfare) immediately accepted this decision, noting that it had also been their policy goal to abolish such censorship regulations.

Inmate mail censorship, considered in Interpretation No. 756, is a more complex problem than advertising censorship. Taiwan's prison administration has been authorized to adopt a sweeping inmate mail censorship program, amounting to utter arbitrariness in practice. Any outgoing or incoming mail, either regular or legal (privileged), is subject to inspection, reading, deletion, and even confiscation, without giving notice to the sender or receiver. Citing prison security and discipline concerns, the TCC upheld the constitutionality of inspection (for contrabands) and reading while suggesting that certain kinds of special mail (e.g., legal mails from courts) be exempt from reading. On the administration's power to delete or confiscate inmate mail, Interpretation No. 756 only requires that a photocopy be kept and later returned to the inmates upon their release from prison if returning the original copy is not feasible.

As compared to Interpretation No. 744, the TCC applies a less stringent standard of intermediate scrutiny in reviewing censorship of inmate mail. Regarding the judicial remedy of inmate mail censorship, the TCC addressed this issue in Interpretation No. 755, which was released on the same day together with Interpretation No. 756.

[Right to Judicial Remedy: Interpretations Nos. 752 & 755](#)

Traditionally, inmates have been regarded as subjects subordinate to the State. Under the theory of special status relationship (*Lehre von besonderen Gewaltverhältnissen*), inmates in Taiwan have long been deprived of the right to judicial remedy against the correctional measures of prisons. In Interpretation No. 755, the TCC, for the first time, recognizes the inmate's right to judicial remedy against the prison's restrictions on their constitutional rights after the exhaustion of administrative remedies available. Mindful of the likely flood of prison litigations, the TCC gives the reviewing court a discretion to dismiss a complaint if the impugned restriction is apparently trivial. In conjunction with Interpretation No. 756, inmates will be able to bring their cases before courts to challenge the legality of inspection, reading, and dele-

tion of inmate mail in the future.

Interpretation No. 752 is another interpretation that explores a different frontier of the right to judicial remedy: the right to appeal in criminal cases. Section 376 of the Criminal Procedure Act provides that certain misdemeanors and specific types of offenses are not appealable to the third instance court. Thus far, the TCC has been reluctant to question legislative wisdom on the overall structure of court litigation and jurisdictional allocation, either vertical or horizontal. The litigation party's right to appeal in either civil or criminal cases is never considered the core of the right to judicial remedy. In Interpretation No. 752, the TCC, again for the first time, ruled subparagraphs 1 and 2 of the said Section 376 unconstitutional as applied to the criminal defendant who is found guilty by the second instance court, reversing the acquittal decision issued by the first instance court. The TCC also holds that in such cases, the defendant's first-time conviction needs to be reviewed by a higher court, at least once, in order to minimize the possible risk of wrongful convictions.

In response, the Judicial Yuan immediately introduced a bill to amend, *inter alia*, the said Section 376 in light of Interpretation No. 752. The Legislative Yuan enacted this bill in November 2017, which further extends this new right to any similarly situated defendants under any subparagraph of Section 376.

IV. LOOKING AHEAD TO 2018

In 2018, nationwide local elections, which have been seen as the functional equivalent of mid-term elections, will be held. The results of the local elections in 2014 were widely regarded as the precursor for the KMT's historic electoral defeat in 2016. Thus, 2018 might be another key milestone in Taiwan's incrementalist constitutional change.

2018 may also see a different kind of election. As noted above, with the amendment of the Referendum Act in 2017, to get an issue on a referendum ballot is much less cumbersome. As the referendum proposal aimed at

restricting the TCC's interpretation of same-sex couples' equal right to marriage has passed the preliminary signatures required for it to proceed, it shows that Interpretation No. 748 falls short of settling the dispute over same-sex marriage. With the legitimacy of Interpretation No. 748 at stake, whether the plan to sabotage the TCC's decision by referendum will succeed is central to the deepening of constitutional democracy.

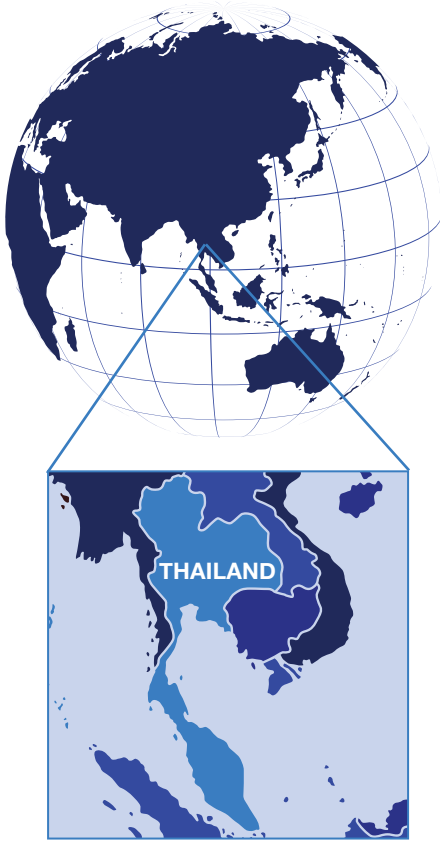
Outside electoral democracy, the TCC is expected to see its share of transformation in 2018 with the planned revamp of the Constitutional Interpretation Procedure Act. In response to the conclusion of the national roundtable on comprehensive judicial reform, the TCC will be remade on the model of the judicial court. On the one hand, the German institution of constitutional complaint will be introduced to allow for the constitutional scrutiny of judicial rulings. On the other hand, to enhance the transparency and efficiency of the TCC, the American style of the opinion of the Court by an authoring judge will be adopted along with an increase of public oral hearings and the lowering of the voting threshold for constitutional interpretation concerning statutes to a simple majority.

V. FURTHER READING

Brian Christopher Jones (ed), *Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements* (Routledge 2017)

Ming-Sung Kuo & Hui-Wen Chen, 'The Brown Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light,' 31 *Columbia Journal of Asian Law* (forthcoming).

Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Hart Publishing 2016).



Thailand

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

The year 2017 was one of unfinished transition. In April, King Vajiralongkorn signed the new Constitution into effect but democracy was nowhere in sight.¹ The 2017 Constitution sets an unusually long transitional period under which the junta, the National Council of Peace and Order (NCPO), will prepare organic laws. Thus, the 2017 Constitution is yet to be implemented. The NCPO continues to exercise its dictatorial power derived from the 2014 Interim Charter. Given the situation, there is not much law, only politics, to be discussed. Political activities are still banned and dissenters are arrested. Attention goes to the legislative process of organic laws, which provide details of how the NCPO will withdraw from Thai politics and democracy can finally resume. These legislations are controversial, for they significantly weaken and complicate the political process while strengthen the judiciary and watchdog agencies. Worryingly, the NCPO shows no enthusiasm in following the timeline as set in the 2017 Constitution. It refuses to set an election date within 2018. It issues an order that overrides a law on political parties which gives advantage to new parties. These attempts indicate the NCPO's preparation to extend its stay after an election. Democracy, if it returns at all in 2018, will be fragile.

This review of Thailand's constitutional law evaluates liberal democracy by assessing the NCPO's administration. The second part focuses on the 2017 Constitution, asking how the new law affects electoral politics as well

as checks and balances. Finally, it forecasts what awaits Thailand in 2018. This review approaches Thailand's constitutional development as part of a broader struggle between the powerful elite minority, including the military, judiciary, and other technocrats, and the grassroots majority over the control of political power.²

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Under the military, liberal democracy unsurprisingly declines. Three factors that contribute to this negative assessment are (1) form of government, (2) rights and liberties, and (3) accountability mechanisms.

A. Form of Government

Currently, Thailand is the only country under a military dictatorship. It has been seven years since the last valid election in 2011, in which Yingluck Shinwatra, the youngest sister of the controversial businessman-turned-politician Thaksin Shinwatra, won. The 2014 election was disrupted by a massive anti-government protest and later invalidated on a procedural ground by the Constitutional Court. The NCPO leader, General Prayuth Chan-Ocha, led a coup in 2014 that ousted Yingluck Shinwatra. Yingluck was subsequently impeached and sentenced to imprisonment. She fled abroad. Yingluck's supporters believed that these legal procedures were politically motivated. Prayuth abolished the 2007 Constitution and

¹ Khemthong Tonsakulrungruang, 'Chaos, Kings, and Thailand's 20th Constitution', Int'l J. Const. L. Blog, 11 April 2017, <<http://www.iconnectblog.com/2017/04/chaos-kings-and-thailands-20th-constitution/>> accessed 28 December 2017.

² See Kasian Tejapira, 'The Irony of Democratization and the Decline of Royal Hegemony in Thailand' (2016) 5 Southeast Asian Studies 219.

appointed himself as prime minister. As the NCPO leader and the head of government, he enjoys the options of normal executive power, reviewable by the court, or dictatorial absolute power, known as Section 44 power, according to Section 44 of the 2014 Interim Charter.³ He often exercises the latter power to circumvent normal legislative and administrative processes, overriding statutes, rules, and orders. Theoretically, he can even exercise judicial power but he voluntarily refrains from doing so.

Prayuth appointed 250 members of the National Legislative Assembly (NLA), which replaced the Parliament. The non-partisan NLA claimed to better represent various groups of professions and interests. However, critics argued that the NLA represented only a narrow band of bureaucracy and large corporations. Dissenters take no part in the NLA. This exclusive political model is unlikely to be responsive to the people's demand.

The 2017 Constitution outlines a 15-month transition in which the NCPO remains the government.⁴ There are signs that the NCPO may not honour that timeline. It often reminds the public that an election date, which has not yet been announced, could be postponed at any time as necessary. The NCPO cited the discovery of an arms cache in No-

vember as evidence of Thailand's unreadiness for an election and possible post-election violence, although many considered the discovery staged.⁵ Moreover, Prayuth hinted at himself or his proxy competing in an election, a choice that ensures a rigged one and an extension of military rule in a democratic disguise. The NCPO conducted a public survey to gauge support for Prayuth as a democratic leader and some NLA members talked openly about setting up an NCPO party.⁶

Even if Prayuth leaves Thai politics for good, the presence of the Thai military is perpetuated in the form of the new Internal Security Operations Command (ISOC) law. ISOC will have local commands in every province to oversee the provincial governor.⁷ This structure allows the military to legally intervene in politics.

Another area where liberal democracy declines is rights and liberties. The NCPO has declared human rights the national agenda. But despite a guarantee of rights and liberties in the 2017 Constitution, a sense of arbitrariness is prevalent, especially among the armed forces. Under Section 44, political parties cannot meet or campaign because a gathering of five or more people for a political purpose is subject to imprisonment.⁸ Officers can search and detain a suspect with a warrant.⁹ Media outlets risk losing their

licenses or having them suspended if their programs jeopardize a broadly construed "national security."¹⁰ Moreover, the NCPO is known for its zero tolerance toward dissent. It has charged its critics for sedition and computer crimes, drawing international attention.¹¹ In November, the army forcibly dispersed locals who protested against a coal power plant, demanding a proper public hearing as guaranteed by the 2017 Constitution.¹² Most shocking is the allegation that the government assassinated a red-shirt leader who resided in Laos.¹³ If confirmed, this clandestine operation is a new development in human rights violation by the Thai government and raises a sharp question on due process of law. The NCPO never denied the allegation. Even when an incident was not initiated by the NCPO, the culture of impunity meant that justice would not be served. In March, soldiers shot dead a local hilltribe activist, possibly over a personal dispute. The murder occurred in broad daylight before the CCTV, but the army intimidated any investigation into the killing.¹⁴ These reports put the NCPO's commitment to the Constitution and the Rule of Law in doubt.

The 2017 Constitution's provision on rights and liberties also raises some questions. The right of local communities to participate in a government project that may harm their livelihood is no longer a right, but the duty of the

³ 'What you need to know about Article 44 of Thailand's interim constitution' *The Strait Times* (7 April 2015) <<http://www.straittimes.com/singapore/what-you-need-to-know-about-article-44-of-thailands-interim-constitution>> accessed 28 December 2017.

⁴ Thai Constitution B.E. 2560 (2017) [2017 Constitution], sec 267-268.

⁵ Army Arrests Alleged Redshirt Militant in 'Ko Tee network' *Khao Sod English* (4 December 2017) <<http://www.kaosodenglish.com/politics/2017/12/04/army-arrests-alleged-redshirt-militant-ko-tee-network/>> accessed 28 December 2017.

⁶ 'PM slammed for six questions' *The Nation* (9 November 2017) <<http://www.nationmultimedia.com/detail/politics/30331162>> accessed 28 December 2017; 'Thai junta leader, backers fuel suspicions of plans to stay in power' Reuters (24 September 2017) <<https://www.reuters.com/article/us-thailand-politics/thai-junta-leader-backers-fuel-suspicions-of-plans-to-stay-in-power-idUSKCN1BZ01D>> accessed 28 December 2017.

⁷ PM Defends Changes to Security Law' *Bangkok Post* (23 December 2017) <<https://www.bangkokpost.com/news/security/1384134/pm-defends-changes-to-security-law>> accessed 28 December 2017.

⁸ NCPO Leader Order no. 3/2558 (2015), sec 12.

⁹ *Id.*, sec 4&5.

¹⁰ NCPO Declaration no. 103/2557 (2014).

¹¹ Sunisa Divakornnamong, a former Pheu Thai Party deputy spokeswoman, and Pravit Rojanaphruk, a journalist, were charged with sedition in 2017.

¹² 'UN rights body criticises Thailand over power-plant protest crackdown' *The Nation* (30 November 2017) <<http://www.nationmultimedia.com/detail/breakingnews/30332853>> accessed 28 December 2017.

¹³ 'Laos/Thailand: Investigate Abduction of Exiled Red Shirt Activist' (*Human Rights Watch*, 1 August 2017) <<https://www.hrw.org/news/2017/08/01/laos/thailand-investigate-abduction-exiled-red-shirt-activist>> accessed 28 December 2017.

¹⁴ Military refuses to reveal CCTV evidence of Lahu activist's death' *Prachatai English* (28 March 2017) <<https://prachatai.com/english/node/7041>> accessed 28 December 2017.

state.¹⁵ Freedom of religion does not include freedom to choose a sect or creed.¹⁶ The implication of these changes is not yet known, and the Constitution Drafting Commission (CDC) gives no justification or clarification on these changes.

In 2017, the NCPO and the NLA proposed several measures to control freedom of expression and right to privacy. The most controversial was the amendment of the computer crime law that allows the government to easily deny access to websites with “harmful” materials and prosecute a person who disseminates “false” contents.¹⁷ Another legislation created the Digital Economy Ministry under which the Cyber Security Operation Center operates to monitor online activities and deny access to “harmful” contents.¹⁸ Its attempt to register social network service providers such as YouTube, Twitter, Line, and Facebook failed after meeting heavy resistance. But a law to register journalists and social influencers is being considered by the NLA.¹⁹ Reporting news without a license will result in three-year imprisonment, a measure to monopolize the dissemination of information by only the government’s allies.

A third aspect of Thailand’s declining democracy is a dysfunctional checks-and-balances system. Eradicating corruption is one of the NCPO’s main goals. All mechanisms, especially the National Anti-Corruption Commission (NACC) and the Supreme Court,

relentlessly went after Thaksin, Yingluck, and their cabinet members. In September, the Criminal Division for a Political Office Holder in the Supreme Court sentenced Yingluck to a five-year imprisonment for corruption in the 2012 rice-pledging scheme.²⁰ The Court did not find her directly involved in corruption but found that she failed to respond to an allegation of her minister in time.²¹ She fled, but not before the NCPO ordered a confiscation of her assets. In March, the Revenue Department retroactively demanded that Thaksin pay USD 540 million of taxes from the sale of his stocks in 2006.²² This serious commitment does not seem to apply to the current regime participants.

Because the NLA is a non-partisan unicameral body appointed by the junta, there is no parliamentary oversight of the cabinet. Unlike the 2006 coup, Prayuth ordered the Constitutional Court and the watchdog agencies to continue operating under his regime. However, these check-and-balance mechanisms appeared reluctant to review any of the NCPO’s scandal. Prayuth’s Deputy Prime Minister, General Prawit Wongsuwan, was recently embroiled in a high-profile scandal of possessing more than 10 luxurious watches and other jewellery, which he had not disclosed in his asset disclosure list. Prawit refused to explain his extra wealth to the public and the NACC denied to comment.²³

Reluctance is understandably partly the fear of retribution. Another reason is the politi-

cization of these agencies, which prioritize prosecuting Thaksin Shinwatra and his peers more than impartially investigating corruption. Moreover, some members of watchdog agencies seem to have personal ties with the NCPO. For example, the head of the NACC is known as Prawit’s “favourite,” therefore, he declined to act on Prawit’s case.²⁴

When a government is not democratically elected, the checks-and-balances system is paralyzed. With the government’s absolute power, the check-and-balance agencies are unwilling and unable to hold the government accountable. Thus, despite the passage of a democratic constitution, liberal democracy in Thailand is still in decline.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The major development is the promulgation of the 2017 Constitution, which introduces several radical changes to Thai politics. It was prepared by the junta-appointed CDC with virtually no public participation. Generally, the Constitution is characterized by its attempt to undermine electoral politics while empowering watchdog agencies. Under the pretext of eradicating corruption, the CDC entrenches the influence of the powerful minority, i.e., bureaucrats, judges, and the military, who can manipulate elected MPs at will.²⁵ This imbalance of power is a cause of

¹⁵ 2017 Constitution, sec 58.

¹⁶ *Id.*, sec 31.

¹⁷ The Amendment to the Computer Crime Act B.E. 2550, B.E. 2560 (2017). See also Khemthong Tonsakulrungruang, ‘Inching toward Orwell’ *New Mandala* (20 December 2016) <<http://www.newmandala.org/inching-toward-orwell/>> accessed 28 December 2017.

¹⁸ See Khemthong, *Inching toward Orwell*.

¹⁹ ‘Thailand: Draft Media Law Threatens News Reporting’ *Human Rights Watch* (28 April 2017) <<https://www.hrw.org/news/2017/04/28/thailand-draft-media-law-threatens-news-reporting-0>> accessed 28 December 2017.

²⁰ The Supreme Court’s Criminal Division for Political Office Holder, Decision 211/2560 (2017).

²¹ ‘Thailand’s political trial of the decade explained’ *BBC* (27 September 2017) <<http://www.bbc.com/news/world-asia-41070924>> accessed 28 December 2017.

²² ‘17.6 billion baht tax bill posted on Thaksin’s door’ *Bangkok Post* (28 March 2017) <<https://www.bangkokpost.com/learning/advanced/1222721/17-6-billion-baht-tax-bill-posted-on-thaksins-door>> accessed 28 December 2017.

²³ ‘Prawit files his watch response – and the NACC keeps its secret’ *Khao Sod English* (29 December 2017) <<http://www.khaosodenglish.com/featured/2017/12/29/prawit-files-watch-response-nacc-keeps-secret/>> accessed 30 December 2017.

²⁴ ‘NACC chief urged to recuse himself in Prawit probe’ *The Nation* (9 December 2017) <<http://www.nationmultimedia.com/detail/politics/30333537>> accessed 28 December 2017.

²⁵ Khemthong Tonsakulrungruang, ‘A year after referendum, only bad news about Thailand’s constitution’ *New Mandala* (29 August 2017) <<http://www.newmandala.org/year-referendum-bad-news-thailands-constitution/>> accessed 28 December 2017.

concern that can easily escalate into political tension.

In addition to the Constitution, there are organic laws on political parties and election and watchdog agencies. In the second half of 2017, attention went to the drafting of these laws by the NLA. Many proposals were criticized by the CDC, which argued that the NLA drafted arbitrarily and radically expanded the scope of and distorted the original intention of the Constitution. To complicate the matter, the NCPO issued orders to amend some of these laws. This struggle indicates that the main agenda of 2017 was not the fight between pro-democracy people and the junta but the quarrel among those in power on how to benefit most from Thai politics once an election occurs.

The CDC adopted a mixed member apportionment (MMA), which sees one vote as determining both the 350 Members of Parliament and the 150 party-list Members of Parliament.²⁶ The CDC argues that this MMA could most accurately reflect the representation of each party. Naturally, that means the system favours small or mid-sized parties as opposed to large parties.²⁷ It is predicted to result in a fractious House of Representatives, which will eventually lead to a coalition government, and inevitably a weak administration.

Selection of the Prime Minister (PM) is even more complicated. Each party must offer in advance three PM candidates so voters know

who they are supporting for premiership when casting a vote.²⁸ At the first meeting, a party may propose, with one-tenth support, a candidate from a party that occupies more than five percent of the seats.²⁹ A candidate with an absolute majority approval will be the prime minister. Especially for the first session, a candidate must be approved by a joint session of the House and the Senate. If no one obtains a joint absolute majority, the Parliament may choose whoever has two-thirds of the votes to be PM.³⁰ This special procedure was proposed by the NCPO during the Constitution referendum in 2016. It allows an outsider, probably Prayuth or his successor, to be appointed a premier without competing in an election since the first Senate will be appointed by the NCPO and a few seats are reserved for armed forces commanders.³¹

The NLA does not seem to share the CDC's dream of promoting mid-sized parties. The Political Party Law imposes stringent requirements such as a nation-wide primary vote, a minimum number of members, nation-wide branches, and a membership fee.³² On one hand, these measures, the NLA argues, guarantee that a party belongs to the mass, not one single politician like Thaksin. On the other hand, the cost of founding and operating a new, smaller party is significantly higher. Only a party with an already large national platform can comply with this unrealistic demand.

The new law orders existing political parties

to submit their membership status within 90 days since the law comes into effect in September, but the NCPO refuses to lift a ban on political activities, making compliance impossible. Finally, in late December, the NCPO partially lifted a ban on administrative work for the formation of new parties, but not on existing ones.³³ The same order mandates all parties to re-register members within 180 days after 1 April 2018.³⁴ The order is expected to cause massive loss of membership, tilting the playing field toward a newly formed party, which is likely a proxy of the junta.³⁵ This "set zero" strategy upsets two major parties, the Phue Thai and Democrat Parties, both of which challenged the order in the Constitutional Court, arguing that an amendment to a statute in the form of a Section 44 order is procedurally unconstitutional.³⁶ The result is yet to be known.

Politicians are subject to strict scrutiny. An MP candidate must not be found guilty of corruption, unusual wealth, election fraud, and a long list of felonies.³⁷ This automatically disqualifies a number of politicians from Thaksin's camp. A cabinet member is removed if the NACC and the Supreme Court find him failing a "moral standard."³⁸ By allowing the court to hear a case on a moral standard, the Constitution judicializes a political question into a legal one.

On the contrary, there is not much debate on accountability of the judiciary and watchdog agencies in the Constitution, although their professionalism and impartiality are regular-

²⁶ 2017 Constitution, sec 83.

²⁷ Bangkok Pundit (pseudonym) 'The effects of Thailand's proposed electoral system' *Asian Correspondent* (10 February 2017) <<https://asiancorrespondent.com/2016/02/the-effects-of-thailands-proposed-electoral-system/#DIPXfkOdTT6JH5Cb.97>> accessed 28 December 2017.

²⁸ 2017 Constitution, sec 159.

²⁹ *Id.*

³⁰ *Id.* sec 272.

³¹ *Id.* sec 269.

³² The Organic Act on Political Party B.E. 2560 (2017), sec 15, 33 & 50-51.

³³ The NCPO Leader Order no. 53/2560 (2017).

³⁴ *Id.*

³⁵ 'Selective Lifting of Political Ban Unfair, Democrat Says' *Khao Sod English* (20 December 2017) <<http://www.khaosodenglish.com/politics/2017/12/20/selective-lifting-politics-ban-unfair-democrat-says/>> accessed 28 December 2017.

³⁶ 'Revolt over "reset" order gains pace' *Bangkok Post* (25 December 2017) <<https://www.bangkokpost.com/news/politics/1385018/revolt-over-reset-order-gains-pace>> accessed 28 December 2017.

³⁷ 2017 Constitution, sec 98.

³⁸ *Id.*, sec 160 & 235.

ly criticized.³⁹ The NLA broadens the power of these agencies. The Constitutional Court now has the power to issue a temporary measure and charge a person who criticizes the Court in bad faith with contempt of court.⁴⁰ This development is worrying because the charge is often invoked by the Court of Justice to silence critics. The Constitutional Court is almost legally invincible so public criticism is one of the few ways to subtly impose accountability on it. The new procedure of the Criminal Division for a Political Office Holder in the Supreme Court allows a trial *in absentia*, triggering revocation of several old cases of Thaksin.⁴¹ The NLA even considered equipping the NACC with the power to wiretap a corruption suspect, a proposal much resisted by the CDC for fear of abuses.⁴² The NLA finally backed down.

To match their growing responsibility, the CDC raises the qualification of watchdog agencies to an impractically high standard. It requires a candidate of extremely high bureaucratic position or of lengthy service in the field.⁴³ The new standard prompted the NLA to debate whether existing members who fail to fulfill this requirement should be dismissed. In the end, only the Election Commission (EC) and the National Human Rights Commission were dismissed en masse. The Constitutional Court, the NACC, and the Ombudsman dodged this set zero strategy. This discrepancy is likely the result of political negotiation, not legal deliberation. The ousted EC then challenged the nomination of the new EC to the Constitutional Court.

IV. LOOKING AHEAD TO 2018

An immediate question is whether an election will take place at all. If so, when and what the result would be. It is obvious that

the NCPO invents mechanisms to continue its reign constitutionally, from an electoral system, to a special PM selection, to a new political party, to a new EC. At least an election will provide democracy with some breathing space as Section 44 would be gone. This leads to the next question of whether political prisoners, whether detained, tortured, court-martialed, or imprisoned under the military regime, should be pardoned and released.

If the NCPO loses an election, how would the next government survive this overly complicated 2017 Constitution? It is predicted to fail to foster a peaceful and stable democracy because it empowers the powerful minority to tightly control the majority's representatives. Unfortunately, replacing it is almost impossible. An amendment must virtually receive a consensus from the government, the opposition, the Senate, and the Constitutional Court, a condition that is difficult to realize.⁴⁴ This rigidity may prevent any peaceful constitutional change and encourage a more violent option.

V. FURTHER READING

Duncan McCargo, Saowanee T. Alexander, and Petra Desatova, 'Ordering Peace: Thailand's 2016 Constitutional Referendum' (2017) 39 *Contemporary Southeast Asia* 65

Khemthong Tonsakulrungruang, 'Entrenching the Minority: The Constitutional Court in Thailand's Political Conflict' (2017) 26 *Washington International Law Journal* 247

Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press 2017)

³⁹ See Veerayuth Kanchoochat, 'Reign-Seeking and the Rise of the Unelected in Thailand' (2016) 46 *Journal of Contemporary Asia* 486.

⁴⁰ See 'Organic law for Constitutional Court approved by NLA, sent to other agencies' *The Nation* (24 November 2017) <<http://www.nationmultimedia.com/detail/politics/30332431>> accessed 28 December 2017.

⁴¹ The Organic Act on the Criminal Procedure for a Political Office Holder B.E. 2560 (2017), sec 31.

⁴² 'NACC wiretapping bill comes under NLA fire' *The Nation* (22 December 2017) <<http://www.nationmultimedia.com/detail/politics/30334498>> accessed 28 December 2017.

⁴³ See 2017 Constitution, sec 222, 228 & 232.

⁴⁴ *Id.*, sec 255 & 256.



Turkey

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 in Turkey was a year in which liberal democracy, human rights and the constitutional order continued their free fall. Since the declaration of a state of emergency following the failed putsch in July 2016, constitutional rights and freedoms are not protected anymore, executive organs rule the country by emergency decree laws, the Parliament is losing its once prestigious position in the system and becoming a rubber stamp organ and citizens feel more and more that they are at the mercy of an uncontrollable power. This situation creates a feeling that there is no constitution in the country.

The Constitutional Court, which refused to review the constitutionality of the emergency decree laws in 2016, has a major role in this picture of arbitrariness. A meaningful portrayal depicting the current relationship between the executive and the Court occurred in an event in the Parliament at the beginning of the juridical year:¹ Chief Justice Zühtü Arslan bowed with respect in front of Recep Tayyip Erdoğan, the President and leader of the governing party, who was smiling with vanity. The picture has been shared hundreds of thousands of times on social media.

As a reflection of this imbalance in the system, in political cases, the Constitutional Court decided in the same direction with the policies of the executive organs. These included freedom of expression and detention of members of Parliament cases. In non-political constitutional complaint applications, the Court seemed to try to protect its reputation by concluding to violations of rights and freedoms more than ever.² This leads us to still hope for the implementation of liberal democracy, but the future of the new constitutional order pursuant to the amendment is still uncertain.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Treated briefly but very clearly, in the book by Jan-Werner Müller, populism is against liberal democracy,³ and, unfortunately, is the dominant political ideology of these times. The concerns arising from twenty-first-century populism led Tom Gerald Daly to describe our time as a “democratic decay.”⁴ Naturally, the checks and balances mechanisms, such as the Constitutional Court, have always been a target for right-wing governments around the world.⁵ That

¹ 30.08.2017.

² Violation found in 917 cases in 2017, the highest number since the start of the constitutional complaint mechanism in 2012. For further statistics, please see: < http://anayasa.gov.tr/icsayfalar/istatistikler/pdf/31122017_istatistik_tr.pdf > accessed 17 February 2018.

³ Jan-Werner Müller, *Popülizm Nedir?* (İletişim, 1st edn., 2017) 67-77.

⁴ Tom Gerald Daly, ‘The “C Word”: Democratic Decay and the New Frontiers of Comparative Law’ (2017) Mar. 8 Int’l J. Const. L. Blog < <http://www.iconnectblog.com/2017/03/the-c-word-democratic-decay-and-the-new-frontiers-of-comparative-law-i-connect-column/> > accessed 5 February 2018.

⁵ For further reading on impacts of populism on the constitutional courts, please look at the mini-symposium co-organized by the editors of *Verfassungsblog* and the editors of *I-Connect*: Michaela Hailbronner & David Landau, ‘Introduction: Constitutional Courts and Populism’ (2017) Apr. 22 Int’l J. Const. L. Blog, < <http://www.iconnectblog.com/2017/04/introduction-constitutional-courts-and-populism/> > accessed 5 February 2018.

has been the case also for Turkey since the 1950s. As Oder states, “they have defined the elite not only as alienated modernists, secularists, supporters of the state-centered economy, the (Westernized) middle class or wealthy industrialists but also as judges.”⁶

In addition, Turkey has been ruled by a state of emergency since July 2016, declared after the failed putsch against the government. Basic constitutional rights are suspended, except for some core ones like the right to life, prohibition of torture and freedom of conscience stated in Article 15 of the Constitution. The cohesion of these circumstances with the President and leader of AKP (Adalet ve Kalkınma Partisi/*Development and Justice Party*) Recep Tayyip Erdoğan’s populist discourse, inherited from the conservative right parties’ policies that shaped contemporary Turkey, led to a fast decline of already weak liberal democracy in 2017.

The populist backlash against the Constitutional Court should be considered victorious in 2017. The Court has no credibility or importance as a counterbalance to the executive organs in the constitutional system of Turkey anymore.

One of the first reasons for the liberal democratic decline in Turkey in 2017 was the constitutional amendment approved by a controversial referendum that transformed the parliamentary system with an already powerful president to a Latin American-style

presidential one. As Bâli mentions, “the Turkish constitutional referendum... may well have been a particularly acute instance of invoking the popular will to disable democratic restraints.”⁷ Bâli does not say this without any reason. The constitutional amendment package consisted of 18 articles and the most important ones,⁸ which dissolve the very institutions that give democracy any proper vitality or legitimacy,⁹ will be implemented in 2019. The new system establishes a single and partisan executive with vastly expanded powers but without any means to check and balance. After going into effect, it will give the President the power to control judicial appointments, rule by decree, declare a state of emergency, appoint vice presidents and ministers without parliamentary approval and dissolve the Parliament without any condition. As the Venice Commission emphasised, the amendment approved by a razor-thin majority¹⁰ “(is) a dangerous step backwards in the constitutional democratic tradition of Turkey.”¹¹

Under the new circumstances, the credibility of the Constitutional Court depends on if it can emerge as a strong game-broker. But the first signals in 2017, even before the presidential system goes into effect officially, were not in that direction. One of the first tests for the Court was control of the alleged voting right violation during the referendum. The Supreme Board of Election (SBE), the only state organ controlling the whole voting process in elections and referendums in

Turkey and whose decisions are final, ruled to count unstamped ballots as valid while the voting process was continuing. This decision resulted from a petition filed by AKP’s representative on the Board that there was clearly a conflict with the explicit legal provision of Art. 101/3 (of Act on Basic Provisions on Elections and Voter Registers, no. 298) that stipulates: “ballots that are not stamped by the Ballot Box Committees shall be counted as invalid.”¹² As Gözler states, the right to count the unstamped ballots as valid belongs only to the legislative organ, which is the Grand National Assembly of Turkey through an amendment of this provision, not to the SBE.¹³

SBE founded its decision on Art. 3 of Additional Protocol (AP) No.1 of the European Convention on Human Rights (ECHR) through paragraph 5 of Art. 90 of the Turkish Constitution which regulates that in the case of conflict between an international convention on human rights to which Turkey is a party and a domestic norm regulating the same matter, the international convention should prevail. But the Constitutional Court of Turkey rejected the constitutional complaint application lodged by a small leftist party¹⁴ just the day after the referendum, alleging that the decision of the SBE, taken while the voting process was continuing, violated the right to free election and, in connection, right to effective remedy. The Court found the application *ratione materiae* inadmissible because, ironically, Art. 3 of AP

⁶ Bertil Emrah Oder, ‘Populism and the Turkish Constitutional Court: the Game Broker, the Populist and the Popular’ (2017) May 2 Int’l J. Const. L. Blog p.1 < <http://www.iconnectblog.com/2017/04/populism-and-the-turkish-constitutional-court-the-game-broker-the-populist-and-the-popular/> > accessed 5 February 2018 .

⁷ Aslı Bâli, ‘Distinguishing Among Referenda’ (2017) Apr. 27, Int’l J. Cons. L. Blog < <http://www.iconnectblog.com/2017/04/distinguishing-among-referenda-i-connect-column/> > accessed 6 February 2018.

⁸ For the details of these articles please see: Bertil Emrah Oder, ‘Turkey’s Ultimate Shift to a Presidential System: The Most Recent Constitutional Amendments in Details’ (2017) Jan. 31, < <http://www.constitutionnet.org/news/turkeys-ultimate-shift-presidential-system-most-recent-constitutional-amendments-details> > accessed 6 February 2018.

⁹ İlayda Güneş, ‘What’s at Stake in the Turkish Constitutional Amendment Proposal’ (2017) Apr. 14, Int’l J. Cons. L. Blog < <http://www.iconnectblog.com/2017/04/whats-at-stake-in-the-turkish-constitutional-amendment-proposal/> > accessed 6 February 2018.

¹⁰ The result of the 16 April 2017 referendum was: 51.4 percent yes votes, 48.6 percent no votes.

¹¹ European Commission on Democracy Through Law, Opinion no. 875/2017, p. 30, § 133 < [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad\(2017\)005-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e) > accessed 6 February 2018.

¹² Ali Acar, ‘The Constitutional Referendum in Turkey: A Far Stretch from Right to Free Elections to Referenda’ (2017) June 1 < <http://verfassungsblog.de/the-constitutional-referendum-in-turkey-a-far-stretch-from-right-to-free-elections-to-referenda/> > accessed 6 February 2018.

¹³ Kemal Gözler, *Referandumdan Önce Referandumdan Sonra* (1st edn., Ekin 2017) 75.

¹⁴ Halkın Kurtuluşu Partisi (People’s Salvation Party).

no.1 is not usable for referendums but only for legislative organs' elections.¹⁵

Another important decision of the Constitutional Court in 2017 was on the offence of insulting the President of the Republic. The first paragraph of Art. 299 of the Turkish Criminal Code provides that anyone insulting the President shall be sentenced to imprisonment for a term from one year to four years. The applications made by two local courts argued in brief that the sentence creates a difference between public officers and violates the equality principle. Courts also maintained that, in a state of law, to form a type of offence specific to a position which is highly political – especially after the last constitutional amendments that allowed the President to be a member of a political party – shall not be possible. Another argument of the courts was that the existence of a law which provides a special safeguard for the head of the state is in breach of the ECHR. In this case, the Constitutional Court decided to dismiss the requests for annulment.¹⁶ Stating that the President represents the Republic and the Turkish nation, the Court said that (s)he is not equal to other public officers, and the offence to the President must be deemed to be committed towards the State. The Court admitted that the Penal Code limits freedom of expression but argued that, although it is known that the acceptable limits of criticisms towards the persons exercising public powers are broader than the limits of criticisms towards other persons, insult is not a protected expression in any legal system. None of the ECtHR cases nor Art. 90 of the Turkish Constitution, which orders the supremacy of international agreements on human rights (obviously including ECHR)

over the national laws was mentioned in the decision.

In a very critical constitutional complaint made by the main opposition party's leader Kemal Kılıçdaroğlu, the Court decided against the applicant and favoured limitation of the freedom of expression. Kılıçdaroğlu's speeches on political issues recalling some corruption cases included accusations of Erdoğan (Prime Minister at that time) being "immoral" and a "religious merchant." Although his observations were value judgements,¹⁷ a first-instance court found Kılıçdaroğlu guilty of defamation and fined him 5.000 TRY (≈ € 1.110). Despite citing one by one case law of the ECtHR on the freedom of expression toward politicians and recalling that the limits of acceptable criticism are wider as regards a politician than a private individual, the Court admitted that the first-instance court did a lawful analysis and evaluated that the compensation was not determined arbitrarily. As a result, in contrast with case law of the ECtHR, the Constitutional Court found no violation of freedom of expression in this case.¹⁸

Other important decisions of the Constitutional Court of Turkey in 2017 were given according to the constitutional complaint applications of the HDP (Halkların Demokratik Partisi/*Peoples' Democratic Party*)¹⁹ deputies. In 2016, the immunity of 70 members of the Parliament had been lifted by way of an allegedly unconstitutional,²⁰ constitutional amendment proposed by Erdoğan's AKP. Subsequently, several members of the Parliament from HDP and one from CHP (Cumhuriyet Halk Partisi/*People's Republican Party*) were arrested. One of them, Gülser

Yıldırım, a deputy of HDP, has been imprisoned allegedly for being a member of the separatist terrorist organisation PKK (Partiya Karkerên Kurdistanê/*Kurdistan Workers' Party*). Ms Yıldırım applied the Constitutional Court, saying that the acts of taking into custody and arresting her were unlawful, the limitation to reach the investigation file violated her right to personal freedom and security and being imprisoned violated her freedom of expression, right to free elections and to engage in politics due to the fact that the accusations were merely related to her usage of freedom of expression and political acts. The Court, in its detailed and relatively long decision,²¹ concluded that the allegations were manifestly ill-founded and rejected the application.²² That, of course, led everybody to remember another application²³ by CHP's deputy Mustafa Ali Balbay under similar conditions in 2013. In that case, the Court decided that the taking into custody of a member of the Parliament violates the right to free elections since it intervened with his political acts and his right to represent the people.

Another application made with the same arguments belonged to another detained member of the Parliament, Selahattin Demirtaş, the co-leader of HDP. Demirtaş is a popular opposition leader who was a candidate for the presidency in 2014 and won around 10% of the votes, which was higher than the Kurdish movement's popular support at that time. As the co-leader of the third biggest party in the Parliament, he is influential in Turkish politics. His detention by a local court was based on his speeches, Twitter posts and some meetings with political actors. The Constitutional Court found all of

¹⁵ Application no. 2017/20127.

¹⁶ Case no: 2016/25, Decision no: 2016/186.

¹⁷ For the selected case law for "value-judgement," look at: *Lingens v. Austria*, application no. 9815/82 (ECtHR).

¹⁸ Application no. 2014/1577.

¹⁹ Kurdish movement's recent biggest party.

²⁰ This allegation's main argument is that the procedure to lift parliamentary immunity is already regulated for all of the members of the Parliament in Art. 83 with its application to annulment procedure in Art. 85, and lifting the immunities of only some of the deputies by a constitutional amendment violated the equality principle and hindered the applications for annulment. For further details, please see: Ali Acar, 'De-constitutionalism in Turkey' (2016) May 19, *Int'l J. Const. L. Blog* < <http://www.icconnectblog.com/2016/05/deconstitutionalism-in-turkey/> > accessed 9 February 2018.

²¹ The decision spanned 43 pages.

²² Application no. 2016/40170.

²³ Application no. 2012/1272.

the allegations against Demirtaş, as with Ms Yıldırım, manifestly ill-founded and rejected the application.²⁴ But the difference in this decision was that Engin Yıldırım, the vice president of the Court and known as being the most liberal amongst the judges, wrote a dissenting opinion arguing that the detention of the co-leader of the third biggest party in the Parliament is not proportional and not necessary in a democratic society.

Along the same lines, a decision which differentiated from the others was the one made after the application of another HDP deputy, Ayhan Bilgen. Mr Bilgen, a member of the Central Executive Board of HDP, was detained because a tweet calling people to the streets to protest ISIS attacks towards Kurdish people in Kobane (or *Kobani*, or *Ayn el Arab* in Syria) was posted by HDP's official Twitter account just after websites and social media accounts related to PKK had done the same. The Diyarbakır Chief Public Prosecutor alleged that this tweet showed that the party's board members, including Mr Bilgen, take orders from the terrorist organisation, but he did not bother himself to prove this allegation nor the presence of Mr Bilgen in the meeting before the tweet. Before the higher court released him due to a lack of evidence, Mr Bilgen made a constitutional complaint according to his right to personal liberty and security in Art. 19 of the Constitution. The Court, saying that the detention was not based on strong evidence related to a commitment, agreed with Mr Bilgen and decided that his right was violated.²⁵

Some important decisions of the Constitutional Court of Turkey in 2017 were on the freedom of the press. Three of them are worth mentioning in this report.

The first was made by Hakan Yiğit, who is the news director of one of the biggest web-

sites in Turkey, *memurlar.net*. After some of the already publicly known tape recordings belonging to Fethullah Gülen (the head of a once-Islamic movement that is now a terrorist organisation, which is allegedly behind the putsch in 2016) had been published on the website, Mr Yiğit was sentenced to one year and eight months in prison on the grounds of the infringement of the confidentiality of the communication. The Constitutional Court concluded that in balancing the right to protection of honour and dignity and the freedoms of expression and the press, it gave priority to the former. Also, because the related person is undeniably famous and the tape recordings were already published on some other websites, the judges decided that the applicant's freedoms of expression and the press were violated.²⁶

Another application alleging the violation of these freedoms concerned Ali Kızık, owner and general director of a website publishing news on aviation. Mr Kızık posted some articles in which he alleged some mismanagement and corruption in Türk Hava Kurumu (Turkish Aviation Institution). Upon the request of the head of the institution, a court in Ankara obstructed access to these posts, and the appeal of the applicant was denied. In this case, the Constitutional Court said that a journalist need not prove what he or she alleges. The journalist, as far as he or she does not insult the related person, can use every method, including Internet websites, to inform the public. In the Court's view, the complainant has several means to answer the journalist since he is the head of a well-known institution. Therefore, the obstruction of access to the articles constituted a violation of the freedoms of expression and the press.²⁷

The applicant in the other case was a very famous actress, Berrak Tüzünataç, whose intimate pictures with an actor on her house's

terrace were televised on a paparazzi show. She sued the owner of the television channel over the violation of her right to protection of honour and dignity, but an Istanbul court rejected the case, saying that the pictures were taken from the street, which is open to public, and that since the complainant is a famous person, she should be tolerant to the interest of paparazzi. The Court of Cassation ratified the decision. Despite admitting that the pictures constitute an intervention to the applicant's right to respect of her private life, the Constitutional Court emphasised that the life of famous artists might be subject to news and critics in a democratic society. In this specific case, the judges thought that, by choosing to be intimate with her partner on her balcony, which can be watched from the street without any special effort, she did not act responsibly. In conclusion, the Court said that the balance between two rights was taken into consideration by the lower courts, and therefore there was no violation of the right to the respect of private life.²⁸

Another significant case was about police violence against a 14-year-old boy in 2009. Seyfullah Turan was participating in a meeting of DTP²⁹ in Hakkari. Because of police interference, he started to escape, but police officer Bahadır Turan caught him and deliberately hit his head several times with the back of his long-barreled gun. The boy could not stand up again. The officer escaped from the scene. After the emergence of the pictures of the incident in the media, he was investigated and condemned to six months and seven days of imprisonment for reckless injury. The punishment has been postponed. The Constitutional Court said that the act is not torture but the violation of the right to life and sent the case to lower court for a retrial.³⁰

Last but not least of the constitutional complaints that should be mentioned in this re-

²⁴ Application no. 2016/25189.

²⁵ Application no. 2017/5974.

²⁶ Application no. 2015/3378.

²⁷ Application no. 2014/5552.

²⁸ Application no. 2014/20364.

²⁹ The biggest Kurdish movement's party at that time. Then closed by the Constitutional Court.

³⁰ Application no. 2014/1982.

port is the application of an aggressive prisoner, Cihan Koçak, who, after failing to stand up for the morning counting, was cuffed on his ankles and hands behind his back. Then, although he had been put in a padded cell, his cuffs were not removed for more than six hours. That caused some bruises on Mr Koçak's wrists and ankles, but he had been taken to a doctor only after 17 days from the incident, not immediately. Upon the allegations of being beaten by Mr Koçak, the prosecutor investigated the case, but no one has been found guilty due to a lack of evidence. The Constitutional Court, in this case, found that keeping someone cuffed in a padded cell for six hours passed beyond the rights and duties of keeping order and transformed into corporal punishment, which constitutes a violation of the constitutional ban of inhuman treatment.

At the end of the list of important decisions of the Turkish Constitutional Court in 2017, an action for annulment is worth mentioning. One of the hot topics in Turkey in 2015 was the new National Security Act (*İç Güvenlik Yasası*). The Act, which strengthened security forces against the constitutional right to assembly and freedom of expression, was brought to the Constitutional Court by CHP with a request for annulment. The Court announced its decision in 2017, and found almost all of the controversial regulations of the Act constitutional, including obstruction to access Internet posts (Twitter, Facebook, etc.) upon the request of the Ministry of the Interior Affairs by the Directorate of Telecommunication and Communication, the use of coloured water by police to disperse demonstrators, direct orders from the governor to security forces in case of emergency, the forbiddance of carrying banned³¹ posters, placards, pictures or other means or to shout or to play through speakers negative slogans and the ban to cover the face totally or partially³² during demonstrations. In this package empowering the executive organs, the Court annulled only one regulation regu-

lating the search of the body and the unseen parts of a person's vehicle upon the written, and in case of emergency, oral order of the law enforcement officer. Because according to Art. 20, in normal cases, a judge's order is obligatory for a body search.³³

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

As mentioned at the beginning of the previous chapter, Turkey has been ruled under a state of emergency declared in July 2016. The Constitutional Court of Turkey continued to reject checking the constitutionality of the emergency decree laws issued by the executive organs in 2017. Also, the Court addressed a newly founded commission to treat the alleged violations of rights and freedoms occurring from the emergency decree laws, saying that the commission constitutes an internal remedy to be exhausted before applying for a constitutional complaint.³⁴

IV. LOOKING AHEAD TO 2018

The Constitutional Court of Turkey will seek to guard its position as a meaningful constitutional organ in 2018. As long as the judges do not start to resist the influence of the executive, the very existence of the Court will soon be negligible. The results of the lack of a completely ineffective Constitutional Court would worsen the country's level of democracy, which has recently been downgraded to a "not free" country by Freedom House.³⁵ But the first signs are unfortunately not hopeful. The rejection of the implementation of the Constitutional Court's decision by the lower courts for the release of journalists Şahin Alpay and Mehmet Altan upon their constitutional complaint application during the first days of 2018 shows that the judges in Ankara have more than a reputation problem now. They are not taken into

account anymore.

V. FURTHER READING

B Baser and AE Ozturk, *Authoritarian Politics in Turkey: Elections, Resistance and the AKP* (1st edn., I.B.Tauris 2017)

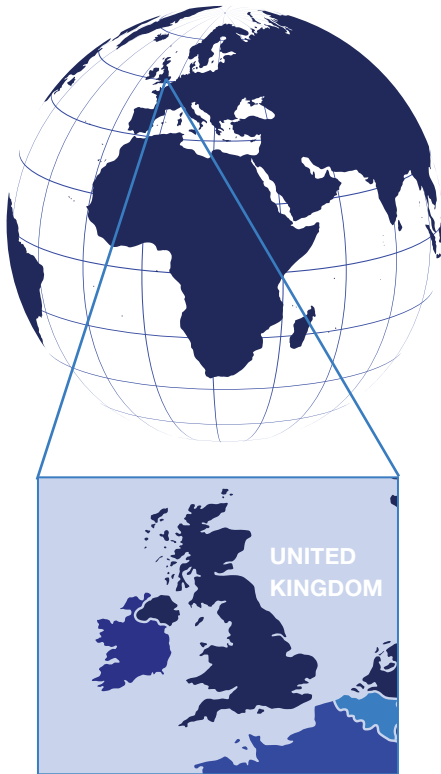
³¹ The allegation here was based on the ambiguity of the term "banned by the law."

³² Does this include also the cases after tear gas usage by the security forces?

³³ Case no: 2015/41, Decision no: 2017/98.

³⁴ Public announcement on 04.08.2017.

³⁵ < <https://freedomhouse.org/report/freedom-world/2018/turkey> > accessed 17 February 2018.



United Kingdom

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

2017 was a dramatic year which saw the UK Parliament begin the process of legislating in preparation for withdrawal from the European Union ('Brexit'). In an attempt to bolster its mandate, the government called a general election with Parliament's authorisation. This backfired badly for the Conservative Party, resulting in a minority government, now dependent upon the support of the Northern Ireland Democratic Unionist Party (DUP) to give effect to the Brexit decision.

How one assesses the health of liberal democracy largely depends upon how one understands its fundamental purposes. Many of those opposed to Brexit have questioned both the process by which the decision to leave was taken and the process by which the United Kingdom's exit will be effected. But as we discuss in our paper, the UK continues to be accorded a very high ranking according to international democracy indicators, it has not witnessed the rise of extremist parties and has seen renewed democratic engagement, evidenced by party membership and voter turnout. The robustness of parliamentary democracy is, however, under challenge. The process of withdrawing the UK from the European Union (EU) and, in doing so, disentangling the UK from the thousands of legal instruments originating from Brussels, will require extraordinary executive pow-

ers. This will test the capacity of Parliament both to circumscribe as effectively as possible the powers it accords to the government and to scrutinise adequately the exercise of these powers. Another delicate and complex challenge will be to give effect to Brexit in a way that takes proper account of the asymmetrical devolution settlements, particularly in relation to Scotland and Northern Ireland, where majorities voted to remain in the EU. In 2018, the resilience of parliamentary democracy will come under unprecedented scrutiny as will the future of the state itself as a multinational democracy.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

The question whether liberal democracy is on the rise or decline in the UK does not lend itself to easy answers. The UK's scores in global indices of democracy (which are not immune to criticism) remain high. The Economist Intelligence Unit (EIU) 2017 Democracy Index still ranks the UK among only 19 'full' democracies in the world and even improved the state's score since 2016. This contrasts with the downward trajectory of other long-established liberal democracies, such as the USA and France, and younger democracies such as Spain.¹ Domestic organisations assessing UK democracy in 2017 focused more on the quality of

¹ Economist Intelligence Unit, *Democracy Index 2017: Free speech under attack* (EIU, 2018) http://pages.eiu.com/rs/753-RIQ-438/images/Democracy_Index_2017.pdf.

democracy in terms of issues such as social, political and economic equality, rather than concerns surrounding democratic decline.²

That said, it would be misleading to suggest that no concerns have been raised regarding the health of the UK's democratic system in 2017. The politically charged atmosphere surrounding the Brexit referendum on the UK's withdrawal from the EU, held on 23 June 2016, and the highly complex and controversial process for achieving Brexit since the vote, intensified contestation concerning the health of UK democracy throughout 2017. Scholars and policymakers have discussed Brexit as a 'democratic crisis'.³ Leading political scientists have suggested that the dynamics of the Brexit vote shared many characteristics with perceived threats to liberal democracy elsewhere:

British voting patterns reflected many of the same discontents that had led to the rise of populist insurgents in Europe, and that a few months later would produce the victory (surprising to so many) of Donald Trump in the November 2016 U.S. presidential election...⁴

Since the referendum vote, various concerns have been raised, especially by those opposed to Brexit or who seek to have its full implications addressed by the government and officialdom. These include: the prospect of diminished rights protection due to withdrawal from the EU Charter on Fundamental Rights;⁵ attacks on the judiciary and the university sector by media and politicians unhappy with any challenge

to the government's approach to the Brexit process;⁶ charges that the central government in Westminster is attempting to achieve Brexit by executive fiat and failing to respect the power of Parliament and the devolution agreements with Scotland, Northern Ireland and Wales; charges that plans for post-Brexit governance will see devolved powers under EU law centralized in the Westminster parliament; concerns regarding the broad legislative powers assigned to ministers under the European Union (Withdrawal) Bill (hereinafter, 'the Withdrawal Bill'); and more broadly, a transfer of significant power from the elected Westminster parliament to unelected officials.⁷

The Brexit process, and the wider democratic landscape, was complicated in 2017 by UK-wide and sub-state elections, which fostered concerns for the stability of the political system. The Conservative government unexpectedly lost its significant majority in a snap general election held on 8 June. In Scotland, the governing Scottish National Party (SNP) lost 21 of its 56 seats, interpreted as a rejection of its call for a second independence referendum. Separate elections in Northern Ireland in March led to political crisis throughout 2017, with the two largest parties (the DUP and Sinn Féin) unable to form a government due to disputes concerning Irish language rights, among other issues. Failure to meet deadlines for bridging the impasse continued as the DUP enjoyed electoral success in the UK general election of June. Discussion of a return to direct rule from Westminster increased by year's end as the Northern Ireland secretary (a minister of

the UK government) produced the 2017/18 budget for the territory.⁸ This impasse underscores that it is more apt to address the health of the UK's *democracies* in the plural: notwithstanding the state's unitary nature, devolution arrangements mean that the dynamics and shape of the democratic system differ significantly from nation to nation. In particular, Northern Ireland is not a 'classic' liberal democracy but rather a consociational democracy where government is exercised through a power-sharing agreement between the unionist and republican communities.

Other concerns about the health of UK democracy have centred on counter-terrorism measures, with high-profile terrorist attacks in Westminster, Manchester and London Bridge during 2017. Serious concerns were voiced about the Investigatory Powers Act, enacted in November 2016, which granted extensive powers to security agencies and codified existing surveillance practices perceived by some as potentially discouraging investigative journalism, not least in diminishing journalists' ability to protect the confidentiality of their sources.⁹ In advance of a judgment in a challenge against the pre-existing Data Retention and Investigatory Powers Act 2014,¹⁰ in November 2017 the Home Office (the ministry responsible for immigration, security and law and order) announced the addition of several safeguards to the 2016 Act, including removal of senior police officers' power of self-authorisation of surveillance and a requirement for requests for confidential communications data to be approved by the new investigatory powers commissioner.¹¹

² See, e.g., Patrick Dunleavy and Ros Taylor (eds.), *The 2017 Audit of UK Democracy* (Democratic Audit UK, October 2017).

³ See, e.g., D French, "'Brexit': A constitutional, diplomatic and democratic crisis. A view from the trenches", presentation, 11 August 2016, Faculty of Law, North-West University, South Africa http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812016000100056.

⁴ See 'Britain After Brexit' (2017) 28(1) *Journal of Democracy* 16.

⁵ See, e.g., Tobias Lock and Tom Gerald Daly, *Legal Implications of Brexit and the British Bill of Rights* (Edinburgh Law School and Bingham Centre for the Rule of Law, February 2017).

⁶ See, e.g., Lord Chief Justice's Report 2017 at p.6: 'The judiciary has had to defend its independence. This is particularly important at a time where we see the deterioration of judicial independence in other jurisdictions.' <https://www.judiciary.gov.uk/wp-content/uploads/2017/09/lcj-report-2017-final.pdf>

⁷ See, e.g., Joelle Grogan, 'How democratic is the Brexit process?' *Democratic Audit* 9 October 2017 <http://www.democraticaudit.com/2017/10/09/audit-2017-how-democratic-is-the-brexit-process/>.

⁸ See Arthur Beesley, 'Westminster sets £10.6bn budget for Northern Ireland' *Financial Times* 14 November 2017 <https://www.ft.com/content/0146a180-c88a-11e7-ab18-7a9fb7d6163e>.

⁹ Freedom House, 'Freedom of the Press 2017: United Kingdom' <https://freedomhouse.org/report/freedom-press/2017/united-kingdom>.

¹⁰ *Secretary of State for the Home Department* [2018] EWCA Civ 70.

¹¹ Alan Travis, 'UK mass digital surveillance regime ruled unlawful' *The Guardian* 30 January 2018 <https://www.theguardian.com/uk-news/2018/jan/30/>

Such concerns might suggest, at least at first glance, that recent developments in the UK resonate with similar concerns elsewhere as to attacks on courts and other accountability actors, rights, a centralization of state power, the rise of populist political forces and an increase in state surveillance, discussed under rubrics such as ‘stealth authoritarianism’ or ‘democratic decay’.¹² Yet the UK is something of an outlier in this contemporary global trend. It is vital to understand and assess the state of liberal democracy in the UK on its own merits. As the same scholars quoted above observe:

Leave’s narrow win in the United Kingdom [Brexit referendum] can be seen as flowing from distinctive features of British political life and history. The Leave forces were by no means all illiberal in character or in opposition to the country’s two leading parties—in fact, they included many leaders of the Conservative Party and a large share of Labour Party voters.¹³

In the arena of party politics, the UK has not suffered the rise of anti-democratic political forces, or at least nativist, far-right and xenophobic forces, found elsewhere. While the United Kingdom Independence Party (UKIP) is firmly rooted in Euroskepticism and isolated members of the party have engaged in nativist and racist rhetoric, its support appears quite unstable, and there is no political force in the UK comparable to the Front National in France, Alternativ für Deutschland (AfD) in Germany or the Fidesz and Jobbik parties in Hungary.

Some long-term negative trends concerning the disengagement of the public from the democratic system, including increasingly low turnout in elections and plummeting political party membership,¹⁴ appear to have reversed somewhat. Party membership figures have doubled from a historic low of 0.8% in 2013, to 1.7% by 2017.¹⁵ Voter turnout has also improved: 72% in the Brexit referendum and 69% in the 2017 General Election, the highest since 1997.

In 2015 Philippe Schmitter – taking a global view – spoke of ‘pressures, not to dismantle or destroy democracy as such but to change the way democracy is being practiced’.¹⁶ Rather than a question of a ‘rise’ or ‘decline’ of liberal democracy in the UK context, it is more apt to speak of the profound state of flux in the UK’s democratic order and the interacting axes of change and contestation involved: the decades-long accumulation of executive power vis-à-vis Parliament (far from a uniquely UK phenomenon); the tensions between a renewed focus on direct democracy and a constitutional framework that has traditionally regarded such mechanisms with suspicion; the sustainability of the UK’s unentrenched constitution and its capacity to serve as a framework for resolving fundamental contestation; and the extent to which the UK can continue as a ‘union state’ with asymmetric devolution settlements or must embrace some form of federal structure. What constitutes an optimal outcome regarding each of these questions is an open question and can depend on one’s conception of what is appropriate to the UK’s venerable constitution, one’s political affiliations, one’s nationality within the UK, and most funda-

mentally, one’s conception of what constitutes an optimal model of liberal democracy.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

The provisions of the Fixed-term Parliaments Act 2011 (FTPA), allowing for early dissolution of Parliament, were used for the first time in April 2017 to call the snap general election in June. The FTPA provides for a five-year parliamentary term, unless the government falls on a vote of no-confidence, or the special procedure under s.2(1) is used whereby the House of Commons can vote for an early dissolution by a two-thirds majority. The constitutional significance of the Act was in transferring the (not inconsiderable) discretionary power held by the Prime Minister to request Her Majesty for an early dissolution to the House of Commons – which, moreover, could only dissolve itself by the special majority.¹⁷ This was seen to be a new constitutional balance between democratic accountability and executive stability by requiring significant cross-party support in the House for an early general election, rather than the matter being the sole prerogative of the Prime Minister, exercised for partisan advantage. When Prime Minister Theresa May requested an early dissolution for the first time in April, the House passed the requisite motion by much more than the required two-thirds.¹⁸ This has led to the view that the FTPA is a dead-letter because it is unlikely an opposition would ever withhold votes for an early election.¹⁹ Others feel that such an assessment is premature.²⁰

uk-mass-digital-surveillance-regime-ruled-unlawful-appeal-ruling-snoopers-charter.

¹² See, e.g., Tom Daly, ‘Democratic Decay in 2016’ in *Annual Review of Constitution-Building Processes: 2016* (International IDEA, 2017).

¹³ ‘Britain After Brexit’ (n 4).

¹⁴ See, e.g., Ian Marsh and Raymond Miller, *Democratic Decline and Democratic Renewal: Political Change in Britain, Australia and New Zealand* (Cambridge University Press, 2012).

¹⁵ See Lucas Audickas, ‘The changing landscape of UK political party membership’ House of Commons Library 31 August 2017 <https://commonslibrary.parliament.uk/parliament-and-elections/elections-elections/the-changing-landscape-of-uk-political-party-membership/>.

¹⁶ Philippe Schmitter, ‘Crisis and Transition, but Not Decline’ in Larry Diamond and Marc Plattner (eds.), *Democracy in Decline?* (JHU Press, 2015) 40.

¹⁷ Votes of no-confidence in the government that may lead to a dissolution of Parliament would still be passed by simple majority (s.2(3)).

¹⁸ Ayes 522, Noes 13: House of Commons Hansard, Division 196, 19 April 2017: <https://hansard.parliament.uk/Commons/2017-04-19/division/BE856226-DD6B-4409-9462-D8D910F942D1/EarlyParliamentaryGeneralElection?outputType=Names>.

¹⁹ See the debate on the resolution, House of Commons Hansard, 19 April 2017, Col.681 et seq.: <https://hansard.parliament.uk/commons/2017-04-19/debates/ODE53CE3-2E92-44E8-A3BE-A7BEE2D9F075/EarlyParliamentaryGeneralElection>.

²⁰ Robert Hazell, ‘Is the Fixed-term Parliaments Act a Dead Letter?’ *UK Constitutional Law Blog*, 26 April 2017: <https://ukconstitutionalallaw.org/2017/04/26/>

Aside from this, constitutional debates in 2017 were inevitably focused on the difficult issues surrounding Brexit, particularly the constitutional implications of the Withdrawal Bill as it commenced its journey through the legislative process at Westminster. Following the Brexit referendum of June 2016, the UK government invoked the procedure under Article 50 of the Treaty on European Union in March 2017.²¹ This was the act of giving formal notice to the European Council of the UK's intention to withdraw from the EU, and to commence negotiations on the terms of withdrawal. In June 2017, the government introduced the Withdrawal Bill in the House of Commons to repeal the European Communities Act 1972, which is the domestic legal basis of the UK's membership of the EU, and to make further provision for the legal issues arising from Brexit. The Bill is currently at Committee Stage in the House of Lords, having passed the House of Commons in January 2018.²²

The post-Brexit constitutional future is uncharted territory, and the legal framework proposed by the Bill to deal with its challenges is, unsurprisingly, complex. EU law that has applied in the UK since 1973 is found in a variety of forms: UK Acts of Parliament and delegated legislation as well as 'directly effective' legislation made by the EU without the intervention of UK institutions by the authority of the European Communities Act 1972;²³ decisions of the Court of Justice of the European Union (CJEU); the UK courts; and regulatory rulings of EU institutions. How this body of laws is to apply, and be amended and repealed, from the date at which the UK exits the EU is what the Bill seeks to legislate for. The soundness of this framework will determine the extent

to which the future UK legal system ensures clarity, certainty and stability.

A number of potential constitutional complications have been highlighted, however, and they can be categorised into four main areas. First is the scope of 'retained EU law' after the UK withdrawal from the EU institutions and legal order. The second concerns the status of retained EU law, which enjoyed supremacy against domestic law so long as the UK was a part of the EU, but whose status will require redefinition once the UK withdraws from that legal order. The third relates to the major constitutional implications of an unprecedented delegation of legislative powers to the executive to modify retained EU law. The final set of issues surround how competences repatriated from the EU will be distributed between the UK government and the devolved bodies in Scotland, Wales and Northern Ireland. The heavily asymmetrical nature of the British system of devolution adds further complexity to this question. Given the extensive ramifications of these matters, the Bill has been subject to wide public and academic comment and robust parliamentary scrutiny, in particular by the Constitution Committee of the House of Lords, which has extensively analysed the Bill in no less than three different published reports so far.²⁴

The Bill contemplates two categories of retained EU law. The first is the straightforward category of EU law that has been given effect by UK domestic legislation, both primary and secondary, or 'EU-derived domestic legislation' as defined in Clause 2. This category will have the same legal status post-exit as it did pre-exit. By Clauses 3 and 4, the UK would also retain the body of EU

law that was directly effective in the UK as an EU member-state, and which had such effect without any domestic legislative act. The Bill contemplates a unique and hitherto unrecognised status for this category of law in that, while it would be made part of domestic law, the legal status (i.e., whether to be treated as primary or secondary legislation) of specific laws falling within this category are to be determined flexibly by the executive in the future (Clause 17). The Constitution Committee has been severely critical of this approach, and has pointed to its significant potential for confusion and uncertainty as well as the constitutional impropriety of giving Ministers rather than Parliament the role of determining the legal status of a large number of laws. It has proposed instead that all retained EU law should without distinction be given the status of domestic primary legislation, and while it concedes certain drawbacks of this approach, it concludes that the benefits outweigh the costs.²⁵

Clause 5 of the Bill seeks to continue the principle of supremacy for retained EU law over pre-exit domestic law (but not post-exit domestic law). The aim here is to ensure against a sudden reversal of legal status between EU and domestic law. EU law that had prevailed over domestic law while the UK was an EU member would suddenly be susceptible to being overridden by contrary domestic legislation if the normal principles of UK constitutional law were to apply after Brexit takes effect. While supportive of the policy underlying Clause 5, the Constitution Committee has dismissed the need for the continued protection of a supremacy status of retained EU law after Brexit on several grounds that it believes would lead to confusion, uncertainty and constitutional impro-

robert-hazell-is-the-fixed-term-parliaments-act-a-dead-letter/.

²¹ UK Foreign and Commonwealth Office, *The process for withdrawing from the European Union*, Cm 9216, February 2016, pp 7 and 13: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/503908/54538_EU_Series_No2_Accessible.pdf; Treaty on European Union (Lisbon Treaty), Article 50: <http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-European-union-and-comments/title-6-final-provisions/137-article-50.html>.

²² European Union (Withdrawal) Bill 2017-19, Progress of the Bill: <https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html>.

²³ For a succinct explanation of 'direct effect' in EU law, see EUR-Lex (2015): <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3AI14547>.

²⁴ House of Lords Constitution Committee: *'The "Great Repeal Bill" and delegated powers'*, 9th Report of Session 2016-17, 7th March 2017, HL Paper 123: <https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/12302.htm>; 'European Union (Withdrawal) Bill: interim report', 3rd Report of Session 2017-19, 7 September 2017, HL Paper 19: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/19/1902.htm>; 'European Union (Withdrawal) Bill', 9th Report of Session 2017-19, 29 January 2018, HL Paper 69: <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/6902.htm>.

²⁵ Mark Elliott and Stephen Tierney, 'Sovereignty or Supremacy? Lords Constitution Committee Reports on EU (Withdrawal) Bill', UK Constitutional Law Blog, 29 January 2018: <https://ukconstitutionallaw.org/2018/01/29/mark-elliott-and-stephen-tierney-sovereignty-or-supremacy-lords-constitution-committee-reports-on-eu-withdrawal-bill/>.

priety within a UK legal system which is no longer an EU member-state. The supremacy clause in particular does not sit comfortably with the doctrine of parliamentary sovereignty, the cornerstone of the British constitution. The Committee has proposed instead that retained EU law be given the status of an Act of Parliament enacted on exit day. This would preserve the primacy of retained EU law over pre-exit domestic legislation while post-exit domestic legislation would prevail over retained EU law under UK constitutional law (as the Bill itself contemplates).²⁶

The third difficulty with the Bill is in relation to the massive expansion of the delegated powers of Ministers to amend and repeal primary legislation and revoke secondary legislation, set out mainly in Clauses 7 to 9 (and Clause 10 for the devolved executives). It is widely accepted that due to the scale of the changes, the need for flexibility and the limited time available to ensure a fully prepared and functioning legal system by exit day, such delegated powers would be needed even if they were unprecedented. However, as the Constitution Committee has noted, this raises fundamental constitutional questions regarding the institutional balance between government and Parliament. The Bill's enlargement of delegated powers may not strike the appropriate balance between the necessary flexibility that must be given to the executive and the requirements of parliamentary scrutiny and accountability.²⁷

Finally, the UK's unique system of asymmetric devolution makes the redistribution of repatriated competences a matter of peculiar complexity. Devolution in Northern Ireland, moreover, is underpinned by an international post-conflict peace agreement in the form of the Belfast Agreement, any changes to which have especially sensitive implications for the ongoing peace process. It also raises controversial questions in respect of the soft border between Northern Ireland/UK and the Republic of Ireland, which re-

mains an EU member-state. Clause 11 of the Bill has attracted the most criticism, with some arguing that it would serve to fundamentally alter the devolution settlements in ways that centralise power in the UK government and Parliament. Under the existing devolution statutes, devolved legislatures are limited in their competence by the restriction on legislating contrary to EU law. Clause 11 seeks to replace this with a provision that limits devolved institutions from enacting primary legislation, or enabling secondary legislation, that would modify retained EU law. This limitation does not apply if the modification would have been within the legislative competence of the devolved body immediately before exit day. But the Bill provides for a procedure whereby, if the UK Parliament and a devolved legislature agree, areas of legislative competence can be released by way of UK Orders in Council (executive orders) to the devolved administrations, permitting them to modify retained EU law. The effect of this provision is that EU competences are assumed to be repatriated at first instance to the UK, and only then to be redistributed to the devolved bodies. Devolved administrations have taken strong exception to this approach, although the UK government has argued that Clause 11 is only intended to provide a flexible procedure for dealing with these competences and avoiding the need for primary legislation for transfers of competences to the devolved bodies.²⁸

IV. LOOKING AHEAD TO 2018

It is anticipated that the final withdrawal agreement with the EU must be secured by the autumn of 2018 in order to allow time for its ratification by Member States and the European Parliament ahead of exit day, scheduled for 29 March 2019. The government has guaranteed Parliament a 'meaningful vote' on the terms of the withdrawal agreement, and it appears that this will take the form of

a motion by both Houses of Parliament. It is not clear what the consequences would be were Parliament to vote against the terms of the draft agreement.

In anticipation that an agreement is secured, agreed to by Parliament and ratified by the EU, there will still be challenges. The next stage will be the negotiation of a new relationship agreement with the EU. At the same time, Parliament will have to conclude the passage of the EU (Withdrawal) Bill, a subsequent Implementation Bill and pass many other pieces of legislation to cover specific areas of policy such as trade, agriculture and customs. Parliament will be fully stretched in the task of giving effect to Brexit. One side effect is that other areas of constitutional reform are likely to remain on hold until the UK's exit from the EU is finally secured. Brexit will be a challenge to the constitution but it remains unclear how much it will alter the balance of power between the executive and Parliament, and between the central state and the devolved territories.

V. FURTHER READING

European Union (Withdrawal) Bill, 2017-19 <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0079/18079.pdf>

'European Union (Withdrawal) Bill', House of Commons Library Briefing Paper, No. 8079, 1 September 2017 <https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8079#fullreport>

'European Union (Withdrawal) Bill' House of Lords Select Committee on the Constitution. HL Paper 69, 9th Report of Session 2017-19, 29 January 2018 <https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/69/69.pdf>

²⁶ Ibid.

²⁷ Ibid.

²⁸ Stephen Tierney, 'Devolution and the repatriation of competences: the House of Lords Constitution Committee reports on the EU Withdrawal Bill', 29 January 2018, The UCL Constitution Unit Blog: <https://constitution-unit.com/2018/01/29/devolution-and-the-repatriation-of-competences-the-house-of-lords-constitution-committee-reports-on-the-eu-withdrawal-bill/>.



Ukraine

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

Since the Revolution of Dignity in late 2013, Ukraine has been fighting for its pro-Europe choice and survival as an independent state. In 2017, the conflict with Russia remained unsolved. Crimea is still annexed and the rights of local populations, especially the Crimean Tatars, are widely violated. The Donetsk and Lugansk regions with the illegitimately established ‘people’s republics’ remained under *de facto* Russian control. In general, there were no positive developments in 2017 between Russia and Ukraine. By contrast, EU-Ukraine relations have never been so intense¹ with visa regime liberalization on 11 June (Ukrainians, holders of biometric passport, can enter the Schengen zone for short-term stays) and the EU-Ukraine Association Agreement entered into force on 1 September 2017.

Despite the severe crisis and military conflict in the east, Ukraine demonstrated a high level of resilience and internal robustness that few predicted in 2014.² It managed to stabilize the economic and political situation and expanded reforms. In April 2017, the Medium-Term Government Priority Action Plan 2017-20 was adopted to underpin the strategy for the implementation of the EU-Ukraine Association Agreement and the reform process.³ The Plan defined five key

objectives – economic growth, effective governance, human capital development, rule of law and security, and defense and the fight against corruption – to be achieved through economic, healthcare, education, decentralization, public administration, military, and other structural reforms. In addition, 2017 witnessed the ongoing judicial reform, which was initiated with the constitutional amendments in June 2016.

This report focuses on developments in the judicial and legal field in the context of current judicial reform, notably its achievements, contradictions, and challenges. Special attention is paid to the Constitutional Court of Ukraine and the new Supreme Court, political fights around which reflect the nature of transitional democracy in Ukraine.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

Since 1991, the year of Ukraine’s independence, judicial reform has been one of the most highly desired changes. Various international and national polls have placed Ukraine among highly corrupt countries with an extremely low level of public trust in the national courts.⁴ Symptomatically, in 2017 the military conflict in the Donbass

¹ European Commission, ‘Association Implementation Report on Ukraine’ (Joint Staff Working Document) SWD (2017) 376 final, 16.

² Ash T., Gunn J., Lough J. and others, *The Struggle for Ukraine* (Chatam House, The Royal Institute of International Affairs 2017), v.

³ http://old.kmu.gov.ua/kmu/control/en/publish/article?showHidden=1&art_id=250120425&cat_id=247511908&ctime=1499422216110.

⁴ Vitalii Rybak, ‘Ukraine’s Judiciary Reform: 5 Things to Know’ (Euromaidan Press, 16 March 2017) <http://euromaidanpress.com/2017/03/16/ukraines-judiciary-reform-5-things-to-know/>.

region was considered even less important than corruption.⁵ The crises in the judicial system is also reflected in the statistic of the European Court of Human Rights: more than 70% of the decisions against Ukraine (916 out of 1213) passed by the European Court since Ukraine joined the European Convention in 1997 deal with the right to fair trial, the length of judicial procedure, or non-enforcement of the courts' decisions.⁶

Ukraine's problems with the judicial system are well known. The EU-Ukraine Association Agreement lists justice, freedom, and security as one of the cooperation areas between the parties. According to Article 14 of the Agreement, cooperation in this field is aimed at 'strengthening the judiciary, improving its efficiency, safeguarding its independence and impartiality, and combating corruption.'⁷ Thus, the judicial reform not only addresses the needs of Ukrainian society but also implements its international obligations. The reform is aimed at the Constitutional Court of Ukraine and the unified court system under the Supreme Court of Ukraine.

To understand the current judicial reform and developments in the Constitutional Court of Ukraine, some preliminary comments are required.

The Constitution of Ukraine was adopted in 1996. On 8 December 2004, during the Orange Revolution, the Constitution was amended by Law n. 2222, which changed the political system of the country from a parliamentary-presidential to a parliamentary one, as the constitutional amendments limited presidential power. In September 2010, the Constitutional Court of Ukraine declared Law n. 2222 unconstitutional and

annulled the constitutional reform. This decision reinstated the original, 1996 version of the Constitution.

In the aftermath of popular mass protests in February 2014, known as the Revolution of Dignity, Parliament overturned the decision of the Constitutional Court of Ukraine and restored the Ukrainian Constitution of 8 December 2004. In June 2016, alongside the adoption of the Law 'On Judicial System and the Status of Judges, n. 437,⁸ this version of the Constitution was amended to open judicial reforms – the reform of the Constitutional Court of Ukraine and the courts of general jurisdiction. On 30 September 2016, the constitutional changes came into force.

The Constitutional Court of Ukraine was established in 1996. It consists of 18 judges. The President of Ukraine, the Verkhovna Rada (the Parliament of Ukraine), and the Congress of Judges each appoint six judges to the Constitutional Court. The authors of the Ukrainian Constitution believed that this parity model of appointment would prevent the Constitutional Court from being blocked by one of the actors. If one of them, whether the executive, legislative, or judicial, does not appoint judges, the Constitutional Court would still be able to function.⁹

The Ukrainian constitutional judges have a mandate of nine years and cannot be reappointed. The recent judicial reform did not affect the composition of the Constitutional Court, quotas for judges' appointments, or their nine-year term. Instead, it has changed the procedures for appointing and dismissing judges, as for many years these procedures have been the main method to ensure the 'obedience' of the Constitutional Court (the appointing organs, especially the President

and the Parliament, could remove a judge who did not prove loyal to them, using the vague concept of a 'breach of the oath').

To reduce political discretion in appointment, the constitutional amendments of 2016 introduced new qualifications for the judges, including high moral character and a recognized level of competence as a lawyer. In addition, the new provisions prescribed competitive appointment. Unfortunately, the amended Constitution does not detail the procedure for the competitive selection of the judges. At the same time, the new law 'On the Constitutional Court' gives the appointing bodies significant control over the composition of screening committees. Furthermore, the Law does not make the list of candidates prepared by the screening committees binding for the appointing organ. Thus, the President, the Parliament, and the Congress of Judges can bypass the requirement of competitive selection.¹⁰ However, there is hope that the amended Constitution will stop the practice of politically motivated dismissals, as the appointing organs can no longer dismiss the constitutional judges. The power to dismiss has been moved from the President, the Parliament, and the Congress of Judges to the Constitutional Court itself. A constitutional judge can be dismissed if two-thirds of all judges (12 judges) vote in favor. In addition, 'breach of the oath' has been excluded from the grounds for dismissal. Furthermore, the judicial reform provided the Constitutional Court with additional financial guarantees, protected its continued work, and recognized the direct access of individuals to the Court.

The reform of the Constitutional Court of Ukraine has one main goal: to ensure the independence of constitutional justice

⁵ Public Opinion Survey of Residents of Ukraine, Center for Insights in Survey Research (June-July, 2017) http://www.iri.org/sites/default/files/2017-8-22_ukraine_poll-four_oversamples.pdf.

⁶ ECtHR Statistic. Violation by Article and by State 1959-2017 (December 2017) http://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf.

⁷ http://publications.europa.eu/resource/cellar/4589a50c-e6e3-11e3-8cd4-01aa75ed71a1.0006.03/DOC_1.

⁸ <http://zakon2.rada.gov.ua/laws/show/1402-19>.

⁹ Михаил Савчин, 'Современное состояние конституционной юстиции в Украине: вызовы и новые решения' в: Я. Залесны (ред.) Конституционные суды в постсоветских государствах: между моделью правового государства и ее местным применением', Варшава: Варшавский ун-т (в печати). [Michael Savchyn, 'Contemporary State of the Constitutional Justice in Ukraine: Challenges and New Decisions' in: Ya. Zalesny (ed.) *The Constitutional Courts in the Post-Soviet States: Between a Model of Law State and Its Local Implication* (Warsaw University, 2018, forthcoming)].

¹⁰ European Commission for Democracy through Law (Venice Commission), 'Opinion on the Draft Law on the Constitutional Court' (2016) 870 12 December 2016, 12-21.

in Ukraine. The Constitutional Court of Ukraine had been widely used by the executive. Traditionally, it has been the President – from Kuchma to Yanukovych – who benefits most from the Constitutional Court’s decisions. Due to the lack of independence and democratic control, the Constitutional Court of Ukraine has not been able to protect the Constitution. On the contrary, it threatened democracy with decisions based on changeable political interests. For instance, in December 2003 the Constitutional Court allowed Leonid Kuchma, the second President of Ukraine (1994-2005), to seek a third presidential term on the grounds that the Constitution which set a two-term limit came into force in 1996 after he was first elected (the fact that the previous Constitution had the same provision did not bother the constitutional judges).¹¹ Kuchma refused to run for the third term, but a dangerous precedent had been created and remained in the constitutional practice.

From October 2005 to August 2006 the Constitutional Court’s activity was disrupted by the Parliament which not only initially failed to elect judges under its own quota but also did not accept the oath of judges appointed by the other two powers. As a consequence, due to retirements, the number of acting judges fell below the quorum and the Court could not work.

In spring 2007, the constitutional crisis caused by President Victor Yushchenko’s (2005-2010) attempts to dissolve the Verkhovna Rada and hold new parliamentary elections showed that the Constitutional Court cannot be an impartial arbitrator in the institutional conflicts between the main state organs. Soon after the Constitutional Court started deliberations on the constitutionality of the President’s decree, the President removed its three judges from the office for

‘breach of the oath’, including Judge Volodymyr Ivashenko, whose situation is a good example of dismissal aimed to ensure loyalty. On 10 May 2007, Ivashenko was dismissed by President Victor Yushchenko’s Decree for breach of the oath. On 14 June 2007, this Decree was canceled to remove the judge on the grounds of his voluntary resignation. In November 2007, the President changed the grounds for Ivashenko’s dismissal again. This time, according to Decree n. 1040/2007, Judge Ivashenko was removed due to inability to perform his functions because of health reasons. Thus, within one year, the same judge was removed from office three times based on different grounds; this proves political reasons behind the dismissal.

In 2007, the judges of the Constitutional Court suffered from political pressure from different actors – President, Government, and Parliament. In the confrontation between President Victor Yushchenko and Prime Minister Victor Yanukovych, the Constitutional Court became paralysed by political pressure, dismissals, and resignations of the judges. It lost further credibility by allegations of corruption.¹²

Most notably, the problem of the Constitutional Court’s independence was manifested in autumn 2010, when President Victor Yanukovych (2010-2014) manipulated the Court to expand his power by annulling the constitutional amendments of 2004.¹³ It should be noted that four judges of the Constitutional Court resigned a month earlier to avoid participation in this illegal act. The decision of the Constitutional Court adopted on 30 September 2010 was illegitimate. As the Venice Commission noted:

‘The reinstatement of the 1996 version of the Constitution by a judgment of the Constitutional Court of Ukraine rais-

es questions of the legitimacy of past actions, as the institutions of Ukraine worked for several years on the basis of constitutional rules later declared unconstitutional. It also raises questions of legitimacy with respect to the present state institutions, since the President and the Parliament were elected under constitutional rules that are no longer recognized as valid. The President of Ukraine, as from this judgment, enjoys far more powers than could be foreseen by the voters when he was elected....’¹⁴

It should be stressed that the Constitutional Court had formal grounds to annul the constitutional reform of 2004 because the constitutional amendments being adopted too rapidly in the atmosphere of political confrontation (during the Orange Revolution) did, indeed, violate some constitutional procedures. On the other hand, the Constitutional Court ruled differently on the same question in February 2008. In late 2007, 102 deputies challenged the amendments based on procedural merits. In the decision of 5 February 2008, the Constitutional Court stated that ‘since the Law on amendments took effect on 1 January 2006, its provisions and clauses became an integral part of the Constitution and the Law itself has exhausted its legal function’.¹⁵ Based on this ground the petition was rejected. In 2010, after the presidential elections when a political situation changed (Victor Yanukovych won the elections in February), the Constitutional Court also changed its approach to the constitutional reform of 2004. Interestingly, the Court’s decision of 30 September 2010 does not explain the difference between the petition of 2007 and the petition of 2010; moreover, it does not mention the Decision of 5 February 2008.

At the end of the Revolution of Dignity in

¹¹ Kuchma gets chance of third term’ *BBC News* (30 December 2003) < <http://news.bbc.co.uk/2/hi/europe/3356579.stm>>

¹² Pavel Korduban, ‘Ukraine’s Constitutional Court Under Pressure’ (*Eurasia Daily Monitor*, 22 May 2007) <https://jamestown.org/program/ukraines-constitutional-court-under-pressure/>.

¹³ Yulia Kyrychenko, ‘The Paralyzed Guardian: Towards an Independent Constitutional Court of Ukraine’ (*Democracy Reporting* 27 June 2017) <http://democracy-reporting.org/the-paralysed-guardian-towards-an-independent-constitutional-court-of-ukraine-briefing-paper/>.

¹⁴ European Commission for Democracy through Law (Venice Commission), Opinion ‘On the Constitutional Situation in Ukraine’ (2010) 599 <[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)044-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)044-e)>

¹⁵ Decision of the Constitutional Court of Ukraine, case n. 6-u/2008, 05 February 2008 <http://zakon3.rada.gov.ua/laws/show/va06u710-08>.

early 2014, when Yanukovich fled the country, the Verkhovna Rada restored the 2004 Constitution. It also dismissed five judges of the Constitutional Court appointed from the Parliament's quota who voted to annul the constitutional reform in 2010. In the Resolution 'On Reaction to the Fact of Breaking an Oath by Judges of the Constitutional Court of Ukraine' dated 24 February 2014,¹⁶ Parliament called on the acting President and the Congress of Judges to follow this example and dismiss the judges appointed from their quotas. According to the Parliament, dismissal of the constitutional judges who helped Viktor Yanukovich to usurp power in 2010 should be 'the first step towards lustration of judges of Ukraine'.

The Parliament's decision to dismiss the judges caused a weird legal situation as the judges appointed by the President and the Congress of Judges who also voted to annul the constitutional reform remained in office. Furthermore, by dismissing the judges, Parliament violated the procedures. On this ground, some of the dismissed judges appealed to the High Administrative Court, which declared Parliament's Resolution illegal. These decisions created 'ghost' or 'phantom' judges with unclear legal status. In this context, Oleksandr Paseniuk's case is very interesting. On 23 February 2014, one day before Parliament passed a decision on dismissal, Oleksandr Paseniuk, a judge of the Constitutional Court and a former head of the High Administrative Court of Ukraine, asked to resign. In July 2014 he would have turned 65 – the ceiling age for holding the constitutional judge office. His application was not taken into consideration. He was dismissed the next day along with other judges for breach of the oath. In June 2014, the High Administrative Court restored Paseniuk as a constitutional judge. After this, Paseniuk resubmitted his application for retirement. This application was ignored. Only in July 2016, when Paseniuk ended his nine-year term as a constitutional judge,

did Parliament dismiss him. In November 2016, Paseniuk appealed again to the High Administrative Court claiming that the Parliament's decision violated his right to retirement and pension. The Court supported Paseniuk's application and annulled the Parliament's decision of 2016. By the end of 2017, Paseniuk's legal status remained unclear. In December 2017, the High Administrative Court declared that the former head of the Constitutional Court, Anatoliy Golovin, was dismissed from office illegally. His status has not been clarified, either.

During 2017, the Constitutional Court of Ukraine was in a deep crisis and passed only three decisions (at the end of the year). Its work was blocked due to various factors: political, structural, and legislative. First, there was a confrontation inside the Court between the judges appointed during Yanukovich's time (before 2014) and judges who entered the Constitutional Court after the Revolution of Dignity. In 2017, four different groups of constitutional judges sat on the bench: a) four judges appointed by the Verkhovna Rada to fill its quota after the judges' dismissal in 2014; b) five judges appointed before 2010 who supported the annulment of the constitutional amendments but remained in their posts in 2014; c) three judges appointed in 2013; and d) three judges appointed in 2016. It should be noted that the legal status of the judges from the first two groups is quite problematic. In the first case, the judges' legitimacy can be challenged by the fact that they were appointed to replace judges whose removal from office in 2014 was declared illegal by the High Administrative Court's decisions. In the second case, the ongoing criminal investigation against the constitutional judges for the decision of 2010 undermines their independence.

By the middle of 2017 two judges from the second group ended their nine-year term in office. In June 2017, there were 13 constitutional judges out of 18 judges foreseen by

law. After the amendments to the Constitution of June 2016, the appointment of new judges was not possible without a new law on the Constitutional Court specifying the constitutional provisions regarding the appointment procedure. Only on 13 July 2017, with almost one year's delay (the law should have been adopted before 30 September 2016), did Parliament succeed on its second attempt to adopt the new law 'On the Constitutional Court of Ukraine'.

Besides the legislative vacuum, the Constitutional Court faced a structural problem as it had to elect its new head, the term of the previous one having ended in May 2017. Under the law, the Constitutional Court should have its head elected at the beginning of 2017, but even by the end of the year this decision had not been made.

In 2017, the Constitutional Court of Ukraine was in a position of 'paralyzed guardian'.¹⁷ In November 2017, the Congress of Judges elected one constitutional judge. On 21 November 2017, the newly elected judge took the oath. The fact that after this appointment the Constitutional Court made three decisions (23 November, 20, and 21 December) indicates the Court's movement from the 2017 stalemate.

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

As has been noted, a high level of public distrust in the judiciary, low effectiveness and corruption in the national courts have fueled demands for their reforms. Reforming the system of courts of general jurisdiction was an important event of 2017. The reform has progressed, although it has also raised controversy.¹⁸ Establishing a new 120-seat Supreme Court, with a lifetime appointment for judges and candidates chosen from scratch, was a key part of the reform.¹⁹

¹⁶ <http://zakon5.rada.gov.ua/laws/show/775-18>.

¹⁷ n. 13.

¹⁸ Ukraine Reform Monitor: October 2017 <http://carnegieendowment.org/2017/10/10/ukraine-reform-monitor-october-2017-pub-73330>.

¹⁹ Josh Cohen, 'Positive Change Is Not Happening in Ukraine's Courts' (*Atlantic Council* 05 July 2017) <http://www.atlanticcouncil.org/blogs/ukrainealert/positive-change-is-not-happening-in-ukraine-s-courts>.

2017 saw an unprecedented open competition to fill vacancies on the Supreme Court of Ukraine. The selection was tough: 846 candidates applied for 120 positions, of which 520 passed the written test.²⁰

This was the first time in Ukraine's history that civil society took part in the selection process through the Public Integrity Council (Council). The Council consisted of civil activists, lawyers, scholars, and journalists recommended by the NGOs. It was empowered to undertake its own independent assessment of the integrity and professional ethics of the applicants based on open sources – CVs, open state's registers, judgments the applicants made, journalists' investigations, and so forth. In case of a negative conclusion by the Council, an applicant can be recommended for further consideration by two-thirds of the High Qualification Commission of Judges (Commission).

Thus, the Council played an important role in forming the new Supreme Court, but it could not prevent dubious candidates from entering the Court. The Council has claimed that one-quarter of the newly appointed judges had violated human rights (as the European Court of Human Rights recognized it), made politically motivated rulings (prohibited peaceful protests), lied in their integrity declarations, or not been able to explain a mismatch between their assets and officially declared income (which is the main indicator of corruption in Ukraine).²¹

Unfortunately, the selection process was not always objective and transparent. The candidates were evaluated by the Commission based on three criteria: test scores (written test and practical task); interviews, and the recommendation of the Public Integrity Council. A 1,000-point scale has been used. However, only 300 points of the evaluation were based on test scores.

The written test stage did not raise questions. But after the practical task, the Commission changed the rules of competition: first, it announced the minimum points for the written test and excluded the applicants whose results were lower. However, the next day the Commission accepted 44 candidates who failed the written test stage. The Commission claimed that the whole exam (written test and practical task) should be considered as one stage of the competition.²²

To ensure the transparency of the selection, the Ukrainian NGOs have repeatedly called on the Commission to explain the results of the applicants' evaluations and disclose the contents of their exams. These requests have been denied.

The process of forming the new Supreme Court lasted almost twelve months and included the following stages: February-March – anonymous testing of the applicants (written test and practical task); April-May – interviews with the applicants, physiological testing; June-July – the Commission overrode 75% of vetoes by the Council concerning applicants deemed to be corrupt or dishonest and nominated a final list of 120 candidates; September – the President appointed the candidates.²³ On 15 December, the Supreme Court of Ukraine started its operation.

It should be noted that the legitimacy of the new Supreme Court has been challenged before the Constitutional Court of Ukraine. The Constitutional Court has to determine the constitutionality of the Law 'On the Judicial System and the Status of Judges'. Particularly, it has been stated that the procedure of liquidation of the Supreme Court of Ukraine, the High Administrative Court, the High Economic Court, and the High Specialized Court has not been foreseen by the Constitution of Ukraine. Thus, the Parliament has abused its power and violated the Constitu-

tion when it prescribed by the Law 'On the Judicial System and the Status of Judges' to liquidate these courts. The petition to the Constitutional Court reflects the resistance of the judiciary against reform, which has affected former judges of the old Supreme Court and the Ukrainian High Courts of Appeal. The Constitutional Court of Ukraine started the consideration of this case on 21 November 2017.

IV. LOOKING AHEAD TO 2018

For the two Ukrainian new courts – the Constitutional Court of Ukraine and the Supreme Court of Ukraine – the year 2018 should be a difficult one, as Ukraine is approaching presidential and parliamentary elections (31 March and 27 October 2019, respectively). Thus, the courts will have to make politically important decisions. The quality of these decisions and the independence of the courts will allow us to conclude whether Ukraine's judicial reform has succeeded. In general, there is hope that next year the changes in the judicial sector will bring their first results.

The beginning of 2018 found the Constitutional Court of Ukraine incomplete and internally divided. To give the Court a new push, the President and the Parliament have to appoint new judges (four judges are still missing) to fill in vacancies. The Constitutional Court has to elect its head, adopt new rulings to regulate internal procedures, and solve other problems it did not in 2017.

2018 should be a year of hard work for the constitutional judges: there are more than 30 constitutional petitions from the people's deputies, the Supreme Court of Ukraine, and the local governments, and almost 450 constitutional complaints from the citizens and legal entities pending before the Constitu-

²⁰ Mykhailo Zhernakov, 'Will Ukraine's New Supreme Court Be Any Different?' (*Atlantic Council* 31 May 2017) <http://www.atlanticcouncil.org/blogs/ukrainealert/how-new-will-ukraine-s-new-supreme-court-be>.

²¹ Anastasia Krasnosilka, 'Ukraine Does It Again: Judicial Reform Focuses on Process, Not Results' (*Atlantic Council* 26 July, 2017) <http://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-does-it-again-judicial-reform-focuses-on-process-not-results>.

²² 'Activists: With Failed New Supreme Court, We Can Forget About Democracy and Justice in Ukraine' (*Euromaidan Press* 02 August 2017) <http://euromaidanpress.com/2017/08/02/activists-new-supreme-court-puts-democracy-in-ukraine-under-threat/>.

²³ Oleg Sukhov, 'Timeline of Judicial Reforms in Ukraine' *Kyiv Post* 02 October 2017 <https://www.kyivpost.com/ukraine-politics/timeline-judicial-reforms-ukraine.html>.

tional Court of Ukraine.²⁴

V. FURTHER READING

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2. Ash T., Gunn J., Lough J. and others, *The Struggle for Ukraine* (Chatham House, The Royal Institute of International Affairs 2017)
3. UN, Office of the High Commissioner for Human Rights, 'Report on the Human Rights Situation in Ukraine' 16 August to 15 November 2017; available at: http://www.ohchr.org/Documents/Countries/UA/UAR-report18th_EN.pdf

²⁴ See statistics of the Constitutional Court of Ukraine <http://www.ccu.gov.ua/publikaciya/konstytucijnyy-sud-ukrayiny-u-cyfrach-za-period-z-01012017-po-31122017-roku>.



Venezuela

THE STATE OF LIBERAL DEMOCRACY

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I. INTRODUCTION

This report discusses major developments that have taken place in Venezuelan Constitutional Law during 2017, as the regime transitioned from competitive authoritarianism to full autocratic rule under President Nicolás Maduro. Unfortunately, liberal democracy is dead in Venezuela.¹ This is not hyperbole – as we discuss below, the regime has effectively shut down existing institutional avenues established in the 1999 Constitution to allow for government turnover by free and fair referendum or popular elections; the opposition has been systematically prevented from using its democratic majority in parliament; the Supreme Court has become a reliable governance tool; of the regime for purposes of annulling the National Assembly, repress the opposition and otherwise legitimize autocratic rule, and the government has resorted for years to expanding the power of the Executive by declaring (and renewing) state of emergency prerogatives. More worryingly, since August 2017, the government has effectively suspended the 1999 *Bolivarian* Constitution. Following long and arduous protests between the government and the opposition, the gov-

ernment resorted to convoking a “National Constituent Assembly” (*Asamblea Nacional Constituyente*) to allegedly revamp the constitutional order and, most importantly, to eliminate current constitutional imperatives and institutional structures and concentrate power in Maduro and the ruling elite. This short article explains the key developments that led to this regrettable state of affairs.

II. THE COLLAPSE OF DEMOCRACY IN VENEZUELA: THE ROLE OF THE SUPREME COURT

Liberal democracy as such is over in Venezuela, but this process did not happen overnight. It was, instead, a *slow coup*, product of a series of deliberate moves to undermine democracy against the backdrop of populist leadership and growing political polarization.² The country’s democratic institutions had been subject to ongoing challenges since the arrival into power of Hugo Chávez in 1998 and the subsequent onset of the *Bolivarian Revolution*.³ Venezuela had been a hybrid regime for years before the most recent slump into full authoritarianism.⁴

¹ As Levitsky said in a recent interview to José Ignacio Hernández. See ‘Steven Levitsky: La democracia en Venezuela está muerta’ (PRODAVINCI, 2 March 2018) < <https://prodavinci.com/steven-levitsky-la-democracia-en-venezuela-esta-muerta/> > accessed 15 March 2018

² J Polga-Hecimovich, I Sagarzazu and R Sánchez Urribarrí ‘Venezuelan Overview’ (2017) LASA FORUM < <http://lasa.international.pitt.edu/forum/files/vol48-issue1/Debates-Venezuela-1.pdf> > accessed 15 March 2018

³ J Corrales and M Penfold, *Dragon in the Tropics: Hugo Chávez and the Political Economy of Revolution in Venezuela* (Brookings Institution Press 2011)

⁴ Freedom House, ‘Freedom in the World 2018: Venezuela’ < <https://freedomhouse.org/report/freedom-world/2018/venezuela> > accessed 15 March 2018

During the last two decades, there were well-documented abuses of executive power by the late President Chávez during his mandate. Chávez engaged in a particularly deleterious variety of populist constitutionalism. His administration's abuses included promoting the creation of a new Constitution in 1999 against the terms of the 1961 Constitution; ruling by decree; restricting fundamental freedoms; politicizing formerly independent state institutions, including the judiciary; promoting constitutional amendments to modify the country's basic socioeconomic and political model (replacing the liberal democratic model established in the 1999 *Bolivarian* Constitution for "21st Century Socialism"); politicizing the armed forces; and eventually securing the ability to seek re-election without restrictions in 2012.⁵ These changes came accompanied by Chávez's deliberate attempts to frame a discourse at odds with the liberal democratic institutions of the past and present, creating an atmosphere where the interpretation of the acceptable realm of action for other branches of power (and the state more generally) was subject to his own whim.⁶ The collapse of democratic rule in Venezuela is now a well-known example of democratic backsliding, where an elected leader uses the support of the majority as a pretext to engage in illiberal practices.⁷

This culture of ongoing abuse of power and unfettered executive rule has persisted and even reached new heights under Nicolás Maduro since 2013. As several observers have pointed out, Maduro's arrival in power was characterized by the systematic use of the law as a tool to consolidate his authority – what Corrales calls "Autocratic Legalism."⁸ Through legislation, decrees and judicial decisions, the regime has managed and punished opposition dissent, expanded the influence of the military across a vari-

ety of realms, controlled freedom of speech and, in short, further dismantled the already feeble institutional spaces that allowed for a modicum of democratic contestation.⁹ The main test for what was left of democracy was whether it was possible for the regime to accept electoral defeat and respect the arrival of the opposition to power by the ballot box.

In December 2015, the opposition won the national legislative elections, allowing it to control a branch of power for the first time since Chávez came to power. Almost immediately, pro-government forces in the outgoing parliament moved quickly to stack the Supreme Court with judges loyal to the ruling elite, including justices with alleged ties with Maduro.¹⁰ This Supreme Court became a reliable ally of the regime against the opposition-leaning legislature, deciding over 50 rulings against them over the course of the past two years and preventing it from exercising its prerogatives.¹¹ In a particularly perverse form of judicial activism, the Supreme Court – especially its Constitutional Chamber, vested with a wide catalog of judicial review – has not only become a major source of support for the regime but has functioned instead as a reliable tool of autocratic governance.¹²

During the first months of 2017, the Supreme Tribunal continued to block the legislative functions of the Venezuelan Congress (the National Assembly). Through decisions number 2 and 3 (2017), the Constitutional Chamber decided that due to "contempt of court," the National Assembly had no competence to appoint its own officers or declare the abandonment of the post by President Maduro (functions clearly established in the 1999 Constitution). With this later ruling, the Supreme Tribunal closed the only institutional mechanism that the Congress had to

promote a political change by declaring the abandonment of the presidential post and further reduced its ability to make effective use of its democratic majority.

Next, towards the end of March, the Constitutional Chamber adopted two new decisions that reiterated the previous conclusions. The ruling adopted on March 28 (number 2017-155) not only restated the National Assembly's contempt of court, but also concluded that deputies who requested the application of the Organization of American States' Inter-American Democratic Charter might have committed treason and therefore could be prosecuted. The next day, the Constitutional Chamber issued decision number 2017-156, according to which, due to contempt of court, the competences of the legislature would be taken over and exercised by the Supreme Tribunal or a body designated for this purpose as an exceptional measure to protect the rule of law. Until this ruling, the Constitutional Chamber acted case by case against the Congress. However, since decision number 156, the Tribunal decided to assume, generally, its functions.

The Supreme Tribunal's rulings were perceived at home and abroad as a judicial coup. Not only did the legislature and international community criticize those judgments; Attorney General Luisa Ortega Díaz – a former ally of the Maduro government and, until then, considered one of the most important figures of *Chavismo* – declared that these decisions amounted to a rupture of the constitutional order. Ortega's change evidenced, for the first time, a deep fracture within the ruling coalition and its control of the remaining branches of power. This can explain why Maduro's government reacted so quickly. On April 1, 2017, President Maduro convened a special meeting of the Security Council

⁵ S Levitsky and D Ziblatt, *When Democracies Die* (Crown, 2018)

⁶ David Landau, 'Abusive Constitutionalism' [2013] 47 UC Davis Law Review 1: 189

⁷ Allan Brewer-Carías, *Dismantling Democracy in Venezuela* (CUP, 2010)

⁸ Javier Corrales 'The Authoritarian Resurgence: Autocratic Legalism in Venezuela' [2015] 26 Journal of Democracy 2: 37

⁹ B Alarcón, AE Álvarez and M Hidalgo, 'Latin America's New Turbulence: Can Democracy Win in Venezuela?' [2016] 27 Journal of Democracy 2: 20

¹⁰ RA Sánchez Urribarrí 'Venezuela (2015): A Hybrid Regime in Crisis' [2016] 36 *Revista de Ciencia Política* 1: 365

¹¹ José Ignacio Hernández-G., 'El Asedio a la Asamblea Nacional' [2016] 145-146 *Revista de Derecho Público* 71

¹² Allan Brewer-Carías, *Dictadura Judicial y Perversión del Estado de Derecho. La Sala Constitucional y la Destrucción de la Democracia en Venezuela* (Editorial Jurídica Venezolana, 2016)

to address the dispute between the Supreme Tribunal and the Attorney General. At the behest of the Vice President, the Supreme Tribunal decided to rectify rulings 155 and 156 by issuing two new decisions (numbered 157 and 158, respectively).

This was nothing more than a façade seeking to correct reputational damage and confuse political opponents. On the one hand, according to article 327 of the 1999 Venezuela Constitution, the Security Council is only a consulting body in national security issues, and consequently has no competence to intervene in the decisions of the Supreme Tribunal. On the other hand, according to article 252 of the Civil Procedural Code, the Constitutional Chamber could not modify rulings 155 and 156. Additionally, the Supreme Tribunal could not follow “coordination” commands issued by the Executive Branch that ordered the revision of its decisions due to the principle of judicial independence (article 254 of the 1999 Constitution). Finally, the “new” rulings did not modify the conclusions of decisions 155 and 156 because the Constitutional Chamber insisted that the Congress was in contempt of court and, therefore, unable to exercise its prerogatives.

This episode galvanized mass demonstrations against the government. As a response, on May 1, 2017, Maduro convened a “National Constituent Assembly,” as is explained in the next section. After the installation of the “National Constituent Assembly,” the Constitutional Chamber reduced its decisions significantly against the Legislature (National Assembly). With the “supra-constitutional” powers of the Constituent Assembly (based on the ostensible representation of the people’s original will), the Constitutional Chamber was no longer necessary as a mechanism to block the opposition legislature.

The installation of the Constituent Assembly would not have been possible without the support of the Supreme Tribunal, and particularly, the Constitutional Chamber (which in a slow-motion process dismantled the Legislature). In the end, the Constitutional Chamber acted in exercise of the judicial review powers established in the 1999 Constitution. Beneath the veneer of its constitutional prerogatives lay the clear intention to block the exercise of the Legislature’s legitimate competences. In this sense, according to Levitsky and Ziblatt (2018, cited above), Venezuela is an example of constitutional hardball, because the “Chavista court effectively incapacitated the legislature by ruling nearly all of its bills.” Rulings 155 and 156 were the final steps of this constitutional hardball that in the end decimated the Congress and facilitated the Venezuelan descent towards an authoritarian regime.

The Venezuelan case also demonstrates the risks associated with granting wide constitutional judicial review powers to judicial institutions in weakly institutionalized democracies, particularly in countries like Venezuela, which adopted a centralized model of constitutional review. The Constitutional Chamber is vested with strong judicial powers with the original intention of safeguarding the supremacy of the Constitution. However, due to an imprecise framework, several Court-packing processes and the justices’ deliberate expansion of their prerogatives, the Constitutional Chamber degenerated into a tool that, under the political control of the presidency, has contributed to undermining liberal democracy instead of protecting it.¹³ Without strong democratic institutions and a strong sense of judicial virtue, constitutional courts can promote “constitutional authoritarianism.”¹⁴

III. THE CREATION AND IMPLEMENTATION OF THE 2017 NATIONAL CONSTITUENT ASSEMBLY

As mentioned above, following the Constitutional Chamber’s blockade of the Legislature and the Attorney General’s defection from *Chavismo*, a series of popular protests began taking place in Venezuela’s capital, Caracas, and in other major cities. These protests met unprecedented repression by State security bodies. As the protests went on and the opposition continued pressing for a constitutional solution to the crisis, President Maduro formally proposed to set up a National Constituent Assembly (May 1, 2017) – the first such institutional change since the 1999 Constitution.¹⁵ To these ends, he issued three decrees to 1) “convene” the Assembly; 2) appoint the members of the “Presidential Commission” in charge of implementing the initiative; and 3) create the electoral guidelines that would regulate the election of the constituent members.

President Maduro’s “call” would be the first unconstitutional decision of the constituent process. Article 347 of the 1999 Constitution states that as Chief Executive, the President can only have the “initiative” to convene a National Constituent Assembly. However, as explained in an earlier work, a Constituent Assembly to overhaul the 1999 Constitution can only be convened by citizens.¹⁶ As Presidential Decree number 2.830 shows, Maduro’s interpretation was completely different: By seeking to exercise his prerogative to “initiate” the process, President Maduro convened the Assembly himself without a popular referendum. Therefore, Decree No. 2.830 is unconstitutional and thus void. However, President Maduro’s interpretation was supported by an ambiguous ruling issued by the

¹³ RA Sanchez Urribarri, ‘Courts between Democracy and Hybrid Authoritarianism: Evidence from the Venezuelan Supreme Court’ [2011] 36 LSI 4: 854

¹⁴ Mark Tushnet ‘Authoritarian Constitutionalism’ [2015] 100 Cornell L. Rev. 391

¹⁵ Carlos García-Soto, ‘Symposium on “Venezuela’s 2017 (Authoritarian) National Constituent Assembly”–The National Constituent Assembly in Venezuela (2017) in its Historical Context,’ Int’l J. Const. L. Blog, Aug. 30, 2017, at: <http://www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assembly/Carlos-Garcia-Soto> accessed 15 March 2018

¹⁶ José Ignacio Hernández G., ‘Symposium on “Venezuela’s 2017 (Authoritarian) National Constituent Assembly”–Pursuing Constitutional Authoritarianism,’ Int’l J. Const. L. Blog, Sept. 1, 2017, at: <http://www.iconnectblog.com/2017/08/symposium-on-venezuelas-2017-authoritarian-national-constituent-assemblyjose-ignacio-hernandez-g>, accessed 15 March 2018

Constitutional Chamber (number 2017-378) on May 31, 2017, according to which the consultative referendum for the people to choose whether to start a constitution-making process or not was not necessary.

Moreover, even though the Attorney General filed a petition for a constitutional interpretation of the contents of that ruling, the Constitutional Chamber issued another ruling (number 441, June 8, 2017), deciding that the appeal was inadmissible. President Maduro also set the rules that would regulate the election of the Assembly's members.¹⁷ However, since convening the Assembly should have been decided by consulting the people directly via popular referendum, the electoral guidelines should have also been subject to a referendum. In any case, despite all that has been said, the election of the Assembly's members took place on July 30, 2017. According to the National Electoral Authority (CNE), more than eight million citizens voted in the election, even though dozens of governments in the region and beyond, local and international public opinion and even the company that offered technical services to the CNE denounced the election as a fraud.

The National Constituent Assembly was installed on August 4, 2017, and it began issuing decisions immediately. The first decision was the removal of Attorney General Luisa Ortega Díaz, who was replaced by the previous Ombudsman, Tarek William Saab. In the days following its installation, several State authorities appeared before the new "Constituent Assembly" to "pledge" their service to the "Constituent Power," including President Maduro himself, Supreme Tribunal Justices and the members of the CNE. To support the subordination of the branches of power to the Constituent Assembly, the body issued a Constituent Decree establishing the rules to guarantee the full institutional opera-

tion of the Constituent Assembly in harmony with the existing branches of power.¹⁸

A large part of the National Constituent Assembly's activity during 2017 was displayed through the sanction of several so-called "Constitutional Laws," which entailed the usurpation of the existing National Assembly's (Congress) legislative functions enshrined in the 1999 Constitution. Some of these "Constitutional Laws" had a noticeable repressive purpose, since their goal was to create the basis for political persecution against political and public opinion leaders that were dissenting and/or protesting against the Maduro government. Other "Laws" sought to establish new economic regulations for private companies, thus seeking to improve the government's ability to control the economy in the midst of crisis. Hence, the Assembly can be best understood as an instrument of authoritarian governance. The "Laws" were the following:

- *Constitutional Law that creates the Commission of Truth, Justice, Peace and Public Calm*: From the analysis of the Commission's goals, described in article 3 of this "Constitutional Law," we can clearly infer that the Commission is meant to become an instrument of political persecution, focusing on the investigation and punishment of political actors who are being accused of "crimes" committed between 1999 and the present day.
- *Constitutional Law against Hate, for Peaceful Cohabitation and Tolerance*. This is another instrument of political repression and persecution directed at owners of mass media and social media influencers.¹⁹
- *Constitutional Law on Agreed Prices*. This "law" constitutes another one of the many price-control instruments

established in Venezuela under the *Chavista* regime since 2003.²⁰

- *Budget Law, Special Indebtedness Law and Annual Operational Plan for 2018*. On November 30, the ANC "sanctioned" these laws, which can only be issued by the National Assembly according to the 1999 Constitution.²¹

Additionally, the Constituent Assembly has also been used as an instrument of unfettered autocratic power. For instance, after the results of the gubernatorial elections of October 15 were announced, there was a question as to whether those elected governors should be sworn into office before the Constituent Assembly since several government spokespeople claimed that it was an essential requisite to take office. While the elected governors from the opposition political party Acción Democrática were sworn in by the Constituent Assembly, Primero Justicia's Juan Pablo Guanipa, governor-elect of the country's most populous state (Zulia), decided not to attend the ceremony. Thus, new elections were conducted soon after that, resulting in the election of a government party candidate.

On the other hand, the Constituent Assembly was also used to usurp another National Assembly constitutional prerogative, which is the authorization to submit legislators to trial. The Constituent Assembly issued a "Constituent Act" that authorized the trial of opposition leader Freddy Alejandro Guevara Cortez in open violation of article 200 of the Constitution.²²

Finally, the Constituent Assembly issued several decisions that were aimed at exercising the constitutional prerogatives of the CNE. These included: 1) A Constituent Decree by which the gubernatorial elections were re-scheduled for October 2017, despite

¹⁷ Presidential Decree N° 2.878, *Gaceta Oficial* N° 41.156, May 23, 2017

¹⁸ *Gaceta Oficial* N° 6.323 Extraordinario, August 8, 2017

¹⁹ *Gaceta Oficial* N° 41.274, November 8, 2017

²⁰ *Gaceta Oficial* N° 6.342 Extraordinario, November 22, 2017

²¹ *Gaceta Oficial* N° 41.293, December 5, 2017

²² *Gaceta Oficial* N° 41.272, November 6, 2017

the electoral timetable previously announced by the Electoral Branch;²³ and 2) A Constituent Decree declaring that the mentioned elected governors were sworn in.²⁴

IV. LOOKING AHEAD TO 2018

Until 2017, as Ginsburg and Huq (2018) argue, Venezuela had been a case of “slow, tortuous descent toward partial autocracy.”²⁵ As we mentioned above, this was largely achieved by “constitutional hardball” (Tushnet, 2004); that is, practices that are within the formal boundaries of the constitutional framework but violate basic informal rules of liberal democracy.²⁶ Unfortunately, 2017 will be remembered as the year when the government sidelined the Venezuelan democratic constitutional order as a whole to preserve power, crush dissent and give full latitude to Maduro’s embattled administration to entrench its regime. This happened in the midst of dramatic socioeconomic strife and humanitarian crises, which show no signs of abatement. In the midst of this challenging time, Maduro’s regime is acting as a *consolidating autocracy* and must be analyzed as such.

Given the *de facto* nature of the regime and its efforts to legitimize the Constituent Assembly’s rule, we should monitor the activities of this body closely, and the extent to which it is used to enact and legitimize government abuse. Additionally, it is imperative to analyze the role of existing branches of power, including the Attorney General, the Ombudsman and even the Supreme Court, all dedicated to supporting the government and entrench its rule. Finally, presidential elections have been called for in May 2018, but they have been boycotted by the vast majority of opposition parties, as the conditions that allow free and fair elections remain notoriously absent. Whether the election will take place as announced remains to be seen.

V. FURTHER READING

For additional information about the 2017 “Constituent Assembly” and its aftermath, we recommend Allan R. Brewer-Carías and Carlos García-Soto (Eds.). *Estudios sobre la Asamblea Nacional Constituyente y su Inconstitucional Convocatoria en 2017*. Caracas Editorial Jurídica Venezolana, 2017

For shorter analyses about the creation of the Constituent Assembly, see our articles in the Symposium on “Venezuela’s 2017 (Authoritarian) National Constituent Assembly” (Organised by I-CONnect and Raul Sanchez Urribarri, see <http://www.iconnectblog.com/2017/08/introduction-to-i-connect-symposium-venezuelas-2017-authoritarian-national-constituent-assemblyraul-a-sanchez-urribarri/>)

In relation to the analysis of the Supreme Tribunal against the National Assembly, see Brewer-Carías, Allan (2016), *Dictadura Judicial y perversión del Estado de Derecho. La Sala Constitucional y la destrucción de la democracia en Venezuela*, Editorial Jurídica Venezolana, Caracas, 28 et seq and Hernández G., José Ignacio, “El asedio a la Asamblea Nacional,” in *145-146 Revista de Derecho Público N° 145-146*, 134

For additional information about the Venezuelan Supreme Court, see Pérez-Perdomo, Rogelio & Andrea Santacruz. 2017. “The Chavist Revolution and the Justice System.” *Latin American Policy* 8(2): 189-200

To place the role of the Venezuelan Supreme Court in Venezuela’s authoritarian context as compared to other developments in the region, see Raul Sanchez Urribarri, “Constitutional Courts in the Region: Between Power and Submissiveness.” 2017. In *Comparative Constitutional Law in Latin America*. Rosalind Dixon and Tom Ginsburg (eds.). Northampton, MA: Edward Elgar, 276-299

²³ *Gaceta Oficial* N° 6.327 Extraordinario, August 12, 2017

²⁴ *Gaceta Oficial* N° 41.259, October 18, 2017

²⁵ T Ginsburg and A Huq, ‘How to Lose a Constitutional Democracy’ [2018] 65 *UCLA Law Review* *Forthcoming*

²⁶ Mark Tushnet, ‘Constitutional Hardball,’ [2004] 37 *J. Marshall L. Rev.* 523



Zimbabwe

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I. INTRODUCTION

After more than three decades of Robert Mugabe's leadership, Zimbabwe ended 2017 with a new President, new Vice Presidents, a new Chief Justice, a new Prosecutor General and many other new public officials after the truly momentous events of 2017. What began as backroom tussles over replacements for the Chief Justice and Prosecutor General late morphed into a public jostle to strategically maneuver the political terrain as President Mugabe's advanced age intensified factional fighting within his party. With his wife assuming an increasingly powerful political role, the military intervened and effected a radical reset to the Zimbabwean body politic; precipitating events which led to the resignation of the now 94-year-old former leader. The same disregard for civil liberties that we grew accustomed to under the Mugabe regime has sullied the early promise of a new post-Mugabe era. The elections scheduled for 2018 will be the key event in determining the democratic viability of Zimbabwe in the post-Mugabe era.

II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

2017 was the watershed year that brought

Robert Mugabe's 37-year authoritarian rule to a dramatic denouement. The series of events leading to his ouster and the subsequent moves to consolidate power after he resigned suggest a decline in liberal democracy. Even though there were mass celebrations when it was announced that Robert Mugabe had resigned, this was by no means the culmination of an organic and people-driven project.¹ He was not voted out of office, and even the parliamentary process which was underway for his removal was in the context of heavy military presence in the streets of the capital, Harare, and at the presidential residence.²

Zimbabwe was already saddled with significant challenges to liberal democracy prior to the events of November 2017. These included elections of questionable integrity, poor respect for individual liberties and press freedoms, independence of the judiciary, violence and intimidation around elections, a moribund economy and predatory state. The enactment of a new constitution in 2013 provided a glimmer of hope through the introduction of a broad gamut of human rights and new institutions supporting democracy as well as the introduction of a Constitutional Court.³ Robert Mugabe still secured victory in yet another discredited election under the new Constitution.⁴ However, his advanced age incited intense factional fighting within

¹ Max Bearak, 'Jubilation in Harare's Streets as Mugabe resigns' (*The Washington Post*, 21 November 2017) <https://www.washingtonpost.com/news/worldviews/wp/2017/11/21/jubilation-in-harare-streets-as-mugabe-resigns/?utm_term=.4a15bcc720c5> accessed 28 February 2018.

² David McKenzie, Brent Swails and Angela Dewan, 'Zimbabwe is under military control after army seizes power from Mugabe' (*CNN*, 16 November 2017) <<https://edition.cnn.com/2017/11/14/africa/zimbabwe-military-chief-treasonable-conduct/index.html>> accessed 28 February 2018.

³ 'Zimbabwe Enacts New Constitution Ahead of Elections' (*VOA*, 22 May 2013) <<https://www.voanews.com/a/zimbabwe-enacts-new-constitution-ahead-of-elections/1665852.html>> accessed 28 February 2018.

⁴ Blessing Miles Tendi, 'Why Robert Mugabe scored a landslide victory in Zimbabwean elections' (*The Guardian*, 5 August 2017) <<https://www.theguardian.com/world/2013/aug/05/robert-mugabe-zimbabwe-election-zanu-pf>> accessed 28 February 2018.

his ZANU PF party, and he moved to purge his party members with an increasingly influential role accorded to his wife.⁵

The dismissal of Vice President Emmerson Mnangagwa proved to be the final straw for the military, which announced that it was conducting a major intervention within a week of the Vice President's dismissal.⁶ On the evening of 14 November 2017, the army made good on its promise and occupied strategic areas in the capital city, announcing on national television that 'Operation Restore Legacy' was not targeted at President Mugabe but the criminals around him.⁷ A public demonstration for the President's ouster was followed by the dismissal of Robert Mugabe, Grace Mugabe and others from the ZANU PF party.⁸ With impeachment proceedings underway, Robert Mugabe resigned on 21 November 2017 and Emmerson Mnangagwa was inaugurated as the new President on 24 November 2017.

While announcing an 'open for business' approach to the economy and zero tolerance for corruption, the new administration moved swiftly to secure legal legitimacy in the courts and political legitimacy at the

regional and international level. Two High Court orders were swiftly granted by consent on 24 November 2017, the same day as the presidential inauguration. In *Joseph Evurath Sibanda and Another vs President of the Republic of Zimbabwe and Three Others* HC 110820/17, the High Court of Zimbabwe issued an order of constitutional validity in respect of the intervention by the Defence Forces of Zimbabwe.⁹ In *Emmerson Dambudzo Mnangagwa vs Acting President of the Republic of Zimbabwe and Another* HC 10940/17, the High Court nullified the dismissal of the Vice President Emmerson Dambudzo Mnangagwa from the office of Vice President on 6 November 2017.¹⁰ Having secured the legal sanction for their dubious rise to power, the Mnangagwa regime then targeted several high-profile former government officials for prosecution on corruption charges in what is an ongoing practice of using the court system to target political opponents.¹¹ Their approach to anti-corruption has not been a systemic restricting of institutions but the prosecution of former government officials who were in a rival faction.

The hopes for a more inclusive membership of the cabinet were dashed when President

Mnangagwa retained a significant number of ministers from the Mugabe regime while adding several military officials to top government positions.¹² The incidence of persons arrested for altercations with the military increased as did disturbing videos of abuse of civilians by armed personnel in the streets.¹³ While reconnecting with the global capital and reforming local investment and indigenization laws, there has been no change with respect to security legislation, which has been used to target members of the opposition and other human rights defenders.¹⁴

Justice Rita Makarau, the chairperson of Zimbabwe's election management body, the Zimbabwe Electoral Commission (ZEC), resigned from her post less than a month after President Mnangagwa's inauguration.¹⁵ She had been touted as the preferred candidate to become new Chief Justice by the political faction led by President Mugabe's wife.¹⁶ The new Chairperson of ZEC is Priscilla Chigumba, a High Court Judge famous for ruling against an unconstitutional ban against public demonstrations by the police but still permitting the ban to continue in operation.¹⁷ Scholars have used this ruling as evidence

⁵ 'Mugabe deepens purge as ZANU PF elects new leaders' (*News24*, 2 December 2014) <<https://www.news24.com/Africa/Zimbabwe/Mugabe-deepens-purge-as-Zanu-PF-elects-new-leaders-20141202>> accessed 28 February 2018.

⁶ 'Zimbabwe army chief warns military could 'step in' over party purge' (*The Guardian*, 13 November 2017) <<https://www.theguardian.com/world/2017/nov/13/zimbabwe-army-chief-warns-military-could-step-in-over-party-purge>> accessed 28 February 2018.

⁷ 'Zimbabwe military's statement after seizing power' (*Al Jazeera*, 15 November 2017) <<https://www.aljazeera.com/news/2017/11/zimbabwe-military-statement-seizing-power-171115061457199.html>> accessed 28 February 2018.

⁸ Lynsey Chutel, 'Robert Mugabe's sacking makes way for hope in Zimbabwe – and uncertainty' (*Quartz Africa*, 19 November 2017) <<https://qz.com/1133127/zimbabwes-robert-mugabe-fired-from-zanu-pf-party-grace-mugabe-expelled-forever/>> accessed 28 February 2018.

⁹ 'Zimbabwe court coup ruling raises concern over Mnangagwa' (*DW*, 25 November 2017) <<http://www.dw.com/en/zimbabwe-court-coup-ruling-raises-concern-over-mnangagwa/a-41528291>> accessed 28 February 2018.

¹⁰ 'Zimbabwe High Court Reverses Mugabe's Dismissal of Emmerson Mnangagwa' (*Zambian Observer*, 25 November 2017) <<http://www.zambianobserver.com/zimbabwe-high-court-reverses-mugabes-dismissal-of-emmerson-mnangagwa/>> accessed 28 February 2018.

¹¹ Dorothy Moyo, 'Police Raid and Arrest Another G40 Minister' (*The Zimbabwean*, 29 December 2017) <<http://www.thezimbabwean.co/2017/12/police-raid-and-arrest-another-g40-minister/>> accessed 28 February 2018.

¹² 'Disappointment as Mnangagwa names new cabinet' (*Al Jazeera*, 1 December 2017) <<https://www.aljazeera.com/news/2017/12/disappointment-mnangagwa-names-cabinet-171201085307165.html>> accessed 28 February 2018.

¹³ 'VIDEO: ZNA Soldier caught on camera assaulting Harare woman' (*ZimEye*, 7 December 2017) <<https://www.zimeye.net/2017/12/07/video-zna-soldier-caught-on-camera-assaulting-harare-woman/>> accessed 28 February 2018.

¹⁴ Tendai Mugabe, 'Govt amends indigenisation law' (*The Herald*, 1 December 2017) <<https://www.herald.co.zw/govt-amends-indigenisation-law/>> accessed 28 February 2018.

¹⁵ Giff Phiri, 'Suspicion as Makarau quits' (*The Daily News*, 10 December 2017) <<https://www.dailynews.co.zw/articles/2017/12/10/suspicious-as-makarau-quits>> accessed 28 February 2018.

¹⁶ See 'Suspicion as Makarau quits' *Id.*

¹⁷ Everson Mushava 'Confusion over ruling on demo ban' (*NewsDay*, 16 September 2016) <<https://www.newsday.co.zw/2016/09/confusion-ruling-demo-ban/>> accessed 28 February 2018.

of her deference to the state at the expense of human rights and freedoms.¹⁸ Appearing before a parliamentary committee, she recently conceded that at least 15% of ZEC's staff members are military/ex-military personnel.¹⁹ This has cast an ominous shadow over the elections to be held in 2018, more so since the traditional chiefs have already started to denounce opposition candidates.²⁰

Another major development was the first amendment to the Constitution of Zimbabwe. One of the new provisions of the Constitution of Zimbabwe (2013) was the requirement for public interviews by the Judicial Service Commission in the appointment of judges. The President was to appoint from a shortlist of successful nominees.²¹ It had drastically reduced executive influence over judicial appointments and thus enhanced judicial independence. In his role as the then-Vice President and the official in charge of the Ministry of Justice, Legal and Parliamentary Affairs, Emmerson Mnangagwa spearheaded enactment of the Constitution of Zimbabwe (2013) Amendment Number 1, gazetted on 7 September 2017.²² In terms of the Constitution as amended, the appointment of the three most senior judges, being the Chief Justice, Deputy Chief Justice

and Judge President of the High Court, shall be done solely by the President *after* consultation with the Judicial Service Commission. The three positions in question have significant influence over the administration of justice. The Chief Justice is the head of the judiciary, presides over the Constitutional Court and selects judges to preside over Supreme Court cases. The administrative duties of the Chief Justice often mean it is the Deputy Chief Justice who consistently presides over Supreme Court matters.²³ The Judge President is in charge of the High Court and periodically allocates cases to various judges.²⁴ Thus all three officers have substantial influence over the operation of the most senior courts in Zimbabwe. It is now plausible that they will be selected solely at the whim of the executive, thus increasing the power of the executive at the expense of the judiciary.

The amendment was the culmination of she-nanigans which followed the retirement of the late Chief Justice Godfrey Chidyaisiku. A law student successfully secured an interdict against the public interview process, but an appeal to the Supreme Court suspended that order and enabled the interviews to proceed. Then-Deputy Chief Justice Luke Malaba scored the highest in the interviews and

was later sworn in as the new Chief Justice of Zimbabwe on 7 April 2017.²⁵ Indications that the then-Vice President preferred a different nominee seemed to create the political will for the amendment, which effectively means Chief Justice Malaba will be the first and last Chief Justice to be appointed after a public interview process.²⁶

III. MAJOR CONSTITUTIONAL DEVELOPMENTS

There were, according to the Zimbabwe Legal Information Institute, 13 judgments from the Constitutional Court of Zimbabwe in 2017.²⁷ None of the judgments granted the relief sought by the applicants. They were all either dismissed or struck from the roll. In 2016, the Constitutional Court outlawed child marriage and set a minimum age of 18 for marriage.²⁸ In another judgment, it ruled as unconstitutional the sentence of life imprisonment without the possibility of parole or release on license process.²⁹ There were no such judgments from the Court in 2017.

The Zimbabwean Government announced the appointment of a new Prosecutor General, Advocate Ray H. Goba, on 13 September

¹⁸ Alex Magaisa, 'Justice Chigumba, the new ZEC Chairperson' (*BSR* – 31 January 2018) <<https://www.bigsr.co.uk/single-post/2018/01/31/BSR-Justice-Chigumba---the-new-ZEC-Chairperson>> accessed 28 February 2018.

¹⁹ '15pct of ZEC staffers are soldiers' (*NewZimbabwe* – 27 February 2018) <<http://www.newzimbabwe.com/news-46795-ZEC+admits+15pct+of+staff+are+soldiers/news.aspx>> accessed 28 February 2018.

²⁰ 'Chiefs come out in support of ZANU PF, say liberation war 'infant' Chamisa will not rule' (*NewZimbabwe* – 27 February 2018) <<http://www.newzimbabwe.com/news-46805-Chiefs+vow+'Toddler'+Chamisa+won't+rule/news.a>> accessed 28 February 2018.

²¹ David T Hofisi and Geoff Feltoe, 'Playing Politics with the Judiciary and the Constitution?' (2016) ZELJ 01 <https://www.zimlil.org/zw/journal/2016-zelj-01/%5Bnode%3Afield_jpubdate%3Acustom%3AY/playing-politics-judiciary-and-constitution> accessed 28 February 2018.

²² See Constitution of Zimbabwe Amendment No.1 <http://veritaszim.net/sites/veritas_d/files/Constitution%20of%20Zimbabwe%20Amendment%20%28No.%201%29%20Act%2C%202017%20%28Act%2010-2017%29.pdf>

²³ Daniel Nemukuyu 'Chidyaisiku stops sitting as Supreme Court Judge' (*The Herald* – 31 August 2015) <<https://www.herald.co.zw/chidyaisiku-stops-sitting-as-supreme-court-judge/>> accessed 28 February 2018.

²⁴ David T Hofisi, 'Clawing Back the Gains of Popular Participation – The First Amendment to the Constitution of Zimbabwe (2013)' (*ConstitutionNet*, 26 September 2017) <<http://www.constitutionnet.org/news/clawing-back-gains-popular-participation-first-amendment-constitution-zimbabwe-2013>> accessed 28 February 2018.

²⁵ Farirayi Machivenyika, 'New Chief Justice Malaba sworn in' (*The Herald* – 7 April 2017) <<http://www.herald.co.zw/new-chief-justice-malaba-sworn-in/>> accessed 28 February 2018.

²⁶ Wongai Zhangazha, 'Ministers in fierce row over chief justice' (*Zimbabwe Independent* – 23 December 2016) <<https://www.theindependent.co.zw/2016/12/23/ministers-fierce-row-chief-justice/>> accessed 1 March 2018.

²⁷ 'Constitutional Court: Decisions in 2017' (*ZIMLII*) <<https://www.zimlil.org/courtnames/constitutional-court/2017>> accessed 28 February 2017.

²⁸ Sebastian Mhofu, 'Zimbabwe's Constitutional Court Outlaws Child Marriages' (*VOA*- 20 January 2016) <<http://www.voanews.com/a/zimbabwe-constitutional-court-outlaws-child-marriages/3154549.html>> accessed November 25, 2016.

²⁹ *Obediah Makoni v. Commissioner of Prisons and Minister of Justice Legal and Parliamentary Affairs* (CCZ 8/16, Const. Application No CCZ 48/15) [2016] ZWCC 8 (July 13, 2016), <<http://www.zimlil.org/zw/judgment/constitutional-court/2016/8/2016-zwcc-8.pdf>> accessed 28 February 2018.

2017 after he successfully participated in a public interview process.³⁰ It was an important substantive appointment since the Constitution had separated the office of Prosecutor General from that of Attorney General. However, the government proceeded to repeal that announcement on 27 October 2017 without any further explanation.³¹ It was largely believed that Advocate Goba was aligned to then-Vice President Mnangagwa and was purged as part of efforts to neutralize the new President. Lawyers successfully challenged the nullification, and once President Mnangagwa was inaugurated, he proceeded to reinstate Advocate Ray Goba as substantive Prosecutor General.³²

V. LOOKING AHEAD TO 2018

All eyes will be on the presidential, parliamentary and local authority elections to be held by August in 2018. Even though President Mnangagwa has stated that he will invite international observers,³³ it is still unclear whether the necessary conditions for a free and fair election will be met. The role of the military in the elections remains a critical issue, more so given the prominent role they played in the elevation of Emmerson Mnangagwa to the presidency. The position of Deputy Chief Justice also remains vacant. Since the Constitution now allows the President to appoint his preferred nominee after consultation with the Judicial Service Commission, President Mnangagwa's choice will highlight whether he has any intention of enhancing judicial independence. Other issues for 2018 include the determination of the question of the diaspora vote³⁴ by the constitutional court as well as the question of whether the voting procedure for the first amendment to the constitution was done in accord with the

requirements of the constitution.³⁵

IV. FURTHER READING

1. David T Hofisi and Geoff Feltoe, 'Playing Politics with the Judiciary and the Constitution?' (2016) ZELJ 01 <https://www.zimlil.org/zw/journal/2016-zelj-01/%5Bnode%3Afield_jpubdate%3Acustom%3AY/playing-politics-judiciary-and-constitution> accessed 28 February 2018
2. David T Hofisi, 'Clawing Back the Gains of Popular Participation – The First Amendment to the Constitution of Zimbabwe (2013)' (*ConstitutionNet*, 26 September 2017) <<http://www.constitutionnet.org/news/clawing-back-gains-popular-participation-first-amendment-constitution-zimbabwe-2013>> accessed 28 February 2018
3. David T Hofisi, 'Zimbabwe's New Boss, Same as the Old Boss?' (*The Progressive*, 19 December 2017) <<http://progressive.org/dispatches/zimbabwes-new-boss-same-as-the-old-boss-171218/>> accessed 28 February 2018

³⁰ Tendai Mugabe 'Ray Goba appointed Prosecutor-General' (*The Herald* – 14 September 2017) <<http://www.herald.co.zw/ray-goba-appointed-prosecutor-general/>> accessed 28 February 2018.

³¹ Breaking: Adv Goba's Appointment Nullified' (*ZBC* – 27 October 2017) <<http://www.zbc.co.zw/?p=58828>> accessed 28 February 2018.

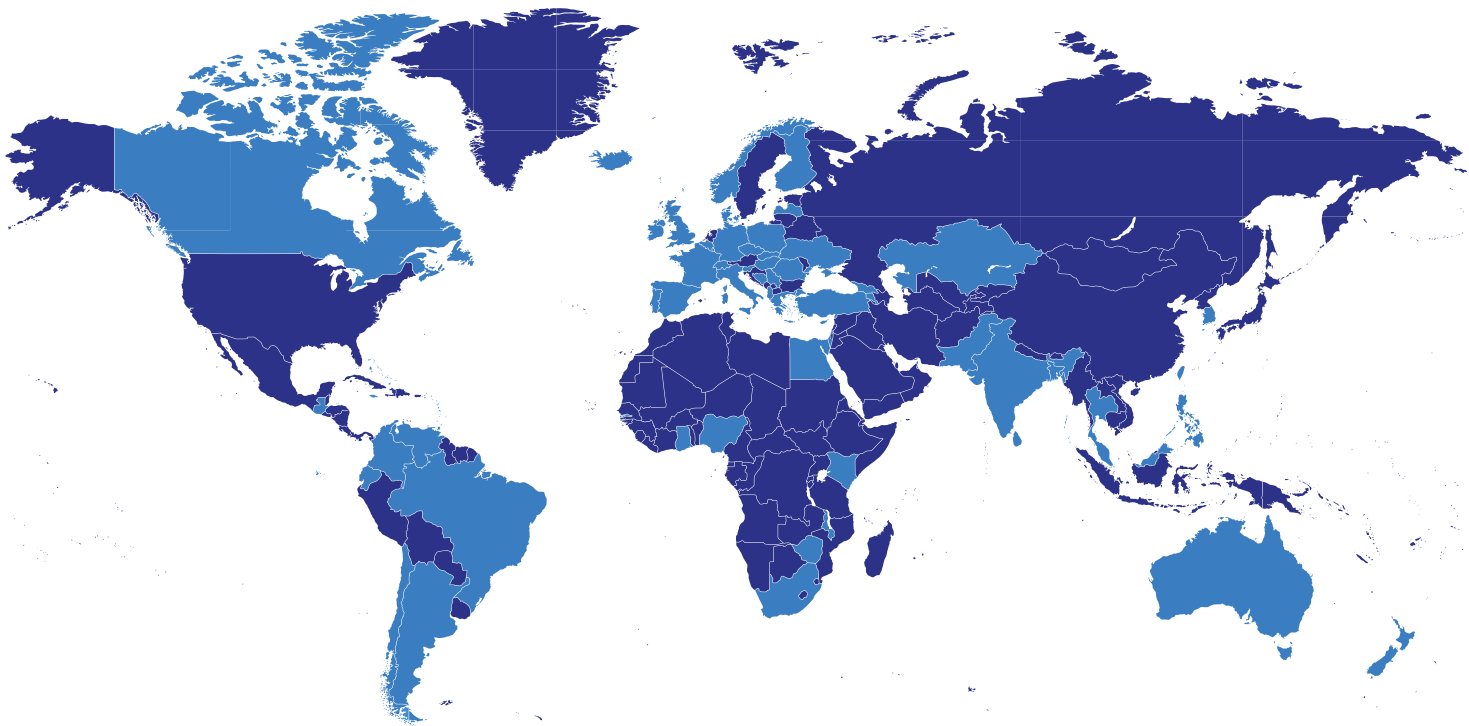
³² Farayi Machamire, 'Mnangagwa reinstates PG Goba' (*The Daily News* – 2 December 2017) <<https://www.dailynews.co.zw/articles/2017/12/02/mnangagwa-reinstates-pg-goba>> accessed 28 February 2018.

³³ 'Mnangagwa says UN, EU should come and observe Zim elections' (*New24* – 20 January 2017) <<https://www.news24.com/Africa/Zimbabwe/zimbabwe-an-president-wants-un-to-observe-vote-20180119>> accessed 28 February 2018.

³⁴ Tendayi Kamhungira, 'Con-Court to hear legal challenge to diaspora vote' (*The Daily News* – 18 January 2018) <<https://www.dailynews.co.zw/articles/2018/01/18/con-court-to-hear-legal-challenge-to-diaspora-vote>> accessed 28 February 2018.

³⁵ Tendai Kamhungira, 'Con-Court reserves ruling in Constitution of Zimbabwe Amendment No.1 challenge' (*The Daily News* – 1 February 2018) <<https://www.dailynews.co.zw/articles/2018/02/01/con-court-reserves-ruling-in-constitution-amendment-no-1-challenge>> accessed 28 February 2018.

SUMMARY



Albania

The year 2017 was marked by parliamentary elections. The events that unfolded prior to the elections not only played a key role in shaping political debate but they also had a significant impact on ongoing justice reform, which constitutes the main challenge of the constitutional system in Albania.

Argentina

Recent changes at the Supreme Court seem to be swaying its decisions in new directions. The Court's two new justices seem willing to subject to scrutiny a previous commitment to international human rights treaties as a privileged source of argument. In a five-member Court, their intervention will prove influential.

Armenia

In 2017, Armenia completed legal reform implementing a transition from a semi-presidential to parliamentary constitution. Further laws were adopted that shaped the recently inaugurated institutions of parliamentary democracy and defined the scope of functions within the new power structures. In April, milestone parliamentary elections were held that determined the post-transition power configuration.

Australia

The eligibility of dual citizens to sit in the Australian Parliament caused political ructions in 2017. Politics came to overshadow more fundamental, grassroots developments of significance for the meaningful constitutional recognition of Australia's indigenous peoples. The legalisation of same-sex marriage was an important development in LGBTI rights.

Bangladesh

The single most important development in 2017 was the Supreme Court's invalidation of the 16th Constitutional Amendment

that re-introduced the original scheme of judicial removals pursuant to a two-thirds majority parliamentary resolution. Eventually, the Chief Justice had to resign, and his replacement was selected superseding the senior-most judge.

Belgium

The state of liberal democracy in Belgium remained quite stable in 2017. Nevertheless, challenges such as asylum and migration, terrorism, climate change and the political 'culture of greed' put pressure on the social welfare state, fundamental rights and freedoms and the traditional functioning of the liberal democratic system.

Bosnia and Herzegovina

In 2017, amendments to the Constitution of Bosnia and Herzegovina and the Election Law of Bosnia and Herzegovina to ensure responsiveness of the democratic system of government at all levels in the country failed again due to ethnic strongholds.

Brazil

Following President Dilma Rousseff's removal and massive criminal investigations implicating several politicians, 2017 can be depicted as the year of political backlash. The Brazilian Supreme Federal Court saw its most impactful workload devoted to examining the criminal offenses of high-ranking authorities while the Executive branch and Congress strategically adopted self-preservationist behavior.

Canada

The Liberal government that took office in 2015 has repaired some of the damage to Canada's democratic fabric wrought by the previous Conservative government and plans to do more. It has backpedaled, however, on its campaign promise to change the federal electoral system to one based on proportional representation.

Chile

As shown by the 2017 judicial decisions on the Constitutional Court's ex-ante review power over legislative bills, the Court is increasingly becoming a consequential institution that constrains legislative majorities when it considers that a legislative bill infringes constitutional rights.

Colombia

The most important 2017 constitutional developments concerned the implementation of the Peace Agreement signed between the Government and the FARC Guerrillas, the constitutional review of the resulting norms, and the resolution of conflicts in which rights to economic development and environmental protection were at stake.

Commonwealth Caribbean

The single most important development was the decision of the Judicial Committee of the Privy Council (JCPC) to henceforth conduct the hearing of appeals by way of video-link. This will have a major impact on those countries in the region that have yet to decide whether to replace the right of appeal to the JCPC with a right of appeal to the Caribbean Court of Justice.

Cyprus

In Cyprus, the main constitutional issue in 2017 was the separation of powers and the protection of the right to privacy vis-à-vis the principles of transparency and proportionality. Moreover, the issue of judicial independence and the rejection of positive discrimination were also examined by the Supreme Court.

The Czech Republic

The most important development in the constitutional system of the Czech Republic in 2017 was the first signs of a paradigm shift in the system of separation of powers and checks and balances, leading to change

from the parliamentary form of government towards the semi-presidential or presidential system.

Ecuador

After a decade of authoritarian rule under Rafael Correa, Ecuador changed presidents. Lenin Moreno has signaled a slight change. Will he stir the country towards the rule of law, or will it be just another rule of a man that is more temperate? It is still uncertain.

Egypt

The judiciary was the main player in 2017. The laws of the judicial authorities were amended to give the president more powers in selecting their heads. Moreover, the battles over appointing female judges in the state council and the jurisdiction over the validity of international treaty disputes are still going.

Finland

In 2017, the Constitutional Law Committee of Parliament found major elements of the proposed reform of healthcare and social services, including regional government, unconstitutional. Also, plans to amend the constitutional provision on the confidentiality of communications in order to allow the enactment of intelligence legislation gave rise to constitutional concerns.

France

2017 was a year of deep political change because of presidential and parliamentary elections, which closely followed one another. The Constitutional Council started interacting with the new majority and applying constitutional principles to important political projects, especially regarding faith in political life. It also continued its review of anti-terrorism legislation.

The Gambia

The Gambia became one of Africa's newest democracies following 22 years of authori-

tarian rule by Yahya Jammeh, who vowed to rule The Gambia for a billion years. This momentous change led to the dawn of a new political and democratic dispensation and a slow but gradual thrust to liberal democracy.

Georgia

A brief introduction to the Georgian constitutional system, constitutional reform, landmark judgments of the Georgian Constitutional Court, and the main directions of electoral, judicial, and local self-government reforms. It also examines developments on presidential elections, constitutional court cases, and other related events in 2018.

Germany

Roughly half a year before a parliamentary election shattered the German party system with the ascension of the far right AfD, the FCC deliberated the Constitution's normative core and redrew the legal limits of political engagement in the first party prohibition case in 60 years, concerning the openly racist NPD.

Ghana

The new heights of judicial independence that the Supreme Court asserted in 2017 represent the single most important constitutional development in Ghana. Achieved by resisting external and internal interference, the Supreme Court thereby preserved the constitutional arrangements for citizens to enforce their rights.

Greece

The state of liberal democracy in 2017 appeared vulnerable but resilient, as Greece is still faced the financial crisis complemented by the refugee crisis. 2017 was characterized by tension between the executive and the judiciary, which culminated following Supreme Court decisions on TV licensing and asylum seekers from Turkey.

Guatemala

The fight against corruption was the crucial constitutional affair in 2017. Guatemala, with international assistance, made moves towards greater accountability of those holding public power. This was supported by a major civil society movement, the judiciary and the International Commission Against Impunity in Guatemala (CICIG).

Hungary

By amending the competence of the Constitutional Court, the two-thirds governing majority modified the focus of constitutional adjudication. By 2017, most cases were born in constitutional complaint procedures and were therefore politically less sensitive. The Court became more a control of the judiciary than of legislative power.

Iceland

The third government in 18 months took office after hastily called elections, which took place in the shadow of a broad injunction on reporting about links between politics and finance. This was related to the Icelandic banks, which nearly bankrupted the country in 2008.

Italy

In 2017, the most salient constitutional developments concerned national electoral legislation. In this field, the Constitutional Court declared partially unconstitutional the electoral law approved in 2015, and the Parliament approved a new law. However, in this as in other fields, a relational approach emerged in the Italian Constitutional Court's affiliation with political bodies.

India

In 2017, the Indian Supreme Court affirmed that the right to privacy was constitutionally protected by reading it into the bill of rights in the Constitution. This ruling has significant implications, particularly for India's

national biometric identification program as well as for ongoing litigation concerning civil liberties and personal autonomy.

Ireland

While abortion was the headline issue in constitutional politics, the public conflict between politicians and judges over judicial appointment reforms had broad significance for constitutional governance. That this is the latest of several heavily politicised controversies about judicial independence and accountability raises concerns about the state of Ireland's separation of powers.

Israel

In Israel, the Supreme Court, for the first time in history, invalidated a law based on flaws in the legislative process and adopted the doctrine of "misuse of constituent power" to issue a nullification notice to a temporary basic law that changed the annual budget rule to biennial.

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Kazakhstan

The 2017 constitutional amendments, which were presented to the public as a major redistribution of powers, fell short of actually empowering the Parliament. Instead, they solidified further the powers and immunities of President Nazarbayev, who shows no signs of leaving office.

Kenya

The Supreme Court of Kenya made history by annulling presidential elections. The

2010 Constitution of Kenya exhibited resilience through strategic judicial decisions and their interactions with pathologies of democracy, political actors and institutions in a volatile political environment.

Latvia

Judgment in case No. 2016-14-01 changed the approach to the legislator's constitutional obligation in the field of taxes. The Constitutional Court underscored the importance of the concept of a sustainable economy. The State's obligation to implement a fair, solidarity-based, effective and timely taxation policy to ensure public welfare follows from the principle of a socially responsible state.

Liechtenstein

The constitutional landscape of Liechtenstein underwent no change in 2017. The parliamentary elections entailed a minor shift between the parties and invoked debate on the political representation of women. The State Court's case law dealt with, *inter alia*, procedural rights questions and remained consistent with its Europe-friendly orientation.

Luxembourg

Constitutional law gets international. Although control of conventionality and constitutional review are exercised separately by general courts and the Constitutional Court, the latter now includes international law when interpreting constitutional provisions. This development is highly desirable, because international law is recognized to take priority over national law, including constitutional provisions.

Malawi

The invalidation of the anti-vagrancy provisions of the Penal Code was arguably the most significant constitutional development in 2017. Although British in origin, the anti-vagrancy provisions were imported into

Malawi during the adoption of the Penal Code and over the years these provisions were used to disproportionately target the poor and marginalized.

Malaysia

Redelineation of electoral boundaries highlighted the Achilles' heel of Malaysia's democracy – the scope for rampant gerrymandering under the Federal Constitution's 'Principles Relating to Delimitation of Constituencies'. Without concrete guidelines upholding the 'one man, one vote' principle, severe imbalances continue in the apportionment of electors, undermining the democratic legitimacy of institutions.

New Zealand

The 2017 general election marks the Mixed-Member Proportional voting system's coming of age, as three smaller parties with somewhat disparate policy programmes were able to negotiate a governing arrangement that excluded Parliament's largest political party. The promise of negotiated compromise over ideological differences has been delivered in full.

Nigeria

The institutionalization of impersonal rule in a formal rational-legal state structure notched up in Nigeria with the unprecedented seamless temporary transfer of power from the President to the Vice-President during incapacity twice in 2017, thereby peeling off by a bit a stubborn and pervasive legacy of personal rule in Africa.

Norway

Constitutional Norway 2017 may be summed up as *status quo*. The minority right-liberal coalition Government keeps Parliament actively participating in politics. Constitutional case law includes refugee, Sami and environmental rights. Liberal democracy is not in decline, but some of its fundamentals are more openly questioned

in public and political debates.

Pakistan

2017 was the year of the *Panama Case*, in which the Supreme Court dismissed a powerful elected prime minister pursuant to charges of corruption and mis-declaration of assets. As Pakistan enters an election year, the *Panama Case* and its aftermath herald judicial review of a broad range of electoral issues.

The Philippines

The Supreme Court assisted President Duterte in consolidating power by refusing to exercise judicial review properly. In a series of decisions, the Court helped create a House of Representatives without an opposition, and then removed from both the Court and Congress constitutional checks on the declaration of martial law.

Poland

In 2017, we witnessed the practical effects of the capture of the Polish Constitutional Court by parliamentary majority. Judicial review was explicitly used – and abused – to promote the political agenda of the majority while degrading the Court to constitutional rubber-stamping and making it complicit in the incremental erosion of the rule of law.

Portugal

Portugal's three-year international bailout (2011-2014) compelled the legislators to a very strict austerity programme, which led to unpopular public policies and stressed the social fabric. In 2016, the country was able to meet the EU Stability and Growth Pact deficit rules and, in June 2017, left the excessive deficit procedure.

Romania

The most important characteristic for the 2017 constitutional year in Romania was the rise of civil society against governmental attempts to perform controversial judi-

cial reforms and to weaken the fight against corruption.

Serbia

The Ministry of Justice started the first preparatory activities aimed to amend the Constitution in order to improve the independence of the judiciary. The most significant changes brought by the draft version of constitutional amendments concern the composition and the competences of the High Judicial Council.

Singapore

The year 2017 was dominated by the elected presidency – constitutional amendments made to the presidency, the operationalization of those amendments, and challenges to them. These implicated important constitutional questions concerning amendment powers and the role of unelected officials as well as right/access to political participation.

Slovakia

Decision I. ÚS 575/2016 in the *Constitutional Court Appointments Case* may prove to be the most consequential development of the 2017 legal year. The *Appointments Case* concerned the permissible scope of discretion in appointment of constitutional judges by the President, and its resolution will affect the selection process in 2019 when nine judges leave the Court.

Slovenia

Discrepancy between liberal democracy as a form and practice persists. While the attempted constitutional override of the Constitutional Court's decision by the parliamentary majority failed in the primary schools financing case, it revealed a political culture bent in favour of the rule *by* law rather than the rule *of* law.

South Africa

The challenges to constitutionalism that

the Zuma presidency produced were met in 2017 with conclusive jurisprudential and parliamentary responses, contributing significantly to the end of a period that could have terminated South African constitutionalism. The political rejection of the decline left the new government with an immense task of reconstruction.

South Korea

President Geun-hye Park was impeached by the Constitutional Court in March 2017. The presidential election held the following May was won by Jae-in Moon, returning leadership of the country to a liberal party after a long period of conservative rule.

Spain

The most important case before the court in 2017 was STC 114/2017, declaring the Catalan parliament law calling a “binding referendum on self-determination” unconstitutional. The court stated that any change to the territorial model could only be made via constitutional reform, needing approval by a referendum in which all Spaniards participated.

Sri Lanka

Some judicial decisions and an important milestone in the constitutional reforms process seemed to register modest wins for liberal democracy in 2017. However, poor process and mismanagement of coalition politics have tested the national unity government beyond endurance, signifying the end of liberal reforms for the foreseeable future.

Switzerland

“Consociational democracy” moderating radical democracy has come under increased pressure. This process is neither inevitable nor linear as some constitutional developments in 2017 testify: Swiss voters eased naturalization requirements for third-generation immigrants and the Feder-

al Court invalidated a popular initiative at the state-level seeking to frustrate training Imams at a public university.

Taiwan

Interpretation No. 748 is not only the Decision of the Year but also the star constitutional event in 2017. Paving the way for Taiwan to become the first Asian country legalizing same-sex marriage, it also aroused populist reactions against the TCC. It is a microcosm of Taiwan's new law-politics dynamics.

Thailand

The 2017 Constitution was finally signed into effect. Despite the junta's propaganda of returning to democracy, critics warned that this constitution introduced a weak and unstable government and strong yet unaccountable judiciary and watchdog agencies. The dysfunctional political model will prolong the junta's grip on power.

Turkey

In political cases, the Constitutional Court has ruled in parallel with the policies of the executive organs. The Court tries to protect its reputability by its decisions on non-political cases, but it seems that it is not enough to avoid its loss of effectiveness.

Ukraine

For Ukraine, the year of 2017 was a year of reforms, intensive cooperation with the EU, and ongoing hybrid conflict with the Russian Federation. In the judiciary, a new law 'On the Constitutional Court of Ukraine' was adopted and a new 120-seat Supreme Court of Ukraine was formed from scratch.

United Kingdom

Brexit dominated constitutional debates in 2017. The EU (Withdrawal) Bill 2016-2019 continued its course through Parliament throughout the year. The legal status of retained EU law, the delegation of legislative

powers on the executive and the redistribution of repatriated EU competences among devolved bodies were the central issues.

Venezuela

Venezuela transitioned from competitive authoritarianism to full autocratic rule. The Supreme Tribunal continued functioning as an authoritarian enclave, blocking the opposition legislature from exercising its prerogatives. Moreover, since August, the government created a "National Constituent Assembly" to sideline the 1999 constitutional order and rule without constraints.

Zimbabwe

The ouster of Robert Mugabe after 37 years in power was by far the most significant development in Zimbabwe in 2017. Purges within Mugabe's ZANU PF party, his advanced age and the increasingly powerful role given to his wife led to a military intervention precipitating his downfall.

ISBN 978-0-692-15916-3
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