Assessing Constitutional Decay, Breakdown, and Renewal Worldwide

Editors
Tom Gerald Daly
Wojciech Sadurski
This e-book is a collection of short essays produced for the Global Roundtable webinar series organised by the International Association of Constitutional Law on 18-26 November 2020: ‘Democracy 2020: Assessing Constitutional Decay, Breakdown, and Renewal Worldwide’. The event was co-sponsored by the Laureate Program in Comparative Constitutional Law, funded by the Australian Research Council (ARC), and the Melbourne School of Government. These essays were initially published as a collection of blog posts on the event blog.
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>iii</td>
</tr>
<tr>
<td>Global Roundtable Summary</td>
<td>iv</td>
</tr>
<tr>
<td>Full Table of Contents</td>
<td>vi</td>
</tr>
<tr>
<td>Contributor Biographies</td>
<td>xii</td>
</tr>
<tr>
<td><strong>GLOBAL CHALLENGES</strong></td>
<td></td>
</tr>
<tr>
<td>1 Threats &amp; Resilience</td>
<td>1</td>
</tr>
<tr>
<td>2 The Big Picture</td>
<td>21</td>
</tr>
<tr>
<td><strong>REGIONAL OVERVIEWS</strong></td>
<td></td>
</tr>
<tr>
<td>3 Americas</td>
<td>51</td>
</tr>
<tr>
<td>4 Middle East &amp; Africa</td>
<td>73</td>
</tr>
<tr>
<td>5 Asia</td>
<td>94</td>
</tr>
<tr>
<td>6 Europe</td>
<td>119</td>
</tr>
<tr>
<td><strong>COUNTRY SPOTLIGHTS</strong></td>
<td></td>
</tr>
<tr>
<td>7 India &amp; Sri Lanka</td>
<td>145</td>
</tr>
<tr>
<td>8 Hungary &amp; Poland</td>
<td>174</td>
</tr>
<tr>
<td><strong>RENEWAL</strong></td>
<td></td>
</tr>
<tr>
<td>9 Saving Constitutional Democracy</td>
<td>205</td>
</tr>
<tr>
<td>Index</td>
<td>237</td>
</tr>
<tr>
<td>Acknowledgments</td>
<td>239</td>
</tr>
</tbody>
</table>
INTRODUCTION

Even before the COVID-19 pandemic hit, 2020 was going to be a key milestone for those focused on the health of constitutional democracy worldwide.

This year marks the tenth anniversary of the Fidesz government’s election in Hungary, which has laid down a template for the active dismantling of democratic governance through incremental and sophisticated use of law and policy. Since 2010, the number of liberal democracies worldwide whose health, or even endurance, is now in doubt has grown exponentially.

Some states have closely followed the Hungarian script: Poland, under Law and Justice Party rule since 2015, has travelled toward constitutional break-down and after the elections in October 2019 saw the rule of that party consolidated.

In other states we see incremental deterioration of the democratic system that follows a less clear ‘masterplan’ but which remains highly troubling, from the USA, to India under the BJP, to Brazil under far-right President Jair Bolsonaro. In the UK, ongoing constitutional crisis occasioned by Brexit has raised rule-of-law concerns, while in Australia recent legislation and State action has prompted soul-searching about core democratic freedoms such as free speech.

The democratic trajectories of other states, such as El Salvador, Indonesia, Latvia, Malta, Malaysia, Nepal, and Sri Lanka remain understudied. Everywhere, democracy is in flux, challenged by interlocking trends like algorithmic governance, authoritarian populism, neo-liberalism, and corruption.

The pandemic has accelerated negative trends worldwide, while, at the same time, intensifying the global focus on reinvigorating and renewing constitutional democracy.

* * *

The Global Roundtable of the International Association of Constitutional Law (IACL), held on 18-26 November, brought together a group of leading and emerging experts, to engage in a global ‘stock-taking’ exercise, aiming to map the health and trajectory of key democracies world-wide, pin-point gaps in analysis, and divine what broader lessons may be learned from multiple contexts and experiences.

Due to the pandemic we re-imagined what was initially envisaged as a 2-day event as a series of 9 inter-connected webinars across 2 weeks.

This e-book is a collection of the 46 blog posts from Roundtable speakers, published on the event blog between 11 and 25 November. Our aim is to provide this collection in a more systematic format, to showcase what is a thought-provoking and truly global collection, and to allow readers to appreciate both the diversity of democratic trajectories in states worldwide and the themes resonating across multiple regions and contexts.

Professor Wojciech Sadurski & Associate Professor Tom Daly

Co-Convenors
GLOBAL ROUNDTABLE SUMMARY

The Virtual Global Roundtable ‘Democracy 2020: Assessing Constitutional Decay, Breakdown and Renewal Worldwide’ was a truly global event:

9 webinars took place on 18, 19, 24, 25, 26 November 2020. Each webinar was 2.5 hours long.

58 speakers from 5 continents presented across 5 days: The event’s aim was to bring together a group of leading and emerging experts, to engage in a global ‘stock-taking’ exercise, aiming to map the health and trajectory of key democracies world-wide, pin-point gaps in analysis, and divine what broader lessons may be learned from multiple contexts and experiences.

Inter-related webinars: Due to the pandemic, what was initially envisaged as a 2-day event was re-imagined as a series of 9 inter-connected webinars across 2 weeks, devoted to an array of themes including global and regional overviews of constitutional democracy, challenges from algorithmic governance to voter suppression, understudied countries, key actors (e.g. courts, parliaments), and possible remedies and renewal of our democratic system. Each webinar lasted 2.5 hours:

Webinar 1 - Global Challenges: Threats & Resilience – 18 November
Webinar 2 - Global Challenges: The Big Picture – 18 November
Webinar 3 - Americas: Constitutional Decay, Breakdown & Resilience – 19 November
Webinar 4 - Middle East & Africa: Constitutionalism, Corruption & Courts – 19 November
Webinar 5 - Asia: Non-Linear Constitutional Pathways – 24 November
Webinar 6 - Europe: Constitutional Impatience & Uncertainty – 24 November
Webinar 7 - Asia: Spotlight on India & Sri Lanka – 25 November
Webinar 8 - Europe: Spotlight on Hungary & Poland – 25 November
Webinar 9 - Saving Constitutional Democracy: Remedies & Renewal – 26 November

Over 30 countries represented: The Roundtable featured speakers from, and analysis of, at least 30 countries and territories: Australia, Belarus, Brazil, Cameroon, Canada, Chile, China, France, Hungary, India, Indonesia, Israel, Kenya, Latvia, Lithuania, Malaysia, Malawi, Malta, Nepal, Nigeria, North Macedonia, Palestine, Philippines, Poland, Slovakia, South Africa, Sri Lanka, Turkey, UK, USA and Zimbabwe.

Multimedia model & outputs: The Roundtable was organised as an innovative multimedia event, with a variety of outputs and activities beyond the webinars themselves, published before, during, and after the event. These include:

- **5 speaker interviews** provided as videos on the event website – link here.
- **46 blog posts** published online (collated as this **ebook**) – link here.
- **Re-publication** of some blog posts in major media outlets (e.g. Scroll.In in India).
- **9 webinar recordings** available at this link.
574 registered participants from 54 countries and territories: Argentina, Australia, Belgium, Bosnia and Herzegovina, Brazil, Canada, Chile, Colombia, Democratic Republic of the Congo, Czech Republic, Dominican Republic, Ecuador, Egypt, Finland, France, Germany, Georgia, Greece, Hong Kong SAR, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Kenya, Malaysia, Mexico, Morocco, Nepal, Netherlands, New Zealand, Nigeria, North Macedonia, Norway, Palestine, Peru, Poland, Portugal, Philippines, Portugal, Romania, Russian Federation, Sierra Leone, Singapore, Slovakia, South Korea, Spain, Sri Lanka, Sweden, Turkey, United Arab Emirates (UAE), United Kingdom, United States of America.

Diversity: Although the event was organised on the basis of a call for papers, every effort was made to ensure a diverse and inclusive event:

- 25 of 58 speakers (43%) and 4 of 8 chairs were female.
- 5 of 9 webinars had gender parity (1, 6 and 9) or female-majority (3 and 8).
- 17 of 58 speakers (29%) were early career scholars (i.e. doctoral or post-doctoral researchers). Early career scholars were included as equal speakers within each webinar.
- The IACL’s bilingual nature as an organisation was reflected in French-language versions of website information and program, and simultaneous interpretation at webinars featuring French speakers.
# FULL TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>iii</td>
</tr>
<tr>
<td>Roundtable Summary</td>
<td>iv</td>
</tr>
<tr>
<td>Long Table of Contents</td>
<td>vi</td>
</tr>
<tr>
<td>Contributor Biographies</td>
<td>xii</td>
</tr>
</tbody>
</table>

## GLOBAL CHALLENGES

### 1 Threats & Resilience

- Technology, Inequality and Democratic Decline: is Australia at Risk?  
  Shireen MORRIS and Andrew BALL  
  2

- The Comparative Constitutional Law and Politics of Voter Suppression  
  Michael PAL  
  9

- How Constitutionalism Withers: Explaining the Changing Discourse of Constitutionalism in Chinese Constitutional Scholarship since 1982  
  Han ZHAI and Chen HUANG  
  13

- Democratic Erosion and Abusive Judicial Review  
  Ros DIXON & David LANDAU  
  18

### 2 The Big Picture

- La crise de la démocratie : Éléments d’explication  
  Bertrand MATHIEU  
  22

- Illiberal democracy and Undemocratic liberalism: Two Symmetrical Opposites  
  George KATROUGALOS  
  27

  Oreste POLLICINO & Giovanno DE GREGORIO  
  34

- Can COVID-19 Save Democracy from Populism?  
  Tamar HOSTOVKSY BRANDES & Yaniv ROZNAI  
  41

- Constitutional Decay and the Crisis of the Liberal Imagination  
  Nigam NUGGEHALLI  
  45
REGIONAL OVERVIEWS

3 Americas: Constitutional Decay, Breakdown & Resilience

COVID-19 Constitution-making in Chile
Jorge CONTESSE

The Consequences of the Change of Political Positioning of the Brazilian Government on Facing the Covid-19 Pandemic: A Breakdown of Democracy
Tatiana CARDOSO SQUEFF & Lúcia SOUZA D’AQUINO

From Hardball to Packing the Court: “PEC do Pyjama” and the Attempt to Attack the Brazilian Supreme Court
Katya KOZICKI & Rick PIANARO

Judicial Assertiveness in Times of Crisis: The Case of El Salvador
Monica CASTILLEJOS-ARAGÓN

The Resurgence of the Notwithstanding Clause
Han-Ru ZHOU

4 Middle East & Africa: Constitutionalism, Corruption & Courts

What Covid-19 has Revealed about the Future of Democracy in the Arab World
Osayd AWAWDA

Democratic Backsliding in South Africa: The Case of the “Secrecy Bill”
Juha TUOVINEN

Unpacking the Normative Roles of Courts in Electoral Processes
Ugochukwu EZEH

Executive Control Through Judicial Appointments in Turkey and Cameroon
Leighann SPENCER

5 Asia: Non-Linear Constitutional Pathways

Two Steps Forward, One Step Back, Another Step Sideways? Dissecting Narratives of Democracy in Nepal
Iain PAYNE & George VARUGHSE

Political Change and the Decline and Survival of Constitutional Democracy in Malaysia and Indonesia
Dian A H SHAH

Maintaining Democracy and Public Order in the Period of Health Crisis – The Malaysian Experience
Nurhafilah MUSA
Two Ways in which the Judiciary can Undermine Constitutional Secularism
Darshan DATAR

Defending Local Democracy Against Democratic Decay in the Post-Covid World
Atagün Mert KEJANLIOGLU

6 Europe: Constitutional Impatience & Uncertainty

Democratic Decay (and Renewal?) in Malta
John STANTON

Deceptive Democratisation: The Cracks in the Foundation of Democracy in Latvia and Lithuania
Beatrice MONCIUNSKAITE

Snap Elections in Illiberal Regimes: Confirming Trust or Establishing Hegemony?
Dorjana BOJANOVSKA POPOVSKA

Crises and Constitutional Courts: Lessons from Slovakia
Max STEUER & Sascha KNEIP

Populism, Executive Power and ‘Constitutional Impatience’: Courts as Institutional Decelerators in the United Kingdom
Raphaël GIRARD

COUNTRY SPOTLIGHTS

7 India & Sri Lanka

Rights During a Pandemic: The Indian Experience
Thulasi K. RAJ

The Indian Supreme Court in the Modi Era
Anuj BHUWANIA

What (if Anything) does Party Dominance Mean for Indian Constitutionalism?
Aradhya SETHIA

Bicameralism and the Rule of Law: Reining in the Abuse of Money Bills in Legislative Procedure
Gaurav MUKHERJEE

COVID-19 and Abusive Constitutional Change in Sri Lanka
Ayesha WIJAYALATH

Sri Lanka’s Dance with Democracy
Mario GOMEZ
8 Hungary & Poland

The Year 2020: Lessons Learned from the Hungarian and Polish Management of the COVID-19 Crisis and Beyond
Tímea DRINÓCZI & Agnieszka BIEN-KACAŁA

The Façade of State Organs in Contemporary Autocratic Regimes: The Case of the Polish Parliament
Piotr MIKULI

Criminal Liability of Poland’s Highest State Representatives
Monika CZECHOWSKA

A Personal Story about the Impact of Anti-NGO Measures Targeting Hungarian Human Rights Defenders
Eszter KIRS

The Role of Emergency Politics in Autocratic Transition in Hungary
Gábor MÉSZÁROS

Dismantling Democratic Governance through Manipulative Electoral Politics – the Hungarian Case
János MÉCS

RENEWAL

9 Saving Constitutional Democracy: Remedies & Renewal

Ensuring Resiliency during Crisis by Protecting Fundamental Equality and ESC Rights
Amy RAUB

Barangay Assembly: A Citizen-led Reinvigoration of Political Discourse and Civic Engagement in the Philippines
Michael Henry YUSINGCO

Preventing Constitutional Decay in India: Some Preliminary Considerations
Amal SETHI

Shilly-Shallying and the EU’s Dichotomous Response to the Rule of Law Crisis
Teodora MILJOJKOVIC

Constitutional Decay in Europe: Can the EU Save the Day?
Matteo BONELLI

Constitutional Reform in Bosnia and Herzegovina: Can We Expect It in The Near Future?
Ajla ŠKRBIC
Use the Index

The Index on p.237 has been carefully compiled to draw out key themes across the texts, and provides an additional guide to selected issues, institutions, and states covered in this collection, including:

- abusive constitutionalism
- COVID-19
- consolidation of democracy
- constitutional breakdown
- corruption
- courts
- democratic consolidation
- democratic decay
- democratic renewal
- elections
- leaders
- parliaments
- participation
- political parties
- populism
- social media
- technology
Don’t miss the World Congress in 2022

click the icon to find out more
Connect with Activities at the University of Melbourne

School of Government

Renewing Democracy
Governing During Crises
Election Watch

School of Law

Centre for Comparative Constitutional Studies (CCCS)
Constitution Transformation Network
COVID-19 Research Network
CONTRIBUTORS

Shireen MORRIS is a constitutional lawyer and senior lecturer at Macquarie University Law School. She was previously a McKenzie Postdoctoral Fellow at Melbourne Law School and a senior adviser at Cape York Institute, leading policy work on Indigenous constitutional recognition and a First Nations constitutional voice. Shireen has published several books including Radical Heart (MUP) and A First Nations Voice in the Australian Constitution (Hart Publishing) which was the topic of her PhD thesis, and A Rightful Place: A Roadmap to Recognition (Black Inc). Shireen is a research fellow with Per Capita think tank and an Academic Fellow with Trinity College at University of Melbourne. Shireen regularly commentates in the media on tv, radio and in print.

Andrew BALL is an Executive at Accenture, one of the world’s leading technology consulting companies. He is a thought leader in helping large corporations leverage agile frameworks to take advantage of Digital Age uncertainty. In this capacity, he has worked for clients in a range of industries including telecommunications, financial services, government and manufacturing. Andrew obtained his Bachelor of Economics from Monash University, his Graduate Diploma of Finance and Investment from Finsia and has studied International Trade at the University of International Business and Economics in Beijing, China. Andrew also acted as a campaign manager for a targeted marginal seat in the 2019 Australian federal election.

Michael PAL is an Associate Professor in the Faculty of Common Law at the University of Ottawa. He studies the law of democracy, comparative constitutional law, and democratic theory. He has an LL.M in Legal Theory from NYU and a J.D. and doctorate from the University of Toronto. He is working on a book on the constitutional politics of election commissions and the fourth branch of government. He was the external legal advisor for Ontario’s recent campaign finance reforms and served as a Commissioner with the Far North Electoral Boundaries Commission in 2017. He is on the Advisory Board for the Indian Law Review.

Han ZHAI, PhD (2017), Tilburg University, is an assistant professor in constitutional law at Wuhan University, China. She holds an LL.M of the Chinese University of Political Science and Law and an LL.B of Inner Mongolia University. The edited version of her PhD thesis, Constitutional Identity of Contemporary China: The Unitary System and Its Internal Logic, was published by BRILL in late 2019. She is also research fellow at the Israel Institute for Advanced Studies at the Hebrew University of Jerusalem, in the 2019-2020 Research Group "Constitutional Transplantation". Her current research fields include comparative constitutional law (secession and state of emergency), contemporary constitutional history of post-1978 China and political constitutional theories.

Chen HUANG is an assistant professor at Department of Politics, School of International Studies, Renmin (People’s) University of China. He is also the secretary-general of the Center for Historical Political Science, editorial director of Chinese Political Science, member of IPSA and APSA. He received a PhD from RUC and joint PhD from Columbia University. His research interests include contemporary Chinese thoughts & culture (in a power-knowledge perspective), Political History (especially the state-building in ancient and modern China). His recent work was published in Dao: A Journal of Comparative Philosophy and Journal of Political Science.

Rosalind DIXON is Rosalind Dixon is a Professor of Law, at the University of New South Wales, Faculty of Law. She earned her BA and LLB from the University of New South Wales, and was an associate to the Chief Justice of Australia, the Hon. Murray Gleeson AC, before attending Harvard Law School,
where she obtained an LLM and SJD. Her work focuses on comparative constitutional law and constitutional design, constitutional democracy, theories of constitutional dialogue and amendment, socio-economic rights and constitutional law and gender, and has been published in leading journals in the US, Canada, the UK and Australia. Her new jointly authored book, with Prof. David Landau (below), *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, is being published by Oxford University Press next year.

David LANDAU is Mason Ladd Professor and Associate Dean of International Programs at Florida State University College of Law. He is a recognized scholar on constitutional theory, constitutional design and comparative constitutional law. His recent work has focused on a range of issues with contemporary salience both in the United States and elsewhere around the world, including constitutional change and constitution-making, judicial role and the enforcement of rights, impeachment, and the erosion of democracy.


George KATROUGALOS is Professor of Public Law at Democritus University of Thrace. He has published extensively on comparative constitutional law, law and globalization and social rights. Among his monographs are: *Crisis and Way Out* (Athens, 2012), *Social Policy and Social Rights at national and international levels* (Athens, 2009), *Southern European Welfare States* (Palgrave Macmillan, London/New York, 2003), *The Social state in the post-industrial era* (Athens, 1998). He has lectured as visiting professor or invited speaker at the Universities of Oxford, Columbia, Humboldt, London School of Economics, Dublin College University, Tilburg, UNAM, New Delhi Law School and others. He is a member of the Greek Parliament, former member of the European Parliament. He has served as Minister of Foreign Affairs, European Affairs, Labor and Social Security and Administrative Reforms of Greece.

Oreste POLLICINO is a full professor of Constitutional Law at Bocconi University in Milan, where he teaches Internet law, constitutional law, and public law. He has also been a visiting professor at Oxford University and other universities in Budapest (CEU), Haifa, and Fribourg (Switzerland).

Giovanni DE GREGORIO is Ph.D. candidate in Public Law at the University of Milano-Bicocca, specialized in Constitutional, IT and IP law. Before graduating in Law at Bocconi University in 2016 with a dissertation about the European Digital Single Market strategy, he attended courses at national and international level such as the Cyberlaw course at the London School of Economics. His research interests are related to the freedom of expression and, in particular, its relationships with new digital technologies.

Tamar HOSTOVSKY BRANDES is a Senior Lecturer at the Faculty of Law of Ono Academic College, in Israel. She holds an LL.B from Tel Aviv University and an LL.M and J.S.D from Columbia Law School. Her research focuses on the relationship between constitutional law and international law, and on the interface between constitutional law and political theory. Her latest research examines the notion of solidarity as a constitutional value.

Yaniv ROZNAI is an Associate Professor at the Harry Radzyner Law School, IDC Herzliya. He holds a PhD and LL.M from the LSE, and LLB and BA degrees in Law and Government from the IDC. He is a Co-
Chair of ICON-S-IL, an elected member of the ICON-S Council, and a Co-Founder of the Israeli Association of Legislation. He is the author of "Unconstitutional Constitutional Amendments - The Limits of Amendment Powers" (OUP 2017) and with Prof. Gary Jacobsohn "Constitutional Revolution" (YUP 2020).

Prof. Nigam NUGGEHALI is the Dean of the School of Law at BML Munjal University. He was previously a Visiting Professor at the National Law School of India University, Bangalore. He has also taught as an Associate Professor in the School of Policy and Governance at Azim Premji University, during which time he also headed the university’s newly founded LL.M programme. Professor Nuggehalli holds a DPhil from the University of Oxford Faculty of Law. Before moving to India, Professor Nuggehalli was a Principal Lecturer teaching tax law and commercial law at BPP Law School, London. As a lawyer and as a law academic, Professor Nuggehalli has extensive research and publication experience in legal issues relating to international taxation, commercial law, and statutory interpretation.

Jorge CONTESTE is Associate Professor of Law and Director of the Centre for Transnational Law at Rutgers Law School. He teaches and writes on international human rights and comparative constitutional law, focusing on the judicialization of international law and on the interaction between domestic constitutional actors and the inter-American human rights system. His work has appeared in the American Journal of International Law, the Harvard International Law Journal, the International Journal of Constitutional Law, and the Yale Journal of International Law, among others. Jorge obtained an LL.M. and J.S.D. degrees from Yale Law School - where he was a Fulbright Scholar and a Senior Editor of the Yale Human Rights and Development Law Journal. He holds an LL.B. from Diego Portales Law School, in Santiago, Chile, where he was an Assistant Professor of Law and Director of the Human Rights Centre. In 2020-2021, he is Visiting Professor at the Université Paris 1 Panthéon-Sorbonne.

Tatiana CARDOSO SQUEFF holds a PhD in International Law from the Federal University of Rio Grande do Sul (UFRGS). LLM in Public Law from Vale do Rio dos Sinos University (Unisinos). She is a Visiting researcher at the University of Ottawa and the University of Toronto. She currently holds a tenure-track position as professor of International Law at the the Federal University of Uberlândia (UFU). ORCID: 0000-0001-9912-9047.

Lucia SOUZA D’AQUINO holds a PhD and LLM in Consumer Law from the Federal University of Rio Grande do Sul (UFRGS). She is a Specialist in Comparative Law and European Contract Law and Consumer Law at Université de Savoie-Mont Blanc/UFRGS. Invited Professor at the Specialization Course “The New Consumer Law” at UFRGS. Substitute Professor at the Federal University of Grande Dourados (UFGD). ORCID: 0000-0002-0838-3566.

Katya KOZICKI is Full Professor of Theory of Law at Federal University of Paraná and Pontifical Catholic University of Paraná, Brazil. She was a Visiting Associate Researcher at the Centre for the Study of Democracy, University of Westminster, London, (1998–1999) and a Visiting Research Scholar at Benjamin N. Cardozo School of Law, New York, (2012–2013). Her research areas include: constitutionalism and democracy, constitutional theory, theory of law, and legal hermeneutics. She was a member of the CAPES Law Evaluation Committee (2008–2010 triennium) and a representative of the Araucária Foundation’s Law Area (2013–2016). She is a Brazilian National Council for Research (CNPq) research fellow. Her works include: “Taking Justice Seriously: legal interpretation and judicial responsibility” (Belo Horizonte: Arraes Editores, 2012) and “Herbert Hart and legal positivism: legal open texture and judicial discretion” (Curitiba: Juruá Editora, 2014). Current project under development: “Shared Authority: jurisdiction between positivism and antipositivism”.

 xv
Rick Daniel PIANARO is an LLM Candidate, Federal University of Paraná, Brazil. Current project under development: Democratic decay and constitutional setback: perspectives of Brazilian constitutionalism. Areas of research: constitutionalism and democracy. Lawyer.

Monica CASTILLEJOS-ARAGÓN received a doctoral degree (J.S.D) and a master’s degree (LL.M) with honors from The University of California, Berkeley School of Law. She is also a licensed attorney in Mexico from Instituto Tecnológico Autónomo de México (ITAM) since 2005. After completing her law school studies, Dr. Castillejos clerked at the Mexican Supreme Court and worked at the Attorney General Office of Mexico for various years. Given her interests in justice systems in comparative perspective, she has conducted professional and research visits at the Supreme Court of California, the Supreme Court of India, and at the Constitutional Court of Colombia. Dr. Castillejos-Aragon has also worked as a Research Associate for the Human Rights Center at UC Berkeley for a transitional justice project along with Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos in El Salvador. Her research and teaching focuses on comparative courts and politics and transitional justice in Latin America. A portion of her doctoral dissertation appeared in the book “Consequential Courts. Judicial Roles in Global Perspective”, published by Cambridge University Press. Dr. Castillejos-Aragón currently teaches Law, Judicial Politics and Rights in Latin America at the Legal Studies Department at UC Berkeley.

Han-Ru ZHOU is an Associate Professor of Public Law at the Université de Montréal Faculty of Law, and a past Sproul Research Fellow at the University of California at Berkeley and Boulton Fellow at McGill University. Before joining the Law Faculty, he served as a law clerk to Justice Marie Deschamps at the Supreme Court of Canada. He is the Co-Editor-in-Chief of the Review of Constitutional Studies and the author of the second edition of Droit constitutionnel: principes fondamentaux – notes et jurisprudence (2016). In 2019, he was a member of the Independent Advisory Board for Supreme Court of Canada Judicial Appointments. Han-Ru Zhou received his legal education at Montréal, Harvard and Oxford Universities. He teaches, researches and consults in the areas of constitutional law and human rights law.

Osayd AWAWDA is an Assistant Professor of Constitutional Law at Hebron University, Palestine. He teaches Public International Law, International Humanitarian Law, International Criminal Law, and Research Methods. He holds an LLB from Birzeit University, an LLM and a PhD from Melbourne Law School, Australia. His PhD thesis’ title was: “The Palestinian Supreme Constitutional Court: A Critical Assessment of its Independence under the Emergency Regime of the West Bank”. He participated in multiple conferences and published several papers that discussed legal challenges present in Palestine in various fields such as: Tax Law, Labour Law, International Humanitarian Law, and International Trade Law.

Juha TUOVINEN is a constitutional lawyer who has held a postdoctoral research fellowship at the Central European Univeristy and received his PhD from the European University Institute. Before the EUI, he spent two years as a researcher at the South African Institute for Advanced Constitutional, Public and International Law (SAIFAC) at the University of Johannesburg and as a foreign law clerk at the Constitutional Court of South Africa. Before that he studied legal theory, public international law and law in Belgium, the Netherlands and the UK.

Ugochukwu EZEH is a Lecturer in the Faculty of Law of the University of Lagos. He was previously an Oxford Human Rights Hub Research Fellow (Comparative Public Law) at Rhodes University, South Africa.

Leighann SPENCER is a PhD candidate at Charles Sturt’s Centre for Law and Justice. Her research explores the role of identity in Nigerian vigilantism and state involvement. More generally, her
expertise is on identity, formal/informal policing, judicial politics, conflict, and state accountability in sub-Saharan Africa and Turkey. She has previously worked: as a researcher at Ndifuna Ukwazi on anti-vigilantism initiatives and police reform in South Africa; and as a researcher/editor at Platform for Peace and Justice on human rights and the rule of law in Turkey. She is currently employed as a tutor for Crime, Justice and Legal Studies at La Trobe University, and is on the executive council for the African Studies Association of Australasia and the Pacific. As a freelance analyst and journalist, she has been published at African Arguments, Index on Censorship, Vocal Europe, The Conversation Africa, among others.

Iain PAYNE is a Senior Program Officer at Niti Foundation. He leads Niti Foundation’s fourth branch institutions program, which seeks to encourage the functional coherence of Nepal’s independent constitutional bodies so that they can better support democratic constitutionalism. He is also currently undertaking a Master of Laws at Melbourne Law School.

George VARUGHESE is the Senior Strategic Advisor at Niti Foundation. Prior to working at Niti Foundation, he worked with The Asia Foundation from 2000 – 2018, most recently as the Nepal Country Representative (2009 – 2018) where he oversaw programs supporting the country’s post-conflict political transition. George holds a joint doctorate in public administration and political science from Indiana University, Bloomington, with an emphasis on public policy, political theory, and environmental policy.

Dian A H SHAH is Assistant Professor at the National University of Singapore (NUS). She was previously a Research Fellow of the Centre for Asian Legal Studies, and a Senior Lecturer at the Faculty of Law, University of Malaya, where she taught constitutional law. Dian completed her LL.M and SJD degrees at Duke University Law School, and prior to that she graduated with an LL.B from Warwick University. Her research interests span the fields of law and religion, comparative constitutional law, and human rights, and her work focuses on the interaction of law, religion, and politics in plural and divided societies. Dian is the author of Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka (CUP 2017) and the co-editor of a volume on Law and Society in Malaysia: Pluralism, Religion and Ethnicity (Routledge 2018). She serves as the Deputy Editor of the Asian Journal of Comparative Law (AsJCL) and the Editor of the AsJCL’s Special Issue on ‘Religion and Constitutional Practices in Asia’ (forthcoming, December 2018).

Nurhafilah MUSA completed a PhD at Melbourne Law School, University of Melbourne. She has taught courses in constitutional law, comparative constitutional law, Islamic legal system and Malaysian legal system at the Law Faculty, National University of Malaysia (UKM) since 2005. Her research interests are constitutional law, federalism, law and policy, human rights, family law and Islamic law.

Darshan DATAR is a doctoral candidate with the Laureate Program in Comparative Constitutional Law at Melbourne Law School. He holds two LL.M degrees from the Central European University, Budapest in Comparative Constitutional Law (2015-16) and the European University Institute (2016-17). His research is focused on the concept of religion followed by constitutional courts. His other research interests include theoretical accounts of secularism and constitutionalism.

Atagün MERT KEJANLIOĞLU is a DCL candidate at McGill’s Faculty of Law. He has an undergraduate degree in law and a master’s degree in public law from Galatasaray University (Istanbul, Turkey). He obtained another master’s degree in fundamental public law from University Paris 1 Panthéon-Sorbonne in 2016 with his dissertation on Turkish and French presidency. He also worked as a research and teaching assistant in the constitutional law department at MEF University Faculty of Law (Istanbul, Turkey). His doctoral research focuses on the rise of populism and reconstituting the “people” as a
legal concept in the context of constitutional amendments. For his doctoral studies, Atagün received a research grant from the Fonds de recherche du Québec - Société et culture (FQRSC). His research interests include comparative constitutional law, constitutional theory, and European human rights law.

John STANTON is a Senior Lecturer in Law at City, University of London. He also holds a visiting post at the University of Malta. John specialises in UK Constitutional Law with a focus on localism and devolution. He is currently putting the finishing touches to a book, *Law, Localism and the Constitution*, which will be published by Routledge in 2021. John also has a growing interest in Comparative Constitutional Law and an expertise on the Constitution of Malta, on which he has also published.

Beatrice MONCUNSKAITE is a Ph.D. candidate at the School of Law and Government at Dublin City University. She graduated from Dublin City University with a B.C.L. degree in 2018 and graduated from Trinity College Dublin with her LL.M. degree in 2019. Beatrice is currently in the second year of her Ph.D. research and was recently awarded a scholarship by the Irish Research Council for her work. She is also editor-in-chief of the Dublin Law and Politics Review. Beatrice’s research interests are wide-ranging but mainly focus on the topics of democratisation, political philosophy and constitutional law. She has teaching experience in modules such as criminology, criminal law and moot court.

Dorjana BOJANOVSKA POPOVSKA is an S.J.D Candidate in Comparative Constitutional Law at the Central European University. Her professional memberships include the European Academy of Religion, International Society of Constitutional Law (ICON S) and the ICON S CEE Chapter. She is a permanent member and contributor to the Gender and Constitutions Research Group part of the International Association of Constitutional Law. She has 5+ years of professional experience as a legal advisor in the private and NGO sector in North Macedonia.

Max STEUER is Assistant Professor at the Jindal Global Law School, O.P. Jindal Global University, India. His research focuses on constitutionalism in the European Union, constitutional courts in Central Europe, freedom of expression and democracy protection and development. He collaborates with the Department of Political Science at the Comenius University in Bratislava, Slovakia, on the Horizon 2020 project EU Differentiation, Dominance and Democracy.

Sascha KNEIP was a researcher in the Department of Democracy and Democratization at the WZB Berlin Social Science Center. His main research areas were legal and constitutional politics and empirical democracy research. Since August 2020 he is a member of the Federal Agency for Civic Education.

Raphaël GIRARD is a PhD Candidate in Law and Graduate Teaching Assistant in Public Law at the London School of Economics and Political Science (LSE). His doctoral research project, entitled “Populism, Law and Spatiotemporality: The Role of Courts in an Age of Constitutional Impatience,” explores the relationship between populism, constitutionalism and the judiciary through the prism of space and time. His research is funded by an LSE PhD Studentship (2017-2021). Raphaël holds an LLM (with distinction) from the LSE and dual degrees in civil law and common law (BCL and LLB) from McGill University. He is also a member of the Quebec Bar since 2016.

Anuj BHUWANIA is a Professor at Jindal Global Law School. He did his B.A., LL.B. (Hons) at the National Law School of India University, Bengaluru and an LL.M. from the School of Oriental and African Studies, London, before completing his Ph.D. at Columbia University, New York. He has previously held teaching positions at South Asian University and Ambedkar University Delhi. He has also held various visiting positions, including at the Centre for Modern Indian Studies (CeMIS) in the University of Göttingen, Centre for the Study of Law and Governance (CSLG) in Jawaharlal Nehru University as well
as at the Centre for the Study of Developing Societies (CSDS) in New Delhi. He is the author of *Courting the People: Public Interest Litigation in Post-Emergency India* published by Cambridge University Press in 2017.

**Gaurav MUKHERJEE** is an S.J.D. candidate in Comparative Constitutional Law at the Central European University, Budapest/Vienna. Gaurav's doctoral project concerns the role of the judiciary in facilitating inter-branch dialogue in the adjudication of socioeconomic rights disputes. He is a co-convenor of the International Association of Constitutional Law Research Group on Social Rights. In 2021, Gaurav will be a Visiting Fellow at the Max Planck Institute of Comparative Public Law & International Law, Heidelberg, and he was an Indian Equality Law Visiting Fellow at the University of Melbourne in 2019. In 2018, Gaurav was awarded the Indian Law Review Early Career Prize for Case/Legislative Notes for his article on executive law-making power. He has worked with organizations like the Hungarian Helsinki Committee and the School of Policy & Governance, Azim Premji University, Bangalore. He has served as a peer reviewer for journals like the International Journal of Human Rights, the Australian Journal of Asian Law and the Indian Law Review. Gaurav is currently the Regional Correspondent for India at the Oxford Human Rights Hub.

**Thulasi K. RAJ** is a lawyer at the Supreme Court of India and the Kerala High Court. She is also an Equality Fellow at Centre for Law & Policy Research, Bangalore. Currently, she is a Visiting Fellow at the Institute of Law and Philosophy, Rutgers University. Previously, she was an Equality Fellow at Melbourne Law School (2019). She appeared (jointly) for the petitioner in Joseph Shire v. Union of India (2018) before the Indian Supreme Court in which the Court held the criminalisation of adultery to be unconstitutional. She completed her Masters in Law at University College London. Her research interests are legal philosophy and constitutional law, with a particular focus on anti-discrimination law. She frequently writes newspaper articles on relevant socio-legal issues.

**Aradhya SETHIA** is a PhD Candidate and Cambridge International Scholar at the University of Cambridge, where he is studying the role and regulation of political parties and party politics in modern constitutionalism with a focus on India. Before joining Cambridge, Aradhya read for MPhil at Oxford and LL.M. at Yale Law School as an Inlaks Scholar and Lloyds Cutler Scholar. He has served as a resident fellow at Yale Information Society Project, an articles editor of the Yale Journal of International Law. Subsequently, he was a Fox International Fellow at the Centre for Comparative Constitutional Studies, Melbourne Law School. He has previously assisted Justice D.Y. Chandrachud (the Supreme Court of India), Justice S. Ravindra Bhat (High Court of Delhi), and the Attorney General for India. He received the 2019 Indian Law Review Best Article Prize for his article ‘Where's the Party?: Towards a Constitutional Biography of Political Parties’. Twitter @sethiaaradhya

**Ayesha WIJAYALATH** is a PhD candidate in UNSW Law and is part of the UNSW Scientia PhD project ‘A Liberal Response to Populist Constitutionalism’. Her research focuses on constraining abusive constitutional change in Sri Lanka and explores the unconstitutional constitutional amendment doctrine as a potential solution. Prior to joining UNSW, Ayesha worked as a Research Associate in the Centre for Asian Legal Studies, National University of Singapore (NUS) and was an Associate Editor of the Asian Journal of Comparative Law. Ayesha graduated from NUS in 2017 with an LLM specialising in International and Comparative Law. She is also an Attorney-at-Law in Sri Lanka. She holds an MA in International Relations from the University of Colombo, Sri Lanka and a BA in French from the University of Kelaniya, Sri Lanka. Ayesha takes a keen interest in comparative constitutional law, democracy and the rule of law, international humanitarian law and transitional justice.

**Mario GOMEZ** is the Executive Director at the International Centre for Ethnic Studies, an independent think-tank in Sri Lanka. He has worked in academia, human rights, and conflict transformation. Recent and forthcoming publications include ‘Advancing Economic and Social Rights through National Human Rights Institutions’, ‘Prosecuting Religious Violence in Sri Lanka’, ‘The Right to Information and

Timea DRINÓCZI is a Professor of constitutional law at the Faculty of Law, University of Pécs, Hungary. She served as a Professor at the Kenyatta University School of Law, Nairobi, Kenya, and will be a Visiting Professor at the Federal University of Minas Gerais School of Law, Brazil, in the coming academic years. She conducts researches in constitutional changes, constitutional identity and legislative studies, and provide expertise to the OSCE ODIHR. Her new, co-edited book on Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union has just been published by Routledge.

Agnieszka BIEN-KACAŁA is an Associate Professor of constitutional law at the Faculty of Law and Administration, Nicolaus Copernicus University in Toruń, Poland. She conducts researches in liberal and illiberal constitutionalism, constitutional changes, and provide expertise to the Marshal of the Polish Senate. Her new, co-edited book on the Rule of Law, Common Values, and Illiberal Constitutionalism: Poland and Hungary within the European Union has just been published by Routledge.

Piotr MIKULI is a professor at the Jagiellonian University in Krakow and head of the Chair in Comparative Constitutional Law. His research interests include constitutional review, constitutional principles and the role of courts and judges. He is the author and co-author of a number of publications dealing with Polish and foreign constitutional issues, among others he is a co-author of the monograph Ministers of Justice in Comparative Perspective published by Eleven International Publishing in 2019.

Monika CZECHOWSKA is a Doctoral Candidate at the Department of Criminal Law, University of Wroclaw, Poland; trainee advocate; representative of the University of Wroclaw on the international rounds of the Phillip C. Jessup International Law Moot Court Competition (Washington D.C. 2017) and the Leiden Sarin International Air Law Moot Court Competition (Seoul, 2018). Her scientific and research interests concern criminal law (primarily criminal economic law), international law and human rights. E-mail: monika.czechowska@uwr.edu.pl.

Eszter KIRS Ph.D. has been a legal officer of the Hungarian Helsinki Committee since 2013 where she has contributed to monitoring visits in detention facilities, international and domestic advocacy, and a number of transnational projects on the efficient prosecution of hate crimes, human rights trainings and the operation of National Human Rights Institutions. She is an associate professor at the Department of International Relations of the Corvinus University of Budapest since 2016. From 2003, she has been lecturing on international law and human rights at various academic institutions. From 2010 to 2015, she worked for a defense team at the ICTY. She was a Fulbright visiting researcher at the Columbia Law School in 2009-2010 and a visiting lecturer at the University of Minnesota Law School in 2019. She has published academic papers and two monographs in the fields of transitional justice and human rights.

Gábor MÉSZÁROS is a senior lecturer and vice-dean at the Law Faculty of the University of Pécs (UP) in Hungary. His primary research interests are comparative constitutional law, human rights and national security law. He has published several articles on these topics in English and Hungarian and has earned a PhD degree in law in 2017 with the thesis of ‘State of Emergencies in Constitutional Democracies’. His first and latest book, ‘Constitutionality in Crisis?’ (Hungarian, 2018) deals with the
most critical issues regarding emergency politics in theory and practice. He joined the UP in 2015 after nearly ten years of legal practising period and professional career at the Ministry of Justice, the National Court Office and the Regional Court of Balassagyarmat in Hungary. Gábor Mészáros is also an editor of Fundamentum, the Hungarian human rights quarterly.

János Mécs is a doctoral researcher at Eötvös Loránd University, Budapest, Faculty of law, Department of Constitutional Law. His research interests focus on public law, and his specific field is the relationship between constitutional law and electoral systems and other political institutions. His goal is to raise awareness about constitutionalism and human rights. He is committed to political change through electoral and constitutional reform in Hungary as well as to contributing to a more robust discussion on the constitutional oversight of electoral reforms.

Amy Raub is Principal Research Analyst at the World Policy Analysis Center and responsible for the translation of World’s comparative policy research into findings for policymakers, citizens, civil society, and researchers. World analyzes over 2,000 policies and laws in all 193 UN member states in a range of areas, including equity and discrimination, constitutional rights, poverty alleviation, adult labor, child labor, education, disability, and child marriage. As the largest global policy data center of its kind, World brings together policymakers, academics, and civil society to advance evidence-based policy reforms in communities around the world. Raub has been deeply involved with the development of World’s databases on constitutional rights, laws, and policies since 2008. She is co-author of Advancing Equality: How Constitutional Rights Can Make a Difference Worldwide and has authored 30 journal articles on constitutional rights, laws, and policies that matter to equal opportunities, health, and economic security.

Michael Henry Yusingco is a senior research fellow at the Ateneo Policy Center of the Ateneo School of Government in Metro Manila and a fellow of the Institute for Autonomy and Governance in the Bangsamoro Autonomous Region in Muslim Mindanao. He is also a lecturer at the School of Law and Governance of the University of Asia and the Pacific. He is a legislative and policy consultant and a regular contributor to various news and public affairs outlets in Asia and Australia. He has authored two books: ‘Rethinking the Bangsamoro Perspective’ and ‘Engaging the Bangsamoro Autonomous Region: A Handbook for Civil Society Organizations’.

Amal Sethi is a Fellow at the University of Pennsylvania from where he also received his masters and doctorate. His research focuses on comparative constitutional law and theory from an interdisciplinary perspective. During his time at Penn, Amal has been appointed as a Legal Writing Fellow and was selected as a Fellow with the Salzburg Cutler Fellows Program and The Global Women Leadership Project. Outside of his academic pursuits, Amal has worked with governmental and intergovernmental agencies ranging from USAID and the US Department of Commerce to UNESCO, UNDP, UN Women, UNHCHR, and The SDG Fund.

Teodora Miljojkovic is a PhD researcher in Comparative Constitutional Law stream at Central European University in Vienna. Under the supervision of Professor András Sajó, Teodora’s PhD project examines whether and to what extent rule of law principle affects and limits the appointment and dismissal procedures of the judiciary in a comparative outlook. The goal of her dissertation is to offer a typological framework based on a comprehensive analysis of more than 15 jurisdictions. Her main fields of interest are rule of law theory, judicial reforms and legal philosophy. Teodora is an active member of the Serbian Association for Legal and Social Philosophy (IVR Serbia) and Belgrade Legal Theory Group. Currently she is a teaching assistant at Central European University on Rule of Law and Illiberal Democracy course, taught by Professor András Sajó.
Matteo BONELLI is assistant professor of European Union law at the Faculty of Law of Maastricht University and a member of the Maastricht Centre for European Law (MCEL). His doctoral dissertation, defended (cum laude) at Maastricht University in June 2019, reflected on how the European Union can best protect its basic values – democracy, the rule of law, and fundamental rights – in the Member States. His research focuses on EU institutional and constitutional law, and on comparative constitutional law. In 2020, he was an Emile Noël Fellow at the Jean Monnet Center of New York University.

Ajla ŠKRBIC is an Assistant Professor of international and public law from Bosnia and Herzegovina (BiH). She has written numerous articles concerning international and public law, and she is the author of *Immunity of State from Judicial Proceeding and Enforcement* (University Press Sarajevo, 2018). She is a certified lecturer for the Civil Service Agency of BiH and an official educator of judges and prosecutors in the FBiH. In 2017, she became the first person from the post-Yugoslav states to be invited to attend the prestigious United Nations International Law Fellowship Programme. In addition, the Austrian Federal Ministry of Education, Science and Research and the Institute for the Danube Region and Central Europe awarded her with the Danubius Young Scientist Award 2017 for BiH, naming her the best young scientist in BiH. Recently she has been awarded a Georg Forster Research Fellowship for postdoctoral researchers from the Alexander von Humboldt Foundation.
GLOBAL CHALLENGES
1

GLOBAL CHALLENGES: THREATS & RESILIENCE
Technology, Inequality and Democratic Decline: is Australia at Risk?

Shireen MORRIS and Andrew BALL

Throughout human history, technological advancements have buttressed the expansion of modern, representative democracies. Yet in recent decades, the ever-quickening pace of technological change is propelling stable democracies in chaotic new directions. It is a key factor facilitating democratic decline, and Australia is not immune. Though Australia is rightly considered a healthy and stable democracy, many underlying drivers of democratic decline are increasingly present.

Three entwined trajectories present cause for concern. First, technology-enabled automation, globalisation and market liberalisation are propelling job polarisation and inequality. Second, these forces may facilitate political polarisation and declining trust in political institutions that fail to address the concerns of those left behind. Third, technology is directly disrupting Australian political discourse and culture, amplifying discontent, disinformation and polarisation.
Technology, Job Polarisation and Inequality

Since the 1980s, a new fault line has emerged between the educated, wealthier ‘winners’ of technology-enabled automation, market liberalisation and globalisation, and lower-skilled workers left behind. Though Australia remains a prosperous country, inequality is increasing and the economic middle is hollowing out. This carries consequences for democracy: economic prosperity and a strong middle class are usually associated with democratic success, while economic stagnation and inequality are known drivers of democratic decline.

As Chalmers and Quigley explain, “there is no such thing as technological trickle down.” Technology transfers power and wealth to the owners of technologies, in line with Thomas Picketty’s insight that the natural rate of return on capital is greater than the growth of wages. In Australia, technology-driven job polarisation is also propelling growth and greater productivity in high-skilled abstract jobs (like software engineers, lawyers and financial advisors) and declines in middle-skilled routine jobs (like office administrators, manufacturing workers and checkout operators) which are more susceptible to automation.

Together with diminishing union power, this drives wage growth in abstract professions and wage stagnation in routine and manual professions, widening income inequality. Technological change therefore tends to benefit the highly educated, who also are better placed to transition into higher-skilled jobs. During the pandemic, such inequities have intensified: low-skilled, manual workers are bearing the brunt of job losses.

Such trends deepen geographic divides, because job polarisation disproportionately benefits the cities (where education levels are higher and abstract jobs concentrate), while the regions (with lower education levels, less adaptability and fewer abstract jobs) bear more costs. In some non-urban areas, underutilisation reached 20% even before COVID-19. Indeed, underutilisation has been rising in Australia over decades, probably due to market liberalisation (including casualisation), globalisation and technological job-displacement combined.
These forces cumulatively drive inequality. While inequality decreased during the post-war decades under government policies pursuing full employment, inequality has increased since the 1980s, after Australia’s economy was liberalised. While the Australian Labor Party’s (ALP) liberalising reforms set Australia up for sustained growth, many have since observed the disproportionate costs borne by workers, who accepted wage restraint in exchange for a ‘social wage’. The vast wealth since created has been unequally shared.

**Loss of Trust, Political Polarisation and Voting Trends**

When living standards stagnate, trust and optimism decline and anxiety increases. Research in 2003 showed ‘middle Australia’ knew who the winners and losers were. Many felt their income and job prospects were falling. They felt more insecure and angry. Their trust in government was declining. Loss of trust has continued since then. By 2018, Australians’ satisfaction with democracy was at lowest levels since the 1970s, and there is growing voter disengagement. Some argue a ‘Trump-like’ disaffection is taking hold, as more Australians see Parliament as unresponsive to public needs.

Picketty contends that Western countries are increasingly governed by contemporary coalitions between the ‘brahmin left’ (the intellectual and cultural elite) and the ‘merchant right’ (the financial and commercial elite) who, despite some identity-based divisions and culture warring, both largely defend the economic status quo. For Picketty, the decline in centre-left parties worldwide has occurred because social democrats “forfeited the support of the least well-off voters and began to focus more and more on the better educated, the primary beneficiaries of globalization.”

If this is correct, then those most disenfranchised by trajectories of change may lack mainstream political choices that genuinely speak to their concerns, exacerbating mistrust in the political establishment. Picketty’s theory finds resonance in Australia, where minor parties are gaining popularity, centrist major parties are diminishing, and the party traditionally representing workers, the ALP, has faced steady decline in its ‘working class’ membership and primary vote since the 1980s. Some argue the ALP has become too adherent to neoliberal orthodoxies, which may partly explain its increasing appeal to educated professionals.
In the 2019 federal election, regional and suburban seats with high unemployment and low income levels were more likely to swing away from the ALP, to the Liberal-National Coalition or right-wing minor parties, while the ALP made moderate gains in educated, wealthier urban areas – even in traditionally Liberal seats. This aligns with international trends: centre-left parties are increasingly appealing to economically secure, educated, urban cosmopolitans, while the “new working class” may understandably tend towards nativism and conservatism – for liberalisation and globalisation have not worked out as well for them. Feeling unheard by the major parties, disenfranchised voters may increasingly be drawn to tactics and rhetoric, which, amplified by new technological platforms, speak to their cultural conservatism and economic concerns.

Notably, research finds political disillusionment especially evident in the regions, where “major parties are particularly on the nose” and minor party popularity is increasing – especially among ‘working class’ voters who may be more concerned the ‘world is changing too fast’, more worried about job security, more begrudging of globalisation, and more nostalgic for past prosperity. These voters are also more likely to feel their concerns are being ignored by politicians.

Along with disillusionment, there is growing political polarisation in Australia. Fewer voters now identify as being in the ideological ‘centre’. Voter ideological variation from the average (standard deviation) increased between 1987 and 2019. Notably, polarisation of ‘very engaged’ voters has increased almost twice as fast as ‘less engaged’ voters. Accordingly, polarisation is particularly evident among politicians, with fewer rating themselves as moderate. This suggests a growing disconnect between a rapidly polarising political elite, and more a gradually polarising but increasingly disengaged public.
Technology is Directly Disrupting Australian Political Culture

While technology is driving economic inequality and anxiety, it also amplifies and exacerbates discontent. Technology enables fast-paced information bombardment which, evidence shows, may reduce attention spans, inhibit our abilities to reason and deliberate, decrease memory and dull empathy. Increased competitive pressure on media outlets to differentiate results in niche information and eventually greater extremism in content. Technology may also contribute to decline in traditional sources of social capital, such that connective ‘bonds and bridges’ deteriorate, contributing to polarisation. Some argue social media has facilitated negativity and bullying of marginalised groups, with trolls emboldened by anonymity.

The political, psychological and social impacts of technology cumulatively change the tone of debate: fake news, echo chambers and tribalism proliferate. This online atmosphere can negatively impact real-world deliberation, creating a “spiral of silence” which inhibits moderate participants from joining offline political conversations, amplifying the disconnect between the polarising political elite and disengaged voters. Supercharged polarisation (in particular among the political class), plus social media’s preference for sound-bite solutions, means sensible policy answers to the problems described above are less likely to be found. Politicians can now appeal directly and instantaneously to the people, but the truth and quality of communication diminishes.

The internet is having a profound effect on Australian politics. A 2020 report found 48% of Australians get their news online, yet many are concerned about fake news. In the 2019 federal election, the internet overtook television as the most followed media channel, highlighting problems of misinformation, user manipulation and abusive micro-targeting.

The ‘death tax’ scare campaign on Facebook perpetuated the fallacy that the ALP was proposing a new tax on estates – a falsehood repeated in the recent Queensland election. Federal MPs are also using social media to ‘astroturf’ desired feedback (i.e., attempting to create an impression of widespread grassroots support for a policy or individual). Energy Minister Angus Taylor infamously forgot to switch Facebook accounts before praising himself with a “Fantastic. Great move. Well Done Angus” comment under his own post. Queensland Senator, Amanda Stoker, similarly admitted to using a fake pseudonym on social media to defend against criticism and agree with supporters.

Social media is being used to propagate false information in aid of the culture wars. During the 2020 bushfires, trolls and bots exaggerated the role of arson to undermine links with climate change. During the COVID-19 lockdown, the hashtag ‘#Danliedpeopledied’, which attracted 10,000 tweets, was found to be driven by hyper-partisan, fake accounts, while Twitter bots gamed an online poll about the Premier of Victoria’s approval ratings. In the digital world, it is increasingly difficult to sort fact from fiction.
However, social media has magnified public scrutiny of political elites by holding candidates more accountable for past behaviour. During the 2019 election, several candidates withdrew after social media history exposed politically incorrect posts. But magnified visibility is also impacting other citizens. In 2019, a public servant was fired for anonymous tweets criticising government policy, and Australia’s implied freedom of political communication was found by the High Court to provide no shield. Ironically, social media’s power to facilitate free speech has also curtailed it, by amplifying its adverse consequences. Contributing to the sense that free speech may be under threat, Australia’s Freedom House press freedom score declined from 4 to 3 in 2019.

Possible Solutions?

Despite concerning trends, Australian democracy is comparatively healthy and stable: we are not yet as unequal or polarised as the US. The unique constitutional combination of compulsory and preferential voting, strong party discipline and non-partisan electoral commissions temper polarisation. However, this should not minimise problems or downplay the urgency of reform.

Though technology is a key driver of the trajectories described, we do not advocate stifling technological advancement. Rather, government should more actively help workers transition in anticipation of technological change and support those left behind through robust safety nets and just provisioning of opportunity.

Education will be key. When the pace of educational attainment lags behind the pace of technological advancement, inequality increases. Education is the most powerful weapon against inequality and the best way to equip citizens to reap the benefits of technological change. Education accessible to all will ensure the workforce is skilled enough to transition into higher-skilled jobs when routine jobs disappear. This should include flexible workplace training and short course upskilling, including government supported ‘lifelong learning accounts’, as seen in Singapore.

Not everyone will be able to transition into abstract jobs, however. In the face of technological change, globalisation and market liberalisation, some will be unable to make a decent living. This is proving a concern for Australians: a 2019 YouGov survey found 81% are worried automation will decimate jobs, and many think government is not doing enough to protect livelihoods. It found 67% of Australians support a federal government job guarantee, which would provide a job safety net, rather than just a welfare safety net, as a solution to underutilisation. A federal job guarantee should be pursued with urgency.

Initiatives that foster citizen engagement, participation and deliberation can also help reignite trust in democracy and generate new policy ideas. Mechanisms encouraging public deliberation can help combat polarisation and echo chambers, and may reduce susceptibility to fake news. Australians widely support increased use of direct democracy, especially on matters of principle, with strongest support among politically disaffected citizens, suggesting this could counter disengagement. Direct public voting, including citizen-initiated referenda, could help break through partisan blockages on policy and foster engagement. But rather than inefficient postal surveys (as utilised with same sex marriage), secure online technology should be used.

To prevent politicians propagating mistruths, truth in advertising laws should be implemented nationally, a move supported by 89% of Australians. Political ad transparency should also be improved. Platforms could be required to utilise ad libraries displaying spend, audiences targeted and purchaser information. Facebook provides this in the US, but not in Australia. Platforms could also block misleading political advertisements.
No one solution will prevent democratic decline: holistic reforms are needed. Underlying economic and other drivers of disengagement, polarisation and loss of trust must be tackled. These ideas and others should be debated with urgency to prevent the decline of Australian democracy.
In the run up to Election Day on November 3, 2020 in the United States, allegations of “voter suppression” were a near daily occurrence. Long-standing concerns that strict voter identification laws or purges of voters’ lists unjustly deterred some voters from casting ballots were top of mind. Novel forms of voter suppression arguably also emerged as a consequence of the emphasis on mail-in voting in response to the COVID-19 pandemic. Disputes over whether ballots received after Election Day should be counted in swing states such as Wisconsin and Pennsylvania made it all the way to the Supreme Court. Texas’ decision to have a tiny number of “drop boxes” for mail-in ballots appeared to be a blatant attempt to make it harder to vote by mail.

While voter suppression is closely linked to the United States given its prevalence in litigation, political disputes, and scholarship, it needs to be understood as a more general
phenomenon affecting democracies. In this blog post, I will set out the what, why, and how of voter suppression.

In brief, voter suppression is a foundational tactic in the attempt to undermine liberal democracy and to shift it toward electoral or competitive authoritarianism. It is a tactic that appeals to would-be autocrats or wobbly democrats where the costs of being perceived to end the universal franchise are too high or where institutional constraints reduce their other options. Rather than risk domestic protest or international condemnation for banning a group from voting or outlawing a rival political party, its perpetrators seek to impose a hybrid style regime where elections are held but are tightly managed so as to reduce the chances that the government will be replaced. Elections take place and ballots are cast and counted. The vote is largely designed, however, to legitimize the regime rather than reflect the actual popular will. It is not impossible for the opposition to win an election under such conditions, but it is designed to reduce the risk of it occurring. Voter suppression allows for the superficial veneer of liberal democracy to persist without truly free and fair elections.

What is Voter Suppression?
The term “voter suppression” gets tossed around to refer to a variety of different phenomena. There are four main types. First are laws designed to make it more difficult or costly to cast a ballot. Strict voter identification laws are the classic form of this type. Such laws are especially suspect if they appear to have differential impacts that coincide with partisan lines. The voter identification law in Texas, for example, has been heavily criticized for permitting hunting licences, but not student identity cards, with predictable partisan effects. Second are campaign tactics that attempt to dissuade voters from casting ballots, such as negative advertising. Such tactics are generally lawful. Third are attempts to interfere illegally in an electoral process. Foreign interference through social media platforms are a prominent example. A fourth type of voter suppression occurs when elections are administered so as to deter some from voting, such as through inadequate provision of resources resulting in long wait times.

I will focus here on the first type, laws designed to restrict access to the vote, because they raise the most challenging issues. Such laws may target different points of the electoral process, from voter identification, to registration, as well as mail-in voting. The tactic is to draft laws that are facially neutral and appeal to some broader normative goal that appears admirable on its own, such as ensuring electoral integrity or the prevention of fraud. While appealing to some lofty and otherwise admirable goal and not discriminatory on their surface, such laws are deliberately designed to achieve a differential impact on groups. The desired impact is to make it more costly or difficult for members of a group likely to vote for an opposing party or candidate to exercise their right to cast a ballot. For example, requiring identification that has a voter’s photograph and residence disadvantages citizens without driver’s licences in jurisdictions such as Canada where there is no national identification card. Racial minorities and the poor have been harmed by strict voter identification laws in the United States.

Why is There Voter Suppression?
Voter suppression is at one level a simple math problem. Political parties need votes to win elections. They can achieve the same result not just by adding votes, but also by subtracting them from the total of their opponents.

A law that makes it harder in practice for some groups to cast ballots relies on there being a partisan valence to the differential impact. The more durable the link between some group characteristic, such as race, and voting intentions or party affiliation, the more confidence that a would-be vote suppressor can have that the law will have the desired, nefarious impact. If Biden
voters are known to disproportionately favour the use of mail-in ballots in comparison to Trump supporters, then laws making it more difficult to cast or count mail-in ballots are likely to decrease the chance that the Democrat will win. Voter suppression does not supply certainty, but it can shift the probabilities.

The voter suppression strategy relies on the reality of imperfect turnout in elections. Turnout in democratic elections is never 100%. Where voting is voluntary, political parties seek to increase the turnout of their base. Voter suppression, dissuading their opponents’ supporters from casting a ballot, can achieve the same end. If a large enough proportion of the opposing parties’ supporters can be dissuaded from voting, the impact of voter suppression may be enough to change electoral outcomes. Voter suppression would appear to be more likely to have an impact on outcomes in first past the post or mixed electoral systems where the marginal voter has greater value than under proportional representation.

One might plausibly think that mandatory voting eliminates the possibility for voter suppression. Even where voting is mandatory as in Australia, however, voter turnout is not truly 100% and voter suppression merely moves to other pressure points in the system, such as voter registration. For example, the Australian High Court in Rowe v. Electoral Commissioner struck down rules imposed by John Howard’s government that would have made it much harder for young voters, new immigrants, and the poor to register. All of those groups were likely to lean towards Labor, rather than Howard’s Liberal Party.

Voter suppression is also a response to the reality in democracies that an outright ban on voting by a minority group or political opponents would be widely perceived as illegitimate and will generally be struck down by courts. With notable exceptions such as over prisoner or non-resident voting, constitutional courts in democracies have converged around the notion that prohibiting a group outright from casting a ballot is suspect by default. Courts are likely to view such blatant manoeuvres with extreme skepticism. Generally, it will be difficult ban groups from voting, especially where they have long had access to the ballot box. Voter suppression seeks to achieve some of the same ends as an outright ban, but with less likelihood of being struck down by the courts. Capture of the courts of the kind seen in Hungary, Turkey, and Poland, or a formally independent but in actuality subservient judiciary, obviously changes the calculus. Voter suppression is often carried out in tandem with broader attempts to undermine democracy, such as by capturing or cowing the judicial branch or other institutional checks.

How Does Voter Suppression Puzzle Courts?

Courts have a much harder time identifying the harm in voter suppression than they do in the cancellation of elections or outright bans on groups voting. First, voter suppression puzzles courts partly because it raises the problem of pretextual motives. The state is limiting the right to vote by implementing restrictive laws. It claims to be doing so for laudable reasons that in the abstract might appear legitimate, but which do not hold up under scrutiny.

At the heart of claims in the political and legal realms is that voter suppression is necessary in the service of some higher goal. Usually that goal is the prevention of fraud or upholding of the integrity of the election. Fraud and a lack of integrity are self-evidently undesirable. The problem is that claims of fraud requiring, for example, strict voter identification, usually fail to clear a minimum evidentiary hurdle. Strict voter identification rules supposedly limit in-person fraud where one person impersonates another so as to be able to vote. The problem is that evidence that fraud is a problem requiring a solution is often limited or non-existent. In that scenario, the cure is worse than the illness. Strict voter identification rules are likely to deter more legitimate voters from casting ballots than to prevent fraudsters. Voter suppressors appeal to that abstract
goal as a fig leaf behind which to hide their actual motives, namely to make it harder for their political opponents to vote.

Some voter suppression efforts are legitimate in the eyes of their proponents because they weed out the worthy from the unworthy. Voters who refuse to make the effort or to pay the fees to obtain a driver’s licence or other photographic identification on this view are failing to meet their minimum obligations as citizens in a democracy. This worthiness rationale ignores the structural barriers that many voters face that render prohibitive the costs of obtaining a photo identification, or properly filling out the paperwork to register, or the trip across the county to drop off a mail-in ballot. It also harkens back to earlier logics before the expansion of democracy after World War II that viewed voting as a privilege to be handed out to the deserving and meritorious, rather than a right. Courts have generally struggled to identify why structural barriers such as poverty, lack of transportation, lack of proficiency in the official language(s), et cetera mean that the right to vote is not fully exercised.

Second, courts have often been at sea when it comes to deciding what normative standards to apply. A ban on voting by a minority group provides a clear line of analysis. The majority cannot disenfranchise a minority simply because it is popular to do so or would help their electoral chances. Democracy requires a franchise as close to universal as possible in order to be legitimate.

Voter suppression proves harder to address because it raises difficult normative questions. “How many ballot drop boxes per county does the Constitution require?” is not a question that has preoccupied political or constitutional theory in the way that the right of all adult citizens to vote has done. Courts are forced to weigh the impact of an increased cost or burden on a segment of the electorate. They are capable of doing so. Older cases in the United States banning poll taxes, for example, are one highlight in the global jurisprudence on how to stop voter suppression. Stopping voter suppression requires courts to establish a baseline for how much access is required, however, which they have had difficulty articulating. Identifying the harm in voter suppression involves weighing the impact of the technicalities of election administration. Holding in favour of access would also often involve courts imposing positive obligations on governments or the electoral management body, which they are sometimes reluctant to do.

Conclusion

The current moment is defined by reasonable fears of the decline of democracy globally. Would-be authoritarians of the post-World War II past resorted to banning opposition parties, prohibiting minorities from casting a ballot, or violence at polling stations. These tactics still occur globally of course. Those methods are crude, but at least they are hard to hide. The new would-be authoritarians or wobbly democrats are more sophisticated in their methods. They undermine the integrity of elections while seeking to foster the impression that the democracy remains vibrant. The tactic of voter suppression allows them to avoid some of the costs that would be entailed by domestic or international recognition of their attempts to decrease the competitiveness of elections.
How Constitutionalism Withers: Explaining the Changing Discourse of Constitutionalism in Chinese Constitutional Scholarship since 1982

Han ZHAI and Chen HUANG

Introduction
Although the recent constitutional decay at the governmental level in China is well known to the world, what the real condition of the constitutional discourse in the legal community is still hidden in shadows so far, and when the constitutional discourse in China exactly began to change profoundly and subtly still invites further investigation. Now the 2018 constitutional amendment is widely considered as the milestone of this change, and even the Chinese reception of Carl Schmitt’s constitutional theory has brought out ongoing studies among our overseas colleagues, shall we blame the currently weakening Chinese constitutional law scholarship for these two oversimplified explanations? Of course not.
Witnessing the worldwide constitutional crisis and democracy decline in recent years, legal scholars, particularly comparative constitutional scholars, began to reflect on their methodology. New approaches are needed to understand what determines the implementation or destruction of laws in different countries. Innumerable factors are influencing the fate of constitutional discourse in a particular society. Political power shall be examined above all the other factors, especially in those countries which are in the process of constitution-building. At this point, the power-knowledge approach promoted by Michel Foucault shall be applied.

From this perspective, we can ask why the discourse of constitutionalism in China could develop during the first two decades of reform and how the changing strategies of the power finally result in the isolation and re-interpretation of constitutionalism. Notwithstanding the benefits of the power-knowledge approach, we do not mean to underestimate the conventional doctrinal approach in legal studies, but to point out: the more fragile a constitutional system is, the more significantly and even more directly the political power influences the fate of the specific legal discourse, then the more critical our approach would be.

The following parts of this paper will provide analysis along the chosen timeline, which stretches from 1982 to the present. Applying the power-knowledge approach, we will respectively analyze how political power disciplines legal scholarship, how legal scholarship produces constitutional discourses, and accordingly, how these produced discourses substantively fall from the original idea of constitutionalism.

**Unspoken Constitutionalism: 1982-1997**

*Invitation from the Power*

The first stage stretches from 1982 to 1997. The year of 1982 marks the birth of the "Reforming" Constitution of China which calls for the requests for establishing constitutionalism. This stage does not end up with the well-known painful 1989, because the legal discourse, as well as crucial legislative legacies, does not experience a substantive shift until the 1990s.

The start of China’s Reform and Opening-up is underpinned by the political structure of two factions, viewed as "reformers" and "conservatives" by scholars as well as citizens of that time. A general tendency throughout the 1980s was that reformers were relatively more powerful and they were able to exert a more enduring impact, because of the tremendous political influences of Deng Xiaoping. So legal scholars who participated in the reform would endeavor under the circumstances of detours and limitations from above.

*Re-estabishment of the Constitutional Scholarship*

The re-estabishment of constitutional scholarship served the need for reform, stimulated by the utility of a workable legal system. This process was seemingly smooth; however, it was accomplished under the very circumstances of the double faceted discipline. The most apparent evidence was that the so-called "circle of the reform and repression" also existed in legal scholarship.

Along with the developments of the legal scholarship, the theoretical themes and self-reflections on Chinese constitutional scholarship became more and more common, aside from the grand policy of the Reform as the keynote theme. In the meantime, an increasingly significant tendency in the Chinese constitutional law community was the strengthening of its theoretical self-reflection. At the same time, law journals were also founded as an active institution to respond to the dynamic political circumstances during this period.
The Immature but Effective Discourse

During this chosen period, the scope of constitutional scholarship in China was significantly broader than the constitutional "law" scholarship. The significance and the need for constitutional reform in China became a consensus among almost all scholars. This particular intellectual situation provided great room for academic discussions on constitutionalism even from other areas such as political science, economics, and the history of the Chinese Communist Party (CCP). It is why the discipline and the discourse of constitutionalism by then were immature.

The aforementioned discourse remained unspoken in the name of constitutionalism. These fragmented conceptions not only presented the connotations of the original constitutionalism but also effectively led the trajectory of scholarly discussions falling into the fundamental solutions to core questions of China's constitutional reform. The constitutional discourse was so effective at both levels of the legal scholarship and the legislations in this period that even the 1989 repression could not end it.

Constitutionalism in Vain: 1997-2014

Manipulating the Intellectuals

Along with the passing away of the elders and the consolidation of Jiang Zemin's power, the reformers-conservatives structure turned single-centered. From the top, the new leadership group was constituted with "centrists". Deng's famous discussion on supporting the core leader became a kind of party discipline which has dominated China's high-level politics until the present. Then from the below, the government and party departments were composed of a new group of bureaucrats as well. The rational logic brought out by marketization and globalization had reshaped the political power since the end of the 20th century.

The new shape of power must have its different strategies governing the scholarship in a more elaborate and rational type of strategies. On the one hand, the new leadership generation who concentrated on market reform merely sought for marginal legal advice at the socioeconomic level, rather than constitutional proposals. One the other hand, more remunerative strategies were adopted to manipulate the expanding group of scholars, instead of direct control by ideological and coercive measures, including national funds and titles and a sophisticated assessment system.

Professionalization and Isolation of Constitution Law

The ongoing development of a market society did encourage the expansion and professionalization of constitutional scholarship. Meanwhile, this kind of professionalization had another unanticipated side: the intellectual isolation of the constitutional law. Constitutional scholars were effectively organized through the Chinese Association of Constitutional Law (CACL) activities for the firm goal of "the self-awakening of Chinese constitutional law scholarship". Nevertheless, this very spiritual goal in professionalism came along with a narrowed horizon due to an over-emphasis on textual interpretation in research. In this way, constitutional scholarship isolated itself within the four corners of the written Constitution by emotionally rejecting empirical studies. As a result, the dominant interpretative method lost sight of the functions and problems of the very political structure of the party-state.

The expansive publication of textbooks and attitudes around teaching and learning constitutional law also similarly revealed the two-sided circumstances around constitutional law: constitutional law was written and taught in every Chinese law school, but it remained rootless in reality, which rendered constitutional law "useless" in legal education in contemporary China.
The Abundant but Illusionary Discourse

Constitutional discourse was much more prosperous at this stage. It embraced more fundamental conceptions such as constitutionalism itself, judicial independence and constitutional review. It also experienced significant debates in constitutional theory. The most important debate emerged between the normative-constitution school and the political-constitution school at the analytical level. At the same time, "socialist constitutionalism" emerged in the scholarship. Its supporters aim at proposing suggestions to the top.

It is evident that these seventeen years witnessed both abundant and professional constitutional discourse, which is usually considered as the first signs of realizing constitutionalism in China. The question is, why they are actually not. We can explain it with a number of key reasons. As for the position of constitutionalism, it neither influenced the political reform nor became the legal justification of the grassroots resistance. As for the connotation of constitutionalism, it was differentiated where the original constitutionalism is only part of the whole picture. In other words, the concept of constitutionalism is implicitly modified by power.

From Constitutionalism to Xian’zhi: 2014 up to Now

Back to Coercion

This phase runs into the generation of 1950-1960s, who became the top leaders of the Chinese government. In mindset, their political knowledge was gained during the typically radical days around the Cultural Revolution. In structure, the political faction further centralized in one and resulted in strongman politics. Consequently, more cadres were promoted according to their political loyalty rather than their socioeconomic performance. In consequence, more and more remunerative strategies were replaced by or combined with coercive ones.

Polarization of the Scholarship: to be Muted or to Cheerlead?

Under such circumstances, the scholarship only has two options in every pointed field: to continue constitutional law research without any implication from "constitutionalism", or to accept the existing mainstream ideology. With a rapidly shrunken academic sphere, constitutional scholarship is gambling with the power's discipline.

A Counterfeit Without Normativity

Both the muted constitutional scholars and the cheerleaders need a counterfeit out of the so-called western discourse "constitutionalism". Here comes the word Xian’zhi (宪制). The same group of constitutional scholars who have been cultivating constitutional law research already changed their word choice. There is no other evidence that could be stronger in revealing this intention behind the word Xian’zhi than translated works. More significantly, Xian’zhi is not accepted only by constitutional scholars, but also political scientists, political philosophers and so-called Neo-Confucians.

The discourse of Xian’zhi would intellectually endanger the scholarship by undermining normativity. As for the specific question, works titled with Xian’zhi inquire what the fundamental institutional structure of China actually is, instead of whether these institutions need reflections and constraints. In methodology, studying Xian’zhi usually examines Chinese history through the perspective of particularism, refusing to evaluate Chinese history according to universal constitutional principles. Logically, such studies deny any possibility in realizing constitutionalism except for maintaining the status quo in China.
Conclusions

In explaining China: The driving force behind both the rise and fall of constitutional discourse is neither global or local constitutional thought, nor any particular group of people. It is the gambling between the power and the intellectual. Additionally, there is usually a contradiction hidden between the directions of constitutional discourse and constitutional reform. Only focusing on the discourse produced by scholars would never bring about accurate understanding of the real workings of the legal system, and vice versa.

In reconsidering constitutional-building: Taking the global constitutional crisis and democracy decline into account, the perspective of this research also sheds light on how legal scholars defend constitutionalism in such an era. The scholarship ought not to be isolated under the mask of professionalization because the scholarship could not be vacuumed from reality. The realistic role of the legal profession is not merely the explorer of legal knowledge. In addition, they should protect legal knowledge for the society and sometimes under the authorities.

For future research: we hope our story could be a new start to apply the power-knowledge approach, to understand the driving forces behind the scene of legal knowledge and its internal dilemma as well. It is also the proper way, we believe, to recognize how we scholars shall practice our profession in this era.

Disclaimer: This text is part of our same-titled working paper, and it is only provided for the 2020 IACL Roundtable as the required blogpost. Readers should therefore be aware that this paper is not finalized by the authors yet, might contain errors, and is not peer-reviewed yet.
Democratic Erosion and Abusive Judicial Review

Ros DIXON & David LANDAU

The Polish constitutional tribunal recently issued an opinion so radically limiting access to abortion for women that Poland now has some of the most restrictive abortion laws in the world.¹ The decision met with widespread outrage from those committed to reproductive rights. ²

But behind the decision is an even deeper erosion in the role of courts in Polish democracy: Polish courts have arguably been captured by the Law and Justice (PiS) regime, and its supporters, so that they are no longer guardians of democracy. They have become part of the architecture of its erosion.

In a recent paper, entitled Abusive Judicial Review, we explore this phenomenon in Poland and a range of other countries undergoing processes of democratic backsliding.³ We suggest that it is in fact quite common for courts to undermine the “minimum core” of democracy through judicial review – both by rubber stamping authoritarian actions through “weak” forms of review, and actively advancing their interests by issuing “strong” orders that invalidate constraints, such as term limits, which might otherwise pose obstacles to their consolidation of power. Thus, while courts are often thought of as protecting democracy, they can be both protectors and weapons...
of its destruction in the hands of judges who are coerced or captured by a would-be authoritarian regime.

Coercion or capture of this kind can also take many different forms: it can involve attacks on judges themselves, or judicial review as an institution, and both the actual and threatened use of a variety of tactics of judicial punishment and control. In some cases, regimes may also seek to undermine judicial independence through a kind of one-two punch strategy: first, by weakening independent courts as institutions, and then, gradually rebuilding their power and prestige, once they are fully “captured” or staffed by judges loyal the regime.

This raises obvious challenging questions for those committed to democracy. Are there any limits on this kind of abuse of judicial review by would-be authoritarians? Are there potential responses at the level of constitutional design, for example in how we design the process of judicial appointment or protect judicial independence?

Or is the challenge a more political one – i.e. how can international actors simultaneously promote respect for courts and judicial independence as values, while calling out instances of their abuse? The challenge of a “global realist” response of this kind, we suggest, is that would-be authoritarians are often quite careful to retain the appearance of judicial independence, even while attacking its substance. Indeed, this is part of a broader pattern of what, in our forthcoming book on the topic, we call “abusive constitutional borrowing” – i.e. the borrowing of the veneer of legitimacy associated with liberal democratic constitutional forms, in order to advance distinctly anti-democratic projects.

This does not mean that the global community is helpless in the face of abusive borrowing. It can sharpen its realist lens, and willingness to criticize instances of abuse, when they arise. But it does mean rethinking how we approach the practice of comparison, and our intuitions about legal globalization.

______________

Endnotes

2

GLOBAL CHALLENGES: THE BIG PICTURE
La crise de la démocratie :
Éléments d’explication

Bertrand MATHIEU

La démocratie représentative a longtemps constitué un modèle. C’est sur ce socle que s’est construit un système qui, pour l’essentiel, a apporté la cohésion sociale, la paix, et le développement des droits de l’homme.

Ce modèle de démocratie occidentale est un système mixte : démocratique et libéral.

Il est démocratique en ce qu’il fonde la légitimité du pouvoir dans le peuple qui manifeste sa souveraineté, en élisant ses représentants chargés d’exprimer la volonté générale, en adoptant sa Constitution, c’est-à-dire les règles de gouvernement et de vie commune, et le cas échéant en se prononçant par référendum.

Il est libéral, en ce qu’il prévoit des mécanismes de contrôle et de contrepoids visant à limiter l’exercice du pouvoir, à le modérer. Relèvent de cette logique, la séparation des pouvoirs, notamment les mécanismes de contrôle juridictionnel, et la garantie des droits.
Or l’utilisation contemporaine du terme démocratie, auquel on substitue souvent la notion d’État de droit, confond ces deux aspects du système occidental, masquant ainsi les contradictions, les conflits qui peuvent opposer la démocratie et le libéralisme.

**Les manifestations de la crise de la démocratie libérale sont protéiformes :**

La perte de confiance dans le système occidental de démocratie libérale est patente, comme le démontrent un certain nombre d’études. La défiance vis-à-vis du système démocratique est plus forte dans les classes populaires.

On peut relever une corrélation entre le sentiment de perte d’identité et la perte de confiance en la démocratie, un fossé se creuse entre les élites et le peuple, et la démocratie fonctionne mal du fait de la déconnexion qui s’établit entre le vote et les décisions politiques prises par les élus.

Ces conflits mettent non seulement en relation, mais aussi en opposition, d’un côté, la souveraineté du peuple avec ses corollaires la volonté générale et l’intérêt général, de l’autre, les droits individuels, les pouvoirs du juge, les droits des communautés... La notion d’État de droit vise à assurer au nom de principes substantiels la protection du citoyen contre un État qui aurait la tentation d’abuser de son pouvoir, aussi légitime soit-il. Mais cet État de droit peut se retourner contre la mission première de l’État d’assurer la protection des citoyens. Cet État libéral peut se retourner contre les droits individuels, en transformant ces droits protecteurs en droits idéologiques.

Avant toute prise de position sur cette situation, avant tout anathème ou jugement de valeurs, il convient d’analyser les causes de cette situation afin de pouvoir en débattre. De ce point de vue l’une des pistes que cette analyse voudrait tracer est la suivante : alors que le droit est la condition de la démocratie, l’instrument de sa réalisation, le droit peut aussi se révéler comme un carcan qui étouffe la démocratie.

La présence de règles juridiques est, bien évidemment, une condition nécessaire à l’existence d’un régime démocratique.

La démocratie est née et s’est développée dans un cadre étatique. En toute hypothèse, elle présume l’existence d’un peuple, inscrit dans des frontières. Ce peuple n’existe comme entité que s’il est uni par le partage de valeurs communes, L’exercice du pouvoir vise dans ce cadre à déterminer l’intérêt commun à cette communauté nationale, il est donc nécessaire de fixer des règles relatives à la manière dont cet intérêt commun, ou général, est défini et à la manière dont seront désignés les représentants du peuple ayant pour mission de déterminer, en son nom, les règles communes.

Dans sa forme représentative, qui est la seule possible dans une société politique étendue, elle implique, pour l’essentiel :

- des élections libres et disputées à intervalles réguliers ;
- la liberté d’expression ;
- l’existence d’une opposition qui puisse aspirer à devenir la majorité ;
- une égalité entre les citoyens, formant le corps électoral
- une éducation suffisante pour participer aux décisions politiques ;
- un contrôle par un juge indépendant de la régularité des opérations électorales ;
- une responsabilité des représentants devant le peuple se traduisant, a minima, par des élections à intervalles réguliers ;
• une subordination du pouvoir technique au pouvoir politique afin d'éviter que la démocratie ne dégénère en oligarchie ;
• des mécanismes permettant au pouvoir légitimement désigné d'imposer les décisions régulièrement prises.

L'empreinte du droit sur la société peut conduire à un certain affaiblissement des mécanismes démocratiques :

*Le développement d'ordres juridiques non démocratiques (au sens de légitimés par le Peuple)*

Des organismes supranationaux, producteurs d’ordres juridiques spécifiques, s’installent en surplomb, sans pour autant constituer des embryons d’État. Par ailleurs, un certain nombre d’États, tendent à éclater sous la pression de la revendication identitaire de « principautés ». La carte géopolitique se transforme, d’une part, par la reconstitution de systèmes impériaux composés d’un État central et d’États satellites ou sous influence, d’autre part, par la déconstruction d’un certain nombre d’États.

Par ailleurs, en matière de droits fondamentaux, des organismes non étatiques: les Organisations non gouvernementales (ONG) jouent un rôle important. Quels que soient les effets positifs des actions menées par certaines ONG, il est évident qu’elles défendent sous couvert d’intérêt général des engagements de nature politique. Le problème posé ne tient pas à la nature de cet engagement, il tient aux informations dont on peut disposer sur les personnes et les intérêts qui sont à l’origine des actions menées.

S’exercent des pouvoirs économiques et financiers qui ne s’inscrivent pas dans un cadre étatique, impropre au développement de leur activité, et qui sont souvent plus puissants que les États. Ces pouvoirs peuvent appartenir à des entreprises privées, ils peuvent également être détenus par des organismes indépendants auxquels les États ou des organisations supranationales ont délégué des fonctions considérées comme régaliennes. Ainsi la liberté d’un État de définir sa politique économique, et partant toutes ses politiques, se réduit à l’aune des contraintes que font peser sur lui des organisations, telles la Banque mondiale, le Fonds monétaire international, voire même des structures privées, telles que les agences de notation. Par ailleurs, certaines entreprises, telles les « GAFA »², sont capables d’imposer non seulement leurs exigences économiques, mais aussi leurs normes de comportement et leurs propres systèmes de valeurs, par la maîtrise dont elles disposent des systèmes de communication et d’échanges.

La conjonction de ces phénomènes entraîne une dépossession de plus en plus visible du pouvoir politique.

*Le droit des droits de l’homme tend à prévaloir sur l’expression démocratique*

S’il est vrai que la démocratie est le cadre qui a permis l’épanouissement des droits de l’homme et que ces mêmes droits sont étouffés dans d’autres systèmes, ce lien n’est pas consubstantiel à la démocratie.

On peut même considérer que le développement d’une conception essentiellement individualiste des droits fondamentaux participe à l’éclatement de la notion d’intérêt général, à un système de valeurs communautaristes et concurrentielles qui affaiblissent la démocratie. L’articulation entre les droits de l’individu, les droits des communautés et les valeurs communes, est aujourd’hui ingérable. La fragmentation engendrée par ce communautarisme conduit à une rupture dans l’identité culturelle. Le multiculturalisme oppose au sein d’une même société des populations qui, non seulement n’ont pas les mêmes problèmes, les mêmes peurs ni les mêmes besoins, mais qui n’ont même plus les mêmes références culturelles. Les algorithmes mis en place
par Google ou Facebook favorisent l'écllosion de ces communautés artificiellement construites qui développent un « entre-soi ». Ainsi ces communautés se compartimentent en réduisant les possibilités de dialogue et d'échanges.

Par ailleurs, le droit des droits fondamentaux tend à s'inscrire dans un projet idéologique contraignant qui restreint le champ du débat démocratique et contraint l’exercice du pouvoir politique. En témoignent les restrictions de plus en plus fortes à la liberté d’expression qui gangrènent nos sociétés. L’État se fait éducateur et thérapeute. Les débats d’opinion se multiplient.

Les rapports sociaux et politiques ne sont plus insérés et structurés dans une dimension tout à la fois collective historique et institutionnelle mais réduits à des relations interindividuelles. Les institutions sont considérées comme des prestataires de services et de droits individuels.

Comme l’écrivait Guy Carcassonne : « La thématique de l’État de droit a désormais excédé ses limites initiales. Il ne s’agit plus seulement de veiller au respect de la règle par l’État lui-même. Il s’agit, de proche en proche, de faire émerger ce que l’on dénommera ici une société de droit dans laquelle à peu près toutes les activités humaines pourraient, voire devraient, être soumises au droit, et encadrées par lui. Il en résulte une immixtion tout à fait nouvelle à ce niveau de fréquence, dans les comportements individuels qui, jusqu’alors, ne relevaient du droit que dans la mesure où ils nuisaient directement à autrui ».

**La place de la justice dans le système institutionnel**

La montée en puissance des juges tient à plusieurs facteurs, notamment :

- le développement d’un droit fondé sur les droits et libertés fondamentaux, dont le juge est l’interprète et le gardien naturel ;
- la pénalisation de la vie politique et sociale qui tend à se développer dans un contexte où la responsabilité politique n’est plus effective ;
- le rôle du juge dans la régulation des rapports entre les ordres juridiques qui n’obéissent plus vraiment à une logique hiérarchique.
- le renforcement du pouvoir normatif du juge que l’on peut voir à l’œuvre s’agissant de la Cour EDH, mais qui est également entre les mains des juges nationaux.

**Malgré ses défauts, la démocratie libérale** a constitué un système politique permettant un équilibre, rarement atteint à ce point, entre la protection des libertés des individus, la construction d’un modèle social, facteur de progrès économique et social et la défense d’un système de valeurs, facteur d’intégration. Elle **vaut la peine d’être défendue**. Deux pistes, parmi d’autres, ont été ouvertes celle de la démocratie participative et celle de la démocratie non libérale.

**La démocratie participative**

Cette forme de « démocratie », qui renvoie plus aux modes d'exercice du pouvoir qu'à sa légitimation, s'appuie sur le fait d'accorder des pouvoirs nouveaux aux citoyens, en réalité à des citoyens engagés dans l'action sociale formés par des experts.

Le recours à la démocratie participative développe les communautarismes et n’est pas exclusive de pratiques sophistiquées de manipulation de l’opinion... Cette volonté de remplacer le vote comme processus de décision constitue une négation même de la politique, en réduisant la compétition pour le pouvoir.
La démocratie non libérale

Ce modèle, qu’il convient de prendre au sérieux et qui recouvre en fait des expériences très différentes, vise à renforcer le caractère démocratique du pouvoir en affaiblissant ses caractères libéraux (notamment rôle des juges);

La démocratie non libérale peut tout aussi bien être la réponse à l’impotence économique, ou idéologique, de la démocratie libérale, ou l’aménagement d’un système autocratique comme en Russie. Elle présente une certaine parenté avec le projet du despotisme éclairé. Mais la rupture avec le libéralisme peut être également une transition vers un effondrement de la démocratie elle-même.

_Tenter de sauver le modèle de démocratie libérale:_

clarifier le lieu du pouvoir politique. Il s'agit en fait de déterminer clairement ce qui doit relever des compétences confiées à des structures, pour l'essentiel, européennes, et les compétences et pouvoirs qui doivent rester entre les mains des États. Pour ce faire, il convient de distinguer ce qui relève de l'identité européenne, qui justifie l'association d'un certain nombre d'États, et ce qui relève de l'identité nationale.

Il convient également de rétablir et de développer les instruments d’intervention du peuple dans la décision politique. Pour les questions locales, le développement des instruments de la démocratie participative constitue une voie féconde. Enfin, il convient de réfléchir à une revalorisation du référendum qui constitue une forme de démocratie directe, complément et correcteur de la démocratie représentative.

_Tenter de relever le sentiment démocratique exige, avant toute autre chose, le retour de la confiance des citoyens._ Pour ce faire le droit doit associer les principes d’efficacité et de responsabilité.

__________________

_Notes_

1. Cf. en ce sens l’intitulé de la Commission de Venise du Conseil de l’Europe « la démocratie par le droit »
2. Google, Apple, Facebook, Amazon.
Illiberal democracy and Undemocratic liberalism: Two Symmetrical Opposites

George KATROUGALOS

Democratic regimes historically synthesize two components, a democratic one, rule of majority and popular sovereignty and a liberal one, respect of human rights. Liberal democracies need both elements to function properly and not to degenerate. However, the usual criticism is limited to the emergence of “illiberal democracies”; in other words the rise of autocrats in states where elections are held, but rule of law is weakened. This phenomenon is usually associated with populism, a vague term with disputable heuristic value.

Actually, weakening of our democracies can clearly be associated also with the dominance of policies which undermine the democratic element, by trends such as the breach of the social contract associated with the welfare state and the delegation of important political decisions to unaccountable public decision makers. By the confluence of these two trends emerges a regime where human rights, especially economic and property rights, are fully protected but the will of
the majority has little, if any, influence on substantive decisions related to the overall direction of economic policies and the relations of state and the market. The archetype of this type of polity is Enlightened despotism – the Prussia of Frederick the Great. There may be judges in Berlin, but the miller of Sans Souci is politically unrepresented and powerless.

I consider this “undemocratic liberalism” as a catalyst for the generation of its inverted idol, “illiberal democracy”, and I will try to show the interaction between these two, as functionally symmetrical opposites, arguing that they should be addressed not distinctly and separately but as a common threat for our democratic regimes.

It is true that under a Schumpeterian concept of democracy, undemocratic liberalism is impossible, at least after the historic moment when the electoral right is generalized to the whole population. Contrary to the republican ideal of civic participation, Arendt’s “Vita Activa”, as the only way for a meaningful democracy, in the elitist theories citizens’ involvement occurs exclusively via their elected representatives. Electors are not supposed to control the latter in any way except by refusing to reelect them. This is by definition guaranteed in countries having periodical elections. And actually, in periods of relative prosperity, the normal pattern of behavior is that electorates do not consider they should back-seat drive their representatives. The formal legitimacy of the electoral procedure is producing also substantive legitimacy.

**A Crisis of Political Trust**

However, this is true only when there is undisputed trust to the institutions, in the sense of a widespread and not contested confidence to the fairness of the political process as a whole and, more specifically, to the institutions of political representation. This is not any more the case neither in Europe (graph 1) nor in the majority of western democracies (graph 2). Interestingly, despite the common wisdom that EU institutions are facing an existential crisis, actually distrust towards national governments and parliaments is more acute (graph 1).

![Graph 1 Trust to National Governments, Parliaments and EU Institutions, 2014-2018](image)

*Source: Standard Eurobarometer, Public opinion in the European Union, 2018, QA 8A*
The more interesting finding in graph 2, besides the obvious dissatisfaction of the majority of population in almost all mature western Democracies, is that the biggest concern of the citizens is about social problems related to poverty and inequality, as well as to the decline of welfare state in healthcare or unemployment. (Corruption, crime and violence dominate the answers of the rest of the countries).

Graph 2 Responders to the question ‘Is my country on the right or the wrong track?’ Source: Ipsos MORI 2016, https://www.ipsos.com/ipsos-mori/en-uk/majority-across-25-countries-say-their-country-wrong-track

The slow process of erosion of the welfare state of the last decades, precipitated by the recent economic crisis, has dramatically uprooted confidence and produced a huge gap in trust towards the political institutions, both national and transnational. In Europe it has been the result of the confluence of two parallel trends: the general deregulating impact of globalization and the gradual erosion of the European social model by the dominant EU neoliberal policies of the last decades.

Globalization and Inequalities

The limits on the state’s regulatory capacity and the removal of barriers to market access are part of the broader process of globalization, as a driving force of both denationalization and extraterritoriality. There is an evolving “disaggregation” of the state through the transfer of public functions both “upwards” to international or transnational entities (EU, WTO) and “downwards,” through the de-centering of decision-making either to lower state levels (devolution) or by new blends of public and private power at all levels of government.

In this framework, overlapping economic and societal crises have morphed into a democracy crisis. Rising economic inequality, accentuated by the financial crisis, has been the
major catalyst to political destabilization. At the center of this evolution is not, as often posited, just the cleavage between winners and losers of globalization, “somewheres” and “anywheres”.\textsuperscript{1}

It is neither a cultural problem, related to the emergence of rigid cultural identities, between cosmopolitan citizens and backwaters. The widespread social malaise is caused by more tangible causes: the fall of living standards and the rise of inequalities.

It is true that regional inequality within rich countries has increased, reflecting trends of globalization favoring the open, “global” cities. According to the Organisation for Economic Cooperation and Development (OECD), the average productivity gap between the most productive 10% of regions and the bottom 75% widened by nearly 60% over the past 20 years. But this is a secondary aspect of the much wider upsurge of inequalities. At the global level, estimates suggest that almost half of the world’s wealth is now owned by just 1% of the population, amounting to $110 trillion—65 times the total wealth of the bottom half of the world’s population. Strikingly, the bottom 70% accounts for just 2.7 percent of global wealth.\textsuperscript{2}

Even in the more affluent OECD countries, as seen in graph 3, 60% of the population has considerably less wealth than the richer 10%. In addition, the top 10% now has an income close to nine times that of the bottom 10%. Even more spectacular is the widening gap between the super-rich and the rest of the society: Between 1980 and 2015 the average real income of 0.01% of the population has grown by 322%, whereas the income of the lowest 90% has stagnated, rising only by 0.003%.\textsuperscript{3} This results in a general pauperization of the whole society but also in the squeezing of the middle class, through the shrinkage of the income share accruing to the middle 20%. In the European South the situation is even worse: 97% of the households in Greece and Italy had stable or falling income between 2005 and 2014, compared with just 20% in Sweden,\textsuperscript{4} where the welfare state has not been so gravely degraded.

\begin{figure}[h!]
\centering
\includegraphics[width=\textwidth]{graph3.png}
\caption{Distribution of Wealth: Bottom 60\% (left) and top 10\% (right) of the population. Source: OECD, Inequalities in Household Wealth among OECD Countries, 2018, https://twitter.com/OECD/status/1023407707440103424}
\end{figure}
The continuous lowering of living standards and the explosion of inequalities should not be attributed abstractly to globalization. The latter is not a natural phenomenon. It can be steered and reined by national policies towards either pro-social or pro-market objectives. What has been described in the previous paragraphs is the outcome of deliberate political options, which have degraded labour relations and dismantled the redistributive mechanisms of the welfare state. More specifically:

- Labour market deregulation and accentuated flexibility, in tandem with a decline in trade union rate and worsening of prevalent collective bargaining legislation has reduced the bargaining power of middle and lower-income workers, leading to lower minimum wages relative to the median wage. According to a recent IMF work report, a decline in trade union membership (union rate) and the resulting easing of labour markets measured by an increase in labour market flexibilities index by 81/2 %—from the median to 60th percentile—is associated with rising market inequality by 1.1%. Moreover, the rapidly increasing gap between rise of productivity and wages, has a cumulative effect on workers’ share of national income, which has fallen dramatically after 2000.

- A huge decline in the progressivity of taxation has undermined the funding of the welfare state and widened the inequalities, through cuts of social transfers such as welfare assistance or public retirement benefits. According to the OECD, top marginal tax rates, which have been above 80% in 1960, have fallen from 59% in 1980 to 30% in 2009. The average rate of Corporation Tax has been cut from a nominal 34% in 1995 to 22% in 2017. The deterioration of provision of public goods that boosted productivity and growth in the past is also associated with the massive privatization of important social services.

**Inequalities and crisis of democratic legitimacy**

Societal inequalities can be tolerated in a capitalist system, even considered as the “natural” outcome of the invisible hand of the market. It is quite different if people believe that they are unfair, as a direct product of a political decision, such as the cancellation of the social contract inherent to the welfare state. It is highly indicative that the declaration that the “economy is rigged” does not come only by outspoken critics of neoliberalism like Jeremy Corbyn, but also by prominent Tory ministers, such as Michael Gove and a vast majority of the electorates (see Graph 4 below).

As it was to be expected, democracy per se is affected by the rampant crisis of confidence. As shown in Graph 5, for the majority of the Americans born after the 1960s and the Europeans born after the 1970s, it is not deemed anymore “essential” to live in a democracy.

Even moderate politicians, like the former Prime Minister of Australia Kevin Rudd are characterising this situation as an existential threat for the future of democratic regimes:

“Citizens will continue to support their democratic capitalist systems so long as there is reasonable equality of opportunity and a humane social safety net. Take these away and the citizenry no longer has a material stake in mainstream democratic politics”. 


Endnotes

1 In D. Goodeheart’s bestseller, *The Road to Somewhere: The Populist Revolt and the Future of Politics*, (London: Oxford University Press 2017) “anywheres” are the winners of globalizations, educated, middle class professionals who feel at ease everywhere, whereas “somewheres” are those attached to their communities, basically because of lack of skills, ambition or professional abilities.


3 Household income/income share: Congressional Budget Office as appears in https://www.motherjones.com/politics/2015/02/income-inequality-in-america-chart-graph/.


8 IMF, ‘Causes and Consequences of Income Inequality’


Constitutional Democracy in the Age of Algorithms:
The Implications of Digital Private Powers on the Rule of Law in Times of Pandemics

Oreste POLLICINO & Giovanno DE GREGORIO

The Rule of law in the Algorithmic Society
New technologies have always challenged, if not disrupted, the social, economic legal and, to an extent, the ideological status quo. The development of data collection, mining, and algorithmic analysis, resulting in predictive profiling is playing a disruptive role. Society is increasingly digitized and the way in which values are perceived and interpreted is inevitably shaped by the consolidation of the information society. The pandemic season has not only amplified technological challenges like in the case of contact tracing, but it has also shown the role of private actors in acting as essential pieces or digital utilities. Facebook, Amazon and Zoom are just three examples of actors which have allowed people to study, work and maintain social relationship.
The rule of law has not been spared in this process of framing (but not transforming) traditional categories in light of technological dynamics. The newness of (algorithmic) technology is a natural challenge for the principles of the rule of law. However, technology is also an opportunity for fostering this principle since it can provide better systems of enforcement of public policies as well as a clear and reliable framework compensating for inefficiencies de facto undermining legal certainty.

Within this framework between innovation and risk, the question to ask is whether algorithmic technologies can encourage the exercise of arbitrary powers. The principle of the rule of law is a precondition for ensuring equal treatment before the law, protecting fundamental and legal rights, preventing abuse of power by public authorities and holding decision-making bodies accountable. In other words, the rule of law can be seen as an instrument to measure the degree of accountability, the fairness of application and effectiveness of the law. It is also a goal of freedoms from certain dangers or pathologies. The rule of law is primarily considered as the opposite of arbitrary public power. Therefore, it is a constitutional bastion limiting the exercise of authorities outside any constitutional limit and ensure that these limit answer to a common constitutional scheme.

In the information society, this principle is a primary safeguard to ensure that, when public actors implement digital technologies to increase their efficiency, provide better services, or improve the performance of public tasks, the exercise of these activities is not discretionary but based on clear and proportionate provisions. At the same time, the lack of expertise of public authorities and the rise of gatekeepers online have led the public sector to increasingly rely on private actors to ensure the enforcement of public policies online.

Nonetheless, in the lack of regulation or horizontal translation of constitutional values, the principle of rule of law does not limit the freedom which private entities enjoy in performing their activities, including their right to free speech or freedom to conduct business. In a global digital environment, the threats for the principle of the rule of law do not just come from the implementation of algorithmic technologies by public actors but also, and primarily, from the ability of transnational private actors to develop and enforce private standards competing with public values. This is evident when focusing on how information flows online and the characteristic of the public sphere which is increasingly personalised rather than plural. Likewise, the field of data is even more compelling due to the ability of private actors to affect users’ rights to privacy and data protection by implementing technologies whose transparency and accountability cannot be ensured.

Nonetheless, it would be naïve to consider the digital environment as the only source of concern in question. Looking at the European Union as an example, recent challenges to the rule of law have spread in some Member States leading the European Commission to define a plan to safeguard this in the Union. Even if the rule of law is a constitutive value, nonetheless this does not mean that it can be taken for granted. In recent cases, some Member States have questioned the stability of the rule of law from different sides. Just to mention a few, the declining independence and legitimacy of constitutional courts, together with high-level corruption and influence of the media, have led to wonder about the future of the Union and democracy.

The technological factor exacerbates and amplifies this troubling situation. Within this framework, it is worth wondering what is the role of constitutional law in the algorithmic society? How does constitutional law deal with new private powers threatening the principle of rule of law? Is constitutional law entitled to step in this and take any move which may be appropriate? If constitutional law is expected to step in, this requires either revisiting the definition of ‘power’ and/or including private powers in the scope of the same? In other words, how should
constitutionalism evolve with a view to facing the challenges brought by the emergence of new forms of power in the algorithmic society?

**Private Powers in Times of Pandemic**

Technology has played a crucial role in empowering the private sector in the last twenty years. A general legislative inertia has been complemented by the rise of judicial powers as the primary player providing a first answer to the challenges of the information society.\(^{12}\) Beyond public powers, the freedom to conduct business has now gained a new dimension, namely that of private power, which – it goes without saying – brings significant challenges to the role and tools of constitutional law. Competition law and regulation, in fact, would no longer be sufficient to capture the functioning of these actors: increasingly, fundamental rights adjudication is directly involved and affected. The liberal approach taken by constitutional democracies in relation to digital technologies and online platforms has contributed to the transformation of economic freedoms into something that is resembling the exercise of powers as vested in public authorities.

One may actually wonder where the connection between algorithms and powers lies, apparently so far, in effect so close. Private actors other than the traditional public authorities are now vested with some forms of power, that is no longer of merely economic nature. The apparently strange couple ‘power and algorithms’ does actually make sense and triggers new challenges in the specific context of the rule of law. Algorithms, in fact, permit engagement in diverse activities that may significantly affect individuals’ rights and freedoms. Individuals may not notice that many decisions are carried out in an automated manner without, at least *prima facie*, any chance of control over them.

A broad range of decision-making activities are increasingly delegated to algorithms which can advise, and, in some cases, take decisions based on the data they process, so that ‘how we perceive and understand our environments and interact with them and each other is increasingly mediated by algorithms’.\(^{13}\) In other words, algorithms are not necessarily driven by the pursuit of public interests, being instead sensitive to business needs. Said concerns are even more serious in light of the learning capabilities of algorithms, which – by introducing a degree of autonomy and thus unpredictability – are likely to undermine ‘accountability’ and the human understanding of the decision-making process. For instance, the opacity of algorithms is seen by scholars as a possible cause of discrimination or differentiation between individuals when it comes to activities such as profiling and scoring.\(^{14}\)

The implementation of algorithms on a large scale has the potential to give rise to a further transmutation of the classic role of constitutionalism and constitutional theory, in addition to that already caused by the shift from the world of atoms to bits,\(^{15}\) where constitutionalism becomes ‘digital constitutionalism’ and power is relocated among different actors in the information society.\(^{16}\) The statement needs an attempt at clarification. As it is well-known, constitutional theory frames powers as historically vested in public authorities, which by default hold the monopoly on violence under the social contract. It is no coincidence that constitutional law has been built around the functioning of public authorities. The goal of constitutions (and thus of constitutional law) is to allocate powers among institutions and make sure that proper limits are set on the same, with a view to preventing any abuse.\(^{17}\)

The global pandemic has highlighted the relevance of online platforms in the information society. For instance, Amazon provided deliveries during the lockdown phase, while Google and Apple offered their technology for contact tracing apps. These actors have played a critical role in providing services which other businesses or, even the State, failed to deliver promptly. The COVID-19 crisis has led these actors to become increasingly involved in our daily lives, becoming
part of our social structure. In other words, their primary role during the pandemic has resulted in these actors being thought of as public utilities.

Nonetheless, the model of the contact tracing app proposed by these tech giants aroused various privacy and data protection concerns. Constitutional democracies have paid greater attention to the risks that contact tracing apps may entail for the rights and freedoms of citizens. In other words, the balancing between the right to health and the right to privacy on the one hand and respect for the rule of law on the other has blocked the adoption of certain measures with the potential to increase public surveillance. Here too, courts have played a critical role. For instance, the Israeli Supreme Court banned electronic contact tracing without statutory authorisation.

The original mission of constitutionalism is to set some mechanisms to restrict government power through self-binding principles, including by providing different forms of separation of powers and constitutional review. Therefore, the constitutional challenges of the algorithmic society require one to deal not only with the troubling legal uncertainty relating to new technologies but also the limits to private determinations, driven by automated decision-making systems affecting fundamental rights’ and democratic values.

**Disinformation and Digital Populism**

Among the challenges for the principle of the rule of law in the algorithmic society and in times of pandemic, disinformation deserves special attention. The spread of false content online has raised concerns for countries around the world. The Brexit referendum, the US elections in 2016 or health misinformation are just some examples of the power of (false) information to shape public opinion. The relevance of disinformation for the principle of the rule of law can be looked from two angles: the constitutional limits to the regulatory countermeasures and the spread of narrative undermining constitutional and democratic values.

From the first standpoint, addressing disinformation entails dealing with the boundaries of freedom of expressions. The decision to intervene to filter falsehood online requires questioning whether and to what extent it is acceptable for liberal democracies to enforce limitations to freedom of expression regarding falsehoods. This is a multifaceted question since each constitutional system paradigm adopts different paradigms of protection even when they share the common liberal matrix like in the case of Europe and the United States. In other words, it is a matter of understanding the limits of freedom of speech to protect legitimate interests or safeguard other constitutional rights. This is why the principle of the rule of law cannot be neglected when defining the boundaries to address the fight against disinformation online in constitutional democracies.

Besides, since the spread of disinformation in the digital environment, the role of online platforms in defining the criteria to moderate false content is another challenge for constitutional democracies. Once Facebook and Google sent their moderators home, the effect of these measures extended to the process of content moderation, resulting in the suspension of various accounts and the removal of some content even though there was no specific reason for this. This situation has not only affected users’ right to freedom of expression but has also led to discriminatory results and the spread of disinformation. Generally speaking, it is worth observing that the solidarity expressed during the pandemic has also been mediated by the role of online platforms at the heart of individuals’ lives and relationships.

Nonetheless, it is not just a matter of ensuring the principle of the rule of law when public actors restrict freedom of expression or private powers impose their standards of protection globally. In recent years, the rise of new (digital) populist narratives manipulating information for
political purposes through a populist constitutional grammar. By exploiting social media as public spaces, populist voices have become a relevant part of the public debate online as also the political situation. It would be enough to mention the electoral successes of Alternativ für Deutschland (AfD) in Germany or the Five Star Movement in Italy to understand how, in these years, populist narratives have widespread no longer as an answer to the economic crisis but as anti-establishment movements fighting globalized phenomena like migration and proposing a constitutional narrative unbuilding democratic values and the principle of the rule of law.

The digital environment seems to be a perfect environment for populism, precisely to advance their mission to challenge democratic values. This new framework is a perfect opportunity to reach and influence public opinion by relying on social media to spread political ads using micro-targeting techniques. Within this system, political strategies have changed. Populist movements have tried to follow mainstream trends and controversial rhetoric to capture users’ attention and lock them in their information bubble. Populists use social media as direct communication channels to overcome traditional filters or gatekeepers. Besides, traditional media outlets fall for this trap and increase their reach by giving spaces in their larger platforms even through unfavourable coverage. Social media allow populist narratives to reach different targets of population and talk directly with people. This is the realization of one of the populist dreams: limiting trust in professional media and having a direct relationship with people to take decisions. In other words, the digital environment provides a way for populism to flourish and better support their narrative showing that they are closer to people than supranational powers hidden in bureaucracy, the media owned by the wealthy and political establishment and the fallacies of the representative democracy. The detection of “parasitic” and manipulative use and abuse of the categories constitutional law by populist narratives has been quite convincingly done in relation, for instance, to sovereignty, will of the people, and constituent power.

However, it is worth underlining that, when relying on digital technologies, populist groups and leaders are exercising constitutional rights and liberties, so they are acting within the constitutional framework. However, they exploit it for their purposes. Populist movements rely on constitutional safeguards such as freedom of expression to share opinions and ideas which inevitably undermine the same values allowing them to perform this right in a democratic society. In other words, they exploit constitutional values to run their unconstitutional project. Besides, when they use social media, they also exercise other pluralist values like freedom of assembly and association which allows everyone to participate in social and political life, including those minorities against whom populism aims to fight as threats to the unity of the people. This situation does not apply just to the online environment but also to other constitutional norms and safeguards. Populists cannot bring to reality their electoral program in the anti-law principle part. The digital populist narrative is coherent with this approach. They also use social media as an alternative tool to challenge traditional media by dismantling dissent and making difficult the possibility to disagree. This framework is also connected with the spread of disinformation. Social media have shown to be one of the primary fields where political parties support their extremist theses which often overcome the threshold of truthfulness.

Therefore, once we agree on the relevance of the technological factor, we should wonder how to address digital populism which threatens the rule of law and to what extent this phenomenon can transform democratic values. As already observed, populism seems to be one of the prices democracies should pay to tolerate pluralism. Nonetheless, this does not mean that the price should be high. Therefore, the focus moves to the remedies to address this situation using those constitutional instruments which populism criticizes.
Reframing Constitutional Law in the Algorithmic Society?

In the algorithmic society, the rule of law is under pressure from multiple sides. Algorithmic technologies have contributed to introducing new paths for innovation producing positive effects for the entire society, including fundamental rights and freedoms. Nonetheless, the domain of inscrutable algorithms which characterize contemporary societies, challenges the protection of fundamental rights and democratic values while encouraging lawmakers to find a regulatory framework balancing risk and innovation considering the role and responsibilities of private actors in the algorithmic society. The global pandemic has amplified the concerns relating to online platforms as transnational private powers exercising forms of public functions.

The rise of digital private powers challenges the traditional characteristics of constitutional powers, thus, encouraging reflection on how constitutional law could evolve to face the challenges brought by the emergence of new forms of powers in the algorithmic society. We believe that potential answers to address this situation can be found by looking at constitutional law. Constitutions have been designed to limit public, more precisely governmental, powers, to protect individuals against any abuse by the state. In recent years, however, the rise of the algorithmic society has led to a paradigmatic change where the public power is no longer the only source of concern for the respect of fundamental rights and the protection of democracy. This would lead to redrawing the relationship between constitutional law and private law, including the duties to regulate the cybernetic complex, within or outside the jurisdictional boundaries.

Endnotes

5 Recent rulings of the European Court of Justice have highlighted the relevance of the rule of law in EU legal order. See Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas; Case C-216/18 PPU, LM; Case C-619/18, Commission v Poland (2018).
10 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Strengthening the Rule of Law within the Union. A Blueprint for Action COM(2019) 343 final.
Giacomo Delle Donne and others, Italian Populism and Constitutional Law. Strategies, Conflicts and Dilemmas (Palgrave Macmillan 2020).
Can COVID-19 Save Democracy from Populism?

Tamar HOSTOVKSY BRANDES & Yaniv ROZNAI

The COVID-19 pandemic emerged in an era in which a large number of countries are encountering challenges to democracy by populist, semi-authoritarian trends and leaders. This collision between the pandemic and populist politics may have led to some troubling consequences as it is claimed that in various countries, the democratic decline accompanied by anti-scientism, religious conservatism, and political polarization have harshly limited countries’ ability to effectively respond to covid-19. Indeed, recent studies show that populist leaders appear to be undermining an effective response to COVID-19. As one study reports: “There appears to be a striking correlation between countries led by politicians who support populist messages and the poor performance in responding to COVID-19”.

Thus, an interesting question arises: has COVID-19 affected the challenges populism poses to democracy? The most obvious concern is that the pandemic will be used by populist leaders as an excuse to grab power. However, in this post, we sketch out four broad topics, under which COVID-19 may affect existing populist tends in different - and potentially conflicting - manners.
COVID-19 and Internationalism

Populism is generally associated with anti-internationalism. First, populism thrives on a friend/enemy distinction, which is directed, first and foremost, against opponents from within, but also against “outsiders”, or those portrayed as such. In addition, “the people”, envisioned as a single, organic entity, is presented by populist leaders as the only legitimate source of political action. Any constraints on the power of the people, for example, by international law or international institutions, is thus perceived as illegitimate intervention in the state’s sovereignty. As a result, populism is often characterized by an inward-facing public discourse, which allows the creation of an echo-chamber that is dominated by the populist narrative. It is not a coincidence that many populist leaders attack and undermine the legitimacy of international law and international institutions.

It is still early to determine the effect of the COVID-19 pandemic on internationalism. On the one hand, the immediate management and containment of the pandemic has been treated by most countries as a national problem that is to be addressed domestically. One of the notable consequences of the pandemic has been the closure of national borders, in a manner unprecedented in the era of globalization. Indeed, some of the countries with the most successful results in the battle against COVID-19, for example, in South-East Asia, are also the ones that applied the strictest border-control measures. In addition, the WHO was criticized for failing to address the pandemic swiftly and effectively. The European Union has also, arguably, provided an inadequate response. Competition between countries on access to vaccination, once completed, also has the potential of states giving preference to national interests over international cooperation.

On the other hand, the pandemic has provided an opportunity for cooperation between scientists from various countries with respect to the development of treatments and a future vaccine, sharing knowledge and information. Countries have also been negotiating the creation of COVID-19 “green zones”, a development which reflect an understanding that isolation may be a short-term solution, but cannot be a permanent strategy. While the early response to the pandemic has been inward-facing, it remains to be seen whether this will remain true, or whether medium and long-term management of the pandemic will be characterized by more international cooperation. The question how a COVID-19 vaccine, once approved, will be distributed globally is especially important in this regard.

The Role of Science and Scientists

One of the main characteristics of populism is its anti-elitist, anti-institution rhetoric, and the presentation of the populists’ worldview as the ultimate and only truth. Accordingly, the rise of populism brought with it attack on scientific expertise. This is due to the objection of populism to the liberal elite, receiving its power from its education and professional status. It is also the result of the claim that unelected technocrats do not ‘let the people rule’. Thus, the populist movement is an attempt of the public to take back its authority allegedly hijacked by experts and bureaucrats who limits its powers.

However, the role of science is crucial for democracy. As Collins & Evans note: “Scientific expertise, when it is working properly, and when it is understood properly, makes it more difficult for a government to do just what it wants.” Science and scientific institutional provide checks and balances that limit the power of elected leaders.

In that respect, COVID-19 has restored to scientists their importance, which has been trampled in recent years by populist leaders who contemptuously rejected professionalism as a disguise for elitism and as a means of preserving the hegemony of the old elites. Learning the
lessons of the harsh results of not abiding by professional advice, the public might increasingly prefer prudent leaders operating in the light of evidence-based policies rather than populist leaders who act whimsically and impulsively and prefer ‘common-sense’ over science.

The pandemic, however, brought science and scientific facts into the center of public discourse. Of course, even under the horrific conditions of the pandemic populist leaders continue to shame science and its importance and claim that science is mere politics and that COVID-19 is “fake news”. They neglect scientific institutions – or worse, are hostile towards them. It was reported that just three months before the emergence of COVID-19, the Trump administration closed down the USAID-funded PREDICT program, developed to provide early warning of possible pandemics. Whereas President Trump and his administration have silenced scientists and undermined scientific institutions, President-elect Biden, emphasized in his victory speech that his administration’s policy will be based on science and experts.

Science, after all, may still have the upper hand as it is so needed in such times of health crisis. As science is also crucial for democracy, the reinvigorating of science might rescue democracy.

**Disinformation and Democracy**

Disinformation and fake news have been a major concern in the context of the rise of populism and democratic decline long before the pandemic. In particular, the attention focused on the role of social media outlets in spreading such news in the context of elections, and of the possibility of disinformation contaminating the election process. Many liberal scholars, generally wary of regulation of expression, suggested that in the social-networks era, the premise that the “marketplace of ideas” is likely to lead to revelation of the truth no longer stands. In such an environment, it has been argued, the ability of citizens to make meaningful political decisions is significantly compromised.

These concerns escalated in the context of COVID-19. The fear and uncertainty prompted by the pandemic created a fertile ground for the spread of disinformation and conspiracy theories. An important and worrying phenomenon was the abuse of the pandemic by authoritarian, semi-authoritarian and populist leaders as an excuse to curtail freedom of expression. A recent Freedom House report indicates that the pandemic had a negative effect on freedom of information. Political leaders, the report argues, block independent news sites, arrested individuals on false accusations of spreading fake news, and, in some instances, spread fake news themselves.

While it is clear how the use of the pandemic as a pretext to limit rights and control public knowledge and opinion poses a threat to democracy, it should be stressed that the misinformation spread during the pandemic threatens democracy in additional, deeper ways. Fake news regarding the pandemic, in particular, undermining its severity, is spread in many countries within circles of government opponents. The concern that limitations imposed by the government are political and not based on public-health considerations is understandable and, as indicated above, at times justified. However, a counter-response that doubts the legitimacy of any measures imposed is concerning both from the perspective of the ability to fight the pandemic, and from the perspective of democracy. A situation in which the information communicated by the government is unreliable, or in which the government takes an active part in spreading fake news is indicative of a democratic decline. However, a situation in which no alternative reliable source of information exists is even more concerning, as it renders exposing and combating the spread of disinformation by the government more difficult.
Friend/Enemy Distinction

Populism, according to one definition, is based on a clear division of the world between "we" and "they": "They" are the elites, the foreigners, the liberals. "We" represent the real, national people. The populist claims that he and only he faithfully represents the real “people”. Populist rhetoric is thus based, to a large extent, on a Schmittian friend-enemy distinction.

As Dana Blander correctly notes, COVID-19 symbolizes a new kind of threat that has no identity, ideology, religion or nationality. It is an enemy, but not one that can be incited against. The corona, in other words, cannot be charged with anti-pluralistic hostility as foreigners, a national minority or a terrorist organization. It is a virus without identity that itself acts indifferently. The threat in this case arises not from the “other” group but from a microorganism.

Here, too, contrasting trends can be identified: while on the one hand, COVID-19 does not distinguish between different ethnic groups or political rivals, it served as a pretext for xenophobia and for blaming minority groups such as Asians, orthodox Jews, and others for spreading the virus. President Trump, for instance, blamed the Chinese, or ‘Kung Flu’ virus for spreading the virus. Hindu nationalists blamed Muslims for India’s COVID-19 crisis. In Hungary, Viktor Orbán blamed foreign migrants student for spreading the virus. And so, emerging evidence suggests that the COVID-19 pandemic has triggered anti-Asian and anti-immigrant sentiments, which accords with populist rhetoric concerning the protection of the homogenous people. Even when facing a neutral virus, populist leaders were able to find a “them” to incite against.

Conclusion

COVID-19 presents new and unprecedent challenges to already unsettled liberal democracies. The pandemic strengthens the role of experts and scientists and the importance of ‘true facts’ while being instrumentalized to bolster exclusionary rhetoric and anti-international institutionalism. But as we suggest in this post, it would be incorrect to think that the demise of democracy and the rise of autocracy is the likelihood result. True, the health crisis – as any emergency – has assisted in increasing executive aggrandizement. At the same time, the pandemic proved that populism core features and promises were hollow in many aspects.

Therefore, Petra Guasti, was correct in claiming that COVID-19:

“is an opportunity for democratic decay because states of emergency significantly expand executive power and enable temporary curbs on civil liberties in the name of public health. It is also an opportunity for democratic resilience if four conditions are present—free press critically assessing information by the government; independent courts making sure mitigation measures and restrictions remain within the constitutional framework; effective parliamentary opposition performing government oversight; and active civil society mobilizing to defend democracy”

As we opened our post, populism leadership enabled the spread of COVID-19 and in a somewhat bothersome sequence COVID-19 allowed the deepening of populism. However, and this is the main point, the pandemic also signifies a rare opportunity to pushback against populism and uncover democratic resistance. Populist policies that are based on lies, denial, ignorance of science or truth have their limits when the outcome is the loss of thousands of lives. In the end, people want their loved ones to survive and be healthy.

It is (probably inaccurately) said that in Chinese crisis and opportunity share the same symbol. The COVID-19 crisis may be an opportunity for the renewal of democracy.
Constitutional Decay and the Crisis of the Liberal Imagination

Nigam NUGGEHALLI

Liberal constitutions have an abiding faith in elected representatives (henceforth called ‘the politicians’). The great democratic constitutions of the world, for example, the United States, Great Britain and India, trust politicians to deliver their countrymen and women into an era of freedom and prosperity. The media might term the politicians as venal, self-centred, and subjects of scorn and mirth, but the respective constitutions take these very same politicians quite seriously. They are given formal grand sounding names and their election and terms of office are mentioned in great detail. Politicians make up the legislative and the executive branch, with only the judicial branch occupied by unelected persons.

The bulk of the political power, i.e., the power to govern the people is apportioned between the legislative and the executive branch. I will focus on India in this essay, but the situation is the same in the United States and in the United Kingdom. In India, the executive and the legislature together account for the bulk of the political power. The judiciary has been typically given more limited powers of interpreting the law and preventing the abuse of the constitution. The judiciary has also been cloaked with a limited independence, mainly to do with their tenure.
I argue for a re-evaluation of the liberal idea that the bulk of the governance must be left to the politicians. One can deny that politics (the practice in which the politicians are involved) is a force for the good and at the same time accept that politics can bring about good outcomes. Politics is necessary for security and for creating the conditions for cultures to flourish, as Hobbes had pointed out in the *Leviathan*. But the practice of politics, with few exceptions, does not encourage politicians to work for the common good intentionally. Politicians intend to perpetuate themselves and focus on control and coercion over others.

If politics is not a force of the good, in whose hands (and hearts) does justice lie? There is a far more congenial place, despite its supposedly anti-democratic credentials: the judiciary. A completely independent judiciary that influences every major economic and social activity is the place where we must seek to encourage a culture of advancing justice. While liberal constitutions allow for limited judicial functions with limited independence, I argue for a judicial function that is present pervasively in top to bottom governance issues and is completely, not partially, independent of politicians.

Allowing the independent judicial function to permeate our culture in the way described above requires a review of the liberal imagination. Liberals must acknowledge the need for an independent review mechanism outside of business and political interests. We have seen the beginnings of this realisation in the private space already, with the emphasis on independent directors. We need to see a similar recognition in political governance, and in particular the hallowed doctrine of the separation of powers (hereafter ‘SOP’).

The SOP doctrine is a familiar story in the writings of Montesquieu, *The Spirit of the Laws* and in the *Federalist papers* (especially No. 47, 48, 49, 50, 51). The SOP doctrine can be analysed from the perspective of two models. In one version of the doctrine, the three bodies perform distinct functions that are justified as functions of public order carried out in a cascading fashion. The legislature issues directives or guidelines regulating the behaviour of the residents of a political community. The executive implements the directives of the legislature. The generality of the directives results in occasions that call for interpretation (how to interpret ‘benefits’ in the legislation on maternity benefits) or problems of application (how to apply the standard of reasonability or freedom of expression) when the directives are enforced by the officials against the residents or by the residents against each other. The courts step in at this stage of interpretation or application by issuing rulings that determine authoritatively the application of the law to particular facts.

In this version of the SOP doctrine, the dominant political function is performed by the legislature, assisted by the executive. The judicial function is the subordinate political function because courts apply the will of the legislature. The version of the SOP that I want to advocate unsettles the cascading story by suggesting an alternate model that rejects the possibility of the directives of governance cascading down to their intended subjects. This model envisages judges as the identifiers and implementers of the moral principles applicable in political communities. Such a function cannot be performed adequately unless the judicial function is performed at all the sites of legislative and executive action. I will have more to say on this below, but it is important to note here that by identifying the judicial function as co-terminus with the legislative and executive functions, this model paves the way towards a new interpretation of the SOP doctrine, one in which the judicial function is performed pervasively, not sporadically or occasionally, and the body of people performing the judicial function are truly independent of the body of people performing the legislative and the executive functions.

Let’s consider the implications of this reappraisal of the SOP doctrine on constitutional design and governance systems. Consider what might happen in an Indian village if a policeman...
arrests a person accused of theft and keeps her in jail overnight. The thief might claim to her friends and family that the policeman arrested her because he was bribed to do so by another person or because he did not like her questioning his methods or some other reason unrelated to any legal grounds for arresting and detaining her. It might be the case that in a few months or even a few years, the woman is able to garner the attention of a court of law that proclaims that her arrest and detention are without any legal basis under the statutes that govern criminal behaviour and criminal procedure. In India, such cases sometimes travel all the way to the Supreme Court, and in many instances take a decade or more to be resolved. In the meantime, the woman might be physically and mentally traumatised, and perhaps the policeman is suspended from his work.

The policeman might argue that because of the daily case load in his area, he has little time to determine guilt exhaustively. He has to make arrests after a hasty preliminary inquiry with the owner of the stolen goods because the alternative-rampant crime-might be worse. He might argue that while he received gifts from the local politician who encourages police to be tough on crime, those gifts were given to everyone employed at the police station. He might also contend that the accused was also guilty of disrupting the peace of the community by getting excessively inebriated and her arrest was partly to do with her anti-social behaviour.

Consider how this situation might be addressed if an independent and pervasive judicial decision making function was built into the governance system. Every government function will have a judicial wing built into it. For example there will be a judicial officer, by whatever name called, associated with the police station, who would be empowered to settle the dispute between the policeman and the woman. His mandate is not to usurp the police powers but to make sure that the rule of law is being followed. The exercise of judicial power will be subject to appeals but since under the new system the judicial function is being performed in a tight-knit independent structure with no political influence, there is a much greater likelihood of a responsible and efficient system of appeals. Like in other mature jurisdictions, an independent judiciary with a good reputation will make sure that the appeals from lower rungs of the judicial chain will be restricted. One of the reasons for the Indian Supreme Court hearing a large number of appeals is the public’s and the lawyer’s lack of faith in the integrity and competence of the lower judiciary.

The discussion so far is theoretical unless there is a real chance of the judiciary willing to be independent and having the capacity to be independent. These are socially contingent factors that might be present in one country and not another. Due to a combination of events, I believe that these contingent social and political factors are present in India. Through a number of judgments creatively interpreting the constitution, the Supreme Court judges in India have insulated the appointment of the higher judiciary (Supreme Court and High Court judges) from direct executive involvement. Judges are selected by a collegium of Supreme Court judges although the final order of appointment is issued by the executive. The virtual usurpation of the power of judicial appointment by the Indian Supreme Court is an indication that the Supreme Court is willing to assert its independence from the executive.

Similarly, there is a longstanding tradition in India of allegiance to people of integrity. The widespread allegiance to Mahatma Gandhi is one example of this tradition. There is a possibility that a social movement consisting of a set of independent judges with incorruptible reputations would garner public support. If there is adequate public support, the judiciary would be able to exert a more pervasive and comprehensive influence on the politicians. The Supreme Court will have to institute a unified national judicial service under its direct command. The national judicial service will be embedded in all forms of government service right up to the retail services that the citizens usually comes into contact with. To return to the example given above, judicial services
ought to be available at the local police station where executive action most affects the citizen. There is little point in the delivery of justice if justice is delayed and judicial action is taken many years after wrongful executive acts have taken place.

The liberal idea of government is based on trusting the elected representatives to act in the public interest. There is nothing in the history of politics to suggest this is the case. There is no reason why a separation of powers should result in the executive and legislature holding the upper hand and the judiciary being relegated to third place. I have argued that for democracy to work properly, and to prevent democracy from being abused, we must have a more independent, comprehensive and pervasive exercise of judicial power. A natural question to ask is how will we present the abuse of the judicial power.

I believe that in order for the judicial power to fulfill the functions I have pointed out, self regulation is the ideal we ought to aim at. The leaders of the institution must set the highest standards of integrity and probity, and it will be left to the leadership group to engage with alleged abuses within the judiciary. The Indian Supreme Court, which has tried doing something like this, has not really followed it through properly, and this is something that must improve in the future. One might say why can’t we expect a similar level of optimism regarding the politicians. I think the answer would be that the practice of politics is not designed for self-correction in the way the judiciary is. Expecting the political class to reform itself would be to underestimate and ultimately ignore the self-serving nature that is fundamental to the nature of politics.
¡Seguir luchando!

Sumisxs ni cagando!
3

THE AMERICAS: CONSTITUTIONAL DECAY, BREAKDOWN & RESILIENCE
COVID-19 Constitution-making in Chile

Jorge CONTESSE

Chile is going through a unique constitution-making moment. At the end of October 2020, the Chilean people overwhelmingly voted — for the first time in the history of the country — to adopt a new Constitution, and to do so through a constituent assembly. The perception that the Constitution has become an obstacle to, rather than an avenue for, political change is the gist of the country’s constituent moment. This contribution focuses on two aspects: first, it discusses some of the main causes of the dramatic constitutional change that is underway, with an emphasis on the role of the Constitutional Court as a key factor for triggering the constituent impetus. Second, it assesses the constituent process as a distinctive case of democratic renewal, that is, an instance where decay is democratic, as when the normal (but imperfect) functioning of the constitutional system may lead to its own destruction (a sort of institutional implosion) followed by a moment of constitutional creation.

How did We Get Here?

The 1980 Constitution was drafted by a commission made up mostly of men, all of whom were sympathetic to the regime of Augusto Pinochet (1973-1980), without any public discussion, with political parties outlawed, and without reliable electoral records to ensure trust in the result of
the plebisicte with which it was approved. (In fact, commentators have noted that electoral fraud was committed in that plebisicte.) And, of course, in the midst of massive and systematic human rights violations.

In 1989, when Pinochet had already lost the referendum that would have allowed him to remain president for eight more years and the country was preparing to hold its first presidential elections since 1970, the opposition parties and those loyal to the Pinochet regime negotiated a package of constitutional reforms that did not shake the foundations of the Chilean constitutional architecture. It took fifteen years to renegotiate a major constitutional reform that, although it introduced significant modifications (such as the power given to the Constitutional Court to review the applicability of laws), did not remove the foundations of the constitutional regime inherited from the dictatorship either. In spite of this, then President Ricardo Lagos proclaimed that Chile had a new constitution; one that would not divide Chilenos.

This was not to be the case. It only took a few years for the streets to be filled with protesters, especially but not exclusively students, who demonstrated, first, in favour of a non-commercialized education system, and subsequently, in favour of the environment, women’s rights, social security, the environment, and so on. Their demand soon became a constitutional one, since protesters found themselves against a wall: the Constitution. It was the Constitution that prevented the radical modification of the neoliberal system that Pinochet had bequeathed.

**The Constitutional Court**

As each of the social demands came up against the Constitutional Court, Chileans realized that the Court was the most eloquent obstacle to social change. Yet, since the Constitutional Court was the guardian of the 1980 Constitution, it was inevitably the Constitution that had to be replaced.

During the 2013 presidential campaign, inspired by the Colombian example of the Seventh Ballot, civil society organizations launched a campaign that called for the marking of votes with the acronym ‘AC’ for ‘asamblea constituyente’ (‘constituent assembly’ in Spanish). The idea was to convey, through marks on the ballots, that the demand for a constituent convention was real and needed to be addressed because it was key to carrying out the desired changes. The campaign faced accusations of fraud and the nullification of votes — ironically, even attracting the label of ‘unconstitutional’! — but it also sparked a sort of constituent energy among the people. The government of Michelle Bachelet took up the demands and initiated a constituent process which mobilized hundreds of thousands. However, as the administration’s popularity declined, the process waned until it eventually receded into invisibility with Bachelet sending Congress a proposal for a new Constitution only days before the end of her government, in an act without any political—much less constituent—transcendence.

In March 2018, the conservative government of Sebastián Piñera stepped in. In an address to the country’s most powerful businessmen, Piñera’s secretary of Interior (also his cousin) sent a clear message: ‘we do not want to advance the proposal for a new Constitution’. The demand for a new Constitution was put to sleep... until a 30 peso (USD 0.4) subway rise triggered a new wave of student protests in Santiago, and on Friday, October 18, 2019, after several subway stations were set on fire, the government decreed a state of emergency. Suddenly, the matter of the Constitution became impossible to ignore.

**An institutional implosion**

Never before in the history of the country had constitutional change been carried out through democratic means, in the sense of mechanisms that allow for the participation of citizens in the process of constitutional creation. Almost fifty years ago, the 1925 Constitution was brought to
an end through the bombing of the presidential palace of La Moneda. And, a few years later, a Constitution was drafted in the midst of a regime that systematically violated human rights, without any public debate.

One of the most interesting features of the process we analyse here is the decay that is itself democratic and democracy's capacity for renewal. In general, we think that it is democracy that is decaying; and it certainly is. There are many examples around the world of how in recent years numerous constitutional regimes have been weakened, generating a real crisis of constitutional democracy that specialists have been concerned with studying and confronting.

However, with the Chilean case, a way of looking at the issue arises in which the decay of democracy is also democratic. What I mean is that it has been the democratic regime itself which, precisely because of its functioning, as it was designed, has lost its legitimacy. It is not that there has been a failure in the system; certainly, we can attribute the so-called “social explosion” to a series of factors, such as, for example, the fact that the binominal electoral system was replaced by a proportional one, without touching the markedly presidentialist regime, thus generating a blockade that has made it virtually impossible to govern. But the decay has occurred, so to speak, within the framework of the very institutions that are decaying and that today require reform, abolition or renewal.

In this last sense, a democratic renewal is taking place. It is democracy itself that today is offering an opportunity to the Chilean people to correct the institutional problems that have resulted from this constitutional crisis. And this process of renewal deserves careful examination. Let me mention three aspects.

First, as has been said, after the demonstrations the political elite had no choice but to agree on a constituent roadmap. While millions were demonstrating in the streets, and renowned analysts insisted that looking at the Constitution was a “fetish” issue, the overwhelming vote in favour of the new Constitution indicated that this demand was not an expression of mere youthful subjectivity, but rather a widespread sentiment among the citizenry.

Second, the Chilean constitutional process is unprecedented in the world insofar that it is the first to ensure gender parity. Perhaps one of the mobilizations that has awakened the most interest in the citizenry has been the mass, peaceful, and convening women's marches. In the same way, it has been the demand for gender equality and the call for attention to male violence that has mobilized many women and, with it, forced them to take a position in the political process. It is not trivial that Time magazine named a Chilean art collective among the highlights of the year.

Third, a central question is how the process will calibrate the high expectations that citizens have of the results. Insistence that the problems in the area of social rights — health, education, and pensions — are constitutional problems has raised the risk of failing to meet expectations with the process of drafting the new Constitution. In this sense, it is not only the Constitution to which we should look, but the way in which the Congress and the constitutional practice that follows it are constituted. It is, as I have argued elsewhere, the “intent of the constituent” that perhaps matters more than the text itself: Chile’s constituent power will want a certain type of State and certain ways to organize the distribution of powers. On the issue of rights, the constituent power will seek a certain distribution of resources that should allow for the respect and effective protection of social rights to a population that has been articulated as consumers, rather than citizens.
A COVID-19 Constitution & its “Zoom-hall” meetings

One of the most interesting aspects of the process leading up to the plebiscite, which will undoubtedly continue, has to do with the restrictions imposed by the pandemic. On the one hand, the health crisis — which hit Chile very hard due to, among other factors, the cavalier attitude of its rulers — forced the end of the massive protests. This was significant: the constitutional temperature dropped, especially during the harsh winter months (May to September) when the pandemic struck with great force, taking away the colour and vibrancy which characterised the constitutional awakening until March. And, since there were no protests, neither were there massive violations of human rights, as was the norm during the months preceding the arrival of the coronavirus.

On the other hand, the pandemic generated an unprecedented degree of social — or, more precisely, constitutional — connection. As it became customary to have classes, conferences, and all kinds of gatherings via Zoom, there has been a real explosion of meetings between experts, non-experts and interested citizens. It was literally impossible to follow up on the number of events that were organized every day before the plebiscite. These truly “Zoom-hall” meetings have been connecting people who were in very distant places, which in a non-pandemic context would have been very difficult, if not impossible. In this sense, the health crisis has pushed Chileans to hold conversations as we had never had before: connecting with the demands and ideas of those who are united with others by the same interests - changing the constitution - but who had not necessarily participated in joint constituent deliberations. In this critical sense, Chile’s constituent process is marked by the pandemic - and as the crisis still unfolds, the constituent process is distinctively a COVID-19 one.
The Consequences of the Change of Political Positioning of the Brazilian Government on Facing the Covid-19 Pandemic: A Breakdown of Democracy

Tatiana CARDOSO SQUEFF & Lúcia SOUZA D’AQUINO

In 2016, Brazil saw significant changes in its government that indicated a change in its political positioning. Beginning in March, with the start of the impeachment process against former President Dilma Rousseff, which culminated in the rise of Michel Temer as head of the executive branch, several measures demonstrated these shifts. Among them is Constitutional Amendment (CA) no. 95, also called “CA of the expenditure ceiling”, which modified the Brazilian Constitution
to change the way in which government funds are transferred to several areas, such as health and education.

Even if it had a very relevant objective, in the Brazilian context, of avoiding the further growth of public debt in relation to the national GDP, this CA limits public expenditures and investments to the same amounts spent by the Federal Government in the previous year, adjusting only for inflation. Thus, primary expenditures, in areas such as health, social programs and education, will not be readjusted until 2036, while other expenditures such as the payment of public debt and electoral expenses, among others, are not covered by it.

As a result, the aforementioned CA ended up preventing an increase in spending in strategic primary areas, hampering the public budget. It thereby weakens and disrupts essential investment in the ongoing development of social policies perceived as essential for the reduction of regional and social inequalities in Brazil in accordance to what was predicted in the constitutional project inaugurated in 1988, with the approval of the current Constitution. According to the United Nations Special Rapporteur on extreme poverty and human rights, Philip Alston, these actions taken by the Brazilian government are deliberate retrogressive measures since they will not only limit the transfer and public investments in essential areas for the fulfillment of economic, social and cultural rights, but will also impact the poorest in society.

This way, it can be said that both the removal of President Rousseff and the approval of CA no. 95 are evidence of democratic decline since both actions have affected the most vulnerable members of society by forcing them back into an “invisibility mode” that previous governments had been working against — and succeeding. Before these maneuvers, Brazil had achieved a significant reduction in hunger, just as it had reduced poverty by over 60% and extreme poverty by over 75%. Higher education was expanded by over 60%, with access to disadvantaged groups also expanded. Investments in the Public Health Care System (called SUS, in the Portuguese acronym) were at the highest levels seen since Brazil’s transition to democracy in the 1980s. Moreover, “the increase in the level of employment, added to the increase in the minimum wage, were the main factors in improving the living conditions” of many Brazilians and reducing social inequality. These achievements are not, however, entirely exempt from (due) criticism, since some actions "increased consumption power, without looking at other urban tensions of contemporary Brazil" that also need to be addressed.

However, those acts were not seen as the low point of the democratic decline of the Brazilian State, since in 2018, the change of political position was further confirmed with the election of President Jair Bolsonaro. His political project, clearly identified with the extreme right, and his constant practice of reacting with jokes, lack of decorum and verbal aggression — even in situations of extreme seriousness or major crisis — has prompted strong pushback from the population, and has led both national and international organizations to criticize, and demand a change in his behavior. However, such measures have had no effect on the President.

Even worse, the cumulative impact of the changes made prior to Bolsonaro’s rise and the current Brazilian governmental policy in the battle against the COVID-19 pandemic has been cause for Brazil to be criticized worldwide, with the sitting President being denounced as the worst ruler in terms of response. In addition to the many occasions in which he called COVID-19 a “little flu”, advised against isolation and social distancing in order to contain the virus, recommended evidently ineffective medications against the disease without any scientific proof, minimized the death toll in the country, and instituted numerous changes in the command of the Ministry of Health in a short time (and during the pandemic!), there is ample evidence of his inability to deal with the novel coronavirus.
It should be noted that Brazil was aware of the pandemic and had time to prepare for its arrival. However, the lack of communication, transparency and coordination between the Federal Government, states, and municipalities with regard to how the scarce resources for health should be allocated, and which unit of the federation would be responsible for which contingency actions aggravated the impact of COVID-19 in the country.

The latest episode of this de-concentration of actions due to the inability of the Federal Government to duly point to the measures that should be taken or promoted in order to battle COVID-19 concerns the vaccines that are being developed worldwide: because of the ideological paradigm applied to the current foreign policy, Bolsonaro defends that the only vaccines that should be made available to the Brazilian population is the one produced by AstraZeneca/Oxford, excluding others even though they might be (scientifically proven) safe and effective, especially CoronaVac – not only because it is made in China by Sinovac, but also because it partnered with the Butantan Institute, which is a São Paulo-based lab maintained by the state whose governor, João Dória, is Bolsonaro’s political rival.

And the consequences of the measures adopted have been more immediate upon the most vulnerable who, in Brazil, are known to be distinguished by colour (mainly the afro-Brazilian) and address (who live in the favelas) and income (the poor). These are the people who are unable to stay in their homes in order to avoid contamination and who depend upon the SUS for medical treatment – a system that is at the limits of its operational capacity. Furthermore, unlike most countries in the world which faced a first wave of the disease and soon managed to reduce contagion, COVID-19 has maintained an upward curve of contagions since its arrival in Brazil and gives no indication of an impending decrease. Meanwhile, the Federal Government seems uninterested in addressing this vulnerable swathe of the population. The measures taken were mainly directed to “save the economy, instead of saving lives”, as the President himself has affirmed.

In view of the foregoing, the consequences of political positioning on the measures adopted to confront the COVID-19 pandemic in Brazil are a clear demonstration of the democratic decay Brazil has been facing for some time. And there are still more problems related to the pandemic and the CA to come. After all, with the "war budget" approved by the Brazilian Congress, Brazil is (legally) not respecting its budgetary limits. It is unlikely that the CA will be extended in 2021. And, with its end, more problems are envisioned since the pandemic, which, most probably, will not yet have come to an end, and the State will have limited funds to deploy in very sensitive areas hard hit by the pandemic, which will include education and social programs, in addition to health. If there were room for political debate (as is to be expected in a democracy), perhaps some positive prospective developments could be imagined, but this is not the case.

As a result, through this study, we can confirm the hypothesis that the limitations imposed by the aforementioned CA exacerbated inequalities in the country, and it has made it easier for the federal government to direct funds to areas that it considers to be a priority, which are not necessarily related to the reduction of social issues, as previously seen in the country. With this greater “directionism” of public funds to other areas, added to the entry of Bolsonaro in the Planalto Palace and COVID-19, reversing any problems prove to be even more difficult. And the de-concentration of political acts thus become a reality, attesting at the end the breakdown of Brazilian democracy.
From Hardball to Packing the Court: “PEC do Pyjama” and the Attempt to Attack the Brazilian Supreme Court

Katya KOZICKI & Rick PIANARO

A proposed amendment to the Brazilian constitution, which seeks to lower the retirement age of public employees, like justices of the Supreme Court, as will be argued, has the goal of weakening Brazilian democracy by threatening judicial independence.

In a relatively recent blog post published in 2015, Professor Diego Werneck Arguelhes stated that the “Bengal Proposal” (‘bengala’ in Portuguese meaning a cane or walking support; employed as an epithet for increasing the forced retirement age to older justices) transformed into Constitutional Amendment No. 88, while oblivious to any serious discussion about the Supreme Court, was the Amendment Proposal of disrespect to the Supreme Court.
More commonly known as the “Bengal Amendment”, amendment No. 88/2015 was presented as a proposal in 2003 by Senator Pedro Simon. It aimed to increase the age of compulsory retirement for all public servants in the country from 70 to 75 years. Its justification was the increase in life expectancy since the enactment of the 1988 Constitution and the resulting maintenance costs, over much longer periods, for the physical and mental care of these employees.

In 2005, the proposal was voted on, and approved, in the Federal Senate and sent to the House of Representatives where it lay dormant until 2015. At that time Congressman Eduardo Cunha, president of the House of Representatives, called a vote on the proposal.

Following the use of an expedited procedure, the final text of the amendment was put to a vote. In the end, the age of 70 was maintained as the rule, but a provision was also created to allow the possibility (of limited effectiveness, contingent on the issue of a supplementary law) of mandatory retirement at age 75. The amendment also modified the Transitory Constitutional Provisions Act (ADCT) to immediately raise the mandatory retirement age for members of the Supreme Court, the Superior Courts and the Court of Auditors.

It is true that analysis of the norm cannot be dissociated from analysis of the political context at the time, which is important for obtaining more refined conclusions about the institutional repercussions expected following its approval. President Dilma Rousseff's second term of office began in 2015. Rousseff was re-elected to the presidency by a narrow margin in a second round run-off and found a Congress far less receptive to her agenda. Add to this the deteriorating economic outlook and the conditions for a serious political crisis were satisfied.

Before accepting the request for impeachment that would culminate in Dilma's removal from office, the President of the House of Representatives, Deputy Eduardo Cunha, sought to limit the executive's powers through a hardball environment, or, as Rubens Glezer has translated and conceptualized well in soccer jargon, ‘constitutional catimba’. The author uses the term catimba to represent, in a language accessible to the Brazilian public’s collective imagination, the idea of "actions of public agents who seek advantages in the midst of relevant conflicts through expedients of questionable legitimacy, despite being clearly or plausibly legal." The Bengal Proposal is the result of a compromise between the executive and the legislature - which instrumentalized but did not directly involve the judiciary. Its tacit objective, as several actors noted at the time, was to avoid the appointments of members connected to Dilma to the higher courts and the Federal Audit Court.

Arguelhes, when analyzing the arguments used by parliamentarians who defended the amendment (i.e., the increase in life expectancy of the average Brazilian citizen, as well as the experience accumulated of the current justices) concluded that none of them could rationally justify the change.

First, the life expectancy of a justice cannot be compared to that of an ordinary citizen. Second, life expectancy should not be a metric to justify the increase in the compulsory requirement age which aims to renew the composition of the court.

Another criticism was made by Thomaz Pereira, who stressed the casuistry of the proposal in the National Congress. After all, it took more than 10 years after the proposal was approved in the Senate before the House of Representatives decided to consider it. In other words, the composition of the Federal Senate in 2015 was quite different from that which approved the bill in 2005 and could refuse it. The approval, however, had remained frozen in time until Eduardo Cunha, opportunistically, decided to unfreeze it.

In conclusion, insofar as the “Bengal Amendment” is concerned, it cannot be said that Eduardo Cunha's constitutional stance in undermining Dilma Rousseff around retirement in higher courts
was aimed at weakening, eliminating or co-opting the Supreme Court. This is because, despite the deliberate intention to challenge the government for circumstantial reasons, raising the retirement age of Supreme Court members is not tantamount to an actual attack on the court.

The “Pyjama Proposal” (an epithet employed for the forced retirement of the justices), paraphrasing Bruno Boghossian, is the proposal to revoke the Bengal Amendment. It was presented in October 2019 by Representative Bia Kicis (Social Liberal Party; PSL, deputy leader in the House of Representatives and member of the party that elected President Jair Bolsonaro. There is only one argument: the need to "oxygenate" the Supreme Court with an air of readiness. At the time, there was talk of the immediate retirement of Ricardo Lewandowski and Rosa Weber if Amendment 88 of 2015 was repealed, increasing from two to four the judicial appointments to be made during Bolsonaro’s term.

Moving from the Bengal Amendment to the Pyjama proposal, we leave Tushnet’s baseball field and Glezer’s soccer pitch to enter a boxing ring. It may seem absurd to contemplate that the immediate retirement of two Supreme Court justices would allow the President, who publicly challenges the Court, to appoint new members who are naturally better aligned with his ideology. It is not.

In Poland in 2017, in a scenario of burning authoritarianism, the Law and Justice Party passed legislation to lower the retirement age of members of higher courts. The members who had already passed the new retirement age were summarily retired and a provision allowed the President of the Republic to reappoint judges of retirement age. The European Court of Justice ordered the suspension of the law’s application and, before a final judgment was issued, all members immediately retired were reappointed.

Back to Brazil, it is patently clear that the Pyjama Proposal violates basic principles of the Constitution, such as the stability of constitutional rules and the principle of irremovability (security of tenure) and eternity (life-time tenure) of magistrates. It is not reasonable, a little more than four years after the enactment of a constitutional amendment changing the retirement age of public servants, to propose a new amendment revoking the former without offering serious and relevant arguments for this change. In addition, the constitutional principles of irremovability and eternity are intended to protect the independence of the judiciary, prohibiting its members’ removal or promotion without consent.

The proposal represents, quite obviously, an attempt by the President of the Republic and his allies to co-opt the Supreme Court. The mere consideration of such a proposal is reprehensible, as both a threat to constitutional stability and a clear violation of constitutional guarantees granted to members of the judiciary.

As in the Polish case, there is a deliberate intent in the proposal to effectively attack the judiciary. The intention is, clearly, to eliminate disaffection or even ‘create’ new vacancies. The Polish constitutional crisis offers valuable insights which can be applied to threats to democracy in Brazil, underscoring the risks but also opening the way toward some early reflection on possible ways to mitigate attempts to pack the Brazilian courts.

Revoking the Bengal Amendment with the Pyjama Proposal means treating the system of checks and balances of the constitution with the disdain of an autocrat who, instead of submitting to the rules imposed by constitutionalism, intends to bend them to his will, adapting the institutions to his desires, and sculpting the democracy that surrounds him.
Constitutional Hardball, in Mark Tushnet's definition, denotes a state of affairs in which government actors engage in conduct that challenges pre-established norms to exploit constitutional institutions. One example would be the Republicans' obstruction of Merrick Garland's appointment to the U.S. Supreme Court, which was held up for more than a year in the U.S. Senate, at the end of the Obama administration. Republican senators, in opposition, acted within the rules of Congress to frustrate the Democrats. The latter argued that the maneuver was inconsistent with constitutional purposes and it was within the legislature's duties to consider the president's nomination. The maneuver was successful and when President Trump took office Garland's nomination was replaced by that of Neil Gorsuch, thereby maintaining the Court's conservative majority. See: Mark Tushnet. Constitutional Hardball. 37 J. Marshall L. Rev. 523 (2004).

We would like to thank Professor Rubens Glezer for the debates with CCONS/UFPR and for making available his paper entitled "Catimba Constitucional: Cortes Constitucionais, Hardball e Crise".

Amendment proposal n. 159/2019 from the Chamber of Representatives. See: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2223878.


Members of the apex courts in Brazil can serve for life-time tenure until the mandatory age to retire.
Judicial Assertiveness in Times of Crisis: The Case of El Salvador

Monica CASTILLEJOS-ARAGÓN

Introduction

Even in democratic nations, the executive power narrows civil liberties in times of emergency, including personal mobility, the writ of habeas corpus, and limiting mechanisms to access justice systems. Literature on this field suggests that courts function poorly as guardian of liberty in times of crisis. To support the account of such weak behavior of courts during crisis, scholarly research has offered various persuasive reasons. Some argue that judges are part of the government and are likely to identify with the government’s interests during challenging times. Others note that assessing executive policies during an emergency is inherently difficult, particularly because judges’ information is often asymmetric in comparison to the Executive.

Other research claims that judges would be concerned that if they rule against the government on emergency policies, their credibility and legitimacy might be tested, and would, eventually, trigger the executive’s defiance of the court’s decision. Political science literature suggest that courts will only challenge powerful actors in defense of rights and rule of law principles if the formal political context allows them to act. However, as Hilbink observes, “something other than political fragmentation is needed to explain assertive judicial behavior.”
The recent behavior of the Constitutional Chamber of the Supreme Court in El Salvador (the Chamber) challenges those propositions and suggests a different account to understand and assess judicial behavior in times of emergency. President Nayib Bukele has governed with a parliamentary minority, and in permanent confrontation with the Legislative Assembly, and even with the Supreme Court. Despite such persistent hostility, Salvadorian justices have exercised their authority proving—as Hilbink suggests—that political fragmentation is neither necessary nor sufficient for them to assert their power and demonstrate judicial independence. Rather, political struggle has reinvigorated their institutional response vis-à-vis the controversial measures imposed to contain the COVID-19 spread. This article describes the novel reaction of the Chamber and how it has moved swiftly to address unique challenges to ensure that the judiciary remains operational during the pandemic.

Recent judicial developments offer a unique model for understanding the role of courts during emergencies. Like a beacon, in these uncertain times, the Chamber has cast its bright light for the executive and legislative powers to see and follow the meaning of the Constitution. With this insight in mind, this article explores broader questions about the conditions under which judges may be able to assert their power against political actors in emergency circumstances.

Post-Civil War Era, 1992

Following the historic Chapultepec Peace Accords in 1992, there has been a lingering perception in El Salvador that peace did not equal justice. The country’s post-civil war struggle to establish fully independent and credible institutions, capable of providing justice to all of its people, is well-documented. After the peace accords, human rights violations continued. The judiciary lacked independence and failed to investigate and try cases of serious human rights violations. Emergencies are not new in El Salvador; the outbreak of the civil war had also led to restrictions on civil liberties.

The notable resolution of the armed conflict (1979-1992) has been properly praised but the process of building the rule of law has remained a work in progress. An independent justice system is a necessary component of a democracy. But a justice system capable of protecting rights, remedying wrongs regardless of the power of those responsible, has never existed in El Salvador. The creation of the Constitutional Chamber, in 1983, represented a crucial step towards the consolidation of democracy in the country. Nevertheless, the idea of the Constitutional Chamber as a court to promote the consolidation of democracy presented a major challenge and, if achieved, a key progress for justices to build upon. In 2020, the Chamber became committed to function as a court for democracy.

Does Time Erase Memory?

On March 11, 2020 President Nayib Bukele defied El Salvador’s status as a constitutional democracy, causing an unprecedented crisis. Amidst the COVID-19 outbreak, President Bukele proposed a series of controversial decrees to limit the spread of the virus among the population. Since their adoption, President Bukele has embarked on an open-ended and seemingly Olympian confrontation with both the Legislative Assembly and the Constitutional Chamber over what he deems an internal power struggle among them, rather than a constitutional controversy. The Executive has issued over 87 administrative regulations, including decrees, accords, and ministerial resolutions imposing highly controversial policies that have affected the lives of thousands of Salvadorans. Three days after the WHO’s pandemic declaration, with no known cases in the country, the President took the extreme measure of announcing a collective quarantine—considered by many a de facto exception regime with serious implications for people’s rights and liberties.
At the outset, Bukele’s fast response was, in fact, praised by the international press, especially for the short-term positive impact of such restrictions vis-à-vis the number of cases reported in the country. Yet the content and scope of those decrees tell a different story. A de facto regime was institutionalized through Decree 594, which allegedly incorporated the “Temporary Restriction of Concrete Constitutional Rights Law to handle the Covid-19 pandemic” into the legal system. Even though the law did not formally declare the existence of an exception regime, in practice it restricted and violated rights and freedoms, including the freedom of movement and due process of law rights. Decree 594 was in effect for 60 days and, fifteen days after its expiration, its contents had been replicated in Decree 611, with slight variations. Decree 611 included the “Regulation for Isolation, Quarantine, Observation and Surveillance Law”, which officially established an exception regime in the country.

Also, under public health pretenses, Nayib Bukele used the military as public security agents and gave the police carte blanche to commit a series of human rights violations. Since then, hundreds of Salvadorans have been illegally arrested and detained in overcrowded quarantine centers (“centros de contención”) with proven unsanitary conditions. Citizens, who did not previously present any symptoms, tested positive after spending days in such illegal detention, all in clear violation of their due process rights. These measures have resulted in higher infection rates and the deaths of some detainees. People have been arrested for not wearing a mask—even though the country’s supply has run short—or for walking to grocery stores or pharmacies. Both the military and the police became “quasi-medical professionals” empowered to determine who was infected or not, without any scientific basis. Videos have circulated showing police officers beating elderly citizens for violating quarantine measures. Other videos have shown police officers forcing a group of men to walk in line down the street, with their hands on their heads, and shouting, “I don’t have to leave my house!”.

On April 2020, President Bukele, an avid user of social media, posted a series of shocking photos from a prison, displaying hundreds of gang members sitting on the ground, closely against each other, wearing only underwear and a few face masks. Rivals gang members have been relocated and commingled in overcrowded cells amid the pandemic. President Bukele ordered this measure after more than 20 people were killed in the country and his intelligence office suggested, without an official investigation, that the orders had come from jailed gang leaders. Bukele has built a rhetorical discourse that labels those opposing his measures to control the pandemic as “enemies” of the State. COVID-19 has presented the most viable excuse to exercise control over the other branches of government.

His actions have been compared to those implemented during the armed conflict. They have also unleashed fears concerning remilitarization of the country, as well as causing social distress at the possible return to the years of siege and human rights violations that profoundly marked the history of El Salvador. Police and military members have become, again, “pseudo” judges authorized to assess who is arrested and transferred to contention centers. President Bukele’s unfamiliarity with the history of his own country, has led him to obliterate years of negotiation and reforms to consolidate the rule of law in El Salvador. It seems that time has erased his memory.

Judicial Response

As described above, there are numerous reasons and much evidence to support the claim that courts perform poorly during emergencies, particularly during the current COVID-19 crisis. However, when assessing what role constitutional judges in El Salvador are playing in framing the options available to the executive power, we could, then, offer a less pessimistic account. Contrary to the conventional wisdom, the Constitutional Chamber of El Salvador has played a
major role in functioning as a guiding beacon to President Bukele’s executive actions. On June 8, 2020, the Chamber issued a landmark decision, *inconstitucionalidad 21-2020*, that struck down a legislative decree that had temporarily suspended fundamental rights and liberties aiming to control the pandemic.

Plaintiffs had filed various lawsuits challenging the constitutionality of Decree 594 and the Chamber admitted the cases. While the Court was still processing each lawsuit, the decree lost force and expired. To avoid judicial review, the Legislative Assembly issued Decree 611. This new decree officially established a collective quarantine order. The Chamber, however, circumvented this legislative tactic by using the “doctrine of the transfer of constitutional control” as a judicial remedy to review the content of the now expired Decree 594, in light of the language adopted in Decree 611. This doctrine prevents “fraud on the Constitution”. That is, it would preclude the legislator from repealing a normative body and transferring its content to a newly enacted body to avoid judicial review. The Chamber has previously held that such legislative practice is fraudulent.

Upon losing its validity, the Chamber examined whether the contents of Decree 611 were identical to the contents of the expired decree. The Chamber concluded that the two decrees were, in fact, alike. According to the legal system of El Salvador, the Legislative Assembly is the body responsible for issuing a state of emergency at the request of the President. The Legislative Assembly, nevertheless, needs to provide evidence that there is a major risk or danger—this is often supported by reports, including those issued by the health ministry. The Assembly takes those reports into account when making the declaration. Exceptionally, a state of emergency may be decreed by the President, but only when the Assembly is not able to hold sessions. If the President requests a declaration of the state of emergency, then the Legislative Assembly is responsible for holding a session to discuss the request.

The main effect of a state of emergency declaration is to empower the President to enact executive decrees to control a situation that, in normal circumstances, could only be regulated by a law passed by the Legislative Assembly. The Chamber held, among other issues, that a decree that declares a state of emergency can neither establish a collective quarantine measure nor restrict the right of mobility. The Chamber also reasoned that rights and liberties cannot be limited via legislative decree. Since the shelter-in-place policy is a collective measure that suspended the rights of all people, it was deemed unconstitutional. The Chamber struck down Decree 611 as unconstitutional, unleashing an aggressive reaction from President Bukele who attempted to defy the Court’s decision.

**Final Comments**

The Constitutional Chamber has played a visible incremental role in monitoring the Executive’s response to the pandemic, balancing both public health measures vis-à-vis fundamental rights. Since June 2020, the Chamber has vigorously asserted its role as constitutional judge and has played various guiding constitutional roles. It has utilized the writ of habeas corpus as the primary mechanism to question and strike down unconstitutional measures implemented by the Bukele administration. It has also promoted better access to justice, by relaxing procedural rules for people to challenge extreme measures to contain the pandemic and departed from formalistic procedures to expedite processing times of cases. Judges have utilized novel judicial remedies (auto de exhibición) and expanded the scope of constitutional interpretation to protect fundamental rights and liberties.
The Resurgence of the Notwithstanding Clause

Han-Ru ZHOU

1982 marks a watershed in the modern history of Canada. More than a century after Confederation (1867), the country formally severed its remaining legal ties with the United Kingdom by “patriating” its constitution and, on the same occasion, adopted its first constitutional bill of rights, the Canadian Charter of Rights and Freedoms. The negotiations between the federal government of Prime Minister Pierre Elliott Trudeau and the provincial governments leading to the 1982 constitutional reform had been mired in strife. The year before, the Supreme Court of Canada, in a landmark reference case, opined that the attempt to pass the reform package without a “substantial measure of provincial consent” would be contrary to convention, thus forcing the federal government to return to the bargaining table. Among some of the provinces’ main objections to the federal plan was the entrenchment of a charter that would constrain their legislative authority. Finally, it was during the ultimate federal-provincial negotiation round in November 1981 that all the parties, excluding Québec, agreed to the draft charter, provided that an override power – which would come to be known as the notwithstanding or non-obstante clause – was added.
The Use and Effects of the Override Power

The idea of an override power was not something new in 1982 as there was already such a power in the Canadian Bill of Rights 1960, which is a federal statute, and in some provincial rights instruments. In a constitutional charter, the presence of a notwithstanding clause is a contradictory element in that it is the antithesis of the constitutionalization of rights. Whereas the purpose of an entrenched charter of rights is to protect fundamental rights against potential abuses of power by the state, the notwithstanding clause authorizes the legislative body to override them. We do not know exactly how the Framers wanted the provision to be used, but some envisaged it as a safety valve, which would rarely be invoked, and only when the government would have the broad support of the population.

Section 33(1) of the Charter states as follows:

Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

This override power seems to be unique to Canada and does not have any real equivalent in other democracies. Although certain international human rights instruments contain a notwithstanding clause, they restrict its scope to emergency situations whereby the life of the nation is threatened (see Art. 4 of the International Covenant on Civil and Political Rights, Art. 15 of the European Convention on Human Rights). In the Canadian Charter, s. 33 does not entail such a restriction. Only s. 4 of the Charter, which fixes the maximum duration of the House of Commons and of the legislative assemblies, limits the possibility of infringing this guarantee and continuing the life of a legislative body beyond the five years provided for “[i]n time of real or apprehended war, invasion or insurrection.”

Section 33 only allows for the override of certain guaranteed rights and freedoms, namely fundamental freedoms (religion, expression, assembly, association), the right to life, liberty and security, equality rights and certain rights in the criminal process. The rights that are immune to any possible override are those that are deemed of particular political importance, either because they are essential for protecting the parliamentary system, such as democratic rights (ss. 3-5), or because they represent minimal or necessary conditions for the maintenance of national unity, such as mobility rights (s. 6) and language rights (ss. 16-23). Contrary to what the Supreme Court suggested, the decision to exempt certain rights from the application of s. 33 should not be seen as part of an effort to prioritize rights and freedoms that would be considered more sacred or inviolable. If this were so, inalienable rights, such as the right to life and the right to not be subjected to cruel or unusual treatment or punishment would have been exempted from the scope of the override power. The determination of the rights to which the Framers gave inviolable status is based on reasons that are specific to the Canadian federal context. In this regard, the Charter differs from the international instruments cited above that protect a “core group” of universal rights that are exempt from any override, even when the existence of the nation is endangered.

Section 33 requires a formal declaration in the overriding legislation that asserts paramountcy over the Charter right or freedom in question. The aim of this mechanism is believed to alert public opinion and to inform those who have, or may have, an input in the legislative process. In the landmark case of Ford v Québec (AG) (1988), the Supreme Court held that the purely formal nature of the clause makes it impossible to consider the merits of an act that invokes it. Once an act with an override provision has been duly passed, there is no more room for judicial review of the suitability or the justification of the statutory policy that gave rise to the use of the override.
Section 33(3) provides that an override declaration “shall cease to have effect five years after it comes into force”. This automatic loss of effect can be avoided by enacting a new declaration that will also be valid for another period of five years, thus mandating a periodic review of the override and, hopefully, sparking a public debate. The five-year period coincides with the maximum duration of a federal or provincial government’s term, and so gives citizens the opportunity to take the overriding of some of their constitutional rights into account in the voting booth.

Recent Developments

By and large, use of the notwithstanding clause has been rare. To date, only three provinces (Québec, Saskatchewan and Alberta) have enacted overrides. The federal government has never used it. Many explanations for this under-utilization have been offered, ranging from fear of political repercussions to the expression of deference to the courts. Several scholars have opined that the less the notwithstanding clause is used, the more difficult it will be for a government to justify its use. Some have even suggested the creation of a convention against its use. The notwithstanding clause seems more politically acceptable in Québec than in the rest of Canada. In the wake of the 1982 patriation without Québec’s consent, the province passed an omnibus-style law that incorporated into every Québec act a declaration according to which the act “shall operate notwithstanding the provisions of sections 2 and 7 to 15” of the Charter, an initiative that was ultimately upheld by the Supreme Court.

Resort to s. 33 has picked up again in recent years with four actual or contemplated uses of the notwithstanding clause. Two provinces saw their governments present an override bill for the first time. In 2018, in the middle of the municipal election campaign, the newly elected Conservative government of Ontario passed a law reducing the number of Toronto City wards and councillors by half. When the trial court invalidated the law on the grounds that it violated freedom of expression, the government countered by introducing a bill containing an override to be inserted into the invalidated statute. The government only withdrew the bill after the Court of Appeal decided to stay the trial court’s decision. The Court later rendered a 3-2 decision on the merits in favour of the government, which is now under appeal to the Supreme Court. In 2019, the New Brunswick government introduced a bill that would require all school-age children to provide proof of immunization for listed diseases. This initiative had been prompted by an outbreak of measles in a high school earlier that year. Faced with mounting pressure from anti-vaccination groups and parents threatening to challenge the bill if enacted, the minority government decided to insert an override, which it subsequently withdrew in an attempt to win over the support of the opposition parties. The last-minute concession proved insufficient as the bill was still narrowly defeated on third reading.

While Ontario and New Brunswick introduced override bills that were later withdrawn, two other recent uses of s. 33 – by provinces that had already enacted overrides – actually reached the stage of a law (although in one case, it has not come into force). The first override in over a decade was passed by the Legislature of Saskatchewan. In 2017, the Saskatchewan Court of Queen’s Bench ruled in Good Spirit School Division No. 204 that funding of non-Catholic students in Catholic public schools violated freedom of religion and equality rights, as no other religion received the same preferential treatment. As the ruling threatened the province’s school funding scheme and would impact thousands of students attending denominational schools, the government passed a law that inserted an override into the Education Act 1995. In the end, the override did not come into force as the Court of Appeal subsequently held that the 1995 Act was valid.
By far the most controversial recent use of s. 33 is Québec’s 2019 Act respecting the laicity of the State (also known as Bill 21), which prohibits public sector employees in a position of authority from wearing religious symbols while in the exercise of their functions. Of the four provincial override initiatives, the Québec bill is the only one that has come into force. The prohibition is not without reminding us of similar laws enacted in several European countries such as Belgium, France and Switzerland. Shortly after its enactment, the Laicity Act became the subject of a lawsuit. In Hak v Québec (2019), the Court of Appeal, in a 2-1 majority decision, dismissed the appellants’ application for a provisional stay of the ban on religious symbols (and the requirement that public sector employees exercise their functions with their face uncovered).

The recent resurgence of the notwithstanding clause may be interpreted as a symptom of deeper disagreements, or even polarization, over major social and political issues across the three branches of the government. 10 of the 36 provincial minority governments since Confederation were elected in the past 20 years. During that period, Québec had two of its three minority governments (2007, 2012), the third one dating back to 1878. At the federal level, the country is under its fourth minority government since 2004; before then, the previous one was in 1979-80. The increased divisiveness in the electorate parallels an increased divisiveness at the Supreme Court. From a 18% low in 2001, the proportion of split decisions has gone to a high of 58% in 2019. In fact, 2018 and 2019 have seen the highest number of split decisions since at least the turn of the century.

Canada is not immune from global social and political currents. It shares in many of the same major controversies and sources of social tension that exist in other democracies. These trends are visible in the four recent instances of actual or intended uses of the notwithstanding clause, which deal with the role of the State vis-à-vis religion, electoral reforms, and popular distrust in science. At the more theoretical level, the notwithstanding clause also exemplifies a perennial debate in democratic societies about the proper balance between the judicial and political branches of government. As the Québec Bill 21 case finally proceeds to be heard on the merits, it is the first Charter challenge involving the notwithstanding clause in more than 30 years. The end result in this latest round of the power struggle between the government and the judiciary has the potential to recast the longstanding role of Canadian courts as the self-appointed guardians of the Constitution and determine their real ability to act as a counter-majoritarian force in a constitutional democracy.

This blog post is partly based on a note from F. Chevrette and H. Marx, Canadian Constitutional Law: Fundamental Principles – Notes and Cases (by H.-R. Zhou, Thémis) (in print). With thanks to Audrey Labrecque for excellent research assistance.
Resort to the notwithstanding clause

Supreme Court split decisions

Minority governments

4

MIDDLE EAST & AFRICA: CONSTITUTIONALISM, CORRUPTION & COURTS
Introduction

What have the Arab regimes’ responses to the COVID-19 pandemic revealed about the future of democracy for their people? Is it promising and bright, or it is looming with fright?

Admittedly, one may find most literature about Arab democracy to be disheartening and distasteful. You come across academics who would take it to the extreme, arguing that the Arab world is ‘immune’ to democracy. Others, who have chosen to be less pessimistic, argue that Arab authoritarianism is so consolidated to the extent that it would be theoretically impossible to replace. The moderates amongst them hold the view that only with economic pressure from ‘developed’ countries, Arab regimes would opt for allowing weak-form democratic practices to take place; that is limited freedom of expression rather than none, for instance.

This is not surprising. Most Arab regimes are post-colonial entities established after the fall of the Ottoman Empire in 1922. In their early phases, these regimes were not chosen through fair
and transparent elections, but through installment by the colonizing power, such as most of the Arab Gulf regimes. This fact resulted in impactful changes on their system of governance, leading it to become distant from democracy, and forming a unique version of self-acclaimed constitutionalism in the Arab world. Understanding the characteristics of Arab constitutions would help us to see in which context does this pandemic reside, and what the past tells us about the future of democracy in such regimes.

The Characteristics of Arab Constitutionalism

It is widely held that Arab constitutions generally authorise their respective regimes through providing the executive with dominance over other powers, rather than limiting it through a system of checks and balances. Generally, most Arab constitutions were written after either declaring independence following the fall of the Ottoman empire, or after ousting former monarchies. In both circumstances, the attainment of constitutional values was grossly hindered by a desire to establish robust authoritarian regimes, as the new rulers wanted.

Constitutions in most Arab region states aimed to achieve three inter-twined goals. The first was a declaration of their independence through affirming national sovereignty. The content and timing of most Arab constitutions suggest that they were adopted to affirm the sovereignty of a new regime after revolutionary change in Arab republics or, more often, following independence after the end of monarchical rule. They were less concerned with seeking international approval for the legitimacy of their sovereignty, and placed greater emphasis on addressing their constituents, in the form of royal and presidential announcements, to establish constitutional legitimacy for their rule. This is critical, as the language of many Arab constitutions indicates that the internal audience are the target of such announcements, making the external audience secondary to it. The language used to communicate with the people has laid the foundation for insignificant restraints on executive powers.

The second aim was to represent political and ideological doctrines. This can be observed in the content of many Arab constitutions, especially those that were adopted after reputedly revolutionary changes, such as Nasser’s regime in Egypt. Such constitutions contained long preambles filled with statements that uphold the regime’s ideology, and uncertain provisions regarding the competences and relationships between state powers. For example, early Arab constitutions following the fall of the Ottoman empire generally attempted to reassert existing ideologies and practices, while monarchical constitutions restated the legitimacy of the royal family while avoiding the upholding of democratic principles and individual rights. Additionally, Arab republics usually have constitutions with garrulous assertions of unrealistic values, rendering it even harder to hold the executive power accountable to these values. In short, reinforcing the legitimacy of the regimes’ ideologies and political principles was sought by adopting constitutions that uphold such values.

The third aim of many of these constitutions is augmenting executive authorities. This is achieved by adopting constitutions that have significantly unrestricted executive competences, vague rights protection, the absence of rules to make the executive accountable to parliaments, and, most importantly, loopholes that allow rulers to escape their obligations under restrictive rules. By adopting such constitutions, Arab regimes can legitimise their executive powers and organise them without imposing effective restriction on their practice of such powers.

Those three aims represent the core characteristics of Arab constitutionalism. These constitutions display the will to establish legitimate, and mostly unrestricted executive powers as their purpose including by relying on the vagueness of constitutional provisions, especially those related to separation of powers and human rights. This vagueness allowed regimes to establish
rigid authoritarian systems that avoided limiting the authorities of the president and to restrict interpretations that might uphold individual rights against the regimes’ interests.

The importance of understanding these characteristics lies in their fundamental impact on the rationales underlying constitutional arrangements in the Arab region, particularly the responses that such regimes may show to states of emergency, similar to this very pandemic.

**Democracy in the Arab World after the Arab Spring**

In 2015, in a special collection of the Journal of Democracy, Tarek Masoud argued that: “[i]n the aftermath of the Arab Spring, democracy in the Arab world seems farther away today than at any point in the last 25 years, leaving one to conclude that the answer to the question posed in this special anniversary issue of the Journal —“Is Democracy in Decline?”—is, at least in the case of the Arab world, a resounding, even deafening, yes. If democracy is to ever arrive in the region, it will likely be through an evolutionary and elite-driven process.”

The International Institute for Democracy and Electoral Assistance (IDEA) highlighted in The Global State of Democracy 2019 report affirmed what Tarek has argued, stating that: “[t]he Middle East is the region in the world that suffers from the greatest democratic weakness. The democratic hopes brought about by the Arab Uprisings have dwindled and the region’s democratic performance has since worsened. Moreover, a number of countries in the Middle East (including Bahrain and Yemen) and North Africa (including Egypt and Libya) have suffered from deepening autocratisation”.

The Arab regimes’ responses to the pandemic made that ‘yes’ (by Tarek) even more deafening. In Iraq, Syria, Lebanon, Morocco, Jordan, Yemen, and Tunisia, curfews and lockdowns, along with other restrictions on movement, were in place. To give three detailed examples, in Algeria, the President said last March that the pandemic is “is a national and health security issue that concerns everyone”, in a statement to legitimise the restrains imposed on public freedom, particularly marches, “irrespective of their shape and declared purpose”. This prohibition put an end to the public protests that took place every Friday in the streets of Algiers since February 2019, but not an end to retrying political activists and jailing influential journalists. In Egypt, an expert on Democracy noted in recent report that: “[t]he military regime has used COVID-19 as an opportunity to further repress political activists, rights defenders, lawyers, journalists, and doctors, arresting dozens, denying them basic assistance in places of detention, and placing several on terrorist lists.”

In Palestine, the response has its own interesting character. The President, whose constitutional term has ended since 2009, and still running the West Bank under a state of emergency for the last thirteen years, issued a decree-by-law declaring a state of emergency (within the current state of emergency!) to face the pandemic. He claimed that this declaration is based on Article 101 of the Palestinian Basic Law, which entitles the President to declare such state of emergency when there is a threat caused by a natural disaster for a period of thirty days. To show how fragile a Basic Law can be, the second paragraph of that Article prevented extending that period except with the approval of at least two-thirds of the Parliament. However, the Parliament has been unconstitutionally suspended since 2007 by a presidential decree-by-law! Hence, the President waited for one day after the period of the first declaration of state of emergency has ended, then declared another state of emergency for another thirty days. Surprisingly, the Basic Law did not have a limit on how many times can the President declare such state, and the Basic Law itself was not ready for a scenario in which the Parliament itself is suspended for thirteen years by a presidential decree.
Given all of these developments, it is not surprising that the United Nations Development Programme (UNDP), summarising the impact of the pandemic on Arab democracy, affirmed, similar to what the following diagram shows, that: “[t]he pandemic has also magnified many decades-long challenges. These include violence and conflict; inequalities; unemployment; poverty; inadequate social safety nets; human rights concerns; insufficiently responsive institutions and governance systems; and an economic model that has not yet met the aspirations of all”.

**Conclusion**

Despite constitutional reform attempts in the Arab region following the Arab Spring, it is arguable that these reforms existed as mere theoretical principles, with significant lack of commitment in practice. The executive powers of many states in the Arab region have been able to control other state organs. Reviewing many Arab states’ responses to COVID-19 Pandemic reveals that respecting human rights, limiting exceptional powers of the executive, and deploying an efficient system of checks and balances are still far from becoming realities in many Arab states. Many of these states responded to the pandemic not only by declaring the state of emergency, but also through taking controversial measures that go beyond the scope of facing health threats, seeking even more restrictions on state organs for the interest of the regime. Such restrictions are arguably indicative of the unfortunate, inauspicious future of democracies in the Arab region.
It seems clear that not everything is ok with South Africa’s democracy but pointing out exactly what is wrong is much more difficult. A sweeping overview of the main ills besetting country might include: First, and maybe foremost, the country is a one party democracy and is beset by a number of the pathologies attendant to them – such as the blurring of the lines between party, in this case the ruling African National Congress (ANC), and the state, the lack of oversight of the executive by Parliament etc. The style of politics has also take a disconcerting turn with Jacob Zuma and Julius Malema in particular. Then there are the various intra-ANC battles which spill over into various abuses of the state. There is also rampant corruption and “state capture” which result in state resources being looted for various purposes on a huge scale. And these are just the structural issues facing the constitutional system.
From another perspective, however, much remains intact in South Africa. The Constitutional text remains untouched where it matters (with the limited potential exception of Section 25 on land expropriation), despite the ANC having had a sufficient majority to amend it. Many of the state institutions remain independent; especially importantly, the judiciary retains its independence throughout the legal system and there have been no efforts to capture either the higher or the lower courts. The media is considered to be independent. Political opposition parties are as lively as ever. And maybe most importantly, civil society is well-organized, active and able to bring a host of victorious legal challenges to odious government measures.

The Protection of State Information Bill (“Secrecy Bill” or “Bill”) sits in between these developments. The Bill seeks to replace the apartheid era Protection of Information Act, 1982 (“1982 Act”) with a new system for classifying, protecting and disseminating state information. The Secrecy Bill, as it has been nicknamed, is a necessary revision of the clearly unconstitutional 1982 Act but it has also been called the greatest threat to democracy in South Africa.

This threat operates on multiple levels. In the first place, there is the threat that excessive secrecy may bring to those who wish to hide their illicit activities. But the Secrecy Bill is especially dangerous in being one of very few institutional steps, albeit not the only one, towards the erosion of democratic governance in South Africa and thus threatening the systemic integrity of the constitutional scheme. The threat posed by the Bill is, then, not just what it could do to the transparency of government in South Africa, it is the way in which that abuse would be institutionalized.

On the bright side, the story of the Secrecy Bill also displays some perhaps surprising areas of resilience within the legislative process as during the debates on the Bill in the ad hoc committee, the Bill was improved. Secondly, the President did not sign the Bill into law and, in fact, most recently, the current President has sent the Bill back to the National Assembly over concerns of its constitutionality.

Background: The Constitution, Open Democracy and the Genesis of the Bill

For the genesis of the current secrecy Bill we need to look back as far back as 2007 at the first effort to replace the apartheid-era Protection of Information Act. The apartheid state was shrouded in secrecy, meticulously concealing records of the atrocities it was committing, whether these were committed at the time legally or illegally. The Secret Police, in particular, engaged extensively in torture and other human rights atrocities in its fight against what they perceived as a terrorist threat, keeping meticulous but secret records which were largely later destroyed before the end of apartheid.

But even beyond these gross violations of human rights, the apartheid state routinely made most decisions in secret without the potential scrutiny of the public.

The post-apartheid democratic constitutional dispensation sought to turn this system of secrecy and authority completely around by embracing a culture of justification, open democracy and the right to access of information. The enactment of the Promotion of Access to Information Act, 2000 (PAIA) creates a system giving access to information held by the state and private bodies. However, some parts of the old legislative scheme remain in place, including the Protection of State Information Act, 1982. There is a very broad consensus that that Act is overbroad and cumbersome, requiring the classification of large swathes of information, and also heightening the potential of abuse.

The Draft Bill and Parliamentary Debates

The first effort to replace the 1982 came with a Draft Bill that was tabled in Parliament in 2008. The 2008 Bill was heavily criticized by civil society, investigative journalists and a ministerial
review commission – for many of the same reasons as the 2010 Bill two years later such as the heavy minimum sentences for leaking information which made the Bill rather draconian – and it was withdrawn. The Bill was then redrafted somewhat and was returned to Parliament in 2010, where it ended up spending several years being debated in the ad hoc committee set up to debate it. In June 2020, the current President returned the Bill to Parliament over concerns of the Bill’s constitutionality.

The debates on the Bill in late July 2020 involved two days of hearings of about 15 civil society organizations and lengthy – sometimes cooperative, sometimes acrimonious – debates between opposition politicians and great a number of interventions by lawyers drafting new drafts working for the State Law Advisor (a time table and accounts of the debates are available here). Beginning with the public consultations, a great number of civil society organizations levelled a great number of criticisms against the various provisions of the Bill. To list the central ones: 1) the scope of application to commercial information, 2) the broad definitions of national interest and national security, 3) the overriding of PAIA, 4) the criminal offences contained in the Bill, 5) the high minimum sentences attached to offences and 6) the lack of a public interest defense to the criminal offenses in the Bill.

During the public submissions and ad hoc committee debates, these and many other topics were debated at length. On some of the clauses the government conceded that the provision could protect transparency better without compromising state security. For example, the concept of “national interest” as a basis of classification was removed entirely from the Bill after it was pointed out, by opposition politicians and civil society members that this made the Bill overbroad, capturing almost anything imaginable. The Minister responded with a rather bizarrely argued memo setting out the law that mostly resembled the freedom of expression case law of the European Court of Human Rights, without any reference to domestic constitutional law, but ultimately conceded that “national security” would be the organizing concept for Bill. What the definition of “national security” should be was then put off until the very end of the drafting process when the ANC forced through a relatively broad definition against the opposition’s narrower definitions.

Another important question was about harmonizing the Secrecy Bill with PAIA. This question was not apparent immediately but when it arose it took up almost a month of the committee’s time. The issue is that PAIA is intended to create a system of access to official records, which possibly clashes with the classification and de-classification scheme of the Secrecy Act. The debates consisted mostly of figuring out the issues, the question of which Act should prevail in the case of conflict, and how to streamline the process of releasing information. Ultimately, a solution was found which kept the access to information framework within PAIA and tailored the provisions of the Secrecy Bill to match that framework.

Finally, as regards the offences in the Bill and in particular the public interest defense, which was probably the most controversial issue in the public’s eye. The Bill contained a number of offences related to disclosing classified information and some long sentences, which were adjusted down during the debates, however the issue of whether a defendant could raise the public interest in the disclosure as a defense. The main argument in favor of such a defense was advanced repeatedly by both civil society and opposition MPs was the potential need of journalists to publish classified information and many examples of such events were presented over the course of the hearings.

The counter-arguments varied. One line of argument was that the law of the UK did not include a public interest defense. Another line was that the Bill included a mechanism for declassifying information which could be followed by anyone wishing to publish this information.
A third argument related to whether softer form of the defense could be adopted where information was already in the public domain and could then be published but this was also rejected.

The result of the debates was an improved Bill that many were nevertheless not satisfied with and civil society organized large demonstrations to protest against the remaining draconian features of the Bill, especially the public interest clause. There is some room, in my view, for optimism for the view that the debates are able to improve rights-protecting features of an Act of Parliament, even if the ANC can push a clearly flawed piece of legislation through the process.

The Presidential “Veto”

All in all, the result was a Bill that, in the words of one opposition MP, was “improved but still flawed”. The Bill was passed by the National Assembly, albeit with some drama as one ANC MP, Ben Turok, refused to vote in favor of it, defying the whip for the first time in the history of the ANC. The National Council of Provinces made some small modifications and ultimately the Bill ended up before the President for his signature.

After sending the Bill back to the NA for some minor corrections. Until this day, the President has not signed the Bill into law. This is highly unusual (Tongoane v. National Minister for Agriculture and Land Affairs and Others [2010] ZACC 10) being the only other example I can think of). While we have no official statement to back up this assumption it would seem that the President’s veto was motivated by the significant pressure by civil society and possibly coupled with the potential for a loss in the Constitutional Court. In this connection, then President Jacob Zuma had a relatively poor track record in the Constitutional Court and especially after his loss in the Glenister II case in 2011, in which the Court invalidated legislation affecting the independence of a key anti-corruption agency (the National Prosecuting Authority (NPA)) (Glenister v. President [2011] ZACC 6) seemed to believe that the Court was prejudiced against him.

In this sense, it must be noted with, not a small hint of irony, that the classification of state information remains governed by the 1982 Act. So, even if the President was acting out of respect for civil society or fear of the Constitutional Court, whatever nefarious purposes the Act could have been used for, the 1982 Act will certainly suffice.

So, What about Democratic Backsliding?

What does this picture tell us about democratic backsliding in South Africa? In the first place, it seems appropriate to consider the Secrecy Bill to be one of the few actual legal instruments that threaten to undermine the constitutional order. There are other ones, such as the reassignment of the specialized corruption fighting unit from the police service to the police, in order to exercise greater political control over it, referred to above (Glenister II). However, by and large most other sources of constitutional backsliding – such as corruption – tend to operate either within the existing legal framework or simply break it, sometimes with, but often without, impunity.

Secondly, the purpose of dismantling appears to be hiding corruption or other improper actions such as the use of the intelligence services for inappropriate purposes. Compared with leaders like Hungarian Prime Minister Viktor Orbán, who dismantle the constitution to stay in power – that is, to expand executive control over the state and also over other aspects of society – this is not what motivates capture of state institutions. This may well be because for now the ANC does not have much to fear by way of losing electoral dominance, so any efforts to undermine state institutions would be directed where it stands to lose, for example through criminal charges, by negative press reports or by a competing ANC faction gaining the upper hand.
This is also the reason the Secrecy Bill is so dangerous. It represents a step towards institutionalizing the pathologies of a dominant party democracy and giving them a legal façade through which to operate. And as we know from the Hungarian example in particular that a legal framework through which power is entrenched becomes very difficult to undo. For now, we are not yet there and the Bill remains a Bill and hopefully the upcoming revision by the National Assembly will set the Bill on a different course.
Unpacking the Normative Roles of Courts in Electoral Processes

Ugochukwu EZEH

Courts, pro-democracy activists, and other politico-constitutional actors in a range of African jurisdictions have sought – with varying degrees of success and failure – to invoke judicial power as a remedial mechanism against the onslaught of electoral malpractices and other patterns of democratic decline. This blogpost uses a series of vignettes from several African presidential election petitions to frame several discussion points, insights, and key questions on democratic decline and the role of municipal courts in the electoral processes of nascent democracies. The blogpost highlights three normative functions courts may fulfil in such contexts. Within the limits of judicial authority, courts may: invalidate electoral malpractices; facilitate the institutional empowerment of core democratic institutions (such as electoral commissions); and edify democratising polities by disseminating constitutional values and democratic norms.

Judicial Invalidation of Electoral Malpractices

Courts can exercise practical remedial functions by refusing to sanction irregularities and malpractices that compromise the integrity of the electoral process. In exceptional cases, this may entail judicial invalidation of sham elections. To discharge this normative function, courts may
need to evolve progressive interpretations of the prevalent ‘substantial effects’ doctrine applied in election petitions.

In basic terms, African courts confronted with the task of determining election petitions have grappled with tensions between qualitative and quantitative standards of validity under the overarching rubric of the substantial effects doctrine. Qualitative standards emphasise the substantive quality and credibility of the electoral process and insist on meaningful compliance with applicable constitutional and statutory frameworks. In contrast, the quantitative standard generally upholds a presumption of validity in favour of impugned elections unless petitioners establish that electoral irregularities have substantially affected the numerical results of an impugned election. Although the distinction between both standards of validity seems artificial, it has nonetheless served as a useful heuristic device in several election petitions.

The prevalent adjudicatory approach has been to treat both standards as a conjunctive two-pronged test although the quantitative standard has generally been regarded as the determining factor. As such, petitioners have been required to establish, first, that an impugned election was not conducted in accordance with relevant electoral rules and, second, that the non-compliance substantially affected the numerical election results.

In some variants of the substantial effects doctrine, encapsulated by the old Nigerian case of Awolowo v Shagari (1979) petitioners were required to further establish that they would have won the impugned election ‘but for’ substantial noncompliance with applicable electoral rules. Although the prevalent approach is not without its merits, it imposes onerous evidentiary burdens on petitioners in circumstances that often shield deficient and fraudulent elections from effective legal scrutiny.

**Insights From Recent Cases**

Within the limits of judicial authority, courts may draw inspiration from progressive adjudicatory approaches adopted in recent cases from Kenya and Malawi. In *Raila Odinga & Anor. v Independent Electoral and Boundaries Commission & Ors. (Presidential Petition No. 1 of 2017)*, the majority decision of Supreme Court of Kenya nullified the disputed August 2017 presidential elections for substantial non-compliance with the Constitution and applicable statutory frameworks.

The majority opinion in *Odinga* tempered the rigour of the substantial effects doctrine by decoupling the two standards of validity. On the disjunctive test applied by the Court, it was sufficient for the petitioner to establish that ‘the conduct of the election violated the principles in [the] Constitution’ and other applicable electoral laws - although the majority opinion held obiter that the noncompliance had, in any case, also affected the election results. With respect to its democratic legitimacy to determine the case, the Court stated that its judicial powers - 'including that of invalidating a presidential election' - were neither ‘self-given nor forcefully taken’ but flowed from the authority of the Kenyan Constitution.

In justifying its decision to order fresh presidential elections, the Court further emphasised its constitutional obligations to ensure that the democratic will of the Kenyan people was not subverted through elections conducted in sheer violation of the electoral principles enshrined in the constitutional text.

The example set in *Odinga* was recently followed in the celebrated case of *Peter Mutharika & Electoral Commission v Lazarus Chakwera & Saulos Chilima*, decided in May 2020. There the Malawian Supreme Court of Appeal declared that Peter Mutharika had not been duly elected as President of Malawi and affirmed the decision of the Constitutional Court to order fresh elections. The Court faulted previous adjudicatory approaches for emphasising the quantitative standard
and relegating concerns about the integrity of the electoral process. The Court reasoned that such quantitative conceptions of elections had unwittingly reinforced ‘increased electoral malpractices over the years’ resulting in ‘the focus being on maximizing the numbers [of votes] by whatever means, without complying with the law.’

Echoing the principle earlier enunciated in *Odinga*, the Court rejected the notion that a presidential election was a mere ‘event’ or a simple numerical exercise in vote counting. Such a notion, the Court reasoned, would not adequately address cases where the numerical results may have been affected by ‘inaccurate counting, intimidation, fraud or corruption’ and other forms of electoral malpractice. In the final analysis, the Court held that a sound adjudicatory approach would be to focus on the electoral process and evaluate its quality by reference to its substantive (non)compliance with applicable constitutional and statutory rules.

**Discussion Points And Key Questions**

As is well known, the Kenyan and Malawian courts faced political backlash in the aftermath of their assertive interventions into the volatile sphere of electoral politics. African judicial actors thus seem trapped within an adjudicatory dilemma: courts seriously undermine their legitimacy when they validate sham elections, yet they risk significant political backlash if they make assertive interventions in the electoral process. In what ways should African courts seek to resolve this dilemma? What accounts for differences in outcome in the jurisdictions - Kenya and Malawi provide an interesting contrast - where courts have chosen to intervene? What patterns of political backlash will judicial activism engender? What strategies of survival should courts adopt?

**Courts and Core Democratic Institutions – The Case of Electoral Management Bodies**

In response to patterns of democratic decline, courts can help open up juridical space for core democratic institutions, like electoral management bodies, to assert their independence with a view to strengthening the democratic process. As institutions vested with crucial functions of electoral administration, election management bodies are central to the consolidation of democratic governance and the development of credible electoral processes in transitional societies. Yet, as Omotola has rightly observed, the ‘weak institutionalization of core institutions in the governance of electoral processes’ militates against democratisation in such societies. The need to facilitate institutional empowerment of electoral management bodies thus assumes material significance.

Courts may strategically utilise opportunities presented by election petitions to uphold constitutional provisions guaranteeing the institutional independence of electoral bodies. Within the context of electoral dispute resolution, courts may also resolve complex legal issues; highlight defects in regulatory frameworks applicable to electoral bodies; and make recommendations for institutional reforms. Courts may also contribute to the institutional empowerment of electoral bodies by safeguarding their jurisdictional spheres from encroachment by other politico-constitutional actors.

**Discussion Points And Key Questions**

An important issue for further discussion would be to interrogate the extent to which courts have actually discharged these functions in the African electoral jurisprudence. How have courts defined their relationships with electoral management bodies? The facts of *Odinga* may provide some interesting points of departure. In the course of litigation, tensions arose between the Supreme Court and the Independent Electoral and Boundaries Commission (IEBC), when the latter failed to comply with court orders to grant independent experts access to its ICT logs and servers for the purpose of verifying the petitioners’ claims about a major breach of the IEBC’s IT system.
The Supreme Court famously decried the ‘contumacious disobedience’ of IEBC officials and made adverse inferences against the electoral body concerning the particular facts in issue.

Consider also an important issue which arose in Mutharika v Chakwera concerning the Malawi Electoral Commission’s establishment of Constituency Tally Centres (CTCs) in the absence of express statutory authorisation. From the facts of the case, stakeholders had designed the CTCs to transmit results to the National Tally Centre ‘in a bid to improve the conduct of the elections.’ Although the Supreme Court of Appeal conceded that the CTCs ‘were created to enhance operational efficiency’, the Court reasoned that they were nonetheless illegal. The Court framed the CTCs as a usurpation of legislative authority to alter the organisational structures of the Malawian electoral system and held that the functions performed by the CTCs were unlawful ‘as no effectual delegation could have been made to an illegal entity.’

Although this decision is defensible, there are good grounds for levelling alternative angles of critique beyond the Court’s legalistic framing of the issues. Do the CTCs raise interesting issues concerning rule adaptation—a significant feature of institutionalisation—on the part of the MEC? This point also maps on to other related lines of inquiry: how should courts define the margin of discretion available to electoral management bodies? In what ways has judicial resolution of electoral disputes facilitated and constrained the institutional development of African electoral management bodies?

The Edificatory Role of Courts: Disseminating Democratic Values

In several African jurisdictions, presidential election petitions have generated considerable public interest in circumstances that often propelled courts to the centre stage of national discourse. In Hakainde Hichilema v Edgar Chagwa Lungu (2016), the majority judgment of the Constitutional Court of Zambia controversially dismissed a petition brought by Hakainde Hichilema, a candidate in the 2016 presidential election, on the grounds that the prescribed timeline for hearing election petitions had lapsed. In the circumstances, the petitioners had been unable to conclude their arguments within the constitutionally stipulated 14-day period for hearing election petitions in the Constitutional Court.

In a trenchant dissenting judgment, Justice Munalula faulted the majority opinion for failing to adopt a purposive and holistic reading of the Zambian constitution. Justice Munalula reasoned that, in failing to decide the petition on the merits, the Court had missed an invaluable opportunity to edify the polity by affirming the cardinal principle of fair hearing enshrined in the constitution. ‘The issue of a presidential election petition’, she declared, ‘is too heavy for a mechanical response by the Court and a well reasoned decision would have helped to heal this nation.’

Disseminating Norms of Judicial Transparency

Beyond its nebulous aspects—it is unclear how judicial review would have healed the polity—Justice Munalula’s dictum nonetheless suggests that judicial resolution of electoral disputes may involve certain edificatory functions. In some jurisdictions, courts have strategically mobilised election petitions as platforms for disseminating constitutional norms and democratic values. In recent cases, courts have signalled the importance of norms of transparency by opening up the proceedings of presidential election petitions to the public. This was illustrated by the decision of Chief Justice Georgina Wood to permit live radio and television broadcasts of the proceedings of Ghana’s historic presidential election petition in 2013. The broadcast of judicial proceedings in Akufo-Addo & Ors v Mahama & Anor was unprecedented in Ghana at the time, and served to underscore the significance of normative principles of probity and accountability in the Ghanaian constitutional order.
In *Chamisa v Mnangagwa* (2018) the normative significance of judicial decisions to permit live streaming of courts proceedings was considered by the Constitutional Court of Zimbabwe in its recent judgment on the 2018 presidential election petition. In its extensive discussion of this issue, the Court reasoned that live streaming of court proceedings provided a valuable basis to foreground the rights to freedom of expression and access to information as well as other constitutional values such as transparency, accountability, justice, responsiveness, and public confidence in the judicial process. According to the Court, live broadcasts were further justified due to the constitutional importance of presidential election petitions which raise polycentric issues implicating the rights of all citizens to a credible electoral process.

**Discussion Points And Key Questions**

Taking the cases from Ghana and Zimbabwe as points of departure, is there an emerging norm of judicial transparency in the African electoral jurisprudence? What implications might this have for democratisation on the continent? What does this norm of transparency mean in challenging contexts that place serious constraints on the rule of law and judicial independence? If courts play edificatory roles in election petition cases, do they possess related obligations to render their decisions and proceedings in more intelligible forms? In what ways should they do so?
Executive Control Through Judicial Appointments in Turkey and Cameroon

Leighann SPENCER

A core principle of democracy and the rule of law is that of separation of powers. The executive, legislative, and judicial arms of the state must exist independently of one another in order to provide checks and balances and ward off consolidation of power. Yet in 2020, the separation of powers remains dubious in many countries. One hindrance to separation of powers is executive control of the judiciary. This is the case in Cameroon and Turkey, which will be examined here. By looking at the origins of executive control it can be shown how and why a judicial system becomes constrained by the ruling regime. An examination of the contemporary workings of the judiciary reveals the extent of the issue. This blog then proposes a solution based on an analysis of these two case studies.
Origins of Executive Interference into the Judiciary

Turkey

Although Turkey has a vexed history with regard to separation of powers, it is commonly agreed that overt meddling into the modern judiciary commenced in early 2014. In particular, there was interference into the First Chamber of High Council Judges and Prosecutors (HSYK), the Council responsible for the appointment and discipline of Turkish judges and prosecutors. An amendment was made to the HSYK legislation in February 2014. This gave the executive’s Minister of Justice powers to replace and reassign key members of the HSYK, which he made use of immediately. In April 2014, the Constitutional Court declared the amendment unconstitutional – however, this decision had no retroactive effect, and as a result the Minister of Justice’s changes remained in place.

A further amendment, made in June 2014, provided for Criminal Peace Judgeships (CPJs); courts that have exclusive authority over search warrants, seizures, appointments of trustees, disclaimer trials, pre-trial detention and release or continuation of detention. Appeals can only be heard by another CPJ, rendering it a closed-circuit system. The establishment of the CPJs is especially relevant as the majority of presiding judges are chosen by the HSYK and they hold enormous sway over criminal investigations and the detention of suspects.

To step back and evaluate the context in which these amendments were made, it is important to emphasise that interference into the HSYK was immediately preceded by the extremely high-profile December 2013 corruption probe that addressed the top echelons of the government. This saw the Istanbul Chief Prosecutor’s Office initiate an investigation against senior ministers and businessmen including then Prime Minister Erdoğan’s son. Although warrants were issued and some suspects arrested, investigations were never finalised. Prime Minister Erdoğan labelled it as “a coup attempt against his government” with the perpetrators being a “parallel state structure” comprised of members of the faith-based Gülen Movement. As discussed above, within months, executive interference into judicial appointments commenced, impacting judges involved in the corruption probe. The establishment of the CPJs was then said to be necessary to combat the Gülenist ‘parallel state’.

Furthermore, a literal coup-attempt was undertaken on 15th July 2016; the fifth coup since Turkey became a Republic. The 2016 attempt was also blamed on the Gülen Movement. Within 12 hours, five HSYK members were dismissed. In April 2017, the legislation was amended once more to change the composition of the HSYK. Its membership was halved to 13 people, six of whom are appointed directly by now President Erdoğan with the remaining seven appointed by Parliament. Given that the Justice and Development Party (AKP) holds the parliamentary majority and is led by the President, the President effectively has the authority to elect every member.

Cameroon

In Cameroon there is similar interference with the judiciary. That is, the appointment of judges is undertaken by the executive without safeguards such as an advisory body. However, rather than occurring via a middleman – like with Turkey’s HSYK – this mandate has been directly granted to the President. It is provided in Section 37(3) of the Constitution, which states that the President has the power to “appoint members of the [judicial] bench and for the legal department”. This has been the case since Cameroon’s independence in 1960, with President Biya appointing judges since taking power in 1982.

With that, it is worth delving into the pre-independence context. In 1884, Cameroon was colonised by Germany. In 1919, as a result of World War One, the country was partitioned between the United Kingdom and France. Subsequently, the two Cameroon colonies developed
separately: one taking on French language and customs, including the inquisitorial judicial system; the other taking on the English language and British customs, including the common law judicial system. Some 42 years later, not long after the two colonies became independent, the former Anglophone and Francophone colonies were unified as a Federation. By 1972, the Anglophone territory was absorbed within a United Republic and, by 1984, the word ‘United’ was scrapped. Since this time, the government has been dominated by Francophones, with repeated attempts at Anglophone assimilation resulting in their marginalisation.

The effects can be seen in recent years, with tensions escalating and exploding into what has been called the ‘Anglophone Crisis’ from October 2016 onwards. Militant secessionist groups have arisen in Anglophone areas and the Francophone-dominated government has undertaken an unrelenting crackdown. By 2020, it is estimated that more than 3,000 people have been killed and at least 700,000 displaced. The judicial system still remains under the direct control of the President – the executive – with consequences that will be examined in this blog.

Findings

The case studies of Turkey and Cameroon provide examples of executive interference into the judiciary via the mechanism of judicial appointments; the ability to stack the judiciary with loyalists, and to intimidate or punish dissenters. However, in Turkey there is a façade of independence in the form of the HSYK. Indeed, the primary recommendation for the maintenance of an independent and impartial judiciary is the existence of an expert council to undertake appointments and disciplinary measures. Yet, if the council is controlled by the executive, the system cannot be considered independent. That Turkey nonetheless involves a Council shows the history of liberal-democratic practice in the country, alongside the countries’ desire to appease Western observers (particularly given Turkey’s endeavours to join the European Union). In contrast, Cameroon, as an authoritarian country since 1960 and one with anti-colonial sentiment, uses a direct method of judicial appointment.

Examining the specific contexts surrounding the origins of judicial appointment mechanisms provides insight into why the executive may interfere with the judiciary. A strong contention advanced in the existing literature on judicial interference is that it occurs in the face of regime insecurity. In Turkey, the 2013 corruption probe compounded by the 2016 coup attempt have undoubtedly weakened the ruling AKP’s hold on power. Additionally, the 2013 incident showed the threat of ‘judicialization’: that the judiciary was willing to make controversial political decisions. This came despite earlier attempts to reform the courts in favour of the AKP. In Cameroon, it could be argued that tensions with the Anglophone regions and the history of colonisation have also created an insecure regime.

Further theories add weight to the Cameroon case. It has been suggested that leaders in weak state environments, where their legitimacy is questioned, will feel this insecurity on a personal level and, in response, interfere with the judiciary to uphold their rule. Moreover, this is especially likely in authoritarian African regimes where becoming an ‘ex-President’ is known to carry serious risks such as arrest, exile, or even death. Having examined the cases of Turkey and Cameroon to see how and why the executive may interfere with the judiciary, we can look at the concrete impacts of this interference.

Contemporary Judicial Workings

Turkey

The judicial system has been instrumental in Turkey’s post-coup crackdown. Since July 2016, over 100,000 people have been arrested. This includes journalists, teachers, human rights advocates, lawyers, and other civil servants. Over 500,000 people have been investigated through
proceedings instigated by the CPJs, which as discussed above, are stacked with HYSK appointees who were, in turn, appointed by the executive. Persecution occurs under allegations that targeted individuals support, or are members of, the Gülen Movement: the so-called parallel state. Moreover, recalcitrant judges are disciplined. At the time of writing, 4,463 judges and prosecutors have been dismissed from their jobs. Some have been detained. Others have been reassigned to different courts or regions to hinder cases, intimidate, or punish them.

In addition to issuing rulings against alleged Gülen Movement supporters, the regime-aligned courts have seized upon another constructed enemy of the state: suspected Kurdistan Worker’s Party (PKK) supporters. In other words, people of Kurdish ethnicity or anyone who exhibits sympathy for the Kurds. To the direct advantage to the ruling AKP, this includes opposition party members, and aligns with long-standing attempts to marginalise and assimilate the Kurds.

Cameroon
Because executive appointment of judges is a longstanding practice in Cameroon, the effects reach back to the country’s early years. This tendency can be highlighted, however, by an analysis of the period beginning with the Anglophone Crisis in 2016. As noted, the country is an amalgamation of Anglophone and Francophone colonies, which used two diverse judicial systems. Although the two systems remained in use post-independence, the Anglophone region has felt marginalised in this regard. For instance, there was no Common Law Bench at the Supreme Court, and common law principles have been gradually phased out of legislation. Furthermore, with regard to the subject matter of this blog, Anglophones have seen little representation when it comes to appointment of judges.

Given that the executive is dominated by Francophones, and the executive has the mandate to appoint judges, this trend makes sense – particularly if the executive seeks judges aligned to the regime’s will. In 2016, there were 1,542 active magistrates, of whom only 227 were English-speaking. Of the 1,265 French-speaking magistrates, some of those deployed to the Anglophone regions had a civil law background. However, some did not, and the language remained a barrier regardless. In fact, the marginalisation within the judicial system is what led to the original 2016 lawyers’ strikes from which the violent Anglophone Crisis developed. In 2017, as governmental measures to ease the crisis, a Common Law Bench at the Supreme Court was created, and new Anglophone magistrates were appointed. Nonetheless, this has been viewed as too little too late, and the crisis has escalated since.

In addition to this impact, the Cameroonian courts acting with executive interference have actively persecuted those alleged to be supportive of the Anglophone secession. This has included journalists and human rights advocates, and as in Turkey, has been used as a pretext to detain opposition members. Furthermore, state agents have been complicit in human rights abuses as the crisis has evolved – such as destruction of property, looting, sexual abuse, torture, and killing of civilians – and judges aligned to the regime offer little to no accountability. Dissenting judges face repercussions; for instance, in 2017 a Supreme Court Judge was arrested without a warrant for allegedly supporting the Anglophone campaign.

Findings
Through an examination of contemporary workings of the judiciary in Turkey and Cameroon, one can see the effects of a system that lacks independence from the executive. There are two main factors that emerge from the case studies. First, predictably, judicial appointments have led to courts operating in a manner aligned with the agenda of the sitting government. In Turkey, the submissive courts have presided over rulings that ensure any dissenters against the regime are
persecuted. At the same time, it has allowed crimes of ruling party members and their allies to go unaddressed. In Cameroon, executive sway over the courts’ composition has maintained the status quo and reinforced Francophone dominance, while shielding state agents from accountability.

The second factor is one that has received insufficient attention in studies of judicial politics: the persecution of minorities. The targeting of ‘dissenters’ in Turkey runs along ethnic and religious grounds. The majority of those prosecuted by the executive-appointed judges are targeted because they are alleged to be members of the Gülen Movement, or because they are Kurdish or are alleged to support the Kurdish cause. In Cameroon, the long-standing marginalisation of those from the Anglophone region has been exacerbated by executive control over judicial members, and this minority continues to be persecuted in the courts. Presently, in both countries, minority groups are tried under the guise of anti-terrorism. They receive little to no help nationally as they are either perceived as dangerous and deserving of conviction, or the self-risk of “assisting terrorists” is too high.

Recommendation

Due to these domestic barriers that thwart the protection of minorities and the upholding of the rule of law, this blog argues that reform will require outside intervention. Turkey and Cameroon are signatories to regional conventions and thus can have cases heard in regional courts, being the European Court of Human Rights and the African Court on Human and Peoples’ Rights respectively. The barrier to this route is that for cases to be tried in these courts, applicants must have previously exhausted all viable domestic remedies. That is, they must have passed through the domestic court system beforehand. This is problematic. There can be little hope for those deemed undesirable by the regimes of Turkey and Cameroon because the courts will likely rule in the regime’s favour. Although going through the system to this end would show the regional courts that the application is hearing-worthy, it is a timely and costly procedure which can ruin lives during the process.

With entrenched executive control via judicial appointments, the judiciaries of Turkey and Cameroon cannot be considered effective. This means that they should not be considered viable domestic avenues when it comes to applications to the European Court of Human Rights or the African Court on Human and People’s Rights. Designating them as unviable would be a good starting point to address the discussed impacts and could provide the much-needed pressure for judicial independence and thus democracy and the rule of law.
5

ASIA: NON-LINEAR CONSTITUTIONAL PATHWAYS
Two Steps Forward, One Step Back, Another Step Sideways?
Dissecting Narratives of Democracy in Nepal

Iain PAYNE & George VARUGHESE

In the aftermath of a decade-long conflict and five years after the promulgation of a new constitution, Nepal has had to grapple with many tenets of democratic governance amidst repeated human-induced and natural disruptions. The democratic project that began in the early 1990s remains a work in progress: democratic institutions exist, basic democratic practices like elections have taken place with routine efficiency, and federalisation has created new opportunities for more inclusive governance. However, the dividends of democracy like better representation of public interest, the participation of progressive political interest groups, and increased accountability of government continue to seem out of reach in the face of political party obdurancy and resistance to the devolution of power. Citizen efficacy (ie, individuals’ trust in their ability to affect political change) and civic engagement (ie, associational engagement with issues in the public realm) can be glimpsed but struggle to emerge from the deep shadows that development and humanitarian assistance cast over Nepal
Contemporary commentaries on Nepali democracy can be situated within three broad narratives: (i) incremental democratic consolidation notwithstanding occasional setbacks; (ii) democratic backsliding and creeping authoritarianism; and, (iii) unchanged and enduring patterns of kleptocratic patrimonialism. While there are clear points of convergence in the analysis of these narratives, they also sit in tension. Ultimately, the narratives lead to divergent diagnoses of the fundamental direction that democracy in Nepal is moving — whether democracy continues to consolidate (moving forwards), whether it is in decline (moving backwards), or whether movement in either direction is more significantly shaped by opportunistic groups of elites serving narrow self-interest (moving sideways). In what follows, we provide a brief overview of how each narrative is framed. In a concluding discussion, we draw attention to the complexity of Nepal’s democratic story.

**Two Steps Forwards, One Step Back**

The first narrative highlights Nepal’s gradual democratic gains over the last 70 years. Despite setbacks, this account observes how democracy has continued to muddle forward slowly, becoming more inclusive over time — ‘two steps forward, one step back’ — a story that comports well with the still-pervasive (but increasingly challenged) assumptions of ‘progress’ within the development and democracy-building fields.

Thus, while the democratic gains of Nepal’s 1990 regime transformation from absolute to constitutional monarchy were undermined by the outbreak of the Maoist People’s War (1996 – 2006) and the consequent expansion of royal power that culminated in the 2005 coup d’état, authoritarian monarchical rule was, once and for all, brought to an end through the 2006 mass protest movement. The alliance forged between the Maoists and the mainstream democratic parties through the 2006 movement also led to the establishment of an elected, constituent assembly — the most representative in the country’s history — to write a new constitution. While the first Constituent Assembly (2008 – 2012) failed to ratify a new constitution, a second Assembly (2013 – 2015) revived Nepal’s constitutional moment to promulgate the 2015 Constitution. And, while many minority communities continue to argue that this Constitution regresses from the 2007 Interim Constitution and thus fails to deliver on the promise of a ‘full democracy through a forward-looking restructuring of the state’, the much more inclusive polity that the Constitution frames vis-à-vis the pre-war constitutional settlement cannot be dismissed. Federalism, proportional representation, and quotas have expanded space for marginalised groups to participate in political processes; there is greater constitutional recognition of the country’s religious and ethnic diversity; and, an expanded list of 31 constitutionally guaranteed fundamental rights assures eventual redress of deep-set societal discrimination.

Most obviously, despite sporadic outbreaks of violence during the protests that accompanied the ratification of the new Constitution, the new constitutional settlement emphasizing inclusion has successfully averted the resumption of armed conflict. Going forward, it is generally agreed that embedding inclusion more substantively in the state-building enterprise will contribute towards a lasting peace. This means that the issues that remain — the inclusion of women in political decision-making, elite support for the devolution of power away from Kathmandu, and ensuring accountability of government — require serious engagement sooner rather than later. However, the glass-half-full perspective of this narrative frames these as the next frontiers to be overcome through the ongoing process of constitutional implementation.

**Creeping Authoritarianism**

A second narrative presents democratic backsliding as driven by creeping authoritarianism within the central Nepal Communist Party (NCP) government. Here, the near finalisation of the post-
conflict political settlement through the 2015 Constitution is taken as something of a high
watermark, with the subsequent faltering, subversive implementation of the Constitution viewed
as signs of democratic decline.

The narrative highlights the general subversion of the Constitution by the party in power,
the NCP. In particular, the narrative focuses on the party’s stubborn resistance to the sharing of
power beyond the political elite of Kathmandu. Despite the establishment of a three-tiered
federation, almost every new law passed by the federal parliament continues to concentrate
power in federal government actors in flagrant disregard of the constitutional requirements for
key government decision-making to be handed over to the provincial and local levels.

The narrative also points to the shrinking space for political dissent and the government’s
lack of commitment to ensure that constitutionalised rights are meaningfully affected through
legislation and regulation. In fact, in 2019, the NCP began advancing an agenda to stymie criticism
and constrain civic engagement. Indeed, the general environment has become increasingly hostile
for journalists and those critical of the NCP. The federal government has put forward a number of
bills that have the potential to curtail free expression. Vaguely worded language in the
Information Technology Management Bill, for example, would criminalise social media posts that
are deemed to contain ‘improper’ content. Given the increasing utilisation of imprecise provisions
in existing laws to detain and fine journalists and other prominent individuals, fears that the new
provisions will be used to restrict freedom of expression seem well-founded. There are also
corns regarding attempts to undermine the independence of the National Human Rights
Commission and moves to restrict the NGO sector. The lack of movement in appointing and
activating various constitutional commissions is further evidence of disregard for constitutional
safeguards over governmental impunity.

In many ways, this account represents a resurfacing of a narrative that presents the threat
of a creeping communist takeover of the state, a trope that is not new to Nepali political discourse
and one that proliferated during the Maoist insurgency. The main opposition party, Nepali
Congress, as well as independent analysts regularly point to the NCP’s ever-closer alignment with
Chinese state interests and the consolidation of power within the hands of a few NCP leaders
with the creeping construction of a one-party state along the lines of China. With elections only two
years away, this alignment presents a credible threat to the survival of democratic institutions in
Nepal.

Persisting Kleptocracy

The final narrative emphasises that democracy in Nepal has only ever been a thin veneer,
papering over an extractive patrimonialism that has shaped political order since the birth of the
Nepali state. The narrative thus stresses the historical continuity between regimes past and the
present constitutional regime.

Prior to the 1990 people’s movement for democracy, state power derived from the Shah
monarchy and was wielded by the king or, as under the Ranas, the autocratic prime minister, for
the benefit of the small ruling clique. Despite the democratisation of the state in the 1990s, the
king, albeit with reduced authority, remained the primary source of political legitimacy. However,
in this era, as political parties became embedded within the state, patronage networks began to
shift away from the palace to organise around individual party leaders. With the monarchy
abolished in 2006, the political parties became the unchallenged organising structures through
which patronage was dispensed, and amidst the fluidity of post-conflict transition politics, cross-
party collusion became an increasingly distinctive characteristic of the extraction and distribution
practices. Government at national and local levels became increasingly informal (and
undemocratic) in order to accommodate rent-seeking behaviour.
Over time, a small number of senior leaders within the major political parties gained a tight grip over the entire political system by using financial incentives to influence individuals. Despite the regularity with which governments have changed, this political party leadership has been incredibly stable. From the late 1990s, the same small circle of leaders has essentially held all of the positions of authority unchallenged. This is because they have managed to maintain tight control over resource extraction, monopolised the flow of intra-party finances, and forged close alliances with unaccountable individuals outside the formal state apparatus. Indeed, subordinate positions within the parties now come as the gift of the senior leaders who reap financial benefit from those paying to move up the kleptocratic network’s hierarchy.

Resource extraction pervades as a deep-rooted political culture. In many regards, little has changed since the Shah and Rana eras — the state remains a predatory institution in which the delivery of public goods and services is wholly subordinated to the appropriation of money and power for a small ruling clique and their clients. The poor performance of state institutions and their continuing incapability owes to an entrenched kleptocratic network that is only concerned with state institutions in so far as they provide access to resources or a convenient way to dispense patronage to their clients. Every state institution is tainted by the system of patronage — either hollowed out (i.e., captured to compromise its regulatory ability to prevent pilfering of state resources) or weaponized (i.e., deliberately corrupted to positively engage in resource extraction).

Democracy in Nepal: A Complex Story

While the three narratives sketched out above generally draw on the same factual foundations, their points of emphasis provide the basis for their differentiation. In particular, subtle differences regarding what each considers to be the primary time period for examination shapes their analyses. While the narrative of creeping authoritarianism locates itself within the most recent events and machinations of the NCP, the two steps forwards, one step back narrative focuses primarily on a comparison between the late 1990s conflict era and today. In contrast, the narrative of persistent kleptocracy searches for patterns of rent-seeking over the entire 250-year lifespan of the Nepali state.

These differences lead to divergent diagnoses of the fundamental direction in which Nepal’s democracy is moving. The most optimistic formulation, of ‘two steps forwards, one step back’, is the predominant frame engaged by development actors and progressive activists. This denotes the pattern, often presented as inexorable, whereby democratic progress is made, even if in a somewhat muddled way. The narratives of creeping authoritarianism and persistent kleptocracy, however, temper expectations by highlighting threats to democracy, threats that should not be viewed as mere speed bumps on the way to inevitable consolidation but, instead, as sure signs of danger.

Rather than trying to reconcile all of these competing narratives within a single, neat storyline, it may be useful to view them together in tension. Each narrative serves an important purpose, complicating our understanding of the state of democracy in Nepal. Such an approach allows us to recognise that the upward arc of Nepal’s trajectory of political reform — which was achieved by popular movements since 1990 — has been flattened by a personalized politics, organised around particular party leaders, and is being forced downward by society-wide networks of kleptocrats. Failure to understand and purposefully engage with these sophisticated networks will sap Nepal’s democratic momentum and, ultimately, threaten its early gains.
Political Change and the Decline and Survival of Constitutional Democracy in Malaysia and Indonesia

Dian A H SHAH

Background
The past two decades in the Southeast Asian region have been marked by significant political change and struggles to define, build, and maintain constitutional democracies. Countries like Indonesia, Myanmar, Thailand, the Philippines, and most recently, Malaysia, have all experienced periods of transition, transformation, and decline in constitutional democracy. In some of these countries, changes in political leadership and regimes were accompanied by promises of democratic transition and consolidation. Yet, events over the last few years or so have shown
otherwise. In Malaysia and Indonesia, in particular, ongoing political competition and struggles have triggered various assaults against, and corruption of, constitutional democracy. In October 2020, for instance, Malaysian Prime Minister Muhyiddin Yassin sought to declare a state of emergency (ostensibly to manage a spike in the number of COVID-19 cases) in order to halt political manoeuvers that could see him ousted through a vote of no-confidence. In Indonesia, in the space of eleven months, the Jokowi government passed the Omnibus Law and laws to curtail the powers of the Corruption Eradication Commission (KPK). The latter has raised concerns about the protection of human rights and the future of Indonesia’s decentralization. So, are these mere lapses in the journey of building a constitutional democracy? Or are they an indication that old habits really do die hard? This contribution illustrates that these constitutional assaults reflect struggles to preserve (or even expand) the sphere of authority of different political institutions, and they are all but mere democratic lapses.

**Political Change**

In May 1998, President Suharto resigned amidst mass protests and violence in Jakarta. All things considered, the fall of Suharto was unexpected, owing to his sheer power and control over the police, the military, and virtually all political institutions. Centralized authority radiated from the corridors of power in Jakarta, through a bureaucracy dominated by Suharto’s close associates, the Golkar party, and the military. The resignation ended more than three decades of authoritarianism and marked the beginning of Indonesia’s democratic reforms. The government quickly embarked on electoral reforms and, after the first free and fair elections in Indonesia in 1999, the new legislature passed laws to advance human rights protection, improve political participation, devolve authority to the districts, and scale back the role of the military in politics and civilian life. Subsequently, four sets of constitutional amendments were adopted, endowing Indonesia with the fundamentals for its democratic transition. Among the many amendments, the adoption of a comprehensive bill of rights, an arrangement for decentralization, and restrictions on the President’s law-making authority were particularly significant. The legal, constitutional, and political renovation in Indonesia was therefore gradual and incremental.

A similar tale emerged in Malaysia twenty years later, when the ruling Barisan Nasional (BN) political coalition was defeated for the first time since independence. As in Indonesia, the defeat of the BN coalition led by then-Prime Minister Najib Razak was unanticipated. Under Najib Razak, Malaysia had turned into a kleptocracy, (as did Indonesia during the Suharto regime), and the regime had become increasingly autocratic and personalistic. Against the backdrop of corruption scandals and a weakening economy, the Pakatan Harapan (PH) opposition coalition led by former Prime Minister Mahathir Mohamad took power in a democratic tsunami – a tsunami that ran counter to the wave of democratic backsliding globally. However, despite promises to reform institutions and restore the rule of law, it soon became clear that reforms would be difficult to achieve. In addition to the political infighting, which largely revolved around Mahathir’s relationship with the (promised) Prime Minister in-waiting Anwar Ibrahim, the PH coalition lacked the requisite two-thirds majority to embark upon constitutional change initiatives that were key to its overall reform agenda. These included the introduction of a two-term limit on the prime ministerial office, the pledge to “restore” the East Malaysian states of Sabah and Sarawak as equal partners in the Federation, and the lowering of the voting age to eighteen years. Bipartisan support (which has proven to be difficult, if not impossible, in Malaysia’s political history) led to the passing of the constitutional amendment on the voting age, but the amendment on the status of Sabah and Sarawak fell through as the PH government was short of ten votes. To some extent, this failure was embarrassing for the newly elected government.
Challenges against Constitutional Democracy

Paradoxically, as both Malaysia and Indonesia have navigated seemingly positive democratic political changes, each country has faced growing challenges or assaults against constitutional commitments for building and sustaining a democracy. These challenges – sometimes initiated by the very individuals who pledged democratic reforms or those tasked to perform checks and balances – have emerged in at least two forms. The first involves political battles between different branches of government. In 2018, the Indonesian legislature (DPR) quietly passed a legislation known as the “MD3 Law” (Law on Legislative Bodies) which was designed to shield lawmakers from criticism and render them immune from prosecution. The Law also, to some extent, cripples the KPK’s investigative powers because it requires investigators to “consult” the House Ethics Council before interrogating a lawmaker. In addition, the House Ethics Council is now empowered to take legal action against individuals or groups who tarnish the reputation of the DPR. Although the Law was supported by many parties in the legislature (including the President’s own party), it later transpired that the President was not consulted on these controversial provisions. The passing of the MD3 Law did not reflect the President’s anti-corruption reform agenda at the time. It also evinced significant dysfunctions both within the executive and between the executive and the legislature. This dysfunction is, of course, costly – not only did it blatantly defy Article 20 of the 1945 Constitution, which requires bills to be jointly approved by the President and the DPR before it could become law, it also allowed the legislature to consolidate its power in defiance democratic principles. On the back of public disapproval, the President refused to sign the Law, but as mandated by the 1945 Constitution, it nevertheless came into operation thirty days after its approval by the DPR.

Meanwhile in Malaysia, a different kind of battle emerged – one between the elected government and the constitutional monarchy. Within days of the election of the PH government, a potential constitutional crisis emerged as the Yang di-Pertuan Agong (the King) reportedly offered the prime ministerial post to the leader of the dominant party in the PH coalition – Wan Azizah Wan Ibrahim. This indicated royal disapproval of the candidate that the PH had put forward – Mahathir Mohamad – and the delay in swearing in the Prime Minister fuelled speculation of a standoff between the monarchy and the elected government. This must also be considered against the backdrop of Mahathir’s complicated history with Malaysia’s royal houses. In any case, this event raised questions about the King’s role in the appointment of the head of government, as set out in Article 43(2) of the Federal Constitution. The provision states that the King shall appoint a Prime Minister who “in his judgment” is likely to command the confidence of the majority of the members of the House of Representatives. The debate thus revolved around the question of how the King ought to exercise “judgment”, even though there are established constitutional conventions on the appointment of the Prime Minister. A serious constitutional crisis was averted when Mahathir was finally sworn in. However, months later, the government suffered another setback – this time involving the decision to ratify the Rome Statute and the International Convention on the Elimination of Racial Discrimination. Although foreign affairs fall within the purview of the executive, Malay-nationalist factions mobilized massive demonstrations objecting to the ratification of these international instruments on the (spurious) grounds that these would erode both the position of Islam as the state religion and the power of the traditional Malay rulers. This appeared to be the rhetoric publicly shared by a few members of the royal households, and subsequently the Conference of Rulers (a body comprising the traditional rulers or sultans in the nine Malay states) allegedly rejected the ratification of the Rome statute. Eventually, the government shelved the ratification on account of public confusion and to avoid the risk of a coup d’état by the ‘deep state’.
Another form of assault emerges from executive actions aimed at stifling legitimate democratic processes. In Indonesia, as Jokowi became increasingly conscious of political competition and challenges to his authority, he sought to quell (or at least to minimize) potential sources of dissent against him. This is reflected in the issuance of a government Regulation in Lieu of Law on mass organizations, which gives the government sweeping powers to dissolve organizations that are identified to have held, promoted, or disseminated concepts or teachings that are against the Pancasila (the national ideology). This is reminiscent of similar heavy-handed approaches utilized by Suharto. In addition, as the 2019 presidential elections drew closer, the government utilized a range of other laws (such as the Criminal Code and the Electronic Information and Transactions Law) to prosecute anti-Jokowi activists advocating a change in leadership. The irony is that unlike the MD3 Law in 2018, where the President and the legislature did not act in concert, the Law on Mass Organizations and, more recently, the Omnibus Law, showcased the ways in which cooperation between the President and the legislature could lead to perverse outcomes. By law, the Regulation issued by the President could be made permanent with the DPR’s approval. Indeed, within three months after Jokowi issued the Regulation, the DPR signed it into law, thereby chipping away at the mechanism of checks and balances between government branches and forging yet another tool for repression.

Malaysia has not escaped this pattern, as evinced through Prime Minister Muhyiddin Yassin’s attempt in October 2020 to declare a state of emergency to halt political processes. The crucial factor here is the weak position of the Prime Minister, who ascended to power through an internal coup within PH that had led to Mahathir’s departure. Muhyiddin had cobbled together support from surviving politicians from the BN regime that was voted out of power in 2018, but he only holds a four seat majority. Amidst plots for another coup (this time engineered by Anwar Ibrahim) and the potential loss of support in Parliament, along with surging COVID-19 cases, Muhyiddin advised the King to declare a state of emergency—ostensibly to ensure the political stability that would allow the government to handle the Covid-19 pandemic. The declaration would have halted ordinary democratic processes, suspending Parliament and postponing elections. It would also provide the government with a virtual *carte blanche* to pursue policies that impinge on fundamental liberties. As it turned out, the King—having consulted the Conference of Rulers—declined Muhyiddin’s advice. This represents the first time in Malaysia’s political history where the constitutional monarch officially rejects the advice of a Prime Minister.

To be sure, this is a precarious precedent to be set in the context of Malaysia’s Westminster parliamentary democracy. This issue is magnified by the revived authority of the monarchy embracing—as Harding notes—Eastminster ideas rather than Westminster constitutional conventions in the past decade or so. Yet, herein lies the paradox or, if you will, the constitutional conundrum: what could arguably be deemed a monarchical overreach has also “saved” democracy from the hands of unscrupulous political actors.

**Political Dynamics and Lessons**

Many countries undergoing political and democratic transitions may inevitably face teething problems. In Malaysia and Indonesia, political alliances have proven to be unstable, and entrenched institutional and political practices do not appear to have evolved along with structural reforms or democratic imperatives. Consider the Malaysian case again: there is reason to be wary of emergency declarations as they have been used to suppress fundamental rights and political dissent, and to facilitate government abuses of power. The last emergency declared in Malaysia was in 1969 in response to the May 13th racial riots, and it was only in 2011 that the declaration was officially lifted. During this period, the government grew accustomed to operating with scant checks on its exercise of power. Similarly, in Indonesia, despite impressive constitutional and institutional reforms since the fall of Suharto, constitutional democracy has
had to compete with engrained corruption, weak rule of law institutions, and the persistence of oligarchic politics. In 2014, President Jokowi was voted into power with promises of weeding out corruption, strengthening human rights, remedying past human rights abuses, and transforming Indonesian politics. What we have witnessed, however, is a weak President who has since formed alliances with the military, former military generals, and the political oligarchs in order to secure power. Viewed in this context, Indonesia’s ‘authoritarian turn’ seems unsurprising.

Having said that, I do not intend to suggest that democratic gains or advances have been completely absent in either Malaysia or Indonesia. In fact, there have been significant “surges”, for instance, through the strengthening of judicial institutions which has enhanced the role and power of the judiciary in curbing excesses of power. However, in order to better understand the decline and survival of constitutional democracy in these two countries – in particular, how constitutional assaults may emerge and how institutions respond to those assaults – it is important to pay attention to the prevailing (and changing) political dynamics and priorities.
Introduction

The year 2020 was supposed to be the year when Malaysia achieved its Vision 2020, launched 3 decades ago. Instead, Malaysians are battling a pandemic of unprecedented scale, along with political instability and economic uncertainty. Malaysians were already experiencing a very tough time. Nevertheless, the maintenance of the separation of powers is crucial to ensure that democracy, public order and public health are preserved in accordance with the rule of law. This blog post intends to document Malaysia’s experience in maintaining democracy and public order.
during the COVID-19 pandemic through the use of the Control and Prevention of Infectious Disease Act. The post is divided into three sections. First, a brief snapshot of the Malaysian political scenario is presented. The second section deals with how Malaysia is fighting the COVID-19 pandemic within its constitutional framework. The third and final section concludes with some brief thoughts on how Malaysia should move forward.

**Political Context**

The Pakatan Harapan (PH), or Coalition of Hope, won the Malaysian 14th General Election in May 2018. It was the first time the ruling coalition, the National Front (BN), lost a general election. After 22 months in power, PH lost its majority due to political maneuvering when one of the parties in its ruling coalition, BERSATU, left PH along with a few members of Parliament.

On 24 February 2020, Prime Minister Tun Mahathir—the seventh prime minister—resigned, causing the whole Pakatan Harapan Cabinet to collapse. According to the Malaysian Constitution, the Yang di-Pertuan Agong (YDPA), as the Head of the State, holds the discretionary power to appoint a Prime Minister subject to certain conditions. The candidate for the office of prime minister must be a member of the House of the Representatives who, in His Highness’s judgement, is likely to command the confidence of the majority of the members of the House.

The Yang di-Pertuan Agong (YDPA) invited all 222 Members of Parliament (MPs) to the Royal Palace over a period of two days. On 25 and 26 February 2020, the YDPA consulted with all 222 MPs to determine who among them was likely to command the confidence of the majority and should, therefore, become the eighth Prime Minister. On 28 February, His Royal Highness issued a statement that none of the MPs had the confidence of the majority of the Lower House and instructed party leaders to put forward their own candidate for Prime Minister.

Negotiations were held between the political parties to find the right candidate for Prime Minister. The political parties presented names to the YDPA and the Conference of Rulers was convened by His Highness for consultation. On 29 February 2020, Tan Sri Muhyiddin Yasin was named eighth Prime Minister of Malaysia and he was sworn in the following day. On 9 March 2020, Tan Sri Muhyiddin’s Cabinet members from Perikatan Nasional (PN), consisting of UMNO, PAS, BERSATU, GPS, PBS and STAR, were presented to the YDPA. With 114 seats, PN held a slim majority over the Pakatan Harapan’s (PH) 108 seats in Parliament. With the exit of BERSATU from PH, several state governments departed from PH and saw changes in political leadership.

Being a government with a slim majority amidst health and economic crises is not an easy feat. It was crucial that bills be passed in Parliament—especially those dealing with the aftereffects of Covid-19 in the economic and financial sector. The PN government managed to sail through two parliamentary sittings in June and July. However, after eight months in power, at the end of October 2020, the Prime Minister sought a declaration of a state of emergency in accordance with Article 150 of the Federal Constitution from the Yang di-Pertuan Agong. No reasons were provided to the public.

Speculation was rife that the reason for the proposal was the third wave of the COVID-19 outbreak that was causing an alarming rise of cases in Sabah and other states in Peninsular Malaysia. Another theory suggested it was to pre-empt the Batu Sapi by-election, which was due in a few weeks’ time and, thus, delay the Sarawak State general election that was set for 2021. There was also speculation that the proposal was made due to the assumption that the PH MPs would not support PN in the tabling of the budget which was due in early November.

His Royal Highness convened the Conference of Rulers for consultation and determined that the PN government was managing the fight against COVID-19 and that there was no need to
declare a state of emergency. His Highness advised the members of the parliament to support the tabling of the budget in the interest of citizens who were suffering economic hardship.

**Fighting the Pandemic within the Constitutional Framework**

The first Covid-19 case detected in Malaysia was on 24 January 2020 among a group of Chinese tourists. Cases climbed steadily throughout February, but with no deaths reported. Between 28 February and 1 March 2020, a large religious gathering involving members of the Tabligh group from all over Southeast Asia took place at a mosque in Kuala Lumpur. This gathering caused a rapid increase in the number of COVID-19 cases in Malaysia. By mid-March, COVID-19 cases in Malaysia reached one thousand with death cases being recorded daily and most cases being traced to this religious gathering.

The sources of the Malaysian federal government’s powers for the management of the COVID-19 pandemic can be found in the Ninth Schedule of the Malaysian Constitution. They are (1) Item 3, Federal List on Internal security which includes public order; (2) Item 14, Federal List on Medicine and Health; and (3) Item 7, Concurrent List on Public Health, Sanitation, and the Prevention of Diseases.

In relation to the maintenance of public order, the National Security Council (NSC) is the government agency entrusted with the national policy, management, and disaster aid. The NSC is granted a mandate under Directive No.20 to coordinate and execute appropriate actions during disasters, including pandemics. The NSC is governed by the National Security Council Act (Act 776).

In relation to health, the Ministry of Health is responsible for medical and health services including, among other things, hospitals, clinics, dispensaries, and the regulation of the medical profession. Operating in a federal system, the Ministry has health departments in all states in Malaysia.

The concurrent management of public health, sanitation, and disease prevention is complex because there is no clear formula to establish the legal demarcations between health and public health. With regards to infectious diseases, section 2 of the Control and Prevention of Infectious Disease Act 1988 (Act 342) defines ‘infectious disease’ as any disease specified in the First Schedule. There are 30 diseases listed in the Schedule, including such diseases as Avian influenza, malaria, and Ebola. On 9 June 2020, the Schedule was amended to include COVID-19.

In early March 2020, less than three weeks after Tan Sri Muhyiddin Yasin was sworn in as Prime Minister, he announced a total lockdown or Movement Control Order (MCO) to curb the spread of Coronavirus through-out Malaysia. The MCO was set for a period of two weeks from 18 March until 31 March 2020. The MCO was declared via Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020, a subsidiary law to Act 342, which declared all of the states in Malaysia as infected areas. The application of the Order was extended five times up to 9 June 2020.

The declaration of an infected area was made by virtue of Section 11(1) of Act 342 which states that if the Minister is satisfied that there is an outbreak of an infectious disease in any area in Malaysia, or that any area is threatened with an epidemic of any infectious disease, he may, by order in the Gazette, declare such area to be an infected local area. Consequently, under Section 11(2) of the same Act, the Minister may, by regulations made under the Act, prescribe the measures to be taken to control or prevent the spread of any infectious disease within or from an infected local area.
Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020, another subsidiary law to Act 342, was enacted, specifying the necessary measures that needed to be taken. The Regulations prohibits travelling within any infected local area except for official, commercial and health purposes; prohibits travelling from one infected local area to another infected area except with prior written permission of a police officer in charge of a police station and bans any form of gatherings. Essential service premises can operate while non-essential premise can only operate with special permission. Types of essential services are contained in the Schedule of the Regulations. Restaurants may open subject to conditions imposed by the Director General. Any contravention of any provisions of the Regulations is considered an offence which is liable to a fine not exceeding RM1,000 or to imprisonment for a term not exceeding 6 months or both.

Aside from the MCO, the Malaysian Government declared a Targeted/Enhanced Movement Control Order (TEMCO/EMCO) over certain areas with observed spikes in the number of COVID-19 cases. TEMCO/EMCO is done administratively and not via any legal declaration made under Act 342. All locals and visitors in the area are not allowed to go out of the area. Non-resident and outsiders are not allowed into the area. All businesses are closed. Food will be provided for the residents. All roads are closed. Police, Army, National Volunteers Department (RELA) and National Defense Team (APM) oversee the area.

At the end of August 2020, the Prime Minister announced the imposition across Malaysia of a Recovery Movement Control Order (RMCO) based on the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No.8) Regulations 2020, with effect from 1 September 2020 to 31 December 2020. The Schedule of the Regulation enumerates prohibited activities, including: sports events, tournaments and other events with large numbers of spectators in attendance, sport events and tournaments involving participants from overseas, activities at pubs and night clubs, and any and all activities where it would be difficult for people in attendance to respect social distancing and comply with the directions of the Director General.

Unfortunately, after the Sabah State Election at the end of September, there was a surge of COVID-19 cases especially in Sabah and Selangor. Thereafter, the Malaysian Government declared a Conditional Movement Control Order (CMCO) that was intended to strike a balance between saving lives and protecting livelihoods. The Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No.8) (Amendment) Regulations 2020 was employed to impose controls on movement within Sabah from 3 October 2020 to 16 October. It was later extended to Selangor, the Federal Territories of Kuala Lumpur, Putrajaya and, more recently, to specific areas in Johore and Negeri Sembilan. During the CMCO, most office workers are required to work from home with some exceptions for those who provide essential services. All education institutions and places of worship are closed. Only businesses can operate.

Conclusion

Daily press conferences are being held by the Senior Minister (security cluster) and by the Director General of the Ministry of Health to update the public on security and health issues. Consistent and clear communication have been essential in ensuring the public is aware of the precautionary steps to be taken in fight COVID-19. Despite some political tussles, Malaysian public servants—especially those serving in front line positions—have continued to serve the public. This is an important point in relation to the functioning of the separation of powers in Malaysia. The Malaysian government operated without any cabinet members for about two weeks while waiting for the appointment of a new prime minister and a new cabinet. The situation did not bring chaos because the public service continued to function and serve the people in the name of the Yang di-Pertuan Agong, as Head of State, rather than in the name of the prime minister.
In resolving the political deadlock of February and October, the current YDPA introduced a new way of settling matters of national importance: namely, by way of consultation with the Conference of Rulers. The outcome of these consultations between the Rulers was released in the form of a press statement. The decisions of the YDPA and the Conference of Rulers were welcomed by the public. This process has served as another form of checking and balancing government action in Malaysia.

Despite some calls for a general election in order to return the democratic mandate to the people, surveys of public opinion have shown that most Malaysians prefer to focus on the economy and adapting to the new normal. Moving forward, it would be wise for Malaysia to develop an improved framework for the management of concurrent powers, specifically in matters of public health. The war against COVID-19 demands teamwork. Cooperation between all stakeholders and the public is vital to ensure that this war will be won.
Two Ways in which the Judiciary can Undermine Constitutional Secularism

Darshan DATAR

Judges are shaping how governments interact with religious organisations and individuals. Judges across the world are constantly reinterpreting freedom of religion provisions and anti-establishment provisions in constitutions. The reason for this reinterpretation has been a recent rise in religiously motivated litigation. An increasing amount of litigation in democracies has specifically centred around religious freedom, discrimination, and the boundaries of anti-establishment clauses. Judges are reinterpreting freedom of religion and anti-establishment clauses in a way that allows governments to privilege the majority religion of a country, while correspondingly, singling out minority religious for targeted regulation.

Headscarf bans across Europe, a crackdown on Muslim family law in India and the vilification of religious minorities across the world are all well-documented instances of the crisis of religious freedom. Perhaps more perturbingly, certain countries are moving away from their established commitments to uphold constitutionally entrenched principles of secularism. Recent
developments in India, with the enactment of the Citizenship Amendment Act and the creation of the National Registry of Citizens, are perhaps the most visible examples of a secular state abandoning its commitment to foster religious tolerance, equality, and neutrality through a constitutional entrenchment of secularism. Critically, these trends demonstrate that liberal democracies are abandoning their commitments to democratic pluralism by vilifying religious minorities.

Through the course of this blog post, I will highlight two ways in which judges are complicit in the decay of freedom of religion and establishment clauses. I will argue that judges can privilege the majority religion of a country in two key ways: by either expanding the protection of freedom of religion provisions to accommodate requests made by religious citizens to opt out of general and neutral laws; or expanding neutrality requirements to the private sphere to overregulate minority religious identity. Starting with case law from the United States, I will demonstrate how judges are privileging practice of the majority faith of the country by allowing them to opt out of obligations created by general and neutral laws. Later, drawing on examples from France, I will demonstrate that judges are expanding secular commitments into the private sphere in order to regulate the private religious conduct of French citizens. Finally, I will conclude this post by demonstrating how the Indian legislature and executive are following a similar path to the French and American judiciary.

Miriymam Hunter-Henin recently demonstrated how liberal democracies, regardless of their specific state-church arrangement, generally ascribe to an inclusive form of secularism. Drawing on the work of Dieter Grimm, Professor Hunter-Henin argues that both England and France ascribe to an inclusive understanding of secularism. Hunter-Henin argues that “under an inclusive model of secularism, “secularism evolves into a [form of] positive constitutionalism under which religious freedoms are not only protected against state interference but also valued as a positive good, capable of enriching political debate and contributing to society.” Her core insight is that an inclusive model of secularism does not need to have a particular institutional church-state relationship. England has an established Church while France has a separationist model of secularism. However, both jurisdictions are, in principle, compatible with type three secularism due to their protection of religious freedom and the corresponding neutrality of the state towards religion in the institutional sphere. Professor Hunter-Henin warns, however, that both France and England are backsliding from their commitments and moving towards more exclusionary forms of secularism. I contend that liberal democracies stray from type three secularism in two ways. The first is by abandoning commitments towards neutrality by privileging one specific religion. The second is by expanding secularism clauses into the private sphere to single out one religion for unique treatment.

An example of the first way in which countries are moving away from type three secularism can be seen in the United States. Through an expansionary interpretation of the free exercise clause of the First Amendment, judges are privileging the majority faith of the country. The Religious Clauses of the First Amendment state that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...’. The religious clauses of the First Amendment guarantee freedom of religion to all citizens and further mandate that the government cannot establish or endorse a state religion. In the case of Reynolds v. United States (1879), which concerned a constitutional challenge to federal bigamy laws, the Court held that the historical persecution of religious minorities in the former colonies was the reason the founding fathers enacted the Religious Clauses of the First Amendment.

Additionally, in Reynolds, the Court ruled that the Free Exercise Clause of the First Amendment did not allow for opt-outs from generally applicable criminal statutes. This position was solidified in the case of Oregon v. Smith (1990). In this case, the Court held that “[t]o permit
for religious exemptions from general and neutral laws] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” This position clarified that citizens’ religious beliefs would not exempt them from being bound by norms created by general and neutral laws. In other words, this position clarified that general and neutral statutes, such as non-discrimination statutes, apply to all citizens regardless of their religious beliefs.

The Court has recently departed from this position. The most prominent example of this can be found in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018). In this case, the Court considered whether the refusal of a Colorado based bakery (Phillips) to bake a cake for a same-sex wedding was justified due to the religious beliefs of the claimant. The Colorado Anti-Discrimination Act prohibits businesses from discriminating, including on the basis of sexual orientation. The Colorado Civil Rights Commission held that Phillips’ conduct amounted to discrimination against sexual minorities. In reaching this decision, the Commissioner observed that “[f]reedom of religion and religion [referring to two conceptions of the freedom] has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the Holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.”

The Supreme Court was called upon to consider “[w]hether applying Colorado’s public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.” The Court held that the Colorado Civil Rights Commission’s actions in assessing the cakeshop owner’s reasons for declining to make a cake for a same-sex couple’s wedding celebration violated the Religious Clauses of the First Amendment. Placing special emphasis on the words used by the Commissioner, the Court observed that:

> The Commission’s treatment of [the] case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. In view of these factors, the record here demonstrates that the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs... The Commission’s hostility was inconsistent with the First Amendment’s guarantee that our laws be applied in a manner that is neutral toward religion.

Based on this assertion, the Court held that the Commission’s decision was hostile towards religion and therefore violated the Establishment Clause of the First Amendment. By interpreting the establishment clause so broadly, the Court effectively held that, in this case, a religious citizen could opt-out of an obligation created by a generally applicable discrimination statute. While the Court did not interpret the Free Exercise Clause of the First Amendment to hold that the Free Exercise Clause allowed for religious exemptions from general and neutral laws, they used a broad interpretation of the Establishment Clause to imply that such a right exists. This demonstrates that the Court could use a broad interpretation of the Establishment Clause to privilege the Christian faith.

The use of a broad interpretation of the First Amendment in order to extend exemptions from generally applicable statutes to religious citizens indicates that the Court has undermined the Establishment Clause. In allowing individuals from the state’s majority religion to opt out of neutral laws of general application, the Court is not protecting religious freedom; it is privileging religious beliefs of the majority faith. Protecting religious freedom would only require that the Court prevented the state from regulating religious freedom unless there was a compelling state interest in doing so. However, as demonstrated in the case of *Masterpiece Cake Shop*, the Court
is now privileging certain individuals to practice their religion, even if the burden of their belief is shifted onto non-religious citizens.

French *laïcité* emerges from the 1905 law on the separation of Church and State. Under article 1 of the 1905 Law, “The French Republic ensures freedom of conscience” and, under article 2, “The French Republic neither recognises or subsidises any cult”. This demonstrates that the 1905 law in France has two essential components. First, the Act protects French citizens’ freedom of religion, and second, it prevents the government from endorsing, promoting or establishing a state religion.

*Laïcité* was, therefore, compatible with both religious freedom as well as state neutrality towards religion in the political sphere. However, *laïcité* was inclusive of religious minorities and protected religious beliefs in the private sphere. Conversely, *laïcité* would prevent civil servants or government agents from wearing any religious symbols so as to protect the neutrality of the French State. *Laïcité* did not apply to private conduct and could not be used to justify the regulating of religious conduct of private citizens. Therefore, it is clear that *laïcité* is compatible with multiculturalism and religious pluralism in the private sphere.

The *Baby Loup* (2013) litigation in particular calls into question whether *laïcité* is still compatible with religious pluralism in the private sphere. In the case of *Baby Loup*, the French courts had to consider whether a woman employed by a day care facility could be dismissed on the grounds of her refusal to comply with an internal employment policy of religious neutrality. The Court of Cassation (*Cour de Cassation*) held that the private day care facility’s policy was legal for three reasons: first, it was a generally applicable policy; second, it applied only to a small number of people; and, lastly because childcare was at stake and therefore, the policy was successful.

The *Baby Loup* case extended the reach of *laïcité* to the private sphere and in doing so impacts upon the religious freedom of citizens in the private sphere. The expansion of *laïcité* beyond government agents and civil servants has been gradual. Writing about the Conseil d’État’s decisions to uphold the ban on headscarfs in public schools, Miriyam Hunter-Henin observes that “[b]y stretching the institutional sphere from state buildings and state agents to users of emblematic Republican sites, such as state school pupils, neutrality requirements, under a closed version of *laïcité*, would considerably increase in scope.” In the case of *Baby Loup*, the Court of Cassation further extended to scope of *laïcité* to include individuals employed by private companies. By expanding the scope of *laïcité* to this extent, the French courts have effectively undermined religious freedom by expanding the understanding of the separation of church and state to regulate the religious conduct of citizens in private. In doing so, *laïcité* ceases to be an inclusive form of secularism which preserves the neutrality of the state and protects religious freedom. Instead, it has moved towards becoming a militant form of secularism which radically polices religious conduct, even in the private sphere.

Finally, to conclude this blog post, it would be important to understand how similar trends have panned out in India. While, the decay of secularism in India is primarily driven by the legislative and executive branches, the trends in India are similar. In 2019, the Indian government enacted a law which amended the country’s citizenship law. In this Act, the Indian government amended the citizenship law of India to exclude named “minority communities,” specifically “Hindus, Sikhs, Buddhists, Jains, Parsis and Christians from Afghanistan, Bangladesh and Pakistan” from being considered illegal migrants. By implication, members of these enumerated groups would not be prevented from applying for Indian citizenship. In contrast, members of other faiths—namely Muslims from the listed countries—would be ineligible to apply for Indian citizenship in the same way.
The passage of this Act calls into question the secular character of the Indian Constitution. By singling out certain religions as beneficiaries of the amendment, the Indian government has created a hierarchy of citizens based on religious affiliation. As observed by Francesca Raimondo, “The Constituent Assembly opted for *jus soli* that was considered ‘enlightened, modern, civilized and democratic’ as opposed to the *jus sanguinis* that implied an idea of a ‘racial citizenship’. On the other hand, India has witnessed a progressive change from a secular citizenship law to a law that is based on religious identity which overtly disadvantages Muslims.” Raimondo’s succinct argument demonstrates that India’s move away from citizenship based on secular principles towards an ethno-religious conception of citizenship. This move calls into question the secular character of the Indian State.

The three jurisdictions of this study have been chosen as examples that demonstrate two major but different ways in which establishment clauses are being undermined. The first way is through the government or the judiciary facilitating one religion over other religions. In doing so, the burden of the intolerance of religious beliefs and practices towards minorities and non-religious citizens is being shifted onto non-religious citizens or religious minorities. The second way in which establishment clauses are being undermined is through the broad interpretation of secular obligations on citizens into the private sphere. In doing so, private citizens’ rights to religious freedom are being curtailed and, as a result, countries are moving away from being neutral towards religion and instituting militantly secular policies that radically police religious conduct in the private sphere, but which ultimately undermine secularism by privileging the majority faith.
Last year, Turkey’s President Recep Tayyip Erdoğan suffered the most significant electoral blow of his political career. Erdoğan’s Justice and Development Party (AKP) lost the political control of the municipalities of Turkey’s two biggest cities: Istanbul and Ankara (the capital). The race was very tight in Istanbul. The opposition candidate, Ekrem İmamoğlu, won the election by a tiny margin. However, the High Council of Elections annulled the elections, and in the re-run elections, İmamoğlu won very comfortably. This victory marked a very important loss for Erdoğan, not only electorally but also symbolically, because İmamoğlu has become a prominent figure in the Turkish political scene since he pulled a surprise win and became the mayor of Istanbul in 1994. The AKP defeat also weakened Erdoğan’s claim to be the people’s only true voice, as the opposition scored wins outside of its usual electoral strongholds. Less than a year later, COVID-19 hit Turkey and Istanbul became one of the hot spots. As COVID-19 experiences around the world have proved, a balanced mixture of local and national solutions is necessary to tackle the pandemic effectively.
Nevertheless, under Erdoğan’s rule, Turkey’s local democracy has been weakened and there has been a trend towards centralization. Of course, this trend is also in line with the contemporary populist mentality, promoting a unified and simplistic understanding of power and the people. At the same time, it highlights the opportunities that local democracy and subnational units might offer to uphold a pluralistic democracy. This post will illustrate how Turkey’s experience can offer insights into the importance of subnational units that might act as a brake on rising populism.

**Populism in the 21st Century**

Populism is indeed a polysemic concept. When we talk about populists, we can refer to the Narodniki in 19th century Russia, to Peron’s political movement in mid 20th century Argentina, or to Donald Trump today in the United States. Although there are objections and criticisms to the concept’s coherence, many political scientists make sense of this category by offering universal definitions of the concept. Amongst these definitions, Mudde and Kaltwasser’s definition stands out. They define populism as “a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘the pure people’ and ‘the corrupt elite,’ and which argues that politics should be an expression of the volonté générale (general will) of the people.”

By singling populism out as a thin-centered ideology, this definition acknowledges the possibility of the different shapes that populism can take in different contexts while maintaining a meaningful core. Thus, we need to determine how populism works today. On that point, Jan-Werner Müller’s account of populism in his book “What Is Populism?” is compelling. According to Müller, one distinctive feature of contemporary populism is anti-pluralism. This feature entails hostility towards anyone who does not belong to the ‘people’ in the populists’ perspective. In other words, there is an exclusionary form of identity politics that defines populism beyond simply being against a class of ‘elites’. This approach to populism is particularly relevant in the context of constitutional law because the anti-pluralist stance of populists heightens their interest in challenging the checks and balances that would constrain government when they come to power. They are inherently opposed to one of the main aims of constitutionalism: the limitation of power. Yet, their stance is not about destroying all institutions. Instead, they tend to capture them in order to consolidate their power.

**Attempts to Capture the Institutions of Local Democracy in Turkey**

The capture of courts by populists is a well-known and widely discussed method of weakening checks and balances in comparative constitutional law literature. Turkey’s current political climate strongly reflects these elements too. Instead of shutting down all of the institutions, Erdoğan captured them, starting with the judiciary using the simple technique of court-packing. However, last year’s municipal elections shed new light on the importance of local democracy in countering populists’ intention to capture the institutions. Especially during the re-run elections for the Istanbul mayorship, Erdoğan’s divisive populist rhetoric became even more visible. Erdoğan has always insisted on the importance of the “national will” as the real source of political power but once the electorate’s will turned away from his party, the anti-pluralist façade of his populism became more visible. He went as far as claiming that the opposition candidate İmamoğlu was the candidate of those with a terrorist mentality. The electorate’s response was quite telling: İmamoğlu’s margin of victory rose from 0.28 to 9 points.

To be clear, this is not Erdoğan’s first or only outburst against local democracy in Turkey. In 2016, 24 mayors who are members of the pro-Kurdish party, HDP, were removed from office at different times based on allegations of ties to terrorism and subsequently replaced by government-appointed trustees. During the 2019 local elections, the HDP was able to regain these seats in many of the municipalities ruled by these appointed trustees. Yet, after the elections, a
new series of investigations were launched against those mayors. As of September 2020, only seven of the HDP mayors elected in 2019 remain in their seats. The government has appointed trustees to replace 58 mayors.

These government actions show how populism took an authoritarian turn in Turkey. They also prove the government’s clear intention to capture any institution that they deem to be out of line with Erdoğan’s understanding of the people. But what happens when they fail to capture some of those institutions? The way Turkey has handled the COVID-19 pandemic offers insight in response to this question too.

**What did the COVID-19 Crisis Expose?**

The chaos that the pandemic created has revealed how unprepared most of the countries around the world were for a major health crisis. Turkey is not an exception. The country’s statute relating to the control of pandemics dates back to 1930, with only minor revisions made to this date. The government tried to act swiftly despite this challenging legal background, and in some cases did so with measures of questionable legality, such as the complete curfew for people over 65.

While these types of draconian measures can only be taken by the central government or the central government’s local representatives (i.e., governors), mayors also tried to use their authority to mitigate with the crisis. For his part, İmamoğlu launched a charity campaign seeking donations of money for those in need. He also called for more effective lockdowns instead of the partial lockdowns that were imposed only during the weekends.

**Erdoğan’s first response to İmamoğlu’s charity campaign was to launch his own campaign while condemning İmamoğlu’s campaign as an attempt to “create a state within the state.”** Later on, the Ministry of Interior issued a directive that explicitly banned İmamoğlu’s campaign along with the other campaigns launched by mayors from opposition parties. This ban was based on a mere technicality. While Municipality Act Section 15 (1) explicitly gives municipalities the authority to receive donations, Sections 6 and 7 of the Act on Collecting Charitable Donations make any donation campaign subject to the approval of the Ministry of Interior or the government representative in the region if the campaign is only regional. Section 31 of the Act on Collecting Charitable Donations states that provisions regarding “public institutions” in other relevant statutes shall be reserved. Nevertheless, the government claimed that donations and charitable donations are different and that the statutory provision on donations in the Municipality Act is inapplicable in this case because the term “public institutions” does not include municipalities. After banning these campaigns, the Minister of Interior also launched an investigation into the municipalities that started these campaigns.

As this reliance on the very detailed legal technicalities should make obvious, the government goes to great lengths to apply pressure on opposition municipalities. This tendency has continued during the current second wave of the pandemic with İmamoğlu not invited to the emergency meeting on taking the pandemic under control in Istanbul. It is quite telling that during a full-blown crisis, Erdoğan prefers to keep the mayor out, refusing to consult him. Even a basic consultative procedure is deemed unnecessary because the government’s sole concern is to avoid legitimating the mayor in the eyes of the public, even though a mere consultation could have facilitated a possible blame-shifting game in the future.

In addition, COVID-19 necessitates a balanced mixture of local and national responses. As the virus is transmitted in clusters, local action remains crucial. Because the severity of the situation might change from region to region, a decentralized response is necessary. In fact, this has been Canada’s approach in coping with the pandemic. Similarly, a study on Germany shows that a decentralised response to the pandemic can be effective when it is well-coordinated.
The complete exclusion of opposition mayors from the decision-making process does not, however, mean that the Turkish government completely ignored the importance of local involvement during the pandemic. Instead of including mayors in the discussion, the government relied on governors who are simply central government representatives and do not hold any electoral legitimacy. However, this move brings one of the main pillars of populism into question: its insistence on electoral legitimacy by focusing on the ‘will of the people.’ If the people’s will is the primary source of expression in politics, why do populists in Turkey try so hard to exclude the opposition mayors? Can this inconsistency provide useful insights in contemplating how to counter the rising trend of populism?

Considered Local Democracy Against Populism

As explained above, one of the main features of populism is its insistence that the ‘will of the people’ is the only source of legitimization in politics. This will is mainly concretized through electoral participation. At the same time, its division of society into two antagonistic camps— the people vs. elites—oversimplifies the diversity of the people. However, any attempts to protect this pluralism through the judiciary also suffers from a lack of electoral legitimacy.

Nevertheless, when institutional pluralism is strengthened through local democracy rather than the judiciary, the populists’ monopoly on the “electoral legitimacy” argument ends. The anti-pluralist vein within contemporary populism overrides its rhetoric of electoral legitimacy. As this anti-pluralist tendency gains strength, it exposes the incoherence of populists’ actions as against the rhetoric of populism. This incoherence, once exposed, tends to generate mistrust of populists among the electorate. Increased support for İmamoğlu in the re-run election shows that when the central government tries to intervene in local democratic processes, the backlash becomes stronger.

The attempts to undermine local democracy in Turkey also show that populists perceive local democracy as a threat. Indeed, it is a threat because it counterweighs their understanding of the people as a unitary entity instead of a plurality. This is precisely one of the main reasons to consider local democracy an essential pillar of liberal democracy and a bulwark against populism. After all, the debate comes down to the question of ensuring a divided government; in the sense of avoiding concentration of power. Instead of solely relying on the judiciary, a focus on local democracy opens up the possibility of a division of powers while still counting on popular legitimacy. This approach also allows us to partially re-orient the debate away from the usual dichotomy that pits popular sovereignty against the protection of rights.

Moreover, the focus on local democracy might tackle one of the core issues that contributes to the rise of populism and democratic decay: lack of trust in institutions. While the mere existence of local democracy does not necessarily ensure more effective citizen engagement, it is easier to increase participation in politics at the local level than on the national level. Greater citizen participation in local decision-making might, in the long run, increase levels of trust in democratic institutions, slowing the process of democratic decay and the rule of law.
6

EUROPE: CONSTITUTIONAL IMPATIENCE & UNCERTAINTY
Democratic Decay (and Renewal?) in Malta

John STANTON

Context

In October 2017, Maltese investigative journalist, Daphne Caruana Galizia, was murdered near to her home in Bidnija, Malta. At the time of her death, she was working on a number of investigations that alleged various levels of corruption in Malta. These focused, inter alia, on the sale of Maltese passports; on allegations of money laundering; and on revelations in the Panama Papers linking senior Government figures to shell companies in Panama; off-shore accounts often used to keep hidden wealth, facilitate money laundering and avoid taxation. Investigations and legal proceedings into those responsible for the killing are still ongoing, but focus has been on Yorgen Fenech, a prominent Maltese businessman, and his alleged links with figures within the Maltese Government. These include Keith Schembri, the chief of staff to former Prime Minister, Joseph Muscat. Fenech was charged in November 2019 for “complicity in the murder”; Schembri, whilst questioned, was released without charge, though he has subsequently been arrested in September 2020 for allegations that “he laundered a secret €100,000 cut on passport sales” back in 2016 and again in November 2020, along with former Cabinet Minister Konrad Mizzi. Various government figures, including Schembri and Muscat have resigned their posts. As investigations
continue, there are suggestions that Schembri, and other figures within the Government, are implicated in the scandal. Caruana Galizia’s investigations into corruption, however, as well as the circumstances surrounding her assassination, are indicative of a broader concern for the state of democracy in Malta and the strength of the rule of law on the archipelago. This post identifies these concerns as part of a broader trend of democratic decay.

**Democratic Decay**

Concern for the state of democracy is prominent across the world. The Institute for Democracy and Electoral Assistance reported in 2019 that 43 per cent of the world’s population live “in countries with democratic erosion”. This “erosion” is typically theorised through the notion of democratic decay. Defined as “the incremental degradation of the structures and substance of liberal (constitutional) democracy”, democratic decay is expressed in myriad concepts, each reflecting a particular form of decay, depending on the institutions and features affected, the broader political climate and the underlying governmental system. A defining feature of such decay, though, is that it is incremental and gradual. Rather than being a consequence of overt, sudden and violent rejection of democratic rule, it “is typically an aggregative process made up of many smaller increments ... many of ... [which] are ‘concealed under the mask of law’ ... Even though most or even all of the individual steps [towards decay] are taken within constitutional limits, in sum they lead to qualitative changes in the legal and political systems”. This is true in Malta as in many other countries. Though there are events that are indeed legally questionable, there are also factors that appear relatively innocuous, legal and constitutionally appropriate, but that nonetheless contribute to a pattern of democratic decay.

Concern for the state of democracy in Malta is not novel. The Economist Intelligence Unit’s annual Democracy Index downgraded Malta to a “flawed democracy” in Spring 2020, “slippage [that] is linked to the political crisis surrounding the assassination of Daphne Caruana Galizia”. What is more, “the actions of international actors ... [is] an additional signal that democratic decay is occurring”. This is significant with regards to Malta. Since 2017, the Council of Europe’s European Commission for Democracy through Law (’Venice Commission’) and institutions of the European Union have visited Malta to investigate the strength of democracy and the state of the rule of law. In subsequent speeches and reports, both have placed focus on allegations of corruption, the assassination of Caruana Galizia and the need for constitutional reform. Indeed, on the strength of proposals outlined by the Venice Commission in December 2018, reforms to certain features of the Maltese Constitution were introduced in July 2020. These are discussed below. For now, this post examines in more detail some of the factors that have contributed to democratic decay in Malta.

**Separation of Powers**

The Maltese system of government adheres to a weak separation of powers, in some respects akin to the UK system upon which it is based. Malta is a parliamentary democracy, though the small Parliament and the lack of an upper chamber mean opportunity for Government scrutiny within Parliament is limited, enabling “the Prime Minister to exercise greater power through enforcing party discipline on parliamentarians”. The concentration of Government power is ensured in other respects, too. Under the Constitution, the Prime Minister has historically had the power to appoint judges, magistrates, the Attorney General, and the Police Commissioner (albeit with formal appointment being made by the President). Though a Judicial Appointments Committee added balance to the process in 2016, discretion still lies with the Prime Minister who can “exercise his political patronage to appoint whomever he wants, with no proper evaluation by an independent committee”. Indeed, the Prime Minister has the power to overrule the Committee. Though the weak separation of authority is not of itself indicative of decay, the
potential for abuse raised by the concentration of power in the hands of the Government is problematic. In recent years, for example, those closely associated with the Prime Minister have been appointed to public office. In 2019, a magistrate was appointed by Prime Minister Muscat who was the daughter-in-law of “the government’s representative on the Commission for the Administration of Justice (CAJ) ... the Prime Minister’s personal lawyer ... [and] the Labour Party’s main legal advisor”. Another consequence of the weak separation of powers is that the Government has ostensible control over those ultimately responsible for prosecution. In Malta, “[t]he task of ... prosecution is ... split between the Police and the AG”, with the Police Commissioner and the Attorney General both historically appointed by the Prime Minister. That the legal advisor to the Government also has a prosecutorial function is also “problematic from the viewpoint of the principle of democratic checks and balances and the separation of powers”. The Attorney General might be faced with a difficult decision if Government figures become liable to prosecution and their decisions have historically not been subject to judicial review. This is particularly pertinent in the context of allegations of Government corruption and the assassination of Caruana Galizia.

Concerns for the separation of power, then, are relevant to the state of the Maltese democracy. It is notable, though, that in July 2020, and after severe criticism from the ‘Venice Commission’, a constitutional amendment was passed, removing the executive’s no role in the appointment of judges. A Judicial Appointments Committee, in which the judiciary has a majority of members, will propose three candidates, one of whom will then be chosen by the President according to his own deliberate judgment. The Chief Justice is now appointed by a Resolution supported by two thirds of all the members of Parliament. The strength of these reforms is discussed below. They potentially signify, though, an attempt to correct some of the problematic features of Malta’s constitutional system.

Anti-Corruption Mechanisms

“Deep corruption patterns have been unveiled [in Malta] and have raised a strong public demand for a significantly strengthened capacity to tackle corruption and wider rule of law reforms”. Prior to July 2020, however, mechanisms in place to tackle allegations of corruption were problematic, with the Government afforded a considerable role in the process. The Permanent Commission Against Corruption, for instance, created to investigate allegations of corruption, previously consisted of members who were appointed by the Prime Minister and it reported to the Minister of Justice. That key members within the Government could play such a crucial role in the work of the Commission potentially compromised efforts to investigate alleged corruption. This blurring of responsibility affected the public perception of corruption and the effectiveness of anti-corruption mechanisms. Substantiating this claim, “[a]ccording to the special Eurobarometer 470 on corruption published in December 2017 ... 79% [of Maltese respondents] see corruption as widespread in Malta”. Connected with concerns for the composition of the Permanent Commission Against Corruption is the reality that, in its 30 years in operation, it has been labelled as ineffective and as failing “to successfully execute its mandate”. These concerns are interesting when seen in the context of efforts to address aforementioned allegations of corruption in Malta where a “track record of securing convictions in high-level corruption cases is lacking ... [and] it remains unclear whether the relevant investigative processes have been initiated”. Allegations - and the perception - of corruption in Malta, combined with the problematic process designed to tackle it, present serious questions regarding the rule of law in Malta, particularly in the context of recent political events outlined above. In view of these questions, and following the aforementioned Venice Commission Report, the law has been amended so that the Chairman of the Permanent Commission Against Corruption is now appointed by a resolution supported by at
least two thirds of all members of Parliament. These reforms, discussed below, indicate a potential correction of Malta’s approach to anti-corruption.

**Free Speech and the Press**

Some of the factors contributing to democratic decay in Malta thus far examined stem from constitutional provisions that have been in place for years. Some have been open to abuse, others are criticised for the manner in which they concentrate power within a Government that is subject to weak institutional checks. Concern for these factors, though, has become particularly prominent in the aftermath of the assassination of Daphne Caruana Galizia. It is the assassination itself, though, that is the most significant contributory factor to the decay of democratic values in Malta.

The Constitution of Malta makes clear provision for free speech, including the freedom both of the press to publish information and of the people to receive such information. (Though there is concern that the Government might be said to control “the broadcast of news”). These values are central to any conception of free democracy and the rule of law so that “the uninhibited exercise of governmental power” can be appropriately constrained (Craig, 1997). In this context, the assassination of Daphne Caruana Galizia, amid her myriad investigations into alleged Government corruption, is a breach of established constitutional rights, an affront to the rule of law and a fundamental betrayal of the democratic principles upon which the Maltese system is based. It is in this way that Caruana Galizia’s death is seen as a stark indicator of democratic decay in Malta. “The assassination of the Maltese journalist was ... an attack on the freedom of the press in Europe given that Caruana Galizia was murdered for revealing scandals about members in the Government. A spokesperson said that the European Commission is working to make it safe for any journalist to work in Europe. He added that ‘if journalists are silenced, so is democracy’”.

**Constitutional Reforms and Democratic Renewal**

This post includes in its title the hope that Malta’s democracy is engaged in a process of renewal. This hope is founded on the reality that, in July 2020, constitutional reforms were introduced that saw an attempt at rebalancing certain powers within the Maltese constitutional order, as this post has already made clear. Significantly, the government can now no longer exercise discretion in the appointment of judges, with appointment now by the President on the advice of the Judicial Appointments Committee. Reforms also provide that the President of Malta will be appointed (and potentially removed) by a two-thirds majority of the House of Representatives, not a simple majority as was previously the case; and the Chief Justice, the Ombudsman and the Chairman of the Permanent Commission Against Corruption are now also appointed by a two-thirds majority. Furthermore, and crucially, where the Attorney General decides not to prosecute cases of suspected corruption, they can be subject to judicial review by *inter alia* the Permanent Commission Against Corruption.

These various reforms were a result of proposals offered by the Venice Commission in 2018 and they serve to limit Government power in the appointment of certain key figures and in anti-corruption processes. In this way, the reforms might be seen as a step towards democratic repair and renewal, demonstrating intention to reduce the power of the Government and to give greater credence to the rule of law and the value of democracy. The reforms, though, are not without their problems. The opinion of the Venice Commission was not sought before the reforms were enacted: “Malta’s active civil society was kept entirely in the dark”; even “most MPs had not even seen the final texts ... [before] they were told to vote for them”.

“Constitutional reform is ... an occasion of historical significance, with profound and lasting consequences for the whole country. High levels of transparency and public engagement are
required to ensure true ... democratic legitimacy and popular acceptance. Unfortunately, neither requirement has been met”.

What is more, Pieter Omtzigt - the Council of Europe’s rapporteur on the rule of law in Malta - voices concern that many of the Venice Commission’s proposals remain so far unadopted, making the process of reform “incomplete”. These include recommendations that the Attorney General be solely responsible for prosecutions; that Parliament’s ability to scrutinise the Government be strengthened and that the process of magisterial inquiry be streamlined.

**Concluding Remarks**

These concerns with what seem, at first glance, promising reforms, suggest that repair of Malta’s democracy is incomplete. Moreover, shortcomings in the Maltese system - both before and after the July 2020 reforms - mean that full investigation into alleged corruption is compromised and unfinished. “[U]ntil the criminal investigations reach credible conclusions and suspects are vigorously prosecuted, impunity will continue to reign in Malta”. Much has contributed to suggestions that Malta has endured a period of democratic decay in recent years and there are issues that this post has not been able to discuss, including the Constitutional Court’s tendency to defer to Parliament on questions of validity of laws. Attempt at reform is to be very much welcomed, but unless reforms address fully the system’s flaws, democratic renewal remains unattainable. There is hope, but more is needed.
Deceptive Democratisation: The Cracks in the Foundation of Democracy in Latvia and Lithuania

Beatrice MONCIUNSKAITE

How successful has democratisation been in Lithuania and Latvia three decades on from their declaration of independence from the Soviet Union? Although these countries have been praised for taking to democracy particularly well after Soviet collapse, clues of an incomplete transition to democracy have begun to show. Although Lithuania and Latvia have not been under the global spotlight for dismantling liberal democracy to the extent that Poland and Hungary have, can we be confident that this will continue? Both Lithuania and Latvia have a similar historical background to Poland and Hungary including being former communist states and being part of the 2004 European Union (EU) enlargement. However, there has been sparse research conducted on the health of democracy in Lithuania and Latvia.
This blog post will aim to identify several factors that threaten the democratic stability of both Lithuania and Latvia. Structural deficiencies in each country’s democratic system push them towards potential democratic backsliding by leaving institutional structures weak to populist power-grabs. With so many established democracies in the world succumbing to anti-system reforms, is the democratic future in Lithuania and Latvia as bright as many anticipate?

**Structural Democratic Deficiencies in Lithuania and Latvia**

The journey towards adopting liberal constitutional democracy in Lithuania and Latvia was motivated by the prospect of ‘re-joining’ Europe and rejecting the painful legacy of Soviet occupation. Importantly, acceding to the EU was also hoped to bring Western-style economic prosperity. The EU however, set out strict standards for accession in the Copenhagen Criteria that were intended to put new member states in line with the political ideology and economic infrastructure of existing member states. The transformation from socialist states to liberal constitutional democracies was a painstaking process which demanded many sacrifices domestically. Lithuania and Latvia along with other Central and Eastern European (CEE) countries like the Czech Republic, Estonia, Hungary and Poland, managed to become members of the EU in 2004.

However, there are concerns that the rush to transform into a democracy led to some weaknesses in democratic infrastructures not being properly addressed. These issues have now started to rise to the surface as made evident by the exponential growth of Euroscepticism, populism and anti-system sentiments in the CEE region in the past decade. These developments are worrying as they threaten the fundamental values of democracy, the rule of law and respect for human rights that the EU is built upon. Because older and well-established democracies built their democratic institutions from the ground up and through hundreds of years of trial and error, they are experienced and resilient to anti-system politics.

As Bojan Bugarič identifies, CEE countries are fragile due to their inexperience. The haste to enter the EU led to the implementation of the Copenhagen criteria in substance but not in spirit. This has resulted in frail national democratic infrastructures such as weak judiciaries, disillusioned civil society, and ineffective anti-corruption agencies. As a result, young democracies of the CEE region such as Latvia and Lithuania are left open to power-grabs. As we have learned from the experiences of Hungary and Poland, it only takes one determined authoritarian populist to reverse years of democratic progress.

**Systemic Corruption and Ineffective Anti-Corruption Agencies**

Dealing with pervasive corruption in both Lithuania and Latvia proved to be one of the most stubborn obstacles to EU accession. Despite significant progress, corruption remains a sprawling problem in both countries. Transparency International, a leading non-profit organisation that monitors corruption globally, has reported either worsening or relatively unchanging scores for both Lithuania and Latvia over the past five years. Although both countries made some critical strides to combat corruption during their accession efforts, this progress seemed to stagnate as soon as EU membership was achieved.

Although sophisticated anti-corruption laws and institutions were established in these countries, there was a resounding lack of enthusiasm on the part of governments to use them effectively. Therefore, it is no surprise that both Lithuania and Latvia suffer from extensive administrative and political corruption. Both countries have been rocked by high profile political scandals involving bribery of politicians and judges and general government ineffectiveness in fighting corruption.
Lithuania was shaken by one of the biggest political corruption scandals in the nation’s history in 2016. In spring of that year, the then party leader of the Liberal Movement (Lietuvos Respublikos Liberalų Sąjūdis; LRLS), Eligijus Masiulis, was caught up in a bribery scandal. A suspected bribe of €106,000 was found in his car which was allegedly given to him by the vice-president of MG Baltic, a large business group, in exchange for favourable political decisions. During the investigation of this case, it became clear that many other prominent politicians, including some from the Labour Party (Darbo Partija, DP), were also involved in this corruption network.

Lithuanian governments have also struggled to gain the initiative to address the issue of corruption for many years. The Peasant and Greens Union (Lietuvos Valstiečių ir Žaliųjų Sąjunga; LPGU), who were in power from 2016 to October 2020, have been accused of ineffectiveness in dealing with corruption. They have also come under fire for politicising and taking advantage of anti-corruption measures to hinder opposition members. Such claims came as LPGU leaders attempted to ban anyone who has been convicted of corruption from running in national elections for ten years. This has been criticised for being a thinly veiled attempt by the then ruling LPGU government to stifle the campaign of the Social Democratic Party (Socialdemokratų Partija; LSDP) whose leader has been convicted of inappropriate public procurement.

There have also been many reports of widespread corruption in Latvia with the most recent Eurobarometer survey on corruption in EU Member States indicating that 84% of Latvians believe that corruption is widespread. This figure is significantly higher than the average of other member states which stands at 71%. This figure has remained unchanged since the last survey in 2017, which indicates that there has been no progress in tackling corruption in Latvia. In 2019, the United States Department of the Treasury’s Office for Foreign Asset Control (OFAC) imposed sanctions against Aivars Lembergs and four other associates, under their ‘Magnitsky Law’. The OFAC accused Lembergs, a prominent Latvian oligarch and politician, of money laundering, bribery and abuse of power. This has proven to be another blow to Latvia’s global reputation as it struggles to manage money laundering networks that hinder foreign investment and economic development.

**Weak Judicial Independence**

Lithuania and Latvia have also both struggled to establish trustworthy independent courts. Although significant progress has been made in gaining judicial independence since the democratisation process began, a number of scandals and inefficiencies have stifled further growth. In 2019 reports of bribe-taking by judges of the Lithuanian Court of Appeal and Supreme Court shook the nation’s confidence in their judiciary. In a 2017 survey, 19% of Lithuanian judges and 18% of Latvian judges expressed that they have been affected by a threat of, or actual, disciplinary or other action as a result of deciding cases in a certain way. These figures were some of the highest in the EU, so it is no surprise that public confidence in their justice systems is low. In a study carried out by the European Commission, 39% of Latvian citizens rated the independence of their courts and judges as very bad or fairly bad, while 33% of Lithuanians said their country’s judicial independence was very bad or fairly bad.

**Disillusioned Civil Society**

With both countries’ populations continuing to fall due to persistently high levels of emigration amongst young people, civil society is weak in these two Baltic states. Latvia, in particular, is an ethnically divided country with over 25% of the population being comprised of Russian-speaking minorities. During the democratisation and Europeanisation process in the late 1990s and early 2000s, high levels of ethnic inequality in Latvia were contentious issues for the European Commission when accession deliberations were underway. Latvia struggled to reconcile the
ethnic divisions within its borders, which remains one of the most significant political issues in the country today.

During the liberalisation of Latvia’s language and citizenship laws, many from the Russian speaking minority felt let down by the EU not doing enough to secure their equality. This was laid to bare during the EU accession vote in Latvia in 2004. Although 67% of Latvian voters were in favour of EU membership, the reality was that 57% of Latvian speakers were in favour of EU membership. However, only 20% of the Russian speaking population supported EU accession. This would explain why trust in the EU in Latvia remains the lowest of all Baltic states, at only 49%.

The combination of ethnic division, lack of trustworthiness of democratic institutions and pervasive corruption have left the people of Lithuania and Latvia disillusioned with democracy. Both countries have displayed persistently low civic and political engagement with voter turnout rates some of the lowest amongst EU member states. Voter turnout for parliamentary elections in Lithuania has fallen from 53% in 2012 to 48% in the recent October 2020 elections. This is the second-worst voter turnout statistic in Lithuania’s modern democratic history. Latvia’s voter turnout rates are equally reflective of peoples waning political engagement having dropped from 65% to 55% in the last ten years.

**Conclusion**

Populism has been gaining traction with the Latvian public in recent years with many observers voicing concerns. The populist parties who received the largest percentage of votes in the 2018 parliamentary elections all took advantage of the country’s pervasive corruption and ethnic inequality to rally support for their anti-EU and anti-system campaigns. At the same time, the Lithuanian governing coalition of the past four years was accused of many attempted power-grabs and populist rhetoric. Although strong-willed populist parties similar to Fidesz or PiS have not yet captured these countries, the structural democratic deficiencies this blog has highlighted leaves the stage open for such parties to take hold.

It is vital that these issues within Lithuanian and Latvian democracy are addressed before they develop further. As we know from observations of Poland and Hungary, once an anti-system party entrenches their power, implementing remedies then might be too little too late.
Snap Elections in Illiberal Regimes: Confirming Trust or Establishing Hegemony?

Dorjana BOJANOVSKA POPOVSKA

While in Hungary and Poland the road towards illiberal democracy was paved with constitutional change, the case of North Macedonia shows us that unfortunately, there are other ways less detectable, yet equally successful in “achieving” similar results, one of which I claim are snap elections.

Snap elections are a litmus test revealing the peoples’ trust in government. At the right time, they are a tool for elevating majorities and/or perpetuating power. In illiberal regimes, unlike in democracies, electoral outcome is often not uncertain, or at least the level of uncertainty is significantly reduced. The right time is when there is not only expected but, (to a certain extent) pre-determined electoral victory—whether through electoral schemes like in Hungary, or by (ab)using parliamentary dissolution power as in North Macedonia.
Between 2006 and 2016 North Macedonia slid into a hybrid regime, a period coinciding with the rule of coalitions led by the center-right, populist VMRO-DPMNE (Internal Macedonian Revolutionary Organization – Democratic Party for Macedonian National Unity) party. In this period, five general elections were held. I argue that in addition to confirming trust following political failures and/or as a remedy to a nonfunctioning parliament, the snap elections had several additional purposes: 1) to reinforce the populist notion of electoral legitimacy as a basis for a narrative justifying violation of constitutional restraints; and 2) to perpetuate power, aiming to rearrange the composition of state institutions. Thereafter, I will elaborate on some of the means employed to ensure electoral victory and briefly assess the continuing practice of snap elections post-2016.

Constitutional Framework

The role of snap elections as a tool to perpetuate power must be understood within the Macedonian institutional setting - partly related to the specificities of parliamentary models *per se* and specifically the particular loose constitutional arrangement regarding dissolution power.

*The weakness of parliamentary regimes under stress.* North Macedonia has a parliamentary model of governance. The Assembly is composed of Representatives elected every 4 years through free and general elections. The leader of the coalition/political party that wins majority of seats in the Assembly receives a mandate from the President to form a Government. In practice, the Prime Minister is the president of the party who has won the majority, or the largest party within a coalition.

Unlike in presidential and mixed systems where term limits are set to curtail power, in parliamentary regimes there are no institutional solutions limiting the terms of prime ministers – if a party repeatedly wins elections, one prime minister can hold office in perpetuity. Landau has recently argued that this aspect of the constitutional design has proved problematic and under stress from illiberal, populist governments, *personalist* in nature.

*Absolute dissolution power.* Article 63 of the Constitution allows the Assembly to vote on its dissolution and therefore for snap elections to be called. The Assembly enjoys absolute discretion – the article does not determine the circumstances in which snap elections *can* be proposed, nor specific time-limits. Thus, in regards to dissolution power, the Macedonian institutional structure is as “parliamentary” as the Westminster model was until the Fixed Terms Parliament Act 2011; positioning the Assembly as a central body in the constitutional system, as it does not give the government (executive) the power to dissolve the Assembly but, it gives the Assembly the power to take a vote of no-confidence in the Government (Article 93).

The Role of Snap Elections

The role of dissolution power is to confirm peoples’ trust in the government (e.g. in the aftermath or in anticipation of, decisions or events of historic importance) or to save the country from a weak or nonfunctioning government or parliament (with weak, unstable majorities resulting in ineffectiveness of the legislative process). Certainly, in the case of N. Macedonia such factors were employed as justifications for calling snap elections (e.g. weak governing coalitions, failures and mishaps on the road towards the country’s Euro-Atlantic membership (2008), a boycotted Assembly (2011)). I nevertheless argue that we should consider that snap elections in illiberal regimes *can* have other additional functions.

*Narratives.* Much has been written about the relationship between populism and illiberal regimes, and populist government’s intimate and distorted relationship with elections. Elections in illiberal regimes do not produce results from healthy political competition; rather, they serve the purpose of confirming results or majorities; as the will of the majority is operationalized as a
justification for actions against the rule of law and other values of the liberal state. As such the illiberal state is democratic (at least in narrow sense - there are multiple parties and elections) but, it lacks constitutionalism. This corresponds to the Macedonian context.

In the narratives of VMRO-DPMNE (especially in those of Nikola Gruevski who served as a leader of the party and as Prime Minister) the role of ‘the people’ (equivalent to the electoral majority) is grand: they are “the final instance that makes any form of moral, legal or political judgment... an arbiter in a legal dispute”; they decide if accusations made by the opposition regarding constitutional violations are true, if criticism by non-governmental organizations (NGOs) and the international community regarding the state of democracy has any merit, and if corruption exists. It is not the task of impartial institutions to investigate corruption, nor is it for the courts to judge – as all these functions are performed by ‘the people’. How do ‘the people’ fulfil this grand role? By casting their vote. Thus, the task of elections is not only to confirm results, but also to legitimize otherwise unconstitutional or/and unlawful actions.

What snap elections add to the mix is reinforcement of plebiscitarian support. Snap elections allow for the confirmation of the majority will within smaller intervals and thus, they reinforce the notion of justification for unrestrained state action.

*Elevating majorities and the gift of time... in office.* Snap elections at the right time can be used as a tool to achieve three goals: 1) elevating majorities to the extent of gaining constitutional amendment/replacement power; 2) settling internal conflicts within the ruling party; and 3) perpetuating power by the gift of time in office. The Macedonian context in the period between 2006 and 2016 can serve as an example of the third.

When a party has the parliamentary majority necessary for constitutional amendment or replacement it may consolidate power by dismantling institutions in place to check it. Indeed, packing government institutions and courts is commonly achieved through constitutional changes that reorganize the composition and the manner in which these institutions function (e.g. Hungary and Poland). However, in parliamentary systems (and depending on the constitution) if a party remains in power or sustains a parliamentary majority long enough, it can consolidate power by changing the officials holding positions in existing government institutions and the judiciary in accordance with existing constitutional procedures. This is less problematic in so-called consolidated democracies where media is free, institutions function transparently and mechanisms of accountability are implemented. The story is quite different where the goal of a regime is to undermine constitutional restraints, perform state capture and is in control of the administrative state resources and the media.

Between 2006 and 2016 five general elections were held in North Macedonia, four of which were snap elections (in 2008, 2011, 2014 and 2016). With the exception of 2016, coalitions led by the incumbent VMRO-DPMNE won the elections and formed a government with the largest ethnic-Albanian party DUI (Democratic Union for Integration). Every two years, *de jure* and *de facto*, the coalitions led by VMRO-DPMNE won 4 more years in power (in two instances by larger majority) amounting to 10 consecutive years in power. The length of the rule and the fact that in the periods between 2008-2011 and 2014-2016 the coalition had an absolute majority (61 seats) allowed the government to pack institutions by previously established constitutional procedures.

Let’s take the Constitutional Court for example. The Court has 9 members, elected by the Assembly with absolute majority for a single 9-year term (constructed as to surpass one or two parliamentary (government) terms). According to the Constitution, two members are proposed by the President, two by the Judicial Council, for the rest the constitution is silent. As a result, a practice has developed that allows for the other five judges to be proposed by the Assembly- the same body that elects them. This by itself is problematic, especially considering that the ruling
party or coalition almost always has an absolute majority. That was certainly the case with VMRO-DPMNE and DUI from 2008. During their 10-year rule, the parliamentary majority led by VMRO-DPMNE elected a total number of seven Constitutional Court judges.

Another example is “institutionalized” patronage. Between 2006 and 2016 the number of public employees increased threefold from 60,000 to 180,000. According to surveys, only 7% of government employees believe that their recruitment is done based on merit. Instead, “political affinity, cronyism, nepotism, patronage, and bribes became the major recruiting factors on the part of the administration.” This served two purposes – establishing complete control of state institutions (blurring of the line between state and party) and, as I will further argue, insuring electoral outcomes.

**Tools: Securing Electoral Victory**

*Media capture.* North Macedonia is another example of media capture. Cases of journalists being imprisoned and threatened, and the closing of one of the biggest TV stations (considered as pro-opposition) evidence this. On the other hand, government funding through “state advertising funds” contributed to “favorable” editorial policies form media outlets whose existence depended on such advertising revenue. Additionally, in 2013 two new laws were adopted in a rather opaque procedure, the Law on Media and the Law on Audiovisual Services imposing over-regulation and thus, restricting editorial freedom.

*Government employment and intimidation.* How to ensure electoral victory? By using the public sector as a “political instrument.” North Macedonia suffers high levels of unemployment, especially among young people, thus, government employment is considered “a success” due to its presumed stability. In 2013, 48% of the enrolled university students expressed their preference towards government employment after graduation. As mentioned, government employment was used as a tool to reward party loyalists, thus, was based on loyalty and rather than merit. As a result, government employees feared termination of employment in the event of change of government; making their livelihood dependent of the sustainability of the party in power. This produces indirect pressure on public employees in an individual capacity as voters but, also in the capacity of voter recruits (by personal motivation). However, both reports and the tapes from the 2015 wiretapping scandal have shown practices of direct forms of voter intimidation and control enforced among public employees – both in an individual capacity (direct pressure to vote for a certain party) and voter recruitment (by being tasked to recruit voters for the party providing exact lists with names) under the threat of being fired.

*Just to be sure: electoral irregularities.* The Electoral Law has been amended according to ODIHR recommendations and overall elections were found to be efficiently administered. However, both reports and the tapes revealed electoral irregularities including extortion, manipulation of voter lists; voter buying; voter intimidation, including threats against civil servants, and prevention of voters from casting votes. This further goes to show that in illiberal regimes well-drafted laws and fulfillment of formal requirements don’t necessarily guarantee truly free elections.

**Post-2016**

In December 2016 snap elections were held in the midst of major political crises following a large scale wiretapping scandal that resulted in massive, long-lasting protests. After the election, despite winning 2 seats less than VMRO-DPMNE, the largest opposition party SDSM (Social Democratic Union of Macedonia) formed a majority and government with three ethnic-Albanian parties including DUI. In its 2.5 year mandate the government signed the historic Prespa Agreement with Greece, ending the decades-long dispute regarding the name of the state. The
agreement ignited fierce public opposition in both countries. In North Macedonia the name change was presented as a tough pill that, if swallowed, would open the doors to Euro-Atlantic partnerships.

When the country did not manage to obtain a date for the opening of accession negotiations with the EU, the Prime Minister called for snap-elections, asking for a more stable (larger) majority that will help him fulfill the obligations leading to Euro-Atlantic membership. The Assembly dissolved itself in February and snap-elections were scheduled for the 12th of April. The call for snap-elections followed the same pattern, aimed to confirm trust after factual political failure and consolidate the legitimacy of the party but, also clearly aimed at elevating majorities. The escalation of the COVID-19 crisis inevitably resulted in postponement of the elections for mid-July. SDSM won 2 more seats than VMRO-DPMNE and formed a government with DUI, vowing to keep the country on its Euro-Atlantic path (after the country already joined NATO that March and obtained a date for accession talks with the EU that June).

It is yet to be seen if the Macedonian Assembly will serve its four-year parliamentary mandate after 12 years of turbulent rearrangement of majorities, the result of snap elections granting the gift of time which allowed for the transformation of the institutional landscape of the country (aimed at advancing particular party and individual interest). It is also yet to be seen if future governments will be able to escape the ghost of the past, or if they will utilize the leftover structures at their disposal.
Despite its independent operation since 1993, the Slovak Constitutional Court (SCC) presently has limited ideational resources to build on in responding to constitutional crises and can be expected to face formidable challenges in its jurisprudence after the pandemic. Slovakia’s case shows that constitutional courts may benefit from developing robust understandings of democracy before crises to be able to mitigate them once they arise.

Slovakia is one of the countries of the Visegrad Four, presently a rather infamous grouping for constitutionalists given Hungary’s and Poland’s turn to illiberalism. The SCC comes across as one of the more successful institutions in the region as (1) it managed to resist court-packing efforts; (2) it carries a legacy or resistance to autocratization when it stood up against the regime of Vladimír Mečiar in the 1990s, a prototype for Zakaria’s concept of ‘illiberal democracy’; and (3) it remains a formally powerful institution, endowed with the competences of constitutional review and abstract constitutional interpretation. Although at one moment the risk of an overhaul of the appointment procedure for constitutional judges towards one controlled by the parliamentary majority was imminent, political actors have generally respected the SCC’s decisions.
So far so good. Yet, amidst a global pandemic crisis, surveying the SCC’s case law on crises shows limited ideational resources for the Court to mitigate or respond to some of them. The Slovak case indicates that understandings of democracy developed over time may provide constitutional courts with a resource to cope with crisis situations that at some point inevitably attain a constitutional dimension. Deferentialism, where the CCs give up (or never develop) a consistent framing of democracy beyond unrestrained majority rule, weakens their crisis-mitigating capacity. This has happened in Slovakia, where the Court has advanced its human rights jurisprudence but has had limited results in strengthening checks and balances.

**Crisis and Democracy**

Conceptual discussions on crises in international constitutional scholarship are not widespread. In the USA, Keith Whittington highlighted that constitutional crises as a subtype of crises do not occur only in cases where the US Constitution appears silent or unclear on a fundamental question of political significance. Crises are also tied to core actors’ rejection of ‘constitutional fidelity’. Although discussion persists as to what extent such rejection should be terms constitutional crisis, the phenomenon is not to be underestimated.

In Central Europe, one published volume on constitutional crises considered one of the indicators of constitutional crisis to be ‘a gradual deterioration of the guarantees of fundamental rights and a lack of effective checks and balances’ (p. vi). Hence, constitutional crises are connected to the deterioration of principles of democracy. Conceptualizing constitutional crises as pivotal moments when curtailments of rights and concentration of power occur, the constitutional courts’ treatment of democracy contributes to their capacity to mitigate them.

As everyone who tried to put out a fire without proper tools available knows, the mitigation process must start before the event in question. Hence, to understand a constitutional court’s crisis-mitigating capacity, we propose a nine-dimensional framework adopted from the ‘Democracy Barometer’, a set of indicators of democracy that are suitable for examining constitutional courts’ understandings of the phenomenon in the broad terms of safeguarding fundamental rights and checks and balances. To apply the framework to the SCC, we have identified cases in which it explicitly made a reference to crisis and then situated these references in the broader case law identified by the Court itself as significant in its collection of findings and rulings, thereby giving it the benefit of the doubt and trying to interpret its case law in the ‘best light’.

**The Slovak Story: The Pitfalls of Strategic Deferentialism**

After the earthquake elections in 2020 (these witnessed the defeat of the political party Smer-SD that had been virtually unchallenged since 2006), Slovakia has adopted a democratic, pro-EU attitude in its foreign policy, with the country’s President serving as a broadly recognized voice for democracy. The SCC has now settled in its fourth term, with all judicial seats being occupied. Our analysis looks back at the SCC’s previous (third) term (2007-2019), which saw a series of crises in the EU with visible jurisprudential aspects, as well as tumultuous domestic transformations including in the aftermath of the murder of a journalist. This period can now be studied in full and serves to identify the current resources the SCC possesses to mitigate future crises.

**Explicit references to crises**

Between 2007-2019, extensive ‘crisis talk’ was observable in Europe. However, unlike with other constitutional courts in the region, it barely reached the SCC. In economic terms, the Court invoked a reference to crises only in relation to judicial salaries (including salaries of the constitutional judges themselves). In two decisions (PL. ÚS 27/2015, 25, PL. ÚS 8/2017, 39), it struck down the freezing of judicial salaries, claiming that despite the freezing being a response
to the financial crisis, it violated judicial independence and the peaceful enjoyment of property by constitutional actors. The decisions fueled an impression of an intra-judicial solidarity ignorant of broader-scale developments in the economy.

The SCC also referred to crisis in the context of inter-institutional struggles surrounding the selection processes of constitutional judges. The issue arose after President Andrej Kiska refused to select three judges out of six nominees put forward to him by the National Council, referring to the lack of expertise of five of the six, all approved by a single-party parliamentary majority. In response to the President’s action that, the SCC’s first senate decided that a new ‘constitutional crisis’ between the head of state and the legislature be avoided (I. ÚS 575/2016, p. 85): it ordered the President to indeed select from the nominations put forward to him, even if that required him go against his understanding of the substantive characteristics a constitutional judge should meet.

Summarizing this brief survey, the Court’s core engagements with ‘crisis talk’ were inward-looking, addressing its own composition and the financial security of its judges in constitutional terms. When seen through the lens of the policy priorities of the key political party at the time, the picture of standing up for the institutions’ independence blurs with the picture of deferring to the interests of the dominant party. Such deference risks the self-marginalization of the Court as an influential institution capable to stand up against the governing majority.

Fundamental rights compared to checks and balances: 1:0

The review of the SCC’s case law in the two broad dimensions enhances the findings identified in cases explicitly referring to ‘crisis’. In short, the SCC was able to stand up against executive-legislative actors in cases concerning the scope of protection of fundamental rights but less so in those concerning checks and balances. This stands in contrast to the 1990s when it is believed to have successfully fought off an illiberal regime precisely on the basis of preventing the concentration of governmental power, but advancing less robust protection of fundamental rights.

Thus, from 2007 to early 2019, the Court succeeded to develop ‘mainstream’ democratic jurisprudence on the protection of freedom of expression, electoral rights and procedural rights (legal equality in judicial proceedings). Yet, it did not recognize the needs restraints in the interaction between governmental institutions. The deficit has been particularly strong in relation to the appointment powers of the head of state, which were first strengthened (PL. ÚS 4/2012) and then weakened again (e.g. I. ÚS 575/2016) in correlation with the political profile of the individual who occupied the position. In both instances, the Court sided with the position of the parliamentary majority on the respective issues, showing deference to the majority. Today, the role of the head of state including in the appointment process for constitutional judges remains contested and may breed further (constitutional) crises.

Slovak Lessons for Constitutional Courts: The Relevance of Time and Commitment to Democracy

In his ‘anti-bully theory’ of judicial review, Yaniv Roznai argues that, when faced with political actors equivalent to school bullies, constitutional courts should avoid ‘going down the bunker’ (p. 28) in an appeasement-like manner, when confronted with efforts to undermine them. Yet, they should also avoid ‘direct confrontation’ (p. 27) which could boost the motivation of assaults against them. Making use of this terminology, the SCC, unlike its Hungarian and Polish counterparts, was rarely subject to bullying during its third term. However, the analysis of its ‘crisis jurisprudence’ questions whether it made best use of this time to buttress its resilience both towards bullies and towards crises emerging independently from them.
The variable of time is essential: from the perspective of ‘normal times’ providing the opportunity to build resilience towards future crises, the SCC could have used its twelve years more wisely, avoiding the facilitation of ‘tug-of-wars’ between heads of states and governing majorities and developing a more robust jurisprudence on the balance between judicial independence and accountability. Despite at times exceeding its competences particularly via introducing procedurally unconventional solutions (e.g. in PL. ÚS 45/2015 where it essentially delivered an abstract constitutional interpretation under the guise of a formal refusal of the petition), its key decisions concerning governmental powers were favorable to the governing majority represented, from 2012 to 2020, predominantly by a single political party (Smer-SD).

A more charitable assessment could invoke the Court’s decision providing robust reasons for coming to terms with past wrongdoings of governmental institutions in the ‘Mečiar amnesties’ case (PL. ÚS 7/2017), and the decision invalidating a constitutional amendment that, together with supporting legislation, would have subjected judges to security clearance procedure run by the executive in the first instance (PL. ÚS 21/2014).

The latter decision, also highlighted (pp. 16-17) by Roznai, exemplifies the Court overcoming the shadow of its previous deference, for three reasons. One, the constitutional amendment was adopted by the governing majority led by the Smer-SD party, towards which the Court was favorable in several earlier decisions calibrating checks and balances. Two, the respective majority was still in power at the time of the decision, moreover, with a potential to influence the selection of future constitutional judges. Three, the Court went well beyond the text of the Constitution, taking up the trouble of justifying such a move when, as dissenting judges argued, similar effect could have been achieved by invalidating the ordinary legislation that was necessary to bring the constitutional amendment to life.

Yet, while the decision is not deferential, it also presents a defense of the people as the constituent power, capable of changing the constitution in a referendum that the Court does not have competence to review. As theoretical as the option sounds in light of contemporary developments in Slovakia, it does indicate that the Court embraced an altogether decisionist conception of constituent power that could breed a future constitutional crisis should such a referendum be held, for instance, by an authoritarian populist leader.

The Slovak case shows that when a constitutional court does not face an imminent constitutional crisis, it is wise to prepare as there might be one behind the corner. This includes backlash against the court emerging as a result of its decisions reacting to natural phenomena, such as a pandemic.

**The SCC’s Jurisprudence and the Pandemic**

The story presented here is one of the past, because the SCC is now in its fourth term with almost all seats on the bench being occupied by recently appointed judges. Yet, it speaks to the present, with the myriad constitutional challenges presented by the COVID-19 pandemic, that epitomizes the concept of ‘crisis’.

The resilience of (not only) Slovak democracy is being tested against the backdrop of the emergency measures adopted by governments to address the pandemic, with checks and balances coming under strain. The SCC is at the center of this struggle, having just recently suspended the effectiveness of portions of emergency legislation until further substantive review (PL. ÚS 13/2020) and endorsed the declaration of a state of emergency ahead of the second wave of the pandemic (Pl. ÚS 22/2020). We expect more ‘crisis talk’ to come, with limited jurisprudential resources for the fourth Court to tap into from its predecessors.
Finally, if political elites’ eagerness to blame the SCC for its pandemic-related case law grows, such as when slowing down emergency measures in support of individual rights considerations, the Court will need to build on its existing ‘canons’ which may turn out to be insufficient for the mission ahead.
Populism, Executive Power and ‘Constitutional Impatience’: Courts as Institutional Decelerators in the United Kingdom

Raphaël GIRARD

Introduction

Contemporary populism does not operate in a vacuum; it emerges and functions in the context of what political and social theorists have called the “social acceleration of time.” As liberal institutions – particularly legislatures and courts – appear ill-equipped to adapt to this trend, populism manifests itself as a powerful critique of liberal democracy: it depicts the latter as distant, lethargic, opaque and elite-driven. Taking advantage of the spatiotemporal contours of liberal democracy, populism puts forward an alternative conception of democratic representation: one that not only aims to reduce the distance between gouvernants and gouvernés, but that is also, as populists would indirectly claim, better suited to the contemporary imperatives of temporal efficiency and rapidity. Indeed, populists are typically impatient with
intermediaries, institutions (including legislatures and courts) and liberal-democratic procedures, which are seen as illegitimately thwarting the direct expression of the authentic “will of the people.”

For that reason, populists are often eager to invoke executive prerogatives, from the executive prerogative in its US meaning to the Royal Prerogative in the UK context. As William E. Scheuerman notes, this is often done through a “perversion of the traditional temporal justification for executive-centered emergency government.” Initially designed to be used in truly extraordinary situations of emergency, Lockean-type, executive-centered emergency powers have been used in less-than-extraordinary situations. For instance, Donald Trump, after declaring a national emergency in 2019 in the context of the “border crisis” between the US and Mexico, quickly conceded that it was not temporally justified: “I didn’t need to do this, but I’d rather do it much faster. I just want to get it done faster, that’s all.” In the UK, while no emergency powers were invoked in the context of Brexit, prominent politicians from Boris Johnson to Nigel Farage have nonetheless invoked on multiple occasions the urgency of “getting Brexit done.” In fact, it was arguably the key element of the Conservative manifesto in the 2019 general election. In these politicians’ view, “artificial” delays to the implementation of the “will of the people,” provoked either by courts (cf. Miller no. 1) or Parliament, were democratically unjustified.

Through its distrust and impatience vis-à-vis liberal institutions and other intermediaries, populism acts as a catalyst for the acceleration of political time and democratic processes – and for the shrinking of the distance between rulers and the ruled. In so doing, it favours proximity, simultaneity, and immediacy – the result of which is a form of what I call “constitutional impatience,” which builds upon what Ming-Sung Kuo labels as “instantaneous democracy.” Yet, it is precisely in this context that courts can play the role of institutional decelerators. As Kuo notes, judicial proceedings have been noted – and criticized – for their slow pace, which, perhaps counterintuitively, “can be a structural asset of the multistage process of constitutional governance in its pushback against new populism.” In this blog post, I argue that courts can act – and have indeed successfully acted – as judicial decelerators in response to populist impatience and executive aggrandizement. I make this brief argument by reference to the Miller (no. 1) and Miller (no. 2) UK Supreme Court judgments.

The UK Supreme Court as Judicial Decelerator

First, the UK Supreme Court successfully acted as judicial decelerator in the Miller (no. 1) case. In the face of an impatient executive galvanized by the result of the 2016 Brexit referendum and who wanted to “exercise political power unilaterally which would fundamentally change the constitutional arrangements of the UK,” the Court’s intervention effectively slowed down the executive’s pace of action. The Court ruled that the royal prerogative could not be used by ministers to trigger Article 50 of the Treaty on European Union (TEU) and that the prior authority of an Act of Parliament was required: “We cannot accept that a major change to UK constitutional arrangements can be achieved by ministers alone; it must be effected in the only way that the UK constitution recognises, namely by Parliamentary legislation.” It should be noted that the Court did not block the executive, as Parliament ultimately voted on February 1st, 2017 in support of a bill that gave then-Prime Minister Theresa May the power to invoke Article 50 TEU; all the Court did, in that case, was slow down the executive’s course of action.

The institutional role of courts as “judicial decelerators” was also made explicit in the Miller (no. 2)/Cherry case, in which the Supreme Court held that Prime Minister Boris Johnson’s decision in August 2019 to prorogue Parliament in was unlawful insofar as the prorogation had the effect of “frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as the body responsible for the supervision of
the executive.” The Supreme Court, wary of potential misuses of powers by the executive, effectively created what Tarunabh Khaitan calls an “effects-based” (proportionality) test, defined as follows: “Governmental action that has the effect of frustrating, preventing, or substantially undermining the ability of constitutional actors to discharge their constitutional powers, duties, or functions shall be unlawful, unless the government can show that such action was a proportionate means of achieving a legitimate objective.” In doing so, the Supreme Court confirmed its role as a bulwark against executive aggrandizement and its ability to slow down the pace of executive action.

It is important to point out, however, as Kuo does, that “what the court is expected to do under the guidance of judicial deceleration is not to set aside the contested policy or law but rather to make room for the learning function of constitutional democracy to play out and the rearticulation of politics by putting brakes on the populist feeling-driven decision.” In both the Miller (no. 1) and Miller (no. 2)/Cherry judgments, the Court did not go as far as to second-guess the desirability of the government’s policy, nor of the outcome of the 2016 Brexit referendum. It also did not enquire into the motives or purposes of governmental action. All it did was slow down the political time in the face of “constitutional impatience” and populist pressures, and to contribute to the restoration of the disrupted temporal contours of liberal democracy.

The Limits of Judicial Deceleration

That said, courts are not necessarily a panacea against “constitutional impatience,” at least not in the UK context. Their role and influence are dependent upon at least three factors, namely (1) the public reception of their judgments; (2) the (overwhelming) forces of politics; and (3) their institutional independence.

First, as is well known, the rendering of the Miller (no. 1) judgment sparked populist outrage in the UK tabloids, with the Daily Mail going as far as to label judges who sided against the government as “enemies of the people.” Less than three years later, the Miller (no. 2)/Cherry decision was also received with indirect personal attacks on judges, particularly against judges of the Scottish Court of Session before the decision reached the Supreme Court. But, and perhaps more importantly, the judgment also led to charges on the institutional role and influence of courts. Jacob Rees-Mogg branded the decision a “constitutional coup” by the Supreme Court. A Conservative Member of Parliament even went as far as make a call for the Supreme Court to be abolished entirely. In a speech to the Bruges Group in September 2019, Martin Howe QC, the Charmain of Lawyers for Britain, also criticized the Supreme Court judgment and called for the replacement of the Supreme Court with a “newer low key and less activist court of final appeal.”

Second, and in the same vein, the role and influence of courts is also dependent on the (overwhelming) forces of politics. In the context of frustrations caused by Parliament’s inability (or unwillingness) to pass the government’s Brexit deal in the period leading up to the 2019 general election, the Conservative party vowed, in its 2019 Election Manifesto, to “to look at the broader aspects of our constitution: the relationship between the Government, Parliament and the courts; the functioning of the Royal Prerogative; the role of the House of Lords; and access to justice for ordinary people.” It also promised to “set up a Constitution, Democracy & Rights Commission that will examine these issues in depth, and come up with proposals to restore trust in our institutions and in how our democracy operates.” It remains to be seen what the findings and proposals of the Commission (which, at the time of writing, was still accepting evidence) will be, and what the government will choose to do, but it is hard to see this as something other than an attempt to “halt the current direction of constitutional travel and reinstate the executive at the centre of the Constitution.” The appointment of Suella Braverman as Attorney General, on February 13th, 2020, is an indication that the government is serious in that regard. Indeed, just
two weeks before her appointment, Braverman criticized the “chronic and steady encroachment by the judges” and accused “a small number of unelected, unaccountable judges” of having too much influence in the determination of wider public policy. Claiming that British democracy cannot be said to be “representative” anymore, Braverman added that “Parliament’s legitimacy is unrivalled and the reason why we must take back control, not just from the EU, but from the judiciary.”

Third, and in relation to the previous point, the efficiency and success of courts in slowing down the populist acceleration of political time and processes is contingent upon the institutional independence of courts. Besieged or captured courts are much less likely to act as institutional decelerators; on the contrary, they can transform into allies or even into instruments of legitimation for the populist regime, helping the latter to consolidate power while maintaining a façade of democracy, as the recent examples of Hungary (since 2010), Turkey (since 2010), Poland (since 2015), Ecuador (2008-2017) and elsewhere illustrate.

Conclusion

Populism is not, of course, a monolithic phenomenon; it can assume different forms – which can, in turn, lead to different relationships between the executive, the legislative and the judiciary. Contrary to Hungary, Turkey, Poland, Ecuador and elsewhere, no attempt has been made by the executive to manipulate, pack or capture the judiciary in the United Kingdom. In that sense, the relationship between government and the judiciary in Britain may be more accurately described as one of “defiance.” Nevertheless, in light of the abovementioned “constitutional impatience” of populism, the judicial responses to executive power grabs in the Miller (no. 1) and Miller (no. 2) cases illustrate that courts can effectively act as judicial decelerators and as bulwarks against populist, executive aggrandizement. Yet, the reception of these two cases, as well as the 2019 Conservative Manifesto’s pledge “to look at the broader aspects of [the UK] constitution: the relationship between the Government, Parliament and the courts; [and] the functioning of the Royal Prerogative,” are both reminders that the courts’ position in the UK constitutional order (and its relationship vis-à-vis the two other branches of government) is, at best, a precarious one.
III

COUNTRY SPOTLIGHTS
7

ASIA: SPOTLIGHT ON INDIA & SRI LANKA
Rights During a Pandemic: The Indian Experience

Thulasi K. RAJ

The COVID-19 pandemic has led to palpable changes in the way we think and behave. It has also influenced the working of democracies around the world. In the Indian context, two threats to democracy are significant. The first is the assumption of wide powers by the executive. The second is the hands-off approach of the Supreme Court of India in rights adjudication.

Executive Excess

International human rights law requires that the restrictions imposed by the state must meet the tests of legality, legitimacy, and proportionality. I will confine the present discussion to legality. The test of legality demands a clear legislative basis. The mere existence of any law is insufficient: the law must be precise, accessible and foreseeable. Invocation and use of the laws in India show that this test is not being met.

The Indian Constitution does not contain a specific provision for health emergencies. Article 352 provides for the declaration of an emergency when national security is threatened by war, external aggression, or armed rebellion. It was felt that there is no specific legislation to govern the issues arising out of the crisis. Since this is a general problem in constitutional democracies,
some countries have passed new legislation. The United Kingdom, for instance, passed the Coronavirus Act, 2020, and Germany passed the Epidemic Protection Act to amend its earlier legislation on infectious diseases.

However, no new legislation was passed in India and the state decided to deal with the crisis using existing legislation. Three levels of legal framework were used and a series of restrictions on movement, travel and access were made by exercising power under: (1) the Disaster Management Act (DMA); (2) the Epidemic Diseases Act; and (3) the criminal law provisions under the Penal Code and the Criminal Procedure Code.

The Disaster Management Act was intended to manage disasters—whether natural or ‘man-made’. For instance, a health crisis such as COVID-19 requires decision-making sensitive to the crisis and that focuses on the kind of health policies required. The nature and extent of the restrictions to be imposed on the public, the effectiveness of the regulation, the procedures for testing, the availability of treatment, and the regulation of healthcare workers are some of the relevant concerns. However, the DMA was not suited to address this health crisis. Many provisions of the Act deal with issues such as evacuation, removal of debris, rescue and relief camps, monitoring of construction in areas affected by the disaster, etc.

This is clear from the nature and purpose of the legislation. However, the term ‘disaster’ was defined widely in the Act and this was utilized to invoke the Act. A National Disaster Management Authority (NDMA) established under the Act was conferred with sweeping powers to lay down plans and guidelines for disaster management. The NDMA—a body not competent and not originally intended to address pandemics—was authorized to lay down policies and orders to address the pandemic. Consider the nature of powers exercised by the NDMA. In March 2020, a national lockdown was announced and enforced (with a mere four hours’ notice) under this law, shutting down all kinds of interstate and international transport and public and private institutions, with few exceptions. The NDMA, a highly unsuitable authority endowed with discretionary powers, issued a series of executive orders which were amended from time to time. The nature of the authority and the manner of its exercise of power was far from foreseeable.

The Epidemic Diseases Act (EDA), a colonial law of 1897, was also used by both the central and state governments. It empowers both levels of government to take measures when an epidemic breaks out. Although the legislation has merely four provisions, its powers are indeed very wide in nature and worded in terms like ‘measures as deemed necessary’. As a result, while no concrete powers sensitive to the pandemic are laid down, vast powers are given which enable the executive to spell out the regulation through executive orders. The legislation is, simultaneously excessive on one level and insufficient on another. Journalists were arrested under this law for accurately reporting issues related to the lockdown. Section 4 of the Act grants public authorities an absolute immunity from prosecution for actions taken under the Act. The Central Government also promulgated the Epidemic Diseases (Amendment) Ordinance, 2020, authorizing itself to inspect goods and vehicles and detain certain persons using transport facilities based on vague criteria.

Both laws are vulnerable to constitutional scrutiny on account of their vague provisions granting wide and unspecified powers to the executive. These provisions have been grossly misused by the government—even to the extent of charging opposition leaders (who wanted to visit a rape victim) under the EDA. Due to the overbreadth of these provisions, virtually every restriction since the pandemic has taken the form of an executive order. There has been no parliamentary oversight or justification for these measures.
The criminal law framework is similarly vague. Section 144 of the Code of Criminal Procedure is intended to prohibit unlawful assembly in times of law and order crisis, nuisance, or public danger. This law was enforced in several cities and gave police officers unfettered powers to control the movement of people. The police often abused people who were simply outside to get essentials such as groceries, street vendors, and even doctors travelling for essential work. The police subjected those who violated lockdown restrictions to extra-judicial punishments such as forcing them to crawl on the street.

Judicial Responses

Rosalind Dixon and David Landau have recently argued that, in recent times, judiciaries in a range of countries have used ‘abusive judicial review’ to threaten democratic norms. They say that courts have often legitimised and enabled authoritarian action and disabled the functioning of the political opposition. The Indian Supreme Court seems to fit the bill, and I will now identify a variety of tools used by the Court to undermine democracy.

First, I will make two caveats. The Indian Supreme Court consists of 30 judges and is certainly a polyvocal institution with judges reacting differently to cases. However, certain trends can be identified from the way the Court has responded to rights adjudication since the outbreak of the pandemic. While the conduct of the Court is not altogether new, it is demonstrably more visible during these times due to the steady increase in executive excess.

Further, COVID-19 has brought various socio-economic concerns to the forefront of political debate, which are in the exclusive domain of the legislature. It is not the Court’s function to resolve economic, health or social crisis. My criticism, however, is that in cases of rights infringements meriting adjudication the Court has failed.

The Court has often remarked that the other branches of government are best suited to resolve social and economic problems thus placing enormous trust in the executive to take action and declaring itself precluded from interfering. In almost all cases against the government, the Court has adopted different tools to maintain this non-interference.

The first tool is that of evasion. In cases against the government, the Court refuses to make a decision one way or the other. Judicial evasion manifests through simply closing the matters without answering the legal question or through the use of indefinite adjournments. When migrant workers were unable to return to their home states, a direct consequence of the unplanned lockdowns, several cases were filed before the Court requiring the government to provide relief to them. The sudden loss of their livelihood threatened migrant workers with starvation and death.

The central government managed to get many of these cases closed, solely based on its assurance that efforts were being taken to alleviate the concerns. On 31 March, counsel for the government assured the Court that no migrant workers were now left walking on the road though reports continued to show their unending plight. There were no consequences and no one was held accountable for the misrepresentation: neither the government, nor the lawyer. Cases were disposed by the Court, recording the affidavits of the central government, in most cases, without ensuring compliance of any manner. Even if the Court believed that enforceable rights were not at play here since these were ultimately socio-economic concerns, the case deserved legal adjudication either way.

During the health emergency, we have also seen numerous political arrests of those who protested or, in some cases, merely disagreed with the government handling of the pandemic. Student leaders and social activists were arrested for charges such as sedition and kept in detention for long periods of time. Criminal complaints were filed against opposition leaders for
raising issues with the government. Strategic The arrests were strategically made, and the pandemic was used as a pretext for arrest and detention. Restrictions on protest and assembly during the pandemic have enabled this practice. The absence of parliamentary sessions has aided the government to remain unaccountable to the legislature.

The Court heard specific arguments, on numerous occasions, that detainees were subject to a high risk of COVID-19 infections in the prisons, which were hotspots of the contagion. However, in cases of political detentions—whether seeking the quashing of criminal charges, bail or stay from arrest—the Court consistently denied any relief. In these cases, as a second strategic tool, the Court practiced complete abstinence. This was made possible by the use of its discretionary power to admit and dismiss cases. This abstinence also has the impact of postponing and diluting public discourse, since the Court attracts significant popular attention.

The third and striking tool is direct attack on constitutional rights. In August, a lawyer who tweeted about the conduct of the Chief Justice was convicted of contempt of court. The Court took it upon itself to act as judge, jury, and executioner. It rejected the argument that criticism of the judge falls within the ambit of free speech. The judgment, apart from its obvious legal flaws, reflects an institutional transformation of the Court from a counter-majoritarian court. It has gone on the attack against civil liberties, and the rights to dissent and criticize. It has transformed into the accomplice of an intolerant executive.

Recently, the Chief Justice of India, when asked in an interview about judicial restraint, readily responded that declarations of rights are now a much lower priority than in other times. This comment sums up the response of the Supreme Court towards the infringement of rights since the pandemic. According to the latest V-dem Institute report, India is on the verge of losing its status as a democracy due to the authoritarian policies pursued by the current government. Indian democracy currently suffers from twin pathologies: of both an overreaching executive and an underreaching Court.
The Indian Supreme Court in the Modi Era

Anuj BHUWANIA

One of the most conspicuous casualties of the ongoing crisis of constitutional democracy in India is the complete capitulation of the Indian Supreme Court to the majoritarian rule of Prime Minister Narendra Modi. With its well-known innovations like public interest litigation, basic structure doctrine and the concomitant judicialization of politics in India, the Indian Supreme Court has for decades attracted disproportionate public attention and international admiration for its judicial interventions. Since Modi’s election in 2014 however, there has been a general sense of disappointment with the Indian Supreme Court, with a widely shared lament that the Court has failed to be a protector of democratic institutions. In this blog post, I will try to trace the departures in the Court’s behaviour during this period, as well as discuss the continuities in its approaches to constitutional interpretation.

In the contemporary global discourse on democratic backsliding, India has emerged as a prime example, often bracketed with countries like Hungary, Poland and Turkey. These are all countries headed by popularly elected right-wing leaders with massive majorities and mandates that enabled them to upend any constitutional limits on their powers. Constraining the ability of
constitutional courts to serve as a counter-majoritarian check on their illiberal agendas has, therefore, been a common feature of these strongmen.

But there is an important difference between the trajectory of the higher judiciary in India under Modi and the trends observed in these other countries. In India, there has been no change in the constitutional regime governing the judiciary in this period. In fact, Modi’s one ambitious attempt to alter the status quo regarding the judiciary failed: a constitutional amendment to undo India’s unique ‘judges appointing judges’ model of judicial appointments was struck down by the Supreme Court as violative of the basic structure doctrine in 2015.

The Modi regime is often compared with an infamous period in contemporary Indian history: the Internal Emergency of 1975-77. The Indian Supreme Court’s capitulation during this Internal Emergency period tends to be seen as the prototype for contemporary judicial behaviour in India. But there is, again, a difference. The Emergency regime saw the judiciary as an obstacle to its political agenda and proceeded to amend the constitution so as to drastically curtail judicial review. The Modi regime has felt no need to do so. Even without any constitutional changes, the Supreme Court has been in a fairly close embrace with the current regime, at least since January 2017. Perhaps the question to ask then is not just about the Modi government’s evident ability to influence the judiciary, but about the nature of the Indian Supreme Court that makes such a complete surrender to governmental priorities possible.

During the Modi period, not only has the Court failed to perform its constitutional role as a check on governmental excesses, it has acted as a cheerleader for the Modi government’s agenda. Not only has it abdicated its supposed counter-democratic function as a shield for citizens against state lawlessness, it has actually acted as a powerful sword that can be wielded at the behest of the executive. To understand why the Indian Supreme Court was so well-placed to perform this supportive role in service of the current government’s majoritarian agenda, we must look at its institutional history as well as India’s constitutional design. I have written about the former elsewhere and the latter is the subject of my ongoing research. While a detailed exposition would be beyond the scope of a blog post, we can discuss some broad aspects here.

The Indian Supreme Court has been characterized as the most powerful apex court in the world. Its innovations in substantive and procedural law have been viewed as remarkably radical. These powers are best instantiated by the basic structure doctrine to review constitutional amendments and by the Court’s willingness to do away with all procedural norms in public interest litigation (PIL). Far from any dilution of these powers, the Court has fashioned even more radical doctrines of judicial review in the last few years. It has innovated a new doctrine of ‘manifest arbitrariness’ to review statutes, a principle that was hitherto applicable to executive action alone. The court has also fashioned another overarching doctrine of ‘constitutional morality’ in constitutional litigation, which it has deployed in ways analogous to the old basic structure doctrine.

Meanwhile, the famous basic structure doctrine, which was intended as a nuclear option to be used only against constitutional amendments, has since been sporadically used to strike down legislation and even executive acts. The Court’s characteristic lack of judicial discipline has meant that in many constitutional cases, petitioners feel obliged to argue basic structure even if they are only challenging statutes. The Court’s well-known nonchalance for procedural norms has meanwhile proceeded apace, and it has been entertaining an increasing number of suo motu PIL cases in recent times (i.e. public interest review triggered by the Court itself). In other words, the Court has been busy expanding its powers even during the Modi years.

Why then do commentators keep complaining about the weakening of the Supreme Court in the Modi era? This is because throughout this period the Court has chosen not to deploy its
vast powers against the government, but instead has placed its enormous arsenal at the
government’s disposal in pursuit of its radical majoritarian agenda. The signature case of the era
is the Court’s systematic use of the PIL juggernaut to pursue the National Register of Citizens
(NRC) in the North-eastern state of Assam, forcing its 33 million inhabitants to prove their Indian
citizenship with documents dating to 1971. All the tools honed over decades of PIL were deployed
to perfection in this case. While the constitutional questions involved in the case remained
pending, the massive NRC exercise which cost almost $200 million was bulldozed through by the
judge presiding over this case over six years. The judge was later nominated by the government
to the upper house of the Parliament soon after his retirement. An estimated 1.9 million people
who are unable to find their names in this Register risk statelessness as a result of this case.

But what really characterizes the Supreme Court of India during the Modi era are its
significant acts of omission, even more than its acts of commission. These acts of omission take
on multiple forms. First, it has become increasingly rare for the Court to rule against the
government on matters of any importance. To appreciate this fact, it is useful to juxtapose the
Court’s present performance with its supposedly conservative period during the 1950s and 1960s,
when it would routinely decide against the government.

Second, many of the cases that challenge the Modi government in areas central to its
policies are rarely, if ever, even listed for hearing by the Court. These include hugely controversial
matters central to Indian politics, such as the unilateral change made to the constitutional status
of Kashmir by the central government, the Citizenship Amendment Act, Demonetization,
Reservation Quotas for Economically Weaker Sections and the use of the opaque Electoral Bonds
for funding political parties. Since the Court refuses to stay these policies while constitutional
challenges are pending before it, these deeply contested policies become fait accomplis. Such
‘judicial evasion’ thus allows the government to enact and implement manifestly unconstitutional
legislation as well as pass highly questionable executive orders, knowing fully well that their
illegality will likely never be pronounced upon by the courts. Hundreds of habeas corpus petitions
challenging allegedly illegal detentions in Kashmir have been pending for more than a year
without being decided. These repeated acts of omission by the courts has increasingly made it
moot if India still actually has rule of law at all. This judicial practice, incidentally, also enables
judges to avoid major changes in doctrinal interpretation, and pretend that nothing much has
changed in constitutional practice.

Third, there have been multiple instances of the Government openly and brazenly flouting
Court orders with impunity. The most well-known of these governmental acts of contempt for
court orders came in the case challenging the constitutionality of the biometric Unique
Identification Number (UID), the ‘Aadhaar’ project. While the case was still pending, the Court
ordered that no compulsory use of UID could be required of those seeking to avail governmental
benefits. But the government went ahead and did precisely that. The petitioners kept filing
contempt of court petitions to enforce the court orders but to no avail. This was a case in which
the government kept calling the Court’s bluff, and won. Even in the final judgment, this repeated
illegal conduct by the State was ignored by the majority. Another well-known instance is the
Sabarimala case in which the court declared unconstitutional the prohibition of women in their
‘menstruating years’ from entering an ancient Hindu temple. Even after the release of the
decision, the government persisted in opposing its implementation. It was a high-profile case in
which the Court itself did not seem keen that its own judgment be implemented. Eventually, the
Court caved and violated its own jurisdictional rules in order to allow a review of its judgment.
These cases of the Court’s impotence in the face of open defiance of its orders by the Government
have affected its prestige greatly.
Finally, there have been increasingly instances where Government lawyers publicly mislead the Court with white lies. The strict lockdown imposed by the Central Government in March 2020 led to a massive migrant crisis with millions of Indians being forced to walk hundreds of kilometres to their homes, during the height of summer, with many dying as a result. This enormous human tragedy was documented in great detail by the media. But when a case on this issue was heard by the Supreme Court, the Solicitor General infamously declared that not a single migrant was walking on the roads at that point. This was a lie worthy of ‘Baghdad Bob’ (Saddam Hussein’s famously mendacious Minister of Information). Perhaps no other singular instance has exposed the Court to such ridicule.

But the Court did nothing to reproach the government counsel for this outrageous lie, not even in subsequent hearings around this issue. There have been similar instances of blatant lying in Court by government counsel with no corresponding judicial action. It increasingly seemed like the Government of India could get away with blue murder in such a Supreme Court. The Court’s credulity hardly seemed credible. Its refusal to take action against such behaviour has exposed court hearings as kabuki theatre.

For all its expansive powers and rhetorical excesses, the crisis of legitimacy plaguing the Supreme Court is now hidden in plain sight. The repeated public humiliation of the Court, as an institution, by the Modi government has made all its bluster and its new high-minded catchphrases like ‘constitutional morality’ and ‘transformative constitutionalism’ look increasingly hollow. To make things worse, the Court has instead chosen to retaliate against those who have dared to point out that the emperor is not wearing any clothes.

The Indian case of judicial capitulation in the face of democratic backsliding is interesting precisely because it has happened without any need for rearrangement of the constitutional architecture. Nor even any major volte face in doctrinal pronouncements by the Court. An external legal observer, oblivious to Indian political realities and reading only law reports, might even find Indian constitutional judgments more radical than ever before.

While the judiciary is generally seen as the key institutional check on the authoritarian tendencies of the executive, the Indian situation is unique among the recent global instances of democratic backsliding because the Indian Supreme Court had long abandoned any such classic judicial role. Its path to power over the last four decades was not paved through performing any counter-majoritarian role, but through its ability to compete in the populist marketplace of Indian politics. It has been willing to shed all norms of judicial process— from standing to evidentiary standards to public reason to stare decisis— and perform an increasingly hybrid legislative and executive role. India’s long history of judicial populism has made its higher judiciary a particularly potent ally to the authoritarian populism currently in power and personified by Modi and an underreaching Court.
What (if Anything) does Party Dominance Mean for Indian Constitutionalism?

Aradhya SETHIA

In May 2019, the Bhartiya Janata Party (BJP) registered its second consecutive win in the elections to the lower house (Lok Sabha) of the Indian Parliament. There is a broad consensus among political scientists that the history of Indian partisan politics, before the first BJP win in 2014, could be divided into three different party systems. From 1952 to 1967, the Indian party system was characterised as a dominant party system tempered by the intra-party accommodation within the Congress Party. In 1967, multi-party competition emerged, particularly at the state level. However, except for the post-emergency elections in 1977, Congress continued to dominate national elections. The period of 1989-2014 marked the period of the third party-system, during which national politics reflected state-level competition, leading to a long period of coalition governments at the centre. There seems to be an emerging consensus that with the two consecutive BJP victories, India has now moved into its fourth party system, which is anchored around the dominance of the BJP in national politics.
Scholars have dissected various causes of BJP’s dominance, including, but not limited to, ideological conflicts, demographic changes, social cleavages, and electoral strategies. However, the constitutional consequences of its victory have received relatively less attention. What are the implications of these new dynamics of party politics for the workings of the Indian Constitution? There have been long-standing debates around the ideology of the ruling party, and how it replaces, undermines, or reconciles with the ideological underpinnings of the Constitution. This essay, however, does not focus on the ideological ends for which state power may be used. Instead, it seeks to examine the impact of party dominance on constitutional means.

There have been growing concerns about the erosion of the independence of institutions, executive aggrandizement, and ‘electoral authoritarianism’. At the heart of these claims lie worries about the decline of institutional checks and balances in the face of single-party dominance in national elections. Is the current state of party dynamics merely an aberration? Or does it reveal something deeper about the shortcomings of the Constitution itself? If it is the former, one may argue that the bug is not in the Constitution; rather, it is politics that has failed. The way forward, then, is to restore political norms, not “fixing” a supposed defect in constitutional design. If it is the latter, which I argue is the case, we may benefit from thinking about how the structural arrangements of power under the Constitution have enabled, and continue to enable, the erosion of accountability in the face of party dominance. In other words, the checks-and-balances deficit may not be a bug introduced by the current state of party politics, but a dormant feature of the Constitution, which is revealed in the face of formidable majorities. In the same vein, I will discuss three inter-related constitutional structures in India: parliamentarism, federalism, and electoral regulation. These three structures are also critical spaces for securing the accountability of a strong central government. This blog post, however, is neither a comprehensive account, nor a reform agenda. Instead, it only seeks to advance a few modest provocations.

At their core, constitutions create and organise political power. Constitutional law presumes or expects that political power is, or ought to be, exercised in accordance with the formal arrangements of political power. In reality, the formal constitutional branches may not be ‘the site of action’. For instance, the dynamics of party politics, which facilitate the operation of constitutional institutions may undermine the intended system of checks and balances. In India, the constitutional forms of the relationship between the legislature and the executive, the union and the states, voters and representatives were conceived without an appreciation for the reality of political parties. The founding of the Indian Constitution occurred in the context of one-party dominance. The contours of a credible political competition were not clear, and the Congress Party internalised many aspects of inter-party competition. Therefore, the founders chose to be silent on the role played by party politics in the working of structural power arrangements. The emergence of a dominant party system provides us with an opportunity and context to think about the spaces that party politics occupy in formal constitutional arrangements. This essay, therefore focusses on the impact of party dominance on three key concepts of constitutionalism – parliamentarism, federalism, and elections.

Parliamentarism

Unlike the US-style presidential system, where ordinary citizens directly elect the executive head, a parliamentary government serves while it exercises the confidence of the legislature – a directly elected body. However, in a parliamentary system, the function of the legislature is not restricted to government formation. At least in theory, the government’s accountability to the legislature is the defining feature of parliamentary government. In its actual functioning, Parliament is not a collection of individual legislators; it is organised along partisan lines. Thanks to the anti-defection
amendment, party leadership has attained an enhanced role in the legislature in India. Moreover, studies on the internal functioning of parties show an intense concentration of power in the leadership of Indian parties. As a result, parliamentary accountability of the executive is unlikely to come from within the party.

Given these features, one-party dominance in Parliament poses significant stress on Parliament’s accountability function. Having recognised that one-party dominance can cause an accountability deficit, what if anything, could potentially overcome this deficit? Three features of the Indian parliamentary System carry the potential for institutional innovations: (1) the second chamber of the bicameral Parliament (Rajya Sabha), (2) parliamentary opposition, and (3) the office of the Speaker.

The Indian Parliament is a bicameral legislature. The Rajya Sabha consists of ‘representatives of each State’ who are indirectly elected by the members of the Legislative Assembly of their respective states. Members of the Legislative Assembly are, in turn, elected directly from state-level territorial constituencies. Thus, the Constitution articulates the relationship between members of the Rajya Sabha, the state legislators, and ordinary voters. Meanwhile, at least theoretically, there seems to be no role for political parties. Moreover, the Rajya Sabha is a permanent body whose members are elected for six-year terms, with one-third of its members retiring every two years. The staggered terms of the Rajya Sabha ensure that the partisan organisation of the second chamber does not reflect the immediate political composition of the Lok Sabha. Therefore, although the BJP dominates in the Lok Sabha, it does not hold a simple majority in the Rajya Sabha, thus encouraging the BJP to form coalitions with smaller parties in order to ensure the passage of its bills in the Rajya Sabha.

In 2006, amendments to the Representation of the People Act, 1951 removed the requirement that a member of the Rajya Sabha should hold a domicile in their respective state. Furthermore, the amendment mandated the disclosure of state legislators’ votes to a party agent. The Supreme Court of India upheld the constitutionality of both amendments, thus cementing the political parties’ control over the second chamber. Under the new party-based conception of the Rajya Sabha, individual legislators became formal ‘vehicles’ for the parties to appoint Rajya Sabha members who may have no connection to the states they are representing. In effect, Rajya Sabha members thus elected are likely to be accountable to the party leadership, not to the state legislators. Staggered elections are, by design, a powerful counterforce to the accountability deficit caused by party dominance in Parliament but the recent amendments have diluted their role and reduced their effectiveness. To rethink the role of the Rajya Sabha as an institution for accountability in the context of party dominance, we may have to ask – Should we make changes to the design of the Rajya Sabha in ways that can contain the constitutional costs of single-party dominance in Parliament?

In India, the role of parliamentary opposition is conceived in severely restricted terms. Although the office of the Leader of Opposition gained statutory recognition in 1977, India has not had a leader of the opposition in the Lok Sabha for 33 of the 71 years since the first general elections in 1951. This is because of the Speaker’s direction that requires a party to secure more than ten per cent of the total seats to be recognised as a parliamentary party, and thus, be eligible to hold the position of the Leader of Opposition. Moreover, there are no significant opposition privileges and there is no practice of appointing shadow cabinets. The truncated role of parliamentary opposition under the Indian Constitution means that the most potent political check on the government operates without any constitutional teeth. The new context of party dominance provides India with an opportunity to rethink the ways in which opposition could be institutionalised.
Finally, the Speaker (primarily the Speaker of the Lok Sabha) ought to play a significant role in securing the government’s accountability to Parliament. Historically, the role of the Speaker has attracted various controversies. For instance, the Speaker has repeatedly allowed the introduction of crucial substantive legislations in the form of money bills. Since the Rajya Sabha does not exercise a veto over money bills, the government can easily bypass the bicameral check on its power. The immediate responses to the Speaker’s partisan behaviour have been to call for judicial review of Speaker’s decisions. Judicial review of the Speaker’s decisions has relied on public law grounds, such as ‘infirmities based on violation of constitutional mandate, mala fides, non-compliance with rules of natural justice and perversity’. However, administrative law doctrines have largely proved to be insufficient in providing appropriate relief against what seems to be a problem of institutional design. By convention, the Speaker is appointed by a majority vote in the legislature. Despite a partisan appointment procedure, ‘the robes of the Speaker’ may ‘change and elevate the man inside’. However, neither judicial review of the Speaker’s discretion nor political norms have been sufficient to overcome the problem of partisan appointments to the role of Speaker. If so, should we think about the institutional design, particularly, the appointment procedure of the Speaker? For instance, would a multi-partisan appointment procedure serve the objective of curtailing Speaker’s partisanship?

Federalism

Along with one-party dominance, another significant characteristic of the new party system is the development of distinct identities between voter behaviour at the national and state level elections. Judging by electoral results, there seems to be a decoupling in voting preferences in national and state-level elections. The results show that voters are making different and seemingly conflicting choices, even when both national and state elections are held together or separated by only a few months, a phenomenon that has previously been termed ‘electoral federalism’. Despite the emergence of electoral federalism, in the face of one-party dominance, the Indian Constitution reveals its tendencies to concentrate power in the central government while diminishing the position of states. Over the last few months, various controversies ranging from the Citizenship Amendment Act to the indirect taxation structure and agricultural reforms, have made Union-State relations the primary battleground of partisan contests.

The founding choice of a unitary tilt in the Constitution is further bolstered by the role of state governors, who have historically played a partisan role in favour of the party in power in federal government. This is because the central government controls the appointment and removal of state governors. Partisan manipulation of the governors’ powers carries the potential to significantly dilute the powers of democratically elected state governments. If we conceive of federalism as one of the avenues for supplying constitutional checks, these features of federalism undermine the checks on party dominance. If we see federalism as not merely the decentralisation of governance, but as a space for checking party dominance, how should we rethink the design of Indian federalism?

Electoral Regulation

Party dominance also poses a severe risk to electoral regulation. In India, the Election Commission – a constitutional body – is responsible for monitoring and supervising elections. However, the competence to make laws regulating both national and state elections lies exclusively with Parliament. The laws framed by Parliament take precedence over the regulations of the Election Commission. Partisan manipulation of electoral regulation has been the subject of long-standing legal debates in various jurisdictions. In India, the power to make laws regulating both national and state elections lies with Parliament. The context of one-party dominance may further intensify the risks of partisan self-dealing. What should be the appropriate response to the threat
of partisan manipulation of electoral laws? Should judicial review of electoral laws take into account partisan effects or motives? Or, should we recognise the exceptionalism of election laws, and instead of focussing only on judicial review, think about law-making procedures that may counter partisan self-dealing? Should the Election Commission be empowered further so that its regulations take precedence? Or, would such an enhancement of the Commission’s powers cause a democratic deficit in the making of the laws that govern democratic politics?

Answering these questions requires untying complex knots. However, the first step would be to recognise that the operation of the Constitution is significantly shaped by the context of the party system in place. The issues explored here are only a few examples of how various design features of the Indian Constitution may facilitate partisan entrenchment and cause accountability deficits. Such partisan control may be particularly dangerous in the context of single-party dominance. Therefore, those who are concerned about the constitutional costs of party dominance may profit more in the long-term from shifting their gaze away from the framework of political norm-violation and towards the structural shortcomings of the Constitution.
Bicameralism and the Rule of Law: Reining in the Abuse of Money Bills in Legislative Procedure

Gaurav MUKHERJEE

Parliamentary democracies engage in the exercise of deliberation during the process of law-making through their institutions. While the design of parliaments varies across countries, a number of them – including India – incorporate an upper house of federal parliament with differences in modes of representation and power from the popularly elected lower house. The upper house is intended to represent a wider range of interests than the lower house, including those of sub-national political units, and can act as a check against the majoritarian tendencies of the lower house. In the Indian constitutional system, both the Rajya Sabha (Indian Upper House) and the Lok Sabha (Indian Lower House) can initiate legislation, while also being able to make recommendations to the other in respect of such legislation.
However, the power of the Rajya Sabha is severely curtailed in respect of ‘money bills’ — legislation that only contains provisions related to taxation, borrowing of money by the government, and expenditure from or receipt to the Consolidated Fund of India. ‘Money bills’ can only be initiated in the Lok Sabha and it remains free to reject any recommendations from the Rajya Sabha pertaining to such bills. Initially intended to give the government of the day a degree of latitude in the field of government finances, the strict textual conditions which circumscribe the classification of laws as ‘money bills’ have been increasingly interpreted in a perverse way so as to ensure that any law on which the government wishes to avoid Rajya Sabha scrutiny is deemed a ‘money bill’. The proliferating classification of ordinary laws which have little to do with government finances in order to evade parliamentary scrutiny has serious deleterious consequences for federalism and the bicameral system of government, citizens’ fundamental rights, and the rule of law.

In this post, I explore this issue in four parts. In the first part, I discuss an instance where legislation having few financial implications, but consequences for the fundamental rights of citizens, was classified as a ‘money bill’ by the Lok Sabha and certified as such by the Speaker. The second part fuses a normative claim about the role of bicameralism in parliamentary democracies with a descriptive argument about the gap between this role and the structural factors that constrain its capacity to perform it under conditions of majoritarian parliamentarism. The third part of this post argues that the rise in the use of ‘money bills’ to avoid Rajya Sabha scrutiny is enabled by the failure of the three veto points which are designed to curb its abuse. In the fourth part, I discuss three ideas to engage the abuse of money bills in the legislative procedure.

**The Abuse of Money Bills: The Aadhaar Case**

On 11 March 2016, the Lok Sabha passed the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016 as a ‘money bill’. The law provides the legal infrastructure for a system of biometric identification aimed at better delivery of public services, benefits, and subsidies to targeted beneficiaries while avoiding welfare fraud. The law as it then stood generated a polarizing public debate: those in favour argued that it could ensure better delivery of public goods and services, while critics pointed to concerns regarding Aadhaar’s privacy implications, its unimpressive record at curbing ‘duplicate’ or ‘ghost’ beneficiaries, the opacity surrounding its mandatory nature, as well as lingering questions about its linkages to services like banking and mobile telephony.

In order to engage with these concerns, several recommendations were put forth by both a bi-partisan standing committee on finance and the Rajya Sabha. These suggestions were summarily rejected by the Lok Sabha and the law was passed as a ‘money bill’; a clear instance of legislation having deleterious implications for fundamental rights of citizens as well as states’ rights being rushed through using an exceptional mechanism to bypass parliamentary debate and scrutiny.

**Bicameralism under Conditions of Majoritarian Parliamentarism**

The classification of ordinary laws as money bills to bypass scrutiny in the upper house has serious consequences for the shared exercise of democratic deliberation, parliamentary oversight of the executive, and the rule of law. The bicameral design of parliamentary systems is intended to serve at least three functions, all of which are collectively eroded when there is a bypass of the Rajya Sabha in the process of law-making.

The first is the representative function of a wider range of interest groups that can influence the legislative agenda which is otherwise dominated by the popularly elected lower house. In India, this is achieved with the Rajya Sabha being indirectly elected through state level elections.
according to a staggered cycle (thereby being able to represent states’ interests at the federal level). The second is a reactive function, where the Rajya Sabha is competent to vote on and reject all bills originating in the lower house except money bills. The Indian federal parliamentary system also incorporates a mechanism by which the Rajya Sabha may delay legislation or force reconsideration by the Lok Sabha for a limited period of time, failing which there may be a joint session of the two houses to resolve the deadlock.

This however has not happened since 2002, when the provisions of the Prevention of Terrorism Bill had been debated in a joint session. The third is an oversight function which the Rajya Sabha is able to execute through horizontal (referral to select or standing committees), diagonal (questions) and vertical (lower house opposition or committees raising questions to the political executive) institutional routes.

The representative, reactive, and oversight functions of the bicameral system assume greater importance within the political conditions of India, where a single party – the Bharatiya Janata Party (BJP) holds an electoral supermajority in the Lok Sabha. Under ordinary conditions in parliamentary systems, there is a hierarchical relationship between the legislative and executive branches’ executive authority. The latter, comprising an executive head and her cabinet, arises out of the legislative body and is subject to potential dismissal through a no-confidence vote.

However, with the BJP’s electoral supermajority, this hierarchical relationship is inverted, leading to a situation which political scientists call ‘majoritarian parliamentarism’ where legislative authority is subordinated to executive authority, a process that is aided by the increasing fusion of executive, party, and legislature; as well as strict party discipline – enforced by a strong anti-defection law.

The Three Veto Points

In our recent paper, my co-author and I suggest that there are three veto points that exist in the Indian constitutional framework against the abuse of the special status granted to ‘money bills’ in respect of the Lok Sabha. First, there are strict textual conditions contained in article 110(1) of the Indian Constitution which states that a bill shall only be deemed to be a money bill if it contains provisions exclusively dealing with, inter alia, federal taxation, borrowing or expenditure. This is meant to ensure that an ordinary bill ‘shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses’.

The second veto point is that a certification to this effect must be granted by the Speaker of the Lok Sabha, who is considered to be a non-partisan constitutionally designated officer. The partisanship of the Speaker has come under a cloud in the last few years, with rampant misapplication of seemingly neutral rules in favour of the majority party in the Lok Sabha. The finality of the Speaker’s certification of ‘money bills’ in the Indian Constitution owes its origins primarily to section 37 of the Government of India Act, 1935 (modelled on section 1 of the Parliament Act, 1911 of the UK) and article 22 of the Constitution of Ireland, 1937.

Two key differences are important to highlight. First, the UK law contains an explicit bar against judicial review of the certification, stating that it ‘shall not be questioned in any court of law’ and that it shall be conclusive ‘for all purposes’. Such language is not present in the analogous provision in the Indian Constitution. Second, a challenge to the certification of a money bill in the Constitution of Ireland is governed by section 22(2), which sets up a detailed politico-legal process for a final determination. These differences provide a compelling basis to consider the Indian Lok Sabha Speaker’s certification judicially reviewable.

This brings us to the third veto point – the judicial review of such certifications by the Speaker, albeit to a limited extent given the Speaker’s position as a constitutionally designated
Engaging with the Abuse of the Money Bills in Legislative Procedure

Having laid out the weaknesses of the three veto points which are required to work in tandem under conditions of majoritarian parliamentarism in order to ensure the continued accountability of the executive to Parliament, I turn to three ways in which the abuse of the ‘money bill’ procedure may be engaged with.

The first mechanism is the exercise of judicial review which takes seriously the textual conditions that govern whether an ordinary bill may be deemed a money bill. In order for this mechanism to function properly, there needs to be a departure from the approach taken by the Supreme Court in the Puttaswamy case, where the analysis of substantive questions of constitutionality within the Aadhaar legislation were folded into the scrutiny of whether the law fell within the ambit of the requirements under article 110(1). For the reasons indicated in section III, judicial review should also start with the presumption that the Speaker’s certification of a money bill is subject to scrutiny. The Supreme Court’s willingness to revisit the constitutional validity of the Speaker’s certification of a proposed law as a ‘money bill’ when its content falls outside the scope of the enumerated grounds in article 110(1) of the Indian Constitution is a welcome step in this direction.

The second mechanism is through reform of the office of Presiding Officer of the Lok Sabha. Currently, this role is held by the Speaker, who is selected from among the members of the party holding a majority in the chamber. The role is meant to be non-partisan, but recent instances of partisan behaviour in favour of the ruling party only reinforce the need for change. Some have suggested an arrangement where the majority party and the opposition each appoint an Associate and Deputy Speaker, each of whom would serve terms in charge of the chamber on a rotating basis, changing with each session. In the event the Associate Speaker were incapacitated or unable to serve, the Deputy Speaker would step in.

The third mechanism does not relate directly to the abuse of the money bill procedure but can strengthen the ability of both houses of Parliament to ensure executive accountability. The empirical evidence from India points to a decline in the use of questions, referrals to joint or standing committees. The number of referrals to parliamentary committees, which performs a large part of the deliberative work of the institution, witnessed a precipitous decline from the
previous Lok Sabha term to the current. During the term of the 14th Lok Sabha (2014-19), there had been a total of 68 of such referrals, amounting to 71% of the total number of legislation passed in that term, whereas in the 15th Lok Sabha (2019-present), there have been a total of 24, amounting to a mere 25% of the total number.

Concurrently, there has also been a steep reduction in the sheer amount of time which is devoted to debate and discussion of legislation in both houses. A renewed vigour and coordination among political actors could have a significant effect on the ability of Parliament to conduct its crucial work to keep an entrenched, powerful executive in check.
COVID-19 and Abusive Constitutional Change in Sri Lanka

Ayesha WIJAYALATH

In Albert Camus’ *La Peste*, Dr. Rieux, reflecting on the plague in the city of Oran in Algeria, says, ‘there’s no question of heroism in all this. It’s a matter of common decency. That’s an idea which may make some people smile, but the only means of righting a plague is, common decency.’ The job, according to Dr Rieux, is relieving human suffering amidst the deadly crisis. In this grave but collective destiny, what is the government’s responsibility towards citizens, and particularly that of the executive? Are they acting ‘decently’ in fulfilling their roles? With these questions in mind, this post looks at executive powers in times of crisis, especially focusing on Sri Lanka’s battle with the COVID-19 pandemic and its implications for the country’s democratic governance.

In this post, I aim to trace the systematic attempts at executive power-grabbing by dismantling the already fragile constitutional democracy of Sri Lanka, and how exogenous events such as the pandemic provides the perfect pretext in this process. The post also engages in the debate about the role of the executive at times of crisis, but focuses more particularly on abusive
constitutional change resulting from the enactment of the *20th Amendment* (20A) to the Constitution of Sri Lanka.

**Background**

When the first COVID-19 cases were identified in Sri Lanka, in the early months of 2020, the government was quick to implement public health surveillance through contact tracing, and to impose a lockdown, which successfully managed to curb the numbers compared to her South Asian neighbours. The military played a variety of roles in containing the crisis and has been duly lauded for its efforts. Yet, characterising the pandemic as a ‘war’, and the increasingly visible military presence in public, soon became unsettling, especially for minority communities in a post-war setting (given that the decades-long conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) only ended in 2009). Communal divisions were further aggravated when Muslim minorities were singled out and stigmatized as carriers of the virus. Presidential Task Forces, which prioritized military personnel in their composition, were established extra-constitutionally. Equally problematic was the way in which an indefinite curfew was imposed with no basis in law.

With the government in full control of the dissemination of information on crisis management, there was an official narrative of strong and successful leadership role in containing the virus. This soon turned into bravado, as a perfect guise to win public support for the ruling regime. Notwithstanding the pandemic, President Gotabaya Rajapakse decided to dissolve Parliament in preparation for elections. The president, rather than reconvening Parliament to better manage the crisis with due transparency and accountability, decided to proceed with the elections in anticipation of a resounding victory for his party.

The timing of the election also raised important constitutional issues but the Supreme Court was quick to dismiss these challenges without providing any reasons. Thus, the general election in August 2020 went ahead. It was a landslide victory, with the President’s party winning an unprecedented majority under the country’s proportional representation system.

**Executive Power in Times of Crisis**

Central to this victory lies the debate on executive powers at times of crisis. One narrative is based on the argument that a strong executive is essential for the control of resources and the deployment of armed forces in the effective management of the crisis. And in doing so, the governing constitutional principles may take a backseat, leaving room for the expansion of the executive power, on the basis that it can better handle widespread emergencies as opposed to a ‘messy’ democracy. Sri Lankans largely held this view when the initial government responses to COVID-19 proved successful. Moreover, this overwhelming public support for a strong executive came at a time when the previous regime, elected under the banner of restoring democracy, colossally failed to protect its citizens from the deadly Easter Sunday terrorist attacks last year.

The counter argument maintains that, even in times of crisis, the executive should be bound by constitutional controls despite temporary allowances for expansions of executive power. The crux of this argument is that a temporary expansion of executive power during a crisis, can soon become entrenched as a new normal. This would undermine democracy with lasting implications on the exercise of fundamental rights. This very argument gained traction in Sri Lanka as the pandemic brought opportunities to aggrandize executive power.

**The 20th Amendment and its ‘Democracy-destabilizing’ Effects**

After politically securing power during the pandemic, it did not take long for the President of Sri Lanka to entrench his powers constitutionally. Easily mustering the required two-thirds majority
in Parliament, the **20A** was recently passed, exacerbating the illiberal turn already underway before the pandemic.

The 20A undoes most of the democratic reforms introduced by the 19th Amendment that had significantly curbed the powers of an over powering executive. Consequently, major risks of democratic retrogression have been raised with untrammeled powers vested in the president. For example, the Constitutional Council, which previously ensured a depoliticised public service appointment process by limiting the president’s powers during the process, was replaced by a Parliamentary Council whose observations have no binding effect upon the president. This process gives the president unfettered powers to appoint all judges of the superior court, including the Chief Justice, the Attorney-General, the Inspector General of Police, and members of independent commissions, thus compromising liberal democratic traditions and institutions.

Similarly, Sri Lanka’s parliamentary democracy is at stake given the president is no longer subject to stringent procedures pertaining to parliamentary dissolution, a mechanism that was frequently abused by past presidents and was a core issue during the 2018 constitutional crisis. Moreover, the Prime Minister has been reduced to a ceremonial role under 20A and can now be removed by the President unilaterally. These are but a few examples of a broad range of constitutional changes that fundamentally weakens the separation of powers, and undermines democracy and the rule of law.

The 20A can broadly be characterised as an ‘abusive’ constitutional amendment. It is ‘abusive’ as it constitutionally entrenches authoritarianism and weakens other institutions. This distortion of constitutional norms poses significant challenges for future re-democratisation processes. The term ‘abusive constitutionalism’ refers to the use of formal constitutional amendment and constitutional replacement, as well as informal constitutional change through judicial decisions, to carry out constitutional change that entrenches the incumbent’s political power and weakens institutions such as courts that check such power. Thus, while the constitution and the amendments to it maintain an appearance of democracy, close scrutiny reveals its ‘democracy-destabilizing’ effects.

**Executive Power and Abusive Constitutional Change**

In Sri Lanka’s history of democratic constitutionalism, the twenty amendments since the promulgation of the 1978 constitution have played a fundamental role in the development of the country’s democratic institutions, and at times, have acted as critical junctures in defining Sri Lanka’s democratic trajectory. The amendments to the Constitution have included pro-democratic and democratic restoration amendments, especially in light of the 2015 democratic regime change after the elections that year (e.g. 19th Amendment).

Yet, the anti-democratic and abusive constitutional amendments (e.g. 18th Amendment) that were passed through formal democratic procedures, have also substantially undermined the democratic character of governance. The implications of these amendments are particularly crucial when judicial review is limited to pre-enactment review in Sri Lanka. Similarly, while no substantive limits on amendment are specified in the Constitution, the Supreme Court only has the mandate to review for constitutionality as regards adherence to procedural requirements.

The problem of abusive constitutional change through the use of the formal amendment procedure to expand the role of the President during extraordinary times is not a new phenomenon in Sri Lanka. In 1982, when ethnic tensions were brewing with calls for secession in the north by the Tamil minorities, the then president J.R. Jayawardene, taking advantage of his popularity in the south, advanced the date of presidential elections at the expiration of four years of the president’s six-year term by way of a Third Amendment to the constitution. **The Court**
upheld the constitutionality of this amendment, highlighting that the people were being given an early opportunity to express their approval or disapproval of the president’s leadership.

The amendment that brought the most drastic changes to Sri Lanka’s constitutional order was the 18th Amendment (18A), which came at the conclusion of Sri Lanka’s thirty-year civil war. The end of the war warranted a major constitutional overhaul in terms of establishing an effective power-sharing mechanism and robust protections of fundamental rights to address the grievances of minorities. Instead, capitalizing on its war victory, the Government introduced the 18A which removed presidential term limits and limitations on presidential powers over the public service appointment process. When the 18A bill was challenged, the Court, construing franchise in a narrow sense, held that the elimination of term limits enhanced franchise by expanding the choice for voters. The Court held that this included the choice to vote the incumbent president and thereby failed to respond to fundamental theoretical objections to the bill.

The COVID-19 outbreak has, once again, provided ideal circumstances for exploitation and the consolidation of an autocratic rule in Sri Lanka. When the 20A Bill was introduced and was subsequently challenged in the Supreme Court for its democracy-defying effects, the petitioners argued that only the Constituent Assembly has a mandate to fundamentally alter the constitution, and therefore 20A is untenable as it makes substantive changes to the Constitution that affect the very basic constitutional framework. But the Court dismissed this ‘basic structure’ argument and found the doctrine, developed in Indian jurisprudence, unsustainable. As a result, the Court held the Bill to be consistent with the Constitution, save for a few clauses that may be passed without the requirement of a referendum once the necessary changes have been made to them at the committee stage. However, the Court’s resistance to restore full presidential immunity is noteworthy.

What is significant in these three amendments, in their pursuit to enhance executive power, and the corresponding judicial decisions, is that they are abusive in character, not only in their attempts to subvert democracy through the formal amendment procedure but also in the way in which the Court decided these cases. ‘Abusive judicial review’, or the courts’ role in promoting anti-democratic practices as examined by David Landau and Rosalind Dixon, also demonstrates that one type of abusive judicial review is a ‘weak’ form where courts simply uphold authoritarian actions.

As evinced in the 20A decision, this judicial deference provides the much-needed legitimacy for the problematic constitutional amendment to be accepted both domestically and internationally, by indicating its compliance with the existing constitutional order. Thus, the courts in tandem with the political branches have set the wheels in motion towards democratic decay in Sri Lanka. Central to this judicial deference is the weak institutional autonomy of the Sri Lankan judiciary and its limited mandate for judicial review. As a result, the Court is wary to take decisions unfavourable to the political authority and the illegal impeachment of a former Chief Justice has further aggravated this reluctance.

Even though the 20A retained some provisions of the 19A, including presidential term-limits, the ruling regime intends to promulgate a new constitution which may entail the removal of whatever democratic principles through constitutional replacement that have been retained so far. Thus, as Radhika Coomaraswamy points out, the written constitution, which is the very source of liberal democratic values, has been subjected to replacement and amendments, leading to an instrumental use of constitutionalism to capture state power in a manner seen across South Asia. This is, in effect, a form of usurpation of constitutional ideology.

Amidst these constitutional reforms, the current pandemic situation in Sri Lanka has also reached alarming proportions with new COVID-19 clusters emerging in different parts of the
island. The government’s approach, using ‘alternative facts’ when reporting COVID-19 numbers, and affirming zero-community transmission based on minimal testing, has impacted the spread of the novel coronavirus. Risking public health, national security, and thereby, the national economy in order to proceed with elections and constitutionally entrench the executive hold on power has little to do with managing the crisis and truly calls into question the ‘decency’ of the way in which the executive is doing his job during this pandemic.
With the passage of the 20th amendment to the constitution in October this year, Sri Lanka retreated once more into the abyss of constitutional authoritarianism. The 20th amendment unravels many of the democratic gains of the 19th amendment passed in 2015. The 20th amendment returns Sri Lanka to hyper-presidentialism with power concentrated in a strong Executive President. The President will now have the power to dissolve a democratically elected legislature after half its term, assume any ministerial post, and have the untrammelled power to make appointments to the judiciary and independent commissions. Cabinet and Parliament have been devalued yet again. This contribution argues that Sri Lanka’s tango with constitutional democracy is the result of flaws in its constitutional design, super-parliamentary majorities, and constitutional manipulation by political elites.

Constitutional Manipulation

Sri Lanka is not unfamiliar with constitutional manipulation. In 1972, the government brought in a new constitution that concentrated power in a strong Parliament and used the new constitution to extend the life of Parliament by two years. In 1977, the government won 141 out of 168 seats
in the legislature and installed an Executive President by means of a constitutional amendment within months of its electoral victory. Within a year, the 1978 constitution was passed, and it created a powerful Executive with very few checks and balances. This same constitutional structure has now been restored to its full glory by the 20th amendment. In 2010, in the wake of a popular victory over the LTTE (Liberation Tigers of Tamil Eelam) the previous year, former President Mahinda Rajapaksa hurriedly passed the 18th amendment to the constitution, which enabled him to compete for a third term and abolished the Constitutional Council, which played an important role in appointments to the judiciary and independent commissions.

**Constitutional Change**

Sri Lanka has flirted with a variety of constitutional models over 90 years and danced from authoritarianism to democracy and back again. In 1931, the country established universal franchise under the Donoughmore Constitution long before its South Asian neighbours. This experience with universal franchise is now strongly ingrained in the national political culture and has enabled peaceful transitions of political power after periods of authoritarianism.

In 1948, the country gained independence and the first post-independence constitution modelled on the Westminster system that included a bicameral legislature, an independent judiciary, an independent public service, and a first-past-the-post electoral system (FPP). The nominal head of government was the Queen, and the final court of appeal was the Privy Council. While the constitution did not contain a bill of rights, it included Section 29: an early version of the ‘equality and equal protection of the law’ clause which was aimed at protecting the rights of religious and ethnic minorities.

The 1947 Constitution lasted 25 years, with power alternating between the two main political parties. A landslide victory at the parliamentary election of 1970 enabled the ruling alliance at that time to steamroll a new constitution in 1972. The 1972 constitution created a unitary state, privileged Buddhism, made Sinhala the official language, and ‘Ceylon’ became ‘Sri Lanka’. Power was centralized in Parliament and judicial review of legislation was precluded. The Tamil parties walked out of the constitution-making process.

In 1977, another steamroller parliamentary majority facilitated passage of the 1978 constitution. This time power was centralized in a strong elected executive President, with Parliament becoming a rubber stamp. The proportional representation electoral system was introduced, and judicial review of legislation was precluded. The constitution included a bill of rights but preserved the sanctity of past law, even if it conflicted with the new Bill of Rights. The Tamil parties, once again, did not vote for the new constitution. In 1987, under pressure from India, and in the middle of an ethnic war, a system of provincial councils and limited provincial autonomy was introduced.

**The 19th Amendment**

The 19th Amendment in 2015 radically transformed the Constitution. It reduced the President’s and Parliament’s terms from six to five years; restored the two-term limit on holding presidential office; and provided that the President cannot dissolve Parliament before four and a half years of its term have elapsed. It prohibited the removal of the Prime Minister from office by the President at will. The 19th amendment also made the President’s official acts subject to the Supreme Court’s fundamental rights jurisdiction. Previously, the President possessed blanket immunity and no proceedings could be instituted against a sitting President. The President was precluded from holding cabinet portfolios and the size of cabinet was capped at 30. The 19th amendment reintroduced the Constitutional Council, which either proposed or vetted appointments to independent commissions and the judiciary.
The Design Flaw

While the Supreme Court has generated important jurisprudence over the years, it has not had the power and prestige that other constitutional courts have had. This has allowed political actors to meddle with the constitution and the judiciary more easily than in other countries. In 1947, the Court was not explicitly given the power of judicial review of legislation, but it subsequently held that it did have that power. That power, however, was used sparingly and only to strike down legislation that encroached on the exercise of judicial power. No law was declared invalid on the ground that it violated section 29 even though there were at least two powerful cases that showed a conflict with this provision. The 1972 and 1978 constitutions explicitly excluded the power of the courts to strike down legislation; this had an impact both on its power and prestige. The power to review bills before enactment and the power to review executive action by way of a fundamental rights application remain.

Despite this lack of power and prestige, the courts have challenged the might of the State and rendered several decisions in support of constitutional democracy. In the Bracegirdle case (1937), the Supreme Court challenged the colonial Governor’s authority by holding that a deportation order against an Australian labour activist was beyond his power. In the Liyanage case (1965), a high water mark of the exercise of judicial power, the Privy Council held that the Minister of Justice had usurped judicial power in constituting a trial-at-bar to try those involved in a failed coup. In the early 1970s, in a determination on a bill, the now defunct Constitutional Court held that the legislature was aiming to assume judicial power through the proposed legislation. In 2018, the Court of Appeal and the Supreme Court came together to resolve a major constitutional crisis when the President attempted to sack the Prime Minister. The Supreme Court held that the President had exceeded his constitutional powers. In addition, there have been a long stream of cases, involving both fundamental rights and writs, where the Supreme Court and the Court of Appeal have scrutinized the exercise of executive power with rigour and developed a unique jurisprudence. Yet, since 1972, the courts have lacked the capacity to overturn legislation that conflicts with the constitution. This has made the judiciary a ‘less equal’ branch of government.

Undermining Judicial Independence

The courts in Sri Lanka have also had to deal with political challenges to their independence and this has had a damaging impact on their prestige and stature. In 1978, the very act of constitution-making undermined judicial independence and security of tenure. The 1978 constitution abolished the previous High Court and Supreme Court and established a new Court of Appeal and a new Supreme Court. Eight of the former judges of the Supreme Court were not appointed to either of the new courts, and one declined an appointment to the Court of Appeal.

By contrast, members of the legislature and the public service continued to hold office. It was clearly an endeavour to remove judges the new regime did not favour. This was followed by the appointment of two Parliamentary Select Committees, a move that humiliated the judiciary. One was appointed to probe the conduct of two judges after they had issued a judgment in relation to a fellow judge who was serving on a commission of inquiry probing the misdeeds of the previous Prime Minister. The second committee sought to impeach the then Chief Justice after statements he made an innocuous prize-giving ceremony. While the committee found that convention had been breached, Parliament did not proceed with the impeachment. Many years later, in 2012, Parliament successfully impeached a sitting Chief Justice within a period of two months. During the tenure of former President Rajapaksa, the President bypassed the Constitutional Council in making appointments to the judiciary in violation of the constitution.

Other events have also undermined judicial independence and prestige. In two cases where the Supreme Court found that state officers violated human rights, the State responded by
promoting the police officers concerned and paying their compensation. In one of those cases, goons in state owned buses visited the houses of two of the judges and hurled abuse.

Dancing between Democracy and Authoritarianism

Sri Lanka’s dance with democracy continues. The 1947 constitution lasted 25 years and provided the greatest degree of democratic stability. The country transited to authoritarianism in 1972 when the constitution created a supreme Parliament. Authoritarianism continued with the 1978 constitution and the creation of a strong presidential system. Both the 1972 and 1978 processes of constitution-making were partisan processes that served to advance the interest of the ruling party. The occasions on which parties have come together across political lines have produced the 17th amendment and 19th amendment to the constitution. The 17th amendment, passed unanimously, created the Constitutional Council, and the 19th amendment, supported by 215 of the 225-member legislature, created a balanced form of constitutional government among the four branches: the legislature, the executive, the judiciary and the independent commissions.

Sri Lanka has a long history of universal franchise and free and fair elections. In 1994 and 2015, this enabled peaceful transitions after prolonged periods of authoritarianism. Yet, on other occasions, elections have produced super-parliamentary majorities, under the FPP system in 1970 and 1977, and under the proportional representation system in 2020, that have paved the way for partisan constitution-making and constitutional authoritarianism.

The 19th amendment raised hopes that constitutions could be put beyond the reach of petty politics. This has proved to be wishful thinking. Barring 2001 and 2015, the political leadership has been unable to cross party lines and create a constitution that was inclusive and garnered support across the country’s ethno-religious identities. The competition for political power remains intense and political actors have not hesitated to mobilize ethno-religious identities and the constitution as tools to secure political power.

Courts play a role as defenders of constitutional democracy and, as the Sri Lankan experience shows, in the absence of a fully co-equal judicial branch democracy is at risk. This failure to generate a co-equal branch is the result of a flaw in Sri Lanka’s constitutional-design and the result of political attacks on the judiciary.

In a multi-religious and multi-ethnic society, the goal of constitution-making should be to build consensus, create a balanced government, and develop points of accommodation amongst and between different social groups. Constitution-making that is partisan and unprincipled, and serves only the interests of the regime in power, is a recipe for disaster. This recipe unfolded in Sri Lanka when it had to face two armed insurrections, by Tamil and Sinhalese extremists. Both insurrections caused tremendous loss to life, social relationships, and the economy.

The manipulation of constitutions has helped political elites retain power at the expense of democracy and social cohesion. Sri Lanka did experience a constitutional moment, in 2015, when political parties of different hues came together to pass the 19th amendment, which created a balanced form of constitutional government. The issue of power-sharing was not pursued by Tamil parties and this enabled a building of consensus across the political spectrum. While that brief ‘democratic-spring’ generated a tolerant political culture and restored institutional independence, it did not deliver on its many promises and got embroiled in its internal power struggles that resulted in an electoral backlash. This balanced scheme of constitutional government has now been jettisoned in 2020 for a return to hyper-presidentialism by another exercise in partisan constitution-making that has heightened social divisions and ethnic polarization.
EUROPE: SPOTLIGHT ON HUNGARY & POLAND
Hungary and Poland no longer embrace liberal constitutionalism and liberal democracy. The populist autocrat leaders of both states, while keeping all the benefits, push the limits of substantive constitutional democracy and that stemming from membership of the European Union (EU) and the Council of Europe (CoE). “Pushing the limits” is a political and legal game, comprising a cynical approach to criticism and the combination or different variations of backing off: taking one step back, followed by two steps forward, in advancing the illiberal system; adopting cosmetic changes; reaching the same result from a different angle; planning on wearing
down critical voices from different institutions, rendering them unable to keep pace with some minor but important and no less questionable changes.

As a result, when these institutions have finally been able to reflect on these changes, many years have already passed and/or political aims been achieved. It has been no different in 2020, even as new possibilities have opened. This year, in the context of “pushing the limits”, nothing has changed, but the deterioration has worsened, even if neither Poland nor Hungary has reached the point of descending into full authoritarianism. It is so, even if, at the beginning of the COVID crisis, many, with good reason, worried about that happening. It is precisely this persistence in the “pushing the limits game” that shows the stability of illiberal constitutionalism.

In this post, we briefly review the most remarkable examples emerging before and during 2020 that can best characterize the mechanism of “pushing the limits” and best illustrate the cynicism, and the individual and combined effects of the above-mentioned components of this “game”.

**Pushing the Limits before 2020**

One might recall the controversies surrounding, e.g., the Fourth Amendment to the Fundamental Law (FL), as the most prominent Hungarian example of an abusive and thus, doctrinally speaking, unconstitutional constitutional amendment (which, e.g., constitutionalised rules that were already declared unconstitutional by the Constitutional Court). After concerns had been raised by the Venice Commission, the government introduced the Fifth Amendment, making some slightly more than cosmetic changes (e.g., on religious freedom and churches), and repealed the criticized constitutional provisions (e.g., on the judiciary). The fight against migration and the defence of “Christian Europe” were not only the focal point of populist rhetoric, but also appeared in the law.

In 2015, Hungary opposed the European Council Decision on the relocation of third-country nationals, from Italy and Greece, based on a predetermined scheme, which required the states where refugee applicants are relocated to examine the application for international protection. It resulted in a decision from the Court of Justice of the European Union (CJEU), which upheld the validity of the Council Decision, leading to the government’s proposing an amendment that became the Seventh Amendment to the FL (2018). This introduced the notion of Hungarian ‘constitutional identity’, which can be used to prevent the implementation of any future European legislation the ruling political power dislikes. On the other hand, other aspects of the migration policy, in the light of the initiated infringement procedure, have been corrected, for example regarding the translation of documents. The European Court of Human Rights (ECtHR) condemned Hungary for its treatment of refugees, e.g., for misinterpreting what a safe third country means (2019). The Hungarian Minister of Justice opined that this judgment favored the government’s position, making its border control legitimate. Therefore, no actions should be criticized, including the inadequacy and controversies emerging concerning the detention centers.

As the Polish Constitution has remained formally unchanged, the ruling Law and Justice party (PiS in the Polish acronym) has used legislative reforms on the judiciary and individual pieces of legislation for remodelling. Disciplinary procedures have been initiated against judges because of their decisions. Criticism by scholars regarding changes to the criminal law have been deemed “false statements” or “lies”, and the authorities have announced charges against such scholars. These proceedings have since been called off due to popular discontent, but not the civil and criminal defamation cases against Professor Sadurski. The infamous Polish defamation law, which created a criminal offense for stating that the Polish nation or state was in any way responsible for Nazi crimes, was in effect for only four months. The Sejm dropped the penal part of this Act due to international criticism. It was never applied.
The Polish and Hungarian judicial reforms seem to be a never-ending saga, featuring all the components of the “game”. In both states, many of the components of the heavily criticised reforms were put forward under the guise of advancements, such as fighting against corruption in Poland or addressing social issues in both countries (e.g. retirement age), implementing constitutional changes (Hungary), or reforming the structure of the judiciary (Poland). But in reality, more usually than not they have compromised judicial independence. Political power has, generally, stubbornly insisted on these reforms until their political cost has become too great. This is what happened with the highly criticized Hungarian administrative judiciary, which first was postponed then given up. Sometimes, a different angle is taken to reach the same political goal. For instance, the de facto situation generated by early retirement in Hungary (namely, that judges were removed from their positions) has not substantially changed after the decision of the CJEU and the subsequent legislation of the Hungarian government (judges were reinstated to different positions much later).

The Polish government reacted slightly differently to the decision of the CJEU (2018). The response to the interim decision was the urgent adoption of another law on the Supreme Court that partially reversed the effects of the reform as far as the retirement rules were concerned. Nevertheless, it affected neither the composition nor the power of the National Council of Judges. The situation has been aggravated in 2020, mainly due to the CJEU’s decision on the preliminary ruling question about the independence of the Polish judiciary (2019): 2020 left the Supreme Court divided on whether to comply with this decision. The political sphere, quite worryingly, keeps pushing the reform, and, for that, they have received support from the Constitutional Tribunal, which itself has been brought under greater political control.

**Pushing the Limits in 2020**

COVID meant new possibilities for pushing the limits. It was feared that the Hungarian constitutional state of emergency would not be terminated and that the government would seize even more power and misuse it. The constitutional emergency was, however, terminated and replaced with a less stringent, statute-based emergency, as a result of which the criticized governmental decrees were withdrawn. The new statute-based emergency, which can last for six months and can be extended, is declared and terminated by the government. The regulating Act lays down the subject matters for which governmental decrees may be issued. Even if it limits the room for manoeuvre, the Parliament is still not involved in decision-making on the emergency; not even a theoretical possibility for oversight is granted. Nevertheless, since 2010, due to the constitutional majority of the government within Parliament, talking about any meaningful practice of oversight is futile; besides, the government has a record of not ending statute-based emergencies. The advent of autumn has shown that the government does not intend to introduce more severe restrictions, mainly because of the economic implications.

In Poland, even before COVID-19 hit the country, it was announced that the presidential election was to be held, due to constitutional regulation, in May 2020. After March 2020, when the emergency was introduced, and with scheduled presidential elections looming, the governing majority wanted to elect a president as soon as possible, trying to create a favourable environment for President Andrzej Duda to stay in office. According to Jarosław Kaczyński, successful crisis management depended upon Duda’s winning this election. The government introduced restrictions because of the pandemic, but the constitutionality of some of them, such as the total ban on assemblies, could rightfully be doubted. Besides, it made the electoral campaign purely illusory, which also violated electoral rights.

Legislative drafts pushing the election amidst the crisis also raised the issue of unconstitutionality, and eventually they were dropped. We might recall the discriminatory
proposal on remote voting (by post) for those in quarantine and aged above 60 – who are predominantly PiS voters. Another draft law, issued just a few days before the original election day, proposed an all-postal vote, which raised concerns about the secrecy of voting and the possible exclusion of those living abroad. A constitutional amendment that proposed to increase the mandate of the current President by an additional two years was also put forward. At this point, Poland was very close to crossing the border into authoritarianism, but the governing majority, based on political agreement within the coalition, eventually postponed the election. Finally, the presidential election was held in June and July 2020, in accordance with another newly passed statute, which, taking the circumstances of the pandemic into consideration, proved to be much closer to the constitutional rules and international standards.

During the constitutional emergency in Hungary, a new crime on spreading “false information” during an emergency was constructed (March 2020). The media reported cases of the arrest of social media users who created and shared “false news”. Some of them have been charged, others released as the prosecutor’s office concluded that no criminal offense had been committed. Concerns were raised, rightfully, about the potential effect of the new provision on the freedom of speech and media. The case was referred to the packed Constitutional Court, which did not embarrass the legislative power by annulling the new crime. By setting a constitutional requirement for the application and interpretation of this crime, however, it changed the content of the original provision of the Criminal Code. The result, in practice, is the complete opposite of what the law-maker intended. There is no sign of this decision’s being addressed at a political level.

In April 2020, the CJEU found Hungary and Poland, and the Czech Republic, in violation of EU law because they refused to comply with the temporary mechanism for the relocation of applicants for international protection. The legal responses are still to be seen, but the Hungarian constitutional law has already been “immunized against migrants” by the constitutional identity clause. The CJEU delivered other, unsurprising decisions as well. In March, it ruled that it is not compatible with the EU law if an asylum request is declared inadmissible because the applicant arrives in Hungary via a country that is incorrectly listed as a safe third country. In May, it stated that the transit zones in certain cases mean an unlawful deprivation of liberty. The government declared that it would close the transit zones, which is a kind of “compliance” with the ruling, which did not demand it. On the other hand, the method of initiating an asylum procedure was changed, which raises new concerns in connection to the very essence of asylum. Now, without valid documents issued by the Hungarian authority, asylum seekers cannot enter into Hungary but have to submit “a letter of intent” at the Embassy abroad. The Embassy will transfer this letter of intent to the immigration authority, which will examine it and conduct an online interview with the applicant, who is requested to present himself or herself at the premises of the Embassy.

In Poland, the binding nature of the (interim) decisions of the CJEU has been challenged, even more seriously than pre-2020, not only in political communications but in legal procedures as well. In the case Commission v Poland on the disciplinary procedure against judges and the lack of impartiality of the disciplinary chamber, an interim measure was issued (April 2020) ordering the suspension of the operation of the disciplinary chamber of the Supreme Court in this regard. The packed disciplinary chamber has referred a question of law to the Constitutional Tribunal about the conformity of the EU Treaty with the Constitution, on the ground that the EU does not have the power to decide on matters concerning the domestic judicial system. The packed disciplinary chamber is still operating. Right now, there seem to be two options: if the usual patterns are followed, Poland will be pushing the envelope until the CJEU delivers its final decision and will then back off; or the Polish government will continue its judicial reform with a
favourable decision of the Constitutional Tribunal and push the country towards authoritarianism even faster.

**Concluding Remarks**

The “pushing the limits game” thus indicates the stability of illiberal constitutionalism and indicates the weakening influence of the EU and Coe. We have also observed a paradox: even though the system does not exclude improvement (but makes it quite unlikely), it rather features accelerated deterioration towards authoritarianism, which is, however, slowed down by the “pushing the limits” game discussed above.
The Façade of State Organs in Contemporary Autocratic Regimes: The Case of the Polish Parliament

Piotr MIKULI

Background
One of the characteristics of the current form of authoritarianism is that legal institutions or procedures are not merely abolished. On the contrary, they are abused, and their real meaning is altered. Kim Lane Schepple rightly argues that authoritarians deploy the law to achieve their own aims. This central tactic of these authoritarians was described already in 2008, among others, by Tom Ginsburg and Tamir Moustafa (Rule by Law: The Politics of Courts in Authoritarian Regimes). Legal institutions originally intended to protect and preserve the rule of law have been distorted
into institutions designated to rubber stamp decisions already taken by a contemporary satrap. In Poland, many constitutional institutions have been politically captured without formally changing their names and competences (The Constitutional Court and the National Council of the Judiciary are often perceived as the best examples of this phenomenon; see, for instance analysis by Marcin Matczak).

In this blog entry, I will present institutional, legal and practical examples of parliamentary freezing in Poland in the years 2015–2020, using three approaches: 1) the issue of the contrast between legal and political constitutionalism: undermining parliamentary debates falsifies the thesis shaping the latter in Poland; 2) the issue of parliamentary functions, mainly the control function: suppressing the opposition leads to the practical disappearance of these functions because certain legal and constitutional tools are usually used by opposition deputies; and 3) the dogmatic and practical approach: presenting a classification of those mechanisms that have been used to make the parliament an institution essential to rubberstamping the ruling party's decisions (made outside parliamentary debates).

**Legal versus Political Constitutionalism: Misleading Assessment**

The first approach seems a little faded nowadays, as the real face of the Polish and especially Hungarian autocrats’ intentions has become known (see Paul Blokker). At the very beginning of the Law and Justice party (PiS) ruling, arguments concerning a shift from legal to political constitutionalism were part of scholarly discussion. Some observers perhaps hoped or were even convinced that the change may involve the prevalence of political discourse at the expense of purely legal analyses of constitutional provisions, which could be connected with the limitation of the judiciary's role, including the constitutional court. As we know, tendencies to criticise judicial review are as old as constitutional justice. Public and scholarly arguments that strong courts and judicial review limit democracy are frequent in developed, stabilised states with rule by law.

However, straightforward attacks on legal and political institutions removed all illusions, which was proven very well by Wojciech Sadurski in his excellent book *Poland's Constitutional Breakdown*. The aim is only to concentrate power and limit the elementary control of its arbitrariness. They adore referring to the rebuilt rule of law, but as Justice of the German Federal Constitutional Court Susanne Baer rightly stated recently, ‘what they mean when this is looked at in detail is law as a means of their power to crush those they dislike’.

To grasp this issue, I would like to develop here that there is the need to define a notion of ‘façade activity’. In this context, by ‘façade,’ I mean depriving a state organ/body of their real competences, especially in relation to a checks and balances system understood in its wide sense, as a necessary element of the contemporary state ruled by law. However, institutional capture takes place not without reason. In the intentions of authoritarians, a hijacked organ must consolidate their power while the current state apparatus is still in formal operation. ‘Façade’ here means the loss of immanent independence, which is necessary to fulfil a given state body’s assigned constitutional role.

Thus, the material aspect is the most important here. Obviously, from a clearly formal perspective, a captured organ may not be a façade at all; conversely, it may be practically effective, especially if it uses its competences in a way hostile to the constitution's normative content. In this sense, for instance, both constitutional court and parliament remain even more vital, as they used to be. They may even invoke legal results, which could not be achieved previously when they acted inside their constitutional scope of power. In this context, I cannot fail to mention the last ruling of the Polish Constitutional Tribunal concerning the ban of abortion in case of irreversible damage to the foetus, which means, in practice, the end of legal abortion in Poland (see Tomasz Koncewicz). It confirms that the ruling camp is ready to support "judicial"
activism, when with it, their political interests may be pursued, or their political views will be clearly expressed by a puppet court.

**Twilight of the Parliamentary Scrutiny Function**

Explaining the marginalisation of the parliament’s constitutional role involves considering the perception of the above-mentioned adjective, "façade". One of the main (apart from the legislative) functions of parliament is its scrutiny (control) function. It may be understood *per se* and comprises typical instruments in the parliamentary political regime such as a vote of no confidence, MPs’ questions, investigative powers of parliamentary select commissions, etc. However, the control function is also strictly connected with law making, as the law in contemporary democracy should balance various interests and clashes of arguments to find the best possible normative solution. Since the PiS party took power, parliamentary debates practically disappeared, becoming, in their minds, an unnecessary element of the procedure.

Normative tools that manifest parliamentary scrutiny can be effective, especially in parliamentary cabinet regimes, when just the political opposition uses them. In this context, one should remember the political division of powers, which is not less important than organisational and functional division within the constitutional apparatus of public authorities. Instead of a sharply defined distance between the parliament and the government, a clear distinction between the ruling camp and the opposition seems to be a guarantor of checks and balances. Modern governmental systems have evolved towards a combination of the division of the state’s legal spheres of action between certain bodies, with the political division of power (influence) between political camps.

Parliamentary debates are directed to fulfil the parliamentary scrutiny function, precisely because the ruling camp has a majority. Any flaws and ambiguities in the proposed regulations can have a chance to become known especially thanks to MPs, who do not belong to the majority camp, as they are interested in contesting ideas and plans of the parliamentary majority. However, the ruling party decided to deny this immanent feature of parliamentary deliberations due to normative as well as practical measures. The consequence: making both chambers of parliament (until 2019) a machine for making laws which, if at all, had been discussed earlier, only within the ranks of their own political caucus.

The above-mentioned solutions can be divided into several categories; however, the presented divisions are not exhaustive. Particular elements may be qualified to various groups. The first category comprises those instruments which already existed in the parliamentary law, though they began to be applied excessively. Amongst them, one can identify the possibility of setting the time limit for MPs wanting to give the floor at the debates concerning particular bills. In the previous term of the Sejm (2015−2019), the practice of limiting MPs’ statements within debates at parliamentary committees to up to one minute (literally, 60 seconds) became the standard.

Another example of the hostile construction of the existing parliamentary rules of procedures involved using the parliament speaker’s management powers to speed up parliamentary legislative procedures to pass a bill in a version convenient to the ruling camp. Three readings of parliamentary bills ceased to be the opportunity to elaborate the best wording of new provisions but turned out to be for PiS just an obstacle on the quick path to achieving the ruling party’s political goals. This must have led to the passing of incoherent and often reciprocally contradictory statutory provisions, which have to be corrected later, often more than once. For instance, it recently happened that a bill was amended before it became a signed statute. In these circumstances, it is clear that all this does not constitute merely undeniable flaws in the legislation process, but obvious insults.
The second group of anti-parliament measures is composed of the set of provisions introduced as amendments to the existing rules of the parliamentary procedure of the Sejm (first chamber). They include a scope of detailed disciplinary rules serving to intimidate opposition deputies, such as a possibility to name a given comportment of an MP as ‘violation of the dignity of the chamber’ by the Speaker and a number of financial penalties which may be imposed for any acts, which according to the Speaker, can be considered a disturbance of parliamentary work. Another negative amendment involved, for example, limiting a debate on a Senate resolution concerning the bill, through an introduction of a provision that only the MP-rapporteur is entitled to present remarks concerning the Senate's standpoint, but not anyone else.

A different classification of all the described legal and controversial practical solutions may refer to political and even psychological assessments. Since some may be even understandable from a praxeological perspective, just to put their foot down (by speeding up the legislative process), many of the other measures may be treated only as a revenge, showing the will to crush political opponents in a spectacular way. Removing the right to speak or exclude deputies from a plenary sitting is often of symbolic meaning. It is supposed to be part of a broader humiliation campaign including the degradation of those who have an opposite view, taking away their dignity and slapping them in the face. It was not without reason the PiS leader and now the deputy prime minister, Jaroslaw Kaczynski, cried out towards opposition MPs: “Treacherous mouths! You are all knaves!” or, just recently, “You are criminals!”

Legislative Rollercoaster and the Continuing Constitutional Crisis

Political and legal acts which could be observed in the previous Sejm’s term of office are being continued in the present term. The slight majority of the opposition gained in the 2019 elections made the Senate the place where at least some concurrent arguments may be presented to a wider public and discussed in a civil manner. In this sense, the Senate in practice, to an extent, must have overtaken the scrutiny function of the first chamber, despite the fact that, according to the Constitution, the Sejm, not the Senate, should exercise control over the executive’s activities. Nevertheless, as the majority in the first chamber usually rejects the Senate’s amendments, the Senate's systemic role is more symbolic. The pandemic crisis deteriorated the quality of the legislation much more. Unfortunately, there is not much hope for a quick improvement. The fading Polish parliament with no doubt is one of the many symptoms of, using Wojciech Sadurski’s words, Poland’s constitutional backsliding.
Criminal Liability of Poland’s Highest State Representatives

Monika CZECHOWSKA

*Every power corrupts and absolute power corrupts absolutely.* This phrase by the English historian, politician, and writer Lord Acton is still valid, even though it was spoken over 100 years ago (Lord Acton was to use it for the first time in a letter to Bishop Mandell Creighton on April 3, 1887).

In democratic countries, one of the methods of preventing the omnipotence of the authorities is to subject their actions and omissions to judicial control, and, if necessary, to expose the representatives of the highest state organs to political, constitutional and criminal liability. For the purposes of this article, we will limit ourselves to constitutional and criminal liability, disregarding political liability.

In the Polish legal system, the constitutional and – to a certain extent also criminal – liability of representatives of the highest state organs is regulated by the Constitution of the Republic of Poland of April 2, 1997 (hereinafter, the Constitution) and also in the provisions of the Act of March 26, 1982 on the Tribunal of State (hereinafter, the Act on the Tribunal of State). Pursuant
to the above-mentioned legal acts, constitutional responsibility is imposed before an authority called the Tribunal of State.

This blog post deals with the criminal liability of representatives of the highest state organs in the light of the Polish Constitution and the current situation in Poland. The aim is to analyze Polish legal solutions regarding the possibility of prosecution of representatives of the highest state organs for both violation of the Constitution or statutes, as well as for crimes committed in connection with the position held. The subject scope of the analysis will cover types of liability, the mode of prosecution before the State Tribunal, as well as the proceedings before the Tribunal and the types of sanctions imposed. In conclusion, the author will try to answer the question of whether the State Tribunal can be an effective tool to enforce constitutional responsibility, or whether it is only a “political sword hanging over the heads of the rulers.”

The Tribunal of State

The Tribunal of State - apart from the courts and the Constitutional Tribunal - is an authority that is separate and independent from other authorities. The Tribunal of State consists of the chairman (who is also the First President of the Supreme Court), 2 deputy chairmen and 16 members elected by the Parliament (Sejm) from outside the group of deputies and senators for the duration of the Sejm’s term of office. The deputy presidents of the Tribunal and at least half of the members of the Tribunal of State should have the qualifications required to hold the office of judge. Moreover, according to Art. 199 sec. 3 of the Constitution, Members of the Tribunal of State in performing the function of judge of the Tribunal of State are independent and are subject only to the Constitution and statutes.

This independence of the members of the Tribunal of State is further strengthened by the immunity granted to them. A member of the Tribunal of State may not be held criminally responsible or deprived of liberty without the prior consent of the Tribunal of State. Moreover, a member of the Tribunal of State may not be detained or arrested, with the exception of being caught in the act of committing a crime, if his detention is necessary to ensure the proper course of the proceedings. The chairman of the Tribunal of State shall be notified each time and immediately about the detention, who may order the immediate release of the detained person.

Personal Scope of Liability before the Tribunal of State

In the light of Polish law, for violations of the constitution or statute, in connection with the position held or within the scope of their office, constitutional liability before the Tribunal of State is borne by:

- the President of the Republic of Poland,
- the Prime Minister and members of the Council of Ministers,
- the President of the National Bank of Poland,
- the President of the Supreme Audit Office,
- members of the National Broadcasting Council,
- persons entrusted with the management of the ministry by the Prime Minister, and
- the Supreme Commander of the Armed Forces.

In addition, deputies and senators also bear constitutional responsibility before the Tribunal of State. However, the constitutional responsibility of members of parliament is limited to situations consisting in running a business with the benefits from the property of the State Treasury or local government, as well as with the acquisition of such property.
The above catalog of subjects that may be held accountable to the State Tribunal is a *numerus clausus*, which means that no one else can be held constitutionally liable before the Tribunal of State. In other words, it is not possible to extend the scope of accountability to other office-holders. The only exception to this rule is in Art. 2 sec. 3 of the Act of Tribunal of State. It follows from this provision that constitutional responsibility before the Tribunal of State may also be borne, respectively, by the Marshal of the Sejm and the Marshal of the Senate, who temporarily perform the duties of the President.

**Objective Scope of Responsibility before the Tribunal of State**

The material scope of responsibility before the Tribunal is also limited. In the doctrine, the totality of behaviors the committing of which actualizes constitutional responsibility before the Tribunal of State is called a constitutional tort. This term is understood as an act or omission consisting in a breach of the Constitution or a statute, which is made in connection with the position held in the field of office.

It should be emphasized at this point that the concept of 'constitutional tort' is not the same as the concept of 'crime' used by the penal code, even though the scopes of application of these terms may overlap. As pointed out by the Constitutional Tribunal in its judgment of February 21, 2001 (reference number: P 12/00), the concept of "constitutional tort" cannot also be treated as a broader concept, “consuming” a crime. Constitutional liability and liability “for a crime” are two different regimes of liability that may, in certain constitutional situations, be applied simultaneously by the Tribunal of State to the same persons.

Moving on to the specific scopes of responsibility of individual representatives of the highest state organs, it should be noted that the scope of this responsibility is subject to differentiation. And so, the President of the Republic of Poland is definitely the office-holder most responsible before the Tribunal of State. According to art. 145 of the Constitution, the President of the Republic of Poland is responsible for the violation of the Constitution, statute or for committing a crime.

It is important that the President's liability before the Constitutional Tribunal covers all crimes committed during his term of office, and not only those committed in connection with the exercise of this office. The above means that the responsibility of the President before the Tribunal of State is sole and complete. Leaving within the jurisdiction of the Tribunal of State to judge the President's responsibility also for committing common crimes is a ‘judicial privilege’, as it is a departure from the principle of equality before the law. Moreover it is also an exception to the rule that adjudication on criminal liability is the domain of common courts.

A slightly narrower scope of responsibility before the Tribunal of State has been introduced in relation to Members of the Council of Ministers. Pursuant to Art. 156 of the Constitution, they are responsible before the Tribunal of State for violations of the Constitution or statutes, as well as for offenses committed in connection with their position. In relation to this category of persons, we are talking about the partial and competitive jurisdiction of the Tribunal of State in criminal cases. This means that only crimes committed in connection with the position held may be liable to a Member of the Council of Ministers before the Tribunal of State.

On the other hand, the remaining representatives of the highest state bodies are solely constitutionally responsible before the State Tribunal. These are:

- the President of the National Bank of Poland,
- the President of the Supreme Audit Office,
- members of the National Broadcasting Council,
• persons entrusted with the management of the ministry by the Prime Minister, and
• the Supreme Commander of the Armed Forces.

It should be pointed out that such distinction in terms of responsibility for a crime and granting the Tribunal of the State of criminal jurisdiction in relation to crimes committed by the President and members of the Council of Ministers and, in a way, removing them from the jurisdiction of common courts results from the systemic position of these organs.

**Procedure of Proceedings before the Tribunal of State**

The procedure for initiating proceedings before the Tribunal of State also differs significantly from the common criminal procedure. In order to initiate proceedings before the Tribunal of State, it is not enough to commit a constitutional tort or commit a crime by the President or a member of the Council of Ministers. A necessary condition for the initiation of the appropriate procedure is the submission of a relevant request by the competent authority. If the President of the Republic is indicted, it is necessary to adopt a relevant resolution by the National Assembly (by a majority of at least two-thirds of the votes of the statutory number of members of the National Assembly) at the request of at least 140 members of the National Assembly.

On the other hand, bringing a member of the Council of Ministers to account before the Tribunal of State requires a resolution of the Sejm adopted at the request of the President of the Republic of Poland or at least 115 deputies by a majority of three-fifths of the statutory number of deputies. On the other hand, bringing other representatives of the highest state organs to justice before the tribunal of State depends on the initiation of proceedings by a minimum of 115 deputies or the President of the Republic of Poland. Moreover, it is necessary to adopt a relevant resolution by the Sejm by an absolute majority of votes in the presence of a quorum.

Consequently, the initiation of criminal liability before the Tribunal of State each time depends on a resolution of the Sejm or the National Assembly, whose members still have a significant impact on the selection of the composition of the Tribunal of State, probably contributes to the low effectiveness of the Tribunal.

**Concluding Remarks**

The possibility of bringing representatives of the highest state authorities to account before the Tribunal of State is undoubtedly one of the most important elements of the system of constitutional measures to protect the rule of law. However, the very manner of initiating proceedings before the Tribunal of State, as well as the manner of selecting a significant number of its members raises questions about the effectiveness of this institution.

Not infrequently, the doctrine indicates that in its present form the Tribunal of State is rather a “sword over the heads of the rulers” or a “court that does not adjudicate”, than an institution exercising real control over the observance of the Constitution and laws by the rulers. There is no way to argue with this view, because significantly, despite the fact that the Tribunal of State has been operating under Polish law for a century (the institution of constitutional responsibility was introduced by the March Constitution, adopted in 1921), so far only a few proceedings were pending before it, of which only two ended the conviction.

Nevertheless, it seems that this unique organ should exist despite its faint activity. However, in the longer term, it would be necessary to consider solutions that would improve the effectiveness of initiating the procedure before the Tribunal of State and eliminate doubts as to the facade nature of the constitutional responsibility borne by politicians.
A Personal Story about the Impact of Anti-NGO Measures Targeting Hungarian Human Rights Defenders

Eszter KIRS

Since 2010, based on its constitutional supermajority, the Hungarian Fidesz-KDNP government has systematically undermined fundamental institutions of the rule of law and democracy. The centralization of power has been coupled with restrictive measures on media freedom, parliamentary debate, freedom of assembly, and the deterioration of independent institutions.

Civil society organizations have played a central role in advocating for human rights and the rule of law. Therefore, it has been a logical step of the authoritative government to attack civil society organizations by (i) a smear campaign; (ii) denying access to state authorities and places
of detention; and (iii) legislation threatening NGOs and their staff members with severe sanctions. Instead of an objective description of the anti-NGO measures, which is available elsewhere, the present post will provide an insight into the impact of governmental attacks on the professional life of human rights defenders from the personal perspective of a legal officer of the Hungarian Helsinki Committee (HHC) established in 1989, a leading human rights organization in the Central and Eastern European region.

I am one of many experts who were listed in a 2018 article of the Figyelő, a weekly magazine close to the government. The list printed on black background included lecturers of the Central European University, employees of NGOs, such as the HHC, Amnesty International Hungary, Transparency International and the Hungarian Civil Liberties Union (HCLU): described by the government as “mercenaries” of George Soros, enemies of the nation, and serving foreign interests. I was proud to be on the list of smart and inspiring people who devoted their work either to academic research and education or the protection of human rights to the best of their knowledge.

In 2019, I attended a commemorative scientific conference at the University of Debrecen, where we discussed the failures of the state authorities to diligently address and investigate the 2008-2009 series of murders committed against Roma people by a group of extremist offenders. The local unit of the Fidelitas (the governing party’s youth wing) demonstrated against speakers of the event, again described us as “Soros mercenaries”.

The above are just examples of the smear campaign framing staff members of human rights organizations and others who openly criticize governmental policies. HHC has successfully sued the government multiple times for disseminating false allegations about the organization. Smear campaigns might have a chilling effect but HHC and other Hungarian NGOs has not backed off. It is not the public and unjust verbal attacks but the attempts to undermine our work that is more painful, for which I introduce two examples.

**No More Monitoring Visits to Detention Facilities**

One of my very first assignments at the HHC in 2012 was to conduct interviews with prisoners for research on ethnic discrimination within the penitentiary system. An interviewee was a reserved, quiet, young boy, who was not complaining about anything related to detention conditions. Later I learned from his personal file that he was from an extremely poor family. He had been in a juvenile prison for minor crimes for two years. Other detainees were repeatedly harassing him, and he suffered from the additional psychological burden of having been refused permission to attend the funeral of his father who passed away while he was detained. He attempted suicide. While I was reading his suicide note, in which he said goodbye to relatives who could not visit him for months, I was literally crying above the file, and decided to invest as much personal capacity as possible into the monitoring activities of the HHC so that I can contribute to the efforts to ameliorate detention conditions.

Some of my colleagues had decades-long experiences in monitoring detention facilities. Learning from them, I also realized just how valuable the competence possessed by the organization really is. The expertise was gained through more than 2000 monitoring visits conducted by the HHC in closed institutions. We had access to these institutions based on cooperation agreements with central authorities. The one between the HHC and the National Penitentiary Headquarters was concluded in 1999 and repeatedly re-concluded afterwards granting constant access to penitentiary institutions.

In prisons, we usually spent two full days, and were entitled to enter any unit of the visited institution and to conduct confidential interviews with the detainees. In my personal story of
visiting prisons for five years, the most impactful case was in Márianosztra, 70 kms to the North from Hungary’s capital, Budapest. We visited its High Security Prison three times in four months in 2016 due to the suspicion of severe ill-treatment. Interviews with inmates and the review of individual cases gradually revealed the everyday routine of physical and verbal abuse. As a sanction for minor misconduct, detainees were taken into solitary confinement, stripped naked, beaten, and left there for long hours sometimes in their own urine. Unidentified security guards wearing full face masks were marching up and down in the prison with the aim of enhancing a threatening environment.

As a consequence of our monitoring report, the National Penitentiary Headquarters conducted a separate monitoring visit at the Márianosztra prison, removed its head, installed cameras, and obliged the institution to cease the practice of regular use of solitary confinement and employing unidentified, face masked guards. When I heard about the result of our monitoring visits and report, I felt direct feedback from reality about the meaning and significance of our work in independent monitoring.

We have not had the chance to achieve such direct impact on the protection of human rights through monitoring visits in detention facilities from 2017 on. Even though the cooperation agreements served the interests of both the national authorities and the detainees, and most of the agreements were concluded for an indeterminate term, the national authorities terminated unilaterally in the course of four months four significant agreements: the agreements concluded with the Immigration and Asylum Office, the National Police Headquarters, the National Penitentiary Headquarters and the tripartite agreement concluded with the National Police Headquarters and the Central European Regional Office of the UN’s refugee agency, the United Nations High Commissioner for Refugees (UNHCR).

Consequently, the HHC ceased to be entitled to carry out monitoring visits to police detention facilities, penitentiary institutions, immigration and asylum jails, reception centres for asylum seekers and the Border Guards’ immigration detention facilities. From 2017 on, all the valuable competence and unique experiences of Hungarian human rights defenders could not have been utilized for the sake of the protection of human rights due to a political decision to explode the well-functioning cooperation between state authorities and a civil society organization labelled as enemy by the government. The access to detainees and information on detention conditions has been reduced to FOI requests and complaints through which prisoners seek for HHC’s legal assistance in individual cases. In addition, the organization strives to discover innovative methods such as reaching out to former detainees after their release and to relatives of detainees.

No More Training for Judges, Prosecutors and the Police

My personal affiliation with academic institutions as a lecturer in public international law and my dedication to education have made me particularly interested in professional trainings organized by the HHC. We have been active in capacity building for judges, prosecutors, the police and attorneys in particular subjects, such as the efficient prosecution of hate crimes, communication of lawyers with the police and clients, the rights of defendants to a lawyer or the right to information and plain language. The professional experiences gained by HHC’s lawyers in strategic litigation at the domestic and the international level have enriched the trainings. This has had utmost importance in transferring knowledge about the jurisdiction of the European Court of Human Rights and the European Court of Justice.

My academic research interest in the subject matter of hate crimes facilitated the preparation of a number of judicial trainings for which I was personally responsible. They were organized in the framework of transnational projects; the first one run in 2015-16 in cooperation
with colleagues from Greece, Italy and The Netherlands. In-depth research into international standards and domestic judicial practice in addition to exchange about the project countries’ best practices were channeled into the development of training materials.

The trainings were interactive filled with role-plays and case study exercises, which was an innovation in Hungarian judicial trainings due to the long tradition of frontal education of a formalistic style (a number of participants shared that they were shocked upon arrival when they realized that the training would be different than usual having seen the room setting suitable for interactive discussions instead of formal lectures). Judges and prosecutors recruited by the Hungarian Judicial Academy arrived at the trainings from all around the country. Practitioners’ interventions were duly channeled into the discussions co-moderated by a judge from the Curia (the Supreme Court of Hungary) and a prosecutor who has been responsible for internal trainings on the topic. We had heated debates about conceptual and professional dilemmas related to challenging issues, such as the application of hate crime laws in cases where the victims are members of extremist right-wing organizations (are hate crime laws tools of minority or identity protection?).

The attendees expressed their utmost satisfaction, and the prosecutor moderator was so much inspired by our experiential methodologies that he continued organizing internal trainings with a reviewed approach. After all the positive experiences in fruitful professional cooperation in trainings with the national authorities, it took us by surprise when after the successful delivery of another judicial training on hate crimes in May 2017, the Hungarian Judicial Academy notified us in August that the next training, which we agreed on to deliver in September 2017, could not take place. By then, we had multiple rounds of preparatory meetings with the Academy, and a detailed plan for the sessions. Nevertheless, we did not receive any detailed explanation for why the event had to be cancelled.

The only triggering factors we could think of were the tendency of termination of cooperation by state authorities in compliance with the government’s anti-NGO propaganda and the pro-governmental media outlet’s articles about the efforts of “organizations connected to George Soros”, such as the HHC to manipulate judges through trainings. First, the person who presumes such manipulation has probably not met a single practicing judge or prosecutor. It would be impossible to brainwash fully competent legal professionals with years or decades of judicial or prosecutorial practice in a one or two-day training. Second, instead of manipulation, HHC has always striven to develop legal professionals’ knowledge and skills related to the application of law with due regard to the victims’ perspective and international legal obligations on human rights. Nothing more, nothing less, just the improvement of skills required for the diligent accomplishment of professional duties.

HHC continues to organize and deliver interactive trainings to defence lawyers facilitated by the cooperation with bar associations. At the same time, from 2017 on, judges, prosecutors and the police could not benefit from its trainings and professional expertise anymore. A high price to pay for the anti-NGO agenda of the government.

**Conclusion**

Several international stakeholders (including the UN Special Rapporteur on the situation of human rights defenders, the EU Fundamental Rights Agency, the CoE Commissioner for Human Rights or the Venice Commission) have raised their voice against the Hungarian anti-NGO governmental measures, with special regard to the legislation, which under the cover of the legitimate aim to ensure transparency of NGOs in fact would serve the restriction of their ability to carry out professional work in protecting human rights and the rule of law. In June 2020, the European Court of Justice held Hungary responsible for the violation of EU law by introducing
discriminatory, unjustified and unnecessary restrictions on foreign donations to NGOs. To date, the anti-NGO laws have not been repealed and hostile propaganda is maintained. However, none of these developments decrease the commitment of Hungarian human rights defenders to continue acting with full professional integrity.
The Role of Emergency Politics in Autocratic Transition in Hungary

Gábor MÉSZÁROS

It is almost obvious that Hungary is not a constitutional democracy anymore, but can rather be described as a transitional or hybrid regime. Diverse descriptions of the Hungarian regime are in use, from illiberalism and populism to various types (electoral or competitive) of authoritarianism as well as a form of hybrid regime. For the purpose of my current analysis, I do not have to enter this debate, because the critical element for the constitutional scholarship is the anti-constitutionalist nature of the regime and the lack of the rule of law, which features also became all too evident in Hungary in 2020.

It is difficult to define just exactly when Hungary lost its constitutional democratic nature; however, various expert opinions are available to clarify this issue. One can depict the most critical aspects of democratic backsliding relatively easily, the core element of this blog post is to briefly
outline the role of emergency politics in the autocratic transition of Hungary. It is also important to note that the toolkit of emergency politics determines the milestones of ‘autocratic legalism’ in Hungary. As I will show in detail, there are three relevant milestones on the road to diminishing Hungarian constitutionalism.

**Abusive Constitutionalism**

After the 2010 parliamentary elections, the winning party Fidesz started to reshuffle the Hungarian constitutional order by using both the elements of abusive or populist constitutionalism and the toolkit of emergency politics. It was a truly decisive moment when the Fidesz party achieved the adoption of a new constitution in 2012 (the Fundamental Law of Hungary). However, even before this final legislative step, the Parliament had already weakened the constitutional institutions designed to check the arbitrary power of the government (with the twelve consecutive amendments of the old constitution; among which the most important was the amendment making it possible for the governing party to nominate and to elect the judges of the Hungarian Constitutional Court).

In 1995, the constitution had been changed to require a four-fifths vote of the Parliament to set the rules for writing a new constitution. However, after the elections the two-thirds majority removed this provision with its first amendment of the constitution and the Fidesz Parliament was able to use its supermajority to write a new constitution on its own. It also to be emphasised that after the acceptance of the Fundamental Law the two-thirds majority started to use this ‘foundation as solid as granite’ to strengthen its political power by using a ‘rule by law’ method. This was also the first step of the process which finally resulted in a ‘one-party elected’ Constitutional Court.

The essential element of the first period was that the new Fundamental Law created a sui generis state of emergency chapter, called ‘Special Legal Order’, which contains the descriptions of the state of national crisis, state of emergency, state of preventive defence, unforeseen intrusion, state of danger, and the emergency response to terrorism (as I will show below, this latter chapter was a result of a countrywide campaign against mass migration in 2015). In contrast to the compact regulations, it became evident by 2020 that the government favours the use of so-called emergency measures outside the emergency provisions of the Fundamental Law.

**Emergency Legislation**

The two elections in 2014 and 2018 resulted again in a two-third majority for the same party. Both elections had been substantially influenced by new election rules, which phenomenon on its own is a sign of ‘autocratic populism'; namely, where the autocrats after a successful democratic election change the electoral law to keep their power, as described in detail by Gábor Halmai.

This was the period when emergency measures started to leak into the regular legal order, a sign of indicating the increasing use of legal means for nakedly partisan purposes. In this way, the law finally became a useful camouflage for the authoritarian government in exercising its power by declaring that everything is formally controlled under the rule of law. During this second period, the government used its supermajority in order to gain more political power via legislation. The hallmark of this period was the practice of the Parliament using ordinary legislation containing extra-legal measures in order to deal with so-called emergencies. Such situation was the newly founded emergency rules called ‘state of migration emergency’ in 2015, which was unknown within the Fundamental Law’s relevant rules. Responding to the mass migration crisis (generated by the conflict in Syria and ongoing conflict in Afghanistan, in particular) the Hungarian Parliament adopted two acts on 4 and 21 September 2015 which enabled to proclaim the “emergency caused by immigration”, without using the Fundamental Law
emergency mechanism, which meant that various emergency restrictions could have been used without the constitutional guarantees. This new so-called emergency first declared in September 2015 and renewed at six-month intervals down to the present day.

Consequently, it became possible to use emergency restrictions without constitutional guarantees, and the state of emergency started to leak into the regular constitutional order. This period had also contained the sixth amendment of the Fundamental Law in 2016, with the new chapter called the ‘Emergency Response to Terrorism’ implemented into the ‘Special Legal Order’, although – as I have previously discussed in detail elsewhere – this new emergency framework was unnecessary.

**Finally, the Exception Became the ‘Norm’…**

The third period can be described as the ‘rule without law’ framework, and culminated in 2020 during the coronavirus pandemic. This year the Hungarian regime has lost its ‘autocratic legalist’ nature because during the enforcement of the ‘state of danger’ the Hungarian government itself was in breach of its Fundamental Law.

With the declaration of the state of emergency in order to handle the situation caused by the coronavirus pandemic in 2020 and with the simultaneous acceptance of the so-called ‘Enabling Act’, it became apparent that the government’s main aim was to hold unconstrained power without even the slightest characteristic of constitutionalism. After the declaration of a state of danger, the Hungarian government issued more than a hundred decrees and also used ordinary legislation to handle the situation.

The most controversial was the above-mentioned ‘Enabling Act’, which was accepted by the two-thirds majority of the Parliament on Monday 30 March and gave the government free rein to govern directly by decree without the constraint of the existing law. It also allowed suspension of the enforcement of specific laws, departed from statutory regulations and implemented additional extraordinary measures by decree in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 concerning disaster management.

However, the ‘Enabling Act’ lacked a constitutional basis. According to the Fundamental Law, it is the government’s authority to issue decrees which may suspend the application of certain laws or to derogate from the provisions of laws, and to take other extraordinary measures. The role of the Parliament is only to give the government authorisation to extend the effect of the decree. There is no constitutional authority for the Parliament to enact new laws concerning the state of danger. Therefore, the Parliament had no authority to accept exceptional laws because the government has its limited power to use extraordinary measures – which are defined in the implementing act – according to the Fundamental Law.

So, let us assume that the Parliament enacts a new law that de facto overwrites the provisions of the Fundamental Law by extending the taxation of the constitution in an act (even if this act also adopted by the same two-thirds majority). In such case, this law is unconstitutional because this act amends the constitution without complying with the formal prescriptions.

It is also important to note that soon after the government had started to use emergency legislation, the Parliament had continuously been in session, and accepted bills which remained ordinary laws after the state of danger was over. Of course, many of these ordinary laws can hardly be regarded as effective responses against the pandemic. Furthermore, various ongoing drafts may have nothing to do with the pandemic and were not justified by the emergency (e.g., the one to **ban gender change** in the birth register after a person has transitioned from one sex to another as an adult).
These are clear signs suggesting that the threshold between emergency and normalcy has faded. Indeed, one can hardly find any remnant of constitutionality and the rule of law. Without a strict legal framework, it is also possible for the government to give sui generis meaning for various threats and use them as a blank check solely for gaining political advantage.

**State of Emergency without a Declaration of Emergency?**

The Hungarian Parliament accepted two acts on the 17 June 2020. One act on the end of the state of danger, which is less than one page long, and another one on the transitional provisions related to the end of the state of danger, which was more than 200 pages long. At the first glance, this latter act was to provide a range of technical answers to questions that arose about how to reset deadlines for various legal processes that were delayed when the economy stopped.

However, this act was also an introduction of another kind of quasi-emergency situation called the ‘state of medical emergency’, which was already known in the terminology of the Act of Health, but which, in its previous incarnation under that Act, ensured a more restricted scope of action for the government. According to this modification, the government may declare a state of medical emergency outside the special legal orders framework which was also declared on the same day when the government ended the state of danger.

As we have already seen above, the government used extra-legal measures unconstitutionally and started to abuse emergency politics in order to acquire political and economic benefits. It also to be mentioned that the government dwelled on the practice they used regarding the ‘state of medical emergency’ after the repeal of the so-called ‘Enabling Act’, which means that Hungary is still operating under a state of emergency regime without a formal declaration of emergency pursuant to the Fundamental Law’s relevant chapter. The situation became even more complicated after the declaration of a state of danger again on 4 November 2020, because the two regimes are still in force: the real and quasi-state of emergency are operating simultaneously.

**Conclusion**

In the last decade, fictitious emergencies have been used as mere tools in the hand of the Hungarian Government. Now the government has extended an unconstitutional practice that started with the ‘state of migration emergency’ in 2015. Never-ending emergency arrangements are now being built into the ordinary law in order to evade the checks and balances that accompany states of emergency regulated under a constitutional rubric. The barrier between emergency and ordinary rules has started to wither. On the one hand, one may find a compact emergency regime regulated in the framework of the Fundamental Law, on the other hand, there is the nearly unlimited power buried deep within the ordinary legal order (especially in the Health Act).

During the second wave of the pandemic, the government has not declared a state of danger so far. However, the government has started to use the newly enacted method of the so-called ‘state of medical emergency’ which is inserted into ordinary law without the constitutional scaffolding that is supposed to guarantee checks on emergency powers and which ignores the constitution and its various safeguards altogether. This quasi-emergency awards the government an almost unlimited power without constitutional guarantees of the Fundamental Law’s ‘Special Legal Order’ chapter, which means that emergency restrictions could be used without constitutional guarantees.
Here it is to be emphasised that even after nearly five years, the state of migration emergency powers have continuously been renewed up to the present day, although the criteria were not fulfilled for a long period of time, i.e. one can hardly see mass migration in Hungary at all. Therefore, it is a real concern that the ‘state of medical emergency’ will be the next permanent emergency prolonged for an indefinite time.
Dismantling Democratic Governance through Manipulative Electoral Politics – the Hungarian Case

János MÉCS

Tailoring electoral legislation to the governmental parties’ partisan needs was an important component of creating the new Hungarian political system. The events taking place show that elections are not just vital but also vulnerable institutions; due to the structural risk inherent in electoral reforms, enhanced judicial protection is called for. For multiple reasons, however, in Hungary the constitutional framework including the Constitutional Court was unable to prevent manipulation. Institutional changes might have been relevant, but I argue that doctrinal shortcomings also played a pivotal role. Constitutional theory and practice thus should work on a solid doctrinal background for reviewing electoral reforms if dismantling of democracy is to be avoided more effectively in the future.
Electoral Redesign in Hungary After 2010

Electoral politics has been a cornerstone of building up the Hungarian illiberal political system. Its landslide victory at the 2010 parliamentary election provided the new government a two-thirds majority in the unicameral Parliament that – with that supermajority being the only procedural requirement – allowed it to completely redesign the whole constitutional background, including the electoral legislation, without any meaningful bargaining with relevant stakeholders.

Indeed, the ruling political actor exploited the situation and tailored the legislation to its partisan needs. One strategy was to exacerbate the division within the opposition and to enhance seat-share by increasing disproportionality. The new law on the electoral system enacted in 2011 kept the mixed-member proportional (MMP) structure, however, the weight of the first-past-the-post (FPTP) branch was increased, and the run-off in the single districts was abolished, thus making cooperation in the opposition more difficult. The constituency boundaries have been gerrymandered, and a new element, the so-called winner-compensation was introduced that rendered the system more disproportionate – just to name the most important changes.

Because of its importance and relative complexity, winner-compensation deserves explanation. The previous system compensated the votes cast for the losing candidates in single constituencies, as they did not result in any mandate. Under the new compensation scheme the winner’s votes above the second candidate’s result also qualify as surplus votes (see Figure 1 below). Thus, if in a constituency Party A’s candidate wins with 10,000 votes and the second best is Party B’s candidate with 5,000 votes, then parties A and B receive an equal number of surplus votes, despite the fact that party A won the single constituency. This element renders the system more disproportionate, especially if nationwide there is a substantial difference between the most and second-most popular candidate.

It is no exaggeration that the results were grave. Winner-compensation in itself provided 5 and 7 additional mandates to the government in 2014 and 2018 respectively, elevating its seat-
share above the two-third threshold (133 MPs). With the abolished run-off, the fragmented opposition failed to cooperate in the single FPTP districts, with the result that governmental candidates won in most of the constituencies with a relative majority, exacerbating disproportionality and thus increasing the government’s seat-share. Moreover, due to gerrymandering, in 2018 the governmental parties would have gained 14 more mandates compared to the opposition even if the two sides would have garnered exactly the same number of votes – thus, it can be expected that in the event of a close vote at the 2022 parliamentary elections, the end results will be determined by the manipulated single districts.

Another strategy was to change the rules on how the right to vote can be exercised. The new regulation on electoral procedure enacted in 2013 discriminates between those with and without Hungarian residence, providing postal voting only to the latter group that is predominantly pro-government. Moreover, an attempt was made to introduce active voter registration, something that was at odds with the twenty-year electoral history of the country, and presumably served partisan purposes, as pro-government voters are better organized and more resolute than protest voters.

Finally, even after the new system and electoral procedure was enacted in 2011 and 2013 respectively, electoral policy did not settle. With its manufactured two-thirds majority the government kept modifying the legislation whenever it confronted its political interests. For example, when the Supreme Court built up an effective case-law preventing the misuse of governmental communicative resources in the campaign-period, the law was changed, exempting governmental actions from scrutiny exacerbating the “pervasive overlap between state and ruling party resources” that characterized the campaign at the 2014 and 2018 elections according to the OSCE/ODIHR final reports.

Constitutional Court Standing Idle – Institutional and Doctrinal Reasons

The Constitutional Court could not act as a real check on the reform process for multiple reasons. Some elements, such as gerrymandering or the abolition of run-off elections, simply did not reach the Court, thanks to enhanced accessibility criteria and the shift in the competences of the tribunal. After 2010, the actio popularis (i.e. the possibility that any citizen may initiate abstract review) was abolished, and just a limited number of public actors (most notably, 50 MPs) may initiate such a review. With this change and the newly introduced German model of constitutional complaint the court was steered towards a rights-based review, however, as I argue below, manipulative electoral reforms in many cases would be better conceptualized in structural terms, such as accountability and the rule of law.

In other cases, the reason presumably was that the Court was packed after 2010, and by Spring 2013, the judges nominated and elected solely by the governmental two-thirds were in majority. An example is the decision upholding the above-mentioned discriminatory rules on postal voting, something that could have been conceptualized and prevented based on the previous, rights-centered case-law. However, the court, in a clear contradiction to its previous case-law, narrowed down the scope of right to vote, inducing sharp criticism from the scholarly sphere. The importance of court packing is underlined, from the other side, by the decision on active voter registration; at early 2013 the then still independent court annulled the legislation, emphasizing the fundamental law nature of the right to vote, and concluding that active registration is an unnecessary restriction of this right. This shows that in many cases the existing conceptual framework might be and indeed proved to be effective in the hands of a court willing to enforce the Constitution.

However, in some cases doctrinal shortcomings might have been relevant as well. Winner-compensation was upheld relying on abstract arguments, leaving aside the context and other
traits of the manipulative nature of the reform. The Court argued that the electoral system is not enshrined in the Constitution, therefore the parliament enjoys a wide margin of appreciation when adopting the electoral scheme. It reiterated that the equal right to vote does not require proportionality, and in abstract terms even a purely majoritarian FPTP system would be constitutional as well.

The decision is an example that some manipulations are hard to conceptualize within the right to vote framework. The Hungarian constitution indeed does not specify the electoral system, leaving open a wide variety of options. Moreover, although the equal right to vote is enshrined in it, concluding that only proportional systems will be in line with it would deprive the political community of the freedom to experiment with different electoral systems, and would require an activism from the Court that is hardly justified by the Constitution. However, the conclusion drawn enabled the reformers to modify the system within a very wide range of institutional options and thus a substantive portion of electoral politics was exempted from constitutional oversight.

**Strict Scrutiny in Electoral Cases**

The Hungarian case underlines some conceptual characteristics of electoral legislation regarding the justifiability of constitutional review. My general claim is that courts are justified and required to review electoral legislation and to apply ‘strict scrutiny’ when doing so. This might be supported on empirical grounds on the one hand. It is a historical experience that, as John Hart Ely put it in his seminal work, *Democracy and Distrust*, “we cannot trust the ins to decide who stays out.”

Constitutional law literature in the US has been long emphasizing the “inherent authoritarianism of democratic regimes” (Pildes) and the importance of treating national assemblies enacting electoral law as what they truly are; political entities. This is exacerbated by the upsurge of populism, that does not accept some pre-given electorate, but “extracts people from the people” (as Jan-Werner Müller puts it), not just in rhetoric, but in terms of institutions as well, as the redesign of electoral law in Hungary shows.

Moreover, this approach is underlined by conceptual reasons. Those arguing for weak judicial review often rely on the political process that is deemed to be more suitable to correct unconstitutional legislation. An ultimate argument in this vein is that governments are accountable to the people, and, at the end of the day, they may be voted out through competitive elections, if they enact law contrary to the constitution.

However, malfunctions of electoral legislation affect the very process that should redeem the situation; manipulative reforms try to overcome accountability to voters, the ultimate safeguard against unconstitutional politics. In Hungary it is difficult to argue that if the voters were dissatisfied with the constitutional or electoral politics of the government, then the decreasing popularity could have withdrawn the authorization to execute such politics, as manipulating the electoral rules in fact led to the government having a two-thirds majority after the 2010 elections, and again in 2014 despite its popular vote dropping from 52 percent to 45 percent.

**But on What Grounds?**

However, Ely’s representation-reinforcing theory might be hard to apply regarding electoral institutions such as electoral systems that are to a great extent underdetermined by political philosophy, constitutional theory, and constitutions alike. While general and equal suffrage are recognized by theory and constitutions as well, there are many institutional options regarding the exercise of the right to vote and electoral systems that are equally democratic.
For example, an FPTP system enhances governability, and a two-party party system, and, in terms of the broader democratic framework, a Westminster-style democracy (as discussed by Lijphart). In contrast, a PR system offers proportional representation and a consensus-model conception of democracy. Political communities should have the opportunity to experiment with these different conceptions and institutional backgrounds.

This means that in many cases manipulative reforms may not be ruled out on a substantive basis. If a reformer excludes from the suffrage some group of voters belonging to the opposition, then the substance of the right to vote enshrined in constitutions, international documents, and theory might be cited and the manipulation can be easily conceptualized and prevented.

If, however, a system is rendered more disproportionate to enhance the seat-share of the reformers, then, due to the underdetermined nature of the electoral system and abstract values (in this case: governability, or the Westminster conception of democracy) can always be invoked to support the manipulative change. Courts may overcome this by narrowing down the constitutionally permissible institutions (e.g. stating that equality of the right to vote requires a PR system), however, this violates the chance to experiment with different conceptions of democracy.

Nevertheless, it can be argued that although the substance of electoral institutions is in many cases underdetermined, the way this substance is set – namely, the process of adopting electoral legislation – is not. If a political actor reforms the system to increase its seat-share, then it violates some core concepts that are common in any plausible conception of democracy. Such a reform violates accountability that is inherent in any democracy built on periodic elections. Moreover, it violates equality, since if the system is changed with the aim to decrease the influence of some groups of voters, then these groups are not treated as of equal worth. Finally, it violates rule of law, as not the actor adapted its behavior to the rules, but the other way around, it tailors the law to its partisan needs.

This points to the constitutional provisions (general principles such as rule of law, equality and the right to vote and rule of law) on which such a ‘meta-procedural’ approach can be built on, that does not take the substance of electoral institutions, but the way they are adopted, as constitutionally entrenched.

Conclusion

The Hungarian case points out that constitutional courts should be vigilant, and they should intervene whenever the electoral legislation is being manipulated with. Although illiberalism exacerbated the problem, inertia in electoral matters is not a unique illiberal feature; in an established democracy such as the USA, a court with unquestionable authority such as the Supreme Court failed to prevent gerrymandering. Courts therefore should be empowered not just institutionally, but in terms of doctrine as well, to be able to prevent the distortion of democracy.

However, this insight opens just as many questions as it tries to answer. Maybe the most important of them is how courts should conceptualize manipulative reforms, namely, what aspects and factors they should consider when deciding whether a reform was genuine, or it merely aimed to entrench the reformers. This creates new challenges in terms of strategic maneuvering and preserving the objective perception of law. Nevertheless, the Hungarian case shows that gravitating from abstract considerations towards the actual context of reforms is inevitable in order to protect the political process.
9

SAVING CONSTITUTIONAL DEMOCRACY: REMEDIES & RENEWAL
The impacts on health, economies, and governance of COVID-19 have been profound. They have also highlighted existing inequalities with the most marginalized population groups facing the highest risks of morbidity and mortality due to chronic health conditions and higher risk of exposure from crowded living conditions or while working on the frontline. Low-wage workers are also the most likely to fall into – or further into – poverty, as economic shutdowns eliminate many jobs, particularly in the informal economy and for those whose work cannot transition to remote. As foundations for our governments and decision making, constitutions have an important role to play in ensuring equality of opportunity including equal access to health care and equal rights at work. These fundamental protections are especially critical during the current pandemic and would strengthen our resiliency for the next pandemic or global crisis.
Approach to Measuring Constitutional Protections

To understand the approaches countries have taken to protecting fundamental rights, our team at the WORLD Policy Analysis Center has developed quantitatively comparative measures of constitutional rights. Constitutional texts are read in full by two analysts independently. Analysts answer questions about which constitutional rights are guaranteed, the strength of those guarantees, and which groups are explicitly guaranteed each right. The resulting data is then analyzed and mapped to visualize constitutional protections for fundamental rights across 193 countries. To assess how constitutional rights have evolved over time, we also examine how guarantees differ by year of constitutional adoption. Interactive maps, data downloads, and full methodology are available at worldpolicycenter.org.

Equality and Non-discrimination

Globally, before the pandemic, nearly every country in the world took some approach to guaranteeing equality and non-discrimination for at least some groups in the constitution. However, these explicit guarantees of equality or non-discrimination varied markedly by characteristic. Whereas 85% of constitutions in force as of 2017 explicitly guaranteed equality or non-discrimination based on sex, and 76% did so based on race/ethnicity, only 27% guaranteed equality based on disability status, 22% for non-citizens, and 5% based on sexual orientation.

The good news is that for many groups, these explicit guarantees seem to be increasing over time. While just over half of constitutions adopted before 1970 guaranteed equality or non-discrimination based on sex, all constitutions adopted since 2000 have done so. Similarly, guarantees of equality or non-discrimination for persons with disabilities have significantly increased, particularly in the wake of the adoption of the 2007 Convention on the Rights of Persons with Disabilities: just 12% of constitutions in force as of 2017 that were adopted prior to 1970

### Constitutional Guarantees of Equal Rights and Non-Discrimination for Different Groups

<table>
<thead>
<tr>
<th>Group</th>
<th>Guarantee Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sex/Gender</td>
<td>85%</td>
</tr>
<tr>
<td>Race/Ethnicity</td>
<td>76%</td>
</tr>
<tr>
<td>Religion</td>
<td>78%</td>
</tr>
<tr>
<td>Social Position</td>
<td>59%</td>
</tr>
<tr>
<td>Disability</td>
<td>27%</td>
</tr>
<tr>
<td>Foreign Citizen</td>
<td>22%</td>
</tr>
<tr>
<td>Stateless Persons</td>
<td>8%</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>5%</td>
</tr>
<tr>
<td>Gender Identity</td>
<td>3%</td>
</tr>
</tbody>
</table>

Source: Advancing Equality, 2020
contained these guarantees, compared to 27% of those adopted in the 1990’s, 47% in the 2000’s, and 71% of those adopted from 2010 to 2017.

But for some groups progress is less clear. In many countries, the COVID-19 pandemic has highlighted stark disparities that persist across race/ethnicity. Although the majority of the world’s constitutions guaranteed equality or non-discrimination based on race/ethnicity, these provisions are not universal amongst recently adopted constitutions: 79% of constitutions adopted from 2010 to 2017 contained this guarantee compared to 89% in the 2000s and 88% in the 1990s. Constitutional gaps are even larger for non-citizens. These guarantees peaked in the 1990s when 40% of constitutions explicitly guaranteed equality and non-discrimination compared to 16% of those adopted in the 2000s and 25% adopted in 2010 to 2017. The absence of these protections leaves migrants particularly vulnerable during a time of widespread unemployment, when they may not have access to social supports in the country they reside, and when the ability to travel is restricted.

Similarly, while all constitutional guarantees of equality and non-discrimination across sexual orientation and gender identity have been introduced since the 1990s, these guarantees remain outliers rather than the norm and have occurred alongside explicit constitutional restrictions on the right to marry for same-sex couples.

**Right to Health**

Unlike civil rights, which are nearly universally guaranteed in national constitutions, only 57% of countries explicitly guaranteed an approach to the right to health. The absence of this fundamental guarantee matters both to health responses during the pandemic and to baseline population health going into the pandemic. Indeed, constitutions are more likely to explicitly address individuals’ right to medical care than public health. Forty-one percent of constitutions explicitly guaranteed a right to medical care, including 10% of constitutions that guaranteed free medical care. Yet, only 19% of constitutions explicitly guaranteed a right to public health with an additional 6% guaranteeing some aspects of the right, such as access to immunizations.

Constitutional commitments to health have increased over time. Whereas only a third of constitutions adopted prior to 1970 addressed the right to health, every constitution adopted from 2000 to 2017 included a constitutional commitment to the right to health.

*Does the constitution explicitly guarantee an approach to the right to health?*

![Worldmap showing constitutions with different levels of commitment to health rights](image)

*Source: Advancing Equality, 2020*
Right to Education

The COVID-19 pandemic has jeopardized progress towards ensuring that all children receive a quality education. Remote learning has disproportionately harmed children from lower income households and state budget constraints pose a real threat to educational systems. More than three-quarters of the world’s constitutions provided at least some protection for children by explicitly guaranteeing some aspect of the right to education. More than half of countries explicitly guaranteed the right to free primary education, whereas only 30% did so for secondary education.

Progress towards realizing a constitutional right to education is greater amongst more recently adopted constitutions. Whereas, 61% of constitutions adopted before 1970 guaranteed some aspect of the right to education, all constitutions adopted between 2000 and 2017 did so and two-thirds of them guaranteed free primary education.

Right to Equal Opportunities at Work and Decent Work

Only a minority of constitutions explicitly addressed non-discrimination at work with just 36% explicitly prohibiting discrimination at work broadly or specifically in pay, hiring, promotions, working conditions or terminations. Slightly more common were constitutional guarantees of decent work. Half of constitutions took at least one approach to decent work by guaranteeing adequate remuneration, safe working conditions, limited working hours, rest, or paid annual leave. Nearly a third (31%) explicitly guaranteed the right to safe working conditions, which may be especially important during the public health crisis of the COVID-19 pandemic.

While constitutional guarantees of decent work are more common amongst recently adopted constitutions, the trend is less clear for prohibitions of discrimination at work. The proportion of constitutions prohibiting discrimination in at least one aspect of work has remained relatively stable since the 1980s: 50% prohibited it among constitutions adopted in the 1980s compared to 45% in the 1990s, 58% in the 2000s, and 42% of those adopted from 2000 to 2017.
Right to Income Security

The pandemic has underscored the need for income support, especially during times of illness and unemployment. When workers lack access to paid sick leave, they are forced to choose between job and income security and public health. Nearly a quarter of constitutions explicitly addressed income security during illness and an additional 19% guaranteed a broad right to social security. Similarly, 23% of constitutions explicitly guaranteed the right to income support during unemployment.

Overall, more than half of constitutions explicitly guarantee income security in at least some circumstances. While these guarantees were more common amongst constitutions adopted in the 1980s and later compared to those adopted earlier, there is no clear trend over the past 40 years towards increasing protections.

Beyond the Current Pandemic

The COVID-19 pandemic has highlighted the critical role that laws play in reducing disparities that matter to health. As foundational documents, constitutions’ fundamental guarantees of equal opportunities, health, education, work, and income security matter to reducing disparities and advancing equality. While COVID-19 has been the most severe pandemic we have faced in our lifetime, it is unlikely to be the last. Understanding where foundational guarantees of equal opportunity can be strengthened is critical to increasing our resiliency for the next crisis.

By comparing constitutional approaches to equality and non-discrimination across 193 countries, we can see areas where constitutional gaps undermine equal opportunities. For example, just a handful of constitutions in force as of 2017 guaranteed equal rights across sexual orientation and gender identity, and discrimination on these ground remains rampant across countries. Some gaps have been particularly consequential in the context of COVID-19: only a minority of countries guaranteed equal rights for migrants or persons with disabilities and the pandemic’s disproportionate impacts on these groups has underscored the urgency of adopting strong protections for equal rights. Less than a quarter of constitutions guaranteed the right to public health and 70% failed to guarantee free secondary education—both crucial to addressing the pandemic and its consequences as well as providing a foundation for the long-term health and wellbeing of individuals and countries. More than two-thirds of constitutions failed to guarantee workers safe working conditions and three-quarters did not explicitly address income security during illness. Without these fundamental guarantees in place, countries are less prepared to face public health and economic crises.

In some areas, the data allow us to see tremendous progress that has been made. All constitutions adopted between 2000 to 2017 guaranteed equality or non-discrimination based on sex, made a constitutional commitment to health, and guaranteed some constitutional right to education. At the same time, progress on other essential areas has stalled. These include equality and non-discrimination for non-citizens, prohibitions of discrimination at work, and a right to income security. Strengthening fundamental guarantees in these areas will be essential to advancing collective security and building resiliency for the next crisis.
Barangay Assembly: A Citizen-led Reinvigoration of Political Discourse and Civic Engagement in the Philippines

Michael Henry YUSINGCO

In 2011, the academic Björn Dressel wrote an article entitled, ‘The Philippines: how much real democracy?’. This is such a noteworthy query because the Philippines played an important role in the democratization wave that passed through Asia from the late 1980s to the early 1990s. It was the first country in the region to topple an authoritarian regime, ousting the dictator Ferdinand Marcos via direct citizen action in 1986. But three decades on, the democratization trajectory of the Philippines is, indeed, still a curious case.

Pertinently, Dressel correctly sees the paradox that has plagued the country all these years. On one hand, he acknowledges “signs of a vibrant democracy” such as high voter turnout, robust
civic engagement, and institutional arrangements that aim to promote and safeguard human rights and civil liberties. But on the other hand, he points to “flaws in the democratic process” exemplified by elite domination of both politics and governance.

This privileged and influential segment of the Filipino polity, or “political dynasties”, has been a constant feature since the Spanish colonial period. And while elite families in politics are certainly not unique to the Philippines, the magnitude of Filipino political dynasties brings an unwelcome notoriety. They have been described by an Australian journalist as “dynasty on steroids”.

President Rodrigo Duterte’s family is a perfect example. His daughter, Sara, is the mayor of Davao City, a bustling metropolitan town in Mindanao, while the vice-mayor is his son, Sebastian. Another son, Paolo, is a member of the House of Representatives.

A recent paper published by the Ateneo Policy Center, entitled “From Fat to Obese: Political Dynasties after the 2019 Midterm Elections,” differentiates the scale and depth of political dynasties into two categories. A “thin dynasty” is one where the mantle of public office is passed on amongst family members sequentially. Elections are used by political dynasty members to succeed one another in holding political posts.

On the other hand, the term “fat dynasty” refers to a family of politicians simultaneously holding public office. Multiple members of the clan all participate in elections at the same time, running for different posts. Notably, data gathered over the past 6 election periods show that political dynasties have become fatter.

Studies have likewise shown that lower standards of living, lower human development, and higher levels of deprivation and inequality persist in the districts governed by local leaders who are members of a political dynasty. But a more alarming development is that the ‘fattest’ dynasties are actually entrenched in the poorest parts of the country.

**Political Dynasties as a Manifestation of Democratic Decay**

Dynastic politicians maintain a firm grip on political power by leveraging their positions in government. Hence, patronage politics consistently undermines problem-oriented policymaking and legislation. The state remains unable to implement social and political reforms that ensure economic development benefits all Filipinos.

According to Dressel, elite capture of government, at both national and local levels, means “effective participation and true representation are largely illusory.” Political dynasties are so unshakable in their positions of power they have become essentially insulated from electoral competition.

One to three fat dynasties and a couple of thin dynasties usually dominate local elections. In some instances, candidates from political clans run for office virtually unopposed. A non-dynastic politico winning over a dynastic one is an exceedingly rare occurrence indeed.

And so as local communities continue to suffer inept and corrupt dynastic leaders, Filipinos who are more qualified, passionate, and patriotic, including many from younger demographics have little to no chance at all to be elected. Political reformists who lack inherited political advantage are effectively denied a fair shot at public office because of the current monarchical nature of electoral politics.

In sum, the gross expansion of political dynasties over the course of three decades has sustained a political culture steeped in corruption and clientelism. This is precisely the reason why
public administration in the country, including policymaking at the top level of the executive branch and even the legislative process itself, consistently earn poor marks in democracy indices.

Moreover, the grotesque supremacy of political elites has utterly marginalized a huge segment of the Philippine polity in the electoral process. Elections now appear to be an ineffective democratic mechanism for the people to elect only deserving political leaders.

Political dynasties manifest democratic decay in the Philippines because they exemplify the incremental degradation of constitutional democracy in the country. Their domination of the political system has sustained the dysfunction afflicting state governance and has made electoral politics essentially a “choosing the lesser evil” proposition for Filipinos.

The Barangay Assembly as a Means to Revitalize Democracy

It is worth noting that the 1987 Constitution actually mandates Congress to enact a law prohibiting political dynasties (Article II, Section 26). But such a statute has yet to be passed because of the reality that most legislators belong to political dynasties. In fact, political reform advocates have accepted the impossibility of absolute prohibition and have instead settled for the enactment of legislation regulating political dynasties. This would be a law that would merely institutionalize a legal threshold to limit the number of family members holding public office simultaneously. But this measure has also been effectively blocked by dynastic lawmakers.

While this advocacy cannot be abandoned, other ways to push back against political dynasty influence over the political system must be pursued. Two provisions of the 1987 Constitution offer guidance to another approach, namely:

1) Article II, Section 1. - The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them.

2) Article XIII, Section 16. - The right of the people and their organizations to effective and reasonable participation at all levels of social, political, and economic decision-making shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms.

The Constitution clearly sanctions the active participation of citizens in governance. These provisions essentially manifest a profound call to Filipinos to reclaim their ability to influence the political space. One way of achieving this goal is to provide them the means and the forum to regularly engage with the burning issues of the day. To institutionalize a process where common folks can freely formulate their views and have the courage and comfort of having their voices heard by others in the polity, including political dynasties. It is worth noting that Dressel maintains that “while Philippine elites seem content with maintaining minimal democratic procedures, civil society continues to push for ‘participatory democracy’”.

Notably, such a community forum already exists, it is called the Barangay Assembly. The barangay is the smallest territorial and political subdivision of the state. Its governing authority is comprised of a chairperson and a seven-member council, all of whom are directly elected by registered voters in the barangay. By law there shall be a Barangay Assembly in each of the country’s 42,046 barangays.

The Barangay Assembly shall be comprised of residents of the barangay aged fifteen years or over. By law, it shall meet at least twice a year to hear and discuss matters that impact the barangay. Notably, meetings can be called by the chairman or by at least four members of the council, or upon written petition of at least five percent (5%) of the assembly members.
The Barangay Assembly can: (a) initiate legislative processes by recommending to the council the adoption of local measures; (b) directly enact or amend any ordinance; and (c) hear and pass upon the semestral report of the council concerning its activities and finances.

The Barangay Assembly is clearly a legal mechanism that facilitates participatory governance. Through this institution, citizens can directly formulate policies for their community. They can also collectively initiate action to influence the powers-that-be in their locality. Indeed, this process, if properly utilized, can empower Filipinos to mount a serious challenge to political dynasties.

Nonetheless, the reality is, unless the Barangay Assembly convenes, citizens at the grassroots level will not be able to exercise or assert these aforementioned powers.

And of course, one reason why the Barangay Assembly is not widely utilized in the way it was designed by law is the fact that many barangay officials are co-opted by local political dynasties. Many barangays leaders owe loyalty to powerful families in their area, even though by law the barangay government must be apolitical.

An Emphasis on Deliberative Democracy

To make the Barangay Assembly truly a vehicle for a citizen-led reinvigoration of political discourse and civic action, civil society organizations (CSOs) must be conscripted to help organize and manage the proceedings. It is worth noting that CSOs in the Philippines are generally held in high regard and are considered a strong force in the political arena. The involvement of CSOs in terms of moderating the sessions of the Barangay Assembly is vital because citizens must be willing to engage in rational discourse, free of any kind of coercion or manipulation.

This CSO-Barangay Assembly joint effort is really a nod to the theory of deliberative democracy where communication and reflection are considered core principles. For deliberative democrats, democracy is not just about the polity making political decisions through elections, but it is also about the polity undertaking informed, respectful, and inclusive deliberation as part of this decision-making ritual.

Notably, CSOs are inherently oriented towards promoting dialogue and consensus-building. They have the technical expertise to conduct vibrant and inclusive discussions where participants with different views and concerns have a chance to be heard. Such that even if no consensus is ever reached at the end, people still come out of the discussion with a better and more complete understanding of the issues being deliberated upon. Having this mindset is particularly important because it makes cooperation and collective action possible. At the very least, it can keep the line of communication within a group of diverse views and interests open.

Furthermore, participants of such deliberative processes have been found to become more motivated to engage with government and even take part in electoral politics. More importantly, those who regularly participate in structured but open public discussions tend to share their learnings to their friends and families, thereby expanding the effects of the deliberative process. Arguably, the deliberative experiences in community forums parlay into essential democratic capacities for the polity. This potentially increases the size and strength of an empowered citizenry that is so vital to the democratic consolidation process.

Poignantly, the raison d’être of the Barangay Assembly is to exemplify the Filipino indigenous custom of collective action known as “bayanihan”. Therefore, it is the natural venue for a community-led effort to reinvigorate political discourse and civic engagement in the country. Ordinary Filipinos can exert more influence in local politics and governance by routinely utilizing this legal mechanism in collaboration with CSOs as a forum that fosters deliberative democracy.
And in doing so, the polity eventually upending the domination of political dynasties becomes a distinct possibility.

**Conclusion**

Democratic decay in the Philippines is a direct result of the expansion of political dynasties. Congress has refused to enact a measure to stem, or even just regulate, their growth despite an explicit mandate in the 1987 Constitution. Hence, other ways to counter this socio-political pathology must be pursued.

The national Constitution offers an option for reformists in the form of provisions that sanction robust citizen participation in government. The Barangay Assembly is a legal mechanism that facilitates the implementation of this constitutional directive. But in order to make it an effective tool to diminish the influence of political dynasties, the Barangay Assembly sessions must be carried out in collaboration with CSOs.

A CSO-Barangay Assembly joint effort is the most viable way to foster genuine and meaningful discourse amongst communities following deliberative democracy principles and methodologies. When done on a regular basis, this could lead to a politically active and potentially more assertive citizenry. Putting Filipinos squarely back on the path to deepening democracy in the Philippines.
Since its ascension to power in 2014, the Bharatiya Janata Party (BJP) led government has been incrementally reversing all the advances constitutional democracy in India had made over the years. Akin to its comparative counterparts such as Hungary, Israel, Thailand, Turkmenistan, Sri Lanka, Philippines, Turkey, Bolivia, Egypt, etc., attacks on constitutional democracy in India have only amplified during the COVID-19 pandemic.

Major recommendations to address threats to constitutional democracy have mainly existed at a generic level and have focused on normative solutions to strengthen constitutional democracies institutions, structures, and processes. While these discourses are vital, they barely help to address the immediate perils at hand. Moreover, 'one size fits all' suggestions fail to adequately account for the differences between constitutional democracies and their ground-level circumstances.
The question that then arises is this: how can the rapid decay of constitutional democracy in India be halted? This is a perplexing challenge and one which does not have a definitive solution – especially one that can be crystallized as a list of propositions. Nevertheless, this predicament would certainly entail considerable effort on the part of the numerous actors engaged in safeguarding constitutional democracy in India. It would also require the said actors to alter their existing methods, which to date have been unable to act as a speed bump to constitutional decay in India. The rest of this blog pots will attempt to briefly list some of the essential considerations in preventing constitutional decay in India.

Taking the Constitution Away from the Supreme Court

In hardly any constitutional democracy is constitutionalism as Supreme Court-centric as it is in India. The Supreme Court has been at the vanguard of nearly all political, social, and economic changes in India and has routinely undertaken both core legislative and executive functions. This has been aided in large part by the Supreme Court relaxing its traditional rules of standing and allowing any member of the citizenry to bring a case before it on matters of public relevance. In turn, the dominant strategy that has been utilized to fight the battle for the soul of India’s Constitution has been through the involvement of the Supreme Court. In present times, reliance on the Supreme Court has taken on alarming proportions, and practically every action of the BJP government has been litigated before the Supreme Court. However, the Supreme Court has seldom ruled against the BJP government in contentious cases. The positive decisions of the Supreme Court have primarily been 'rights without remedies' rulings or on matters to which the BJP government at the centre does not seem to have significant opposition. On the contrary, several of the Supreme Court’s recent decisions have possibly been in line with what David Landau and Rosalind Dixon term ‘abusive judicial review’.

To put things into context, among several controversial actions, the Supreme Court has aided the BJP government in upsetting the delicate balance of secularism in India’s deeply divided society; in passing controversial laws and actions without undergoing the requisite constitutionally-mandated processes; in undermining and/or imprisoning opposition leaders, activists and protestors; in making social mobilization harder; in putting an entire state under a large-scale communication blockade for over a year; in destabilizing the integrity of the electoral process; in interfering with accountability mechanisms; and in weakening the federal system. The Supreme Court’s decision making has even resulted in sitting as well as former judges expressing concern as can be seen here, here, here and here.

The point for actors involved in preventing constitutional decay in India to note is that the Supreme Court is no longer its ally and recourse to the Court needs to be undertaken very cautiously. In previous decades, the Supreme Court utilized deferral strategies to sidestep providing legitimacy to unconstitutional actions of the government. In fact, through the use of deferral strategies, it had almost always managed to condemn unconstitutional behavior on the part of the government. Today, in many cases, reliance on the Supreme Court results in pushing the fight for India’s Constitution a few steps behind, by adding a veneer of legality to the unconstitutional actions of the BJP government and further entrenching them. This only makes attempts at constitutional renewal more arduous.

Increased Role for Civil Society Organizations

Through extensive empirical work, Mila Versteeg and Adam Chilton have shown how even if a polity has independent courts that pass favorable decisions, the promises of constitutions are only actualized when organizations push for the Constitution's realization. This is because organizations (including but not limited to civil society organizations) can aid in resolving
coordination and collective action problems as well as chalk out the best strategies to achieve specific ends. Predominant among these strategies include civil resistance in the form of boycotts, strikes, protests, and organized non-cooperation. Major civil resistance movements between 1990-2006 achieved 53% success across the globe in challenging entrenched power and exacting political concessions. These tools were also instrumental in helping countries like Senegal and Burkina Faso ensure that their dictators did not hold power indefinitely, which has been a recurring problem in the African continent.

However, things are easier said than done. Civil society organizations in India are middle class dominated, and they often do not involve themselves in primary concerns of the average Indian. An added problem of organizations in a global south society with as many problems as India is that they jump from issue to issue and infrequently take things over the finish line. Even when civil society organizations manage small gains, they consider issues as won and move on without pursuing them to the enforcement stage. These limited outrage cycles make sustained advocacy extremely difficult.

In light of this tendency, barring a few instances, civil resistance movements in India have not been able to garner the continued critical mass of people needed to make a difference. Governments are, therefore, easily able to suppress small movements and, at times, label them as 'extremists' or, in Indian terms, as 'anti-nationals'. It is the large crowds that make the government rethink their moves or pressure them to undertake actions since the costs of suppressing them are incredibly high. When on rare occasions, civil resistance movements have been able to garner a critical mass of support and applied sustained pressure - such as during India Against Corruption Movement and in the wake of the heinous Nirbhaya Rape - their endeavors have provoked reactions on the part of the government.

Considering the crucial role civil society organizations have to play, they would have to undertake immediate measures before the clock runs out. Foremost among these is to keep aside their agendas or the temptation to address every problem and prioritize on occurrences that are impacting foundations of constitutional democracy in India or concern the average Indian. Civil society organizations will have to make the effort of ensuring continued and sustained advocacy rather than jumping from issue to issue. They would also have to take the measure of adequately framing issues in ways that can capture the collective imagination of the country's populace rather than just a handful of elites. The BJP government has sizable support, and it would take a lot to convince a critical mass of the populace that many of the government's actions are impermissible.

**Opposition Parties and the Need to Step Up**

For constitutional democracies to thrive, it requires incumbents to lose elections from time to time. In the absence of rotation of powers, ruling parties are disincentivized from ensuring the general welfare or upholding the civil and political rights of people (particularly those of minorities). Signs of these trends are already evident in India. Moreover, for incumbents to lose, there needs to be a viable alternative for the populace to vote for. While the BJP government is taking all the steps to render the opposition impotent and elections meaningless, opposition parties in India have also not been helping their cause.

Opposition political parties have been embroiled in their own internal discords and power struggles. The Indian National Congress (INC), the largest opposition political party in India, has been without a full-time permanent leader since the last parliamentary elections in 2019. It is currently being run on an interim basis by Sonia Gandhi, a member of the dynastic Gandhi-Nehru family that has held consistent command of the INC since 1947. Despite statements by members of the Gandhi-Nehru family promising much-needed democratic reforms in the INC, they have refused to let go of their command.
On the contrary, when senior INC leaders sought organizational changes through elections to party leadership positions, they were victimized and sidelined. This situation within the INC is illustrative of the bigger problem plaguing the numerous regional parties that make up the opposition in India. Several of these regional parties are embroiled in their own dynastic politics and have their prominent leaders charged with serious cases of corruption and other wrongdoings.

Opposition parties have also failed to put forward a collective front to challenge the might of the BJP. There has been an extreme unwillingness on the part of opposition parties to keep ambitions for the premiership aside and strengthen coalitions. Additionally, the main policy questions remain unsettled on the part of the opposition, and they rarely make any significant noise when the BJP government engages in unconstitutional behaviour. In fact, opposition parties have frequently toed the BJP government line on key issues.

As a result, opposition parties are not providing a concrete ideological alternative to the BJP that the electorate can consider and vote for. What the opposition offers to the 'bulk of the populace' is just a weaker and disorganized version of the ruling coalition. A large part of the opposition’s strategy to seek electoral gains is based on banking on anti-incumbency sentiments against the BJP government. While this might result in small victories, it is undoubtedly not an efficient strategy to win major electoral battles. Consequently, there seems to be no end in sight to the BJP dominance.

There is a significant onus on opposition parties to sort out their internal issues, keep aside leadership ambitions, develop clear ideological platforms and present to the bulk of the population a united and robust alternative that they can vote for. India's history should give opposition parties a lot of encouragement. When Indira Gandhi's authoritarian INC government was defeated in the general elections in 1977, it was because various opposition parties came together to contest against the INC.

The INC defeat in 1977 proved to be a crucial moment that inhibited India's descent to full-fledged authoritarianism. Recent history at a state level also shows the enormous potential a united opposition can achieve. When, for instance, in the state of Maharashtra, the INC and regional parties kept their historical differences aside and entered into a coalition, it saw them forming the state government in the place of a rather popular BJP government.

A Scholarly Agenda for The Future

In light of the above, academics may also need to explore newer research agendas. A critical exercise for academics going forward would be to examine how specific governmental actions are serving the purpose of eroding the basic foundations of constitutional democracy. For example, many laws passed by the BJP government have not only been controversial in their substance, but have also simultaneously weakened separation of powers and the federal scheme. This poses even graver challenges for constitutional democracy in India.

Further, scholars would need to investigate how, in a country like India with a weak constitutional culture, can the populace be convinced that certain actions of the government are not in their greater interests. This might be challenging, considering a large part of the country is often persuaded by the BJP government, its actions, and its promises. Academics can also assist the conversation by suggesting which issues would need the most prioritizing and the optimal strategies that organizations could adopt vis-a-vis particular concerns.

Academics could even seek to study how, in the current political climate, opposition parties could establish stable united fronts and which ideological platforms they could put forward.
Specific technical questions such as deciding on post-election leadership positions between coalition members could benefit from scholarly inquiry as well.

The list is long, but in seeking answers to preventing constitutional decay in India, academics have their own vital part to play. Civil society organizations and opposition forces, as they lead the charge to revive constitutional democracy, can undeniably benefit from pragmatic scholarly discourse.

Constitutional democracy in India has defied the odds and managed to survive in the past. However, this time around, leaving things to run their course might not be prudent. The road is long and preventing constitutional decay would require all the concerned actors to fulfil their respective roles adequately.
The complete saga of the European Union (EU)’s response to the rule of law backsliding among Member States – in its complexity and far-reaching consequences for all Member States, but also the EU itself – surpasses the scope of this short analysis. The elegant techniques and tools of illiberal regimes employed to dismantle the constitutional constrains on one hand, but also the inherent problems of EU values enforcement on the other, have been already well identified within the literature (detailed analysis is provided e.g. here, here and here).

The concerns which I will address may be analyzed through one broad dimension: this is the discrepancy between the robust approach of the European Court of Justice in its efforts to interpret the Article 19(1) of the Treaty on European Union (TEU) as “giving the concrete expression to the rule of law” on one hand and the vague and still dialogue-driven response of the European Commission on the other. The mixed signals of the EU’s response to rule of law
backsliding sends the message to the self-declared illiberal regimes that their behavior will receive a scowl, but not yet an effective sanction.

The mentioned controversial dimension of the EU’s response to the rule of law crisis has already been systematically broken down within the legal community (for one of the most recent accounts, see here). In that regard, the scope of my analysis will be limited to emphasizing the dichotomy between the robust (in the given circumstances) legal protection of the rule of law as an EU founding value, deriving from the CJEU jurisprudence, and the Commission’s Rule of Law framework, which keeps falling short of its initial purpose.

The case I will be focusing on is Poland, as it presumably shows all the flaws of the EU’s approach to the rule of law protection among Member States. If the EU continues relying on the CJEU to grapple with the illiberal practices, the detrimental consequences of the Polish so-called reforms may become almost impossible to remediate.

From Article 7(1) TEU to Requests for Interim Measures

The obvious stillness of the Article 7(1) TEU procedure against Poland (2017) and Hungary (2018) was noted even by the European Parliament in its January 2020 Resolution and the concerns were reiterated again in September 2020 Resolution. All eyes were on the Commission to react swiftly to the ever-deteriorating situation in Hungary and Poland, primarily through infringement procedures. Infringement procedures have been recognized by the scholarship as having the great potential to tackle the rule of law problems, but in order for them to be effective, as Śledzińska-Simon and Bárd argue, they ought to be expedient and preferably followed by the request for an interim measure.

Despite the noted potential benefits of the infringement procedures, the fourth one initiated against Poland in August 2020, specifically in regard to the Muzzle Law, arguably came too late to make the Polish government halt its persecution of the politically “disobedient” judges. The Muzzle Law adopted in December 2019 was introduced under the PiS government’s already well-known pretext of fighting corruption within the judiciary as one the relics of the Communist past. However, the law’s radical disciplinary measures cast a serious doubt on the government’s assertion of “acting in good faith”.

This law, as it will be described below, serves to punish judges for their verdicts and it is a direct response to the CJEU’s assessment of the Polish reforms. The law enabled the Polish government to impose further pressure on national judges who attempted to implement CJEU rulings, upon the threat of proceedings before the very same Disciplinary Chamber of the Supreme Court whose independence was brought into question in the CJEU’s A.K. and Others decision (November 2019).

The Muzzle Law was, only days prior to adoption, assessed in an urgent opinion of the Council of Europe’s Venice Commission as unacceptable, since the amendments that it entails “diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments.”

Despite the Venice Commission’s opinion, the EC request for interim measures from the CJEU in regard to the disciplinary regime for judges (belated though), and widespread criticism coming from both scholarship and relevant international bodies, the law went into force. On April 8th, the CJEU granted the interim measures and urged Poland to halt the work of its Disciplinary Chamber. Nevertheless, the Polish government kept its retaliating practice against the judges, which began with the suspension of judge Jyszczyszyn, who was the first one to try applying the criteria of A.K. and Others in the national realm.
As mentioned above, the Commission eventually did react to it by initiating an infringement procedure, stressing the key detriments of the Muzzle Law, already highlighted by the Venice Commission. Essentially, the controversial amendments broadened the scope of the notion of offense and made the content of judicial decisions subject to possible disciplinary sanctions, which opened the door to total political control of the judiciary.

**ECJ jurisprudence – Necessary, but Far from Enough**

According to the EU law scholar Laurent Pech’s insightful illustration, the legal war against Polish so-called reforms has been led in front of both CJEU and the European Court of Human Rights (ECtHR) through a number of cases.

The work of the European Court of Justice in carving the path towards the effective enforcement of the EU values and its efforts and of Advocate General Tanchev should be lauded, despite the inherent dilemma of double standards which may appear when the wide jurisdiction set under the Article 19(1) TEU gets applied outside the context of Poland and Hungary. The scope and implications of the CJEU case-law which addresses the principle of judicial independence of the Member States’ judges has been already thoroughly analyzed (for example, see [here](#), [here](#), [here](#)). In the well-known case *Associação Sindicato dos Juízes Portugueses v Tribunal de Contas* (Case C-64-16 of 27 February 2018) the European Court of Justice sent a clear message not only to Portugal or Poland, but to all Member States, that the independence of national judges is an EU matter and that the CJEU will treat it as such. The specific question before the CJEU in this case was whether the temporary salary reduction of Portuguese public officials (including judges) violates the principle of judicial independence expressed through the right to an effective legal protection, as provided in Article 19(1) of TEU and Article 47 of the EU Charter of Fundamental Rights. The temporary reduction of judges’ salary essentially does not raise the same concerns as the pressure on the judiciary in Poland. However, the Trade Union of Portuguese Judges’ reliance on the principle of judicial independence gave the CJEU an opportunity to finally tackle the meaning of the rule of law as a founding value of TEU.

Relying on Article 19(1) TEU as the “concrete expression to the value of the rule of law stated in Article 2 TEU’, the CJEU reserved for itself a wide jurisdiction in all the future cases in which the principle of judicial independence as the necessary condition for the effective legal protection may emerge. As Pech and Platon already noted, the principle of judicial independence was already present in EU law, notably in Article 47 of the Charter of Fundamental Rights, but in the CJEU’s jurisprudence it emerged in the 2006 Wilson judgement.

However, unlike Article 47, which is limited in scope by the Article 51(1) of the Charter, Article 19(1) TEU gave the CJEU the opportunity to delve into the necessary but burdensome work of addressing the Polish judicial reforms. Within the first line of judgements in relation to the Polish judicial reforms (*Commission v. Poland* (C-619/18), *Independence of the Ordinary Courts judgement* (C-192/18) and most clearly in *A.K. and Others* (Independence of the Disciplinary Chamber of the Supreme Court (C-585/18, C-624/18 and C-625/18)), the CJEU set out the elements of judicial independence which should be taken into consideration by national courts when assessing whether to disapply the norm which grants jurisdiction to another court that doesn’t meet the requirements of judicial independence or impartiality under the EU law. In the A.K. and Others the CJEU asserted that it is not only a right, but also a duty of referring courts to assess the independence of judges.

Despite the CJEU’s necessary reliance on national courts to assess the independence and impartiality of the (fellow) judges, in accordance with the logic behind preliminary ruling, the whole set of pervasive and incremental ‘Frankenstate’ measures (i.e. combining deficient practices that normally exist as aberrations within a single legal system) that the Polish
government introduced throughout this year precluded an efficient implementation of such a mechanism.

While we spent the last months concerned about the legal harassment of Polish judges (e.g. see the recent cases of judge Beata Morawiec or judge Irena Majcher) and waiting for the CJEU’s final ruling in Commission v. Poland (Case C-791/19), the question that emerges is – What else can be done?

Scholars suggest initiating a systematic infringement procedure which would in a comprehensive manner address the questions of the dubiously composed Constitutional Tribunal, the work of the National Council of Judges (NCJ) and the Chamber of Extraordinary Review within Supreme Court (further explanation provided below). That way, the CJEU would be able to provide a more structural remedy. Despite that being a viable option, swamping the courts cannot be the only response to the rule of law crisis. Legal protection of the rule of law might fix the consequences of the rule of law crisis (even that is questionable), but it cannot deal with the causes.

Dialogues, Recommendations and Naming and Shaming Toolkits

Besides the Sisyphean work of the CJEU, the European Commission’s second “battle front” against the practices diminishing the rule of law has been formed through its Rule of Law Framework which was introduced in 2014. According to the 2014 Communication on the “New” EU Framework to Strengthen the Rule of Law,

The Framework will be activated in situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.

As Kochenov and Pech argued even before the framework was introduced, the dialogue-approach may function only as a warning mechanism for the Member States which display potential dangers as regards undermining of the rule of law, but not as any meaningful constraint in countries where rule-of-law violations are already apparent.

Nevertheless, the Commission insisted on this approach and has proceeded in a dialogue-driven manner. The Rule of Law Dialogue with Poland, which began in 2016, consisted of four recommendations to Poland issued during 2016/17. The Recommendations repeated that the Polish government should urgently remedy the effects of the 2017 legislative reforms which aimed at deep restructuring (capturing) all instances of the judicial branch – the Constitutional Tribunal, Supreme Court, ordinary courts and National Council of the Judiciary.

While the Commission continued to make recommendations and express serious concerns, the Polish government captured the whole judicial system under the pretext of departing from the Communist past. The most recent attempt of the Commission to make a difference through dialogue-driven soft law was expansion of its rule of law toolkit by issuing the long-awaited Annual Rule of Law Report, as a follow-up to the 2019 April Communication and the July 2019 Blueprint for Action. The 2020 report, consisted of the general assessment of the rule of law compliance within the Union, but also chapters on particular Member States, entails essentially preventive measures and relies on the promotion of the rule of law mainly through dialogue and promotion of a “robust political and legal culture of the rule of law” (for an incisive analysis of the report, see here and here).

However, the methodology followed in both the general summary and particular reports hardly goes to the roots of the problem. Other than being a useful reference within the EU rule
of law discourse, the mentioned documents do point out to another important perspective - namely, they highlight the EU’s self-restraint to only a subsidiary and supportive role in rule of law protection among the Member States. As the 2019 Communication states: “the primary responsibility to ensure the rule of law rests with each Member State, and the first recourse should always be to national redress mechanisms”. One does not need to be a lawyer to see we’re at this moment far from the first-recourse-optimism.

As various scholars have suggested (see e.g. here, here, here), there are plenty of possibilities for the EU to reinvent its response to rule of law backsliding – other than stepping up on its infringement procedures, interim measures or making better use of Article 7(1) procedure, it could introduce rule of law conditionality in distributing funds.

Whatever path the EU chooses (and it could choose all of them), expediency is the key element. In that regard, positive developments can be noted as only one round of the “trilogue” (inter-institutional negotiations between the European Parliament, Council, and Commission) on the rule of law conditionality mechanism took place last month was enough for EU institutions to reach an agreement that from now on, EU Member States which disrespect the rule of law will risk losing their funds.

The procedure behind this mechanism will require the Commission to establish the existence of a rule of law breach and propose measures against an EU Government, which the Council would subsequently need to adopt with a two-thirds majority vote. Although the high threshold for the Council’s decision may raise considerable doubts about the effectiveness of the funding-conditionality, this agreement is one of the rare serious steps that the EU has so far taken to prove its proclaimed commitment to the protection of the rule of law principle.
For almost a decade now, the European Union (EU) has struggled to find convincing answers to cases of constitutional decay in its own Member States, most notably in Hungary and Poland. Politicians, civil society, academics, and often also ordinary citizens of the countries concerned, have sometimes harshly criticized the EU for ‘not doing enough’ and called the EU institutions to ‘do more’. There is indeed no doubt that several mistakes have been made in the use of the Union’s values-protection toolkit.

Yet, ten years after the first signs of the crisis, it is probably time to reassess our expectations and start a deeper reflection on what can really be achieved by EU intervention and on where EU action should focus. This is what I aim to do in the following paragraphs, explaining why I believe that a EU top-down rescue of national democracies and rule of law systems is out of the question, but at the same time that the EU can still have a key role in fighting constitutional decay in its Member States.
Constitutional Decay: A Common EU Concern

Before moving to the core message of my contribution, however, a brief introductory remark is necessary. Regardless of what one believes should be the goals of EU intervention, it is essential to understand that constitutional decay is not only a national concern, a Hungarian or Polish problem, but a truly European one, one that affects the European Union as a whole. To offer only one example, cases of constitutional decay undermine systems of cooperation between EU Member States based on the principle of ‘mutual trust’. A Dutch court made the point very clearly in a 2020 preliminary reference to the Court of Justice of the EU (CJEU), asking whether it should suspend cooperation – in the context of the so-called European Arrest Warrant - with Polish courts in view of the systemic problems with judicial independence caused by the reforms of the judiciary.

As soon as even only one Member State fails or refuses to uphold the common values of the Union established by Art.2 TEU, the entire system is affected, and EU institutions need to take action and try to tackle situations of constitutional decay. To be clear in this respect: I fully agree with those who argue that the EU needs to ‘do more’ in order to protect its foundational values and the smooth functioning of the Union system. But here lies the key tension, as grasping more precisely what the institutions need to do, and how, is a much more complex question and exercise. The EU only has limited mechanisms at its disposal, and, more structurally, the EU constitutional settlement rests on a thin balance, exemplified perhaps more evidently by the tension between diversity and commonality, between the ‘common values’ and the need to protect and respect the national identity of the Member States, as Art.4(2)TEU requires.

Constitutional Decay and EU Intervention: What Has Gone Wrong So Far

Rather than describing in detail how EU institutions have reacted to each and every development of the Hungarian and Polish crises, and eventually where mistakes have been made, I would like here to identify what might have been the major shortcoming in the institutional – but often, also academic - approach to the constitutional decay question. I will define it as the ‘silver bullet’ approach, in the sense that, too often, the debate went in the direction of seeking a single and almost magical solution to the crises. To offer a few examples: after the first attempts to intervene in Hungary via the more ordinary mechanism of infringement actions under Article 258 TFEU produced limited results, the Commission came up with a new solution, the ‘Rule of Law Framework’, which was then activated against Poland. That instrument proved insufficient as well. Then, it was the turn of what had been mistakenly defined the ‘nuclear option’, namely Article 7 of the Treaty on European Union (TEU). As many hoped, Article 7(1) was finally launched first against Poland, and then against Hungary, yet it fell once again short of the high expectations that had been raised, as the two procedures were soon stuck at the Council level. Today, the debate concentrates on yet another possible silver bullet, the proposed ‘Rule of Law conditionality’ regulation, an instrument that would allow EU institutions to suspend EU funds in case of rule of law problems in a Member State.

The ongoing debate on the latter instrument well shows the problems of the silver bullet approach, as former commissioner Andor also pointed out just last month. While it is clear that, by introducing a conditionality clause linked to the distribution of EU funds, the Union’s values-protection toolbox might be further strengthened, it would be a mistake to think that the new regulation alone will be a fundamental game-changer. Evidently, much will actually depend on the outcome of the negotiations and the final decisions on the scope of the instrument and its decision-making procedures. Even if the institutions manage to overcome the Hungarian and Polish veto on the Multiannual Financial Framework, which has for the time being halted the final adoption of the Rule of law conditionality regulation, it is all to be seen what effects the new
instrument may actually produce in practice. Its ability to trigger meaningful domestic change is to be tested, and the idea actually comes with possible risks, in particular in terms of potentially alienating the domestic population from the EU and produce rally-round-the-flag effects.

Rather than taking robust action with the already existing instruments, energies and political capital are invested into creating yet another tool, with little guarantee that it will actually work, and even more fundamentally, with no clear ideas on what precise results it is meant to achieve.

Most crucially, the problem with the approach I have described is that no silver bullet actually exists. Constitutional decay is such a complex, multi-level issue that it cannot be addressed by inventing a new instrument, or finding in the current EU treaties a tool that has somehow remained hidden so far. In this respect, for far too long, EU institutions – and often commentators and observers – have struggled to realize that the challenge is not finding the perfect instrument, but rather combining existing, and only where absolutely necessary, new tools.

Furthermore, the search for a silver bullet has made us emphasize top-down solutions, imagining the EU coming to the rescue of national democracies and rule of law systems. Too little attention has been paid to bottom-up solutions, and to how EU intervention can contribute to individual and collective resistance within the Member States concerned. Yet it is arguably time to acknowledge that any EU-led, top-down rescue national democracies and rule of law systems seems extremely unlikely, if not plainly impossible.

It becomes even more difficult to believe that the key answer can come mainly, or exclusively, from the EU level if we accept the argument made most recently by Kratsev and Holmes that one of the very causes of decay in Hungary and Poland might be resentment against the ‘imitation imperative’ that has been sponsored by the EU since the beginning of the 1990s; that is, the requirement that newer Member States must emulate the institutional, political, and economic organisation of older Member States. Furthermore, and to conclude this part of the analysis, if it is true that democracy and the rule of law are more than a set of institutions, and depends on broad cultural and societal factors, then once again, those can hardly be imposed or created by the outside or from the top.

**Constitutional Decay and EU Intervention: What Can, and Should, Be Done**

I would argue, therefore, that those involved – at various levels - in the debate should stop looking for a silver bullet, accept the limitations of the EU framework, and more broadly, the limitations of outsiders’ interventions in domestic constitutional regimes, and then reflect in a more structured fashion on what should be the objectives of EU action or intervention. My argument is that the EU should focus on more realistic goals: protecting, empowering, and mobilizing those domestic actors that can resist and slow down constitutional decay within the national political and legal order, and then trying to foster conditions for domestic constitutional renewal in the medium and long term. To make my suggestion more concrete, I would like to offer three examples of areas in which the EU could intervene and how it could do so.

First, it is essential that EU institutions take robust and swift action to guarantee the independence of the national judiciary. The importance of independent courts for protecting the rule of law can hardly be overstated, and in the EU legal order, (independent) national courts become even more crucial as an avenue to protect EU-law-derived rights, also thanks to their direct link with the CJEU via the preliminary reference procedure, which empowers national courts to ask to the Court of Justice questions on the interpretation and validity of EU law.
Now, while it is true that both in Hungary and Poland a lot of damage has already been done— in particular when it comes to the two constitutional courts— many judges in the ordinary judiciary are still bravely resisting attacks to judicial independence in a variety of ways, from preliminary references to the CJEU, to political action in a wider sense. The Commission in particular should constantly and carefully monitor the situation and, by relying on the key provision of Art.19 TEU, open infringement actions whenever necessary, ensuring that the CJEU gets the opportunity to decide the relevant cases as soon as possible, and, where needed, also make use of interim orders in order to prevent any consolidation of controversial reforms. The action concerning the Polish Supreme Court offers a positive model in that respect: by reacting promptly and forcefully, the Commission was originally able to stop the attempt to capture the Supreme Court by modifying the retirement age of the court’s judges.

Secondly, EU action could focus on the protection of those fundamental rights that can ensure participation in political debate and democratic contestation, such as freedom of expression or association. In developing this ‘procedural’ approach to fundamental rights’ protection as also suggested by Dawson, the Commission, following up on what has been done in the context of the ‘NGO law’ (measures limiting the possibilities of NGOs operating in Hungary to receive funding from abroad) and the ‘CEU law’ (a reform of the system of Higher Education institutions, which de facto forced the Central European University to leave Budapest and relocate to Vienna) in Hungary, should make more structured use of the Charter of Fundamental Rights in the context of Art.258 procedures.

In this respect, an area to be explored is that of freedom of information and media pluralism, where the EU so far has mostly remained silent, but where real concerns exist in both Hungary and Poland, as the recent Commission Rule of Law Report also made clear. While we should not forget that the EU Charter of Fundamental Rights has a limited scope of application, and thus that EU institutions must always demonstrate that the national law or measure in question ‘falls within the scope of EU law’ under Art.51 of the Charter, the Commission could try to use EU competition and state aid law in a creative manner.

In this respect, there seems to be recent promising developments. If the Commission can demonstrate that Hungarian and Polish media regulation runs afoul of EU competition rules, then it can ‘attach’ a possible violation of the Charter provisions guaranteeing freedom of expression and information. In this respect again, however, the Commission should try to make sure that its actions are timely and that decisions are taken swiftly, unlike what happened for example in the CEU case.

Finally, and to some extent this suggestion might come too late, as the key financial decisions for the next multiannual budget have already been reached, the EU could invest more in ‘positive’ conditionality and make proactive use of its funds, rather than on the ‘negative’ conditionality under discussion at the moment. For example, while it is true that a new ‘Justice, Rights & Values’ fund was created, this happened to a large extent by repackaging existing programmes, without increasing the Union’s financial commitment. In this respect, and while we are still waiting for the outcome of the discussion on the rule of law conditionality proposal, the negotiations on the multi-annual financial framework might have been a missed opportunity. Yet, if we unfortunately have to accept that the fight against constitutional decay will continue for years, then these proposals could then return in the next years and eventually even in the negotiations of the next budget.

To some, the suggestions I have advanced might be underwhelming, perhaps too little, too late. As a possible response, I would like to first make clear that those efforts should be seen as complementing other initiatives at the EU level, rather than fully replacing them. For example,
there is no doubt that procedures under Art.7 TEU should continue, and actually that the Commission and the EP should try to push the Council to adopt its final decisions as soon as possible.

Second, I ultimately agree that the framework I have proposed falls short of what others have claimed, for example arguing for a stronger ‘militant democracy’ type of intervention. But as argued earlier, I believe there is a limit to what can be achieved by EU intervention, at the very least in the current context. While on a more normative level we might want to see the EU becoming a militant democracy, this is not what the current constitutional framework provides, and it is unlikely that such a transformation can take place soon.

To conclude, the EU most likely cannot ‘save the day’. Even if the EU institutions would adequately address the mistakes that have been made so far, most of key answers are to be found in the domestic arena. Domestic actors ultimately have a fundamental responsibility in finding solutions at the national level, and it is in this respect that the EU should intervene, doing its best to protect and support those actors that can slow down constitutional decay today, and create the conditions for democratic renewal in the longer run.
More than ten years ago, the European Court of Human Rights (ECtHR) delivered its ruling in the Sejdijć and Finci case. Even though this judgment confirmed the discriminatory nature of the Constitution of Bosnia and Herzegovina (BiH), i.e. exclusion of those outside the three constituent peoples from key state institutions, this Constitution is still in force. Elected leaders of this country (which have been practically the same throughout all these years) cannot agree among themselves how to bring the Constitution in line not just with this verdict but also with other ECtHR rulings against BiH that followed the Sejdijć and Finci case (see, e.g., the Zornić, Šlaku and Pilav cases). The bottom line of all these rulings is clear: all citizens in BiH should have equal rights. Is it so hard to make the Constitution in line with this general principle of the rule of law?
A Little Background

BiH is rather unique when it comes to its constitutional arrangements. This is a result of a violent armed conflict that lasted on Bosnian territory from 1992 to 1995 and ended with the signing of the Dayton Peace Agreement (DPA), with Annex 4 serving as the Constitution for BiH. Primarily driven by the imperative to end the war, the DPA introduced peculiar solutions for the distribution of rights enjoyed by its citizens. Namely, although explicitly securing the enjoyment of the rights and freedoms of all persons in BiH without discrimination on any grounds, the Constitution declares Bosniacs, Croats, and Serbs as ‘constituent peoples’, making them more equal than ‘others’ – those who are not part of these peoples (e.g. Roma). For instance, anyone identifying other than a member of constituent peoples is ineligible to be elected for the state-level House of Peoples or the Presidency.

However, even the constituent peoples are being discriminated against based on the territory in which they live. More specifically, the Presidency is tripartite and has to be comprised of one Bosniac, one Croat, and one Serb. The Serb presidency member must be elected from the territory of the Republika Srpska (an entity within the state with a predominantly Serb population), while Bosniac and Croat presidency members must be elected from the territory of the Federation of BiH (an entity predominantly with a Bosniac and Croat population). As such, every Serb in the Federation of BiH, like every Bosniac and Croat in Republika Srpska, is discriminated against.

Discrimination is visible in all spheres of public life. Civil servants, ministers, prosecutors and others are elected on the basis of their ethnicity, which directly affects the quality of public administration. Even the Institution of Human Rights Ombudsman/Ombudsmen of BiH, which is supposed to protect against discrimination, includes three ombudsmen appointed from three constituent peoples. In sum, the choice is not limited to the best candidate but to the one who has the appropriate ethnicity.

This has led to several ECtHR rulings against BiH, including, among others, the 2009 Sejdić and Finci ruling, which was the first time that the ECtHR declared a constitutional provision of a state party to be in violation of the European Convention on Human Rights (ECHR). However, the needed constitutional and legislative reforms in BiH have not yet been adopted. Therefore, the Committee of Ministers of the Council of Europe characterised this situation as a manifest breach of the BiH’s obligations under the ECHR as well as of its undertakings as a member state of the Council of Europe. Moreover, the ECtHR has stated that the failure of BiH to introduce necessary reforms is a threat to the future effectiveness of the ECHR machinery.

So, What Stands in the Way of Constitutional Reform in BiH?

Even the creators of the DPA knew that the DPA was imperfect and that it would represent a stumbling block in BiH’s development. However, they all thought the BiH Constitution would be significantly amended shortly after codification. Yet, it never happened. The BiH Constitution can be amended by a decision of the Parliamentary Assembly, which includes a two-thirds majority of the members of the House of Representatives present and voting. All attempts by the BiH authorities to change the Constitution have been unsuccessful. The reasons are multitudinous: from the short deadline for drafting constitutional and legislative amendments, to the failure to hold working group meetings due to the absence of their members and consequent lack of a quorum. But, in essence it all comes down to one thing: a lack of will among politicians to reach an agreement.
Why are politicians unable and unwilling to change the Constitution? The DPA has organised BiH, as a polity, around ethnicity and has paved the way for ethnonationalist parties to rule. In addition, since the Constitution stipulates that officials appointed to BiH institutions need to represent the peoples of BiH, the DPA also paved the way for these ethnonationalist parties to use the quota system to appoint their people of trust to high state positions. These politicians are among the highest paid politicians in Europe in comparison to the salaries of the rest of the population, meaning the BiH political system is a cash cow for politicians.

Consequently, there is a whole political class in BiH whose sole ethic is self-enrichment. And this is the real reason why they are ethnonationalists in the first place. Their nationalism and spreading of ethnic distrust is what keeps them in power. And the process of constitutional reform, just as any other process, is becoming less about the reform necessary for ensuring human rights for everyone, and more about cheap political gains.

So why do people still vote for them? Because a vote for a non-ethnic party is construed as weakening one’s ethnic community. Politicians are elected for their promise of protecting their respective ethnic group against the other two. This is something the politicians repeat over and over again, and this is what sticks with voters. Also (and even more important) is the fact that essential positions in the state are held by these ethnonationalist parties and that the best way to secure a job for yourself or your children is to vote for them. And even though the European Union (EU) accession is still a shared goal among all BiH politicians, it remains secondary to the aim of preserving and advancing the power of one’s own group.

Hence, after an unusually long wait for the BiH authorities to implement the Sejdic and Finci verdict, now that more than 10 years have passed since this verdict was issued, it is the right time to face the truth: no, BiH authorities will not implement this verdict themselves. Pressure from the outside is thus not only needed but also necessary.

Possible Steps Forward
Before we deal with possible steps towards implementing ECtHR rulings and amending the BiH Constitution, it is important to clarify two things: BiH authorities’ (in)action in the case of ECtHR rulings are not exceptional since these politicians also fail to respect other courts’ rulings (not even the BiH Constitutional Court’s judgments), nor is the implementation of the Sejdic and Finci verdict a guarantee that BiH would transform itself into a successful and efficient democratic state. Implementation of the Sejdic and Finci verdict is just a formality that must be completed in order for this process to begin.

So far, apart from statements and resolutions, there has been no concrete pressure from the international community on BiH towards implementation of the ECtHR judgments. They rely on the pressure of public condemnation, considering this should have been sufficient to make BiH leaders to take action. As we can see, however, this has not been the case. Therefore, stronger pressure is needed. Here, the role of the EU is crucial. The EU must not allow BiH politicians to get away with such inaction and should make the continuation of any talks about BiH’s EU accession process conditional on the implementation of these rulings.

However, as the BiH authorities, as well as international community, are still undecided on how to or even if they should take actions, I consider two possibilities here.

One option is the intervention of the High Representative, since if there is any time that BiH should not be allowed to take ownership over its affairs, this is it. Namely, one of many consequences of the DPA was the establishment of the Office of a High Representative with the task of facilitating the implementation of the peace agreement. The High Representative has the power to impose decisions in cases where BiH authorities are unable to make an agreement, and
in the past, it has carried out this task numerous times. Now is the proper time to use these powers again.

A possible second option is to use the BiH civil society and academic institutions to make changes. Research shows that, where NGOs have sought and pursued opportunities for engaging with the authorities, where they have formed alliances with other civil society actors and used the media to drive implementation forward, they have managed to secure important human rights gains. Besides (and importantly), all talks have to include consultations with people directly affected by the discriminatory provisions in the Constitution - which so far was minimal. And even before the ECtHR rulings are implemented, these rulings can be used as a trigger for reforms with a wider scope of building representation based on the civic principle. Far-reaching measures can be adopted, such as education reforms aimed at promoting equality and strengthening BiH nationality and unity as opposed to ethnic division.

**Conclusion**

Democracy is currently in jeopardy in many countries in the world. Most authors do not count BiH among them since the political and constitutional situation here has been unchanged for the last 25 years. On the other hand, there is an active and pressing dismantling of democratic governance rising around the globe - to name just a few: Poland, Hungary, Brazil, and the US. Still, the BiH case study can contribute to the current constitutional discussions, as there are several important insights that can be learned from the BiH experience.

For one thing, the BiH case study serves as an indicator of possible detrimental consequences arising from a poor post-conflict process of territorial division and state restructuring driven by strategic considerations and not the benefit of the citizens of the state concerned. Namely, the word ‘Dayton’ has entered the language as a shorthand for the ‘Big Bang’ approach to negotiations: lock everyone up until they reach an agreement. This is certainly a good type of diplomacy if the end of the war is the only thing you want the warring parties to reach. If, however, during that process you also create the highest legal act of a state – its Constitution – the process must not be rushed and led behind closed doors.

Hence, the first big lesson is that the process of creating a constitution in secret and as a compromise between warring states certainly results in the consolidation of disputed conflicts (ethnic or otherwise) as well as instability and inefficiency in the future state. The Constitution should instead be drafted and adopted involving the citizens of the state concerned and applying procedures that provide democratic legitimacy. No, BiH is not a sui generis case but a cautionary tale for the rest of the world, illustrating how hard it is to reverse the post-conflict process that starts off poorly. This case can contribute to the literature and potentially influence policy-makers interested in issues relevant to any country emerging from conflict.

Second, and in line with what Satang Nabaneh has also recently highlighted for Gambia’s attempts at constitutional reform, the BiH case study demonstrates how political elites can serve as stumbling blocks when proposed constitutional change threatens their political power. Here, ethnicity is clearly being instrumentalised by leaders (still) hungry for power. Therefore, the second big lesson is that a state that faces a dire economic situation and high unemployment is susceptible to manipulation of political elites.

Finally, prolonged non-implementation of the judgments of the ECtHR is a challenge to the Court’s authority and thus to the Convention system as a whole. Thus, the third big lesson is the unavoidable need to improve the supervision of the implementation of the ECtHR rulings by the Committee of Ministers within the Council of Europe.
And as far as BiH is concerned, it is high time to offer equal treatment to every citizen of BiH and make this country a home for all its citizens, regardless of their ethnic affiliations. To be clear, no one claims that the implementation of the Šejić and Finci ruling is easy. However, it is not impossible and Bosnia cannot be the only country in the world with a constitution that labels some of its citizens as ‘others’.
INDEX

Arab Spring, 76–77
armed conflict, 64–65, 77, 80, 95–98, 165, 194, 233–236
austerity, 57–58
breakdown, 56, 58, 181, Brexit, 37, 140–141, citizen engagement, 7, 117
civil society, 44, 53, 79–81, 123, 126–7, 188–192, 214–5, 218–221, 235
constitutional amendment, reform
  Brazil, 56, 59–61
  Hungary, unconstitutional constitutional amendment, 176
  India, unilateral, 152
  Malta, insufficient, 123
  Sri Lanka, abusive, 164–172
constitutional crisis, 14, 17, 54, 61, 101, 135–7, 166, 171, 183;
  constitutional decay, 13, 45
  European Union, 227–231
  India, 217–221
constitutionalism
  abusive constitutionalism, 18–19, 164–8, 194
  Arab constitutionalism, 74–77
discourse in China, 13–17
  illiberal constitutionalism, Hungary and Poland, 175–9
corruption
  electoral malpractice, Africa, 85
  European Union, threat, 35
global concerns, 29
  India, 219–220
  Indonesia and Malaysia, 99–103,
  Latvia and Lithuania, 125–8
  Malta, 120–4
  Nepal, kleptocracy, 95–8
  North Macedonia, 131
  Philippines, 213
  Poland, pretext for anti-democratic reforms, 176, 223
  South Africa, 81
courts
  abusive judicial review, 18–19
  appointments, 19, 47, 59–61, 88–92, 121–3, 134–8, 151, 166, 169–172,
  assertiveness, Ecuador, 63–6
  capitulation, India, 150–3
court-packing, 59–62, 115, 131, 134, 142, 178, 200
crisis, Slovakia, 134–8
elections see elections
  independence,
  institutional decelerators, UK, 139–142
  lack of discipline, India, 151
  pervasive judicial control, India, 45–8
  undermining secularism, 109–113
COVID-19
  Arab states, 74–7
  Brazil, 56–8
  Hungary and Poland, 175–9, 193–7
  India, 146–9
  Malaysia, 104–8
  populism see populism
  Slovakia, 134–8
  Sri Lanka, 164–8
democracy
  consolidation of, 95–8, 99–103, 120–128
deliberative, 162, 215–6
  illiberal democracy, 22–6, 27–33, 134
  hybrid regime / illiberal regime, 129–133,
  193, 222–223
démocratie, 22–6
disinformation,
d  and democracy, 43–4
d  and digital populism, 37–8
dential advertising, 7
dynasties, political, 212–6
  ‘fat dynasty’, Philippines, 213
democracy, 5, 7, 15, 42, 54, 56–8, 190–1
d  right to education see rights
elections
  court intervention, 83–7, 200–202
  electoral transparency, norm, 86–7
  mandatory voting, 11
  manipulative electoral politics, 198–202
  regulation, 157–8
  snap elections, 129–133
  voter suppression, 9–12
emergency powers see COVID-19
  emergency politics, Hungary, 193–7
European Union
  Court of Justice, 39, 61, 176, 190–1, 222, 224, 228, 229
  Intervention, 222–231
executive
  executive excess, 146–7
  executive power and Covid-19 see COVID-19
fake news see disinformation
globalisation, 2–8, 15
  legal globalisation, 19
  globalisation and inequalities, 29–32
  globalisation and populism, 38, 42,
  inequality, 2–8, 27–33, 56–8, 77, 127–8, 206, 213
international organisations
  European Court of Human Rights, 80, 92, 176, 190, 224, 232,
  United Nations, 57, 77, 190,
  Venice Commission, 121–4, 176, 191, 223–4
leaders
  Brazil, Bolsonaro, 57–8, 61,
  Ecuador, Bukele, 64–6
  India, Modi, 150–3
  personalized politics, 98, 100, 130
  Poland, criminal liability, 184–7
liberalism
  crisis of, 45–8
  undemocratic liberalism, 27–33
local democracy
  bulwark against authoritarianism, 114–7
  Barangay Assembly see participation
media
  media freedom, 79, 123, 131–2, 153, 178, 188, 191, 230
  social media, 6–7, 10, 38, 43, 65, 97, 178,
parliament
  India, abuse of money bills, 159–163
  India, parliamentarism, 155–7, 159–163
  India, Speaker role, 156–7, 160–3, 182–3
  Malta, lack of upper chamber, 121
  Poland, façade organ, 180–3
  UK, prorogation, 140
participation
  Australia, greater participation, 7
  Chile, Zoom town-halls, 55
  Philippines, Barangay Assembly, 212–6
political parties
  dominant party, 81–2, 101, 136–7, 154–8
  party discipline, 7, 121, 161
  opposition parties, 12, 53, 69, 79, 91, 97, 116, 132, 219, 220
  opposition parties as guardians of democracy, 219–220
polarisation, 2–8, 16, 41, 70, 160, 172
populism
  and Covid-19, 41–4
  anti-pluralism, 44, 114–7
  constitutional impatience, 139–142
  digital populism see disinformation
private power, 29, 34–9
public power
  paradigm shift in digital era, 39
rights and freedoms
  economic, social, cultural, 206–211
  education, 209
  equal opportunities and decent work, 209
  equality, 207
  freedom of religion, 109–113
  freedom of speech, 7, 35, 111, 123, 149, 178, 181
  health, 208
  income security, 211
rule of law, EU framework, 222–231
scholarship, 13–7, 220–1,
science, 41–4, 65, 70
secularism
  decline in France, UK, USA, 109–113
separation of powers see also courts, executive, parliament
  Arab world, 74–7
  Canada, notwithstanding clause, 67–70
  Ecuador, 63–6
  India, 45–8, 146–158
  Malta, 122–4
  Sri Lanka, 164–172
social media see media
State secrecy, South Africa, 78–82
technology
  algorithmic governance, 34–9
  automation, 2–8
  information society, 34–9
welfare, 7, 27–33 see also rights
  Australia, federal job guarantee, 7
ACKNOWLEDGMENTS

The organisers are very grateful to the following organisations and individuals for their assistance in organising the Roundtable:

The International Association of Constitutional Law (IACL)
- IACL President Professor Adrienne Stone
- IACL Roundtable Commission heads Professor Selin Esen & Professor Jose Maria Serna
- IACL Secretary General Anna Jonsson Cornell

Co-sponsors
- Laureate Program in Comparative Constitutional Law (Melbourne Law School), funded by the Australian Research Council (ARC)
- Melbourne School of Government, University of Melbourne

Partners
- IACL-AIDC Blog
- Constitution Transformation Network (CTN), University of Melbourne
- Democratic Decay & Renewal (DEM-DEC)

Speakers & Chairs
- All speakers are listed above.
- Sincere thanks to our chairs: Dr Raul Sánchez-Urribarri, Professor Selin Esen, Associate Professor Jaclyn Neo, Dr Erika Arban, Menaka Guruswamy, Dr Joelle Grogan, and Professor Cheryl Saunders.

Roundtable organisation team
- Gabbi Dalsasso,
- Astari Kusumawardani
- Joshua Snukal
- Kathryn Taylor

Videographer
- Greta Robenstone

French-English Interpreter team:
- Camille Lapierre
- Yveline Piller
- Congress Rental

Marketing Team, Melbourne Law School:
- Troy Hunter
- Sam Burt
- Sophie Suelzle
Additional assistance:

The following individuals provided highly valuable additional assistance, e.g. regarding logistics and providing feedback on draft materials:

- Professor Cheryl Saunders
- Dr Anna Dziedzic
- Dr Erika Arban
- Dr Dinesha Samararatne
- Toerien van Wyk
- Julian Murphy