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Editors

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Switzerland

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I. INTRODUCTION: FOREIGN POLICY AND DIRECT DEMOCRACY

The Swiss Federal Constitution of 18 April 1999 (Swiss Fed. Const.)¹ is a ‘popular constitution’.² Formally, it ranks amongst the most rigid given the considerable hurdles amendments must clear.³ Not only are constitutional amendments subject to a referendum but require a double majority of both the voters nationwide and the 26 constituent states (Cantons) to be approved.⁴ The result of the popular vote in each Canton determines its respective vote.⁵ Constitutional amendments are nevertheless frequent. Swiss citizens are usually called upon four times a year to vote on two to four referenda regarding constitutional amendments, international treaties, or federal statutes. In 2019, however, the voters and the Cantons *failed to approve any constitutional amendment*. On 10 February 2019, they rejected a popular initiative against urban sprawl aimed at mitigating the deprivation of cultivated land by barring the Cantons from creating new residential zones.⁶ Federal Parliament had

met some of the demands by amending the Federal Statute on Spatial Planning in 2012.

In small and open economies like Switzerland, referenda on international treaties may, in both political and legal terms, rise to the same importance as referenda on far-reaching constitutional amendments. This is supported by empirical evidence according to which voter turnout tends to be significantly higher in referenda on *foreign policy* than on domestic issues.⁷ Unlike all of its neighbours, Switzerland is neither a member of the European Union (EU) nor the European Economy Area. The country is nonetheless closely linked with the EU by a densely knit network of bilateral treaties allowing, among other things, for free movement of persons.⁸ Coupling the EU’s dynamic *acquis communautaire*, including secondary legislation and decisions by the European Court of Justice, with static treaties under international law, however, creates inevitable tensions. Such friction resurfaced with regard to the EU’s ‘Schengen Agreement’, which largely abolished internal border checks within the European ‘Schengen Area’,⁹ of which Swit-

¹ Swiss Federal Constitution, 18 April 1999, Classified Compilation of Swiss Federal Law (SR) No. 101; official titles are in German, French, and Italian. Available at: <https://www.admin.ch/opc/en/classified-compilation/19995395/index.html> (non-official English translation).

² Johannes Reich, ‘Switzerland: The State of Liberal Democracy’, in Richard Albert et al. (eds), *2017 Global Review of Constitutional Law* (I•CONnect & Clough Center 2018) 280, 280.

³ Astrid Lorenz, ‘How to Measure Constitutional Rigidity’ 2005 (17), *Journal of Theoretical Politics* 339, 359.

⁴ Swiss Fed. Const. (note 1), article 140 section 1a.

⁵ Swiss Fed. Const. (note 1), article 142 section 3.

⁶ ‘Popular Initiative Against Urban Sprawl’. Vote of 10 February 2019. Available at: <https://www.bk.admin.ch/ch/f/pore/va/20190210/index.html>.

⁷ For empirical evidence see, e.g., Lionel Marquis and Pascal Sciarini ‘Opinion formation in foreign policy: the Swiss experience’ (1999) 18 *Electoral Studies* 453, 458.

⁸ See ‘Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons’ [21 June 1999], O J L 114, 30/04/2002, 6-72. Available in French at: <https://www.admin.ch/opc/fr/classified-compilation/19994648/index.html>.

zerland has been part since 2008 based on its ‘Schengen Association Agreement’.¹⁰ The latter committed Switzerland to adopt the ‘Schengen *acquis*’¹¹, and a failure to comply would lead to the termination of the treaty by default.¹² Each national referendum launched against the adoption of the developing Schengen *acquis* therefore amounts to a flirtation with terminating Switzerland’s membership of the ‘Schengen Area’ altogether. This would not only lead to reintroduced checks at the Swiss border but put Switzerland’s participation with the EU’s ‘Dublin Regime’, determining which country bears the responsibility to examine an application for asylum, in jeopardy.¹³

In January 2019, a referendum was launched against adopting a further development of the Schengen *acquis* on control of the acquisition and possession of weapons. In Switzerland, where the Constitution provides for general conscription for all male Swiss citizen of full age,¹⁴ individual ownership of a firearm and full membership of the citizenry have been emblematically linked for centuries. The Federal Constitution of 1874, in force until 1999, even stated, that the ‘firearm shall ... remain in the hands of the ser-

viceman’ off duty.¹⁵ Despite these persistent yet slowly fading traditions, the voters *rejected* the referendum against the adoption of the Schengen *acquis* and thus *allowed* for continued membership of Switzerland in the Schengen Area.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS: GENERAL ELECTION OF THE SWISS FEDERAL PARLIAMENT

1. Bicameral Swiss Federal Parliament: Constitutional Framework

On 20 October 2019, Swiss voters were called upon to elect the Federal Parliament. When the first Swiss Federal Constitution of 12 September 1848 was drafted, transforming the former confederacy into a federal state, the ‘United States Congress served as a blueprint for Switzerland’s bicameral parliamentary system’.¹⁶ The bicameral Swiss Federal Parliament consists of the *National Council* and the *Council of States*, the former resembling the United States House of Representatives, the latter emulating the United States Senate. Both houses, the National

Council and the Council of States, which taken together are called *Federal Assembly*,¹⁷ are, unlike the chambers of the U.S. Congress, equal and have identical powers.¹⁸ The *National Council* consists of 200 representatives of the People.¹⁹ They are elected directly by the voters according to a system of proportional representation for a term of four years.²⁰ Proportional representation is, however, severely distorted by the fact that each of the 26 Cantons forms a constituency (electoral district).²¹ The seats of each Canton are allocated according to their permanent resident population.²² The authority to adjust the allocation of seats based on the most recent census is delegated to the federal executive branch (Federal Council).²³ Voters domiciled in the Canton of Zurich, for instance, were therefore entitled to elect 35 representatives in 2019, whereas the voters residing in one of the six smallest Cantons could each elect a sole representative only.²⁴ The *Council of States*, in turn, consists of 46 members.²⁵ Each Canton elects two representatives, bar those six Cantons that emerged from partition of a single Canton into two between the Late Middle Ages and the 19th century. These Cantons each elect one representative to the Council of States

⁹ See ‘Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders’ [14 June 1985], O J L 239, 22/09/2000, 13-18.

¹⁰ See ‘Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation’s association with the implementation, application and development of the Schengen *acquis*’ [26 October 2004], O J L 53, 27/02/2008, 52-79. Available in French at: <https://www.admin.ch/opc/fr/classified-compilation/20042363/index.html>.

¹¹ See M Oesch, *Switzerland and the European Union* (Nomos & Dike, 2018) 42-3, 103-10.

¹² See ‘Schengen Association Agreement’ (note 10), article 7 section 4.

¹³ See ‘Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the Free Movement of Persons’ [21 June 1999], O J L 114, 30/04/2002, 6-72. Available in French at: <https://www.admin.ch/opc/fr/classified-compilation/19994648/index.html>.

¹⁴ Swiss Fed. Const. (note 1), article 59 section 1.

¹⁵ Swiss Federal Constitution, 29 May 1874, in force until 31 December 1999, article 18 section 3.

¹⁶ Johannes Reich ‘The Americanization of Swiss Legal Culture [Book Review]’ (2018), 66 *American Journal of Comparative Law* 723, 725.

¹⁷ Swiss Fed. Const. (note 1), article 148.

¹⁸ Swiss Fed. Const. (note 1), article 148 section 2.

¹⁹ Swiss Fed. Const. (note 1), article 149 section 1.

²⁰ Swiss Fed. Const. (note 1), article 149 section 2.

²¹ See Swiss Fed. Const. (note 1), article 149 section 3.

²² Federal Act on Political Rights, 17 December 1976, article 16 section 2; SR (see note 1) 161.1; official titles are in German, French, and Italian. Available at: <https://www.admin.ch/opc/en/classified-compilation/19760323/index.html> (unofficial English translation).

²³ See Federal Act on Political Rights (note 22), article 16 section 2 and Decree on Political Rights, 24 May 1974, article 6a; SR (see note 1) 161.1; official titles are in German, French, and Italian. Available at: <https://www.admin.ch/opc/de/classified-compilation/19780105/index.html>.

²⁴ Decree on the Allocation of Seats regarding the General Election of the National Council, 30 August 2017; official titles are in German, French, and Italian. Available at: <https://www.admin.ch/opc/fr/official-compilation/2017/4259.pdf>.

²⁵ Swiss Fed. Const. (note 1), article 150 section 1.

only.²⁶ It is for the Cantons to determine the rules governing the elections regarding the Council of States.²⁷ All of the Cantons elect their representatives directly by the people for a term of four years, all but two Cantons by majority voting.²⁸

2. Climate Change: Environmental and Political Impacts

Global warming has had a profound and visible impact on the Swiss landscape already: Alpine glaciers have lost around 60 percent of their volume since 1850, the number of days with snowfall has halved since 1970 at altitudes below 800 metres above sea level, heatwaves have doubled in both frequency and intensity since 1901, and near-surface air temperature has increased by 1.5 °C over the last 150 years, which is considerably more than the global average of 0.9 °C.²⁹ Within a period being shorter than today's life expectancy at birth, average temperatures are estimated to rise up by a further 4 to 7 °C during the summer season.³⁰ Such dramatic climatic changes are most likely to have profound societal and economic consequences even for Switzerland, being a highly developed and land-locked country. They thus call for decisive political action.³¹

Climate change consequentially was featured among the issues dominating the election campaigns. The Swiss Green Party (GPS) increased its share of the national vote by 6.1 percent, gaining 17 additional seats in

the *National Council*³² – the most significant increase of any party since proportional representation had been introduced by a popular initiative in 1918. The *Green Liberal Party* (GLP) increased its share of the vote by 3.2 percent and secured nine additional seats. All of the remaining parties stagnated or suffered defeats: The right-wing *Swiss People's Party* (SVP) lost 12 mandates, albeit holding on to its position achieved in 1999 as the most influential political group in Parliament by a large margin, while the *Social Democratic Party's* (SP) share of the national vote dropped to 16.8 percent – the lowest since the party came into being in the late 19th century. Both the centre-right *Democratic Liberal Party* (FDP) and the moderate-conservative *Christian Democratic Party* (CVP) stagnated at historically low levels with 29 and 25 seats, respectively. Both of them, nevertheless, continue in their roles as the dominating forces in the *Council of States*³³ as a result of majority voting in all but two Cantons, holding 12 (FDP; – 1) and 13 (CVP; +/- 0) of the 46 seats, respectively. The GPS jumped from one to five mandates while the SP holds nine (– 3) and the SVP six (+ 1) seats.

3. Composition of the Federal Executive Branch – Still 'a Kind of Magic'?

The *Federal Council*, the executive branch of the federal government, forms a *singularity* in a comparative perspective: It consists of *seven* members with *equal rights and powers* and is elected by the National Coun-

cil and the Council of States in a joint meeting ('United Federal Assembly') for a term of *four years* after each general election of the National Council.³⁴ The right of 50,000 citizens eligible to vote to launch a referendum against any federal statute decided by Parliament provides for incentives to strive for a broad consensus at an early stage of legislative proceedings even before the draft bill is put on the agenda of Parliament. As the Federal Council usually conducts preliminary legislative proceedings,³⁵ at least four different political parties have been represented in the Federal Council continuously since the so-called '*magic formula*', a political convention according to which all five parties with the largest share of the national vote hold at least one seat in the Federal Council, has taken root in 1959 to enhance the possibility to reach a broad political consensus.³⁶ According to this 'epitome of Swiss consociationalism',³⁷ the GPS would have qualified for a seat in the Federal Council. The unprecedented gains of the GPS in the general election failed to alter the composition of the Federal Council, however, as Parliament *reelected all of the incumbent Federal Councilors*. The Federal Council thus furthermore consists of two members of the SVP, the FDP, and the SP and one member of the CVP; four of the members have German, two French, and one Italian as their native language.³⁸

III. CONSTITUTIONAL CASES:

²⁶ See Swiss Fed. Const. (note 1), article 150 section 2

²⁷ See Swiss Fed. Const. (note 1), article 150 section 3.

²⁸ See, inter alia, W Haller, *The Swiss Constitution in a Comparative Context* (2nd ed, Dike, 2016) 130-2.

²⁹ National Centre for Climate Services [NCCS], *Climate Scenarios for Switzerland* (2018), 18 (available at: https://www.nccs.admin.ch/dam/nccs/en/dokumente/web-site/klima/CH2018_broschure.pdf.download.pdf/CH2018_broschure.pdf).

³⁰ NCCS (note 29) 6-13.

³¹ See Johannes Reich, 'Abwendung der Klimakatastrophe durch Gerichte?' (2019), 120 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 413 (available at: <https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html>).

³² Federal Statistical Office FSO, *Élections fédérales 2019* (FSO, 2019) 9-12, 16 (<https://www.bfs.admin.ch/bfsstatic/dam/assets/10907688/master>).

³³ Federal Statistical Office, 'Élections au Conseil des États' (<https://www.bfs.admin.ch/bfs/fr/home/statistiques/politique/elections/conseil-etats.html>).

³⁴ Swiss Fed. Const. (note 1), article 175 sections 1-3 and article 177 section 1.

³⁵ Government and Administration Organisation Act, 21 March 1997, article 7; SR (see note 1) 172.010; official titles are in German, French, and Italian. Available at: <https://www.admin.ch/opc/en/classified-compilation/19970118/index.html> (unofficial English translation).

³⁶ Johannes Reich, 'An Interactional Model of Direct Democracy – Lessons from the Swiss Experience' (2008), 12-4, 17-8 (<https://ssrn.com/abstract=1154019>).

³⁷ Adrian Vatter, 'Switzerland on the Road from a Consociational to a Centrifugal Democracy?' (2016), 22 *Swiss Political Science Review* 59, 71.

³⁸ On the legal relevance of multilingualism in Switzerland, see Johannes Reich, 'Auslegung mehrsprachigen Rechts unter den Bedingungen der Polyglossie in der Schweiz' in Frank Schorkopf and Christian Starck (eds.), *Rechtsvergleichung – Sprache – Rechtsdogmatik* (Nomos, 2019) 145-173.

JUDICIALIZATION OF POLITICS, ISLAMIC HEADSCARVES, AND HOMESCHOOLING

1. First-ever Judicial Nullification of a Federal Ballot – a Judicialization of Politics?

The Federal Constitution guarantees each citizen the right ‘to form an opinion and to give genuine expression to his or her will’ in particular with regard to their political rights (elections and ballots).³⁹ The Federal Court, Switzerland’s supreme court, thus consistently held that no result of a ballot shall be approved failing to reflect ‘the genuine and undistorted will of the voters’.⁴⁰ Accordingly, the Court has regularly nullified such ballots at the levels of the Cantons and the municipalities in which public authorities had interfered by means of unbalanced information or distorting propaganda. Pursuant to an explicit constitutional provision, however, *acts of both the Federal Assembly and the Federal Council remain outside of the scope of judicial review*.⁴¹

In the run-up to each federal ballot, ballot papers are mailed to voters together with an *official information booklet*. All information contained therein must comply with ‘the principles of completeness, objectivity, transparency, and proportionality’.⁴² The official information booklet is an ‘act of the Federal Council’, as it is responsible for providing for the respective ‘short’ and ‘objective explanation’⁴³ of the referenda and popular initiatives to be decided upon at the ballot box.

In a decision of 2011,⁴⁴ the Federal Court held that despite the official information booklet’s character as ‘an act of the Federal Council’, the Court would still scrutinize the ‘general state of information prevailing at the time of a popular vote’.⁴⁵ As the Federal Council’s official information booklet plays a crucial role in the decision-making process,⁴⁶ this effectively amounted to a *circumvention* of the constitutional restrictions on judicial review.

Drawing on the aforementioned case law, the Federal Court, on 10 April 2019,⁴⁷ nullified a federal ballot for the first time in Switzerland’s history. The Court’s judgment annulled the federal ballot of 28 February 2016 on a popular initiative seeking to abolish what is commonly referred to as ‘the penalty on marriage’. The term describes the phenomenon according to which the tax due for married couples and homosexual couples living in a registered partnership is determined based on the *total* income and wealth of *both* individuals involved. Due to *progressive* tax rates, the tax levied on individuals joint in marriage or registered partnership tend to be higher than the tax imposed on two single persons in the same situation, provided both individuals gain income. In its official information booklet, the Federal Council estimated that 80,000 couples would be affected by the ‘penalty on marriage’, only to correct this figure to 454,000 two years later. The Federal Court not only deemed the previous estimate to be ‘grossly misleading’ but assumed that it significantly impacted the ‘general state of information prevailing at the time of a popular vote’. It *nullified* the

ballot as a consequence.

Whereas the Federal Court, with its decision of 10 April 2019, *strengthened the integrity of the process of direct democracy at the federal level*, both the lack of manageable standards to assess the ‘general state of information prevailing at the time of a popular vote’ and the circumvention of the constitutional limits imposed on judicial review with regard to ‘acts of the Federal Council’ amount to a *constitutionally unwarranted judicialization of federal politics*.

2. Prohibition of ‘Visible Religious Symbols’ in Court Hearings

Whereas the Islamic headscarf has featured frequently in the case law of Switzerland’s highest court, all previous decisions have so far related to *public schools*. In 1997, the Court held a prohibition for *teachers* at public schools to wear Islamic headscarves to be *constitutional* both in view of the constitutional commitment of Geneva, the Canton in question, to a strict separation of religion and state (*laïcité*) and the teachers’ role representing the state and thus being bound to remain neutral on religious matters.⁴⁸ In 2015, the Court ruled that banning ‘headgear’ in general and headscarves in particular for *students* would *unconstitutionally* infringe on their freedom of religion.⁴⁹

On 11 March 2019, the Federal Court held a mere ordinance issued by the Council of Justice of the Canton of Basel-City committing all court officials (judges and clerks) to

³⁹ Swiss Fed. Const. (note 1), article 34.

⁴⁰ See, e.g., Swiss Federal Court, BGer., decision BGE 140 I 394 section 8.2 (26 September 2014). Available at: www.bger.ch.

⁴¹ Swiss Fed. Const. (note 1), article 189 section 4.

⁴² Federal Act on Political Rights (note 22), article 10a section 2.

⁴³ Federal Act on Political Rights (note 22), article 11 section 1.

⁴⁴ Swiss Federal Court, BGer., decision BGE 138 I 61 (20 December 2011). Available at: www.bger.ch.

⁴⁵ See Swiss Federal Court, BGE 145 I 207 (10 April 2019) at section 1.5 (‘...l’état d’information global prévalant au moment d’une votation populaire...’). Available at: www.bger.ch.

⁴⁶ See Alexander H Trechsel and Pascal Sciarini, ‘Direct democracy in Switzerland: Do elites matter?’ (1998), 33 *European Journal of Political Research* 99, 113-5 and, for a contextual assessment, Hanspeter Kriesi, *Direct democratic choice: The Swiss experience* (Lexington, 2005) 230-9.

⁴⁷ BGE 145 I 207 (note 45).

⁴⁸ Swiss Federal Court, BGer., decision BGE 123 I 296 (12 November 1997). Available at: www.bger.ch.

⁴⁹ Swiss Federal Court, BGer., decision BGE 142 I 49 (11 December 2015). Available at: www.bger.ch; for a critical assessment see Johannes Reich, ‘BGE 142 I 49’ (2016), 117 *Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht* 369 (available at: <https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html>); see also Swiss Federal Court, BGer., decision 1C_76/2018 (20 August 2019). Available at: www.bger.ch.

abstain from ‘wearing visible religious symbols’ during both public pronouncements of judgments and court hearings with the parties or the public being present to be *constitutional*.⁵⁰ The Court found that the prohibition would pursue a legitimate public interest by seeking to prevent parties from being given the impression that court officials would be ‘guided by their religious convictions in their decision-making process’. The Court furthermore stated that the regulation would not severely restrict the freedom of religion of court officials as it would only apply to circumstances being strictly limited both in time and subject matter, leaving ‘the everyday life’ of court officials mostly unaffected. Against this backdrop, the prohibition would, according to the Court, not only be proportionate but rest on a *sufficient legal basis*. This is *unconvincing* as firmly held and religiously rooted beliefs tend to form part of an individual’s self-conception. An obligation to visually disassociate oneself from one’s religious convictions when appearing in public even in one’s professional life thus amounts to a *severe* restriction of freedom of religion, asking for a proper legal basis.

3. No constitutional right to home-school

‘Home-schooling’ – to teach one’s child school subjects at home – remains a rare phenomenon in Switzerland. In 2012, around 500 children were home-schooled, representing 0.055 percent of all children at compulsory school age.⁵¹ Even though these numbers may have risen considerably in the meantime, they are most likely to have lingered well below the threshold of 1 percent. School education is a subject

matter to be regulated by the Cantons rather than the Federation.⁵² As a result, 26 different regulations apply to home-schooling across Switzerland.⁵³ Despite such varying standards, every child has a *constitutional right to adequate primary education being free of charge*.⁵⁴ Primary ‘education’ (not to be confused with ‘schooling’) is *mandatory* for all children living in Switzerland on constitutional grounds.⁵⁵ The Cantons are, at the same time, under a constitutional obligation to provide for schools allowing for such adequate primary education free of charge.⁵⁶ Children furthermore have a constitutional right to ‘special protection of their integrity and to the encouragement of their development’ (*best interest of the child*).⁵⁷

In its first leading case on the subject, the Federal Court held on 22 August 2019,⁵⁸ that the right to respect for one’s private and family life enshrined in both the Federal Constitution and European Convention on Human Rights (ECHR) would *not grant an individual right to home-school*. Regulations enacted by the Cantons severely restricting or even prohibiting home-schooling are thus, according to the Court, in line with both the Federal Constitution and the ECHR as long as the schools of the respective Cantons provide for adequate primary education free of charge. Notably, the Court made no mention of the constitutional clause protecting the best interest of the child. It thus turned a blind eye to the possibility that home-schooling might, as an exception and for a limited time only, indeed be in a child’s best interest.⁵⁹

IV. LOOKING AHEAD: POPULAR INITIATIVES AS ‘SOCIETAL SEISMOGRAPHS’

Popular initiatives, which require only 100,000 signatures of Swiss citizens to be launched,⁶⁰ often amount to ‘societal seismographs’, putting issues on the political agenda that have been neglected by the political elites. The popular initiative ‘for more affordable housing’, to be decided on 9 February 2020, sheds light on high rents in some Swiss cities, whereas the popular initiative ‘for moderate immigration’ to be decided on 17 May 2020 amounts to yet another flirtation with Switzerland turning its back on the EU altogether. The initiative seeks to end the free movement of people within EU countries. Continually *evaluating the inevitable trade-offs* between self-governance, democracy, and economic integration will, therefore, remain a defining feature of Switzerland’s direct democracy in the year to come.

V. FURTHER READING

Oliver Diggelmann, Maya Hertig Randall, Benjamin Schindler (eds.), *Verfassungsrecht der Schweiz – Droit constitutionnel suisse* (three volumes, Schulthess, 2020)

⁵⁰ Swiss Federal Court, BGer., decision 2C_546/2018 (11 March 2019). Available at: www.bger.ch.

⁵¹ Johannes Reich, ‘“Homeschooling” zwischen elterlichem Erziehungsrecht, staatlicher Schulpflicht und Kindeswohl’ (2012), 113 Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 567, 568, 607-9 (available at: <https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html>).

⁵² Swiss Fed. Const. (note 1), article 19.

⁵³ For an overview of these regulations, see Reich (note 51) 607-9.

⁵⁴ Swiss Fed. Const. (note 1), article 19.

⁵⁵ See Swiss Fed. Const. (note 1), article 62 section 2.

⁵⁶ See Swiss Fed. Const. (note 1), article 62 section 2.

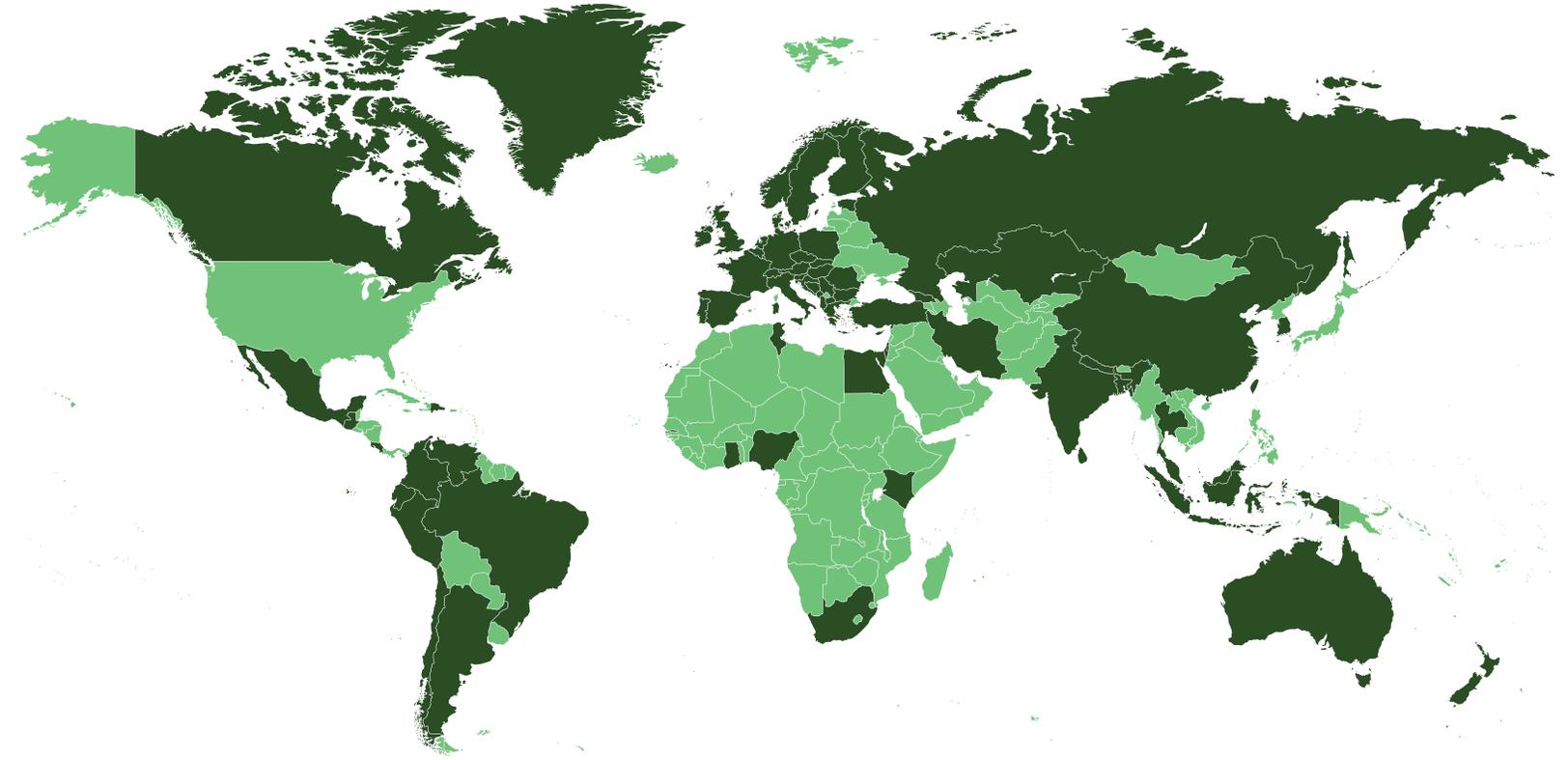
⁵⁷ Swiss Fed. Const. (note 1), article 11 section 1; for a detailed analysis see Johannes Reich, ‘“Schutz der Kinder und Jugendlichen” als rechtsnormatives und expressives Verfassungsrecht’ (2012), 131(I) Zeitschrift für Schweizerisches Recht 363 (available at: <https://www.ivr.uzh.ch/en/institutsmitglieder/reich/publikation.html>).

⁵⁸ Swiss Federal Court, BGer., decision 2C_1005/2018 (22 August 2019). Available at: www.bger.ch.

⁵⁹ See Reich (note 51) 605.

⁶⁰ Swiss Fed. Const. (note 1), article 139 section 1.

SUMMARY



Albania

2019 was characterized by a constitutional conflict between the President and Parliament leading up to the impeachment of the head of state. Because the opposition boycotted the local election, only a single candidate ran in most municipalities, winning by default. The implementation of justice reform slowly progressed throughout the year, affecting the renewal of justice institutions.

Argentina

In an election year, the Supreme Court was not at the forefront of public discussion. However, a handful of important and politically charged decisions timidly evinced the emergence of a majority inclined to check the government and protect some rights. Political change and economic turbulence may alter this.

Australia

Religious freedom dominated public consciousness in 2019 as the government consulted on and developed a Religious Discrimination Bill to be introduced to Parliament in February 2020. If passed, the Bill will protect against religious discrimination (and discrimination against atheists and agnostics) and establish a Freedom of Religion Commissioner.

Austria

In 2019, the Federal Government's breakdown after the "Ibiza scandal" ended a phase of bold legislative reforms that also induced the Constitutional Court to examine several and repeal part of them. The Federal Constitution proved to be a highly stabilizing factor during the breakdown phase and following political events.

Bangladesh

The Awami League commenced its third consecutive term. The BNP, the real opposition to the ruling party, joined the current parliament with just six seats after five years. The larger Supreme Court mostly showed reluctance on civil rights. But its activism in compensation and gender-based violence cases attracted appreciation.

Belgium

Elections were held and resulted in an arduous formation process of the federal government. Moreover, an attempt to amend Article 7bis of the Constitution in order to adopt a "Special Climate Act" was unsuccessful, yet the provision was again included in the list of articles that can be amended.

Bosnia and Herzegovina

The distribution of mandates after the elections in 2018 proved to be a contentious issue in Bosnia and Herzegovina. Despite the decisions of the Constitutional Court, political stakeholders held that impugnable constitutional provisions were still in effect. This put enormous pressure on the Election Commission of the country.

Brazil

Brazil under President Bolsonaro, a populist with an explicit authoritarian mindset, is certainly a threatening scenario for democracy. Interestingly enough, Brazil's democracy, up to this point, has shown some resilience and

its institutions have provided a reasonable degree of horizontal accountability.

Bulgaria

For Bulgaria, 2019 was marked by rising tensions among the highest echelons of state power, particularly between the President and the government. Against this background, the most significant constitutional developments concerned the controversial appointment of a new chief prosecutor and a long-overdue reform aimed at ending the impunity of this office.

Canada

In June, the legislature of the province of Québec made a rare use of the Canadian Charter's 'notwithstanding clause' in passing an act to prohibit public sector employees 'in a position of authority' from wearing religious symbols at work. Four lawsuits challenging the constitutionality of the act ensued.

Cape Verde

The year 2019 was especially marked by an increase of constitutional complaints lodged with the Constitutional Court, and subsequently to the continuous development of case law in the field of protection of accused persons in the criminal framework and in other proceedings that led to the application of sanctions.

Chile

The constitutional reform of December 24, which was the result of a bipartisan agreement that tried to offer a political way out of a crisis, established the steps of a Constitution-making process that, if successful, will generate a total constitutional replacement.

Colombia

The core 2019 constitutional developments concerned matters on limitations to free-

doms, gender equality, and non-discrimination between nationals and non-nationals; the protection of the environment; and the relationships between constitutional law, on the one hand, and international investment law and inter-American human rights law on the other.

Costa Rica

Politicians' growing dissatisfaction with the Constitutional Court's exercise of its review powers engendered a backlash in Congress that resulted in significant delays in the election of new magistrates and a highly contentious debate over the fairness of the procedures used to elect them to the country's apex court.

Croatia

2019 was marked by important decisions of the Constitutional Court on the protection of the freedom of thought and expression. The Court underlined that protecting freedom of expression not only relates to non-offensive information and/or ideas but also 'to those which are offensive, shocking or disturbing'. This has implications for democratic dissent.

Cyprus

2019 was marked by a significant amendment of the Cypriot Constitution. It introduced the notion of 'non-taken parliamentary seats' in an attempt to fill the 56th seat that remained vacant following the 2016 parliamentary elections due to the impasse created by the non-affirmation of one of the elected candidates.

Czech Republic

In 2019, the Senate prepared a constitutional charge against President Zeman, claiming serious breaches of the Constitution. However, it was rejected by the Chamber of Deputies, mostly thanks to the votes of PM

Babiš's party, ANO. Also, the investigation of PM Babiš's conflicts of interest continued on national and European levels.

Denmark

The new government strengthened the state but was accused of arrogating judicial power to its own hand through a new law aimed at revoking citizenship, while a large majority of MPs agreed to adopt an ambitious climate law, expected to influence Danish politics for a decade.

Dominican Republic

Through several decisions on political party and electoral laws in 2019, the Constitutional Court made key decisions regulating both the internal organization of political parties and the political competition between them. The Court is now firmly placed at the center stage of Dominican politics.

Ecuador

The transitory Council for Public Participation and Social Control dissolved and appointed several public officials, and also gave birth to a new Constitutional Court. While there have been crucial steps made towards a stronger constitutional democracy, the fruits of this transition are still to be seen after a much-anticipated period of consolidation.

Egypt

The most significant development in Egypt's constitutional status in 2019 was the constitutional amendments adopted in late April. Those amendments widened the scope and level of the executive branch's power vis-à-vis other authorities, and gave the military a new constitutional duty of protecting the Constitution and democratic pillars of the country.

Estonia

2019 was marked by elections to the Estonian Parliament. They had a decisive effect on the claims the Supreme Court had to deal

with and brought the so-called far right into government. This led to a tense relationship between the government and the president and raised several constitutional issues.

Finland

The proposed legislation on civil and military intelligence and on the oversight of intelligence gathering, the implementation of which Section 10 of the Constitution of Finland on the secrecy of confidential communications had been amended, was approved by the Parliament and entered into force on 1 June 2019.

France

In a period of intense social protest and claims for a renewal of democratic participation, the Constitutional Council ruled for the first time on a joint Parliament- and citizen-initiated referendum. It also reviewed major bills relating to the right to protest and a major reform of the judicial system.

Gambia

2019 saw The Gambia move from setting up key institutions such as the Constitutional Review Commission (CRC); Truth, Reconciliation, and Reparations Commission (TRRC); and National Human Rights Commission (NHRC) to actualising the key transitional justice standards required to restore the rule of law and democracy to the country.

Georgia

This report provides a brief introduction to the constitutional system of Georgia, constitutional amendments, civil protest, local elections, media, and main challenges facing the judiciary. It also provides an overview of landmark judgments of the Constitutional Court in 2019 and developments expected in 2020, including court vacancies, court cases, and other related events.

Germany

The federal Constitutional Court recalibrated its stance towards the European Union,

also ruling for the first time on the digital right to be forgotten. In short, the Court promoted the EU Charter of Fundamental Rights to the constitutional standard of review when EU law is applicable.

Ghana

The most important development in 2019 emerged from the decision of the Supreme Court to uphold state resource expenditures on one particular religion if they benefit society as a whole. As a legally secular, culturally multi-religious society, Ghana can ill afford religious disaffection. Religious equality was guaranteed in the 1992 Constitution to prevent that.

Greece

A toothless yet useful constitutional revision marked 2019. The Constitution had remained formally unaltered throughout a crisis, first because of a mandatory time lapse between revisions and then due to a lack of consensus. Nine out of forty-nine proposed amendments were made. All formal change is now frozen for many years.

Greenland

The most important constitutional development was the unilateral decision to draft a subregional constitution for Greenland in two stages: the first, to enter into force under the Danish constitutional framework; the second to take effect only when (or if) Greenland becomes independent.

Guatemala

2019 was a year marked by the intervention of the Constitutional Court in the election and selection of the traditional powers of the state: Executive, Congress and the Judiciary. However, this came at a cost. The year was also marked by strong backlash against the Constitutional Court.

Hong Kong

Misjudgment of public opinion by the Hong Kong and Chinese Governments contributed to the mass civil unrest in 2019. The state's hardline approach against the protestors prompted further violence. The Hong Kong judiciary's independence and credibility were tested as disputes related to the movement found their way to the courts.

Hungary

Government influence on courts increased in 2019. Although amending actors abandoned the idea of establishing a separate administrative court system through the 8th Amendment to the Fundamental Law, new statutory provisions constrained judicial power to interpret legal and constitutional rules. Institutional tensions in the entire judicial system increased.

India

In 2019, the Indian state of Jammu and Kashmir lost its constitutional status as a semi-autonomous region and was brought under complete federal control. The absence of public consultation contributed to widespread protests at the annulment of the historical guarantee granted at its accession to the Indian union.

Indonesia

In 2014, the Court issued a decision on the simultaneous general election. But the Court has come under fire after around 400 polling station workers died in the 2019 election. In this term, the Court has to decide on whether to nullify its decision or re-affirm the simultaneous election.

Iran

The gas price hike regulations in November 2019 via the Supreme Council for Economic Coordination (SCEC) put the Constitution on edge. They opened several fractures between the latent conflicts in the Constitution, making constitutional dysfunctions more clearly and dramatically visible.

Ireland

2019 saw the passage of legislation to establish a Judicial Council. This had been discussed for over two decades, with the senior judiciary becoming increasingly vocal on the issue in recent years. The Council will have responsibility for judicial conduct, disciplinary matters, training and representation.

Israel

The most important developments in Israeli constitutional law in 2019 were the political deadlock resulting in recurring general elections and the unprecedented criminal indictment of a sitting Prime Minister, Benjamin Netanyahu, for bribery, fraud and breach of trust. These two combined to generate a constitutional crisis in Israel.

Italy

In 2019, the Italian Constitutional Court ruled in continuity with its most recent case law and strengthened its institutional role by coordinating the exercise of its powers and competences with both other constitutional actors and supranational institutions.

Kazakhstan

2019 was marked by the surprising voluntary resignation of the country's first President, Nazarbayev, in the spring, and the transfer of the presidential office to Tokayev, former Senate Speaker, in the summer. The Constitutional Council of Kazakhstan upheld these developments.

Kenya

The most important constitutional development was something that has not happened – yet. Namely, a debate about whether to make major shifts, and whether by a referendum, in the system of government, with the purpose of creating one that is more inclusive (especially of ethnic groups).

Luxembourg

The dominant theme in Luxembourg remained the questions of whether and how the Constitution should be rewritten. This long-lasting discussion came to a sudden end in November 2019. The transformation of the Constitution into a “living instrument,” however, continues to occupy all institutions, notably the strengthened Constitutional Court.

Malaysia

Securing meaningful reform in the post-transition era remained the main challenge in Malaysia, given the formidable vested interests against it. Abortive attempts by the new government to amend the Federal Constitution and to ratify several international conventions emphasized the areas in which reform is needed, as well as the challenges ahead.

Mexico

The National Guard (a civil police institution composed of members of the Federal, Military, and Naval Police responsible for guaranteeing public security) was introduced in the Constitution. The Constitution was also amended to introduce the revocation of the mandate as a popular consultation mechanism that will be applied to the President.

Montenegro

The year was not marked by major constitutional developments but controversies and challenges to the autonomy and consistency of the judicial authorities and their commitment to the rule of law, particularly the power imbalance between the Constitutional Court and the Supreme Court.

Nepal

The implementation and operationalisation of the 2015 Constitution remained the primary constitutional focus. Federalisation persisted as a significant challenge. While the ineffective transfer of governmental

responsibility to subnational governments spurred intergovernmental conflict and weakened the foundations for federalism, devolution appears to be conferring new forms of legitimacy on government.

New Zealand

In response to the March 15 gun attack on two mosques by a lone far-right extremist, which murdered 51 people and injured another 49, New Zealand had to reconsider a swathe of laws relating to gun ownership and terrorist activity.

Nigeria

Nigeria's democratic trajectory seemed to veer off course in 2019. Pre- and post-election violence and the threat of violence and electoral manipulation marred the 2019 general elections. Also, horizontal accountability mechanisms appeared to weaken during the period. A course correction will be required in the coming years.

North Macedonia

Combatting impunity in high-level corruption cases remained a challenge in 2019 as citizens still awaited the prosecution and punishment of high-level officials involved in wire-tapping scandals from 2015. Fighting corruption is a precondition for the country's EU integration, especially after its historic name change this year.

Norway

Following unlawful administration of social welfare benefits, citizens were wrongfully convicted. The secret police unlawfully collected airline passenger data. Central cases concerned retention of DNA profiles, the Norway-EFTA Court relationship, and children's right to privacy in social media. In the ECtHR, cases about the Norwegian child welfare system dominated.

Palestine

Palestinian President Mahmoud Abbas dissolved the Palestinian Legislative Council but did not call for new elections as per the SCC ruling on the matter. He also replaced the sitting High Judicial Council with a temporary one. This concentration of powers makes it harder to counteract his power/s and ensure accountability in government.

Peru

In 2019, Peru managed to overcome a tough fight between the legislative and the executive, which culminated in the closure of Congress, by constitutional means. Since Peru has a history of overcoming political crises by coup d'états, this cannot be overstated.

Poland

In 2019, the rule of law further deteriorated in Poland, including the undermining of the judiciary's independence. This was possible by applying legal measures that were introduced in previous years. In December, the first chamber of Parliament passed a law allowing the extensive punishment of judges.

Portugal

2019 was a year marked by elections and, subsequently, parliamentary fragmentation, governmental change, and social contestation (with the summoning of several strikes and manifestations by dissatisfied professional sectors). The Constitutional Court dealt with issues such as surrogacy, citizenship, data protection, and paternity proceedings, revisiting some of its previous jurisprudence.

Romania

The most important development of 2019, besides the Constitutional Court's involvement in the political and judicial spheres, was a significant shift in the options of the electorate, manifested in the outcome of three major popular consultations. This led to an unexpected but rather conjunctural

change of parliamentary majority and to the change of Government.

Russia

The Constitutional Court continued a trend of consistent political subordination that dates back to the entry into force of the current Constitution. It has never been an independent actor and does not deal with politically sensitive issues. However, it plays a significant role in the protection of social and economic rights.

Serbia

In June 2019, the Committee on Constitutional and Legislative Issues of the National Assembly accepted the Government's initiative for constitutional changes. However, due to the forthcoming parliamentary elections in spring 2020, it is upon the new legislature to continue and, most likely, finish the procedure.

Singapore

Besides the usual constitutional issues, it was the enactment of the Protection from Online Falsehoods and Manipulation Act that had the strongest constitutional impact in 2019, and beyond. By regulating online falsehoods, the law attempts to balance freedom of speech against the integrity of democracy and other public interests.

Slovakia

In a historic ruling, the Slovak Constitutional Court held that the Constitution contains an implicit material core that cannot be changed through the ordinary amendment process. If an amendment violates a core provision, it will be struck down. The Court's composition changed dramatically in 2019, possibly having implications for the endurance of this ruling.

Slovenia

In 2019, the Constitutional Court rendered several precedential and important decisions, strengthening the protection of

human rights and fundamental freedoms. While the Court continues to be regarded as the most reliable rule-of-law institution in Slovenia, its stature was diminished in 2019, in particular due to its growing ineffectiveness.

South Africa

The proposed amendment of section 25 of the Constitution, intended to allow the government to seize property without compensation, continued to be an ongoing project reflecting accelerated creeping socialism and a concomitant decline of constitutionalism amidst ongoing revelations of corruption and attempts to remedy its consequences. Meanwhile, lively constitutional litigation continued.

South Korea

The South Korean Constitutional Court decided on the nonconformity to the Constitution of the abortion ban; the Moon administration was criticized for returning two North Korean fishermen demanding asylum to the North; and the scandal surrounding Kuk Cho, the former Minister of Justice, deeply disappointed the Korean people.

Spain

Judgment 89/2019 reviewed the constitutionality of the process of activation and application of the instrument of state coercion on autonomous communities in case of serious non-compliance with the constitutional system. The article was applied for the first time by the government following the events in Catalonia in autumn 2017.

Sri Lanka

The 2019 presidential election ended the government elected in 2015 to strengthen democracy and good governance through constitutional reform. With the country turning to strong leadership, the new President, Gotabhaya Rajapaksa, offered an alternative vision of nationalist authoritarianism. A pe-

riod of democratic regression has followed.

Sweden

Three constitutional issues dominated the Swedish constitutional law debate in 2019: the relationship between the Council on Legislation and the Government, the criminalization of joining and supporting terrorist organizations and the outlawing of racist organizations, and lastly, the constitutional enhancement of the independence of the judiciary.

Switzerland

The Green Party won the general election to the Federal Parliament but failed to get a seat in the executive branch. The Federal Court nullified a federal ballot for the first time in history and held that a prohibition barring court officials from wearing ‘visible religious symbols’ in court hearings was constitutional.

Taiwan

Taiwan’s constitutional development in 2019 was reactive in character, with the legislative arena as the main theater. In reaction to the disappointing referenda on the legalization of same-sex marriage in 2018, laws were passed reworking the relationship between referendums and elections while finally realizing marriage equality in law, but without a name.

Thailand

For the first time in Thailand’s history, the military junta successfully became a democratically elected government, regardless of the democratic quality of the Constitution. The regime remains as repressive as ever. However, this arrangement provided a flimsy disguise, posing a challenge to those wishing to question the regime’s legitimacy.

The Netherlands

The government responded to the State Commission’s recommendations to strength-

en the parliamentary system. Also, a temporary parliamentary committee on the digital future was established; the Supreme Court delivered the *Urgenda* climate change judgment; and there were evolutions regarding militant democracy as a response to criminal activities of outlaw motorcycle gangs.

Tunisia

Eight years after its revolution, Tunisia made a milestone step toward the creation of sustainable democracy despite political challenges. The North African resource-poor country managed to complete its third set of elections and, despite imperfections, was hailed as the only democracy in the region.

Turkey

A comprehensive implementation of the new presidential system in Turkey perpetuated executive dominance, eradicated key checks and balances, and pushed the country toward the brink of becoming a constitutional autocracy. Under these worrying circumstances, the Turkish Constitutional Court struggled to give consistent judgments.

United Kingdom

In 2019, the battle between the Government and the House of Commons concerning Brexit intensified. In September 2019, two weeks after the prorogation of Parliament, the Supreme Court unanimously ruled the prorogation ‘unlawful, null, and of no effect’, reaffirming the need for judicial and parliamentary scrutiny of government acts.

Venezuela

In 2019, Venezuela experienced a major constitutional standoff. Following the fraudulent May 2018 presidential election, President Juan Guaidó of the opposition-led legislature acted as Interim President to achieve a democratic transition via elections, yet Nicolás Maduro clung to power supported by the Supreme Tribunal and National Constituent Assembly.



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